

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
BEFORE THE COURT OF APPEAL
CIVIL DIVISION

No. 2115/01

BETWEEN:

**ANSETT AUSTRALIA GROUND STAFF SUPERANNUATION
PLAN PTY LTD** (ACN 065 590 178) (as trustee of the Ansett Australia
Ground Staff Superannuation Plan)

Appellant

and

ANSETT AUSTRALIA LIMITED (Subject to a Deed of Company
Arrangement) & **ORS** (ACN 004 209 410)

Respondents

AND BETWEEN:

ANSETT AUSTRALIA LIMITED (Subject to a Deed of Company
Arrangement) & **ORS** (ACN 004 209 410)

Cross Appellants

and

**ANSETT AUSTRALIA GROUND STAFF SUPERANNUATION
PLAN PTY LTD** (ACN 065 590 178) (as trustee of the Ansett Australia
Ground Staff Superannuation Plan) & **ORS**

Cross Respondents

RESPONDENTS' OUTLINE OF SUBMISSIONS

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1. These submissions are made in answer to the appellant's ("the Trustee's) application, dated 10 April 2003, that the hearing of the appeal be expedited.

2. The respondents/cross-appellants (“Ansett” and “the Administrators”) rely upon the affidavit of Carmel Lyndsay Flynn sworn 23 April 2003 (“the Flynn affidavit”).

3. In summary, Ansett and the Administrators support the Trustee’s application for expedition. That support is, however, premised on these assumptions:
 - (a) the Court is prepared to entertain the appeal in respect of the priority of any obligation on Ansett to make further contributions to the Ground Staff Superannuation Plan under s. 556(1) of the *Corporations Act* (“the Act”), in the circumstance where Ansett is not in liquidation but rather subject to a Deed of Company Arrangement (“DOCA”);

 - (b) the Court is prepared to hear and determine the appeal in the circumstance where its determination on the priority of any such obligation will not, in a legal sense, finally determine the priority of any further contributions; and

 - (c) the Court is able to hear the appeal and cross-appeal more quickly than the Federal Court is likely to hear the related Federal Court proceeding.

Ansett and the Administrators are concerned not to divert their attention to the appeal, rather than Federal Court proceeding V3107/02 in which the priority under the DOCA of the claim for further contributions is being challenged by the Trustee, if the Federal Court is the more appropriate and expeditious means of resolving the priority issue.

Background to the appeal

4. This proceeding was brought by the Trustee by way of Originating Motion between the Parties for relief pursuant to Order 54 of the Supreme Court Rules, that is for the determination of questions as to the rights or interests of persons claiming to be entitled under a trust. In addition to Ansett and the Administrators, the defendants to the proceeding included representatives of those members of the Ground Staff Superannuation Plan who have been made redundant since 12 September 2001 and those who have not.

5. The Originating Motion was amended on numerous occasions. By the Fourth Amended Originating Motion dated 20 February 2003, the Trustee sought answers and declarations in relation to 14 questions. The questions essentially related to three issues, which were as follows:
 1. Are all or any of the members of the Ground Staff Superannuation Plan who have been made redundant by the Administrators, since 12 September 2001 entitled to Retrenchment benefits under Rule 1.13 of the First Schedule to the Ground Staff Superannuation Plan Trust Deed dated 17 August 1999 made between Ansett and the Trustee (“the Trust Deed”)?¹

¹ The first issue initially came before the Federal Court in proceeding V3075 of 2001. In that proceeding, the respondents to this proceeding by agreement with the appellant in this proceeding, sought *inter alia*:

“Directions pursuant to s. 447D of the *Corporations Act* and a declaration pursuant to s. 21 of the *Federal Court Act* as to whether the recent termination of the employment of employees is a ‘Retrenchment’ for the purposes of the respective trust deeds of the Ansett Staff Superannuation Plans.”

2. Is Ansett obliged to make further contributions, and if so what further contributions, to the Ground Staff Superannuation Plan to fund any shortfall in the Plan to pay the Retrenchment benefits to the members so entitled.
3. Is the obligation to make further contribution to fund the Retrenchment benefits, if any:
 - (a) an expense within the meaning of s. 556(1)(a) of the *Corporations Act 2001 (Act)*?
 - (b) a debt within the meaning of s. 556(1)(c) of the Act?
 - (c) an expense within the meaning of s. 556(1)(dd) of the Act?
 - (d) a superannuation contribution within the meaning of s. 556(1)(e) of the Act?
6. By orders dated 7 February 2003 (“the orders”), Justice Warren answered the questions in the Originating Motion, *inter alia*, as follows:
 - (a) all members of the Ground Staff Plan who have been made redundant by the Administrators since 12 September 2001 are entitled to Retrenchment benefits under Rule 1.13 of the First Schedule to the Trust Deed;
 - (b) Ansett is obliged to make further contributions for Membership Groups 1 and 3 in accordance with the requirements of the Funding and Solvency Certificate dated 24 April 2002 issued by the actuary of the Ground Staff Plan (“FSC5”);

- (c) the further contributions required for Membership Group 3 under FSC5 do not have priority under ss. 556(1)(a), (c), (dd) and (e) of the *Corporations Act*. The further contributions required for Membership Group 1 under FSC5 are expenses within the meaning of s. 556(1)(a).

A copy of the orders is exhibit "ALM-2" to the Middleton affidavit.

7. The reference to a funding and solvency certificate in the orders is a reference to a certificate issued by the actuary of a superannuation plan pursuant to Division 9.3 of the *Superannuation Industry (Supervision) Regulations* 1994. The reference to FSC5 is a reference to the funding and solvency certificate issued by the actuary of the Ground Staff Superannuation Plan dated 24 April 2002 with an effective date of 24 April 2002. FSC5 is exhibited as "CLF3" to the Flynn affidavit. The reference to Membership Group 3 is a reference to the group members identified as such in Appendix B to FSC5.
8. By Notice of Appeal dated 24 March 2003, the Trustee has appealed against the orders of Justice Warren in respect of the priority of the further contributions (the answers to the questions in paragraphs 14(a), (c) and (d) of the Originating Motion) in so far as those orders refer to the further contributions required for Membership Group 3 under FSC5. The Notice of Appeal is exhibit "ALM-3" to the Middleton affidavit.
9. Ansett and the Administrators have cross appealed against the orders of Justice Warren as to the liability of Ansett to make further contributions in accordance with FSC5 (the answer to question 12(a) of the Originating Motion). Ansett and the Administrators have filed a Notice of Contention in relation to the priority issue. The Notice of Cross-Appeal and Notice of Contention are exhibits "ALM-4" and "ALM-5" respectively to the Middleton affidavit.

Background to Federal Court proceeding V3107/02

10. On 2 May 2002, the Administrators executed a DOCA for Ansett. The background to the execution of the DOCA is set out in paragraph 3 of the Flynn affidavit. A copy of the DOCA is exhibit “CLF2” to the Flynn affidavit.

11. By application dated 19 June 2002, the Trustee initiated Federal Court proceeding V3107/02, seeking orders, *inter alia*, that the DOCA be amended or alternatively terminated pursuant to ss. 447A(1) and/or 445D(1) of the Act on the grounds that the provisions of the DOCA which provide for the priority of the “Top Up Retrenchment Benefit Claim” are, or giving effect to those provisions would be, unjust, oppressive, unfairly prejudicial to or unfairly discriminatory against the Ground Staff Superannuation Plan and further or alternatively, the information provided to the creditors of Ansett in relation to the DOCA contained omissions or was false or misleading (“the DOCA proceeding”).

12. “Top Up Retrenchment Benefit Claim” is defined in cl. 1.1 of the DOCA as:

“The amount of any claim for payment or contribution to a Superannuation Fund in respect of any shortfall in the Superannuation Fund in meeting or paying retrenchment benefits, being a claim of the type raised in Victorian Supreme Court proceeding no. 2115/01 ... as so determined in that proceeding (if any).”

The ranking for the Top Up Retrenchment Benefit Claim is provided for in cl. 18.2.5, it is treated as ordinary.

13. The application to vary or terminate the DOCA is, pursuant to paragraphs 4 and 8 of the application, expressed to be conditional upon the outcome of this proceeding.
14. On 21 June 2002, the Trustee sought to have the DOCA proceeding set down for hearing. Ansett and the Administrators opposed the application on that occasion due to the imminence of the trial of this proceeding (the trial was set down for hearing on 16 July 2002). Justice Goldberg did not, on that basis, set down the proceeding but made orders as to interlocutory steps. The issue of priority of the Top-Up Retrenchment Benefit Claim under the DOCA was not, by agreement between the parties, before Justice Warren.
15. The DOCA proceeding was subsequently adjourned pending the outcome of this proceeding (see paragraph 11 of the Flynn affidavit). On 28 March 2003, Ansett and the Administrators issued a Notice of Motion seeking to have those paragraphs of the application which relate, *inter alia*, to the alleged unfairness of the DOCA set down for trial and fixed for hearing, despite the pending appeal and cross-appeal to this Court, on the grounds that:
 - (a) the DOCA is determinative of priority;
 - (b) Ansett's creditors voted overwhelmingly for the DOCA;
 - (c) analysis of the financial consequences of priority (and costs of dispute to date) fortify a resolution by reference to Part 5.3A and the creditor's vote;
 - (d) the Federal Court will have to determine the DOCA proceeding, even if the Trustee succeeds on appeal;

- (e) it is not certain that the Court of Appeal will entertain the priority dispute;
- (f) two hearings are possible whichever course is chosen, but a Federal Court decision is more likely to resolve the matter;
- (g) a final determination of priority under s. 556(1) of the Act is not a prerequisite to the attack on the DOCA;
- (h) the ambit of the Federal Court application is comparatively narrow compared to the appeal and cross-appeal.

[See exhibit "CLF6" to the Flynn affidavit.]

Ansett and the Administrators submitted that they would not contend that there had been a final determination of priority of the Trustee's claim in a winding up, given the appeal, and that the Trustee's application to vary or terminate the DOCA should be dismissed whether there is priority in a winding up or not. The Trustee submitted that no further steps should be taken in the DOCA proceeding before the resolution of the issues before this Court.

16. Justice Goldberg did not set down the relevant paragraphs for hearing and nor did he adjourn the Trustee's application pending the outcome of the appeal but rather he made orders in relation to the filing of pleadings and affidavit material. The DOCA proceeding was adjourned for directions on 2 July 2003 (now 30 July 2003). A copy of the transcript and orders of Justice Goldberg are exhibits "ALM-9" and "ALM-8" respectively to the Middleton affidavit.

Ansett and the Administrators support the Trustee's application for expedition, but do so upon the assumptions referred to in paragraph 3

17. Ansett and the Administrators support the Trustee's application that the hearing of the appeal and cross-appeal be expedited but are concerned not to divert their attention to the appeal in the circumstances where the Federal Court may now be the most expeditious and appropriate forum for determining priority. The basis of Ansett and the Administrators concern is that the determination of the question of priority in this proceeding is premised on the assumption that Ansett is in liquidation. Ansett is not in liquidation, it is under the DOCA pursuant to Pt. 5.3A of the Act. The DOCA has made provision for the ranking of the Top Up Retrenchment Benefit Claim. Priority on ranking will ultimately be determined under Part 5.3A not s. 556(1) of the Act.
18. The issue of priority under s. 556(1) of the Act was agitated by the Trustee in this proceeding, with the support of Ansett and the Administrators, because it was linked to the other issues before Justice Warren for determination and was potentially relevant to the DOCA proceeding. It is potentially relevant to the DOCA proceeding because the question of priority under s. 556(1) of the Act is relevant to, but it is submitted not determinative of, the question whether the provisions of the DOCA are unjust, oppressive, unfairly prejudicial to or unfairly discriminatory against the Ground Staff Plan.
19. The Administrators are concerned that the priority of the Trustee's claim under the DOCA be resolved as expeditiously as possible as until the matter is resolved, the Administrators are unable to pay any further redundancy entitlements to former employees (see paragraph 15 of the Flynn affidavit).

20. If the hearing and determination of the appeal were to precede the DOCA proceeding, it appears likely that:
- (a) if the Court were to uphold Justice Warren's determination of the priority of any further contribution, and there was no further appeal, the Trustee's challenge to the DOCA would not proceed;
 - (b) if the Court were to overturn Justice Warren's determination on priority and there was no further appeal, the Trustee would need to pursue the DOCA proceeding in order to establish priority under the DOCA.
21. If the hearing and determination of the DOCA proceeding were, on the other hand, to proceed before the appeal, it is likely that:
- (a) if the Federal Court upheld the provisions of the DOCA so far as they provide for the priority of the Top Up Retrenchment Benefit Claim, and there is no appeal, the determination of this appeal would not be necessary. Ansett and the Administrators would not pursue the cross-appeal;
 - (b) if the Federal Court were to order that the DOCA be amended in the manner suggested by the Trustee, or alternatively that the DOCA be terminated, and there was no appeal, the Trustee would need to pursue its appeal to this Court in order to establish priority.

Amendment to Notice of Appeal

22. At paragraph 21 of the Trustee's submissions dated 24 April 2003, the Trustee states that it will apply to amend the notice of appeal ... "to seek an order from the Court of Appeal that the contractual obligation of Ansett ... means that Ansett will have to make a contribution that is sufficient to pay all benefits in full". Ansett and the Administrators will oppose any such application to amend. In the Trustee's submissions at trial dated 2 July 2002 relief on that ground was expressly disavowed (Part D, para. 34, although the treatment of the issue in the Trustee's submissions dated 19 August 2002 was ambiguous: para. 156). If leave to amend is granted, Ansett and the Administrators will need to re-consider the ambit of the matters to be raised on appeal (either by amendment of the cross-appeal or by filing a further notice of contention). At the time of filing these submissions the Trustee has not given notice of the form of the proposed amendment.

S P WHELAN

B M McMAHON

29 April 2003