
TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF VICTORIA

CIVIL JURISDICTION

MELBOURNE

FRIDAY 7 FEBRUARY 2003

BEFORE THE HONOURABLE JUSTICE WARREN

B E T W E E N

ANSETT AUSTRALIA GROUND STAFF SUPER

Plaintiff

- and -

ANSETT AUSTRALIA LTD (ADMINISTRATOR APPOINTED) & ORS

Defendants

1 HER HONOUR: Before I hear the parties this morning, I indicate
2 that a revised judgment will be distributed this morning
3 by my Associate after I rise and that will be available
4 shortly. I indicate that I will not supply any
5 supplementary reasons as raised by the third defendant.
6 Mr Maclean?

7 MR MACLEAN: Your Honour should have two versions of draft
8 final orders.

9 HER HONOUR: Yes, I have read those, together with the
10 submissions on behalf of the administrators.

11 MR MACLEAN: Has Your Honour received the trustee's - - -?

12 HER HONOUR: Yes, I have. Perhaps you might deal at the
13 outset, Mr Maclean, with the matter raised by the
14 administrators that matters and issues affecting Group 1
15 and Group 2 were not seriously agitated during the course
16 of argument, and that the proceeding was for all intents
17 and purposes occupied with Group 3.

18 MR MACLEAN: Yes. We would say that the way that Your Honour
19 has put it does characterise the way my learned friend
20 puts it. But from the trustee's point of view, what we
21 need to ascertain from Your Honour is advice. We've read
22 paragraph 371, and it may be that the orders that we
23 formulated do reflect the paragraph, but really it's a
24 matter for Your Honour.

25 HER HONOUR: It might be said that it would be undesirable at
26 this point to make orders as provided by the trustee
27 without the other parties having the opportunity to make
28 any additional submissions they would wish to make.

29 MR MACLEAN: On this point, Your Honour?

30 HER HONOUR: Yes. I'm not urging or inviting that course, but
31 I just raise it as to whether it is a concern.

1 MR MACLEAN: Your Honour will have to ask my learned friends,
2 but the trustee is content to rely upon what's in our
3 written submission, and really we have nothing else to
4 say.

5 HER HONOUR: And so far as the trustee is concerned, on the
6 basis of the reasons provided, the trustee is content to
7 have the various questions answered as set out in the
8 minute you submitted yesterday?

9 MR MACLEAN: Unless Your Honour tells us we shouldn't.

10 HER HONOUR: Yes.

11 MR MACLEAN: Your Honour, I think that finishes membership
12 Group 1 for the trustee's purposes.

13 HER HONOUR: Yes.

14 MR MACLEAN: The other matter, Your Honour, is - if Your Honour
15 could turn to the trustee's draft orders, Order No. 2,
16 the order appointing Mr Booth - I think everyone, Your
17 Honour, would be content if the words "For the purposes
18 of this proceeding" were inserted after the words
19 "Russell Thomas Booth". And similarly in paragraph 3,
20 "An order appointing Wayne Stephen Clarke for the
21 purposes of this proceeding".

22 HER HONOUR: Yes.

23 MR MACLEAN: That's all we have.

24 HER HONOUR: I see that you contemplate that the matter be
25 adjourned to deal with the question of costs at another
26 time. I have some difficulty in understanding why that
27 is necessary, Mr Maclean.

28 MR MACLEAN: We would anticipate there may well be substantial
29 and we would expect time consuming argument about what
30 should be done.

31 HER HONOUR: Without having formed a final view, on its face it

1 seems to be a matter that is attractive to the usual
2 order being made in a trust matter. But as I say, it is
3 not the final view in any way.

4 The other difficulty is a logistic difficulty, in
5 effect for the court. This matter has taken up a great
6 deal of time; I will not rehearse the history of it. And
7 in my view it would be desirable to dispose of the matter
8 today, if at all possible.

9 MR MACLEAN: I can't say to Your Honour that there's been
10 really any correspondence or debate between the parties
11 about what the orders as to costs should be. Parties
12 have rather focused on the substantive orders.

13 HER HONOUR: That is unfortunate, because given the nature of
14 this matter and its public interest, it is highly
15 desirable that it be disposed of entirely as soon as
16 possible. I have to indicate that I may have
17 difficulties because of my other court commitments,
18 allocating much time to this matter, for some months.
19 Hence - I appreciate what you say and I'll have to hear
20 what the other parties say, but it would be desirable if
21 the question of costs could be resolved and dispatched
22 quickly.

23 MR MACLEAN: Yes.

24 HER HONOUR: Is there anything else, Mr Maclean?

25 MR MACLEAN: No, Your Honour.

26 HER HONOUR: Mr Whelan?

27 MR WHELAN: Your Honour, on the question of the Group 1, we
28 don't have anything to add to our written submission.
29 Save to say it's unwise to make orders about matters that
30 are not the subject of direct issue in a case, and which
31 have not been argued. As a practical matter, in the

1 light of the trustee's submission, Your Honour will have
2 seen - there may be no practical consequences, the
3 trustee has disavowed our concern that by a side wing
4 something might be being decided about Group 1 which has
5 not been argued, but we do still say the safer course is
6 to follow our form of orders which only differs from the
7 trustee's in that one respect.

8 As to the question of costs, Your Honour, we do
9 submit that it should be dealt with in the ordinary way
10 that such matters are dealt with, but we know the other
11 parties want to argue about that. I can't say that it
12 could be dealt with. I suspect it will probably take
13 half a day for - presumably they're going to argue that
14 our costs should not be paid from the trust fund on some
15 basis, and I can't imagine it would take less than half a
16 day for that matter to be dealt with.

17 HER HONOUR: Dr Hardingham?

18 DR HARDINGHAM: If Your Honour pleases, on the issue of the
19 category 1 payments, and Mr Whelan's memorandum and
20 Mr Maclean's memorandum, our view is as follows. It
21 would seem to be the case that the question of whether
22 the category 1 payments enjoyed some priority under s.556
23 was before the court. Because when one looks at the
24 originating motion, one sees that it's worded in terms of
25 further contributions, and no distinction is drawn
26 between further contributions under category 1 or
27 category 3 for the purposes of the originating motion.

28 There is no doubt that the focus of argument during
29 the proceeding was on the category 3 payments and not on
30 the category 1 payments. But the reason for that was
31 because I thought my learned friend Mr Whelan was

1 conceding that the category 1 payments - the nine per
2 centers - did indeed fall within A.

3 It seems to us, Your Honour, that if Your Honour
4 has decided in paragraph 371 of the judgment that the
5 category 1 payments do enjoy priority under A, then the
6 orders ought to reflect that. If on the other hand Your
7 Honour hasn't decided that, or if Your Honour is of the
8 view that the matter wasn't agitated at all, then my
9 learned friend Mr Whelan's approach is the correct one.

10 As far as the matter of costs is concerned, Your
11 Honour, there is as I understand it - and I understood
12 that talks were taking place between the instructing
13 solicitors, but I may be wrong there - there is a
14 question as to whether the administrators should be
15 accorded their full costs, having regard to the fact that
16 the question of priorities is very much one that redounds
17 for the benefit of the deployment of the fund in the
18 hands of the administrators for the benefit of the
19 creditors, and that's something that we wanted to agitate
20 before Your Honour in the fullness of time.

21 There's also another question. There are a number
22 of plaintiffs. Some of the funds weren't discussed in
23 detail because it was felt by the trustee that it would
24 be appropriate to run the case in relation to the ground
25 staff superannuation plan only. But of course the other
26 funds - the other superannuation funds that are before
27 the court, the pilots fund, et cetera - they enjoy the
28 benefit of this judgment and there's a question that
29 arises as to whether the costs oughtn't to be spread
30 between the funds insofar as they are to be borne by the
31 superannuation funds.

1 So as Your Honour can see, it's not quite as
2 straightforward as it may appear on the surface. I think
3 as my learned friend Mr Whelan says, it would probably
4 require half a day, provided people got their submissions
5 to Your Honour in advance, to argue the matter out. If
6 Your Honour pleases.

7 HER HONOUR: Mr Merralls?

8 MR MERRALLS: If Your Honour pleases. If I may briefly address
9 the last point. I'm instructed that we have no
10 instructions about costs issues, because we understood
11 that we were all in agreement that the matter should be
12 deferred. So I'm unable to even intimate the attitude
13 that we would take if questions such as those raised by
14 my learned friend Dr Hardingham were before the court.

15 As to the answer concerning membership Group 1,
16 that matter of course affects the group that my learned
17 friend Mr Macauley and I represent most keenly, because
18 we are the continuing employees, and the employers
19 obligation to contribute is one which affects our
20 interests in particular.

21 We concur with what my learned friend Dr Hardingham
22 has said, and only wish to add that it is inherent in
23 Your Honour's reasons for judgment respecting membership
24 Group 3, that the obligation to contribute created by the
25 funding and solvencies certificates applies to that
26 group. And not having heard - the obligation either
27 supersedes or is concurrent with an obligation arising
28 from the acceptance by the trustee of the actuary's
29 report and recommendation with option of nine per cent as
30 the rate.

31 So it is implicit in Your Honour's reasons for

1 judgment on what I might call the second issue - that is
2 the source of obligation - that the funding and solvency
3 certificate in conjunction with the regulations, and the
4 trustee created an obligation, and allied with the
5 concession made by my learned friend Mr Whelan in
6 argument, we say that Your Honour should be taken to have
7 expressed a conclusion that the debt arising from the
8 obligation is entitled to priority under paragraph A.

9 I understand from my learned friend Mr Whelan that
10 he was principally concerned that the answer to the
11 question might assume that the rate of nine per cent was
12 to be applied to one or another amount. Your Honour may
13 remember that there was affidavit evidence that it's been
14 the practice of the administrators to calculate the
15 deduction of five per cent from employees' salaries -
16 that is the members contributions and to calculate the
17 nine per cent in another way. On the one hand it was the
18 contractual salary for the year, month or whatever the
19 applicable period is; and the other way - it was the
20 actual hours worked that was used.

21 In our submission the answer proposed doesn't go to
22 that point. So there is nothing that my learned friend
23 has to fear from the question being answered that it
24 might be submitted that a higher amount or greater amount
25 was payable by the administrators, and the administrators
26 would be prepared to concede. If Your Honour pleases.

27 HER HONOUR: Mr Maclean, in terms of the matter of Cross,
28 although you contemplate in the order that that question
29 would be adjourned to a date to be fixed, did you have a
30 timetable in mind as to how the parties would conduct
31 themselves?

1 MR MACLEAN: No, Your Honour. It really would be at Your
2 Honour's convenience. No, we don't. But we will comply
3 with whatever is convenient to Your Honour.

4 HER HONOUR: If the matter is to be agitated, I would be
5 assisted by written submissions. It may be appropriate
6 therefore to give a direction in that regard, unless you
7 can persuade any concerns I have that the parties will go
8 about that and provide it in a reasonable time in
9 advance. You also need to give me an indication as to
10 how long the parties would need before they would be
11 ready to argue that matter.

12 I would be content to leave the Bench for a moment
13 to enable the parties to have discussions about that. I
14 would not be able to give the parties I believe, this
15 morning a fixed date, but once I know the timetable, then
16 my Associate hopefully in the next few days would be able
17 to inform you of a tentative date, and subject to all the
18 parties being available, then I would allocate half a day
19 if the parties agree that that is in fact all that is
20 needed on the basis that written submissions will be
21 filed and exchanged, at least, I would think, seven days
22 beforehand.

23 MR MACLEAN: Yes, Your Honour, we're very grateful for that.

24 HER HONOUR: Perhaps if I leave the Bench for a moment, would
25 that be convenient? I see everyone is nodding. I will
26 do that, and if the parties could let my Associate know,
27 I will return as soon as you are ready.

28 (Short adjournment.)

29 MR MACLEAN: The position is this, Your Honour. The
30 presumptive timetable that we've agreed is that the
31 trustee put its material in within 30 days, and that all

1 the other parties respond within 14 days thereafter. It
2 occurs to me on my feet, Your Honour, judging from what
3 Dr Hardingham said, it may be that the pilots management
4 plan might want to say something.

5 If we make it, Your Honour, the plaintiffs within
6 30 days; all other parties within 14 days thereafter. If
7 it proves to be impossible, we will certainly let Your
8 Honour know. I should say to Your Honour I was unaware
9 of this, but there have been apparently communications
10 between the various solicitors about the financial effect
11 of the judgment, and apparently - as I understand it,
12 some of my learned friends will not be able to formulate
13 their position until they know certain matters. If that
14 goes wrong, we will let the court know, but on the
15 limited amount of information we have, this seems a
16 reasonable proposal.

17 HER HONOUR: It sounds as if it may well be prudent to also
18 grant liberty to apply.

19 MR MACLEAN: Yes, I think so, Your Honour.

20 HER HONOUR: I would be available most mornings on reasonable
21 notice to the court and to all the parties, to have the
22 matter mentioned in the morning at about 9.30 if there
23 are any difficulties. Does that deal with that aspect
24 completely then?

25 MR MACLEAN: Yes, Your Honour.

26 HER HONOUR: Are all the parties content with what Mr Maclean
27 has indicated? Mr Whelan?

28 MR WHELAN: Yes, Your Honour.

29 HER HONOUR: Dr Hardingham?

30 DR HARDINGHAM: Yes, Your Honour.

31 HER HONOUR: Mr Merralls?

1 MR MERRALLS: Yes, Your Honour.

2 HER HONOUR: Very well. Leaving the remaining matter then to
3 last - that is the question of the form of order - having
4 had the opportunity to read the submissions that have
5 been provided, and in particular to hear the oral
6 submissions this morning, especially those of Mr
7 Merralls, I am satisfied that the appropriate form of
8 order is that proposed on behalf of the trustee, and I
9 will make orders accordingly, subject to the amendment
10 indicated by Mr Maclean with respect to paragraphs 2 and
11 3, and necessary consequential amendments dealing with
12 the exchange of submissions and filing of submissions in
13 relation to costs, and I will make orders as proposed by
14 Mr Maclean in that regard. As indicated, I will also
15 grant liberty to apply.

16 For the purposes of perhaps certainty hereafter,
17 Mr Maclean, it might well be desirable in paragraph 1
18 where reference is made to the third amended originating
19 motion, to actually insert thereafter filed on the
20 particular date. That may avoid confusion at another
21 time.

22 MR MACLEAN: Yes, Your Honour.

23 HER HONOUR: Subject to those amendments being made, it would
24 be of assistance to my Associate if you or your
25 instructor were in a position to provide a re-engrossed
26 amendment reflecting those matters.

27 MR MACLEAN: We will, Your Honour.

28 HER HONOUR: Are there any other matters to deal with at this
29 point?

30 MR MACLEAN: No, Your Honour.

31 HER HONOUR: Mr Whelan?

1 MR WHELAN: No, Your Honour.
2 HER HONOUR: Dr Hardingham?
3 DR HARDINGHAM: No, Your Honour.
4 HER HONOUR: Mr Merralls?
5 MR MERRALLS: No, Your Honour.
6 HER HONOUR: Very well.
7
