

ANSETT AUSTRALIA GROUND STAFF SUPERANNUATION PLAN PTY LTD  
AND ANOR

v

ANSETT AUSTRALIA LIMITED (subject to a deed of company arrangement)  
AND ORS

Summary

1. The plaintiff is trustee of the Ansett Australia Ground Staff Superannuation Plan ("the Plan"). The first defendant, Ansett Australia Limited ("Ansett") became the subject of administration on 12 September 2001 and the second defendant, Mark Mentha and Mark Korda were subsequently appointed the administrators of Ansett ("the administrators"). On 2 May 2002 the administrators executed a deed of company arrangement with the creditors of the company.
2. Ansett, as an employer, was party to certain superannuation trust deeds with respect to its employees, including the Plan. The administrators effected ongoing redundancies after 12 September 2001 of Ansett employees. As a result, the entitlements of the employees of Ansett under the Plan crystallised. Questions arose on the part of the trustee of the Plan as to the entitlement of the employees of Ansett under the Plan. In summary, there were three issues. First, whether the retrenched employees of Ansett who were members of the Plan were entitled to benefits under the subject trust deed and, if so, to which categories of benefits. Secondly, if the entitlements gave rise to a deficiency in the superannuation fund, is Ansett obliged to make further contributions to enable payment of those benefits? Thirdly, if so, did the obligation to make further contribution attract any and if so what priority under s.556(1) of the

*Corporations Act 2001.*

3. The third defendant was joined to the proceeding as a representative party representing those employees of Ansett who have been retrenched and are members of the Plan. The fourth defendant was joined to the proceeding as a representative party representing those persons who remain in the employ of Ansett. The Australian Council of Trade Unions ("the ACTU") intervened and made oral and written submissions.
4. The position of the trustee supported by the representative defendants in the proceeding was that the Ansett employees who have been made redundant were entitled to the highest level of benefits, namely, the retrenchment benefit under rule 1.13 of the trust deed. The trustee and the representative defendants also argued that under the legislation governing employee superannuation plans, the trust deed and the contracts of employment of Ansett employees, Ansett and, therefore, the administrators, were obliged to make contributions to the superannuation fund in accordance with the funding and solvency certificate known as "FSC 5". The administrators submitted that there was no obligation on them to make contributions to the fund in order to make up a shortfall estimated to be in the order of \$200,000,000. Lastly, the trustee and the representative defendants submitted that if there was an obligation on the administrators to contribute to the fund it constituted an expense in the administration of the company and, therefore, attracted the first priority contained in s.556(1)(a) of the *Corporations Act 2001* or, alternatively, one of the other orders of priority in the sub-section over and, therefore, attracted priority over creditors of Ansett.
5. The position of the administrators in the proceeding was that Ansett, as the employer, had a discretion to grant retrenchment entitlements under rule 1.13 of the trust deed. They argued, also, that the administrators had not exercised and would not exercise that power. The administrators further submitted that

there was no obligation on them to pay the shortfall. The administrators supported by the ACTU submitted that if there was such an obligation it did not attract priority under s.556 of the *Corporations Act* and was a debt provable in the administration of Ansett.

6. The court held:

1. Pursuant to the superannuation statutory regime and the Trust Deed, Ansett is obliged to make contributions in accordance with the Funding and Solvency Certificate known as "FSC 5".
2. The said obligation arises, also, from the contract of employment between Ansett and its employees who were members of the Ground Staff Plan.
3. The Funding and Solvency Certificate known as "FSC 5" is valid and a shortfall has arisen that is required to be met pursuant to the obligations upon Ansett.
4. The obligation does not attract priority under s.556(1) of the *Corporations Act* 2001 and constitutes a debt provable in the administration of Ansett.

This summary is published for convenience only and is not intended to provide a complete or authoritative exposition of the reasons for judgement or to constitute in any way a substitute for the reasons. The effect of the decision should be derived solely from the judgement published by the court.

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