

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

No 2115 of 2001

**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 Deed of Company Arrangement)  
(ACN 004 209 410) & ORS**

**Respondents**

**OUTLINE OF ARGUMENT  
BY APPELLANT  
IN SUPPORT OF APPLICATION FOR EXPEDITED HEARING**

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Filed on behalf of the appellant

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**A. INTRODUCTION**

1. These submissions are made in support of the Appellant's application by summons dated 10 April 2003 for the hearing of this appeal to be expedited.
2. The Appellant believes that its application for expedition is supported by the respondents (exhibit 'ALM -6' to the affidavit of Anthony Leigh Middleton sworn 15 April 2003, being a letter to Minter Ellison from Arnold Bloch Leibler dated 9 April 2003).
3. In these submissions the Appellant is referred to as the 'Trustee', the Ansett Australia Ground Staff Superannuation Plan is referred to as the 'Plan', the first respondent is

referred to as 'Ansett' and the second respondents are referred to as the 'Administrators'.

## **B. SUMMARY OF SUBMISSION AND ORDERS SOUGHT**

4. In summary, given the effect on the Plan members, the related Federal Court proceeding and the administration of Ansett generally, the Trustee submits that expedition is appropriate. The legal issues in the appeal are of general importance for the law of insolvency and superannuation.

## **C. BACKGROUND TO THIS PROCEEDING**

5. The Appellant is Trustee of the Plan, established by Ansett for a large group of its employees. The Plan has a Defined Benefits Section (First Schedule of the Trust Deed) and an Accumulation Section (Second Schedule of the Trust Deed).
6. The Administrators were appointed administrators of Ansett and related companies on 17 September 2001, replacing other administrators who had been appointed on 12 September 2001. On 2 May 2002 the Administrators executed a deed of company arrangement covering the Ansett group of companies ('DOCA').
7. The Trustee commenced this proceeding on 21 December 2001. It was heard by Warren J between 16 July and 28 August 2002. The parties before Warren J were as follows:
- plaintiffs – Ansett Australia Ground Staff Superannuation Plan Pty Ltd; Ansett Australia Pilots/Management Superannuation Plan Pty Ltd
  - first defendant – Ansett Australia Limited (Subject to Deed of Company Arrangement)
  - second defendant – Messrs Mentha and Korda (as Administrators)
  - third defendant – Russell Thomas Booth (representing members of the Plan who had been made redundant)
  - fourth defendant – Steven Clarke (representing members of the Plan as of 12 September 2001 who were not subsequently made redundant).
8. Submissions were also made by a non-party, the Australian Council of Trade Unions. (Ansett Australia Pilots/Management Superannuation Plan Pty Ltd did not participate in

the hearing. Issues relating to that party had previously been adjourned sine die by orders made by Warren J on 14 June 2002.)

9. Warren J delivered her judgment on 20 December 2002. Revised reasons were delivered and final orders made on 7 February 2003 (exhibits 'ALM-1' and 'ALM-2'). In her revised reasons for judgment Warren J came to three principal conclusions:
- (a) That all of the Plan members who had been made redundant by the Administrators were entitled to retrenchment benefits under Rule 1.13 of the First Schedule to the Trust Deed for the Plan (as opposed to benefits under Rule 1.12, being the benefits payable to any member on leaving the service of Ansett): see paragraph 378(1) of the revised reasons for judgment of Warren J. The significance of this finding was that, in general, retrenchment benefits are greater than benefits on leaving service only (referred to as the resignation benefits) and lead to a greater call for contributions from the employer, Ansett, in order that benefits can be paid.
  - (b) That the Funding and Solvency Certificates issued by the Plan's Actuary, Mr Paul Francis, on 23 January 2002 and 24 April 2002, pursuant to the requirements laid down in the *Superannuation Industry (Supervision) Act 1993* and *Regulations*, were valid and enforceable: see paragraphs 86-93 and 240-242 of the revised reasons for judgment of Warren J. The significance of this finding is that Mr Francis in his Certificates had required Ansett to pay to the Trustee the difference between each member's resignation benefit and retrenchment benefit, where the member was entitled to a retrenchment benefit and it was greater than the resignation benefit. The difference in each case was divided by 0.85, in order to allow for the 15% contributions tax. A related finding was that the terms of the standard Ansett contract of employment (between Ansett and any Plan member) led to the conclusion in paragraphs 245-6 of the revised reasons for judgment that:
 

'there was a contractual obligation imposed on Ansett to contribute an amount to the Plan that was sufficient to provide the benefits promised by the Plan including the retrenchment benefit under rule 1.13.'
  - (c) That the Trustee did not have any status as a priority creditor under sub-sections 556(1)(a), (c), (dd) or (e) of the *Corporations Act 2001* (on the basis,

agreed to by all parties, that this issue be determined without regard to the deleterious effects of the DOCA upon any entitlement of the Trustee to priority) for the amounts described under the Funding and Solvency Certificates as the difference (for each member made redundant, as applicable) between resignation and retrenchment benefits and allowing for the 15% contributions tax. A related finding was that the regular, 9% of salary contributions required of Ansett by the Funding and Solvency Certificates did have priority under s 556(1)(a).

10. On 20 February 2003, by consent of all parties, Warren J granted an extension of time for filing any notice of appeal until 24 March 2003. The Trustee filed a notice of appeal on 24 March 2003 (exhibit 'ALM-3'). In general terms, the Trustee seeks orders that it has priority under one or more of s 556(1)(a), (dd) or (e) of the *Corporations Act* 2001.
11. On 7 April 2003 the respondents gave notice of cross-appeal (exhibit 'ALM -4'). On 11 April 2003, the respondents filed a notice of contention (exhibit 'ALM -5').

#### **D. FEDERAL COURT PROCEEDING**

12. On 19 June 2002 the Trustee commenced proceedings in the Federal Court (V3107 of 2002) seeking to be established as a priority creditor under the DOCA ('DOCA Proceeding'). In general terms, the DOCA removes any status as a priority creditor that the Trustee may have in relation to what is owed by Ansett to the Trustee to make up the shortfall to fund benefits to which Plan members are entitled.
13. Under the DOCA the priorities afforded by s 556(1) of the *Corporations Act* 2001 apply unless the DOCA says otherwise (see s444A(4), (5) of the *Corporations Act* 2001). The 'prescribed provisions' for s 444A(5) are found in Schedule 8A to the *Corporations Regulations* 2001 (see reg 5.3A.06).
14. The relief sought by the Trustee is the amendment or termination of the DOCA.
15. It is a precursor to any application by the Trustee to amend or terminate the DOCA in the DOCA Proceeding that it must first be determined whether or not the Trustee has any claim for priority under s 556(1), absent the provisions of the DOCA.
16. On 9 April 2003 Goldberg J considered, at the request of the Administrators, whether or not the DOCA Proceeding should be set down for trial. Rather than setting the matter down for trial, Goldberg J gave directions (exhibit 'ALM-8' and 'ALM-9', orders and

transcript of 9 April 2003, pages 22 and 23). By paragraph 1 of those orders, the Trustee is required to file and serve its statement of claim by 14 May 2003. Contrary to paragraph 7 of the orders, the next directions hearing in the Federal Court is on 30 July 2003.

#### **E. REASONS FOR EXPEDITION**

17. The parties are concerned to obtain a determination of all the issues as soon as possible.
18. At the hearing before Warren J on 20 February 2003, when she granted the extension of time for filing any appeal, Mr Leon Zwier, of Arnold Bloch Leibler who appeared for the Administrators, stated (pages 2 and 3 of the transcript, exhibit 'ALM -7'):

Your Honour is correct in observing that this matter is in the public interest and there is a great deal of public attention focused on it. ...

... The administrators presently are of the view that a short extension of time may enable the parties to reach that settlement. If they are unable to do so, Your Honour, then obviously it may require one or more of the parties to proceed with an appeal and all the parties would thereafter, and perhaps I'm overstating it, seek expedition, and would not want this short adjournment to be seen as suggesting that there is no urgency, Your Honour.'

#### ***Effect on Plan members***

19. The Plan has approximately 9,000 members who are waiting for their benefits to be paid (to another superannuation fund or direct to those members eligible to receive it). Some partial payments have already been made. The Trustee is unable to pay their benefits in full unless it is successful in this appeal and in the DOCA proceeding. The amount claimed by the Trustee from the Administrators is more than \$100m. Despite the considerable passage of time the final asset position of the Plan is still not known. All Plan members are adversely affected by further delays. If the Trustee is successful in this appeal then (subject to any further appeal) it expects to have to prosecute the DOCA Proceeding.

#### ***Effect on former Ansett employees***

20. At the hearing on 9 April 2003 in the DOCA Proceeding before Goldberg J, Mr Whelan QC, for the Administrators, advised that until the determination of this appeal and the DOCA Proceeding the Administrators are unable to pay any further redundancy entitlements to former Ansett group employees, as the payments of those entitlements

may be affected by the outcome of the litigation (pages 10 - 11 of the transcript, exhibit 'ALM-9').

**F. AMENDMENT TO NOTICE OF APPEAL**

21. The Trustee will apply to amend the notice of appeal to seek an order from the Court of Appeal that the contractual obligation of Ansett (referred to above) means that Ansett will have to make a contribution that is sufficient to pay all benefits in full. The contribution required by the Funding and Solvency Certificates (referred to above) are insufficient to enable benefits to be paid in full.

**G. EXPECTED DURATION OF APPEAL**

22. The Trustee's estimate is 5 days, which takes into account the effect of the amendment referred to above.

D. M. Maclean

24 April 2003