

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

No. 2115 of 2001
~~2003~~

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

NOTICE OF CROSS-APPEAL

Date of document: 7 April 2003

Filed on behalf of the Respondents and Cross Appellants

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TO: Ansett Australia Ground Staff Superannuation Plan Pty Ltd (ACN 065 590
178) (as trustee of the Ansett Australia Ground Staff Superannuation
Plan)

TAKE NOTICE that the respondents/cross appellants intend to cross-appeal to the
Court of Appeal of the Supreme Court of Victoria against the judgment of and orders
made by the Honourable Justice Warren on 7 February 2003.

NOTE: In this notice of cross-appeal:

"Administrators" means Mark Francis Xavier Mentha and Mark Anthony Korda.

"Ansett" means Ansett Australia Limited (Subject to Deed of Company Arrangement) (ACN 004 209 410), the first respondent.

"FSC" means a funding and solvency certificate issued by an actuary of a Plan pursuant to Division 9.3 of the *Superannuation Industry (Supervision) Regulations* 1994.

"FSC4" means the funding and solvency certificate issued by the actuary of the Ground Staff Plan dated 23 January 2002 and having an effective date of 23 October 2001.

"FSC5" means the funding and solvency certificate issued by the actuary of the Ground Staff Plan dated 24 April 2002 with an effective date of 24 April 2002.

"Ground Staff Plan" or "Plan" means the defined benefit superannuation scheme established pursuant to rules contained in the First Schedule to the Trust Deed.

"Membership Group 3" refers to the group of members identified as such in Appendix B of FSC5 in respect of whom certified minimum contributions (as described) are required by the Plan's actuary.

"Originating Motion" means the Fourth Amended Originating Motion.

"Rule 1.13" means Rule 1.13 of the First Schedule to the Trust Deed.

"Trust Deed" means the Ansett Australia Ground Staff Superannuation Plan 1999 Consolidated Trust Deed made 17 August 1999.

"Trustee" means the appellant.

PERSONS UPON WHOM THIS NOTICE IS TO BE SERVED

Ansett Australia Ground Staff Superannuation Plan Pty Ltd (ACN 065 590 178) (as trustee of the Ansett Australia Ground Staff Superannuation Plan).

SCOPE OF CROSS-APPEAL

The respondents cross-appeal from the judgment and orders made and pronounced by the Honourable Justice Warren on 7 February 2003, in response to paragraphs 1 to 14 of the relief sought in the Originating Motion whereby it was ordered that:

Paragraph 1

All members of the Ansett Australia Ground Staff Superannuation Plan ("Ground Staff Plan") who have been made redundant by Messrs Mentha and Korda as administrators of Ansett Australia Limited (which is now subject to a Deed of Company Arrangement) ("Ansett") since 12 September 2001 are entitled to retrenchment benefits under Rule 1.13 of the First Schedule to the Trust Deed dated 17 August 1999.

Paragraph 2

Unnecessary to answer at this stage.

Paragraph 4

Unnecessary to answer.

Paragraph 5

Unnecessary to answer at this stage.

Paragraph 7

Unnecessary to answer.

Paragraph 8

Unnecessary to answer.

Paragraph 9

Unnecessary to consider at this stage.

Paragraph 10

Unnecessary to consider at this stage.

Paragraph 11(a)

Unnecessary to answer at this stage.

Paragraph 12(a)

Ansett Australia Limited (subject to Deed of Company Arrangement) (ACN 004 209 410) 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"). It is unnecessary to answer in relation to Membership Group 2.

Paragraph 12(b)

Unnecessary to consider at this stage.

Paragraph 13

Unnecessary to answer in relation to the Ground Staff Plan. Unnecessary to answer at this stage in relation to the Ansett Australia Transport Industries Limited Pilots/Management Superannuation Plan ("Pilots/Management Plan").

Paragraph 14

In relation to the Ground Staff Plan:

- (a) the further contributions required for Membership Group 3 under FSC5 are not expenses within the meaning of s. 556(1)(a). The further contributions required for Membership Group 1 under FSC5 from Ansett are expenses within the meaning of s. 556(1)(a). It is unnecessary to answer in relation to the contributions for Membership Group 2;

- (b) the further contributions required for Membership Groups 1 and 3 under FSC5 are not debts within the meaning of s. 556(1)(c). It is unnecessary to answer in relation to Membership Group 2;
- (c) the further contributions required for Membership Groups 1 and 3 under FSC5 are not expenses within the meaning of s. 556(1)(dd). It is unnecessary to answer in relation to Membership Group 2;
- (d) the further contributions required for Membership Groups 1 and 3 under FSC5 are not superannuation contributions within the meaning of s. 556(1)(e). It is unnecessary to answer in relation to Membership Group 2.

In relation to the Pilots/Management Plan:

- (a) – (d) Unnecessary to consider at this stage.

The respondents/cross appellants cross-appeal against the orders made by her Honour in response to paragraph 12(a) of the Originating Motion.

ORDERS SOUGHT IN THIS CROSS-APPEAL

The respondents seek the following orders:

1. This cross-appeal be allowed.
2. The orders made in response to paragraph 12(a) of the Originating Motion be set aside.
3. In lieu thereof, orders and declarations as follows:

Paragraph 12 (a)

Save for the obligation to pay contributions pursuant to clause 2 and Rule 1.3(3) of the Trust Deed for those members whose employment has continued, Ansett is not obliged to make further contributions to the Ground Staff Plan.

GROUNDS OF CROSS-APPEAL

1. The learned trial judge erred in finding that Ansett is under an obligation pursuant to the Superannuation Industry (Supervision) legislation to make a contribution to the Ground Staff Plan to achieve solvency.
2. The learned trial judge should have found that the *Superannuation Industry (Supervision) Act* does not impose an obligation upon Ansett to comply with the standards prescribed by the *Superannuation Industry (Supervision) Regulations* but that any obligation to comply with the standards is placed solely and exclusively upon the Trustee.
3. The learned trial judge should have found that if any obligation to make contributions to achieve solvency is imposed upon Ansett (which is denied) it is imposed by the terms of the Trust Deed.
4. The learned trial judge erred in finding that Ansett is obliged to make further contributions in accordance with the requirements of the FSC5.
5. The learned trial judge erred in finding that Ansett is under an obligation pursuant to the terms of the Trust Deed to make contributions in accordance with FSC5.
6. The learned trial judge erred in finding that Ansett is under an obligation pursuant to the provisions of the Superannuation Industry (Supervision) Regulations 1994 to make contributions in accordance with FSC5 or at all.
7. The learned trial judge should have found that Ansett is under no such obligation.

8. The learned trial judge erred in finding that FSC5 is valid.
9. The learned trial judge should have found that FSC5 is invalid because it was not made in compliance with Division 9.3 of the Superannuation Industry (Supervision) Regulations 1994.
10. In particular, the learned trial judge should have found that FSC5 is invalid because, by its own terms, it certifies minimum contributions which are in excess of those reasonably expected by the actuary to secure the solvency (as defined by regulation 9.06(2)) of the Ground Staff Plan on the expiry date of the certificate.
11. The learned trial judge should have found that FSC5 is invalid because it certifies minimum contributions by reference to the standard referable to "unsatisfactory financial position" in regulation 9.04 rather than by reference to the solvency standard in regulation 9.06.
12. The learned trial judge erred in finding that the calculation of the further contributions in respect of Membership Group 3 in FSC4 and FSC5 was made by the actuary in accordance with the requirements of the *Superannuation Industry (Supervision) Regulations 1994*.
13. The learned trial judge should have found that the further contribution in respect of Membership Group 3 in FSC4 and FSC5 was not made in accordance with the requirements of the *Superannuation Industry (Supervision) Regulations 1994* as the minimum contributions sought in FSC4 and FSC5 were not minimum contributions reasonably expected by the actuary to secure solvency (as per regulation 9.06(2)) on the expiry date of the certificates.

DATED: 7 April 2003

Arnold Bloch Leibler
Arnold Bloch Leibler
Solicitors for the respondents
and cross-appellants