

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL LIST

No. 2115 of 2001

ANSETT AUSTRALIA GROUND STAFF
SUPERANNUATION PLAN PTY LTD AND
ANOR

Plaintiff

v

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

Defendant

<u>JUDGE:</u>	WARREN J.
<u>WHERE HELD:</u>	MELBOURNE
<u>DATE OF HEARING:</u>	25 August 2003
<u>DATE OF JUDGMENT:</u>	2 September 2003
<u>CASE MAY BE CITED AS:</u>	Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Limited and Ors (No. 2)
<u>MEDIUM NEUTRAL CITATION:</u>	[2003] VSC 301

COSTS - Determination of trial costs after appeal - Conduct of trustee - Benefit to administrator.

APPEARANCES:

Counsel

Solicitors

For the First Plaintiff

Mr J.G. Santamaria Q.C. with
Mr D.M. MacLean

Minter Ellison

For the Second Plaintiff

Ms N.A. Connell (Solicitor)

Hunt and Hunt

For the First and Second
Defendants

Mr S.P. Whelan Q.C. with
Ms Bernadette McMahon

Arnold Bloch Leibler

For the Third Defendant

Mr A. Cox (Solicitor)

Pointon Partners

For the Fourth Defendant

Mr J.D. Merralls Q.C. with
Mr C.C. Macaulay

Piper Alderman

HER HONOUR:

- 1 Reasons for judgment were published in this proceeding on 20 December 2002 ("the trial judgment")¹ relating to the collapsed airline, Ansett Australia. The first plaintiff ("the trustee"), as trustee of the Ansett Australia Ground Staff Superannuation Plan ("the Plan") issued the proceeding in this court by originating motion seeking answers to certain questions. The facts and circumstances are described in the trial judgment. Essentially, three issues arose: first, the entitlement of the retrenched Ansett employees to certain benefits under the subject trust deed; secondly, the matter of the obligation of Ansett to make further contributions to enable payment of such benefits; and, thirdly, the priority ranking of such obligations for the purposes of s.556(1) of the *Corporations Act* 2001.
- 2 The three issues were determined in the trial judgment. For convenience, for present purposes, I refer to these three matters as the retrenchment issue, the obligation issue and the priority issue. Ultimately, I concluded² that certain members of the Plan were entitled to retrenchment benefits; that Ansett was obliged to make certain contributions to facilitate payment of those benefits; and that the obligation did not attract priority under s.556(1)(a), (c), (dd) or (e) of the *Corporations Act*.
- 3 In the trial judgment the submissions of the trustee and the third and fourth defendants, who were joined as representative parties, succeeded on the retrenchment and obligation issues. They did not succeed on the priority issue. The second defendant, the administrators of Ansett Australia Limited ("the administrators") made submissions that were not accepted on the retrenchment and obligation issues; the administrators' submissions on priority succeeded.
- 4 After the publication of the trial judgment the parties required time, including extensions of time, to prepare orders. On 7 February 2003 orders were made upon the questions ventilated at trial.³ In particular, question 14 in the originating motion

1 *Ansett Australia Ground Staff Superannuation Plan Pty Ltd and Anor v Ansett Australia Ltd (subject to a deed of company arrangement) and Ors* [2002] VSC 576.

2 See trial judgment at para [378].

3 Being questions set out in the fourth amended origination motion filed on 21 August 2002.

was answered by the court upon the priority issue. The parties, having spent some time formulating the orders then set about preparing submissions on costs. The second plaintiff, Ansett Australia Pilots/Management Superannuation Plan Pty Ltd, is trustee of another Ansett staff plan. It did not appear or participate in the trial. After the trial judgment it participated in the costs submissions. There was no issue that any costs orders against the plaintiffs should include the second plaintiff, although I was informed that there was a private indemnity agreement in place between the plaintiffs. The parties required various extensions of time to file submissions for reasons that are not important at this time save to observe that it was as a result of urging by the Court, not the parties themselves, that eventually the hearing on the costs of the trial came to be fixed. However, by that time certain important developments had occurred.

5 It is necessary to visit a little of the background events that preceded the trial and, also, followed the trial judgment. Proceedings concerning the administration of Ansett were issued in the Federal Court of Australia.⁴ On 27 November 2001, the administrators issued separate proceedings in the Federal Court on the request of the trustee seeking declaratory relief ("the declaratory proceeding"), in part, in relation to the retrenchment issue. On 20 December 2001 the Federal Court declaratory proceeding was adjourned, it seems by consent, to enable the trustee to issue the present proceeding in this court. The fact of the Federal Court declaratory proceeding was adverted to (although not described) at an early directions hearing in this court.⁵ The proceeding in this Court was commenced on 21 December 2001 and urgent directions and orders were made by Beach J on 9 January 2002. The originating motion, as originally filed, raised questions and sought declarations with respect to the retrenchment and obligation issues and, in part, the priority issue (although the priority issue was expanded at the commencement of the trial).⁶ It transpired that on 19 June 2002, shortly before the commencement of the trial, the trustee issued further proceedings in the Federal Court seeking to terminate or vary

⁴ The Federal Court proceedings are generally referred to in the trial judgment at paras [3] - [7].

⁵ See transcript of directions hearing on 8 February 2002 pp.4-6.

⁶ Confined to s.556(1)(e) of the *Corporations Act* 2001.

the deed of arrangement ("the termination proceeding"). It was adjourned with the consent of the administrators and did not arise or come to the fore during the course of the trial in this proceeding.

6 During the opening of the plaintiffs' case at the commencement of trial in this proceeding on 17 July 2002, an oblique reference was made to the earlier Federal Court declaratory proceeding. I was informed that the trustee considered it ought commence its own proceedings as distinct from the administrators' proceeding in the Federal Court " ... in which all the questions it needed answered were asked, were put into a logical order and were brought before a court which it was thought had indubitable jurisdiction to deal with all of them".⁷ I was informed, also, that the trustee had persuaded the Federal Court not to proceed with the declaratory proceeding because the subject issue was before this court, together with other matters.⁸ Thereafter the trial proceeded on the footing that this court was to answer the questions raised by the trustee and that such questions were ventilated in this court with the agreement of the administrators. After orders were made on the trial judgment on 7 February 2003 the trustee lodged an appeal with respect to the obligation and priority issues. A significant part of the trial judgment was concerned with the application and effect of the Funding and Solvency Certificate issued by the actuary to the Plan known as "FSC5". On 23 March 2003, after the trial judgment, the actuary issued a special funding and solvency certificate ("the special SFC"). It appears that the special certificate overtook FSC5. (The Court of Appeal regarded that event as a significant development).

7 The trustee applied for expedition of the hearing of the appeal. The expedition application was apparently agreed to by the administrators who were the respondent on the appeal. They asserted before me on the hearing of the costs submission that the administrators attached a condition to their agreement to an order for the expedition of the appeal to the effect that the appeal not be treated as hypothetical. The trustee was granted an expeditious hearing of the appeal.

⁷ See trial transcript p.49.

⁸ Ibid.

8 After the trial judgment but before the hearing of the appeal the administrators applied to have the Federal Court determine the termination proceeding. The Federal Court did not accede to the administrators' request. Subsequent to the trial judgment, the administrators raised in correspondence with the trustee their view that the appeal may be hypothetical in light of the actions by the trustee for the reasons set out in the Court of Appeal judgment.

9 Subsequently, on 21 August 2003 the Court of Appeal allowed the appeal on the priority issue and made other consequential orders, including the adjournment of a cross-appeal by the administrators to a date to be fixed. The Court of Appeal ordered that the trustee, as the appellant, pay the costs of the administrators, as respondent of the appeal. The Court of Appeal (in the leading judgment of Ormiston JA), with whom Callaway JA (with additional reasons) and Batt JA agreed held that the priority issue was pursued by the trustee, incorrectly, but with the acquiescence of the administrators at trial. Furthermore, the Court of Appeal observed that the administrators co-operated in allowing the appeal to proceed on the basis of a hypothetical issue. The Court of Appeal ordered that the appeal be allowed, that the trust fund pay the administrators' costs of the appeal on a party party basis and, further, ordered that a cross-appeal by the administrators be adjourned sine die. The Court of Appeal held that it was not appropriate to resolve the issues said to be before the court, save to the extent necessary of dealing with question 14 concerned with the priority issue.⁹

10 In his reasons, Ormiston JA held that the primary reason why the court took the course it did was that the question raised by the appeal was "both advisory and hypothetical".¹⁰ His Honour observed that the difficulties before the Court of Appeal arose because the trustee, as appellant, but with the concurrence of the other parties, embarked on the proceeding including the formulation of an inappropriate question.¹¹ Ormiston JA described the proceeding brought by the trustee with

⁹ See Court of Appeal judgment at [1].

¹⁰ See Court of Appeal judgment at [2].

¹¹ See [4].

respect to the priority issue thus:

"In truth the appellant [the trustee] sought adversary relief against the company [Ansett] and its administrators, albeit that it chose to do so by originating motion. Whatever was appropriate for it to do in relation to the liabilities and obligations of the fund and of the appellant as trustee, it sought here, first, to recover moneys, or to obtain a declaration as to their recoverability, and, secondly, to obtain orders as to the priority upon which they should be paid by the company and its administrators. Counsel for the appellant, though asked several times, clearly denied any intent to seek advice, so the application and appeal should be looked at on the basis that it sought declarations of right."¹²

11 Ormiston JA¹³ and Callaway JA¹⁴ emphasised that it was the appellant, that is, the trustee who created a division of jurisdiction between the Federal Court and this court. Ormiston JA concluded on the matter of the costs of the appeal that it was not appropriate for question 14 to be raised in the proceeding below¹⁵ but, that the question was so raised with the "explicit acquiescence" of the other parties.¹⁶

12 Hence, I am in the unusual position of determining the costs of the trial after the appeal and informed by the judgment of the Court of Appeal. Against this background then there are a number of aspects that were raised on the costs argument. First of all, there is the matter of the deed challenge in the Federal Court in the termination proceeding; whilst that matter did not come to the fore in the trial it seems it was of considerable importance in the disposition of the appeal. There was then the matter of the consideration of the retrenchment and obligation issues at trial and the relevant declarations that have not been affected by the appeal.¹⁷ Thirdly, there is the acknowledgment by the administrators (as recognised by Mr Whelan in the costs argument) that they have benefited from the trial judgment with respect to the retrenchment and obligation issues. Fourthly, there is the order

12 See Court of Appeal judgment [13].

13 At [18].

14 At [31] and [32].

15 See Court of Appeal judgment [21].

16 At [24].

17 Although this Court was informed that the trustees appealed against aspects of the obligation issue and which part of the appeal might return for consideration before the Court of Appeal at the hearing of the administrators' cross-appeal that matter was adjourned sine die by the Court of Appeal on 21 August 2003.

of the Court of Appeal that the appeal be allowed and that question 14 be answered differently on the basis that the priority issue should not have been determined at trial.

13 As a general approach when a trustee seeks advice from the court the costs of representative parties to enable the court to consider all issues are frequently ordered to be paid out of the trust. In this case there was no issue that the costs of the third and fourth defendants having been joined as representative parties should be met by the plaintiffs and on a solicitor client basis. It was urged by Mr Santamaria for the trustee that the administrators should pay their own costs of the retrenchment issue but that as the trustee had succeeded on the obligation issue then its costs should be paid by the administrators on a party party basis. As I have noted, the Court of Appeal made some observations as to the nature of the proceedings with respect to the obligation issue. Having had the benefit of hearing the evidence at trial I am satisfied that the administrators played an important role of contradictor against the submissions urged by the trustee and the representative defendants although in some respects in an adversarial context. Nonetheless, all this was done with the urging and concurrence of the trustee. It might be expected, therefore, that the administrators would be entitled to their costs on the same basis as the third and fourth defendants. However, in this case there is an unusual factor and it is this: the administrators acknowledge that they benefited from the agitation of the retrenchment and obligation issues before the court. In my view, it would be inappropriate, therefore, for the creditors of Ansett to have the benefit of the outcome of the proceeding as to the issues of retrenchment and obligation at the full expense of the beneficiaries of the trust. I consider that in all the circumstances of this case it is appropriate that they bear some of their own the costs in this proceeding on that issue. There is the additional matter that throughout the trial the administrators were content, indeed, acquiesced at trial to the proceeding continuing in this court, including the agitation of the retrenchment and obligation issues.

14 Weighing matters up it seems that the appropriate course would be to order that the

costs of the administrators of the proceeding as to the issues of retrenchment and obligation be paid by the trustee but limited to a party party basis only.

15 I turn then to the remaining matter of the costs of the priority issue. A great deal of time at trial was taken up with that matter. Mr Whelan for the administrators urged that I treat the determination of the costs on the priority issue as if no appeal had occurred. He submitted that as the administrators had succeeded and given their contradictor role they should have their costs. On the other hand, Mr Santamaria for the trustee urged that his client came to the court seeking advice albeit on a misconceived basis whilst on the other hand the administrators were content to come to the court and seek an outcome on the priority issue and acquiesced to the trustee doing so. He submitted that in light of the outcome the administrators should bear their own costs.

16 It seems to me that the appropriate course in all the circumstances of this matter is to make no order as to costs as between the plaintiffs and the first and second defendants concerning the priority issue, rather, to leave costs where they fall, that is, that each party bear their own costs on that matter. The trustee came to the court and agitated the priority issue. The Court of Appeal has held that that was inappropriate. The administrators supported the trustee coming to this court to seek declarations with respect to the priority issue and were content to have the matter determined in this court. In my view, it is not appropriate to attach blame for the purposes of determining costs on the priority issue. Rather, in light of the conduct of the parties before and at trial it is appropriate that they bear their own costs and I will order accordingly.

17 I record that submissions were made on costs by the third and fourth defendants. Those submissions deviated in some respects from those articulated for the trustee and the administrators. Ultimately, I determine costs on the basis stated.

18 During the course of submissions the parties uniformly acknowledged that there would be difficulty, if not extraordinary difficulty, in apportioning the costs in

accordance with the three issues of retrenchment, obligation and priority. There was universal agreement that it would be desirable if the court apportioned in terms of a percentage the portion of costs attributable to each issue. It was uniformly agreed between the parties that the issues of retrenchment and obligation each occupied 25 per cent of the time and costs of the trial, that is, a total of 50 per cent. It was agreed that the priority issue occupied 50 per cent of the time and costs of the trial. Allowances will be made, therefore, in accordance with these agreed proportions with respect to the orders for costs.

19 I direct that the parties prepare orders in accordance with these reasons.

CERTIFICATE

I certify that this and the 7 preceding pages are a true copy of the reasons for Judgment of Warren J of the Supreme Court of Victoria delivered on 2 September 2003.

DATED this second day of September 2003.



Mawland
Associate