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COMMERCIAL LIST - DIRECTIONS HEARING
IN THE SUPREME COURT OF VICTORIA
COURT 1 OLD HIGH COURT

BEFORE THE HONOURABLE JUSTICE WARREN

MONDAY 25 AUGUST 2003

IN THE MATTER OF

THE TRUSTEE OF THE ANSETT GROUND STAFF SUPERANNUATION PLAN PTY
LTD & ANOR

v

ANSETT AUSTRALIA LTD & ORS

F5382

- - -

MR J.G.SANTAMARIA QC WITH MS D.M. MACLEAN APPEARED ON BEHALF OF
THE FIRST PLAINTIFF.
MS N.A. CONNELL APPEARED ON BEHALF OF THE SECOND PLAINTIFF.
MR S. WHELAN QC with MS B.M. McMAHON APPEARED ON BEHALF OF THE
FIRST AND SECOND DEFENDANT.
MR D. COX APPEARED ON BEHALF OF THE THIRD DEFENDANT.
MR J.D. MERRALLS WITH MR C.C. MACAULAY APPEARED ON BEHALF OF
THE FOURTH DEFENDANT.

HER HONOUR: (Off microphone) The appearances have been entered
(indistinct), announce their appearances. For the
purpose of the hearing today, I will deal with the
remaining issue from the trial (indistinct.)

MR WHELAN: Yes, Your Honour.

MR SANTAMARIA: Your Honour, there are just slight changes
with the appearances, not at this level but Dr Harding
and the third defendant - - -

HER HONOUR: (Off microphone) Yes, I can see that Mr Cox appears
for the third defendant and Mr Clarke appears for the
fourth defendant?

MR SANTAMARIA: No, Mr Clarke is the fourth defendant, Mr

1 Merralls and Mr Macaulay are back for the fourth

2 defendant. It's just that - - -

3 HER HONOUR: Mr Cox appears for the third defendant?

4 MR SANTAMARIA: That's right, yes. And also, the second
5 plaintiff is before you for the first time.

6 HER HONOUR: No, the second plaintiff appeared (indistinct) on
7 the last occasion (indistinct).

8 MR SANTAMARIA: I beg your pardon. Your Honour, we have all
9 filed written submissions before you already and the
10 written submissions filed on behalf of the firstnamed
11 plaintiff, the Ground Staff Trustee, is dated 13 March
12 2003. I want to speak to those quite briefly but Your
13 Honour, in the light of the judgment and the reasons of
14 the Court of Appeal, we wish to make a separate
15 submission about the third issue. And if I could provide
16 a copy of that to Your Honour and there are some - Your
17 Honour, in addition we have provided Your Honour's
18 associate with a little folder of some materials that we
19 wish to refer to, which I think is under your hand at
20 present.

21 If I could just speak to these written materials,
22 Your Honour. In paragraph 1 we say that what was just
23 provided to Your Honour is supplementary. We say in
24 paragraph 2 that our learned friends, on behalf the
25 administrators have accurately stated what the issues
26 are, what were the issues decided before Your Honour at
27 trial and we've briefly synopsisied those in paragraph 3.

28 Now instead of going to them in the order that
29 we've put in paragraph 3, we wish to deal with the last
30 question first, the question of priority. And the Court
31 of Appeal, we understand Your Honour has read the Court

1 of Appeal's reasons, it decided that it could not deal
2 with the priority issue in the circumstances that prevail
3 now. The Court of Appeal, Your Honour, it's reasons were
4 that we shouldn't have brought the priority issue before
5 the court.

6 Second, by reason particularly for the straw as it
7 were to break the camel's back was the existence of the
8 special Funding Insolvency Certificate. Your Honour
9 would be aware from having read those reasons that FSC4
10 and FSC5 were before you and then subsequent to the
11 orders that Your Honour made, a special Funding
12 Insolvency Certificate was made and issued by the actuary
13 and it was the presence of that which Mr Justice Ormiston
14 said really made it impossible for the substance of the
15 appeal on third question to proceed. That's what we say
16 in paragraph 4 of this note but we don't want to suggest
17 other than what the Court of Appeal said which was that
18 the third issue of priority ought not to have been
19 brought by the parties before the court.

20 In paragraph 5, Your Honour, we make the point to
21 you that the Court of Appeal only decided the costs on
22 the priority question of the appeal. The Court of Appeal
23 expressly left to Your Honour, the issue of the costs of
24 the trial in relation to the priority issue. And we
25 refer to - does Your Honour actually have the reasons of
26 the Court of Appeal there?

27 HER HONOUR: Yes, I do.

28 MR SANTAMARIA: And Your Honour will see in paragraph on p.21,
29 this is paragraph 33 of His Honour Mr Justice Callaway's
30 reasons, you can see that he's dealing with the question
31 of costs there. And then on p.21: "The costs below

1 including the cost attributable to paragraph 14 of the
2 originating motion", that's the priority question,
3 "should be left for the primary judge, especially as the
4 respondents may have been jointly responsible at first
5 instance for the declarations having been made."

6 Now what we are contending, Your Honour, is two
7 things, first, that that is exactly the case and second,
8 as a result the fair order is that on the third issue no
9 order for costs ought to be made.

10 HER HONOUR: Why do you say that? Do you say that with respect
11 to all parties?

12 MR SANTAMARIA: Yes. Well, no, that's not right, as between
13 myself and Mr Whelan, we say that should be the situation
14 and we are going to say a bit later on as we've already
15 said, that the costs of the third and fourth defendants
16 are our costs.

17 HER HONOUR: And on a solicitor/client basis.

18 MR SANTAMARIA: And on a solicitor/client basis. So in other
19 words, the point that you've reminded me of, the third
20 and fourth defendants, come out of here harmless.

21 So in paragraph 6, Your Honour, sort of following
22 the intimation of Mr Justice Callaway, we say the Trustee
23 submits that each party should pay it's own costs in
24 relation to the priority issue. And paragraph 7 both the
25 Trustee and the administrators urged Your Honour to
26 determine the priority issue. And Your Honour, we did at
27 transcript 51 to 60, we pointed out that by reason of the
28 deed of company arrangement, we asked Your Honour to
29 decide the issue upon the assumption that there was a
30 liquidation and similarly, Your Honour, at transcript 190
31 to 193, my learned friend also urged upon Your Honour

1 that this is what the court ought to do.

2 Your Honour, in that little folder that I've
3 provided to you this morning, is there a tab entitled
4 "Transcripts"?

5 HER HONOUR: Yes, there is.

6 MR SANTAMARIA: I just want to provide my friend with a copy
7 of what it is that I'm referring to. So under that tab
8 "Transcripts", between pp.50 and 60, there are
9 submissions that we made. At page - it's really, I
10 think, pp.58 to - that's where we urge you to do it on
11 the assumed basis.

12 And then, Your Honour, my learned friend,
13 underneath there, it starts at p.186 then goes over, I
14 think it's about on p.191, I don't think my friend will
15 suggest otherwise that also the administrators were
16 asking the court to determine the priority question.

17 Your Honour, we then point out, we make a reference
18 to our friend's submissions dated 8 July 2002, which were
19 their original submissions in which they effectively made
20 the same point about the priority question.

21 In paragraph 8, there's a particular matter we wish
22 to bring to your attention. Your Honour was told and I
23 think Your Honour's reasons reflect that the trustee has
24 brought proceedings in the Federal Court seeking the
25 termination of the deed of company arrangement, and the
26 Court of Appeal referred to that.

27 There was a Directions hearing in that matter, Your
28 Honour, before the trial before you was commenced. At
29 that Directions hearing, Your Honour, the trustee - the
30 party that I represent - sought the expeditious hearing
31 of the termination proceedings, sought that they be heard

1 before Your Honour commenced the trial that Your Honour
2 heard and determined.

3 What we want to draw to your attention now is the
4 position that the administrators took before Justice
5 Goldberg. In effect they said to Justice Goldberg that
6 the termination proceedings were contingent upon what was
7 decided here. Your Honour, we've referred on p.3 in
8 paragraph 8 to the various parts of the transcript.

9 The transcript before Justice Goldberg, Your
10 Honour, is before you as the transcript of 21 June 2002.
11 There should be a Federal Court transcript, a Spark &
12 Cannon transcript.

13 HER HONOUR: Yes, I have that.

14 MR SANTAMARIA: In paragraph 8 of our written submissions we
15 really draw your attention to the parts of the transcript
16 which we consider the most favourable to us. On p.2,
17 line 33 to 35 you will see Mr Lacava seeking expedition,
18 and His Honour says on p.2 down at line 36 and 37: "The
19 orders you seek ... (reads) ... the relief you seek."

20 Then if we could take Your Honour to p.10 - Your
21 Honour, my friend I think is suggesting that I'm - - -

22 HER HONOUR: Perhaps at this stage if you tell me what it is
23 you want to tell me, Mr Santamaria, and Mr Whelan can
24 make his submissions in due course.

25 MR WHELAN: I'm sorry, Your Honour, it's just that I'll have to
26 get some documents brought up, but the passage is
27 ambiguous in that the application itself - in other words
28 the initiating document, was contingent - was expressed
29 to be contingent. It's not an observation about - I
30 don't think there's any argument about it, it's just that
31 I haven't brought the application up here - - -

1 HER HONOUR: If you need to send for those documents, I'll
2 allow you time if needs be.

3 MR WHELAN: Thank you, Your Honour.

4 HER HONOUR: Yes, Mr Santamaria. You're at p.10?

5 MR SANTAMARIA: About p.10. And at line 6 His Honour says:

6 "All I'm seeking to do ... (reads) ... in some ways it
7 is." Your Honour, if we could refer you then to p.12.
8 There's a further dialogue between my friend and His
9 Honour at line 21: "The way you put it, it seems to
10 follow ... (reads) ... cart before the horse, in our
11 submission."

12 Your Honour, I think just to the same effect on page
13 17, my learned friend at the top of the page is saying
14 that, "Mr Justice Goldberg further ...(reads)... is to
15 arise." That's the first point. So it's not just that
16 their relief is, in terms, contingent on the outcome
17 before Justice Warren is an unusual thing to see. The
18 reason it is in terms contingent on it is because in
19 every sense this application is premised on the
20 assumption of succeeding on all issues before Justice
21 Warren. The sensible thing is to see if they do and then
22 embark on this debate when we know." My friend is there,
23 I hope I don't do him an injustice, Your Honour, is
24 pointing out exactly what he pointed out to you a moment
25 ago, that the application is contingent but he is saying
26 it actually is contingent.

27 Down at the bottom of the page, the last two lines;
28 "Well, that's sensible and we ...(reads)... in the light
29 of that." What, with respect, my friend is saying to His
30 Honour Justice Goldberg is let the issues of principle be
31 determined in the Supreme Court - let it be determined

1 first of all by the Supreme Court whether Ansett is under
2 an obligation to make further contributions. Let it be
3 decided as an issue of principle whether, if there is
4 such an obligation, it is entitled to priority and when
5 the Supreme Court has determined those issues of
6 principle, then we can revisit the termination
7 proceedings.

8 He said if there is no priority, that will - my
9 words - draw the teeth of the termination proceedings,
10 and if there is priority, then in the termination
11 proceedings we can see whether it's reasonable for them
12 to have been dislocated.

13 So we say, Your Honour, in paragraph 9 of our
14 supplementary submission - in the circumstances it is
15 evident that what Mr Justice Callaway intimated is borne
16 out, namely that the respondents are jointly responsible
17 at the first instance for the declarations, and these
18 were the declarations in respect of priority having been
19 made.

20 We point out, Your Honour, in paragraphs 10 and 11
21 something which I hadn't noticed when those submissions
22 were being prepared. It's something that Your Honour
23 pointed out in Your Honour's reasons. Mr Korda, who was
24 the administrator who gave evidence before you, said "If
25 I'd realised there was being a claim made under 5561A, I
26 would've sought the advice of the court". So although
27 we're the ones in a sense who made the application, he
28 said he would, apprised of the claim himself have
29 probably made an application.

30 So in all the circumstances, Your Honour, we say
31 that the costs in relation to the priority question ought

1 to be left where they are. No order for costs ought to
2 be made in respect of that.

3 HER HONOUR: In terms of the order that you propose, do you
4 contemplate that if satisfied, I would make an order
5 identifying the issue and leave it to the parties, and in
6 the absence of agreement for the taxing master to sort
7 that out?

8 MR SANTAMARIA: Yes.

9 HER HONOUR: That may not be an easy task, Mr Santamaria.
10 Another way might be for a percentage of the costs to be
11 identified, and that certainly would be easier and
12 cleaner in all the circumstances.

13 MR SANTAMARIA: Yes, I agree with what Your Honour says. I
14 haven't sought without some indication from Your Honour
15 to pitch a percentage.

16 HER HONOUR: In saying that, I obviously have not formed a
17 view, but I do have some sympathy with the taxing master
18 in trying to sort this out, in the absence of agreement
19 between the solicitors. It may just not be possible for
20 the solicitors to agree on it, despite best intentions.

21 MR SANTAMARIA: I have received instructions, Your Honour, to
22 propound a percentage solution, if it comes to that, and
23 therefore there ought to be a percentage solution because
24 we're contending that it ought to be dealt with according
25 to issues. And on the last issue the priority is there
26 ought to be no order as to costs. So we're driven to a
27 percentage solution.

28 HER HONOUR: At some point I would be assisted if you could
29 give some consideration and obtain instructions as to the
30 percentage that you would put forward. Do you simply say
31 it is one third? Or do you say it is more complex than

1 that? You do not need to respond to it now, it's
2 something in fairness you might need to reflect on.

3 MR SANTAMARIA: Thank you, Your Honour. Your Honour, the next
4 issue - I'm going back to front in these - we come to the
5 question of obligation. By obligation, Your Honour, I
6 mean the issue that arose in question 12, which is where
7 we sought declarations that Ansett was under an
8 obligation to make further contributions. So Your Honour
9 decided Ansett was under an obligation to make further
10 contributions, but that the obligation attracted no
11 priority.

12 That question of obligation Your Honour decided
13 arose both by reference to the trust - the obligation
14 directly to the trustee and secondly, Your Honour made a
15 finding that Ansett was under an obligation under the
16 contracts of employment, which was additional or
17 commensurate - were Your Honour's words. So Ansett had
18 to pay further money to the trustee by reason of the law
19 or the trustee, and secondly, Ansett was under a
20 contractual obligation to each of its employees to make a
21 further payment which Your Honour described as additional
22 and commensurate to the trustee.

23 That was an issue, Your Honour, upon which the
24 trustee succeeded. The Court of Appeal didn't say that
25 was hypothetical; it's adjourned the appeal on that
26 question. So we're not informed at all by the Court of
27 Appeal in relation to the obligation question. Before
28 the Court of Appeal my learned friend appealed against
29 Your Honour's orders with respect to contribution. But
30 that's all been adjourned.

31 So Your Honour, with respect, has to make orders in

1 relation to the costs. We say you should make orders
2 pertinent to the costs of that issue. Your Honour would
3 recognise that the trustee was wholly successful on that
4 issue, and Your Honour therefore ought to order that the
5 administrator pay the costs of the trustee.

6 I don't really want to add anything, Your Honour,
7 to what we have put in our existing written submission in
8 relation to this issue, save we summarise in paragraph 14
9 what we say there. Your Honour will recall that at the
10 heart of - that my learned friend had two things to say.
11 The first thing he said was that under the contracts of
12 employment Your Honour ought not to find that there is
13 any obligation, and then the second thing my friend
14 contended, in the light of his cross-examination of Mr
15 Francis who was the actuary, my friend said to you - even
16 if Your Honour - if the funding insolvency regime can
17 create obligations, Your Honour ought to find that
18 Funding Insolvency Certificate IV, and Funding Insolvency
19 Certificate V were not made according to law. And he
20 made that submission to you in the light of his cross-
21 examination of Mr Francis.

22 Your Honour rejected his submission, so we say my
23 friend made a lot of this issue, and in respect of it he
24 was not successful. And therefore he ought to pay our
25 costs.

26 On the first question, Your Honour, which was the
27 retrenchment issue, this was an issue in which the
28 trustee was seeking the advice of the court. In our
29 existing submissions, Your Honour, we make the
30 submissions we do. We say either - Your Honour will
31 recall what happened there. The trust deed provided for

1 various benefits to be paid. A retrenchment benefit was
2 payable where there had been a declaration of
3 retrenchment by the employer. The question before Your
4 Honour was what that meant.

5 Originally in substance that question was brought
6 by the administrator before the Federal Court, and
7 efforts to expand that proceeding failed. The trustee
8 brought not only the first question before Your Honour,
9 but several consequential questions. So we asked if
10 there hasn't been a declaration, should the employer make
11 a declaration? If the employer isn't to make the
12 declaration, can the trustee make the declaration?
13 Should the court make the declaration?

14 None of those other questions were asked in the
15 Federal Court, all those other questions had to be asked
16 depending upon the answer that Your Honour gave to the
17 first question. Because if Your Honour found that in
18 fact there had been no declaration, then these other
19 questions would've arisen. And that's why we brought the
20 proceedings here, because of the plenitude of the
21 jurisdiction of this court.

22 Your Honour, in substance the original and pivotal
23 question was brought by the administrators in the Federal
24 Court. Those proceedings were cooperative proceedings,
25 Your Honour - we don't suggest otherwise. But they were
26 proceedings which we say arose as much in the
27 administration as they did in the trust; as much in the
28 administration of Ansett as they did arise as questions
29 to which the trustee required the court's definitive
30 answer in the trustee's administration of the estate in
31 respect of which it was trustee.

1 In the written submission, Your Honour, we refer to
2 the relevant paragraphs in the court book, and we have
3 put underneath the submission, Your Honour, that we've
4 handed up to you, a letter which formed part of the
5 submissions by the secondnamed plaintiff to you - I
6 hadn't noticed it when we were preparing the original
7 submission - and Your Honour sees a letter dated 25
8 January 2002.

9 What the context of this letter - my friend will
10 correct me, Your Honour, if I mistake this - is that the
11 administrators are saying "Look, there's no need for this
12 Supreme Court proceeding, it can be really all done in
13 the Federal Court". Paragraph 2: "The relief sought in
14 ... (reads) ... and its unsecured creditors."

15 Your Honour, we don't agree that all the relief
16 that we sought was within the jurisdiction of the Federal
17 Court. I'm not suggesting that to you, what I'm
18 suggesting to you is that this is, we propound, a
19 concession that the first question before you - the
20 question in relation to retrenchment was as much as issue
21 which arose in the administration as it did in the trust.
22 Evidence of that is the fact that the administrators in
23 the friendly proceeding sought such advice from the
24 Federal Court.

25 As a matter of fairness, Your Honour, we say either
26 they can pay our costs - they opposed us on the issue,
27 probably a more reasonable result, Your Honour, is that
28 each as between ourselves and the administrators, each of
29 us pay its own costs on the first question.

30 So in summary, Your Honour, we say in respect of
31 the (indistinct) question between myself and my learned

1 friend, each of us should pay our own costs. In relation
2 to obligation, each should pay our costs, and in relation
3 to the advice question, each party probably should its
4 own costs.

5 Could I provide to Your Honour a set of minutes.

6 HER HONOUR: Just before you do that, there's a further
7 attachment to your most recent submission, the affidavit
8 of Mr Korda of 7 August.

9 MR SANTAMARIA: Yes.

10 HER HONOUR: Do you wish to take me to any part of that?

11 MR SANTAMARIA: I'm sorry, I should have.

12 HER HONOUR: I will revisit it, but it may be in your
13 submission that you say something about it.

14 MR SANTAMARIA: In the written submission that I've handed up
15 today - can I refer you back to paragraph 10 where we
16 say: "Further, Mr Korda deposed on the question of
17 priority under 5561A, he would himself have sought the
18 advice of the court." I'll take you to that submission,
19 Your Honour. Do you see that paragraph 149 of Your
20 Honour's reasons - I'm not taking you to Your Honour's
21 reasons now, I'm taking you to the additional document
22 you've just referred me to.

23 HER HONOUR: Yes.

24 MR SANTAMARIA: It's just at p.56 of Your Honour's reasons, and
25 in paragraph 149 - - -

26 HER HONOUR: This is in the additional reference material?

27 MR SANTAMARIA: In the additional reference material that I
28 have - the submission I've just handed to you that was
29 prepared this morning had some attachments to it.

30 HER HONOUR: Yes, I've now found the page you're referring to.
31 And you're referring to paragraph 149?

1 MR SANTAMARIA: That's it. And there is Your Honour saying:
2 "Mr Korda gave evidence ... (reads) ... urgent direction
3 from the court." Your Honour, I've put after that - in
4 the attachments, Mr Korda's affidavit. And I suspect my
5 friend would want this before you, because what actually
6 Mr Korda said is in paragraph 8, and I think that's what
7 Your Honour is referring to. In paragraph 4(d) above I
8 refer to the fact that: "It was never suggested to me ...
9 (reads) ... reconsider the course of the administration."

10 So what he's saying is that - he's referring to the
11 fact, Your Honour, that we raised (e) first of all and
12 then later in the day we raised (a) under s.556. And
13 he's saying if that had been done earlier, I would've
14 sought a direction from the court.

15 It can't really be for other people to tell him
16 what questions he ought to be asking, but in this case,
17 because he didn't ask any such questions, we were
18 compelled - we've always claimed priority, Your Honour,
19 whether or not - always claimed an obligation, we've
20 always claimed that there was a liability for the
21 shortfall; always claimed that it attracted priority, and
22 with respect, he says that that issue had to be
23 determined by the court.

24 He limits the question only to the fact that we
25 raised it later under (a), but with respect, Your Honour,
26 it can't be accredited to govern the obligations of a
27 trustee. And if a trustee needs advice in relation to
28 them, so be it. That was why those attachments were put
29 into that submission, Your Honour.

30 Can I just show you the orders that we would seek -
31 there's one last thing, but it doesn't involve Mr Whelan.

1 It involves the secondnamed plaintiff. The secondnamed
2 plaintiff, Your Honour, is the pilots' management
3 trustee. You would recall how the staff of Ansett are in
4 different funds. Originally there were three plaintiffs
5 in this proceeding, and the thirdnamed plaintiff
6 discontinued, Your Honour, I think before Your Honour was
7 ever seized of it. I think the thirdnamed plaintiff
8 discontinued in January 2002 - he might have done it
9 without any need for leave.

10 In all the interlocutory stages before you until 14
11 June 2002, the first and secondnamed plaintiffs were
12 jointly represented and were jointly pushing the
13 proceedings through. Then on 14 June the secondnamed
14 plaintiff I think told the court that it would be playing
15 no further part in the proceedings, and I'm instructed,
16 Your Honour, that there is an agreement between the
17 firstnamed plaintiff and the secondnamed plaintiff to the
18 effect that up until 14 June 2002 the secondnamed
19 plaintiff will pay 20 per cent of the costs and expenses
20 of what would otherwise be the costs of the firstnamed
21 plaintiff.

22 I will in a moment give you a separate order which
23 is designed to permit Your Honour to make an order that
24 captures that. If I could give Your Honour first of all
25 a form of order. Your Honour, can I just talk to these
26 one by one. You'll see I've got a little heading above
27 them "Issue one, whether retrenchment benefit payable",
28 and Your Honour there I've got my learned friend paying
29 our costs. Your Honour will have heard me submit that
30 probably the fairer result is each party pay its own
31 costs in relation to the first issue.

1 Second, Your Honour, is that the second order is
2 designed to deal with the issue whether Ansett is under
3 an obligation to make further payments. You heard my
4 submission, I suggested that the fair order is that
5 Ansett lost that issue and should be - paragraph 3,
6 whether the payment obligation is subject to priority -
7 Your Honour heard my first submission today, which is
8 that there should be no order for costs of the first and
9 second defendants of the issues arising from paragraph
10 14.

11 Your Honour, I'm not suggesting that the first and
12 second defendants should be paying our costs, so it
13 should be no order as to the costs of the first and
14 secondnamed plaintiffs or the first and second
15 defendants. In paragraph 4, Your Honour, we raise the
16 question which is that the third and fourth defendants'
17 costs of and incidental to the proceeding should be paid
18 by the plaintiffs on a solicitor/client basis to the
19 extent that they are not paid by the first and second
20 defendants.

21 If you go back to paragraph 2, what we're saying
22 there is on the obligation question, the administrators
23 should be paying the costs of the third and fourth
24 defendants as well as ours. So that's the reason we say
25 in paragraph 4 to the extent that they are not paid by
26 the first and second defendants.

27 In paragraphs 5 and 6, Your Honour, we seek the
28 customary order which is that the costs and expenses of
29 the firstnamed plaintiff of the proceeding including any
30 costs payable by them to other parties, be paid out of
31 the assets held by it as trustee. So that's with

1 respect, Your Honour, the usual order. And similarly,
2 Your Honour, there is a corresponding order with respect
3 to the secondnamed plaintiff.

4 They're the costs, Your Honour, we seek. Your
5 Honour, could I just provide one last document to you.
6 Do you have a document entitled "Partial indemnity
7 between plaintiffs"?

8 HER HONOUR: Yes, I do. And it starts at paragraph B.

9 MR SANTAMARIA: I made the mistake of giving paragraph A to my
10 learned friend Mr Whelan, and he would've held onto it.
11 I don't know what Your Honour is going to do, obviously,
12 and I've got some other versions of things. B: "The
13 secondnamed plaintiff indemnify the firstnamed plaintiff
14 in respect of any costs payable by the firstnamed
15 plaintiff reserved in this proceeding at any time prior
16 to and including 14 June 2002. Such indemnity being
17 limited to 20 per cent of such reserved costs."

18 HER HONOUR: So just to clarify what you propose, referring to
19 the agreement between the first and second plaintiffs, is
20 that if I make any negative orders as it were, that
21 affect the first plaintiff, the second plaintiff as a
22 result of the agreement, has agreed to indemnify the
23 first plaintiff to the extent of 20 per cent of such
24 costs, up to and including 14 June?

25 MR SANTAMARIA: That's correct, Your Honour. Your Honour,
26 they're the submissions I wish to make.

27 HER HONOUR: Mr Whelan, do you wish to be heard next?

28 MR WHELAN: We're in Your Honour's hands. We do apprehend that
29 the third and fourth defendants are likely to make
30 submissions which are to the same effect as the
31 plaintiff.

1 HER HONOUR: What I might do is hear from you, and if there are
2 any outstanding matters that you want to reply to after
3 I've heard from the others, I'll give you that
4 opportunity.

5 MR WHELAN: Thank you, Your Honour. Your Honour, the position
6 which evolved before the Court of Appeal was
7 unsatisfactory to say the least. Can I explain to Your
8 Honour how the principal problem which the Court of
9 Appeal raised, arose.

10 The principal problem which the Court of Appeal
11 raised at a quarter to one on the first morning was the
12 fragmentation of issues between the Federal Court and the
13 Supreme Court, and how had this position come about that
14 Your Honour had been asked to rule on relevant issues by
15 all the parties, and yet a proceeding was pending in a
16 different court which in one sense raised the same
17 issues, in another sense completely took the issues that
18 Your Honour was dealing with.

19 The very first proceeding issued by anyone about
20 any of this was the administrator's proceeding in the
21 Federal Court, was a directions application issued at the
22 end of 2001 and it only raised the first issue, which was
23 the entitlement to retrenchment benefits. When I come to
24 our written submission I'll show you what that proceeding
25 was about, and what attitude parties took and in essence,
26 the administrator's attempted to be neutral in that
27 proceeding, they attempted to say we won't put a point of
28 view, and the trustee and a representative of continuing
29 employees would argue it.

30 So that was the first proceeding that was issue.
31 Then Your Honour, the trustee issued this proceeding in

1 the Supreme Court, and initially that caused some
2 controversy. Can I hand up to Your Honour, there are two
3 affidavits which are on this court file, which were sworn
4 at the outset. They exhibit the letters that - or they
5 exhibit one of the letters, Your Honour, was shown by Mr
6 Santamaria.

7 Firstly, Mr Chiapi, who was my partner in the firm
8 of solicitors instructing the administrators, swore an
9 affidavit on 7 February in which he simply exhibited two
10 letters. One which Mr Santamaria's already shown you, 25
11 January, and then a follow up letter of 1 February and Mr
12 Santamaria's paraphrasing of that correspondence was
13 accurate. Effectively the administrators were saying,
14 "Why have you gone and issued in the Supreme Court when
15 there's a proceeding pending in the Federal Court?"

16 Now, Mr Cash's affidavit produces the letter that
17 explained why, and the administrators accepted the
18 explanation. It's a letter of 7 February. I don't need
19 to read it to Your Honour, but it sets out in detail what
20 the trustee was concerned about in the Federal Court, and
21 I think it's a fair summary - Mr Santamaria will correct
22 me if I'm wrong - but the trustee was concerned that
23 Order 54 in the Supreme Court gave a wider jurisdiction
24 than the Federal Court had.

25 It was concerned that the Federal Court might not
26 have all the powers that would be necessary to deal with
27 all the issues the trustee wanted to raise. It seems a
28 long time ago now, but Your Honour will remember for
29 instance, the trustee was raising issues such as should
30 the court exercise the power to make a declaration? That
31 was all over taken by events, but such issues were raised

1 in their application, and the trustee was saying, "We're
2 concerned the Federal Court doesn't have jurisdiction to
3 address these sorts of issues."

4 HER HONOUR: My recollection is that on the very first
5 directions hearing I raised one way or another with Mr
6 Santamaria the fact of the Federal Court proceedings, and
7 my recollection is - without revisiting the transcript -
8 that he raised the matter of jurisdiction - - -

9 MR WHELAN: Yes.

10 HER HONOUR: - - - and perceived difficulties and the need to
11 be here.

12 MR WHELAN: That's exactly right, Your Honour. Well, so far so
13 good if I might put it that way. So we all shift over to
14 the Supreme Court, because there's the worry of the
15 jurisdiction in the Federal Court and really, our
16 directions application in the Federal Court becomes an
17 irrelevance, and I think it may have even been dismissed
18 now, but it certainly became irrelevant.

19 Now, there is a point - and I don't want to make
20 more of this than I ought to, Your Honour, because in the
21 Court of Appeal and now, we don't resile from the fact
22 that we urged Your Honour to deal with the priority issue
23 of this. There's no question about that.

24 But Your Honour, we were responding to an
25 application by the trustee, and it was the trustee's
26 application. So much so that when they issued this
27 application in the Supreme Court we queried why they were
28 doing it this way. They explained why and we went along,
29 and that's a correct characterisation of what's happened.
30 It's the trustee's application, and we have gone along
31 with it. Then the real error was made. If I can hand

1 Your Honour - this is the document I asked - I apologise
2 for interrupting Mr Santamaria - then the error occurs.

3 On 19 June Your Honour has the whole proceeding in
4 the Supreme Court. My friend's instructors - and Mr
5 Santamaria was not part of this, this was all canvassed
6 before the Court of Appeal. There were other counsel
7 involved - incredibly issue an application in the Federal
8 Court to terminate or vary the deed. I say "incredibly",
9 I perhaps should have said "amazingly", which was what
10 Justice Callaway's description of that step was,
11 amazingly given the proceeding before you they issued
12 this application in the Federal Court.

13 Mr Santamaria told the Court of Appeal that that
14 was - he believed the reason was, there was a concern
15 that the deed required a proceeding in the Federal Court.
16 The problem with that submission was that Clause 16.2 of
17 the deed contained an expressed consent by the
18 administrators to the Supreme Court dealing with the
19 application, which had been foreshadowed. I can't
20 remember whether Your Honour was mentioned by name, but I
21 think perhaps not.

22 There was certainly an expressed consent in Clause
23 16.2 of the deed to the Supreme Court dealing with a deed
24 termination, or variation application. Now, Your Honour
25 has been read some observations of mine about how the
26 Federal Court proceeding was contingent on the outcome in
27 the Supreme Court, and again, Mr Santamaria's recitation
28 of what occurred then was fair. But can I just point out
29 to Your Honour that it was contingent because the
30 application which was issued in the Federal Court was
31 expressed to be contingent.

1 So if one goes to paragraph 4 of the document I've
2 just handed up, Your Honour, it reads, "Any order made by
3 the court amending ... (reads) ... Supreme Court
4 proceeding" - then giving certain orders. So, the
5 application was expressly contingent on the outcome of
6 Supreme Court proceedings - the proceeding that was
7 before Your Honour. However, Your Honour, that
8 application was issued on 19 June - and Your Honour may
9 not recall - but the proceeding before you was brought on
10 with great expedition at the urging of the parties, and
11 there was an enormous flurry of activity in terms of
12 outlines of facts and contentions and submissions and so
13 forth in June, the original hearing date that Your Honour
14 had fixed was immediately after the short vacation.

15 The first trial date was March - as Mr Santamaria
16 points out - and then it was put over to July at the
17 urging of Mr Stocks. Then Mr Santamaria's taken you to
18 what was said at the first directions hearing after this
19 Federal Court application had been issued. Can I take
20 Your Honour to that transcript just to alert Your Honour
21 to a couple of things that were not read to you.

22 HER HONOUR: This is in the folder of additional materials?

23 MR WHELAN: Yes. I was just handed that, Your Honour.

24 HER HONOUR: If you give me a page number I'll be able to find
25 it.

26 MR WHELAN: Yes. On p.10 - - -

27 HER HONOUR: This is the hearing before His Honour Justice
28 Goldberg - - -

29 MR WHELAN: Yes.

30 HER HONOUR: - - - on 21 June.

31 MR WHELAN: Yes.

1 HER HONOUR: Yes, I have p.10.

2 MR WHELAN: Yes. Page 10, just before the passage that Mr
3 Santamaria read - I'm sorry if I'm carried away by the
4 hyperbole here, but we did observe in the second line.
5 "Your Honour, this application really somewhat takes our
6 breath away in circumstances as to why it hasn't been
7 brought in the existing proceeding is a legitimate matter
8 which will have to be addressed." Then His Honour said,
9 "All I'm seeking to do today is decide where we go. I'm
10 not going to make any decision on anything today."

11 Then we said, "Well simply adjourn it." I must
12 confess, Your Honour, our primary motivation in that
13 regard was because the trial was pending before Your
14 Honour. Then we made all the submissions that Mr
15 Santamaria has read to Your Honour to the effect that the
16 Federal Court proceeding was in any event contingent on
17 the outcome in the Supreme Court, and indeed, the
18 application expressed itself in that way.

19 We did point out, or raise at the time the fact
20 that it seemed to us to be an extraordinary thing, that
21 the proceeding had been issued whilst the main
22 proceeding, so as to speak, was before Your Honour. Can
23 I go now to what the Court of Appeal has done, and does
24 Your Honour have a copy of the Court of Appeal's reasons
25 there?

26 HER HONOUR: Yes I do.

27 MR WHELAN: I just want to alert Your Honour to some aspects of
28 the Court of Appeal's judgment for the purpose of making
29 three points really. The first is, Your Honour, there
30 has been no attempt on our part to suggest that we did
31 anything other than urge Your Honour to answer the

1 questions, and there has been no resiling on our part
2 from the proposition that all the parties wished Your
3 Honour and urged Your Honour to answer the questions the
4 trustee had raised.

5 The problems entirely raised by the Court of
6 Appeal, although it must be said the administrators had
7 been warning of their concern about the issue for some
8 considerable time, and had proposed various solutions
9 which didn't commend themselves to the trustee.

10 HER HONOUR: However, is that a matter that I should become
11 immersed in - - -

12 MR WHELAN: No, Your Honour. That's the first point, that we
13 did urge Your Honour to answer them, and there's no
14 resiling from that. The second point which we wish to
15 make by reference to the Court of Appeal judgment is that
16 the true problem in relation to priority is the
17 fragmentation issue, which was caused by the trustee's
18 inexplicable issuing of the application in relation to
19 the deed in the Federal Court.

20 The third point we wish to make from the Court of
21 Appeal's reasons is that the reliance by the plaintiff
22 and the other defendants upon the proceeding as a kind of
23 quasi directions application by us - which Mr Santamaria
24 makes that submission in relation to the first issue, and
25 the third and fourth defendants did in relation to other
26 issues - is untenable in the light of the Court of
27 Appeal's reasons.

28 Now, can I just tell Your Honour the paragraphs
29 that we would particularly alert Your Honour to. At
30 paragraph 4 of the leading judgment - Justice Ormiston's
31 judgment - he says in paragraph 4, "Many of the present

1 difficulties arise ... (reads) ... the kind should be
2 answered." Now, Your Honour, Mr Santamaria has not
3 suggested that we played in any part in formulating the
4 questions, and we didn't. It was their application and
5 our fault is in cooperating with them, not in devising
6 either the questions, or the proceeding.

7 Paragraph 11 we would also alert Your Honour to
8 that in the second sentence Justice Ormiston says,
9 "Counsel for the respondents, though ... (reads) ...
10 appeal to be adjourned." Your Honour, our submission was
11 that the appeal be adjourned, so that the deed could be
12 ruled upon in the Federal Court before the appeal was
13 heard.

14 HER HONOUR: That is the appeal in its entirety, not - - -

15 MR WHELAN: Yes, that was our submission. We had in fact made
16 that submission to Justice Goldberg earlier in the year.
17 We had urged him, "Rule on the deed before the Court of
18 Appeal, because we're concerned the Court of Appeal won't
19 deal with the matter." But the trustee opposed that
20 approach and said, "No, let the appeal go first then
21 we'll" - - -

22 HER HONOUR: So that latter development in relation to His
23 Honour Justice Goldberg occurred subsequent to my
24 judgment.

25 MR WHELAN: Yes. As soon as the appeal was instituted, we went
26 to Justice Goldberg and said, "Fix your proceeding now
27 urgently", because we're concerned the Court of Appeal -
28 we were concerned what did happen would happen. That's a
29 substantial reason why the trustee was ordered to pay the
30 costs of the appeal, Your Honour.

31 HER HONOUR: And just to complete that, His Honour Justice

1 Goldberg, what did he do?

2 MR WHELAN: He simply made directions - he didn't accede to our
3 application for an urgent fixture. He didn't accede to
4 the trustee's application to adjourn his proceeding until
5 after the appeal. He simply made directions and
6 otherwise didn't make any further orders, although the
7 practical effect was to reject our approach in that the
8 appeal then did come on before the deed proceeding.

9 HER HONOUR: What was the date of that directions hearing
10 before His Honour?

11 MR WHELAN: Sorry. I should hand up our submission on that
12 directions hearing, it was handed to the Court of Appeal.
13 I'll have I found, Your Honour, could I come back to
14 that?

15 HER HONOUR: Yes you may. You just need to bear in mind that
16 it might be a little surprising, but once the orders were
17 made encompassing the answers in this proceeding with
18 respect to the trial, subject to reading the reasons of
19 the Court of Appeal delivered on 21 August my knowledge
20 of the matter is virtually nil.

21 MR WHELAN: Yes. Well there are only two things that happened
22 that was significant. The first was, we applied to
23 Justice Goldberg to have the Federal Court proceeding
24 fixed for hearing, and the basis of that application,
25 amongst other things, was a concern that the Court of
26 Appeal might say the matter was hypothetical. The second
27 thing was, there was an application for expedition of the
28 hearing of the appeal, which we supported with the
29 proviso that the Court of Appeal was prepared to deal
30 with the matter in circumstances where the deed had not
31 been varied, or terminated.

1 Unfortunately that proviso was not highlighted as
2 the matter was dealt with on the papers. But when Your
3 Honour read the Court of Appeal's reasons Your Honour
4 would have seen references to warnings, and so forth.
5 There was correspondence as well, but essentially that's
6 what that was referring to. Then - - -

7 HER HONOUR: Just in relation to the application for
8 expedition, and the agreement. I think you described it
9 as of the administrators to that course, subject to the
10 proviso.

11 MR WHELAN: Yes.

12 HER HONOUR: Was that an order made by His Honour Mr Justice
13 Batt?

14 MR WHELAN: Yes.

15 HER HONOUR: Yes.

16 MR WHELAN: So, His Honour Justice Batt had been - the sequence
17 was, the expedition application was issued before we
18 asked Justice Goldberg to fix the Federal Court
19 proceeding. Our application to have it fixed urgently
20 was not acceded to, and then the expedition application
21 was heard by Justice Batt, but it was dealt with on the
22 papers. The issue doesn't seem to have crystallised
23 itself in Justice Batt's mind until the hearing of the
24 appeal, notwithstanding that it was all canvassed in the
25 written submission of that expedition.

26 Then Your Honour, can I take Your Honour to p.12,
27 paragraph 16 - - -

28 HER HONOUR: Of the judgment of the Court of Appeal?

29 MR WHELAN: Of the judgment of the Court of Appeal. I'm just
30 going through highlighting the passages which we say make
31 out the three matters we say are relevant now on this

1 cost application. Now, firstly, the special funding and
2 solvency certificate was a complication of the fund
3 having been declared technically insolvent. Then on p.12
4 about the fifth line down Justice Ormiston is talking
5 about whether the matter will be settled finally if a
6 declaration is made.

7 Justice Ormiston says, "That certainly will not
8 occur here ... (reads) ... relief it desires there." So
9 that's the fundamental problem which the Court of Appeal
10 was concerned with, that Clause 14, it was only a
11 dressing, a step along the way, paragraph 14. Then
12 paragraph 18, over the page, Your Honour, Justice
13 Ormiston says, "The position is all the worse in this
14 case ... (reads) ... issues between the parties."

15 Now, Your Honour, we plead guilty to having urged
16 Your Honour to answer the question, but we say the
17 trustee is responsible for the fragmentation problem,
18 which is the real cause of the fact that we now don't
19 have answers to paragraph 14. We say the trustee's
20 responsible for that. If the question in paragraph 14
21 were asked in the context of the application to
22 terminate, or vary it's clear on the Court of Appeal's
23 reasoning that this problem would not have arisen.

24 HER HONOUR: In the course of his opening of the trial - I
25 think it was on 17 July last year - Mr Santamaria
26 referred - as I recall - briefly to what had happened in
27 the Federal Court, but not in a way that would alert me
28 to the sorts of difficulties that have subsequently come
29 to light. Should the administrators be subject to
30 criticism, or perhaps have to bear their own burden of
31 costs because they acquiesced?

1 MR WHELAN: Yes. It's a legitimate consideration, Your Honour,
2 because we did acquiesce. It's fair to say we didn't
3 whilst we expressed concern about the fragmentation when
4 the issue was raised in the Federal Court. We did
5 acquiesce in the trustee proceeding in the Supreme Court,
6 and we did that because we wanted the quickest answer
7 that we could get. It's fair to say, Your Honour, nobody
8 - none of the counsel in the trial appreciated the
9 potential for this problem in the manner in which it
10 arose subsequently.

11 So, to that extent, yes, that's a legitimate point
12 from Mr Santamaria, and we accept that. But the question
13 now is what's to be done about costs, and what Mr
14 Santamaria is submitting to you is that we should lose
15 our costs on an issue we succeeded on. So he says
16 because of the problem the trustee has created, and which
17 we confess that we acquiesced in, but nothing worse than
18 acquiesced in. We become the ones who suffer the
19 penalty, not the trustee. We suffered the penalty, an
20 issue which we otherwise would've got our costs on, we
21 lose our costs, according to Mr Santamaria.

22 So the position the Court of Appeal describes as
23 being a problem created by the trustee, according to Mr
24 Santamaria it results in us being in a worse position
25 then we would otherwise be in, which we would submit
26 can't be correct. I was just taking Your Honour to - can
27 I take Your Honour to paragraph 21 of the Court of Appeal
28 judgment. At the top of that page His Honour Mr Justice
29 Ormiston says that he might have overlooked all of these
30 problems if it hadn't been for certain issues that he
31 felt couldn't be overlooked.

1 He records the fact that Your Honour was persuaded
2 to deal with the matter with the concurrence of the other
3 parties, so I only point that out as - certainly both Mr
4 Santamaria and I made it clear that what Your Honour did
5 was what the parties asked, and that's recorded in a
6 number of places in that paragraph 21. Paragraph 22
7 refers to the cross appeal and Your Honour, Your Honour
8 might not have realised but Mr Santamaria has actually
9 appealed on the second issue as well.

10 The obligation issue Mr Santamaria has appealed on,
11 as he's not happy with Your Honour's orders on that
12 issue, and that appeal has been adjourned as well. So on
13 the second issue I think Mr Santamaria said he fully
14 succeeded, but there is an appeal pending by the trustee
15 on the second issue. Well, we've asked him to adjourn
16 it, but we're not quite sure whether they have, or they
17 haven't at the moment. They thought we'd made a mistake
18 in the minutes of orders, Your Honour might have noticed
19 that.

20 HER HONOUR: Yes, I think what has been adjourned is the cross
21 appeal, and the appeal has been allowed.

22 MR WHELAN: Yes, in fact they seem to us to have overlooked the
23 fact that the custody has also appealed Your Honour's
24 order on paragraph 12A, the obligation issue. We've each
25 sent a note about that, and we haven't heard the outcome
26 yet. So, on the second issues there's an appeal pending
27 by both the trustee and the administrators, although the
28 Court of Appeal has rather suggested they don't expect to
29 see us again. They expect that to be dealt with in the
30 Federal Court.

31 Then paragraph 24 they record again the fact that

1 both parties urged Your Honour to deal with the matter.
2 Can I take Your Honour to p.17, at the top of the page,
3 the third line, "Again, counsel said that all parties
4 were agreed that the judge should disregard Clause 16 for
5 the purpose of the hearing," that's the paragraph of the
6 deed, "It's not suggested that that statement
7 ...(reads)... of the Federal Court application." Now,
8 Your Honour, I haven't set all the material out, the
9 Court of Appeal had all the material, that's the finding
10 and that is the position. "They directed the appellant's
11 attention ...(reads)... however I would award
12 solicitor/client costs as sought." So, Your Honour, we
13 would submit that it cannot be that when the real author
14 of the disaster is the appellant our position becomes
15 worse on the question of costs than it would have been
16 otherwise.

17 Justice Ormiston then said in the last sentence
18 that the costs below have not been dealt with, and he
19 said: "The judge will no doubt be informed by these
20 reasons as to how her discretion should be exercised."
21 If Mr Santamaria takes some comfort in Justice Callaway's
22 reference to joint responsibility, might we take some
23 comfort in that observation, as Justice Ormiston was
24 fairly clear on where the blame was - not the blame,
25 where responsibility for the problem properly resided.

26 HER HONOUR: I see that His Honour Mr Justice Batt agreed with
27 both of - - -

28 MR WHELAN: Yes, yes. Well, neither of them, I'm sure, are
29 intending to inhibit Your Honour in any way. Justice
30 Callaway doesn't depart from Justice Ormiston's approach.
31 He records in paragraph 28 the fact that counsel on both

1 sides urged Your Honour to proceed as Your Honour did.
2 He says in paragraph 31, can I take Your Honour to that,
3 he says: "Thirdly, no satisfactory explanation
4 ...(reads)... to make the declaration sought." So that's
5 the point made in paragraph 31. Then in paragraph 32 he
6 says where you have courts both having jurisdiction it's
7 a very undesirable thing to fragment the proceeding.

8 Then in paragraph 33 he says, "The last two
9 paragraphs are one of my reasons for agreeing the
10 appellant should pay the respondent's costs of the
11 appeal." So that the fragmentation issue is, we would
12 submit seen by Justice Callaway, as being at the root of
13 the problem. And then in paragraph 33 he says: "The
14 last two paragraphs are one ...(reads)... was called on
15 for hearing." And Justice Batt agrees with (indistinct)

16 Your Honour, in essence what we say Your Honour
17 should do to give proper regard to what the Court of
18 Appeal has said about what the problem is and how it's
19 arisen, but also to give proper account to the fact that
20 we did, as Your Honour said, acquiesce, and urge Your
21 Honour to answer, is to deal with the costs of the third
22 issue in the same way that Your Honour would have dealt
23 with them had this matter been decided before the appeal.
24 The parties came to you and asked you to address the
25 issue in a particular way and really it's quite
26 opportunistic for the trustee to now seek to improve its
27 position on costs by reference to circumstances for which
28 it's been criticised. We say that's the burden of the
29 submission which is now put against us, that our position
30 has been made worse by what transpired in the Court of
31 Appeal.

1 The alternative - so we're happy to be judged on
2 what happened before Your Honour, we're happy for Your
3 Honour to decide the costs on what happened before Your
4 Honour, but if Your Honour thinks that's not appropriate
5 well then in our submission it's fairly clear, if the
6 Court of Appeal's reasoning is to be taken into account,
7 that the trustee has to pay the costs. And the Court of
8 Appeal said on a party/party basis we don't seek more
9 than that.

10 HER HONOUR: So you don't seek in any respect more than
11 party/party costs?

12 MR WHELAN: Your Honour, our submission - sorry, Your Honour,
13 could I say that on the first two issues, which is the
14 retrenchment and the obligation, in our submission they
15 ought to pay our costs on a solicitor/client basis.

16 HER HONOUR: The usual trustee order.

17 MR WHELAN: Yes, because we were the proper contradictor, we
18 say. On the third issue it's an unusual situation which
19 has developed; either it should be dealt with as if -
20 solely on the basis of what happened before Your Honour,
21 in which case they ought to pay our costs on a
22 solicitor/client basis, but if it is to be dealt with,
23 informed by the Court of Appeal's reasoning, then the
24 same order as the Court of Appeal made would seem to us
25 to be the appropriate one, which is that our costs be
26 paid on a party/party basis. And we don't say anything
27 about the plaintiff's arrangements with the first
28 plaintiff and the second plaintiff or that the plaintiff
29 should indemnify the third and fourth defendants, we
30 don't say anything about that.

31 Your Honour, in the written submissions that were

1 filed before the Court of Appeal judgment the plaintiff
2 submitted that the first and second defendants had been
3 successful overall in the proceeding but that the amount
4 of costs ordered in their favour should be reduced by
5 reference to the questions upon which they failed, being
6 the first two issues.

7 The third and fourth defendants adopted a different
8 approach, they said, well, issues one and two are Trust
9 issues and the plaintiff should pay everybody's costs of
10 that, and issue three, priority, well that's a
11 Corporations Law issue and the administrator should pay
12 everybody's costs of that, even though we succeeded. I
13 do not think that they persist in that submission but if
14 they were to it's a submission which the Court of Appeal
15 has rendered untenable, in our submission, in paragraph
16 13, as in relation to priority the Court of Appeal held
17 that an application by us for directions on that issue
18 would have been inappropriate. The more obvious answer,
19 I suppose, is that it is the trustee's application and
20 not ours. But the suggestion that the priority issue
21 should be treated as a kind of quasi directions
22 application by the administrators in our submission is
23 precluded by the Court of Appeal's analysis of the
24 position in paragraph 13 where they say that such an
25 application would have been inappropriate.

26 Your Honour, the trustee's written submission was
27 13 March. The position it contends for now is one in
28 which a greater burden is placed on the first and second
29 defendants and in our submission Your Honour should not
30 accede to that.

31 Can I turn now to our written submission, Your

1 Honour, of 25 March?

2 HER HONOUR: This is the first - - -

3 MR WHELAN: The first and second defendants' submission in
4 relation to costs.

5 HER HONOUR: Before me?

6 MR WHELAN: Yes.

7 HER HONOUR: There were two submissions, there was - - -

8 MR WHELAN: Yes, it was the second one, that's right, Your
9 Honour.

10 HER HONOUR: You wish to go now to both of them?

11 MR WHELAN: Just to the first one for the moment, Your Honour.

12 It had some attachments which were confusing and I
13 thought it would assist if I took Your Honour through
14 them.

15 HER HONOUR: Yes, I have it.

16 MR WHELAN: Your Honour, firstly, could I just take Your Honour
17 through this submission? I don't want to read it, can I,
18 in a sense, adopt this as our submission without reading
19 it, but I do just want to make some matters clearer, I
20 hope.

21 This of course was written before the Court of
22 Appeal. In paragraph 1.3 we address the general rule as
23 to costs following the event. This submission was made
24 in the context at that time of the plaintiff submitting
25 that the administrators had, in effect succeeded, and the
26 burden of the submission in paragraph 1.3 is that whilst
27 the court will allocate costs by reference to issue
28 against a successful party, in certain circumstances,
29 it's unusual and it would ordinarily only be - the court
30 could only adopt that course where it concluded that the
31 successful party had been unreasonable.

1 Your Honour, at 1.7.3 there was a warning of
2 Justice Jacobs which the Full Court in our submission
3 essentially adopted in *The State of Victoria v. Master*
4 *Builders* - I'm sorry, 1.3.7, Your Honour. Justice Jacobs
5 said: "Trials occur daily in which ...(reads)... on
6 those particular issues." That submission in a sense has
7 been overtaken because the trustee no longer accepts that
8 the administrators were substantially successful. To the
9 extent that the written submission of the trustee
10 advances its position on that basis well we rely on the
11 cases referred to there.

12 Then at 1.4, Your Honour, we turn to the issues
13 upon which we, if I can put it this way, were
14 unsuccessful, and the first submission we make at 1.4.3
15 onwards is that the trustee could not have obtained the
16 relief which it has on issues one and two without
17 somebody being prepared to argue the contrary and present
18 evidence to the contrary. In 1.4.5 we refer to *Forster*
19 *v. Jododex*, and if I can just alert Your Honour to the
20 passage which we have emphasised by underlining, "Before
21 obtaining a declaration ... (reads)... oppose the
22 declaration sought."

23 Similarly, Your Honour, at 1.4.9, the observations
24 of Justice Young in *Corporate Affairs Commission v.*
25 *Transfer* which was an undefended case for breach of the
26 *Corporations Law* in relation to prescribed interest
27 provisions. And the court emphasised that in the absence
28 of a contest, declarations are ordinarily inappropriate
29 and that in an appropriate case indeed, an *amicus curiae*
30 would be appointed to put the contrary view.

31 I won't take Your Honour through all those cases,

1 as I don't think there's anything controversial in any of
2 this, but the trustee was essentially seeking
3 declarations - not essentially, was only seeking
4 declarations and it could not have obtained this relief
5 unless somebody had been either appointed or was prepared
6 to put the contrary view.

7 We then turn to the way the matter evolved here,
8 and in paragraph 1.5.1 we say: "In a differently
9 constituted proceeding ... (reads) ... priority, on which
10 it succeeded." Mr Santamaria and I rely on the same
11 passages. Does Your Honour have some attachments to that
12 submission - they're transcripts substantially?

13 HER HONOUR: Yes, I do.

14 MR WHELAN: Has someone written on the top "Attachment 1,
15 Attachment 2"?

16 HER HONOUR: There is typed "Attachment 1" and so on, and
17 numbers going right through to 23.

18 MR WHELAN: Thank you, Your Honour. Can I just alert Your
19 Honour to the relevant parts of these attachments. The
20 first one is making the point that: "In a differently
21 constituted proceeding the administrator may have only
22 made submissions about priority." And the transcripts to
23 make good that point are matters which occurred before
24 Your Honour, and that's Attachments 1 and 2.

25 I don't need to read them out. In essence they're
26 simply me telling Your Honour that that is the fact, that
27 if it weren't for the fact that there's no other
28 contradictor, we would have not participated other than
29 in relation to priority.

30 Then turning particularly to Question 1 which Mr
31 Santamaria has said was initially instituted by the

1 administrators in the Federal Court, we say at 1.5.2:
2 "The first issue initially ... (reads) ... whether there
3 had been a retrenchment."

4 Then if I can go to 1.5.4: "In that proceeding the
5 first ... (reads) ... the purposes of the plans." If I
6 can go to Attachment 3, Your Honour - do your attachments
7 have highlighting on them, Your Honour?

8 HER HONOUR: No, they do not appear to.

9 MR WHELAN: If I could perhaps then just alert Your Honour to
10 the relevant passages. Firstly, at line 21, Mr Beach was
11 for the ACTU. We're in the Federal Court here, in the
12 proceeding that - the existence of which is relied upon
13 as being relevant on costs because we issued Directions
14 application. Mr Beach, who was for the ACTU in the
15 Federal Court was asked what his position was, and he
16 said: "I suspect it's concomitant with the position ...
17 (reads) ... neutral position about the matter."

18 Then further down, Mr Walker who appeared for the
19 administrators, said: "Your Honour, if I could just
20 indicate ... (reads) ... staff superannuation plans."
21 Then His Honour asks Mr Walker - we're on to Attachment 4
22 now - what the administrator says. At the bottom Mr
23 Walker says: "The administrator is not actually ...
24 (reads) ... in answer to that." Then over the page at
25 line 21, Your Honour, Mr Walker says: "That is another
26 issue ... (reads) ... for by the trustees." Over on p.4
27 between lines 20 and 40 it's essentially the same. It
28 revolves around Mr Walker really refusing to say whether
29 the administrators say there's been retrenchment with a
30 capital "R" or not, at p.5 of the transcript, Attachment
31 6, between lines 20 and 40.

1 Then over on Attachment 7, line 42, His Honour asks
2 Walker: "To ask you now what your ... (reads) ... say?
3 No, Your Honour." If I can take Your Honour to
4 Attachment 9, which is the same day, still in the Federal
5 Court - it's now p.12. Mr Walker said at the top of the
6 page: "We would like to see ... (reads) ... mute on that
7 question, Your Honour."

8 So the problem which was immediately raised by our
9 application in the Federal Court was there was no one
10 there to contend no retrenchment. If I can go to 1.5.6
11 - - -

12 HER HONOUR: Just before you do, have the administrators had
13 any benefit from the judgment of mine of December last
14 year?

15 MR WHELAN: Yes.

16 HER HONOUR: It's no issue?

17 MR WHELAN: No. We now know that they are entitled to
18 retrenchment benefits, and our apprehension is that the
19 obligation issues on any view are narrower. I probably
20 can't say any more than that, but certainly the
21 retrenchment issue is resolved once and for all.

22 HER HONOUR: You were going somewhere else?

23 MR WHELAN: Yes. In 1.5.6 we say: "When the matter came
24 before this court ... (reads) ... relation to issue one."
25 Then we refer to the Directions hearing on 12 February,
26 and that's Attachments 10, 11 and 12. I won't read them
27 out to Your Honour, but the burden of them was complaints
28 by Mr Stops that he was expected to put the argument on
29 behalf of a group - a class, and the administrators were
30 pushing for an early trial date in circumstances where
31 they weren't the ones who had to make the argument he

1 was.

2 So initially it was not anticipated that the
3 administrators would make submissions about issue one,
4 and if I can just return to our written submission. At
5 1.5.6: "When the matter came before this court, the
6 first and second defendants initially maintained their
7 position that they would not take a position in relation
8 to issue one." Then we've referred to transcript there,
9 and those transcripts are Attachments 10, 11 and 12.

10 Then we go on: "As the third and fourth defendants
11 were joined ... (reads) ... deposed at paragraphs 89 and
12 99" - and that affidavit, Your Honour, is in the court
13 book at vol. 1 p.77, and these two paragraphs are at
14 p.101. "Mr Allison deposed the third defendant ...
15 (reads) ... retrenchment benefits under Rule 1.13." Your
16 Honour will remember Mr Hardingham appeared for Mr Booth.

17 Then paragraph 99: "The fourth defendant, Mr
18 Hennessy, is a continuing ... (reads) ... Mr Merrells
19 appeared for Mr Hennessy." So the trustees structured
20 the proceeding on issue one so that one employee would
21 argue they were entitled to retrenchment benefits, and
22 one employee representative would argue that they were
23 not.

24 However, Your Honour, what transpired was that Mr
25 Hennessy's group determined to argue for the same result
26 as Mr Booth. So we say in 1.5.7: "However, the position
27 of the fourth ... (reads) ... as defined in the trust
28 deed." Your Honour will recall Mr Merrells appeared for
29 Mr Hennessy, and the position adopted was unsurprising.
30 One was that it was inevitable everyone was going to be
31 retrenched, and in the very near future, and Mr Hennessy

1 was indeed himself retrenched during the hearing.

2 HER HONOUR: And replaced by Mr Clarke.

3 MR WHELAN: And replaced by Mr Clarke, exactly. Then we say:

4 "In the circumstances on the first day" - of course, Your
5 Honour, if Mr Hennessy had argued that they were not
6 entitled to retrenchment benefits, if he had - as had
7 originally been the plan, nobody was suggesting he
8 shouldn't have his costs. Or even if an employee - not
9 Mr Hennessy - who simply was interested to open that
10 proposition - if an unsecured creditor or some such
11 person had come and said "I will argue they are not
12 entitled to retrenchment benefits", nobody would've
13 suggested that that contradictor would not have been
14 entitled to their costs.

15 We submit that that's essentially the role that we
16 then took up, once Mr Hennessy changed his position, so
17 that the trustee had no contradictor. At 1.5.8. we say:
18 "In the circumstances on the first day of the trial ...
19 (reads) ... in the shoes of the employees." And that's
20 Attachment 13.

21 Your Honour, the way this comes off on the
22 electronic version is not very friendly to the reader,
23 but in Attachment 13 under the break which has "26",
24 about three or four lines down, we say: "Your Honour, we
25 would submit that ... (reads) ... that will not be
26 necessary."

27 Your Honour, I either said effectively will not be
28 paid - either I made a mistake, or the transcript might
29 have made a mistake, but the point's fairly clear anyway,
30 that we were saying somebody has to argue against the
31 proposition that they're entitled to retrenchment

1 benefits.

2 Then we say at 1.5.9, on 17 July the commonwealth
3 indicated that it did not wish to be intervened, or be
4 heard unless the administrators did not oppose the
5 plaintiff's claim, in which case it would reconsider its
6 position, and then Attachment 14, the passage - just
7 beginning, "Mr Whelan", Your Honour, I'm sorry, I should
8 have mentioned something on the record about the
9 commonwealth. If there's alteration the administrators
10 opposition to the claims being advanced, or canvassed by
11 the trustee the commonwealth would consider that that is
12 the circumstance of which they ought to be notified, so
13 they can reconsider their position.

14 I should have mentioned that earlier, I'm sorry.
15 The solicitor for the commonwealth wishes to leave, and
16 he just gave me a note about that, so the commonwealth
17 does not wish to intervene, but if there's any change in
18 the administrators position of opposition that would be a
19 circumstance which the commonwealth would want to be
20 informed of, so they could reconsider their position.
21 So, Your Honour, we argue the case that they were not
22 entitled to retrenchment benefits. If the
23 matter had been dealt with in the manner that the trustee
24 originally anticipated, the trustee would have had to pay
25 the costs of the person who made that argument, and it
26 shouldn't make any difference that it transpired that it
27 was the administrators who made that argument. The
28 trustee needed somebody and Mr Hennessy was not
29 appropriate as it transpired. The commonwealth didn't
30 want to adopt that role, so the contrary proposition was
31 argued by the administrators, and we would submit quite

1 appropriately so, indeed, essentially so if the
2 declaration was to be obtained.

3 On the second issue, Your Honour, a not dissimilar
4 position arose. In 1.5.10 we say, the second issue is
5 not before the Federal Court in Proceeding V3075 of 2001.
6 However, counsel for the plaintiff, the trustee at the
7 directions hearing on 29 November 2001 indicated that
8 there were down stream issues including one in the nature
9 of the second issue before the court, that's Attachment
10 15. It's two pages of the transcript in the Federal
11 Court where Mr Santamaria simply indicated that
12 retrenchment was one matter that needed to be determined,
13 but then there were further matters such as who's going
14 to fund the obligation, so that's Attachment 15.

15 Then we say, in response counsel for the first and
16 second defendants indicated to the court that the
17 contrary position on any question of whether the
18 administrators were under an obligation to fund any
19 shortfall should be ventilated by, for example, an
20 unsecured creditor. Attachment 16 is where Mr Walker
21 said that. Of course, the administrators have no
22 particular axe to grind in terms of who is a creditor, or
23 who isn't and what priority they have, or they don't
24 have.

25 The unsecured creditors were perceived at that time
26 to be those who would have a commercial interest in
27 opposing an argument that Ansett was obliged to fund the
28 shortfall. Then in 1.5.11 we say - and Your Honour may
29 recall this - before this court at the directions hearing
30 on 12 February 2002 counsel appeared on behalf of a Mr
31 Wallan, an unsecured creditor in the administration of

1 Ansett at the request of the second defendants. An
2 application was made for Mr Wallan to represent the
3 unsecured creditors in the administration, and to make
4 submissions as to their interest.

5 Then Attachment 17 was Mr Peters, explaining Mr
6 Wallan's position.

7 HER HONOUR: Yes, I remember that. I should indicate to you,
8 Mr Whelan, I have read the submission, although I have
9 not gone through the attachments, if that assists you.

10 MR WHELAN: I'm sorry if reading is not assisting in that
11 manner. If I can just then point to the next attachment,
12 which is 1.5.12, "It became clear that the unsecured ...
13 (reads) ... outcome of the proceeding." The first and
14 second defendants then adopted the role of contradictor
15 on the obligation issue, and Attachment 18 records that
16 occurrence. So, we say in 1.6 that in the circumstances
17 the administrators having succeeded on the priority
18 issue, it's not reasonable to deprive them of any costs
19 of the proceedings, because of the approach they adopted
20 on the retrenchment and the obligation issue.

21 We set out the five reasons why at p.11. I won't
22 read them, Your Honour, but the most important in our
23 submission is that it was essential that there be a
24 contradictor, and we performed that task. If Mr Merralls
25 had performed it, he would have had his costs. If an
26 amicus curiae had performed it, the amicus would have had
27 it costs. If Mr Wallan had done it, Mr Wallan's costs
28 would have been paid by the trustee. It shouldn't be any
29 difference, because the first and second defendants did
30 it.

31 We say in 1.7 that it should be on a

1 solicitor/client basis.

2 HER HONOUR: Well just on that. Is this case a little bit
3 different from the usual case where a trustee comes
4 seeking advice, and the party plays the role of
5 contradictor in that a significant party, that is the
6 administrators have the benefit of the judgment?

7 MR WHELAN: Yes, that might well be a reason to perhaps make
8 the order on a party/party basis. Then we submit in
9 paragraph 2 that there should not be a substantial
10 reduction. Your Honour may not recall the progress of
11 the trial. Might we submit that the trustee was given a
12 good deal of latitude by Your Honour, quite appropriately
13 so in the circumstances, but the burden of that latitude
14 was substantially borne by the first and second
15 defendants, and we submit that that's another factor
16 which ought to be taken into account.

17 I won't take Your Honour through the attachments,
18 but can I just tell you what they are. At the bottom of
19 paragraph A on the top of 12 the transcript reference is
20 referred to in brackets, they're Attachments 19, 20 and
21 21. The transcript reference on the third line at sub
22 paragraph is Attachment 22, and the directions hearing
23 transcript reference halfway through paragraph B is
24 Attachment 23. So, absent the Court of Appeal's
25 reasoning, that's our submission on costs.

26 In our submission if one directs one's attention to
27 the Court of Appeal, and the problem they address it
28 ought not to put us in a worse position than we would
29 otherwise have been in. The third and fourth defendants
30 in their written submissions submitted that the trustees
31 should pay all the costs of the first and second issues,

1 and the administrator should pay all the costs of the
2 third issue, the priority issue. Essentially the reason
3 why they submitted that that ought to occur is because
4 they said well, the priority issue is really an issue
5 arising in administration.

6 They urged Your Honour to treat the matter as if it
7 were a directions application by the administrators, and
8 they referred Your Honour to the authorities about that,
9 including Your Honour's own judgment in the earlier
10 ground staff matter, and Farrow Finance v. ANZ. I think
11 the third defendant doesn't advance that submission any
12 more, so it would be only the fourth defendant that
13 advanced - - -

14 HER HONOUR: Well it seems you need not worry about that.

15 MR WHELAN: Yes, I needn't worry about that. Your Honour, can
16 I take Your Honour though to the submission in reply, if
17 only to fortify our submission as to - - -

18 HER HONOUR: This is your document entitled, "Supplementary
19 submissions"?

20 MR WHELAN: No, the one I have is entitled, "Further submission
21 on behalf of the first and second defendants in relation
22 to costs of 11 June."

23 HER HONOUR: Yes, I was looking at the wrong document. I have
24 that.

25 MR WHELAN: We summarise what the position was up until the
26 time of that submission. Your Honour, can I take Your
27 Honour to 3.2 where we deal with the third issue
28 priority. Firstly, we recite the submissions that the
29 third and fourth defendants had made. Might we still
30 advance the submission in 3.2.2 by way of fortifying our
31 position in relation to the third issue, and resisting

1 the trustees order that there should be no order on the
2 third issue.

3 We say the first and second defendants submit that
4 the submission made in this regard by the third and
5 fourth defendants is misconceived. As is recognised in
6 each of their submissions priority in this particular
7 administration is in fact regulated by a deed of company
8 arrangement, not by s.556. Ansett is not in liquidation.
9 S.556 does not apply to it. The reason the issue is
10 relevant is because the trustee has sought to vary or
11 terminate the deed of company arrangement in a Federal
12 Court proceeding.

13 The trustee perceives it to be in an essential
14 foundation of that claim that it establishes that in a
15 liquidation it would have priority. That is why it
16 pursued in this proceeding the question as to whether the
17 obligations in question were of the character falling
18 within s.556. Then we referred to the first plaintiff's
19 submissions. This is not relevantly a matter of benefit
20 to all creditors of Ansett. Creditors of Ansett voted
21 for the deed of company arrangement. The only reason the
22 issue as to 556 has been pursued is as a pre cursor to
23 the trustee's application to terminate or vary the deed
24 of company arrangement in the Federal Court.

25 The administrators have not sought a direction on
26 this issue, and did not request or encourage the trustee
27 to do so. If it were not for the trustee's claim to vary
28 or terminate the deed of company arrangement there would
29 be no reason for any order, or guidance about s.556.
30 Essentially, Your Honour, this is rehearsing the same
31 issues that eventually the Court of Appeal raised. This

1 submission is fortified by what - in our submission - the
2 Court of Appeal - the way that the Court of Appeal
3 analysed the matter as well.

4 Your Honour, our application to Justice Goldberg to
5 have the Federal Court date of proceeding fixed for
6 hearing urgently was heard on 9 April, and our submission
7 in support of that application included a submission, the
8 Supreme Court proceeding insofar as it concerns priority
9 is premised on a hypothetical winding up. It is not
10 certain that the Court of Appeal will deal with the issue
11 on that basis. They may say the matter ought to be
12 determined in this application.

13 Then the application for expedition in this court
14 was dealt with on 9 May by Justice Batt. There is a
15 written submission by the respondents on 29 April, and
16 the potential problem of the concurrent Federal Court
17 proceeding was referred to in our written submission. In
18 any event, the Court of Appeal has dealt with the
19 position in relation to that sequence of events. So,
20 Your Honour, in our submission the trustee should pay the
21 costs of the first and second defendant of the
22 proceeding.

23 We would submit it ought to pay them on a
24 solicitor/client basis on the first two issues, and a
25 party/party basis on the third issue.

26 HER HONOUR: Do you want to say anything about the allocation
27 of a percentage?

28 MR WHELAN: I think the other parties have suggested 50 per
29 cent for issues one and two, and 50 per cent for issue
30 three. I think Dr Hardigan's submission suggested that,
31 and I think an earlier submission of the trustee might

1 have suggested that.

2 HER HONOUR: It's been a floating factor.

3 MR WHELAN: It is. That doesn't -- -

4 HER HONOUR: Do you want to say anything about it? I should
5 add, if you wish time to reflect on it I would permit you
6 and indeed, any other party to submit a memorandum in due
7 course providing it is exchanged. It's something you
8 might need to reflect on.

9 MR WHELAN: Yes. It's terribly difficult, in our submission,
10 to allocate costs in that manner, particularly between
11 obligation and priority as the nature of the obligation
12 seems to be bound up in the priority issue, and one
13 couldn't decide the priority issue without knowing what
14 the obligation is that one is addressing.

15 HER HONOUR: Well precisely for that and other reasons I raise
16 this percentage approach - - -

17 MR WHELAN: Yes.

18 HER HONOUR: - - - because it seems to me it would be a
19 terribly difficult task to try and tax it - - -

20 MR WHELAN: We would have thought so, Your Honour. We would
21 have thought it'd be a terrible difficult task which
22 might expend as many costs as - or an inordinate amount
23 of costs.

24 HER HONOUR: Well it seems to me that it may well just be out
25 of proportion to - - -

26 MR WHELAN: Yes.

27 HER HONOUR: - - - what is sought to be determined in the
28 proceeding.

29 MR WHELAN: The 50 per cent on the first two issues, 50 per
30 cent on the third, did not seem unreasonable to us, as a
31 kind of recognition of the overlap between issues two and

1 three. So that sort of very broad analysis seemed to us
2 to be not unreasonable. Thank you, Your Honour.

3 HER HONOUR: Thank you, Mr Whelan. Mr Cox, just before I hear
4 from you; Ms Connell, is there anything you wish to say?

5 MS CONNELL: (Off microphone.) Nothing further, Your Honour.

6 HER HONOUR: I do apologise, Mr Cox, I am trying to read the
7 appearance sheet, I confused you with your client.

8 MR COX: Your Honour, we have prepared minutes of proposed
9 orders which I would hand up via your Associate, and
10 circulate to any other parties who may not already have
11 them. I propose, Your Honour, to address the issues
12 numerically through these paragraphs unless Your Honour
13 prefers to take me to particular matters.

14 The first paragraph deals with what we are all
15 calling, I believe, the retrenchment issue. But there is
16 a paragraph of the originating amended motion that - of
17 the amended originating motion and indeed it's the fourth
18 amended originating motion dated 20 February 2003 that is
19 not referred to in paragraph 1, and that is paragraph
20 11A.

21 HER HONOUR: Do you wish me to have the originating motion?

22 MR COX: It might be of some assistance to Your Honour, if I
23 could hand up this copy if that - - -

24 HER HONOUR: If you have a copy that would be convenient.

25 MR COX: I would ask that back from your Associate in due
26 course. Your Honour will see that paragraph 11A deals
27 solely with an issue relating to pilots' management and
28 to a statutory interpretation question that was not
29 ventilated before Your Honour and was not, in our
30 submission, productive of substantial costs to any
31 parties and we effectively are not seeking an order in

1 relation to paragraph 11A. Although there are paragraphs
2 later which expressly provide for there to be no order as
3 to costs in relation to certain matters, 11A is not
4 mentioned within our paragraph 1, and the effect of it is
5 that there would be no order as to costs in relation to
6 that paragraph. I raise that matter simply to draw to
7 Your Honour's attention that it is a live paragraph and,
8 for example, it is not a paragraph within Mr Santamaria's
9 minute of orders, and it may well be that Mr Santamaria
10 intends the same effect.

11 Your Honour, Mr Santamaria has argued that the
12 costs of the retrenchment issue should be paid by the
13 first and second defendants on a party/party basis. We
14 don't see the matter that way, although it would of
15 course be of some benefit to our client. The
16 retrenchment issue essentially arose from the deed
17 setting up the Ground Staff and Pilots' Management Funds,
18 both of which contain the same ambiguity. Once that
19 ambiguity was pointed out the trustees, for their own
20 protection as much as because of any dispute that may
21 have arisen with the administrators, found it necessary
22 to come to court to have the meaning of that ambiguity
23 resolved. We accept what Mr Whelan says that the
24 administrators became, in effect, proper contradictors
25 for that issue and we do not oppose a costs order on a
26 solicitor/client basis in the usual course in relation to
27 that retrenchment issue for the costs of the first and
28 second defendants.

29 We do, however, particularly as a result of the
30 reasons given by the Court of Appeal, say that the
31 situation is different in relation to the obligation

1 issue arising under paragraphs 12 and 13 and addressed in
2 paragraph 2 of our proposed minute. Mr Whelan says that
3 the first and second defendants were proper contradictors
4 in relation to that issue also. However, we distinguish
5 the situation between the first retrenchment issue and
6 the obligation issue on the basis that there would have
7 been no need to come to court on the obligation issue but
8 for a reluctance or refusal on the part of the
9 administrators to accept that they were under an
10 obligation or that the company was under an obligation to
11 pay. There was a real underlying dispute there that
12 could have been addressed by the issue of a Writ. That
13 fact is adverted to in the judgment of Justice of Appeal,
14 His Honour Justice Ormiston. If I could take Your Honour
15 to paragraph 13 of the reasons of the Court of Appeal on
16 p.10? If I could briefly interpolate, Your Honour? Our
17 position is that Your Honour can have regard to the
18 matters raised by the Court of Appeal in exercising your
19 discretion as to costs.

20 About half way down Your Honour will see a sentence
21 commencing "In truth." "In truth the appellant sought
22 adversary relief against the company and its
23 administrators albeit that it chose to do so by
24 originating motion." His Honour, of course, is dealing
25 with the second and third issues which are the issues on
26 appeal, the obligation and priority issues. They
27 proceeded effectively as adversary declarative matters.
28 Had the administrators at any point said to the trustee
29 we accept that there's an obligation on the company to
30 pay the issue would not have been before the court.
31 There was no need to come to court but for the fact that

1 the administrators had - it appeared likely the
2 administrators would refuse a proof. That made the
3 matter one which was not lacking a proper contradictor
4 but one which was truly an adversarial dispute, and that
5 dispute has been resolved in favour of the trustees who
6 we contend should have their costs and the costs of the
7 third and fourth defendants on a party/party basis from
8 the first and second defendants.

9 As to the priority issue, Your Honour, which is
10 addressed in paragraph 3 of our minute, we support the
11 trustee's position that there should be no order as to
12 costs. The primary reason why we believe that is the
13 appropriate order is to be found in the reasons of the
14 Court of Appeal but I should say to Your Honour that that
15 is a change from the position addressed in our written
16 submissions of 27 March, and the change is as a result of
17 the publication of reasons by the Court of Appeal. We
18 accept that the argument that this was, in effect,
19 directions that the administrators could have obtained,
20 is no longer open to make in view of the court's findings
21 that this court was unable to determine that issue. We
22 say the proper basis then for looking at the costs of the
23 priority issue is whether any party should be entitled to
24 them from any other party.

25 If I could take Your Honour to paragraph 24 of
26 Justice Ormiston's reasons on p.17, that the most
27 material fact is to be found just under half way down
28 that page, "They directed the appellant's attention
29 ... (reads) ... and said it could well arise." Your
30 Honour, we, that is the solicitors for the third
31 defendant, were unaware of this correspondence - my

1 learned friend has corrected my understanding of the
2 time, Your Honour.

3 The basis we say for the party - for there being no order
4 in relation to the priority issue is acquiescence. I
5 withdraw what I was saying to Your Honour in relation to
6 paragraph 24 of Justice Ormiston's reasons.

7 That acquiescence, Your Honour, took the form of
8 not arguing before Your Honour that the obligation issue
9 was hypothetical. Had that argument been made in a
10 formal manner it's quite possible that the trustees may
11 have discontinued the Federal Court proceeding and
12 brought the whole issue into the Supreme Court but the
13 acquiescence in not making that argument was a
14 contributing factor towards the position that the Court
15 of Appeal has advised of. We say in effect, Your Honour,
16 that the honours are even and that neither the creditors
17 in the administration nor the beneficiaries in the
18 superannuation plans should bear the burden of the costs
19 of the other party in relation to what has occurred on
20 the priority issue.

21 Turning Your Honour to paragraph 4 of our proposed
22 draft minutes - - -

23 HER HONOUR: There seems to be no issue that the third and
24 fourth defendants should have their costs on that basis.

25 MR COX: Yes, Your Honour. Paragraph 5, Your Honour, is
26 different from the paragraphs which Mr Santamaria has put
27 before Your Honour in relation to the plaintiffs and
28 whatever private arrangement or agreement may have been
29 reached between the plaintiffs in relation to costs,
30 particularly reserved costs, which appears to be the
31 subject of the paragraph B that Mr Santamaria gave to

1 Your Honour. We should say to Your Honour that until
2 this morning we haven't seen or known of any such
3 agreement, and we believe, for the reasons set out in our
4 written submissions of 27 March, that the appropriate
5 order is that the plaintiffs' own costs, including any
6 costs ordered to be paid to other parties, be paid out of
7 the assets held by them as trustees in equal proportion.
8 If some agreement is reached between the funds about how
9 they see equal proportion, or to other effect, that's a
10 matter between the trustees and the respective funds.

11 The last paragraph, Your Honour, deals with the
12 costs of the costs issue. We've put that on the basis
13 that the first and second defendants should pay the other
14 parties party/party costs on the confident assumption
15 that we might succeed before Your Honour in the argument
16 as to costs. What we mean is the basis for that is that
17 it should follow the event but if Your Honour were
18 against the other parties, that is, the plaintiffs and
19 the third and fourth defendants, Mr Whelan would be
20 entitled to his clients' costs of the dispute as to
21 costs.

22 Unless Your Honour had any matters that you wish to
23 ask, those are the submissions on behalf of the third
24 defendant.

25 HER HONOUR: Do you want to say anything about the percentage
26 or apportionment of the three issues?

27 MR COX: We have propounded and still suggest that it is 25 per
28 cent to retrenchment, 25 per cent to obligation and 50
29 per cent to priority. We accept that priority was a
30 relatively late addition and until the originating motion
31 was amended to add the current paragraph 14 the costs to

1 that point would be 50/50 between the first two issues.
2 I beg Your Honour's pardon, paragraph 14, being the
3 priority paragraph, and up until that point the costs
4 would be 50/50 between the first two issues.

5 HER HONOUR: And thereafter?

6 MR COX: Thereafter we would say 25, 25 and 50.

7 HER HONOUR: Thank you, Mr Cox. Mr Merralls.

8 MR MERRALLS: May it please Your Honour. We too have passed up
9 a supplementary piece of paper which represents the
10 orders that we now claim ought to be made, they differ
11 from the orders that were sought in our written
12 submissions, primarily in relation to issue three where
13 we submit that the order affecting the first and second
14 defendants should be somewhat more beneficial to them
15 than the order that we originally sought. Contrary to
16 something which my learned friend seemed to suggest that
17 he be punished for what happened in the course of the
18 appeal, in effect we're suggesting that he should obtain
19 the benefit of observations by the court, or some of the
20 observations, and certainly what happened there. So we
21 have departed from paragraphs 4, 5, 6 and 7B of our
22 written submissions.

23 As to the first paragraph of our proposed order it
24 differs from the order, the comparable order sought by
25 the third defendant in two respects - we do mention 11A,
26 whether or not it is in the final order is really a
27 matter of indifference to us as presumably no costs were
28 incurred expressly relating to that issue. The other
29 respect in which it differs from Mr Cox' minute is that
30 we include questions 12 and 13 in that category. We make
31 no submission other than Mr Whelan - a submission that Mr

1 Whelan has made about that.

2 As to the third issue, question 14, we adopt the
3 submissions that have been made by Mr Santamaria for the
4 trustees and Mr Cox for the third defendant and we have
5 nothing to add. As to two other matters, first,
6 contribution between the plaintiffs, and secondly, the
7 basis upon which the costs should be distributed between
8 the three issues, we say this: the matter of
9 contribution between the plaintiffs ought not to be dealt
10 with by the court order, it is a matter between
11 themselves, and it complicates matters both between
12 themselves and between the plaintiffs and the other
13 defendants if it is dealt with, as has been proposed, in
14 a partial manner in the order. We had originally
15 included in paragraph 4 of our minute the words "in equal
16 proportions" and on second thoughts we do not consider
17 that those words ought to be included but that references
18 to the plaintiffs should simply be to them in the plural,
19 leaving matters of contribution to the rules of
20 contribution.

21 As to the last point we have no instructions about
22 an appropriate percentage basis for distribution between
23 the issues. We readily agree that it would be highly
24 unsatisfactory for the matter to have to be determined by
25 a Taxing Master, it would be almost impossible, so that
26 some proportions ought to be fixed in the order if Your
27 Honour should - we haven't had the ability to obtain
28 instructions ourselves today but if Your Honour would
29 allow us the indulgence we will submit a memorandum with
30 proposed proportions without argument, simply figures
31 that we have obtained when instructions are sought.

1 HER HONOUR: That seems only fair and appropriate that you have
2 that opportunity, Mr Merralls. I do indicate, I intend
3 to reserve my reasons in this matter and would it be
4 possible for you to obtain those instructions and provide
5 a memorandum perhaps by the end of tomorrow?

6 MR MERRALLS: I'm sure it would be Your Honour, yes. If Your
7 Honour pleases.

8 HER HONOUR: Thank you, Mr Merralls. Mr Santamaria.

9 MR SANTAMARIA: Your Honour, could I just deal with three short
10 matters by reply, and they will be short?

11 The first, Your Honour, is in relation to question
12 14, the priority question. You heard our argument, which
13 is that we bear joint responsibility and therefore there
14 ought to be no order as to costs. My learned friend when
15 he went through the reasons for the Court of Appeal,
16 referred to warnings and referred to correspondence, and
17 a mark of not perhaps what he intended but how the
18 submission sounded was what Mr Cox said, he wasn't aware
19 of warnings, he wasn't aware of correspondence. The
20 warnings and correspondence to which the Court of Appeal
21 refers are warnings and correspondence which arose after,
22 well after Your Honour's declarations, and I'm sure my
23 friend accepts that. Before Your Honour my learned
24 friend - I referred you to p.192 of the transcript, he
25 said that it was critical that obligation and priority be
26 heard together, he said we're desperate, I think, that
27 they be heard together, so before Your Honour he was with
28 us that they had to be determined together. The warnings
29 and correspondence came after Your Honour's declarations
30 and the Court of Appeal took them into account in making
31 us pay the costs of the appeal but they're not germane to

1 the question of the costs of the trial.

2 Second, Your Honour, again as Mr Cox said, question
3 12, my learned friend said Mr Santamaria's client should
4 pay the costs of a trustee seeking advice of a proper
5 contradictor on a solicitor/client basis - that's what my
6 learned friend put to you. The Court of Appeal said
7 question 12 and question 14 were not seeking advice, they
8 were truly adversarial. My friend was the adverse party,
9 he wasn't a proper contradictor, and therefore, with
10 respect Your Honour, either he should pay our costs
11 because we were successful or there should be no order,
12 or if we have to pay his costs on that issue they ought
13 not to be on a solicitor/client basis, they ought to be
14 on a party/party basis.

15 Finally Your Honour, with respect to the first
16 question, the retrenchment question. Your Honour was
17 taken by my learned friend, Mr Whelan, to what happened
18 originally before Justice Goldberg in the Federal Court.
19 You'll see Justice Goldberg in that transcript trying to
20 find out from the administrators what their position was,
21 and Mr Walker - it's Attachment 5, Attachment 5 to my
22 learned friend's original submission - on p.4.

23 HER HONOUR: This is the transcript at the foot of the page 29
24 November 2001?

25 MR SANTAMARIA: That's correct. And on p.4, the very top, His
26 Honour is asking Mr Walker whether or not a declaration
27 has been made. His Honour, "On the evidence before me at
28 the ... (reads) ... will not at all know." So in a
29 sense, that was, with respect, the problem. They were
30 denying in fact that there was a declaration, so we had
31 to go and determine there had been a declaration, and

1 that attitude which was taken before Justice Goldberg,
2 with respect, Your Honour, was a source of much that
3 followed.

4 Finally, Your Honour, could we have until also
5 close of business tomorrow to give an estimate along the
6 lines that you invited?

7 HER HONOUR: Yes, certainly, Mr Santamaria. Mr Santamaria, do
8 you want to say anything about this contribution factor?
9 Do you want to press it? I indicate to you I initially
10 had some hesitation as to whether the court should become
11 embroiled in that.

12 MR SANTAMARIA: Yes.

13 HER HONOUR: Now having heard some of the parties resistance to
14 what you propose - - -

15 MR SANTAMARIA: Yes.

16 HER HONOUR: - - - I do indicate to you that I have a
17 reluctance to accept the course you're - - -

18 MR SANTAMARIA: I understand what Your Honour's putting to me.
19 Your Honour - - -

20 HER HONOUR: It's really a private matter between the
21 plaintiff's - - -

22 MR SANTAMARIA: It is a private matter and may I again, just
23 give me 24 hours on that, but probably my instructions -
24 I'll seek instructions that the matter remain a private
25 contribution matter, Your Honour.

26 HER HONOUR: Well so that no difficulties arise hereafter, you
27 have leave to submit a memorandum setting out any
28 percentage in terms of apportionment of the three issues.

29 MR SANTAMARIA: Yes.

30 HER HONOUR: You have leave to indicate whether or not you
31 persist with your proposal as to contribution in the

1 orders, and no more. And so far as Mr Merralls is
2 concerned, he has leave, as I indicated to provide a
3 written memorandum as to his instructions concerning
4 apportionment.

5 MR SANTAMARIA: If Your Honour pleases.

6 MR WHELAN: Your Honour, Your Honour did perceive - but I might
7 just say something that I wanted to briefly amplify. Can
8 I just raise one matter, Your Honour?

9 HER HONOUR: Yes, certainly, Mr Whelan.

10 MR WHELAN: Attachment 15, I just wanted to - - -

11 HER HONOUR: To your submissions?

12 MR WHELAN: To our submissions, yes - - -

13 HER HONOUR: Yes.

14 MR WHELAN: I think Mr Santamaria just submitted that the
15 reason that Mr Walker's unresponsive approach to the
16 problem is what meant there was a controversy on issue
17 one, and he has supported what Mr Cox said about issue
18 two. As we apprehend it, Mr Merralls supports us on
19 issues one and two, in that we were the proper
20 contradictor. But in the Federal Court where we were in
21 those days, November 2001, Justice Goldberg was trying to
22 tease out whether there really was a just issuable
23 controversy, because Mr Walker would not say that there
24 had not been retrenchment.

25 At line 10 His Honour asked Mr Santamaria, "Are you
26 prepared to pay out on the basis ... (reads) ... that
27 raised all of these questions." In our submission it's
28 an originating motion by the trustee to raise a whole lot
29 of questions that were controversial, and to now
30 characterise us as being like a defendant to a writ is
31 not an accurate representation of what's occurred.

1 If Your Honour please.

2 HER HONOUR: I reserve my judgment in this matter.

3 ADJOURNED TO A DATE TO BE FIXED

4