

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

No. 2115 of 2001

BETWEEN:

ANSETT AUSTRALIA GROUND STAFF SUPERANNUATION PLAN PTY LTD
ACN 065 590 178 (as trustee of the Ansett Australia Ground Staff Superannuation Plan)
and **ANSETT AUSTRALIA PILOTS/MANAGEMENT SUPERANNUATION PLAN**
PTY LTD ACN 065 590 178 (as trustee of the Ansett Australia Pilots/Management
Superannuation Plan)

Plaintiffs

- and -

ANSETT AUSTRALIA LIMITED (subject to a deed of company arrangement)
(ACN 004 209 410) AND OTHERS ACCORDING TO THE SCHEDULE ATTACHED

Defendants

**SUBMISSION ON BEHALF OF THE SECONDNAMED PLAINTIFF IN
RELATION TO COSTS**

Date of document: 16 June 2003
Filed on behalf of: The Secondnamed Plaintiff

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1. Background

- 1.1 By order dated 7 February 2003, Justice Warren made orders implementing reasons for judgment dated 20 December 2003 and revised on 7 February 2003.
- 1.2 The Originating Motion as originally conceived related to questions arising from the administration of three superannuation funds;
 - (a) the Ansett Australia Ground Staff Superannuation Plan ("the Ground Staff Plan");
 - (b) the Ansett Australia Pilots/Management Superannuation Plan ("the Pilots/Management Plan");

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- (c) the Ansett Australia Flight Engineers' Superannuation Plan ("the Flight Engineers' Plan");
- 1.3 The Originating Motion in essence sought declarations from the Court in relation to:
- (a) the construction of the respective Plans's trust deeds in relation to retrenchment of Plan members by the Firstnamed Defendant;
 - (b) the obligation of the Firstnamed Defendant and/or the Secondnamed Defendant to make further contributions to the respective Plans pursuant to certain documents known as Funding Solvency Certificates;
 - (c) whether any such contribution attracted a priority under Section 556 of the *Corporations Act 2001*.
- 1.4 In summary, the Fourth Amended Statement of Claim ultimately raised three questions for determination by the Court:
- (a) Were all or any of the members of the Ground Staff Plan who had been made redundant by the Secondnamed Defendant as, administrators of the Firstnamed Defendant, since 12 September 2001 entitled to retrenchment benefits under the Ground Staff Plan Trust Deed dated 17 August 1999? ("the Construction Question")
 - (b) Is the Firstnamed Defendant obliged to make further contributions, and if so what further contributions, to the Ground Staff Plan? ("the FSC Validity Question")
 - (c) If yes to (b) above, are any such further contributions accorded priority under s. 556(1) of the *Corporations Act 2001*? ("the Priority Question")
- 1.5 Prior to the trial the Thirdnamed Plaintiff discontinued the proceedings in its name.
- 1.6 On 14 June 2002, the Secondnamed Plaintiff sought and obtained an order adjourning the proceedings brought by it sine die. The Secondnamed Plaintiff took no further part in the proceedings after that date.
- 1.7 Proceedings had originally been commenced in the Federal Court of Australia (no V3075 of 2001) by the Secondnamed Defendant seeking declarations in relation to 1.4(a) above.
- 1.8 Justice Warren made the following relevant decision. The decision was confined to declarations in relation to the Firstnamed Plaintiff:
- (a) All members of the Ground Staff Plan who had been made redundant by the Secondnamed Defendant, as administrators of the Firstnamed Defendant, since 12 September 2001 are entitled to retrenchment

benefits under Rule 1.13 of the First Schedule to the Trust Deed dated 17 August 1999.

- (b) The Firstnamed Defendant is obliged to make further contributions to the Ground Staff Plan.
- (c) The further contributions do not attract priority under s.556(a) of the *Corporations Act 2001*.

2. Summary of Contentions

- 2.1 The Court has power under section 63.04 of the *Supreme Court (General Civil Procedure) Rules 1996* to make an order for costs in relation to a particular question in or a particular part of a proceeding.
- 2.2 Section 1335(2) of the *Corporations Act 2001* also provides that the Court has the discretion to order that costs of a proceeding are to be borne by such party to the proceeding as the Court directs.
- 2.3 The Plaintiffs and the Firstnamed and Secondnamed Defendants agreed that a judicial determination should be sought in relation to the Construction Question.
- 2.4 The question of what priority was accorded under section 556(1) of the *Corporations Act 2001* was a novel question of law, the answer to which benefited all creditors.
- 2.5 The Firstnamed and Secondnamed Defendants acknowledged that the relief the Plaintiffs sought in the present proceeding was relief in respect of a company under administration, in respect of the conduct of that company or its administrators, and that the relief sought may impact upon the interests of the company and of its unsecured creditors. They should not now be permitted to argue that the relief sought was solely for the benefit of the Plaintiffs. There is authority that where the relief sought relates to a complex or novel question of law the general rule is that the costs of all necessary parties are to be paid by the liquidator and counted as costs in the liquidation: Farrow Finance Co Ltd (in Liquidation) v ANZ Executors and Trustee Co Ltd and Ors SCV (unreported, 13 December 1996; 12 February 1997) Hansen J; see also Re GPI Leisure Corporation (in liquidation) (1994) 15 ACDR 282 and Australian Securities Commission v Melbourne Asset Management Nominees Pty Ltd (rec and mar apptd) and Anor (1994) 49 FCR 334

It is submitted that:

- (a) that authority is equally applicable to administrators as to liquidators;

- (b) it is irrelevant that the relief sought in this proceeding was not sought by the administrators of the company, but by the Trustees, who are effectively creditors of the company.

2.6 The Secondnamed Plaintiff:

- (a) Contends that the Firstnamed and Secondnamed Defendants should pay the costs of the Plaintiffs in relation to the Construction Question. Such costs to be paid on a solicitor/client basis, or alternatively on a party/party basis, and to be costs of the administration of the Firstnamed Defendant.
- (b) Alternatively, contends that the Plaintiffs and the Firstnamed and Secondnamed Defendants should bear their own costs in relation to the Construction Question.
- (c) Alternatively, contends that if the Plaintiffs are ordered to pay the costs of the Firstnamed and/or the Secondnamed Defendants in relation to the Construction Question, they should be ordered to pay only a proportion of those costs.
- (d) Contends that the Secondnamed Defendant should pay the costs of the Plaintiffs in relation to the FSC Validity Question. Such costs to be paid on a solicitor/client basis, or alternatively on a party/party basis, and to be costs of the administration of the Firstnamed Defendant.
- (e) Alternatively, contends that the Plaintiffs and the Firstnamed and Secondnamed Defendants should bear their own costs in relation to the FSC Validity Question.
- (f) Alternatively, contends that if the Plaintiffs are ordered to pay the costs of the Firstnamed and/or the Secondnamed Defendants in relation to the FSC Validity Question, they should be ordered to pay only a proportion of those costs.
- (g) Contends that the Secondnamed Defendant should pay the costs of the Plaintiffs in relation to the Priority Question. Such costs to be paid on a solicitor/client basis, or alternatively on a party/party basis, and to be costs of the administration of the Firstnamed Defendant.
- (h) Alternatively, contends that the Firstnamed and Secondnamed Plaintiffs and the Firstnamed and Secondnamed Defendants should bear their own costs in relation to the Priority Question.
- (i) Alternatively, contends that if the Plaintiffs are ordered to pay the costs of the Firstnamed and/or the Secondnamed Defendants in relation to the Priority Question, they should be ordered to pay only a proportion of those costs.

- (j) Contends that the Firstnamed and Secondnamed Defendants should pay the costs and expenses of the Thirdnamed and Fourthnamed Defendants of and incident to the proceeding. Such costs to be paid on a party/party basis, or alternatively on a solicitor/client basis, and to be costs of the administration of the Firstnamed Defendant.
- (k) Alternatively, will submit to an order that the Plaintiffs pay the costs and expenses of the Thirdnamed and Fourthnamed Defendants of and incident to the proceeding in relation. Such costs to be paid on a party/party basis, or alternatively on a solicitor/client basis. Such costs to be paid out of the assets held by the Plaintiffs.
- (l) Contends that in the event the Firstnamed Plaintiff is ordered to bear its own costs, or to pay the costs of any other party, there should be an order that the costs and expenses of the Firstnamed Plaintiff of and incident to the proceeding be paid out of the assets held by the Firstnamed Plaintiff. See *Practice Note* [1954] VLR 208; Re National Safety Council of Australia Victorian Division (In liq) (No. 2) 1 VR 485 at 503.
- (m) Contends that in the event the Secondnamed Plaintiff is ordered to bear its own costs, or to pay the costs of any other party, there should be an order that the costs and expenses of the Secondnamed Plaintiff of and incident to the proceeding be paid out of the assets held by the Secondnamed Plaintiff. See *Practice Note* [1954] supra; Re National Safety Council of Australia Victorian Division (In liq) (No. 2) supra.

3. Costs of the Firstnamed and Secondnamed Defendants

- 3.1 The general rule is that costs follow the event. Ritter v Godfrey [1920] 2 KB 47. However, the authorities indicate that the general rule may be departed from. See *Williams, Supreme Court Practice Volume 1*, [63.04.0] and the cases cited therein, together with Verna Trading Pty Ltd v New India Assurance Co Ltd [1991] 1 VR 129; Inn Leisure Industries Pty Ltd v DF McGloy Pty Ltd (No 2) (1991) 28 FCR 172; Commissioner of the Australian Federal Police v Razzi (No 2) (1991) 30 FCR 64; Coogi Australia Pty Ltd v Hysport International Pty Ltd [1988] 1331 FCA.
- 3.2 The Court has power under section 63.04 of the *Supreme Court (General Civil Procedure) Rules 1996* to make an order for costs in relation to a particular question in or a particular part of a proceeding. The Court also has the power to make a single order for costs fixing what proportion of a party's costs is to be paid by the other party. Byrns v Davie [1991] 2 VR 568. Section 1335(2) of the *Corporations Act 2001* also provides that the Court has the discretion to order that costs of a proceeding are to be borne by such party to the proceeding as the Court directs.

- 3.3 This is a case in which the Court should exercise its power under section 63.04 of the *Supreme Court (General Civil Procedure) Rules 1996* and under section 1335(2) of the *Corporations Act 2001*.
- 3.4 The Firstnamed and Secondnamed Defendants acknowledged in a letter dated 25 January 2002 to Deacons Lawyers (the Plaintiffs' former solicitors) that the relief the Plaintiffs sought in the present proceeding was relief:

"in respect of a company under administration, in respect of the conduct of that company or its administrators, and that the relief sought may impact upon the interests of the company and of its unsecured creditors."

(See attachment 1.)

They should not now be permitted to argue that the relief sought was solely for the benefit of the Plaintiffs. There is authority that where the relief sought from a Court relates to a complex or novel question of law the general rule is that the costs of all necessary parties are to be paid by the liquidator and counted as costs in the liquidation. Farrow Finance Co Ltd (In Liquidation) v ANZ Executors and Trustee Co Ltd and Ors SCV (unreported, 13 December 1996; 12 February 1997) Hansen J; see also Re GPI Leisure Corporation (in liquidation) (1994) 15 ACDR 282 and Australian Securities Commission v Melbourne Asset Management Nominees Pty Ltd (rec and mar apptd) and Anor (1994) 49 FCR 334

It is submitted that:

- (a) that authority is equally applicable to administrators as to liquidators;
- (b) it is irrelevant that the relief sought in this proceeding was not sought by the administrators of the company, but by the Trustees, who are effectively creditors of the company;
- (c) this is a case in which the costs of the proceeding should be paid by the administrator and counted as costs in the liquidation.

3.5 CONSTRUCTION QUESTION

3.6 The Construction Question was properly raised by the Plaintiffs.

3.7 The Secondnamed Defendant refused to make a determination as to whether the termination of employees by the Secondnamed Defendant, on behalf of the Firstnamed Defendant, constituted a "retrenchment" for the purposes of the Rules of the respective Plans. The Secondnamed Plaintiff refers to and adopts paragraphs 14 and 15 of the Firstnamed Plaintiff's written submissions dated 13 March 2003 ("the Firstnamed Plaintiff's submissions").

- 3.8 The Secondnamed Defendant agreed that a judicial declaration should be sought in relation to the issue. The Secondnamed Plaintiff refers to and adopts paragraphs 16 and 17 of the Firstnamed Plaintiff's submissions.
- 3.9 It is unfair of the Firstnamed and Secondnamed Defendants to claim they are entitled to costs on the basis they acted as a contradicter on the Construction Question in this proceeding in circumstances where:
- (a) the Secondnamed Defendant commenced proceedings in the Federal Court of Australia (No. V3075 of 2001) in relation to substantially the same issues;
 - (b) the Firstnamed and Secondnamed Defendants did not object to the Construction Question being heard as part of these proceedings;
 - (c) the Firstnamed and Secondnamed Defendants acknowledged in their letter dated 25 January 2002 that relief the Plaintiffs sought in the present proceeding was relief in respect of a company under administration, in respect of the conduct of that company or its administrators, and that the relief sought may impact upon the interests of the company and of its unsecured creditors;
 - (d) the Construction Question took up a significant part of the proceeding;
 - (e) the Firstnamed and Secondnamed Defendants were unsuccessful in relation to the Construction Question;
 - (f) costs would most likely have been awarded against the Secondnamed Defendant if the Construction Question had been determined by the Federal Court of Australia in proceeding number V3075 of 2001.
- 3.10 The Secondnamed Plaintiff contends that the Firstnamed and Secondnamed Defendants should pay the costs of the Plaintiffs in relation to the Construction Question. Such costs to be paid on a solicitor/client basis, or alternatively on a party/party basis, and to be costs of the administration of the Firstnamed Defendant.
- 3.11 Alternatively, the Secondnamed Plaintiff contends that the Plaintiffs and the Firstnamed and Secondnamed Defendants should bear their own costs in relation to the Construction Question.
- 3.12 Alternatively, the Secondnamed Plaintiff contends that if the Plaintiffs are ordered to pay the costs of the Firstnamed and/or the Secondnamed Defendants in relation to the Construction Question, they should be ordered to pay only a proportion of those costs.
- 3.13 *FSC VALIDITY QUESTION*
- 3.14 The FSC Validity Question was properly raised by the Plaintiffs.

- 3.15 The Secondnamed Defendant denied that the relevant Financial Solvency Certificates, known as "FSC4" and "FSC5", were valid. The Secondnamed Plaintiff refers to and adopts paragraphs 24 to 32 (inclusive) of the Firstnamed Plaintiff's submissions.
- 3.16 It is unfair of the Firstnamed and Secondnamed Defendants to claim they are entitled to costs on the basis they acted as a contradictor on the FSC Validity Question in this proceeding in circumstances where:
- (a) the Secondnamed Defendant denied FSC4 and FSC5 were valid;
 - (b) the Firstnamed and Secondnamed Defendants acknowledged in their letter dated 25 January 2002 that relief the Plaintiffs sought in the present proceeding was relief in respect of a company under administration, in respect of the conduct of that company or its administrators, and that the relief sought may impact upon the interests of the company and of its unsecured creditors;
 - (c) the FSC Validity Question took up a significant part of the proceeding;
 - (d) the Secondnamed Defendant was unsuccessful in relation to the FSC Validity Question.
- 3.17 The Secondnamed Plaintiff contends that the Secondnamed Defendant should pay the costs of the Plaintiffs in relation to the FSC Validity Question. Such costs to be paid on a solicitor/client basis, or alternatively on a party/party basis, and to be costs of the administration of the Firstnamed Defendant.
- 3.18 Alternatively, the Secondnamed Plaintiff contends that the Plaintiffs and the Firstnamed and Secondnamed Defendants should bear their own costs in relation to the FSC Validity Question.
- 3.19 Alternatively, the Secondnamed Plaintiff contends that if the Plaintiffs are ordered to pay the costs of the Firstnamed and/or the Secondnamed Defendants in relation to the FSC Validity Question, they should be ordered to pay only a proportion of those costs.
- 3.20 *PRIORITY QUESTION*
- 3.21 The Priority Question was properly raised by the Plaintiffs.
- 3.22 The Priority Question was for the benefit of all of the creditors of the Firstnamed Defendant. The Priority Question raised issues in relation to the administration of the assets of the Firstnamed Defendant under the control of the Secondnamed Defendant as part of the administration of the Firstnamed Defendant.
- 3.23 The Secondnamed Plaintiff contends that the law on this issue is equally as applicable to administrators as it is to liquidators, and the costs of the Priority

Question should properly be dealt with as costs of the administration of the Firstnamed Defendant.

- 3.24 The Priority Question was complex and involved novel propositions of law. In Farrow Finance Co Ltd (In Liquidation) v ANZ Executors and Trustee Co Ltd and Ors SCV (unreported, 13 December 1996; 12 February 1997) Hansen J (in relation to proceedings involving directions sought by a liquidator) stated at page 10:

"...where the issue involved is a complex one, or one involving a relatively novel proposition in law, then the starting point is that the costs of all necessary parties are to be paid by the liquidator and counted as costs in the liquidation".

Hansen J cited the cases of Re GPI Leisure Corporation (in liquidation) (1994) 15 ACDR 282 and Australian Securities Commission v Melbourne Asset Management Nominees Pty Ltd (rec and mar apptd) and Anor (1994) 49 FCR 334 in support of this proposition.

- 3.25 The Firstnamed and Secondnamed Defendants did not object to the Priority Question being dealt with in this proceeding rather than in the Federal Court proceeding. The Firstnamed and Secondnamed Defendants should not now be permitted to argue that the ruling in relation to the Priority Question does not apply to it. The Priority Question was determined in the present proceeding as a matter of mutual convenience.
- 3.26 The Secondnamed Defendant refers to and adopts the paragraphs 11 and 12 of the Thirdnamed Defendant's written submissions dated 27 March 2003 ("the Thirdnamed Defendant's submissions").
- 3.27 The Secondnamed Plaintiff contends that the Secondnamed Defendant should pay the costs of the Plaintiffs in relation to the Priority Question. Such costs to be paid on a solicitor/client basis, or alternatively on a party/party basis, and to be costs of the administration of the Firstnamed Defendant.
- 3.28 Alternatively, the Secondnamed Plaintiff contends that the Firstnamed and Secondnamed Plaintiffs and the Firstnamed and Secondnamed Defendants should bear their own costs in relation to the Priority Question.
- 3.29 Alternatively, the Secondnamed Plaintiff contends that if the Plaintiffs are ordered to pay the costs of the Firstnamed and/or the Secondnamed Defendants in relation to the Priority Question, they should be ordered to pay only a proportion of those costs.

4. Costs of the Third and Fourth Defendants

- 4.1 The Secondnamed Plaintiff contends that the Firstnamed and Secondnamed Defendants should pay the costs and expenses of the Thirdnamed and Fourthnamed Defendants of and incident to the proceeding. Such costs to be

paid on a party/party basis, or alternatively on a solicitor/client basis, and to be costs of the administration of the Firstnamed Defendant.

4.2 Alternatively, the Secondnamed Plaintiff will submit to an order that the Plaintiffs pay the costs and expenses of the Thirdnamed and Fourthnamed Defendants of and incident to the proceeding in relation. Such costs to be paid on a party/party basis, or alternatively on a solicitor/client basis. Such costs to be paid out of the assets held by the Plaintiffs.

5. Costs of the Firstnamed Plaintiff

5.1 The Secondnamed Plaintiff contends that in the event the Firstnamed Plaintiff is ordered to bear its own costs, or to pay the costs of any other party, there should be an order that the costs and expenses of the Firstnamed Plaintiff of and incident to the proceeding be paid out of the assets held by the Firstnamed Plaintiff. See *Practice Note* [1954] VLR 208; Re National Safety Council of Australia Victorian Division (In liq) (No. 2) supra.

6. Costs of the Secondnamed Plaintiff

6.1 The Secondnamed Plaintiff contends that in the event the Secondnamed Plaintiff is ordered to bear its own costs, or to pay the costs of any other party, there should be an order that the costs and expenses of the Secondnamed Plaintiff of and incident to the proceeding be paid out of the assets held by the Secondnamed Plaintiff. See *Practice Note* [1954] supra; Re National Safety Council of Australia Victorian Division (In liq) (No. 2) supra.

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HUNT & HUNT
Solicitors for the Secondnamed Plaintiff

SCHEDULE OF PARTIES

ANSETT AUSTRALIA GROUND STAFF SUPERANNUATION PLAN PTY LTD ACN
065 590 178 (as trustee of the Ansett Australia Ground Staff Superannuation Plan)

Firstnamed Plaintiff

ANSETT AUSTRALIA PILOTS/MANAGEMENT SUPERANNUATION PLAN PTY LTD
ACN 065 590 178 (as trustee of the Ansett Australia Pilots/Management
Superannuation Plan)

Secondnamed Plaintiff

- and -

ANSETT AUSTRALIA LIMITED (subject to a deed of company arrangement) (ACN
004 209 410)

Firstnamed Defendant

MARK FRANCIS XAVIER MENTHA AND MARK ANTHONY KORDA

Secondnamed Defendants

RUSSELL THOMAS BOOTH

Thirdnamed Defendant

WAYNE STEVEN CLARKE

Fourthnamed Defendant

25 January 2002

By facsimile: 9222 4222

Deacons
Lawyers
DX 445
MELBOURNE

Your ref Peter Cash
Our ref PC/SLI
File no 01-1208689
Doc no 125640
Direct fax: 9229 9712

Dear Sirs

Ansett Australia Limited (Administrators Appointed) and the Trustees of the Ansett Australia Superannuation Plans

We refer to the Supreme Court proceeding issued by your clients.

The relief sought at paragraphs 1 to 6 and 12 to 14 inclusive of the originating process in that proceeding can be dealt with by the Federal Court. The relief sought is clearly within the Federal Court's jurisdiction. The relief is sought in respect of a company under administration, in respect of the conduct of that company or its administrators and the relief sought may impact upon the interests of the company and of its unsecured creditors.

It is not clear to us what is sought by paragraphs 8 to 11 of the relief. We would be obliged if you would inform us as to the power, jurisdiction or basis on which the trustees rely in relation to the relief sought by these paragraphs. Would you please inform us of the circumstances in which it is thought that the Court would make the declarations sought.

It appears to us that paragraph 7 repeats the same issues or seeks the same relief as are raised or sought by paragraphs 1 to 6. We would be obliged if you would inform us of what other matters or issues are separately raised by paragraph 7.

If you believe that paragraph 7 does raise other issues or relief, would you please inform us why those issues or relief do not fall within the Federal Court's jurisdiction.

We would be obliged for your response to this letter as a matter of urgency. As you are aware, the Federal Court proceeding returns before Justice Goldberg on 1 February 2002. It is essential that we have your answer in sufficient time to allow these issues to be raised then.

Yours faithfully
ARNOLD BLOCH LEIBLER

Paul Chiappi