

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

No. 2115 of 2001  
F.5382

BETWEEN:

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

Plaintiffs

and

ANSETT AUSTRALIA LIMITED (ACN 004 209 410) (Subject to a Deed of  
Company Arrangement) & OTHERS

Defendants

OUTLINE OF SUBMISSIONS AS TO COSTS  
OF THE THIRDNAMED DEFENDANT

Introduction

1. These proceedings essentially related to questions arising from the administration of three funds:-
  - (a) the Ansett Australia Ground Staff Superannuation Plan ("the Ground Staff Plan");
  - (b) Ansett Australia Pilots/Management Superannuation Plan ("the Pilots/Management Plan"); and
  - (c) the funds available to creditors arising from the administration of the First and Secondnamed Defendants.

The claim made by the former Thirdnamed Plaintiff in respect of the Flight Engineers' plan was discontinued prior to trial and the references made herein to "the Plaintiffs" are confined to the First and Secondnamed Plaintiffs.

2. In summary, the Originating Motion as finally amended raised three distinct questions:-
  - (a) were the members of the Ground Staff Plan and the Pilots/Management Plan who had been retrenched since the appointment of the Administrators to the Firstnamed Defendant entitled to retrenchment benefits pursuant to their respective superannuation plans ("the first question");

- (b) was the Firstnamed Defendant liable to make further contributions to the Ground Staff Plan and the Pilots/Management Plan pursuant to the applicable Funding and Solvency Certificates ("FSC") issued on behalf of the respective plans ("the second question"); and
- (c) what if any priority applied under Section 556 of the *Corporations Act 2001* to any obligation to make further contributions to the Ground Staff Plan and the Pilots/Management Plan ("the third question").

The proceedings raised complex and important questions of construction of the trust deeds of the Plaintiffs and complex and important questions of the law of priorities under Section 556 of the *Corporations Act 2001* in respect of an insolvent employer's obligation to contribute to superannuation plans.

Whilst the proceedings were hard fought on each of the three questions, the Thirdnamed Defendant submits that the question of costs should not necessarily be determined purely on the basis of outcome as in more typical adversarial litigation, but should have close regard to the directory nature of the proceedings and the issues involved.

3. The hearing of the proceeding took place over a period of more than 20 sitting days. Whilst there were no pleadings, each of the parties filed and served detailed outlines of arguments and the Plaintiffs filed and served detailed statements of facts and contentions and supplementary statements of facts and contentions. It is a notoriously difficult exercise to attempt to discretely apportion what part of a trial and the preparation of the documentation relating to a trial related to the specific issues raised therein. Whilst such an assessment is essentially a matter for judicially applied impression, it is submitted that a fair assessment in the present matter, after allowing for introductory matters, is that approximately 50% of the trial and the relevant preparatory work related to the third question.

**Form of order in favour of the Third and Fourthnamed Defendants**

4. It is submitted that the appropriate order is that the Plaintiffs pay out of their respective funds the costs of the Third and Fourthnamed Defendants, in their capacity as representative parties, on a solicitor-client basis. Whilst the solicitor-client basis for payment of costs appears to be the implicit

assumption made in the Plaintiffs' outline of submissions, the order as made should be explicit in this respect.

#### Form of costs orders against the Plaintiffs

5. Although the Secondnamed Plaintiff did not press for answers to the specific questions relating to the Pilots/Management Plan, it is submitted that the Court's answers to the questions specifically applicable to the Ground Staff Plan also benefited the Pilots/Management Plan by informing it of the correct approach to construing the Pilots/Management Plan trust deed and the Section 556 priorities issue. It was common ground that the terms of the two trust deeds insofar as they were relevant to the first and second questions were effectively identical [eg. CB2.208]. Senior Counsel for the Plaintiffs explained in opening on 16<sup>th</sup> July, 2002 that:-

*"This proceeding originally commenced with three plaintiffs. One was the Ground Staff Superannuation Plan Pty Ltd, one is the Pilots Management Superannuation Plan and one was Flight Engineers, so three quite separate plaintiffs, each a trustee of three quite separate superannuation plans.*

*Early on the third plaintiff filed a notice of discontinuance so it has gone. Subsequently it has been thought – I hope I express this on behalf of all the parties – that there is no need at present to proceed with the application on behalf of the second plaintiff, the Pilots Management Trustee and the Pilots Management Plan. So what we are proposing to proceed to do, Your Honour, is simply to go ahead on behalf of the first plaintiff, in other words the Ground Staff Superannuation Plan Pty Ltd.*

*Rulings that the court makes on its application will not be binding on anybody not a party to the order but it should go a great deal of the way to informing the parties as to what the situation will be. So we are just going ahead now, Your Honour, with ground staff, flight engineers is out, it's discontinued. The pilots management we are not*

*proceeding with but it's still there but we are only going to go ahead with ground staff."*

[transcript pp.8-9 lines 15ff]

Accordingly, it is submitted that the Secondnamed Plaintiff as trustee for the Pilots/Management Plan in a very real sense has received the benefit of the Court's advice by being "informed as to the situation" relevant to it.

6. It is submitted that it would be an unfair burden upon the beneficiaries of the Ground Staff Plan if their fund was to be the sole source from which costs are ordered to be paid. The substantive fact is that both funds have benefited from the answers provided by the Court where the Trustee of the Pilots/Management Plan did not discontinue the proceedings insofar as they were brought by it. Given the foregoing, it is unnecessary for the Court to have regard to considerations such as the respective sizes of the two funds in terms of resources or members, even if such a comparative analysis could be usefully attempted. Accordingly, in the circumstances it is appropriate that the Plaintiffs bear any costs orders made against them equally.

#### **Orders in respect of the Plaintiffs' costs**

7. Consistently with the above, these costs should be paid in equal proportions out of the funds respectively administered by each of the Plaintiffs.

#### **Orders in respect of the First and Secondnamed Defendants' costs**

8. The third question was essentially one relating to the administration of the Firstnamed Defendant and the priority in which funds recovered or realised by the Administrators were to be applied in favour of creditors. The third question was not one which arose from the wording of the trust deeds, the complex Superannuation regulations and legislation or the minutiae of the administration of the two plans even if the significance to the two plans of the answer to the third question was considerable. It is submitted that the third question arose principally, if not solely, from the insolvent administration of the Employer and the complex issue of the priority in which competing classes of creditors, the employees generally or the Plaintiffs, should be paid from the assets available in the Administration of the Employer (see for example

how the potentially wide impact of this question was explained by Senior Counsel for the Administrators at transcript 16<sup>th</sup> July, 2002 pp23-24 lines 25ff). It was common ground that after the First and Secondnamed Defendants make payment of those claims accorded priority, nothing would be left for other creditors.

9. Indeed after the issue of the originating motion herein the Deed of Company Arrangement of the Firstnamed Defendant ("the DoCA") [CB8.228] was entered into which purported to downgrade the priority of the claims by the Plaintiffs. Proceedings are pending in the Federal Court as to whether the DoCA should be set aside on grounds, inter alia, of such downgrading of priority.
10. The First and Secondnamed Defendants did not resist the determination of the third question in these proceedings, notwithstanding the fact that directions as to the administration had been sought more generally in the Federal Court. Accordingly the exercise of the Court's discretion as to the costs of the third question should be made in much the same way as on an application for directions by an administrator or liquidator of an insolvent corporation.
11. The Thirdnamed Defendant respectfully urges that the same principles should be applied in this respect as in *Ansett Australia Ltd v Ansett Australia Ground Staff Superannuation Plan Pty Ltd (2002) 41 ACSR 598*. At paragraphs 23 to 25 thereof it was held that where the issue requiring directions for an insolvent corporation is a complex one or one involving a novel proposition in law, costs will usually be paid by the administrator and counted as costs of the administration. Where the matter requiring directions, however, is not complex and the position taken by the administrator is ultimately vindicated, costs should follow the event. See also *Farrow Finance Co Ltd (in liq) v ANZ Executives and Trustee Co Ltd (1997) 23 ACSR 521*. It is submitted that the foregoing principles apply where the substantive issue in question is one which arises from the corporate insolvency regardless of the formal nature of the litigation and whether or not the administrator or liquidator in question be plaintiff or defendant.

12. It is submitted that it is beyond debate that these proceedings were complex and involved novel propositions of law as to the third question. The proceedings raised issues of considerable public importance and concern and which were potentially of wide application to not only defined benefit superannuation plans but as to the priority of outstanding superannuation contributions under Section 556 more generally. For example, the First and Secondnamed Defendants invited the Court to apply the so-called *Lundy Granite principle* to the issue of such outstanding payments and much time in running and in final address focused on this issue.
13. It is submitted that if the Court has regard to the composite nature of the proceedings, which in part dealt with the trust issues (ie. the first and possibly also the second questions) and in part the issues arising from the insolvent administration of the First and Secondnamed Defendants (ie. the third question), the alternatives as to appropriate orders costs orders are:-
  - (a) that the Plaintiffs pay the First and Secondnamed Defendants' costs of the first and second questions and the First and Secondnamed Defendants pay the costs of the Plaintiffs and the Third and Fourthnamed Defendants of the third question (ie. costs of approximately 50% of the total proceeding); or
  - (b) that there be no order for costs either in favour of or against the First and Secondnamed Defendants (ie. the First and Secondnamed Defendants bear costs of approximately one third of the total proceeding).
14. It is submitted that the most fair and just order is that there be no order made at all in respect of the costs of the First and Secondnamed Defendants.
15. It is respectfully submitted that it would be conceptually wrong to approach the analysis of the costs issues arising from the determination of the third question on the premise that costs follow the event merely because the First and Secondnamed Defendants procured an answer to the third question more favourable to the other creditors or that the proceeding was inter partes

adversarial litigation. Such premises would be fallacious and do not reflect or do justice to the true directory nature of these proceedings.)

### Summary

16. Accordingly, the Thirdnamed Defendant submits that costs orders be made as follows:-
  1. The Plaintiffs pay the costs of the Third and Fourthnamed Defendants of and incidental to the proceedings, such costs to be paid on a solicitor-client basis.
  2. The costs and expenses of the Plaintiffs of and incidental to the proceedings, including the costs under Order 1, be paid out of the assets held by the Plaintiffs as trustees in equal proportions.
  3. There be no order as to the costs of the First and Secondnamed Defendants.

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Senior Counsel  
for the Thirdnamed Defendant  
27<sup>th</sup> March, 2003

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Junior Counsel  
for the Thirdnamed Defendant