

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

No. 2115 of 2001  
F 5382

**B E T W E E N:**

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

and

**ANSETT AUSTRALIA LIMITED** (Administrators appointed)  
(ACN 004 209 410) & **ORS**

**FURTHER SUBMISSION ON BEHALF OF THE  
FIRST AND SECOND DEFENDANTS IN RELATION TO COSTS**

**1. Previous submissions**

The following submissions have been received in relation to costs:

- 1.1 The plaintiff's submission is dated 13 March 2003. The plaintiff conceded that the first and second defendants were successful in the proceeding "overall" but argued for a reduction in the costs order on the basis that the submissions of the first and second defendants had not been accepted on the first issue ("Retrenchment") and the second issue ("Obligation").

1.2 The first and second defendants' submission dated 25 March 2003 addressed the plaintiff's submission. That submission explained in detail how the first and second defendants came to take the position which they did on the first two issues (Retrenchment and Obligation) and how they were in the position of proper contradictor on those issues. Accordingly it was submitted that the first and second defendants' costs of those issues ought to be paid by the plaintiff, in addition to the costs of the third issue ("Priority").

1.3 The outline of submissions as to costs of the third defendant dated 27 March 2003 adopted a different approach. It was submitted that the plaintiff ought to pay the costs of the "trust" issues of all parties, being the Retrenchment and Obligation issues and that the first and second defendants should pay the costs of the "administration" issue, being the Priority issue. It was submitted that the most fair and just order to reflect this approach ought to be that there be no order as to the costs of the first and second defendants.

1.4 By a submission dated 16 April 2003 the fourth defendant adopted a similar approach to that of the third defendant ( save in relation to the issue of whether any part of the costs should be borne by the Pilot Management Fund).

2. **Letter dated 28 May 2003 from the Court**

2.1 By a letter dated 28 May 2003 the Associate to The Honourable Justice Warren has advised the parties of Her Honour's intention to list the matter for mention on 25 June for the purpose of determining whether any further submissions are required. The solicitors for the third defendant have written to the parties suggesting that neither further submissions nor a directions hearing is required.

2.2 The first and second defendants wish to make this short further submission in response to the submissions of the third and fourth defendants.

3. **Further submission**

3.1 **The first issue ("Retrenchment") and the second issue ("Obligation")**

It now seems to be the position of the parties other than the plaintiff that the plaintiff ought to pay the costs of all defendants on the first two issues.

### 3.2 The third issue ("Priority")

3.2.1 The third and fourth defendants contend that the first and second defendants ought to pay the costs of the other parties on the Priority issue on the basis that the question of priority under s. 556 was a question arising in the insolvent administration. They submit that the answers provided have given "direction to the administrators as to the proper disposition of Ansett's assets under the s. 556 regime" (fourth defendant's submission para. 4) and that the answer was obtained "for the benefit of all creditors of Ansett" (fourth defendant's submission para. 5).

3.2.2 The first and second defendants submit that the submission made in this regard by the third and fourth defendants is misconceived. As is recognised in each of their submissions (third defendant's submission para. 9 and fourth defendant's submission para. 5), priority in this particular administration is in fact regulated by a deed of company arrangement, not by s. 556. Ansett is not in liquidation. Section 556 does not apply to it. The reason the issue was relevant is because the trustee has sought to vary or terminate the deed of company

arrangement in a Federal Court proceeding. The trustee perceives it to be an essential foundation of that claim that it establishes that in a liquidation it would have priority. That is why it pursued in this proceeding the question as to whether the obligations in question were of the character falling within s. 556 (see attached Submissions of Firstnamed Plaintiff dated 2 July 2002, with passages highlighted). This is not relevantly a matter of "benefit" to all creditors of Ansett. The creditors of Ansett voted for the deed of company arrangement. The only reason the issue as to s. 556 is being pursued is as a precursor to the trustee's application to terminate or vary the deed of company arrangement in the Federal Court. The administrators have not sought a direction on this issue (as it is covered by the deed) and did not request or encourage the trustee to do so.

3.2.3 If it were not for the trustee's claim to vary or terminate the deed of company arrangement, there would be no reason for any order or guidance about s. 556. As matters stand, the issue is governed by the deed of company arrangement and no direction or order would be required concerning s. 556 from the administrators' point of view. If the trustee in due

course fails in its application to vary or terminate the deed it will have to pay the costs of the administrators and Ansett on that application. The position ought to be no different in relation to the Priority issue in this proceeding.

4. **Further disposition of the matter**

The first and second defendants do not consider it to be necessary to further develop their submissions as to costs beyond what is contained in their submission of 13 March 2003 and in this further written submission. They are of course ready and willing to do so if the other parties wish to address this matter further or if it will be of assistance to the court.

**Simon Whelan**

**Bernadette McMahon**

11 June 2003