

**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)**

Plaintiffs

and

**ANSETT AUSTRALIA LIMITED (Administrators Appointed) (ACN
004 209 410) and Others according to the Schedule attached**

Defendants

**SUBMISSIONS ON BEHALF OF THE PLAINTIFF
IN RELATION TO COSTS**

Date of Document: 13 March 2003

Filed on behalf of the Plaintiffs

MINTER ELLISON
Lawyers
Rialto Towers
525 Collins Street
MELBOURNE VIC 3000

DX 204 MELBOURNE
Telephone (03) 8608 2000
Facsimile (03) 8608 1000
Reference Mr. R. Freeman

Summary of Contentions

1. On 7 February 2003, the Court (Warren J.) made orders implementing reasons for judgment published 20 December 2002 and revised on 7 February 2003.
2. Provision must now be made in relation to the costs of:

- (a) the Ground Staff Plaintiff (hereinafter "the Plaintiff");
- (b) the Third and Fourth Defendants;
- (c) Ansett and the Administrators (the Second and Third Defendants) (hereafter "the Administrators").

3. The Plaintiff:

- (a) will submit to an order to pay the costs and expenses of the Third and Fourth Defendants of and incident to the proceeding;
- (b) contends that it should not have to pay the costs of the Administrators;
- (c) alternatively, if it is ordered to pay costs of the Administrators, contends that it should be ordered to pay only a proportion of those costs;
- (d) contends that there should be an order that the costs and expenses of the Plaintiff of and incident to the proceeding be paid out of the assets held by the Plaintiff.

Costs of the Plaintiff

4. An order should be made that the costs and expenses of the Plaintiff of and incident to the proceeding be paid out of the assets held by the Plaintiff as trustee. See *Practice Note* [1954] VLR 208; **Re National Safety Council of Australia Victorian Division (In liq) (No. 2)** [1992] 1 VR 485 at 503.

Costs of the Third and Fourth Defendants

5. An order should be made that the Plaintiff pay the costs and expenses of the Third and Fourth Defendants of and incident to the proceeding.

The Administrators' costs

6. Overall, the Administrators for Ansett were successful in the proceeding. The general rule is that costs follow the event.
7. However, the Plaintiff submits that there are certain circumstances in the present case which make it just that the general rule be varied.
8. Particularly, the Plaintiff submits that:
 - (a) each side should bear its own costs; or
 - (b) alternatively, the Plaintiff should pay only a proportion (half, it is suggested) of the taxed costs of the Administrator.
9. Ultimately, the originating process comprised the Fourth Amended Originating Motion filed on 21 February 2003 in accordance with leave given on 20 February 2003 ("the Amended Motion").
10. Despite the fact that there were several questions in the Amended Motion, in truth, there were three issues agitated before the Court:

- (a) whether members of the Fund whose employment had been terminated by the Administrators were entitled to a retrenchment benefit under Rule 1.13 of the Ground Staff Plan;
- (b) whether Ansett was under a legal obligation to pay to the Plaintiff such sums as were necessary to ensure that the Plaintiff would be able to meet its liabilities to its members; and
- (c) in the event that there was any such obligation, whether that obligation was a priority debt or claim under s.556(1) of the *Corporations Act* 2001 (Cth) ("the Act").

The First Issue: Rule 1.13

Federal Court Proceedings

- 11. As the Court will recall, the first question was originally the subject of proceedings brought before the Federal Court of Australia (Goldberg J.).
- 12. In proceeding no. V3075 of 2001, the Administrators (as applicants) sought directions including the following:

Directions pursuant to Section 447D of the Corporations Act and a declaration pursuant to Section 21 of the Federal Court Act as to whether the recent termination of the employment of employees is a "retrenchment" for the purposes of the respective trust deeds of the Ansett Australia Staff Superannuation Plans.

That application may be described as a friendly application. In other words, it was an application in which both the Administrators and the Trustee in effect jointly approached the Court for resolution to a question which was to affect their mutual and respective interests.

13. The origin of the "joint" application can be seen in various documents in the Court Book in the present proceeding.
14. On 17 October 2001, the solicitors for the Plaintiff (Deacons) wrote to the solicitors for the Administrators (Andersen Legal) requesting confirmation that terminations of employees will constitute a "retrenchment" being a reduction of staff declared by the employer for the purposes of the Rules of the relevant Superannuation Plan". See **CB 8.48-49**.
15. On 5 November 2001, a further letter was sent to the same effect. See **CB 8.66**. On 12 November 2001, Andersen Legal (Mr. Emmett) wrote to Deacons as follows:

With regard to the current redundancy program, the present intention of the Administrators is to notify your clients in a manner consistent with the way in which notification has been made by Ansett in the past. We appreciate that it may be in issue as to whether that notification constitutes retrenchment as you mentioned. In light of your contention and your request for judicial determination, we agree that an expeditious judicial determination of this issue would seem appropriate. We shall discuss further strategy for seeking such a determination."

16. On 27 November 2001, Paul Francis Chiappi swore an affidavit in support of that application. In that affidavit, he deposed, amongst other things:

I am informed by Mr. Emmett and believe that the trustees of the Plans have raised with the plaintiffs the following issues. The Plans, through their definition of Retrenchment, require there to have been a reduction of staff declared by the employer for the purpose of the Rules (being the Rules of the respective Plans). The plaintiffs have not made a declaration in formal terms. The Trustees of the Plans have agreed with the plaintiffs that the issue of whether the redundancies are properly to be regarded as Retrenchment in terms of the respective trustees for the various Plans is an issue that should be put before this Honourable Court for directions and declarations.

See **CB 12.37**

17. On 29 November 2001, a directions hearing in the matter was brought on before Goldberg J. The transcript of that directions hearing is at **CB 12.38-12.59**. It is fair to say that, at that directions hearing, the complexity of the arguments had yet to be revealed. However, in substance, counsel for the Administrators contended that members were not entitled to a retrenchment benefit (see **CB 12.39-12.40**) and counsel for the Trustees (the Plaintiff here) contended that they were (see **CB 12.42-12.43**).
18. In December 2001, the Plaintiff commenced the present proceeding. The first question in the Amended Motion was, in substance, the same question which had been raised in the Federal Court application. However, the plaintiff required answers to further questions which were not included in the Federal Court proceedings.

19. In the present proceeding, the position of the Plaintiff on the first issue was not that of a protagonist. Rather, the principal protagonists in relation to it were the Administrators and the Third and Fourth Defendants.
20. During the trial, the Administrators contended that members whose service had been terminated by them were not entitled to a benefit under Rule 1.13. In the event, the Court held that members were entitled to a retrenchment benefit.
21. Given that:
 - (a) the issue of entitlement to a retrenchment benefit was originally the subject of a friendly approach to the Federal Court;
 - (b) the same issue subsequently came before this Court for determination;
 - (c) the issue was highly significant;
 - (d) the Administrators contended that members were not entitled to such a benefit;
 - (e) many witnesses were called and cross-examined in relation to this issue. They were as follows:
 - (i) Graeme Clifford Allison;
 - (ii) John Ian Cann;
 - (iii) Kelvin Thomas Cosgriff;
 - (iv) Peter John Salerno Alerno;
 - (v) Iain Bruce Lang;
 - (vi) Nigel Antony Fish.

(f) the Court ruled that members were entitled to such a benefit

the Plaintiff now contends that the discretion in relation to costs should be exercised in such a way that either:

(a) the Administrators should pay the costs of the Trustee on this issue; or

(b) each party should bear its own costs in relation to the issue.

22. If the application had proceeded before the Federal Court, it is more than likely that, given the way it has been resolved, the Administrators would have been required to pay the costs and that the costs would have come out of the administration.

23. If the Court is disposed to accept the second suggestion, it would be appropriate, to make an order that the Plaintiff pay a specified percentage of the Defendant's costs including any reserved costs. The difference between 100% and the specified percentage will reflect the substance of the second suggestion.

Second Issue: liability of Ansett to the Trustee

24. The second issue in the case was whether Ansett was under an obligation to pay to the Trustee Plaintiff such amounts as were necessary to ensure that the Plaintiff was in a position to meet its liabilities to members, under FSC4 and FSC5 or the contract of employment.

25. The Plaintiff contended that Ansett was under such a liability; the Administrators contended that it was not.
26. In the event, the Court held that Ansett was under such a liability. It held that the liability arose both under the Trust Deed and the contract of employment.
27. The issue of the liability of Ansett took up a significant part of the case.

Validity of FSC

28. Part of the issue of liability involved an attack by the administrators on the validity of FSC4 and FSC5.
29. The Court will recall the evidence given by Mr. Francis, the actuary of the Ground Staff Plan. He was cross-examined extensively. The evidence of Richard Mitchell was admitted without cross-examination.
30. Part of the evidence of Mr. Emmett and of other witnesses called on behalf of the administrators went to the issue the validity of FSC4 and FSC5.
31. Further, the Administrators made a sustained attack upon the validity of FSC4 and FSC5 in their submissions.

Contract of employment

32. Further, evidence was tendered by the Plaintiff in relation to the contract of employment between Ansett and its employees. That evidence was comprised in documentation and brochures ("Clouds" and "Rainbows") which were provided to employees. In particular, that evidence was drawn from the Member Booklets which are described in Part IV of the Reasons for Decision.

Submission

33. Accordingly, the Plaintiff contends that the circumstance that the Plaintiff was successful in relation to the liability of Ansett to make further contributions to the Plaintiff (on all of the grounds that were argued) should be taken into account when the discretion in relation to costs is exercised. In particular, the Plaintiff contends that either:

- (a) the Administrators should pay the Plaintiffs' costs in relation to that issue; or
- (b) any order that the Plaintiff pay the costs of the Administrators should be reduced by reason of the circumstance that the Administrators were unsuccessful in relation to this major issue.

34. Success on this second major issue should result in a further reduction expressed in percentage terms of any costs of the Defendant which the Plaintiff must pay.

Other Evidence

35. Other evidence was adduced during the proceeding. There were no pleadings. Issues tended to arise slightly unsystematically. The affidavits filed on behalf of the Administrators showed that the Administrators were proposing to defeat any possible application of the *Lundy Granite* principle in favour of the Plaintiff by contending that any preservation of the Ground Staff Plan was for the *mutual benefit* of both the Plaintiff and the Administrators. Accordingly, the Plaintiff adduced further evidence relating to the transactions between the Plaintiff and the Administrators after 12 September 2001. For example, the evidence of Mark Daniel Abramovich. That evidence was met by further evidence filed on behalf of the Administrators: Mr. Emmett, Carmel Lyndsay Flynn, Michael Thomas Robert Binetter, Andrew Proebstl, Dennis James Thorn and Paul Francis Chiappi.

Third Issue: priority

36. The Administrators succeeded on the third issue in relation to FSC4/FSC5 and Membership Group 3.

Law

37. Section 24 of the *Supreme Court Act* 1986 confers the discretion upon the Court in relation to costs.
38. The general rule is that costs follow the event: **Ritter v. Godfrey** [1920] 2 KB 47 at 52.
39. However, there are several authorities which indicate that the discretion is such that, in certain circumstances, the general rule may be departed from. In particular, there are several cases in which the courts have held that the costs of a successful party may be reduced or, even that the costs of an unsuccessful party may be ordered to be paid. See Williams, *Supreme Court Practice* Volume 1 [63.040.0].
40. It is not suggested that the conduct of the Administrators was unreasonable or that it caused the litigation to be protracted.
41. In **Coogi Australia Pty. Ltd. v. Hysport International Pty. Ltd.** [1988] 1331 FCA Drummond J. set out the basic principles:

The broad guidelines in accordance with which the discretion to deprive a successful party of the whole or part of its costs is to be exercised are stated in *Hughes v Western Australian Cricket Association (Inc)* (1986) ATPR 40-748 at 48,136, a passage approved by the Full Court in *Queensland Wire Industries Pty Ltd v BHP Co Ltd* (1987) 17 FCR 211 at 222. It is sometimes said that the proper application of these guidelines requires unreasonable conduct in connection with the case on the part of the successful respondent. But there are cases, including *Inn Leisure Industries Pty Ltd v DF McCloy Pty Ltd (No 2)* (1991) 28 FCR 172 at 174 and *Commissioner of the*

Australian Federal Police v Razzi (No 2) (1991) 30 FCR 64 at 67 - 68, in which the ordinary rule has been departed from and the successful party has been deprived of part of its costs where nothing more has occurred than the failure of that otherwise successful party on a discrete issue whose litigation occupied a significant part of the hearing. In *Razzi*, in particular, Wilcox J took what seems to me a different approach from that of Jacob J in his "note of cautious disapproval" in *Cretazzo v Lombardi* (1975) 13 SASR 4 at 16. It is an approach which I think is in accordance with the authorities. The discretion to deprive a successful party, including a successful respondent, of all or part of its costs is unfettered, but must be exercised judicially, ie, for some reason connected with the case: see *Cretazzo* at p 11 and *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129 at 153 - 154. The true nature of the discretion is shown by the abandonment of the once inflexible rule that a successful defendant would never be ordered to pay any of the costs of an unsuccessful plaintiff: see *Verna Trading* at 151 - 152.

42. In **Hughes v. Western Australia Cricket Association Inc**

(1986) ATPR 40-748 Toohey J. said (at 48,136) stated the

relevant principles as follows:

1. Ordinarily, costs follow the event and a successful litigant receives his costs in the absence of special circumstances justifying some other order. *Ritter v. Godfrey* (1920) 2 KB 47.
2. Where a litigant has succeeded only upon a portion of his claim, the circumstances may make it reasonable that he bear the expense of litigating that portion upon which he has failed. *Forster v. Farquhar* (1893) 1 QB 564.
3. A successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party's costs of them. In this sense, "issue" does not mean a precise issue in the technical pleading sense but any disputed question of fact or of law. *Cretazzo v. Lombardi* (1975) 13 SASR 4 at p. 12.

In that case, the Court ordered that the unsuccessful party pay

75% of the successful party's costs.

43. Toohey J. referred to **Cretazzo v. Lambardi** (1975) 13 SASR 4 where Jacobs J. said (at 12):

But trials occur daily in which the party, who in the end is wholly or substantially successful, nevertheless fails along the way on particular issues of fact or law. The ultimate ends of justice may not be served if a party is dissuaded by the risk of costs from canvassing all issues, however doubtful, which might be material to the decision of the case. There are, of course, many factors affecting the exercise of the discretion as to costs in each case, including in particular, the severability of the issues, and no two cases are alike. I wish merely to lend no encouragement to any suggestion that a party against whom the judgment goes ought nevertheless to anticipate a favourable exercise of the judicial discretion as to costs in respect of issues upon which he may have succeeded, based merely on his success in those particular issues.

44. See **Victoria v. Master Builders Association of Victoria** (unreported, 15 December 1994) (per Tadgell and Eames JJ.). However, see the remarks of Ormiston JA in that case where it is suggested that, in present circumstances, the caution of Jacobs J. may have less weight. See Williams *Supreme Court Practice* at [63.04.0]; **Toomey v. Scolaro's Concrete Constructions Pty. Ltd.** [2001] VSC 477.

45. In this jurisdiction, see RSC O.63.04. However, instead of making orders in relation to particular issues, the Plaintiff contends that the difficulties in that order should be obviated by making a global order. See Williams, *Supreme Court Practice* at [63.04.5].

46. In **NRMA Ltd. v. Morgan**[1999] NSWSC 768, the Supreme Court of New South Wales (Giles J.) said at [24]-[25]:

Principles according to which some other order may be made are fairly well established. If a party fails on some issues, the circumstances may make it reasonable that he be deprived of the costs of those issues, or even be ordered to pay the other party's costs of those issues. For this purpose, issues may be issues in a pleading sense of bases of claim, or may be disputed questions of fact or law. But it must be remembered that parties should not be dissuaded by the risk of costs from canvassing all issues which might be material to the decision in the case, and unless a particular issue or group of issues is clearly dominant or separable from the balance of the proceedings it will ordinarily be appropriate to award the costs of the proceedings to the successful party without attempting to differentiate between the issues on which he was successful and those on which he failed. It is sufficient to refer to *Cretazzo v Lombardi* (1975) 13 SASR 4 at 12; *Hughes v Western Australian Cricket Association* (1986) ATPR 40-748 at 48,136; *Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd* (1993) 26 IPR 261 at 271-2; and *Waters v P C Henderson (Australia) Pty Ltd* (NSWCA, 6 July 1997, unreported).

If an order reflecting success or failure on issues is made, it is appropriate to have regard to the time referable to the issues, although necessarily without mathematical precision (*Lenning v Alexander Proudfood Company World Headquarters* (NSWCA, 22 April 1991, unreported)). It is not necessary that the issue or issues on which the party failed was or were raised by him unreasonably (*Rosniak v Government Insurance Office* (1997) 41 NSWLR 608 at 615).

47. The order made by Toohey J. in **Hughes** was to the following effect:

An order that the (unsuccessful party) pay 75% of the (successful party's) costs including all costs reserved.

Submission

48. In all the circumstances, it is respectfully submitted that either:
- (a) each party should bear its own costs; or
 - (b) the costs otherwise payable by the Plaintiff to the Administrators should be reduced.

49. In order to implement the first submission, the following orders are suggested:
- (a) each of the Firstnamed Plaintiff and the Firstnamed and Secondnamed Defendants shall bear its own costs;
 - (b) the Firstnamed Plaintiff shall pay the costs and expenses of the Third and Fourth Defendants of and incident to the proceeding;
 - (c) the costs and expenses of the Firstnamed Plaintiff of and incident to the proceeding be paid out of the assets held by the Plaintiff as trustee.
50. In order to implement the second submission, the following orders are suggested:
- (a) the Firstnamed Plaintiff pay X% of the Firstnamed Defendant and the Secondnamed Defendants' costs including all costs reserved;
 - (b) the Firstnamed Plaintiff shall pay the costs and expenses of the Third and Fourth Defendants of and incident to the proceeding;
 - (c) the costs and expenses of the Firstnamed Plaintiff of and incident to the proceeding be paid out of the assets held by the Plaintiff as trustee.

13 March 2003

Minter Ellison

Minter Ellison