SUPREME COURT OF QUEENSLAND

CITATION:	*Cadman v Aborigines And Islanders Alcohol Relief Service Ltd* [2018] QSC 72
PARTIES:	**JUSTIN JAMES CADMAN** (*Applicant*) **v** **ABORIGINES AND ISLANDERS ALCOHOL RELIEF SERVICE LTD (IN LIQUIDATION)** (*Respondent*)
FILE NO/S:	90 of 2018
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX TEMPORE ON:	16 March 2018
DELIVERED AT:	Cairns
HEARING DATE:	16 March 2018
JUDGE:	Henry J

ORDER:

1. **For the purpose of distributing a surplus in accordance with paragraph 2, the liquidator is granted special leave under section 488(2) of the *Corporations Act*.**
2. **The applicant, Justin James Cadman, would be justified in applying surplus funds in the winding up of Aborigines and Islanders Alcohol Relief Service Ltd (In Liquidation) as follows:**
   - **(a) 50% of the surplus to Gindaja Treatment and Healing Centre (ABN 63 659 548 014; and**
   - **(b) the balance to be distributed on a pro-rata and equal basis to each of:**
     - **(i) Yarrabah Aboriginal Corporation for Women (ABN 24 891 650 266);**
     - **(ii) Warringu Aboriginal and Torres Strait Islander Corporation (ABN 34 734 844 295 0; and**

(iii) Mookai Rosie Bi-Bayan (Aboriginal and Torres Strait Islanders Corporation) (ABN 72 617 505 047)

3. **The requirements of regulation 5.6.71 *Corporations Regulations* be dispensed with.**

4. **The applicant's non-compliance with rules 7.9(1), 9.4(2) and 9.4(3) *Corporations Proceedings Rules* be excused.**

5. **The liquidator's remuneration (excluding outlays) for the period 2 June 2015 to 31 January 2018 be determined in the sum of $121,520.52 (including GST).**

6. **The liquidator's remuneration (excluding outlays) for the period 1 February 2018 to finalisation of the liquidation be approved in a sum not exceeding $66,000.00 (including GST).**

CATCHWORDS: CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP –

Corporations Act s 90-15(1), s 488(2)
Corporations Proceedings Rules r 2.11, r 7.9, r 7.9(1), r 9.4(2), r 9.4(3)
Corporations Regulations 2001, reg 5.6.71
Insolvency Practice Rules (Corporations) 2016 s 75-105(2)

Application of Gregory Jay Parker (Liquidator of Shellharbour Golf Club Ltd) (In liq) [2006] NSWSC 219, cited
Barbo Group Pty Ltd v Investment and Construction Enterprise Pty Ltd [2012] VSC 71, cited
Deputy Commissioner of Taxation v Starpicket Pty Ltd (No 2) [2013] FCA 699, applied
In the matter of Blacktown City Rugby League & Sports Club Ltd (In liq) [2006] NSWSC 618, cited
Re Cardiff Coal Company (2014) ACSR 135, cited
Traditional Values Management Limited (in liq) (No 2) [2015] VSC 126, applied

COUNSEL:

SOLICITORS: Miller Harris Lawyers

[1] **HENRY J:** The applicant liquidator, a victim of his own success, has encountered difficulties with the appropriate means of distributing a surplus and problems arising in

connection with that process. He seeks orders from the Court involving the granting of special leave to distribute a surplus pursuant to s 488(2) Corporations Act 2001.

[2] Other orders sought include an order, which is in effect a declaration, that he would be justified in applying surplus funds in the winding up of the relevant company by applying 50 per cent of the surplus to Gindaja Treatment and Healing Centre and the balance to be distributed on a pro rata and equal basis to Yarrabah Aboriginal Corporation for Women, Warringu Aboriginal and Torres Strait Islander Corporation and Mookai Rosie Bi-Bayan (Aboriginal and Torres Strait Islanders Corporation). Orders are also sought dispensing with the schedule annexure requirement of regulation 5.6.71 of the *Corporations Regulations* 2001 and excusing non-compliance with rules 7.9(1), 9.4(2) and 9.4(3) of the *Corporations Proceedings Rules*.

[3] In addition, orders are sought that the liquidator's remuneration, excluding outlays, for the period 2 June 2015 to 31 January 2018 be determined in the sum of $121,520.52, including GST, and that his remuneration (excluding outlays) for the period 1 February 2018 to finalisation of the liquidation be approved in a sum not exceeding $66,000 (including GST). The applicant had hitherto also sought orders authorising the destruction of books and records but, absent the consent of ASIC, that aspect of the application is not pressed.

[4] Firstly, on the issue of leave to distribute a surplus, s 488(2) *Corporations Act* provides a surplus may only be distributed with the Court's leave. Rules 7.9 and 2.11 *Corporations Proceedings Rules* make provision in respect of the materials in support of the application, including notice and advertising.

[5] The liquidator's affidavit material demonstrates compliance with the requirements of rule 7.9(1), save that the liquidator does not depose to the address of each proposed recipient. That, though, is uncontroversial. It ought be appreciated the proposed recipients offer drug rehabilitation services and refuge from domestic violence. The address of each proposed recipient should not be a matter of public record. This protects the safety and privacy of the people who use those services. The affidavit material demonstrates compliance with the requirements of rules 7.9(2), 7.9(3) and 2.11.

[6] The matters to be satisfied of in an application of this kind are that there is a surplus and that those who might have a legitimate claim on the surplus have been identified and notified – see for example *Re Cardiff Coal Company* (2014) ACSR 135, 145.

[7] The liquidator has deposed as to the existence and likely quantum of the surplus. He deposes all creditors' claims have been paid. The creditors have also been paid statutory interest in addition to their claims. The application has been advertised so that all creditors and contributories have had an opportunity to have their claims considered before any surplus funds are distributed. It ought be borne in mind the company has been in liquidation for a long time – since 25 October 2010 – so there has been more than enough opportunity for creditors to be identified or for them to identify themselves. The real issue is the question of to whom the distribution ought be made.

[8] The company's constitution contained a mechanism in respect of the distribution of surplus funds in a winding up. Rule 21.1 provided:

> "If, on the winding up or dissolution of the company, by any means and for any reason, there remains any property after the satisfaction of all the Company's debts and liabilities, the property shall not be paid to or distributed among the members, but shall be given or transferred to one or more institutions selected by the members at or before the dissolution of the Company, having objects similar to the Company and whose rules prohibit the distribution of its or their income and property amongst its or their members and which is eligible for tax deductibility and donations under division 50 of the Income Tax Assessment Act 1997 (Cth)." (Emphasis added)

[9] There was, of course, no such resolution in respect of the distribution of surplus finds here, for no surplus was contemplated.

[10] The liquidator's approach in the present circumstances, informed by cases such as *Application of Gregory Jay Parker (Liquidator of Shellharbour Golf Club Ltd) (In liq)* [2006] NSWSC 219 and *In the matter of Blacktown City Rugby League & Sports Club Ltd (In liq)* [2006] NSWSC 618, has sought out institutions of the kind the members

would likely have selected were they exercising the power they once had under rule 21.1.

[11] The liquidator has consulted with directors of the company and identified the bodies which might be considered as recipients of the surplus, they being the entities I earlier named. Proper enquiries have been undertaken to ensure that the proposed recipients meet the requirements set out in the company's constitution.

[12] There is no committee of creditors for the purpose of the winding up of the company. Only three members attended a meeting of members held on 23 February 2018. That number constitutes a quorum under s 75-105(2) *Insolvency Practice Rules (Corporations)* 2016, but not so under the company's constitution. The members have approved the four proposed recipients. The liquidator has some concerns regarding the accuracy of the company's membership records. Against that background, the liquidator seeks an order, effectively a declaration, that he would be justified in acting pursuant to the resolution of members. Such an order is sought pursuant to s 90-15(1) of schedule 2 to the *Corporations Act*, which provides:

> "The Court may make such orders as it thinks fit in relation to the external administration of the company."

The liquidator clearly has standing to bring such an application. Section 90-15(1) is similar to s 447A *Corporations Act*, one of the provisions which it replaced. It is uncontroversial the Court ought continue to act in accordance with the principles guiding the exercise of discretion under such a comparable provision. The members of the company resolved to pay the surplus to the proposed recipients. The directors propose the surplus be divided equally amongst the recipients, whereas the members favour Gindaja Treatment and Healing Centre on the basis that 50 per cent of the surplus be distributed to it, with the balance to be distributed on a pro rata and equal basis amongst the remaining recipients.

[13] The liquidator, by this application, seeks to give effect to the wishes of the members as best they can be ascertained in these unusual circumstances. It will be noted that each of the proposed recipients have objects similar to the objects of the company in

liquidation, have rules which prohibit the distribution of income and property amongst its members and are eligible for tax deductibility and donations under division 50 of the Income Tax Assessment Act 1997. In the circumstances, then, it is entirely appropriate to make orders to facilitate the payment of the surplus as proposed.

[14] Turning to some matters of ancillary relief, regulation 5.6.71(1) *Corporations Regulations* provides:

> "An order in a winding up by the Court authorising the liquidator to distribute any surplus to a person entitled to it must, unless the Court otherwise directs, have annexed to it a schedule in accordance with form 551."

[15] Form 551 is directed to the distribution of surplus funds amongst contributories. On perusal of it, it does not appear to be intended for use in matters involving the distribution of surplus funds to parties who are not members. In circumstances where the rule related to the form serves no present purpose, it is appropriate for the Court to dispense with the requirement that a schedule in form 551 be annexed to the order.

[16] This is also an appropriate case in which to dispense with the requirement of rule 7.9(1) *Corporations Proceedings Rules* that the address of recipients be identified. Ample reason has been given by the liquidator as to why the addresses ought not be publicised.

[17] Turning to the issue of remuneration, the application is made under s 473(3) *Corporations Act*. That provision was repealed by schedule 2 to the *Insolvency Law Reform Act* 2016 (Commonwealth) and replaced with s 60-10 of schedule 2 to the *Corporations Act*. However, s 473 continues to operate in a case like the present because of the effect of s 1581(1) *Corporations Act*, which specifically contemplates the old Act continues to apply in relation to the remuneration of an external administrator of a company appointed before the commencement date. In any event the provisions are of similar effect in the present context.

[18] Turning then to s 473(3), it provides:

> "A liquidator is entitled to receive such remuneration by way of percentage or otherwise, as is determined: …

(b) if there is no committee of inspection, or if the liquidator and the committee of inspection fail to agree:
(i) by resolution of the creditors; or
(ii) if no such resolution is passed – by the Court."

[19] Here, there is no committee of inspection involved in the winding up. There are no creditors remaining, so the liquidator's remuneration can hardly be approved by resolution of such persons. It falls, clearly enough, to the jurisdiction of the Court to determine remuneration.

[20] The materials deposed to by the liquidator include a statement of receipts and payments. In fixing remuneration, s 473(10) requires the Court to consider the actual work undertaken by the liquidator in the liquidation, including the complexity and difficulty of the task performed. Section 473(10) provides that in exercising its powers under subsection (3) the Court must inter alia have regard to whether the remuneration is reasonable; and if the remuneration is ascertained, in whole or in part, on a time basis, the time properly taken or likely to be properly taken; and whether the total remuneration payable is capped. It is uncontroversial the onus is on the liquidator to satisfy the Court that the work the subject of the claim for remuneration was properly performed and in the due course of the liquidator's work and that the amount claimed is fair and reasonable – see *Deputy Commissioner of Taxation v Starpicket Pty Ltd (No 2)* [2013] FCA 699, [22].

[21] It was suggested in *Barbo Group Pty Ltd v Investment and Construction Enterprise Pty Ltd* [2012] VSC 71, [16], that to discharge this onus "a liquidator or insolvency practitioner should provide a document not dissimilar in form to a bill of costs in taxable form". Here the liquidator has provided members with his remuneration report. He has produced work in progress reports which are akin to bills of costs.

[22] As was observed by Gardner ASJ in the matter of *Traditional Values Management Limited (in liq) (No 2)* [2015] VSC 126, [18], the Court's task is the summary procedure involving consideration of whether the liquidator has made out a prima facie case that the remuneration claimed is fair and reasonable, and there is no absolute rule regarding the amount of detail into which the Court must descend in considering the issue. As his Honour contemplated, the detail should, of course, be sufficient to enable potential

objectors to review the amounts claimed and ascertain whether there are matters to which objection ought be taken.

[23] The liquidator went to significant steps to notify members of his intention to make application for approval of remuneration and the quantum involved. This included him posting notice of a meeting to members on 9 February 2018, advertising notice of the meeting in the Cairns Post in 17 February 2018, broadcasting notice of the meeting on Bumma Bippera radio on 20 occasions between 19 and 22 February 2018, posting notice of the meeting on the insolvency notices webpage of ASIC on 9 February 2018 and 21 February 2018, including notice in accordance with form 16 and the report to creditors posted on 9 February 2018, and making particulars of the liquidator's work in progress reports available for inspection at the meeting of members held on 23 February 2018.

[24] No objection is raised by the members to the claimed remuneration. While not obliged to do so, the liquidator has given all material in relation to the remuneration application to ASIC, and there have been some exchanges of correspondence as between ASIC and the liquidator. The liquidator deposes that his responses to ASICs correspondence have been true. ASIC does not seek to be heard and neither consents to nor opposes the application. A perusal of the materials demonstrates that such concerns as have been raised by ASIC have been adequately addressed.

[25] It ought be appreciated the conduct of this administration has been protracted and complex, dealing with the principal assets of the companies involved, dealing with some unique legal and commercial issues, within an environment of great cultural sensitivity. The liquidator's experience in dealing with members demonstrated some members had difficulty in digesting lengthy or complex written material. Those dealings have been time consuming. It is not suggested nor does it appear to me that the work carried out ought not have been undertaken. There is no credible basis to think that the liquidator or his staff have acted unreasonably in performing their work.

[26] The liquidator has attested that he has reviewed the work undertaken, that he has not charged for some work and has provided a proper basis to conclude that the work the subject of his claim is proper and reasonable. Given I am satisfied the work undertaken

was necessary and the amount charged reasonable, there is no reason why the liquidator should not be able to recover remuneration for his work, work, I might add, which has been successful. I am satisfied the remuneration claimed ought not be in any way reduced by me.

[27] Finally, turning to the matters of ancillary relief, rule 9.4 of the *Corporations Proceedings Rules* provides a mechanism for notice of application to be given to affected parties. The liquidator has complied with the requirements of rule 9.4 to the extent that they have application in the circumstances of the present case. I mention that qualification because it is not possible here for the liquidator to fully comply with the requirements of rule 9.4 as that rule assumes the existence of creditors and or the existence of shareholders holding issued capital in the company. Such circumstances do not prevail here.

[28] Rule 1.3(1) of the rules provides that unless the Court otherwise orders the rules apply to a proceeding in the Court under the *Corporations Act* or the *ASIC Act* that is commenced on or after the commencement of the rules. It seems to me clear that this is an appropriate case in which to conclude that the Court should order rule 9.4 does not apply to the present application.

[29] For all of these reasons, therefore, I order as per the draft order signed by me and placed with the papers.