SUPREME COURT OF QUEENSLAND

CITATION:	*BDO Corporate Finance (Qld) Ltd v Russell* [2019] QCA 39
PARTIES:	**BDO CORPORATE FINANCE (QLD) LTD** ACN 010 185 725 (respondent/applicant) **v** **BRIAN BENJAMIN RUSSELL** (applicant/respondent)
FILE NO:	Appeal No 11769 of 2018 SC No 8239 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application to Strike Out
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 31 October 2012 (Ann Lyons J)
DELIVERED ON:	8 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	25 February 2019
JUDGE:	Fraser JA
ORDERS:	**1. Strike out the notice of appeal filed on 31 October 2018 and the application filed on 30 October 2018.** **2. If the parties do not agree upon an order as to costs, each party is at liberty to file an outline of submissions as to costs, not exceeding three pages, such outline to be filed and served on the other party no later than 4 pm on 15 March 2019.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – where an application for an extension of time in which to appeal and a notice of appeal are filed six years after the decision to be appealed – where the application and notice of appeal are lengthy, convoluted and largely incomprehensible – whether the application and notice of appeal ought to be struck out as vexatious and an abuse of process – whether the notice of appeal should be struck out for a failure to state briefly and specifically the grounds of appeal APPEAL AND NEW TRIAL – RIGHT OF APPEAL – WHO MAY EXERCISE RIGHT – IN RELATION TO CORPORATIONS – where a company is wound up in insolvency pursuant to a court order – where a former director purports to apply to appeal on behalf of the company in liquidation – where the former director has no beneficial

interest in the company, ceased directorship as the result of bankruptcy, and is disqualified from managing any corporation for a period of five years – whether the former director has standing to bring an appeal in the name of the company – whether leave to bring an appeal in the name of the company ought to be granted under Part 2F.1A *Corporations Act* 2001 (Cth) – whether leave to bring an appeal in the name of the company ought to be granted pursuant to an unproven guarantee and the inherent power of the Court

Corporations Act 2001 (Cth), s 206B, s 236(1)(a), s 237
Criminal Code (Qld), s 408C(1)(a)(i)

Aliprandi v Griffith Vintners Pty Ltd (in liq) (1991) 6 ACSR 250, cited
Chahwan v Euphoric Pty Ltd t/as Clay & Michel (2008) 227 FLR 43; (2008) 65 ACSR 661; [2008] NSWCA 52, followed
Challis v Hoffman & Ors (2017) 121 ACSR 585; [2017] NSWSC 870, approved
Russell v Westpac Banking Corporation (1994) 61 SASR 583; (1994) 13 ACSR 5; [1994] SASC 4479, explained

COUNSEL: T Pincus for the respondent/applicant
The applicant/respondent appeared on his own behalf

SOLICITORS: Gadens Lawyers for the respondent/applicant
The applicant/respondent appeared on his own behalf

[1] **FRASER JA:** On 31 October 2012 A Lyons J ordered that BRGOC Group Finance Pty Ltd ("the company") be wound up in insolvency pursuant to the *Corporations Act* 2001 ("the Act"). Six years later, on 30 October 2018, Mr Brian Benjamin Russell filed an application to the Court of Appeal. On the following day Mr Russell filed a notice of appeal against the winding up order.

[2] The application and the notice of appeal name as the applicant and appellant, "Brian Benjamin Russell (for BRGOC Group Finance Pty Ltd ACN 143 288 331)". The named respondent was the applicant for the winding up order.

[3] The respondent has applied for orders striking out the application and the notice of appeal. The respondent's principal contention is that Mr Russell has no standing to make the application or to bring the appeal. The respondent also contends that: the application and notice of appeal are lengthy, convoluted and in large part incomprehensible and/or irrelevant; it would be oppressive to require the respondent to prepare a response to the application and notice of appeal; they are thus vexatious and an abuse of the Court's process; and, alternatively, the notice of appeal should be struck out pursuant to UCPR Rule 371(2)(a) on the ground that it fails to comply with the requirement in Rule 747(1)(b) that it "state … briefly and specifically the grounds of appeal".

Background

[4] According to a company search, Mr Russell was a director of the company from its registration until he was made bankrupt on 4 February 2011.[1] There was no director or secretary of the company after July 2011. The evidence does not reveal who managed the company from July 2011 until 31 October 2012 or if anyone did manage the company in that period.

[5] The evidence does not identify the beneficial owner of the company. The only member of the company has been B & B Russell No 2 Pty Ltd. There is no company search of B & B Russell No 2 Pty Ltd in evidence. There are references to it being a trustee but the nature and details of the trust or trusts are not explained. Mr Russell deposes that he is a "Third Party by virtue of being a Settlor of the B & B Russell Family Trust No 2 and cannot by statute obtain a benefit of equity or capital." Presumably that is intended to convey that Mr Russell is not a beneficiary of a trust of which, so it perhaps may be inferred, B & B Russell No 2 Pty Ltd is or was trustee. The evidence does not show that Mr Russell has or ever had any beneficial interest in any share in B & B Russell No 2 Pty Ltd.[2]

[6] Although the company's failure to comply with a statutory demand for the payment of $29,645.55 resulted in the company being deemed insolvent from a date in May 2012 pursuant to s 459C(2)(a) of the Act, there was no presumption of insolvency in the respondent's application to wind up the company because the respondent filed that application outside the prescribed three month period. The winding up order made on 31 October 2012 was instead grounded upon the finding by A Lyons J that the company was in fact insolvent. That finding was based upon evidence that the company failed to pay a debt which was owing to the respondent, in October 2012 a previous director of the company failed to respond to a request by the respondent's solicitors for evidence as to and confirmation of solvency of the company, the company had no director or secretary since July 2011, the company failed to provide any evidence of solvency, and the company failed to appear at the hearing after having been served with the winding up application.

[7] On 6 May 2014 the liquidators published a report which makes plain their opinion that the company was hopelessly insolvent when it was ordered to be wound up and it remained in that position. The report includes the following conclusions:

(a) The company's financial difficulties could be attributed to bad debts (loans to related parties), lack of working capital, the appointment of insolvency practitioners to related group companies, and the withdrawal of $270,000 by Westpac from the company bank account. (I interpolate here that the report does not suggest that Westpac lacked authority to make that withdrawal, so much is not established by any other evidence before me, and the evidence adduced by Mr Russell does not establish that the company would have been solvent if that money had remained in the company's bank account.)

(b) Although a former director of the company provided a Report as to Affairs which estimated that (subject to the costs of the liquidation) there was a surplus of assets of $64,051,512, the liquidators'

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1 I note that in *R v Russell* [2018] QCA 96 at [7], Gotterson JA indicated that the Australian Securities and Investment Commission removed the appellant's registration as a director on 29 June 2011, with that removal being backdated to the date of his bankruptcy.

2 I note that in *R v Russell* [2018] QCA 96 at [5], Gotterson JA noted that the sole shareholder in B & B Russell No 2 Pty Ltd was "Bernadette Davina Russell".

investigations established that the assets were not recoverable because of the liquidation and deregistration of the group companies which represented the vast majority of assets. The liquidators estimated that there would be a deficiency of assets against liabilities of about $13.5 million.

(c) The liquidators' summary of the company's comparative balance sheets and profit and loss statements extracted from the company's books and records for the previous three financial years disclose that the company's working capital had decreased considerably from 30 June 2010 to 31 October 2012 (to an increased deficiency of $165,431), the company's net asset position had deteriorated significantly over the same period (to a net asset deficiency of $714,802.89 in 2012), and the company operated at a continual loss from 30 June 2010 to the date of the liquidator's appointment on 31 October 2012; the liquidators considered that a substantial capital injection and turn around in trading activities of related entities would have been required to enable the company to continue in operation.

(d) The liquidators had not determined the exact date of insolvency, it did not appear that the former directors had any substantial assets that might be recovered if an insolvent trading claim was successfully pursued, and no dividend was available to the creditors in Mr Russell's bankruptcy.

(e) The estimated dividends to creditors was nil.

[8] Mr Russell has produced his own valuations of a different company in the same group but that company was also ordered to be wound up in insolvency. Mr Russell has not adduced evidence of any independent valuation of the company that conflicts with the evidence of the liquidators' opinion.

[9] A solicitor for the respondent deposes that he was informed by the current liquidator of the company, who replaced the initial liquidators on 14 December 2015, that to the liquidator's knowledge the financial position of the company had not changed since his appointment.

[10] Mr Russell was discharged from bankruptcy in 2014. In February 2017 he was convicted of an offence under s 408C(1)(a)(i) of the *Criminal Code* (Qld) of dishonestly applying to his own use and the use of the company and others property belonging to another. In the following month he was sentenced to three years imprisonment with a parole release date in August 2018. Mr Russell has foreshadowed applying for a pardon or seeking leave to appeal to the High Court from the Court of Appeal's decision to dismiss his appeal against conviction. The present position is that he is disqualified from managing any corporation until the expiry of five years after the day of his release from prison: the Act, s 206B(1)(a), s 206B(2)(b).

The notice of appeal and the application

[11] Mr Russell, who appears for himself, does not articulate arguments in defence of the form of his application and notice of appeal. The respondent's criticisms of the form of those documents is amply justified.

[12] In the notice of appeal, the grounds of appeal are expressed in a narrative form over two and a half pages comprising many unnumbered paragraphs. That section of the document commences with nine unnumbered bold subheadings referring to manifestly irrelevant topics, including "breach under *Oaths Act Qld* 1867", "breach of *Privacy Act 1988* (Cth)", "breach under *Interpretation Act 1954* (Qld) including s 49", and "breach of contract and indemnity under tort and equity". None of that is explained in the following text. Two additional passages are sufficient to illustrate the confusing language used in the appeal grounds section of the notice of appeal:

(a) "… hearing Justice Lyons relied under the paramount duty of care to the Court that there were no issues and or disputes, defence and or counterclaims and thereby the company BRGOC Group Finance Pty Ltd was deemed insolvent and winding up order issued with appointment of Liquidator."

(b) "Independently, without an order made, with a clarity of the issue and supporting documentation presented, if any of this would affect standing/liability as one of the parties to bind, the agreement reference in the Demand and Affidavit, to another to be liable for debt of another and an application could be made for winding up of another without demonstration in tort and/or equity how this was possible, the Courts documents are silent by omission on this."

[13] The notice of appeal, particularly when it is read together with Mr Russell's arguments, does convey one potential ground of appeal that is comprehensible. Mr Russell argues that the respondent was not entitled, and knew that it was not entitled, to apply to wind up the company because it was not a creditor, in that, contrary to an affidavit sworn by an employee of the respondent in support of the winding up application, the respondent's contract was with Queensland Sea Scallops Pty Ltd (formerly Qld Aqua Pty Ltd), which was a different company in the same group. Mr Russell refers to a document subsequently supplied to him by the same employee in October 2015 which on its face appears to support the contention that the respondent's contract was with a different company in the group. The respondent argues that other exhibited documents strongly suggest that the respondent did contract with the company, as its employee deposed. The essence of the documentary evidence upon this point in the affidavits is as follows:

(a) Agreement for valuation services between the respondent and the company, dated 19 July 2011.

(b) Tax invoice issued by the respondent for the amount of $29,645.55, dated 30 September 2011. The invoice is addressed to the company and gives the reference number 204261.

(c) Agreement for valuation services between the respondent and "Qld Sea Scallops Pty Ltd", dated 18 November 2011.

(d) Agreement for valuation services between the respondent and "BRGOC Pty Ltd", dated 23 November 2011.

(e) Statement issued by the respondent, dated 14 December 2011. The statement is addressed to "Queensland Sea Scallops Pty Ltd (ex – Qld Aqua P/L)", and records an outstanding balance of $29,645.55. The

amount is identified as being related to an invoice dated 30 September 2011, with the reference number 204261.

[14] It is possible that evidence of conversations between about July and December 2011 might shed light upon the identification of the contracting company, but the affidavit evidence before me does not reveal who might give such evidence on behalf of the company.

[15] Returning to the form of the notice of appeal, the orders sought include some that might be made in appropriate circumstances in the event of a successful appeal – including an order setting aside the winding up order – but other orders sought are difficult to decipher. Some are extraordinary. A few examples suffice to illustrate the point:

> "8. **Orders sought to recover such position as per order 7 including, such orders as maybe required from the Court of Appeal – Supreme Court of Queensland, and counterclaim, if so order:**
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> **Monetary order**
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> …
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> (b) award of damages as foreseeable claim, inability to pursue claim, loss of chance, negligence, omission and wilful misconduct involving the existing historical valuation of $3,939,000 and updated increase of $32,556,278 for the updated total adjusted valuation of $36,495,278 for the activity and other assets and licences by Queensland Shellfish Pty Ltd and others, including on updated figures and application of correct taxation rate under legislation Australian and New Zealand Double Tax Agreement and Tax Act at present 10%. Together with interest at Qld Law Rate being 6% pa of $18,357,125 within 7 days;
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> …
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> **Delayed monetary order**
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> (ii) The following orders seek to be delayed, pending the outcome or until decisions of other jurisdictions and matters are obtained, and or issued
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> (a) award of damages, to be determined subject to outcome of Supreme Court Qld 4943/18 between Queensland Shellfish Pty Ltd in its own right and as trustee Vs Grant Dene Sparks, Michael Andrew Owens and PPB Pty Ltd in its own right and as trustee PPB Trust (now Falcon Prime Pty Ltd part of PWC Australia) of the awarded claim or the maximum amount of 43% including interest per funding agreement terms amount of $138,753,008;
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> …

(iv) Or, in the alternative, order a review of effect on the business including litigation and insurance claims and should further applications for damages and interest for incorrect winding-up of non-contracted party/debtor as the Court may order."

[16] As to the application filed by Mr Russell, the eight paragraphs (the eighth of which includes a series of subparagraphs) which describe the orders sought in the application largely duplicate orders which are sought in the notice of appeal. The only order sought in this section of the application which is presently relevant is an order for an extension of time which, although not clearly expressed as such, may be treated as seeking the necessary extension of time to 31 October 2018 for the filing of the notice of appeal.

[17] Under the headings "The details of the judgment appealed against are" and "The reasons justifying the granting of leave are", the application includes much of the ambiguous narrative in the notice of appeal. Some of the narrative under the second heading refers to different disputes which are said to have involved entities other than the parties to the proceeding in which the winding up order was made. Irrelevant and vague statements are made in the context of such disputes; for example: "documents wrongfully created and subject to negligence claim which have later been declared as "void ab intio"", "a review of this action having recently been completed by [a bank's] Customer Advocate section, which has comeback with advices that the appeal must be handled externally by the Courts", and (in relation to a company called "Cape Seafarms Pty Ltd") "an appeal is to be progressed, the subject outcome has been affected by some 43%, which I believe should be held against [the respondent] and/or BDO Persons". There follows the vague assertion that "The affected work product, subject to errors being corrected with work product provided by the applicant (appellant) on the basis of this application." The vagueness of the application is compounded by a reference to "affected matters included, civil, insurance and valuations claim within the areas of …" various generally described projects and claims.

Should Mr Russell be authorised to bring the proposed appeal in the company's name?

[18] Upon the face of the notice of appeal and application they are incompetent. Contrary to the impression conveyed by the description of the appellant and applicant, Mr Russell was not entitled and he does not claim to have been entitled to commence this litigation in a representative capacity. Furthermore, whilst a liquidator of a company is empowered to bring a legal proceeding in the name and on behalf of a company in liquidation (see the Act, s 477(2)(a)), Mr Russell does not have and does not claim to have any such power. He has not obtained the approval of the liquidator or any court to commence any litigation in the name of the company and he does not contend that he has any such approval. As matters presently stand the notice of appeal and application should be struck out for those reasons.

[19] Under the heading in the application "The reasons justifying the granting of leave are" the first (unnumbered) paragraph states that the applicant "seeks leave to bring action under s 237 and 236 (1)(a) of the *Corporation Act 2001* (Cth) based on a miscarriage of justice, being in that it's in the best interest of the company,

BRGOC Group Finance Pty Ltd for the application to proceed for grant of leave to appeal, leave to adduce evidence including agreements 18/11/2010 and statement of account 14/12/2011 together with supporting correspondences and searches, to address this injustice of the incorrect company being wound up." That is an odd place in which to make such an application, but in the course of argument the applicant pursued an application under the identified provisions of the Act and the respondent invited me to consider it.

[20] Mr Russell argues that agreements between the respondent and a company or companies, to which Mr Russell was a party, empowered him to bring a proceeding, but he did not point to any contractual provision in evidence which purports to authorise him to bring a proceeding in the company's name and on its behalf. Otherwise the effect of Mr Russell's argument upon this point is that the interests of justice require an exception in his case.

[21] In certain circumstances leave may be granted under ss 236(1)(a) and 237 of the Act for a former company officer to bring proceedings in the company's name. It is not necessary to elaborate upon those provisions. There are conflicting decisions upon the question whether the part of the Act containing them (Pt 2F.1A) applies at all in relation to a company in liquidation. The cases were thoroughly reviewed and a negative answer to that question was given by the New South Wales Court of Appeal in *Chahwan v Euphoric Pty Ltd*.[3] I am not persuaded that the decision in that case is plainly wrong. I am therefore bound to conclude that ss 236(1)(a) and 237 of the Act do not empower me to make any order of the kind sought by Mr Russell.

[22] In argument Mr Russell invoked what was submitted to be the inherent power of the court to authorise a creditor, guarantor or member to bring a proceeding in the name of the company. There is ample authority, old and recent, that the Court does possess such a power in relation to a member and a creditor: see, for example, *Aliprandi v Griffith Vintners Pty Ltd (in liq)*,[4] *Chahwan v Euphoric Pty Ltd*,[5] and *Challis v Hoffmann*.[6] In *Challis v Hoffmann*, Gleeson JA summarised the legal principles applicable in the exercise of the power to allow a creditor or member to sue in the name of a company in liquidation:

> "[25] The jurisdiction to allow a creditor or member to sue in the name of a company in liquidation was described, by McLelland J, in *Aliprandi v Griffith Vintners Pty Ltd (in liq)* (1991) 5 ACSR 250, in the following terms at 252:
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> > The form in which orders 1 and 2 are expressed is based on a recognition of the power of the court to order that a creditor or contributory of a company in liquidation be authorised to use the company's name as a plaintiff. This is a matter which I discussed in *Wenham v General Credits Ltd* (16 November 1988, SC (NSW), unreported). Such a procedure is of respectable antiquity and is sanctioned by high authority. Orders of that kind were made in *Re Bank of Gibraltar and Malta*

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3 (2008) 65 ACSR 661 at [95]-[125].
4 (1991) 6 ACSR 250 at 252.
5 (2008) 65 ACSR 661 at [124(j)].
6 (2017) 121 ACSR 585 at [4]-[6], [25]-[29].

> (1865) LR 1 Ch APP 69; *Re Imperial Bank of China India and Japan* (1866) LR 1 Ch App 339; *Re Dominion Portland Cement Co Ltd (No 2)* [1919] NZLR 478 and *Lloyd-Owen v Bull* (1936) 4 DLR 273 (Privy Council). The legitimacy of the procedure was also recognised in *Cape Breton Co v Fenn* (1881) 17 Ch D 198 at 207-8; *Ferguson v Wallbridge* (1935) 3 DLR 66 at 83 (Privy Council) and *Fargro Ltd v Godfroy* [1986] 3 All ER 279; [1986] 1 WLR 1134 at 1136-8; [1986] BCLR 370. It was said by Jessel MR in Cape Breton (at 207) to be based on "the same principle on which a man could always have filed a bill in the old Court of Chancery against his trustee to be allowed to use his name to recover the trust property".
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> The proper approach of the court in such an application as this has been described by the Privy Council in Lloyd-Owen at 276 in the following terms: "A judge in winding up is the custodian of the interests of every class affected by the liquidation. It is his duty … to see to it that all assets of the company are brought into the winding up. In authorising proceedings, especially if they may or will involve some drain upon the assets, he must satisfy himself as to their probable success; where … they involve no possible charge on assets, he will nevertheless be careful to see that any action taken in the company's name under his authority is not vexatious or merely oppressive."

[26] In *Carpenter v Pioneer Park Pty Ltd* (2008) 71 NSWLR 577; 66 ACSR 56; [2008] NSWSC 551 (*Carpenter*) at [34], Barrett J summarised the "three main matters" that the Court will have regard to when asked to exercise its discretion upon an application such as the present:

> 1. The question whether the proceedings proposed to be pursued have some solid foundation, in that they exhibit such a degree of merit as to be neither vexatious nor oppressive and to present reasonable prospects of success.
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> 2. The attitude of the liquidator to the question whether the proceedings should be pursued.
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> 3. The question whether "practical considerations support the initiation of the proceedings", with particular reference to financial protection of the liquidator and the estate of the company by means of indemnity and, if indicated, security."[7]

[23] Gleeson JA also observed that the matters identified in *Carpenter* were not exhaustive since the exercise of the discretion must have regard to all of the

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7 (2017) 121 ACSR 585 at [25]-[26].

circumstances of the case[8] and that satisfaction of the criteria for the exercise of the power does not compel the grant of leave.[9]

[24] As I have mentioned, the evidence does not show that Mr Russell is or was ever a member of the company. The evidence does not establish and he does not contend that he is a creditor. He argues that he is a guarantor of an obligation owed by the company and that this is sufficient.

[25] In *Russell v Westpac Banking Corporation*,[10] to which the respondent referred, the Full Court of the Supreme Court of South Australia held that the class of persons who may be authorised to use the name of a company in liquidation in litigation "extends to a guarantor who has not yet become a creditor by paying out the guarantee". King CJ (Bollen and Mullighan JJ agreeing) described the rationale of the inherent power as being "that the failure of a liquidator to institute proceedings to recover assets or debts of the company ought not to operate to the prejudice of the persons in whose interests the winding up is carried out and who are entitled to benefit from the assets of the company".[11] That reflects statements in *Cape Breton Company v Fenn*,[12] to which King CJ referred, that (per Jessell MR) a creditor or contributory has been allowed to sue in the name of the company upon "the same principle on which a man could always have filed a bill in the old Court of Chancery against his trustee to be allowed to use his name to recover the trust property"[13] and (per Cotton LJ) the power "is confined to those who are parties to the liquidation".[14] The rationale given by King CJ for the inclusion of "a guarantor who has not yet become a creditor by paying out the guarantee" within the class of persons who might be authorised to use the company's name in litigation is that a guarantor is a "prospective creditor" of the company in that, if the guarantor is called upon to pay the creditor and does so, the guarantor will become a creditor and therefore a beneficiary in the winding up; King CJ considered that the eligible class should not be confined to exclude a guarantor, although the cases in which the discretion is used in favour of the guarantor who has not become an actual creditor by paying the creditor might be uncommon.[15]

[26] As to the question whether Mr Russell is a "prospective creditor" of that kind in his capacity as a guarantor, Mr Russell deposed in his affidavit sworn on 22 February 2019:

> "I am a guarantor for advance from various parties including those provided by McB Russell, and Cuvu Bay Trust and beneficiary This company as listed in 2, being BRGOC Group Finance Pty Ltd,"[16]

[27] Any liability to which Mr Russell was subject before or during his bankruptcy under a guarantee he gave before he became bankrupt was provable in his bankruptcy, and Mr Russell was released from any such liability upon his subsequent discharge from bankruptcy: *Bankruptcy Act* 1966 (Cth), ss 82(1) and 153(1). That is one of the

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8 (2017) 121 ACSR 585 at [28] citing *Re Colorado Products Pty Ltd (in prov liq)* (2014) 101 ACSR 233 at [9].
9 (2017) 121 ACSR 585 at [29].
10 (1994) 13 ACSR 5 at 6.
11 (1994) 13 ACSR 5 at 8.
12 (1881) 17 Ch D 198.
13 (1881) 17 Ch D 198 at 207.
14 (1881) 17 Ch D 198 at 208.
15 (1994) 13 ACSR 5 at 8.
16 The apparent errors in that text are in the original affidavit.

many things that Mr Russell's evidence does not address. The evidence also does not address the questions whether the guarantee is in writing, when it was given, the obligations secured by it (other than might be inferred by the word "advance"), any of its terms, when and what guaranteed advance was made to the company, whether any security for such an advance was given, whether any part of the advance was satisfied out of any such security, how much of any such advance was not repaid by the company or others, and whether or not any claim against Mr Russell pursuant to the guarantee would now be statute barred by the effluxion of time.

[28] Thus the evidence does not establish that Mr Russell may be legally liable to a creditor of the company as a guarantor despite Mr Russell's bankruptcy, his discharge from bankruptcy, and the passage of eight years after he was made bankrupt and ceased to be a director of the company. If, as Mr Russell's affidavit arguably suggests, eight years after he became bankrupt and ceased to be a director of the company he still has not fulfilled an obligation he assumed under a guarantee of an advance to the company, it is difficult to give any credence to the idea that he might fulfil that obligation in the future. The rationale for the decision in *Russell v Westpac* has no application to the peculiar facts of this case; Mr Russell has not shown that he is a prospective creditor of the company pursuant to any guarantee he has given such as to bring him within the class of persons who the court may authorise to use the name of a company in liquidation.

[29] If, contrary to that conclusion, Mr Russell is within the class of persons who may be authorised by the court to bring proceedings in the company's name, the question would be whether the discretion to exercise that power should be exercised in favour of Mr Russell so as to permit him to bring an appeal against the winding up order in the name of the company.

[30] In favour of exercising the discretion, I have concluded that Mr Russell's evidence supplies some support for a potential ground of appeal to the effect that the respondent was not a creditor of the company when it successfully applied for a winding up order. But such a ground might be viable only if the time for appealing were extended by about six years and if the discretion to admit new evidence in an appeal were exercised in Mr Russell's favour. Some of the factors referred to in the next paragraph are strongly opposed to the favourable exercise of those discretions.

[31] Even assuming in Mr Russell's favour that he is a prospective creditor of the company as a guarantor of an advance to the company, that the proposed ground of appeal might be found to be factually correct upon new evidence permitted to be adduced in an appeal, and that time might be extended to allow such an appeal to be brought, the combination of the following considerations persuade me that it is not reasonably arguable that the discretion should be exercised in favour of granting Mr Russell's application:

(a) Mr Russell is disqualified from being involved in the management of the company. There is no evidence before me that any appropriately qualified person will accept appointment as an officer of the company or will act for the company in any managerial role.

(b) The evidence of the original liquidators' apparently compelling report suggests that the primary judge's conclusion that the company was insolvent was correct whether or not the company's debts included the debt claimed by the respondent. The evidence of the current

liquidator's opinion is to the effect that the company remains hopelessly insolvent. Those opinions are not contradicted by any independent expert evidence.

(c) There is a paucity of evidence about the guarantee and the guaranteed advance which form the sole basis of Mr Russell's claimed entitlement be a prospective creditor of the company.

(d) There is no evidence about the attitude to Mr Russell's application of persons who have an interest in the litigation proposed by Mr Russell, notably including the liquidator, the sole member of the company, and any company creditors other than the respondent.

(e) There is no evidence that Mr Russell is willing and able to indemnify the liquidator against any claims or costs that might arise consequent upon the exercise of the authority sought by Mr Russell or to supply worthwhile security in support of such an indemnity.

(f) The delay between the making of the winding up order and Mr Russell's application is extraordinary.

(g) Mr Russell's explanation for that delay is very unsatisfactory. He argues that the delay is attributable to a difficulty in obtaining the documents necessary to support his contention that the wrong company was wound up. But exhibits to Mr Russell's affidavits support the respondent's submissions that Mr Russell advanced the same contention within days of the company being wound up, by 1 October 2015 he had a copy of the respondent's letter of engagement by a different entity which he now seeks to adduce in the proposed appeal as evidence that the wrong company was wound up, and more than three years ago he was foreshadowing a claim of the kind he now seeks to advance. Furthermore, the evidence does not explain who (if anyone) was managing the company – and therefore might be able to give evidence about this issue – in the sixteen months leading up to the winding up order.

(h) The form of the notice of appeal and application create the strong impression that Mr Russell is unlikely to be able to efficiently litigate the proposed appeal, much less claims of the kind foreshadowed in his notice of appeal and application, without expert legal assistance. The evidence does not suggest that Mr Russell will retain a lawyer for those purposes.

(i) Whether or not the company has any potentially viable and substantial claims for damages if it were free of liquidation should not be decided in this application, but Mr Russell has not coherently articulated any such claim.

[32] I would add that Mr Russell has not filed an affidavit verifying that he has served his application upon the liquidator. That in itself is a reason for not making the order Mr Russell seeks. But even if the liquidator does not oppose the order Mr Russell seeks, for the other reasons I have given no such order should be made.

[33] I make the following orders:

(a) Strike out the notice of appeal filed on 31 October 2018 and the application filed on 30 October 2018.

(b) If the parties do not agree upon an order as to costs, each party is at liberty to file an outline of submissions as to costs, not exceeding three pages, such outline to be filed and served on the other party no later than 4 pm on 15 March 2019.