SUPREME COURT OF QUEENSLAND

CITATION:	*Bank of Queensland Ltd & Anor v Ross Auto Auctions Pty Ltd (in liq) (Receivers & Managers appointed) & Anor* [2015] QSC 347
PARTIES:	**BANK OF QUEENSLAND LIMITED** ABN 32 009 656 740 (first applicant) **BOQ CREDIT PTY LIMITED** ABN 92 080 151 266 (second applicant) **BOQ EQUIPMENT FINANCE LIMITED** ABN 78 008 492 582 (third applicant) **v** **ROSS AUTO AUCTIONS PTY LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)** ACN 159 553 250 (first respondent) **BRENT KIJURINA** (second respondent)
FILE NO/S:	SC No 7420 of 2015
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	9 September 2015
JUDGE:	Philip McMurdo JA
ORDER:	**Upon the undertaking of the first applicant to indemnify Robert Hutson and Richard Buckby as liquidators of the first respondent for:** **(i) their reasonable remuneration and expenses for investigating the affairs of the first respondent and pursuing any claim (with good prospects) arising out of those investigations (including any claim under Pt 5.7B); and** **(ii) any adverse costs orders which may be made against them in pursuit of such claims,**

so long as, if they make a recovery, they are willing to support an application by the first applicant under s 564 of the *Corporations Act* for an order that the first applicant receive a priority distribution from the recovery for such amount as the court may think just

It is ordered that:

1. **The second respondent be removed as liquidator of the first respondent.**
2. **Mr Buckby and Mr Hutson be appointed as liquidators of the first respondent.**
3. **Anything that is required or authorised by the *Corporations Act* to be done by the liquidators can be done by both or by either of the persons appointed.**

CATCHWORDS: CORPORATIONS – WINDING UP – LIQUIDATORS – REMOVAL – IN VOLUNTARY WINDING UP – APPLICATIONS – application to remove the second respondent as liquidator of the first respondent company

CORPORATIONS – WINDING UP – LIQUIDATORS – REMOVAL – IN VOLUNTARY WINDING UP – GROUNDS – application to remove the second respondent as liquidator of the first respondent company – whether there was a reasonable apprehension of bias on the part of the liquidator because his independence could be compromised by his referral relationship with an unsecured creditor of the company which was providing financial advice regarding its actual or potential insolvency – it is appropriate to apply the same test for apprehended bias to the liquidator as that applicable to the judiciary and administrative decision makers – where the history of frequent referrals of work by the insolvency advisors to the liquidator was sufficient to give him a personal interest in maintaining a good business relationship with it which could come into conflict with his duty as a liquidator – where it was accepted that there was a reasonable apprehension of bias – where a fair-minded observer might apprehend that the liquidator might not with to put his continued receipt of income in jeopardy by the performance of his duties – where the first applicant indicated that if the second respondent was replaced by the liquidators proposed by the applicants, then it would provide an undertaking to the court to indemnify those liquidators for their reasonable remuneration and expenses and pursuing any claim as warranted and this would provide an advantage in the company's pursuit of any claims

Corporations Act 2001 (Cth), s 491(1), s 564

Australian Securities and Investments Commission v Franklin (2014) 223 FCR 204; [2014] FCAFC 85, followed

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, applied
Firepower Operations Pty Ltd (No 2), Re [2008] FCA 1228, considered

COUNSEL: C Wilkins for the applicants
C Wilson for the respondents

SOLICITORS: Thomson Geer for the applicants
Mullins Lawyers for the respondents

[1] The applicants are creditors of the first respondent, which I will call the company. The second respondent is its liquidator. The applicants apply to have him removed and replaced by other liquidators.

[2] The company carried on business dealing in used cars. The business was funded by a floor plan facility provided by the second applicant which claims to be owed approximately $2.1 million for which it holds security of an estimated value of approximately $1.8 million.[1] The first applicant claims to be owed by the company, as a guarantor of certain home loans, amounts totalling approximately $1.6 million.[2] The third applicant claims to be owed amounts totalling approximately $310,000.[3]

[3] On 17 June 2015, pursuant to s 491(1) of the *Corporations Act* 2001 (Cth), the company resolved that it be wound up voluntarily and that the second respondent and another member of his firm be appointed as its liquidators. That other person resigned as a liquidator one week later.

[4] The company held its last auction on 6 June 2015, when about 60 cars were sold. That left about 20 cars in the company's stock all of which were sold by the time that the first and second applicants appointed receivers and managers of the assets and undertaking of the company on 16 June 2015.

[5] On 3, 11 and 13 June 2015, the company made payments to the Deputy Commissioner of Taxation, an unsecured creditor, totalling approximately $425,000. Under the contract between the company and the second applicant, the company was not to sell vehicles which were subject to a security interest held by the second applicant except in the ordinary course of its business. That contract also provided for a security interest over the proceeds of sale of vehicles and contained an agreement by the company to do everything necessary or reasonably required by the second applicant to preserve and protect the realisable value of the secured property and the second applicant's interest in such property. The second applicant claims that the payments made to the Deputy Commissioner in June were from funds which were part of the secured property, the funds being the proceeds of sale of vehicles, so that the payments were made in breach of the company's agreement with it. But it submits that it is unlikely that its security interest is enforceable against the Deputy Commissioner having regard to s 48 of the *Personal Property Securities Act* (2009) (Cth).

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1 Second applicant's proof of debt dated 3 July 2015, Affidavit of J B Daniel, Exhibit 11.
2 First applicant's proof of debt dated 3 July 2015, Affidavit of J B Daniel, Exhibit 13.
3 Third applicant's proof of debt dated 3 July 2015, Affidavit of J B Daniel, Exhibit 14.

[6] On 25 June 2015, the second respondent, Mr Kijurina, reported to creditors that the company had total assets of approximately $1.6 million, secured creditors of approximately $2.1 million and unsecured creditors of approximately $770,000 as at the date of his appointment. Those figures were derived from a Report as to Affairs which had been provided by the company's sole director, Mr Ross. Based upon those figures, Mr Kijurina wrote that the only potential for a payment to unsecured creditors was from recoveries from voidable transactions and insolvent trading.

[7] One of the unsecured creditors which lodged a proof of debt for the purposes of a meeting of creditors is Insolvency Guardian Pty Ltd, which I will call IG. Its claim is for the amount of its invoice to the company dated 16 June 2015 which was $21,162.90. The invoice contains four components: three for the work done by certain individuals within IG and apparently charged on a time basis and the other a so-called Liquidator Appointment Fee of $10,000. The applicants say that the amount of this invoice tends to suggest that IG may have been providing services to the company for "some time prior to 16 June 2015".

[8] IG conducts a business which provides at least financial advice to companies and individuals in the context of their actual or potential insolvency. On 17 June, IG's Mr Sierocki wrote to the receivers and managers as follows:

> "I write to inform you that we act for the Directors of both of these Companies[4] and further that as of today we have appointed Liquidators to Ross Auto Auctions Pty Ltd.
>
> I have been advised that a Report as to Affairs is currently being prepared for both Companies and to facilitate this, all books and records of these Companies are currently in our possession. Valuers have also been engaged to prepare a valuation report on the properties owed [sic] by the Directors in order to obtain an equity position. …"

[9] On 6 July 2015 there was a meeting of creditors of the company. The applicants' solicitor, Mr Daniel, attended as proxy for the second applicant. A solicitor working under Mr Daniel's supervision, (Mr Shaw), attended as proxy for the first applicant. A chartered accountant and insolvency specialist, Mr Clout, attended as proxy for the third applicant. Mr Clout was retained by Mr Daniel and paid a fee. Mr Sierocki attended as proxy for IG and some other creditors.

[10] The meeting became acrimonious as the applicants took steps to have Mr Kijurina replaced as liquidator. Mr Daniel proposed to the meeting that Mr Clout should chair it instead of Mr Kijurina's nominee, Ms Barley. Mr Kijurina was not physically present but observed the meeting via a teleconference facility from his location overseas. Creditors voted on the motion that Mr Clout chair the meeting. A majority in number voted against the motion. Mr Daniel demanded a poll be taken. This produced no result because a majority in number voted against the motion and a majority in value, more specifically the applicants, voted for it. Ms Barley did not exercise her casting vote. The result was that she remained in the chair.

[11] A further motion was then moved that two persons from Korda Mentha replace Mr Kijurina. Again a majority in number of creditors voted against that motion, a poll

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[4] There being another company, Ross Auto Transport Pty Ltd, which is not the subject of the present proceeding.

was taken and a majority in number voted against the motion and a majority in value voted for it. For this motion Ms Barley did exercise her casting vote against the motion.

[12] Relevant correspondence preceded this meeting. On 19 June 2015, Mr Daniels' firm, Thomson Geer, received a letter from Mr Kijurina which attached a signed Declaration of Independence Relevant Relationships and Indemnities (which I will call the declaration) in relation to the company. In that document Mr Kijurina (and his then fellow liquidator) disclosed that their appointment was by a referral by IG, which they understood had been "contacted by the Company to discuss the Company's financial affairs." They disclosed that within the preceding 24 months they had had a relationship with IG in that "Insolvency Guardian is an advisor of the Company and referred the Company to us." They said that they did not believe that this relationship resulted in any conflict of interest because:

- "Insolvency Guardian refers matters to this firm from time to time.
- Our dealings with Insolvency Guardian were not in relation to the Company's and/or the Director's affairs or related parties of the Company and/or the Director.
- Referrals from solicitors, business advisors or accountants are common and do not impact on our independence in carrying out our duties as Liquidators.
- We have provided no other information or advice to the Company and Directors prior to our appointment as outlined in this [declaration]."

[13] On 23 June Thomson Geer emailed a letter to the liquidators saying that in the light of that letter of 19 June, the applicants intended to take all necessary steps to have them replaced as liquidators. There followed some email correspondence in which Thomson Geer wrote to Mr Kijurina developing the argument for the replacement of the liquidators by reference to what were alleged to be details lacking in the declaration about the "referral relationship with [IG]", the continuing role of IG in advising the company and its associated entities and the directors and some concerns specific to the other liquidator. That last matter resulted in the other liquidator resigning, leaving Mr Kijurina as the sole liquidator. In an email of 24 June from Mr Kijurina to a solicitor at Thomson Geer, he wrote that:

> "If Insolvency Guardian have acted inappropriately prior to our appointment, such matters would be properly investigated. If you have such information, please provide same to our office."

On 3 July, Thomson Geer sent to Mr Kijurina consents to act as liquidators signed by two individuals of Korda Mentha.

[14] There are affidavits from Mr Daniel, Mr Shaw, Ms Barley, Mr Kijurina and Mr Clout about what happened at the meeting. There are differences between those accounts which largely involve claims on the applicants' side that Mr Daniel was treated rudely by Ms Barley, Mr Kijurina (because he did not take steps to correct her) and Mr Sierocki and claims by Mr Kijurina and Ms Barley that it was Mr Daniel who was rude and unprofessional.

[15] The minutes of the meeting, as lodged with ASIC, record that there was "a heated discussion between Mr Daniel and Mr Sierocki" with Ms Barley "firmly" asking each of them to stop, after which Mr Daniel "continued to strongly express his view, speaking over the Chairperson". The applicants submit that the inaccuracy of those minutes is indicated by some delay in their preparation in that they were not finalised for about a month. But the minutes do provide some support for the applicants' case that Mr Sierocki behaved rudely and aggressively towards Mr Daniel.

[16] Undoubtedly the meeting was acrimonious. Whether either or both sides behaved improperly could not be fairly resolved here. But if the evidence for the applicants in this respect is accepted, the rudeness of Ms Barley according to that evidence, and the non-intervention by Mr Kijurina, was not such as to show any bias or other characteristic which could found his removal.

[17] On 22 July Thomson Geer wrote to Mr Sierocki, demanding that IG immediately deliver up possession of all books and records of the company in its possession. On the following day, IG replied that all records held by IG or under its control had been provided to the receivers and managers already, "in the form of a Report as to Affairs and its various annexures". The letter continued that the "internal financial records of the company" could not be "accessed by us or the Directors" because of an outstanding debt to the software vendor. It further advised that 200 boxes of physical books and records had been picked up by a transport company with instructions to move them to a secure location, because of the possibility that access to the company's premises would be denied by the landlord in the light of appointment of receivers and liquidators. The letter from IG further advised that because there was an outstanding amount owed to the transport company, it was holding the 200 boxes. On 25 July the receivers and managers paid $3,500 to the transport company and took possession of the books and records.

[18] On 27 July Thomson Geer wrote to Mr Ross and other guarantors, expressing the first applicant's concern about certain auctions of real property which had been advertised, these properties forming part of the first applicant's security. That drew an immediate response from Mrs Ross to the effect that IG were "handling all matters on our behalf" and that Thomson Geer should "desist from contacting both [Mr and Mrs Ross] directly."

[19] The applicants advance four reasons for the removal of Mr Kijurina. The first is that a reasonable fair-minded observer might reasonably apprehend that his independence as a liquidator might be compromised by what is said to be his referral relationship with IG.

[20] The second is that if Mr Kijurina is replaced by the liquidators proposed by the applicants, then the first applicant will undertake to the court to indemnify those liquidators for their reasonable remuneration and expenses for investigating the affairs of the company and pursuing any claim as warranted by those investigations and to indemnity them against any adverse costs orders which may be made against them in doing so. This undertaking would be upon the basis that if funds are recovered by the liquidators, they will support an application by the first applicant under s 564 of the *Corporations Act* for an order that the first applicant receive a priority distribution from the amounts recovered in such amount as the court should think just. It is said that this will provide an advantage in the company's pursuit of any claims which Mr Kijurina would not have, because although he has solicitors who are willing to act to recover the payments to the Deputy Commissioner on a speculative basis, he would have the risk of having to pay costs if unsuccessful.

[21] Thirdly, it is said that it is desirable, for reasons of cost, that the liquidator be based in Brisbane and Mr Kijurina is based in Sydney.

[22] Fourthly there is an argument which is reliant upon what occurred at the meeting of creditors, in that it is said Ms Barley should have exercised her casting vote in favour of the motion for Mr Clout to chair the meeting of creditors and that had she done so, the outcome of the meeting would have been a replacement of Mr Kijurina.

[23] Going to the first of those arguments, the parties are agreed as to the legal principles and that, in particular, in this context it is appropriate to apply the test for apprehended bias of the liquidator which is the same as that which applies to the judiciary and to administrative decision makers. In *Ebner v Official Trustee in Bankruptcy*,[5] Gleeson CJ, McHugh, Gummow and Hayne JJ said:

> "Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge … the governing principle is that … a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide."

Their Honours continued that the application of this principle required two steps:[6]

> "First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed."

[24] The argument for the applicants understandably relies upon the outcome, as well as the reasoning, in *Australian Securities and Investments Commission v Franklin*,[7] where it was held that there was a reasonable apprehension that liquidators might not discharge their duties with independence and impartiality because of their relationship with an entity which regularly referred work to them and which was a party to transactions with the company in liquidation which they would or might have to investigate. In that case there was more detailed evidence of the extent to which the liquidators or their firm benefitted from referrals from this entity than exists in the present case. Nevertheless there is here clearly a history of frequent referrals of work by IG to Mr Kijurina's firm. Mr Kijurina said so in the declaration. In cross-examination he agreed with the suggestion that IG "frequently" referred insolvency matters to him.[8] And he agreed that the majority of his appointments as a liquidator in a creditors' voluntary winding up for a Queensland based company during the past year had been as a result of referrals from IG.[9]

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5 (2000) 205 CLR 337, 344 [6].
6 Ibid 345 [8].
7 (2014) 223 FCR 204; [2014] FCAFC 85 ('*ASIC v Franklin'*).
8 Transcript 1-39, line 35.
9 Transcript 1-36, lines 22-27.

[25] It is not suggested that Mr Kijurina's firm has any agreement or particular understanding with IG from which his performance as a liquidator might be compromised. The applicants' case is that he has obtained work on referral from IG sufficiently often to give him a personal interest in maintaining what must be a good business relationship with it and that this interest could come into conflict with his duty as a liquidator if to perform that duty, he would have to act adversely to IG's interests. I accept that Mr Kijurina has a personal interest of that kind.

[26] It is then necessary to look at the ways in which the performance of the liquidator's duties might conflict with that interest. In *ASIC v Franklin* the company which referred work to the liquidators was itself a party to transactions which might have required the liquidators' particular consideration. That is not a feature of the present case.

[27] As the argument was developed, the applicants' case is that IG's interests might be affected by the due performance of the liquidator's duty in two ways. The first is that because it is likely that IG advised the director to make relevant payments or transfers which a liquidator might wish to investigate, IG's own conduct could require investigation. The second is said to come from the fact that IG has an ongoing retainer to act for the director.

[28] It is not known for how long IG was advising the director prior to the company going into liquidation. But it is likely that it was doing so during the fortnight immediately preceding the liquidation, in which the payments to the Deputy Commissioner were made. And it was during that fortnight that the company held an auction at which it sold about three-quarters of its stock. It is unlikely that Mr Ross chose to sell most of the company's stock and make payments to one creditor from the proceeds of sale before retaining the services of IG.

[29] It is likely that a liquidator would wish to investigate the director's conduct in disposing of the entirety of the company's stock and in making those payments, immediately ahead of resolving to wind up the company. There is a strong possibility that such an investigation would extend to the advice which the director received in doing so and that this would involve an investigation of the conduct of IG. In turn that investigation could be adverse to IG's interests. It might affect IG's professional reputation. There is also a possibility that it would expose a factual basis upon which IG could be liable to the second applicant as inducing a breach of the contract between the second applicant and the company.

[30] The ongoing retainer of IG by the director is likely to make IG resistant, or more so, to cooperation with the liquidator under which he would provide a full and frank disclosure of all relevant facts.

[31] This is a case, as in *ASIC v Franklin*, where an entity (IG) appears to have influenced the selection of the person who, as liquidator, would investigate its own pre-administration conduct.[10] It is a case, as White J described in *ASIC v Franklin*, where a fair-minded observer might apprehend that the liquidator might not wish to put an ongoing source of business in jeopardy by the due performance of his duties. As White J there said:[11]

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[10] *ASIC v Franklin* (2014) 223 FCR 204, 226 [104].
[11] Ibid 222 [77].

> " The 'double might' test is concerned with possibility, and not reasonable expectation … in *Ebner* at [7], the majority said that the question is 'one of possibility (real and not remote), not probability'."

[32] In my conclusion there is a reasonable apprehension of bias in the present case. It must be noted that the applicants stopped short of alleging actual bias.

[33] I should also note that some of the applicants' submissions on this question were not so persuasive. One was that the liquidator would also have to investigate transactions in which some cars were transferred to a related company for little or no consideration. Those transactions occurred, with one exception, in December 2014 and January and February 2015. There does not seem to be any real possibility that IG was influential in those transactions.

[34] Another submission was as to what could be made of the fact that the liquidator did not immediately take possession of the relevant books and records. However I accept that the liquidator's immediate concern was to move the books and records from the company's premises so that they would remain accessible to him and the receivers and managers. There was then the difficulty in not being able to pay the company which transported the records. No inference could be drawn against the liquidator from the fact that he did not immediately have possession of the books and records.

[35] By demonstrating apprehended bias of Mr Kijurina, the applicants have shown cause for his removal. The case for his removal is then strengthened by the possible advantage that other liquidators would have in the prosecution of a claim against the Deputy Commssioner. Such an advantage was sufficient to have another liquidator and not Mr Kijurina appointed in *Re Firepower Operations Pty Ltd (No 2)*.[12] Of course the present application is for the removal of Mr Kijurina. I would not have been persuaded to remove him for this reason alone but it is supportive of the applicants' case.

[36] The same may be said of the applicants' third argument, which was that there could be cost savings from having a Brisbane-based liquidator.

[37] It is unnecessary to consider the applicants' fourth argument which is based upon what they say should have occurred at the creditors' meeting. Ultimately that argument had a basis that it was in the interests of the liquidation that Mr Kijurina be replaced. If that could not have been demonstrated otherwise, the applicants could not have succeeded upon this fourth argument.

[38] The orders will be as follows:

Upon the undertaking of the first applicant to indemnify Robert Hutson and Richard Buckby as liquidators of the first respondent for:

(i) their reasonable remuneration and expenses for investigating the affairs of the first respondent and pursuing any claim (with good prospects) arising out of those investigations (including any claim under Pt 5.7B); and

(ii) any adverse costs orders which may be made against them in pursuit of such claims,

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[12] [2008] FCA 1228.

so long as, if they make a recovery, they are willing to support an application by the first applicant under s 564 of the *Corporations Act* for an order that the first applicant receive a priority distribution from the recovery for such amount as the court may think just

Order that:

1. The second respondent be removed as liquidator of the first respondent.

2. Mr Buckby and Mr Hutson be appointed as liquidators of the first respondent.

3. Anything that is required or authorised by the *Corporations Act* to be done by the liquidators can be done by both or by either of the persons appointed.