SUPREME COURT OF QUEENSLAND

CITATION:	*Re ACN 084 908 092 Pty Ltd (in liquidation)* [2018] QSC 167
PARTIES:	**JULIE ANN WILLIAMS** (applicant) **v** **MATTHEW DAVID PERRIN as trustee for the GPK Goodwin Property Trust No 2** (first respondent) **and** **COMMONWEALTH BANK OF AUSTRALIA** (second respondent)
FILE NO/S:	No 5922 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	1 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	19 July 2018
JUDGE:	Jackson J
ORDER:	**The order of the Court is that:** 1. **The applicant would be justified in making a second interim dividend of $800,000 to the creditors as set out in part 4.0 of her report to creditors dated 27 April 2017.** 2. **The applicant would be justified in not paying to Nicole Maree Bricknell an additional amount as dividend she would have been entitled to receive if the amount of $8,336.100.00 had been admitted as the amount of her proof of debt before the first interim dividend was declared or paid.**
CATCHWORDS:	CORPORATIONS – LEGAL CAPACITY AND

RELATIONS WITH OUTSIDERS – ASSUMPTIONS IN RELATION TO DEALINGS – where bank relied on statutory assumptions in s 129 *Corporations Act* 2001 (Cth) – where submitted that bank was aware one director was forging signature of other director – where submitted bank had duty to enquire with other director in circumstances where guarantee document purporting to be executed by the company was over a loan to the personal benefit of one director – whether bank was aware of forgery – whether duty to enquire of other director where transaction was to the benefit of one director – whether able to rely on statutory assumptions

CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – PROOF OF DEBTS – UNSECURED CREDITORS – OTHER MATTERS – where creditor admitted to proof for an amount less than claimed – where first dividend distributed to creditors on the basis of that amount – where settlement deed of dispute as to amount of debt provides that creditor will be admitted to proof for a higher amount – where settlement deed provides that creditor will only be entitled to new higher share of assets in respect of future dividends – whether justified in following settlement deed despite r 5.6.55 of the *Corporations Regulations* 2001 (Cth)

CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – APPLICATIONS TO COURT FOR DIRECTIONS OR ADVICE – where Family Court of Australia has ordered that liquidator is "authorised" to distribute dividends from insolvency to reflect property settlement – whether direction should be made that dividends should be paid in accordance with order of Family Court of Australia

Corporations Act 2001 (Cth), ss 128, 129
Corporations Regulations 2001 (Cth), r 5.6.55

Beach Petroleum NL v Abbott Tout Russell Kennedy (1997) 26 ACSR 114, distinguished

Beach Petroleum NL v Abbott Tout Russell Kennedy (1999) 48 NSWLR 1, cited

Caratti v Mammoth Investments Pty Ltd (2016) 50 WAR 84, cited

Correa v Whittingham (2013) 278 FLR 310, cited

Re Kimberley Diamonds Ltd [2018] NSWSC 1106, cited

COUNSEL:	C Johnstone for the applicant
	M Perrin in person
	K Downes QC and B Wacker for the second respondent
SOLICITORS:	James Conomos Lawyers for the applicant
	Norton Rose Fulbright Australia for the second respondent

Jackson J:

[1] The applicant seeks an order in relation to the administration of ACN 084 908 092 Pty Ltd (in liquidation) ("company") under the *Insolvency Practice Schedule (Corporations)*, s 90-15. The court will apply the same principles as upon an application under former ss 479 and 511 of the *Corporations Act* 2001 (Cth) ("CA").[1]

[2] The application is for directions:

(a) that the applicant would be justified in paying a second interim dividend of $800,000 to the creditors as set out in part 4.0 of her report to creditors dated 27 April 2017;

(b) whether the applicant is required to pay any additional amount to Nicole Kathleen Bricknell, when paying the dividend, by reason of the operation of r 5.6.55(5) of the *Corporations Regulations* 2001 (Cth);

(c) whether the applicant is required to pay any part of the dividend payable to Nicole Kathleen Bricknell in accordance with the order of the Family Court of Australia dated 13 October 2017 in proceeding BRC8546/2010.

[3] The second respondent[2] supports the order sought to pay the second interim dividend as proposed, and does not make submissions as to the other questions.

[4] The first respondent[3] also supports payment of the second interim dividend as proposed, except that he contends that the second respondent should not receive any part of the dividend because he submits it is not a creditor. He also contends that an additional amount should be paid to Ms Bricknell by reason of r 5.6.55(5), but makes no submission on whether the applicant should make payment of the dividend payable to Ms Bricknell in accordance with the order of the Family Court.

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1 *Re Kimberley Diamonds Ltd* [2018] NSWSC 1106, [11].

2 It is described as the second respondent in these reasons because it was named as a respondent to the application.

3 He is described as the first respondent in these reasons because he was named as a respondent to the application.

Second respondent as a creditor

[5] On 18 July 2013, the applicant called for proofs of debt. On 5 August 2013, the second respondent provided a proof of debt and particulars of the amounts that had been owing on the relevant accounts.

[6] On 30 August 2013, the applicant admitted the second respondent as a creditor in winding up for the sum of $10,000,000.

[7] The basis of the company's debt to the second respondent was that by a deed of guarantee dated 23 June 2008 the company had guaranteed loans made by the second respondent to the first respondent. The guarantee was executed by the first respondent as director of the company and purportedly by Ms Bricknell, his then wife, as the other director.

[8] In a proceeding to which the company was not a party, it was held that the first respondent forged Ms Bricknell's signature upon the guarantee and other securities given to the second respondent for the loans made by the second respondent to the first respondent.[4]

[9] It was not then and is not now suggested, however, that the second respondent was a party to the first respondent's fraud or was aware of the forgery when any of the loans was made.

[10] Accordingly, the second respondent relied upon the statutory assumptions under ss 128 and 129 of the CA as supporting the validity of the guarantee given by the company. The applicant, in admitting the second respondent to proof as a creditor in the sum of $10 million accepted that submission.

First respondent as opponent

[11] The first respondent, however, disputes that conclusion. Accordingly, the applicant gave notice of the application to him.

[12] As a person aggrieved, the first respondent did not appeal to the court in dispute of the decision of the applicant to admit the second respondent as a creditor upon the debt owing under the guarantee.[5] However, on an application for an order that the applicant would be justified in making a distribution by way of dividend to creditors, it is appropriate to permit a creditor who opposes the order sought to appear to advance any arguable ground of opposition.[6]

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4 *Commonwealth Bank of Australia v Perrin* [2011] QSC 274.

5 *Corporations Act* 2001 (Cth), s 1321.

6 In fact the first respondent is one of two trustees who are a creditor, the other being Ms Bricknell. However, rather than delay the hearing of the application further to enable him to obtain her agreement to give notice of intention to appear, or to apply to join her as a respondent if she declined to do so, I

Grounds of opposition

[13] Sections 128 and 129 of the CA provide as follows:

> "**128 Entitlement to make assumptions**
>
> (1) A person is entitled to make the assumptions in section 129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
>
> (2) A person is entitled to make the assumptions in section 129 in relation to dealings with another person who has, or purports to have, directly or indirectly acquired title to property from a company. The company and the other person are not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
>
> (3) The assumptions may be made even if an officer or agent of the company acts fraudulently, or forges a document, in connection with the dealings.
>
> (4) A person is not entitled to make an assumption in section 129 if at the time of the dealings they knew or suspected that the assumption was incorrect.
>
> **129 Assumptions that can be made under section 128**
>
> …
>
> *Director or company secretary*
>
> (2) A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company:
>
> (a) has been duly appointed; and
>
> (b) has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.
>
> *Officer or agent*

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gave him leave to appear to make his arguments that the applicant would not be justified in making the proposed second interim dividend.

(3) A person may assume that anyone who is held out by the company to be an officer or agent of the company:

(a) has been duly appointed; and

(b) has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of officer or agent of a similar company.

Proper performance of duties

(4) A person may assume that the officers and agents of the company properly perform their duties to the company.

Document duly executed without seal

(5) A person may assume that a document has been duly executed by the company if the document appears to have been signed in accordance with subsection 127(1). For the purposes of making the assumption, a person may also assume that anyone who signs the document and states next to their signature that they are the sole director and sole company secretary of the company occupies both offices.

Document duly executed with seal

(6) A person may assume that a document has been duly executed by the company if:

(a) the company's common seal appears to have been fixed to the document in accordance with subsection 127(2); and

(b) the fixing of the common seal appears to have been witnessed in accordance with that subsection.

For the purposes of making the assumption, a person may also assume that anyone who witnesses the fixing of the common seal and states next to their signature that they are the sole director and sole company secretary of the company occupies both offices.

Officer or agent with authority to warrant that document is genuine or true copy

(7) A person may assume that an officer or agent of the company who has authority to issue a document or a certified copy of a document on its behalf also has authority to warrant that the document is genuine or is a true copy."

[14] In his written submissions, the first respondent asserts that the second respondent was aware that he was "signing Company security documents for Bricknell", a euphemism for saying that he was forging her signature. But he does not identify who had the awareness at the relevant time, and the evidence to which he refers in support of the contention is no more than that on a document other than the guarantee, among many documents executed in connection with the various loans, his name was erroneously entered below a signature of "N Perrin" as the name of one of the signatories on behalf of the company.

[15] The first respondent's main contention is that the second respondent owed a duty to the company to investigate whether the purported signature of Ms Bricknell on the guarantee was genuine. Because it did not do so, he submits that the second respondent was not entitled to make the assumptions provided for under ss 128 and 129 of the CA. Because of that, he submits that the guarantee does not bind the company.

[16] In support of his main contention, the first respondent relied upon two points. The first point was that the second respondent did not comply with the Banking Code of Practice ("code") in failing to deal personally with Ms Bricknell and accepting, instead, documents purportedly signed by her that had been provided to him to obtain her signature and returned by him as signed by her.

[17] Because the company was not an individual, the code did not apply to the second respondent taking the guarantee. But, in my view, even if it had applied, whether or not the second respondent complied with the code in taking the guarantee does not, per se, speak to whether it is entitled to the benefit of the statutory assumptions provided for under ss 128 and 129. An unexplained or suspicious non-compliance with such a procedure or process may be relevant evidence as to whether a person entertained the disentitling knowledge or suspicion under s 128(4), but does not operate of itself in a way that legally qualifies the operation of the statutory assumptions provided for under ss 128 and 129 otherwise.

[18] The second point was that in *Beach Petroleum NL v Abbott Tout Russell Kennedy*,[7] Rolfe J said:

> "The defence, which raises s 68A, makes it very clear that it is raised in the context of a finding, which ATRK denied should be made, that they owed and breached fiduciary duties to Beach. However, it was submitted, that to allow the operation of the assumptions would be contrary to the policy of equity to hold the fiduciary to, and vindicate, the high duty owed, because it is the fiduciary's duty to enquire as to the state of affairs. In somewhat different terms, or, perhaps, for different reasons I agree with this submission and, in my opinion, the correct analysis is that s 68A is directed to the situations in which a person dealing with a company is entitled to make, subject to the operation of subs (4), certain assumptions. My view is that the person dealing with the company, who is entitled to make those assumptions, cannot be a person who has an independent duty to it, by

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[7] (1997) 26 ACSR 114, 300.

> virtue for example of the fiduciary relationship created by the retainer as a solicitor. Unless this were so a solicitor would be able to avoid the consequences of the fiduciary duty in circumstances where this would be contrary to its very assumption."

[19] However, the relationship between the second respondent and the company was not equivalent. The relationship between solicitor and client, considered in *Beach*, is a fiduciary relationship. That character fundamentally affects the solicitor's rights and obligations in any dealings with the client in the solicitor's own interests.

[20] On appeal in *Beach*[8] this was said:

> "Rolfe J's conclusions were, of course, based on the hypothesis that in so far
> as Abbott Tout were acting for Beach, they could not assert that by virtue of the fiduciary relationship thereby created, they ought not to have been aware of the facts.
>
> At first blush it may seem that his Honour was excluding a solicitor acting for a company from ever being able to rely on the assumptions in s 68A. However, we do not think that his Honour so intended. Rather, Rolfe J was saying that assuming a fiduciary relationship, and its breach, as it seems one must for the purposes of the argument, then the section cannot be relied on. This was because to do so would over-ride the fiduciary duty."

[21] The first respondent does not suggest that the second respondent's relationship with the company was other than as creditor and prospective surety or (although this was not proved in the present proceeding) as banker and customer.

[22] Neither relationship disentitled the second respondent from being able to rely upon the statutory assumptions it was otherwise entitled to make under ss 128 and 129 of the CA.

[23] I do not find that any of the matters relied upon by the first respondent gave rise to an actual knowledge or suspicion by the second respondent that the guarantee was not duly executed by the company, which is what is required under s 128(4) to disentitle the second respondent from relying upon, in particular, the assumption in s 129(5) of the CA.[9]

[24] It follows that the first respondent's main contention in opposition to the order that the applicant would be justified in making a distribution by way of dividend to creditors, including the second respondent, must be rejected.

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[8] (1999) 48 NSWLR 1, 96 [457]-[458].

[9] *Caratti v Mammoth Investments Pty Ltd* (2016) 50 WAR 84, 169 [377]; *Correa v Whittingham* (2013) 278 FLR 310, 336 [127].

[25] Although the first respondent advanced two other grounds of opposition, in my view they are not sufficiently arguable to require reasoned consideration.

[26] In the result, it is appropriate to make the order sought by the applicant that she would be justified in making a second interim dividend of $800,000 to the creditors set out in part 4.0 of her report to creditors dated 27 April 2017.

Additional amount of first interim dividend

[27] The second question is whether before making the proposed second interim dividend the applicant is required to pay an additional or "top up" amount to Ms Bricknell in respect of the first interim dividend previously made by the applicant.

[28] On 17 September 2013, the applicant paid a first interim dividend in the sum of $508,374.42 to the creditors identified in the circular to the creditors dated 17 September 2018. The occasion for the second question is that after the first interim dividend was made, the applicant by agreement with Ms Bricknell (and the first respondent) increased the admitted amount of Ms Bricknell's proof of debt.

[29] Regulation 5.6.55 of the *Corporations Regulations* 2001 (Cth) provides, in part:

> "(5) If the liquidator:
>
> (a) revokes a decision to reject all of a proof of debt or claim; or
>
> (b) amends a decision to admit part of a proof of debt or claim;
>
> by increasing the amount of the admitted debt or claim, the creditor by whom it was lodged is entitled to be paid, out of available money for the time being in the hands of the liquidator:
>
> (c) the dividend; or
>
> (d) an additional amount of dividend;
>
> that the creditor would have been entitled to receive if all of the debt or claim had been originally admitted, or the increased amount had been admitted, before the available money is applied to pay a further dividend.
>
> (6) The creditor is not entitled to disturb the distribution of any dividends declared before the liquidator revoked or amended the decision."

[30] If r 5.6.55(5) applies, Ms Bricknell is entitled to be paid an additional amount for the first interim dividend before the second interim dividend is made.

[31] The question is whether after the declaration of the first interim dividend the applicant has increased the amount of the admitted debt or claim within the meaning of par (b).

[32] On or about 11 March 2009, Ms Bricknell lodged a first proof of debt in the sum of $21,870,363.

[33] On or about 7 August 2013, Ms Bricknell lodged a second (substituted) proof of debt in the reduced sum of $6,098,464.

[34] On 15 August 2013, the applicant admitted Ms Bricknell as a creditor in the sum of $6,098,464 upon the second proof of debt.

[35] On 13 September 2013, the first respondent purported to appeal the decision made by the applicant not to adjudicate upon the first proof of debt and to admit the second proof of debt.

[36] On 28 February 2014, I decided that the first respondent was not an aggrieved person who had a right of appeal from the decision.[10]

[37] On 28 April 2014, the first respondent filed a further proceeding claiming, inter alia, relief by way of amendment of the applicant's decision not to admit Ms Bricknell's first proof of debt.

[38] On 4 March 2015, the further proceeding was settled under the terms of a deed of settlement between the applicant, Ms Bricknell and the first respondent.

[39] Clause 2.1 of the deed of settlement provides:

> "For the purposes of any future dividend in the liquidation of the Company (not including the dividend declared by Williams on 17 September 2013), Williams will, pursuant to Regulation 5.6.55 of the Corporations Regulations, amend the decision to admit the proof of debt lodged by Nicole on 7 August 2013 by increasing it to $8,336.100.00"

[40] In my view, the intention of the parties to the deed of settlement, in accordance with the ordinary meaning of the text of cl 2.1, was that Ms Bricknell was not to receive any additional amount under r 5.6.55(5) in relation to the first interim dividend. That conclusion follows from the words "(not including the dividend declared by Williams on 17 September 2013)". If the intention was that she should have the entitlement to an additional amount as provided for under r 5.65.55(5) there would have been no reason to include those words which are inconsistent with that outcome.

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[10] *Perrin v Williams* [2015] 1 Qd R 426.

[41] It is not submitted that it was beyond the power of the applicant as liquidator to make such an agreement.

[42] In my view, it follows that the applicant would be justified in not paying a top up amount to Ms Bricknell as an additional amount as dividend she would have been entitled to receive if the increased amount of the debt had been admitted to proof before the first interim dividend was declared or paid.

Family court order

[43] On 13 October 2017, the Family Court of Australia made an order, in part, that the applicant:

> "…is hereby authorised to pay any dividends payable either to either Nicole Kathleen Bricknell or Matthew David Perrin pursuant to the assignment of [Nicole Kathleen Bricknell]'s rights as a creditor of Christie (QLD) Pty Ltd [sic] from Christie (QLD) (in liquidation) [sic] as follows:
>
> a. firstly, the sum of $370,000.00 (or any part thereof proportionately until that amount has been paid in total) to Tucker and Cowen Solicitors ($120,000.00) and the Liquidator of ACN 084 908 092 Pty Ltd (in liquidation) ($250,000.00) on a pro rata basis; and
>
> b. second, the sum of $25,000.00 to Catherine Perrin; and
>
> c. thirdly, the sum of $255,000.00 (or any part thereof until that amount has been paid in total) to the Trust Account of Attwood Marshall Lawyers (to the account of Matthew Perrin); and
>
> d. finally, any further amount payable, equally in the proportions of 50% each to, or at the direction of, Matthew David Perrin and Nicole Kathleen Bricknell respectively…"

[44] However, the liquidator was not a party to the proceedings in the Family Court. The deed of settlement previously mentioned was entered into subsequently, between the applicant, the second respondent and Ms Bricknell. Clause 5.2(b) of the deed of settlement provides, in part, that:

> "5.2 Williams shall direct the payment of…
> (b) any further dividends in the liquidation of the Company in respect of the proof of debt by Nicole to the trust account of Wiltshire Family Lawyers PROVIDED THAT the further dividends … will:
> …
> (iii) be otherwise dealt with by Wiltshire Family Lawyers strictly according to the terms of the orders of the Family Court of Australia in proceedings BRC8546/2010 made on 13 February 2014 and 17 December 2014…"

[45] The orders of 13 February 2014 and 17 December 2014, to the extent that they related to Ms Bricknell's proof of debt, provided for payments to Ms Bricknell and the first respondent.

[46] In my view, the order of 13 October 2017 does not relieve the applicant of the contractual promise she made by cl 5.2(b) of the deed of settlement to pay future dividends in respect of Ms Bricknell's second proof of debt, as increased, to the trust account of Wiltshire Lawyers. How those lawyers may be obliged to deal with amounts received is not a subject that was ventilated in this hearing.

[47] I decline to make an order that the applicant would be justified in paying Ms Bricknell's entitlement to payment of an amount in respect of the proposed second interim dividend in accordance with the order of the Family Court of Australia dated 13 October 2017 in proceeding BRC8546/2010.