PARTIES:	ABORGINAL & TORRES STRAIT ISLAND COMMISSION v JURNKURAKURR ABORIGINAL RESOURCE CENTRE ABORIGINAL CORPORATION (IN LIQUIDATION)
TITLE OF COURT:	SUPREME COURT OF THE NT
JURISDICTION:	SUPREME COURT OF THE NT
FILE NO:	NO 425 OF 1991
DELIVERED:	16 JUNE 1992
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CORPORATIONS - COMPANIES - Liquidator - Grounds for removal of Liquidator - "in performing his functions the Liquidator must both be and appear to be independent and impartial of the creditors" -

Corporations Act 1990 (Cth) ss. 473 and 532(2)

Re Stewden Nominees No. 4 Pty Ltd (1975) 1 ACLR 185, considered
Shanks Byren Industries Pty Ltd (1979) 2 NSWLR 880, considered
Re Queensland Stations (1991) 9 ACLC 1341, considered
Re Adam Eyton (1887) 36 CH. D 229, considered

REPRESENTATION:

Counsel:

Liquidator:	T Riley QC
Spice Cake (a creditor):	N Henwood
ATSIC	S Ridgeway

Solicitors:

Liquidator:	Cridlands
Spice Cake (a creditor):	McBride & Stirk
ATSIC	Australian Government Solicitor

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 425 of 1991

JURNKURAKURR ABORIGINAL RESOURCE CENTRE ABORIGINAL CORPORATION
AND:
ABORIGINAL COUNCILS & ASSOCIATION ACT 1976

BETWEEN:

ABORIGINAL & TORRES STRAIT ISLAND COMMISSION

Plaintiff

AND:

JURNKURAKURR ABORIGINAL RESOURCE CENTRE ABORIGINAL CORPORATION (IN LIQUIDATION)

Defendant

CORAM: ASCHE CJ

REASONS FOR JUDGMENT
(Delivered 16 June 1992)

On 22 November 1991 I had ordered that Mr Jackson, a partner of the firm Pannell Kerr Forster be appointed provisional liquidator of the Jurnkurakurr Corporation, JARCAC, and he subsequently became liquidator.

On 22 November 1991 my attention was not drawn to the requirement of s532 of the Corporations Act that the Court's leave be granted for the appointment of Mr Jackson. By application before me on 5 May 1992 I was asked to rectify this. That request was, however, opposed by Mr Riley QC, acting on behalf of one of the creditors, Spice Cake Proprietary Limited.

The basis of the opposition at that time was that a Mr Kennedy, who is also a partner in Pannell Kerr Forster, was on 11 November 1991 appointed a receiver and manager of the property of the corporation pursuant to the powers contained in a debenture executed by the Corporation as mortgagor in favour of the Aboriginal Development commission as mortgagee.

The circumstances of the appointment of Mr Kennedy meant that he became an officer of the Corporation pursuant to s82A and therefore Mr Jackson would be "a partner of an officer of the company" pursuant to s532(2)(c)(v).

On 5 May 1992 I gave reasons why I would still have been prepared to give leave to Mr Jackson pursuant to s532 if the objection was only on the basis of Mr Kennedy's appointment. I adhere to those reasons and I do not propose to repeat them here.

I was prepared to make the appropriate declarations under s1,322 to validate the appointment of Mr Jackson. By that time, however, some further objections to the appointment or continuance in office of Mr Jackson had been raised by Mr Riley on behalf of Spice Cake.

Since it appeared that those objections might be of substance and that Mr Jackson had not had a proper opportunity to meet them, I adjourned the application to allow

both parties to give further consideration to the position. That has now been done and Mr Jackson has filed a further affidavit, as has Mr Stirk, the solicitor for the creditors Spice Cake Proprietary Limited.

The matters left unresolved at the previous hearing were these:

1. An allegation that Pannell Kerr Forster had conducted an audit investigation of the corporation.

2. That Pannell Kerr Forster had conducted a number of investigations of the corporation on behalf of ATSIC.

3. That as a consequence of the business association between ATSIC and Pannell Kerr Forster, Mr Jackson might have an appearance of bias in favour of ATSIC against other creditors of the Corporation.

4. That it may become Mr Jackson's duty, as liquidator, to examine whether grants from ATSIC to the Corporation were properly applied, and to do this he may require to re-examine reports from Pannell Kerr Forster to ATSIC on such matters.

As to the first of those matters, Mr Jackson's affidavit explains this and his explanation is not contested. Paragraph 9:

> "From time to time my firm has been instructed by ATSIC to monitor the performance of a particular community to whom it has made a specific grant in relation to the conditions upon which the grant was made and to report to ATSIC as to whether, in view of my firm, the conditions upon which the grant was made gave been complied with. ATSIC and my firm generally refer to these assignments as acquittals, which term refers to the wish of ATSIC to ensure that the funds which are the subject of the

grant are spent in the manner which the conditions attach to the grant intended. These assignments are also often colloquially referred to as audits.

10. Audits or acquittals of the nature described are not of the nature of audit in the ordinary commercial sense and more particularly are not audits of the general affairs of either ATSIC or the relevant community, they are confined to a specific transaction.

11. My firm has never audited the affairs of ATSIC but it has been an auditor of some of the communities to which ATSIC from time to time has made grants. My firm has never accepted instructions from ATSIC to conduct an assignment of the nature of an acquittal when it has been the auditor of the recipient of the grant.

12. ATSIC is usually the entity which pays the remuneration sought by my firm in respect of assignments of the nature of acquittals. The majority of such assignments involve one partner and/or one member of staff and usually involve a request by ATSIC for my firm to investigate one or more particular aspects of the financial affairs of the recipient of a grant and report to ATSIC on the findings. These assignments rarely extend for a period of time greater than one or two weeks.

Hence the reasoning of Bowen CJ in Equity in *Re Stewden Nominees No. 4 Pty Ltd* (1975) 1 ACLR 185 at 187 does not seem to me to have the same force in these circumstances as it would have if Pannell Kerr Forster had been "auditors" of the corporation in the usually accepted use of the term. I refer to the remarks of his Honour at 187:

> "However, the auditor's relationship to the company is necessarily a close one. It may be noted that in the case of special investigations under Part VI A 'officer' in relation to a company includes an auditor. It would, of course, be against the usual practice of the court to appoint as liquidator an officer of the company, but whether an auditor should be regarded as falling into this category or not, there are reasons why it may often be undesirable to appoint an auditor or his partner. In practice an auditor is likely to become fairly closely connected with the board of directors. It is true that an auditor is appointed by the shareholders and is a watch-dog for the shareholders. However, even conceding this, it may be that the interests of creditors will be in conflict with those of shareholders or contributories. Furthermore, a liquidator may have to take action which would call in question accounts or proceedings which have directly or indirectly been proved or covered in the past by audit. It is important that a liquidator should be independent and should be seen to be independent."

I turn, therefore, to the other three grounds but I think I should keep in consideration the overall picture that Mr Jackson's firm has also acted for ATSIC in the circumstances set out in paragraphs 9 and 12 of Mr Jackson's affidavit.

I commence with the question raised by counsel as to whether these proceedings are governed by s532(2) or s473. In my view, at this stage they are not governed by s532(2). That point involving s532(2)(c)(v) was expressly the basis of the earlier opposition by Spice Cake. My earlier decision makes it plain that I would have found in favour of the liquidator on that aspect.

The present proceedings are, I consider, more properly under s473. That is, I should proceed as if I had granted leave under s532, which indeed I would have done in the circumstances as they were before me on the original application had the provisions of s532(2) been brought to my attention, and the circumstances of s532(2)(c)(v) been presented to me.

I think I must treat these further hearings as notionally accepting that I have granted leave under s532(2) but now putting forward further material which should, on Spice Cake's submission impel the removal of the liquidator by the Court pursuant to s473.

Mr Henwood may therefore be strictly correct when he submits that the onus of proof was on Spice cake to establish that cause be shown for the removal of the liquidator; but I do not think that questions of onus of proof are of any real significance here because the facts are undisputed and the decision lies within the Court's discretion on those facts.

In considering whether to remove a liquidator for cause shown the Court may look at a multitude of factors many of which are referred to in McPherson Law of Company

Liquidation 3rd Edition by J. O'Donovan 1987 pp 227-8, headed "Grounds for Removal".

> "In *re Sir John Moore Goldmining Company*, Jessell MR considered that the phrase 'on cause shown' referred to 'some unfitness of person - it may be from personal character or from his connection with other parties or from circumstances in which he is mixed up'. On this principle the court has removed a liquidator whose independence or fiduciary position was compromised by personal indebtedness to the company or by his claiming to rank as a creditor of the company or by his efforts to prevent misfeasance proceedings from being taken against him. Likewise, the fact that he has been closely associated with promoters or directors whose conduct required investigation or that he has manifested a tendency to favour certain interests at the expense of others or that he is motivated by personal animosity towards some of those interested in the winding up, may indicate such a lack of probity, impartiality or independence as makes it proper that he should be removed from office.
>
> Impropriety, misconduct or unfitness of this kind is always a sufficient ground for removal but it is now well settled that a liquidator may also be removed from office whenever the court is satisfied that this is in the best, - i.e. the real, substantial and honest-interests of the liquidation. This requirement may be satisfied by proof of some breach of duty or want of efficiency or appearance of partiality or conflict of duty on the part of the liquidator, but it also seems to be enough to show that winding up can be conducted more cheaply or more effectively by some other person. And since the creditors and contributories themselves are usually the best judges of what is in the interests of the liquidation, the court will take account of their wishes in deciding whether a liquidator should be removed, and may direct that meetings be held in order to ascertain their views. But while their wishes are relevant they are certainly not decisive for the seriousness of removing a liquidator requires that consideration of fairness to him should not be left out of account, as might occur if the matter were left simply to the unfettered control of creditors and contributories. Consequently, those who assert that the liquidator should be removed, are under a duty to establish at least a prima facie case that this is for the general advantage of the persons interested in the winding up, and the onus of proof will not be easy to discharge if the liquidator has become well acquainted with the business and affairs of the company, or the process of winding up has almost reached completion."

I should say that there is nothing before me to suggest that the process of winding up has almost reached completion.

Of all these matters set out by McPherson the relevant ones here of course are

the appearance of partiality or conflict of duty.

Mr Riley submits that any of the circumstances set out in paragraphs 2 to 4 of the unresolved matters mentioned, and certainly a combination of them, must be sufficient to establish this. Perhaps the most compelling argument relates to the $900,000 claimed by ATSIC. Paragraphs 18 and 19 of Mr Jackson's affidavit state this:

> "18. ATSIC has lodged a claim in the liquidation of JARCAC of the order of $900,000. The greater part of that claim is comprised of amounts granted by ATSIC to JARCAC which ATSIC asserts have become debts due to it because ATSIC alleges that JARCAC breached a condition of the grant thus rendering it a debt due to ATSIC.
>
> 19. The proof of debt which contains the claim of ATSIC against JARCAC has been and will be the subject of scrutiny on my part with a view to determining whether JARCAC did in fact breach the conditions of the grant and in so doing render the claim a debt.

As I follow it, the grants of monies by ATSIC to JARCAC were on certain conditions. If those conditions are breached, and only if they are breached, the grants become debts. Hence the liquidator must investigate the circumstances in which the monies were applied and it is suggested in Mr Stirk's affidavit that some form of estoppel by acquiescence might operate against ATSIC.

Although it is difficult to forecast how real such a situation may be, it cannot be discounted as a possibility at this stage.

If the total realisable assets of JARCAC are $1,332,263 or thereabouts (see the affidavit of Mr Jackson of 15 April 1992, paragraph 7), and ATSIC is accredited to the extent of $900,000, obviously the other creditors would have a real interest in the success or otherwise of ATSIC's proof of debt.

Mr Riley then points to the affidavit of Mr Jackson sworn 26 May 1992 in which he sets out that his firm conducted 19 assignments for ATSIC in the financial year 1990/91 and 16 during the nine months ended 31 March 1992. These assignments are referrable to paragraph 12 of Mr Jackson's affidavit where he says:

> "The majority of such assignments involve one partner and/or one member of staff and usually involve a request by ATSIC for my firm to investigate one or more particular aspects of the financial affairs of the recipients of a grant and report to ATSIC on the findings."

Mr Jackson's affidavit in paragraphs 13 and 14 set out that the remuneration in the first period, that is the financial year 1991, was 1.54 per cent of total fees earned by the firm in that year and in the second period, 1.74 per cent of total fees.

Mr Riley translates that into $169,400 and $191,400 respectively and submits these are not insignificant amounts, particularly if they comprise 10 per cent of the fees earned by the Alice Springs branch of the firm.

Mr Riley therefore submits that looking at that relationship between ATSIC and Pannell Kerr Forster, particularly in the Alice Springs area and bearing in mind the large proportion of total debt claimed by ATSIC, any creditor would be entitled to hold doubts as to whether Mr Jackson could be sufficiently independent.

In *Shanks Byrne Industries Pty Ltd* (1979) 2 NSWLR 880 at 88 Needham J says this:

> "It is submitted on behalf of Mr Brown, that, while a person in his position might not be appointed by the court as a liquidator, nevertheless one must show something more

than that fact in order to show cause for his removal. I think, however, I should apply the same principles to an application to remove a liquidator as I would apply to an application to appoint a person to be a liquidator.

I think, from what I have said, that it is already clear that, if I were appointing a liquidator to this company, I would not appoint Mr Brown or one of his partners, not because there is any criticism voiced of Mr Brown, nor because there was any suggestion that Mr Brown would perform his duties in any way other than to the best of his ability; I would not appoint him because he would be placed immediately into a position where a conflict might arise, and it is not proper that an order of the court should place anybody in such a position.

It is equally, I think, quite proper that the court should revoke, when it is challenged, the appointment of a person in such circumstances. I should again stress this application and this decision casts no reflection upon Mr Brown's character or his integrity. However, I think it is in the interests of the creditors that the order should be made and that I should appoint an A list liquidator."

Furthermore, Mr Riley submits that if Pannell Kerr Forster's acquittals or audits presently fail to turn up some suspicious circumstances in the corporation's management of its finances, it may be necessary to re-examine these in the light of the now discovered circumstances, and it may be necessary to determine with great care whether such circumstances should have been discovered earlier.

In other words, Mr Jackson may well be placed in a position of investigating whether his own firm had been negligent in the advice it gave to ATSIC. See, for instance, the investigation carried out into the financial viability of Eastbar Limited referred to in paragraph 3 of Mr Stirk's affidavit of 10 June 1992.

In *re Queensland Stations* (1991) 9 ACLC 1341 the head note reads:

"K, a partner in the firm KFH, a Brisbane firm, was the liquidator of the three subject companies. J was a partner in the firm BRM, a Townsville firm, and was also a partner in KFH so as to give the latter a presence in Townsville. Solicitors acting for a group of which the subject company were members, were examined by K under the

Companies Code concerning certain transactions and certain payments involving the solicitors' trust account. J, as a member of BRM had been the auditors of the solicitors' trust account, and BRM had given the solicitors financial and taxation advice concerning certain transactions under investigation. The solicitors argued that because of their relationship with J and BRM, K was placed in a position of conflict of interest and duty because he had been assisted in the liquidations by J. They applied for an order removing K as liquidator of the companies. K argued that while the staff at BRM was made available to assist him in the liquidations, the involvement of J was deliberately kept to a minimum. J said that he had carried out no inspection of company documents in relation to the liquidations and had had no involvement in any decisions made in respect of the liquidations.

It was held that K be removed as liquidator."

At 1344 Ryan J says this:

"It is true that in this case there is no nexus of the liquidator with any of the companies in liquidation or with any companies which are under investigation and that Mr Jessop has no nexus with them except so far as I have stated. Nevertheless it does seem to me that the liquidator is put into a position where he may have to review transactions in respect to which his partner has given advice, and payments into and disbursements from a trust account of which his partner is an auditor. That places him, in my opinion, in a position where his independence might seem to be in question. There is no suggestion that the liquidator would not perform his duties with complete integrity and to the best of his ability. But a liquidator must be independent and must be seen to be independent.

See also *re Adam Eyton* (1887) 36 CH. D. 299 at 306, Bowen LJ:

"In many cases, no doubt, and very likely, for anything I know in most cases, unfitness of the liquidator will be the general form which the cause will take upon which the court in this class of case acts but that is not the definition of due cause shewn. In order to define "due cause shewn" you must look wider afield, and see what is the purpose for which the liquidator is appointed. To my mind the Lord Justice has correctly intimated that the due cause is to be measured by reference to the real, substantial, honest interests of the liquidation and to the purpose for which the liquidator is appointed. Of course fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation. That should be thoroughly understood, I think, as of great importance; and in that sense it seems to me that this case is of interest because it clears, once and for all, away the misconception upon which the argument of the appellant's counsel

was based."

Mr Riley strongly submits that, to allow the liquidator to remain, this court would be applying a lesser standard than in other jurisdictions. This is a matter for serious consideration; for it would be regrettable if different standards would appear to apply in Australian courts; but I suppose it is really just another way of saying that the courts must demand the highest standards in the appointment of liquidators.

I emphasise, as has been emphasised in other cases, that nothing derogatory to the character of the liquidator is suggested. Indeed I am perfectly satisfied that Mr Jackson has most competently and properly discharged his function.

But the principles are plain, that "in performing his functions the liquidator must both be and appear to be independent and impartial of the creditors" (see *re Intercontinental Properties* 2 ACLR 488 at 491-492).

In my view, therefore, there is sufficient here to justify the removal of the liquidator, not, as I stress again, for any reasons derogatory to him, but simply because there is sufficient suspicion of appearance of partiality or conflict of duty which would make it proper that another liquidator be appointed; and I do that in the knowledge that this will cause further expense, as Mr Jackson himself has set out, and which I accept, and that Mr Jackson has become well acquainted with the business and affairs of the company and that the process of winding up has proceeded some substantial way. But it seems to me that while those are matters I must take into consideration the overall principle cannot be denied.

I take a view, however, that the liquidator is entitled to recognition under

section 532 and that removal should be seen as a subsequent act dependent on the further material placed before the court.

I propose, therefore, to make the orders in these forms:

1. Declare, pursuant to section 1322(iv)(a) that the appointment of Mr Jackson as provisional liquidator and liquidator and of his acting and continuing to act as provisional liquidator and liquidator of the corporation is not invalid by reason of any contravention of section 532(2) of the Corporations Law.

2. Order, pursuant to section 473(1) that Mr Jackson be removed by the court as provisional liquidator as from this day.

3. Order that the costs, including the costs of Mr Jackson be paid out of the liquidation.