

Hooke v Bux Global Limited (No 6) - [2018] FCA 1545

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FEDERAL COURT OF AUSTRALIA

**Hooke v Bux Global Limited (No 6) [2018] FCA 1545**

File number: WAD 644 of 2017

Judge: COLVIN J

Date of judgment: 11 October 2018

Catchwords: **CORPORATIONS** - application to wind up company on just and equitable grounds - winding up order made

**CORPORATIONS** - application by administrator to be appointed as liquidator - winding up order made on basis of matters including evidence of misconduct by directors - whether administrator appointed by directors would be independent and seen to be independent - consideration of matters bearing upon whether administrator would be seen to be independent - appearance of requisite independence not demonstrated - application dismissed - provisional liquidators appointed as liquidators

Legislation: [Corporations Act 2001 \(Cth\)](#) ss 461(1)(k), 462(2), 466(2)

Cases cited:

*Advance Housing Pty Ltd (in liq) v Newcastle Classic Developments Pty Ltd* (1994) 14 ACSR 230,

*Australian Securities and Investments Commission v Bilkurra Investments Pty Ltd* [2016] FCA 371,

*Bux Global Limited v Hooke* [2018] FCA 882,

*Deputy Commissioner of Taxation v Barroleg Pty Ltd* [1997] NSWSC 428; (1997) 25 ACSR 167,

*Hooke v Bux Global Limited* [2018] FCA 740,

*Re Allebart Pty Ltd (in liq)* [1971] 1 NSWLR 24,

*Re National Safety Council of Australia* [1990] VR 29,

Date of hearing: 11 October 2018

Registry: Western Australia

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

Category: Catchwords

Number of paragraphs: 28

Counsel for the Plaintiffs: Mr DJ Jackson SC with Ms CE Moss

Solicitor for the Plaintiffs: Tottle Partners

Counsel for the Defendant: The Defendant did not appear

Counsel for the Interested Person: Mr MJ Sims

Solicitor for the Interested  
Person:

Brown Wright Stein Lawyers

**Table of  
Corrections**

**ORDERS**

15 October 2018                    **WAD 644 of 2017**  
At [18], line two, 'Mr Sutherland' has been deleted and 'Mr Civil'  
inserted.

**BETWEEN: PETER JAMES HOOKE & CLAIRE ELIZABETH HOOKE**  
First Plaintiff

**PETER JAMES HOOKE & BRICE JAMES HOOKE AS TRUSTEES FOR  
THE HOOKE SUPERANNUATION FUND**  
Second Plaintiff

**JOHN CORRAN CRAWFORD**  
Third Plaintiff

**AND: BUX GLOBAL LIMITED (ACN 613 313 616)**  
Defendant

**GRAEME ROBERT BEATTIE**  
Interested Person

**JUDGE: COLVIN J**

**DATE OF ORDER: 11 OCTOBER 2018**

## THE COURT ORDERS THAT:

1. Pursuant to s 465B of the *Corporations Act 2001 (Cth)*, the following persons be substituted as the plaintiffs in these proceedings.
  - (a) Peter James Hooke and Claire Elizabeth Hooke, as first plaintiffs;
  - (b) Peter James Hooke and Brice James Hooke as trustees for the Hooke Superannuation Fund, as second plaintiffs; and
  - (c) John Corran Crawford, as third plaintiff.
2. The defendant company be wound up pursuant to s 461(1)(k) of the *Corporations Act*.
3. Martin Bruce Jones and Andrew Smith of Ferrier Hodgson, Level 28, 108 St George's Terrace, Perth, having consented to act, be appointed as the liquidators of the defendant.
4. The application by Graeme Robert Beattie for leave to be appointed as liquidator of Bux Global Limited be dismissed.
5. Order 1 of the orders made on 4 October 2018 appointing a provisional liquidator be vacated.
6. The plaintiffs' costs (including reserved costs), of the application to wind up the defendant and the application for the appointment of a provisional liquidator be assessed and reimbursed out of the property of the defendant in accordance with s 466(2) of the *Corporations Act 2001*.
7. There be liberty to the plaintiffs to apply within 14 days for further or special orders in relation to costs.
8. The plaintiffs' costs of the application for leave by Mr Beattie to be appointed as liquidator be paid by Mr Beattie to be assessed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

## REASONS FOR JUDGMENT

COLVIN J:

1. On the applications before me today, there are four substantive issues for me to determine concerning Bux Global Limited:
  - (1) should an order be made winding up the company on the just and equitable grounds now provided for in s 461(i)(k) of the *Corporations Act 2001* (Cth) ;
  - (2) if I am not satisfied that an order should be made on those grounds, should I grant leave to amend the application to allow a winding up order to be sought on the grounds of insolvency;
  - (3) if an order is to be made winding up Bux Global, who should be appointed as liquidator; and
  - (4) what should occur in relation to orders that I made for the appointment of a provisional liquidator which orders have been stayed until this afternoon.
2. Before I deal with these four matters, there is an application by Dr John Crawford to be joined as a plaintiff on the winding up application. He is the holder of fully paid shares in Bux Global. Dr Crawford seeks to be joined in circumstances where issues have been raised in the course of the winding up application as to whether the existing plaintiffs are contributories for the purposes of s 462(2) and have standing on that basis. Dr Crawford seeks to raise no additional grounds to those which have been advanced by the plaintiffs in this application for many months. The standing issue does not arise in relation to Dr Crawford. In those circumstances, I am satisfied that he should be joined as a plaintiff in these proceedings and I will make orders in due course formally joining him as the third plaintiff on the application and substituting the names of the other plaintiffs to reflect a minute of proposed orders provided to me this morning.

#### **Issue 1: Application to wind up on just and equitable grounds**

3. The principles to be applied in considering whether to wind up a company on just and equitable grounds are well established. As stated by Beach J at [56] in *Australian Securities and Investments Commission v Bilkurra Investments Pty Ltd* [2016] FCA 371 'there are three factors that are of central significance' in relation to the exercise of the power to wind up a company on just and equitable grounds:
  - (a) First, is there a justifiable lack of confidence in the conduct and management of the relevant company or its affairs?
  - (b) Second, is there a real risk to the public or the public interest that warrants protection by such an order and the incidents flowing from liquidation?
  - (c) Third, is the relevant company solvent?
4. The last question arises because '[a] court may be reluctant to wind up a solvent company' on just and equitable grounds.
5. As to the third factor, there can be no doubt because on 4 October 2018 the directors of Bux Global resolved that the company was insolvent and appointed Mr Graeme Beattie as administrator of the company.

6. For the following reasons, the other two factors are satisfied.
7. First, despite the serious matters raised in support of the application, the directors provided no substantive response to those claims in the course of these proceedings. The winding up application was commenced in December 2017. After an adjournment of the initial hearing dates which were to commence in July 2018, Bux Global was required to file affidavits in substantive response on 17 September 2018. It did not do so and terminated the instructions for solicitors who have had the conduct of the proceedings for Bux Global on 19 September 2018.
8. Second, the unanswered claims made in these proceedings include the following matters, which are supported by evidence before the Court on the winding up application:
  - (1) Bux Global was established to conduct a business in relation to an application for mobile devices whereby funds may be transferred in different currencies from one Bux account to another to facilitate the international transfer of funds (**Bux App**);
  - (2) investors in the business have contributed at least \$65 million over a period of a number of years;
  - (3) Bux Global was the latest in a series of companies which had been used to raise funds from investors for the development of the Bux App on the basis that there would be a public listing of a company conducting the business in which the investors would have shares that could be publicly traded;
  - (4) despite representations over a number of years by those involved with the companies and Bux Global, that listing has not occurred;
  - (5) in relation to the establishment of Bux Global as an Australian publicly listed company, those involved as its controllers disseminated offers of shares without complying with the prospectus provisions of the *Corporations Act*;
  - (6) responses provided by Mr Andrew Webber, as a director of Bux Global, to inquiries by the Australian Securities and Investments Commission concerning its fundraising activities were of a character that are properly described, as submitted, as being not candid;
  - (7) in the weeks prior to this hearing, those in control of Bux Global took steps which support the conclusion that the business relating to the Bux Apps was, to use the modern parlance, phoenixed into another company. Indeed, this is a view which Mr Beattie, in the affidavits that he has provided, has identified evidence to support in the course of the administration that has been conducted to this time;
  - (8) a licence agreement entered into by the directors of Bux Global with 2WayWorld as part of recent activities by directors allows that company the right to take over the assets of Bux Global if certain costs were not met by the company;
  - (9) some of the investments made in the Bux App were deposited into Australian bank accounts and those funds have been used to meet the personal expenses of those associated with the company. In particular, between 2007 and 2011, a total of about \$1.2 million was transferred to Mr Raymond Webber's wife, Roslyn Webber;

- (IO) Bux Global has received minimal earnings from the Bux App;
- (II) on the evidence before me, as I noted on the application for the appointment of a provisional liquidator, there is an issue as to whether the Bux App works. Since his appointment as administrator Mr Beattie has made inquiries about these matters. He says:

I have not been able to test the mobile phone app because I have not been able to locate the apps on either the Android and Apple App Stores ... I am informed that the app was removed as a result of my appointment ... Andrew Webber informed me, in effect, that, (a) as a result of my appointment, he turned off the company's website with download links to the app due to the freezing of the company's bank accounts subsequent to my appointment and the loss of the company's Australian Financial Services licence as authorised representative of Flexewallet, (b) there was a third party audit conducted in June 2017 showing that the app was working.

The affidavit of Mr Beattie also says that he is informed and believes that Mr Webber advised his staff, that is Mr Beattie's staff, that there are hardly any active users of the App given that there has not been sufficient advertising conducted with funds being spent on defending the current litigation. As to the truth of that explanation, Mr Beattie says:

However, upon review of the financial records, the company recorded advertising expenditure of circa \$1.5 million for the financial year ended 30 June 2018 as opposed to legal fees of circa \$621,000 paid to K&L Gates in defending the current proceedings. These records do not accord with the comments made by Mr Webber and further investigation is required.

- (I2) Mr Beattie, as administrator, supports the appointment of a liquidator of Bux Global and does not seek an adjournment of the winding up application under s 440A (2) of the *Corporations Act* in the interests of creditors; and
- (I3) the majority of the staff of Bux Global have resigned.
9. As I have noted, an issue was raised in these proceedings as to the standing of the parties who have been the plaintiffs in the application up until this point prior to my determination that Dr Crawford should be joined as a third plaintiff. Although the plaintiffs claim to have standing as contributories, it was contended that they were not contributories. Those plaintiffs also claimed that they were creditors and still claim that they are creditors of Bux Global on the basis that it was a knowing recipient of trust property which had been held for their benefit.
10. The issue as to whether the claims made by the plaintiffs as to their standing should be upheld was addressed on an unsuccessful application for summary dismissal of the winding up application that was brought by Bux Global and those issues are dealt with in the reasons relating to that application: *Hooke v Bux Global Limited* [2018] FCA 740 (Colvin J) and *Bux Global Limited v Hooke* [2018] FCA 882 (McKerracher J).

11. As matters presently stand, it is not necessary to determine this question because Dr Crawford, who is now the third plaintiff, clearly has standing and he supports the grounds that have been advanced for many months by the other plaintiffs.
12. For all of those reasons, I am satisfied that there should be an order winding up the company on just and equitable grounds.

### **Issue 2: Winding up on the grounds of insolvency**

13. Counsel for the plaintiffs only pressed the application to wind up on the grounds of insolvency if I was not satisfied that Bux Global should be wound up on just and equitable grounds. It follows from the conclusion I have reached upholding the application to wind up on just and equitable grounds that there is no need to consider the application brought this morning to amend the application to seek winding up on the grounds of insolvency.

### **Issue 3: Who should be appointed as liquidator**

14. As to the identity of the liquidator to be appointed, in April 2018, Mr Martin Jones and Mr Andrew Smith of Ferrier Hodgson provided their consent to being appointed should a winding up order be made on the present application. They are both experienced liquidators and no issue has been raised as to their suitability for appointment. Indeed, by orders presently stayed, they have been appointed as provisional liquidators of Bux Global. Those orders were made by me on 4 October 2018. On that same date, Mr Beattie was appointed as administrator by the directors of Bux Global. Not long after the orders were made in relation to the provisional liquidation of the company, which were stayed to enable Mr Beattie as administrator to consider the position in relation to the provisional liquidation, Mr Beattie was informed of those orders.
15. As to the terms and circumstances of his appointment as administrator, Mr Beattie was provided with an upfront payment of \$60,000 to cover his initial remuneration and expenses associated with the administration of the company. Those funds were provided by Champagne Australia Pty Ltd, which claims to be a secured creditor of Bux Global. On the evidence before me, Champagne is a company associated with Mr Raymond Webber. Information to be provided by Mr Beattie to creditors shows that the company has assets of about \$2 million and the claim by Champagne as a secured creditor is about \$5.8 million.
16. In an affidavit in these proceedings in support of an application that he be appointed as liquidator, Mr Beattie says:

At this stage, I have received limited funding from related entity and major creditor Champagne Australia Proprietary Limited to pay ongoing expenses for the company, however given the various concerns on the continued viability of the company, the app, inter-company loans and overall purported actions taken by Mr Webber and possibly the former directors, I will leave the decision to court to decide if a court liquidation is the best approach for the company ... in my view, it is appropriate that the court orders the winding up of the company.

17. Mr Beattie also deposes to the following reasons as to why he says it is appropriate that he be appointed as liquidator:

- (1) He is suitably qualified to take the appointment;
  - (2) the company's registered office and business appears to have been conducted out of offices in New South Wales;
  - (3) he has undertaken what he describes as a significant amount of work in investigations over the past few days since his appointment and there would be a duplication of costs if another practitioner was appointed;
  - (4) he is capable of bringing an independent mind to the appointment and would not feel restrained from bringing proceedings against the directors and former directors;
  - (5) he has possession of a number of books and records of the company;
  - (6) a number of key stakeholders, directors, former director, Andrew Webber and creditors are based in Sydney;
  - (7) from the records available the majority of nonrelated creditors are from New South Wales; and
  - (8) there is a shareholder listing and he cannot identify which States those shareholders are in, but says the Australian shareholders are based throughout Australia.
18. Mr Beattie does not depose to the content of the communications that he had with directors of Bux Global or with officers of Champagne or with a Mr Civil, a person with whom he has had an ongoing professional relationship for some time, in relation to his appointment. He has referred to what he describes as key communications in relation to his appointment that occurred over the period from 17 September 2018 until 3 October 2018. They include a number of meetings and telephone calls with Mr Andrew Webber and Mr Raymond Webber discussing the company's circumstances and the possible appointment of an administrator. However, he does not beyond that identify the matters that were discussed in those communications.
19. Mr Beattie says that he is a creditor for about \$32,000. An affidavit in evidence provided to me today raises issues about the position of the company in relation to availability of funds to meet any such liability. He says fees of approximately \$32,000 have been incurred in the administration of the company since his appointment.
20. Mr Beattie says he believes he has a head start over any other person who may be appointed. I would not describe Mr Beattie's involvement to date as a head start in the administration of the affairs of a company that are likely to involve close scrutiny of the conduct of those involved in his appointment and the company who has funded his activities.
21. Both the solicitors and counsel involved in advancing the application for the winding up orders in this case have described the conduct by the controllers of Bux Global as involving fraud. This characterisation has been put to Mr Beattie and notwithstanding the fact that the character of the liquidation is one which takes place against that background and he was appointed by those officers involved in that conduct or at least some of them, he maintains that it is appropriate for him to be appointed as liquidator.

22. It is clear on the authorities that first and foremost liquidators must be independent and be seen to be completely independent: *Re Allebart Pty Ltd (in liq)* [1971] 1 NSWLR 24 at 2830; *Re National Safety Council of Australia* [1990] VR 29 at 3234; *Advance Housing Pty Ltd (in liq) v Newcastle Classic Developments Pty Ltd* (1994) 14 ACSR 230 at 23234 and *Deputy Commissioner of Taxation v Barroleg Pty Ltd* [1997] NSWSC 428; (1997) 25 ACSR 167 at 174.
23. As I have noted, Mr Beattie was selected by the directors of the company. He says that this is not unusual. But this is no ordinary liquidation. The issue of whether Mr Beattie might be seen to be completely independent for the purposes of the application of those well-established principles must be viewed in the context of the particular circumstances in which this company is being ordered to be wound up.
24. I have explained the basis upon which the winding up orders are made in this case and they include matters of serious concern about the manner in which the affairs of the company have been conducted by its controllers. Mr Beattie himself recognises that even at this preliminary stage there are matters raised by his investigations concerning issues about the phoenixing of the company by its directors. Bux Global has, on Mr Beattie's investigations to date, been trading only with the support of Champagne, the party who has provided him with funds for the purposes of the administration. In those circumstances it is very difficult to see how Mr Beattie could consider that he would meet the requirement that he be seen to be completely independent for the purposes of undertaking the liquidation of Bux Global.
25. Further, this is not a case where significant work has been undertaken by Mr Beattie. Indeed, he knew from the outset that there had been an order for provisional liquidation and that the present application was listed for hearing today and had been so listed for a considerable period. The matters raised about location of creditors and contributories and directors are matters of secondary concern and only fall for consideration in circumstances where there is a conclusion that the proposed appointee's liquidator has the requisite independence.
26. For the reasons I have given I do not accept the application made by Mr Beattie for leave for him to be appointed as liquidator. I will make orders appointing Mr Jones and Mr Smith as liquidators.

#### **Issue 4: Provisional liquidator**

27. It follows that the orders that I made in relation to provisional liquidation would no longer serve any purpose and I will discharge those orders.

#### **Conclusion**

28. In the above circumstances, I will make orders for winding up and the appointment of Mr Jones and Mr Smith as liquidators. I make an order that the application by Graeme Robert Beattie for leave to be appointed as liquidator of Bux Global be dismissed. I will make an order that the plaintiffs, that is, all plaintiffs' costs, including reserved costs, of the application to wind up the defendant and the application for appointment of the provisional liquidator be assessed and reimbursed out of the property of the defendant in accordance with s 466(2) of the *Corporations Act*.  
I will hear from the parties as to any further orders and, in particular, what orders should be made in relation to the costs of the application by Mr Beattie.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the

Reasons for Judgment herein of the Honourable Justice Colvin.

Associate:

Dated: 11 October 2018