

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Uglii Corporation Ltd

(No. 2) [2016] FCA 1511

File number: VID 640 of 2016

Judge: **DAVIES J**

Date of judgment: 6 December 2016

Catchwords: **CORPORATIONS** – application for winding up in insolvency under s 459B of the *Corporations Act 2001* (Cth) – whether the “cash flow test” for insolvency under s 459B is satisfied

Legislation: *Corporations Act 2001* (Cth), ss 459B, 464

Cases cited: *Australian Securities and Investments Commission v Bilkurra Investments Pty Ltd* [2016] FCA 371
Australian Securities and Investments Commission v Uglii Corporation Ltd [2016] FCA 1099
Southern Cross Interiors Pty Ltd v Deputy Commissioner of Taxation (2001) 53 NSWLR 213

Date of hearing: 6 December 2016

Registry: Victoria

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

Category: Catchwords

Number of paragraphs: 23

Counsel for the Plaintiff: M Pearce SC with L Papaelia

Solicitors for the Plaintiff: Australian Securities and Investments Commission

Counsel for Interested Persons: J Knorr and H Knorr were granted leave to make submissions in opposition to the Plaintiff’s applications

ORDERS

VID 640 of 2016

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Plaintiff

AND: **UGLII CORPORATION LIMITED** (and others named in the
Schedule)
First Defendant

JUDGE: **DAVIES J**

DATE OF ORDER: **6 DECEMBER 2016**

THE COURT ORDERS THAT:

1. The plaintiff have leave to amend the name of the sixth defendant in the originating process dated 14 June 2016 from Uglii Ads System Pty. Ltd. to Global Ads System Pty Ltd and to file and serve an amended originating process.
2. John Knorr and Heather Knorr have leave to make submissions in opposition to the plaintiff's application to wind up each of the defendants in insolvency pursuant to section 459B of the *Corporations Act 2001* (Cth) ("**the Act**").
3. Uglii Corporation Limited (ACN 085 265 309) be wound up in insolvency pursuant to section 459B of the Act.
4. Robyn-Lee Erskine and Adrian Hunter, official liquidators, of Brooke Bird of 471 Riverside Road, Hawthorn East, in the State of Victoria be appointed as joint and several liquidators to Uglii Corporation Limited (ACN 085 265 309) with all relevant statutory powers given to liquidators under the Act.
5. Traralgon Technology Holdings Limited (ACN 130 403 520) be wound up in insolvency pursuant to section 459B of the Act.
6. Robyn-Lee Erskine and Adrian Hunter of Brooke Bird be appointed as joint and several liquidators to Traralgon Technology Holdings Limited (ACN 130 403 520) with all relevant statutory powers given to liquidators under the Act.
7. Uglii Find Australia Limited (ACN 101 790 505) be wound up in insolvency pursuant to section 459B of the Act.

8. Robyn-Lee Erskine and Adrian Hunter of Brooke Bird be appointed as joint and several liquidators to Uglii Find Australia Limited (ACN 101 790 505) with all relevant statutory powers given to liquidators under the Act.
9. Bizmio Limited (ACN 123 172 412) be wound up in insolvency pursuant to section 459B of the Act.
10. Robyn-Lee Erskine and Adrian Hunter of Brooke Bird be appointed as joint and several liquidators to Bizmio Limited (ACN 123 172 412) with all relevant statutory powers given to liquidators under the Act.
11. Projects Discovery Services Pty Ltd (ACN 112 690 347) be wound up in insolvency pursuant to section 459B of the Act.
12. Robyn-Lee Erskine and Adrian Hunter of Brooke Bird be appointed as joint and several liquidators to Projects Discovery Services Pty Ltd (ACN 112 690 347) with all relevant statutory powers given to liquidators under the Act.
13. The plaintiff's application to wind up Global Ads System Pty Ltd (ACN 604 405 263) be adjourned to Friday, 9 December 2016 at 11.30 am.
14. The defendants pay the plaintiff's costs of the winding up applications.

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

REASONS FOR JUDGMENT
(REVISED FROM TRANSCRIPT)

DAVIES J:

- 1 On 8 September 2016, the Court ordered pursuant to section 472 of the *Corporations Act 2001* (Cth) (“**the Act**”) that Robyn-Lee Erskine and Adrian Hunter, official liquidators of Brooke Bird, be appointed as joint and several provisional liquidators to each of the defendants. The application that the defendants be placed into provisional liquidation was made by ASIC, which has been conducting an investigation into the affairs of the companies. Two primary grounds were relied upon by ASIC, namely, that there was evidence that each of the companies is insolvent, and evidence justifying a lack of confidence in the controllers of the companies and the manner in which they have managed the entities and raised funds from investors.
- 2 The Court was satisfied that there was a reasonable prospect that the companies would ultimately be wound up in insolvency, stating that it was clearly arguable that the companies were all insolvent and that the cogent evidence of insolvency had not been answered by the companies. The Court also considered that there was a reasonable prospect that a winding up order would ultimately be made on the just and equitable ground, holding that there was cogent reason to have a lack of confidence in the conduct and management of the affairs of the companies and a risk to the public interest requiring protection: *Australian Securities and Investments Commission v Uglii Corporation Ltd* [2016] FCA 1099 (“**ASIC v Uglii Corporation**”).
- 3 ASIC has now applied for orders to wind up, and appoint a liquidator to, each of the companies on the ground of insolvency pursuant to section 459B of the Act. ASIC has the standing to make that application under section 464 of the Act. ASIC no longer presses its application for the winding up of the companies on the just and equitable ground pursuant to section 461(1)(k) of the Act, but has submitted that the considerations which would support the winding up on that basis clearly dispel any discretionary ground for declining to wind up the companies.
- 4 The first defendant (“**Uglii Corporation**”) was registered as a proprietary company on 20 November 1998 and became an Australian public company on 29 August 2008. Each of the other companies was registered between 2002 and 2015. The second (“**TTH**”), third

(“**Ugllii Find**”) and fourth (“**Bizmio**”) defendants are Australian public companies, and the fifth (“**PDS**”) and sixth (“**Global Ads**”) defendants are proprietary companies.

5 Ugllii Corporation’s principal business activities are described as developing a portfolio of intellectual property and developing an online spatial global business discovery and directory and search systems, content management systems and spatial marketplace systems. These systems appear to be web-based systems which assist in locating and evaluating businesses, marketing and compiling information.

6 The principal activity of TTH is holding investments in Ugllii Corporation, as well as some shares in Bizmio.

7 Bizmio’s principal activity is stated to be the “sales and marketing of the Ugllii system to national partners and affiliates”.

8 Ugllii Find appears to be dormant.

9 The business carried on by Global Ads is stated to be the provision of “spatial and geographical search and discovery processes for all types of classified ads”.

10 PDS is the entity which employs the staff for Ugllii Corporation.

11 John Knorr was a director of Ugllii Corporation from registration until 22 March 2016 and a director of Global Ads from 24 February 2015 to 25 October 2016. He is a current director of TTH, Bizmio, Ugllii Find and PDS. Heather Knorr is currently a director of Ugllii Corporation. Mr and Mrs Knorr each applied for leave to appear to oppose ASIC’s application to wind up the companies in insolvency, and each of them filed affidavits supporting their opposition. Leave was granted to each of them to make submissions to the Court as to why the companies should not be wound up in insolvency. There is no notice of opposition setting out their grounds of opposition but, in essence, three grounds were raised by Mr and Mrs Knorr in the course of submissions.

12 First, Ugllii Corporation’s intellectual property is very valuable and will generate substantial revenue for the company. It was submitted that the company has numerous claims for breaches of its patents, including claims against Nokia for €300 million. It was submitted by Mr Knorr that the company’s patent assertion program is ready to be implemented and will generate very substantial amounts of money. It was also submitted that the Ugllii system will generate significant revenue either through implementation or sale. It is the firm and

considered belief of Mr Knorr that if Uglia Corporation is able to remain in existence, the company will be able to meet all of its debts as and when they become payable. Mr Knorr submitted that the potential for the company to generate substantial revenue from its patents and the operation of the Uglia system is a compelling reason not to wind up the company, taking into account also the interests of the shareholders who have invested substantial amounts of money in the company.

13 Secondly, Global Ads does not have any debtors and is not insolvent.

14 Thirdly, the other companies are either not related to Uglia Corporation and should not be caught up with the issues concerning Uglia Corporation and/or the debts owed by some of the companies are so insignificant that those companies should not be wound up.

15 It is well established that the statutory test for insolvency is a cash flow test: *Australian Securities and Investments Commission v Bilkurra Investments Pty Ltd* [2016] FCA 371, [59]. In considering whether a company is insolvent, the Court must have regard to commercial realities in considering what resources are available to the company to meet its liabilities as they fall due, and whether resources other than cash are realisable by sale or borrowing upon security and when such realisations are achievable: *Southern Cross Interiors Pty Ltd v Deputy Commissioner of Taxation* (2001) 53 NSWLR 213 at 224 – 225. The Court will consider whether a company's position as a whole reveals surmountable temporary illiquidity or insurmountable illiquidity and inability to pay debts as and when they fall due.

16 There is ample evidence of insolvency which has not been rebutted. That evidence comprises the same evidence that supported ASIC's application for the appointment of provisional liquidators to the companies, which is set out in detail in *ASIC v Uglia Corporation* at [48] to [62], and on which ASIC also relies on the application to wind up. In addition, the provisional liquidators have since filed their report to the Court which contains their findings concerning the solvency of the companies. In respect of each company, the provisional liquidators hold the opinion that the company is insolvent. In this regard, I note that the financial position of Global Ads as reported by the provisional liquidators in their report to the Court may have altered since that report was filed and the company may no longer have any liabilities. ASIC asked for an adjournment of the winding up application in respect of that company to verify whether, in fact, there are any debts now owing by that company. The provisional liquidators, in reaching their view in relation to the other companies that each of those companies is insolvent, reported that none of the companies has any readily realisable

assets available to them to meet their outstanding liabilities from their own resources and they have not been provided with any substantive information that would indicate that any of the companies has access to funds from third parties that would allow the liabilities to be met.

17 In forming the view that the companies are insolvent, the provisional liquidators gave consideration to the value of the intellectual property which is held by the Uglii Corporation. The provisional liquidators reported that the value had not been able to be quantified. Under the heading "Intellectual Property", the provisional liquidators stated as follows:

The directors expressed concern that due to the unique and complex nature of the intellectual property the Provisional Liquidators would be unable to grasp the true value of the intellectual property.

Therefore in an attempt to ensure we were equipped with appropriate information to assess the value of the intellectual property the directors were invited to provide information to us to describe the intellectual property and provide evidence to substantiate its value.

Attached at **Annexure 2** is the report received from John Knorr and the schedule of patents and trademarks provided by Ann Zhu, company secretary, at the request of John Knorr.

On 21 October 2016 we received a letter from John Knorr which is attached and marked **Annexure 3**. In this letter Mr Knorr states "Uglii has never tried to understand the value of its patents because it has never intended to sell those patents."

We are aware that certain trademarks/patents are due for renewal or are overdue. As the company is without funds we have not been able to do anything to protect these assets.

From the information we have seen the intellectual property comprises primarily patents (granted and pending), registered trademarks and business names. We have not been provided with any independent information from the company or its directors to establish a value for these assets. Further, given the lack of funds in the administrations we have been unable to engage the services of a suitably qualified professional to provide us with an opinion as to the value of the intellectual property.

Due to the nature of the intellectual property we believe even if we were to find a suitably qualified person to conduct a valuation it would be a difficult task as the intellectual property, despite having been in development now for some years, has not produced any significant income and has no track record that could underpin estimates of future performance and value.

The concerns raised by KPMG as to the values placed on the Intellectual property by the directors seem to be legitimate and proper concerns and we are also unable to conclude what value the intellectual property has if any.

The value of the intellectual property underpins the assets of Uglii Corporation Ltd, Traralgon Technology Holdings Ltd, Global Ads System Pty Ltd and Project Discovery Services Pty Ltd; either due to the major assets being shares in Uglii Corporation or the major assets being monies owed from Uglii Corporation. The inability to confidently predict a value for the intellectual property and lack of

evidence having been produced to indicate the Uglii system is readily saleable would indicate these companies will not have the capacity to meet their liabilities from their own resources in the immediate future due to the inability to realise their major asset.

- 18 The provisional liquidators also stated that the return to the creditors and shareholders was completely dependent on the ability to realise the intellectual property of the group and that, due to the uncertainty surrounding its saleability and value, they had been unable to estimate the return to creditors or shareholders.
- 19 Mr and Mrs Knorr have taken issue with the provisional liquidators' report. Save for Global Ads, the substantive issue concerns the value of the intellectual property. Mr Knorr put several submissions to the Court supporting his view that the intellectual property has considerable value, and his plea that Uglii Corporation should be given the chance to extract that value at least by implementing the assertion program which, he said, was ready to commence.
- 20 I accept that Mr and Mrs Knorr genuinely believe for considered reasons that the assertion program and Uglii system each have substantial worth, and that substantial revenues would be generated for Uglii Corporation if the company was able to continue, and not placed into liquidation. However, the only independent evidence produced to the Court in verification of their claims was a report by a Dr Robert Sanders, who conducted an income based valuation of the Uglii system as at December 2014. That valuation indicates that the patents for the Uglii system do have considerable value but the valuation was based on cash flow projections provided by Uglii Corporation. KPMG have referred to this report in its going concern file note on Uglii Corporation and did not consider that this valuation could be used as a basis to test the valuation of the patents because there was insufficient evidence to support the cash flow projections reliably. In *ASIC v Uglii Corporation* the Court considered it relevant to the ground of insolvency on the application for the appointment of provisional liquidators that Uglii Corporation did not file any independent evidence verifying those cash flow projections, and expressed the view that it would be expected that such evidence would have been adduced by the company if available. It is pertinent that the provisional liquidators were also not provided with any independent information to establish the value of the patents although they invited Mr and Mrs Knorr to provide such evidence. It is also pertinent to the applications to wind up the companies that there is still no independent evidence before the Court to verify the reliability of those cash flow projections. There is no substantive evidence

which would enable the Court to form the view that the cash flow projections are, or may be, reasonably based and that the patents or the Uglii system have, or will have, substantial value.

21 The material before the Court also does not enable the Court to form the view that the patent assertion program is likely to result in considerable funds being generated by the company, either in the near future or at all. In this regard it is pertinent that the KPMG going concern analysis, which is referred to and set out in more detail in *ASIC v Uglii Corporation*, considered the claim that Uglii Corporation had forecast, for the January 2016 to September 2016 period, that it would generate \$100 million from its claims against breaches of the Uglii patents. The KPMG report noted that Uglii Corporation had represented that the Uglii patents had been breached by all smartphone manufacturers whose apps feature business search process across a number of countries and Mr Knorr had stated his expectation that an initial claim would be able to be made against Nokia, and that it had been stated by Uglii Corporation that Nokia have set aside \$300 million (not €300 million as claimed in this hearing) for potential claims in relation to such breaches. KPMG's opinion, following its review, was that it was highly uncertain that Uglii Corporation will be able to be successful in such claims within the next 12 months; it appeared that no official legal action had yet been taken; KPMG had not seen communications between Uglii Corporation and Nokia; and KPMG was unable to confirm the assertion that Nokia had set aside \$300 million for potential claims in relation to such breaches. KPMG reported that positive cash flows in the near future were uncertain, as there had been no legal action to date, there was uncertainty over successful legal future outcomes and uncertainty over timeframes before settlement. KPMG concluded that it was difficult to place reliance on this revenue stream as a viable positive cash flow avenue in the next 12 months and that it was unlikely to support the current cash flow requirements. It is pertinent that Mr and Mrs Knorr have still not produced any independent evidence to substantiate that Nokia has set aside any amount, whether in the order of €300 million, \$300 million or some other amount, to meet a potential claim against it for breach of the Uglii patents, let alone that its patent assertion program will produce significant income.

22 The Court cannot be satisfied on the basis of Mr and Mrs Knorr's assertions alone that the intellectual property is likely to produce significant income, either through the implementation of the Uglii system, the sale of the patents or the patent assertion program. The assertions made by Mr and Mrs Knorr do not fill the gap of the lack of cogent, probative evidence to demonstrate that Uglii Corporation holds assets which are readily realisable and

if realised within the near future would enable Uglii Corporation to meet its liabilities as and when they fall due. Having regard to the failure to provide such evidence to KPMG, the provisional liquidators and the Court, it is reasonable to conclude that such evidence cannot be produced. The evidence otherwise clearly established that Uglii Corporation is insolvent. The evidence also was that the other companies are reliant upon the ongoing viability of the Uglii Corporation to be able to meet their liabilities as and when they fall due. I am therefore satisfied that the other companies are also insolvent (save for Global Ads which is yet to be determined).

23 It was submitted by Mr and Mrs Knorr that even if the Court concluded that the companies are insolvent, nonetheless the prospect of either the patent assertion program or the implementation or sale of the Uglii system generating substantial revenue is a compelling reason that would justify the Court not making the winding up orders, taking into account also that the shareholders have invested very substantial amounts in the companies in the expectation of Uglii Corporation generating revenues from those sources. The Court was urged to give Uglii Corporation a period of three months to demonstrate that it would derive revenue from its patent assertion program. However, in the absence of any independent evidence substantiating either the likelihood that funds of any considerable magnitude may be expected, let alone within a reasonable timeframe, I do not consider such time should be afforded to the company where otherwise I am satisfied that the company is insolvent. The orders winding up the companies (apart from Global Ads) will be made.

I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies.

Associate:

Dated: 13 December 2016

Schedule

No: VID 640 of 2016

Federal Court of Australia

District Registry: Victoria

Division: General

Second Defendant

**TRARALGON TECHNOLOGY HOLDING
LIMITED (ACN 130 403 520)**

Third Defendant

UGLII FIND AUSTRALIA LTD (ACN 101 790 505)

Fourth Defendant

BIZMIO LIMITED (ACN 123 172 412)

Fifth Defendant

**PROJECTS DISCOVERY SERVICES PTY LTD
(ACN 112 690 347)**

Sixth Defendant

**GLOBAL ADS SYSTEM PTY LTD (ACN 604 405
263)**