FEDERAL COURT OF AUSTRALIA

Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed) (No 2) [2020] FCA 472

File number:	NSD 357 of 2020
Judge:	**MARKOVIC J**
Date of judgment:	1 April 2020
Date of publication of reasons:	9 April 2020
Catchwords:	**CORPORATIONS** – application for orders pursuant to s 447A(1) of the *Corporations Act 2001* (Cth) (**Act**) varying the operation of s 443A(1)(c) and s 443B(2) of the Act such that the administrators of a group of companies are not personally liable for rent due under leases for a two week period – application allowed **CORPORATIONS** – application for directions pursuant to s 90-15 of the Insolvency Practice Schedule (Corporations), being Sch 2 to the Act, that the administrators are justified in causing the group of companies not to pay rent due under leases for a two week period – application allowed
Legislation:	*Corporations Act 2001* (Cth) ss 435A, 443A(1)(c), 443B(2), 447A(1), Sch 2 ss 5-30, 90-15, 90-15, 90-20 *Federal Court of Australia Act 1976* (Cth) ss 37AF, 37AG(1)(a)
Cases cited:	*Ample Source International Limited v Bonython Metals Group Pty Limited (in liquidation), in the matter of Bonython Metals Group Pty Limited (in liquidation) (No 8)* [2018] FCA 1614; (2018) 366 ALR 491 *Australasian Memory Pty Limited v Brien* (2000) 200 CLR 270 *In the matter of Cook Cove Pty Ltd (admins apptd) and Boyd Cook Cove Finance Corporation Pty Ltd (admins apptd)* [2009] NSWSC 620 *In the matter of Mothercare Australia Limited (administrators appointed)* [2013] NSWSC 263 *In the matter of Octaviar Administration Pty Ltd (in liq)* [2017] NSWSC 1556 *In the matter of RCR Tomlinson Ltd (administrators*

	appointed) [2018] NSWSC 1859 *In the matter of Renex Holdings (Dandenong) 1 Pty Ltd (administrators appointed)* [2015] NSWSC 2002 *Mentha, in the matter of Griffin Coal Mining Company Pty Ltd (administrators appointed)* [2010] FCA 1469; (2010) 82 ACSR 142 *Silvia v FEA Carbon Pty Ltd* (2010) 185 FCR 301
Date of hearing:	1 April 2020
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Category:	Catchwords
Number of paragraphs:	72
Counsel for the Plaintiffs:	Ms V Whittaker SC and Ms T Jonker
Solicitor for the Plaintiffs:	Hamilton Locke
Counsel for the Interested Party:	Mr H Austin QC and Ms N Papaleo
Solicitor for the Interested Party:	Lander & Rogers

ORDERS

NSD 357 of 2020

IN THE MATTER OF CBCH GROUP PTY LTD ACN 600 219 841, CBCH AUSTRALIA PTY LTD ACN 137 924 791, CBCH BUYING CO PTY LTD ACN 162 989 335 AND COLETTE INTERNATIONAL PTY LTD ACN 158 346 046 (ALL ADMINISTRATORS APPOINTED)

VAUGHAN STRAWBRIDGE, SAM MARSDEN AND JASON TRACY IN THEIR CAPACITY AS JOINT AND SEVERAL ADMINISTRATORS OF CBCH GROUP PTY LTD ACN 600 219 841, CBCH AUSTRALIA PTY LTD ACN 137 924 791, CBCH BUYING CO PTY LTD ACN 162 989 335 AND COLETTE INTERNATIONAL PTY LTD ACN 158 346 046
Plaintiffs

JUDGE: **MARKOVIC J**

DATE OF ORDER: **1 APRIL 2020**

THE COURT ORDERS THAT:

1. Pursuant to s 37AF(1)(b) of the *Federal Court of Australia Act 1976* (Cth), on the ground that it is necessary to prevent prejudice to the proper administration of justice, the following documents are to be marked "confidential" on the electronic court file and are not to be published or accessed, except pursuant to an order of the Court or the written agreement of the plaintiffs, until 5 pm on 15 April 2020:
   (a) confidential exhibit SAM-A to the unsworn affidavit of Sam Andrew Marsden dated 30 March 2020 (**Marsden Affidavit**) and marked "confidential" (**Confidential Exhibit**); and
   (b) the transcript of the hearing of the application on 30 March 2020 and 1 April 2020 to the extent that the transcript discloses the content of the Confidential Exhibit.
2. Pursuant to s 447A(1) of the *Corporations Act 2001* (Cth) (**Act**), Pt 5.3A of the Act is to operate in relation to each of CBCH Group Pty Ltd (administrators appointed), CBCH Australia Pty Ltd (administrators appointed), CBCH Buying Co Pty Ltd (administrators appointed) and Colette International Pty Ltd (administrators appointed) (**Colette Group**) as if each of ss 443A(1)(c) and 443B(2) of the Act provide that each of the plaintiff administrators is not, from the date of this order to 5

pm on 14 April 2020, personally liable for any liability for property leased, used or occupied, nor for the rent or other amounts payable pursuant to any of the leases referred to in annexure SAM-13 to the Marsden Affidavit (**Leases**).

3. Pursuant to s 90-15 of the Insolvency Practice Schedule (Corporations), being Schedule 2 to the Act, each of the plaintiff administrators is justified in causing the companies in the Colette Group not to meet their obligations to pay rent pursuant to any of the Leases which have accrued up until 5 pm on 14 April 2020.

4. Any person demonstrating sufficient interest in Order 1 above has liberty to apply to vary that order on three business days' notice to the plaintiffs and to the Court.

5. Any creditor of the Colette Group demonstrating sufficient interest in Order 2 above has liberty to apply to vary that order on three business days' notice to the plaintiffs and to the Court.

6. The costs and expenses of and incidental to this application and the hearing on Monday 30 March 2020 be costs and expenses in the administrations of the companies in the Colette Group and the plaintiffs may allocate those costs amongst the companies on a pro rata basis.

7. Adjourn the proceeding to 15 April 2020 at 2.15 pm to be listed before the Commercial and Corporations Duty Judge or a docket judge to be allocated by the National Operations Registrar for the hearing of any application which the plaintiffs wish to make at that time, noting that the plaintiffs will endeavour to notify the Court of their intention to make an application and of the nature of that application at the earliest opportunity.

8. A copy of these Orders is to be served on each landlord set out at SAM-13 to the Marsden Affidavit (each **Landlord**) by email to the email addresses provided by the Landlords to the plaintiffs by 10 am on 2 April 2020.

THE COURT NOTES:

9. The Confidential Exhibit will be provided to the legal representative of each Landlord pursuant to each Lease upon receipt by the plaintiffs of a signed confidentiality undertaking in a form acceptable to the plaintiffs.

10. At the hearing of this matter, the plaintiffs gave the Court an undertaking that, from the date of these Orders until 5 pm on 14 April 2020, they will not open for trade any of the retail premises leased by GPT RE Limited (ACN 107 426 504) and GPT Funds

Management Limited (ACN 115 026 545), Melbourne Central Custodian Pty Ltd (ACN 006 470 560), GPT Funds Management 2 Pty Limited (ACN 115 026 536) to the Colette Group (as defined in the Marsden Affidavit) nor will they conduct any online trading from those retail premises.

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

REASONS FOR JUDGMENT

MARKOVIC J:

1 On 1 April 2020 I made orders and a direction on the application of Vaughan Strawbridge, Sam Marsden and Jason Tracy in their capacity as joint and several administrators (**Administrators**) of CBCH Group Pty Ltd (**CBCH Group**), CBCH Australia Pty Ltd (**CBCH Australia**), CBCH Buying Co Pty Ltd (**CBCH Buying**) and Colette International Pty Ltd (**Colette International**) (collectively, the **Colette Group** or the **Companies**) including:

- an order pursuant to s 447A(1) of the *Corporations Act 2001* (Cth) (**Act**) varying the operation of s 443A(1)(c) and s 443B(2) of the Act in relation to each of the Companies such that the Administrators are not personally liable for rent and other payments due under leases for 93 stores (**Leases**) described below accruing from 1 April 2020 to 14 April 2020 and payable on 15 April 2020; and
- a direction pursuant to s 90-15 of the Insolvency Practice Schedule (Corporations) (**IPSC**), being Sch 2 to the Act, to the effect that the Administrators are justified in causing the Companies not to pay rent in relation to 93 stores for the two week period up to 14 April 2020.

2 These are my reasons for making the orders and the direction sought by the Administrators.

BACKGROUND

3 The Colette Group is a mid-market bag, jewellery and accessories retailer.

4 On 31 January 2020 the Administrators were appointed to each of the Companies and were appointed as joint and several administrators of CBCH New Zealand Limited (**CBCH NZ**) pursuant to the *Companies Act 1993* (NZ).

5 At that time of the Administrators' appointment the Colette Group operated 138 stores (124 in Australia and 14 in New Zealand) and an online store.

6 Following their appointment the Administrators continued to trade the Colette Group.

7 On 21 February 2020 the Administrators applied to this Court for an extension of the convening period, at that time due to expire under s 439A(5)(a) of the Act on 28 February 2020. On 24 February 2020 the Court made an order, among others, extending the convening

period under s 439A(5)(a) of the Act for a period of 90 days until 27 May 2020 (**Extension Orders**). The effect of the Extension Orders is that the second meetings of creditors of the Companies can be held at any time on or before 4 June 2020: see *Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed)* [2020] FCA 296 (***CBCH Group (No 1)***).

8 On 26 February 2020 the High Court of New Zealand ordered an extension of the convening period for CBCH NZ until 2 June 2020. The effect of that order is that the second meeting of creditors of CBCH NZ can be held at any time on or before 9 June 2020.

9 The structure of the Colette Group was explained by Yates J in *CBCH Group (No 1)* at [5] as follows:

(1) CBCH Group is the ultimate holding company of CBCH Australia, CBCH Buying, Colette International and CBCH NZ, holding 100% of the issued capital of each company;

(2) CBCH Australia is the operating and employing entity for the Colette Group's Australian activities. As at 24 February 2020 it employed 309 full-time or part-time employees and approximately 755 casual employees;

(3) CBCH Buying orders stock from its suppliers which it then sells to CBCH Australia, Colette International and CBCH NZ at cost price; and

(4) Colette International has entered into a franchise agreement with Foschini Retail Group Pty Ltd (**Foschini**) in South Africa. The franchise agreement covers eight Colette branded franchise stores, 31 concession stands and an online presence. Foschini purchases its stock from CBCH Buying.

10 By the date of the Extension Orders, the Administrators had formed the view that they would close 31 of the 124 Australian stores then open on the basis of underperformance. Accordingly, 27 stores were closed/vacated on 16 March 2020 and an additional four were closed on 26 March 2020, leaving 93 stores which remained open. It is those 93 stores and the Leases for them which were the subject of the application that came before me and the subject of the orders and direction that I made.

11 As at 21 February 2020, the date of their application to extend the convening period of the Companies, the Administrators were of the view that the best outcome for the Colette Group and its creditors would involve the completion of the sale of business campaigns then being

conducted and expected to conclude around April 2020 or a recapitalisation of the business. To this end, whilst progressing these matters, up until 26 March 2020 the Administrators continued to operate the business from the 124 Australian stores while also undertaking an orderly closure of the 31 underperforming stores as set out in the preceding paragraph. The Administrators met the Colette Group's lease obligations which accrued during the administration after the initial grace period afforded to them by s 443B(2)(a) of the Act.

12 However, on 26 March 2020 the Administrators formed the view, in light of the novel coronavirus (**COVID-19**) pandemic, that it was critical to close all of the Colette Group retail stores to protect the health of all employees and the communities in which those stores operate. Accordingly, all stores were closed as at that date and remain closed. Notwithstanding their closure, the Administrators remain in possession of the premises relating to the 93 stores.

The sale and recapitalisation process

13 The Administrators progressed the potential sale or recapitalisation of the Colette Group until 26 March 2020 as follows:

(1) a shortlist of 46 prospective interested parties was formulated based upon previous successful retail assets sales and consultation. Those parties included trade, private equity and intermediaries. A sale flyer was distributed to the shortlisted parties on 7 February 2020;

(2) on 13 February 2020 an advertisement was printed in the *Australian Financial Review* newspaper;

(3) 11 parties expressed interest, entered confidentiality agreements and received the Information Memorandum dated 14 February 2020;

(4) by the weeks of 9 and 16 March 2020, the Administrators were still in discussion with a number of parties however those parties were starting to express concern about COVID-19 related impacts on the business; and

(5) by 25 March 2020 all interested parties had withdrawn from the process but, based on feedback at the time of their withdrawal, the Administrators believe several parties will have interest in completing a transaction once the COVID-19 related market uncertainty has subsided.

Impact of the COVID-19 pandemic on trading

14 Sam Marsden, one of the Administrators, gave evidence about the impact of the COVID-19 pandemic on the Colette Group's operations. In summary:

(1) from the Administrators' appointment up to 8 March 2020 sales far exceeded targets;

(2) from Monday, 9 March 2020 the Colette Group started to operate at a loss. That week, sales dropped significantly due to government restrictions and social distancing measures and continued to drop. By the week commencing 16 March 2020 sales were 50% below targets; and

(3) customer visits declined until all stores were closed on 26 March 2020.

Store closures

15 As set out at [10] above, the Administrators completed the closure of the 31 underperforming stores located in Australia by 26 March 2020. On that date the Administrators also closed and "mothballed" the remaining 93 Australian stores and stood down 938 employees, including casuals. The course taken by the Administrators mirrors that taken by other Australian retailers.

16 While the Administrators remain in possession of the 93 remaining Australian stores, they are unwilling to recommence in-store trading until such time as it is safe for employees to do so. Mr Marsden's evidence is that it is not clear how long that will be and what restrictions might apply to each of the stores in each state as each state announces different measures concerning permitted activities. In any event, the Administrators do not consider that it would be economically viable to recommence trading in the midst of the COVID-19 pandemic.

Lease liability

17 The Leases are held by CBCH Australia with 17 different landlords (**Landlords**). The total monthly rental liability with respect to the Leases is approximately $1.3 million, excluding outgoings.

18 The pre-appointment liability to eight of the Landlords is $132,605.00 and relates to 20 premises.

19 Generally, the rent is due under each of the Leases on the first day of the month in advance. However, from the end of the grace period provided for in s 443B(2)(a) of the Act, the Administrators have been paying rent fortnightly in arrears.

20 Under the current arrangements, rent was due on 31 March 2020 for all 93 stores, bringing the rent up to date, with the next rental payment due on 15 April 2020. Although the rent is not due until that time, the Administrators' liability for rent would accrue, absent the grant of relief, from 1 April 2020.

21 On 19 and 20 March 2020 the Administrators requested a 100% rent reduction from all of the Landlords until the earlier of a buyer being identified and a binding sale agreement executed for the sale of business or, if a sale of business is not achieved, the commencement of winding down the Companies' operations (which at that time was to occur by 31 March 2020 absent a sale).

22 Subsequently, correspondence passed between the Administrators and several of the Landlords. By close of business on 28 March 2020 the Administrators had received a 9% rent reduction across the total Australian store portfolio so that the fortnightly rent payable by CBCH Australia as at that date was $648,923, reduced from $714,827.

23 As at 30 March 2020 it was not clear to the Administrators how the Federal and State governments would mandate relief for retail tenants and landlords. However, the Administrators had no reason to believe that their personal liability would be removed.

The Administrators' position

24 The Administrators have modelled the different returns to the Colette Group's creditors, including the New Zealand operations, in five alternate hypothetical scenarios:

(1) a pre COVID-19 managed wind down premised upon no sale of the business nor recapitalisation occurring and there being a pre-liquidation sale of the stock in the most advantageous way in order to maximise value. Under this scenario the sale of the stock would be effected through the current store infrastructure over an 8 to 12 week period. A managed wind down is not currently feasible given that all stores are closed and employees stood down but is a likely viable option available to the Administrators if the stores are able to be reopened in the future;

(2) a COVID-19 shut down based on two alternative scenarios. Both of these scenarios involve vacating possession of the stores and will ultimately result in the Companies being wound up:

(a) COVID-19 "shut down 1" scenario involves abandoning all stock by leaving it in the stores; and

(b) COVID-19 "shut down 2" scenario involves attempting to recover some value from the stock. This option involves additional costs associated with lifting the stock from the stores, storing it at a distribution centre and the retention of head office staff to manage the online store;

(3) a pre COVID-19 deed of company arrangement (**DOCA**). This option has not been fully explored as the sale and recapitalisation process commenced by the Administrators was prematurely terminated before they received a proposal to take to creditors. However, according to Mr Marsden the status of the negotiations suggests that it may remain a viable alternative at some point in the future. The Administrators consider that a potential sale or recapitalisation, even if modified post COVID-19, will provide a greater value of realisation of assets than the "shut down 1" or "shut down 2" scenarios although they temper that opinion, noting that this may change over the course of the coming weeks as the COVID-19 pandemic continues to impact the economy; and

(4) a post COVID-19 sale after a period of two months of "mothballing" followed by a four week trading period during which the sale process is progressed. This scenario involves the Administrators retaining possession of the 93 closed stores for a two month period, while continuing the Colette Group's online presence, so that they can reopen and re-trade at an appropriate time while conducting a sale process. Mr Marsden notes that because of the current volatility and the uncertainties surrounding the possibility or ambit of legislative intervention with respect to rent relief, the Administrators are unable to form a firm view about the likelihood of how long the Companies will be able to trade online or how long it is likely to be before there is sufficient economic certainty to enable them to consider another sale process for the Colette Group and assess the likelihood of a business sale or DOCA proposal or some other form of recapitalisation.

25 Each of these scenarios has been modelled by the Administrators and the results of that modelling is contained in confidential exhibit SAM-A to the affidavit of Sam Andrew

Marsden dated 30 March 2020 (**Marsden Affidavit**) and is the subject of an order I made pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) (see [69]-[71] below). It is not necessary to set out the result of the modelling in any detail save to note that the Administrators currently consider, subject to their uncertainty as to the duration and extent of the impact of the COVID-19 pandemic, that "mothballing" is likely to realise most value for the Colette Group's business. This is because post COVID-19 they will have the option of undertaking a managed wind down or re-engaging with interested parties to facilitate a sale or recapitalisation through a DOCA. It is therefore in the best interests of the creditors as a whole.

Post COVID-19 rent

26 If the Court was minded to make the orders sought by them, the Administrators do not propose to cause the Companies to pay rent. Mr Marsden notes that if that occurs then the Landlords will become unsecured creditors for the accrued rental amounts for the period covered by the orders sought.

27 The Administrators are of the opinion that not paying rent for the Leases is the most advantageous course to the Colette Group's creditors as a whole for the following reasons:

(1) paying the rent will substantially deplete the Colette Group's cash resources which will diminish the return available to creditors and potentially undermine the future sale or recapitalisation process;

(2) in the current economic environment, many commercial retailers who have been faced with this issue have taken steps to close stores and not pay rent;

(3) government legislative intervention remains a possibility; and

(4) it is unlikely that the Landlords will be able to re-lease the premises for the period covered by the orders sought in any event and, should the business be revitalised after "mothballing", it may well be that any outstanding amounts form part of the lease renewal negotiations.

LEGISLATIVE FRAMEWORK

28 The Administrators sought orders under s 447A of the Act to vary the operation of s 443A and s 443B of the Act.

29 Section 447A(1) of the Act relevantly provides that the Court may make such order as it thinks appropriate about how Pt 5.3A of the Act, which concerns the administration of companies, is to operate in relation to a particular company.

30 The object of Pt 5.3A is found in s 435A of the Act which provides that the object of the Part is to provide for the business, property and affairs of an insolvent company to be administered in a way that maximises the chances of the company, or as much as possible of its business, continuing in existence or, if that is not possible, results in a better return to the company's creditors and members than would result from an immediate winding up.

31 Sections 443A and 443B of the Act respectively concern an administrator's liability for general debts and for payments for property used or occupied by, or in possession of, the company in administration. Those sections relevantly provide:

> **Section 443A General debts**
>
> (1) The administrator of a company under administration is liable for debts he or she incurs, in the performance or exercise, or purported performance or exercise, of any of his or her functions and powers as administrator, for:
>
> …
>
> (c) property hired, leased, used or occupied, including property consisting of goods that is subject to a lease that gives rise to a PPSA security interest in the goods; or
>
> …
>
> **Section 443B Payments for property used or occupied by, or in the possession of, the company**
>
> *Scope*
>
> (1) This section applies if, under an agreement made before the administration of a company began, the company continues to use or occupy, or to be in possession of, property of which someone else is the owner or lessor, including property consisting of goods that is subject to a lease that gives rise to a PPSA security interest in the goods.
>
> *General rule*
>
> (2) Subject to this section, the administrator is liable for so much of the rent or other amounts payable by the company under the agreement as is attributable to a period:
>
> (a) that begins more than 5 business days after the administration began; and
>
> (b) throughout which:
>
> (i) the company continues to use or occupy, or to be in possession of, the property; and

(ii) the administration continues.

(3) Within 5 business days after the beginning of the administration, the administrator may give to the owner or lessor a notice that:

(a) specifies the property; and

(b) states that the company does not propose to exercise rights in relation to the property; and

(c) if the administrator:

(i) knows the location of the property; or

(ii) could, by the exercise of reasonable diligence, know the location of the property;

specifies the location of the property.

…

Restrictions on general rule

…

(8) Subsection (2) does not apply in so far as a court, by order, excuses the administrator from liability, but an order does not affect a liability of the company.

32 The Administrators also seek a direction under s 90-15(1) of the IPSC which provides that the Court may make such orders as it thinks fit in relation to the external administration of a company. Relevantly, the Court can exercise its power under s 90-15(1) on application under s 90-20: see s 90-15(2) of the IPSC.

33 Section 90-20(1) of the IPSC provides that, among others, a person with a financial interest in the external administration of a company can apply for an order under s 90-15. Section 5-30 of the IPSC provides that a person has a financial interest in the external administration of a company if the person is, relevantly, an external administrator of the company.

34 Section 90-15(3) of the IPSC provides that, without limiting subs (1), the orders which the Court may make include an order determining any question arsing in the external administration of the company.

LEGAL PRINCIPLES

Section 447A of the Act

35 Section 447A of the Act enables the making of orders which alter the way in which Pt 5.3A is to operate in relation to a particular company and to permit a company to depart from an

otherwise mandatory requirement under Pt 5.3A of the Act: see *Australasian Memory Pty Limited v Brien* (2000) 200 CLR 270 (***Australasian Memory v Brien***) at [18]-[19].

36 It is well established that the Court has power under s 447A of the Act to make orders limiting an administrator's personal liability: see *Mentha, in the matter of Griffin Coal Mining Company Pty Ltd (administrators appointed)* [2010] FCA 1469; (2010) 82 ACSR 142 (***Griffin Coal***) at [29].

37 In *Griffin Coal* at [30] Gilmour J summarised the principles governing the grant of an application for orders under s 447A to vary an administrator's liability under s 443A as follows:

> (a) the proposed arrangements are in the interests of the company's creditors and consistent with the objectives of Pt 5.3A of the *Corporations Act*.
>
> (b) typically the arrangements proposed are to enable the company's business to continue to trade for the benefit of the company's creditors.
>
> (c) the creditors of the company are not prejudiced or disadvantaged by the types of orders sought and stand to benefit from the administrators entering into the arrangement.
>
> (d) notice has been given to those who may be affected by the order.
>
> (Citations omitted.)

38 In *Griffin Coal* the administrators applied for, and were granted, limitation of their personal liability in respect to grants of new mining leases, licences, exploration licences and prospecting licences, including liability for rent, such that they were only liable for debts accrued during, or were attributable to, the administration period. At [31] Gilmour J observed that at that time most of the cases where courts had exercised power under s 447A of the Act to vary an administrator's personal liability under s 443A had involved administrators borrowing funds during the period of the administration and that the orders usually sought had the effect of limiting recourse of the counterparty to the administrator personally to the extent to which he or she was able to be indemnified from the assets of the company. At [32] his Honour referred to *In the matter of Cook Cove Pty Ltd (admins apptd) and Boyd Cook Cove Finance Corporation Pty Ltd (admins apptd)* [2009] NSWSC 620, a case which involved administrators entering into various post appointment construction related contracts and in which orders were made limiting the administrators' personal liability

under those contracts to the extent that they were able to be satisfied out of the property of the company.

39 Section 447A(1) of the Act also gives the Court ample power to alter the operation of s 443B(2) and (3) of the Act: see *In the matter of Mothercare Australia Limited (administrators appointed)* [2013] NSWSC 263 at [6]. Alternatively, s 443B(8) gives the Court an additional power to alter the operation of s 443B(2) and (3): see *Silvia v FEA Carbon Pty Ltd* (2010) 185 FCR 301 (***Silvia v FEA***) at [13]. The usual rationale behind the extension of the five business day period in s 443B(2) and (3) or the exercise of the power in s 443B(8) is because the administrator has had insufficient time to conduct the necessary investigations to decide whether he or she thinks it best to retain or give up possession of leased property: see *Silvia v FEA* at [12]-[13]. Further it seems that s 443B(8) allows the Court to excuse the administrator from liability to pay rent even after the five business day period has passed (see *Silvia v FEA* at [13]-[14]) or that s 447A enables a court to amend the operation of Pt 5.3A of the Act retrospectively (see *Australasian Memory v Brien* at [26]).

Section 90-15 of the IPSC

40 In *Ample Source International Limited v Bonython Metals Group Pty Limited (in liquidation), in the matter of Bonython Metals Group Pty Limited (in liquidation) (No 8)* [2018] FCA 1614; (2018) 366 ALR 491 at [89]-[92] Gleeson J summarised the principles applicable to the consideration of an application made for directions pursuant to s 90-15(1) of the IPSC as follows:

> 89 The Court's supervisory powers under s 90-15 of the Insolvency Practice Schedule are arguably as broad, or broader than, its powers under the previous provision, being the former s 479(3) of the Act.
>
> 90 Section 479(3) allowed a court-appointed liquidator to apply to the Court for directions in relation to a matter arising under a winding up. The function of a liquidator's application for directions under s 479(3) was to give the liquidator advice as to the proper course of action for him or her to take in the liquidation: *Re MF Global Australia Ltd (in liq)* [2012] NSWSC 994; (2012) 267 FLR 27 at [7].
>
> 91 In *Re Ansett Australia Ltd and Korda* [2002] FCA 90; (2002) 115 FCR 409, Goldberg J explained at [44]:
>
> > When liquidators and administrators seek directions from the Court in relation to any decision they have made, or propose to make, or in relation to any conduct they have undertaken, or propose to undertake, they are not seeking to determine rights and liabilities arising out of particular transactions, but are **rather seeking protection against claims that they have acted unreasonably or inappropriately or in breach of their duty in**

making the decision or undertaking the conduct. They can obtain that protection if they make full and fair disclosure of all relevant facts and circumstances to the Court. In *Re G B Nathan & Co Pty Ltd* (1991) 24 NSWLR 674, McLelland J said at 679–680:

> "The historical antecedents of s 479(3) …, the terms of that subsection and the provisions of s 479 as a whole combine to lead to the conclusion that the only proper subject of a liquidator's application for directions is the manner in which the liquidator should act in carrying out his functions as such, and that the only binding effect of, or arising from, a direction given in pursuance of such an application (other than rendering the liquidator liable to appropriate sanctions if a direction in mandatory or prohibitrary form is disobeyed) is that the liquidator, if he has made full and fair disclosure to the court of the material facts, will be protected from liability for any alleged breach of duty as liquidator to a creditor or contributory or to the company in respect of anything done by him in accordance with the direction.
>
> …
>
> Modern Australian authority confirms the view that s 479(3) 'does not enable the court to make binding orders in the nature of judgments' and that the function of a liquidator's application for directions 'is to give him advice as to his proper course of action in the liquidation; it is not to determine the rights and liabilities arising from the company's transactions before the liquidation': [cases cited omitted]."
>
> (Emphasis added)

92 At [65], Goldberg J concluded:

> [T]he prevailing principle adopted by the courts, when asked by liquidators and administrators to give directions, is to refrain from doing so where the direction sought relates to the making and implementation of a business or commercial decision, either committed specifically to the liquidator or administrator or well within his or her discretion, in circumstances where there is no particular legal issue raised for consideration or attack on the propriety or reasonableness of the decision in respect of which the directions are sought. There must be something more than the making of a business or commercial decision before a court will give directions in relation to, or approving of, the decision. **It may be a legal issue of substance or procedure, it may be an issue of power, propriety or reasonableness, but some issue of this nature is required to be raised. It is insufficient to attract an order giving directions that the liquidator or administrator has a feeling of apprehension or unease about the business decision made and wants reassurance.** There must be some issue which arises in relation to the decision. A court should not give its imprimatur to a business decision simply to alleviate a liquidator's or administrator's unease. **There must be an issue calling for the exercise of legal judgment.**
>
> (Emphasis added)

(Original emphasis.)

41 In *In the matter of Octaviar Administration Pty Ltd (in liq)* [2017] NSWSC 1556 at [7]-[9] Black J set out the relevant principles as follows:

> 7 I summarised the scope of the Court's power to give directions under s 479(3) of the *Corporations Act* in *Re MF Global Australia Ltd (in liq)* [2012] NSWSC 994; (2012) 267 FLR 27 at [7] as follows:
>
> "Section 479(3) of the *Corporations Act* allows a liquidator to apply to the court for directions in relation to a matter arising under a winding up. The function of a liquidator's application for directions under this section is to give the liquidator advice as to the proper course of action for him or her to take in the liquidation: *Sanderson v Classic Car Insurances Pty Ltd* (1985) 10 ACLR 115 at 117; (1986) 4 ACLC 114; *Re Ansett Australia Ltd (admins apptd) and Korda* [2002] FCA 90; (2002) 115 FCR 409; 40 ACSR 433 at [46]. The court may give directions that provide guidance on matters of law and the reasonableness of a contemplated exercise of discretion but will typically not do so where a matter relates to the making and implementation of a business or commercial decision, where no particular legal issue is raised and there is no attack on the propriety or reasonableness of the decision: *Sanderson v Classic Car Insurances Pty Ltd* above at 117; *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 at 686–7; 5 ACSR 673; 9 ACLC 1291; *Re Ansett Australia Ltd* above at [65]; *Re One.Tel Networks Holdings Pty Ltd* [2001] NSWSC 1065; (2001) 40 ACSR 83 at [32]."
>
> 8 I also referred to the scope of the Court's powers under s 511 of the *Corporations Act* in that decision and observed (at [8]) that:
>
> "Section 511 of the *Corporations Act* provides an alternative source of power to give such a direction and the Liquidators also rely on that section. The principles applicable to an application under that section were recently reviewed by Ward J in *Re Purchas* [2011] NSWSC 91 … Applications made under this section in a voluntary winding up are determined in a similar manner to applications in a court ordered winding up under s 479(3) of the *Corporations Act* notwithstanding that section does not expressly require that it be 'just and beneficial' to give the relevant direction. The court may give such a direction where it will be 'of advantage in the liquidation': *Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd* (1997) 42 NSWLR 209 at 212; *Handberg v MIG Property Services Pty Ltd* (2010) 79 ACSR 373 at [7]. The effect of a determination under the section is to sanction a course of conduct on the part of the liquidator so that he or she may adopt that course free from the risk of personal liability for breach of duty: *Handberg v MIG Property Services Pty Ltd* at [7]."
>
> 9 I also recognise that the Court's powers to give judicial advice and give directions under these sections are intended to facilitate the performance of a liquidator's functions and should be interpreted widely to give effect to that intention, and the Court may give such advice or give such a direction where it is advantageous to the liquidation to do so: *Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd* (1997) 42 NSWLR 209 at 212; *Handberg v MIG Property Services Pty Ltd* [2010] VSC 336; (2010) 79 ACSR 373 at [7]; *Re One.Tel Networks Holdings Pty Ltd* [2001] NSWSC 1065; (2001) 40 ACSR 83; *Re One.Tel Ltd* [2014] NSWSC 457; (2014) 99 ACSR 247 at [32]; *Re Octaviar Ltd (in liq) and Octaviar Administration Pty Ltd (in liq)* [2017] NSWSC 1005. The directions sought in this case do not involve either the GPLs or the SPL seeking a direction as to the making of implementing of a

> business or commercial decision, which the Court will generally be reluctant to give.

42 In *In the matter of RCR Tomlinson Ltd (administrators appointed)* [2018] NSWSC 1859 at [14] Black J, in making a direction pursuant to s 90-15 of the IPSC that administrators were justified in making a decision with a commercial character, said:

> … I recognise that that decision has a commercial character, at least in substantial part, but it also seems to me that it involves a balancing of complex interests, where there are advantages and disadvantages to that course, as recognised in Mr Preston's affidavit evidence. The Court has been prepared to give directions of this kind, where the decision is a complex one, and where it has to be made, as here, under circumstances of time pressure, in respect of a very large corporate group, and by balancing different interests. The Court's preparedness to grant such a direction in those circumstances reflects the intrinsic unfairness of leaving a voluntary administrator to be at risk of liability, in respect of a complex decision of that kind, where any decision that is made, including making no decision, will have inevitable risks for some or all of the affected constituencies.

THE ADMINISTRATORS' PERSONAL LIABILITY

Orders sought

43 By paras 5 and 6 of their amended originating process filed on 30 March 2020 (**AOP**) the Administrators sought the following orders pursuant to s 447A of the Act, in the alternative, in relation to their personal liability:

(1) by para 5, that Pt 5.3A of the Act is to operate in relation to each of the Companies as if each of s 443A(1)(c) and s 443B(2) of the Act provides that each of the Administrators is not, from the date of the order to 5.00 pm on 14 April 2020, personally liable for any liability for property leased, used or occupied, nor for the rent or other amounts payable pursuant to any of the Leases; or

(2) by para 6, in the alternative to para 5, that Pt 5.3A of the Act is to operate nunc pro tunc in relation to each company as if:

  (a) the words "that begins more than 5 business days after the administration began" in s 443B(2)(a) of the Act read "that begins after 14 April 2020"; and

  (b) the words "[w]ithin 5 business days after the beginning of the administration" in s 443B(3) of the Act read "by 14 April 2020".

In their submissions, the Administrators noted that the same result as sought in para 6 of the AOP could be achieved by operation of s 443B(8) of the Act.

44 The primary relief that the Administrators sought was that sought in para 5 of the AOP (see [43(1)] above) in relation to the operation of s 443A(1)(c) and s 443B(2) of the Act. For the reasons that follow I was satisfied that relief in the form of that proposed order should be granted.

Relief sought in para 5 of the AOP

45 As noted at [37] above, the factors to be considered in determining whether to make an order under s 447A of the Act to modify the operation of Pt 5.3A of the Act relevantly by varying an administrator's liability under s 443A of the Act, were summarised by Gilmour J in *Griffin Coal* at [30]. Having regard to those factors and the circumstances of this case, I was satisfied of the following matters.

46 First, based on the evidence before me, it was clear that the proposed arrangements varying the Administrators' personal liability for rent under the Leases for a two week period, while the effect of the COVID-19 pandemic on the physical, legal and economic landscape continues to evolve, is in the interests of the Colette Group's creditors as a whole and consistent with the objectives of Pt 5.3A of the Act (see [30] above). In addition, the arrangements proposed by the Administrators, enabled by the order sought in para 5 of the AOP, may at a future point in time enable the Colette Group's business to trade for the benefit of its creditors.

47 The Administrators conceded that they do not know the timeframe for economic recovery from the COVID-19 pandemic or its ultimate effect on the prospects for sale or recapitalisation of the Colette Group's business. However, they have, as set out at [24] above, modelled the different returns to the Colette Group's creditors, including the New Zealand operations, in five alternate hypothetical scenarios. The results of that modelling are included in confidential exhibit SAM-A to the Marsden Affidavit. For present purposes it is sufficient to observe that, as things presently stand, based on their modelling the Administrators are of the opinion that the alternative of "mothballing" followed by a period of trading and then a sale is likely to realise the most value for the Colette Group's business and is thus in the interests of creditors as a whole. As the Administrators submitted that scenario also has the benefit of preserving the pre COVID-19 alternatives of a managed wind down of the business or re-engaging with interested parties to facilitate a sale or recapitalisation through a DOCA and avoids the less desirable alternative of the "shut down 1" or "shut down 2" scenarios.

48 I accept that the Administrators are unable to express any opinion with certainty in the current climate. The difficult and unpredictable environment in which the Administrators are operating is the result of the COVID-19 pandemic. It is not caused by any action or inaction on their part. Despite that, I can and do give considerable weight to their views, arrived at after their own evaluation based on the information available to them at the time. As Black J said in *In the matter of Renex Holdings (Dandenong) 1 Pty Ltd (administrators appointed)* [2015] NSWSC 2002 at [9] "the case law has frequently recognised the significance of an administrator's view … particularly where the administrator is dealing with a complex administration". That description applies equally here. That is the administration of the Colette Group is one of some complexity, particularly given the impact of the COVID-19 pandemic.

49 Secondly, on balance, I was satisfied that there would no prejudice or disadvantage to creditors if the order sought in para 5 of the AOP was made.

50 The relevant prejudice to be weighed is that to the Landlords for the 93 stores the subject of the Leases. Insofar as they are concerned the evidence established that:

(1) eight of the Landlords have unsecured pre-administration claims totalling $132,605;

(2) all lease obligations, including for the Leases, accrued after the initial period afforded by s 443B(2)(a) of the Act have been met until 30 March 2020;

(3) from 1 April 2020 to 14 April 2020 the sum of approximately $648,923 will accrue in rent owing to the Landlords, excluding outgoings, for the Leases; and

(4) no rental payments are due in the two week period from 1 April 2020 to 14 April 2020.

51 The detriment to Landlords of making the order sought by the Administrators in para 5 of the AOP by varying their personal liability is that the Landlords become unsecured creditors in respect of the rental payments due to them for the period in which the orders operate, namely 1 April 2020 to 14 April 2020. This will occur because, if the relief, including the direction sought pursuant to s 90-15(1) of the IPSC, is granted, the Administrators do not currently intend to cause the Companies to make rental payments.

52 That detriment is to be weighed against the following factors:

(1) no rental payments are in fact due during the two week period during which the orders sought by the Administrators will operate;

(2) the effect of the orders sought by the Administrators is to give them further time to assess what is best for creditors as a whole given the ever-changing physical, legal and economic impacts of the COVID-19 pandemic; and

(3) making the orders sought by the Administrators may ultimately enable the Administrators to pursue one of the alternative courses they have modelled which do not involve an immediate shut down i.e. a wind down or a period of trading followed by a sale. At least in the sale scenario there is potential for the Landlords to maintain tenanted stores and any outstanding amounts could form part of lease renewal negotiations.

53 On the other hand, if the relief sought by the Administrators was not granted, they would vacate the stores immediately and proceed with the "shut down 1" or "shut down 2" scenarios. In those circumstances, according to Mr Marsden, it is unlikely that the Landlords would be able to re-lease the premises for the period in which the orders sought would operate in any event and the modelling undertaken by the Administrators shows that there would be no value to the Landlords in either of the shut down scenarios.

54 It was apparent that, notwithstanding the uncertainty faced by the Administrators brought about by the current situation, the Landlords are likely to be in no worse position if the order sought by the Administrators in para 5 of AOP was made than they would be if the stores were vacated. While there is no certainty, if the order is made and the "mothballing" proceeds, there is at least a potential for the Landlords' position ultimately to be improved.

55 Thirdly, the evidence established that the Administrators had given notice to those persons or parties potentially affected by the orders.

56 On 30 March 2020 I made orders, on the application of the Administrators, that by 5.00 pm on that day each of the Landlords be served by email with the AOP and the Marsden Affidavit, excluding confidential exhibit SAM-A. Based on the evidence relied on by the Administrators:

(1) by email sent at 4.48 pm on 30 March 2020, the AOP, the Marsden Affidavit and the orders made on 30 March 2020 (**March Orders**) were served on each of the Landlords;

(2) by email sent at 8.23 am on 1 April 2020, the AOP and the March Orders were served on the Australian Securities and Investments Commission (**ASIC**);

(3) by email sent at 1.07 pm on 1 April 2020, Patricia Hu, a lawyer with ASIC, informed the solicitors for the Administrators that ASIC considered that the Administrators' application was "a matter properly left for the determination of the Court" and confirmed that it did not propose to intervene in the proceeding or seek leave to appear at the hearing;

(4) by email sent at 6.01 pm on 31 March 2020, JKR Lawyers, solicitors for Vicinity Centres, one of the Landlords of 18 "shopping centres", informed the solicitors for the Administrators that their client neither consented to nor opposed the relief sought by the Administrators in paras 5 to 8 of the AOP and that those solicitors did not intend to appear at the hearing;

(5) by letter dated 31 March 2020, Colin Biggers & Paisley Lawyers, solicitors for Scentre Group, who I understand to be the operators of Westfield shopping centres, informed the solicitors for the Administrators that their client "is willing to consent to the orders sought" in paras 5 to 8 of the AOP, provided that the time during which the Administrators "are not liable for payment of rent … ends on 14 April 2020"; and

(6) senior counsel and counsel for those Landlords who are part of the GPT Group, being GPT RE Limited, GPT Funds Management Limited, Melbourne Central Custodian Pty Ltd and GPT Funds Management 2 Pty Limited, appeared at the hearing. Those Landlords did not oppose the grant of the relief but were content for the orders sought by the Administrators to be made on the basis of an undertaking by the Administrators not to trade from the premises subject to leases to them until 14 April 2020. However, those Landlords also expressed their concern about the relief going beyond 14 days and noted that they were giving consideration to bringing an application after that period for leave to re-enter at least one of the premises under s 440D of the Act.

57 In the circumstances of this case and, having regard to each of the matters set out above, I was satisfied that it was appropriate to make the order sought in para 5 of the AOP. Those circumstances could not be described as "usual". They are in fact extraordinary. The Administrators find themselves operating the Colette Group in an ever-changing environment brought about entirely by external factors. They need to be agile and able to react to the interests of a number of stakeholders. One of these groups is of course the creditors of the Colette Group. When this application was viewed in that light, it was clear to me that making the order sought in para 5 of the AOP was consistent with the principles identified in

Griffin Coal at [30] and importantly was in the interests of the creditors of the Colette Group as a whole.

58 Given that I was satisfied that in the circumstances of this case I would make an order in terms of para 5 of the AOP it was not necessary for me to consider the Administrators' submissions in relation to the alternative order sought in para 6 of the AOP.

PAYMENTS DUE UNDER THE LEASES

Directions sought

59 By paras 7 and 8 of the AOP, in the event that the order sought in para 5 or para 6 of the AOP was made, the Administrators sought the following directions pursuant to s 90-15 of the IPSC in the alternative:

(1) by para 7, that the Administrators are justified in causing the Companies not to meet their obligations to pay rent pursuant to any of the Leases which have accrued up until 5.00 pm on 14 April 2020; or

(2) by para 8, in the alternative to para 7, that the Administrators are justified in causing the Companies to meet their obligations to pay rent pursuant to any of the Leases which have accrued up until 5.00 pm on 14 April 2020.

60 As set out at [32] above, s 90-15(1) of the IPSC provides a source of power for the Court to provide directions in relation to the external administration of a company and, relevantly, to voluntary administrators. It enables the Court to make "such orders as it thinks fit" in relation to the external administration of a company.

Direction sought in para 7 of the AOP

61 Given the Administrators' present intention is not to pay the rent due under the Leases in the two week period ending on 14 April 2020, the primary direction they sought was that in para 7 of the AOP. By seeking that direction the Administrators seek protection from what they describe as unforeshadowed but foreseeable claims that they have acted unreasonably or inappropriately by not paying rent.

62 As the Administrators frankly submitted their decision to cause the Colette Group not to meet its future rental obligations is clearly a commercial one. However, I accepted the Administrators' submissions that their decision was made in the context of:

(1) the COVID-19 infection rate in Australia continuing to increase daily so that it is presently unclear when it will be safe to recommence retail operations;

(2) other major jewellery, clothing, footwear, stationery and department store retailers taking action similar to that proposed by them;

(3) the uncertainty about the availability or reach of any stimulus package to underwrite commercial rent or any legislative intervention;

(4) the Administrators' largely unsuccessful attempts to negotiate rent reductions with the Landlords; and

(5) the fact that notice has been given to the Landlords.

63 The Administrators submitted that they are in a highly unusual and invidious position and that continuing to pay rent in the current climate would deplete the Colette Group's resources in a significant way. So much can readily be accepted.

64 While the Administrators' proposed course not to pay rent is an unusual one and, I accept, will jeopardise the Colette Group's tenancies, it is, as the Administrators submitted, the preferable course, taking into account the creditors' interests as a whole in the maximisation of the value of the Colette Group's business and the current commercial environment in which that business operates.

65 For those reasons I was satisfied that the direction sought in para 7 of the AOP should be made.

CONFIDENTIALITY ORDERS

66 The Administrators sought orders for the suppression or non-publication of confidential exhibit SAM-A to the Marsden Affidavit.

67 Section 37AF(1)(b) of the FCA Act empowers the Court to make a suppression order or non-publication order prohibiting or restricting the publication or other disclosure of information that relates to a proceeding before the Court and is, relevantly, information that comprises evidence or information about evidence. Confidential exhibit SAM-A is of that nature.

68 Section 37AG of the FCA Act sets out the grounds upon which such an order can be made including that the order is necessary to prevent prejudice to the proper administration of justice: see s 37AG(1)(a) of the FCA Act. The suppression order or non-publication order

must specify the ground or grounds on which the order is made: see s 37AG(2) of the FCA Act.

69 Mr Marsden gave evidence as to why the Administrators sought an order pursuant to s 37AF of the FCA Act in relation to confidential exhibit SAM-A. In particular the Administrators are concerned that disclosure of the content of confidential exhibit SAM-A will likely negatively impact any future sale of the Colette Group's business or its stock. In particular Mr Marsden points out that:

(1) the size of the industry and the nature of the potential purchasers is such that they are likely to be known to each other;

(2) the Administrators' estimates of the value of the stock and the likely realisation from the sale is likely to operate as a ceiling on what they could obtain for that stock; and

(3) disclosing the Administrators' modelling for a DOCA is likely to cap the value offered by any future proposal.

70 As Mr Marsden points out, maintaining the confidentiality of confidential exhibit SAM-A will serve to protect the value in the Colette Group's business and its stock which, in turn, will allow the Administrators to administer its affairs for the benefit of creditors.

71 I was satisfied that the clear public interest in the due and beneficial administration of the Colette Group for the benefit of its creditors justified the making of the order sought by the Administrators in relation to confidential exhibit SAM-A pursuant to s 37AF of the FCA Act on the ground set out in s 37AG(1)(a).

CONCLUSION

72 For those reasons I made the orders sought by the Administrators.

I certify that the preceding seventy-two (72) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Markovic.

Associate:

Dated: 9 April 2020