6 October 2016

Ministry of Business Innovation & Employment
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By Email: Corporate.Law@mbie.govt.nz

Submissions of Scentre Group on Review of Corporate Insolvency Law (Report No.1)

1. Scentre Group manages, develops and has an ownership interest in Westfield branded shopping centres throughout New Zealand. As part of that role, many of the New Zealand companies comprising the Scentre Group are lessors and licensors under hundreds of leases and licence agreements.

2. Our lessees and licensees are usually corporate entities. Our lessees and licensees operate retail and commercial outlets of various sizes ranging from small business enterprises to large-scale, internationally branded businesses with a global presence.

3. The New Zealand insolvency law regime frequently impacts on us, particularly when our lessees and licensees (or the guarantors under those leases and licences) face insolvency issues and/or enter into a formal insolvency position e.g. liquidation.

4. We have considered Report No. 1 of the Insolvency Working Group, on Insolvency Practitioner Regulation and Voluntary Liquidations dated 27 July 2016 (report). The purpose of this letter is to:

   (a) Confirm our view that the current insolvency law regime, so far as it relates to the regulation and supervision of insolvency practitioners (and in particular, liquidators), is inadequate;

   (b) Set out a recent example of our dealings with a liquidator to demonstrate what we consider to be inadequacies of the current insolvency regime so far as it relates to the regulation and supervision of insolvency practitioners (and in particular, liquidators); and

   (c) Submit our support for certain recommendations contained in the report, so far as those recommendations relate to the regulation and supervision of insolvency practitioners (and in particular, liquidators).

Inadequacy of the current regime

5. In our view, the current insolvency regime, so far as it relates to the regulation and supervision of insolvency practitioners (and in particular, liquidators), needs to be reformed. Scentre Group has two areas of concern.

6. First, the current rules and regulations do not appear to promote professionalism or accountability amongst insolvency practitioners. Creditors are therefore having to rely largely on the practitioner's personal standards of integrity and professionalism.

7. Second, the costs associated with holding insolvency practitioners (particularly liquidators) to account when they fail to comply with their statutory duties and/or seeking supervision of certain decisions made by insolvency practitioners (particularly liquidators) are often seen to be uneconomical in light of the amounts and risks involved.

8. We set out below our most recent experience as an example of the scale of harm being caused by the inadequacy of the current insolvency practitioner regime and the impact it has on our business operations.

Example of our dealings with a liquidator under the current regime

9. In October 2014, one of our lessees, a small company operating a business in a single Westfield branded shopping centre in New Zealand, was placed into liquidation. The liquidator was appointed by resolution of the lessee's sole shareholder (who was also the sole director of the lessee company). So far as we know, the liquidator was/is not a member of CAANZ or RITANZ.

10. The liquidator's appointment coincided with the director/shareholder (who had personally guaranteed the lessee's obligations under the lease) being sentenced to a term of imprisonment for filing false tax returns over a period of five years on behalf of the lessee company.

11. In November 2014, the liquidator issued his first report. However the name of the insolvency practice organisation (and the liquidator's contact details) on the first report's letterhead was different to the name of the insolvency practice organisation (and the liquidator's contact details) recorded on the Companies Office register. This led to some confusion as to which was the correct entity that we were dealing with.

12. The liquidator elected to continue trading from, and using, the premises with a view to selling the lessee's assets and assigning the lease. In December 2014, the liquidator arranged for the sale of the lessee's assets to Company X and permitted Company X to trade from and use the premises (at that time without our formal consent). The liquidator then sought to negotiate the terms of an assignment with us (as lessor) and Company X (as assignee). The lease was ultimately assigned to Company X with our consent effective 1 May 2015.

13. During the period of negotiations (December 2014 to April 2015), and while the liquidator permitted Company X to trade from, and use, the premises (but before the assignment process was completed), Company X paid the liquidator rent and other moneys due to us under the lease. According to Company X, the liquidator undertook to pay those monies received from Company X to us, as lessor. Pursuant to the arrangement, the liquidator 'on-paid' to us the rent and other moneys received from Company X during the months of December 2014 and January 2015. However, the liquidator failed to 'on-pay' to us the rent and other moneys received from Company X during the months of February 2015, March 2015, and April 2015 in the sum of approximately $53,500 (funds).

14. Despite various demands from us, our solicitors on our behalf, and from Company X's solicitors, and despite confirmation from the liquidator in May 2015 that he was holding the funds, the liquidator failed to pay the funds to us.

15. In June 2015, the liquidator issued his six monthly report. The name of the insolvency practice organisation (and the liquidator's contact details) on the six monthly report was different from that recorded on the first report, but was now consistent with the organisation details (and the liquidator's contact details) recorded on the Companies Office register. The six monthly report indicated that the liquidator was "holding an amount of $61,893 received from the tenant at [Westfield shopping centre]...pending a settlement of a dispute with these parties". To our knowledge, there was no apparent dispute as both Company X (as assignee) and Scentre Group (as lessor) agreed that the funds should be paid to us.

16. By early July 2015, we had become incredibly frustrated with the liquidator's lack of professionalism and what appeared to us to be a nonchalant attitude towards resolving the

issue. In our view, the liquidator had breached his undertaking, his duties as liquidator, and his fiduciary duties. Accordingly, at that time Scentre Group, with the support of our solicitors:

(a) Served the liquidator with a notice under section 286(2) of the Companies Act 1993 requiring the liquidator to comply with his duties (e.g. by paying the funds to us);

(b) Lodged a complaint with the New Zealand Companies Office (Registries Integrity & Enforcement Team) regarding the conduct of the liquidator; and

(c) Made a formal complaint to the New Zealand Police.

17. In response to the section 286(2) notice, the liquidator (via his solicitor) denied that he was in breach of his duties and alleged that he was holding the funds for the benefit of the lessee company, and not for us.

18. The New Zealand Companies Office responded to our complaint stating that the Companies Office had no jurisdiction to take any action in relation to our complaint.

19. We provided additional information to the New Zealand Police upon request. However, we were later informed by the New Zealand Police that they considered this to be a civil matter and did not intend to take any further action.

20. In late July 2015, our solicitors pressed the issue with the liquidator's solicitor, and indicated that given the express purpose of the funds, and the circumstances under which the funds were paid to the liquidator by Company X, the funds did not and could not form part of the pool of resources available for general distribution to the creditors of Company X.

21. At that time, the liquidator's solicitor responded with a short letter enclosing various medical certificates and asserting that the solicitor will not be in a position to take instructions during the liquidator's absence. The medical certificates indicated that the liquidator had:

(a) Between 2007 and 2015, suffered from severe stress, anxiety and depression (which "occurred largely as a result of significant financial losses he suffered through the global financial crisis" in 2007 which resulted in him entering into a scheme of arrangement to avoid bankruptcy);

(b) Recently been seeing a specialist psychiatrist;

(c) Recently been advised to "have a total break for at least a month, preferably out of Auckland" (where his insolvency practice was); and

(d) Recently been advised to seek specialist rehabilitation help.

22. In consideration of the liquidator's health concerns we took no further action for a month. After that, we (via our solicitors) approached the liquidator (via his solicitor) and asked whether the liquidator would agree to a voluntary replacement, particularly given his health and wellbeing issues, rather than take part in High Court litigation regarding the liquidator's

conduct. The liquidator's solicitor confirmed to our solicitors that he was unable to take further instructions from the liquidator.

23. With a view to preserving our position, in September 2015 we filed a preferential creditor's claim in the liquidation for the funds (but without prejudice to our position that the funds did not form part of the general pool for distribution).

24. We explored at length with our solicitors the possibility of issuing court proceedings against the liquidator personally and/or applying to the High Court for an order replacing the liquidator. Our ultimate goal was to recover the funds which, according to the liquidator's six monthly report, were being held by the liquidator.

25. We had already incurred significant legal costs getting to this point and were conscious that there was no guarantee that the funds were actually being held by the liquidator for payment in the event we were successful in any court proceedings. In light of the complexities and uncertainties involved, we considered that any court action would likely involve a significant cost to us that may outweigh any amounts ultimately recovered by us (if any). We reluctantly chose to take no further action in pursuit of the funds.

26. In October 2015 the liquidator, without further prompting, proposed to pay the funds to us by way of two instalments. We agreed to this proposal, but despite demand, the liquidator failed to comply with the payment arrangement. He did not respond to various communications from us seeking to discuss the issue.

27. In March 2016 we engaged an agent to carry out a trace enquiry with a view to locating the liquidator. Our agents were able to speak with the liquidator who advised that he was "not currently working", frequently travelled outside of Auckland for rehabilitative purposes, and was suffering from a "stress related illness" for which he was currently receiving medical treatment outside of Auckland.

28. We have received no further communications from the liquidator since that time. The liquidator has failed to file any further six monthly reports since June 2015. Despite the liquidator's allegations that he is not currently working, he remains on the Companies Office register as the liquidator responsible for administering the lessee company's assets.

29. We consider that the inadequacies of the current regime, including the lack of professionalism and accountability demanded from the liquidator, and the hurdles associated with seeking judicial intervention in an economical manner, has caused Scentre Group unjustifiable losses and enabled this particular liquidator to:

    (a) Breach his undertaking, his statutory duties and his fiduciary duties without sanction;

    (b) Avoid accounting for the funds (other than making conflicting statements of a general nature with no documentary proof); and/ or

    (c) Formally remain as the liquidator of a company whilst refusing to carry out and/or ignoring his duties on the grounds of ill-health.

Support for certain recommendations

30. We support the recommendations set out in the report so far as those recommendations relate to the regulation and/or supervision of insolvency practitioners. In particular:

    (a) We agree with the working group's views on the problems with the status quo as set out in the report at paragraphs 39 to 46, 56 to 59, and 70 to 77

(b) We agree with the working group's views on the objectives of insolvency practitioner regulation as set out in the report at paragraphs 78 to 81.

(c) We agree with the co-regulation model proposed by the working group, as set out at Recommendation 3 of the report

(d) We agree with the working group's proposal to make changes to improve High Court supervision of liquidators as set out in Recommendation 10 of the report.

31. Other than as set out above, Scentre Group does not wish to comment on the working group's views and/or recommendations contained within the report that do not relate to the regulation and supervision of insolvency practitioners.

Please do not hesitate to contact us if you wish to discuss any aspects of the above.

Yours faithfully,
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