FEDERAL COURT OF AUSTRALIA

Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed) (No 3) [2020] FCA 555

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| File number: | NSD 357 of 2020 |
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| Judge: | **MARKOVIC J** |
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| Date of judgment: | 15 April 2020 |
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| Date of publication of reasons: | 28 April 2020 |
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| 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 three 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 three week period – application allowed |
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| Legislation: | *Corporations Act 2001* (Cth) ss 443A(1)(c),  443B(2), 447A(1), Sch 2 s 90-15  *Federal Court of Australia Act 1976* (Cth) ss 37AF, 37AG(1)(a) |
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| Cases cited: | *Mentha, in the matter of Griffin Coal Mining Company Pty Ltd (administrators appointed)* [2010] FCA 1469; (2010) 82 ACSR 142 |
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| Date of hearing: | 15 April 2020 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 77 |
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| Counsel for the Plaintiffs: | Ms V Whittaker SC and Ms T Jonker |
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| Solicitor for the Plaintiffs: | Hamilton Locke |

ORDERS

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|  | | 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 (ALL ADMINISTRATORS APPOINTED)**  Plaintiffs | |

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| JUDGE: | MARKOVIC J |
| DATE OF ORDER: | 15 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 5.00 pm on 6 May 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 SAM-A**);

(b) unsworn affidavit of Sam Andrew Marsden dated 15 April 2020 and marked “confidential” (**Confidential Affidavit**); and

(c) the transcript of the hearings of the application on 30 March 2020, 1 April 2020 and 15 April 2020 to the extent that the transcript discloses the content of Confidential Exhibit SAM-A and the Confidential Affidavit.

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 plaintiffs is not, from the date of these Orders to 5.00 pm on 6 May 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 plaintiffs 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 5.00 pm on 6 May 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. List the proceeding for case management hearing before Markovic J on 29 April 2020 at 9.30 am.

7. Prayers 9 to 12 of the amended originating process filed on 30 March 2020 be stood over for hearing to 6 May 2020 at 10.15 am before Markovic J.

8. The case management hearing referred to in Order 6 above and the hearing referred to in Order 7 above are to take place by video conference using the technology known as “Microsoft Teams”. Any party wishing to appear at the case management hearing or the hearing is to notify the Associate to Markovic J by email at associate.markovicj@fedcourt.gov.au or by telephone on +61 2 9230 8380 by 8.30 am on 29 April 2020 or 9.30 am on 6 May 2020, as applicable, so that an electronic invitation can be issued to participate in the case management hearing or the hearing.

9. The costs and expenses of and incidental to this application 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.

10. A copy of these Orders is to be served on each landlord set out at annexure SAM-13 to the Marsden Affidavit (each a **Landlord**) by email to the email addresses provided by the Landlords to the plaintiffs by midday on 16 April 2020.

**THE COURT NOTES THAT:**

11. Each of Confidential Exhibit SAM-A and the Confidential Affidavit 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.

12. At the hearing of this matter, the plaintiffs gave the Court an undertaking that, from the date of these Orders until 5.00 pm on 6 May 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 15 April 2020 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**) I made orders and a direction 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 each of the Administrators is not personally liable for rent and other payments due under leases for 93 stores (**Leases**) accruing from 15 April 2020 to 5.00 pm on 6 May 2020; and

 a direction under s 90-15 of the Insolvency Practice Schedule (Corporations) (**IPSC**), being Sch 2 to the Act, that each of the Administrators is justified in causing the Companies not to pay rent pursuant to any of the Leases in the three week period ending on 6 May 2020.

2 The orders and direction I made on 15 April 2020 are, in effect, an extension of the orders and direction I made on 1 April 2020 (**1 April Orders**): see *Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed) (No 2)* [2020] FCA 472 (***CBCH (No 2)***).

3 These are my reasons for making the orders and the direction that I made on 15 April 2020. These reasons should be read in conjunction with my reasons in *CBCH (No 2)*.

# BACKGROUND

4 The Colette Group is a mid-market bag, jewellery and accessories retailer which operates from a network of stores. Its operations have been affected by the novel coronavirus (**COVID-19**) pandemic.

5 The structure and background of the Colette Group, the appointment of the Administrators to the Companies, the steps taken by the Administrators from the date of their appointment to 30 March 2020 to attempt to sell or recapitalise the Colette Group and the impact of the COVID-19 pandemic on that process and the administration of the Colette Group more generally to 30 March 2020 are set out at [3]-[27] of *CBCH (No 2)*.

## Developments since 1 April 2020

6 A number of things have occurred since the 1 April Orders were made which have had an impact on the Colette Group administration.

### Government guidelines and legislation

7 Since late March 2020 the Commonwealth and state and territory governments have imposed restrictions and/or announced legislative changes necessitated by the COVID-19 pandemic.

8 First, as Sam Marsden, one of the Administrators, explained, each state and territory has released rules or guidelines (**COVID-19 Restrictions**) which make it extremely difficult for the Administrators to operate the 93 retail stores which were the subject of the Leases as at 15 April 2020. By way of example Mr Marsden referred to the announcement made by the Prime Minister of Australia, the Honourable Scott Morrison MP, on 29 March 2020 in the following terms:

National Cabinet’s strong guidance to all Australians is to stay home unless for:

* shopping for what you need - food and necessary supplies;
* medical or health care needs, including compassionate requirements;
* exercise in compliance with the public gathering requirements;
* work and study if you can’t work or learn remotely.

9 The Administrators are of the view that it is necessary to keep the retail stores closed until the COVID-19 Restrictions are lifted as most people are not permitted to be outside other than to obtain essential goods and services and the type of products the Colette Group sells cannot be considered as essential goods or services.

10 The Administrators note that, based on the information provided to the public by the Australian Government and the Chief Medical Officer for the Australian Government, they cannot predict how long the COVID-19 pandemic and associated restrictions will persist or when the health threat will subside or be such that it does not impose a risk to both employees and customers.

11 Secondly, on 8 April 2020 the Commonwealth Parliament passed a $130 billion JobKeeper package for eligible businesses that suffer significant financial detriment caused by the COVID-19 pandemic. Mr Marsden explained that the JobKeeper package is a subsidy that is paid to eligible employers of $1,500 per fortnight per eligible employee for up to six months from 30 March 2020.

12 The Administrators submitted an expression of interest to the Australian Taxation Office (**ATO**) for access to the JobKeeper program on the basis that the Colette Group has faced in excess of 30% fall in turnover in the month or three months relative to turnover one year earlier. As at 15 April 2020 the Administrators had sought clarification from the ATO emergency support information line as to whether CBCH Australia is an eligible employer but had not received a definitive answer. On the Administrators’ analysis CBCH Australia should be an eligible employer but they will continue to follow up the issue with the ATO.

13 If CBCH Australia is accepted as an eligible employer, the Administrators will pass those payments through to employees. On the assumption that it is an eligible employer the Administrators estimate that the following numbers of employees will be eligible employees under the JobKeeper package:

(1) approximately 226 full-time/part-time employees; and

(2) between 15 to 100 of the 220 casual employees, who have been with the business for more than 12 months and would be considered to be “employed on a regular and systematic basis” on the basis that their engagement occurs as a consequence of an ongoing reliance upon their services as an incident of the business.

14 Based on those employee estimates the Administrators have calculated the potentially available JobKeeper subsidy to be:

(1) for 226 full-time/part-time employees, $339,000 per fortnight equating to 74.1% of the employment costs for full-time/part-time employees for the week commencing 16 March 2020; and

(2) for casual employees:

(a) if there are 15 eligible casual employees, $22,500 per fortnight equating to 11.1% of the casual employee employment costs for the week commencing 16 March 2020; or

(b) if there are 100 eligible casual employees, $150,000 per fortnight equating to 73.9% of the casual employee employment costs for the week commencing 16 March 2020.

15 Mr Marsden notes that the full amount of the JobKeeper subsidy will be passed on to eligible employees and that all employees have also been given the option to use their annual leave balance to make up the difference between the JobKeeper payment of $1,500 per fortnight and their usual salaries.

16 As at 15 April 2020 the Administrators were still in the process of calculating the effect of the JobKeeper package on the overall viability of the Colette Group and on the assumptions underpinning the scenario modelling described at [24] of *CBCH (No 2)* that they have undertaken and continue to undertake.

17 Thirdly, on 7 April 2020 the “National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19” (**Code of Conduct**) was released. Mr Marsden notes that the Code of Conduct imposes good faith leasing principles for commercial tenancies where the tenant is an eligible business for the purpose of the JobKeeper program. Under the heading “Purpose” the Code of Conduct includes:

These principles will apply to negotiating amendments in good faith to existing leasing arrangements – to aid the management of cashflow for SME tenants and landlords on a proportionate basis – as a result of the impact and commercial disruption caused by the economic impacts of industry and government responses to the declared Coronavirus (“COVID-19”) pandemic.

This Code applies to all tenancies that are suffering financial stress or hardship as a result of the COVID-19 pandemic as defined by their eligibility for the Commonwealth Government’s JobKeeper programme, **with an annual turnover of up to $50 million** (herein referred to as “SME tenants”).

The $50 million annual turnover threshold will be applied in respect of franchises at the franchisee level, and in respect of retail corporate groups at the group level (rather than at the individual retail outlet level).

(Emphasis added.)

18 Mr Marsden gave evidence about the Administrator’s understanding of the Code of Conduct as at 15 April 2020 based on the announcements made. I do not propose to set out that evidence in detail save to note that, among other things, the Code of Conduct sets out principles by which commercial landlords and eligible tenants must negotiate amendments in good faith to existing leasing arrangements, including that landlords:

(1) must not terminate leases due to non-payment of rent during the COVID-19 pandemic period or reasonable subsequent recovery period;

(2) must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals of up to 100% of the amount ordinarily payable, on a case by case basis, based on the reduction in the tenant’s trade during the COVID-19 pandemic period and a subsequent reasonable recovery period; and

(3) must not draw on a tenant’s security for the non-payment of rent during the period of the COVID-19 pandemic and/or a reasonable subsequent recovery period.

19 The Code of Conduct will come into effect in all states and territories on a date following 3 April 2020 to be defined by each state or territory for the period during which the JobKeeper program remains operational and will operate in conjunction with existing legislation. As at 15 April 2020 Mr Marsden was not aware of any state or territory having announced draft legislation to implement the Code of Conduct.

20 The Administrators are of the view that CBCH Australia and the broader Colette Group will be subject to the Code of Conduct. On 9 April 2020 they wrote to the 17 landlords of the Leases (**Landlords**) and expressed their willingness to engage in good faith negotiations with each of them in accordance with the Code of Conduct. However, until all states and territories have enacted legislation to implement the Code of Conduct the Administrators are not in a position to finalise any such negotiations with the Landlords.

### Steps taken and to be taken by the Administrators

21 Since their appointment, and in line with normal practice following the commencement of the administration period, the Administrators have undertaken a number of steps with the objective of reducing costs in the Colette Group business. Those steps are described by Mr Marsden. I do not intend to set them out here.

22 Mr Marsden gave evidence that, if the relief sought by the Administrators was granted, between 15 April 2020 and 6 May 2020 the Administrators would undertake the following steps, all of which they considered to be necessary in the context of the administration of the Colette Group continuing during the COVID-19 pandemic:

(1) assess the impact of the Code of Conduct and engage in good faith discussions with the Landlords including:

(a) discussions about any viable alternative leasing arrangements that may be available for individual premises;

(b) where a surrender of the premises is in the best interests of the Colette Group, the timeframe required for CBCH Australia to remove stock from those premises; and

(c) where the continued possession of the premises is in the best interests of the Colette Group, on a confidential basis, each Landlord’s financial status and ability to provide further waivers including information about what concession, if any, each Landlord has or is able to receive from its financier;

(2) assess the impact of the JobKeeper subsidy on the business and eligible employees;

(3) model the impact of the Code of Conduct, JobKeeper subsidy and any rental concessions agreed to by Landlords and update their estimated statement of position of the returns that could be available for creditors in each of the scenarios described in *CBCH (No 2)* at [24] based on that new modelling;

(4) engage with stakeholders, including secured creditors;

(5) monitor market developments, including further federal government announcements and actions taken by other market participants in the retail space; and

(6) continue to consider and potentially form a view about whether it is possible or appropriate to reopen stores and continue to work towards a sale or DOCA, including whether to close permanently and vacate certain stores.

23 Each of these steps is explained in greater detail in a confidential affidavit sworn by Mr Marsden on 15 April 2020 (**Marsden Confidential Affidavit**) which is the subject of an order I made pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) (see [70]-[76] below).

24 The Administrators consider that by 6 May 2020:

(1) there will be more certainty about the likely mandated rental waiver and deferrals, how the legislation proposed by the Code of Conduct is likely to work in each state and territory and each Landlord’s position across their respective premises;

(2) having undertaken the steps set out in [22] above, they will be in a better position to understand if it continues to be feasible to maintain their current “mothballing” strategy (as explained at *CBCH (No 2)* at [24(4)]) and to obtain the secured creditor’s views about that strategy; and

(3) given how quickly the situation is evolving, all stakeholders will have a better understanding about the economic climate, including whether other retailers are considering reopening or have reopened and whether any reopening strategy is limited to certain areas.

### Status of the sale process

25 Mr Marsden provided an update about the sale process which the Administrators had commenced prior to, and progressed up to, 26 March 2020 when they closed all stores:

(1) during the week commencing 30 March 2020 one additional interested party came forward to consider an acquisition of the Colette Group business. The Administrators provided that party with access to the data room and it is currently undertaking initial due diligence. The relevant party is described by Mr Marsden as a “management buy-in candidate” who will likely require external capital to offer sufficient value to creditors;

(2) on 13 April 2020 the Administrators were contacted by a lawyer representing a consortium interested in purchasing the business. As at 15 April 2020 the Administrators were in the process of providing the consortium with access to the data room to commence their due diligence;

(3) the Administrators anticipate that these additional parties will be included in a short list of interested parties to resume the sale process once some visibility returns to the market and capital is more readily available; and

(4) the Administrators were also contacted by some of the original interested parties who sought to recommence discussions about a potential sale of the intellectual property of the Colette Group business without taking over the retail shops. Mr Marsden has deferred this interest until such time as other interest for the business as a whole, or substantially the whole, has been fully explored.

### Online trading

26 Since the Administrators’ closure of the Colette Group’s 93 retail stores in Australia on 26 March 2020, the Colette Group has continued to make online sales.

27 In the weeks commencing 30 March 2020 and 6 April 2020:

(1) online sales were made of $194,939 and $185,196 per week respectively, compared to approximately $1,660,000 and $720,000 in weeks 7 and 8 of the administration respectively and approximately $2 million per week in earlier weeks of the administration;

(2) total sales were approximately 14% of target for the full store network; and

(3) turnover was respectively 87% and 88% adverse compared to the same periods in the previous year and turnover in March 2020 was 36% adverse to sales in the previous month.

### Employees

28 Insofar as employees were concerned:

(1) on 2 April 2020, 15 of the 59 CBCH head office and distribution centre staff were stood down pursuant to s 524 of the *Fair Work Act* (Cth);

(2) on 9 April 2020, seven employees were made redundant; and

(3) since 1 April 2020, three employees have resigned.

29 The standing down of the 15 head office and distribution centre staff equates to a reduction in employment costs of approximately $110,521 per month from 1 April 2020. Employment costs for the week commencing 6 April 2020 were $49,869 for 34 of the total of 56 staff in the head office and distribution centre that had not been stood down or made redundant.

### The Leases

30 As at 26 March 2020, 10 Landlords had called on bank guarantees for 48 retail stores to the value of $665,732.23 and between 27 March 2020 and 9 April 2020, one further Landlord called on bank guarantees for two retail stores to the value of $46,260.44. As at 9 April 2020:

(1) $48,878.05 of the bank guarantees called on related to underperforming stores closed between 1 February 2020 and 26 March 2020; and

(2) 11 Landlords had called on bank guarantees valued at $663,114.62 for 50 of the 93 remaining retail stores subject to the Leases. This amount includes one $500,000 “blanket” guarantee which, the Administrators understand, covers 29 retail stores and which covered an additional six of the underperforming retail stores closed between 1 February 2020 and 26 March 2020. Further, 7 of those 11 Landlords have pre-appointment liabilities and one agreed to the Administrators’ rent reduction request sent on 19 and 20 March 2020.

31 Of the 17 Landlords, the Administrators estimate that:

(1) 13 have called or uncalled guarantees between 1 April 2020 and 15 April 2020; and

(2) 12 also have called or uncalled guarantees sufficient to cover the rent accrued between 16 April 2020 and 6 May 2020.

32 As Mr Marsden made plain in his evidence, and as was the case at the time I made the 1 April Orders, if the relief sought by the Administrators was granted, they did not intend to cause the Companies to make the rental payments pursuant to the Leases, liability for which would begin to accrue on 16 April 2020. Absent the application of the Code of Conduct the rent that would ordinarily accrue for the period 16 April 2020 to 6 May 2020 is estimated to be $610,769 (including outgoings and GST). However, Mr Marsden pointed out that the liability that will accrue may be materially different from that which would be otherwise owing following the Administrators’ intended negotiations with the Landlords in compliance with the Code of Conduct.

33 The Administrators remain of the view that not paying rent is the most advantageous course to the Colette Group’s creditors as a whole because:

(1) paying rent would substantially deplete the Colette Group’s cash resources which would diminish the return available to creditors and potentially undermine the future sale or recapitalisation process. The Administrators do not know the extent to which the Code of Conduct will apply to rental payments until their eligibility application for the JobKeeper package is resolved;

(2) in the current economic environment, many commercial premises in relation to which retailers took steps to close stores and for which, the Administrators understand, the retailers are not paying rent remain closed; and

(3) government legislative intervention has recently occurred which the Administrators are yet fully to understand and incorporate into their modelling.

## The Administrators’ position as at 15 April 2020

34 Based on those matters, as at 15 April 2020 it remained Mr Marsden’s opinion, as was the case at the time of the 1 April Orders, that:

(1) the “mothballing” of the Colette Group business (as explained in *CBCH (No 2)* at [24(4)]) is likely to continue for a period of at least two months;

(2) there remains a potential for the Colette Group business to continue through to a sale, recapitalisation or DOCA (as described at [24(3)] of *CBCH (No 2)*);

(3) proceeding to a managed wind down (as described at [24(1)] of *CBCH (No 2)*), a sale or recapitalisation once stores reopen would maximise the chance of the Colette Group or as much as possible of its business continuing; and

(4) a managed wind down, DOCA or potential sale will be a better outcome for creditors than closing all stores and winding down the business immediately (described at [24(2)] of *CBCH (No 2)* as the COVID-19 “shut down 1” or “shut down 2” scenarios).

35 These alternatives and the Administrators’ opinion in relation to them as at the time I made the 1 April 2020 Orders are set out in *CBCH (No 2)* at [24]-[25].

36 The Administrators have undertaken further modelling which supports their current view and which is included in exhibit SAM-B to the Marsden Confidential Affidavit. Mr Marsden noted that the Administrators’ modelling of the effect of the JobKeeper package and the Code of Conduct will also affect these figures.

37 Mr Marsden also remained of the opinion that, although any potential sale at the end of the COVID-19 pandemic could be materially different (for example, a potential purchaser may be interested in acquiring less stores than currently exist in the network), “mothballing” is still a better outcome for creditors and maximises the chance for the business to continue. This is because post COVID-19, the Administrators will have the option of either re-engaging with interested parties to facilitate a business sale or recapitalisation through a DOCA or undertaking a managed wind down and then liquidation. According to Mr Marsden, if the Administrators are able to achieve a sale or recapitalisation through a DOCA many employees may retain their jobs and, if so, their entitlements will be transferred, creditors may obtain repayment of debts and other synergies capable of providing value may be obtained.

38 The Administrators remained unable to form a firm view about the likelihood of how long the Companies will be able to trade online or how long it would be before there is sufficient economic certainty to enable them to consider another sale process for the business. Relevantly, the Administrators had no reason to suppose there was any realistic prospect of any DOCA, recapitalisation or sale occurring between 15 April 2020 and 6 May 2020.

39 Mr Marsden said that if the order sought was not made the Administrators would immediately commence to wind up the Colette Group business, resulting in the COVID-19 “shut down 1” or “shut down 2” scenarios. In those circumstances it is not clear whether any JobKeeper payments would be available beyond liquidation and all employees would lose their current employment. Based on the figures in the Administrators’ updated modelling, the COVID-19 “shut down 2” scenario would result in a better return to priority creditors than the COVID-19 “shut down 1” scenario.

## The attitude of the Landlords

40 The Landlords were given notice of the Administrators’ proposed application. Landlords for 56 of the 93 premises the subject of the Leases responded. Those response are summarised below.

41 Scentre Group is the Landlord for 29 of the premises. On 9 April 2020, it solicitor, Peter Harkin of Colin Biggers & Paisley, sent a letter to the solicitors for the Administrators which included:

**3. Necessary considerations**

3.1 In making orders regarding the operation of sections 443B(1) and 443B(2) of the *Corporations Act 2001* (Cth) (Act), it is necessary for the Court to take into consideration whether the proposed arrangements are in the interests of the creditors and are consistent with the objectives of Part 5.3A of the Act.

3.2 Typically, the arrangement proposed by an administrator should also enable the business to continue to trade for the benefit of the company’s creditors.

3.3 Furthermore, the creditors of the company should not be prejudiced by the proposal and they should stand to benefit from the administrator entering into the arrangement.

3.4 It seems to us that if your clients were to implement their strategy, Scentre’s rent as an unsecured creditor would accrue significantly for the period and the Colette Group will not likely have the capacity to pay that rent in whole or in part in the future.

3.5 The proposal by the Administrators and orders sought would effectively put Scentre into permanent abeyance pending some uncertain outcome as to the sale or recapitalisation of the business in circumstances where, on your clients’ own evidence, there are no realistic sale options at this time and may not be for some time yet. The business will also not continue to trade during the period for the benefit of creditors.

3.6 The proposal appears to benefit only the Administrators, by enabling them to continue the administrations of the Colette Group without accruing any personal liability, whilst maintaining their priority position in respect of their fees.

42 By letter dated 11 April 2020, the solicitors for the Administrators responded to Mr Harkin in which, among other things, the Administrators rejected the contentions set out in the preceding paragraph and summarised their reasons for seeking an extension of the relief granted by the 1 April Orders.

43 By email dated 14 April 2020 sent at 2.45 pm, Mr Harkin informed the Administrators’ solicitors that Scentre Group would not be appearing at the hearing of the Administrators’ application on 15 April 2020 but foreshadowed a further letter would be sent. That letter also dated 14 April 2020 includes:

**2. Mandatory Code of Conduct - SME Commercial Leasing (Code of Conduct)**

2.1. Your letter of 9 April 2020 states that your clients are of the view that the Code of Conduct applies to the Colette Group.

2.2. As you would be aware, the Code of Conduct applies to tenancies with an annual turnover of up to $50 million. The $50 million annual turnover threshold is applied at a group level in respect of retail corporate groups (as opposed to the individual retail outlet level).

2.3. We understand from the Judgment of Justice Yates in Federal Court of Australia proceeding no. NSD 172 of 2020 dated 24 February 2020 (Yates Judgment), that it is your clients’ evidence, accepted by the Judge, that the Colette Group has an annual turnover of at least $100 million.

2.4. Accordingly, we invite you to explain on what basis your clients assert that the Code of Conduct applies to the Colette Group.

2.5. The Colette Group was placed into administration in January of this year and its insolvency is consequently not a function of the Covid-19. We note that according to the Code of Conduct, the very fact that the Colette Group is in administration modifies the operation of the Code of Conduct.

**3. Prejudice of proposed approach**

3.1. We reiterate the matters set out in our letter of 9 April 2020 in respect of the anticipated financial burden on the landlords of Colette Group resulting from your clients’ “mothballing” strategy.

3.2. In your letter of 11 April 2020, you say that your clients have elected to close the retail stores in order to ensure the health and safety of employees and due to social distancing restrictions implemented in Victoria, New South Wales and Queensland.

3.3. As you would be aware, both State and Federal governments have said that they anticipate the current social distancing measures will remain in place for at least the next 6 months.

3.4. Accordingly, even though your clients currently anticipate that the Colette Group’s retail stores will be closed for at least the next 3 weeks, and possibly for up to 3 months, Scentre is concerned that your clients may potentially continue to seek further extensions, which may run into many months of lost rent and an accruing debt as unsecured creditors.

3.5. Your clients indicated in their letter to Scentre of 9 April 2020 that they would be open to discussing the option of vacating certain premises. However, this potential compromise was subject to a number of conditions, namely that the landlord has an alternative tenant willing to step in and trade from the relevant premises immediately, that it would be subject to the provisions of sufficient time remove stock, and if your clients determine it to be in the best interests of creditors to do so. With respect, the conditions attached by your clients were so severe that it could not accurately be said that a legitimate compromise was offered.

3.6. Mr Marsden stated in his evidence in support of the application for the extension of the convening period, among other matters, that there are a number of high-value company loans within the Colette Group, amounting to approximately $10 million which may be voidable transactions or inappropriate related-party transactions (the **voidable transactions**).

3.7. We note that the voidable transactions were referred to at paragraph 9 of the Yates Judgment.

3.8. We anticipate that in order for the proposed “mothballing” approach, which we note the Administrators prefer, to be able to operate for the duration of the anticipated six month lockdown, it may ultimately involve the Colette Group, or indeed the Administrators, proposing a “holding” deed of company arrangement. The effect of any deed of company arrangement being entered into, would obviously preclude a liquidator issuing claw-back actions in respect of the voidable transactions.

3.9. Furthermore, as you would be aware, the timing in which any liquidators that were appointed to the companies within the Colette Group would have to commence voidable transaction claims begins from the date of the appointment of your clients. In other words, time in running.

3.10. Your letter of 11 April 2020 states that your clients reject the assertion that their proposal appears to only benefit themselves. We invite your clients to provide further explanation as to the basis of why the proposal is for the benefit of the creditors as a whole, particularly given your clients appear to have no current intention to trade and no understanding of when they might either be able to commence trading or effect a sale of the Colette Group's business.

3.11. These are relevant considerations for the Court when granting the orders sought by your clients.

(Original emphasis.)

44 On 15 April 2020 at 1.23 pm, Mr Harkin sent a further email, after receiving the Administrators’ evidence to be relied on in support of their application, which included:

With some difficulty I have now downloaded the affidavits.

I note in paragraph 21 the Administrator adheres to his stated view that the Code applies notwithstanding what Justice Yates found presumably on the administrator’s evidence in February of this year.

This is essentially an ex-parte hearing and the Code is material to it. Consequently please confirm that the administrator will draw the judges [sic] attention to the earlier finding regarding revenue and the specific reference in the Code (contained at page 56 of Mr Marsden’s affidavit) to the 50,000,000 ceiling on turn over. Please let us have a copy of any submissions made to the Court on the point.

45 As foreshadowed in Mr Harkin’s letter dated 14 April 2020, Scentre Group did not appear at the hearing.

46 Members of the GPT Group, being GPT RE Limited, GPT Funds Management Limited, Melbourne Central Custodian Pty Ltd and GPT Funds Management 2 Pty Limited (**GPT Companies**), are Landlords for seven of the premises. By email dated 14 April 2020 sent at 1.00 pm, Lily Nguyen of Lander & Rogers, the solicitor for the GPT Companies, indicated that the GPT Companies did not oppose the relief sought by the Administrators provided the Administrators gave an undertaking to the Court that they would not trade from the premises subject to those Leases to them until 5.00 pm on 6 May 2020. That undertaking was provided and is noted in the orders that I made on 15 April 2020.

47 By email dated 14 April 2020 sent at 10.58 am, Chris Brodrick of Holding Redlich, the solicitor for ISPT, the Landlord for one of the premises indicated that he anticipated “obtaining instructions to adopt a ‘not oppose’ position and to attend only to observe the hearing”. However, Mr Brodrick noted that he was “yet to receive final instructions”. No further correspondence was received from ISPT by the Administrators or their solicitors.

48 Vicinity Centres is the Landlord for 18 of the premises. By email dated 14 April 2020 sent at 5.15 pm, its solicitor, Justin Ratanatray of JKR Lawyers, indicated that Vicinity Centres neither consented to, nor opposed, the orders sought by the Administrators. That email also included:

With that said, my client’s disquiet is growing particularly given that there has been no significant movement since the last hearing.

My client expects that in the coming weeks, irrespective of the Code and the final form of the legislation, the Administrators will engage with it immediately to see if a commercial resolution can be achieved.

In the event that the parties cannot reach such a commercial resolution, it is unlikely my client will consent to any further requests by the Administrators on the terms presently sought.

49 By email dated 14 April 2020 at 12.07 pm, Cantale Paoliello, Commercial Manager of CityGate, the Landlord for one of the premises, indicated that CityGate did not intend to appear at the hearing of the application and that, among other things, it “agreed to the proposed 3 week extension to the orders”.

# LEGISLATIVE FRAMEWORK AND RELEVANT PRINCIPLES

50 The legislative framework and applicable principles when considering an application under s 447A of the Act and s 90-15 of the IPSC are set out at [28]-[42] of *CBCH (No 2)*. They apply equally to this application.

# CONSIDERATION

## The Administrators’ personal liability

51 The Administrators sought an order pursuant to s 447A(1) of the Act amending the operation of s 443A(1)(c) and s 443B(2) of the Act to limit their personal liability under the Leases such that they have no liability until 5.00 pm on 6 May 2020.

52 As set out in *CBCH (No 2)* at [37]-[38], 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 *Mentha, in the matter of Griffin Coal Mining Company Pty Ltd (administrators appointed)* [2010] FCA 1469; (2010) 82 ACSR 142 at [30]. Having regard to those factors and the facts relied on by the Administrators I was satisfied, for the reasons which follow, that the order sought by the Administrators should be made.

53 First, as submitted by the Administrators, the proposed arrangements varying their personal liability for rent for a three week period during the COVID-19 Restrictions while they negotiate with the Landlords and analyse the likely effect of the JobKeeper package and the Code of Conduct on the Colette Group is in the interests of the Colette Group’s creditors as a whole, consistent with the objectives on Pt 5.3A of the Act. Those arrangements are directed towards enabling the Colette Group’s business to trade for the benefit of its creditors, albeit at a future point in time.

54 The Administrators have updated their modelling of the different returns to the Colette Group’s creditors in the five alternative hypothetical scenarios described in *CBCH (No 2)* at [24]. On the basis of that updated modelling and subject to their caveat as to the uncertainty of the duration and extent of the impact of the COVID-19 pandemic, the Administrators continue to consider that “mothballing” the Colette Group business followed by a sale or recapitalisation process is likely to realise the most value and is therefore in the best interests of the Colette Group’s creditors as a whole.

55 Mr Marsden gave evidence about two additional factors likely to impact on the viability of the Colette Group going forward and the “mothballing” strategy: the JobKeeper program and the Code of Conduct (see [11]-[24] above). As to those matters the Administrators:

(1) have sought clarification from the ATO as to whether CBCH Australia is an eligible employer for the purpose of the JobKeeper program; and

(2) are of the opinion that the Code of Conduct will apply to the Colette Group and have approached the Landlords with a view to engaging in negotiations in accordance with it. However, as the Administrators submit, its impact is less certain than that of the JobKeeper program and more nuanced.

56 One relevant matter brought to my attention by the Administrators is that the Code of Conduct applies to entities with an annual turnover of up to $50 million (see [17] above). In *Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed)* [2020] FCA 296 (***CBCH (No 1)***) at [6] Yates J, in considering the Administrators’ application for an extension of the convening period, noted the following:

As at the date of the administrators’ appointments, the Colette Group’s annualised net sales were approximately $100 million. The administrators’ initial enquiries indicate that secured creditors of the Colette Group are owed in the vicinity of $10 million, and the unsecured creditors (excluding inter-company creditors) are owed in the vicinity of $22 million. The unsecured creditors include 309 employees who are owed in the vicinity of $1.3 million; 158 trade and statutory creditors who are owed in the vicinity of $12 million (excluding intercompany loans); and shareholder loans in the vicinity of $10 million.

57 The evidence recorded by Yates J in *CBCH (No 1)* was given at an earlier stage in the administration. Whether the Colette Group’s turnover is in that amount and whether the Code of Conduct will or will not apply to it is a matter that is yet to be finally resolved by the Administrators and the Landlords who may have competing views about that matter.

58 That said, it is clear that the Administrators consider that waiver or deferral of the rental liability is appropriate in the context of an administration insofar as the objectives of Pt 5.3A of the Act are being maximised and that in the period in which the order operates the Administrators will, among other things, attempt to determine whether the Code of Conduct does apply to the Colette Group.

59 It is unclear how long the COVID-19 Restrictions will continue. However, as the Administrators point out, the Code of Conduct is expressed to apply past the date on which such restrictions might end and for a “recovery period” thereafter. That being so, if the Code of Conduct applies to the Colette Group, it will most likely continue to apply after the stores are reopened so that any benefits obtained by the Colette Group pursuant to it will continue for the duration of the “mothballing” strategy.

60 Notwithstanding the uncertainty surrounding the JobKeeper package and the ultimate applicability and/or outcome of the Code of Conduct on the administration, the Administrators’ position as at 15 April 2020 was that:

(1) their updated modelling showed that the best return to secured creditors would be via a managed wind down, DOCA or potential sale;

(2) interest in relation to a sale or recapitalisation of the Colette Group business continued although the Administrators did not think there was any realistic prospect of a recapitalisation or sale occurring in the period 15 April 2020 to 6 May 2020;

(3) the Colette Group is restricted to trading online with the result that total sales were at 14% of the target for the full store network in the weeks commencing 30 March 2020 and 6 April 2020;

(4) the Administrators are still 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 sales process for the business and assess the likelihood of either a business sale, a DOCA proposal or a form of recapitalisation; and

(5) while the Administrators’ updated modelling shows that the best return to secured creditors will be via a managed wind down, DOCA or potential sale, if the Court does not make the order sought, the Administrators will proceed with the COVID-19 “shut down 1” or “shut down 2” scenarios (see *CBCH (No 2)* at [24(2)]).

61 Secondly, the Administrators are of the view that in the current climate a “mothballing” of the business for an undetermined period with a view subsequently to recommence the sale or recapitalisation process continues to be the option which will maximise the value in the Colette Group business and which is likely ultimately to advance the interests of all creditors.

62 In that regard, for the purpose of considering any prejudice or disadvantage to creditors, the relevant pool of creditors is the Landlords for the 93 stores the subject of the Leases, all of whom were notified of the Administrators’ application. As summarised at [40]-[49] above, five of those Landlords, representing 56 of the 93 stores, responded. Although one of the five responding Landlords, Scentre Group, raised a number of issues, none of the Landlords appeared at the hearing of the application or sought to challenge it.

63 In determining whether to make the order sought by the Administrators I considered the issues raised by Scentre Group in its correspondence (set out at [41], [43] and [44] above). But, in my opinion, those issues did not raise any matters that would cause me not to make the order sought. The real detriment to the Landlords of making the order is that they become unsecured creditors in respect of the rental payments due to them for the period in which the order operates, namely 15 April 2020 to 6 May 2020. However, that detriment had to be weighed against the following factors:

(1) if the relief sought was not granted the Administrators would:

(a) vacate the stores. In those circumstances, as the Administrators submitted, the economic environment is such that no Landlords would likely be able to find a replacement tenant in the near future and, indeed, none of the five Landlords who provided a response to the Administrators in relation to this application confirmed that they had a replacement tenant; and

(b) proceed with the COVID-19 “shut down 1” or “shut down 2” scenarios (see *CBCH (No 2)* at [24(2)]) with the consequence that there would be no value to the Landlords;

(2) none of the modelled scenarios envisage a return to unsecured creditors, including the Landlords. However, if the relief is granted and a managed wind down, a DOCA or a post COVID-19 sale is pursued there is potential for the Landlords to maintain tenanted stores and any outstanding rental amounts may form part of lease renewal negotiations; and

(3) several Landlords have called on bank guarantees provided in support of the Leases which may effectively give those Landlords some priority.

64 As submitted by the Administrators, notwithstanding the uncertainty brought about by the current situation the Landlords would likely be in no worse position if the Court granted the relief sought by the Administrators than they would be if the stores were vacated. If the order was made and “mothballing” continues followed by a sale or recapitalisation process, there at least remains a potential for the Landlords’ position ultimately to be improved.

65 Thirdly, and as noted at [40]-[49] above, the evidence established that the Administrators had given notice to those persons or parties potentially affected by their application and of their proposed next steps.

## Payments due under the Leases

66 The Administrators sought a direction pursuant to s 90-15 of the IPSC that they will be justified in causing the Companies not to meet their obligations to pay rent pursuant to any of the Leases accruing up until 5.00 pm on 6 May 2020. In doing so, as was the case at the time of the 1 April Orders, the Administrators sought protection from what they described as unforeshadowed but foreseeable claims that they acted unreasonably or inappropriately by either paying or not paying rent due under the Leases.

67 In addition to the matters relied on by the Administrators in support of the 1 April Orders as set out in *CBCH (No 2)* at [62], the Administrators submitted that their decision to cause the Colette Group not to meet its future rental obligations was made in the context of the fact that the rental liability that will accrue from 16 April 2020 to 6 May 2020 may be materially different from that which would be otherwise owing following negotiations with the Landlords that they intend to undertake in compliance with the Code of Conduct, assuming it applies.

68 It remains the case that the Administrators are in a highly unusual and invidious position and that continuing to pay rent in the current climate would not be in line with the actions of other retailers and would deplete the Colette Group’s resources in a significant way. As frankly submitted by the Administrators, failure to pay rent is an unusual course for an administrator to take and jeopardises the Colette Group’s tenancies and potentially their ultimate ability to reopen the stores and sell the Colette Group business as a going concern. However, for the same reasons as I gave in *CBCH (No 2)* at [61]-[64] it is the preferable course, taking into the account the creditors’ interest 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.

69 For those reasons I was satisfied that the direction sought by the Administrators pursuant to s 90-15 of the IPSC should be made.

## Confidentiality orders

70 The Administrators sought orders for the suppression or non-publication of the Marsden Confidential Affidavit and confidential exhibit SAM-A to Mr Marsden’s affidavit dated 30 March 2020 (**Marsden Affidavit**). I note that the 1 April Orders included a confidentiality order in relation to the confidential exhibit SAM-A which operated up to 15 April 2020.

71 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. The Marsden Confidential Affidavit and confidential exhibit SAM-A are both of that nature.

72 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.

73 Mr Marsden gave evidence as to why the Administrators sought an order pursuant to s 37AF of the FCA Act in relation to the Marsden Confidential Affidavit and confidential exhibit SAM-A.

74 Mr Marsden noted that the Marsden Confidential Affidavit disclosed:

(1) assumptions upon which the Administrators undertook their modelling;

(2) how the Administrators intend to negotiate with the Landlords in relation to the Code of Conduct and what impact those negotiations may have on the future strategy of the Colette Group administration; and

(3) the status of the Administrators’ discussions with the Colette Group’s secured creditor.

75 Mr Marsden noted that disclosure of confidential exhibit SAM-A to the Marsden Affidavit and exhibit SAM-B to the Marsden Confidential Affidavit, which both set out the Administrators’ modelling of the different scenarios as described at [24] of *CBCH (No 2)*, would be likely to impact negatively on any future sale of the Colette Group business or of the stock because:

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

(2) the Administrators’ estimates of value of stock and the likely realisation from its 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.

76 In light of those matters 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 the Marsden Confidential Affidavit and confidential exhibit SAM-A pursuant to s 37AF of the FCA Act on the ground set out in s 37AG(1)(a).

# CONCLUSION

77 For those reasons I made the orders and direction sought by the Administrators.

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| I certify that the preceding seventy-seven (77) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Markovic. |

Associate:

Dated: 28 April 2020