Registered Master Builders' Association of New Zealand incorporated

Report No.2 of the Insolvency Working Group's on voidable transactions.

JUNE 2017

BUILDING EXCELLENCE FOR OVER 100 YEARS

Registered Master Builders

Introduction

Registered Master Builders have been building in New Zealand for over 100 years. We represent most residential builders, group home builders and major contractors in the building and construction sector in New Zealand. We are proud to count amongst our membership Leighs Construction, Naylor Love, Fletchers, Ebert, Hawkins and Dominion.

We have a wealth of knowledge and experience to draw on in helping shape reforms relevant to the building and construction sector.

The RMBA's purpose is to help our members build better businesses through improved productivity and profitability; a prosperous vibrant sector and as a voice for builders and the sector.

Brand values at the heart of the RMBA are:

- We act with integrity in all that we do,
- We listen and focus on delivering value to our members,
- We take a leadership role in the sector,
- We align and collaborate to support a stronger and more productive industry,

Submission

The Registered Master Builders Association (RMBA) welcomes the opportunity to provide its views on Report No.2 of the Insolvency Working Group on voidable transactions. The starting point for the Association's perspective on this matter is increasing certainty. We welcome that the report emphasises the societal and commercial imperative of business certainty.

Our members, in either head contractor or subcontractor arrangements, are at the sharp end in the event of the insolvency of the principal. Accordingly, we are supportive of reducing the clawback period for transactions between unrelated parties from two years to six months to bring it more into line with other jurisdictions.

The current 2-year period places considerable uncertainty on members during that period, who are vulnerable to having payments received in consideration for services delivered under contractual obligations set aside even if the payment was received in good faith. Furthermore, during that

period individual creditors can be exposed to a number of liquidator inquiries which increase compliance costs.

As required under section 296 (3) of the Companies Act 1993, the defence to voidable transaction requires not only good faith, but an objective element that a reasonable person receiving the payment would not have suspected, and did not have reasonable grounds for suspecting, that the company was, or would become, insolvent. In addition, an applicant must show that they either "gave value" or "altered" their positions.

In our view, however, the Insolvency Working Group's has not identified sufficient grounds to support their recommendation that the "gave value" limb of the defence should be repealed. We do not agree that the current regime is excessively weighted to individual creditors' interests. To say that because the "altered position" test is effectively redundant because of the ease of meeting the "gave value" test is not sufficient reason to abandon this aspect of section 296(3). This kind of argumentation glosses over the very fundamental nature of a commercial exchange i.e. individual creditors are able to meet the "gave value" test because they provide due consideration in the return for the payment received in good faith. This is noted in paragraph 33 of the Working Group's report. The perception that it is too easy for individual creditors to satisfy this test are not grounds to repeal the "gave value" requirement.

As noted in the report, the Supreme Court recognised Parliament's intention in amending the Companies Act and including the 'gave value' test in 2006, was to provide creditors with more certainty that the transactions they are entering into would not be set aside. To remove this element, reduces certainty and would represent a step backwards.

We are not persuaded that excessive administration by the liquidator, who invariably passes the cost to the creditors, would be addressed by removing the "gave value" test. Indeed, doing so and requiring individual creditors to instead prove that they "altered" their position in the reasonably held belief that the transaction was valid, will almost certainly result in greater administrative burden and increased compliance costs on that party. This is quite the opposite of one of the reasons cited by the Working Group for removing the "gave value" test in the first place.

We also take issue that the current regime places little incentive on individual creditors to know as little as possible. A reasonable person test applies so that creditors cannot adopt an approach analogous to wilful blindness. Our members whether they are major contractors, commercial construction companies, group home builders, or residential builders can take on significant commercial risk when contracting to the principal. Like any other commercial entity, they mitigate

this risk by carrying out their due diligence to ensure the principal can meet their contractual payment obligations in the contract. We, therefore, do take exception to arguments put forward by the Working Group that individual creditors under the current rules are incentivised to know as little as possible.

Conclusion

As noted early in our submission, the question that has guided us in developing our views on the Insolvency Working Group's report is how their proposals can improve certainty for businesses. Our comments are intended to identify areas where certainty can be enhanced, hence our support for reducing the clawback period to bring it into line with what other countries with similar judicial systems are doing. Equally, we do have strong reservations about amending the defences available under section 296 (3) in the Companies Act 1993 and effectively repudiating what was a sensible decision by the Supreme Court in *Allied Concrete v Meltzer*, which as noted by the Working Group was overwhelmingly well received by the legal sector.

Registered Master Builders Association

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