CORPORATE LAW REFORM IN NEW ZEALAND

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Thank you Mr Chairman. I was told to hurry to the podium because I could be out of time by the time I got here! With my Law Commission hat on - and I had hoped that I might be allowed to remain on the Law Commission until my term of office expires in 18 months - I did wish at times during Jack Hodder's address that he would restrict himself to talking about Australian stamp duty! (An absolutely fascinating topic. Nobody in New Zealand ever talks about stamp duty.) I guess I could be fired just for being in the same room. Anyway, fortunately I am able to say that I did not see his paper before he delivered it and therefore what you are going to get is a commentary on it which is not a commentary on it. And I intend to talk instead about some matters relating to reform of insolvency law.

First of all, receiverships. In New Zealand, unlike the position as I understand it to be in the Australian States, we have never had anything in our property statutes dealing with receiverships; no implied power to appoint receivers. We have also had a tradition of extreme judicial reluctance to appoint court receivers. Why, I am not quite sure, but they are a comparative rarity. We had the English based receivership sections in the Companies Act 1955. We have still got most of those. In 1981, however, there was considerable reform in that area and at that point I think we probably moved a little bit ahead of the Australian legislation. But you in Australia have been catching up. And then, a couple of years ago, tucked away in the back of Report No. 9 from the Law Commission were a series of proposals and a draft bill on receiverships, the suggestion being that we would finally put something reasonably comprehensive into our property law statute. Now in fact I do not think I am giving away any state secrets if I say that what the Justice Department has decided to do, and I must say for once I am in agreement, is to make it a separate receivership statute. And I think that some time in the next months we are likely to see it introduced into the House and I understand that it will largely pick up the recommendations of the Law Commission with some re-drafting - not necessarily for the worse.

This will be a new Act to apply to receiverships of property of both individuals and corporations, and it will include court appointments. The receiver will be given an implied power to manage property and carry on an associated business; again filling a gap which has existed in New Zealand law and which has always had to be plugged by documentation. There will be a duty to exercise powers in a particular way. If I can find it in here in the back of this monumental report, I will tell you what these powers are going to be.

The fundamental duty of a receiver is going to be to exercise all powers in respect of the property in receivership in a manner which the receiver believes on reasonable grounds to be in the best interests of all persons in whose interests the receiver was appointed - normally of course, that will be a debenture holder. But in the case of a court appointment, then it would be interpreted rather more widely. And then it goes on that, except where it is inconsistent with that duty, the receiver is to exercise all powers in respect of the property in receivership with reasonable regard to the interests of the grantor (that is the debtor) and anyone claiming through the grantor, and any unsecured creditor and any surety. And then finally it says that in particular a receiver who exercises a power of sale in respect of any property in receivership "shall take all reasonable care to obtain the best price reasonably obtainable as at the time of sale". You will recognise that that is a variant of the ***Cuckmere Brick*** test (***Cuckmere Brick Co Ltd v Mutual Finance Ltd*** [1971] Ch 949) and in fact that statutory test has been in New Zealand law and apparently operating quite successfully since 1981. It does not appear to cause any problems to receivers. It remains to be seen whether the other more general powers do.

There will also be a restatement of reporting requirements. The law that we inherited from the Brits is a real mess in that respect - very difficult to understand. A receiver will now be required to produce reports within a couple of months after the appointment and then every six months. Those reports will be in a rather more useful form. In particular, they will contain, in the case of the first report, the receiver's summary of the pre-receivership events so that the creditors are given a commentary on what led up to the receivership - which in the case of some bank appointments may be bloody interesting - and information on and proposals for disposal and carrying on of the business. So each six months at least the receiver will be obliged to say what has been disposed of and what the intention is in relation to future disposals, and what the intention is in relation to the carrying on of the business.

Then there is a provision picked up from the Harmer Report, and you will, as I go through these things and in the liquidation provisions I will also refer to, recognise many manifestations of Harmer which we may well get here in New Zealand well before you get them in Australia by the look of things. We have picked up from the Harmer Report a provision enabling a receiver to carry on business after a liquidation with the consent of the liquidator or the court. So you do not get into that rather ridiculous situation of a business that is far better off traded and the debenture holder and the receiver being pressured by creditors who are using their right to petition the court and have the company wound up, which effectively puts a stop to the carrying on of the business. It is a form of suicide for the creditors, but they love playing. Probably a better analogy would be Russian roulette. And unfortunately the way the judge made law has developed it has become too easy for that game to be played by unsecured creditors.

There will be a provision which imposes personal liability on the receiver, subject of course to the usual indemnities, for wages or salary during the receivership unless notice of termination of the employment is given within 14 days of the appointment. In the case of directors, however, there would have to be a written adoption of any contract of employment, because otherwise all that will happen is that the golden parachutes will get triggered. There will also be a requirement that the receiver will be personally liable for rent, either for land or for chattels, while occupying or using the asset concerned; but that will not commence for seven days after the receivership, so that the receiver will have a week of breathing space to make up his or her mind whether or not to carry on in occupation and thus incur an obligation for rental while the asset concerned is being used.

Enforcement, it is hoped, will be by way of compliance orders with provision for the court to disqualify receivers who are guilty of persistent breaches. Now I say at this point that I think one of the things that will have gone missing in action from the proposals made by the Law Commission is that there will not be, and there is not in the Companies Bill in the equivalent sections relating to liquidators, any qualification requirement. There will be some disqualifications, many of which have been picked up from the Australian legislation - we have lagging a bit behind on that issue. But the Commission believed that all receivers and all liquidators should be what were going to be called "experienced insolvency practitioners". If you were going to be appointed a receiver or a liquidator, you had to have a certain requisite degree of experience. It had not been pinned down very definitely. The expression was "a person who has substantial experience in administering or advising on the insolvency of individuals or the liquidation or companies or receiverships." That person would be an experienced insolvency practitioner. We do not have in New Zealand any requirement for registration of lists of accountants with that kind of experience. You may say: "Well, how would anyone get that experience if he did not actually operate as a receiver?" The answer was that you could have a joint appointment and, where there was a joint appointment, only one of the people appointed had to be an experienced insolvency practitioner. So the apprentice could come on the job with the experienced insolvency practitioner and eventually would become one. That, for better or worse, has been dropped from the liquidation provisions and I have every reason to believe it will be dropped from the Receivership Bill.

Finally on receiverships, there will be - again from Harmer - a section which prevents a supplier of essential services from refusing to supply unless payments are made of pre-receivership debts owing to that supplier. Now that provision I am certain will be in the legislation about to emerge because it is in the draft Companies Bill applicable to liquidators. So we have Mr Harmer to thank for that one.

Now, turning to liquidations. There is of course a part - Part 14 - of the Companies Bill as introduced which deals with liquidations. The main feature I guess is that there is considerable simplification of the liquidation procedures. There is now to be only one category of liquidation. We used to have three, we are now down to two, and this bill will bring us down to one. There will be no distinction based on how the company came to be put into liquidation. You will not have the ridiculous distinctions that are made in the powers of the liquidator in our Companies Act 1955 depending upon how the liquidator came to be appointed. And there will be a very significant reduction in court involvement. Really it will only be necessary to race off to the court if there is a problem. It will not be necessary generally to go to the court to get permission to do something. The liquidator is given extremely wide powers. The section virtually says that the liquidator has all the powers that are necessary to carry out the liquidation.

There will be new procedures relating to statutory demands - what we call s218 notices - including a procedure for the company to make application to have the notice set aside, and procedures dealing with the vexed question of set-offs and counter-claims, which have been productive of some very lucrative litigation in New Zealand in recent years.

Importantly, we are going to come alongside Australia, or at least come alongside Harmer, in relation to voidable transactions. New Zealand law has been the British law relating to the setting aside of a payment or a transfer made when the company was dying a lingering death pre-liquidation. You had to show an intention to prefer the creditor and that is a hopeless exercise. It is extremely difficult to do. That has never, as far as I know, been the case in Australia, certainly not in the time that I have had any experience of Australian company law. So we are going to abandon that.

The proposal that is now being put forward largely follows the suggestions made by Harmer, and I will quote from s225(1) of the Bill: "A transaction that involved a transfer of property by a company to another person is voidable on the application of the liquidator if the transfer was made on account of an antecedent debt; and at a time when the company was unable to pay its due debts; and within a period of two years preceding the commencement of the liquidation and it enabled that person to receive more towards satisfaction than the person would otherwise have received or be likely to received in the liquidation, unless the debt was incurred in the ordinary course of business and the transfer was made no later than 45 working days after the debt was incurred." So obviously the intention there is if it is just an ordinary transaction and the payment is made on the 20th of the following month it will be exempt. There has been considerable criticism of going further that ordinary course of business and adding the reference to the 45 days. It does seem a little ridiculous that if the payment is made 46 days later that it is not in the ordinary course of business and I would hope that that will get changed. The "2 years" in the section is also different from Harmer: there the recommendation was six months.

When the transaction is within six months of the liquidation, the recipient will have to prove that the company was solvent and knowledge of the creditor will be irrelevant in that proof, and will also have to prove that the debt was incurred in the ordinary course of business - and knowledge, of course, will be relevant there. So transactions within the last six months of the company's life will reverse the onus.

Now lastly, a brief comment on things that are missing in action. I have already referred to experienced insolvency practitioners. There are two other Harmerisms which are not so far to be part of New Zealand law. They are not in the Companies Bill. I can understand why voluntary administration of troubled companies has not emerged. You have not adopted it in Australia yet, it is relatively new in the United Kingdom, and there is still a shake-down process going on there, so it is perhaps reasonable for us to pause and see what happens in Australia. But I do find it extremely puzzling that the proposal for the asset-less companies fund which was made by Harmer and which is in this report, has not been adopted. It seems to me a very harmless and very simple device. It also seems to me that it is essential to the enforcement of the processes of the new Companies Bill.

For those of you who are not familiar with it, and it does not take long to summarise because it covers less than two pages of the draft, there is set up a board consisting of nominees of the Registrar of Companies, the President of the Law Society, the President of the Society of Accountants. A small sum from annual registration fees, and I think the feeling was that it would not need to be more than $5 or $10 a year per company, would be diverted into that fund. It would be paid with the annual licence fee, diverted into that fund and the people who were administering it would then receive applications from liquidators who believed that the officers of the company concerned had done something naughty and believed that they were worth chasing, but were able to say that the company had no assets or insufficient, to be able to fund any litigation. They would look at that, I suppose, much the same way as a legal aid committee does and then, if they thought that it was a useful piece of litigation, would allow it to go ahead. If and when there was recovery, the moneys which had been advanced by the fund would be a first charge on the recovery and so the fund would be put back in funds again.

Now for some inexplicable reason that has been dropped from the bill despite being in the Law Commission draft and no good reason has yet been given. I have asked one or two people in high places the reason for this; none has been able to supply any answers that satisfied even the person trying to answer the question. They could only speculate that it might have something to do with treasury policies and possibly the fact that there is going to be quite a lot of expense for every company in converting over once the new

Companies Bill has been enacted, because each company will need to re-register itself and have a new constitution. Now it is true that there will be expense, but heavens, five or ten dollars! Is that really going to make a difference in the case of each company? And that is without even taking into account the on-going benefits of the simplicity of the new Companies Bill itself. So although each company might have to put its hand in its pocket for re-registration, it is going to get a pay-back on the simplicity of the new Act many times over. And even if you look at it only as a form of insurance policy, surely most company directors would be perfectly happy to see their company paying five or ten dollars a year as an insurance premium against the day when they will end up being creditors and the debtor company will have no assets but the directors will be worth pursuing.

In my experience the vast majority of the cases brought by liquidators these days are brought because some creditors are prepared to cough up funds of their own, put it into the pool to enable the liquidator to pursue the action. If we do not have an asset-less companies fund an essential element of the Companies Bill will be missing in action.