IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S229 of 2014

BETWEEN:

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
(ACN 074 112 011)
First Appellant

J.P. MORGAN SECURITIES AUSTRALIA LIMITED
Second Appellant

And

WILLIAM JOHN FLETCHER AND KATHERINE ELIZABETH BARNET AS LIQUIDATORS OF OCTAVIAR LIMITED (RECEIVERS AND MANAGERS APPOINTED)(IN LIQUIDATION) AND OCTAVIAR ADMINISTRATION PTY LTD (IN LIQUIDATION)
First Respondents

OCTAVIAR LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)
Second Respondent

OCTAVIAR ADMINISTRATION PTY LTD (IN LIQUIDATION)
(ACN 101 069 390)
Third Respondent

APPELLANTS' WRITTEN SUBMISSIONS

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Part I: Internet publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of issues

2. Where:

a. a Court has already granted to a liquidator, under paragraph 588FF(3)(b) of the *Corporations Act* 2001 (Cth) (the **Act**), an extension of the time within which to commence an application under s.588FF(1) in respect of an alleged unfair preference or another voidable transaction, and

b. no further extension of that time period could be obtained by the liquidator by means of a further application under the Act, because the time by which any such extension application must be brought has expired,

can the Court nonetheless grant a further extension of that time period by exercising its powers under the Court's civil procedure rules so as to vary the date specified in the extension order previously made under the Act?

Part III: *Judiciary Act*: s.78B

3. There are no constitutional issues in this case. Notices under section 78B of the *Judiciary Act* 1903 (Cth) were issued in the proceeding at first instance before Justice Black, on the basis that an argument was then raised by the appellants that rule 36.16(2)(b) of the *Uniform Civil Procedure Rules* 2005 (NSW) (**UCPR**) was inconsistent with s.588FF(3) of the Act, and, by reason of section 109 of the Constitution, was invalid to the extent of that inconsistency. None of the Attorneys-General appeared at that hearing. That constitutional argument was not pursued on appeal, and no notices under s.78B were served in the Court of Appeal proceeding, or have been served in respect of this appeal.

Part IV: Case citations

4. The decision of Black J is reported as *Re Octaviar Limited (recs and mgrs apptd) (in liq) & Anor* (2013) 93 ACSR 316.

5. The decision of the Court of Appeal is reported as *JP Morgan Chase Bank, National Association v Fletcher (as liquidators of Octaviar Ltd) & Ors* (2014) 306 ALR 224.

Part V: Statement of relevant facts

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6. In early 2008, there occurred various transactions by which the first respondents allege that the appellants received unfair preferences from the second respondent, Octaviar Limited (**Octaviar**).

7. On 4 June 2008, the Public Trustee of Queensland commenced winding up proceedings in the Supreme Court of Queensland against Octaviar. This is when the winding up of Octaviar is taken to have commenced.[1] The "relation-back day" for Octaviar, within the meaning of s.588FF of the Act, was 4 June 2008 (Reasons for Judgment of the Court of Appeal 28 February 2014 (**CA**), [5]).

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8. By order of the Supreme Court of Queensland made on 9 September 2009, Octaviar was placed in liquidation and the first respondents were appointed its liquidators.

9. By operation of s.588FF(3)(a) of the Act, and subject to any extension of time being ordered under paragraph 588FF(3)(b), any application in respect of Octaviar under subs 588FF(1) was required to be commenced by 4 June 2011 (CA, [5]).

10. On 10 May 2011, the respondents filed the Originating Process in Supreme Court of New South Wales proceeding no. 2011/153330 (the **Proceeding**). The respondents
30 sought *ex parte* an order under paragraph 588FF(3)(b) of the Act that the time for the making of any s.588FF(1) application in respect of Octaviar be extended to 3 October 2011.

[1] See *Re Octaviar Ltd (No 8)* [2009] QSC 202; confirmed in *Re Octaviar Ltd (No 8)* [2010] QCA 45.

11. On 30 May 2011, Hammerschlag J made the orders sought in the Originating Process. The terms of the relevant order were: "Order under section 588FF(3)(b) of [the Act] ... that the time for the making of an application in respect of [Octaviar] under section 588FF(1) of the Act be extended to 3 October, 2011" (the **Extension Order**) (CA, [5], [15]).

12. On 4 June 2011, the period within which any application under paragraph 588FF(3)(b) was able to be made expired (this date being 3 years after the relation-back day): s.588FF(3)(a).

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13. On 8 September 2011, the respondents' solicitors notified the appellants that the respondents intended to make an application, pursuant to paragraph 588FF(3)(b) of the Act, for orders further extending, to 3 April 2012, the time by which any s.588FF(1) application in respect of Octaviar must be brought.

14. On 19 September 2011, the respondents filed two forms of process in the Proceeding: one was an amended originating process; and the other was an interlocutory process (CA, [17]). Identical orders were sought in both forms of process (CA, [18]). Relevantly, the respondents sought:

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a. an order under paragraph 588FF(3)(b) of the Act that the time for the making of any s.588FF(1) application in respect of Octaviar be further extended to 3 April 2012; and

b. an order under rule 36.16(2)(b) of the UCPR that the Extension Order previously made by Hammerschlag J be varied to insert in lieu of "3 October 2011" the date "3 April 2012".

15. The respondents filed further affidavit material in support of this application, setting
30 out the work that had been done since the Extension Order and the reasons why a longer period of time was now sought beyond that which had been specified in the Extension Order.

16. On 19 September 2011, the respondents' application was heard by Justice Ward. The appellants did not appear at the hearing. Her Honour made an order under rule 36.16(2)(b) of the UCPR in the terms described in paragraph 14(b) above, varying the

Extension Order by substituting the date "3 April 2012" for the date "3 October 2011" (the **Variation Order**) (CA [23]). The effect of the Variation Order was to extend the period within which any s.588FF(1) application in respect of Octaviar had to be brought by a further six months beyond the "longer period" which had previously been ordered by Justice Hammerschlag under s.588FF(3)(b).

17. On 3 April 2012, the first respondents brought a s.588FF(1) application in respect of Octaviar against the appellants. This was outside the period specified by the Extension Order as originally made, but within the period specified by the Extension Order as varied by the Variation Order.

18. On 18 October 2012, the appellants filed an interlocutory application in the Proceeding, seeking to set aside the Variation Order.

19. The appellants' application to set aside the Variation Order was heard by Justice Black on 7 December 2012, and was dismissed by his Honour on 8 February 2013.

20. The New South Wales Court of Appeal granted the applicants leave to appeal from Black J's decision, but a majority of the Court (Macfarlan and Gleeson JJA; Beazley P dissenting) upheld the decision of the primary judge and dismissed the appeal.

Part VI: Appellants' argument

The terms of s.588FF(3)(b)

21. Section 588FF(1) of the Act provides that the Court may, on the application of a company's liquidator, make certain orders where it is satisfied that a transaction of the company is voidable because of section 588FE. Subsection 588FF(3) of the Act relevantly provides that:

> An application under subsection (1) may only be made:
>
> (a) during the period beginning on the relation-back day and ending:
>
> (i) 3 years after the relation-back day; …
>
> or
>
> (b) within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period.

22. The first respondents did not bring any s.588FF(1) application in respect of Octaviar within the time period specified in s.588FF(3)(a), which expired on 4 June 2011. However, the first respondents did, within that period, make an application to the Court under paragraph 588FF(3)(b). In terms of the language of that paragraph, the Supreme Court (being a "Court" as defined in s.58AA) made an order "on" the s.588FF(3)(b) application that the "longer period" within which a s.588FF(1) application "may only be made" was the period ending on 3 October 2011.

23. The use of the phrase "may only be made" in the chapeau of s.588FF(3) indicates that the requirement to bring an application under s.588FF(1) within the time period specified in either paragraph 588FF(3)(a) or 588FF(3)(b) is of the essence of the provision made by s.588FF and is not to be characterised as a time stipulation of a procedural nature: *Gordon v Tolcher* (2006) 231 CLR 334 (***Gordon v Tolcher***) at [37]. This was recognised by Gleeson JA in the Court of Appeal (CA [168]).

24. In determining the precise time constraint imposed by paragraph 588FF(3)(b), it is important to note that this paragraph contains a number of elements. It requires that:

a. there be "an application under this paragraph" – that is, an application under s.588FF(3)(b);

b. the operative application be "made by the liquidator during the paragraph (a) period" (here, on or before 4 June 2011);

c. the Court (as defined in s.58AA) makes an order "on" that particular application;

d. the order specifies a "longer period" (than the period specified in paragraph (a)); and

e. any s.588FF(1) application "may only be made" within the "longer period" so ordered.

25. Those elements were not satisfied in the present case in respect of the Variation Order. The application for the Variation Order was not made under paragraph 588FF(3)(b), but under UCPR r.36.16(2). That application under r.36.16(2) was not made "during the paragraph (a) period", but several months after the expiry of that period. The Variation Order was an order made by the Court on the r.36.16 application, not on the s.588FF(3)(b) application. And the first respondents have not commenced their s.588FF(1) application against the appellants within the "longer period" that was specified in the original Extension Order that was made by Justice Hammerschlag on the s.588FF(3)(b) application.

26. The language of s.588FF(3)(b) indicates a need for certainty and finality in respect of the time within which any s.588FF(1) application must be brought. That point was recognised by this Court in *Gordon v Tolcher*, and in particular in the plurality's endorsement (231 CLR at 348) of the propositions stated by Spigelman CJ in *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 (***BP v Brown***) at 345-6.

27. Those propositions include that:

a. the effect of the time limit in s.588FF(3) is that, by the end of the s.588FF(3)(a) period, a person who has had dealings with the company "*will know*" whether he or she remains at risk;

b. the policy behind this time limit "*favours certainty*";

c. the section requires that those who wish to extend the period for bringing a s.588FF(1) application must "*seek a determinate extension of the period*";

d. on such an application it "*must be decided*" how long the process of deciding whether to pursue voidable transactions "*will take*"; and

e. Parliament has identified a time for investigations or pursuit of funding to occur, "*subject to a single determinate extension of time*" following which time such activities "*must cease*".

28. The need for certainty and finality (or "determinacy") in respect of any decision made on a s.588FF(3) application is an essential element of the legislative scheme of which s.588FF(3) forms a part. This scheme seeks to balance conflicting commercial interests, by ensuring that persons who received payments from the company in question know either:

a. that the time period specified in s.588FF(3)(a) has expired, without any application under s.588FF(3)(b) or under s.588FF(1) being brought; or

b. that an application under s.588FF(3)(b) was brought within that period, which, if decided in the applicant's favour, has resulted in a *determinate* extension of time, such that any s.588FF(1) application must now be brought within the "longer period" (s.588FF(3)(b)) specified by that determinate extension.

29. While the word "single" in the phrase "single determinate extension of time" may require some qualification, as it may be open (though this need not be determined[2]) for a person to bring two separate applications under s.588FF(3)(b), so long as each is brought within the period specified by s.588FF(3)(a) (CA [84]), the critical concept is the need for a "determinate" extension in respect of any such application. A "determinate" extension is one that is finally determined, which is fixed and definitely limited, and which is for a "single" period. That is, s.588FF(3) requires that there be a final determination, and a single extension, in respect of any application under that provision.

Terms of UCPR r.36.16(2)

30. Rule 36.16(2) of the UCPR relevantly provides that:

> (2) The court may … vary a judgment or order after it has been entered if:
> …
> (b) it has been given or made in the absence of a party, whether or not the absent party had notice of the relevant hearing or of the application for the … order, …

[2] In *Re Bowcher (Liquidator); In the Matter of Meares Nominees Pty Ltd (In Liq)* [2013] FCA 631 at [96], Foster J read *BP v Brown* as holding, and agreed, that a liquidator can make only one extension application pursuant to s 588FF(3)(b).

31. The language of this rule is broad. There is no time limit within which any application for variation of an order must be brought. There is no requirement that the "party" in whose absence the order was made be a party to the proceedings, it being sufficient that the order was made in the absence of a person affected by it (see CA [143]-[147]). There is no requirement that the application for variation be made by the absent "party" (and in this case, it was not made by the appellants – being persons affected by the Extension Order who were absent when it was made – but was made by the respondents in the absence of the appellants). There is no limit imposed by the rule on the type of variation that may be made, or the grounds on which a variation may be made.

32. As the plurality observed in *Achurch v The Queen* [2014] HCA 10 at [16], the principle of finality forms part of the common law background against which any provision conferring power upon a court to re-open concluded proceedings (including UCPR r.36.16(2)) is to be considered. When considering whether the power under UCPR r.36.16 is available to revisit and vary an extension order which has previously been made on a s.588FF(3)(b) application, it is necessary to consider not only the ambit of the variation power having regard to the principle of finality, but also whether such a use of the variation power is inconsistent with the specific requirement articulated in *BP v Brown* and endorsed in *Gordon v Tolcher* that there be a final determination and single extension in respect of any s.588FF(3)(b) application.

Reasoning of the majority in the Court of Appeal

33. The question that arises in this proceeding is whether, by reason of s.79 of the *Judiciary Act* 1903 (Cth), the power under r.36.16(2) is available to amend an order which has been made under s.588FF(3)(b), at any time, on any grounds (subject only to discretion), or whether s.588FF "otherwise provides".

34. In the Court of Appeal, Macfarlan and Gleeson JJA agreed (CA [149], [166]) with the following propositions in Beazley P's judgment (at CA [82]-[87]):

    a. first, the decisions in *BP v Brown* and *Greig v Stramit Corporation Pty Ltd* [2004] 2 Qd R 17 (***Greig v Stramit***) are "high and persuasive" authority for the

proposition that section 588FF of the Act is "the sole source of power for an extension of time beyond the three year period specified in s.588FF(3)(a)" (CA [82]-[83]);

b. secondly, and contrary to the respondents' submission below, the decision of this Court in *Gordon v Tolcher* endorsed the proposition in paragraph (a) above, and therefore subs 588FF(3) "comprehensively governs the circumstances in which an application may be made for an extension of time" (CA [84]); and

c. thirdly, *Gordon v Tolcher* is authority for the proposition that once a proceeding has been commenced under s.588FF(3), the conduct of the proceeding is governed by the procedural law of the particular state, except where "the procedural rule was inconsistent with the Federal provision" (CA [86]).

35. In the present case, all members of the Court of Appeal agreed that there was only one application for an extension of time made within the 3-year period specified by s.588FF(3), with an application subsequently being made under UCPR r.36.16(2) for a variation of the order made on the original application (CA [85], [149], [166]); and therefore the issue that arose was one "as to the nature of the procedural rule" in question (CA [87]).

36. The majority held that an application brought under UCPR r.36.16(2)(b) to extend the period specified in a previous order of the Court which was made following the determination of a s.588FF(3)(b) application was not inconsistent with section 588FF; and, because there was no such inconsistency, UCPR r.36.16(2)(b) was 'picked up' by section 79 of the *Judiciary Act* 1903 (Cth).

37. Macfarlan JA (with whom Gleeson JA agreed, CA [166]) correctly held that the making of the Extension Order by Hammerschlag J implicitly brought the extension application under s.588FF(3)(b) to an end, because what was sought by that application had been achieved. However, his Honour held that, by analogy with the decision in *Gordon v Tolcher*, this termination was subject to the rules of court which

were able to, and effectively did, provide for its revival in certain circumstances, including where the 'slip rule' was engaged (CA [156]), where an appeal was allowed in respect of a rejection of a s.588FF(3) application and an extension order was then made (CA [157]), or where a judge exercised the amendment power conferred by UCPR r.36.16(2)(b) to vary the date specified in the Extension Order (CA [155]). So, when Ward J made the Variation Order, her Honour was making an order on the revived s.588FF(3)(b) application (CA [173]).

38. There were four main errors in the majority's reasoning.

Reasoning inconsistent with Gordon v Tolcher and BP v Brown

39. *First*, the decision of the majority in the Court of Appeal is inconsistent with the statements of principle in *BP v Brown*, which were endorsed in *Gordon v Tolcher*, to the effect that s.588FF(3) requires that there be certainty and finality in respect of the determination of any extension of time application.

40. The only consideration in the majority judgments of the significance of those statements in *BP v Brown* appears in CA[161]. There, Macfarlan JA states that he does not regard the relevant passage in *BP v Brown* as precluding the view his Honour had taken in the present case, "as there was no issue in [*BP v Brown*], as there is here, of use of the amendment power in r 36.16(2)(b)".

41. The decision in *BP v Brown* was that the power under s.1322(4)(d) of the *Corporations Act* 2001 (Cth), being a power to make an order varying (by extending or abridging) the period for doing any act, or commencing any proceeding, under the Act or in relation to a corporation, was not available to extend the time period specified in s.588FF(3) regarding the time for bringing a s.588FF(1) application. In the present case, the power under r.36.16 was used to make an order varying (by extending) the period for bringing a s.588FF(1) application in relation to a corporation. The conclusion in *BP v Brown* that the use of the Federal power of variation would be inconsistent with the regime established by s.588FF must be equally applicable to the use of power of variation under the State rules.

42. In considering the issue whether a State procedural power is picked up, or whether a Federal law "otherwise provides", the first step must be to determine the proper

construction of the particular Federal law being applied by the State court. The Federal provision at issue here, namely s.588FF(3), had been considered in *BP v Brown*, which had emphatically construed its effect in a way that was clearly binding on the Court of Appeal, as set out in paragraph [27] above.

43. The next step is to consider whether the State rule is inconsistent with that Federal law. The availability of UCPR r.36.16(2)(b) to grant a further extension of time, after a s.588FF(3)(b) application has already been heard and determined, and after the end of the period in which such an extension application may be brought under the Act, is inconsistent with the correct construction of the Federal legislation being applied by the State court in the exercise of Federal jurisdiction, as articulated in *BP v Brown*.

44. If the period of time within which a s.588FF(1) application must be brought is capable of extension, in substance, by subsequent variations under UCPR r.36.16 of an order initially made on the determination of a s.588FF(3)(b) application, this would fundamentally undermine the essential features of the legislative scheme identified in *BP v Brown*, and repeated in *Gordon v Tolcher*, in a way that renders those features meaningless.

45. In terms of the language of the relevant passage of Spigelman CJ's judgment (see paragraph [27] above), the availability of UCPR r.36.16 to vary any extension order previously made on an application under s.588FF(3)(b) would mean that:

a. by the end of the period specified in s.588FF(3), a person who has had dealings with the company will not know whether he or she remains at risk;

b. the policy behind the time limit in s.588FF(3), which "*favours certainty*", will have been undermined;

c. persons making a s.588FF(3) application will not be required to "seek a *determinate* extension of the period", but only an extension for the time being, which may be revisited if the circumstances justify further extension;

d. after such an application has been heard and determined, it will not have been "decided" how long the process of deciding whether to pursue voidable

transactions "will" take, as the extension granted will be subject to any later applications for variation and therefore further extension; and

e. there will not be "*a single determinate extension of time*" following which steps for the purpose of deciding whether to being a s.588FF(1) application "*must cease*", but only an extension which may be revisited as required.

46. Whereas s.588FF(3) requires determinacy, the availability of the variation power under UCPR r.36.16(2)(b) would ensure indeterminacy. After the hearing and determination of a s.588FF(3)(b) application, there could be no certainty as to the period within which any s.588FF(1) application must be brought, as the period specified by the Court in its s.588FF(3)(b) order would always be subject to any variation application which may be brought at any later period in time, on fresh evidence, and subject only to the Court's discretion.

47. The availability of this variation power under the UCPR is therefore inconsistent with the Federal provision. It follows that the majority of the Court of Appeal erred in finding that UCPR r.36.16(2)(b) is 'picked up' by s 79 of the *Judiciary Act* 1903 (Cth).

Inconsistent with Grieg v Stramit

48. *Secondly*, the reasoning of the majority is inconsistent with the reasoning of the Queensland Court of Appeal in *Greig v Stramit*, and in particular the observation in that decision that "any general power of amendment conferred on the court … would not permit the making of an amendment which effectively (though not in express terms) extended the time limited in s.588FF(3)" (at [89]-[90], [126]).

49. Macfarlan and Gleeson JJA expressly agreed (CA [149], [166]) with the passage of Beazley P's judgment in which her Honour observed that the relevant statements in *Greig v Stramit* "albeit in contexts different from that which arises here, are of high and persuasive authority and should be followed" (CA [84]).

50. However, the majority in the NSW Court of Appeal was of the view that *Greig v Stramit* could be distinguished from the present case, because that decision was authority only for the proposition that an amendment power conferred by the rules of

court cannot be used to extend the period specified in s.588FF(3)(b) for the making of an application for extension of time (CA [160]).

51. Despite the power of amendment at issue in *Greig v Stramit* being used in a manner different to the way in which the power of variation was used here, the statement of principle in that case is clear: a general power of amendment under State law cannot be used so as to extend, directly or indirectly, the specific time limitation imposed by s.588FF(3). In the present case, and contrary to that statement of principle, the use of the variation power in UCPR r.36.16(2)(b) represented the use of a general power of amendment conferred under State rules so as to extend the time limit imposed by s.588FF(3) (that is, to extend the "longer period" which the Court had already ordered on an application under that provision). If the relevant statements in *Greig v Stramit*, which were endorsed by the Court of Appeal, are correct,[3] such a use of a general State amendment power is impermissible, as it is inconsistent with the Federal provision. So must be the case here.

No analogy with 'slip rule' or position on appeal

52. *Thirdly*, the majority in the Court of Appeal erred in regarding the position with respect to r.36.16(2) as being similar to the position with respect to an application of the slip rule, or the position where an order is made upon an appeal from the rejection of an extension application.

53. The critical feature of an application of the 'slip rule', or of the inherent jurisdiction to correct an order that did not truly represent the order that the court intended to pronounce (see CA [87], [156]), is that the order which was in fact made by the Court does not, because of some error or oversight, reflect the Court's intended disposition of the matter. As was observed by the plurality in *Burrell v The Queen* (2008) 238 CLR 218 at 224 [21], and repeated by the plurality in *Achurch v The Queen* [2014] HCA 10 at [18], the power under the 'slip rule' is a power to correct the record so that it truly does represent what the court intended to pronounce as its order: "It does not

[3] Noting that the relevant passage of *Greig v Stramit* was subsequently repeated by a differently constituted Queensland Court of Appeal in *Park and McIntosh v Lanray Industries Pty Ltd* [2010] QCA 257 at [13] per Holmes JA (with whom Fraser and Chesterman JJA agreed).

permit reconsideration, let alone alteration, of the substance of the result that was reached and recorded".

54. It follows that an application of the 'slip rule', after the end of the s.588FF(3)(a) period, to an order previously made on a s.588FF(3)(b) application which was brought within time, would not contravene the requirement for a final determination and single extension in respect of any application under that provision. That is because it would not involve any new assessment by the Court of the appropriate period of extension based on fresh evidence, but would instead ensure that the terms of the order made by the Court reflected the Court's determination of that application.

55. Similarly, the application in *Gordon v Tolcher* of a rule of the District Court permitting the extension of time for service, after a "deemed" dismissal of a s.588FF(3)(b) application for want of service, did not infringe the requirement that there be a final determination and single extension in respect of any such application, as there had not in fact been any substantive determination of the application in that case, which was brought within time, prior to its deemed dismissal. The effect of the rule in question was only to remove the deemed dismissal (itself the result of the operation of a court rule) so as to allow such a determination to occur (CA [88], [149], [166]). Those circumstances are a far cry from the facts of this case where an extension application had been finally determined, and a "longer period" under paragraph 588FF(3)(b) had been ordered.

56. Likewise, where an application under paragraph 588FF(3)(b) has been rejected, and no extension order has been made, a finding on appeal that the primary judge erred in rejecting that application, and that an extension order should have been made, does not in any way undercut the proposition that s.588FF requires finality and determinacy in respect of any extension order which is in fact made under that paragraph.

57. In contrast, as recognised by Beazley P (at CA [92]), the application under UCPR r.36.16(2)(b) which was brought in this case was substantive in nature, in the sense that it was made on new or additional facts and called for a fresh exercise of the discretion to extend time. There was no challenge to the Extension Order that had been made, or to Justice Hammerschlag's determination of the s.588FF(3)(b)

application that had been brought by the respondents. Rather, the application made before Justice Ward by the first respondents was an application to extend the "longer period" (s.588FF(3)(b)) which had been specified in the Extension Order, on the basis that the period originally ordered had proved, in the event, to be insufficient from the respondents' perspective.

58. In circumstances where a s.588FF(3)(b) application had been heard and determined in the liquidators' favour, and therefore implicitly brought to an end (CA [155]), there had already been a "single determinate extension of time", and the effect of the application before Justice Ward was to seek, on fresh material and outside the s.588FF(3)(a) period, a new and different determination of the appropriate period of extension. This was fundamentally inconsistent with the requirement that there be "a single determinate extension of time".

Variation Order was not an order made on a s.588FF(3)(b) application

59. *Fourthly*, the majority erred in finding (at CA [155] and [173]) that the Variation Order was an order made on the application under s.588FF(3)(b) which had already been heard and determined by Hammerschlag J.

60. The majority correctly identified that the effect of making the Extension Order by Justice Hammerschlag was implicitly to bring that application to an end, because all that was sought by that application had then been achieved (CA [155], [166]). Nonetheless, the majority held that the application subsequently made before Justice Ward was made "on" the extension application that had previously been thus brought to an end. In particular, Gleeson JA held that "although procedurally" the Variation Order relied on the Court's power under r.36.16(2)(b), "as a matter of jurisdiction that order is properly characterised as an order made 'on an application' under s.588FF(3)(b)" (CA [173]). If that is so, the problem then arises that the application for the Variation Order was made after the end of the paragraph 588FF(3)(a) period. Gleeson JA sought to deal with this issue by saying that the time limit for the making of the application before Justice Ward had been satisfied when the original s.588FF(3)(b) application (which Justice Hammerschlag had determined) had been filed in the registry (CA [173]). In support, Gleeson JA relied on paragraph [151] of *BP v Brown*, which merely says that the relevant date under s.588FF(3)(b) is the date on which an application for a "longer period" is made to the Court. *BP v Brown* is not

authority for the proposition that, if an application is filed in the registry within time, and subsequently determined, it can be moved on, and be the subject of further extension orders, on multiple subsequent occasions. Any such proposition would be fundamentally inconsistent with the principles stated in *BP v Brown*, identified in paragraph [27] above.

61. As recognised by Beazley P (at CA [92]), the application before Ward J was in substance a new application for an extension of time, which fell outside the period prescribed by s.588FF(3)(b). That characterisation is consistent with the detailed consideration given to this same issue by Barrett J, whose views on such a matter command significant weight, in *Onefone Australia Pty Ltd v One.Tel Ltd* (2007) 61 ACSR 429 at [34]-[37].[4]

62. Prior to the application being made before Justice Ward, there was no pending application under s.588FF(3) before the Court. The orders which had been sought in the originating process had already been made in May 2011. The making of the Extension Order disposed of all issues raised by the application. What then occurred was that before Justice Ward the respondents sought a period of extension never previously sought, on the basis of fresh evidence. The Variation Order was not, in substance, an order on the May application under paragraph 588FF(3)(b), which had been brought within time, but instead an order on the September application under UCPR r.36.16(2), brought after the end of the paragraph 588FF(3)(a) period.

63. The time stipulation in s.588FF(3) imposes, as was held in this Court in *Gordon v Tolcher* (231 CLR 334 at [37]), a condition which is of the essence of the right created by the section. It follows that the Court did not have power to hear and determine a new application in September 2011, on fresh material, made after that time period had expired.

Conclusion

64. The majority erred in finding that the Variation Order was validly made. The majority ought to have found, as Beazley P held, that the use of r.36.16(2)(b) to make the Variation Order was inconsistent with s.588FF(3) of the Act, which "otherwise

[4] See also the earlier decision of Barrett J in *Onefone Australia Pty Ltd v One.Tel Ltd* [2007] NSWSC 69 at [66]-[70].

provided", such that UCPR r.36.16(2) was not 'picked up' by section 79 of the *Judiciary Act* 1903 (Cth).

Part VII: Applicable statutes

65. Section 588FF of the *Corporations Act* 2001 (Cth) provided at the time of the Extension Order, and has provided at all times since then, as follows:

588FF Courts may make orders about voidable transactions

(1) Where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE, the court may make one or more of the following orders:

(a) an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction;

(b) an order directing a person to transfer to the company property that the company has transferred under the transaction;

(c) an order requiring a person to pay to the company an amount that, in the court's opinion, fairly represents some or all of the benefits that the person has received because of the transaction;

(d) an order requiring a person to transfer to the company property that, in the court's opinion, fairly represents the application of either or both of the following:

(i) money that the company has paid under the transaction;

(ii) proceeds of property that the company has transferred under the transaction;

(e) an order releasing or discharging, wholly or partly, a debt incurred, or a security or guarantee given, by the company under or in connection with the transaction;

(f) if the transaction is an unfair loan and such a debt, security or guarantee has been assigned—an order directing a person to indemnify the company in respect of some or all of its liability to the assignee;

(g) an order providing for the extent to which, and the terms on which, a debt that arose under, or was released or discharged to any extent by or under, the transaction may be proved in a winding up of the company;

(h) an order declaring an agreement constituting, forming part of, or relating to, the transaction, or specified provisions of such an agreement, to have

been void at and after the time when the agreement was made, or at and after a specified later time;

(i) an order varying such an agreement as specified in the order and, if the Court thinks fit, declaring the agreement to have had effect, as so varied, at and after the time when the agreement was made, or at and after a specified later time;

(j) an order declaring such an agreement, or specified provisions of such an agreement, to be unenforceable.

(2) Nothing in subsection (1) limits the generality of anything else in it.

(3) An application under subsection (1) may only be made:

(a) during the period beginning on the relation-back day and ending:

(i) 3 years after the relation-back day; or

(ii) 12 months after the first appointment of a liquidator in relation to the winding up of the company;

whichever is the later; or

(b) within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period.

(4) If the transaction is a voidable transaction solely because it is an unreasonable director-related transaction, the court may make orders under subsection (1) only for the purpose of recovering for the benefit of the creditors of the company the difference between:

(a) the total value of the benefits provided by the company under the transaction; and

(b) the value (if any) that it may be expected that a reasonable person in the company's circumstances would have provided having regard to the matters referred to in paragraph 588FDA(1)(c).

66. Rule 36.16(2) of the *Uniform Civil Procedure Rules* 2005 (NSW) provided at the time of the Variation Order, and has provided at all times since then, as follows:

36.16 Further power to set aside or vary judgment or order

...

(2) The court may set aside or vary a judgment or order after it has been entered if:
   (a) it is a default judgment (other than a default judgment given in open court), or
   (b) it has been given or made in the absence of a party, whether or not the absent party had notice of the relevant hearing or of the application for the judgment or order, or
   (c) in the case of proceedings for possession of land, it has been given or made in the absence of a person whom the court has ordered to be added as a defendant, whether or not the absent person had notice of the relevant hearing or of the application for the judgment or order.

...

Part VIII: Orders sought

67. The appellants seek the following orders:

(1) The appellants' appeal be allowed.

(2) Order 2 of the orders made by the Court of Appeal on 28 February 2014 be set aside, and in lieu thereof order that:
   (a) orders 1 and 3 made in the proceeding below by Justice Black on 8 February 2013 be set aside; and
   (b) the following order made by Justice Ward on 19 September 2011 be set aside:

> "That pursuant to Part 36 rule 16 of the *Uniform Civil Procedure Rules* 2005 (NSW) the orders made by Hammerschlag J on 30 May 2011 in these proceedings be varied to insert in lieu of '3 October 2011', the date '3 April 2012'."

   (c) the respondents pay the costs of the appeal and of the hearing before the primary judge.

(3) The respondents pay the costs of the application for special leave to appeal and the appeal in this Court.

Part IX: Time estimate

68. On the material currently available, it is estimated that the appellants' argument will take around 1-1.5 hours.

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