

**FORTRESS CREDIT CORPORATION (AUSTRALIA) II PTY LTD & ANOR v  
FLETCHER & ORS (S276/2014)**

Court appealed from: New South Wales Court of Appeal  
[2014] NSWCA 148

Date of judgment: 14 May 2014

Special leave granted: 17 October 2014

Octaviar Ltd (Receivers and Managers Appointed) (In Liquidation) ("OL") is the holding company of a group that includes Octaviar Administration Pty Ltd (In Liquidation) ("OA"). Mr William Fletcher and Ms Katherine Barnet ("the Liquidators") are the joint and several liquidators of both OL and OA.

In the winding up of OA, the relation-back day is 3 October 2008. The Liquidators faced a three-year time limit from that date, under s 588FF(3)(a) of the *Corporations Act* 2001 (Cth) ("the Act"), in which to apply for orders under s 588FF(1) of the Act in respect of any voidable transactions made by OA.

The Liquidators applied for an order under s 588FF(3)(b) of the Act to extend the time in which they could make any application under s 588FF(1) from 3 October 2011 to 3 April 2012. In doing so, the Liquidators identified certain entities which may have been parties to voidable transactions with OA. Those entities did not include the Appellants. On 19 September 2011 Justice Ward made the order sought ("the extension order").

On 3 April 2012 the Liquidators commenced proceedings against the Appellants that included an application under s 588FF(1) ("the Claim"). The Liquidators also applied to vary the extension order such that it would expressly permit the Claim. The Appellants meanwhile applied to set aside or vary the extension order such that the Claim would not be permitted.

On 18 December 2012 Justice Black dismissed both applications in relation to the extension order. His Honour held that the extension order permitted the Claim, despite the Liquidators' failure to identify the transactions (and the parties to those transactions) the subject of the Claim at the time the extension order was made. Justice Black also found that, were the extension order to be discharged, the court could re-exercise its discretion under s 588FF(3)(b) of the Act after the time prescribed by s 588FF(3)(a) had expired. The Appellants appealed.

The Court of Appeal (Bathurst CJ, Beazley P, Macfarlan, Barrett & Gleeson JJA) unanimously dismissed the appeal. Their Honours found that although s 588FF(1) refers to "a transaction" and s 588FF(3) refers to "[a]n application under subsection (1)", s 588FF(3)(b) confers a discretionary power that is to be construed broadly. The Court of Appeal held that that power, to extend time for an application later to be made under s 588FF(1), was not limited to applications targeting transactions (and third parties) that could be identified by liquidators at the time they applied for an extension order.

The grounds of appeal include:

- The Court of Appeal should have held that the Court does not have power under s 588FF(3)(b) of the Act to make an order extending the time for a liquidator to make an application under s 588FF(1) of the Act, by reference to, or capable of comprehending, transactions that are, at the time of the application under s 588FF(3), neither known nor identified as the possible subject of an application under s 588FF(1), because, upon their proper construction, ss 588FF(1) and 588FF(3)(b) of the Act require that an application under ss 588FF(3)(b) be made by reference to a particular transaction or categories of transactions.