IN THE HIGH COURT OF AUSTRALIA No. S276 of 2014

SYDNEY REGISTRY

BETWEEN: **FORTRESS CREDIT CORPORATION (AUSTRALIA) II PTY LIMITED**

First Appellant

FORTRESS INVESTMENT GROUP (AUSTRALIA) PTY LIMITED

Second Appellant

and

WILLIAM JOHN FLETCHER AND KATHERINE BARNET AS LIQUIDATORS OF OCTAVIAR LIMITED (RECEIVER AND MANAGERS APPOINTED) (IN LIQUIDATION) AND OCTAVIAR ADMINISTRATION PTY LIMITED

First Respondent

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

Second Respondent

OCTAVIAR ADMINISTRATION PTY LIMITED (IN LIQUIDATION)

Third Respondent

Submissions

APPELLANTS' ~~SUMMARY OF ARGUMENT~~

PART I: PUBLICATION ON THE INTERNET

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

PART II: STATEMENT OF ISSUES

2. *First*, whether the court has power under s. 588FF(3)(b) of the *Corporations Act 2001* (Cth) (the **Act**) to make an order extending the time for a liquidator to make an application under s. 588FF(1), by reference to, or capable of comprehending, transactions that are, at the time of the application under s. 588FF(3), neither known

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nor identified as the possible subject of an application under s. 588FF(1) (a **Shelf Order**).

3. The appellants contend that, upon their proper construction, ss. 588FF(1) and 588FF(3)(b) of the Act require that an application under s. 588FF(3)(b) be made by reference to a particular transaction or to particular categories of transactions.

4. *Secondly*, whether the court had power, on discharging the Shelf Order made in this proceeding on 19 September 2011 (the **OA Shelf Order**), to re-exercise the power under s. 588FF(3)(b) of the Act, where the period prescribed by s. 588FF(3)(a) of the Act had expired.

5. The appellants contend that the second question can be resolved on a narrow basis. The primary judge made unchallenged findings that, at the time of the original application, the appellants were not, and could not with reasonable diligence have been, identified as a party to any relevant transaction. Any fresh application by the Liquidators would thus necessarily be predicated on facts unknown at the time of the original application, and unknown until the 3-year period had expired. Even if able to be re-exercised, such matters could not properly be the subject of the court's discretion.

6. *Thirdly,* whether the Court of Appeal should have dismissed the respondents' application for joinder of the appellants as defendants to the proceedings, the application for joinder having been made out of time.

7. The appellants contend that the application ought to have been dismissed, for reasons deriving from those identified in respect of the first and second questions. At the date any joinder was ordered, the period under s. 588FF(3)(a) of the Act would have expired, the proceedings would have been out of time as against the appellants, and would accordingly have been futile.

PART III: SECTION 78B JUDICIARY ACT 1903

8. The appellants consider that no notice need be issued under s. 78B of the *Judiciary Act 1903* (Cth).

PART IV: CASE CITATIONS

9. The decision of Black J. is reported as *In the Matter of Octaviar Ltd (Receivers and Managers Appointed) (in liq) and In the Matter of Octaviar Administration Pty Ltd (in liq)* (2012) 271 FLR 413 (**J**).

10. The decision of the Court of Appeal is reported as *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2014) 308 ALR 166 (**CA**).

PART V: STATEMENT OF RELEVANT FACTS

(a) Background to the substantive proceedings

11. On 9 September 2009, by order of the Supreme Court of Queensland, the first respondents (the **Liquidators**) were appointed as joint and several liquidators of the second respondent, Octaviar Limited (receivers and managers appointed) (in liquidation) (**OL**) and the third respondent, Octaviar Administration Pty Ltd (in liquidation) (**OA**): *Public Trustee (Qld) v Octaviar Limited (ACN 107 863 436) (in provisional liquidation) (receivers and managers appointed) and ors* (2009) 74 ACSR 109.

12. The relation-back day, as contemplated by Part 5.6 of the Act, for the winding up of OA is 3 October 2008. Absent an extension of time under s. 588FF(3)(b), the time for commencement of an application for relief under s. 588FF(1) in relation to the winding up of OA expired on 3 October 2011.

13. On 6 April 2010, the Liquidators, as liquidators of OL, commenced proceedings 3442 of 2010 against the first appellant in the Supreme Court of Queensland (the **OL Proceedings**).

14. On 19 September 2011, the Liquidators of OA applied for an order under s. 588FF(3)(b) in respect of the time for commencement of voidable transaction proceedings in relation to the winding up of OA. Ward J. made the OA Shelf Order in the following terms:

> "Order under s 588FF(3) of the *Corporations Act 2001* (Cth) that the time for the making of the application in respect of Octaviar Administration under s 588FF(1) be extended to 3 April 2012."[1]

15. This form of order has attracted the description "shelf order." That language appears to originate from *Brown and anor v DML Resources Pty Ltd (No. 5)* (2001) 166 FLR 1, where, at [31], Austin J spoke of a shelf application. In *Re Harris Scarfe Ltd (In Liq) and anor (No 3)* (2008) 216 FLR 242, at [17], Debelle J spoke of shelf or blanket orders.

16. On 3 April 2012, the Liquidators, as liquidators of OA, and OA commenced proceedings 3135 of 2012 in the Supreme Court of Queensland (the **OA Proceedings**). The appellants are defendants to the OA Proceedings, together with David Anderson and Craig White, who were directors of OA. Mr Anderson was also the company secretary of OA. The OA Proceedings were served on the appellants on

[1] The use of the definite article in the Order departed from the language of Ward J's reasons at [18]. The appellants raised an issue concerning the wording of the Order at first instance, which is dealt with at J[15]-[16]. That issue was not pursued in the Court of Appeal and is not pursued in this Court.

5 April 2012. *Inter alia*, in those proceedings, the Liquidators seek relief pursuant to s. 588FF of the Act.

(b) Background to the proceedings below

17. The primary judge describes the procedural history of the application below at J[11]-[14].

18. On 3 May 2012, by interlocutory process, the appellants applied, *inter alia*, to set aside the OA Extension Orders.

19. By further amended interlocutory process, filed on 23 July 2012, the appellants sought an order, pursuant to rule 36.16(2)(b) of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**), or alternatively pursuant to UCPR r. 36.15(1), that the OA Shelf Order, in so far as it affected (or may affect) the appellants (or either of them) be varied so as to exclude any application to the appellants or alternatively set aside in so far as it applied to the appellants or either of them.

20. On 8 June 2012, the Liquidators, as liquidators of OL and OA (as plaintiffs), filed and served an interlocutory process seeking the following orders:

(a) that the appellants be joined as parties to the Amended Originating Process and the Interlocutory Process filed by the plaintiffs in court on 19 September 2011;

(b) a direction that the plaintiffs be at liberty to have the original application filed on 19 September 2011 for an order under s. 588FF(3)(b) of the Act that the time for the making of an application in respect of OA be extended to 3 April 2012, be reheard as against the appellants;

(c) a direction that the plaintiffs' interlocutory process be heard at the same time as that filed by the appellants on 3 May 2012;

(d) the first order made by Ward J. on 19 September 2011 be varied to read:

> "An order under section 588FF(3)(b) of the Act that the time for the making of an application in respect of OA against parties including Fortress Credit Corporation (Australia) II Pty Limited and Fortress Investment Group (Australia) Pty Limited under section 588FF(1) of the Act be extended to 3 April 2012."

(e) alternatively, an order under s. 588FF(3)(b) of the Act that the time for the making of an application in respect of OA against the appellants under s. 588FF(1) be extended to 3 April 2012; and

(f) alternatively, an order under s. 588FF(3)(b) of the Act to take effect *nunc pro tunc* so as to authorise proceedings number 3135 of 2012 commenced in the Supreme Court of Queensland on 3 April 2012 by the first respondents as liquidators of OA and OL against the appellants.

21. There is no contest that the appellants were not notified of the Liquidators' application for the OA Shelf Order. Nor is it in dispute that the OA Shelf Order is relied upon by the Liquidators in bringing the OA Proceedings.

22. On 30 November 2012, Black J. published his judgment. On 18 December 2012, Black J. made orders in favour of the respondents.

23. The appellants' appeal from those orders was dismissed by the Court of Appeal on 14 May 2014.

24. In dismissing the appeal, it was held that the decision of the Court of Appeal in *BP Australia v Brown* (2003) 58 NSWLR 322 was not plainly wrong: at CA[100] and [107] (Bathurst CJ), at CA[114] (Beazley P), at CA[119] (Macfarlan JA), at CA[124] (Barrett JA) and at CA[137] (Gleeson JA).

25. On the correctness of the decision in *BP v Brown*, Beazley P and Macfarlan, Barrett and Gleeson JJA held that the decision in *BP v Brown* was correct: CA[114], [119], [124], [137]. Bathurst CJ made no such finding.

26. Beazley P, Macfarlan, Barrett and Gleeson JJA concluded that the construction of the words in s. 588FF(3)(b) supported the power of the court to make Shelf Orders: CA[117], [121], [133]-[134], [138]-[139].

27. Bathurst CJ at CA[45]-[59] summarised the appellants' submissions on the question referred to at paragraph 2 above. At CA[88] he observed that those argument "have considerable force." The Chief Justice identified the merits of that construction at CA[88]-[94].

PART VI: APPELLANTS' ARGUMENT

(a) Ground 1 - Power to make the OA Shelf Order

28. The first ground concerns whether the court has power under s. 588FF(3)(b) to make an order extending the time for a liquidator to make an application under s. 588FF(1), 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).

29. The appellants contend that, upon their proper construction, ss. 588FF(1) and 588FF(3)(b) require that an application under s 588FF(3)(b) be made by reference to a particular transaction or at least by reference to particular categories of transactions.

(i) The text and context of s 588FF(1) and (3)

30. Section 588FF(1) provides relevantly that where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of s 588FE, the court may make one or more of the orders identified in subsections (a)-(j).

31. In requiring the court to be satisfied that a transaction is voidable "because of section 588FE," s 588FF(1) requires that the court be satisfied either of the existence of one or more of the sets of circumstances accompanying an insolvent transaction of the company and described in ss. 588FE(2) to (5), or of the existence of circumstances making a loan before winding up an "unfair loan".

32. When so satisfied, the orders the court is empowered to make under s 588FF(1)(a)-(j), are directed to particular persons and require specific acts, or the release of particular debts or securities, or the making of specific declarations concerning or varying specified agreements.

33. The term "a transaction" when used within Part 5.7B, Division 2 is defined: see s. 9. It denotes a particular, identified transaction. Consistently with this proposition, any application under s. 588FF(1) should relate to particular identified transactions, involving particular identifiable parties: *BP v Brown* at [112] – [115] (Spigelman CJ).

34. The *Corporate Law Reform Act 1992* (Cth) (the **1992 Act**) introduced a 3 year limitation period under s 588FF of the then *Corporations Law* for the proceedings by liquidators in respect of voidable transactions, because of a concern that the former limitation period of 6 years tended to prolong liquidations unnecessarily.[2] The Explanatory Memorandum to the 1992 Act said at [1034]:

> "The Harmer Report noted in particular that this area of insolvency law is...retrospective in nature. Because it operates in a retrospective fashion, it is necessary to balance the interests of unsecured creditors of the insolvent and persons who have engaged in fair transactions with the insolvent."

[2] Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, 1988 (**Harmer Report**) at [688] citing *Re Supreme Finance Corp Pty Ltd* (1984) 2 ACLC 529 at 537 (Cohen J) and *Larade Pty Ltd (in liq) v Foodland Stores Pty Ltd* (unreported Vic Supreme Court, 6 June 1991). M Broderick, "Voidable Transactions – extending the limitation period under s 588FF(3) of the Corporations Act 2001 (Cth)" (2009) 17 *Insolv LJ* 121.

35. Section 588FF(3) was amended by s. 3 and Schedule 4, items 69 and 70, of the *Corporations Amendment (Insolvency) Act 2007* (Cth) (the **2007 Act**).[3]

36. Section 588FF(3) at all relevant times provided:

> "(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."

37. Section 588FF(3) addresses, as an essential aspect of the regime it creates, the period within which an application must be made: *Gordon v Tolcher as liquidator of Senafield Pty Ltd* (2006) 231 CLR 334 at 347, [37]; 348 [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). It "is of the essence of the provision made by s. 588FF; it is not to be characterised merely as a time stipulation of a procedural nature" (*ibid* at [37]).

38. And so, in respect of s. 588FF(3), as Barrett J observed in *Kassem v Zhang* [2008] NSWSC 1287, at [12]:

> "...failure to commence action within the specified period means that an essential ingredient of the right of action the section creates is lacking, with the result that an application purportedly made after the end of the period is incompetent and must be dismissed."

39. As recognised by Spigelman CJ in *BP v Brown*, the 3-year limit has the effect that a person knows whether he or she will remain at risk. There is a broader public interest to be served by allowing persons who have had dealings with companies, which become insolvent, to conduct their commercial affairs with a degree of certainty about their exposure to having past transactions unravelled (Spigelman CJ at [111] - [115]); *Gordon v Tolcher* at [39].

40. An application under s. 588FF(1) must be made either:

(a) within the period provided for by s. 588FF(3)(a) ending on the later of s. 588FF(3)(a)(i) or (ii); or

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[3] Those items were discussed in the Explanatory Memorandum to the 2007 Act, pages 125-126.

(b) within such longer period as the court orders. Further, an application under s. 588FF3(b) must be made "during the paragraph (a) period".

The existence of such very specific time stipulations brings some degree of certainty to the position of a person or corporation that has had dealings with a company that has come to be wound up. (Subject to the appeal before this Court, that certainty has been limited by the recent judgment in *JP Morgan Chase Bank v Fletcher* (2014) 306 ALR 224.)

(b) The proper construction of s 588FF(3)

41. To say that the purpose of s 588FF(3) is to extend time indicates very little, and possibly nothing, about the proper construction of that provision: *Carr v Western Australia* (2007) 232 CLR 138 at 142-143, [5] (Gleeson CJ).

42. Similarly, while a provision that confers jurisdiction on a court should not be given a narrow construction,[4] this requires only that the court not imply into such provisions limitations not found in the express words of the statute: *David Grant & Co v Westpac Banking Corp* (1995) 184 CLR 265 at 277 (Gummow J). It remains necessary to attend to the language used, and reach the preferred construction, "by the application of rules of interpretation accepted by all arms of government in the system of representative democracy": *Tian Zhen Zheng v Cai* (2009) 239 CLR 446, at [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

43. An application of the kind contemplated by s. 588FF(1) is, of course, distinct from the application contemplated by s. 588FF(3)(b): *Gordon v Tolcher* at [35]. This is recognised in the language of s 588FF(3)(b). The term "an application" as first used in subsection (3), relates to an application made under subsection (1). The term "an application under this paragraph" as secondly used, in subsection (3)(b), relates to an application made under subsection (3)(b) itself.

44. Notwithstanding this, the facultative provision in s. 588FF(3)(b) operates only and expressly in respect of "an application under subsection (1)". The success of an application under s. 588FF(3)(b) allows an application under s. 588FF(1); which is a particular application concerning a nominate transaction. The basal character of an application under s. 588FF(3) requires that the application concern such a transaction.

45. The opening words of s. 588FF(3) qualify the remaining text of s 588FF(3). The reference there to "an application" is necessarily a reference to an application for orders in respect of the transaction the subject of the application, within the meaning

[4] *Roy Morgan Research Centre v Commissioner of State Revenue* (2001) 207 CLR 72 at [11] (Gaudron, Gummow, Hayne and Callinan JJ) (cited in the Court below by Macfarlan JA at [120]).

of s. 588FF(1). The term "a transaction" when used within Part 5.7B, Division 2 denotes a particular, identified transaction.

46. In this regard an application under s. 588FF(1), in so far as it relates to s. 588FF(3)(a), is an application that has form and content. It must take place within the period provided for under subsection 3(a). There should, as a result, be an identified transaction. Subsection 588FF(3)(a) specifies the period during which an application having the characteristics mandated by s 588FF(1) may be brought. Those characteristics are:

(a) it seeks orders within the identified sub-paragraphs;

(b) the orders concern "the transaction";

(c) the transaction is alleged to be voidable under s. 588FE; and

(d) the transaction is one between the company and one or more than one third party.

47. An application under s. 588FF(3)(b) is an application to create, by order, a new period within which an application possessing the above characteristics can be brought.

48. The premise underlying s. 588FF(3)(b) is that, at the time of the making of an application under that provision, there is no form of application under s. 588FF(1) that the liquidator of the company is then able, or at least willing, to make. Under s. 588FF(3)(b) the court makes an order that a stated longer period is ordered as the period within which an application may be made by a liquidator for orders under s. 588FF(1), in relation to *the* transaction (the definite article being repeated throughout the subsections of s 588FF(1)).

49. It is submitted that s. 588FF(3)(b) contemplates an extension of time in respect of a potential application with respect to an actual transaction. It does not permit an extension of time to make any application in respect of any transaction that may later be found to be a transaction that the liquidator of a company seeks to allege is voidable because of s. 588FE.

50. The words "may only" in the opening words of subsection (3) are properly read as qualifying each of the time periods identified in sub-paragraphs (a)(i) and (ii) and (b): *BP v Brown* at [82] – [85] (Spigelman CJ). The use of that term results in a "time so emphatically prescribed": *Texel Pty Ltd v Commonwealth Bank of Australia* [1994] 2 VR 298 at 300 (Hayne J). It defines the court's jurisdiction by imposing a requirement as to time as an essential condition of the power conferred by s.

588FF(1). As Gummow J observed in the cognate context of s 459G of the Act, in *David Grant & Co v Westpac Banking Corp* (1995) 184 CLR 265 at 277: "it is a condition of the gift in sub-s (1) of s 459G that sub-s (2) be observed and, unless this is so, the gift can never take effect. The same is true of sub-s (3)".

51. The words "may only be made" demonstrate an intention that the provision should have a limited operation. Nothing within s. 588FF(3)(b) expands that intention or the meaning of "application" in s. 588FF(1) as repeated in the opening words of s. 588FF(3). Nor should the provisions be construed in a manner capable of defeating this intention. Subsection (3) defines the jurisdiction of the court by imposing a requirement as to time as an essential condition of the power conferred by s 588FF(1). Subsection 3(b) provides a mechanism by which that period may be extended; but does not expressly provide, and should not be construed as impliedly providing, a mechanism by which the power conferred by s. 588FF(1) is expanded.

52. Of course it may, and often will, be convenient to join a multiplicity of applications in one proceeding. That joinder would be permissible under provisions such as UCPR Part 6, rule 6.19, as each application would be likely to involve at least some common question of fact, namely as to whether the liquidator has demonstrated an adequate degree of diligence to justify any extension of time with respect to any application. And the course of the liquidation will generally be an essential factual enquiry with respect to any application.

53. In this sense, the form of process for applications under s. 588FF(3)(b) could include an order that referred to more than one transaction. That is, a liquidator might approach the court seeking the same (or different) extensions of time in respect of a finite number of identified transactions. There is no express requirement that there be but one subsection (3)(b) application per company; but a requirement only that a subsection (3)(b) application be made prior to the expiry of the subsection 3(a) period. Similarly, there is no requirement that there be a separate initiating process for each application.

54. It is important to distinguish between the permissible joinder of several identified transactions within one application, and an application made in respect of unidentified transactions. The error in the approach in *BP v Brown* is to move from the permissible notion that there can be a joinder within one application of multiple nominated transactions, to the latter notion that the character of an application extends to a class order or a Shelf Order.

55. It is submitted that the application under s. 588FF(3)(b) is, and must be, directed to a transaction, being a known thing. A Shelf Order does not identify anything. It does

not identify a transaction. As a result, it identifies no parties or persons affected. A class order unless confined in a meaningful way, is also problematic.

56. The appellants' construction of the power contained in s 588FF(3)(b) is consistent with the approach to construction adopted by the House of Lords in *R (Burkett) v Hammersmith and Fulham London Borough Council,*[5] and referred to by Spigelman CJ in *BP v Brown* with approval (at [116]), being:

> "[L]egal policy favours simplicity and certainty rather than complexity and uncertainty. In the interpretation of legislation this factor is a commonplace consideration. In choosing between competing constructions a court may presume, in the absence of contrary indications, that the legislature intended to legislate for a certain and predictable regime."

57. Further, the Act must be construed within the context of a legal framework in which, where a court is invited to make, or proposes to make, orders directly affecting the rights or liabilities of a non-party, that non-party is a necessary party and ought to be joined: *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [131]. As that case demonstrates, this has been the law since at least 1969. That was the legal context in which the legislation was enacted.

58. As the concept underlying a Shelf Order is that it can extend to transactions unidentified and unknown by the liquidator (and thus the court), the usual procedures of a court when making orders apt to directly affect the interests of an identified party cannot be followed. Those procedures involve a requirement that the party be notified of the potential making of an order apt to deprive that person of the immunity from suit conferred by s. 588FF(3)(a).

59. It follows that every person who deals with a company in one or other of the circumstances in which s. 588FE could apply, must be in a state of uncertainty as to whether the person is exposed to suit beyond the period provided for under subsection 3(a) unless steps are taken to establish whether an application under subsection (3)(b) has been made and if so, its outcome. This uncertainty is magnified by the decision of the New South Wales Court of Appeal in *JP Morgan* – because such a potentially affected party must also maintain a watching brief as to whether a second application has been granted. In a structure that has, as at least part of its purpose, to bring a degree of certainty to business affairs, it should not be concluded that a person could have an immunity removed without any capacity of the court to notify that person of the application to remove that immunity.

60. A construction of s. 588F(3) that permits the making of general, or shelf, orders produces unnecessary uncertainty. The construction of s. 588FF(3)(b) ultimately

[5] [2002] 1 WLR 1593 at 1608 [46]; [2002] 3 All ER 97 at 112 [46].

favoured in *BP v Brown* has been productive of a complex and uncertain body of jurisprudence, which has led to uncertainty in the statutory scheme and commercial life.[6] Not only deprived of certainty, are those persons within the direct or contemplated sights of the liquidator, but so too is every person who had any dealing with the now insolvent company, within the various statutory periods.[7] Further, the matters capable of being affected by such uncertainty are broad, and may include: the very fact that the company is insolvent; the fact that transactions to which the person is party are the subject of scrutiny, and the duration of any period for which that uncertainty is extended. Only notice, within the period for which s. 588FF(3)(b) provides, cures this uncertainty.

61. The policy factors militating against a broad construction are familiar, and include:

(a) potential defendants would be disadvantaged by not being identified in s. 588FF(3)(b) applications;

(b) liquidators would be encouraged not to identify potential defendants thereby reducing the prospect of opposition (at least in the first instance);

(c) having regard to accepted notions of natural justice, there may be a multiplicity of litigation by successive defendants applying to re-agitate leave applications of which they had not been given notice in the first instance;

(d) the possibility of inconsistent outcomes on applications to set aside the grant of leave by respective defendants, since each application would need to have regard to the factors that need to be taken into account such as the strength of the case against that defendant and the prejudice to that defendant;

(e) there would be no finality - defendants who could claim that they were fairly identifiable but not identified might cause ongoing challenges to any leave granted;

(f) liquidators would not have certainty themselves and prospective defendants may seek to have leave revoked after it has been granted and after proceedings have been commenced;

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[6] Compare *BP v Brown* and *Greig v Stramit* [2004] 2 Qd R 17 on the jurisdiction to make a Shelf Order. Compare *Williams v Kim Management Pty Ltd* [2012] QSC 143; [2013] 1 Qd R 387 and *BP v Brown* on the test to be applied in determining whether or not a Shelf Order should be made in a particular instance. Compare *Williams v Kim Management* and the Judgment on the powers of the Court to discharge a Shelf Order. Compare *Greig v Stramit* and *BP v Brown* (together with *Ansell v Davies* (2008) 219 FLR 329) as to the power of the Court to re-exercise a discretion under s. 588FF(3)(b) after discharge of a Shelf Order and after the time allowed by s 588FF(3)(a) has lapsed.

[7] Identified by Spigelman CJ at [99] in *BP v Brown*.

(g) the interests of creditors could not be served by such uncertainty and the potential for wasted costs to be incurred; and

(h) that applications would be decided by reference only to the evidence that the liquidator elected to put before the court.[8]

62. As Jerrard JA observed in *Greig v Stramit* at 43, [110], of s. 588FF(1)(a)-(j):

> "These are all orders requiring carefully prepared applications, and it seems incongruous that s. 588FF(3) should be construed as allowing a (necessarily very specific) "application under subsection (1)" to be made within such extended period as the court orders, on an application brought ex parte in the broadest possible terms. Instead, s. 588FF(3) will be construed more consistently with the particularity required in s. 588FF(1) if s. 588FF(3) is construed to require that any foreshadowed "application under subsection (1)," for the bringing of which an extension of time is sought, should itself be described in the application made "under this paragraph" for that extension."

63. The reasoning of Beazley P (at CA[117]), Macfarlan JA (at CA[121]), Barrett JA (at CA[133]-[134]) and Gleeson JA at (CA[138]-[139]) does not answer the above submissions.

64. The conclusion that an application referred to in the opening words of s. 588FF(3) may be brought within the general period for applications specified in paragraph (a), with the court being able to act under paragraph (b) to extend that generally applicable rule (so far as it applies to a particular liquidation) (Macfarlan JA at CA[121]) does not give effect to the force of the words "may only", the reference therein to subsection (1) and to the qualifying effect of the chapeau on all that follows it. Only in an exceptional case will a prefatory provision be read down so as not to qualify that which follows it (for example, where it produces absurdity): *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 92 (Brennan CJ). Still more so in respect of the chapeau to a single provision.

65. The conclusion that the mechanism within s 588FF(3) can be used to deal with an identified application, with some delineated class of applications not capable of precise identification or with all applications not capable of precise identification (Barrett JA at CA[134]) fails to achieve any accommodation between the competing statutory purposes and produces the plenary uncertainty described above.

66. It is wrong to regard the construction for which the appellants contend as treating commercial certainty as the "paramount consideration". Rather it seeks to achieve a balance between commercial certainty and plenary uncertainty (cf Gleeson JA at CA[138]).

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[8] *Clarecastle Pty Ltd (in liq), Re* (2011) 255 FLR 435; (2011) 85 ACSR 260; [2011] NSWSC 857 at [103] (Ward J.).

(b) Grounds 2 and 3: Power to re-exercise discretion under s. 588FF(3)(b)

67. The second ground concerns the power of the court to re-exercise the discretion under s. 588FF(3)(b) following discharge of orders previously made under that subsection, in circumstances where the period prescribed by s. 588FF(3)(a) of the Act has expired.

68. Grounds 2 and 3 are only engaged if the appellants succeed on Ground 1. They involve the assumption that an application under subsection (3)(b) is an application with respect to a transaction that may be the subject of orders under subsection (1). That requires the identification by the applicant liquidator of transactions that it sees as candidates for subsection (1) applications during the term of the extension sought.

69. As a general proposition Grounds 2 and 3 are capable of generating various issues, including:

(a) whether the "application" for the order extending time, referred to within s. 588FF(3)(b), describes the proceeding commenced by originating process, or the interlocutory application by which orders extending time are sought;[9]

(b) whether, upon discharge of orders obtained *ex parte* or irregularly, any extant but incomplete proceeding survives, in which some further step can be taken (i.e., to reinstate *inter partes* the orders initially obtained ex parte), or whether the proceeding is at that point concluded, and the court *functus*, with the consequence that a fresh proceeding must be commenced by the Liquidators, which application will necessarily be outside the period prescribed by s 588FF(3)(b);[10] and

(c) whether the power to amend under ss 64 and 65 of the *Civil Procedure Act 2005* (NSW) comprehends an amendment the effect of which would be to seek fresh relief, outside a limitation period, against a party not previously joined to the proceeding.

70. In the present case, however, the matter can be disposed of narrowly. The Liquidators' case, accepted by the primary judge, was that the appellants were not, and could not with reasonable diligence have been, identified as a party to any relevant transaction as at 19 September 2011. There is no challenge to those findings of fact. J[32] – [52] and [59].

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[9] See the related consideration in *Onefone Australia Pty Ltd v One.Tel Ltd* (2007) 61 ACSR 429 at [36] (Barrett J): it is the application for an order extending time and not the order itself that s. 588FF(3)(b) requires be made within 3 years after the relation back day. See further, *McGrath and Others v National Indemnity Company* (2004) 49 ACSR 403 (Barrett J).

[10] See *Greig* per Williams JA at [117] – [118].

71. Accordingly, any expansion of the original orders or joinder was necessarily sought on the basis of facts unknown at the time of the original application, and unknown until the 3-year period had expired.

72. If a liquidator were entitled to rely on facts that came to light after the original application, an error on the part of the court could become the engine of injustice to affected creditors. It would offend the fundamental principle identified in *Commonwealth v McCormack* (1984) 155 CLR 273 at 276, by Murphy, Wilson, Brennan, Deane and Dawson JJ., that:

> "...one of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors, and when the expression 'the act of the court' is used, it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole, from the lowest court which entertains jurisdiction over the matter to the highest court which finally disposes of the case."

73. Accordingly, the Court of Appeal:

(a) should have reversed the finding of Black J., at J[61] and [82], that the OA Shelf Order should not be varied or set aside as the appellants had claimed in their Further Amended Interlocutory Process filed on 23 July 2012; and

(b) should have made an order that the OA Shelf Order be varied to exclude its application to an appellant or alternatively set aside in so far as it applied to an appellant.

(c) Ground 4: Joinder

74. The third question concerns whether, upon the discharge of a Shelf Order purportedly made pursuant to ss. 588FF(1) and (3)(b) of the Act, the court has power to join a non-party to a further application for relief pursuant to ss. 588FF(1) and (3)(b) of the Act, in the event that the period prescribed by s. 588FF(3)(a) has expired.

75. This question should be answered "no", for reasons similar to those identified in respect of the second question. That is because, at the date any joinder were ordered, the period under s. 588FF(3) of the Act would have expired, the proceedings would be out of time as against the appellants, and accordingly futile: *Greig v Stramit Corporation Pty Ltd* [2004] 2 Qd R 17 at [44] and [83]; *Ansell Ltd v Davies* (2008) 219 FLR 329 per Doyle CJ at [59],[11] and Austin J in *Brown v DML Resources Pty Ltd (in liq) (No 3)* (2001) 188 ALR 469.

[11] Upholding Debelle J in *Re Harris Scarfe Ltd (in liq) (No 3)* (2008) 216 FLR 242.

76. Where non-parties are relevantly affected by an ex parte order they do not thereby become parties to the proceedings: *Pickles v Gratzon* (2002) 55 NSWLR 533. Nevertheless, as persons likely to be adversely affected by the orders, they have a right to be heard: *Cameron v Cole* (1944) 68 CLR 571; and they may appear to discharge or vary orders made in their absence: *Hardie Rubber Co Pty Ltd v General Tire & Rubber Co* (1973) 129 CLR 521; *Owners of the SS Kalibia v Wilson* (1910) 11 CLR 689 at 694; *Bidder v Bridges* (1884) 26 Ch D 1 at 9, per Lord Selborne and at 12 per Cotton LJ.

77. In *Ansell v Davies* (2008) 219 FLR 329, Doyle CJ (with whom Anderson and David JJ. agreed, upholding Debelle J in *Re Harris Scarfe Ltd (in liq) (No 3)* (2008) 216 FLR 242) concluded that a creditor need not be joined as a defendant to an extension application.

PART VII: APPLICABLE STATUTES

78. Sections 588FE and 588FF *Corporations Act* 2001 (Cth).

79. Rules 36.15(1) and 36.16(2)(b), *Uniform Civil Procedure Rules 2005* (NSW).

PART VIII: ORDERS SOUGHT

80. The appellants seek the following orders:

(a) Appeal allowed.

(b) Judgment of the Court of Appeal made on 14 May 2014 be set aside and in lieu thereof it be ordered:

(i) Appeal to the Court of Appeal allowed.

(ii) Paragraphs 1, 2, 3, 4 and 5 of the orders made on 17 December 2012 in the proceeding at first instance by Black J be set aside.

(iii) In lieu thereof:

(A) the Octaviar Shelf Order made in the proceeding at first instance be varied so as to exclude any application to an appellant or alternatively set aside in so far as it applies to an appellant; and

(B) the respondents' Interlocutory Process filed on 8 June 2012 in the proceeding at first instance be dismissed.

(c) The respondents pay the appellants' costs of this proceeding and in the courts below.

(d) Such further or other relief as the court thinks fit.

PART IX: TIME ESTIMATE

81. It is estimated that the appellants' argument will take 1.5 hours to present.

Date: 7 November 2014

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