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

APPELLANTS' SUBMISSIONS IN REPLY

Filed on behalf of the appellants
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PART I: PUBLICATION ON THE INTERNET

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

PART II: SUBMISSIONS IN REPLY

GROUND 1

(1) The limited assistance of policy and purpose

2. As alluded to in the appellants' submissions (**AS**) at [41], in *Carr v Western Australia* (2007) 232 CLR 138 at 142-143, [5], Gleeson CJ said this, in respect of purposive statutory construction:

> "That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose."

3. The respondents' submissions (**RS**) lay great weight upon the alleged complexity of the present liquidation, in the particular factual matrix of the current application, and as a species of a concern that the language of s. 588FF(3)(b) is said to address: RS [2], [5]-[11], [22], [44]-[46], [65(e)].

4. The Explanatory Memorandum to the 1992 Act succinctly identified the competing policy interests accommodated within the provision, in noting, at [1034] (extracted at AS [34]), that "it is necessary to balance the interests of unsecured creditors of the insolvent and persons who have engaged in fair transactions with the insolvent."

5. Matters capable of affecting the protection of the rights of unsecured creditors of a company – including the complexity of the liquidation – are properly taken to be reflected in the final language adopted by the Parliament. As a result, to reintroduce complexity as a matter compelling a plenary construction of s. 588FF is to engage in a form of analytical double-counting.

6. As Spigelman CJ said about the balancing of competing interests in *BP v Brown* at [108]-[110]:

> "The reduction of the time period for applications from six years to three years was part of a broader rebalancing of the conflicting interests involved.
>
> Indeed, the Parliament went further than the recommendations of the Harmer Report, which proposed a provision in the following terms: "AT8 An application under AT3, AT4, AT5 or AT6 shall not be made by the liquidator after the expiration of three years from the relevant date unless the court, by order, so allows".

> As can be seen, further consideration of the issue of timeliness led to the inclusion both of the introductory phrase "may only be made" in s 588FF(3), and also to the stipulation that an application for an extension beyond the three year period should be made within the originally stipulated period. By reason of this significant strengthening of the original proposal, the consideration of the relevant issues in the Harmer Report is not as useful as may otherwise have been the case. That the Parliament went further than this comprehensive inquiry recommended does, however, indicate the weight to be afforded to the policy purpose of encouraging greater expedition in the conduct of a liquidation."

7. It is accordingly misconceived to speak of the "clear purpose" (RS [44]) of s. 588FF(3)(b), as RS [44] seeks to do.

8. Further, it is not correct, and assumes too much, to say that "the power to extend time is intended to deal with cases in which it is not possible satisfactorily to identify such transactions": RS [2]; cf AS [48]. That is one set of circumstances in which a liquidator may make the application permitted by s. 588FF(3)(b). However, the extension permitted by s. 588FF(3)(b) does not operate solely to ameliorate epistemic constraints a liquidator might face.[1] To focus solely upon this matter is to risk erroneously pursuing one statutory purpose to the fullest possible extent. A liquidator may bring an application under s. 588FF(3)(b) where he or she *is aware* of the target transactions and parties, but is yet to articulate - or come to a final view as to the merits of - any causes of action that lie against those parties in respect of those transactions. An application may also be made where a liquidator *is aware* of the claims he or she wishes to bring - but has insufficient funds to bring those - in order to create a period in which litigation funding may be sought. Hence, it appears, contrary to RS [35], that Parliament has permitted a longer period to be fixed even though the liquidator is in a position to articulate a claim under s. 588FF(1).

9. Once the respondents' distorted focus on uncertainty is exposed, much of the force is drawn from submissions of the kind that, where liquidators have not sufficiently identified "defendants or transactions" to commence proceedings within time, this would "to a large extent and in a practical sense eviscerate the point and purpose of the power to extend time": RS [58]-[59].

10. Likewise, the appellants do not contend that commercial certainty is the paramount purpose of the provision: cf RS [52] and AS [65]. It is, instead, necessary to achieve some balancing between commercial certainty and promoting other ascertainable objectives of the legislation.

11. However, it is mistaken to suggest that the certainty which s. 588FF(3) produces ensures that, at the end of the paragraph (a) period, persons who have had dealings with the company will know either: (a) whether or not any application for a longer period has been made (but not necessarily its outcome); or (b) absent such application, whether an application under s. 588FF(1) has been made: RS [48]. The proposition in (a) will not be true of any company not notified of the application

[1] And so, in *BP v Brown* at 354, [170] Spigelman CJ observes that: "The power to extend the time limit for commencing proceedings is intended to provide for the circumstance in which a liquidator is not in a position to commence proceedings within three years of the relation-back day, *for whatever reason*, subject to the assessment of the court of all relevant circumstances, including the liquidator's conduct." (Emphasis added)

under s. 588FF(3), but which is amenable to being affected by its operation, because the form of order sought is general in its terms and plenary in its application.

12. If, contrary to this, it were necessary to nominate transactions, most (and often all) parties capable of being affected by proceedings would be known and notified.

13. Nor would it be necessary to resort to the extreme measures suggested at RS [60]-[61], of naming every entity to which the company in liquidation has paid money in any relevant period, and seeking an extension against every such party individually, to the disadvantage of persons who have engaged in fair transactions.[2] The focus of s. 588FF(1) is upon transactions of the company. Upon the appellants' construction, the liquidator would be required to identify each transaction that he or she might seek to impugn. Identification of those transactions would entail identification of the parties thereto. However, the extension would extend time in respect of the transactions. Accordingly, should it transpire that more than the originally identified parties were involved in those transactions, they too could ultimately be pursued. Such an outcome fosters certainty, protects the interests of unsecured creditors and avoids absurd results.

14. The present instance demonstrates the practical effect and ultimate correctness of the appellants' construction of s. 588FF(3)(b). The primary Judge found that a transaction referred to by the respondents and the primary Judge as the "Allocation Letter" was entered into by, among others, OA.[3] The primary Judge also found that, prior to the making of the OA Shelf Order, the Liquidators were aware of the transaction recorded in the Allocation Letter.[4] That transaction is one of the transactions of OA that is the subject of the Liquidators' application under s. 588FF(1) in relation to the winding up of OA.[5] The Primary Judge also found, however, that:

    (a) there were considerable difficulties for the Liquidators in identifying which of the entities within the "Octaviar Group" was party to particular transactions; [6] and

    (b) the Liquidators did not believe, in September 2011, that the respondents had any basis to bring proceedings against the appellants under s. 588FF(1);[7] but

    (c) as found by Ward J,[8] the nature of the winding up of OA was such that investigations into OA's transactions were still continuing in September 2011.[9]

15. On the appellants' construction of s. 588FF(3)(b), in September 2011, the Court would have had jurisdiction to make, on the application of the Liquidators, an order under s. 588FF(3)(b) to extend time to bring an application for orders under s.

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[2] "Fair" is a characterisation that cannot, in any event, be applied until the totality of alleged claims is known.
[3] J [8].
[4] J [33].
[5] AB67, l. 20; AB70, l. 10.
[6] J [25].
[7] J [34].
[8] AB113, l. 40.
[9] J [67]*ff*.

588FF(1) in respect of the Allocation Letter, being a transaction to which OA was at that time known to be a party. For instance, the Court might have ordered:

> "order pursuant to s. 588FF(3)(b) that the time for the making of an application under s. 588FF(1) in respect of OA [as defined] with respect to the transaction evidenced by or recorded in the Allocation Letter [as defined] and any consequential transaction of OA [as defined] be extended to 3 April 2012."

Such an order would give effect to both the statutory text of s. 588FF(3)(b) (traversed below) and the purpose of that provision identified by the respondents. The Liquidators, faced with demonstrated uncertainty about the availability and merits of an application under s. 588FF(1) for relief in relation to the "Allocation Letter", as a transaction of OA, would have been able to obtain further time to investigate and consider such an application.

16. It emerges, however, that the competing purposes s. 588FF(3) reflects, and the various practical circumstances it might accommodate, underscore the observation of Gleeson CJ extracted above. Undue emphasis on policy and purpose may distract from proper attention to the statutory text.

(2) The statutory text

17. While s. 588FF(3) makes no express reference to any "transaction" (RS [34]), it operates in respect of s. 588FF(1), which in turn operates on "a transaction of the company": see AS [43]-[45].

18. Within s 588FF(3), no significance can properly be attached to the use of the indefinite article: cf RS [34]. The indefinite article is used to describe both the necessarily particular application under s. 588FF(1)[10] ("an application" as it is used in the chapeau to s. 588FF(3)) and the separate application permitted under s. 588FF(3)(b) ("an application" as it is used self-reflexively within s. 588FF(3)(b)). Amongst other things, the indefinite article recognises that it will often be convenient to join a multiplicity of applications in one proceeding: see AS [52].

19. While an application for fixing a longer period under s. 588FF(3)(b) is a separate and distinct matter from the application under s. 588FF(1), 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): cf RS [36].

20. Further, the time stipulation in s 588FF(3) is not merely "an essential element in making an application to the Court for a longer period" (RS [37]) but more generally of an application under s. 588FF(1): "The provision in subs (3) of s. 588FF as to the time of the making of the application 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": *Gordon v Tolcher* at 347, [37].

21. Within that scheme, the words "may only" have the effect identified at AS [50]. They do not to manifest a "sweeping intention" (cf RS [39]). They instead provide a

[10] *BP v Brown* at [112]-[115] (Spigelman CJ).

textual indicator that the provision has a limited operation, which nothing within s. 588FF(3)(b) modifies or expands: see AS [51].

22. The appellants do not contend that the provision which controls the time for instituting a s. 588FF(1) application controls the content and subject matter of an application under s. 588FF(3)(b): cf RS [38]. Rather, the text of s. 588FF(3), within the context of s. 588FF and Part 5.7B more generally, discloses that s. 588FF(3)(b) contemplates an extension of time in respect of a potential application with respect to an actual transaction; and 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. As a consequence, the language of the provision militates against a construction under which an application can be made in any manner or with any scope: cf RS [40].

23. Put differently, it is not correct to contend that "the essentiality of time says nothing about the essentiality or otherwise of form": RS [74]. As noted in AS [51], nothing within s. 588FF(3)(b) expands 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 operation. 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.

24. The respondents' frequent references to deliberate and intentional legislative action - RS [34], [51], [56]-[57] - fall into the error of attributing a collective mental state to the legislature and involve a misleading use of metaphor: *Singh v Commonwealth* (2004) 222 CLR 322 at 385, [159]. The correct approach is to apply the rules of interpretation accepted by all arms of government in the system of representative democracy to the text of the statute. The application of those rules produces the construction for which the appellants contend.

GROUNDS 2-4

25. Should Ground 1 be resolved in favour of the appellants, it would be appropriate for the matter to be remitted to the Court of Appeal to resolve Grounds 2-4.

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