HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, GAGELER AND KEANE JJ

FORTRESS CREDIT CORPORATION (AUSTRALIA) II PTY LIMITED & ANOR — APPELLANTS

AND

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

Fortress Credit Corporation (Australia) II Pty Limited v Fletcher
[2015] HCA 10
11 March 2015
S276/2014

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

D F Jackson QC with R C A Higgins for the appellants (instructed by Baker & McKenzie)

B W Walker SC with B A J Coles QC, P J Dowdy and A K Flecknoe-Brown for the respondents (instructed by Henry Davis York)

CATCHWORDS

Fortress Credit Corporation (Australia) II Pty Limited v Fletcher

Corporations – Winding up – Voidable transactions – Section 588FF(3)(b) of *Corporations Act* 2001 (Cth) empowers courts to make orders extending time for liquidator to make application under s 588FF(1) with respect to voidable transactions – Order extending time for respondents to make s 588FF(1) application did not refer to identified transaction – Respondents made s 588FF(1) application within extended time period – Whether courts can make order under s 588FF(3)(b) extending time to make s 588FF(1) application without identifying particular transaction or transactions to which it would apply.

Words and phrases – "extension of time", "re-enactment presumption", "shelf orders".

Corporations Act 2001 (Cth), s 588FF.

FRENCH CJ, HAYNE, KIEFEL, GAGELER AND KEANE JJ.

Introduction

1 This appeal concerns the power of courts under s 588FF(3)(b) of the *Corporations Act* 2001 (Cth) ("the Act") to extend the time within which a company's liquidator may apply for orders in relation to voidable transactions entered into by the company. The question for determination is whether an extension can only be ordered in relation to a transaction or transactions identified in the order, or may apply to transactions not able to be identified at the time of the order. The latter form of order has sometimes been called a "shelf order"[1].

2 Section 588FE of the Act sets out categories of voidable transactions. Such a transaction must answer the description of one or more of a number of defined designations in s 588FE. It must also have been entered into or taken effect within a specified period generally defined by reference to the "relation-back day"[2]. The periods vary according to the characteristics of the transaction[3]. If, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of s 588FE then the court is empowered by s 588FF(1) to make one or more of a number of orders. They include orders directing or requiring persons to repay money or transfer property

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1 A term apparently originating in *Brown v DML Resources Pty Ltd (In Liq) [No 5]* (2001) 166 FLR 1 at 8 [31] per Austin J; see also *Re Harris Scarfe Ltd (in liq) (No 3)* (2008) 216 FLR 242 at 246 [17] per Debelle J.

2 Defined in s 9 of the Act in relation to the winding up of a company or Pt 5.7 body as:

> "(a) if, because of Division 1A of Part 5.6, the winding up is taken to have begun on the day when an order that the company or body be wound up was made—the day on which the application for the order was filed; or
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> (b) otherwise—the day on which the winding up is taken because of Division 1A of Part 5.6 to have begun."

3 See Act, ss 588FE(2)(b), 588FE(2A)(c), 588FE(2B)(c), 588FE(3)(b), 588FE(4)(c), 588FE(5)(c), 588FE(6), 588FE(6A)(b).

to the company if the company has paid the money or transferred the property under the voidable transaction.

3 Section 588FF(3), as it stood at 19 September 2011, the date of the shelf order giving rise to this appeal, provided:

> "An application under subsection (1) may only be made:
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> (a) during the period beginning on the relation-back day and ending:
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> (i) 3 years after the relation-back day; or
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> (ii) 12 months after the first appointment of a liquidator in relation to the winding up of the company;
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> whichever is the later; or
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> (b) within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period."

The Court of Appeal of the Supreme Court of New South Wales, in the decision which is now appealed to this Court, held that s 588FF(3)(b) empowered a court to make an order extending time without specifying the particular transaction or transactions to which it would apply. In so doing, the Court of Appeal followed its earlier decision in *BP Australia Ltd v Brown*[4], a decision which did not elicit any legislative response in the subsequent re-enactment of s 588FF(3). The Court of Appeal was correct. The appeal against its decision must be dismissed with costs.

Factual background

4 The first respondents are the joint and several liquidators of the second and third respondents, Octaviar Limited ("OL") and Octaviar Administration Pty Limited ("OA"), appointed by order of the Supreme Court of Queensland made on 9 September 2009[5]. The relevant relation-back day for OA was 3 October

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4 (2003) 58 NSWLR 322.

5 *Public Trustee (Qld) v Octaviar Ltd (ACN 107 863 436) (in prov liq) (recs and mgrs apptd)* (2009) 74 ACSR 109. The first respondents replaced the former

(Footnote continues on next page)

2008[6]. The time limited for the commencement of proceedings under s 588FF(3)(a) was that prescribed by s 588FF(3)(a)(i)[7]. It expired on 3 October 2011. In September 2011, the first respondents applied for an order that the time for applications under s 588FF(1) in relation to OA be extended from 3 October 2011 to 3 April 2012[8]. On 19 September 2011, Ward J in the Supreme Court of New South Wales made an order in relation to OA in the following terms:

> "Order under s 588FF(3)(b) 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."

5 On 3 April 2012, acting pursuant to that extension, the first respondents, as liquidators of OA, commenced proceedings against the appellants in the Supreme Court of Queensland for orders under s 588FF(1). On 18 December 2012, Black J in the Supreme Court of New South Wales dismissed an application by the appellants to set aside the extension order made by Ward J. On 14 May 2014, the Court of Appeal of the Supreme Court of New South Wales granted the appellants leave to appeal against the decision of Black J but dismissed the appeal[9]. The appellants now appeal to this Court pursuant to special leave granted by Crennan and Gageler JJ on 17 October 2014[10].

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administrators of a deed of company arrangement, who had been appointed as liquidators when the deed was terminated on 31 July 2009.

6 The date on which OA was placed into voluntary administration: Act, ss 513A(d), 513C(b). See *Public Trustee (Qld) v Octaviar Ltd (subject to a deed of company arrangement) (recs and mgrs apptd) (ACN 107 863 436)* (2009) 73 ACSR 139 at 145 [12], fn 7.

7 The alternative limit provided by s 588FF(3)(a)(ii) had expired on 31 July 2010.

8 There were antecedent and concurrent applications in relation to OL, which have given rise to cognate appeals in this Court, mentioned later in these reasons.

9 *Fortress Credit Corporation (Australia) II Pty Ltd (ACN 114 624 958) v Fletcher* (2014) 308 ALR 166 at 184 [112]–[113] per Bathurst CJ, 184 [114] per Beazley P, 185 [118] per Macfarlan JA, 186 [124] per Barrett JA, 188 [136] per Gleeson JA.

10 [2014] HCATrans 233.

6 This appeal arises out of an extension order in relation to OA. Two cognate appeals to this Court by other parties arise out of another extension order by Ward J in relation to OL. That extension order, also made on 19 September 2011, purported to apply r 36.16(2)(b) of the Uniform Civil Procedure Rules 2005 (NSW) ("the UCPR") to vary, to 3 April 2012, an extension order made by another judge of the Court in relation to OL. The question in those appeals, judgment in which is given on the same day as this judgment, was whether s 79 of the *Judiciary Act* 1903 (Cth) picked up the UCPR to authorise that further extension of time pursuant to an application made outside the par (a) period. This Court's answer to that question was in the negative[11].

The decisions of the Supreme Court

7 In 2001, Austin J in *Brown v DML Resources Pty Ltd (In Liq)*[12] held that an application could be made under s 588FF(3)(b) for a shelf order. His Honour said[13]:

> "[Subsection (3)] sets the time limit for making an application under subs (1) as three years after the relation-back day, or such longer period as the Court orders on an application *under subs (3)* — that is a different application whose purpose is only to extend the time period. Consistently with the wording of subs (3), the application to extend the time limit can be an application to extend the time limit within which a particular subs (1) application can be made, or a broader application that applies to the particular subs (1) application under consideration and to other applications as well. I see no reason why the other applications cannot be described by category rather than in specific terms, provided that the description is clear." (emphasis in original)

His Honour identified the purpose of s 588FF as preventing liquidators from relegating the recovery of voidable preferences to the end of their work programs. He accepted that the investigation of such transactions should generally be concurrent with other liquidation work. Nevertheless, he recognised that there would be some cases where, notwithstanding the most diligent of efforts, the liquidator was so far short of completing investigations towards the

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11 *Grant Samuel Corporate Finance Pty Ltd v Fletcher* [2015] HCA 8.

12 (2001) 52 NSWLR 685.

13 (2001) 52 NSWLR 685 at 693 [33].

end of the time limit that it was impossible to identify particular transactions in respect of which orders for extension of time could be made[14].

8 On appeal, *sub nom*, *BP Australia Ltd v Brown*[15], the Court of Appeal of the Supreme Court of New South Wales affirmed that aspect of the decision of Austin J. Spigelman CJ agreed with his Honour's reasoning and added[16]:

> "It is not difficult to envisage a circumstance in which a liquidator is still ascertaining the identity of the recipients of benefits under possible voidable transactions and cannot give the court an indication of the creditors to be targeted. The power should be broad enough to allow, in those circumstances, for an order granting an extension of time in general terms."

That construction involved a balancing of the requirement of commercial certainty on the part of those who had had past dealings with the corporation against the conflicting interest of the creditors of the company[17]. Mason P[18] and Handley JA[19] agreed with the Chief Justice's reasons.

9 Black J applied the decision of the Court of Appeal in *Brown*, as he was bound to do[20]. As Bathurst CJ pointed out in the Court of Appeal[21], *Brown* has also been followed consistently by courts of first instance in New South Wales and by the Full Court of the Supreme Court of South Australia in *Ansell Ltd v*

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14 (2001) 52 NSWLR 685 at 693–694 [34].

15 (2003) 58 NSWLR 322.

16 (2003) 58 NSWLR 322 at 354 [170].

17 (2003) 58 NSWLR 322 at 354 [171].

18 (2003) 58 NSWLR 322 at 361 [215].

19 (2003) 58 NSWLR 322 at 361 [216].

20 *Re Octaviar Ltd* (2012) 271 FLR 413 at 418–419 [17]–[19].

21 (2014) 308 ALR 166 at 175–176 [42]–[43].

Davies[22]. There were obiter observations in the Court of Appeal of the Supreme Court of Queensland in *Greig v Stramit Corporation Pty Ltd*[23] by Williams JA and Jerrard JA to the effect that s 588FF(3)(b) did not authorise the making of shelf orders[24]. While acknowledging that the appellants' arguments in the Court of Appeal had "considerable force", Bathurst CJ could not conclude that *Brown* was "plainly wrong"[25]. Nor, in his Honour's opinion, was there a compelling reason for it to be overruled. It had been followed and applied since 2003. Although no information was supplied as to the number of shelf orders made, liquidators and their advisors presumably would have been acting on the assumption that the decision was correct. Reversing *Brown* in those circumstances could be productive of substantial injustice[26]. Beazley P, Macfarlan, Barrett and Gleeson JJA, in separate and shorter reasons, agreed with the orders that were proposed by the Chief Justice.

10 Before considering the text of s 588FF, it is useful to have regard to its legislative history, which, in this case, informs its construction.

Legislative history

11 The first version of s 588FF and its associated provisions was enacted in 1992[27] by insertion in the Corporations Law. Before that enactment, provisions in companies legislation for the avoidance of antecedent transactions of a company in liquidation had incorporated by reference the provisions of bankruptcy legislation relating to undue preferences[28]. Section 588FF and related

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22 (2008) 219 FLR 329. Special leave to appeal to this Court against the decision of the Full Court was granted but the appeal was not pursued: [2008] HCATrans 373.

23 [2004] 2 Qd R 17.

24 [2004] 2 Qd R 17 at 28 [44] per Williams JA, 42–43 [110]–[111] per Jerrard JA.

25 (2014) 308 ALR 166 at 183 [100].

26 (2014) 308 ALR 166 at 183 [100].

27 *Corporate Law Reform Act* 1992 (Cth), s 111.

28 *Uniform Companies Acts* 1961–1962, s 293; *Companies Act* 1981 (Cth), s 451 as applied to the Australian Capital Territory and adopted by each of the States and the Northern Territory ("Companies Code"); Corporations Law, s 565.

provisions concerning voidable transactions were enacted on the basis of the recommendations made by the Law Reform Commission ("the LRC") in the Report of the General Insolvency Inquiry, published in 1988[29] ("the Harmer Report"). The LRC described the pre-existing policy of provisions for the avoidance of antecedent transactions[30]:

> "Insolvency law has long adopted the policy of avoiding transactions by which an insolvent individual or company disposed of property within a relevant period prior to the actual commencement of the formal insolvency in circumstances that are unfair to the general body of unsecured creditors."

The continuance of that policy was recommended[31]. The LRC, however, proposed a new legislative framework providing for substantially uniform but separate provisions regulating antecedent transactions in both bankruptcy and companies legislation[32]. Its draft legislation incorporated a broad definition of "transaction" "so as to embrace a wide range of means by which property may be disposed of"[33].

12 As the Court observed in its cognate judgment, *Grant Samuel Corporate Finance Pty Ltd v Fletcher*[34], under the law as it stood when the LRC published the Harmer Report, an action to avoid an antecedent transaction generally had to be commenced within six years of the date of commencement of the winding

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29 Australia, The Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988).

30 Harmer Report, vol 1 at 266 [629].

31 Harmer Report, vol 1 at 267 [632].

32 Harmer Report, vol 1 at 267–268 [633].

33 Harmer Report, vol 1 at 269 [637].

34 [2015] HCA 8 at [18].

up[35]. Submissions complaining about inordinate delays in commencing proceedings in respect of voidable transactions led the LRC to conclude[36]:

> "It is therefore considered desirable to place liquidators under a more rigorous but, nonetheless, reasonable time limitation for taking action under these provisions."

That conclusion was reflected in a draft provision that applications for the avoidance of preferential transactions, transactions at an undervalue, and transactions made with intent to defeat, delay or obstruct creditors, should not be made by the liquidator after the expiration of three years from the relevant day "unless the Court, by order, so allows"[37].

13 The *Corporate Law Reform Act* 1992 (Cth) inserted a new Pt 5.7B into the Corporations Law entitled "Recovering Property or Compensation for the Benefit of Creditors of Insolvent Company". The new Part included ss 588FE and 588FF. Section 588FF(3) as enacted provided:

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

The Explanatory Memorandum for the Bill that became the 1992 Act referred to the retrospective nature of the avoidance provisions, which had been noted in the Harmer Report, and added[38]:

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35 *Bankruptcy Act* 1966 (Cth), ss 122, 127(5); *Companies Act* 1981 (Cth), s 451; Companies Code, s 451. This time limit was based on the assumed application of the time limit in s 127(5) of the *Bankruptcy Act* to the relevant provisions of the Companies Code: see *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 at 344 [105] in the context of the equivalent provision in the Corporations Law.

36 Harmer Report, vol 1 at 283 [688].

37 Harmer Report, vol 2 at 139, s AT8.

38 Australia, House of Representatives, Corporate Law Reform Bill 1992, Explanatory Memorandum at [1034].

> "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."

14 Section 588FF(3) was reproduced in its original form in the *Corporations Act* 2001 (Cth). However, it was amended by the *Corporations Amendment (Insolvency) Act* 2007 (Cth) to introduce an alternative time limit of 12 months after the first appointment of a liquidator in relation to the winding up of the company. That amendment gave effect to a recommendation of the Corporations and Markets Advisory Committee, published in October 2004[39]. Its purpose was stated in the Explanatory Memorandum as follows[40]:

> "To address situations where there is a long period between the relation-back day and the termination of a [deed of company arrangement], subsection 588FF(3) will be amended to allow a liquidator either three years from the relation-back day or one year from their appointment to challenge voidable transactions, whichever is later."

The form of the 2007 amendment was the repeal and re-enactment of s 588FF(3)(a), the omission from s 588FF(3)(b) of the words "within those 3 years" and their substitution with the words "during the paragraph (a) period"[41]. The respondents relied, in support of their construction, upon what amounted to a re-enactment of the provision without any alteration affecting its interpretation in *Brown*. The appellants submitted that not a great deal of weight should be attributed to that legislative inaction.

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39 Corporations and Markets Advisory Committee, *Rehabilitating large and complex enterprises in financial difficulties*, Report, October 2004, Recommendation 50.

40 Australia, House of Representatives, Corporations Amendment (Insolvency) Bill 2007, Explanatory Memorandum at [7.206].

41 *Corporations Amendment (Insolvency) Act* 2007 (Cth), Sched 4, items 69–70.

What has been called the "re-enactment presumption"[42] was explained by this Court in *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees*[43]:

> "There is abundant authority for the proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already 'judicially attributed to [them]'". (footnote omitted)

The Court noted that the validity of the proposition has been questioned but accepted it as a permissible approach to interpretation. *Alcan* was cited, and a similar approach applied, in *Electrolux Home Products Pty Ltd v Australian Workers' Union*[44]. As McHugh J observed[45]:

> "The principle that the re-enactment of a rule after judicial consideration is to be regarded as an *endorsement* of its judicial interpretation has been criticised, and the principle may not apply to provisions re-enacted in 'replacement' legislation. However, industrial relations is a specialised and politically sensitive field with a designated Minister and Department of State. It is no fiction to attribute to the Minister and his or her Department and, through them, the Parliament, knowledge of court decisions — or at all events decisions of this Court — dealing with that portfolio." (emphasis in original; footnote omitted)

In this case a substantive amendment is involved[46], an amendment which followed upon an expert review of the law and presumably the case law.

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42 Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 136–145 [3.43]–[3.50].

43 (1994) 181 CLR 96 at 106; [1994] HCA 34.

44 (2004) 221 CLR 309; [2004] HCA 40.

45 (2004) 221 CLR 309 at 346–347 [81]; see also at 323–325 [7]–[8] per Gleeson CJ, 370–371 [161] per Gummow, Hayne and Heydon JJ, 398 [251] per Callinan J.

46 Cf consolidating statutes, for which the principle has been held weak or inapplicable: Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 141–143 [3.48]; *Williams v Dunn's Assignee* (1908) 6 CLR 425 at 441 per Griffith CJ; [1908] HCA 27; *Melbourne Corporation v Barry* (1922) 31 CLR

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16 The Report of the Corporations and Markets Advisory Committee did not discuss shelf orders. Nevertheless, it is difficult to imagine that the judgments at first instance and on appeal in *Brown* were not known to those involved in the field as interpretive decisions of considerable significance and likely to be applied nationally. The legislative history is a factor which may support a construction of s 588FF(3) which authorises shelf orders, if such a construction is reasonably open from the text.

Text, context and purpose

17 Section 588FF(3)(b) is located in Pt 5.7B, which is its immediate statutory context. An important element of that context is the concept of a "voidable transaction" and, embedded in that, the concept of a "transaction".

18 The term "transaction" is non-exhaustively defined in s 9 of the Act in relation to a body corporate as "a transaction to which the body is a party". There follows a list of examples, which includes conveyances, transfers, dispositions, charges, guarantees, payments, the incurring of obligations, releases or waivers, and loans. The definition includes a transaction that has been completed or given effect to, or that has been terminated. Being non-exhaustive, the definition extends to the ordinary meaning of "transaction", which includes having dealings or doing business with another[47]. The definition covers conduct of a company ranging from an uncomplicated transfer or payment to a complex arrangement which may require difficult, evaluative judgments as to its definition and characteristics, those who were party to it, and the time when it was done, or acts were done to give effect to it.

19 The classes of "voidable transactions" are set out in s 588FE by reference to designations, each of which is defined in a separate provision of Pt 5.7B. They are unfair preferences[48], uncommercial transactions[49], insolvent

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174 at 188 per Isaacs J; [1922] HCA 56. See also Kidd, "The Construction of Consolidating Statutes and the *Barras* Principle: The Significance of *Farrell v Alexander*", (1977) 51 *Australian Law Journal* 256.

47 *The New Shorter Oxford English Dictionary*, (1993), vol 2 at 3366, "transaction" and "transact".

48 Act, s 588FA.

49 Act, s 588FB.

transactions[50], unfair loans to a company[51], and unreasonable director-related transactions[52]. They are "voidable transactions" if entered into within certain periods, or if acts were done for the purpose of giving effect to them during those periods.

20 Section 588FF(1) empowers the court to make the orders for which it provides on the condition that:

> "on the application of a company's liquidator, [the] court is satisfied that a transaction of the company is voidable because of section 588FE".

As the appellants submitted, an application under s 588FF(1) must seek orders for which that subsection provides, which concern a transaction alleged to be voidable under s 588FE between the company and one or more other parties. The transaction must be identified, in terms of conduct of the company. It must be arguably capable of inclusion in one of the designated classes of transaction mentioned in s 588FE. The specification of the time that it was done, or of an act done to give effect to it within a relevant period, would also be necessary to the contention that it was a voidable transaction. Parties to the transaction who would be affected by the orders sought would have to be identified and those parties named as respondents.

21 The time limits prescribed by s 588FF(3) apply to "[a]n application under subsection (1)". That term refers to the class of applications which can be made by liquidators under s 588FF(1) in relation to a transaction alleged to be voidable. The time limit in par (a) applies to all such applications, save for those the subject of an order under par (b). The text of par (b), read with the opening words of s 588FF(3), leaves open the construction that the "longer period" may be ordered only for a prospective application relating to a particular transaction or transactions. The text also leaves open the construction that a "longer period" may be ordered for any application under subs (1). The appellants accepted that it was a possible view of the provision that an order under s 588FF(3)(b) could extend generally the period otherwise fixed under s 588FF(3)(a). That was not, they submitted, the better view. The parties relied upon textual and contextual

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50 Act, s 588FC.

51 Act, s 588FD.

52 Act, s 588FDA.

indicators and purposive and consequentialist arguments in support of their preferred constructions.

22 The appellants submitted that an application under s 588FF(3)(b) is an application to create, by order, a new period within which an application possessing the characteristics required by s 588FF(1) can be brought. The premise underlying s 588FF(3)(b) was said to be that, at the time of making an application under that provision, there was no form of application under s 588FF(1) that the liquidator was then able, or at least willing, to make. The appellants submitted that under s 588FF(3)(b) the court makes an order that a stated longer period is the period within which an application may be made by a liquidator for orders under s 588FF(1), in relation to *the* transaction. The appellants observed that the definite article is repeated throughout the subsections of s 588FF(1). In the end, with respect, the submission was conclusionary in character. It identified the constructional choice, but did not assist in its resolution.

23 The appellants relied upon the words "may only be made" in s 588FF(3) as indicating a limited scope for the power under par (b). As this Court observed in *Grant Samuel*, those words impose a requirement as to time as an essential condition of the right conferred by s 588FF(1) to bring proceedings for orders with respect to voidable transactions[53]. They do no more than that. The words "may only" give no guidance about the scope of the power to extend time. As the respondents pointed out, the only express essential condition upon the exercise of the power under s 588FF(3)(b) is that the application for an order under that paragraph be made within the par (a) period. In the event, there is no textual support for preferring one construction over the other. That conclusion directs attention to the purposive and consequentialist arguments which tended to dominate the debate about construction.

24 The function of s 588FF(3)(b), which reflects its immediate purpose, is to confer a discretion on the court to mitigate, in an appropriate case, the rigours of the time limits imposed by par (a). That is a discretion to be exercised having regard to the scope and purposes of Pt 5.7B, characterised in the Harmer Report as the continuing "policy" which underpinned its recommendations. That policy included the avoidance of transactions by which an insolvent company has disposed of property in circumstances that are regarded by the legislature as unfair to the general body of unsecured creditors. It is, however, a policy

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53 [2015] HCA 8 at [22].

qualified in its application by the requirement that liquidators be placed under a reasonable time limitation for taking action under the voidable transaction provisions. A purpose of that qualification, expressed in "clear and emphatic" terms, is to favour certainty for those who have entered into transactions with the company during the periods in respect of which designated transactions may be voidable[54]. There is, however, no independent basis for the assertion that any extension of time which does not identify a particular transaction or transactions must be an unreasonable prolongation of uncertainty militating against a construction which would allow such an order to be made. The section provides for the exercise of discretion by the court. Questions of what is a reasonable or an unreasonable prolongation of uncertainty and the scope of such uncertainty are more appropriately considered case-by-case in the exercise of judicial discretion than globally in judicial interpretation of the provision.

25 The appellants set out a number of "policy factors" which they said militated against a broad construction. In summary these were:

(a) disadvantage to potential defendants not identified in a shelf order;

(b) the encouragement to liquidators not to identify potential defendants, thereby reducing the prospect of opposition at initial application;

(c) the risk of a multiplicity of litigation by successive defendants applying to reagitate extension applications of which they had not been given initial notice;

(d) the risk of inconsistent outcomes on applications to set aside extension orders by respective defendants;

(e) no finality, as claims by defendants that they were identifiable, but not identified, might cause ongoing challenges to any extension granted;

(f) want of certainty for liquidators and prospective defendants who might seek to have leave revoked after it had been granted and after proceedings had commenced;

(g) the potential for wasted costs to be incurred contrary to the interests of creditors; and

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54 *Grant Samuel Corporate Finance Pty Ltd v Fletcher* [2015] HCA 8 at [21], citing *Texel Pty Ltd v Commonwealth Bank of Australia* [1994] 2 VR 298 at 300.

(h) the determination of applications by reference only to evidence that the liquidator elected to put before the court.

26 All of those are considerations which may inform the approach to the exercise of discretion by the court in cases in which applications are made for shelf orders under s 588FF(3)(b). They are considerations which could have moved but did not move the legislature, when it amended s 588FF(3), to exclude the application of the power conferred by par (b) to shelf orders.

27 In the end, as the appellants accepted, the availability of shelf orders is a construction open on the text of s 588FF(3)(b). It is a construction which is consistent with the evident purpose of that provision, to allow the court to mitigate the strictness of the time limits imposed by par (a) in an appropriate case. The effect of re-enactment of s 588FF(3), in light of the construction adopted by the Court of Appeal, is no barrier to that construction. Indeed it may be taken to support it.

Conclusion

28 For the preceding reasons the appeal will be dismissed with costs.