

HIGH COURT OF AUSTRALIA

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

Matter No S228/2014

GRANT SAMUEL CORPORATE FINANCE PTY
LIMITED

APPELLANT

AND

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

RESPONDENTS

Matter No S229/2014

JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION & ANOR

APPELLANTS

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) & ORS

RESPONDENTS

Grant Samuel Corporate Finance Pty Limited v Fletcher
JPMorgan Chase Bank, National Association v Fletcher
[2015] HCA 8
11 March 2015
S228/2014 & S229/2014

ORDER

Matter No S228/2014

1. *Appeal allowed with costs.*
2. *Set aside paragraph 2 of the order of the Court of Appeal of the Supreme Court of New South Wales made on 28 February 2014 and, in its place, order that:*
 - (a) *the appeal is allowed with costs; and*
 - (b) *paragraphs 1 and 3 of the order of Black J made on 8 February 2013 are set aside and, in their place, it is ordered that:*
 - (i) *paragraph 2 of the order of Ward J made on 19 September 2011 is set aside and, in its place, it is ordered that the liquidators' application is dismissed; and*
 - (ii) *the liquidators pay the costs of the proceedings.*

Matter No S229/2014

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 - (a) *the appeal is allowed with costs; and*
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 - (ii) *the liquidators pay the costs of the proceedings.*

On appeal from the Supreme Court of New South Wales

Representation

A J L Bannon SC with P M Knowles for the appellant in S228/2014
(instructed by Watson Mangioni Lawyers Pty Limited)

C R C Newlinds SC with N M Bender for the appellants in S229/2014
(instructed by Corrs Chambers Westgarth Lawyers)

B A J Coles QC with P J Dowdy and A K Flecknoe-Brown for the
respondents in both matters (instructed by Henry Davis York)

Notice: This copy of the Court's Reasons for Judgment is subject
to formal revision prior to publication in the Commonwealth Law
Reports.

CATCHWORDS

Grant Samuel Corporate Finance Pty Limited v Fletcher JPMorgan Chase Bank, National Association v Fletcher

Corporations – Winding up – Voidable transactions – Section 588FF(3) of *Corporations Act* 2001 (Cth) provided that application with respect to voidable transactions under s 588FF(1) "may only be made" during period set out in s 588FF(3)(a) or "within such longer period as the Court orders" on an application made by liquidator during par (a) period – On application made by liquidators after par (a) period had expired, Supreme Court made order under r 36.16(2)(b) of Uniform Civil Procedure Rules 2005 (NSW) varying date by which liquidators could make application under s 588FF(1) – Whether UCPR could be utilised to extend time within which proceedings under s 588FF(1) could be brought – Whether s 588FF(3) "otherwise provided" within meaning of s 79(1) of *Judiciary Act* 1903 (Cth).

Words and phrases – "otherwise provided", "picked up".

Corporations Act 2001 (Cth), s 588FF.

Judiciary Act 1903 (Cth), s 79(1).

Uniform Civil Procedure Rules 2005 (NSW), r 36.16(2)(b).

1 FRENCH CJ, HAYNE, KIEFEL, BELL, GAGELER AND KEANE JJ. Section 588FF(1) of the *Corporations Act* 2001 (Cth) provides that a court, on the application of a company's liquidator, may make certain orders where it is satisfied that a transaction of the company is voidable because of s 588FE. Section 588FE states reasons why a transaction may be voidable. Section 588FF(3) provides:

"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."

2 Where an order has been made that a company be wound up and the winding up is taken to have begun on the day the order was made, the "relation-back day" is the day on which the application for the order was filed¹. In the liquidation of the second respondent in these appeals ("Octaviar Limited"), the relation-back day was 4 June 2008. The effect of the period of limitation stated in s 588FF(3)(a) ("the par (a) period") in this case was to require an application under s 588FF(1) to be made by the liquidators of Octaviar Limited by 4 June 2011, unless the Court² ordered, under s 588FF(3)(b), that an application could be made within a longer period.

3 On 10 May 2011, the first respondent in these appeals ("the liquidators") applied to the Supreme Court of New South Wales for an order extending the period within which they might bring proceedings under s 588FF(1). On 30 May

1 *Corporations Act* 2001 (Cth), s 9.

2 *Corporations Act* 2001, s 58AA.

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2011, Hammerschlag J extended that period to 3 October 2011 ("the extension order").

4 A further application was made to the Supreme Court within the period of that extension, but after the par (a) period had expired. On 19 September 2011, Ward J made an order on that application, under r 36.16(2)(b) of the Uniform Civil Procedure Rules 2005 (NSW) ("the UCPR"), varying the extension order by changing the date set by Hammerschlag J by which the liquidators could make an application under s 588FF(1), to 3 April 2012 ("the variation order").

5 Each of the above-mentioned orders was made on the ex parte application of the liquidators. Application was subsequently made by the appellants in these two appeals to set aside the variation order. Black J dismissed those applications. A majority of the Court of Appeal dismissed the appeals from Black J's decision.

6 These appeals raise the question, generally stated, whether a court, on an application made outside the par (a) period, but within an extended period ordered under s 588FF(3)(b) on an application made in the par (a) period, may exercise power under the general rules of procedure in the UCPR to further extend time for the making of an application under s 588FF(1). Attention is therefore directed to the relationship between the provisions of the *Corporations Act* and the general procedural rules of the UCPR.

7 Section 79(1) of the *Judiciary Act* 1903 (Cth) provides that the laws of each State or Territory, including the laws relating to procedure, shall, "except as otherwise provided by the Constitution or the laws of the Commonwealth", be binding on all courts exercising federal jurisdiction in that State or Territory. It has been observed³ that the *Corporations Act* does not directly impose a universal, federal procedural regime, but rather leaves s 79 of the *Judiciary Act* to operate according to its terms in the State or Territory concerned. The particular question on these appeals arises from those terms. It is whether s 588FF(3) "otherwise provides", so that the UCPR are not picked up by s 79.

8 Section 588FF(3) may be said to "otherwise provide" if it is inconsistent with so much of the general rules of procedure in the UCPR as would permit variation of the time fixed by the extension order. Inconsistency in this sense may be taken to include that s 588FF(3) leaves no room for the operation of the

3 *Gordon v Tolcher* (2006) 231 CLR 334 at 348 [40]; [2006] HCA 62.

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UCPR⁴, which would be the case if s 588FF(3)(b) is clearly intended to be the exclusive source of power to extend time for the purposes of s 588FF(1).

9 A majority of the Court of Appeal (Macfarlan and Gleeson JJA) held⁵ that the only restriction placed by s 588FF(3)(b) on the court's power to extend time for bringing proceedings under s 588FF(1) is that the court's order be made on an application made by the liquidator during the par (a) period. On this view, s 588FF(3)(b) does not require that the order, as distinct from the application, be made in that period. Their Honours considered that, in this case, it would be sufficient that the application for extension made within the par (a) period remained on foot when Ward J made the variation order.

10 There may be a question whether the application on which Hammerschlag J made the extension order was extant at the time Ward J made the variation order, or whether the extension order finally disposed of the matter before Hammerschlag J. This may be put to one side. The real issue on these appeals is whether s 588FF(3) "otherwise provides" so that the relevant rule of the UCPR permitting variation of the extension order cannot apply. This was not a question which the majority in the Court of Appeal addressed⁶. It may be inferred that their Honours accepted that Ward J could not, and did not, exercise the power given by s 588FF(3)(b) to grant the further extension by making the variation order. Their Honours assumed that r 36.16(2)(b) of the UCPR could apply even though an order under s 588FF(3)(b) had been made and the par (a) period had expired.

11 Beazley P, who was in dissent in the Court of Appeal, considered⁷ that, to the extent that it permits a new or further application to be made for an extension

4 Cf *Northern Territory v GPAO* (1999) 196 CLR 553 at 589 [84]; [1999] HCA 8.

5 *JPMorgan Chase Bank, National Association v Fletcher; Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2014) 85 NSWLR 644 at 672-673 [152], 674 [160], 675 [166].

6 Cf *JPMorgan Chase Bank, National Association v Fletcher; Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2014) 85 NSWLR 644 at 676 [171].

7 *JPMorgan Chase Bank, National Association v Fletcher; Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2014) 85 NSWLR 644 at 662 [89].

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of time, r 36.16(2)(b) is inconsistent with s 588FF(3)(b) and could not therefore be picked up by s 79 of the *Judiciary Act*.

12 The majority considered⁸ there to be an analogy with the circumstances in *Gordon v Tolcher*, where the District Court Rules 1973 (NSW) were applied. *Gordon v Tolcher* was regarded as establishing that, once an application for extension of time is made in conformity with s 588FF(3)(b), the conduct of the litigation is left for the operation of the procedures of the court in which the application is made.

13 In *Gordon v Tolcher*, a liquidator instituted proceedings in the District Court of New South Wales seeking orders pursuant to s 588FF(1) with respect to what were alleged to be voidable transactions. Those proceedings were instituted shortly before the end of the three year period fixed by s 588FF(3)(a) as it then stood⁹. There was no need for an extension of time under s 588FF(3)(b) as the application under s 588FF(1) was brought within time.

14 A further relevant aspect of *Gordon v Tolcher* which sets it apart from this case is that the rules of the District Court were employed for a different purpose, namely to overcome the effect of their automatic operation on the proceedings which had been instituted. The circumstances in *Gordon v Tolcher* were that the statement of liquidated claim had not been served on the defendant and therefore no defence had been filed. The effect of Pt 18, r 9 of the District Court Rules, where a defence had not been filed within a certain time from the date of the commencement of the action, was that the action was treated as dormant and taken to be dismissed. A judge of the District Court declined to make an order having the effect of rescinding the dismissal of the liquidator's action. On appeal, the Court of Appeal made an order under Pt 3, r 2(2) of the District Court Rules extending the time for serving the statement of liquidated claim, thus overcoming the effect of the District Court Rule deeming the action to be dismissed.

8 *JPMorgan Chase Bank, National Association v Fletcher; Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2014) 85 NSWLR 644 at 673 [154]-[155].

9 See *Gordon v Tolcher* (2006) 231 CLR 334 at 343 [17]. At the relevant time, s 588FF(3)(a) only provided that an application must be brought "within 3 years after the relation-back day". As discussed later in these reasons, the additional period now appearing in s 588FF(3)(a)(ii) was subsequently added.

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15 As this Court said in *Gordon v Tolcher*¹⁰, that appeal could be disposed of simply upon the basis that the procedural regulation of a matter, after the institution of an application, is left to the State or Territory procedural law. The application in question was that filed under s 588FF(1). In the circumstances of that case, s 588FF clearly did not "otherwise provide" so as to deny the operation of s 79 "to pick up so much of the Rules as supported the orders made by the Court of Appeal."¹¹

16 It is evident from the conclusion reached in *Gordon v Tolcher* that the Court rejected the appellant's submission¹² that the liquidator's request to apply the provisions of Pt 3, r 2 was in effect an application for extension made outside the three year period and therefore not authorised by s 588FF(3). It is no doubt because of that submission that the Court felt obliged to say something more about the provision for time in s 588FF(3).

17 The Court in *Gordon v Tolcher* said¹³ that s 588FF deals with the period within which an application under s 588FF(1) is to be made, as an essential aspect of the regime s 588FF creates. The provision in s 588FF(3), as to the time for the making of the application, is not to be characterised merely as a procedural stipulation as to time¹⁴. It would follow that the bringing of an application within the time required by s 588FF(3)(a) or (b) is a precondition to the court's jurisdiction under s 588FF(1).

18 The Court in *Gordon v Tolcher* referred to the explanation which had been given by Spigelman CJ in *BP Australia Ltd v Brown*¹⁵ as to the significance of s 588FF(3) in the statutory scheme. In the Harmer Report¹⁶, which was

10 (2006) 231 CLR 334 at 346 [32]-[33].

11 *Gordon v Tolcher* (2006) 231 CLR 334 at 348-349 [41].

12 *Gordon v Tolcher* (2006) 231 CLR 334 at 336-337.

13 *Gordon v Tolcher* (2006) 231 CLR 334 at 348 [40].

14 *Gordon v Tolcher* (2006) 231 CLR 334 at 347 [37].

15 (2003) 58 NSWLR 322.

16 Australia, The Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 282-283 [688].

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published in 1988, it had been observed that the Australian Law Reform Commission ("the ALRC") had earlier proposed that a liquidator should have only three years within which to commence proceedings to recover the proceeds of voidable transactions, instead of the six years which were then allowed under legislation such as the *Bankruptcy Act* 1966 (Cth), although the ALRC had also proposed that the court should have power to extend the period of three years. The ALRC had received many submissions complaining of inordinate delay in the commencement of proceedings of this kind and there had been judicial observations critical of delays in winding up insolvent companies. The Harmer Report recommended that liquidators be placed under a more rigorous, though reasonable, time limit.

19 In a passage from *BP Australia Ltd v Brown*¹⁷, which was cited in *Gordon v Tolcher*¹⁸, Spigelman CJ said that the legal policy which underlies s 588FF(3) is one which favours certainty. Whilst that provision does not have the effect of requiring all applications under s 588FF(1) to be brought within a short period of time, it does have the effect "of requiring those who wish to keep open the option to do so, to determine that they do wish to do so within the three year period and to seek a determinate extension of the period." His Honour said that "Parliament has identified a reasonable time for such matters to occur, subject to a single determinate extension of time."

20 At the time *BP Australia Ltd v Brown* was decided, s 588FF(3)(a) contained only the requirement now appearing in sub-par (i), that proceedings be brought within three years of the relation-back day. Subsequently, in 2007¹⁹, an alternative time limitation, that appearing now in sub-par (ii), was added whereby an application under s 588FF(1) may be brought 12 months after the first appointment of a liquidator in a winding up. The provision in s 588FF(3)(b), whereby the court may fix a further period, has remained throughout.

21 The addition of the alternative time limitation in s 588FF(3)(a)(ii) does not detract from the force of what was said in *BP Australia Ltd v Brown* concerning the statutory aim of certainty which is evident in s 588FF(3). If anything, it tends to reinforce the decision of the legislature, in balancing in a liquidation the

17 (2003) 58 NSWLR 322 at 345 [115], 346 [118].

18 (2006) 231 CLR 334 at 348 [39].

19 *Corporations Amendment (Insolvency) Act* 2007 (Cth).

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competing interests of creditors and those who have dealt with the company and might be the subject of s 588FF(1) proceedings, to limit the times within which such proceedings may be brought. Section 588FF(3) does so in language which may be described as "clear and emphatic"²⁰.

22 Section 588FF(3) provides that an application under s 588FF(1) "may only be made" within the periods set out in pars (a) and (b) of s 588FF(3). The phrase "may only be made" should be read with both paragraphs. So understood, the term "may only" has the effect of defining the jurisdiction of the court by imposing 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. An element of that right is that it must be exercised within the time specified²¹. This is what is conveyed by *Gordon v Tolcher*.

23 The only power given to a court to vary the par (a) period is that given by s 588FF(3)(b). That power may not be supplemented²², nor varied, by rules of procedure of the court to which an application for extension of time is made. The rules of courts of the States and Territories cannot apply so as to vary the time dictated by s 588FF(3) for the bringing of a proceeding under s 588FF(1), because s 588FF(3) otherwise provides. It provides otherwise in the sense that it is inconsistent with so much of those rules as would permit variation of the time fixed by the extension order.

24 The extension order made on 30 May 2011 was within power. As a result of that order, proceedings under s 588FF(1) could be brought by 3 October 2011, but no further extension could be granted once the par (a) period had elapsed. The UCPR could not be utilised to further extend the time within which proceedings under s 588FF(1) could be brought.

20 *Texel Pty Ltd v Commonwealth Bank of Australia* [1994] 2 VR 298 at 300, referring to Corporations Law, s 459G(2) and (3).

21 *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 277; [1995] HCA 43.

22 *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 at 337 [65], quoting *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at 281 [22]; [2000] HCA 30.

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The appeals should be allowed with costs. The orders of the Court of Appeal should be set aside and in lieu thereof it should be ordered that leave to appeal be granted, the appeals be allowed with costs, the orders of Black J dismissing the appellants' applications with costs be set aside and the respondents pay the costs of those proceedings. The variation order made on 19 September 2011 should be set aside.

