

Section 588FF(3) - the exclusive source of power to extend the time for bringing voidable transactions proceedings

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Introduction

1. Under s 588FF(3) of the *Corporations Act 2001* (Cth) (“**CA**”), proceedings for orders in respect of voidable transactions under s 588FF(1) may only be brought:
 - within the time period specified in para (a) of s 588FF(3); or
 - under para (b) of s 588FF(3), within such longer period as the Court orders on an application under para (b) made by the liquidator during the para (a) period.
2. In *Grant Samuel Corporate Finance Pty Limited v Fletcher*¹ (“**Grant Samuel**”), the High Court of Australia has held, overturning a decision of the New South Wales Court of Appeal, that s 79 of the *Judiciary Act 1903* (Cth) does not ‘pick up’ r 36.16(2)(b) of the *Uniform Civil Procedure Rules 2005* (NSW) (“**UCPR**”) to authorise a further extension of time for the bringing of s 588FF(1) proceedings pursuant to an application made outside the s 588FF(3)(a) period, but within an extended period ordered under s 588FF(3)(b) on an application made during the para (a) period.
3. The High Court said that the bringing of an application within the time required by s 588FF(3) is a precondition to the court’s jurisdiction under s 588FF(1) and that the only power to vary the time period in s 588FF(3)(a) is that given by s 588FF(3)(b). The High Court further said that the para (b) power cannot be supplemented, nor varied, by rules of procedure of the court to which an application for extension of time is made because s 588FF(3) “otherwise provides” within the meaning of s 79 of the *Judiciary Act 1903*.
4. This paper considers the relevant legislation, some of the cases which have previously addressed the time limitation in s 588FF(3) and the High Court’s decision in *Grant Samuel*.

Relevant legislation

5. Section 588FE of the CA renders voidable certain transactions of a company which is the subject of a winding up. Section 588FF(1) specifies the orders which a court may make on the application of a company’s liquidator if the court is satisfied that a transaction of the company is voidable because of s 588FE. Section 588FF(3) then provides that:

¹ [2015] HCA 8.

“An application under subsection (1) may only be made:

(a) during the period beginning on the relation-back day² 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 Court³ orders on an application under this paragraph made by the liquidator during the paragraph (a) period.”

6. Section 79(1) of the *Judiciary Act* ‘pick ups’ the laws of a State or Territory including procedural laws “except as otherwise provided” by, *inter alia*, the laws of the Commonwealth:

“The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, 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 in all cases to which they are applicable.

7. Rule 36.16 of the UCPR made pursuant to the *Civil Procedure Act 2005* (NSW) relevantly provides that:

“(2) The court may ... vary a judgment or order after it has been entered if:

...

(b) it has been given or made in the absence of a party, whether or not the absent party had notice of the relevant hearing or of the application for the judgment or order...”

Earlier cases

BP Australia Ltd v Brown

8. In *BP Australia Ltd v Brown*,⁴ an issue for the New South Wales Court of Appeal was whether s 1322(4)(d) of the CA could be used to extend the time within which proceedings could be brought under s 588FF(1). Section 1322(4)(d) permits a court to make an order extending the period for taking any proceeding under the CA, including

² Defined in s 9 CA.

³ Defined in s 58AA CA to include the Supreme Court of a State. Section 1337B CA confers federal jurisdiction on, *inter alia*, the Supreme Court of each State.

⁴ [2003] NSWCA 216; (2003) 58 NSWLR 322.

an order extending a period where the period had ended before the application for the order was made.

9. Spigelman CJ (with whom Mason P and Handley JA agreed) held that s 1322(4)(d) could not be used in this way because both the text of s 588FF(3) and the scope and purpose of Pt 5.7B (which includes s 588FF(3)) supported the conclusion that s 588FF(3) was a comprehensive provision which was intended to cover the field of extensions of time with respect to s 588FF(1) proceedings, to the exclusion of the general power in s 1322(4)(d).⁵
10. At this time, s 588FF(3)(a) contained only the requirement, which now appears in sub-para (i), that proceedings be brought within 3 years of the relation-back day and did not contain the alternative time limitation in sub-para (ii).
11. In the course of his judgment, Spigelman CJ referred to the Harmer Report⁶ and observed that the Commonwealth Parliament had significantly strengthened the original proposal in that Report by including both the introductory phrase "may only be made" in s 588FF(3) and the requirement that an application for extension beyond the 3 year period be made within the originally stipulated period. That Parliament had gone further than the Report's proposal, his Honour said, indicated the weight to be given to the policy purpose of encouraging greater expedition in the conduct of a liquidation.⁷
12. His Honour then went on to say:

"A creditor or other person who has received the benefit of a voidable transaction is at risk of having to surrender it. The time limit in s 588FF(3) has the effect that at the end of the period of three years, such a person will know whether s/he remains at risk. In a legislative scheme which seeks to balance conflicting commercial interests of this character, that appears to me to be a perfectly reasonable requirement. Those who have an interest, or who represent those who have an interest, to disturb transactions must indicate, within three years, whether they wish to keep open the option of doing so. In this, as in other areas, legal policy favours certainty."⁸

13. His Honour also said:

"[T]he legal policy in favour of certainty is ... manifest in the text of s 588FF(3).

[118] Section 588FF(3) does not have the effect of requiring all applications to be brought within a short period of time. It does, however, have the effect of requiring those who wish to keep open the option to do so, to determine that

⁵ Above, n 4, at [85], [89] and [129].

⁶ The name commonly given to Australia, The Law Reform Commission, *General Insolvency Inquiry*, Report No. 45, 1988.

⁷ Above, n 4, at [109]-[110].

⁸ Above, n 4, at [115].

they do wish to do so within the three year period and to seek a determinate extension of the period. One thing that must be decided within the three year period is how long the process of deciding whether to pursue voidable transactions will take. Eventually, investigations to overcome deficiencies of information or the pursuit of funding must cease. Parliament has identified a reasonable time for such matters to occur, subject to a single determinate extension of time.⁹

Gordon v Tolcher

14. Subsequently, in *Gordon v Tolcher*,¹⁰ the High Court considered the question of whether a rule of the *District Court Rules 1973* (NSW) had been picked up by s 79 of the *Judiciary Act*.
15. In that case, a statement of liquidated claim seeking orders in respect of voidable transactions under s 588FF(1) had been filed shortly before the end of the 3 year period in s 588FF(3)(a) but had not been served. Under Pt 18 r 9 of the *District Court Rules*, there was a deemed dismissal of an action on the expiry of the period of 6 months and 28 days from the lodging of a statement of liquidated claim where no notice of grounds of defence had been filed, default judgment entered or the action otherwise disposed of by judgment or final order. As the statement of liquidated claim had not been served, no defence had been filed and no other action had been taken with the result that, after the expiry of the relevant period, the liquidator's action was taken to have been dismissed.
16. The liquidator sought orders rescinding the deemed dismissal from the District Court but was unsuccessful. On appeal, the New South Wales Court of Appeal relied upon Pt 3 r 2(2) of the *District Court Rules* to extend the time for service of the statement of liquidated claim. That rule conferred a general power on the court to extend any time fixed by the rules or any judgment or order, including after the time had expired and whether or not an application for the extension had been made before the time expired or at all.
17. On further appeal, the High Court affirmed the Court of Appeal's decision on the basis that Pt 3 r 2(2) had been picked up by s 79 of the *Judiciary Act*.¹¹
18. The High Court observed that Pt 5.7B, and s 588FF in particular, did not deal with the conferral of federal jurisdiction in any court and that conferral of federal jurisdiction was dealt with by Pt 9.6A of the CA. The High Court further observed that s 588FF was silent on the procedures to be adopted by a court exercising federal jurisdiction in the matter before it. The High Court then concluded that s 588FF evinced a two-fold legislative intention:

⁹ Above, n 4, at [117]-[118].

¹⁰ [2006] HCA 62; (2006) 231 CLR 334.

¹¹ It was not challenged that s 79 had picked up Pt 18 r 9 to effect a deemed dismissal of the action.

- conferral of federal jurisdiction was left to Pt 9.6A; and
- “*subject to any operation of other provisions of the Corporations Act, after the institution of an application the procedural regulation of the conduct of a matter is left for that particular State or territorial procedural law which is to be picked up by s 79 of the Judiciary Act.*”¹²

19. The High Court said that this conclusion was sufficient to dispose of the appeal but went on to make a number of observations about the construction of s 588FF, its inclusion in Pt 5.7B and its relationship with Pt 9.6A.¹³

20. In particular, the High Court observed that, for the competent institution of proceedings under s 588FF(1), it was required that the proceedings be brought by the liquidator and that the proceedings be brought, as they had been in the case before the Court, within 3 years after the relation-back day. These requirements, the High Court said, were “elements of the right” of the liquidator to have the court consider making the orders sought by the liquidator.¹⁴

21. The High Court further observed that the time stipulation in s 588FF(3) “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”.¹⁵

22. The High Court referred¹⁶ to the observations of Spigelman CJ in *BP Australia Ltd v Brown* concerning the legislative history and effect of s 588FF(3)¹⁷ and concluded that:

“[40] Accordingly, s 588FF is dealing, as an essential aspect of the regime it creates, with the period within which the application must be made. An application may be made only to a court invested with federal jurisdiction by one or other of the provisions of Pt 9.6A. Thereafter, and subject to any other relevant provision of the Corporations Act, the conduct of the litigation is left for the operation of the procedures of that court. These procedures will vary from one State or Territory to another and within the court structures of those States and Territories. The scheme of the Corporations Act is not to impose a direct federal and universal procedural regime. Rather, s 79 of the Judiciary Act is left to operate according to its terms in the particular State or Territory concerned.

[41] Thus the relationship between s 588FF and s 79 (and between Pt 9.6A and s 79) is not one of which it may be said that the former provision is a law of the Commonwealth which 'otherwise provides' so as to deny the operation

¹² Above, n 10, at [32].

¹³ Above, n 10, at [33].

¹⁴ Above, n 10, at [36].

¹⁵ Above, n 10, at [37].

¹⁶ Above, n 10, at [37]-[39].

¹⁷ See above para 11-13.

of s 79 in this case to pick up so much of the Rules as supported the orders made by the Court of Appeal."¹⁸

Grant Samuel

Background

23. In *Grant Samuel*, under s 588FF(3)(a), the liquidators of Octaviar Limited (“**Liquidators**”) had 3 years from 4 June 2008, being the relation-back day, to bring proceedings under s 588FF(1).
24. Shortly before the end of the 3 year period, on 10 May 2011, the Liquidators made an *ex parte* application to the Supreme Court of New South Wales for an order under s 588FF(3)(b) that the time for bringing of s 588FF(1) proceedings be extended to 3 October 2011. Hammerschlag J made the extension order on 30 May 2011.
25. The Liquidators subsequently made a further *ex parte* application for a variation of the order to extend the time for the bringing of s 588FF(1) proceedings to 3 April 2012. This application was made outside the 3 year period specified in s 588FF(3)(a), being made after 4 June 2011, but was made within the extended time of 3 October 2011.
26. On 19 September 2011, Ward J varied the extension order pursuant to r 36.16(2)(b) of the UCPR, by changing the date fixed by Hammerschlag J by which the Liquidators could bring proceedings under s 588FF(1), to 3 April 2012 (“**Variation Order**”).
27. The Liquidators then commenced proceedings under s 588FF(1) against the appellants within the further extended period.
28. The appellants applied to have the Variation Order set aside. The matter was heard by Black J, who dismissed the applications.¹⁹

Court of Appeal

29. The appellants appealed to the New South Wales Court of Appeal which, by a majority, dismissed the appeal.²⁰
30. Beazley P, who dissented, found that r 36.16(2)(b) of the UCPR, to the extent that it permitted a new or further application to be made for an extension of time, was inconsistent with s 588FF(3)(b) and was not picked up by s 79 of the *Judiciary Act*.²¹

¹⁸ Above, n 10, at [40]-[41].

¹⁹ *In the matter of Octaviar Limited (receivers and managers appointed) (in liquidation) and Octaviar Administration Pty Limited (in liquidation)* [2013] NSWSC 62.

²⁰ *JPMorgan Chase Bank, National Association v Fletcher; Grant Samuel Corporate Finance Pty Limited v Fletcher* [2014] NSWCA 31; (2014) 85 NSWLR 644.

²¹ Above, n 20, at [89].

31. In contrast, the majority (Macfarlan JA, with whom Gleeson JA agreed) held that the only restriction which s 588FF(3)(b) placed on the Court's power to extend the time for a liquidator to bring proceedings under s 588FF(1) was that the Court's order be "on an application under this paragraph made by the liquidator during the paragraph (a) period." The majority said that para (b) did not require that the order, as distinct from the application, be made during the para (a) period. On this view, therefore, it would not matter that the Variation Order was made outside the para (a) period because an application for an extension of time had been made during the para (a) period provided the application had remained on foot when the Variation Order was made. If it had remained on foot, then the Variation Order was an order made "on an application" filed in conformity with para (b).²²
32. The majority referred to *Gordon v Tolcher* and said that it had established that once an application for an extension of time had been made in conformity with s 588FF(3)(b), then the conduct of the litigation was left for the operation of the procedures of the court in which the application was made.²³
33. The majority then considered that there was an analogy between the circumstances of *Gordon v Tolcher* and those of the case before them, saying that:

*"Hammerschlag J's order extending time implicitly brought the application for extension of time to an end because what was sought by the application was achieved. However, that termination was subject to the rules of court which were able to, and effectively did, provide for its revival in certain circumstances. One circumstance was that which occurred in the present case where a judge exercised the amendment power conferred by r 36.16(2)(b) to vary the earlier order. To the extent that the rule of court permitted the making of the variation order, the rule implicitly provided for the application for extension of time to be revived, as the variation order could not be made in the absence of process invoking the Court's jurisdiction."*²⁴

High Court

34. By grant of special leave, the appellants appealed to the High Court which unanimously allowed the appeal. The members of the Court (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ) delivered a joint judgment.
35. The High Court said that the real issue in the case was whether s 588FF(3) "otherwise provides" so that r 36.16(2)(b) of the UCPR was not picked up by s 79 of the *Judiciary Act* and that s 588FF(3) would "otherwise provide" if it left no room for the operation of the UCPR. This would be the case if s 588FF(3)(b) was "clearly intended to be the exclusive source of power to extend time for the purposes of s 588FF(1)."²⁵

²² Above, n 20, at [152].

²³ Above, n 20, at [154].

²⁴ Above, n 20, at [155].

²⁵ Above, n 1, at [8] and [10].

36. The High Court, however, found that the issue of whether s 588FF(3) “otherwise provides” had not been addressed by the majority in the Court of Appeal who had assumed that r 36.16(2)(b) could apply even though an order under s 588FF(3)(b) had been made and the para (a) period had expired.²⁶
37. The High Court further found that the majority was wrong to have considered that there was an analogy with the circumstances in *Gordon v Tolcher*, saying that the circumstances in that case had differed in that:
- the application under s 588FF(1) had been brought within time so there had been no need for an extension of time under s 588FF(3)(b) - i.e. the statement of liquidated claim seeking orders with respect to voidable transactions had been filed shortly before the end of the 3 year period. It had just not been served; and
 - the procedural rules of the court had been used for a different purpose - to extend the time within which the statement of liquidated claim could be served, thus overcoming the effect of the rules’ own automatic dismissal of the proceedings which had been instituted.²⁷
38. Therefore, the High Court said, the appeal in *Gordon v Tolcher* (as the Court in that case had acknowledged) could have been disposed of simply upon the basis that State or Territory procedural law regulated the matter after the institution of proceedings. As the proceedings had been instituted under s 588FF(1), s 588FF did not “otherwise provide” so as to deny the operation of s 79 to pick up those rules which enabled the court to grant an extension of time for service of the statement of liquidated claim.”²⁸
39. As to why the Court in *Gordon v Tolcher* had then gone on to address the time stipulation in s 588FF(3), the High Court said that this was because the appellant in that case had submitted that the liquidator’s request to apply the relevant procedural rule was effectively an application for extension made outside the para (a) period and so was not authorised by s 588FF(3) and the Court had felt it necessary to say something more about s 588FF(3).²⁹
40. The High Court noted that *Gordon v Tolcher* had observed that s 588FF dealt with the time within which proceedings under s 588FF(1) were to be brought, as an essential aspect of the regime that s 588FF created and that s 588FF(3) was not to be characterised simply as a procedural stipulation as to time. The High Court then concluded:

²⁶ Above, n 1, at [10].

²⁷ Above, n 1, at [12]-[14].

²⁸ Above, n 1, at [15].

²⁹ Above, n 1, at [16].

*"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)."*³⁰

41. The High Court also noted that *Gordon v Tolcher* had referred to *BP Australia Ltd v Brown* in which Spigelman CJ had explained the significance of s 588FF(3) in the legislative scheme. After repeating Spigelman CJ's observations about the legal policy underlying s 588FF(3) and the effect of that provision,³¹ the High Court said that, at the time *BP Australia Ltd v Brown* was decided, the only time limitation contained in s 588FF(3)(a) had been the requirement that proceedings be brought within 3 years of the relation-back day. However, the High Court went on to say that the later change to include the alternative time limitation:

*"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 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'."*³²

42. The High Court also said that the introductory phrase "may only be made" in s 588FF(3) should be read with both paras (a) and (b) and that the words "may only" had the effect of defining the court's jurisdiction by imposing a requirement as to time as an essential condition of the right given by s 588FF(1) to bring proceedings with respect to voidable transactions. An element of the right to bring those proceedings was that it had to be exercised within the time specified in s 588FF(3) as had been indicated in *Gordon v Tolcher*.³³

43. The High Court then concluded as follows:

*"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 supplemented, 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."*³⁴ [Footnotes excluded]

³⁰ Above, n 1, at [17].

³¹ Above, n 1, at [18]-[19]. See also above para 11-13.

³² Above, n 1, at [21], citing *Texel Pty Ltd v Commonwealth Bank of Australia* [1994] VicRp 62; [1994] 2 VR 298 at 300. See also the High Court's cognate judgment in *Fortress Credit Corporation (Australia) II Pty Limited v Fletcher* [2015] HCA 10 at [24].

³³ Above, n 1, at [22]. See also *Fortress Credit Corporation (Australia) II Pty Limited v Fletcher* [2015] HCA 10 at [23].

³⁴ Above, n 1, at [23].

44. The result of the appeal then was that a valid extension order had been made on 30 May 2011 so that proceedings under s 588FF(1) could be brought by 3 October 2011 but no further extension could be granted once the para (a) period had expired. The UCPR could not be relied on to further extend the time within which proceedings under s 588FF(1) could be brought.³⁵

45. The High Court accordingly allowed the appeals.

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³⁵ Above, n 1, at [24].