The court's power to amend pleadings after the expiry of the time period in s 588FF(3) of the Corporations Act 2001 (Cth)

25 January 2017

Karin Ottesen

Introduction

1. Section 588FF(3) of the *Corporations Act 2001* (Cth) ("**CA**") imposes a time requirement on the bringing of an application by a company's liquidator for orders in respect of voidable transactions under s 588FF(1) of the CA.

2. In *Sydney Recycling Park Pty Ltd v Cardinal Group Pty Ltd (in liq)* ("**Sydney Recycling**"),[1] the New South Wales Court of Appeal, constituted by five judges, dealt with the question of whether the court had power under ss 64 and 65 of the *Civil Procedure Act 2005* (NSW) to grant leave to amend a pleading in proceedings which had been commenced within the s 588FF(3) time period, after the expiry of that period, and where the effect of the amendments was to include additional transactions arising from substantially the same facts as the transactions originally pleaded, against the same defendant.

3. The Court of Appeal held that there was power to allow the proposed amendments because the s 588FF(3) time period did not apply to each individual "transaction" that the liquidator sought to impugn under s 588FF(1) and the amendment powers in ss 64 and 65 of the *Civil Procedure Act* were 'picked up' by s 79 of the *Judiciary Act 1903* (Cth) as s 588FF(3) did not "otherwise provide".

4. In so holding, the Court of Appeal followed the decision of the Full Court of the Federal Court of Australia in *Rodgers v Commissioner of Taxation* ("**Rodgers**")[2] which had held that s 588FF(3) was concerned with the time for the commencement of proceedings for orders under s 588FF(1) and was not directed to the subsequent amendment of pleadings in proceedings commenced within time.

Relevant legislation

Federal

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. The orders that may be made include requiring a person to pay money or to transfer property that the company has paid or transferred under "the transaction", releasing or discharging a

---

[1] [2016] NSWCA 329.
[2] (1998) 88 FCR 61.

debt incurred by the company under "the transaction" and declaring an agreement relating to "the transaction" to have been void.

6. Section 588FF(3) then imposes a time limit for the bringing of an application under s 588FF(1) in the following terms:

> *"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."*

7. Section 79(1) of the *Judiciary Act* 'pick ups' the laws of each State or Territory including procedural laws "except as otherwise provided" by, *inter alia*, the laws of the Commonwealth.

State

8. Section 64 of the New South Wales *Civil Procedure Act* provides for the amendment of documents generally and relevantly provides:

> *"(1) At any stage of proceedings, the court may order:*
>
> *(a) that any document in the proceedings be amended, or*
>
> *(b) that leave be granted to a party to amend any document in the proceedings.*
>
> *(2) Subject to section 58, all necessary amendments are to be made for the purpose of determining the real questions raised by or otherwise depending on the proceedings, correcting any defect or error in the proceedings and avoiding multiplicity of proceedings."*

9. Section 65 of the *Civil Procedure Act* deals with the circumstances in which a plaintiff may amend an originating process (which includes any pleading subsequently filed in the proceedings) after the expiry of a limitation period and relevantly provides as follows:

> *"(1) This section applies to any proceedings commenced before the expiration of any relevant limitation period for the commencement of the proceedings.*
>
> *(2) At any time after the expiration of the relevant limitation period, the plaintiff in any such proceedings may, with the leave of the court under section 64(1)(b), amend the originating process so as:*
>
> ...
>
> *(c) to add or substitute a new cause of action, together with a claim for relief on the new cause of action, being a new cause of action that, in the court's opinion, arises from the same (or substantially the same) facts as those giving rise to an existing cause of action and claim for relief set out in the originating process.*
>
> *(3) Unless the court otherwise orders, an amendment made under this section is taken to have had effect as from the date on which the proceedings were commenced."*

Background

10. In *Sydney Recycling*, the respondents, a company ("**Company**") and its liquidators, had commenced proceedings against the appellant ("**SRP**") in the Supreme Court of New South Wales seeking to recover certain payments made by the Company to SRP. The payments were alleged to constitute unfair preferences, insolvent transactions and voidable transactions.

11. The proceedings were commenced by the filing of an originating process[3] within the s 588FF(3)(a) time period and were subsequently continued by statement of claim.

12. After the time period had expired, the Company and its liquidators sought leave under ss 64 and 65 of the *Civil Procedure Act* to file an amended statement of claim which included the following additional payments:

    - three further payments alleged to constitute unfair preferences, insolvent transactions and voidable transactions on the same basis as the other payments; and

    - certain 'contra payments' alleged to constitute preference payments which had been made pursuant to an arrangement between the Company and SRP that the Company would set-off a sum of money inadvertently paid by its customers to a company associated with SRP against liabilities owed by the Company to SRP.

[3] This was in accordance with the *Supreme Court (Corporations) Rules 1999* (NSW).

13. The proposed amendments had the effect of increasing the amount sought to be recovered from $280,000 to some $494,000.

14. At first instance, Black J granted leave for the amended statement of claim to be filed.

Appeal to the Court of Appeal

15. SRP then appealed to the Court of Appeal.

16. SRP's main submissions were that:

- the s 588FF(3) time period was required to be satisfied in respect of each individual "transaction" that was sought to be impugned under s 588FF(1); and

- the amendment powers in ss 64 and 65 of the *Civil Procedure Act* were not 'picked up' and applied in federal jurisdiction because s 588FF(3) "otherwise provided" for the purposes of s 79 of the *Judiciary Act*.

17. SRP accepted that the amendments sought to be made arose from substantially the same facts as those giving rise to an existing cause of action and claim for relief set out in the originating process pursuant to s 65(2)(c) of the *Civil Procedure Act* and did not challenge the Company and its liquidators' claim that the omission of the additional payments was inadvertent.[4]

18. The Court of Appeal (Bathurst CJ, Beazley P, Ward JA, Payne JA and Bergin CJ in Eq) dismissed the appeal. Bathurst CJ and Payne JA delivered joint reasons ("**Joint Reasons**") with which Beazley P, Ward JA and Bergin CJ in Eq agreed. Beazley P made some additional observations to indicate her Honour's own reasoning on the submissions.

Joint Reasons

The relevant authorities

19. The Joint Reasons first conducted a review of *Rodgers* which had found that rules of court could be relied on to allow amendments to add new causes of action against the same defendant outside the s 588FF(3) time period.

Rodgers

20. *In Rodgers*, the liquidator of a company had brought an application in the Federal Court of Australia seeking orders that a number of group tax payments made by the company to the Commissioner of Taxation were voidable transactions under s 588FF of the then *Corporations Law*. The application had been made within the s 588FF(3) time period but after the expiry of the period, the liquidator had become aware of another group tax payment as well as a group tax penalty payment made by the

[4] Above, n 1, at [15], [58].

company. The liquidator had then sought leave under the since repealed O 13 r 2 of the *Federal Court Rules 1979* (Cth) to amend the original application to add the two further payments. Order 13 r 2 permitted the Court to grant leave to amend any document in the proceeding even if the leave was sought after the expiry of any relevant period of limitation and notwithstanding that the effect of the amendment was to add or substitute a new claim for relief if the new claim for relief arose out of the same facts or substantially the same facts as those already pleaded to support existing claims for relief.

21. The Full Court of the Federal Court had held that s 588FF(3) was concerned with the making of an application to the court i.e. with the commencement of the proceedings, and was not directed to the subsequent amendment of a pleading commenced within time and that, accordingly, there was no inconsistency between O 13 r 2 and s 588FF(3) because the former was concerned with making an amendment to a pleading in an existing proceeding while the latter was concerned with the commencement of a proceeding. The Full Federal Court had found that, although each payment amounted to a separate transaction, the new claims had arisen out of substantially the same facts as those pleaded to support the original claims and that, therefore, the requirements of O 13 r 2 were satisfied in respect of the two further payments.[5]

Cases following Rodgers

22. The Joint Reasons then noted that two other intermediate appellate courts had adopted the reasoning applied in *Rodgers*[6]:

- In *Greig v Stramit Corporation Pty Ltd* ("**Stramit**"),[7] two judges of the Queensland Court of Appeal had referred to *Rodgers* with approval, explaining that *Rodgers* had dealt with an application to amend an existing cause of action, commenced within the 588FF(3)(a) time period, by adding new causes of action against an existing defendant, a situation which was permissible, unlike the application in *Stramit* which had been to amend an application for an extension of time brought under s 588FF(3)(b) to add a new party outside the time limit.

- In *Davies v Chicago Boot Co Pty Ltd (No 2)* ("**Chicago Boot**"),[8] the Full Court of the Supreme Court of South Australia had made the following points:

    - *Rodgers* had been followed in a number of subsequent single judge decisions and had received apparent approval from the Queensland Court of Appeal in *Stramit*.

---

[5] Above, n 1, at [33]-[39].
[6] Above, n 1, at [40]-[46].
[7] [2003] QCA 298; [2004] 2 Qd R 17.
[8] [2007] SASC 12; (2007) 96 SASR 164.

- The authorities had consistently found that the applicable rules of court could be used to allow new amendments to add new causes of action against the same defendant outside the relevant statutory limitation period.

- The reasoning in *Rodgers* and the other authorities was not plainly wrong but was sound. It allowed a consistent approach to be taken to the amendment of existing applications in accordance with well-established procedures in all Australian jurisdictions.

- There was nothing in the High Court's reasoning in *Gordon vTolcher*[9] which suggested that *Rodgers was* incorrectly decided.

High Court decisions

23. Finally, the Joint Reasons reviewed three decisions of the High Court of Australia concerning s 588FF which had been decided subsequently to *Rodgers* as these cases were being relied on by SRP to argue that the reasoning applied in *Rodgers* and the cases which had followed *Rodgers* was no longer maintainable.

24. The first of these cases was *Gordon v Tolcher*[10] where a statement of liquidated claim seeking orders in respect of voidable transactions under s 588FF(1) had been filed in the District Court of New South Wales shortly before the s 588FF(3)(a) time period had expired but had not been served. After a certain period of time, by operation of certain rules of the *District Court Rules 1973* (NSW), the action had been taken to be dismissed. The question for the High Court had been whether, after the expiry of the s 588FF(3) period, other rules of the *District Court Rules*, namely, Pt 3 r 2(2) which 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, could be used to extend the time within which the statement of liquidated claim could be served.

25. The High Court had found that those rules could be used to extend the time for service because s 588FF(3) did not "otherwise provide" so as to deny the operation of s 79 of the *Judiciary Act* to pick up those rules. The High Court had said that s 588FF dealt with the period within which the application was required to be made and that an application could be made only to a court invested with federal jurisdiction by one or other of the provisions of Pt 9.6A of the CA. Thereafter, and subject to any other relevant provisions of the CA, the conduct of the proceedings was left for the operation of the procedures of that court. The High Court had also said that the CA did not impose a direct federal and universal procedural regime and that, instead, s 79 of the *Judiciary Act* was left to operate according to its terms in the particular State or Territory concerned."[11]

26. The second High Court case reviewed by the Joint Reasons was *Grant Samuel Corporate Finance Pty Limited v Fletcher; JP Morgan Chase Bank, National*

---

[9] [2006] HCA 62; (2006) 231 CLR 334.
[10] Above, n 9.
[11] Above, n 1, at [48]-[51].

Association v Fletcher ("**Grant Samuel**").[12] In *Grant Samuel*, an extension order had been made under s 588FF(3)(b). Outside the time stipulated in s 588FF(3)(a) but within the extended time, an order had been made under r 36.16(2)(b) of the *Uniform Civil Procedure Rules 2005* (NSW) varying the s 588FF(3)(b) extension order by changing the date by which the liquidators of the company could make an application under s 588FF(1).

27. The High Court, applying *Gordon v Tolcher*, had said that the bringing of an application within the time required by s 588FF(3)(a) or (b) was a precondition to the court's jurisdiction under s 588FF(1). The High Court had further said that the only power given to a court to vary the s 588FF(3)(a) period was that given by s 588FF(3)(b) and that the power could not be supplemented or varied by rules of procedure of the court to which an application for extension of time was made because s 588FF(3) otherwise provided. Accordingly, the High Court had found that r 36.16(2)(b) of the *Uniform Civil Procedure Rules* was not 'picked up' by s 79 of the *Judiciary Act*.[13]

28. The third High Court case reviewed by the Joint Reasons was *Fortress Credit Corporation (Australia) II Pty Limited v Fletcher* ("**Fortress**").[14] In *Fortress*, the High Court had confirmed the practice of allowing an extension of time for commencing proceedings under s 588FF(3)(b) in general form, without identifying any particular transaction, often called 'shelf orders'. The High Court had said that the function of s 588FF(3)(b) was to confer a discretion on the court to mitigate, in appropriate cases, the rigours of the s 588FF(3)(a) time limits, a discretion which was to be exercised having regard to the scope and purposes of Pt 5.7B of the CA. The High Court had gone on to say that, while a purpose of the time limits was to favour certainty for those who had entered into transactions with the company during the periods in respect of which designated transactions might be voidable, there was no basis for the assertion that any extension of time which did not identify a particular transaction would be an unreasonable prolongation of uncertainty, militating against an interpretation which would allow such an order to be made. Rather, questions of what was a reasonable or an unreasonable prolongation of uncertainty and the scope of such uncertainty were more appropriately to be considered on a case-by-case basis in the exercise of judicial discretion than globally in judicial interpretation of the provision.[15]

Did the time period provided by s 588FF(3) apply to each individual "transaction"?

29. The Joint Reasons then went on to consider SRP's submission that the time period provided by s 588FF(3) applied to each individual "transaction" that was sought to be impugned under s 588FF(1). SRP advanced a number of arguments in support of this construction[16] which the Joint Reasons described as having "real force"[17] and as

---

[12] [2015] HCA 8; (2015) 254 CLR 477. A detailed summary of this decision can be found in K Ottesen "*Section 588FF(3) – the exclusive source of power to extend the time for bringing voidable transactions proceedings*",17 March 2015.
[13] Above, n 1, at [52]-[55].
[14] [2015] HCA 10; (2015) 254 CLR 489.
[15] Above, n 1, at [56]-[57].
[16] Above, n 1, at [59]-[64].

having "much to commend it".[18] Nevertheless, the Joint Reasons ultimately rejected SRP's construction of s 588FF.

30. Two of SRP's arguments in support of its construction relied on the text of s 588FF. The first argument was that, because s 588FF(1)(a)-(h) referred to "the transaction", the "application" in s 588FF(3) was required to be one in respect of a particular identified "transaction".

31. In rejecting this argument, the Joint Reasons said SRP's construction would require an "application" to be in a particular form and have a particular content when there was no definition of "application" in the CA and the form and content of an "application" was left to rules of court and to State and Territory legislation.[19] The Joint Reasons further said that s 588FF(1) did not deal with the form of the application at all, that this was left to the rules of court and that there was nothing in s 588FF(1) or any other section of the CA which "otherwise provided" so as to prevent the rules of court setting out the requirements for an application under s 588FF(1) being picked up by s 79 of the *Judiciary Act*."[20]

32. The second argument was that ss 588FA to 588FDA, with the exception of s 588FD[21] referred to "a transaction" or "the transaction" and, accordingly, the "application" referred to in s 588FF(1) and (3) was the "application" in relation to a particular "transaction" with the characteristics specified in s 588FE.

33. The Joint Reasons, however, said that this textual argument suffered from further difficulties in that such a construction would have the effect that if any error was made in the proper particularisation of the alleged voidable transaction in the originating process, no amendment would be able to be made after the expiry of the s 588FF period when there was nothing to suggest that as a matter of policy that effect was intended. Furthermore, the language of s 588FF(1) and (3) did not compel such a construction.[22]

34. The Joint Reasons also rejected an argument by SRP that the reasoning in *Fortress* at [20] and [21] required an "application" to particularise the "transaction" in respect of which it was made at the time the application was made. In *Fortress*, the High Court had said at [20]-[21]:

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

---

[17] Above, n 1, at [72].
[18] Above, n 1, at [98].
[19] Above, n 1, at [77].
[20] Above, n 1, at [78].
[21] Sections 588FA, 588FB, 588FC and 588FDA explain the meaning of unfair preferences, uncommercial transactions, insolvent transactions and unreasonable director-related transactions respectively.
[22] Above, n 1, at [79]-[81].

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

35. The Joint Reasons, however, said that these paragraphs did not mandate the form and content of an originating process under s 588FF(1).[23] The Joint Reasons explained as follows:

- *Fortress* at [20] addressed the proposition that an application under s 588FF(1) had to seek "orders for which that subsection provides" and set out the specific matters that had to be addressed before a court could make an order under the section. It did not address the point in time at which all necessary particulars had to be provided to enliven the court's jurisdiction to make "orders for which that subsection provides", much less did it address whether once commenced an "application" could be amended.

- *Fortress* at [21] addressed "the class of applications which can be made by liquidators under s 588FF(1) in relation to a transaction alleged to be voidable." This referred to an application by a company's liquidators for the

[23] Above, n 1, at [84].

kind of orders that could be made under s 588FF and was not a prescription of the matters which had to be contained in an originating process.[24]

36. A further argument by SRP that the purpose of s 588FF(3) favoured commercial certainty and that the construction advanced by SRP better reflected that purpose was also rejected by the Joint Reasons, essentially, for the following reasons:

    - Section 588FF(3) involved a statutory balancing of competing interests between creditors and those who might be the subject of s 588FF(1) proceedings. That balance had been recognised in *Fortress* when the High Court had said that one purpose of the s 588FF(3) time period was to favour certainty for those who had entered into transactions with the company and when the High Court had held that a shelf order was permissible.[25]

    - Section 65 of the *Civil Procedure Act* gave effect to an established policy which allowed amendments to pleadings arising from the same or substantially the same facts and SRP had accepted that amendments to an application to plead that an unfair preference was also an unreasonable director-related transaction could be made after the expiry of the time period on the basis that this flowed from the fact that the "transaction" was the same. Given that "transaction" in s 9 of the CA was defined broadly and inclusively and could extend to a series of dealings which were connected in being directed to bring about a change in the company's rights, liabilities or property,[26] there was no reason why as a matter of policy, a case pleaded as a very broadly described "transaction" involving many payments could effectively be amended by the addition of further particulars while a more closely described pleading which attacked the same payments pleaded as separate "transactions" could not be amended. In addition, SRP had conceded that amendments to correct a "typographical slip in the amount" could be made after the expiry of the time period and this was undoubtedly correct even if the typographical error related to a significant sum of money. [27]

37. Finally, the Joint Reasons rejected an argument by SRP that *Rodgers* and the cases which had followed it either did not survive *Grant Samuel* and *Fortress* or did not require the construction which had been adopted by the trial judge. The Joint Reasons said as follows:

---

[24] Above, n 1, at [85]-[86].
[25] Above, n 1, at [88]; [90].
[26] Above, n 1, at [68]-[69].
[27] Above, n 1, at [89]; [91]-[94]. Note: The case had been pleaded on the assumption that each of the additional payments was a separate "transaction" from those already pleaded and, accordingly, the trial judge had treated them as separate transactions. However, the Joint Reasons, agreeing with observations made by the trial judge, said at [70] that the definition of "transaction" did not require that each separate payment be identified as a separate "transaction" and that the many individual payments made by the Company to SRP directed to reducing the Company's debt on the same basis could be treated as a single "transaction" and that the contra payments, in adopting a different mechanism for the same purpose and in the same period, could arguably also be treated as part of the same "transaction".

- The construction of the section in *Rodgers* that s 588FF(3) was concerned with the commencement of the proceeding itself and did not prohibit the amendment of a pleading commenced within time was not "plainly wrong" or incorrect and nothing in the three High Court cases decided subsequently to *Rodgers* required the conclusion that *Rodgers* should no longer be followed.[28]

- *Grant Samuel* and *Fortress* did not address the amendment power which was the subject of *Rodgers* or any of the cases which had followed *Rodgers*. If anything, *Grant Samuel* and *Fortress* did not support SRP's position because in neither case did the High Court find that the court's satisfaction of the matters relating to a "transaction" in s 588FF(1) required the filing of an "application" containing all of the necessary particulars underpinning that state of satisfaction within the s 588FF(3) time period. *Grant Samuel* had dealt with the question of whether a State rule permitting variation of an extension order impermissibly extended time in a manner inconsistent with s 588FF(3), but this question did not arise in the present case because s 65(3) of the *Civil Procedure Act* did not extend the s 588FF(3) time period.[29]

- The presumption of re-enactment addressed in *Fortress* at [15][30] tended against SRP's argument because, after the decision in *Rodgers* and the cases which had followed it including *Chicago Boot* in 2007, the ability to amend a proceeding commenced within time, after the expiry of the time, using powers conferred by rules of court and State and Territory legislation had been well known. Yet, s 588FF(3) had been amended in 2007 following a report by the Corporations and Markets Advisory Committee published in October 2004 and there had been no suggestion in that report that there was any perceived issue with amendments being permitted to an application once commenced in such circumstances and no change had been made to s 588FF or the CA more generally in 2007 to address any such perceived issue.[31]

Did s 588FF(3) "otherwise provide" so that the amendment powers were not 'picked up'?

38. The Joint Reasons then considered SRP's submission that the amendment powers in ss 64 and 65 of the *Civil Procedure Act* were not 'picked up' and applied in federal jurisdiction because s 588FF(3) "otherwise provided" for the purposes of s 79 of the *Judiciary Act*. A number of arguments were also advanced in support of this submission[32] but were rejected by the Joint Reasons.

---

[28] Above, n 1, at [96]-[98].
[29] Above, n 1, at [99]-[100].
[30] This was that, where Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already judicially attributed to those words.
[31] Above, n 1, at [101]-[102]. The amendment to s 588FF(3) in 2007 had introduced the alternative time limit in par (a)(ii) of 12 months after the first appointment of a liquidator in relation to the winding up of the company.
[32] Above, n 1, at [105]-[106].

39. The important points made by the Joint Reasons in relation to this submission included the following:

- Although no question had arisen in *Rodgers* as to whether the rules of court had been 'picked up' by s 79 of the *Judiciary Act* because the rules in question were *Federal Court Rules*, the ratio of *Rodgers* that the *Federal Court Rules* were concerned with making an amendment to a pleading in an existing proceeding and that s 588FF(3) was concerned with fixing the time limit for the commencement of a proceeding, was directly applicable to the present case. Rodgers had expressly found that there was no inconsistency between the relevant *Federal Court Rules* and s 588FF(3). Moreover, *Rodgers* had been followed by intermediate State appellate courts in *Stramit* and *Chicago Boot* where the question of s 79 of the *Judiciary Act* had been directly engaged.[33]

- As had been seen when dealing with SRP's first submission, the policies identified by the High Court in *Fortress* and *Grant Samuel* did not require that an "application" be brought by reference to each individual transaction.[34]

- Section 588FF(3) did not preclude an amendment to include further "transactions" in an application commenced within the s 588FF(3) time period, after the expiry of that time because, as the High Court had said in *Gordon v Tolcher*, while an application could 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 CA, the conduct of the proceedings was left for the operation of the procedures of that court.[35]

40. Accordingly, there was no inconsistency between the amendment powers and s 588FF(3) and so 588FF(3) did not "otherwise provide" to prevent the amendment powers being picked up by s 79 of the *Judiciary Act*.

Conclusion

41. The Joint Reasons then concluded as follows:

> "*In our view, the conclusion in Rodgers (at 67-68) that the amendment provision in the Federal Court Rules '[O 13 r 2] is to be contrasted with s 588FF(3), which is concerned with the making of an application to the Court; that is, the commencement of the proceeding itself' and that s 588FF(3) 'is not directed to an amendment of an existing claim', is not plainly wrong. Accordingly, it should be followed by this Court. There is nothing in the trilogy of High Court cases concerning s 588FF which obliges this Court to conclude that the decision in Rodgers is plainly wrong.*"[36]

---

[33] Above, n 1, at [107]-[110].
[34] Above, n 1, at [117]-[118].
[35] Above, n 1, at [119].
[36] Above, n 1, at [121].

Beazley P's additional observations

42. Beazley P made some additional observations on SRP's submissions.

43. Her Honour said that there was nothing in the text of s 588FF, the extrinsic materials which accompanied it or the relevant High Court cases that supported SRP's submission that the s 588FF(3) time period applied to each individual "transaction" that was sought to be impugned.[37]

44. Her Honour's reasoning for saying that the text of s 588FF did not support such a construction was, in summary, as follows:

- Section 588FF was not concerned with the procedural formalities of the application as the CA did not impose a uniform procedural regime and assumed the co-existence of state and federal law.[38]

- There was nothing in the text of s 588FF requiring that the "application" relate to an individual transaction. The references in s 588FF(1)(a)-(h) to "the transaction" and, in ss 588FA-588FDA, to "a transaction" and "the transaction", were directed to whether the Court was empowered to make orders in relation to that transaction, provided that all the pre-conditions to the making of an order were met. In addition, both ss 588FH(3) and 588FI(2)[39] used the broader language "an application relating to the transaction" and the definition of the term "recovery proceeding" in s 588E included "an application under section 588FF by the company's liquidator".[40]

- SRP's reading of *Fortress* at [20] was wrong. That paragraph set out the first of the two conditions to the making of an order under s 588FF(1), namely, the relevant state of satisfaction on the application of a company's liquidator. The words "which concern a transaction alleged to be voidable" in the second sentence referred to the kinds of orders that the court could make while the rest of the paragraph contained observations of what would generally be required in order to obtain relief under s 588FF. Furthermore, *Fortress* at [20] did not refer to an application in relation to a particular transaction, but to an application seeking orders for which s 588FF(1) provided and this was further emphasised in *Fortress* at [21].[41]

- This approach to s 588FF was consistent with the Explanatory Memorandum to the *Corporate Law Reform Bill 1992* (Cth) which indicated that s 588FF(3) was intended to operate to limit the time period within which a liquidator could

---

[37] Above, n 1, at [149].
[38] Above, n 1, at [136].
[39] Section 588FH enables a liquidator to recover from a related entity any benefit resulting from an insolvent transaction. Section 588FI enables a creditor who gives up the benefit of an unfair preference to prove in the winding up for the preferred debt.
[40] Above, n 1, at [137]-[138].
[41] Above, n 1, at [139]-[140].

seek relief from the courts under s 588FF(1), as opposed to operating in relation to each individual transaction.[42]

- Section 588FF(3) was amended in 2007 to introduce the alternative time limit in s 588FF(3)(a)(ii) and the Explanatory Memorandum to that amendment also indicated that s 588FF(3) was concerned with the time period in which a liquidator was required to exercise his or her powers of challenge to alleged voidable transactions.[43]

45. Her Honour's reasoning for finding that the policy underlying s 588FF did not support SRP's construction was, in summary, as follows:

    - s 588FF(3) reflected a balancing of competing interests as between the general body of creditors and those who had had previous dealings with the company.

    - While the decision of Parliament to limit, by s 588FF(3), the time within which a liquidator could bring an application under s 588FF(1) undoubtedly reflected the desirability of commercial certainty, the overriding principle in Pt 5.7B of the CA was one of fairness, as had been observed in *BP Australia Ltd v Brown*,[44] and the balance of fairness did not require the degree of precise certainty for which SRP contended. Otherwise, the making of shelf orders would not be allowed and *Fortress* had held that such orders were allowed.

    - Where an application commenced within time put the defendant on notice that orders under s 588FF(1) were being sought, the policies identified by the High Court did not require that the liquidator be shut out from challenging additional transactions by amendment when they came to light.[45]

46. On the question of whether s 588FF(3) "otherwise provided" so that the amendment powers were not 'picked up', after reviewing *Rodgers*, *Stramit* and *Chicago Boot*, Beazley P considered that there was no reason for the Court of Appeal to reject the distinction that had been made between the amendment of existing proceedings and the extension of time within which to commence proceedings or to reject the reasoning of the Full Federal Court in *Rodgers*.[46]

47. Her Honour accordingly concluded as follows:

> "*[An] application for orders under s 588FF(1) against [SRP] was commenced within the time limit imposed by s 588FF(3). The proposed amendment introduced transactions between the same parties which, although accepted to constitute a new cause of action, were acknowledged to arise from substantially the same facts as the transactions originally pleaded. No new*

---

[42] Above, n 1, at [141].
[43] Above, n 1, at [142].
[44] [2003] NSWCA 216; (2003) 58 NSWLR 322 at [98].
[45] Above, n 1, at [144]-[148].
[46] Above, n 1, at [160].

defendant was introduced and no fault was identified on the part of the [liquidators] in failing to identify the original transactions at the outset. ... [T]here was no attempt to extend the time for the commencement of proceedings. Thus, s 588FF(3)(b) did not 'otherwise provide' and the powers of amendment were picked up by the Judiciary Act, s 79."[47]

K Ottesen 25 January 2017

[47] Above, n 1, at [161].