IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S228 of 2014

BETWEEN: GRANT SAMUEL CORPORATE FINANCE PTY LIMITED
(ACN 076 176 657)
Appellant

and

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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)
First Respondent

OCTAVIAR LIMITED (RECEIVERS AND MANAGERS APPOINTED)
(IN LIQUIDATION)
Second Respondent

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OCTAVIAR ADMINISTRATION PTY LIMITED (IN LIQUIDATION)
Third Respondent

No. S229 of 2014

BETWEEN: JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
(ACN 074 112 011)
First Appellant

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J.P. MORGAN SECURITIES AUSTRALIA LIMITED
Second 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)

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First Respondent

OCTAVIAR LIMITED (RECEIVERS AND MANAGERS APPOINTED)
(IN LIQUIDATION)
Second Respondent

OCTAVIAR ADMINISTRATION PTY LIMITED (IN LIQUIDATION) (ACN 101 069 390)
Third Respondent

ANNOTATED

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RESPONDENTS' SUBMISSIONS

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PART I: PUBLICATION ON THE INTERNET

1. This submission is in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2. The ultimate question in each appeal is whether, in the proceedings brought by the respondents under s 588FF(3)(b) of the *Corporations Act* 2001 (Cth), s 79 of the *Judiciary Act* 1903 (Cth) operated to pick up r 36.16(2)(b) of the *Uniform Civil Procedure Rules* 2005 (NSW) ("**UCPR**"), so as to provide a foundation for the order made by Ward J on 19 September 2011[1] varying the "further period" in respect of the second appellant ("**OL**") which had previously
10 been ordered by Hammerschlag J on 30 May 2011. This issue is to be resolved by application of the principles respecting what is meant by "otherwise provides" in s 79.

3. However, at the heart of these appeals is an issue of statutory construction, which particularly concerns the phrase "on an application made under this paragraph" in s 588FF(3)(b). The appellants can only succeed, in contending that r 36.16(2)(b) was not picked up, if a construction is given to s 588FF(3)(b) such that an "application" is confined to a particular set of facts and arguments. The appellants contend that the facts and arguments which were before Hammerschlag J constituted an "application", and that when the same
20 proceedings later came before Ward J, her Honour considered a different set of facts and circumstances and thus a different "application", and made a discrete order for a "longer period". The respondents say that the "application" embraced the whole of the proceedings, including that part which was before Ward J, and that the relevant order was therefore made "on" that application.

PART III: SECTION 78B NOTICES

4. The respondents consider that no notice need be issued under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: STATEMENT OF FACTS

The liquidation of the Octaviar Group

30 5. Mr Fletcher and Ms Barnet (**the liquidators**, being jointly the first respondent) were appointed on 9 September 2009 as liquidators of the second respondent (**OL**).[2] At the time it was placed in liquidation, OL was a publicly listed company with 483,646,630 issued ordinary shares, and was the ultimate holding company of the Octaviar Group.[3]

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1 Order 2 of Ward J's orders of 19 September 2011; hereafter the "**Variation Order**".

2 AB71.47-49.

3 AB68.30-44.

6. On the same date, the liquidators were also appointed liquidators of Octaviar Administration Pty Ltd (**OA**), a subsidiary entity within the Octaviar Group, which then comprised some 70 companies.[4] The business of the Octaviar Group included the operation of managed investment schemes; the ownership, operation and management of hotels, resorts and holiday accommodation; the ownership and operation of aged care facilities; and the ownership and operation of childcare facilities.[5]

7. The affidavit of Ms Barnet of 10 May 2011 describes the massive size and scope of the liquidators' duties as liquidators of OL, OA and another 12 or so
10 companies within the Octaviar Group.[6] That was the evidence relied upon before Hammerschlag J on 30 May 2011, when his Honour extended time pursuant to s 588FF(3)(b) of the Corporations Act for OL to bring proceedings under s 588FF(1) up until 3 October 2011.

8. The process of the winding up of OL and OA, which led to the ultimate appointment of the first plaintiffs as liquidators thereof by orders of McMurdo J in the Supreme Court of Queensland on 9 September 2009, was lengthy. It was preceded, from 13 September 2008, by various appointments of voluntary administrators, deed administrators and provisional liquidators, and the removal of earlier liquidators.[7]

20 9. In the result, by reason of the orders of McMurdo J of 31 July 2009 (as upheld in the Queensland Court of Appeal on 9 March 2010),[8] the "relation-back day" for the purposes of the winding up of OL was 4 June 2008 (being the date of the filing of the Public Trustee of Queensland's winding up application of OL).[9] Thus, the date by which any applications under s 588FF(1) had to be commenced by OL was 4 June 2011, unless otherwise extended.

10. The consequence was that the liquidators, having been appointed as liquidators of OL on 9 September 2009, had not had the benefit of the whole of the 36 month period ordinarily contemplated by s 588FF(3)(a) to investigate and bring voidable transaction proceedings but rather had lost a period of 15
30 months since the relation-back date for OL. Consequently, the liquidators only had 21 months in which to carry out their investigations and commence voidable transaction proceedings on behalf of OL.

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4 AB68.49-52.

5 AB69.12-30.

6 See especially AB76.20 to 90.50.

7 AB71.50-73.30.

8 *Re Octaviar Limited (No 8)* [2009] QSC 202; [2010] QCA 45.

9 See AB71.55-60, 73.39-45.

Extension application for OL before Hammerschlag J on 30 May 2011

11. On 10 May 2011 the respondents filed an originating process seeking an order under s 588FF(3)(b) in respect of OL.[10]

12. On 30 May 2011 a hearing on that originating process was held by Hammerschlag J. The present appellants were notified of the hearing but none were present. His Honour made the following order:[11]

> Order under s 588FF(3)(b) of the Corporations Act 2001 (Cth) that the time for the making of an application in respect of OL under section 588FF(1) of the Act be extended to 3 October 2011.

10 **Extension applications for OL and OA before Ward J on 19 September 2011**

13. On 8 September 2011, the respondents' solicitors notified each of the present appellants that OL intended to vacate the 30 May 2011 order of Hammerschlag J and seek further orders having the effect that OL would have until 3 April 2012 to commence proceedings.[12]

14. On 19 September 2011, the matter was heard before Ward J. Again, none of the present appellants were present at that hearing. The hearing was conducted upon an interlocutory process filed in Court by leave on the same day, together with an amended originating process (also filed in Court by leave that day).[13] The evidence before Ward J consisted of the same 20 evidence as had been before Hammerschlag J,[14] with two further short affidavits describing what had occurred in the intervening time.[15]

15. Ward J made two orders.[16] Order 1 is not presently relevant; it extended time under s 588FF(3)(b) for OA. Order 2 (defined above as the Variation Order) is the focus of these appeals. That order varied Hammerschlag J's order made on 30 May 2011, under UCPR r 36.16(2)(b), by substituting the date "3 April 2012" in place of the date "3 October 2011".

PART V: APPLICABLE LEGISLATIVE PROVISIONS

16. The respondents accept the appellants' statements of the terms of the statutory provisions at issue, as in force on 19 September 2011.

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[10] AB2-4.

[11] AB157.

[12] AB173.51-60.

[13] AB9-10 (interlocutory process); AB6-8 (amended originating process).

[14] Affidavit of Katherine Barnet 10 May 2011: AB65-93; affidavit of Melanie Row 30 May 2011 (not reproduced; this affidavit merely deposed to communications having occurred with various interested parties about the proceedings and hearing before Hammerschlag J).

[15] Affidavit of Katherine Barnet 8 September 2011: AB95-102; affidavit of Katherine Merrick 19 September 2011 (not reproduced; this affidavit again dealt only with procedural fairness matters.)

[16] AB168.

PART VI: THE RESPONDENTS' ARGUMENT

Section 79 of the Judiciary Act

17. There is no dispute in this case about the principles to be applied in determining whether s 79(1) of the *Judiciary Act* operates so as to pick up a particular law of the State and apply it in a matter in federal jurisdiction. They are the principles which were articulated in this Court in *Northern Territory v GPAO*[17] and *Austral Pacific Group Ltd v Airservices Australia*,[18] and applied in relation to s 588FF in *Gordon v Tolcher*.[19]

18. The proper way to apply those principles was most succinctly stated in *GPAO*, by Gleeson CJ and Gummow J, as being whether the operation of the federal law "so reduces the ambit of the [State law] that the provisions of the [federal law] are inconsistent with those of the [State law]".[20] The "objective of s 79 is to facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law".[21] The application of those principles raises a question of the proper construction of the federal provision, and also requires an understanding of the ambit of the State provision.

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Rule 36.16(2)(b) of the Uniform Civil Procedure Rules

19. The material terms of r 36.16(2)(b) are as follows: "*The court may set aside or vary a judgment or order after it has been entered if: ... it has been given or made in the absence of a party*". In this case, an "order" was "varied" having been made "in the absence of", inter alia, the appellants. (The Court of Appeal concluded that the appellants were "parties" in the sense of this rule, being interested persons, even though not parties on the record of the proceedings.[22] That is not now challenged.)

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20. Three relevant observations may be made about this power, which aid in understanding the role the power played in these proceedings and how it was picked up by s 79 of the *Judiciary Act*.

21. The first point is that, in its terms, r 36.16(2) assumes and depends upon the existence of some other order (not limited to an interlocutory order), and operates upon that order. The rule also assumes the prior existence of some law creating rights and duties for determination and conferred jurisdiction to determine them, so as to enable the making of the order which is sought to be varied. It is not a power of the same order as s 588FF(3)(b) itself.

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17 (1999) 196 CLR 553 at 587-588 per Gleeson CJ and Gummow J (Gaudron J agreeing at 606, Hayne J agreeing at 254 ("*GPAO*").

18 (2000) 203 CLR 136 at 144 per Gleeson CJ, Gummow and Hayne JJ (McHugh J agreeing at 155) ("*Airservices*").

19 (2006) 231 CLR 334 at 346-349 [31]-[41].

20 (1999) 196 CLR 553 at 588 [81].

21 *GPAO* (1999) 196 CLR 553 at 588 [80].

22 AB281 [147] (Beazley P), 286 [162] (Macfarlan JA), 287 [166] (Gleeson JA).

22. Secondly, provisions such as r 36.16(2) are properly to be understood with reference to, among other things, the principle of finality.[23] Absent the existence of r 36.16(2)(b), the mere existence of the circumstances described in that paragraph would not empower the Supreme Court to vary its own order after entry. This is a statutory provision which overcomes the usual common law position.[24] But it is not right to say that r 36.16(2)(b) operates where litigation has already been brought to an end. Where the power is available according to its terms, that very fact means that the litigation cannot properly be described as being at an end.

10 23. Thirdly, the terms of r 36.16(2)(b) acknowledge that an *ex parte* order does not have the same conclusive quality as an order which is made after full argument in the presence of all interested parties; rather, it is "essentially provisional in nature".[25] That consideration underpins the purpose of the r 36.16(2)(b) power, being to enable the court to revisit the subject-matter of the previous order to consider whether it ought to be varied or discharged. While sufficient reason to do so may lie in some deficiency in the court's appreciation of the circumstances which could have been remedied with full *inter partes* argument, the terms of the power are broad and discretionary, and it is not limited to being used to remedy a denial of procedural fairness.

20 ***The text of section 588FF(3)***

24. All the words of s 588FF(3) are material to its interpretation; however, the emphasis of argument is likely to be on the expressions, in paragraph (b), "*such longer period as the Court orders*" and "*on an application under this paragraph made by the liquidator during the paragraph (a) period*".

25. There are two relevant aspects of the construction of s 588FF(3) which are likely to be uncontentious. First, it is accepted that no order under that paragraph can be made "on" an "application" which is "made" outside the period prescribed by s 588FF(3)(a). Secondly, once an "application" has been made within that period, an order can be made on that application after the
30 period has expired. The relevance of these matters is addressed below.

***The scheme of the* Corporations Act**

26. Section 588FF[26] appears in Div 2 of Pt 5.7B of Ch 5 of the *Corporations Act*. Chapter 5 deals with "External administration".

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23 *Achurch v The Queen* [2014] HCA 10 at [16].

24 Cf *Bailey v Marinoff* (1971) 125 CLR 529 at 530 per Barwick CJ: "...apart from any specific and relevant statutory provision...".

25 *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 2 All ER 589 at 593.

26 Section 588FF(3) was amended with effect from 31 December 2007: *Corporations Amendment (Insolvency) Act* 2007 (Cth), Act No 132 of 2007, s 3 and Sch 4 items 69 and 70. The effect of these amendments was to add, to the three-year period, the alternative period now set out in para (a)(ii) ("whichever is the later"). It is uncontentious that these amendments are not material for present purposes, and do not change the effect of the analysis of the statutory words and their context in *Gordon v Tolcher* (2006) 231 CLR 334.

27. Various Parts within Ch 5 deal with other aspects of external administration, including the appointment of receivers and administrators and the means by which a company may be wound up, and the consequences of external administration.

28. Part 5.7B deals with "Recovering property or compensation for the benefit of creditors of [an] insolvent company". The various Divisions of Pt 5.7B provide for ways in which the insolvent estate may be augmented, including in ways which may make directors and holding companies liable, and by conferring rights to proceed on various parties including, most obviously, liquidators.

10 29. Division 2 of Part 5.7B provides for recovery in respect of various classes of "Voidable transactions". Within Div 2, ss 588FA to 588FDA define various kinds of transactions. Those kinds of transactions are then subject to s 588FE which may operate to render them voidable.

30. Section 588FF then provides for the making of orders in respect of such voidable transactions. Subsection (1) provides for the kinds of order by which the insolvent estate may be augmented. Subsections (2) to (4) refine the application of subsection (1) in various ways.

31. In contrast, Pt 9.6A in Ch 9 of the *Corporations Act* deals with the "Jurisdiction and procedure of courts". The structure of that Part indicates that its primary
20 concern is the conferral of jurisdiction.[27] The remaining provisions of Pt 9.6A go only so far, in respect of "procedure" in civil jurisdiction, as to provide for transfer of proceedings between courts, and to empower federal and Territory courts to make certain rules of Court.[28] Further, Pt 9.4B provides for the consequences of contravening civil penalty provisions, and Pt 9.5 confers certain powers on the courts. However, as the Court observed in *Gordon v Tolcher*, neither of those Parts "encompasses the provisions for the conduct of litigation which generally are left to Rules of Court".[29]

Gordon v Tolcher: section 588FF prescribes rights, not procedure

32. The principal issue in *Gordon v Tolcher* was whether s 79 of the *Judiciary Act*
30 1903 (Cth) picked up the general extension or abridgment of time power in certain Rules of Court, so that it could be exercised to revive proceedings under s 588FF(1) which had been deemed dismissed by effluxion of time, where the revival would take effect after the expiry of the three-year period stipulated by s 588FF(3)(a).[30] The Court's ultimate conclusion was that s 588FF(3)(b) did not "otherwise provide" for the purposes of applying s 79 of the *Judiciary Act*, and that the relevant rule of Court was therefore engaged.[31]

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[27] Here, jurisdiction was conferred on the Supreme Court by s 1337B(2). In *Gordon v Tolcher*, s 1337E had conferred jurisdiction on the NSW District Court: (2006) 231 CLR 334 at 341 [9].

[28] *Corporations Act* Pt 9.6A Div 1 Subdivs C and D.

[29] (2006) 231 CLR 334 at 341 [10].

[30] Pt 3 r 2 of the *District Court Rules* 1973 (NSW); see (2006) 231 CLR 334 at 344 [23].

[31] (2006) 231 CLR 334 at 346 [32], 348 [40].

33. Although the s 79 issue arose in that case with respect to a proceeding under s 588FF(1), that conclusion was based upon a thorough analysis of the proper construction of s 588FF. The Court's analysis placed considerable weight upon the place of s 588FF within the scheme of the *Corporations Act*, as described above.[32]

34. That analysis served to elaborate upon the basal observation the Court had made, at the beginning of its reasons, that the Act as a whole "deals distinctly with the creation of rights and liabilities, and with the conferral of federal jurisdiction to adjudicate matters arising thereunder."[33] Consistently with that
10 observation and analysis, the Court concluded that:[34]

> [32] Section 588FF does not deal with the investment of federal jurisdiction in any court or with the manner of exercise of that jurisdiction. The section is found in Pt 5.7B, whilst the jurisdiction of courts is provided for in Pt 9.6A. Section 588FF is silent respecting the procedures to be adopted by the court exercising federal jurisdiction in the present matter ... **Section 588FF evinces a two-fold legislative intention.** First, conferral of federal jurisdiction is left to Pt 9.6A of the Corporations Act. **Secondly, subject to any operation of other provisions of the Corporations Act, after the institution of an application the procedural regulation of the conduct**
20 **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.**

35. It may be noted that the Court did not confine these observations to s 588FF(1), but referred to s 588FF as a whole. This conclusion was "sufficient to dispose of the appeal".[35] However, the Court went on to make further observations about "the construction of s 588FF, its presence in Pt 5.7B and its relationship with the conferral of civil jurisdiction" under Pt 9.6A.[36] Three underlying points were made:

a. An "application for the fixing of [a] longer period is a 'matter' distinct from that seeking an order with respect to the voidable transaction".[37]

30 b. It is an "element of the right" to bring s 588FF(1) proceedings that they be commenced within the time prescribed by s 588FF(3).[38]

c. The stipulation as to time in s 588FF(3) is "not to be characterised merely as a time stipulation of a procedural nature".[39]

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[32] See especially (2006) 231 CLR 334 at 340-341 [3]-[10], 345 [29], 346 [32]-[33].

[33] (2006) 231 CLR 334 at 340 [3].

[34] (2006) 231 CLR 334 at 346 [32] (emphasis added).

[35] (2006) 231 CLR 334 at 346 [33].

[36] (2006) 231 CLR 334 at 346 [33].

[37] (2006) 231 CLR 334 at 346 [35], see also at 342-343 [15]; AB288 [170] (Gleeson JA).

[38] (2006) 231 CLR 334 at 347 [36].

[39] (2006) 231 CLR 334 at 347 [37].

36. Following on from the last point, the Court made the observation, upon which the appellants rely, that "s 588FF is dealing, as an essential aspect of the regime it creates, with the period within which the application must be made."[40] However, all of these observations substantiated, rather than detracted from, the earlier conclusion that s 588FF defines rights but not procedures. The Court went on to say that:[41]

> [40] ... 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.

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37. Thus the largest portion of the Court's reasons was directed to establishing, as a major premise, the proposition that nothing in s 588FF makes any provision with respect to the procedure to be adopted in proceedings in federal jurisdiction. The minor premise was that the rule in question was part of the procedure for such proceedings. It followed that "the relationship between ss 588FF and 79 ... is not one of which it may be said that [s 588FF] 'otherwise provides' so as to deny the operation of s 79 in this case to pick up so much of the Rules as supported the orders made by the Court of Appeal".[42]

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The appellants' flawed analysis of *Gordon v Tolcher*

38. The major premise described above is the *ratio decidendi* of *Gordon v Tolcher*. The decision is not merely authority for any one of the observations made in the course of establishing that larger proposition. That larger proposition should be applied in construing s 588FF(3) for the purposes of applying s 79 of the *Judiciary Act*.

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39. However, the appellants' submissions ignore the largest portion of the reasons in *Gordon v Tolcher*, and rely upon on three isolated statements. The first is that the time specified in s 588FF(3) is an "element of the right" under s 588FF(1).[43] The second is that that time stipulation is an "essential aspect of the regime" of s 588FF.[44] The third is the Court's quotation of a passage in the decision of the NSW Court of Appeal in *BP Australia Ltd v Brown*, in which Spigelman CJ referred to a "single determinate extension of time".[45]

[40] (2006) 231 CLR 334 at 348 [40].

[41] (2006) 231 CLR 334 at 348 [40].

[42] (2006) 231 CLR 334 at 348-349 [41].

[43] GS submissions para 39; cf AB 262-263 [84] (Beazley P) and JPM submissions paras 23, 63.

[44] GS submissions para 39; cf JPM submissions paras 23, 63.

[45] GS submissions paras 41, 49; JPM submissions paras 26, 27e, 29, 34b, 45e, 58.

40. As seen above, each of those expressions was intended to illustrate the fact that Pt 5.7B creates rights rather than defines jurisdiction and procedure; matters of procedure are simply not addressed by s 588FF; and accordingly s 588FF does not "otherwise provide" for such matters. By taking those statements out of their context, the appellants portray the Court's reasons as standing for a proposition contrary to what was actually held.

41. Thus, it is asserted that the statements in *Gordon v Tolcher* "regarding the conduct of litigation being left to the procedures of the relevant court presupposes [sic] compliance with the essential stipulation in s. 588FF(3)."[46] That contention fails to acknowledge that, at a level of generality, the "essential stipulation" and the r 36.16 power lie on opposite sides of the distinction between creation of rights and prescription of procedure which this Court drew. It is, rather, the appellants' argument which presupposes that the "essential stipulation" and the exercise of the power under r 36.16 collide.

42. The proposition which the appellants seek to establish is essentially the same as a proposition that was not accepted in *Gordon v Tolcher*. That proposition was that the revived proceedings were "in substance, if not in form"[47] a new application under s 588FF(1), and therefore inconsistent with the requirement that such an application be made within the original three years.

43. That raises for consideration Beazley P's dissent. Central to her Honour's reasoning was the proposition that, upon describing the r 36.16(2)(b) interlocutory application as being "substantive in nature",[48] it was therefore a new "application" under s 588FF(3)(b), and outside the scope of the regulation of "the procedural aspects" of the proceeding.[49]

44. Her Honour's reasoning is not supported by authority. It also has no apparent basis in principle. It does not square with the proper construction of s 588FF(3)(b), for the reasons given below.

The proper construction of "on an application under this paragraph"

45. At the heart of the issues in this case is whether "an application" under paragraph 588FF(3)(b):

    a) embraces the entirety of the proceedings in the Court concerning the "matter" of whether the liquidators should have an extension of time; or

    b) is limited to some particular set of facts and issues, excluding any facts and issues which have previously been the subject of a judicial determination under that paragraph (whether in the course of the same proceedings or otherwise).

[46] GS submissions para 59.

[47] See (2006) 231 CLR 334 at 336 (last line) to 337 (first sentence).

[48] AB265-266 [92] (Beazley P).

[49] AB 265 [91] (Beazley P).

46. As a matter of construction, this question should be answered by reference to the ordinary meaning of the statutory text, read in context, and viewed in light of its object and purpose to the extent of any ambiguity.[50] An abstract distinction between "substance" and "form" is not a proper intellectual construct for this purpose.

47. The ordinary meaning of the expression "application" is, relevantly, "a formal request".[51] Here, however, the expression appears in the context of a limited provision for the extension of time in which to bring a different kind of "application" under s 588FF(1). There can be no question that the latter kind of "application" connotes *proceedings*, that is, a vehicle of a recognized kind for the judicial determination of the relevant rights and liabilities.[52] As *Gordon v Tolcher* demonstrates, consequent upon that "application", a very wide range of orders can be sought and made – not just the orders specified by the terms of s 588FF(1), but also orders empowered by rules of Court.

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48. The "application under" s 588FF(3)(b) is itself a vehicle for the liquidators to vindicate a right, being the right to seek the exercise of the Court's discretion to order a "longer period" within which to make a s 588FF(1) application. As held in *Gordon v Tolcher*, a distinct "matter" arises with respect to that right. It follows, as a matter of commonsense, that the "application" refers to the process which commences the proceedings in federal jurisdiction by which that matter is resolved.

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49. Nothing in the construction given to s 588FF in *Gordon v Tolcher* stands in the way of that conclusion. Nor does that decision require the commonsense understanding of what is embraced by the term "application" to be limited or carved up by reference to what facts are raised at different times by different procedural vehicles.

50. Rather, the reasoning in *Gordon v Tolcher* provides strong support for the conclusion that all matters properly addressed by means of procedural or adjectival law may be taken to be included within the concept of something done "on" such an "application". Such adjectival law provides for many kinds of formal request to the Court for the exercise of a power. However, a step under a rule like r 36.16(2)(b) is by its nature dependent upon the existence of a larger vehicle for judicial determination of the right created by s 588FF(3)(b) – namely, the proceedings in the Supreme Court as a whole.

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51. The appellants' submissions on this topic rely heavily upon considerations of purpose.[53] Of course, *a priori* statements of "purpose" at large are no substitute for careful consideration of context in statutory construction. But in

[50] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

[51] *Australian Oxford Dictionary* (1999) p 58.

[52] *Jowitt's Dictionary of English Law* (3rd ed) states that "An application is the usual method of invoking the jurisdiction of a court within the context of, or in anticipation of, a civil claim or criminal proceedings".

[53] GS submissions paras 41-42, 49-50; JPM submissions paras 26, 27b, 28, 45b, 46.

any event, the appellants identify only some of the considerations of "purpose" which are relevant. They rely upon a broad notion of promoting "certainty" or "finality" in relation to commercial transactions, which was identified in the Harmer Report and in the passage from *BP* quoted in *Gordon v Tolcher*.[54]

52. However, that broad element of purpose cannot be considered in isolation from the more specific purpose[55] served by s 588FF(3)(b) itself, and for that matter by the particular expression "an application under this paragraph". Paragraph 588FF(3)(b) acknowledges the need for flexibility in the time limit in appropriate cases (of which the present is a classic example). It serves the purpose of providing for a means of alleviating the effects of the time bar which would otherwise apply on expiry of the paragraph (a) period. The making of an "application under this paragraph", "within" the paragraph (a) period, is the formal step which commences the process leading to an order which disapplies that time bar. That is the purpose served by the crucial words of the subsection.

53. That element of purpose confirms that "application" in s 588FF(3)(b) refers to the proceedings brought under that paragraph, and that the only relevant point in time at which to assess whether such an application has been made by the liquidator is the point when those proceedings were commenced. It provides no support whatsoever for giving the term "application" the nebulous meaning which the appellants seek to assign to it by their arguments about what constitutes an application "in substance".

54. The appellants seek to give a definite statutory expression ("application") an indefinite content. Grant Samuel's submissions define the term by reference to whether a particular order "had previously been sought"; whether the applicant "relied on evidence that was" before the Court previously; and whether the Court was "called on ... to exercise afresh" the same power.[56] Such a loose construction of a term with a clear meaning cannot be accepted.

55. However, even if that nebulous construction were to be accepted, Grant Samuel's submission misdescribes what occurred before Ward J in all three respects. The respondents' interlocutory process did not seek a new extension order; it sought a variation of an existing order. It did not call upon the Court to exercise the s 588FF(3)(b) discretion again; rather, it sought exercise of the r 36.16(2)(b) discretion – which involved, in part, a consideration of the content of the power which had originally been exercised by Hammerschlag J. And the respondents did not simply rely upon evidence that was not before Hammerschlag J; rather, most of the evidence relied upon was the same evidence, with some additional material to describe events that had occurred in the intervening time, and which justified the variation sought.

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[54] See especially GS submissions paras 41-42; *Gordon v Tolcher* (2006) 231 CLR 334 at 347-348 [38]-[39]; *BP* (2003) 58 NSWLR 322 at 344-346.

[55] Cf *Carr v Western Australia* (2007) 232 CLR 138 at 142-143 [6]-[7] per Gleeson CJ; *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 632-633 [40]-[41].

[56] GS submissions para 33, see also para 63.

56. The appellants' argument is also at odds with the fact that s 588FF(3) says nothing about the time by which any particular step must be taken, once it is accepted that the relevant "application" was indeed made within the paragraph (a) period. There is no provision which confines the period within which the Court must determine the application.[57] There is no period prescribed within which evidence in support of the application must be filed,[58] or any other interlocutory steps in the proceedings must be taken. There is no limit at all to the duration of the "longer period" the Court may order.

57. In these ways, the notions of certainty and finality that the appellants invoke are attenuated by the very terms of the provision. These matters are left to the Court's discretion in the ordinary conduct of litigation, armed as it is with the usual powers conferred by the rules of Court the operation of which s 588FF assumes.

58. Indeed, the appellants' argument, if accepted, would lead to a perverse lack of flexibility in proceedings under s 588FF(3)(b). As Macfarlan JA pointed out,[59] there is no common law principle or procedural provision which confines the Court to making exactly the order which is sought in the originating process, or nothing. Rather, the Court may make orders in any terms it considers appropriate which are within the scope of the governing provision.

59. Nothing in s 588FF(3), or elsewhere, suggests that it should be otherwise in cases such as the present. But that is the effect of the appellants' submissions; as Grant Samuel puts it, "the particular (and hence 'determinate') extension must be sought within [the paragraph (a)] period."[60] At the least, this is an impermissible gloss upon the text of a statutory provision which confers a discretionary power upon the Court.[61]

60. Broader observations about "finality" do not deny that the power to re-open was able to be exercised judicially in this case. There has been no challenge in this case to Ward J's exercise of discretion under *House v The King*[62] principles. The appellants instead make a kind of "floodgates" argument, suggesting that the Court of Appeal's reasoning is undesirable because it would permit a liquidator to make infinite reopening applications.[63] That argument does not overcome the fact that such a discretionary power appropriately safeguards against any erosion of certainty and finality. The judicial exercise of that discretion has due regard to the desirability of finality.[64]

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57 Cf s 459R of the *Corporations Act.*

58 Cf s 459G(3) of the *Corporations Act.*

59 AB285 [159].

60 GS submissions para 64.

61 Cf *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 at 1101 [40], 1106 [56], 1117 [127], 1120 [141]; *Knight v F P Special Assets Ltd* (1992) 174 CLR 178 at 205.

62 (1936) 55 CLR 499 at 505.

63 GS submissions para 50;

64 See AB286 [163] (Macfarlan JA); see also AB265 [91] (Beazley P).

The "application" was the proceeding, not the interlocutory process

61. For those reasons, Gleeson JA was correct to conclude that, as Doyle CJ had said in *Ansell Ltd v Davies*,[65] an "application" under s 588FF(3)(b) "is made when it is filed in the registry".[66] Section 588FF has nothing to say about what happens thereafter within the course of such an "application".

62. Spigelman CJ implicitly accepted the same proposition in *BP* when concluding that, even without reliance on s 1322(4)(d) of the *Corporations Act*, the original "application" under s 588FF(3)(b) remained on foot after the initial extension order was set aside.[67] In other words, it is the proceedings as a whole which constitute the "application". That is consistent with two of the general propositions emerging from *Gordon v Tolcher*: that s 588FF(3)(b) gives rise to a distinct "matter"; and that s 588FF is concerned with the creation of rights and not the prescription of procedure.

63. Once it is accepted that the "application" in this case was the originating process filed on 10 May 2011, and that the exercise of the r 36.16(2)(b) power depended upon that application having been made (and, indeed, upon Hammerschlag J's order having already been made), it follows that the Variation Order falls within the scope of an order which is made "on" that application. It was not in its own right an "order" of the kind described by s 588FF(3)(b). Rather, the relevant "order" which was made "on" the "application" was Hammerschlag J's order, *as varied*.

"Single determinate extension of time"

64. Also central to the appellants' submissions (and to Beazley P's dissent) is the proposition, based upon *BP Australia Ltd v Brown*,[68] that s 588FF(3) "is a comprehensive provision for extension of time".[69] It is in light of that proposition, together with general invocations of "a need for certainty and finality",[70] that the appellants cite Spigelman CJ's reference to a "single determinate extension of time".[71] JP Morgan, in particular, says that the latter expression means that the extension must be "finally determined" or "fixed and definitely limited".[72] This appears to be the appellants' only answer to the point made above that the discretionary power at issue here was to be exercised judicially.

65 (2008) 67 ACSR 356 at [49]; 219 FLR 329 at 336.

66 AB288-289 [170], [173] (Gleeson JA); see also AB284 [155], [157] (Macfarlan JA).

67 (2003) 58 NSWLR 322 at 352 [160] (and 355 [176]: relying on s 1322(4)(d) was "unnecessary").

68 (2003) 58 NSWLR 322 ("*BP*").

69 See GS submissions para 40; AB262 [84] (Beazley P).

70 JPM submissions para 26.

71 *BP* (2003) 58 NSWLR 322 at 346.

72 JPM submissions para 29.

65. The first difficulty with this argument is that the appellants take the various expressions in *BP* out of context. *BP* was not concerned with any question of how s 588FF is to be construed to determine whether it "otherwise provides" for the purposes of determining whether rules of Court are picked up by s 79. Rather, the question was how to reconcile s 588FF with s 1322(4)(d) of the *Corporations Act*.[73] In that case, s 1322(4)(d) had been relied upon to extend the three-year period, in circumstances where a s 588FF(3)(b) application was thought to be unavailable after an order previously made was set aside.[74]

66. It was in that context – a separate extension of time power being relied on as a true alternative to s 588FF(3)(b) – that his Honour described the latter as being "comprehensive". Section 1322(4)(d) does not have to be invoked in the course of existing proceedings in relation to an order already made by a Court (which r 36.16(2)(b) does, by its very terms). Thus, *BP* says nothing about whether adjectival variation powers in rules of court may be invoked within a proceeding under s 588FF(3)(b) which was brought within time.

67. In the course of construing s 588FF(3) so as to address the s 1322(4)(d) issue, Spigelman CJ properly considered the whole context of Pt 5.7B. His Honour gave particular attention to the "disparate pre-liquidation transactions referred to in Pt 5.7B".[75] The five classes of transaction to which his Honour pointed[76] were each subject to different time limits under s 588FE. His Honour noted that, although "the relevant *pre-liquidation* time periods vary from one category of voidable transaction to another", under s 588FF(3) "a **single** *post-liquidation* time period for bringing proceedings was adopted".[77]

68. His Honour went on to consider the general policy underlying Pt 5.7B and in particular the prescription of a time period in s 588FF(3). The objective of s 588FF(3)(b) was that those who are interested in disturbing transactions "must indicate, within three years, whether they wish to keep open the option of doing so",[78] for the sake of commercial certainty. In light of that policy, s 588FF(3)(b) would not allow an extension to be granted which did not specify a date on which the period ends, i.e. without a "**determinate** ... period" being prescribed.[79]

69. That was the context in which Spigelman CJ made the statement upon which the appellants place such weight: "Parliament has identified a reasonable time for such matters [investigating and bringing s 588FF(1) proceedings] to occur, subject to a **single determinate** extension of time".

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[73] Cf *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia* (1932) 47 CLR 1 at 7, cited by Spigelman CJ, (2003) 58 NSWLR 322 at 331 [42]. See AB285-286 [161] (Macfarlan JA).

[74] See *BP* (2003) 58 NSWLR 322 at 326 [9], 331 [40], 355 [176]. See further para 62 above.

[75] (2003) 58 NSWLR 322 at 342 [96].

[76] (2003) 58 NSWLR 322 at 343 [99].

[77] (2003) 58 NSWLR 322 at 343 [103] (emphases in bold and italics added).

[78] (2003) 58 NSWLR 322 at 345 [115].

[79] (2003) 58 NSWLR 322 at 346 [118] (emphasis added).

70. Those words do not mean (as the appellants would have it) that only once may a Court make any decision which has the effect of extending the "period", nor that, once made, the order is fixed for all time. Rather, they mean only that the same general time limit applies equally to all kinds of voidable transactions, and that extension orders must prescribe a date (rather than, say, a contingent event) on which the extended "period" ends.

71. The appellants' argument involves seeking to read into the text of s 588FF a selection of words from a Court of Appeal judgment, then giving those words a construction which disregards their context in Spigelman CJ's reasons. Moreover, the fact that this Court quoted a passage from *BP* which includes the reference to a "single determinate extension of time" does not amount to "endorsing" the appellants' interpretation of that particular phrase.[80] Rather, the Court endorsed more generally Spigelman CJ's observations about the purposes served by the various provisions with which the Harmer Report was concerned, including s 588FF as a whole. That was done for the purpose, again, of showing that s 588FF was concerned not with procedure, but with substantive rights. The expression "single determinate extension of time" had no special role to play in making that point.

The relevance of *Greig v Stramit Corporation Ltd*[81]

72. JP Morgan contends that the majority's reasoning was inconsistent with a Queensland Court of Appeal decision in which it was said that "any general power of amendment ... would not permit the making of an amendment which effectively (though not in express terms) extended the time limited in s.588FF(3)".[82]

73. Yet again, this quote is taken out of context. What was at issue in that case was a discrete power of amendment, as such. What is at issue in this case is a re-opening or variation power. In *Greig*, the amendment power was exercised so as to add a new party, and thus enable the belated commencement of proceedings against that party. Here, the power in r 36.16 was exercised within proceedings that had been commenced in time, in a way which is not taken – for the purposes of either s 588FF(3)(b) or the rules of Court – to be the commencement of new proceedings. JP Morgan's submission is inconsistent with the fact that such distinctions ought to be drawn, as recognized in *Greig* itself.[83] For those reasons, *Greig* is to be distinguished, and JP Morgan's submission should not be accepted.

80 JPM submissions paras 26, 32, 34(b), 39; cf GS submissions para 41.

81 [2004] 2 Qd R 17 ("*Greig*").

82 *Greig* [2004] 2 Qd R 17 at [89]-[90], [126]; JPM submissions paras 48-51.

83 *Greig* [2004] 2 Qd R 17 at [88] per Williams JA; *Davies v Chicago Boot Company Pty Ltd (No 2)* (2007) 96 SASR 164, especially at [39] and [49] per Gray, Sulan and Anderson JJ; see also *Re Norman Nominees Pty Ltd (in liq) v Zervos Pty Ltd* [2011] QSC 320 per Dalton J.

Conclusion

74. The decision of the majority of the Court of Appeal was based upon a correct analysis of the construction of s 588FF for the purposes of applying s 79 of the *Judiciary Act*. It was consistent with *Gordon v Tolcher* and other authorities.

75. The correct answer to the core question of construction is, as Gleeson JA held in the Court of Appeal, that an "application" under s 588FF(3)(b) refers to the process which commenced the proceedings by which the liquidators seek an "order" for a "longer period". When that construction is given to s 588FF(3), it follows that the ambit of r 36.16(2)(b) is not so reduced as to exclude the
10 power to vary an order already made.

76. This is a construction which is neither surprising nor undesirable. It advances the legislative object that the period of time ultimately fixed by the Court on an application under s 588FF(3)(b) should be one which is useful and appropriate to achieve the end for which the power in paragraph (b) was conferred. It also preserves the proper scope of the judicial discretion conferred by s 588FF(3)(b), consistently with the principles respecting the construction of discretionary judicial powers.

77. Once that construction is accepted, it follows that the Variation Order was relevantly made "on" an "application" made under s 588FF(3)(b) within the
20 s 588FF(3)(a) period, because the relevant "application" was the proceedings instituted by the originating process filed by the liquidators on 10 May 2011, and the "order" which was made "on" that application was the order of Hammerschlag J as varied by the Variation Order.

78. Those conclusions warrant the dismissal of each appeal with costs.

PART VIII: ORAL ARGUMENT

79. It is estimated that one and a half hours will be required for presentation of oral argument on behalf of the respondents.

Dated 10 October 2014

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