

**GRANT SAMUEL CORPORATE FINANCE PTY LTD v FLETCHER & ORS**  
**(S228/2014)**  
**JPMORGAN CHASE BANK, NATIONAL ASSOCIATION & ANOR v FLETCHER & ORS (S229/2014)**

Court appealed from: New South Wales Court of Appeal  
[2014] NSWCA 31

Date of judgment: 28 February 2014

Special leave granted: 15 August 2014

In the liquidation of the companies Octaviar Ltd and Octaviar Administration Pty Ltd, any application under s 588FF(1) of the *Corporations Act* 2001 (Cth) (“the Act”) in respect of voidable transactions was to be made before 4 June 2011. That time limit, of three years from the “relation-back day”, was imposed by s 588FF(3)(a) of the Act. Section 588FF(3)(b) provided that an application in respect of voidable transactions could be made “*within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period.*”

Upon an application by the liquidators (“the Extension Application”), on 30 May 2011 Justice Hammerschlag made an order (“the Extension Order”) under s 588FF(3)(b) of the Act extending time for the making of any application under s 588FF(1) to 3 October 2011. That was done in the absence of the Applicants, who would each be affected by the order.

After circumstances then arose that would prevent them from applying under s 588FF(1) of the Act before 3 October 2011, the liquidators applied to further extend that deadline. They did so under r 36.16(2)(b) of the *Uniform Civil Procedure Rules* 2005 (NSW) (“UCPR”), which permitted the variation of an entered order that had been made in the absence of a party (or a sufficiently affected third party). On 19 September 2011 Justice Ward ordered that the Extension Order be varied by the insertion of “3 April 2012” in lieu of “3 October 2011” (“the Variation Order”).

The Applicants each applied to have the Variation Order set aside, partly on the basis that it could not be validly made under UCPR r 36.16(2)(b) in the face of s 588FF(3) of the Act. On 8 February 2013 Justice Black dismissed the Applicants’ applications, holding that the Variation Order had been validly made. His Honour found that when considering the time requirement of s 588FF(3)(b), the only relevant application was the Extension Application, which had been made within the three-year limit set by s 588FF(3)(a).

The Applicants then appealed (in two separate appeals).

On 28 February 2014 the Court of Appeal (Macfarlan & Gleeson JJA; Beazley P dissenting) dismissed both appeals. The majority held that the determination of an extension application under s 588FF(3)(b) was subject to revival through rules of court such as UCPR r 36.16(2)(b). Their Honours then held that the Variation Order was valid, as it stemmed from the Extension Application and therefore had been made “on an application” within the meaning of s 588FF(3)(b). The President however held that the liquidators’ application under UCPR r 36.16(2)(b) was in effect a new application to extend time, as it required a decision based on facts that had not been considered in the Extension Application. Her Honour therefore found the Variation Order invalid, as the application for it had been made outside the time limit imposed by s 588FF(3)(b) of the Act.

In appeal S228/2014, the grounds of appeal include:

- The Court of Appeal erred in finding that rule 36.16(2)(b) of the UCPR was “picked up” by s 79 of the *Judiciary Act* 1903 (Cth) to the extent that it permits the further extension of the three year period specified in s 588FF(3)(a) of the Act by an order varying an earlier valid extension in circumstances where the application for such variation is made on a date after the expiry of the original three year period, notwithstanding the terms of s 588FF(3)(b) of the Act and s 79 of the *Judiciary Act* 1903 (Cth).

In appeal S229/2014, the grounds of appeal include:

- The majority of the Court of Appeal erred in finding that the Variation Order:
  - a) which was made pursuant to rule 36.16(2)(b) of the UCPR, after the end of the period specified in s 588FF(3)(a) of the Act, and
  - b) which varied the time period that had previously been ordered on an application made under s 588FF(3)(b) of the Act,was an order which was made “on an application” under s 588FF(3)(b) within the meaning of that paragraph of the Act.