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

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

HIGH COURT OF AUSTRALIA
FILED
19 SEP 2014
THE REGISTRY SYDNEY

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

OCTAVIAR ADMINISTRATION PTY LIMITED (IN LIQUIDATION)
Third Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. The Appellant certifies that these submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The ultimate issue is whether proceedings were validly commenced on 21 March 2012 by the Respondents pursuant to s. 588FF(1)(a) of the *Corporations Act 2001 (Cth)* for an order that the Appellant pay an amount equal to the money paid to it by the Second Respondent on 19 March 2008 pursuant to a transaction alleged to be voidable as an unfair preference under s. 588FE(2).

3. That question depends on whether it was open to the Supreme Court to exercise its power under rule 36.16(2)(b) of the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") to vary an extension order made under s. 588FF(3)(b) of the *Corporations Act* in circumstances where the application for such variation was made on a date after the expiry of the original three year period prescribed by s. 588FF(3)(a).

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4. More specifically, the issue raised is whether, as applied in the circumstances of this case, rule 36.16(2)(b) was given force (or "picked up") by s. 79 of the *Judiciary Act 1903* (Cth): see appeal grounds 1 and 2.

5. A secondary issue is whether the application to vary an extension order validly made under s. 588FF(3)(b) is properly characterised as a fresh application under s. 588FF(3)(b): see appeal ground 3.

Part III: Section 78B, *Judiciary Act 1903* (Cth)

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6. The Appellant has considered whether notice pursuant to s. 78B of the *Judiciary Act* should be given, but does not believe this to be necessary.

Part IV: Citations

7. The decision of the primary judge (Black J) is reported at *Re Octaviar Ltd (receivers and managers appointed) (in liq)* (2013) 272 FLR 398, 93 ACSR 316, [2013] NSWSC 62 ("PJ").

20 8. The decision of the Court of Appeal (Macfarlan and Gleeson JJA; Beazley P dissenting) is reported at *JPMorgan Chase Bank, National Association v Fletcher* (2014) 284 FLR 357, 306 ALR 224, 97 ACSR 638, [2014] NSWCA 31 ("CA").

Part V: Facts

9. In early 2008 there occurred a transaction by which the First Respondents allege that the Appellant received an unfair preference from the Second Respondent ("Octaviar").

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10. On 4 June 2008, the Public Trustee of Queensland commenced winding up proceedings in the Supreme Court of Queensland against Octaviar.[1] An order for the winding up of Octaviar was subsequently made. The "relation-back day" in relation to the winding up of Octaviar, within the meaning of s. 588FF(3) of the *Corporations Act*, was therefore the date of the winding-up application, 4 June 2008.[2]

11. Section 588FF(3) provides:

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> *(3) 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 made under this paragraph made by the liquidator during the paragraph (a) period.*

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[1] *Re Octaviar Ltd (No. 8)* [2009] QSC 202 at [16]; confirmed in *Re Octaviar Ltd (No. 8)* [2010] QCA 45.
[2] CA[5] and see s 9 definition of "relation-back day" and s 513A(e).

12. By reason of s. 588FF(3)(a) of the *Corporations Act*, and subject to any extension of time under s. 588FF(3)(b), any application in respect of Octaviar under s. 588FF(1) had to be commenced by 4 June 2011.[3]

13. On 10 May 2011, the Respondents filed an "Originating Process" in proceedings 2011/153330. By that application, the Respondents sought an *ex parte* order under s. 588FF(3)(b) of the *Corporations Act* extending the time for making an application under s. 588FF(1) to 3 October 2011.

14. On 30 May 2011, Hammerschlag J granted the extension of time sought in the originating process.[4] The Appellant was not represented before the Court when the orders were made.[5]

15. On 4 June 2011, the period within which any application under s. 588FF(3)(b) could be made expired (i.e. the 3 year period prescribed by s. 588FF(3)(a)).

16. On 8 September 2011 the Respondents' solicitors notified the Appellant that the Respondents intended to make an application, pursuant to s. 588FF(3)(b), for orders further extending, to 3 April 2012, the time by which any application under s. 588FF(1) could be brought.[6]

17. On 19 September 2011, the Respondents filed two forms of process. One was an "amended originating process", the other an "interlocutory process".[7] Both processes sought to invoke the Court's power under s. 588FF(3)(b) of the *Corporations Act* and, alternatively, rule 36.16(2)(b) of the UCPR. The form of orders sought in the two processes were identical.[8] Relevantly, the Respondents sought:

    a. An order that the time for the making of any s. 588FF(1) application in respect of Octaviar be further extended to 3 April 2012; and

    b. An order that the extension order previously made by Hammerschlag J be varied to insert in lieu of "3 October 2011" the date "3 April 2012".

18. The Respondents filed further affidavit material in support of this application, setting out the work that had been done since the original extension order made by Hammerschlag J and the reasons why a longer period of time was now sought.[9]

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[3] CA[5].
[4] CA[15].
[5] Ibid.
[6] PJ[5].
[7] CA[17].
[8] CA[18].
[9] PJ[14].

19. On 19 September 2011, the Respondents' application was heard by Ward J.[10] The Appellant did not appear at the hearing.[11] Ultimately, the Respondents did not press their application for a further extension under s. 588FF(3)(b) of the *Corporations Act* as the time for making an application under that provision had already expired.[12]

20. However, Ward J did make an order under rule 36.16(2)(b) of the UCPR in the terms sought, thus substituting the date "3 April 2012" for the date "3 October 2011" (the "Variation Order").[13] The purported effect of the Variation Order was to extend the period within which any s. 588FF(1) application in respect of Octaviar had to be brought by a further six months beyond the date which had been set by Hammerschlag J.

21. Rule 36.16(2)(b) is in the following terms:

> *(2) The court may set aside or 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, ...*

22. On 21 March 2012 the First Respondents filed a s. 588FF(1)(a) application against the Appellant for the recovery of an alleged unfair preference transaction payment. The application was made outside the period originally specified by Hammerschlag J, but within the time as provided for by the Variation Order.[14]

23. On 30 August 2012, the Appellant (and the appellants in the related proceedings) filed an "interlocutory application" seeking to set aside the Variation Order.[15]

The interlocutory application was heard by Black J on 7 December 2012, and was dismissed by his Honour on 8 February 2013.[16] Relevantly, Black J held that the application of rule 36.16(2)(b) was not inconsistent with s. 588FF(3) and therefore rejected the Appellant's argument that the rule was not "picked up" by s. 79 of the *Judiciary Act.*[17]

24. The New South Wales Court of Appeal granted the Appellant leave to appeal from the decision of Black J, however a majority of the Court upheld the decision of the primary judge and dismissed the appeal. Macfarlan and Gleeson JJA both held that Ward J had the power under rule 36.16(2)(b) to make the Variation Order because it was a procedural rule which was "picked up" by s. 79.[18] In dissent, the President was of the view that the

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[10] PJ[7].
[11] PJ[6]; CA[19].
[12] PJ[6].
[13] CA[22]-[23].
[14] CA[7]; PJ[11].
[15] PJ[13]; CA[24]
[16] PJ[54]; CA[24].
[17] PJ[49]-[50].
[18] CA[145]-[150] *per* Macfarlan JA and CA[171]-[173] *per* Gleeson JA.

application on 19 September 2011 to vary the original time for extension was in substance a further application to extend time and inconsistent with s. 588FF(3).[19] That is to say, the President found that rule 36.16(2)(b) did not operate in this instance because a law of the Commonwealth, namely s 588FF(3), "otherwise provided" within the meaning of s 79.

25. On 21 July 2014, the Supreme Court (Brereton J) granted leave under s. 471B for the Appellant to proceed with this appeal (including the application for special leave).

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26. This Court (French CJ and Bell J) granted special leave to appeal on 15 August 2014.

Part VI: Argument

(a) Outline

27. The reasoning of the majority of the Court of Appeal involved two aspects.

20 28. First, once the application under s. 588FF(3)(b) was filed, it was subject to the procedures of the Court in which the application was filed, including rule 36.16(2)(b).[20] Such procedures were, it was held, "picked up" by s. 79 of the *Judiciary Act.*

29. Secondly, the application before Ward J which led to the Variation Order was properly characterised as a continuation of the original application under s. 588FF(3)(b) considered and determined by Hammerschlag J.[21] In this sense, the Court held that the original application for an extension of time was and remained the "operative" application.[22]

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30. In short, even assuming the original application for an extension of time remained the operative application, the process of reasoning of the majority involved no consideration of whether the substantive effect of the application of rule 36.16(2)(b) in these particular circumstances was inconsistent with s. 588FF(3)(b) and was not "picked up" by s. 79 because s. 588FF(3)(b) "otherwise provided". Rather the approach was to treat the question as binary such that the rule had to be either procedural or substantive and, once determined to be procedural, any substantive effect could be ignored.

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31. By contrast, the President correctly appreciated that the relevant question under s. 79 was whether s. 588FF(3) "otherwise provided" to preclude the rule from having the substantive effect it had in this case, namely an extension of time being made as a matter of substance outside the s.

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[19] CA[89]-[93]
[20] CA[154]-[155] and CA[160] *per* Macfarlan JA and CA[171] *per* Gleeson JA.
[21] CA[155] and CA[160] *per* Macfarlan JA and CA[173] *per* Gleeson JA. Beasley P, at CA[85], agreed that the relevant application under s. 588FF(3)(b) in this matter was the original application considered by Hammerschlag J; *cf.* PJ[41].
[22] *cf.* PJ[38].

588FF(3)(a) period. The President correctly determined that the rule was not picked up by s. 79 to the extent that it had that substantive effect.[23]

32. These issues are dealt with below.

(b) The substantive nature of the further application

33. The application of rule 36.16(2)(b) in this case was, in every sense, equivalent to the grant of a fresh extension. The application for the extension order:

a. sought an order that had not been previously sought (i.e. an extension to 3 April 2012);
b. it relied on evidence that was not before Hammerschlag J[24]; and
c. was a substantive application in that it called on the Court to exercise afresh a discretion to grant a further extension.

34. The application before Ward J sought a new and different order to that sought before Hammerschlag J.[25] The only order sought in the application before Hammerschlag J had already been made. There was no incomplete or pending application under s. 588FF(3). The orders made by Hammerschlag J disposed of all of the issues raised by that application.[26]

35. There was no suggested invalidity of the order of Hammerschlag J up to and including the making of the Variation Order. Only one of two things occurred on 30 September 2011 when the Variation Order was made: either the original order was left intact but further extended until 3 April 2012 or the original order was set aside and a new order made until 3 April 2012. On either view what occurred as a matter of substance was an extension on an application made outside the original three year period.

36. It may also be noted that the power under rule 36.16(2)(b) only arises where a party was not present when the original order under s. 588FF(3)(b) was made. If correct, the reasoning of the majority of the Court of Appeal affords an incentive for liquidators to approach the Court *ex parte* and without notice to affected parties when seeking an order under s. 588FF(3)(b), with the object of leaving open the possibility of multiple extensions of time outside the s. 588FF(3)(a) period under the guise of rule 36.16(2)(b).

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[23] CA[92]
[24] CA[90] *per* Beazley P.
[25] *Onefone Australia Pty Ltd v One Tel Ltd* (2007) 61 ACSR 429 at 437-438 [35]-[37] *per* Barrett J
[26] See *Greig v Stramit Corporation Pty Ltd* [2004] 2 Qd R 17 at 35 [71], 36 [78]-[81] *per* Williams JA and at 43 [113], 44-45 [116]-[117] *per* Gerrard JA; *contra BP Australia Ltd v Brown* (2003) 58 NSWLR 322 at 359-360 [206]-[209] *per* Spigelman CJ.

(c) *Assuming rule 36.16(2)(b) is otherwise applicable, is it given force by the operation of s. 79 of the* Judiciary Act*?*

(i) The proper construction of s. 588FF(3) of the Corporations Act

37. In order to determine whether r. 36.16(2)(b) of the UCPR is "picked up" by s. 79, it is first necessary to consider the proper construction of s. 588FF, and especially s. 588FF(3). Only then can it be determined whether the application of r 36.16(2)(b) to this case can be reconciled with s. 588FF.

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38. Three propositions emerge when the construction of s. 588FF(3) is considered.

39. First, the time stipulation in s. 588FF(3) is an "element of the right" to relief created by s. 588FF(1) and is "an essential aspect of the regime" that s. 588FF creates.[27] Compliance with s. 588FF is thus a "jurisdictional requirement".[28] This is consistent with the inflexible language employed by s. 588FF(3)(b): an application under s. 588FF(1) "may ***only*** be made ... within such longer period as the Court orders on an application under this
20 paragraph made ... during the paragraph (a) period".[29]

40. Secondly, s. 588FF(3)(b) is exhaustive. The sub-section "is a comprehensive provision for extension of time" which is intended to "cover the field" of extensions of time with respect to s. 588FF(1) applications.[30] It precludes, for example, the exercise of the general power to extend the time "for doing any act, matter or thing or instituting or taking any proceedings" conferred by s. 1322(4)(d) of the Corporations Act.[31]

41. Thirdly, s. 588FF(3) manifests a requirement for certainty in the conduct of
30 commercial affairs.[32] In *Gordon v Tolcher*, this Court endorsed the following statement of Spigelman CJ in *BP Australia Ltd v Brown*[33]:

> *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 they do wish to do so within the*

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[27] *Gordon v Tolcher* (2006) 231 CLR 334 at 347 [36]-[37], 348 [40]. At 347 [37] (footnote 25), the High Court cited decisions considering analogous statutory provisions; *Rudolphy v Lightfoot* (1999) 197 CLR 500 at 507-508 [11]-[12]; *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 268-269 [51], 270 [54].

[28] See *Rudolphy v Lightfoot* (1999) 197 CLR 500 at 508 [12]; *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 270 [59]; *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 277.

[29] Emphasis added.

[30] *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 at 341 [85], 341 [89], 347 [129]. It may be accepted that the doctrine known as "covering the field" applicable to inconsistency under s. 109 of the Commonwealth Constitution is not directly applicable to determining whether a state law is "picked up" for the purposes of s. 79 of the *Judiciary Act*: see *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136 at 144 [17]. For reasons set out below, in the circumstances of this case, rule 36.16(2)(b) is irreconcilable with s. 588FF(3)(b) and therefore not "picked up" by s. 79.

[31] *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 at 326 [9]-[12], 331-333 [40]-[49], 340-341 [77]-[87], 341 [89], 347 [129].

[32] *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 at 345-346 [112]-[119].

[33] (2003) 58 NSWLR 322 at 344-346 *per* Spigelman CJ, cited in *Gordon v Tolcher* (2006) 231 CLR 334 at 347-348 [37]-[40].

> *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. Parliament has identified a reasonable time for such matters to occur, subject to a single determinate extension of time*** (emphasis added).[34]

42. That the purpose of s. 588FF(3) is to achieve certainty is confirmed by reference to extrinsic material, in particular the Australian Law Reform Commission's *Report No. 45 General Insolvency Inquiry*.[35] In respect of the proposed s. 588FF(3), the ALRC said:

> *Actions by a liquidator to recover the proceeds of a void execution, a preference, a transaction at an undervalue or a transaction with intent to defeat should be commenced within a reasonable time. The Commission proposed in DP 32 (para 454) that a liquidator should have three years to commence such an action, although the court might extend that time. Under the existing law the time period would be six years (for example,* Bankruptcy Act *s 127). Many submissions to the Commission complained about the sometimes inordinate delay in commencing proceedings in respect of voidable transactions. In addition, there have been recent judicial observations critical of the general delays associated with the winding up of insolvent companies. It is therefore considered desirable to place liquidators under a more rigorous but, nonetheless, reasonable time limitation for taking action under these provisions. The Commission recommends accordingly.*

(ii) The operation of s. 79 of the Judiciary Act in this case

43. Having noted the three pertinent matters relevant to the construction of s. 588FF(3), it is possible to consider the application of s. 79 of the *Judiciary Act.*

44. Whether a law of a state will be "picked up" as a surrogate Federal law by operation of s. 79 depends on whether or not the state law can be reconciled with the Constitution and other Commonwealth laws.[36] A state law will be irreconcilable with a Commonwealth law where the state law reduces "the ambit of"[37] or "derogates from"[38] the Commonwealth law, or where the Commonwealth law leaves "no room" for the operation of the state law.[39]

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[34] (2003) 58 NSWLR 322 at 346, [118] *per* Spigelman CJ.
[35] Australian Government Publishing Service (Canberra; 1988) (the "Harmer Report"). It is permissible to have regard to the Harmer Report for the purposes of interpreting s. 588FF in order confirm the ordinary meaning of the provision taking into account the purpose or object underlying the *Corporations Act*: see s. 15AB(1)(a) of the *Acts Interpretation Act 1901* (Cth).
[36] *Northern Territory v GPAO* (1999) 196 CLR 553 at 587-9 [81] and 606 [135].
[37] *Northern Territory v GPAO* (1999) 196 CLR 553 at 588 [81].
[38] *Macleod v Australian Securities and Investments Commission* (2002) 211 CLR 287 at 296 [22].
[39] *Northern Territory v GPAO* (1999) 196 CLR 553 at 589 [84].

45. The Supreme Court was vested with jurisdiction to determine an application under s. 588FF(3)(b) by s. 1337B(2) of the *Corporations Act.* The majority in the Court of Appeal held that once the application under s. 588FF(3)(b) was filed, it was subject to the procedures of the court in which it was filed, including rule 36.16(2)(b).[40] The majority expressly relied upon the decision of this Court in *Gordon v Tolcher* in support of this conclusion.[41]

46. The approach of the majority in the Court of Appeal fails to engage with the question of whether, in the circumstances of this case, rule 36.16(2)(b) can be reconciled with s. 588FF(3). Instead, under the approach of the majority, upon the jurisdiction of the Court being invoked by an application under s. 588FF(3), the UCPR (including rule 36.16(2)(b)) simply applies as a matter of course. The error in this approach can be seen once regard is had to the three matters relating to s. 588FF(3) identified in paragraphs 39-41 above.

47. First, the exercise of power under rule 36.16(2)(b) in this case had the effect of circumventing the essential stipulation in s. 588FF(3). Section 588FF(3) stipulates an essential precondition to the exercise of the Court's jurisdiction that cannot be reconciled with the application of rule 36.16(2)(b) in this case.

48. Secondly, the use of rule 36.16(2)(b) in this context derogates from the position of s. 588FF(3) as the exhaustive statement of the Court's power to grant an extension of time. This is a case where the general power in rule 36.16(2)(b) has been used to achieve an outcome which was not available under the specific power in s. 588FF(3). As a matter of statutory construction, the enactment of s. 588FF(3) appointing a course to be followed for the granting of an extension of time should be understood as restricting that same thing being done by some other, less direct, course.[42] True it is that this principle is ordinarily applied where a single enactment contains both a specific power and a general power. However, there is no reason why the principle should be limited to such situations. It has, for example, been applied to prevent the use of a general power of amendment in the *Supreme Court of Queensland Act 1991* (Qld) to join a party to proceedings outside the period specified by s. 588FF(3).[43]

49. Thirdly, the approach of the Court of Appeal contradicts both the specific requirement for a "single determinative extension" and the general imperative for certainty. The decision below gives liquidators a potentially limitless period of time within which to seek a "longer period" to file an application under s. 588FF(1), provided that they make an *ex parte* application within the s. 588FF(3)(a) period.

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[40] CA[154]-[155] and CA[160] *per* Macfarlan JA and CA[171] *per* Gleeson JA.
[41] Ibid.
[42] *R v Wallis* ("the *Wool Stores Case*") (1949) 78 CLR 529 at 550 per Dixon J; *Plaintiff S4-2014 v Minister for Immigration and Border Protection* [2014] HCA 34 at [43]; see also *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566.
[43] *Greig v Stramit Corporation Pty Ltd* [2004] 2 Qd R 17 at 38 [89]-[90] and 47 [126].

50. Moreover, on the approach adopted, liquidators will be permitted to apply, indefinitely, for successive extensions to the period within which applications under s. 588FF(1) must be made. This is inconsistent with Parliament's manifest intention to provide certainty in the conduct of commercial affairs.[44] It is not to the point that the risk of indeterminate liability or repeated unmeritorious applications might be ameliorated by the exercise of the discretion conferred by rule 36.16(2)(b).[45] Section 588FF(3) does not contemplate the grant of extensions outside the period subject to a court exercised discretion.

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51. It is no answer to say, as the majority held, that this case does not involve multiple applications under s. 588FF(3)(b), but rather involved the re-agitation by means of rule 36.16(2)(b) of an application that remained on foot.[46] As Beazley P noted, any such re-agitation requires the Court to consider new evidence and exercise its discretion afresh.[47] More fundamentally, any rule of Court which allows the essential precondition in s. 588FF(3) to be circumvented is inconsistent with that sub-section and cannot be "picked up" by s. 79 of the *Judiciary Act.*[48]

20 52. Nor does analogy with the "slip rule" or a right of appeal assist the Respondents.[49] Neither example involves the Court, in either substance or in form, considering a new application for an extension of time.[50] Instead, in those circumstances, the same application (made within the time allowed by s. 588FF(3)) is the subject of the Court's consideration. Further, an amendment pursuant to the "slip rule" does not circumvent the requirements of s. 588FF(3), it simply allows the Court to correct an order which was not intended. In doing so, the Court in fact promotes certainty by, for example, correcting obvious errors. Similarly, an appeal from the rejection of an application under s. 588FF(3)(b) does not upset any
30 requirement for commercial certainty. The right of appeal is part of the ordinary conduct of litigation. An appeal does not ordinarily involve the receipt of fresh evidence or, in the absence of demonstrated error, the re-exercise of a discretionary power. A process of appeal also promotes certainty by ensuring consistent application of legal principle.

53. The Appellant does not need to go so far as to submit that rule 36.16(2)(b) can never be applied in cases where an application is made under s. 588FF(3)(b). Rather, the question in this case is whether s. 588FF(3)(b) excludes the operation of rule 36.16(2)(b) in circumstances where the effect
40 of an order under rule 36.16(2)(b) would be to allow an extension that would not be permissible under s. 588FF(3)(b) itself. Thus, in proceedings in federal jurisdiction a state law may be "picked up" by s. 79 of the *Judiciary Act* for some purposes and yet not available where its application would be

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[44] *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 at 345-346 [112]-[119], 347 [129].
[45] PJ[40].
[46] CA[160].
[47] CA[90]-[92].
[48] *Rudolphy v Lightfoot* (1999) 197 CLR 500 at 507-508 [11]-[12]; *Ag-Track (NT) Pty Ltd v Hatfield* (223 CLR 251 at 270-271 [59]-[60].
[49] CA[156]-[157].
[50] CA[90]-[92].

inconsistent with a federal law.[51] The state law will only operate as a surrogate federal law to the extent it is consistent with an actual law of the Commonwealth. This is not inconsistent with principle. It is one thing to say that a state law cannot be "picked up" if to do so would alter the meaning of the state law[52] and a different thing to say the law is only "picked up" to the extent that it is not irreconcilable with a Commonwealth law.

(iii) *The decision in* Gordon v Tolcher

54. Contrary to the reasoning of the trial judge[53] and the majority of the Court of Appeal[54], the decision in *Gordon v Tolcher*[55] provides no support for the conclusion that rule 36.16(2)(b) was available in the circumstances of this case.

55. In *Gordon v Tolcher* an application under s. 588FF(1) was made within three years of the relation-back day.[56] Subsequently, pursuant to certain rules of the District Court of New South Wales, the application was "taken to be dismissed" for want of service.[57] Relying on other District Court rules, the plaintiffs sought to have the deemed dismissal rescinded and the time for service of the statement of claim extended[58].

56. Unlike this case, the court in *Gordon v Tolcher* was not asked to extend the time period within which s. 588FF(1) applications might be made.[59] Rather, *Gordon v Tolcher* was a simple case of one procedural rule (relating to deemed dismissal) being qualified by another procedural rule (relating to the reinstatement of proceedings deemed by the rules to have been dismissed). There was therefore no interference with the essential stipulations for the making of a competent application under s. 588FF(1).[60] In this case, by way of contrast, the exercise of power under rule 36.16(2)(b) has been used to bypass the stipulation in s. 588FF(3).[61]

57. True it is that in *Gordon v Tolcher* this Court said that s. 588FF does not stipulate any particular procedures to be adopted by a Court invested with jurisdiction.[62] However, contrary to the reasoning of the majority[63], this

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[51] See, by way of comparison, *Air Link Pty Ltd v Paterson* (2005) 223 CLR 283 at 295, [11] and 296 where the Court held that a state law authorising an amendment adding a fresh cause of action could be exercised within a limitation period prescribed by a Commonwealth law, but not outside the limitation period. See also *Greig v Stramit Corporation Pty Ltd* [2004] 2 Qd R 17 at 38 [89]-[90] and 47 [126].
[52] *Pedersen v Young* (1964) 110 CLR 162 at 165.
[53] PJ[40]-[41] and [49].
[54] CA[154]-[155]; [171].
[55] *Gordon v Tolcher* (2006) 231 CLR 334.
[56] Ibid at 343 [17].
[57] Ibid at 343 [18]-[19].
[58] Ibid.
[59] Indeed, the District Court would have had no jurisdiction to entertain an application for an extension under s. 588FF(3)(b) – see *Gordon v Tolcher* (2006) 231 CLR 334 at 346 [35].
[60] *Gordon v Tolcher* (2006) 231 CLR 334 at 347 [36].
[61] This case is therefore more akin to those cases considering whether a procedural power to amend can be used to extend the period specified in s. 588F(3)(b) – see, e.g., *Greig v Stramit Corporation Pty Ltd* [2004] 2 Qd R 17.
[62] *Gordon v Tolcher* (2006) 231 CLR 334 at 346 [32].
[63] CA[154]-[155] *per* Macfarlan JA and CA[171] *per* Gleeson JA.

statement does not mean that once an application under s. 588FF(3)(b) is filed that all rules of court (including rule 36.16(2)(b)) will apply. Consistently with s. 79 of the *Judiciary Act,* the application of any procedural rule after the institution of an application under s. 588FF(3)(b) is subject to any provision of the *Corporations Act* which "otherwise provides".[64]

58. In this case, for the reasons outlined above, s. 588FF itself "otherwise provides". It is no answer to say that s. 588FF of the *Corporations Act* is concerned with the creation of substantive rights and not the regulation of procedure. Even if this premise is correct, it does not follow that that s. 588FF(3) cannot operate to exclude the application of a state rule of procedure. A procedural rule (e.g. a rule conferring a power of amendment) can be inconsistent with a substantive provision (e.g. a limitation provision extinguishing a cause of action) where the procedural rule reduces "the ambit of"[65] or "derogates from"[66] the state of affairs created by the substantive provision. The decisions of this Court in *Air Link Pty Ltd v Paterson*[67] and *Agtrack (NT) Pty Ltd v Hatfield*[68] are authority for this proposition.

59. Accordingly, this Court's statement in *Gordon v Tolcher* regarding the conduct of litigation being left to the procedures of the relevant court presupposes compliance with the essential stipulation in s. 588FF(3). That stipulation has not been left to the procedures of the relevant court and any procedural rule which derogates from this stipulation is not "picked up" by s. 79 of the *Judiciary Act.*[69]

(d) Was the original application the relevant application?

60. An alternative route to the same ultimate conclusion is that regardless of whether the original application remained the "operative" application, the application before Ward J did not constitute an application within the meaning of s. 588FF(3)(b) within the s. 588FF(3)(a) period as a matter of construction of that section.

61. The Court of Appeal unanimously characterised the application which supported the Variation Order as the same application that supported the original extension order made by Hammerschlag J.[70] This conclusion necessarily assumes that the "applications" (or "processes") before Ward J on 30 September 2011 were not applications for an extension of time under s. 588FF(3)(b) in their own right.

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[64] *Gordon v Tolcher* (2006) 231 CLR 334 at 346 [32] and 348 at [40].
[65] *Northern Territory v GPAO* (1999) 196 CLR 553 at 588, [81].
[66] *Macleod v Australian Securities and Investments Commission* (2002) 211 CLR 287 at 296 [22].
[67] (2005) 223 CLR 283 at 295, [11] and 296, [14] (where it was held that rules of the District Court of New South Wales allowing for the amendment of pleadings could not operate so as to permit a claim to be made under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) at a time when the right to bring such a claim had been extinguished).
[68] (2005) 223 CLR 251 at 270-271 [59]-[60].
[69] *Ag-Track (NT) Pty Ltd v Hatfield* (223 CLR 251 at 270-271 [59]-[60].
[70] CA[85], [149] and [146].

62. This conclusion is doubtful as a matter of form. Both the "amended originating process" and the "interlocutory process" before Ward J, expressly invoked s. 588FF(3)(b) in addition to rule 36.16(2)(b).[71]

63. However, even if this question of form is put to one side, as a matter of substance, the application before Ward J cannot be characterised as the same application that was considered by Hammerschlag J. As noted above, the application considered by Ward J sought a new order, based on new evidence and the fresh exercise of discretion.[72]

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64. Thus, even if the Court of Appeal was correct to find that the original application under s. 588FF(3)(b) remained on foot, it would not assist the Respondents. This is because it would not mean that the claims against the Appellant under s. 588FF(1) were filed "within such longer period as the Court orders on an application under [s. 588FF(3)(b)] made ... during the paragraph (a) period". It is not enough that *an* extension be sought during the paragraph (a) period. Rather, the particular (and hence "determinate") extension must be sought within that period.[73]

20 65. In the present case, the only "longer period" that was the subject of an application under s. 588FF(3)(b) "during the paragraph (a) period" is the period ending on 3 October 2011. No application was made for the "longer period" ending on 3 April 2012 until after the paragraph (a) period. Even if the process before Ward J was a continuation of the original application, the particular extension or "longer period" relied upon by the Respondents was not sought until after the paragraph (a) period expired and, therefore, cannot satisfy the jurisdictional requirement in s. 588FF(3)(b).[74]

Part VII: Legislation

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66. See annexure.

Part VIII: Orders sought

67. The Appellant seeks orders that:

a. The appeal be allowed.

b. Set aside order 2 of the orders made by the Court of Appeal of the
40 Supreme Court of New South Wales on 28 February 2014 and in its place order:

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[71] PJ[6]. See also CA[17]-[18]. It may be accepted however that, at the hearing before Ward J, the respondent's abandoned reliance on s. 588FF(3)(b).
[72] See paragraph 48 above.
[73] *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 at 346 [118] *per* Spigelman CJ, cited in *Gordon v Tolcher* (2006) 231 CLR 334 at 347-348 [37]-[40].
[74] *Onefone Australia Pty Ltd v One Tel Ltd* (2007) 61 ACSR 429 at 437-438 [35]-[37] *per* Barrett J.

i. Set aside orders 1 and 3 made in the proceeding below by Black J on 8 February 2012.

ii. The following order made on 19 September 2011 be set aside:

"That pursuant to Part 36 Rule 16 of the Uniform Civil Procedure Rules 2005 (NSW) the orders made by Hammerschlag J on 30 May 2011 in these proceedings be varied to insert in lieu of '3 October 2011', the date '3 April 2012'".

iii. Proceedings number 2012/90181 commenced by the Respondents against the Appellant be dismissed with costs.

iv. The Respondents pay the Appellant's costs of the appeal and of the proceeding below.

c. The Respondents pay the costs of the appeal to this Court.

Part IX: Estimate of time

68. The Appellant estimates that the presentation of its oral argument will take one hour and thirty minutes.

Dated: 19 September 2014

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Annexure

Relevant legislation

1. The following legislative provisions are relevant to the arguments in this case. The relevant provisions have not been amended since the time of the hearing at first instance before Black J.

2. Section 588FF of the *Corporations Act* provides:

> *(1) Where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE, the court may make one or more of the following orders:*
>
> *(a) an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction;*
>
> *(b) an order directing a person to transfer to the company property that the company has transferred under the transaction;*
>
> *(c) an order requiring a person to pay to the company an amount that, in the court's opinion, fairly represents some or all of the benefits that the person has received because of the transaction;*
>
> *(d) an order requiring a person to transfer to the company property that, in the court's opinion, fairly represents the application of either or both of the following:*
> *(i) money that the company has paid under the transaction;*
> *(ii) proceeds of property that the company has transferred under the transaction;*
>
> *(e) an order releasing or discharging, wholly or partly, a debt incurred, or a security or guarantee given, by the company under or in connection with the transaction;*
>
> *(f) if the transaction is an unfair loan and such a debt, security or guarantee has been assigned--an order directing a person to indemnify the company in respect of some or all of its liability to the assignee;*
>
> *(g) an order providing for the extent to which, and the terms on which, a debt that arose under, or was released or discharged to any extent by or under, the transaction may be proved in a winding up of the company;*
>
> *(h) an order declaring an agreement constituting, forming part of, or relating to, the transaction, or specified provisions of such an*

agreement, to have been void at and after the time when the agreement was made, or at and after a specified later time;

(i) an order varying such an agreement as specified in the order and, if the Court thinks fit, declaring the agreement to have had effect, as so varied, at and after the time when the agreement was made, or at and after a specified later time;

(j) an order declaring such an agreement, or specified provisions of such an agreement, to be unenforceable.

(2) Nothing in subsection (1) limits the generality of anything else in it.

(3) 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.

...

3. Rule 36.16(2) of the UCPR provides:

(2) The court may set aside or 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, or

...

4. Section 79(1) of the *Judiciary Act* provides:

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.