IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S229 of 2014

BETWEEN:

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

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 LTD (IN LIQUIDATION)
First Respondents

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

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

APPELLANTS' REPLY

Filed for: the appellants
Corrs Chambers Westgarth
8-12 Chifley Square
SYDNEY NSW 2000

Telephone: (02) 9210 6537
Fax: (02) 9210 6611
Ref: Andrew Herbert John Korbel

12119762/4

Part I: Internet publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Reply to Respondents' submissions

Decision in Gordon v Tolcher

2. The Respondents contend that "a major premise" of the Court's decision in *Gordon v Tolcher* (2006) 231 CLR 334 (***Gordon v Tolcher***) is that "nothing in s.588FF" makes any provision with respect to the procedure to be adopted in proceedings brought under s.588FF (Respondents' Submissions (**RS**) [37]), with the result that "matters of procedure are simply not addressed by s588FF; and accordingly s.588FF does not 'otherwise provide' for such matters (RS [40]).

3. That contention misses the point. The holding in that case was in fact that the conduct of an application under s.588FF(1) is, "subject to any other relevant provision of the Corporations Act", left for the operation of the procedures of the Court hearing that application (*Gordon v Tolcher* at 348 [40]). One such relevant provision is s.588FF(3).

4. As recognised in RS [39], the Court said in *Gordon v Tolcher* that:
   a. the time limit specified in s.588FF(3) is an "element of the right" under s.588FF(1); and
   b. the time stipulation in s.588FF(3) is an "essential aspect of the regime" of s.588FF;

   and in doing so, quoted and endorsed Spigelman CJ's statement in *BP Australia v Brown* (2003) 58 NSWLR 322 (***BP v Brown***) at 346 that s.588FF(3) provides for a "single determinate extension of time".

5. The Respondents dismiss these as "isolated statements" (RS [39]), which are taken "out of their context", the purpose of those statements in *Gordon v Tolcher* being solely to "illustrate the fact that Pt 5.7B creates rights rather than defines jurisdiction and procedure" (RS [40]). This submission ought be rejected.

6. *Gordon v Tolcher* holds that s.588FF requires that any application in respect of a voidable transaction must be properly made within the defined time period in s.588FF(3)(a), subject to a single determinate extension under s.588FF(3)(b), and a State rule will not be picked up to the extent that it is inconsistent with this essential element of the right created by s.588FF.

7. In that regard, all members of the Court of Appeal agreed that *Gordon v Tolcher* endorsed the proposition in *BP v Brown* that s.588FF(3)(b) is "the sole source of power for an extension of time beyond the three year period specified in s 588FF(3)(a)", and that this provision "comprehensively governs the circumstances in which an application may be made for an extension of time" (at [83]-[84], [149], [166]). Indeed, the Respondents at no time during this litigation have ever submitted that the relevant passage of Spigelman CJ's decision in *BP v Brown*, endorsed in *Gordon v Tolcher*, ought not be followed. No contention to that effect is propounded in this Court, and no notice of a challenge to *Gordon v Tolcher* has been given.

8. The starting point in determining whether the operation of a federal law so reduces the ambit of a State law that the provisions of the former are inconsistent with those of the latter is "the proper construction of the federal provision" (RS [18]). The Respondents acknowledge (RS [33]) that the decision in *Gordon v Tolcher* "was based upon a thorough analysis of the proper construction of s 588FF". Against that background, the Court's statements at paragraph [4] above are not random, isolated statements of marginal importance, taken out of context. Rather, they represent the Court's considered analysis of the proper interpretation of the federal provision in issue.

A single determinate extension of time

9. The Appellants accept that the context of the Court's endorsement of Spigelman CJ's construction of s.588FF(3) is important. That context includes that the quotation of the relevant passage from his Honour's judgment appears immediately before the following statement in *Gordon v Tolcher* (at [40]): "Accordingly, s.588FF is dealing, as an essential aspect of the regime it creates, with the period within which an application must be made". (That sentence is omitted from the Respondents' quotation at RS [36] of that paragraph of the judgment, which is said to articulate its "major premise".) That is, the Court did not treat this passage of Spigelman CJ's judgment as an "isolated statement", but rather endorsed it as a statement of the essential elements of the s.588FF regime, including the requirement that any s.588FF(1) application must be brought within the time period stipulated by s.588FF(3), namely, within the fixed period in s.588FF(3)(a) or within the single determinate extension allowed under s.588FF(3)(b).

10. The use of the word "Accordingly" makes two things clear. First, the Court agreed with Spigelman CJ's analysis; and, secondly, that analysis was an essential step in the Court's reasoning.

11. The Respondents' interpretation of "a single determinate extension of time" seeks to rob the adjectives used in that phrase of their plain meaning. The word "single" is said (at RS [67]) to relate only to the fact that, while there are different pre-liquidation time periods for different categories of voidable transaction, there is a single post-liquidation time period for bringing proceedings under s.588FF(3). As for "determinate", the Respondents submit that this word merely requires that any extension which is granted "specify a date on which the period ends" (RS [68]).

12. These submissions should be rejected, having regard to the context in which the phrase appears. In particular, in the passage leading up to this phrase (*BP v Brown* at 345-346) Spigelman CJ referred to the need for those who wish to make an application under s.588FF(3) to "seek a determinate extension", said that s.588FF(3) "favours certainty" in that a person dealing with the company "will know" the period within which he or she remains at risk, observed that it "must be decided" on a s.588FF(3)(b) application how long the process of deciding to bring a s.588FF(1) application "will take", and said that after the period of a single determinate extension ends any further investigations or pursuit of s.588FF(1) claims "must cease". That is, the words "a single determinate extension of time" refer to the fact that the effect and purpose of s.588FF(3) is that when the specific and determinate "longer period

[ordered] on an application" made under s.588FF(3)(b) comes to an end, no s.588FF(1) application is able to be brought.

13. Finally, in the event the Court finds that the relevant passage from Spigelman CJ's judgment was not endorsed in *Gordon v Tolcher*, and was presented as no more than an "isolated statement" or "illustration" in that case (cf RS [40]), then the Court ought now to conclude that Spigelman CJ's reasoning and conclusion as to the proper construction of s.588FF(3) is correct.

10 *Rule 36.16(2)*

14. Once the proper construction of the federal provision is ascertained, it is necessary to consider the ambit of the relevant State provision.

15. In that regard, the Respondents submit that r 36.16(2) operates upon an order which has previously been made in a proceeding (RS [21]), with the result that:
    a. the proceeding can never "properly be described as being at an end" (RS [22]) even if all the orders sought in a proceeding have been made, and
    b. any orders which are made are "essentially provisional in nature" (RS [23]).

20

16. If that be the operation of r.36.16(2), it is inconsistent with, and outside, the ambit prescribed by s.588FF for the operation of State rules of procedure. That is, given the proper construction of s.588FF(3), section 79 of the *Judiciary Act* does not leave room for a State rule, such as r.36.16(2), which treats any extension under s.588FF(3)(b) as "essentially provisional in nature", pending further determination, and which allows for multiple variations, under the State rule and outside the s.588FF(3)(a) period, to the "longer period" that was fixed by an order made under s.588FF(3)(b).

30 17. It is no answer to that proposition to argue (cf RS [60]) that the desirability of finality can be taken into account in the exercise of the discretion for which r.36.16(2) provides. First, that debate has been resolved in *Gordon v Tolcher*. Secondly, if that were the intention of the legislature, there would be no need for s.588FF(3)(b) at all; rather, the Court could have been invested with a broad discretion to extend the s.588FF(3)(a) period, which was able to be exercised judicially whenever, and as often as, the Court considered appropriate. That is precisely what s.1322(4)(d) does, yet it was held in *BP v Brown* that the legislature did not intend s.588FF(3) to be subject to the broad discretionary power of extension under that provision.

40 *Application before Ward J*

18. The Respondents submit that the "application" referred to in s.588FF(3)(b) is the originating process filed to commence a proceeding (RS [48], [63]), with the result that any order subsequently made in the same proceeding is an order "on" that application. That submission should be rejected. An application is the act of invoking the Court's jurisdiction and seeking relief, whether by an initiating process, summons, statement of claim, interlocutory process, motion on notice, or an application without notice (cf RS, fn 52). Whatever such a document is called, once the Court has exercised the jurisdiction which has been invoked, and made a

determination, whether granting or refusing the relief sought, or making some other order, then the application is spent.

19. According to the Respondents' own submissions, there was only one occasion on which the Respondents sought that the Court exercise the discretion available "under that paragraph" (that is, under s.588FF(3)(b)) and only one occasion on which relief was sought and granted "under" that provision, and that occurred when they moved on the application before Hammerschlag J (within the s.588FF(3)(a) period), with his Honour making all of the orders then sought and specifying a "longer period" within the meaning of s.588FF(3)(b). The making of the Extension Order on that occasion brought the application "under that paragraph" to an end, because what was sought by that application had been achieved (CA [155], [166]).

20. As the Respondents recognise, what occurred before Ward J was quite different. The Respondents acknowledge that, absent r.36.16(2), the Court would have had no jurisdiction to vary the date in the Extension Order (RS [22]). The jurisdiction to make such a variation order was therefore only invoked by the r.36.16 application. Further, the Respondents recognise that the discretion exercised by Ward J upon that application under r.36.16 was the discretion given by that rule, rather than the discretion under s.588FF(3) (RS [55]). Accordingly, the Variation Order was not an order made on an application "under" s.588FF(3)(b), but an order made on an application "under" the State rule.

21. Given that is so, the Respondents criticism (at RS [43]-[44]) of Beazley P's observation that the application before Ward J was distinct from the application before Hammerschlag J should be rejected. Further, Beazley P's reasoning is entirely consistent with that of Barrett J in *Onefone Australia Pty Ltd v One.Tel Ltd* (2007) 61 ACSR 429 at 438 [37] (which was decided after, and took into account, *BP v Brown* and *Gordon v Tolcher*: see at [32]). There, his Honour in rejecting the same argument observed that, although a varying order may, according to its terms, have effect from the date on which the order it varies was made, that does not affect the time at which the varying order was made or the time at which the application for the varying order was made, the latter being the important event for the purposes of s.588FF(3)(b). Barrett J concluded by saying: "I consider it obvious that the varying order made [after the expiration of the s.588FF(3)(a) period] could not, by any form of retrospective language, turn the application in fact made [after the expiration of the s.588FF(3)(a) period] into an application made on [the date the original s.588FF(3)(b) application was made]".

22. If the Respondents' arguments were correct, the result would be that a s.588FF(1) application could be brought either:

    a. within the time limited by s.588FF(3)(a), or
    b. within the longer period ordered on an application under s.588FF(3)(b) made within the s.588FF(3)(a) period, or
    c. within a different and longer still period which is ordered on an application under a State rule which grants jurisdiction to make such a variation order, brought after the s.588FF(3)(a) period has elapsed.

Such a result must be outside the language of s.588FF(3) and would be inconsistent with the interpretation of that provision set out in *Gordon v Tolcher* and *BP v Brown* (see paragraphs [3]-[8] above). Moreover, it would mean that it would be impossible

for the Commonwealth parliament to impose any restriction on the number of time extensions available under s.588FF, which could not be outflanked by the rules of a State court. That is a startling state of affairs, and is not the intended operation of s.79 of the *Judiciary Act*.

Greig v Stramit

23. The Respondents avoid grappling with the statements of principle in *Greig v Stramit* [2004] 2 Qd R 17 at [89]-[90], [126], by again arguing that these statements have been taken "out of context" and the case can be distinguished (RS [73]). The submission ignores that all of the members of the NSW Court of Appeal agreed that the relevant passages from that decision, while made in a different context, were "high and persuasive authority and should be followed" (at [84], [149], [166]). In that regard, as set out in the Appellants' submissions in chief, the use of r.36.16(2) in this case was clearly inconsistent with the principle, articulated in *Greig*, that a general variation power conferred on a court under State legislation or rules does not permit a variation which effectively extends the time within which a s.588FF(1) application must be brought.

Robert Newlinds
Counsel for the Appellants
Tel: (02) 8239 0228
Fax: (02) 8226 2305
Email: newlinds@banco.net.au

Scott Nixon
Counsel for the Appellants
Tel: (02) 9221 0272
Fax: (02) 9233 3902
Email: snixon@sixthfloor.com.au

Dated: 23 October 2014