IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S276 of 2014

BETWEEN:

FORTRESS CREDIT CORPORATION (AUSTRALIA) II PTY LIMITED (ACN 114 624 958)
First Appellant

FORTRESS INVESTMENT GROUP (AUSTRALIA) PTY LIMITED
Second Appellant

and

WILLIAM JOHN FLETCHER AND KATHERINE BARNET AS LIQUIDATORS OF OCTAVIAR LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) AND OCTAVIAR ADMINISTRATION PTY LIMITED
First Respondent

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

OCTAVIAR ADMINISTRATION PTY LIMITED (IN LIQUIDATION)
Third Respondent

RESPONDENTS' SUBMISSIONS

Henry Davis York
44 Martin Place
Sydney NSW 2000

Telephone: (02) 9947 6000
Fax: (02) 9947 6999
Ref: Melanie Row

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 issue of principle in this case is whether, when making an application under s 588FF(3)(b) for a "longer period" in which to bring s 588FF(1) applications, liquidators should be required to identify specific transactions and the parties to those transactions in their application, notwithstanding that the power to extend time is intended to deal with cases in which it is not possible satisfactorily to identify such transactions. At stake is the effectiveness of the voidable transactions regime in extraordinarily complex liquidations such as that out of which the present appeal arises.

3. The ancillary or consequential grounds of appeal (grounds 2 to 4) were not addressed by the Court of Appeal. However, an issue of principle does underlie at least grounds 2 and 3, even on the narrow basis upon which the appellants say they can be resolved. That issue is whether, after setting aside the order they challenge, there would still be an "application" under s 588FF(3)(b) on foot. It is only if the proceeding in the Supreme Court was a nullity that the question arises of whether a "fresh application"[1] had to be made.

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

5. Generally, the facts stated in the appellants' written submissions are not disputed. However, a number of critical aspects of the factual background are omitted.

6. When the second respondent (**OL**) was placed in liquidation, it was a publicly listed company with 483,646,630 issued ordinary shares.[2] The third respondent (**OA**) was a subsidiary entity within the Octaviar Group (of which OL was the ultimate holding company), which then comprised some 70 companies.[3] 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.[4]

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1 Appellants' submissions ("AS") para 5.

2 AB68.30-44.

3 AB68.49-52.

4 AB69.12-30.

7. Consistently with the scale of the Octaviar Group, the liquidators' duties, as liquidators of OL, OA and another 12 or so companies within the Octaviar Group, can only be described as massive. These complexities are exemplified by the evidence which was before Hammerschlag J when his Honour was called upon to make a s 588FF(3)(b) order in respect of OL, and the further evidence which, together with the initial evidence, was before Ward J when her Honour made the order which is challenged by the appellants.

8. In particular, the evidence was that:

(a) The liquidators had, since their appointment, been faced with an extraordinary volume of work to be done to get to grips with the affairs of the insolvent entities.[5] The evidence "pointed to the volume of the books and records of the Octaviar Group and the liquidators' experience that relevant information was often found in various records and numerous locations. ... [T]he liquidators' investigations had disclosed [that] transactions that may be susceptible to challenge as voidable transactions often involved more than one Octaviar entity... and it had been difficult to conclude by whom and on whose behalf payments had been made." Finally, there was "the complexity of an assessment of solvency of companies within the Octaviar Group, because of inter-company loans, guarantees and group tax arrangements across the Group."[6] In relation to matters concerning the appellants specifically, the "liquidators' investigations were detailed and comprehensive and covered a very wide field, in circumstances where they were hampered by the complexity of the Octaviar Group, its dealings and issues as to the accuracy of documentation."[7] Even by 19 September 2011, there were "complex accounting and intercompany loan issues" which were yet to be resolved; proofs of debt were still being received in the liquidation of OL and being adjudicated in both liquidations (the magnitude of which was in the billions of dollars); and a comprehensive expert report on the entities' insolvency had yet to be prepared.[8]

(b) The liquidators had identified a very substantial volume of potential claims even by 10 May 2011, when the extension proceedings were commenced. By that date, the potential claims amounted to a value in excess of $100 million.[9] That included claims against the appellants of a value of around $35 million, but it excluded the largest claim subsequently brought against the appellants, of around an additional $189 million. Because the liquidators were still investigating matters such as the complex inter-company loans, and uncovering such transactions, this claim on behalf of OA against the appellants had not been identified by 19 September 2011, and consequently the appellants were not notified. Those circumstances are described further below.

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5 Ward J at [10]; AB 113.10-20.

6 Black J at [67]-[68]; AB 164.45-165.45. See also at [68]-[69]; AB 166.15-30.

7 Black J at [50]; AB 156.30-35; see also at [48]; AB 154.35-155.40.

8 Ward J at [12]; AB 113.40-50.

9 Ward J at [10]; AB 113.18-21.

(c) Various entities had been identified as having been involved in transactions the subject of proposed applications. Those entities were notified of the application to Ward J, as particularised in an affidavit of the respondents' solicitor.[10] Ward J was satisfied that those entities had had sufficient notice and an opportunity to be heard, but there was no appearance for any such interested party when the matter was called.[11] However, as Black J later found, the appellants were not among those parties notified. As the appellants accept, at the time of the hearing before Ward J they were not, and could not with reasonable diligence have been, identified as a party to any relevant transaction.[12]

9. Consistently with the complexity of the liquidation, the joint appointment of Mr Fletcher and Ms Barnet (the first respondent; together, **the liquidators**) as liquidators of OL and OA was preceded, from 13 September 2008, by various appointments of voluntary administrators, deed administrators and provisional liquidators, and the removal of earlier liquidators.[13]

10. The liquidators' appointment on 9 September 2009 was well after the "relation-back day" for the purposes of the winding up of OL, being 4 June 2008 (the date of the filing of the Public Trustee of Queensland's winding up application of OL).[14] In the case of OA, the relation-back date was 3 October 2008 (OA having been placed into voluntary administration on that date).

11. The consequence was that the liquidators did not have the benefit of the whole of the 36 month period ordinarily contemplated by s 588FF(3)(a) to investigate and bring voidable transaction proceedings. Rather, the liquidators had lost a period of 15 months, and had only 21 months, to investigate before that period was due to expire in respect of OL. They had slightly more than 24 months by the time that period was due to expire in respect of OA.

The OA Extension Order

12. Of the two orders made by Ward J on 19 September 2011, the only one of present relevance is Order 1, which extended time under s 588FF(3)(b) in respect of OA by six months to 3 April 2012 (the **OA Extension Order**). Order 2 is not the subject of the present appellants' challenge.

The Fortress transaction

13. The appellants are members of the Fortress Investment Group LLC, which operates investments adopting what it describes as a "distressed investment strategy".[15]

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10 Ward J at [5], [17]; AB 111.40-45, 115.25-30. The affidavit referred to named each party which had been so identified and notified; however, that affidavit was not before the Court of Appeal.

11 Ward J at [17]; AB 115.30-35.

12 AS para 5.

13 AB71.50-73.30.

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

15 Black J at [3]; AB 133.50-134.15.

14. In May 2007, the appellants entered into a loan agreement with an entity which was not then a subsidiary of the Octaviar Group (the **YVE Loan**). OL granted the appellants a guarantee in respect of the borrower's obligations, which guarantee was itself unsecured.[16]

15. In June 2007, the appellants provided a three-month facility of $250 million to Octaviar Castle Pty Ltd, which was subsequently amended several times (the **Castle Facility**). The second amended Castle Facility provided for a payment to be made to the appellants of $103 million in November 2007, out of the assets of a managed investment scheme called the Premium Income Fund.[17] This facility was secured by a charge over the assets of OL.[18]

16. By January 2008, the amount due had not been paid, and the appellants, OL and Castle agreed to extend the charge in favour of Fortress under the second facility to include OL's liability under the guarantee of the YVE Loan.[19]

17. On 1 February 2008, OL's board accepted a third party's offer to acquire a 65% interest in a group of companies called the Stella Group. As a condition of the appellants' consent to that sale, the Castle Facility was amended, and it was agreed that the appellants would be repaid the Castle Facility in full from the proceeds of the Stella Group sale.[20] On 29 February 2008, OA, OL and another entity entered into an agreement concerning the allocation of those proceeds. On completion of the sale, on 29 February 2008, approximately $189 million was paid to the appellants.[21]

18. OA entered voluntary administration in September 2008 and the appellants appointed receivers and managers of its assets. OL entered voluntary administration on 3 October 2008 and the appellants appointed receivers of OL's assets. The OL receivers contended that OA held about $19.7 million on trust for OL, which was an asset which was subject to the charge in favour of the appellants which OL had granted to secure the Castle Facility. In December 2008, the OA administrators transferred that sum to the receivers of OL's assets.[22] In January 2009, a further amount of $304,331 was paid by the then deed administrators of OA to the receivers appointed by the appellants to OL, which was referable to interest.[23]

19. On 6 April 2010 the liquidators, on behalf of OL, brought proceedings against the appellants in the Supreme Court of Queensland, claiming, inter alia, payment of $35,051,044 on the basis that the extension of the charge to the YVE Loan, the payments in December 2008 and January 2009, and other transactions were unfair preferences.[24]

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16 Black J at [4]; AB 134.15-25.

17 Black J at [5]; AB 134.25-35.

18 Bathurst CJ at [6]; AB 202.10-15.

19 Black J at [6]; AB 134.35-40; Bathurst CJ at [7]; AB 202.18-22.

20 Black J at [7]-[8]; AB 134.45-135.15; Bathurst CJ at [8]; AB 202.25-30.

21 Black J at [8]; AB 134.10-25; Bathurst CJ at [8]; AB 202.30-35.

22 Black J at [9]; AB 135.25-35; Bathurst CJ at [9]; AB 202.35-45.

23 Black J at [9]; AB 135.35-40.

24 Black J at [13], [38]; AB 136.35-50, 148.28-30; AS para 13.

Events following the orders of Ward J

20. As the appellants' submissions say, on 3 April 2012 the liquidators on behalf of OA brought proceedings number 3135/12 in the Supreme Court of Queensland against the appellants and certain other parties.[25] Those proceedings relied upon the OA Extension Order, notwithstanding that the pre-existing proceedings brought on behalf of OL did not rely upon any extension order because they had been brought within the para 588FF(3)(a) period for OL. The proceedings brought on behalf of OA also seek to recover the $189 million paid in February 2008.[26]

21. As Black J recorded, the reason for the initial proceedings on behalf of OL, and the later proceedings on behalf of OA, was that until sometime after the hearing before Ward J the liquidators were only aware of facts which enabled OL to bring proceedings against the appellants, and were unaware of any basis upon which OA might bring proceedings against the appellants.[27]

22. It was only in October to November 2011 that such a basis for OA to proceed against the appellants materialised, when it became apparent that the source of the funds used to pay Fortress was funds to which OA had a better entitlement than OL. Black J's reasons exemplify the complexity of the analysis of accounts and transaction documents which was required to reach this conclusion; it involved, among other things, the very kind of analysis of inter-company loans which had been foreshadowed in the extension application before Ward J.[28]

23. There were also some 13 proceedings under s 588FF(1) brought against other defendants on behalf of OA and/or OL. The other defendants had each been notified of the application to Ward J, as her Honour recorded[29] and as Black J also noted.[30]

24. The appellants subsequently filed the interlocutory process which gave rise to this appeal,[31] invoking r 36.16(2)(b) and alternatively r 36.15 of the *Uniform Civil Procedure Rules* 2005 (NSW) (**UCPR**). The appellants sought to have the OA Extension Order varied so as not to apply to the applicants, or alternatively set aside insofar as it affected them.

25. The liquidators also filed an interlocutory process before Black J, which sought orders in the event that the appellants' challenge was successful.[32] Black J summarised it as seeking "that their [application for an extension] be reheard as against [the appellants] and to vary the OA Extension Order expressly to

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25 Bathurst CJ at [12]; AB 203.25-30; AS para 16.

26 AB 32.20-30.

27 Black J at [32], AB 145.30-146.35.

28 Black J at [35]-[36]; AB 146.50-147.35.

29 Cf para 8(c) above.

30 Black J at [12]; AB 136.25-30.

31 AB24.10-30. The interlocutory process was filed on 2 May 2012 and was amended on 1 June and 23 July 2012.

32 AB 28.10-50.

grant the extension of time in respect of [the appellants]".[33] It also sought joinder of the appellants as parties for these purposes, an application to which Black J acceded in any event on the basis that it was desirable that the appellants be parties since they were directly affected. His Honour dealt with that application briefly at the end of his reasons.[34] (These matters have some bearing upon grounds 2 to 4 of the appeal to this Court.[35])

26. In the first instance proceedings, Black J neither set aside nor varied the OA Extension Order.[36] That outcome was based on his Honour's consideration, for the purposes of the re-hearing conducted under UCPR r 36.16(2)(b), of the evidence relevant to whether the OA Extension Order should have been made, including the particular circumstances of the appellants and the s 588FF(1) proceedings against them.[37] As to UCPR r 36.15, Black J ultimately rejected the appellants' claim to set aside the OA Extension Order based on the circumstance that the appellants were not notified of, or made party to, the application for the OA Extension Order, or identified by the respondents as potential targets of s 588FF(1) proceedings prior to the s 588FF(3) application being made.[38]

27. In the Court of Appeal, the factual and discretionary matters considered by Black J were not in issue. The sole point of substance raised was the point which now forms ground 1 of the appeal. Ancillary grounds were raised in similar terms to those which now form grounds 2 to 4 of the appeal to this Court, but they were not challenges to Black J's exercise of discretion.

PART V: APPLICABLE LEGISLATIVE PROVISIONS

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

PART VI: THE RESPONDENTS' ARGUMENT

The statutory text contains no limit on the form of the "application"

29. The words of s 588FF(3)(b) confer power upon the Court to order a "longer period...on an application under this paragraph made by the liquidator during the paragraph (a) period".

30. An application under this provision has as its subject the making by the Court of an order for a "longer period" than that otherwise fixed by subparagraph (a).

31. By contrast, s 588FF(1) refers explicitly to "a transaction of the company" with another person which is voidable because of one or more of the provisions of s 588FE(2)-(6A).

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33 Black J at [1]; AB 133.10-20.

34 Black J at [83]-[86]; AB 173.10-174.40.

35 Cf AS para 20.

36 Bathurst CJ at [102]; AB 229.25-30.

37 Black J at [66]-[82]; AB 164.25-172.50.

38 Black J at [59]; AB 160.10-35.

32. Necessarily, an application under subsection (1) necessitates the identification of the elements which constitute the "transaction" (illustratively, but not comprehensively defined in s 9 of the Corporations Act). It requires that any person against whom an order may be sought under one or more of paragraphs 588FF(1)(a)-(j) be identified, and the essential facts as to why the transaction is voidable because of s 588FE be specified.

33. Likewise, the provisions of s 588FF(4) make specific reference to "the transaction", and detailed reference to the limitations on the powers of the Court in making orders under subsection (1), in the particular circumstances with which that subsection is concerned.

34. Section 588FF(3), though standing between the two provisions just noted, makes no reference at all to any "transaction", nor to any of its features, or participants. The contrast between the respective subsections is clear and deliberate. Furthermore, the subsection repeatedly uses the indefinite article when referring to the different types of proceeding: "*An* application under subsection (1)"; "on *an* application under this paragraph".

35. Any application under subsection (3) for an order fixing a "longer period" will necessarily be made at an earlier time than an application under s 588FF(1) brought within that longer period. It would not be sensible for the legislature to make provision for an application to fix a longer period, in circumstances where the liquidator was already in a position fully to articulate a claim under s 588FF(1). As noted below, it is no part of the legislative scheme to promote or sanction delay in the institution of recovery proceedings.

36. The words "may only be made" in s 588FF(3) refer to an application under s 588FF(1). An application for fixing a "longer period" under s 588FF(3)(b) is a separate and distinct "matter" from the application under s 588FF(1).[39]

37. The time stipulation in s 588FF(3) is an essential element in making an application to the Court for a longer period.[40] The application for a longer period must be made "during the paragraph (a) period". Those last words embed an essential element, which is not amenable to extension under more general powers contained in s 1322(4) of the Act. The requirement that a s 588FF(1) application "may only be made" within a specified period is neither sufficient nor necessary to produce the essential condition for an application under s 588FF(3)(b).[41] Rather, that essential condition is the consequence of the requirement that such application be made "during the paragraph (a) period".

38. There is thus no textual justification for treating the provision which controls the time for instituting a s 588FF(1) application, as if it were a provision controlling the content and subject matter of an application under s 588FF(3)(b). As Macfarlan JA observed,[42] the respective applications are plainly of a different character and nothing in subsection (3) ties the one to the other.

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[39] See *Gordon v Tolcher* (2006) 231 CLR 335 at 346-347 [35], [37].

[40] See *Gordon v Tolcher* (2006) 231 CLR 335 at 347 [37].

[41] See *BP* (2003) 58 NSWLR 322 at 340-341 [80]-[85].

[42] Macfarlan JA at [121]; AB233.30-45.

39. Accordingly, it is not useful to say that the words "may only be made" manifests some sweeping "intention that the provision should have a limited operation".[43] The intention of those words is more specific: they indicate the essentiality of the time limit which s 588FF(3) prescribes in relation to applications under 588FF(1).

40. Nothing in s 588FF(3) *requires* particular persons to be parties to an application under paragraph (b). Nothing *prohibits* such an application from being made in any particular manner or form or with any particular scope.

41. Accordingly, the appellants' proposed construction of s 588FF(3) is both inconsistent with its text, and an unnecessary (and as noted below, undesirable) constraint on its purpose and operation.

42. The foregoing analysis makes plain that the appellants' proposed construction of s 588FF(3) is inconsistent with its text and unnecessarily confines the Court's discretion under that subsection.

The purposes of s 588FF(3)(b) support the Court of Appeal's construction

43. Section 588FF(3)(a) applies in the circumstances of all liquidations, however small or large. There is no limit to how complex a liquidation might be, or how many difficulties may be placed in the way of the advancement of the liquidation and satisfaction of creditors' claims.

44. The clear purpose of s 588FF(3)(b), in enabling an order for a "longer period", is to be discerned from the provisions of the Act, particularly those contained in Part 5.6 and Part 5.7B. The period defined by s 588FF(3)(a) (the paragraph (a) period) may itself be attenuated, or otherwise insufficient for a great variety of reasons, including the magnitude and scale of the company's affairs, and the complexity of its transactions.[44]

45. The extension power also accommodates the considerable public interest and concern in the due investigation of the affairs of companies which have become insolvent. Creditors are entitled to "the benefit of having the affairs of an insolvent company properly investigated and administered in an orderly fashion in terms of the provisions of the law".[45]

46. As Spigelman CJ observed in *BP Australia Ltd v Brown*:[46]

> The power to extend the time limit for commencing proceedings is intended to provide for the circumstance in which a liquidator is not in a position to commence proceedings within three years of the relation-back day, for whatever reason, subject to the assessment of the court of all relevant circumstances, including the liquidator's conduct. It is not difficult to envisage a circumstance in which a liquidator is still

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43 See AS para [51].

44 See generally the observations of Austin J in *Brown v DML Resources Pty Limited* (No. 2) (2001) 52 NSWLR 685 at [34] to [36], referred to by Barrett J, AB236 to 237.

45 See *Pegulan Floor Coverings Pty Limited v Carter* (1997) 24 ACSR 651 at 659 per Doyle CJ; *Hall v Poolman* (2009) 75 NSWLR 99 at 134 at [128]: "there is a public interest in liquidators bringing recovery proceedings, such as proceedings against directors for breach of duty or insolvent trading and proceedings for recovery of unfair preferences". And see also, eg, *Hamilton v Oades* (1989) 166 CLR 486, 494-495.

46 (2003) 58 NSWLR 322 (**BP**) at 354 [170]-[171] (emphasis added).

> ascertaining the identity of the recipients of benefits under possible voidable transactions and cannot give the court an indication of the creditors to be targeted. The power should be broad enough to allow, in those circumstances, for an order granting an extension of time in general terms.
>
> The requirement of commercial certainty on the part of those who have had past dealings with the corporation *is to be balanced against the conflicting interest of the creditors of the company.* ... Subject to reasonable expedition on the part of a liquidator ... the creditors are entitled to: "... the benefit of having the affairs of an insolvent company properly investigated and administered in an orderly fashion in terms of the provisions of the law".

47. The observations of Barrett JA in the Court of Appeal illustrate how the statutory scheme operates, and further illuminate the understanding of the relevant purposive considerations. Division 2 of Part 5.7B redresses "imbalance to the detriment of the general body of creditors resulting from favourable treatment of certain persons in transactions undertaken while the company was still a going concern".[47] To this end, the liquidator is empowered to "seek the assistance of the court in augmenting [the insolvent] estate for the benefit of creditors by countering the effects" of such transactions.[48] That underlies the fact that the s 588FF(3) time limit is "principally concerned with the conduct of liquidators ... instilling a sense of due dispatch".[49] This observation of Barrett JA directly recognises the policy considerations referred to in the Australian Law Reform Commission Report No. 45 (the **Harmer Report**).[50]

48. The certainty which s 588FF(3) produces ensures that at the end of "the paragraph (a) period", persons who have had dealings with the company will know either: (a) whether or not any application for a longer period has been made (but not necessarily its outcome); or (b) absent such application, whether an application under s 588FF(1) has been made.

49. The extent of the certainty which the statutory provisions supply was accordingly described in the following terms in *BP*:[51]

> ...Those who have an interest, or who represent those who have an interest, to disturbed transactions **must indicate within 3 years, whether they wish to keep open the option of doing so. In this, as in other areas, legal policy favours certainty**.

50. In this regard, s 588FF(3) assures persons who may be affected by voidable transaction claims only "that a proceeding will not be commenced after the expiration of the specified period unless the liquidator has positively satisfied the court that some longer period should be allowed".[52] That is a straightforward understanding of the way in which the provision balances conflicting interests.

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47 Barrett JA at [125]; AB 234.38-45.

48 Barrett JA at [127]; AB 235.10-20.

49 Barrett JA at [129]; AB 235.40-236.20; see also Gleeson JA at [138]; AB 239.15-30.

50 The relevant extracts of the Harmer Report are reproduced in the reasons of Bathurst CJ at [20] to [21]; AB207.45-208.50.

51 (2003) 58 NSWLR 322 at 345 [115] (emphasis added).

52 Barrett JA at [130], see also [134]; AB 236.20-30, 238.28-40.

51. In no respect does the statute otherwise impose any further emphatic terms. If the legislature had intended to impose further elements prescribing the form and content of an application under subsection (3), it would be expected that it should have done so.

52. As the Court of Appeal recognised, the proper construction of s 588FF(3)(b) should not be approached on the basis that providing certainty to persons who have had dealings with the company is the paramount consideration.

53. Rather, its construction must be approached "having regard to the nature and purpose of the extension power and the variety of circumstances in which a company liquidator may seek an extension of time" under that section.[53]

54. The respondents do *not* say that "the" purpose of s 588FF(3), as a whole, is just "to extend time".[54] Rather, the subsection serves several purposes, balancing conflicting interests in the process.[55] The interests of potential defendants are served to some extent by there being a general time bar, but the interests of creditors are served to some extent by that time limit being flexible.

55. To the extent that the appellants make submissions about "uncertainty" arising from the very circumstances of a liquidation, the solution is not to deny unsecured creditors any recovery in relation to as yet unknown transactions. The solution can only be to maintain a judicial discretion capable of dealing with the circumstances of any case.

56. The power of making an order granting to the liquidators a "longer period" has been granted to the Court, subject only to an application for that order being filed during the paragraph (a) period. Section 588FF(3)(b) is accordingly "to be construed with all the amplitude that the ordinary meaning of its words admits".[56] It is to be given no narrow construction.

57. In drafting s 588FF(3)(b) in its distinctly broad terms, the legislature has deliberately invoked this principle. It has assigned to the Court the task of striking the appropriate balance between the interests of unsecured creditors and those of counterparties to transactions with the insolvent company. The legislature's intention must be respected.

Policy considerations do not favour constraining the form of the application

58. The appellants' arguments would have an unattractive result. They would lead to a position where a liquidator would not be entitled to bring claims under s 588FF(1) unless such claims were clear and obvious from the relevant company's records with respect to parties already thereby identified as prospective defendants in respect of identified transactions. It would not permit extensions in respect of defendants or transactions the liquidators had not sufficiently identified to commence proceedings against within that time.

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53 Gleeson JA at [138]; AB 239.15-30; cf Beazley P at [117]; AB 232.40-50.

54 Cf AS para 41.

55 See also Bathurst CJ at [93], [96]; AB 227.25-228.25; cf Macfarlan JA at [120]; AB 233.20-30.

56 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* (2001) 207 CLR 72 at [11]; *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421; *David Grant & Co Pty Ltd v Westpac Banking Corp* (1995) 184 CLR 267 at 277.

59. This would to a large extent in a practical sense eviscerate the point and purpose of the power to extend time. This would be even the more so in cases where by reason of events relating to the setting of the "relation-back day" the liquidator had far less than three years to identify potential causes of action such as *Green v Chiswell Furniture Pty Ltd (in liq)*[57] where the liquidator had only three months and *Re Green*[58] where the liquidator had only one year.

60. The Appellant's position would confer no practical benefit from the point of view of "certainty", or from the point of view of particular targets of prospective s 588FF(1) claims. On the contrary, in complex liquidations, if they did not yet have a sufficient basis to identify exhaustively every such target, the best the liquidator could do would be to take an undiscriminating approach to preparing their extension of time applications. It would be necessary to name every entity to which the company in liquidation has paid money in any relevant period, and seek an extension against every such party individually.

61. To require of liquidators such an approach would work against the interests of "persons who have engaged in fair transactions with the insolvent", which the legislation which introduced the three-year limitation period had sought to balance.[59] Such persons would be subjected to litigation irrespective of the fairness of their transactions. The construction would work to the benefit of persons who have engaged in *unfair* transactions, who have been lucky or clever enough to remain unidentified by the liquidators. Subterfuge would not only be encouraged, it would be rewarded. This approach does not promote but rather undermines the policy of the Corporations Act.

62. The appellants invoke the general principles of joinder[60] to suggest that s 588FF(3)(b) cannot affect a person's rights without their being notified (or joined). However, ex parte applications are by no means unusual in proceedings under the *Corporations Act*, and rules of Court authorise interested persons to be heard without becoming a party to the proceedings.[61] A Court faced with an ex parte application will proceed cautiously; but it will proceed nonetheless, if that mode of procedure is necessary to resolve the issue before the Court.[62]

63. The fact of the matter is that, where the liquidator is not in a position to proceed under s 588FF(1) within the paragraph (a) period, *because* it is not possible to identify the relevant transaction sufficiently, it will be necessary to apply for a longer period on an ex parte basis. The terms of subsection (3) do not deny resort to its provisions in such circumstances.

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57 [1999] NSWSC 608.

58 [2002] 41 ACSR 69.

59 Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth), para [1034], quoted in AS para 34.

60 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [131]; AS para 59.

61 See, for example, *Supreme Court (Corporations) Rules* 1999 (NSW), rule 2.13.

62 *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 681: "But instances occur where ... delay would involve greater injustice than instant action."

64. In circumstances of that kind, the prospective defendant is not without redress. A party who moves ex parte is under a heavy duty of candour, which serves to represent the absent party's interests, breach of which engages severe sanctions.[63] The absent party always has the right subsequently to move to set the order aside,[64] especially where the duty of candour was breached.[65] These normal safeguards will always apply – and they did apply in this case.[66]

65. Thus, every one of the complaints the appellants make from the point of view of "policy factors" can be answered fully:

(a) Potential defendants suffer no "disadvantage"[67] either in having their interests represented in an ex parte hearing, or in their ability to contest the grant of the extension of time. Assuming they did wish to contest the extension application – which is far from a foregone conclusion – they would incur costs anyway. Either way, the result is the same.

(b) Liquidators will always be required to at least notify every party they are aware of who is potentially adversely affected by the extension application – as they did in this case.[68] Anyone who cares to oppose the application is able to do so, whether they are joined as a party or not.[69] That is so whether they attend the hearing in the first place or, like the appellants, seek to reopen the proceeding later on. There is therefore no opportunity for "reducing the prospect of opposition".[70]

(c) A shelf order creates no greater prospect of multiplicity of litigation than if each transaction was individually identified, and each prospective defendant joined, in the first place. If such persons are inclined to contest the application, they will contest it either sooner or later. They can also appeal. If they contest it later, they can also appeal.

(d) If there is any prospect of inconsistent outcomes[71] on setting aside applications, that would be a result of differences between the facts relevant to each prospective defendant. Some may be prejudiced more seriously than others. That is for the Court's judgment in respect of each such person. The same would apply if each such person had appeared at the hearing to begin with. Either way, if the Court concludes that there ought not to be an extension in respect of a particular transaction, that will be the result.

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63 *R v Kensington Income Tax Commissioners* [1917] 1 KB 486 at 505, 509, 514.

64 UCPR r 36.16(2)(b).

65 Cf UCPR r 36.15.

66 Black J at [58]-[60]; AB 159.30-161.30.

67 AS para 61(a).

68 See para 8(c) above.

69 Cf *Supreme Court (Corporations) Rules* 1999 (NSW), r 2.13.

70 AS para 61(b).

71 AS para 61(d).

(e) If liquidators lack certainty of the outcome,[72] again that is a result of the circumstances of the particular liquidation. The present liquidation was so extraordinarily complex that it was not even feasible to determine if one Octaviar entity or another was party to a particular transaction.[73] The liquidators were compelled to seek shelf orders for that reason.

(f) The interests of creditors[74] are served by their claims being satisfied. If particular creditors desire a quicker or cheaper end to the liquidation, and are prepared to compromise their claims to that end, they will be able to express that desire to the liquidator.

(g) Liquidators proceeding on ex parte applications would not be able to simply choose what evidence to put before the Court;[75] they are subject to a duty of candour and must disclose to the Court all material matters which may be relevant and adverse to their case.

The case law is settled

66. The appellants suggest that the decision in *BP* has produced a body of uncertain jurisprudence which, they say, has led to uncertainty in the statutory scheme and commercial life.[76] To the contrary, *BP* has been followed consistently by courts of first instance both in New South Wales and elsewhere for over a decade.[77]

67. As to the existence of power to make a shelf order, there is no inconsistency between the Court of Appeal's construction and the Queensland decision of *Greig v Stramit Corporation Ltd*,[78] as the Court of Appeal pointed out (and as had Doyle CJ in *Ansell Ltd v Davies*).[79] As to the circumstances in which a shelf order may be discharged and the discretion re-exercised thereafter, any apparent differences in the authorities reflect the facts of the particular cases.

68. There is no evidence at all that the conclusion in *BP* that shelf orders can be made has led to any practical difficulty for the courts. The courts have had no difficulty discerning circumstances of the exceptional kind which warrant the making of shelf orders.[80] The courts have also not had difficulty in determining when shelf orders should not be made.[81]

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72 AS para 61(f).

73 Black J at [25]; AB 142.25-45.

74 AS para 61(g).

75 AS para 61(h).

76 AS para 60.

77 Bathurst CJ at [43]; AB 216.18-31; at [100] (AB 229.10-20), his Honour observed that "[r]eversing the decision in these circumstances could be productive of a substantial injustice".

78 [2004] 2 Qd R 17.

79 Bathurst CJ at [40]-[41]; AB 215.22-35; *Ansell* (2008) 219 FLR 329 at [54].

80 See, eg, *Re McGrath; HIH Insurance Ltd (in liq)* (2004) 205 ALR 643; *ASIC v Karl Suleman Enterprizes Pty Ltd (in liq)* (2004) 52 ACSR 103; *Tolcher v Capital Finance Australia Ltd* (2005) 143 FCR 300; *Insurance Australia Pty Ltd v Crisp* [2010] FCA 166.

81 See, eg, *Re Australian Hotel Acquisition (in liq)* [2011] NSWSC 1374 at [26]-[30] (Windeyer AJ); *Re Clarecastle Pty Ltd (in liq)* [2011] NSWSC 857 at [123] (Ward J); *Matthews v Ipex Itg Pty Ltd* [2007] SASC 387.

69. The accepted principles governing the exercise of discretion under s 588FF(3)(b) have been readily applied to the range of circumstances which come before the courts, whether they be simple liquidations and a small range of claims, or extraordinarily large and complex liquidations like the one from which the present case arises.

Conclusion on the "shelf order" issue

70. The appellants suggest that the construction of s 588FF(3) preferred by the Court of Appeal "fails to achieve any accommodation" between the competing purposes served by the provision.[82] On the contrary, that construction is the one which enables the Court to reconcile conflicting interests and take account of the circumstances of each case in a manner most befitting the exercise of a discretionary judicial power. That was the very reason why an extension of time power was committed to the Court, in such broad terms. It facilitates orderly administration in the winding up. As Spigelman CJ correctly observed in *BP*:[83]

> Such an orderly administration is one of the underlying purposes of the legislation. Pursuant to s 5C of the Act and s 15AA of the *Acts Interpretation Act* 1901 (Cth), the court must prefer a construction that would promote the purpose or object underlying the Act. The purpose or object of orderly liquidation is best served by recognizing that diligent liquidators may not be able to identify a full list of targets for applications under s 588FF(1) within the three year period specified in s 588FF(3).

Grounds 2 to 4 of the appeal

71. These grounds only arise if the Court decides in the appellants' favour on the first ground of appeal. Although grounds of appeal in similar terms were before the Court of Appeal, they were not the subject of any consideration. Thus, if these points do arise, it would be appropriate for the matter to be remitted to the Court of Appeal to resolve them.

72. However, either way, these grounds should be rejected.

73. There is no necessary link between limits on the form of the order made and the validity ab initio of the "application" which seeks it. As submitted above, there is nothing in s 588FF(3)(b) which gives any formal or technical content to the statutory expression "application under this paragraph", beyond the fact that the action was taken of instituting the extension proceedings.

74. These matters are simply not the concern of the subsection. The only limit the subsection imposes is that the action of applying be taken within the paragraph (a) period. The essentiality of time says nothing about the essentiality or otherwise of form. That is why intermediate courts of appeal have held that amendment of pleadings would generally not offend s 588FF(3).[84] It would be otherwise if, and to the extent that, any such formal requirements were spelled out in the text of the subsection. They are not.

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82 AS para 65.

83 (2003) 58 NSWLR 322 at 354-355 [172].

84 See, eg, *Ansell Ltd v Davies* (2008) 219 FLR 329 at 335-336 [44]-[49]; *BP* (2003) 58 NSWLR 322 at 350-352 [149]-[159]; cf *Davies v Chicago Boot Company Pty Ltd (No 2)* (2007) 96 SASR 164 (concerning power to amend pleadings to add a new cause of action; addition of a new cause of action being a different matter to narrowing the scope of the relief sought).

75. If the originating process is defective in form because it seeks an extension order in terms which are beyond power, then it would be susceptible of an exercise of some remedial discretionary power. Whether the Court strikes the process out or gives leave to amend would be a matter for the Court in the particular circumstances. In appropriate circumstances, the Court might even disregard the form of the originating process and simply make an order in narrower terms.

76. In considering the appellants' submissions,[85] it must be recalled that the evidence of facts that came to light after the hearing before Ward J was evidence put before the Court by the appellants, and by the respondents in answer to the appellants. As Black J said, it would be fundamentally unfair to allow a moving party to rely on new evidence, but not the opposing party.[86]

77. As to ground 4 (joinder), again the appellants' submissions are predicated upon there being a "further application for relief", i.e. assuming the application which originally sought a shelf order was a nullity.[87]

78. For those reasons, grounds 2 to 4 should be rejected. The result is that Black J's discretionary decision on the rehearing under r 36.16(2)(b) stands, and there remains an extension of time effective against the appellants.

Conclusion and orders

79. The conclusion that Ward J had power to make the OA Extension Order requires that the appeal should be dismissed with costs. Alternatively, if the appellants are successful on ground 1, either grounds 2 to 4 should be rejected in any event, again with the result that the appeal may be dismissed with costs, or else the remainder of the appeal should be remitted to the Court of Appeal to deal with those grounds.

PART VII: ORAL ARGUMENT

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

Dated 21 November 2014

B. A. COLES
University Chambers
T: (02) 8227 4400
F: (02) 8227 4444
E: bernardcoles@hotmail.com

P. J. DOWDY
6th Floor St James Hall
T: (02) 9232 7932
F: (02) 9236 8600
E: pdowdy@stjames.net.au

A. K. FLECKNOE-BROWN
5 Wentworth
T: (02) 8815 9184
F: (02) 9232 8995
E: alexander.flecknoe-brown@5wentworth.com

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85 AS paras 71-72.

86 Black J at [65]; AB 164.11-20.

87 AS para 74.