HIGH COURT OF AUSTRALIA

Grant Samuel Corporate Finance Pty Limited

Vs.

William John Fletcher and KatherineElizabeth Barnet as Liquidators Of Octaviar Limited (Receivers and Managers Appointed) (In Liquidation) and Octaviar Administration Pty Limited (In Liquidation) & Ors

(French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ.)

11.03. 2015

ORDER

(French CJ, Hayne, Kiefel, Bell, Gageler and Keane, JJ.)

1. Section 588FF(1) of the Corporations Act 2001 (Cth) provides that a court, on the application of a company's liquidator, may make certain orders where it is satisfied that a transaction of the company is voidable because of s 588FE. Section 588FE states reasons why a transaction may be voidable. Section 588FF(3) provides:

"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."

2. Where an order has been made that a company be wound up and the winding up is taken to have begun on the day the order was made, the "relation-back day" is the day on which the application for the order was filed . In the liquidation of the second respondent in these appeals ("Octaviar Limited"), the relation-back day was 4 June 2008. The effect of the period of limitation stated in s 588FF(3)(a) ("the par (a) period") in this case was to require an application under s 588FF(1) to be made by the liquidators of Octaviar Limited by 4 June 2011, unless the Court ordered, under s 588FF(3)(b), that an application could be made within a longer period.

3. On 10 May 2011, the first respondent in these appeals ("the liquidators") applied to the Supreme Court of New South Wales for an order extending the period within which they might bring proceedings under s 588FF(1). On 30 May 2011, Hammerschlag J extended that period to 3 October 2011 ("the extension order").

4. A further application was made to the Supreme Court within the period of that extension, but after the par (a) period had expired. On 19 September 2011, Ward J made an order on that application, under r 36.16(2)(b) of the Uniform Civil Procedure Rules 2005 (NSW) ("the UCPR"), varying the extension order by changing the date set by Hammerschlag J by which the liquidators could make an application under s 588FF(1), to 3 April 2012 ("the variation order").

5. Each of the above-mentioned orders was made on the ex parte application of the liquidators. Application was subsequently made by the appellants in these two appeals to set aside the variation order. Black J dismissed those applications. A majority of the Court of Appeal dismissed the appeals from Black J's decision.

6. These appeals raise the question, generally stated, whether a court, on an application made outside the par (a) period, but within an extended period ordered under s 588FF(3)(b) on an application made in the par (a) period, may exercise power under the general rules of procedure in the UCPR to further extend time for the making of an application under s 588FF(1). Attention is therefore directed to the relationship between the provisions of the Corporations Act and the general procedural rules of the UCPR.

7. Section 79(1) of the Judiciary Act 1903 (Cth) provides that the laws of each State or Territory, including the laws relating to procedure, 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. It has been observed that the Corporations Act does not directly impose a universal, federal procedural regime, but rather leaves s 79 of the Judiciary Act to operate according to its terms in the State or Territory concerned. The particular question on these appeals arises from those terms. It is whether s 588FF(3) "otherwise provides", so that the UCPR are not picked up by s 79.

8.Section 588FF(3) may be said to "otherwise provide" if it is inconsistent with so much of the general rules of procedure in the UCPR as would permit variation of the time fixed by the extension order. Inconsistency in this sense may be taken to include that s 588FF(3) leaves no room for the operation of the UCPR , which would be the case if s 588FF(3)(b) is clearly intended to be the exclusive source of power to extend time for the purposes of s 588FF(1).

9.A majority of the Court of Appeal (Macfarlan and Gleeson JJA) held that the only restriction placed by s 588FF(3)(b) on the court's power to extend time for bringing proceedings under s 588FF(1) is that the court's order be made on an application

made by the liquidator during the par (a) period. On this view, s 588FF(3)(b) does not require that the order, as distinct from the application, be made in that period. Their Honours considered that, in this case, it would be sufficient that the application for extension made within the par (a) period remained on foot when Ward J made the variation order.

10. There may be a question whether the application on which Hammerschlag J made the extension order was extant at the time Ward J made the variation order, or whether the extension order finally disposed of the matter before Hammerschlag J. This may be put to one side. The real issue on these appeals is whether s 588FF(3) "otherwise provides" so that the relevant rule of the UCPR permitting variation of the extension order cannot apply. This was not a question which the majority in the Court of Appeal addressed . It may be inferred that their Honours accepted that Ward J could not, and did not, exercise the power given by s 588FF(3)(b) to grant the further extension by making the variation order. Their Honours assumed that r 36.16(2)(b) of the UCPR could apply even though an order under s 588FF(3)(b) had been made and the par (a) period had expired.

11. Beazley P, who was in dissent in the Court of Appeal, considered that, to the extent that it permits a new or further application to be made for an extension of time, r 36.16(2)(b) is inconsistent with s 588FF(3)(b) and could not therefore be picked up by s 79 of the Judiciary Act.

12. The majority considered there to be an analogy with the circumstances in *Gordon v Tolcher*, where the District Court Rules 1973 (NSW) were applied. Gordon v Tolcher was regarded as establishing that, once an application for extension of time is made in conformity with s 588FF(3)(b), the conduct of the litigation is left for the operation of the procedures of the court in which the application is made.

13. In Gordon v Tolcher, a liquidator instituted proceedings in the District Court of New South Wales seeking orders pursuant to s 588FF(1) with respect to what were alleged to be voidable transactions. Those proceedings were instituted shortly before the end of the three year period fixed by s 588FF(3)(a) as it then stood . There was no need for an extension of time under s 588FF(3)(b) as the application under s 588FF(1) was brought within time.

14. A further relevant aspect of Gordon v Tolcher which sets it apart from this case is that the rules of the District Court were employed for a different purpose, namely to overcome the effect of their automatic operation on the proceedings which had been instituted. The circumstances in Gordon v Tolcher were that the statement of liquidated claim had not been served on the defendant and therefore no defence had been filed. The effect of Pt 18, r 9 of the District Court Rules, where a defence had not been filed within a certain time from the date of the commencement of the action, was that the action was treated as dormant and taken to be dismissed. A

judge of the District Court declined to make an order having the effect of rescinding the dismissal of the liquidator's action. On appeal, the Court of Appeal made an order under Pt 3, r 2(2) of the District Court Rules extending the time for serving the statement of liquidated claim, thus overcoming the effect of the District Court Rule deeming the action to be dismissed.

15. As this Court said in Gordon v Tolcher , that appeal could be disposed of simply upon the basis that the procedural regulation of a matter, after the institution of an application, is left to the State or Territory procedural law. The application in question was that filed under s 588FF(1). In the circumstances of that case, s 588FF clearly did not "otherwise provide" so as to deny the operation of s 79 "to pick up so much of the Rules as supported the orders made by the Court of Appeal."

16. It is evident from the conclusion reached in Gordon v Tolcher that the Court rejected the appellant's submission that the liquidator's request to apply the provisions of Pt 3, r 2 was in effect an application for extension made outside the three year period and therefore not authorised by s 588FF(3). It is no doubt because of that submission that the Court felt obliged to say something more about the provision for time in s 588FF(3).

17. The Court in Gordon v Tolcher said that s 588FF deals with the period within which an application under s 588FF(1) is to be made, as an essential aspect of the regime s 588FF creates. The provision in s 588FF(3), as to the time for the making of the application, is not to be characterised merely as a procedural stipulation as to time . It would follow that the bringing of an application within the time required by s 588FF(3)(a) or (b) is a precondition to the court's jurisdiction under s 588FF(1).

18. The Court in Gordon v Tolcher referred to the explanation which had been given by Spigelman CJ in BP Australia Ltd v Brown as to the significance of s 588FF(3) in the statutory scheme. In the Harmer Report , which was published in 1988, it had been observed that the Australian Law Reform Commission ("the ALRC") had earlier proposed that a liquidator should have only three years within which to commence proceedings to recover the proceeds of voidable transactions, instead of the six years which were then allowed under legislation such as the Bankruptcy Act 1966 (Cth), although the ALRC had also proposed that the court should have power to extend the period of three years. The ALRC had received many submissions complaining of inordinate delay in the commencement of proceedings of this kind and there had been judicial observations critical of delays in winding up insolvent companies. The Harmer Report recommended that liquidators be placed under a more rigorous, though reasonable, time limit.

19. In a passage from BP Australia Ltd v Brown , which was cited in Gordon v Tolcher , Spigelman CJ said that the legal policy which underlies s 588FF(3) is one which favours certainty. Whilst that provision does not have the effect of requiring all applications under s 588FF(1) to be brought within a short period of time, it does

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 three year period and to seek a determinate extension of the period." His Honour said that "Parliament has identified a reasonable time for such matters to occur, subject to a single determinate extension of time
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20. At the time BP Australia Ltd v Brown was decided, s 588FF(3)(a) contained only the requirement now appearing in sub-par (i), that proceedings be brought within three years of the relation-back day. Subsequently, in 2007 , an alternative time limitation, that appearing now in sub-par (ii), was added whereby an application under s 588FF(1) may be brought 12 months after the first appointment of a liquidator in a winding up. The provision in s 588FF(3)(b), whereby the court may fix a further period, has remained throughout.

21. The addition of the alternative time limitation in s 588FF(3)(a)(ii) does not detract from the force of what was said in BP Australia Ltd v Brown concerning the statutory aim of certainty which is evident in s 588FF(3). If anything, it tends to reinforce the decision of the legislature, in balancing in a liquidation the competing interests of creditors and those who have dealt with the company and might be the subject of s 588FF(1) proceedings, to limit the times within which such proceedings may be brought. Section 588FF(3) does so in language which may be described as "clear and emphatic" .

22. Section 588FF(3) provides that an application under s 588FF(1) "may only be made" within the periods set out in pars (a) and (b) of s 588FF(3). The phrase "may only be made" should be read with both paragraphs. So understood, the term "may only" has the effect of defining the jurisdiction of the court by imposing a requirement as to time as an essential condition of the right conferred by s 588FF(1) to bring proceedings for orders with respect to voidable transactions. An element of that right is that it must be exercised within the time specified . This is what is conveyed by Gordon v Tolcher.

23. The only power given to a court to vary the par (a) period is that given by s 588FF(3)(b). That power may not be supplemented , nor varied, by rules of procedure of the court to which an application for extension of time is made. The rules of courts of the States and Territories cannot apply so as to vary the time dictated by s 588FF(3) for the bringing of a proceeding under s 588FF(1), because s 588FF(3) otherwise provides. It provides otherwise in the sense that it is inconsistent with so much of those rules as would permit variation of the time fixed by the extension order.

24. The extension order made on 30 May 2011 was within power. As a result of that order, proceedings under s 588FF(1) could be brought by 3 October 2011, but no further extension could be granted once the par (a) period had elapsed. The UCPR

could not be utilised to further extend the time within which proceedings under s 588FF(1) could be brought.

25. The appeals should be allowed with costs. The orders of the Court of Appeal should be set aside and in lieu thereof it should be ordered that leave to appeal be granted, the appeals be allowed with costs, the orders of Black J dismissing the appellants' applications with costs be set aside and the respondents pay the costs of those proceedings. The variation order made on 19 September 2011 should be set aside.