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

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

OCTAVIAR ADMINISTRATION PTY LIMITED (IN LIQUIDATION)
Third Respondent

APPELLANT'S REPLY

Part I: Certification

1. The Appellant certifies that this reply is in a form suitable for publication on the internet.

Part II: Reply

Identifying the issues in the appeal

2. The Respondents' submissions concentrate on the proper construction of the term "application" in s. 588FF(3)(b) of the *Corporations Act 2001* (Cth).[1] That is an issue in the appeal.[2] However, it should not be confused with the principal issue, whether rule 36.16(2)(b) is given force by reason of s. 79 of the *Judiciary Act* 1903 (Cth).

3. Even if the Respondents' submission as to the proper meaning of an "application under this paragraph" in s. 588FF(3)(b) is accepted, the principal issue remains: whether rule 36.16(2)(b) is "picked up" by s. 79. The Respondents' submissions tend to elide the two issues.[3] They are

[1] Respondents' submissions at [3], [45]-[63].
[2] See ground 4 of the Notice of Appeal in proceedings S228 of 2014 (AB300:7*ff*) and ground 2 in the Notice of Appeal in proceedings S229 of 2014 (AB305:39*ff*).
[3] Respondents' submissions at [3], ("the appellants can only succeed…) and [45] ("At the heart of the issues").

Watson Mangioni Lawyers Pty Limited
Level 13, 50 Carrington Street
Sydney NSW 2000
Telephone: (02) 9262 6666
Fax: (02) 9262 2626
Ref: Michael Edward France

however distinct albeit that, necessarily, questions of statutory construction inform the application of s. 79.[4]

The operation of s. 79 of the Judiciary Act *in this case*

4. Contrary to the Respondents' submissions,[5] the Appellant's submissions do not ignore the fact that this Court in *Gordon v Tolcher* held that s. 588FF deals with substantive rights rather than the "the investment of federal jurisdiction in any court or with the manner of exercise of that jurisdiction".[6] That proposition was squarely addressed.[7] Instead, the Respondents mischaracterise the reasoning in *Gordon v Tolcher.* The statement that s. 588FF(3) and UCPR 36.16(2)(b) "lie on opposite sides of the distinction between the creation of rights and prescription of procedure"[8] ignores the fact that a procedural rule may, for the purposes of s. 79 of the *Judiciary Act*, operate inconsistently with a substantive right.[9]

5. The Respondents' attempts[10] to distinguish *Greig v Stramit Corporation Pty Ltd*[11] fail for this reason. It is not to the point that this case concerns a variation power while *Greig* concerned a power of amendment. For reasons stated elsewhere,[12] the relevance of *Greig* is that it demonstrates that a procedural power can operate inconsistently with the substantive rights created by s. 588FF.

6. In this case, the Respondents do not challenge the proposition that the time limit in s. 588FF(3) is an essential element of the right to bring proceedings under s. 588FF(1).[13] The only question therefore is whether rule 36.16(2)(b) could be deployed in the circumstances consistently with this essential stipulation. Regardless of whether the application before Ward J was the same application for the purposes of s. 588FF(3)(b) as the application that was before Hammerschlag J, the answer is no. This is because the order under rule 36.16(2)(b) achieved an outcome that was not available by a fresh application under s. 588FF(3)(b). The essential stipulation was thereby circumvented. In light of the essential time stipulation, as well as the general imperative in favour of certainty and finality, the procedural rule should not be permitted to act as a substitute for a substantive application.[14]

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[4] Appellant's submissions at [37].
[5] Respondents' submissions at [39].
[6] *Gordon v Tolcher* (2006) 231 CLR 334 at 346 [32].
[7] Appellant's submissions at [57]-[59].
[8] Respondents' submissions at [41]. The use of the term "sic" in the Respondents' submissions at [41] suggests some error in the Appellant's submissions at [59]. There is none. Given the noun "statement" at [59] is used in the singular, it is correct to use the verb "presupposes".
[9] See Appellant's submissions at [58] and the authorities cited therein.
[10] Respondents' submissions at [72]-[73].
[11] [2004] 2 Qd R 17.
[12] Submissions of the Appellant in matter S229 of 2014 at [48]-[51].
[13] *Gordon v Tolcher* (2006) 231 CLR 334 at 347 [36]-[37], see also 348 [40]. This proposition is accepted in the Respondents' submissions at [35(b) and (c)].
[14] *cf. Achurch v The Queen* (2014) 88 ALJR 490 at 497 [16] in the context of determining the proper construction of a procedural provision.

7. So understood, the Appellant's submissions on s. 79 of the *Judiciary Act* do not depend on any proposition rejected in *Gordon v Tolcher,* or a general desire for substance over form.[15] The Court in *Gordon v Tolcher* did not accept that a proceeding under s. 588FF(1), which had been revived after having been deemed to have been dismissed, was a new proceeding. The position in this case is different. The principal issue is not whether an application under rule 36.16(2)(b) is in substance if not form an application under s. 588FF(3)(b), but whether an order under rule 36.16(2)(b) is inconsistent with the essential stipulation in s. 588FF(3).

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8. This statement of the issue highlights the mechanistic approach upon which the Respondents rely in asserting that the rule 36.16(2)(b) is "picked up" by s. 79. The central premise of the Respondents' submission is that, upon proceedings under s. 588FF(3)(b) being filed, every procedural rule of court is applicable in federal jurisdiction.[16] The majority in the Court of Appeal relied on the same premise.[17] *Gordon v Tolcher* suggests a more nuanced position. The procedural law of a state is applicable subject to the provisions of the *Corporations* Act and, of course, subject to s. 79 of the *Judiciary Act*.[18] In each case it is necessary to consider whether a particular
20 procedural rule can operate consistently with s. 588FF(3). For the reasons already stated[19], the operation of rule 36.16(2)(b) in this case was inconsistent with s. 588FF(3).

The meaning of an "application"

9. The Respondents contend that an "application" under s. 588FF(3)(b) for an extension of time was made on 10 May 2011 when an originating process was filed. On this view, everything that occurred thereafter (including the separate orders made by Hammerschlag J and Ward J) were simply steps
30 taken in the course of a single application.[20]

10. The Appellant contends that the interlocutory process filed in Court on 19 September 2011 and determined by Ward J was a separate application for the purposes of s. 588FF(3)(b).[21] Alternatively, if the application considered by Ward J is taken for the purposes of s. 588FF(3)(b) to be the same application that was before Hammerschlag J, the Appellant submits that the order made by Ward J could not authorise the commencement of proceedings under s. 588FF(1) because the application for that *particular* order was not made within the relevant period.[22]

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[15] Respondents' submissions at [42]. It may be accepted that Appellant's alternative submissions do emphasise the need to look to substance rather than form.
[16] Respondents' submissions at [37], [50] and [61].
[17] See AB 283 at [154] and AB 285 at [160] *per* Macfarlan JA and AB 288 at [171] *per* Gleeson JA.
[18] *Gordon v Tolcher* (2006) 231 CLR 334 at 346 [32]. Thus, it is not apt to suggest that by investing jurisdiction in the Courts of a state, the Commonwealth Parliament takes those Courts as it finds them: *cf.* Respondents' submissions at [59] citing *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 at 1101 [40], 1106 [56], 1117 [127] and 1120 [141]. Such an approach ignores the operation of s. 79.
[19] See above at [6] and the Appellant's submissions at [47]-[49].
[20] Respondents' submissions at [3], [48]-[50].
[21] Appellant's submissions at [33]-[36].
[22] Appellant's submissions at [64]-[65].

11. There is nothing in the language of s. 588FF(3)(b) which supports the Respondents' contention.[23] It may be accepted that an "application" requires the commencement of some form of proceedings.[24] However it does not follow that the commencement of the proceedings constitutes the one and only application made in those proceedings. On its ordinary meaning, the term "application" for the purposes of s. 588FF(3)(b) refers to any occasion when the Court is asked to exercise the discretion conferred upon it.

10 12. The Appellant's reliance on the legislative purposes of certainty and finality reflects orthodox principles of statutory construction. A construction which "would best achieve" the statutory purpose is to be preferred over any other construction.[25] It may be acknowledged that s. 588FF(3)(b) is a mechanism that provides a degree of flexibility to liquidators.[26] However, this purpose is achieved within an overall framework which focuses on certainty and finality. This does not render the Appellant's construction "nebulous".[27] It is not difficult to determine when a request for the exercise of the discretion is made. It is when a process calling for, in substance, the exercise of the discretion is filed.

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13. Nothing in *Gordon v Tolcher* supports the construction propounded by the Respondent.[28] Proceedings commenced seeking an order under s. 588FF(3)(b) are a distinct matter for the purposes of federal jurisdiction.[29] However this fact does not determine whether, within those proceedings, there can be more than one application within the meaning of s. 588FF(3). Indeed, the substantive rather than procedural nature of s. 588FF(3)(b) supports the view that the nature of an "application" is to be determined by reference to matters of substance rather than form.

30 14. In this regard, nothing in the Respondents' submissions undermines the reasoning of Beazley P.[30] As her Honour noted, a request to exercise the procedural power in rule 36.16(2)(b) in the circumstances of this case "would invariably" be substantive in nature".[31] The Respondents submit that the Appellant has misstated the actual position.[32] This is not so. The order made by Ward J was, in substance if not form, a new order rather than a "variation".[33] The application did call for a fresh consideration of the matters

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[23] *cf.* Respondents' submissions at [47].
[24] Respondents' submissions at [47] ("There can be no questions ...rights and liabilities").
[25] Section 15AA of the *Acts Interpretation Act 1901* (Cth); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 592-593 [45].
[26] *cf.* Respondents' submissions at [52]
[27] Respondents' submissions at [53] and [55]. The Respondents' proposed construction could similarly be dismissed as "rigidly formalistic".
[28] *cf.* Respondents' submissions at [48], [50], [62].
[29] (2006) 231 CLR 334 at 346 [35].
[30] AB 265 at [90]-[92].
[31] AB 265 at [92].
[32] Respondents' submissions at [55].
[33] AB 168:33. Before Ward J, the Respondents relied on an amended originating process (AB 6-8) and an interlocutory process (AB 9-11). Both processes sought orders under s. 588FF(3)(b) and rule 36.16(2)(b). While Ward J only made orders on the interlocutory process under rule 36.16(2)(b), the fact that the Respondents sought to achieve the same outcome by four different means serves to highlight the artificiality of the Respondents' position.

relevant to the exercise of discretion under s. 588FF(3)(b).[34] There was new evidence before Ward J which was not before Hammerschlag J.[35] Without such evidence, the application for the variation would almost certainly have failed.[36]

15. It may be accepted that rule 36.16(2)(b) is derivative in nature. Its operation depends on the existence of some anterior order.[37] However, it does not follow that an order made under rule 36.16(2)(b) is an order "on an application" under s. 588FF(3)(b) rather than an order on an application in its own right.[38] The Respondents' submission inverts the proper process of statutory construction. The meaning of "an application" for the purposes of s. 588FF(3)(b) is not to be determined by reference to a procedural provision enacted by a different legislature.

16. The fact that a Court is not limited to granting the relief sought by the parties[39] does not foreclose the alternative submission of the Appellant.[40] That is, even if Ward J had granted an extension to a different date than the one sought, the particular extension or "longer period" relied upon would not have been sought until after the s. 588FF(3)(a) period had expired.

17. Finally, the Respondents submit that the requirement for a "single determinate extension"[41] means no more than: (a) proceedings to recover any of the various types of voidable transactions are subject to the same (i.e. "single") time limit; and (b) an order under s. 588FF(3)(b) must prescribe a specific date as marking the end of the extended period.[42] This position is unsustainable once reference is had to the immediately preceding sentence where Spigelman CJ stated that it "must be decided within the three year period ... how long the process of deciding whether to pursue voidable transactions will take".[43] On the Respondents' construction of s. 588FF(3)(b) this requirement can never be satisfied as rules such as rule 36.16(2)(b) allow the issue of an extension to be re-agitated after the expiry of the three year period.

Dated: 23 October 2014

A. J. L. Bannon
Telephone: 02 9233 4201
Facsimile: 02 9221 3724
Email: bannon@tenthfloor.org

P. M. Knowles
Telephone: 02 9232 4609
Facsimile: 02 9221 3724
Email: knowles@tenthfloor.org

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[34] This is precisely how Ward J approached the issue: AB163 at [15], AB165 at [20] and AB 165-166 at [22]
[35] Including the detailed affidavit of Ms Barnet: AB 95-102.
[36] AB 265 at [90] *per* Beazley P.
[37] Respondents' submissions at [50] and [63].
[38] Respondents' submissions at [63].
[39] Respondents' submissions at [58] citing AB 285 at [159] *per* Macfarlan JA.
[40] Appellant's submissions at [64]-[65].
[41] *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 at 346 [118].
[42] Respondents' submissions at [70].
[43] (2003) 58 NSWLR 322 at 346, [118] *per* Spigelman CJ.