Limitation period for claims in respect of voidable transactions

Gideon Gee reports on *Fortress Credit Corporation (Australia) II Pty Limited v Fletcher* [2015] HCA 10 and *Grant Samuel Corporate Finance Pty Limited v Fletcher; JP Morgan Chase Bank, National Association v Fletcher* [2015] HCA 8.

Introduction

On 11 March 2015 the High Court delivered two judgments concerning the limitation period for claims by liquidators in respect of voidable transactions under s 588FF(1) of the *Corporations Act* 2001 (Cth) (the Act).

In *Fortress Credit Corporation (Australia) II Pty Limited v Fletcher* [2015] HCA 10 (*Fortress Credit*) the High Court held unanimously (French CJ, Hayne, Kiefel, Gageler and Keane JJ) that an order may be made under s 588FF(3) of the Act to extend the time generally for making an application in respect of a company's voidable transactions. This decision confirmed that the power is not limited to specific transactions; so-called 'shelf orders' are valid.

In *Grant Samuel Corporate Finance Pty Ltd v Fletcher; JP Morgan Chase Bank, National Association v Fletcher* [2015] HCA 8 ('*Grant Samuel*') the High Court held unanimously (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ) that an order for extension of the limitation period may only be made if the application is brought within the time specified in s 588FF(3)(a) of the Act (the 'par (a) period'). An order to extend the limitation period may not be made once the par (a) period has expired, even if time to apply under s 588FF(1) of the Act has not yet expired because of an earlier order under s 588FF(3)(b) of the Act. The High Court also held that s 588FF(3)(b) of the Act is the only basis to extend time to bring claims under s 588FF(1) – state and territory procedural laws cannot be used.

The provision

Section 588FF(1) of the Act provides that liquidators may apply for specified orders in respect of voidable transactions. The limitation period for these applications is set by subsection 588FF(3) of the Act which 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.

The orders extending the limitation periods

The two proceedings arose out of the collapse of the Octaviar group, which operated a diversified travel, property and financial services business.

The time for claims by the liquidator in respect of Octaviar Limited (OL) was extended by a shelf order made within the par (a) period ('the OL extension order'). This period was extended subsequently by a second order, which was made after the expiry of the par (a) period but before the expiry of the OL extension order. This second order was made pursuant to r 36.16 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) ('the OL variation order').[1]

The time for claims in respect of Octaviar Administration Pty Limited (OA) was extended by a shelf order made within the par (a) period ('the OA extension order').[2]

The liquidators commenced proceedings seeking relief against Fortress, Grant Samuel and JP Morgan, including orders under s 588FF(1) of the Act. Fortress applied to set aside the OA extension order. Grant Samuel and JP Morgan applied to set aside the OL variation order.

Black J dismissed both of these applications at first instance.[3] The New South Wales Court of Appeal dismissed both appeals from those decisions.[4]

Fortress Credit – shelf orders are within power

The New South Wales Court of Appeal decision in *BP Australia Limited v Brown*[5] was followed by Black J and applied by the Court of Appeal (Bathurst CJ, Beazley P, Macfarlan, Barrett and Gleeson JJA) to dismiss Fortress' application and appeal below. In *BP Australia Limited v Brown* Spigelman CJ (with whom Mason P and Handley JA agreed) held that s 588FF(3)(b) of the Act allowed for a shelf order to be made in appropriate circumstances.

On appeal to the High Court, the *Fortress Credit* appellants relied upon the repeated use of the definite article in the subsections of s 588FF(1). The appellants submitted that under s 588FF(3)(b) the court may make an order for a longer period in which an application may be made for orders under s 588FF(1) in relation to *the* transaction. This required the identification of the transaction and the naming of the parties to that transaction as respondents on the application for the order under s 588FF(3)(b).[6]

The High Court considered that the text of s 588FF(3)(b) left the two opposing constructions open.[7] Nothing in the text lent itself to one construction over the other.[8]

To resolve the issue the High Court considered the function of the provision. The 'immediate purpose' of s 588FF(3)(b) is to confer a discretion on the court in an appropriate case to mitigate the rigours of the par (a) period. That discretion is to be exercised having regard to two policies. First, the policy of avoiding unfair transactions by insolvent companies. Secondly, the policy of providing certainty for those who have transacted with companies during periods in which transactions may be voidable. Allowing for the broad construction would not lead to unreasonable prolongation of uncertainty.[9] The various 'policy factors' relied upon by the appellants to militate against the broad construction may be used as considerations that inform the exercise of the discretion in a particular case.[10]

The High Court also considered the legislative history of s 588FF(3).[11] The High Court found it difficult to imagine that the judgments in *BP Australia Limited v Brown* were not known by those involved in the 2007 amendment of s 588FF(3) of the Act.[12] The liquidators argued that nothing in this amendment altered the basis for which the Court of Appeal in *BP Australia Limited v Brown* preferred the broad construction.[13] The High Court considered that this 're-enactment presumption' can be used as a 'factor … if such a construction is reasonably open from the text'.[14]

Grant Samuel – an extension may only be granted during the par (a) period

The High Court stated the general question on the appeal to be whether on an application 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, a court may exercise power under the UCPR to further extend the time for making an application under s 588FF(1).[15] This raised the question of whether s 588FF(3) of the Act was inconsistent with the rules for variation of time in the UCPR. If so, s 588FF(3) 'otherwise provided' for the variation of time. Section 79 of the *Judiciary Act 1903* (Cth) would therefore not pick up the UCPR in this context.[16]

The High Court held that by prescribing that an application under s 588FF(1) 'may only be made' within the periods set out in s 588FF(3)(a) and (b), it is an essential condition of the right conferred by s 588FF(1) that it is exercised within the time specified. It followed that, in answer to both the general and particular questions:[17]

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.

Beazley P, who was the only member of the Court of Appeal who considered this question, reached this same conclusion.[18]

The majority in the Court of Appeal (Macfarlan and Gleeson JJA) and Black J at first instance followed the decision of the High Court in *Gordon v Tolcher*[19]. In that case the High Court held that once an application is made under s 588FF(1) of the Act the procedural regulation of the litigation is a matter for state procedural law.[20] In *Grant Samuel* the High Court referred to two distinguishing aspects of *Gordon v Tolcher*. First, no extension of time was required in that case because the application was brought in the par (a) period.[21] Secondly, the procedural rule at issue in *Gordon v Tolcher* was the power to extend the time for service of an originating process. This was not a matter on which s 588FF(3) 'otherwise provides'.[22]

Is only one extension possible?

In *BP Australia Limited v Brown* Spigelman CJ commented on the policy which underlies s 588FF(3) of the Act as one that favours certainty. In that context, according to Spigelman CJ, a liquidator could only make a single application to extend the limitation period under s 588FF(3)(b) of the Act for a determinate period of time.[23]

Whilst not disputing the importance of certainty, in *Grant Samuel* Beazley P did not 'foreclose the possibility' that more than one application for an extension could be brought under s 588FF(3)(b), provided that each such application is commenced within the par (a) period.[24]

The High Court did not specifically address this question in *Grant Samuel*. The High Court did, however, comment that the addition of s 588FF(3)(a)(ii) since *BP Australia Limited v Brown* 'does not detract from the force of what was said in that case concerning the statutory aim of certainty evident in s 588FF(3)'.[25]

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Endnotes

1. In the matters of *Octaviar Ltd (recs and mgrs apptd) (in liq) and Octaviar Administration Pty Ltd (in liq)* [2011] NSWSC 1691 per Ward J.
2. Ibid.
3. In the matter of *Octaviar Limited (receivers and managers appointed) (in liquidation)* and in the matter of *Octaviar Administration Pty Limited (in liquidation)* [2012] NSWSC 1460; (2012) 271 FLR 413 and in the matter of *Octaviar Limited (receivers and managers appointed) (in liquidation) and Octaviar Administration Pty Limited (in liquidation)* [2013] NSWSC 62; (2013) 272 FLR 398; 93 ACSR 316.
4. *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2014) 87 NSWLR 728; [2014] NSWCA 148 and *JPMorgan Chase Bank, National Association v Fletcher; Grant Samuel Corporate Finance Pty Limited v Fletcher* (2014) 85 NSWLR 644; [2014] NSWCA 31.
5. [2003] NSWCA 216; (2003) 58 NSWLR 322.
6. *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2015] HCA 10 at [20]–[22].
7. Ibid. at [21].
8. Ibid. at [23].
9. Ibid. at [24].
10. Ibid. at [26].
11. Ibid. at [11]–[16].
12. *The Corporations Amendment (Insolvency) Act 2007* saw the introduction of s 588FF(3)(a)(ii) and the substitution of the words 'during the paragraph (a) period' for 'within those 3 years' in s 555FF(3)(b).
13. Ibid. at [14].
14. Ibid. at [16].
15. *Grant Samuel Corporate Finance Pty Ltd v Fletcher; JPMorgan Chase Bank, National Association v Fletcher* [2015] HCA 8 at [6].
16. Ibid. at [7]. Section 79 of the *Judiciary Act 1903* (Cth) relevantly provides that the procedural laws of a state shall apply in courts exercising federal jurisdiction in that state except 'as otherwise provided' by the Constitution or Commonwealth laws.
17. *Grant Samuel Corporate Finance Pty Ltd v Fletcher; JPMorgan Chase Bank, National Association v Fletcher* [2015] HCA 8 at [23].
18. *JPMorgan Chase Bank, National Association v Fletcher; Grant Samuel Corporate Finance Pty Limited v Fletcher* [2014] NSWCA 31 at [89] per Beazley P.
19. [2006] HCA 62; (2006) 231 CLR 334.
20. Ibid., per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at [32]–[33], [40].
21. Ibid. at [13].
22. Ibid. at [14]–[15].
23. *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 at 345.
24. *JPMorgan Chase Bank, National Association v Fletcher; Grant Samuel Corporate Finance Pty Limited v Fletcher* [2014] NSWCA 31 at [84] per Beazley P.
25. *Grant Samuel Corporate Finance Pty Ltd v Fletcher; JPMorgan Chase Bank, National Association v Fletcher* [2015] HCA 8 at [21].

Fraud and the indefeasibility of a joint tenant's title

James Willis reports on *Cassegrain v Gerard Cassegrain & Co Pty Limited* [2015] HCA 2.

In *Cassegrain v Gerard Cassegrain & Co Pty Limited* [2015] HCA 2 (Cassegrain), the High Court gave consideration to the fraud exception to indefeasibility of title under the *Real Property Act 1900* (NSW) (RPA). In particular, the court found that a person's proprietary interest as a joint tenant in real property was not defeasible merely on account of a fraudulent act committed by a second joint tenant, to which the first joint tenant was not a party.

The facts

The proceedings concerned, *inter alia*, whether or not the proprietary interest held by the appellant, Felicity Cassegrain (Felicity), in real property known as the 'Dairy Farm', was defeasible on account of a fraudulent act committed by her husband, Claude Cassegrain (Claude). A brief summary of the facts are as follows.

Gerard Cassegrain & Co Pty Limited (GC&Co), the respondent in the proceedings, was registered under the RPA as the proprietor in fee simple of the Dairy Farm.[1] In 1997, Claude and Felicity acquired the Dairy Farm which was held by them as joint tenants.[2] This acquisition was brought about, in part, by Claude and his sister, Anne-Marie Cameron, who were both directors of GC&Co at the time, passing a company resolution to sell the Dairy Farm to Claude and Felicity as joint tenants for an agreed consideration of $1 million. It was further resolved that the consideration for the purchase would be effected by a journal entry in a loan account.[3] The loan account purported to record a loan from Claude to GC&Co in the amount of $4.25 million and the entry in the account purported to reduce the amount outstanding under the loan by $1 million. In about March 1997, the transfer of the Dairy Farm was registered.

It was not in dispute before the High Court that the alleged debt recorded in the loan account did not represent a genuine debt owed by GC&Co to Claude and that, accordingly, Claude was acting fraudulently by causing an entry to be made in the loan account in respect of the purported $1 million consideration. The loan account arose in circumstances where, in 1993, GC&Co sought to structure a payment made to GC&Co by the CSIRO, by way of a settlement, to bring about an apparent