

## Article Information

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## Insolvency Update - It is all about timing

**In the recent matter of JP Morgan Chase Bank, National Association v Fletcher; Grant Samuel Corporate Finance Pty Ltd v Fletcher [2014] NSWCA 31, the NSW Court of Appeal handed down a decision with important consequences for liquidators and the time they have to commence proceedings for voidable transactions.**

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*The decision also illustrates the frequently inconsistent operation of the Corporations Act 2001 (Cth) and Court procedure rules.*

### Background Facts

Liquidators were appointed to Octaviar Limited (Receivers and Managers Appointed)(In Liquidation) and Octaviar Administration Pty Limited (In Liquidation) in 2008.

During the course of their investigations, the Liquidators identified potential voidable transaction claims against JP Morgan Chase Bank (JP Morgan) and Grant Samuel Corporate Finance Pty Limited (Grant Samuel). The Liquidators had to commence any voidable transaction proceedings (Proceedings) against those parties within three years of the "relation back-date", in this case, by 4 June 2011.

By late May 2011, the Liquidators had not commenced the Proceedings and realised they needed further time to do so. They approached the Court and Justice Hammerschlag made orders under section 588FF(3)(b) of the *Corporations Act 2001* (Cth) extending the time for them to commence the Proceedings to 3 October 2011. Relevantly, JP Morgan and Grant Samuel did not appear when the extension order was made.

By October 2011, the Liquidators were still not in a position to commence the Proceedings and in September 2011 sought a further extension of time, this time pursuant to the Supreme Court's civil procedure rules, the *Uniform Civil Procedure Rules 2005* (UCPR). On 19 September 2011 Justice Ward (as her Honour then was) granted a further extension of time until April 2012. The Liquidators commenced the Proceedings within the extended time ordered by Justice Ward.

JP Morgan and Grant Samuel filed an application seeking to set aside Justice Ward's extension order on the basis that the only valid extension order was the one made by Justice Hammerschlag in May 2011 pursuant to the *Corporations Act 2001* (Cth). If their argument was successful, then the Liquidators' Proceedings would have been commenced out of time. Their application was dismissed by Justice Black, giving rise to the present appeals.

### The relevant legislation

The May 2011 orders of Justice Hammerschlag were made under section 588FF(3)(b) of the *Corporations Act 2001* (Cth) which, in summary, provides that a voidable transaction application may only be made during the period ending 3 years after the relation-back day (usually the date of appointment of the liquidators) or within such longer period as the Court orders on an application under that paragraph.

Section 79 of the *Judiciary Act 1903* (Cth) provides, in summary, that the laws of each State or Territory, including the laws regarding procedure, shall be binding on all Courts exercising federal jurisdiction in that State or Territory.

UCPR Rule 36.12(2)(b) provides that the Court may set aside or vary a judgment or order after it has been entered if it has been given or made in *the absence of a party*. JP Morgan and Grant Samuel did not appear when Justice Hammerschlag made his orders in late May 2011. Accordingly, Justice Ward made orders on 19 September 2011 *varying* Justice Hammerschlag's previous extension orders. In doing so, this effectively extended the time for the Liquidators to commence

the Proceedings.

### **Issues on the appeals**

The central issue raised in the appeals was effectively whether the Supreme Court's civil procedure rules enabled the Court to grant an extension of time for the commencement of the Proceedings after the three year period set out in the *Corporations Act 2001* (Cth) had passed. This issue raised two interrelated questions: -

- Whether only one application may be made under Section 588FF(3)(b) of the *Corporations Act 2001* (Cth) for an extension of time.
- Whether UCPR 36.16(2)(b) permits an order made extending time to be varied so as to permit an extension of time.

### **The Court's decision**

The majority of the Court (comprised of Justice Macfarlan and Justice Gleeson) found that the orders of Justice Ward were valid and accordingly the appeals were dismissed.

In reaching their decision, the majority of the Court found that once an application for extension is made in conformity with section 588FF(3)(b), the conduct of the litigation is left for the operation of the procedural rules of the relevant Court. In this case, UCPR Rule 36.16 was able to revive the extension order of Justice Hammerschlag and effectively produce a further extension of time.

President Beazley, on the other hand, came to the conclusion that UCPR 36.16, to the extent that it permits a fresh or new application to be made for an extension of time, is inconsistent with section 588FF of the *Corporations Act 2001* (Cth).

### **Conclusion**

The decision illustrates the frequently conflicting relationship between the *Corporations Act 2001* (Cth) and Courts' civil procedure rules. In addition, it has important consequences for liquidators regarding the limited circumstances in which a voidable transaction claim may be commenced outside the three year period under the *Corporations Act 2001* (Cth).

One would expect that this will continue to be the subject of future litigation, most likely in other jurisdictions. Given the uncertainty regarding the conflicting legislation, liquidators are advised to ensure that voidable transaction claims are commenced within the statutory period to avoid complications with applications being out of time.

Should you have any questions about this decision or Insolvency matters in general, contact a member of our [Restructuring & Insolvency](#) team.