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legal update

VOIDABLE TRANSACTIONS AND THE RACE AGAINST TIME

Some good news for IPs who discover additional claims after the s 588FF(3) time limit has expired.

In a significant five judge bench decision of the New South Wales Court of Appeal, important questions concerning the construction of s 588FF of the Corporations Act 2001 (Cth) (the Act) have been resolved. The decision is *Sydney Recycling Park Pty Ltd v Cardinal Group Pty Ltd (in liquidation)* [2016] NSWCA 329 (*Sydney Recycling v Cardinal*) and features as a crucial authority for the liquidation of insolvent corporations if the time limits imposed under s 588FF(3) are in dispute.

BACKGROUND

The facts of the case in *Sydney Recycling v Cardinal* can be stated briefly. The appellant, Sydney Recycling Park Pty Ltd (Sydney Recycling), supplied tipping services to the first respondent, Cardinal Group Pty Ltd (in liquidation) (Cardinal), who in turn operated waste management and skip bin services. An associated company of Sydney Recycling, known as Wanless Enviro Asset Management Pty Ltd (Wanless Enviro), sold a business called Smart Skip to Cardinal. In turn, Cardinal made payments to Sydney Recycling and inadvertently to Wanless Enviro.

On 11 December 2014, Cardinal and its liquidators filed proceedings seeking recovery of \$280,000 from Sydney Recycling on the grounds that payments made to it from Cardinal between 17 June 2011 and 2 December 2011 were unfair preferences, and both insolvent and voidable transactions. An order for that payment was sought pursuant to s 588FF of the Act.

Critically, s 588FF(3)(a) provides that an application for such relief is to be made within three years of the relation-back day or 12 months after the first appointment of the liquidator. In these circumstances,

the relation-back date was 15 December 2011 and the application was filed in time.

On 8 September 2015, nearly a year after the statutory limitation period expired, Cardinal and the liquidators sought to amend their claim pursuant to ss 64 and 65 of the *Civil Procedure Act 2005* (NSW) (CPA). The amendment proposed three further transactions arising from the same facts increasing the current claim to \$340,000. In addition, a new allegation was made from the same facts concerning monies inadvertently paid to Wanless Enviro which were liabilities owed to Sydney Recycling, thereby increasing the total amount claimed to \$494,000.

DECISION OF THE PRIMARY JUDGE

At first instance, the trial judge, Black J, found that the amendment arose out of substantially the same facts as those disclosed in the originating process and statement of claim and granted leave to amend. His Honour also treated the numerous payments by Sydney Recycling to Cardinal/Wanless Enviro as a single transaction. The Court of Appeal considered such a characterisation correct.

GROUNDINGS OF APPEAL

Consequently, Sydney Recycling appealed his Honour's decision on two grounds:

1. his Honour erred by holding that the Court had power to allow an amendment, the effect of which was to add claims in relation to new transactions after the expiry of the limitation period under s 588FF(3), and
2. his Honour erred in failing to hold the amendment was statute barred.

SECTION 588FF AND VOIDABLE TRANSACTIONS

Upon the court being satisfied that a transaction of a company is voidable, such as it being an insolvent or uncommercial transaction, unfair preference or loan, the court can, amongst other things, award a lump sum figure directing a person or corporation to pay the company in liquidation an equal amount that the person or corporation received.

Importantly, s 588FF(3) imposes time constraints on such applications being made. Those constraints provide, as outlined briefly above, that an application under s 588FF(1) may only be made on the relation-back date and ending:

1. three years after the relation-back day, or
2. 12 months after the first appointment of a liquidator in relation to the winding up of the company, whichever is later or within such longer period as the Court orders on an application under s 588FF(3)(b) made by the liquidator within the imposed time limits.

AMENDMENTS UNDER THE CPA

Sections 64 and 65 of the CPA contain the relevant provisions regarding the power to allow amendments of documents in proceedings. Section 64 of the CPA permits a court to order, at any stage in the proceedings, that any document in the proceedings be amended or that leave be granted to a party to do so.

Section 65 of the CPA applies to proceedings commenced within time and provides that a plaintiff may amend a pleading at any time after the expiration of the relevant limitation period in order to add or substitute a new cause of action that arises from the same (or substantially the same) facts as those already pleaded. If an amendment is made under s 65 then, unless the court orders otherwise, it is taken to have had effect as from the date on which the proceedings were commenced (s 65(3) CPA).

SECTION 79 OF THE JUDICIARY ACT

Critical to the Court of Appeal's determination in respect of out-of-time amendments to pleadings was whether ss 64 and 65 of the CPA, were 'picked up' (i.e. if they could be used) for the purposes of s 79 of the *Judiciary Act 1903* (Cth) (*the Judiciary Act*). Section 79(1) 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.

The *Corporations Act* does not impose any uniform procedure on State courts exercising Federal jurisdiction but relies on s 79 of the *Judiciary Act* to operate according to the practices and procedures in the respective State or Territory concerned. Accordingly, and as was the case in *Sydney Recycling v Cardinal*, the conduct of the litigation was left for the operation of the procedures outlined in the CPA.

RODGERS V COMMISSIONER OF TAXATION

At issue was whether the liquidators were entitled to amend their claim outside the limitation period. In support of their claim, the liquidators relied on the Full Court of the Federal Court's decision of *Rodgers v Commissioner of Taxation*¹ (*Rodgers*). In that case, the liquidator had commenced proceedings within time in relation to claims that eight payments made by a company were voidable transactions. Following the expiry of the limitation period under s 588FF(3), the liquidator became aware of two further payments made by the company and so applied for leave to amend the original application to include these two additional payments.

The Full Court ultimately allowed the amendment based on the reasoning that s 588FF(3) is concerned with the making of an application to the court, that is, the commencement of the proceeding itself, and did not preclude the amendment of a pleading that had been commenced within time. Further, the Full Court found that while each payment amounted to a separate transaction, the additional claims arose out of the same facts or substantially the same facts as those already pleaded in the original claim.

Rodgers also confirmed that the Court is prepared to allow an application to be amended to add new causes of action against an *existing defendant* after the expiration of the limitation period. However, it is not inclined to permit an amendment to a claim to add a *new party* where the application to amend has been brought outside the three-year time limit imposed by s 588FF(3) of the Act.²

¹ [1998] 88 FCR 61. ² *Greig v Stramit Corporation Pty Ltd* [2004] 2 Qd R 17; [2003] QCA 298.

Voidable transactions

HIGH COURT AUTHORITIES

Sydney Recycling sought to rely on a trilogy of High Court cases, namely *Grant Samuel*,³ *Gordon v Tolcher*,⁴ and *Fortress Credit*,⁵ to advance the argument that, based on those decisions, *Rodgers* should not be followed and the amendments should therefore not be permitted.

In *Grant Samuel*, the High Court held that s 588FF of the Act prevailed over State law so that the power of a court to extend the timeframe could not be supplemented, nor varied, by rules of procedure of the court in which the application was made.⁶

Similarly, in *Gordon v Tolcher*, the High Court also observed that the bringing of an application within the time required by s 588FF(3) is a precondition to the court's jurisdiction to make orders under s 588FF(1).⁷

In *Fortress Credit*, the issue was whether an extension of time under s 588FF(3)(b) could be permitted for commencing proceedings in general form without identifying any particular transaction or transactions, also referred to as a 'shelf order'. In considering various policy reasons, the High Court determined that a court has power to make 'shelf orders' under that section.

FINDINGS OF THE COURT OF APPEAL

Ultimately, the Court of Appeal found that there was nothing in the trilogy of High Court cases relied upon by Sydney Recycling to persuade it that *Rodgers* should no longer be followed, nor that the construction of that case was wrong.

As such, the Court of Appeal followed the reasoning of the Full Court in *Rodgers* in concluding that:

- s 588FF(3) does not prohibit an amendment to include additional transactions that would otherwise be out of time in circumstances where the original application was properly commenced within the time limit under s 588FF(3), and
- there is no inconsistency between ss 64 and 65 of the CPA, which provide for the amendment of existing proceedings, and s 588FF(3) of the Act which fixes the time for the commencement of proceedings.

In short, the appeal of Sydney Recycling was unanimously dismissed.

POLICY CONSIDERATIONS

One of the policy considerations underlying the time constraints for liquidators to bring an action is to give

commercial certainty to those who have had dealings with the insolvent company as to their potential exposure in relation to past transactions. However, this needs to be balanced with the reality that ongoing investigations by liquidators may uncover additional transactions or potential claims after the expiry of the limitation period that were not included as part of the original claim.

A different outcome in this case could have resulted in a situation in which there was no avenue for liquidators to amend a claim outside the time limit. This may have led to liquidators having to make additional applications to the court within the three year timeframe seeking to extend the limitation period in order to preserve their rights to amend their claim in the event additional transactions were discovered during the proceedings.

Needless to say, it would also increase the workload and costs for liquidators and practitioners in seeking extensions in anticipation of amendment applications, which may or may not be ultimately required, not to mention place an unnecessary burden on the courts in determining those applications.

TAKEAWAY POINTS

Some general principles and practical points gleaned from the decision, which can guide liquidators and practitioners in relation to steps that can be taken outside limitation periods, are as follows:

- A liquidator may amend their pleadings to include additional claims that would otherwise fall outside the limitation period so long as proceedings have been commenced within time pursuant to s 588FF(3) of the Act.
- Any additional claims that a liquidator seeks to add need to arise out of the same facts or substantially the same facts as those already pleaded in the original claim pursuant to s 65 of the CPA.
- It is not necessary that each additional payment/claim form part of a single transaction to the original claim so long as they arise from the same facts or substantially the same facts.
- A liquidator may be permitted to amend a pleading after the expiry of the s 588FF(3) limitation period to plead claims in the alternative. For example, a claim for preferential payments against a company may be amended after the time limit expires to plead the payments as voidable preferences in the alternative.⁸

³ *Grant Samuel Corporate Finance Pty Limited v Fletcher*; *JP Morgan Chase Bank, National Association v Fletcher* [2015] 254 CLR 477; [2015] HCA 8. ⁴ *Gordon v Tolcher in his capacity as liquidator of Senafeld Pty Ltd (in liq)* [2006] 231 CLR 334; [2006] HCA 62. ⁵ *Fortress Credit Corporation (Australia) II Pty Limited v Fletcher* [2015] 254 CLR 489; [2015] HCA 10. ⁶ *Grant Samuel* at [23]. ⁷ *Gordon v Tolcher* as affirmed by *Grant Samuel* at [17]. ⁸ *Davies v Chicago Boot Co Pty Ltd (No 2)* [2007] 96 SASR 164; [2007] SASC 12.

- A court will not allow an existing claim to be amended to add a new party to the proceedings if the application to amend is brought outside the three-year limitation period under s 588FF(3).⁹
- A court may be prepared to extend the time for service of a claim on a defendant outside the s 588FF(3) limitation period so long as the claim was filed within the time prescribed by that section.¹⁰
- 'Shelf orders' are permissible. That is, an application to extend the time for commencing proceedings under s 588FF(3)(b) can be made in general form without having to identify any particular transaction or transactions.¹¹

- If proceedings have been commenced within time, but then a typographical slip in the amount of the claim is discovered after the expiry of the s 588FF(3) period, then that typographical error could be corrected by virtue of ss 64 and 65 of the CPA and s 79 of the *Judiciary Act*.¹² This is even in circumstances where the typographical error relates to a substantial sum of money.

From the above salient points, it is self-evident that *Sydney Recycling v Cardinal* is instructive for any insolvency practitioner who discovers additional claims after the statutory time limit has expired and should provide comfort that there is an avenue available to seek maximum recovery for creditors. ▲

⁹ *Greig v Stramit Corporation Pty Ltd*. ¹⁰ *Gordon v Tolcher*. ¹¹ *Fortress Credit*. ¹² *Sydney Recycling Park Pty Ltd v Cardinal Group Pty Ltd (in liq)* [2016] NSWCA 329 at [93]-[94].

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