FEDERAL COURT OF AUSTRALIA

Bryant (Liquidator) v L.V. Dohnt & Co Pty Ltd, in the Matter of Gunns Limited (In Liq) (Receivers and Managers Appointed) [2018] FCA 238

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| File number(s): | WAD 540 of 2015  WAD 550 of 2015  WAD 553 of 2015 |
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| Judge(s): | **DAVIES J** |
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| Date of judgment: | 6 March 2018 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY** – Test for insolvency; When Plaintiff Group became insolvent; Voidable preference claims under s 588FE of the *Corporations Act* *2001* (Cth); Application by liquidator for relief under s 588FF of the *Corporations Act* in relation to a transaction claimed to be voidable by reason of s 588FE; Whether an amendment of pleadings to expand the period for voidable preference claims is statute barred by reason of s 588FF(3).  **PRACTICE** **AND** **PROCEDURE** – Trial of separate questions pursuant to r 30 of the *Federal Court Rules*; Leave sought to amend originating process and statement of claim pursuant to r 8.21 of the *Federal Court Rules*; conditional leave granted subject to a trial on preliminary questions; Whether amendment of pleadings constituted adding new material facts or was based on the same facts or substantially the same facts as those already pleaded. |
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| Legislation: | *Civil Aviation (Carriers’ Liability) Act 1959* (Cth)  *Corporations Act 2001* (Cth)  *Corporations Act 1989* (Cth)  *Judiciary Act 1903* (Cth)  *Federal Court Rules 2011* (Cth)  *Civil Procedure Act 2005* (NSW)  *District Court Rules 1973* (NSW) |
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| Cases cited: | *Advanced Switching Services Pty Ltd v State Bank of New South Wales t/as Colonial State Bank)* [2007] FCA 954  *Agtrack (NT) Pty Ltd v Hatfield* [2005] 223 CLR 251  *Air Link Pty Ltd v Paterson (No 2)* (2003) 58 NSWLR 388  *Australian Securities and Investments Commission v Cassimatis (No. 6)* [2016] FCA 622  *ASIC v Plymin (No 1)* [2003] VSC 123  *Brickfield Properties Ltd v Newton* [1971] 1 WLR 862  *Bryer Merchandisers Pty Ltd v Nike Australia Pty Ltd* [2003] FCA 472  *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1138  *Carter, Re Spec FS NSW Pty Ltd (in liq)* [2013] FCA 1027  *Clasul Pty Ltd v Commonwealth of Australia* [2014] FCA 1133  *Clurname Pty Ltd v McGraw-Hill Financial Inc* [2017] FCA 1319  *Crema Pty Ltd v Land Mark Property Development Pty Ltd* [2006] VSC 338  *Darcy v Medtel Pty Ltd (No 3)* [2004] FCA 807  *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1985) 184 CLR 265  *Davies & Anor v Chicago Boot Company Pty Ltd (No 2)* (2007) 96 SASR 164  *Davies v Chicago Boot Co Pty Ltd (No 2)* (2007) 96 SASR 164  *Draney v Barry* [2002] 1 Qd R 145  *Dye v Commonwealth Security Ltd (No 2)* [2010] FCAFC 118  *First Equilibrium Pty Limited v Bluestone Property Services Pty Limited (in liq)* [2013] FCAFC 108  *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489  *Gordon v Tolcher* (2006) 221 CLR 334  *Grant Samuel Corporation v Fletcher* (2015) 254 CLR 477  *Greig v Stramit Corporation Pty Ltd* [2004] 2 Qd R 17  *International Cat Manufacturing Pty Ltd (in liquidation) v Rodrick* [2013] QSC 91  *Lewis re: Damilock Pty Ltd (in liquidation) v Visa Australia Pty Ltd* [2008] FCA 1801  *Luck v Chief Executive Officer of Centrelink* [2015] FCAFC 75  *Manday Investments Pty Ltd v Commonwealth Bank of Australia* [2011] FCA 681  *New South Wales v Radford* [2010] NSWCA 276; (2010) 79 NSWLR 327  *PSL Industries Ltd v Simplot Australia Pty Ltd* (2003) 7 VR 106  *Re Spec FS NSW Pty Ltd (in liquidation)* [2013] FCA 1027  *Rodgers v Commissioner of Taxation* (1998) 88 FCR 61  *Sandell v Porter* [1966] HCA 28  *Southern Cross Interiors Pty Ltd (in liquidation) v Deputy Commissioner of Taxation* (2001) 53 NSWLR 213  *Skiwing Pty Ltd t/as Café Tiffany’s v Trust Company of Australia Ltd (Stockland Property Management Ltd)* [2009] FCA 347  *Sydney Recycling Park Pty Ltd v Cardinal Group Pty Ltd (In Liq)* [2016] NSWCA 329  *Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu (A Firm), in the matter of Tamaya Resources Limited (in liq)* [2015] FCA 1098  *Titan v Romano* [2000] FCA 431  *Tolcher v Capital Finance Australia Ltd* (2005) 143 FCR 300  *Trinick v Forgione* [2015] FCA 642  *Worldwide Specialty Property* *Services Pty Ltd (in Liq) v Worldwide Specialty Property Services Pty Ltd (in Liq)* [2017] FCA 687  *Quick v Stoland* (1998) 87 FCR 371 |
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| Date of hearing: | 27–28 November 2017 |
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| Registry: | Victoria |
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| Division: |  |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial and Corporate Insolvency |
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| Category: | Catchwords |
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| Counsel for the Plaintiffs: | Mr M Hoffmann QC with Mr B Gibson |
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| Solicitor for the Plaintiffs: | Johnson Winter & Slattery Lawyers |
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| Counsel for the Defendant in SAD334 of 2015: | Mr TW Cox SC with Mr BJ Doyle |
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| Solicitor for the Defendant in SAD334 of 2015: | Minter Ellison |
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| Counsel for the Defendants in WAD540 of 2015, WAD550 of 2015, and WAD553 of 2015: | Mr M De Kerloy |
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| Solicitor for the Defendants in WAD540 of 2015, WAD550 of 2015, and WAD553 of 2015: | Mony De Kerloy Barristers & Solicitors |

ORDERS

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|  | | SAD 334 of 2015 |
| IN THE MATTER OF GUNNS LIMITED (IN LIQUIDATION) (RECEIVERS & MANAGERS APPOINTED) (ACN 009 478 148) | | |
| BETWEEN: | DANIEL MATHEW BRYANT, IAN MENZIES CARSON AND CRAIG DAVID CROSBIE IN THEIR CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF GUNNS LIMITED (IN LIQUIDATION) RECEIVERS & MANAGERS APPOINTED) (ACN 009 478 148)  Plaintiffs | |
| AND: | LV DOHNT & CO PTY LIMITED  Defendant | |

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| JUDGE: | DAVIES J |
| DATE OF ORDER: | 6 March 2018 |

THE COURT ORDERS THAT:

1. The following preliminary questions be answered as follows:

***Question One****: Whether any (and if so which) of the companies listed in Annexure 1 was insolvent between 30 March 2012 and 25 September 2012.*

***Answer****: Each of the companies listed in Annexure 1 was insolvent between 30 March 2012 and 25 September 2012.*

***Question Two****: If the answer to question (1) is yes, from what date did each insolvent company become insolvent.*

***Answer****: Each of the companies listed in Annexure 1 was insolvent as at 30 March 2012 and remained insolvent to the date of the appointment of the administrators.*

***Question Three****: Whether any (and if so which) of the claims that were added by the plaintiffs pursuant to the grant of leave are statute barred by reason of s 588FF(3) of the Corporations Act 2001 (Cth).*

***Answer****: None of the claims added by the plaintiffs pursuant to the grant of leave are statute barred by reason of s 588FF(3) of the Corporations Act 2001 (Cth).*

***Question Four****: Whether the conditional leave granted ought be granted in any event.*

***Answer****: Yes.*

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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|  | | WAD 540 of 2015 |
| IN THE MATTER OF GUNNS LIMITED (IN LIQUIDATION) (RECEIVERS & MANAGERS APPOINTED) (ACN 009 478 148) | | |
| BETWEEN: | DANIEL MATHEW BRYANT, IAN MENZIES CARSON AND CRAIG DAVID CROSBIE IN THEIR CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF GUNNS LIMITED (IN LIQUIDATION) RECEIVERS & MANAGERS APPOINTED) (ACN 009 478 148)  Plaintiffs | |
| AND: | **EDENBORN PTY LTD (ACN 065 056 180)**  Defendant | |

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| JUDGE: | DAVIES J |
| DATE OF ORDER: | 6 March 2018 |

THE COURT ORDERS THAT:

1. The following preliminary questions be answered as follows:

***Question One****: Whether any (and if so which) of the companies listed in Annexure 1 was insolvent between 30 March 2012 and 25 September 2012.*

***Answer****: Each of the companies listed in Annexure 1 was insolvent between 30 March 2012 and 25 September 2012.*

***Question Two****: If the answer to question (1) is yes, from what date did each insolvent company become insolvent.*

***Answer****: Each of the companies listed in Annexure 1 was insolvent as at 30 March 2012 and remained insolvent to the date of the appointment of the administrators.*

***Question Three****: Whether any (and if so which) of the claims that were added by the plaintiffs pursuant to the grant of leave are statute barred by reason of s 588FF(3) of the Corporations Act 2001 (Cth).*

***Answer****: None of the claims added by the plaintiffs pursuant to the grant of leave are statute barred by reason of s 588FF(3) of the Corporations Act 2001 (Cth).*

***Question Four****: Whether the conditional leave granted ought be granted in any event.*

***Answer****: Yes.*

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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|  | | WAD 550 of 2015 |
| IN THE MATTER OF GUNNS LIMITED (IN LIQUIDATION) (RECEIVERS & MANAGERS APPOINTED) (ACN 009 478 148) | | |
| BETWEEN: | DANIEL MATHEW BRYANT, IAN MENZIES CARSON AND CRAIG DAVID CROSBIE IN THEIR CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF GUNNS LIMITED (IN LIQUIDATION) RECEIVERS & MANAGERS APPOINTED) (ACN 009 478 148)  Plaintiffs | |
| AND: | **BLUEWOOD INDUSTRIES PTY LTD (ACN 111 597 454)**  Defendant | |

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| JUDGE: | DAVIES J |
| DATE OF ORDER: | 6 March 2018 |

THE COURT ORDERS THAT:

1. The following preliminary questions be answered as follows:

***Question One****: Whether any (and if so which) of the companies listed in Annexure 1 was insolvent between 30 March 2012 and 25 September 2012.*

***Answer****: Each of the companies listed in Annexure 1 was insolvent between 30 March 2012 and 25 September 2012.*

***Question Two****: If the answer to question (1) is yes, from what date did each insolvent company become insolvent.*

***Answer****: Each of the companies listed in Annexure 1 was insolvent as at 30 March 2012 and remained insolvent to the date of the appointment of the administrators.*

***Question Three****: Whether any (and if so which) of the claims that were added by the plaintiffs pursuant to the grant of leave are statute barred by reason of s 588FF(3) of the Corporations Act 2001 (Cth).*

***Answer****: None of the claims added by the plaintiffs pursuant to the grant of leave are statute barred by reason of s 588FF(3) of the Corporations Act 2001 (Cth).*

***Question Four****: Whether the conditional leave granted ought be granted in any event.*

***Answer****: Yes.*

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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|  | | WAD 553 of 2015 |
| IN THE MATTER OF GUNNS LIMITED (IN LIQUIDATION) (RECEIVERS & MANAGERS APPOINTED) (ACN 009 478 148) | | |
| BETWEEN: | DANIEL MATHEW BRYANT, IAN MENZIES CARSON AND CRAIG DAVID CROSBIE IN THEIR CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF GUNNS LIMITED (IN LIQUIDATION) RECEIVERS & MANAGERS APPOINTED) (ACN 009 478 148)  Plaintiffs | |
| AND: | SOUTHERN REGIONAL TRANSPORT PTY LTD  (ACN 009 478 148)  Defendant | |

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| JUDGE: | DAVIES J |
| DATE OF ORDER: | 6 March 2018 |

THE COURT ORDERS THAT:

1. The following preliminary questions be answered as follows:

***Question One****: Whether any (and if so which) of the companies listed in Annexure 1 was insolvent between 30 March 2012 and 25 September 2012.*

***Answer****: Each of the companies listed in Annexure 1 was insolvent between 30 March 2012 and 25 September 2012.*

***Question Two****: If the answer to question (1) is yes, from what date did each insolvent company become insolvent.*

***Answer****: Each of the companies listed in Annexure 1 was insolvent as at 30 March 2012 and remained insolvent to the date of the appointment of the administrators.*

***Question Three****: Whether any (and if so which) of the claims that were added by the plaintiffs pursuant to the grant of leave are statute barred by reason of s 588FF(3) of the Corporations Act 2001 (Cth).*

***Answer****: None of the claims added by the plaintiffs pursuant to the grant of leave are statute barred by reason of s 588FF(3) of the Corporations Act 2001 (Cth).*

***Question Four****: Whether the conditional leave granted ought be granted in any event.*

***Answer****: Yes.*

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DAVIES J:

1. On 5 March 2013, Ian Menzies Carson, Craig David Crosbie and Daniel Mathew Bryant (“**the liquidators**”) from PPB Advisory were appointed as joint and several liquidators of Gunns Limited (“**Gunns**”) and each of the other companies within the Gunns Group of companies (**the** “**Gunns** **Group**”). Following their appointment, the liquidators investigated potential voidable preference claims available to the plaintiffs pursuant to s 588FE of the *Corporations Act 2001* (Cth) (“**the Act**”). After reviewing the books and records of Gunns and the Gunns Group, the liquidators determined that Gunns and other companies in the Gunns Group were insolvent from at least 3 July 2012 and possibly earlier. The liquidators commenced a number of proceedings in different registries of this Court against various defendants alleging that payments received by them from the Gunns Group were voidable transactions pursuant to s 588FE of the Act. The various proceedings, which have been case managed together by Middleton J, raised some common questions including when companies in the Gunns Group became insolvent (“**the Insolvency Question**”) and, in relation to some of the defendants, whether claims made by the plaintiffs pursuant to conditional leave are statute barred by reason of s 588FF(3) of the Act (“**the** **Amendment** **Question**”).

# insolvency question

1. On 6 May 2016, Middleton J made orders pursuant to r 30.01 of the *Federal Court Rules 2011* (Cth) for a separate trial of the following preliminary questions:

1. Whether any (and if so which) of the companies listed in Annexure 1 was insolvent between 30 March 2012 and 25 September 2012.

2. If the answer to question (1) is yes, from what date did each insolvent company become insolvent.

1. Initially, a number of defendants contested the liquidators’ allegations as to insolvency, but a number of those proceedings have since settled. Nine proceedings remain (which are listed in Annexure 2) in which the defendant either has not admitted the insolvency allegation or has denied that allegation, but as none of those defendants filed any evidence or sought to be heard on the insolvency question, the trial on this question ultimately proceeded without a contradictor.
2. The relation back day for the purposes of s 513C of the Act is 25 September 2012, being the date on which the companies in the Gunns Group went into administration. Accordingly, the relation back period for the purposes of the voidable transaction claims pursuant to Part 5.7B of the Act is between 25 March 2012 and 25 September 2012 (“**the relevant period**”): ss 91, 588FE of the Act. The liquidators contend that Gunns and its subsidiaries were insolvent during the whole of this period. The liquidators have relied on the following evidence:
   1. the expert report of George Georges (“**Mr Georges**”) of Ferrier Hodgson dated 12 February 2016 (“**the first report**”);
   2. the supplementary expert report of Mr Georges dated 10 November 2016 (“**the second report**”);
   3. an affidavit of Malcolm Matthews (“**Mr Matthews**”) sworn on 1 August 2017 (“**the Matthews Affidavit**”). Mr Matthews was the group financial controller of the Gunns Group during the relevant period; and
   4. business records of Gunns and the relevant Gunns Group entities.

## Test for insolvency

1. Section 95A of the Act states that “a person is solvent if and only if the person is able to pay all the person’s debts, as and when they become due and payable”, and that “a person who is not solvent is insolvent”. The Act does not define “insolvency” but it is well established by the case law that insolvency for the purposes of s 95A is the inability to meet liabilities out of available resources, as they fall due. The assessment of solvency focusses on cash flow and the company’s liquidity in considering whether the company is able to meet its expenses and liabilities when payable: *ASIC v Plymin (No 1)* [2003] VSC 123. While an excess of assets over liabilities will satisfy a balance sheet test, if the assets are not readily realisable so as to permit the payment of all debts as and when they fall due, the company will not be solvent. Conversely, a company may be able to pay its debts as and when they fall due, despite a deficiency of assets: *Crema Pty Ltd v Land Mark Property Development Pty Ltd* [2006] VSC 338 at [141].
2. Insolvency, however, involves something more than mere temporary lack of liquidity. It is the company’s inability, utilising such cash resources as are available through the use of assets or which may otherwise realistically be raised to meet debts as and when they fall due which indicates insolvency: *Sandell v Porter* [1966] HCA 28. In *Sandell v Porter* Barwick CJ said (at [15]):

Insolvency is expressed in s 95 as an inability to pay debts as they fall due out of the debtor’s own money. But the debtor’s own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realization by sale or by mortgage or pledge of his assets within a relatively short time - relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor’s financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor’s inability, utilizing such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency.

In *Southern Cross Interiors Pty Ltd (in liquidation) v Deputy Commissioner of Taxation* (2001) 53 NSWLR 213 at [54] Palmer J distinguished between “surmountable temporary illiquidity” and “insurmountable endemic illiquidity” as follows:

In my opinion, the following propositions may now be drawn from the  
authorities:

(i)  whether or not a company is insolvent for the purposes of the  
Corporations Act (Cth), ss 95A, 459B, 588FC or 588G(1)(b), is a  
question of fact to be ascertained from a consideration of the  
company's financial position taken as a whole: *Sandell v Porter*,  
*Pegulan Floor Coverings Pty Ltd v Carter* (1997) 24 ACSR 651; 15  
ACLC 1,293 and *Fryer v Powell*;

(ii)  in considering the company’s financial position as a whole, the  
Court must have regard to commercial realities. Commercial realities will be relevant in considering what resources are available to the company to meet its liabilities as they fall due, whether resources other than cash are realisable by sale or borrowing upon security, and when such realisations are achievable: *Sandell v Porter*, *Taylor v Australia and New Zealand Banking*, *Re Newark and Sheahan v Hertz*.

(iii)  in assessing whether a company’s position as a whole reveals  
surmountable temporary illiquidity or insurmountable endemic  
illiquidity resulting in insolvency, it is proper to have regard to the  
commercial reality that, in normal circumstances, creditors will not  
always insist on payment strictly in accordance with their terms of  
trade but that does not result in the company thereby having a cash  
or credit resource which can be taken into account in determining  
solvency: *Bank of Australasia v Hall* (1907) 4 CLR 1,514 at 1,528;  
*Re Norfolk Plumbing* (at 615; 169); *Taylor v Australia and New  
Zealand Banking* (at 784; 811); *Guthrie (as liq of ULT Ltd (rec  
apptd) (in liq)) v Radio Frequency Systems Pty Ltd* (2000) 34 ACSR  
572 at 575;

(iv)  the commercial reality that creditors will normally allow some  
latitude in time for payment of their debts does not, in itself, warrant  
a conclusion that the debts are not payable at the times contractually  
stipulated and have become debts payable only upon demand:  
*Standard Chartered Bank v Antico* (at 331); *Hall v Press Plumbing;  
Melbase* (at 199; 832–833); *Carrier* (at 253; 777–778); *Cuthbertson  
v Thomas* (at 320); *Lee Kong* (at 112; 1,568);

(v)  in assessing solvency, the court acts upon the basis that a contract  
debt is payable at the time stipulated for payment in the contract  
unless there is evidence, proving to the court's satisfaction, that:

* there has been an express or implied agreement between the  
  company and the creditor for an extension of the time  
  stipulated for payment; or
* there is a course of conduct between the company and the  
  creditor sufficient to give rise to an estoppel preventing the  
  creditor from relying upon the stipulated time for payment; or
* there has been a well-established and recognised course of  
  conduct in the industry in which the company operates, or as  
  between the company and its creditors as a body, whereby  
  debts are payable at a time other than that stipulated in the  
  creditors' terms of trade or are payable only on demand:

*Re Newark* (at 414–415); *Standard Chartered Bank v Antico* (at  
331); *Melbase*; *Cuthbertson v Thomas*; *Fryer v Powell* (at 444–445);

(vi)  it is for the party asserting that a company's contract debts are not  
payable at the times contractually stipulated to make good that  
assertion by satisfactory evidence: *Fryer v Powell* (at 444–445);  
*Melbase*; *Cuthbertson v Thomas*.

These principles have been endorsed in numerous cases: see eg, *First Equilibrium Pty Limited v Bluestone Property Services Pty Limited (in liq)* [2013] FCAFC 108 at [34].

1. The liquidators also referred to the 14 indicia of insolvency identified in *ASIC v Plymin* by Mandie J, namely: continuing losses; liquidity ratios below 1; overdue Commonwealth and State taxes; a poor relationship with the bank, including an inability to borrow further funds; no access to alternative finance; an inability to raise further equity capital; suppliers placing the company on cash on delivery, or otherwise demanding special payments before resuming supply; creditors unpaid outside trading term; issuing of post-dated cheques; dishonoured cheques; special arrangements with selected creditors; solicitors’ letters of demand, summonses, judgments or warrants issued against the company; payments to creditors of rounded sums which are not reconcilable to specific invoices; and the inability to produce timely and accurate financial information to display the company’s trading performance and financial position, and make reliable forecasts. A number of subsequent decisions have referred to this list with approval: see for example *Lewis re: Damilock Pty Ltd (in liquidation) v Visa Australia Pty Ltd* [2008] FCA 1801 at [16]; *International Cat Manufacturing Pty Ltd (in liquidation) v Rodrick* [2013] QSC 91 at [70]–[77]; *Trinick v Forgione* [2015] FCA 642 at [271]. As the cases illustrate though, the presence of one or more of those factors does not of itself, establish insolvency and, in any particular case, one or more of those factors may be of more particular significance and in some may not be relevant. It is always necessary to consider the nature of a company’s assets and the company’s ability to convert those assets into cash within a relatively short time to meet debts as and when they fall due. That assessment is objectively made.
2. The liquidators have the onus of establishing the insolvency of the Gunns companies during the relevant period.

## The Gunns Group

1. Gunns is the parent company of the Gunns Group, which comprised the companies listed in schedule A. The Gunns Group was organised on a divisional basis by reference to its major operating business units rather than by reference to individual legal entities or groups of entities and, as the parent company, Gunns performed various functions for the group, including providing a centralised treasury and banking system. The principle financier to the Gunns Group was a syndicate of 10 banks led by ANZ Cavell Court (“**the** **ANZ**”) as syndicate agent (“**the ANZ debt**”).
2. During the period from January 2012 to 25 September 2012 (“**the relevant period**”), the principle activities of the Gunns Group were:
   1. the processing, manufacturing and selling of sawn timber products and veneers including merchandising;
   2. forest management and development, milling, processing and export of hardwood wood chip products;
   3. responsible entity management of various forestry and horticultural managed investment schemes; and
   4. financing managed investment scheme investors.
3. The Gunns Group operated from various sites during the relevant period, namely:

(a) sawmills in Tarpeena, South Australia and Bell Bay, Tasmania;

(b) a wood chip export facility at the Port of Portland, Victoria (sold in August 2012);

(c) hardwood plantations (owned) located in the south east of South Australia;

(d) plantations (owned and managed under managed investment schemes) in Tasmania;

(e) plantations owned by investors under various managed investment schemes located in several states of Australia;

(f) softwood plantations in the area known as the “green triangle” (Auspine softwood plantations) located in the south east of South Australia and Victoria; and

(g) vineyards and wineries located in Tasmania.

1. During 2010 and 2011 the trading performance of the Gunns Group was impacted by several external factors and the Gunns Group suffered significant declines in revenue. From mid‑2011 onwards there were ongoing delays in the payment of creditors and in September 2011, Gunns identified that it was unlikely to repay the ANZ debt which was repayable by 31 January 2012 and would require an extension of the repayment date. On 31 January 2012 the term was extended to 31 December 2012.
2. Despite steps taken by the Gunns Group to reduce its finance debt Gunns Group remained reliant on the lenders to fund its working capital requirements. A capital raising announced in early February 2012 did not proceed and alternative equity raising options did not eventuate.
3. On 25 September 2012, the directors of Gunns appointed the liquidators as joint and several administrators of Gunns and its subsidiaries. On 5 March 2013 at the second meeting of creditors it was resolved to put Gunns and the companies in the Gunns Group into liquidation.
4. As at 25 September 2012, the creditors of the Gunns Group totalled $780,798,000, which included unsecured trade creditors of $61,820,000 and other unsecured creditors of $73,016,000.

## The expert’s reports

1. In his first report, Mr Georges examined the financial position of the Gunns Group on a consolidated basis and concluded that Gunns and the Gunns Group were insolvent from on or around 30 March 2012 and continuously from that date through to the date of the appointment of the administrators. Mr Georges explained that he examined the financial position of the Gunns Group on a consolidated basis because from the financial year ending 30 June 2010 onwards, the Gunns Group, for tax and financial reporting purposes, was treated as a single economic entity and financial statements were prepared on a consolidated group basis, including monthly management reports.
2. In his first report, Mr Georges noted that there were numerous indicators of the insolvency of Gunns and the Gunns Group during the relevant period. In summary they were:

(a) the trading performance of the Gunns Group had deteriorated as at 31 December 2011 and budgeted sales and profit were not met;

(b) the trading performance continued to deteriorate in the three month period to 31March 2012 and the cash flows were insufficient to bring overdue unsecured trade creditors within terms;

(c) Gunns’ cash flow assumptions prepared in February 2012 were based on assumptions that, in Mr Georges’ opinion, were unrealistic;

(d) the Gunns Group had a significant net liquid asset deficiency as at 31 December 2011 of approximately $14 million which deteriorated to approximately $45 million by 25 September 2012;

(e) the Gunns Group had a working capital deficiency of $533 million as at 31 January 2012 which deteriorated to $590 million as at 31 March 2012 and to $614 million by 31 July 2012 after adjusting reported balances for overstated carrying values of assets held for sale included as current assets and adjusted for additional provisioning against aged receivables;

(f) the Gunns Group had significant levels of overdue unsecured trade creditors as at 31 December 2011 of $16 million which fluctuated and peaked in July 2012 at $46 million and were $33 million as at 25 September 2012;

(g) unsecured trade creditors were being paid outside terms and some major unsecured trade creditors had threatened legal action or stopped supplying;

(h) no undrawn working capital facilities were available to address overdue unsecured trade creditors during the relevant period and Gunns’ overdraft continually operated in excess of the approved facility limit from around 30 March 2012;

(i) Gunns could not repay its senior syndicated lenders their debt due by 31 December 2011 and negotiated a 12 month extension of the repayment date to 31 December 2012. Gunns then undertook an asset sale process during 2012 with the object of reducing its secured debt which was $516.7 million as at January 2012. The assets subject to this sale process were secured in favour of the lenders;

(j) asset sales did not produce funds to bring overdue unsecured trade creditors within terms. Gunns’ secured debt of $516.7 million as at January 2012 was only reduced by $16.1 million to $500.6 million as at the appointment of administrators to the Gunns Group on 26 September 2012;

(k) Gunns incurred an extension fee in January 2012 of $60 million due to the ANZ in consideration for the lenders extending the due date for repayment, which was fully repayable by 31 December 2012 but, in Mr Georges’ opinion, there was no reasonable basis as at 30 March 2012 or thereafter to assume that the $60 million could be paid by 31 December 2012;

(l) Gunns was unable to raise further equity: a proposed capital raising announced in February 2012 did not proceed; in March 2012 an alternative capital raising was initiated to raise $450 million in capital and a draft prospectus was prepared but, in May 2012 Credit Suisse (which was engaged to assess the capital structure options) advised that $605 million would in fact be required to repay the finance debt and capital raising costs, and the prospectus was never issued; and

(m) Gunns was reliant on its lenders for support to continue to trade throughout the period from 30 March 2012 onwards.

1. These opinions are cogently supported by the evidence which Mr Georges referenced in his first report.
2. In his second report of 10 November 2016, Mr Georges examined the solvency of Gunns and four of its subsidiaries on a standalone basis, namely Auspine Limited (“**Auspine**”), GTP Heyfield Pty Ltd (“**GTPH**”), GTP Alexandra Pty Ltd (“**GTPA**”) and Gunns Forest Products Pty Ltd (“**GFPPL**”) (termed collectively in Mr Georges’ report “**the relevant subsidiaries**”or“**the ANZ security group**”). Those companies had each given cross guarantees in favour of the ANZ under the syndicated facility agreement. For the purpose of forming his opinions, Mr Georges prepared reconstructed financial statements for each of those companies and his conclusions as to the solvency of those companies was based on his reconstructed single entity financial statements as well as his consideration of whether the solvency of each entity was inextricably bound up with, and dependant on, the solvency of the other companies in the Gunns Group. From that review, Mr Georges reached the same conclusion that each of those companies was insolvent from 30 March 2012 onwards. His reasons included that the solvency of each of those companies was inextricably linked because of the facility agreement and cross guarantees.
3. In his second report, Mr Georges gave the following reasons for his opinion that Auspine was insolvent from 30 March 2012:
   1. Auspine did not have access to operating cash flows other than to service its secured debt to the NAB facilities. This was because the balance of the cash generated by Auspine after payments to the NAB was regularly transferred to the Gunns ANZ overdraft account for use by the Gunns Group;
   2. Auspine was in breach of one of its quarterly borrowing covenants as at December 2011 and it had no undrawn facilities available nor any independent capacity to increase its borrowings because its assets had been pledged to secure the NAB’s debts and those of the Gunns syndicated lenders;
   3. Auspine was a guarantor of Gunns’ debt to the ANZ and accordingly was jointly liable for the net deficiency in Gunns. After recognition of the guarantee liability for the Gunns shortfall, Auspine had a deficiency of current assets to current liabilities of $514m as at 31 March 2012 and, in Mr Georges’ opinion, given the Gunns Group’s overall position there was no reasonable basis, as at 31 March 2012, to expect that the ANZ debt could be repaid; and
   4. including the Gunns shortfall, total liabilities exceeded total assets by $242m, after eliminating intercompany loans, intercompany investments, and tax account balances.
4. Mr Georges gave the following reasons for his opinion that GTPH was insolvent from 30 March 2012:
   1. GTPH had no trading activity and was economically dependent on Gunns and/or the Gunns Group;
   2. GTPH’s major asset was an amount owed to it by another member of the Gunns Group, GTP Holdings Pty Ltd;
   3. its other asset was land which formed part of the security for the NAB facility;
   4. GTPH was a guarantor of Gunns’ ANZ debt and in view of GTPH’s economic dependency on Gunns, GTPH had no ability to satisfy the debt to the secured lenders as at 31 March 2012;
   5. as at 30 March 2012 the deficiency in Gunns was approximately $352m and there was no reasonable basis to assume as at 30 March 2012 that the ANZ debt could be repaid by 31 December 2012.
5. In respect of GTPA, Mr Georges gave the following reasons:

(a) GTPA had no trading activity and was also economically dependent upon Gunns and/or the Gunns Group;

(b) GTPA had no assets of realisable value;

(c) GTPA was also a guarantor of the ANZ debt and was accordingly jointly liable for the net deficiency in Gunns and there was no reasonable basis to assume that as at 30 March 2012 that the debt could be repaid by 31 December 2012.

1. In respect of GFPPL, Mr Georges gave the following reasons:

(a) GFPPL was also economically dependent upon Gunns and/or the Gunns Group;

(b) GFPPL was a guarantor of Gunns’ ANZ debt and was accordingly jointly liable for the net deficiency in Gunns and there was no reasonable basis to assume that as at 30 March 2012 that the debt could be repaid by 31 December 2012;

(c) after recognition of the guarantee liability for the Gunns shortfall, GFPPL had a deficiency of current assets to current liabilities of $565m as at 31 March 2012; and

(d) including the Gunns shortfall, total liabilities exceeded total assets by $105m, after eliminating intercompany loans and tax account balances as at 31 March 2012.

1. These opinions are cogently supported by the evidence which Mr Georges referenced in his second report.
2. Mr Georges also opined that the solvency of Gunns and the relevant subsidiaries in the ANZ security group were inextricably bound up with and dependent upon the solvency of the other entities in the Gunns Group. Mr Georges concluded that this was the case by reason of the terms of the ANZ facility agreement and cross guarantees granted by the relevant Gunns Group entities in favour of the ANZ. Mr Georges stated that:

In my opinion, the ANZ security group was insolvent from 30 March 2012 and otherwise continued to trade principally because of the non‑payment of overdue unsecured trade creditors…, the accommodation of the ANZ in allowing Gunns to operate the overdraft account in excess of approved limits…, and the ongoing ad hoc support of its lenders…that support was backed by a first ranking charge over the assets of the ANZ security group, was conditional upon various milestone and covenant events, and had a specified repayment date of 31 December 2012.

## Conclusion

1. The analysis conducted by Mr Georges shows as at 30 March 2012 Gunns and the Gunns Group had an insurmountable endemic illiquidity and did not have the resources available to meet debts as and when they fell due. As at March 2012, Gunns had a significant deficiency in cash flow needed to pay the debts as and when they became due and payable and even though the banks extended finance, Gunns did not have the capacity to repay those facilities out of its available resources and nor were any other sources of funds realistically available. As of March 2012, there were substantial overdue amounts owed to unsecured trade creditors and, on Mr George’s analysis, there was no reasonable basis to assume that the ANZ debt could be repaid by 31 December 2012; Gunns was trading at a loss and below budget; Gunns did not have access to additional borrowings during the relevant period; all of its finance facilities were fully drawn down as at 30 March 2012, other than a leasing facility which could not have contributed cash to pay overdue trade creditors; there were no undrawn working capital finance facilities available to Gunns to address overdue or unsecured trade creditors during the relevant period and Gunns’ overdraft continually operated in excess of its approved facility limit from around 30 March 2012; further, Gunns’ efforts to raise additional capital during 2012 were unsuccessful. The evidence showed a further deterioration in the company’s financial position as from 30 March 2012 with no realistic prospect of meeting its liabilities as and when they fell due. I accordingly accept Mr Georges’ conclusion that Gunns and the other companies were insolvent as from 30 March 2012 and remained insolvent to the date of the appointment of the administrators.

# The amendment question

1. Pursuant to s 588FF(3) of the Act, an application by a liquidator for relief under s 588FF(1) in relation to a transaction which is voidable because of s 588FE 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.

1. After the period specified in s 588FF(3)(a), Middleton J gave conditional leave to the plaintiffs pursuant to r 8.21 of the *Federal Court Rules* to amend the originating process and statement of claim in proceedings WAD 553 of 2015, WAD 540 of 2015, WAD 550 of 2015 and SAD 334 of 2015 to include additional voidable preference claims against those defendants. Rule 8.21 of the *Federal Court Rules* relevantly provides:

Amendment generally

(1) An applicant may apply to the Court for leave to amend an originating application for any reason, including:

…

(g) to add or substitute a new claim for relief, or a new foundation in law for a claim for relief, that arises:

(i) out of the same facts or substantially the same facts as those already pleaded to support an existing claim for relief by the applicant; or

(ii) in whole or in part, out of facts or matters that have occurred or arisen since the start of the proceeding.

(2) An applicant may apply to the Court for leave to amend an originating application in accordance with … subparagraph (1)(g)(i) even if the application is made after the end of any relevant period of limitation applying at the date the proceeding was started.

(3) However, an applicant must not apply to amend an originating application in accordance with subparagraph (1)(g)(ii) after the time within which any statute that limits the time within which a proceeding may be started has expired.

1. The condition of the grant of leave was that any defendant wishing to raise a limitation point had liberty to do so and the defendants in this proceeding have all raised the limitation point by way of defence to the additional voidable preference claims against them, alleging that those claims are statute barred by reason of the operation of s 588FF(3) of the Act.
2. A trial of the following preliminary questions was ordered pursuant to r 30.01 of the *Federal Court Rules*:

1. Whether any (and if so which) of the claims that were added by the plaintiffs pursuant to the grant of leave are statute barred by reason of s 588FF(3) of the *Corporations Act 2001* (Cth).

2. Whether the conditional leave granted ought be granted in any event.

## Factual background

1. Between 17 and 24 September 2015, the liquidators commenced 73 actions by originating process supported by affidavits of one of the liquidators, Mr Bryant, in the Victorian, South Australian, New South Wales and Western Australian Registries of this Court. In each proceeding the liquidators seek declarations that payments made by Gunns or alternatively Gunns on behalf of, relevantly, Auspine or Gunns Forest Products Pty Ltd (in liq) (“**GFP**”) during the period between 3 July 2012 and 25 September 2012 (the relation back day) were unfair preferences pursuant to s 588FA, insolvent transactions pursuant to s 588FC and/or voidable transactions pursuant to s 588FE of the Act.
2. In the original statements of claim, it was pleaded that the payments in issue were made at a time that Gunns (or, relevantly, Auspine, or GFP) was insolvent. It was particularised that “the following matters … indicate that Gunns was insolvent from at least 3 July 2012 and possibly earlier”. The “following matters” set out in the sub-paragraphs contained factual circumstances and events spanning from January 2012 through to 25 September 2012.
3. On 16 February 2016 the plaintiffs served on the defendants the solvency report of Mr Georges of 12 February 2016. In that report, Mr Georges expressed his opinion that Gunns and the other companies in Gunns Group, which included Auspine and GFP, were insolvent as from 30 March 2012. The plaintiffs gave notice to each of the relevant defendants that they proposed to seek leave under r 8.21 of the *Federal Court Rules* to amend the statement of claim to “capture all payments made to [that defendant] between 30 March 2012 and 25 September 2012”.
4. On 6 May 2016 the Court made an order in each of the relevant proceedings granting the plaintiffs conditional leave to file and serve an amended originating process and statement of claim on or before 13 May 2016 but without prejudice to the right of the defendant to argue that leave ought not to have been granted. Amended originating processes and statements of claim were filed in accordance with the order and each amended statement of claim now pleads payments in the expanded period from 30 March 2012 to 25 September 2012 (“**the additional claims**”) which are alleged to have been unfair preferences made at a time when Gunns (or relevantly Auspine or GFP) was insolvent. The particulars of insolvency allege that “the following matters … indicate that Gunn was insolvent from at least 30 March 2012 and possibly earlier”. The “following matters” include further facts and circumstances in the period January through to September 2012 and reliance upon the expert report of Mr Georges of 12 February 2016 is also expressly pleaded.
5. The defendant in SAD 334 of 2015 (“**the SA defendant**”) has filed an amended defence, pleading to the new claims against it as follows:

Further, the Defendant says that in respect of the payments numbered 1 to 11 both inclusive in paragraph 8 the Plaintiff’s action is time barred under section 588FF (3) of the Act and the claims relating to those payments do not arise out of the same facts or substantially the same facts as the claims pleaded in respect of the payments numbered 12 to 17 in paragraph 8 of the Amended Statement of Claim.

1. Each of the defendants in WAD 553 of 2015, 540 of 2015 and 550 of 2015 (“**the WA defendants**”) have filed amended defences, pleading to the additional claims against them as follows:

Section 588FF(3) of the *Corporations Act 2001(Cth)* (“the Act”) bars the Plaintiffs from making an application under s.588FF(1) of the Act with respect to the Additional Payments.

**Particulars**

1. The Relation Back Day for the purposes of s.588FF(3) of the Act is 25 September 2012 (“the Relation Back Day”);
2. The Plaintiffs’ claim for the Additional Payments was first made on 12 May 2016 being more than 3 years after the Relation Back Day;

(c) The Plaintiffs’ claim for the Additional Payments is a new claim for relief and it does not arise out of the same facts or substantially the same facts as those pleaded in their Originating Process dated 23 September 2015 and Statement of Claim dated 19 November 2015.

**Particulars of Different Facts**

(i) The date of insolvency being 30 March 2012 rather than 3 July 2012; and

(ii) The fact of the Additional Payments having been made.

## Question 1: Whether any (and if so which) of the claims that were added by the plaintiffs pursuant to the grant of leave are statute barred by reason of s 588FF(3) of the Corporations Act 2001 (Cth)

1. It was common ground that the additional claims for relief referable to the expanded period between 30 March 2012 and 2 July 2012 were not made within the time limits prescribed by s 588FF(3)(a). The plaintiffs argued in reliance on *Rodgers v Commissioner of Taxation* (1998) 88 FCR 61 (“***Rodgers***”) that the Court was empowered by r 8.21(1)(g) of the *Federal Court Rules* to grant leave to the plaintiffs to amend the pleadings, notwithstanding the limitation period in s 588FF(3)(a) to add the new claims which, it was contended, arose “from the same or substantially the same facts” as those already pleaded. In *Rodgers* the Full Federal Court held that O 13 r 2 of the *Federal Court Rules*, the predecessor rule to r 8.21, enabled the Court to allow an amendment to add additional claims for relief under s 588FF(1) notwithstanding the expiry of the limitation period prescribed by s 588FF(3). The decision in *Rodgers* has been followed and applied numerous times at first instance (*Carter, Re Spec FS NSW Pty Ltd (in liq)* [2013] FCA 1027; *Manday Investments Pty Ltd v Commonwealth Bank of Australia* [2011] FCA 681; *Tolcher v Capital Finance Australia Ltd* (2005) 143 FCR 300; *Darcy v Medtel Pty Ltd (No 3)* [2004] FCA 807; *Bryer Merchandisers Pty Ltd v Nike Australia Pty Ltd* [2003] FCA 472; *Titan v Romano* [2000] FCA 431 and by intermediate courts of appeal in Victoria (*PSL Industries Ltd v Simplot Australia Pty Ltd* (2003) 7 VR 106 at [17]), New South Wales (*Air Link Pty Ltd v Paterson (No 2)* (2003) 58 NSWLR 388, 404, 429*; Sydney Recycling Park Pty Ltd v Cardinal Group Pty Ltd (In Liq)* [2016] NSWCA 329 (“***Sydney Recycling***”)), South Australia (*Davies v Chicago Boot Co Pty Ltd (No 2)* (2007) 96 SASR 164) and Queensland (*Greig v Stramit Corporation Pty Ltd* [2004] 2 Qd R 17 at 37). The plaintiffs submitted that this Court is bound by *Rodgers.*
2. The WA defendants argued that r 8.21 did not authorise the amendments which added the additional claims for relief under s 588FF(1) against them because the requirement of r 8.21(1)(g)(i) that the new claims arise out of the same or substantially the same set of facts was not met.
3. The SA defendant similarly argued that the new claims against it did not arise out of the same or substantially the same set of facts and thus r 8.21 did not authorise the amendments in the proceeding against it. The SA defendant also raised a threshold question for determination, namely whether the amendments were precluded by s 588FF(3). It was argued that s 588FF(3) states a jurisdictional requirement in respect of an action for relief pursuant to s 588FF and that r 8.21(g)(i) of the *Federal Court Rules* does not authorise the Court to permit amendments raising additional claims for relief after expiry of the time limits prescribed by s 588FF(3). The SA defendant also raised a further threshold question as to whether *Rodgers* remains good law and should not be followed in light of three subsequent High Court cases: *Gordon v Tolcher* (2006) 221 CLR 334 (“***Tolcher***”); *Grant Samuel Corporation v Fletcher* (2015) 254 CLR 477 (“***Grant Samuel***”)and *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 (“***Fortress Credit***”). Recently in *Sydney Recycling,* a five member bench of the New South Wales Court of Appeal rejected the submission that *Rodgers* was no longer good law by reason of those High Court decisions. The SA defendant respectfully submitted that the decision in *Sydney Recycling* was plainly wrong.

## The threshold questions

1. In view of the threshold questions raised by the SA defendant, it is necessary to refer to the relevant authorities in some detail.

## *Rodgers*

1. In *Rodgers*, the liquidator had commenced proceedings seeking orders under s 588FF in respect of group tax paid by the company to the Commissioner of Taxation within the time‑frame prescribed by s 588FF(3)(a). After the expiry of the period fixed by s 588FF(3)(a), the liquidator became aware of two additional payments also in respect of group tax. The Court (Wilcox, Tamberlin and Emmett JJ) allowed an appeal from the decision of the primary judge refusing amendment under O 13 r 2 (the predecessor to r 8.21). The Court distinguished between a voidable preference claim first made outside the prescribed time in s 588FF(3) and an application to amend a voidable preference claim first made within the prescribed time, holding that O 13 r 2(3) enabled the Court to allow the amendment notwithstanding the expiry of the limitation period. The Court reasoned at pages 67–8:

In support of the submission that s 588FF(3) governed this case, counsel for the Commissioner referred to the High Court decision in *David Grant &* *Co Pty Ltd (rec apptd) v Westpac Banking Corp* (1995) 184 CLR 265; 131 ALR 353. That case concerned a time limitation on the making of a statutory demand. More precisely, the question was whether s 1322 of the Law authorises an extension of time for compliance to be granted in circumstances where no application had been made within time. Section 459G(2) of the Law stipulates an application for an order setting aside a statutory demand *may only* be made within 21 days after the demand is served. Section 1322 of the Law empowers the court to make an order extending the period for taking any proceeding under the Law or in relation to a corporation even where the period expired before the extension application was made. Gummow J, with whom all other members of the court agreed, said (at CLR 277; ALR 360):

The force of the term “may only” is to define the jurisdiction of the court by imposing a requirement as to time as an essential condition of the new right conferred by s 459G. An integer or element of the right created by s 459G is its exercise by *application made* within time specified [emphasis added].

This statement establishes an *application* first *made outside the prescribed time* is ineffective; it says nothing about an *application to amend*.

In *Harris v Western Australian Exim Corp* (1994) 56 FCR l; 129 ALR 387, Hill J adverted to the operation of O 13, r 2 in its amended form. He decided the court had power to permit an amendment to pleadings in order to raise, for the first time, a claim against a respondent based on a breach of the Fair Trading Act 1987 (NSW) (FTA). The application originally alleged only a breach of s 52 of the Trade Practices Act 1974 (Cth) (**TPA**). When the amendment application was made, a fresh proceeding seeking relief pursuant to the FTA would have been statute-barred, although it would not have been barred when the proceeding was commenced. His Honour held the court had power to permit the amendment pursuant to O 13, r 2. He said the limitation imposed by s 79(2) of the FTA was procedural rather than substantive in nature, an amendment to the pleading would operate retrospectively to the date of the original pleading, thereby satisfying the limitation requirement. Hill J said (at FCR 9; ALR 395):

Another way of looking at the matter is to say that all s 79(2) requires is that the action … be commenced within three years of the cause of action accruing. An action has, in the present circumstances, been commenced. True, that action was based on another cause of action but an amendment to the pleading operates, as I have said, retrospectively to the date of the original pleading …

…

The language of O 13, r 2 draws no distinction between “substantial” and “procedural” amendments, nor between elements of a claim and elements of a defence to a claim. The rule regulates the position *after* a proceeding has been commenced. In that situation, O 13, r 2(3) enables the court to allow an amendment notwithstanding expiry of a relevant limitation period. The word “nevertheless”, in para (3), reflects an appreciation that there might previously have been an obstacle to the grant of leave to amend. Leave can only be granted if the court thinks it is “just” to do so.

This provision is to be contrasted with s 588FF(3), which is concerned with the making of *an application* to the court, that is, the commencement of the proceeding itself. Section 588FF(3) is not directed to an amendment of an existing claim, at least if that amendment does not involve a new cause of action: see *Quick v Stoland Pty Ltd* (1998) 157 ALR 615. There is no inconsistency between O13, r 2 and s 588FF(3). One is concerned with making an amendment to a pleading in an existing proceeding; the other is concerned with the commencement of a proceeding.

1. *Rodgers* was not referred to in any of the three subsequent High Court cases on which the SA defendant has relied to submit that *Rodgers* is no longer good law.

### Tolcher

1. *Tolcher* concerned the interaction between s 79 of the *Judiciary Act 1903* (Cth) (“**the Judiciary Act**”) and s 588FF. Section 79 of the *Judiciary Act* provides:

The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, 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 in all cases to which they are applicable.

1. In that case, a liquidator had commenced a preference claim in the District Court of New South Wales within the time-frame prescribed by s 588FF(3)(a), but the proceeding had been taken to have been dismissed under the *District Court Rules 1973* (NSW) because certain steps were not taken in the prosecution of the proceeding. The Court of Appeal granted an extension of time *nunc pro tunc* for those steps to be completed, exercising the general power to extend time under the Rules. The extension was granted well after the time limit under s 588FF(3) had expired. The High Court held that the time period specified in s 588FF(3) is a jurisdictional requirement for bringing a voidable preference claim and the section does not merely prescribe a time stipulation of a procedural nature for making such a claim. The Court stated (at [37]–[40]) as follows:

37. The provision in sub‑s (3) of s 588FF as to the time of the making of the application is of the essence of the provision made by s 588FF; it is not to be characterised merely as a time stipulation of a procedural nature. The significance of sub‑s (3) in the statutory scheme was considered by Spigelman CJ, who gave the leading judgment in *BP Australia Ltd v Brown*. His Honour referred to the *General Insolvency Inquiry* (“the Harmer Report”), published in 1988.

38. Paragraph 688 of the Harmer Report had stated:

Actions by a liquidator to recover the proceeds of a void execution, a preference, a transaction at an undervalue or a transaction with intent to defeat should be commenced within a reasonable time. The Commission proposed in [Discussion Paper 32 (par 454)] that a liquidator should have three years to commence such an action, although the court might extend that time. Under the existing law the time period would be six years (for example, [the *Bankruptcy Act* 1966 (Cth), s 127)]. Many submissions to the Commission complained about the sometimes inordinate delay in commencing proceedings in respect of voidable transactions. In addition, there have been recent judicial observations critical of the general delays associated with the winding up of insolvent companies. It is therefore considered desirable to place liquidators under a more rigorous but, nonetheless, reasonable time limitation for taking action under these provisions. The Commission recommends accordingly.

39. In *BP*, Spigelman CJ said of s 588FF:

Prior to Pt 5.7B, the practice was for the court to declare a disposition to be void with the consequences left to the general law, together with some statutory powers of limited scope such as s 567 of the *Corporations Law*. Section 588FF(1) identifies a range of specific orders that can be made and which are more focused and more comprehensive than the orders that were hitherto available by way of relief under the general law or statute.

His Honour further remarked that the original proposal in the Harmer Report had significantly been strengthened by the inclusion both by the introductory phrase “may only be made” in s 588FF(3) and also by the stipulation that an application for extension beyond the three year period had to be made within the original stipulation period. Spigelman CJ added:

The time limit in s 588FF(3) has the effect that at the end of the period of three years, such a person will know whether [that person] remains at risk. In a legislative scheme which seeks to balance conflicting commercial interests of this character, that appears to me to be a perfectly reasonable requirement. Those who have an interest, or who represent those who have an interest, to disturb transactions must indicate, within three years, whether they wish to keep open the option of doing so. In this, as in other areas, legal policy favours certainty.

...

Section 588FF(3) does not have the effect of requiring all applications to be brought within a short period of time. It does, however, 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. One thing that must be decided within the three year period is how long the process of deciding whether to pursue voidable transactions will take. Eventually, investigations to overcome deficiencies of information or the pursuit of funding must cease. Parliament has identified a reasonable time for such matters to occur, subject to a single determinate extension of time.”

40. Accordingly, s 588FF is dealing, as an essential aspect of the regime it creates, with the period within which the application must be made. An application may be made only to a court invested with federal jurisdiction by one or other of the provisions of Pt 9.6A….

1. However, the Court held that the time limit in s 588FF(3) did not preclude the Court of Appeal from making orders under the rules of the Court extending time for the taking of certain steps in the conduct of the action which had the effect of overcoming the operation of the rules which the preference action was otherwise taken to be dismissed as a dormant action. The Court reasoned at [40]–[41]:

40. … Thereafter, and subject to any other relevant provision of the Corporations Act, the conduct of the litigation is left for the operation of the procedures of that court. These procedures will vary from one State or Territory to another and within the court structures of those States and Territories. The scheme of the Corporations Act is not to impose a direct federal and universal procedural regime. Rather, s 79 of the Judiciary Act is left to operate according to its terms in the particular State or Territory concerned.

41. Thus the relationship between s 588FF and s 79 (and between Pt 9.6A and s 79) is not one of which it may be said that the former provision is a law of the Commonwealth which “otherwise provides” so as to deny the operation of s 79 in this case to pick up so much of the Rules as supported the orders made by the Court of Appeal.

### Grant Samuel

1. In *Grant Samuel* an application for an extension of time to bring a voidable preference action was made within the time prescribed by s 588FF(3)(a) and the Court had granted an extension of time under s 588FF(3)(b). The liquidators subsequently applied for a further extension by which to bring a claim under s 588FF(1) on an application made outside the period prescribed in s 588FF(3)(a). In issue was whether the Court had the power to grant that further extension under the general procedural rules of the Court. The majority in the NSW Court of Appeal held on the authority of *Tolcher* that once an application for extension of time was made in conformity with s 588FF(3)(b) the conduct of the litigation was left for the operation of the procedures of the Court in which the application was filed and the Court had the power to grant a further extension of time. On appeal, the High Court distinguished *Tolcher* on the basis first that in *Tolcher* the voidable preference claim had been instituted within the three year period fixed by s 588FF(3)(a) and secondly, the rules of the District Court were not relied on to extend the s 588FF(3) time limitation but for the different purpose of overcoming the effect of the District Court Rule deeming the action to be dismissed.
2. The High Court held that once the time frame under s 588FF(3) for the bringing of a proceeding had expired, the rules of the Court could not be utilised to extend the time within which proceedings under s 588FF(1) can be brought. At [22]–[23], the Court (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ) reasoned as follows:

Section 588FF(3) provides that an application under s 588FF(1) “may only be made” within the periods set out in paras (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 [*Tolcher*].

The only power given to a court to vary the para (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.

### Fortress Credit

1. *Fortress Credit* concerned the power of the Court under s 588FF(3)(b) to extend the time within which a liquidator may bring an application under s 588FF(1). Under s 588FF(3)(b), an application under s 588FF(1) may be made during the period prescribed under s 588FF(3)(a) or, pursuant to s 588FF(3)(b), “within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period”. In that case, before the time limited for the commencement of proceedings under s 588FF(3)(a) expired, the liquidators applied for an order that the time for making any application be extended. In issue was whether the Court had the power to make a general order (known as a “shelf order”) without identifying any particular transaction or transactions. The Court held yes, reasoning as follows:

23. The appellants relied upon the words “may only be made” in s 588FF(3) as indicating a limited scope for the power under para (b). As this court observed in *Grant Samuel*, those words impose 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. They do no more than that. The words “may only” give no guidance about the scope of the power to extend time. As the respondents pointed out, the only express essential condition upon the exercise of the power under s 588FF(3)(b) is that the application for an order under that paragraph be made within the para (a) period. In the event, there is no textual support for preferring one construction over the other. That conclusion directs attention to the purposive and consequentialist arguments which tended to dominate the debate about construction.

24. The function of s 588FF(3)(b), which reflects its immediate purpose, is to confer a discretion on the court to mitigate, in an appropriate case, the rigours of the time limits imposed by para (a). That is a discretion to be exercised having regard to the scope and purposes of Pt 5.7B, characterised in the Harmer report as the continuing “policy” which underpinned its recommendations. That policy included the avoidance of transactions by which an insolvent company has disposed of property in circumstances that are regarded by the legislature as unfair to the general body of unsecured creditors. It is, however, a policy qualified in its application by the requirement that liquidators be placed under a reasonable time limitation for taking action under the voidable transaction provisions. A purpose of that qualification, expressed in “clear and emphatic” terms, is to favour certainty for those who have entered into transactions with the company during the periods in respect of which designated transactions may be voidable. There is, however, no independent basis for the assertion that any extension of time which does not identify a particular transaction or transactions must be an unreasonable prolongation of uncertainty militating against a construction which would allow such an order to be made. The section provides for the exercise of discretion by the court. Questions of what is a reasonable or an unreasonable prolongation of uncertainty and the scope of such uncertainty are more appropriately considered case-by-case in the exercise of judicial discretion than globally in judicial interpretation of the provision.

25. The appellants set out a number of “policy factors” which they said militated against a broad construction. In summary these were:

(a)  disadvantage to potential defendants not identified in a shelf order;

(b)  the encouragement to liquidators not to identify potential defendants, thereby reducing the prospect of opposition at initial application;

(c)  the risk of a multiplicity of litigation by successive defendants applying to reagitate extension applications of which they had not been given initial notice;

(d)  the risk of inconsistent outcomes on applications to set aside extension orders by respective defendants;

(e)  no finality, as claims by defendants that they were identifiable, but not identified, might cause ongoing challenges to any extension granted;

(f)  want of certainty for liquidators and prospective defendants who might seek to have leave revoked after it had been granted and after proceedings had commenced;

(g)  the potential for wasted costs to be incurred contrary to the interests of creditors; and

(h)  the determination of applications by reference only to evidence that the liquidator elected to put before the court.

26. All of those are considerations which may inform the approach to the exercise of discretion by the court in cases in which applications are made for shelf orders under s 588FF(3)(b). They are considerations which could have moved but did not move the legislature, when it amended s 588FF(3), to exclude the application of the power conferred by para (b) to shelf orders.

27. In the end, as the appellants accepted, the availability of shelf orders is a construction open on the text of s 588FF(3)(b). It is a construction which is consistent with the evident purpose of that provision, to allow the court to mitigate the strictness of the time limits imposed by para (a) in an appropriate case. The effect of re-enactment of s 588FF(3), in light of the construction adopted by the Court of Appeal, is no barrier to that construction. Indeed it may be taken to support it.

Accordingly the High Court held that it was permissible to make “shelf orders” under s 588FF(3)(b) which do not identify a particular transaction or transactions at the time of making the order.

### Sydney Recycling

1. In none of the three High Court cases was the Court asked to consider, nor did it consider, *Rodgers* or the principles governing an application made pursuant to r 8.21 to amend an existing claim that had been made within time under s 588FF(1). That question did fall for consideration by the New South Wales Court of Appeal in *Sydney Recycling*. In *Sydney Recycling*, the appellant arguedthat *Rodgers* and other decisions of intermediate appellate courts which followed *Rodgers* were “clearly wrong” and should no longer be followed in light of *Grant Samuel* and *Fortress Credit*.
2. In *Sydney Recycling*, the liquidator had brought an application for orders under s 588FF(1) within time but after the time expired sought leave to file an amended statement of claim adding three further transactions arising from the same facts as those giving rise to the existing cause of action and claim for relief and adding a new allegation arising from the same facts in relation to alleged contra payments which the company had agreed to set off. The New South Wales Court of Appeal held that the Court had the power under the general rules governing procedure (relevantly found in the *Civil Procedure Act 2005* (NSW) (“***the Civil Procedure Act***”) to allow amendments to pleadings to add after the expiry of the time period under s 588FF(3) additional claims for voidable transactions.
3. Bathurst CJ and Payne JA (with whom Ward JA and Bergin CJ in Eq. agreed) concluded that the construction of s 588FF adopted in *Rodgers* was both open and the better construction and rejected the appellant’s submission that *Rodgers* was plainly wrong in light of the three subsequent High Court cases concerning s 588FF. Their Honours also rejected the appellant’s submission that the relevant sources of power to amend (ss 64 and 65 of the *Civil Procedure Act*) were not picked up and applied by s 79 of the *Judiciary Act* as s 588FF(3) “otherwise provides”. At [121] their Honours concluded:

In our view, the conclusion in *Rodgers* (at 67-68) that the amendment provision in the Federal Court Rules “[O 13 r 2] is to be contrasted with s 588FF(3), which is concerned with the making of *an application* to the Court; that is, the commencement of the proceeding itself” and that s 588FF(3) “is not directed to an amendment of an existing claim”, is not plainly wrong. Accordingly, it should be followed by this Court. There is nothing in the trilogy of High Court cases concerning s 588FF which obliges this Court to conclude that the decision in *Rodgers* is plainly wrong

1. In a separate judgment, Beazley P agreed with Bathurst CJ and Payne JA and gave additional reasons. Her Honour rejected the appellant’s submission that, on its proper construction, the time limit prescribed by s 588FF(3)(a) must be satisfied in respect of each “transaction”, stating that there was nothing in the text of s 588FF, the extrinsic materials that accompany it, or the relevant High Court authorities that compelled the construction contended by the appellant that the time limit in s 588FF(3) applied in relation to each individual transaction that the liquidator sought to impugn. Beazley P then considered whether s 588FF(3) “otherwise provides” such that ss 64 and 65 of the *Civil Procedure Act* were not picked up by s 79 of the *Judiciary Act*. Her Honour held no, reasoning as follows:

153. As has already been noted, s 588FF(1) is “*silent respecting the procedures to be adopted by the court exercising federal jurisdiction*”: *Gordon v Tolcher* at [32]. It is also clear that s 588FF(3)(b) constitutes an exhaustive provision as to the power of the courts to extend the time in which an application for orders under s 588FF(1) may be made: see *Grant Samuel* at [23] set out above at [53].

154. Accordingly, ss 64 and 65 of the *Civil Procedure Act* will be picked up by s 79 of the *Judiciary Act* unless s 588FF(3)(b) “*otherwise provides*”, that is, unless those provisions would, in effect, facilitate the extension of time within which to commence an application for orders under s 588FF(1).

155. A central aspect of the reasoning in *Rodgers v Commissioner of Taxation* (1998) 88 FCR 61 was the distinction between the amendment of existing proceedings and the extension of time within which to commence proceedings. As the Full Court explained in *Rodgers*, at 67-68:

“This [power of amendment] is to be contrasted with s 588FF(3), which is concerned with the making of an application to the Court; that is, the commencement of the proceeding itself. Section 588FF(3) is not directed to an amendment of an existing claim.”

156. The Full Court cited the following remarks of Clarke JA in *Fernance v Nominal Defendant* (1989) 17 NSWLR 710 at 733 in support of that proposition:

“… there is a clear distinction between a case in which a defendant is added and a case in which an additional cause of action is raised against an additional defendant. In the latter instance a party who is put on notice of proceedings before the expiry of the limitation period is required to widen the ambit of his defence whereas in the former a person may be brought into the proceedings years after the expiry of the relevant limitation period without any prior notice.”

157. It was in relation to this distinction that the Full Court of the Supreme Court of South Australia in *Davies v Chicago Boot Co Pty Ltd (No 2)* (2007) 96 SASR 164; [2007] SASC 12 followed the reasoning in *Rodgers*. As Gray J explained, at [45]:

“The Courts have concluded that it is appropriate to utilise the applicable rules of the courts to allow amendments to add new causes of action against the same defendant outside the relevant statutory limitation period. That is what the liquidators seek to do in this case. These authorities should be followed and applied by this Court in accordance with the principles enunciated by the High Court in *Marlborough Gold Mines Ltd*.”

158. This distinction was also accepted by two members of the Queensland Court of Appeal in *Greig v Stramit Corporation Pty Ltd* (2004) 2 Qd R 17;[2003] QCA 298. As Williams JA observed, at [88]:

“Counsel for Stramit drew a distinction between an application to amend an existing cause of action, commenced within the time limit prescribed by s. 588FF(3)(a), by adding new causes of action against an existing defendant, and an application by liquidators to amend an application for an extension of time, brought pursuant to s. 588FF(3)(b), to add a new party outside the three year time limit prescribed in that section. The decisions in *Rodgers* and *Star* were concerned with the first situation. I accept that distinction.”

159. Likewise, Jerrard JA commented at [126]:

“As Williams J.A. notes, there is authority for the proposition that an amendment can be made to a proceeding brought pursuant to s. 588FF(1) within time, although the amendment is made after the expiry of the time limitations provided for by s. 588FF(3). However, that authority distinguishes between amendment to a proceeding commenced within time, and the addition of a new defendant. In *Rodgers* the Full Federal Court cited with apparent approval the remarks of Clarke J.A. in *Fernance v. Nominal Defendant* (1989) 17 N.S.W.L.R. 710 at 733, to the effect that there is a clear distinction between a case in which a defendant is added and a case in which an additional cause of action is raised against an existing defendant. Clarke J.A. reminded, and in my respectful opinion forcefully, that when it is sought to add a defendant after the expiration of a time period, this may occur years after the expiration of the relevant limitation period and without any prior notice.”

160. I see no reason for this Court to reject this distinction, nor for it to reject the reasoning of the Federal Court in *Rodgers*.

The President thus concluded that s 588FF(3)(b) did not “otherwise provide” and the powers of amendment were picked up by s 79 of the *Judiciary Act*.

### Consideration

1. *Tolcher,* affirmed in *Grant Samuel*, established that commencement of a voidable preference action within the time stipulated in s 588FF(3) is an essential condition of the right conferred by s 588FF(1) to bring proceedings. In this case, each of the actions against the defendants were commenced within the time limit prescribed by s 588FF(3) but the amendments to the original pleadings added voidable preference claims after the expiry of the limitation period prescribed by s 588FF(3). The question for determination is whether the time limits prescribed by s 588FF(3) applied to the additional claims. For the reasons that follow, I do not accept the submission that *Rodgers* is no longer good law following the High Court decisions in *Tolcher, Grant Samuel* and *Fortress Credit*.
2. First, the question as to whether the Court has the power under its general rules of court to amend an existing application under s 588FF(1) after the expiry of the period prescribed in s 588FF(3) to add further “transactions” in respect of which orders are sought under s 588FF(1) was not addressed in any of those cases. Nor did any of those cases consider the correctness of theconstruction of s 588FF adopted by the Full Court in *Rodgers*.
3. Secondly, I am not persuaded by the submissions for the SA defendant that the approach of the Full Court in *Rodgers* is inconsistent with the later High Court cases. The inconsistency was said to relate to the premise upon which the analysis of the Full Court in *Rodgers* proceeded which, it was argued, is no longer good law in light of *Tolcher* and *Grant Samuel*. That premise was said to be that s 588FF(3) operated to preclude the commencement of an action for relief under s 588FF(1) if the action was not commenced within the time period prescribed by s 588FF(3) whereas, the argument went, *Tolcher* and *Grant Samuel* have since established that the commencement of an action within time is an element of the right to relief under s 588FF(1). Reference was also made to *Agtrack (NT) Pty Ltd v Hatfield* [2005] 223 CLR 251 (“***Agtrack***”). In that case an action had been brought within the limitation period pleading negligence and breach of contract in respect of an aircraft accident but did not plead a right to claim damages under the *Civil Aviation (Carriers’ Liability) Act 1959* (Cth) (“**the** ***Civil Aviation Act****”*). Section 34 of the *Civil Aviation Act* provided that the right of a person to damages under that Act was extinguished if an action was not brought within a prescribed time. After that time limit had expired, the plaintiff applied to amend the statement of claim to add a damages claim under the *Civil Aviation Act*. The High Court held that s 34 of the *Civil Aviation Act* imposed “a condition which is the essence of the right to damages rather than providing no more than a bar to the enforcement of an existing right”. Thus, it was argued, unless the applications for relief in the present cases as originally instituted constituted applications for relief under s 588FF(1) in respect of the additional transactions sought to be impugned, the liquidators had no right of action under s 588FF(1) in respect of those additional transactions and the Court had no power or jurisdiction to grant relief in respect of those additional transactions under s 588FF(1). This argument was said not to have been addressed in *Sydney Recycling.* There are two responses. First, it is clear, in my view, that the Full Court in *Rodgers*, by itsreference to what Gummow J said in *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1985) 184 CLR 265 with regard to s 459G(2) of the Act, was cognisant that s 588FF(3) imposes a jurisdictional precondition for an action for relief under s 588FF(1). Secondly, the difficulty with the argument is that it must depend on a different construction of s 588FF(1), namely that the section requires the commencement of an application for relief under s 588FF(1) within the prescribed time limitation in respect of each transaction for which relief is sought under s 588FF(1). In *Sydney Recycling* the Court of Appeal rejected such a construction of s 588FF.
4. In *Sydney Recycling*, the appellant argued on the language of s 588FF(1) that s 588FF(1) concerned an “application” in relation to a particular “transaction” with the characteristics specified in s 588FE. At [72] Bathurst CJ and Payne JA accepted that the appellant’s constructional argument was open and had “real force” but their Honours considered that the text of s 588FF(1) was also open to the construction that the section was only concerned with the time limit within which to make an “application”, and that the “application” referred to in s 588FF(1) was to be understood as the application, including the application as subsequently amended. At [74]–[78], their Honours reasoned as follows:

74. The text of s 588FF(3), however, is also open to the interpretation that the section is concerned and only concerned with the time limit to make an application, the form of which application is left to the relevant law of the jurisdiction where the proceeding is commenced. Section 588FF(1) is open to the construction that the “application” referred to in sub-s (1) is to be understood as the application, including the application as subsequently amended.

75. Support for this constructional choice is provided by the fact that the *Corporations Act* leaves the form of the “application” required or permitted under that Act to the rules of the State or Territory where the proceeding is commenced.

76. The relevant requirements for an “application” under sub-ss 588FF(1) and 588FF(3) of the *Corporations Act* in the present caseare those contained in an originating process under the Supreme Court (Corporations) Rules*.* The only requirements of an originating process under those Rules are the identification of the parties, the section of the *Corporations Act* relied upon, the relief sought and, at least at some level of generality, identification of the claims made by the plaintiff, which are in turn based on facts stated in a supporting affidavit “if appropriate”.

77. The appellant’s construction of s 588FF(1) requires an “application” under the section to contain particular content, in circumstances where an “application” is not otherwise defined in the *Corporations Act* and the form and content of an originating process is otherwise left to rules of court and State and Territory legislation.

78. Section 588FF(1) does not deal with the form of the application at all. This is left to the rules of court which set out the relevant requirements. These requirements, to which we have referred in [76] above, are sufficient to identify the fact that the application is one brought under s 588FF(1), the nature of the claim and the relief sought. There is nothing in s 588FF(1) or any other section of the *Corporations Act* which otherwise provides so as to prevent those rules being picked up by s 79 of the *Judiciary Act…*

1. Beazley P also rejected the appellant’s construction, stating that there was nothing in the text of s 588FF that required that the “application” on which the Court’s power to make orders was conditioned to relate to an individual transaction. Her Honour stated that the references in s 588FF(1)(a)–(h) to “the transaction”, and to “a transaction” and “the transaction” in ss 588FA–588FDA, were directed to whether the Court is empowered to make orders in relation to that transaction, provided that all the pre-conditions to the making of an order are met. Her Honour also observed that both ss 588FH(3) and 588FI(2) employ the broader language “an application relating to the transaction”, and that the s 588E definition of the term “recovery proceeding” includes “an application under section 588FF by the company’s liquidator”.
2. Bathurst CJ and Payne JA also rejected the appellant’s argument in that case that the reasoning in *Fortress Credit* at [20] required that an “application” must particularise the “transaction” in respect of which it was made. The High Court in *Fortress Credit* had stated at [20]–[21]:

20. Section 588FF(1) empowers the court to make the orders for which it provides on the condition that:

"on the application of a company's liquidator, [the] court is satisfied that a transaction of the company is voidable because of section 588FE".

As the appellants submitted, an application under s 588FF(1) must seek orders for which that subsection provides, which concern a transaction alleged to be voidable under s 588FE between the company and one or more other parties. The transaction must be identified, in terms of conduct of the company. It must bearguably capable of inclusion in one of the designated classes of transaction mentioned in s 588FE. The specification of the time that it was done, or of an act done to give effect to it within a relevant period, would also be necessary to the contention that it was a voidable transaction. Parties to the transaction who would be affected by the orders sought would have to be identified and those parties named as respondents.

21. The time limits prescribed by s 588FF(3) apply to "[a]n application under subsection (1)". That term refers to the class of applications which can be made by liquidators under s 588FF(1) in relation to a transaction alleged to be voidable. The time limit in par (a) applies to all such applications, save for those the subject of an order under par (b). The text of par (b), read with the opening words of s 588FF(3), leaves open the construction that the "longer period" may be ordered only for a prospective application relating to a particular transaction or transactions. The text also leaves open the construction that a "longer period" may be ordered for any application under subs (1). The appellants accepted that it was a possible view of the provision that an order under s 588FF(3)(b) could extend generally the period otherwise fixed under s 588FF(3)(a). That was not, they submitted, the better view. The parties relied upon textual and contextualindicators and purposive and consequentialist arguments in support of their preferred constructions.

1. In rejecting the appellant’s submission on paragraphs 20 and 21 of *Fortress Credit* Bathurst CJ and Payne JA stated at [85]–[86] as follows:

85. *Fortress Credit* at paragraph [20] addresses the proposition that “an application under s 588FF(1) must seek orders for which that subsection provides”. The court then sets out the specific matters that must be addressed before a court could make an order under that section. The High Court was not addressing the point in time at which all necessary particulars needed to be provided to enliven the court’s jurisdiction to make “orders for which that subsection provides”, much less was it addressing whether once commenced an “application” could be amended.

86. In paragraph [21] of *Fortress Credit* the High Court addressed “*the class of applications which can be made by liquidators* under s 588FF(1) in relation to a transaction alleged to be voidable”. This is a reference to an application by a company’s liquidators for the kind of orders that can be made pursuant to s 588FF. It is not in our view a prescription of the matters which must be contained in an originating process.

1. Beazley P likewise rejected the appellant’s submission on paragraphs 20 and 21 of *Fortress Credit.* At [139]–[142] the President stated:

139 I also disagree with the appellant’s reading of the reasons of the High Court in *Fortress Credit* at [20]. That passage is set out above at [83] in the reasons of the Chief Justice and Payne JA. In the first sentence, the High Court sets out the first of the two conditions to the making of an order under s 588FF(1), *viz*, the relevant state of satisfaction on the application of a company’s liquidator. The words “*which concern a transaction alleged to be voidable*” in the second sentence are clearly a reference to the kinds of orders the court is empowered to make. The remainder of the paragraph contains observations of what will generally be required in order to obtain relief under [s 588FF.](http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s588ff.html) For example, in the second last sentence, the High Court refers to what will be “*necessary*” to a contention that a transaction constitutes a “*voidable transaction*”.

140 It is also telling that the High Court in *Fortress Credit* at [20] referred not to an application in relation to a particular transaction, but rather to an application seeking orders for which s 588FF(1) provides. This is further emphasised in *Fortress Credit* where the Court stated, at [21]:

“The time limits prescribed by s 588FF(3) apply to ‘[a]n application under subsection (1)’. **That term refers to the class of applications which can be made by liquidators under s 588FF(1) in relation to a transaction alleged to be voidable**. The time limit in par (a) applies to all such applications, save for those the subject of an order under par (b).” (emphasis added)

141 This approach accords with the statement in the Explanatory Memorandum to the Corporate Law Reform Bill 1992, which indicates that s 588FF(3) was intended to operate to confine the time period in which a liquidator can seek relief from the courts under s 588FF(1), as opposed to operating in relation to each individual transaction:

“1058. Proposed subsection 588FF(3) provides that **an application may only be made for an order** under proposed section 588FF(1) within three years after the relation-back day or within such longer period as the Court orders providing the application for extension is made within those three years.” (emphasis added)

142 Section 588FF(3) was amended by the *Corporations Amendment (Insolvency) Act 2007* (Cth) to introduce the alternative time limit in s 588FF(3)(a)(ii), *viz*, of 12 months after the first appointment of a liquidator in relation to the winding up of the company. The Explanatory Memorandum to that amendment also described s 588FF(3) as concerned with the time period in which a liquidator must exercise their powers of challenge to alleged voidable transactions:

“[7.204] A liquidator’s power to challenge voidable transactions must be exercised within three years after the relation-back day, or such further time as the court permits (subsection 588FF(3) of the Corporations Act).”

(emphasis in original)

1. I respectfully agree with their Honours’ conclusion and reasons for affirming the *Rodgers* construction of s 588FF and their rejection of the argument that the reasoning in *Fortress Credit* at [20] required that an “application” must particularise the “transaction” in respect of which relief is sought. Accordingly, I consider that there is nothing in the subsequent High Court cases that compels the conclusion that *Rodgers* is no longer good law. On the *Rodgers* construction, it is the commencement of the action for relief under s 588FF(1) that is the relevant jurisdictional precondition prescribed by s 588FF(3) and the amendment power under the *Federal Court Rules* in that circumstance would therefore not impermissibly operate to vary the time dictated by s 588FF(3). As the jurisdictional precondition is met by an action for relief under s 588FF(1) commenced within time, the *Federal Court Rules* are not being used to vary the time stipulated by s 588FF(3) within which a proceeding must be commenced. It follows that *Rodgers* is not inconsistent with the principles settled by *Agtrack, Tolcher, Grant Samuel* or *Fortress Credit.* In view of this conclusion, the further arguments advanced for the SA defendant based the nature of the Court’s rule making power ins 59(2B) of the *Federal Court of Australia Act* accordingly do not arise for consideration because no inconsistency with s 588FF(3) arises on the *Rodgers* construction of s 588FF(1): cf *Grant Samuel* at [23].
2. The SA defendant put the additional argument that *Rodgers* was wrongly decided because the term “application” as used in s 588FF(1) includes an application to amend to add transactions. It was submitted that this point of law was not raised in *Rodgers* nor considered in *Sydney Recycling.*  The submission that the word “application” in s 588FF(1) should be construed to include an application to amend to raise additional transactions that are sought to be impugned was put in two ways.
3. First, it was argued that the statutory policy of s 588FF(3) that was recognised in *Tolcher* and *Grant Samuel* informs the meaning of “application”. In *Grant Samuel* at [21] the High Court explained that the statutory policy favours certainty for creditors as to whether they remain at risk of voidable preference proceedings being brought against them by imposing a time limit within which such proceedings may be brought. See also *Tolcher* at [37]–[39] and *Fortress Credit* at [24]. I am not persuaded that regard to the statutory policy does inform the meaning of “application”. In *Fortress Credit* the High Court rejected an argument that the statutory policy militated against a construction of s 588FF(3)(b) enabling shelf orders to be made. The Court reasoned at [24]:

There is, however, no independent basis for the assertion that any extension of time which does not identify a particular transaction or transactions must be an unreasonable prolongation of uncertainty militating against a construction which would allow such an order to be made. The section provides for the exercise of discretion by the court. Questions of what is a reasonable or an unreasonable prolongation of uncertainty and the scope of such uncertainty are more appropriately considered case-by-casein the exercise of judicial discretion than globally in judicial interpretation of the provision.

So too, the statutory policy would not dictate a construction of the term “application” to include an application to amend to raise additional transactions. That does not gainsay the relevance of the statutory policy in the exercise of the discretion under r 8.21 as a matter bearing upon whether to allow an amendment.

1. Secondly, reliance was placed on Finkelstein J’s comments in *Quick v Stoland* (1998) 87 FCR 371 in what was said to be an analogous context. In that case, the Full Federal Court considered whether the amendment of an existing claim to add a new cause of action supporting the claimed relief was incompetent. The appellant was a director of a company that incurred debts to the respondent and a proceeding was issued by the respondent against the appellant under s 592 of the *Corporations Act 1989 (Cth)* (“**the*****Corporations******Law****”*) to recover the debt. The statement of claim was subsequently amended to include a claim under s 558M of the *Corporations Law*. The appellant contended that the respondent was not entitled to bring a claim against him under s 588M by reason of s 588R which provided that:

A creditor of a company that is being wound up may, with the written consent of the company's liquidator, begin proceedings under s 588M in relation to the incurring by the company of a debt that is owed to the creditor.

The appellant argued that the company's liquidator had not given his consent to the commencement of “proceedings” against him and thus the claim was not maintainable. In issue was whether the amendment to add a claim under s 588M could be characterised as the commencement of a proceeding. It was held that the proceeding under s 588M was incompetent because the liquidator had not given his consent to its institution. In a passage relied on by the SA defendant, Finkelstein J stated at p 388:

… it is not necessary to reach any concluded view on the precise meaning of "proceedings" in s 588R(1). It is sufficient to hold that the word should be taken to mean, at the very least, any process by which a claim under s 588M is made in a court of competent jurisdiction. Such a claim may be made in an originating process. If it is, that process could only be commenced with the consent of the liquidator. It would also include a claim made by way of amendment to an existing proceeding. It is the claim made by the amendment which is the means by which the creditor seeks to "recover from the director, as a debt due to the creditor, an amount equal to the amount of the loss or damage" suffered by the creditor. It conforms with the object of s 588R(1) if "proceedings" are taken to include both the commencement of an action at law and any step in that action: compare *Eddy v Stewart* [1932] 3 WWR 71 at 74; *Re Carrick Estates Ltd* (1987) 43 DLR (4th) 161.

By parity of reasoning it was argued in the present case that an “application” under s 588FF should be taken to include a claim in the proceedings made by way of amendment to an existing application. The issue in *Quick v Stoland,* however, concerned the right to amend the statement of claim to add a new and different cause of action to support the claimed relief in the circumstance where the condition for relying on that new cause of action had not been met, whereas in the present matters the amendments concern the addition of further claims under s 588FF in the circumstance of the time requirement under s 588FF having been met by the institution of the proceedings under s 588FF within time.

1. *Quick v Stoland* was referred to in *Rodgers.* In *Rodgers* the Full Court held that s 588FF(3) was not directed to an amendment of an existing claim “at least if that amendment does not involve a new cause of action” citing *Quick v Stoland*. In *Sydney Recycling* Bathurst CJ and Payne JA at [114]–[115] affirmed this distinction in the context of s 588FF, stating at [114]‑[115]:

114. The reservation by the Full Court concerning cases where “that amendment does not involve a new cause of action” can be put to one side here. The reference to *Quick v Stoland* makes it clear that what the Full Court was concerned with was carving out cases where the then *Corporations Law* provided a specific mechanism which needed to be complied with before any proceedings could be commenced. *Quick v Stoland* was a case involving the meaning of the word “proceedings” in the former s 588R(1) of the *Corporations Law*. In that case, the Full Court of the Federal Court dealt with the question of whether an amendment of a claim to add a cause of action under s 588M of the former *Corporations Law* to an existing claim under s 592 of the Law constituted “proceedings” for the purposes of s 588R(1). It was held that “proceedings” are taken to include both the commencement of an action at law *and* any step in that action (at 388). That conclusion was reached in that case, as Finkelstein J explained, on the basis that under s 588R(1) it was a requirement that the liquidator of the company concerned consent to the commencement of proceedings. In *Quick v Stoland*, proceedings under s 592 were commenced in 1992. Almost five years later, in 1997, the liquidator’s consent was obtained to commence proceedings under s 588R(1). The original (s 592) proceedings were amended to add the s 588R(1) claims. That was held to be impermissible. It is in that sense that the Full Court is to be understood as carving out an amendment which “does not involve a new cause of action”.

115. The reservation concerning *Quick v Stoland* does not apply to the present case which is relevantly identical to the amendment allowed in *Rodgers*, being two further payments, one being another group tax payment and the other being a group tax penalty payment made by the company, added by amendment after the expiry of the period fixed by s 588FF(3).

I respectfully agree.

1. I have concluded that *Rodgers* remains good law and accordingly I am bound to follow and apply that decision. For the sake of completeness, I note and also reject the submission that the decision in *Rodgers* rested upon two “flawed” premises, namely that: (1) the time provision in s 588FF(3) was procedural rather than substantive in nature; and (2) the intention of the drafters of O 13 r 2, which, it argued, was an irrelevant inquiry and an illegitimate approach in resolving the construction question. To the contrary of those submissions, the reasoning in *Rodgers* was not predicated on either asserted “flawed premises” but rather on the basis of the analysis that once the jurisdictional requirements for the making of the application are met, the conduct of the litigation, including the amendment power, is regulated by the *Federal Court Rules*. In this regard, the decision is on all fours with *Tolcher* at [40].

## Did r 8.21 authorise the amendments?

1. Two issues arise in this context. The first issue raised by the SA defendant is whether r 8.21(g)(i) permits amendments adding new material facts to support a new cause of action after the expiry of a limitation period in which the cause of action may be brought. The second issue is whether the amendments arose out of “the same facts or substantially the same facts as those already pleaded”.

### The first issue

1. Senior counsel for the SA defendant argued on the authority of *Advanced Switching Services Pty Ltd v State Bank of New South Wales t/as Colonial State Bank)* [2007] FCA 954 (“***Advanced Switching Services***“) and *Skiwing Pty Ltd t/as Café Tiffany’s v Trust Company of Australia Ltd (Stockland Property Management Ltd)* [2009] FCA 347 (“***Skiwing****”*) that r 8.21(g)(i) only permits the addition of “a new claim for relief” or “a new foundation in law for a claim for relief” but does not authorise amendments adding new material facts in support of the new claim if that claim is not made within the limitation period. In *Advanced Switching Services* Rares J refused an application pursuant to O 13 r 2, the predecessor provision to r 8.21, to amend a statement of claim to add material facts necessary to complete a defective pleading of the cause of action, after the cause of action had become statue barred. In *Skiwing* Buchanan J followed *Advanced Switching Services* “as a matter of comity” in refusing an application to join an additional party as an applicant and to amend the existing pleadings to plead new material facts to support a new cause of action by the added party against the respondent in circumstances where that cause of action was then statute barred.
2. *Advanced Switching Services* does not, in my view, support the proposition advanced on behalf of the SA defendant. In that case, a claim had been made under s 52 of the *Trade Practices Act* but as the statement of claim had not pleaded reliance, the cause of action was not disclosed on the pleading. It was in that context that Rares J held at [69] that “the supplementation of an existing pleading to add a material fact necessary to constitute what [was] not, at that time, a cause of action, cannot be made outside a limitation period”. Likewise in *Skiwing,* the facts were different. It was sought that a new party be joined and a new cause of action be added outside the statute bar. This case is different. The s 588FF proceedings were all commenced within time and the jurisdictional precondition in s 588FF(3) was met. Neither *Advanced Switching Services* nor *Skiwing* referred to the Full Court decision in *Rodgers.*
3. In *Re Spec FS NSW Pty Ltd (in liquidation)* [2013] FCA 1027, Wigney J granted leave to amend an application made under s 588FF(1) within time to add further transactions alleged to be voidable, although the additional claims were raised after the expiry of the limitation period in s 588FF(3). It was submitted in that case that the proposed amendments would have the effect of bypassing the statutory time limit in s 588FF(3) and that r 8.21 must be construed having regard to the authorities that establish that s 588FF(3) was intended to cover the field of extensions of time with respect to actions under s 588FF(1). That submission was rejected. His Honour reasoned on the authority of *Rodgers* that unlike s 588FF(3), r 8.21(2) does not operate to extend the time for commencement of proceedings and where it applies, it permits an amendment to an application commenced within time, even though the effect of the amendment is to add a new claim for relief which, had the proceedings not already been commenced, would have been statute barred. As I am not persuaded that the decision of the Full Court in *Rodgers* was plainly wrong, in my opinion *Re Spec* is, with respect, correct and should be followed.

### The second issue

1. In *Camilleri  v The Trust Company (Nominees) Limited* [2015] FCA 1138 Middleton J helpfully summarised the legal principles governing amendments to an originating process pursuant to r 8.21 as follows:

(a) r 8.21(1)(g)(i) directs attention to the existing claim for relief, and the facts pleaded to support it, and then directs attention to the question of whether the proposed amendments are properly characterised as a new foundation in law for the relief, arising out of “substantially” the same facts as those already pleaded: see generally *Re Spec FS NSW Pty Ltd (In Liquidation)* [2013] FCA 1027; (2013) 225 FCR 79 at [38]; *Darcy v Medtel Pty Limited (No 3)* [2004] FCA 807 at [[30]](http://www.austlii.edu.au/au/cases/cth/FCA/2004/807.html#para30); *Clasul Pty Ltd v Commonwealth of Australia* [2014] FCA 1133 (“***Clasul***”) at [41]; *New South Wales v Radford* [2010] NSWCA 276; (2010) 79 NSWLR 327 at [[69]](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2010/276.html#para69), citing *Brickfield Properties Ltd v Newton* [1971] 1 WLR 862 at 880 (Cross LJ);

(b) the Court should not be too pedantic in considering the nature of the facts added to the existing pleading. Whether the added facts are substantially the same as the facts already pleaded will be a question of degree, and will depend on the nature and extent of the existing pleaded case, the facts sought to be added in and the relief already sought;

(c) the expression “substantially the same facts” does not mean “the same facts” and the need to prove additional facts to support the new cause of action would not be fatal to the favourable exercise of the Court’s discretion, otherwise the word “substantially” would have no effect: *Draney v Barry* [2002] 1 Qd R 145 at [57].

(d) if the necessary additional facts to support the new cause of action arise out of substantially the same story as that which would have to be told to support the original cause of action, the fact that there is a changed focus with elicitation of additional details should not of itself prevent a finding that the new cause of action arises out of substantially the same facts: *Draney v Barry* at [57].

1. The SA and WA defendants both argued that the new claims did not arise out of “the same facts or substantially the same facts as those already pleaded” but instead arose out of substantially different anterior facts and circumstances.
2. The original pleadings in each proceeding all followed the same format. In each statement of claim, it was alleged that the relevant defendant received various payments from Gunns (and/or the relevant subsidiary but for this purpose I will only use “Gunns”) in the period from 3 July 2012 to 25 September 2012. The payments were identified and collectively defined as “the Payments”. The pleadings relevantly included the following allegation in paragraph [10]:

Further the Payments were insolvent transactions within the meaning of s 588FC of the Act in that:

1. the payments were unfair preferences given by Gunns to the relevant defendant within the meaning of s 588FA of the Act; and
2. the payments were made at time when was insolvent.
3. In the particulars to that allegation, the plaintiffs referred to and relied upon a number of matters which, it was alleged, “indicate that Gunns was insolvent from at least 3 July 2012 and possibly earlier”.
4. In each of the relevant proceedings, the amended pleadings now allege that the relevant defendant received various payments from Gunns in the period 30 March 2012 to 25 September 2012. Each statement of claim has identified earlier payments in the period from 30 March 2012 to 3 July 2012 within the term “Payments”. Paragraph 10 of each statement of claim has been amended to include a further subparagraph in the following terms:
5. In the alternative to paragraph 10(b), Gunns became insolvent as a result of making the Payments.
6. The particulars were also amended as set out in Annexure 3 to these reasons.
7. The effect of the amendments is that in each proceeding, it is now alleged that Gunns was insolvent from at least 30 March 2012. It is also alleged that Gunns became insolvent as a result of making the “the Payments”, where the “the Payments” include payments received by the defendants back to 30 March 2012.
8. It was submitted for the WA defendants that the amended applications and statements of claim now rely on two substantially different facts, namely (1) that Gunns was insolvent from at least 30 March 2012 – citing at least seven new and different particulars to support that assertion; and (2) that Gunns became insolvent as a result of making those payments – again citing at least seven new and different particulars to support that assertion. It was submitted that a company cannot be insolvent on 30 March 2012 (as a fact) if it becomes insolvent on 3 July 2012 (as a fact) and nor can a company become insolvent by making payments in March, April, May and June 2012 if (as now alleged as fact) it did not become insolvent until 3 July 2012 (which was originally pleaded). It was also submitted that the new particulars are wide‑ranging and expansive, raising complex new facts and ranging over considerably expanded time periods. It was submitted that the consequences of the amendments have a significant impact on the number of payments that are the subject of the proceedings and their value and significantly expand on the original claim and relevant facts which are brought into issue in the proceedings. It was also submitted that by introducing a new period of the company’s insolvency, supported by new particulars, the plaintiffs are requiring the Court to undertake a substantially expanded examination of facts and evidence in these proceedings, including and making findings with respect to:
   1. whether the Gunns Group was insolvent during the additional three month period between 30 March 2012 and 3 July 2012;
   2. what payments have been made by the Gunns Group to the defendants over that new period;
   3. what knowledge or suspicions the defendants had of the insolvency of the Gunns Group (if at all) on any given day during that new period; and
   4. the effect that the payments had on the overall indebtedness of the Gunns Group to the defendants during the course of the period.

It was submitted that these facts and circumstances had previously not been placed directly in issue.

1. It was similarly contended for the SA defendant that whilst at a high level the added allegations are of the same character, that is, seeking to overturn particular transactions between the defendant and Gunns in the six months prior to the Gunns Group entering administration, the new claims relate to substantially different facts and circumstances in a different and discrete time period, in a different financial year and would involve a different factual inquiry as to each of the allegations.
2. I do not agree. I am satisfied that the relevant transactions in the earlier period sought to be impugned arise out of substantially the same facts as those already pleaded to support the existing claims for relief, namely in each matter: the payments in question relate to earlier transactions in the same course of business conducted between the parties; the new claims are of the same nature as the existing claims and there are many common facts; there is a substantial overlap between the facts pleaded in respect of the additional claims and the facts pleaded in respect of the existing claims; substantially the same facts as those originally pleaded will have to be considered in determining liability and the defences in respect of the additional claims; and, which period has been expanded, the amended statements of claim do not introduce wide ranging new facts and enquiries or require the Court to undertake a substantially different examination of the facts and evidence in these proceedings. The fact that new facts have been placed in issue because of the expanded period of alleged insolvency does not mean that the amendments do not arise substantially out of the same facts as those initially pleaded.
3. The real issue concerns whether the earlier date of insolvency relied upon constitutes a substantially different fact. In my opinion it does not. It may be accepted that new and different particulars are relied upon to support the assertion that Gunns was insolvent from at least 30 March 2012 but the claim of insolvency as from the earlier period arises out of substantially the same factual substratum as the existing claims. In the original claims the material fact of insolvency was particularised on the basis that Gunns was insolvent from at least 3 July 2012 and possibly earlier and the particulars on which the plaintiffs relied were facts and circumstances in the period from June 2010, but primarily between January and September 2012.
4. The WA defendants drew heavily upon various cases which have considered the power to amend but I did not find any of those cases particularly helpful and it is unnecessary to refer to them. As the authorities make clear, there are no concrete rules for determining whether amendments arise out of substantially the same facts as those already pleaded and in each case it is a matter of looking at the particular facts and circumstances of that case: *Clurname Pty Ltd v McGraw-Hill Financial Inc* [2017] FCA 1319.

## Discretion

1. That leaves the question of discretion as all amendments under r 8.21 require leave.
2. The onus is on the party seeking leave to amend to persuade the Court that leave should be given: *Dye v Commonwealth Security Ltd (No 2)* [2010] FCAFC 118 at [17]. In *Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu (A Firm), in the matter of Tamaya Resources Limited (in liq)* [2015] FCA 1098 [127] Gleeson J noted that the relevant factors to be considered include:
   1. the nature and importance of the amendment to the party applying for it;
   2. the extent of the delay and the costs associated with the amendment;
   3. the prejudice that might be assumed to follow from the amendment, and that which is shown;
   4. the explanation for any delay in applying for leave;
   5. the parties’ choices to date in the litigation and the consequences of those choices (see also *Luck v Chief Executive Officer of Centrelink* [2015] FCAFC 75 (“***Luck***”) at [44]);
   6. the detriment to other litigants in the Court (*Luck* at [44]);
   7. potential loss of public confidence in the legal system which can arise where a court is seen to accede to applications made without adequate explanation or justification.
3. The WA defendants argued that relevant factors against the grant of leave are:

(a) the defendants were entitled to know the case against them on or before 24 September 2015 – that is the purpose of the limitation period;

(b) in cases involving the repayment of monies under the Act, the case (or the story put) involves a creditor in allocating resources to make specific appropriate enquiries and gather evidence to meet that case and allows the creditor to comprehend the risk it faces. Section 588FF of the Act ensures that persons seeking to recover monies against the creditors must indicate their intentions within three years: see *Davies & Anor v Chicago Boot Company Pty Ltd (No 2)* (2007) 96 SASR 164 at [48];

(c) this is not a situation in which payments were “missed” by the liquidator prior to the expiry of the limitation period, in which case the defendants would know of the different facts on which a further claim would be based – the fact of the payments. The date of insolvency of the company is a matter that could not have been known to the defendants and they could not have prepared themselves for the risk that the additional payments would be claimed by the liquidators;

(d) there is no explanation from the plaintiffs as to why an expert report could not have been commissioned earlier and, in particular, before the expiry of the limitation period. It must have been obvious to the plaintiffs that such a report was always going to be required particularly if the plaintiffs were going to base their case upon it;

(e) if the issue was an inability or delay in obtaining information so as to determine an insolvency date (or the facts upon which that date was based) an application for leave to extend the time period before the limitation period expired would have been appropriate: see s 588FF(3)(b) of the Act. No such application was made, it was said presumably because the liquidators had all the relevant information and had come to a considered view;

(f) what has happened here is that the view of the insolvency date of the Gunns Group formed by the plaintiffs within the limitation period differs from the view formed by its trial expert. Because the latter view expands considerably the period between insolvency of the Group and its collapse and raises new facts, a new basis or story (if the amendment is allowed) presents itself to the plaintiffs for claiming the additional payments. In addition to raising facts and matters different to the old basis and not at all the same, the new basis is prejudicial to the defendants (in terms of resource allocation and provisioning against possible loss) and sets at nought the protection provided by the limitation period. It is relevant therefore to set the plaintiffs’ delay in getting the report (which, it was said, could readily have avoided) against that prejudice: see *ASIC v Cassimatis (No. 6)* [2016] FCA 622 [8]–[13] per Edelman J.

1. The SA defendant argued that this is not a case where the Court should be inclined to exercise the discretion in favour of the grant of leave particularly given:

(a) the exceptional nature of a preference claim, which aims to disturb historical commercial transactions and which is anomalous in so far as it is not designed to respond to any breach of duty or commercial morality by the defendant but is justified on grounds of equality between unsecured creditors;

(b) the statutory policy considerations referred to in *Grant Samuel* and *Fortress Credit*;

(c) the liquidators’ “undoubtedly calculated” decision to formulate their claim as one based on separate transactions rather than by reference to s 588FA(3)(c); and

(d) the absence of any justification for the liquidators’ apparent change of position and actual delay.

1. It was submitted that there was no suggestion that the liquidators were unaware of the additional transactions now sought to be made the subject of preference claims at the time that proceedings were instituted. Rather, it was said, a decision was “self-evidently made not to pursue them” and, it was argued, to the extent that any prejudice may be occasioned to the liquidators by their inability now to attempt to overturn the additional transactions, any such prejudice was “self-inflicted” (*Worldwide Specialty Property* *Services Pty Ltd (in Liq) v Worldwide Specialty Property Services Pty Ltd (in Liq)* [2017] FCA 687 at [19] per Lee J). Furthermore, it was argued, “if and to the extent it were open to suppose in the liquidators’ favour that they perceived some difficulty or uncertainty about the merits of pursuing those claims (and that should not be inferred given the absence of evidence), the point would cut both ways in any event”. It was said that the difficulties caused by the passage of time are more keenly felt by a defendant to a preference claim than to the liquidator, who has access to, “and here, obviously” the resources to investigate matters of history. It was also submitted that it is oppressive for an unsecured creditor, having pleaded to a claim based on a discrete number of preference claims over a discrete period, then to be faced with a very different and much broader case, amounting to a total claim which is more than double the claim as originally formulated.
2. I am not persuaded by these arguments that leave to amend should not have been granted. First, the original pleading flagged that the companies may have been insolvent from a date earlier than 3 July 2012 which included particulars of facts and events going back to January 2012. Furthermore, each of the defendants were put on notice of the companies’ possible insolvency from a date earlier than 3 July 2012 in letters of demand that were earlier sent to them. In other words, taking into account and giving weight to the statutory policy of the limitation period in the exercise of discretion, it is relevant, in my view, that the possibility that the liquidators may seek to claim back alleged preference payments from an earlier period was not foreclosed by the institution of proceedings. Secondly, the statements of claim were served in the relevant actions on 18 and 19 November 2015. On 16 February 2016, the plaintiffs served on the relevant defendants the solvency report of Mr Georges of Ferrier Hodgson dated 12 February 2016. Notice of the proposed amendments was initially provided on a without prejudice basis on 15 March 2016 (to the solicitors acting for the WA defendants) and on 6 April 2016 (to the solicitors acting for the SA defendant) and on an open basis to all of these defendants on 3 May 2016. In other words, there has not been a significant time lapse between the institution of the proceedings, obtaining an expert’s report on solvency, and amending the pleadings to add the further claims. Moreover, the plaintiffs acted promptly following receipt of their expert’s report in making application to amend. Thirdly, the defendants have not identified any particular prejudice consequent on any alleged delay in bringing forward the amendments, and the “delay” was not extensive.

# Conclusion

1. Accordingly, I am satisfied that the companies in the Gunns Group were and remained insolvent at least from 30 March 2012 until 25 September 2012. I am also satisfied that the Court had the power pursuant to r 8.21(g)(i) to authorise the amendments the subject of the orders of Middleton J on 6 May 2016.

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| I certify that the preceding eighty‑nine (89) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies. |

Associate:

Dated: 6 March 2018

**ANNEXURE 1**

**Gunns Group of Companies**



**ANNEXURE 2**

**Remaining Gunns Group Proceedings**

**Victoria District Registry**

1. Bryant & Ors v JEG Management Pty Ltd & Ors VID 586 of 2015
2. Bryant & Ors v Mumbannar Lime (a partnership) VID 584 of 2015
3. Bryant & Ors v Thode Knife & Saw Pty Ltd & Anor VID 556 of 2015
4. Bryant & Ors v The Trustee for the West Coast Transport Unit Trading Trust & Anor VID 583 of 2015

**South Australia District Registry**

1. Bryant & Ors v Badenoch Integrated Logging Pty Ltd SAD 341 of 2015
2. Bryant & Ors v LV Dohnt & Co Pty Ltd SAD 334 of 2015

**Western Australia District Registry**

1. Bryant & Ors v Bluewood Industries Pty Ltd WAD 540 of 2015
2. Bryant & Ors v Edenborn Pty ltd WAD 553 of 2015
3. Bryant & Ors v Southern Regional Transport WAD 550 of 2015

**ANNEXURE 3**

**Amended Particulars**

The plaintiffs refer to and rely upon, inter alia, the following matters which indicate that Gunns was insolvent from at least ~~3 July 2012~~ 30 March 2012 and possibly earlier.

1. The Gunns Group experienced declines in revenue in each financial year between 30 June 2010 (**FY10**) and the financial year ended 30 June 2012 (**FY12**), including a loss after tax of $903.9 million as at 30 June 2012;

ia. The Gunns Group experienced deteriorating trading conditions affecting various divisions of the business and resulting in significant reductions in EBIT as at 31 December 2011;

1. Minutes of meetings of the board of directors of Gunns and the other companies in the Gunns Group and the management reports generated by the Gunns Group in 2012 contain numerous references to the Gunns Group being under significant cash flow and creditor pressure;
2. Between January 2012 and June 2012, the Gunns Group’s liabilities increased from $715 million to $880 million and the Gunns Group’s net asset position decreased from $885 million to approximately $24 million in the same period;
3. The net asset position of the Gunns Group was materially impaired by write‑downs of at least $1.4 billion by 30 June 2012;

iva. Between 31 December 2011 and 25 September 2012, the Gunns Group had a net liquid asset deficiency of between approximately $14 million and $45 million;

ivb. The Gunns Group undertook a significant asset sale process with the objective of reducing its secured debt. The total probable realisable value of the assets sold and/or to be sold in the relevant period was significantly less than the total secured debt;

ivc. The Gunns Group further incurred significant expenditure in relation to the construction of a Pulp Mill. In respect of that project:

(a) development cost projections for the project as at June 2008 were approximately $2.067 billion;

(b) as at December 2011, the carrying value of the capitalised costs relating to the project were in the amount of $232 million;

(c) the Gunns Group was required by its lenders to engage a joint venture partner by 31 March 2012 for the project to proceed. That did not occur; and

(d) in June 2012, the Gunns Group determined that it was no longer probable that the project would proceed to completion and capitalised costs in relation to the project were impaired and written down to a recoverable amount of $37.5 million;

ivd. Between 31 December 2011 and 25 September 2012, the Gunns Group had significant levels of overdue unsecured trade creditors in the amount of between $16 million and $33 million, with a peak overdue indebtedness of $46 million in July 2012;

1. During the period of January 2012 to June 2012, the Gunns Group took approximately 183 days on average to pay its creditors and numerous lump sum round amount payments were made to trading creditors from at least January 2012;
2. Aged debts of the Gunns Group increased between the financial year ended 30 June 2011 (**FY11**) and the financial year ended 30 June 2013 (**FY13**) with debts over 30 days increasing from 16.6% in FY11 to 33.5% in FY13;

via. At various times, major unsecured trade creditors threatened legal action against the Gunns Group and/or threatened to issue statutory demands. Some major unsecured trade creditors ceased and/or threatened to cease the supply of good and/or services to the Gunns Group unless payments were made to reduce overdue debts;

1. ~~Between January 2012 and June 2012, the guns Group had deficiencies in working capital of at least $500,000 in each of those months, assuming exclusion from current assets of those assets that were held for sale~~ Between 31 December 2011 and 31 July 2012, the Gunns Group had a working capital deficiency of between $533 million and $614 million, after adjusting reported balances for overstated carrying values of assets held for sale included as current assets, and adjusted for additional provisioning against aged receivables;
2. Payments were made out of the central bank account of the Gunns Group to the Defendant in rounded sums referred to in paragraph 7 on or around 6 July 2012 and 20 September 2012 respectively;
3. From around March 2012 onwards, the Gunns Group was unsuccessful in its efforts to obtain further equity investment from existing or prospective shareholders;
4. Between January and June 2012, all of the Gunns Group’s banking facilities were fully drawn (with the exception of its leasing facility), and Auspine Limited (ACN 004 289 730) was, between December 2011 and June 2012, in breach of one of its quarterly borrowing covenants;
5. Between 2 May and 12 September 2012, the Gunns Group made numerous requests to its lenders for extensions, waivers and compromises of scheduled repayments owing under its banking facilities, which requests were refused or not granted.
6. Gunns and a number of other companies within the Gunns Group, were party to a Deed of Cross-Guarantee (**Deed**):
7. The Deed was in writing;
8. The Deed contained express terms to the effect that each of the parties to the Deed guaranteed the debts of each of the other parties to the Deed in the event of the winding up of one of those parties pursuant to certain provisions of the Act; and
9. The Plaintiffs will refer to the Deed at trial for its full terms and effect.

The Plaintiffs refer generally to the expert report of Mr George Georges dated 12 February 2016.

A copy of the Deed is in the possession of the solicitor for the Plaintiffs and may be inspected by appointment during ordinary business hours.

Further particulars may be provided prior to trial.