



# Extension of Time for Liquidators to bring Proceedings

November 15, 2017

Written by JHK Legal Lawyer Belinda Melton

## Introduction:

The *Corporations Act 2001* (Cth) (the “Act”), places time limits on when liquidators can bring voidable transaction proceedings. However, it can be difficult for liquidators to always comply with the time limits in place, particularly where they are dealing with large and complicated liquidations and extra time is required to make investigations into the company’s books and records to identify all creditors that may need to



be pursued for voidable transaction claims. Therefore, there are circumstances where liquidators may apply to the Court to have the time limits specified under the Act extended.

## The Legislation:

Pursuant to section 588FF(1) of the Act, a liquidator may apply to the Court for orders relating to voidable transactions. An important date with respect to voidable transactions is the relation back date. The relation back date is the date on which the liquidation commenced, which can be any of the following:

1. In the case of voluntary administration, the day in which the administrators were first appointed;
2. In the case of an order being made by the Court, the day in which the wind up application was filed with the Court; and

3. In the case of a creditors' voluntary winding up, the date of the resolution to wind up the company.

Section 588FF(3)(a) of the Act provides the following:

*“3) An application under subsection (1) may only be made:*

*(a) during the period beginning on the relation-back day and ending:*

*(i) 3 years after the relation-back day; or*

*(ii) 12 months after the first appointment of a liquidator in relation to the winding up of the company;*

*whichever is the later; or*

*(b) within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period.”*

Therefore, if the liquidator needs to bring proceedings more than three years after the relation back date, the liquidator will be required to make an application to the Court seeking an extension of time before the three year period has lapsed pursuant to Section 588FF(3)(b) of the Act.

### **Case Law:**

There have been a number of important decisions made where the Court has used its discretion to make an order extending the time for the liquidator to bring voidable transaction proceedings. Two important High Court decisions were made in the cases of *Fortress Credit Corporation (Australia) II Pty Limited v Fletcher* [2015] HCA 10 (“Fortress Credit Corporation”) and *Grant Samuel Corporate Finance Pty Limited v Fletcher; JP Morgan Chase Bank, National Association v Fletcher* [2015] HCA 8 (“Grant Samuel”).

### **Fortress Credit Corporation**

In the case of Fortress Credit Corporation, the High Court had to make a decision on whether an order for an extension of time could be granted where the liquidator had not identified the transactions alleged to be voidable at the time of the order. These types of orders are commonly referred to as shelf orders.

In coming to a decision, the Court accepted that there are certain circumstances where liquidators may find it extremely difficult to complete their investigations and identify voidable transactions within the time allowed under Section 588FF(3)(a) of the Act. Further, the High Court recognised

that Section 588FF(3)(b) of the Act confers “a discretion on the court to mitigate, in an appropriate case, the rigours of the time limits imposed by [s 588FF(3)(a)]...”<sup>1</sup>

The decision in Fortress Credit Corporation shows that the Court is exercising its discretion when granting an extension of time. This is because there are often a number of factors the court must try and balance (such as public policy factors), and decisions will be reached on a case by case basis.

### **Grant Samuel**

In the case of Grant Samuel, the liquidators were successful in their application for an extension of time under section 588FF(3)(b). After the limitation period expired, the liquidators then applied again for a further extension of time (“the second order”). The New South Wales Supreme Court granted the second order, allowing the liquidator a further six months to commence proceedings.

The appellants applied to set aside the second order, however were unsuccessful before the Court of Appeal.

When the matter went to the High Court, the liquidators argued that the provisions of the *Uniform Civil Procedure Rules 2005 (NSW)* (“UCPR”) allowed the second order to be made. However, the High Court held that the UCPR could not be relied upon to extend the time to commence proceedings. This is because relying on the UCPR would give preference to the New South Wales legislation rather than the Commonwealth legislation.

The decision of the High Court in Samuel Grant reinforces that further extension applications must be sought before the limitation period expires. This is because bringing an application within the time required under the Act is a precondition, and while the Act gives the Court power to vary the time period under section 588FF(3)(b), the High Court has stated that this power cannot be supplemented or varied by rules of procedure of the Court to which an application for extension of time is made.

### **Conclusion:**

Where liquidators are dealing with large and complicated liquidations, extra time may be required for them to complete their investigations before they are able to proceed with a voidable transaction claim.

---

<sup>1</sup> *Fortress Credit Corporation (Australia) II Pty Limited v Fletcher* [2015] HCA 10 at [24]

While section 588FF(3)(b) of the Act allows liquidators to make applications to the Court to extend the time to commence proceedings, liquidators must still be mindful that they must have a sufficient explanation as to why an order to extend the time to commence proceedings is required. Further, any application for an extension of time must be made within the time limits provided under section 588FF(3)(a) of the Act.

If you require further information about extensions of time for a liquidator to bring proceedings or require assistance to make an application to the Court seeking an extension of time, JHK Legal are ready, willing and able to provide assistance.