SUPREME COURT OF QUEENSLAND

CITATION:	*Greig & Duff as Liquidators of Australian Building Industries P/L (in liq) v Australian Building Industries P/L (in liq) & Anor; Greig & Duff as Liquidators of Australian Building Industries P/L (in liq) v Stramit Corporation P/L & Anor* [2003] QCA 298
PARTIES:	**JOHN LETHBRIDGE GREIG and ROBERT JOHN DUFF as Liquidators of AUSTRALIAN BUILDING INDUSTRIES PTY LTD (IN LIQUIDATION)** ACN 009 340 952 (applicants/respondents/appellants) **v** **AUSTRALIAN BUILDING INDUSTRIES PTY LTD (IN LIQUIDATION)** ACN 009 340 952 (respondent) **STRAMIT CORPORATION PTY LIMITED** ACN 005 010 195 (applicant/respondent) **JOHN LETHBRIDGE GREIG and ROBERT JOHN DUFF as Liquidators of AUSTRALIAN BUILDING INDUSTRIES PTY LTD (IN LIQUIDATION)** ACN 009 340 952 (plaintiffs/applicants/respondents) **v** **STRAMIT CORPORATION PTY LIMITED** ACN 005 010 195 (defendant/respondent/appellant) **AUSTRALIAN BUILDING INDUSTRIES PTY LTD (IN LIQUIDATION)** ACN 009 340 952 (second defendant)
FILE NO/S:	Appeal No 5302 of 2002 Appeal No 9833 of 2002 SC No 7589 of 2000 SC No 8117 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from interlocutory decision General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2003

JUDGES: Williams and Jerrard JJA and Fryberg J
Separate reasons for judgment of each member of the Court, Williams and Jerrard JJA concurring as to the orders made, Fryberg J dissenting in part

ORDERS:

1. **Appeal No 5302 of 2002 dismissed with costs to be assessed**
2. **On Appeal No 9833 of 2002 [appeal from S7589/00]:**
   - **(a) Appeal allowed**
   - **(b) set aside the orders of Mullins J of 1st and 25th October 2002**
   - **(c) order that the application filed 5 June 2002 be dismissed**
   - **(d) order that the respondents John Lethbridge Greig and Robert John Duff as liquidators of Australian Building Industries Pty Ltd (in liquidation) pay the costs of and incidental to the application and the appeal to be assessed**
3. **On Appeal No 9833 of 2002 [appeal from S8117/01]:**
   - **(a) Appeal allowed with costs to be assessed**
   - **(b) set aside the order dismissing the application filed 23 May 2002**
   - **(c) grant the appellant Stramit Corporation Limited leave to withdraw the admission of the matters alleged in paragraph 18 of the Statement of Claim filed 7 September 2001 and grant further leave to the appellant to file and serve its Amended Defence of 23 May 2002**
   - **(d) judgment for the defendant Stramit Corporation Limited in action S 8117/02 with costs of and incidental to the application and action to be assessed**

CATCHWORDS: CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF LIQUIDATION – EFFECT OF WINDING UP ON OTHER TRANSACTIONS – PREFERENCES – WHAT CONSTITUTES PREFERENCE – GENERALLY – where payments were made by company to Stramit Corporation P/L – where company went into liquidation – where liquidators sought to recover payments made to Stramit on the grounds that they were unfair preferential payments – where Stramit was granted summary judgment dismissing liquidators' claim below – whether the liquidators have no real prospect of succeeding on their claim

CORPORATIONS – SUPERVISION, REGULATION AND CORRECTION – IRREGULARITIES IN PROCEEDINGS –

EXTENSION OF TIME – where liquidators sought an extension of time within which they could bring applications under s 588FF of the Corporations Law – where extension granted – where extension subsequently set aside insofar as it applied to Stramit – whether court had discretion to set aside original order granting extension of time – where liquidators were aware prior to making original application for extension of time that Stramit would be significantly affected by an order extending time – where Stramit was not made a party to the original application – whether Stramit should have been made a party to the original application – whether original order extending time should have been set aside

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – PARTIES – OTHER MATTERS – where Stramit was added as a party to proceedings brought by liquidators after expiration of time – where extension of time to commence proceedings against Stramit was granted to liquidators – whether liquidators were effectively seeking to commence a fresh proceeding against an added defendant after expiration of the relevant time limitation – whether general power of amendment conferred on the court would permit the making of an amendment which extended the time limited in the *Corporations Act*

Brown v DML Resources Pty Ltd (No 2) (2001) 52 NSWLR 685, discussed
Brown v DML Resources Pty Ltd (No 3) (2001) 188 ALR 469, discussed
Brown v DML Resources Pty Ltd (No 5) [2001] NSWSC 973, discussed
Brown v DML Resources Pty Ltd (in liq) (No 6) (2002) 40 ACSR 669, discussed
Cameron v Cole (1944) 68 CLR 571, followed
Commissioner of Police v Tanos (1958) 98 CLR 383, cited
Craig v Kanssen [1943] KB 256, followed
Dahozo Pty Ltd v Oz-US Film Productions Pty Ltd (1997) 24 ACSR 739, cited
David Grant & Co Pty Ltd v Westpac Banking Corporation (1995) 184 CLR 265, followed
Draney v Barry [2002] 1 Qd R 145; [1999] QCA 491; Appeal No 1136 of 1998, 30 November 1999, cited
Green v Chiswell Furniture Pty Ltd (in liq) [1999] NSWSC 608, cited
Hoskins v Van Den-Braak (1998) 43 NSWLR 290, cited
Oates v Attorney-General (1998) 156 ALR 1; [1998] QCA 233; Appeal No 2582 of 1998, 21 August 1998, cited
Queensland Police Credit Union Ltd v Criminal Justice Commission [2000] 1 Qd R 626, cited
Re Aura Commercial Interiors Pty Ltd [2002] NSWSC 380, discussed

Re McLellan [1979] Qd R 392, cited
Rodgers v Commissioner of Taxation (1998) 88 FCR 61, distinguished
Star v National Australia Bank Ltd (1999) 30 ACSR 583, distinguished
Sutherland v Dexion Pty Ltd [2003] NSWSC 24, distinguished
Tagoori Pty Ltd (in liq) v Lee [2001] 2 Qd R 98, followed
Taylor v Taylor (1979) 143 CLR 1, followed
W R Carpenter Australia Ltd v Ogle [1999] 2 Qd R 327; [1997] QCA 383; Appeal No 5023 of 1996, 28 October 1997, cited
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514, considered

Corporations Act 2001 (Cth), s 588FA, s 588FE, s 588FF, s 1322, s 1383
Corporations (Ancillary Provisions) Act 2001 (Cth), s 10
Supreme Court of Queensland Act 1991 (Qld), s 81
Uniform Civil Procedure Rules 1999 (Qld), r 69, r 74, r 371, r 377, r 995

COUNSEL: H Fraser QC, with M Gunther, for the appellant in Appeal No 5302 of 2002 and the respondent in Appeal No 9833 of 2002
W Sofronoff QC, with P Bickford, for the respondent in Appeal No 5302 of 2002 and the appellant in Appeal No 9833 of 2002

SOLICITORS: Jones King for the appellant in Appeal No 5302 of 2002 and the respondent in Appeal No 9833 of 2002
Clayton Utz for the respondent in Appeal No 5302 of 2002 and the appellant in Appeal No 9833 of 2002

[1] **WILLIAMS JA:**

The Parties

[2] John Lethbridge Greig and Robert John Duff ("the liquidators") were appointed liquidators of Australian Building Industries Pty Ltd ("the company") on 14 November 1997. The company manufactured and marketed roll-formed steel roofing, fascia and rainwater goods. It was a wholly owned subsidiary of Farnell & Thomas Ltd, a publicly listed company.

[3] Stramit Corporation Pty Ltd ("Stramit") carried on the business, inter alia, of supplying fabricated steel building products including roll-form steel roofing, fascia and rainwater products. It was a significant supplier of goods to the company.

Appeals

[4] This court is effectively hearing three appeals; the position can be summarised as follows:

(i) The liquidators obtained an ex parte order from Mullins J on 7 September 2000 extending until 11 September 2001 "the time within which

applications may be brought under Section 588FF(1)" of the Corporations Law (S7589/00). On the application of Stramit filed 16 April 2002 that order of Mullins J was set aside by the order of Chesterman J of 16 May 2002 "in so far as it applies to Stramit Corporation Ltd". From that order of 16 May 2002 the liquidators have appealed to this court by Notice of Appeal filed 12 June 2002 (Appeal No 5302/02). Essentially the liquidators seek an order that Stramit's application be dismissed; effectively that would restore the full effect of the order of 7 September 2000.

(ii) On 5 June 2002 the liquidators applied to the court for an order joining Stramit in the proceeding S7589/00, and a consequential order extending time for commencing proceedings against Stramit pursuant to s 588FF(3)(b) until 30 June 2002. By order of 1 October 2002 Mullins J added Stramit as a party and extended the time pursuant to s 588FF(3)(b) until 10 September 2001, the date on which the liquidators had commenced proceedings (S8117/01) against Stramit. From those orders Stramit appeals to this court by notice filed 28 October 2002 (Appeal No 9833/02) and essentially seeks orders that the orders of 1 October 2002, in particular the order joining Stramit and the order pursuant to s 588FF(3)(b), be set aside.

(iii) By Claim and Statement of Claim filed 10 September 2001 (S8117/01) the liquidators commenced an action against Stramit seeking orders pursuant to s 588FF(1) that certain payments by the company to Stramit were void and payment by Stramit to the company of $1,426,655.72. Consequent upon the order of Chesterman J of 16 May 2002 Stramit, by application filed 23 May 2002, sought an order pursuant to Rule 293 of the UCPR that the claim be summarily dismissed. That application was heard by Mullins J at the same time as she heard the liquidators' application filed 5 June 2002. Stramit's application of 23 May 2002 was dismissed by the order of 1 October 2002. From that order Stramit appeals to this court (Appeal No 9833/02) and seeks an order in terms of its application.

Relevant History

[5] Stramit commenced making demands on the company for payment of outstanding debts from about 23 April 1997. On 15 May 1997 the company paid Stramit $567,445.53 in reduction of its ongoing indebtedness. Then on 27 June 1997 Stramit commenced proceedings against the company and Farnell & Thomas Ltd seeking recovery of $859,210.19. (Farnell & Thomas Ltd had guaranteed payment of the company's debts). Stramit obtained judgment against the company and Farnell & Thomas Ltd on 6 August 1997 in the sum of $859,210.19 and issued a statutory demand on 8 August 1997 directed to the company for payment of that sum. On 22 August 1997 the company paid $200,000.00 in reduction of the indebtedness, and the balance of $659,210.19 was paid on 29 August 1997.

[6] On 11 September 1997 the company went into voluntary administration and the liquidators were appointed voluntary administrators. By resolution of creditors on 14 November 1997 the company was placed in liquidation and the liquidators appointed. Pursuant to the provisions of the Corporations Law the "relation back" day was 11 September 1997.

[7] The company had branches outside of Brisbane in Toowoomba, Lismore, Bundaberg, Rockhampton, Townsville and Cairns. It took over 12 months for the liquidators to effect the sale of all the branches. Some litigation had to be resolved in order to achieve that. A number of suppliers to the company made retention of title claims and resolution of those issues took up a significant amount of time on the part of the liquidators; some litigation relating thereto was in train. As at September 2000 there were a number of debts outstanding which were subject to litigation; they were being pursued by the liquidators. The records of the company were incomplete and that delayed the progress of the liquidation.

[8] On 3 March 1998 Dunhill Madden Butler, solicitors for the liquidators, wrote to Stramit as follows:

> "We have been instructed that payments were made to you by the Company in the sum of $1,426,655.72 in the period May 1997 to August 1997.
>
> We are of the opinion that these payments constitute unfair preferential payments pursuant to section 588FA(1) of the Corporations Law and as such are voidable against our client. Details of the unfair preferential payments made in the relation back period are as follows:
>
> | | | |
> |---|---|---|
> | (a) | 15 May 1997 | $ 567,445.53 |
> | (b) | 22 August 1997 | $ 200,000.00; and |
> | (c) | 29 August 1997 | $ 659,210.19 |
> | | TOTAL | $1,426,655.72 |
>
> Unless payment of the sum of $1,426,655.72 is made to our client on or before Monday, 9 March 1998 we have been instructed to issue recovery proceedings against you."

[9] By letter dated 6 March 1998 Clayton Utz replied as solicitors for Stramit relevantly saying:

> "Our client denies that any payments made to it constitute an unfair preference within the meaning of the Corporations Law.
>
> Please advise the basis or bases upon which you contend to the contrary."

[10] That drew the response from Jones King, lawyers on behalf of the liquidators, dated 12 March 1998 in the following terms:

> "We refer to your facsimile of 6 March 1998 and refer you to our correspondence of 3 March 1998 setting out your client's claim.
>
> We note that you served a creditors statutory demand on Australian Building Industries on or about 8 August 1997, subsequently further payments were accepted by your client in reductions of debts that our client owed. Pursuant to section 588FA(1) of the Corporations Law the payments received by your client in the period between May

> 1997 to August 1997 fall within the definition of a preferential payment and as such are voidable.
>
> We advise that as the payment of $1,426,655.72 has not been made to our client we are instructed to issue proceedings against you.
>
> Do you have instructions to accept service."

[11] By letter dated 17 March 1998 Clayton Utz replied stating that they held instructions to accept service. (Those letters of 12 and 17 March were not in the material before Chesterman J).

[12] Nothing of relevance then happened until the liquidators' application filed 31 August 2000 seeking the extension of time pursuant to s 588FF(3). Relevantly s 588FF provides:

> "(1) Where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE, the court may make one or more of the following orders:
>
> (a) an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction;
>
> . . .
>
> . . .
>
> (3) An application under subsection (1) may only be made:
>
> (a) within 3 years after the relation-back day; or
>
> (b) within such longer period as the Court orders on an application under this paragraph made by the liquidator within those 3 years."

[13] The application was not served on any creditor, and it did not seek anything other than a general order extending time. The affidavit by Greig in support of that application did not refer to the correspondence with Stramit set out above, but relevantly it did say: "I have already identified from my investigations to date that the company was insolvent and that a number of substantial preferences exist, including: . . . Stramit of around $1.4 million . . ." One other creditor was identified in that affidavit. The affidavit also referred to the difficulties faced by the liquidators and the work carried out to date; that has been set out in broad terms above.

[14] The order made by Mullins J on 7 September 2000 was in these terms; "Pursuant to Section 588FF(3) of the Corporations Law, the time within which applications may be brought under Section 588FF(1) by the applicants be extended to end on 11 September 2001."

[15] The next relevant step was the filing of the claim and counter-claim in proceeding S 8117/01 on 10 September 2001; those documents were served on that day and Chesterman J found (and this was not contested) that the "service of the claim and

pleading was the first notice Stramit received of the fact that the liquidators had applied for, and obtained, the extension of time within which to bring the action against it."

[16] It should be noted (the relevance will become clearer later) that the decision of Austin J in *Brown v DML Resources Pty Ltd* ("*Brown No 2*") (2001) 52 NSWLR 685 was handed down on 17 July 2001; it was first reported in 39 ACSR 219, the relevant part thereof being published on or about 15 October 2001.

[17] Stramit filed a notice of intention to defend and defence on 26 October 2001; in it the making of the order by Mullins J was admitted. The liquidators filed a reply on 16 November 2001.

[18] The solicitors acting for Stramit first became aware of the decision in *Brown No 2* early in March 2002. Enquiries relating to the making of the order of 7 September 2000 were put in train and counsel was asked to advise. That resulted in Stramit's application of 16 April 2002 being filed. The application was heard on 24 April 2002 and the decision and reasons of Chesterman J handed down on 16 May 2002.

[19] Thereafter Stramit sought to amend its defence in S8117/01 by withdrawing the admission of the order of Mullins J and instead pleading the order of Chesterman J.

[20] That was followed by Stramit filing its application of 23 May 2002 and the liquidators filing their application of 5 June 2002. The hearing of those applications took place before Mullins J on 13 June 2002 and her reasons and decision were handed down on 1 October 2002. A consequential order disposing of the costs of the applications was made on 25 October 2002.

[21] In an affidavit relied on before Mullins J on 5 June 2002 Greig deposed "that if the Orders made by Her Honour Justice Mullins had not been made, I would have issued instructions to my solicitors to file proceedings immediately based on the limited facts available to me at the time. My investigations were not at that time complete but it would have been the only prudent course should the Court not have made the Orders made . . .". He indicated in that affidavit that his concern was to "verify the issue of insolvency of the company" and he did not "wish to issue proceedings until [he] could provide proper particulars as to insolvency." It was also necessary for the liquidators to obtain litigation funding and that was not in place in September 2000.

The Decision and Reasoning of Chesterman J

[22] Essentially Chesterman J approved of and applied the reasoning of Austin J in *Brown No 2*. Because of that it is more logical to begin with an evaluation of the reasoning in *Brown No 2*.

[23] Liquidators were appointed with respect to two companies which were referred to in the judgment as the DML Companies. On 4 September 2000 those liquidators applied ex parte for an order pursuant to s 588FF(3)(b) extending the time within which to bring proceedings to challenge transactions as unfair and voidable preferences. Austin J in his judgment in *Brown No 2* at 687 summarised what happened on the hearing of that application as follows:

> "I entertained the application on an ex parte basis, but in view of the fact that the orders sought by the plaintiffs might affect creditors who

> may wish to appear and make submissions, I made provisions in the orders to ensure that certain specified large creditors were served and given an opportunity to appear at a later stage.
>
> I made orders extending the period within which any application in respect of a voidable transaction of either of the DML Companies might be made to 24 October 2001. . . . I directed the plaintiffs to serve copies of the originating process and the supporting affidavit, and my orders, on five named corporations . . . and I granted those corporations liberty to file and serve any application to set aside my orders within 28 days."

[24] Why the liberty to apply to set aside the order was limited to "certain specified large creditors" escapes me. If the interests of justice required that such creditors should be given notice, then all creditors, large and small, should have been treated equally. What might appear to a judge to be an amount deserving of the description "small" may well be a very significant amount for a company or individual called upon to pay that amount; indeed if the transaction was declared void pursuant to s 588FF, repayment of the amount may have the consequence that that "small" creditor would have to go into liquidation. Surely justice demands that such a creditor should be in no worse a position than a "large" creditor who could repay any transaction declared void without disastrous financial consequences. That is a matter to which I shall return.

[25] *Brown No 2* was concerned with an application by one of the large creditors ("BP") to have the order extending time with respect to it set aside ex debito justitiae on the ground that as it was not served the order was made contrary to fundamental principles of natural justice.

[26] Prior to the ex parte application the liquidators had written to BP asserting that payments it had received constituted voidable preferences and sought recovery of an amount ranging from just over $2 million to $3.7 million. The reason stated in the material supporting the ex parte application for not commencing proceedings against that creditor was that the liquidators lacked litigation funding.

[27] At 693 Austin J noted that on some three occasions in New South Wales a judge had made a blanket order extending time on an ex parte application, but he observed that in none of the cases had the question been considered whether the court had power to make such an order on ex parte application. He referred to an earlier decision of his (*Green v Chiswell Furniture Pty Ltd (in liq)* [1999] NSWSC 608) in which he had considered the factors which were relevant to the exercise of the discretion to extend time. In broad terms those considerations were (i) the explanation for the delay in commencing proceedings, (ii) a preliminary view of the merits of the foreshadowed proceedings, and (iii) whether the likely actual prejudice resulting from the grant of an extension is sufficiently substantial to outweigh the case for granting an extension.

[28] That may well be not an exhaustive statement of what could be relevant circumstances when considering such an application, but clearly each of those three considerations would be an important matter for the court to have regard to. My difficulty is that once it is acknowledged that prejudice to a creditor is a legitimate consideration that factor can only be evaluated properly if the creditor is given the opportunity of putting forward facts which might demonstrate prejudice. That

seems to have been impliedly recognised by Austin J on 4 September 2000, because that consideration was probably the rationale behind the order requiring service on large creditors.

[29] It is worth noting at this point that Austin J, both in *Green v Chiswell* and *Brown No 2*, referred to the origin of the changes in the legislation which reduced the limitation period within which proceedings of the type in question had to be commenced from six years to three years from the relation back day. The genesis was to be found in the Harmer Report; the author of that Report apparently accepted submissions that often there were inordinate delays in the commencement of proceedings where voidable transactions were alleged and that such delays had a prejudicial effect on the creditors. Austin J in *Brown No 2* at 692-3 observed: "Part of the legislative purpose appears to have been to protect potential defendants from late claims, but the legislature acknowledged that there will be occasions when it is appropriate to allow an extension of the three-year period. . . . Another aspect of the legislative purpose appears to have been to protect creditors generally from delays in administration of the winding up of the debtor company, but it would be a subversion of that purpose to construe s 588FF(3) in a manner that had the effect of depriving the liquidator of adequate time to pursue recoveries for their benefit."

[30] Against that background Austin J dealt with the submission of the applicant-creditor that relief pursuant to s 588FF(3) could only be granted "against particular persons", in other words the order extending time had to be limited to a named creditor. He rejected that argument on the basis that it placed "an unduly restrictive interpretation" on the section. He went on at 693:

> "Consistently with the wording of subs (3), the application to extend the time limit can be an application to extend the time limit within which a particular subs (1) application can be made, or a broader application that applies to the particular subs (1) application under consideration and to other applications as well. I see no reason why the other applications cannot be described by category rather than in specific terms, provided that the description is clear."

[31] He then pointed out at 694 that in many instances the liquidator may not be in a position through no fault of his own to specify within the statutory time limit each transaction that he might wish ultimately to challenge as a voidable transaction. That led the learned judge to deal with the submission that to "make such an order . . . would mean that no one who had had commercial dealings with the company before commencement of the winding up could be sure that he or she was beyond the liquidators' reach, even though the statutory time limit would have expired if the order had not been made." The answer he gave to that was as follows:

> "In my opinion this submission identifies a matter that the Court should take into account in the exercise of its discretion to grant or refuse the application for an extension of time. It is undesirable to leave creditors in a state of uncertainty as to the validity of their transactions with the company for an extended time, and the Court should therefore be careful not to grant an unwarranted extension or an extension for an unwarranted period."

[32] Again I have real difficulty with that reasoning. How can one determine what is an "unwarranted extension" or an "unwarranted period" if the only material before the

court is from the liquidator who says that he has not been able to complete investigations with respect to possible voidable transactions? Why should the recipient of a payment within the relation back period be placed in further jeopardy merely because the liquidator, without fault on his part, cannot determine whether or not proceedings should be commenced seeking to have that payment declared a voidable preference; in particular, why should such a creditor be potentially prejudiced without being heard?

[33] Austin J then drew a distinction between those creditors whom the liquidators knew prior to bringing the application would be adversely affected by such an order and other unspecified creditors who would be caught by such an order. With respect to the "known creditors" the audi alteram partem rule of natural justice applied and they in consequence had a right to be heard. A number of authorities were cited in support of that clearly correct proposition and it is sufficient merely to mention *Cameron v Cole* (1944) 68 CLR 571, *Commissioner of Police v Tanos* (1958) 98 CLR 383, *Dahozo Pty Ltd v Oz-US Film Productions Pty Ltd* (1997) 24 ACSR 739 and *Oates v Attorney-General* (1998) 156 ALR 1.

[34] It was by adopting that reasoning that his Honour reached the conclusion that the applicant-creditor BP should have been given notice of the application, and as it had been denied natural justice he set aside "the relevant orders only so far as they affect the applicants".

[35] There can, in my respectful view, be no doubt that such conclusion was correct. My only concern is one of principle. Given the observations I have made previously I cannot see how such a conclusion can be reached without acknowledging that justice would require the same opportunity to be given to all creditors affected by the order extending time. Again that is a matter that I will return to later.

[36] In the present case Chesterman J referred to the fact that the liquidators were aware prior to making their application for an extension of time that Stramit would be significantly affected by an order extending time. He based that conclusion on the letters of 3 and 6 March 1998. As already noted he did not have before him the subsequent two letters and in consequence said in his reasons that the "liquidators did not reply" to the letter of 6 March 1998 from Stramit's solicitors, and that the liquidators had not "given Stramit an explanation of the proposed preference claim." But the fact that the subsequent correspondence is now before the court does not in any way affect the validity of his Honour's reasoning. The application by Stramit was to have the order set aside because "its rights were adversely affected by an application of which it was given no notice." The reasoning in *Brown No 2* was broadly adopted by Chesterman J and ultimately he made an order in similar terms to that made by Austin J. The order ultimately made is clearly supported by the authorities referred to above and also by cases such as *Hoskins v Van Den-Braak* (1998) 43 NSWLR 290 and *Craig v Kanssen* [1943] KB 256.

[37] It is significant that Chesterman J noted in his reasons:

> "Stramit submits that it had been sufficiently identified by the liquidators as a prospective defendant in an action to recover the amounts of the preferential payments to make it essential, if justice were to be done, that it have notice of the application to extend time.

> . . . There is no doubt that but for the order Stramit would have had an unanswerable defence to the claim commenced on 7 September 2001.
>
> . . It is not right that the order did not itself affect Stramit's rights. Without it Stramit would have had a complete defence to the liquidators' claim."

[38] Chesterman J went on to make what in my respectful view is a very valid observation about the legislative provisions in question. He said:

> "The evident purpose of the time limit contained in s 588FF(3) is to protect creditors of an insolvent corporation from late claims for the repayment of preferences. The Act requires a liquidator to investigate the affairs of the company and bring any claims for recovery of moneys within a specified period, while recognising that there may be cases when it is appropriate to lengthen the period allowed for the purpose. The provision recognises the right of traders to organise their affairs and conduct their businesses on the basis that they are not liable to account for payments received from a failed company more than three years after its demise."

[39] The liquidators made submissions at first instance that the court ought not in the exercise of its discretion set aside the order extending time because it had not caused substantial injustice that could not be remedied, because Stramit had delayed in bringing its application, and because there was no fundamental irregularity requiring the order to be set aside. For reasons which he gave Chesterman J rejected those submissions.

[40] Because it was sufficient for him to dispose of the matter on the ground that the liquidators knew that Stramit was a creditor who would be adversely affected by an extension of time, it was not necessary for Chesterman J to consider whether or not the court had power to make an order of the type in question ex parte and if so in what circumstances.

The Appeal from the Order of Chesterman J

[41] The first point taken by counsel for the liquidators on the appeal from the judgment of Chesterman J is that his Honour erred in holding that s 1322 of the Corporations Law did not confer upon the court a discretion in the circumstances, and then in failing, in the exercise of that discretion, to reach the conclusion that the order of Mullins J ought not be set aside. Section 1322(2) provides that a proceeding is not invalidated "because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court". Authorities such as *Cameron v Cole* and *Craig v Kanssen*, referred to above, establish that failure to provide an opportunity to be heard gives the party denied that right an entitlement, ex debito justitiae, to have the order made set aside. That line of authority generally supports the proposition, in my view, that there is more than a mere procedural irregularity where a party has been denied a hearing. But even if denying an affected party a right to be heard does constitute a "procedural irregularity" for purposes of s 1322, then the authorities referred to would clearly establish that such irregularity had caused "substantial injustice". McPherson JA (with the concurrence of Pincus JA

and Derrington J) concluded, after a review of relevant authorities, that once it is demonstrated that a person was denied the opportunity of being heard, that person "is ordinarily entitled to relief against adverse consequences of being denied that right without having to establish in detail how the opportunity would have been made use of.": *Queensland Police Credit Union Ltd v Criminal Justice Commission* [2000] 1 Qd R 626 at 634-5. If Stramit had a right to be heard before the order extending time on 7 September 2000 was made, then I can see nothing in s 1322 of the Law which would have justified the court in refusing to set aside the order so made.

[42] The liquidators also sought to rely on rule 371 of the UCPR. Again, for the reasons given above, that rule would not provide a basis for refusing to set aside the order where a party affected was denied the right to be heard.

[43] It was also submitted on behalf of the liquidators that no right vested in Stramit had been irretrievably lost at the time of the hearing before Mullins J on 7 September 2000, and the making of the extension order that day. It is true that the limitation period did not expire until 11 September 2000, but the right to rely on the limitation period which would have accrued in favour of Stramit on 11 September 2000 was lost if the order extending time was effective. It is merely a play on words for counsel for the liquidators to say that no rights were affected because the order merely "delayed or suspended the ability to rely on s 588FF(3)" for a further year. As I said in *Tagoori Pty Ltd (in liq) v Lee* [2001] 2 Qd R 98 at 99: "Section 588FF(3) imposes a time requirement as an essential condition of the right to apply to have a transaction set aside as a voidable preference." Without the order of 7 September Stramit had an unanswerable defence to proceedings brought by the liquidators seeking to have the payments set aside as voidable preferences.

[44] The argument on behalf of the liquidators also relies on the artificial distinction between recipients of payments who have been sufficiently identified and those who have not been so. The argument recognises that it is inequitable to distinguish between recipients of payments in that way, and in consequence it is said that there should be no requirement to serve anyone. The approach of Chesterman J was submitted to be unsatisfactory from the liquidator's point of view because a liquidator might have to serve a large body of creditors with the application or face the prospect that any subsequent proceedings initiated to seek recovery of an undue preference might be challenged on the basis that the order extending time was made without hearing from the creditor.

[45] Those arguments highlight a number of criticisms made above of the reasoning of Austin J in *Brown No 2*. The answer, in my respectful view, is not to say that no creditor need be served with the application for an extension of time, but rather that any creditor sued outside the three year limitation period must have been made a party to the application for an order extending time. Surely any liquidator doing his or her job competently would at least be able to say towards the end of the three year limitation period what transactions might be challenged. Austin J in *Brown No 2* at 694 referred to the situation which existed in *Green v Chiswell* as indicating that in some situations the liquidator may not be in the position to do that. I doubt, however, that that would be so in the circumstances which arose in *Green v Chiswell*. There the relation back day was 1 May 1996 when administrators of the company were appointed. Then those administrators were appointed liquidators on 21 January 1999 only a couple of months before the three year limitation period

expired. But surely in such a situation, particularly where there was an identity between the administrators and liquidators, it would be known within the three year period what transactions were suspect. That would clearly be a case where an extension would be granted, but the creditors affected thereby would have to be served with the application and given the opportunity of making submissions as to why such an extension should not be granted.

[46] Then counsel for the liquidators submitted that if Stramit had the right to be heard the discretion to set aside the order ought not to have been exercised because of the following considerations:

(a) Delay by Stramit in taking steps to seek a remedy in respect of its asserted right;

(b) Steps taken by Stramit in proceedings S 8117/01;

(c) Stramit had waived the right to apply to set aside the order.

[47] The points made in (a) and (b) can be considered together. It is true that the application to set aside the order of 7 September 2000 was not filed until 16 April 2002. But it is not in dispute that Stramit had no notice at all of the order of 7 September until it received the statement of claim in the action on 10 September 2001. Whilst it initially admitted in its defence the making of the order, Stramit moved quickly once its solicitor became aware of the decision in *Brown No 2* in March 2002.

[48] As Chesterman J noted in his reasons, "delay and indolence are no barrier" to a successful application to set aside an order made in the absence of due notice. Specifically he referred to *Craig v Kanssen* at 258-262 and *Hoskins* at 298. The reasoning of the High Court in *Taylor v Taylor* (1979) 143 CLR 1, followed and applied by this court in *W R Carpenter Australia Ltd v Ogle* [1999] 2 Qd R 327, demonstrates that delay will not ordinarily be a bar to setting aside an order where a person affected by it was not given a reasonable opportunity of appearing and presenting his case. (See also *Muir v Jenks* [1913] 2 KB 412.)

[49] Insofar as the argument on behalf of the liquidators relies on waiver (or election) it is sufficient to say that the elements of neither concept are established by the facts here. There is no suggestion that Stramit had at any time prior to making its application full knowledge of its rights and in some way acted contrary to what those rights dictated.

[50] It follows that the liquidators have not established any error in the reasoning of Chesterman J such as would warrant setting aside his orders. The appeal against his orders should be dismissed.

[51] Strictly it is not necessary for this court to go beyond the limited basis on which Chesterman J arrived at his conclusion, namely that as the liquidators knew Stramit was substantially affected by the order they ought to have served Stramit with notice of the application. But as is obvious from previous remarks in these reasons I am of the view, at least as a general rule, that the court has no power to grant a blanket extension of time pursuant to s 588FF(3) on an ex parte application.

<u>The Decision and Reasoning of Mullins J of 1 October 2002</u>

[52] By this order Mullins J added Stramit to application S7589/00 pursuant to s 81 of the *Supreme Court of Queensland Act* 1991 "despite the expiry of the limitation periods under s 588FF(3) . . . at the date of this order" and then made an order pursuant to s 588FF(3)(b) of the *Corporations Act* extending the time within which proceedings could be brought by the liquidators against Stramit pursuant to s 588FF(1) "to end on 10 September 2001". Stramit appeals against each of these orders. The order of 1 October 2002 recited that it was relevantly made on the original application filed on 31 August 2000 (S7589/00) and on an "interlocutory application" filed in that proceeding on 5 June 2002. The latter application sought the following relief:

> "1. An Order pursuant to Rule 69 of the *Uniform Civil Procedure Rules* 1999 that Stramit Corporation Limited be joined as a Respondent to the proceedings.
>
> 2. An Order pursuant to Section 1322 of the *Corporations Act* 2001 that the time set by Section 588FF(3)(b) for making an Application under Section 588FF be extended to the date on which the order joining the Respondent, Stramit Corporation Limited as a Respondent to the proceedings S7589 of 2000 takes effect.
>
> 3. Alternatively an Order pursuant to Section 1322 of the *Corporations Act* 2001 that the time set by Section 588FF(3)(b) for making an Application under Section 588FF be extended to 30 June 2002.
>
> 4. An order pursuant to Rule 377(1)(b) of the *Uniform Civil Procedure Rules* 1999 that the Plaintiff have leave to amend its originating Application.
>
> 5. Such further or other orders as may be just."

[53] The liquidators were emboldened (if not invited) to make the applications they did in October 2002 because Chesterman J added the following footnote to his reasons for judgment:

> "The purpose of this order is to leave extant the liquidator's application to extend time but to remove from the order actually made the extension of time to commence proceedings against Stramit. The liquidators, if they so wish, must re-argue the application."

Undoubtedly in making that statement his Honour was influenced by the following passage in the reasons of Austin J in *Brown No 2* at 688:

> "However, the plaintiffs also submitted that if the Court decided to set aside its previous orders on procedural grounds, they should be permitted to revive their original application under s 588FF(3), notwithstanding that the three years for commencement of proceedings to challenge voidable transactions has now well and truly expired. According to the plaintiffs, once the original application is revived upon the setting aside of the orders of 4

> September 2000, the Court should make equivalent orders on the merits."

At the conclusion of his reasons Austin J at 703 said he would next proceed to hear that application. That was followed by a series of hearings and judgments in what can only be described as the disastrous debacle of litigation between DML and BP.

[54] Mullins J was referred to the decisions in *Brown No 3* (2001) 188 ALR 469 delivered 29 August 2001 and *Brown No 6* (2002) 40 ACSR 669 delivered 23 January 2002. It is necessary to refer to each of those decisions.

[55] In order to make some sense out of what I have described as a debacle the best starting point is the following summary taken from the reasons for judgment in *Brown No 6* at 671-2:

> "Issues arose as to the further conduct of the proceedings, and I dealt with them in my judgment of 29 August 2001. I held that it would be necessary for the plaintiffs to join the BP companies as parties to the proceeding before any final hearing of their application under s 588FF(3)(b), but that it was too late to do so. This was because s 588FF(3)(b) required that an application, for extension of the period during which unfair preference proceedings could be brought, must be made within 3 years after the relation-back day; and the effect of Pt 8 r 11(3) of the Supreme Court Rules was that the application would be taken to be made only when the BP companies were joined as parties, at a time necessarily outside the 3 year period.
>
> In [113] of my judgment of 29 August 2001, I expressed the opinion that it would be futile to make an order for the joinder of the BP companies as parties to the proceeding, and that in the circumstances the correct course was for the proceeding to be dismissed, unless the plaintiffs could satisfy me that there was some point in allowing the proceeding to continue on foot, notwithstanding the conclusions I had reached. I decided to give the plaintiffs 'one last opportunity to make submissions' as to why I should not dismiss the proceeding.
>
> The plaintiffs responded by making three applications. First, they applied under the 'slip rule' for orders to set aside my orders of 10 September 2001 for manifest error, essentially on the ground that I had overlooked the discretionary effect of s 81 of the Supreme Court Act 1970 (NSW). I dealt with that application, rejecting it, in a judgment delivered on 24 October 2001: *Brown v DML Resources Pty Ltd (No 4)* [2001] NSWSC 947 . . . . Second, they invited me to reconsider my reasons for concluding that it was too late for them to join the BP companies as parties. I dealt with that application, rejecting it, in a judgment delivered on 31 October 2001: *Brown v DML Resources Pty Ltd (in liq) (No 5)* [2001] NSWSC 973 . . . .
>
> In the judgment of 31 October 2001 I held that, although the plaintiffs had made an application for extension of time as against creditors generally within the 3 year period set by s 588FF(3)(a), the effect of an order for the joinder of BP Australia Ltd as a defendant (an order found by me to be a necessary step) would be that the

> application as against that company would be taken to have been made on the date of the order for joinder. This flowed from the proposition that an order for joinder would necessarily be made under Pt 8 r 8 of the Supreme Court Rules, to which Pt 8 r 11(3) was applicable.
>
> By their third application, the plaintiffs seek to invoke s 1322 of the Corporations Act to cure the irregularities in their initial application. Because the plaintiffs wished to adduce substantial evidence of factual matters for the purposes of the third application, it was not practicable to deal with it concurrently with the first and second applications, which I have disposed of without any need to enter into evidence of factual matters. A substantial hearing was needed and has been held. The present reasons for judgment deal with the application under s 1322."

[56] In *Brown No 3* Austin J considered "the status of the plaintiffs' original application once the ex parte orders have been set aside". Because, in his view, the original orders were set aside on "a procedural ground" and "not a ground relating to the substance or merits of the plaintiffs' application for an extension of time" he concluded that "the proceeding will remain in existence after the ex parte orders have been set aside." No authorities are cited for that conclusion.

[57] That judgment then went on to consider whether BP should be joined as a party to the proceedings before the original application was reheard. It was noted that "the relief sought by the plaintiffs in the present proceedings will become, in effect, relief by way of orders expanding the scope of the existing extension of time orders so that they come to apply to the BP companies." As that was "relief targeting the position of the BP companies" they were parties affected by any judgment on the application and therefore ought ordinarily to be joined.

[58] But Austin J went on to conclude that there was "an insurmountable impediment" to the joinder of BP. As it was put in the reasons:

> "The problem for the plaintiffs is that their application, even if such an amendment were to be made, is an application to which the BP companies are not parties. For the reasons I have given, the court ought not make orders on the plaintiffs' application without first joining the BP companies as parties. If orders were made without joinder, they would be liable to be set aside . . . . Consequently, absent joinder of the BP companies, this is not a case where the court is able to do what s 588FF(3)(b) envisages, namely to order a longer period than 3 years from the relation-back day 'on' the plaintiff's application made within those 3 years.
>
> If the plaintiffs' application were amended to join the BP companies, the application would be out of time as against them. This is because the order for joinder of the BP companies would be made under Pt 8 r 8 of the Supreme Court Rules, and would therefore be affected by Pt 8 r 11(3)
>
> . . . ."

[59] The reasons also noted that if the BP companies were to be joined as parties to the proceeding, the date of commencement of the proceedings so far as concerns them would be the date of the amendment adding them as parties. As the relevant time for the limitation provision would be the time of the joinder order, the application would be outside the time limit prescribed by s 588FF(3). The court would not make the joinder order "because such an order would be futile".

[60] *Brown No 5* did not significantly alter the position reached in consequence of the decision of *Brown No 3*. Austin J reiterated that in "the interests of commercial certainty, the targeted creditor must become a defendant to the application for extension of time within the three-year time limit for making that application." He reiterated his conclusion that it "would be futile to join BP . . . as a defendant under Part 8 rule 8 because, having regard to Part 8 rule 11(3), the plaintiffs' application for extension of time as against that company would be barred by s 588FF(3)(b)".

[61] That leads to the reasoning of *Brown No 6*. The formal application before the court was filed by the liquidators seeking leave to join BP as a defendant, and leave to amend the originating process seeking, inter alia, the following orders:

> 5. "A declaration pursuant to s 1322 of the Corporations Act that, notwithstanding the defendant not having been joined to these proceedings prior to 24 October 2000, these proceedings are valid against the defendant.
>
> 6. An order extending the period for joinder of the defendant to these proceedings.
>
> 7. Such further or other orders or declarations pursuant to s 1322(4) as the court thinks appropriate."

[62] It should be noted that on the hearing of the s 1322 application the liquidators adduced "substantial evidence of factual matters". The evidence was said to be relevant to the discretion conferred on the court as s 1322(6) required the court to be satisfied "that no substantial injustice has been or is likely to be caused to any person."

[63] The most important part of the reasoning in *Brown No 6* is that which considers the applicability of s 1322 where an application is made under s 588FF(3)(b) out of time. At the outset it was noted that s 1322 was a remedial provision which had to be construed liberally; there can be no disputing that. That led to a consideration of the judgment of the High Court in *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265. That decision was concerned with s 459G which provided that an application to set aside a statutory demand "may only be made" within 21 days after the demand was served; the section also specified the manner in which such an application was to be made. The High Court unanimously held that s 1322 did not provide a basis for remedying a failure to comply with s 459G. Austin J concluded that the reasoning of the High Court in that case "does not apply to s 588FF(3) . . . as a matter of construction, having regard to the contrasting legislative policies underlying the statutory demand procedure and s 588FF, and also some important differences in the two statutory contexts" (676). In his view the reasoning of the High Court was directed to the new specific legislative scheme which provided a "complete code for the resolution of disputes involving statutory demands" as the "21-day time limit for making an application to set aside a

statutory demand is an integral part of the legislative scheme, in which there are other time limits"; that legislative scheme would "be compromised" if s 1322 permitted the court to extend the time. (677) Austin J went on at 677-8:

> "Section 588FF(3) is also part of a legislative scheme . . . directed in this case to the vitiation of voidable transactions entered into by a company near to its winding-up. The scheme sets out statutory grounds for the avoidance of certain defined transactions, prescribing time limits beyond which transactions are safe from curial interference on those statutory grounds.
>
> For present purposes, it is notable that the statutory time limits (set out in s 588FE) are not open to modification by the court, and the statutory grounds for interference with transactions do not purport to be, and are not, an exclusive code (and thus, for example, transactions are open to challenge on general equitable grounds. . .).
>
> . . .
>
> In this context, the fixing of a statutory time limit for the liquidator to make an application to challenge a voidable transaction is merely directed to ensuring that due and timely attention is given to this aspect of the liquidator's duties of administration. The 3 year time limit, important though it is, is not an integral part of any wider legislative structure."

[64] The statutory context which influenced the thinking of Austin J included the fact that s 459G had to be read together with s 459F, which says that a company is taken to fail to comply with the statutory demand 21 days after the demand is served, unless the company applies in accordance with s 459G for an order setting aside the demand. (679) In his view the observations by Gummow J at 276 in *David Grant* (approving the reasoning in dissent of McPherson JA in *Cavetina Pty Ltd v Synthetic Dyeworks Industries Pty Ltd* (1994) 14 ACSR 274 at 281) as to the meaning and effect of the words "may only" were limited because of the statutory context. In the opinion of Austin J "the word 'only' may be used to stipulate that the stated time limit must be followed *unless* the court is satisfied that a curative order should be made under s 1322. That is, the word 'only' excludes all possibilities other than compliance with the time limit and obtaining a s 1322 order ...". (680)

[65] For all those reasons Austin J concluded that "s 588FF(3) does not exclude the application of s 1322."

[66] When he came to consider s 1322 Austin J initially concluded that because s 588FF(3) provided substantive protection by giving immunity from proceedings with respect to voidable transactions the problem under consideration was not due to a "procedural irregularity". He also concluded that "the purported making of an application for an extension of the 3 year time period, outside the 3 year period, is not aptly described as a 'contravention' of s 588FF(3)(b)" for purposes of s 1322(4)(a).

[67] Ultimately Austin J concluded that he ought to make orders in favour of the liquidator under s 1322(4)(d). His reasoning appears to be stated in the following extract:

> "However, in my opinion s 1322(4)(d) is available for a more straightforward use. An application by the plaintiffs to challenge voidable transactions between the DML companies and BP Australia Ltd would be a proceeding under the Act. Equally, an application by the plaintiffs under s 588FF(3)(b) to extend the period for making an application to challenge voidable transactions between the DML companies and BP Australia Ltd would be a proceeding under the Act. In each case, s 1322(4)(d) would literally authorise the court to make an order extending the period for making the application, notwithstanding that the period for doing so, set by s 588FF(3)(b), has already ended. In the former case, s 1322(4)(d) would be used as the source of power to extend the time for bringing unfair preference proceedings. In the latter case, the source of the power to extend the time for bringing unfair preference proceedings would be s 588FF(3)(b), s 1322(4)(d) being used to overcome the fact that the application under s 588FF(3)(b) was out of time. The plaintiffs seek to use s 1322(4)(d) in the latter rather than in the former way. . .
>
> In my opinion, s 1322(4)(d) upon its proper construction is available to support an order extending the period, otherwise set by s 588FF(3)(b) as the period of 3 years after the relation-back day, within which the plaintiffs may seek an extension of the time for making an application to challenge voidable transactions between the DML companies and BP Australia Ltd. The plaintiffs seek an order for the joinder of BP Australia Ltd as a defendant in the present proceeding. As I have said, that has the effect, under Pt 8 r 11(3) of the Supreme Court Rules, that the application for an extension of time as against BP Australia Ltd is taken to be made as at the date of joinder. Therefore the order under s 1322(4)(d) should extend the time, for an extension of time application, up to the date upon which the order for joinder of BP Australia Ltd as a defendant takes effect." (689)

This view of s 1322 and s 588FF is contrary to that taken by Rolfe J in *Star v National Australia Bank* discussed below.

[68] Rather surprisingly his Honour went on to say that in making that order he did so "without making findings with respect to the merits of the plaintiffs' case for an extension of time (except to the extent required by s 1322(6)(c)), so as to preserve questions going to the merits of extending time for determination after the final hearing." (690-1). He also did not make any finding "as to whether there is a reasonable explanation for the plaintiffs not making an immediate application under s 588FF(1), in about September 2000, to set aside specific voidable transactions between the DML companies and BP Australia Ltd, or as to whether it was reasonable for them to proceed by seeking a general extension of time, as they did on 4 September 2000." (691). It appears that his Honour considered that those questions should be determined at the final hearing. [The final decision is reported as *Brown v DML Resources (No 7)* (2002) 41 ACSR 299.]

[69] As already noted the application determined by Mullins J on 1 October 2002 was argued and determined against the background of those decisions.

[70] Because the liquidators contended they were "re-arguing" the application filed 31 August 2000 the first question Mullins J had to consider was whether the Law or the Act applied to the hearing before her which took place on 13 June 2002. Because in her view the effect of the order of Chesterman J was that "the liquidators' application filed on 31 August 2000 remains extant and undisposed of in respect of Stramit" that proceeding was "not concluded" for purposes of s 1383(1)(d) of the Act, and therefore the proceeding was to be determined by application of the Act.

[71] The concern I have with that process of reasoning is with the statement that the application of 31 August 2000 remained "extant and undisposed of in respect of Stramit"; her Honour's reasoning is further encapsulated in the following passage:

> "Although prior to Chesterman J's order on 16 May 2002 there had been a final determination by my order of 7 September 2000 of the extension of time to commence proceedings against Stramit, that order was defeasible and as it was set aside, there was no longer a final determination of that issue."

[72] No authorities are referred to in support of that reasoning; nor, as noted above, did Austin J cite any authority for concluding that "the proceeding will remain in existence after the ex parte orders have been set aside." My concern is that the original ex parte order has not been set aside. In this case the order made by Mullins J on 7 September 2000 still stands as a final order of the court. Effectively all the order of Chesterman J has done is to make it clear that that order does not apply to Stramit because that company was denied the opportunity of being heard. The order stands with respect to all other creditors of the company, and is, prima facie, an order finally disposing of the application. Stramit was not identified as a party to the original application as at 7 September 2000 and, as has been recognised by both Austin J and Mullins J, it is necessary to somehow have a proceeding against Stramit before an order binding upon it can be made. There was an application made to the court by the document filed 31 August 2000 and there was a final order of the court, disposing of all issues raised by that application, made on 7 September 2000. The fact that it was subsequently held that that order was not binding on Stramit, who was not a party to that application, does not mean that the proceeding commenced by the application has not been fully and finally determined by the order of 7 September 2000.

[73] This is an aspect to which I shall have to return, but it is preferable at this stage to proceed with the analysis of the reasoning of Mullins J.

[74] The reasons record that it was "common ground between the parties at the hearing on 13 June 2002 that it is necessary for Stramit to be joined as a party to the application filed on 31 August 2000, before any order can be made which affects Stramit's interests." Given my approach the joinder of Stramit is critical.

[75] Mullins J then correctly analysed the issue as to the applicability of Queensland procedural rules relating to the joinder of parties. She concluded that Rule 995 of the UCPR, the Corporations Law Rules, applied, and as Rule 995 did not contain any specific provision dealing with the joinder of a party to an existing application the general provisions of the UCPR applied.

[76] For reasons with which I agree, Mullins J concluded that Rule 69 of the UCPR (which relates to adding parties) did not empower the court to join a party outside the limitation period specified in s 588FF(3). Mullins J correctly interpreted the relevance of Rules 69, 74(5) and 377(1) of the UCPR because the expression "limitation period" used therein is defined as meaning a limitation period under the *Limitation of Actions Act* 1974. Such Rules could not therefore empower the court to add a party outside a limitation period provided for in either the Law or the Act.

[77] However, her Honour went on to hold that s 81 of the *Supreme Court of Queensland Act* 1991 (as it then stood) did provide a source of power for the liquidators to seek to join Stramit as a party to the application filed on 31 August 2000, notwithstanding the expiry of the limitation provisions in s 588FF(3). Given the reasoning of this Court in *Draney v Barry* [2002] 1 Qd R 145 that section confers a wide discretionary power on the Court. The question remains whether or not, given the express provisions of s 588FF(3), it was appropriate to use the provision as Mullins J did.

The Appeal against the Order of 1 October 2002

[78] Stramit's appeal concentrated on the order for joinder made pursuant to s 81. But her Honour's conclusion that the application of 31 August 2000 remained "extant and undisposed of in respect of Stramit" was also strenuously attacked.

[79] The formal order of Chesterman J of 16 May 2002 relevantly states: "That the order of 7 September 2000 that time be extended for the Respondent to make applications under s 588FF(1) of the Corporations Act be set aside in so far as it applies to Stramit Corporation Ltd". The order itself does not contain his Honour's remarks which I have called a "footnote" and quoted in paragraph 53 hereof; those remarks are clearly obiter. I have already pointed out that neither Chesterman J nor Austin J in *Brown No 2* cited any authority for the proposition that the original application would remain extant so far as the creditor held to be excluded from the operation of the order originally made was concerned. Mullins J repeated those remarks. As I have already pointed out the original ex parte order was not set aside; it still stands so far as every creditor of the company, other than Stramit, is concerned. The order of 7 September 2000 is a final order of the court disposing of all the issues raised by the application filed 31 August 2000.

[80] In those circumstances counsel for Stramit submits that the matter is covered by s 10(1)(d) of the *Corporations (Ancillary Provisions) Act* 2001. That section relevantly provides that a proceeding commenced under the Law may be continued as provided for by that Act provided that the proceeding "had not been concluded or terminated" before the enactment of the *Corporations Act*. The submission is that if the order of 7 September 2000 finally disposed of the application of 31 August 2000 then s 10 did not apply to it.

[81] In my view there is merit in that submission. The effect of the order of Chesterman J is a declaration that Stramit is not a creditor affected by the order of 7 September 2000. That order of 7 September still remains as a final order co-extensive with the relief sought in the application of 31 August 2000. In those circumstances one cannot say that by some process the application has been reopened so that the applicant liquidators can seek further orders on it.

[82] The consequence is that strictly the liquidators should have commenced a fresh proceeding after the order of Chesterman J seeking a relevant order pursuant to s 588FF with respect to Stramit. It is obvious that any such application was doomed to fail because on any view it was made outside the time periods prescribed therein, and as Mullins J has correctly held there was no provision in the Act (which would have been the legislation applicable at the time such fresh application was made) permitting an extension of a time period prescribed in that section. If the court was to regard the application filed 5 June 2002 (quoted in paragraph 51 hereof) as a fresh application seeking relief pursuant to s 588FF(3)(b) against Stramit it would be bound to fail for the reason just given.

[83] It is, however, desirable that consideration also be given to the position if that approach be wrong in law. In those circumstances the original application filed 31 August 2000 would be treated as an application under s 588FF(3) of the Act. Counsel for Stramit submitted that in that situation Mullins J erred in applying s 81.

[84] There is no doubt that an amendment can be made to a proceeding brought pursuant to s 588FF(1) within time, though the amendment is made after the time limitations provided in s 588FF(3); *Rodgers v Commissioner of Taxation* (1998) 88 FCR 61 and *Star v National Australia Bank Ltd* (1999) 30 ACSR 583. But in my view there is a clear and important distinction between making some amendment to a claim commenced within time and what is effectively commencing a fresh proceeding against an added defendant after the expiration of the relevant time limitation; that is a distinction which I drew in *Tagoori Pty Ltd v Lee* at 99.

[85] *Rodgers* involved a proceeding, commenced within the three year time frame, originally seeking to have payments totalling $392,192 declared void as preferences. After the three year period expired the applicant sought to amend to include in the proceeding two further payments totalling approximately $85,000 which the liquidator only became aware of after the proceeding was commenced. The Full Court of the Federal Court concluded that "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" (67-8). The Court held there was no inconsistency between its rule permitting amendments and s 588FF(3) and that applying that rule the amendment in question should be made. The payments were made in the same financial year, and were "identical" to those set out in the original application.

[86] *Star* involved an application by liquidators to set aside pursuant to s 588FF securities given to a bank. The original application was made within time, but the liquidators overlooked some additional securities. Subsequently, after the three year period had expired, they sought to amend the application to include those additional securities. In a carefully reasoned judgment Rolfe J concluded that the amendment should be permitted. After referring to *David Grant* he said at 592-3:

> "While the wording is obviously not identical to that in s 588FF(3), I think it is necessary to consider the words 'only if' in s 459G(3) and 'may only be made' in subs (3), and the general structure of the sections. In each, although the words differ, the essential import is the same and, in my opinion, it is a condition of bringing an application under s 588FF, that the application must be made either within 3 years of the relation-back day, or within such extended period granted in consequence of an application within that three year period".

[87] Later he said (598) that as "a matter of language it seems to me that no difference can be drawn between the two sections in so far as the application of s 1322 is concerned. Accordingly, I do not consider that an application could be made under that section to extend the time provided by s 588FF(3)".

[88] However Rolfe J considered the position was different where an amendment was sought to a proceeding commenced within time. The court had no power under the Law to make the amendment, but could do so pursuant to the Rules of Court. In that regard he followed the reasoning in *Rodgers*. As the new cause of action arose out of substantially the same facts the amendment could be permitted.

[89] 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. The reasoning in *Rodgers* and *Star* does not support the conclusion reached by Mullins J in this case. The effect of the approach of Mullins J is that the making of an order pursuant to s 81 adding a party to the original application overcomes the time limit prescribed in s 588FF(3). That would be contrary to the approach taken by Toohey J at 562 (with whom Deane J agreed at 545) in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; there Toohey J said:

> "When the Federal Court is faced with an application to amend a statement of claim by introducing allegations that, though they may relate to a time after the relevant limitation period has expired, do no more than expand a cause of action already pleaded, there is no difficulty in treating O. 13, r. 2 as wide enough to permit such an amendment. But when, as here, the proposed amendment introduces an admittedly new cause of action, the position is quite different. Section 82(2) presents a statutory barrier to any new cause of action; to this barrier, reference to express, implied or incidental powers provides no answer."

That was said in the light of the Federal Court Act and rules as they then stood; amendments to those rules have widened the power of the Federal Court judges to make amendments after the expiration of the limitation period, but the approach therein approved is still relevant.

[90] As would be evident from earlier passages in these reasons it is my view that the approach taken by the High Court to the construction of s 459G in *David Grant* applies to the proper construction of s 588FF(3). In my view that construction is supported by the legislative history (including the Harmer Report), the reasoning of Rolfe J in *Star* and Mullins J in this case. Given that construction the time prescriptions in s 588FF(3) constitute an insurmountable boundary which cannot be overcome by recourse to a general power such as conferred on the Court by s 81. That is also consistent with the approach adopted in *Tagoori Pty Ltd v Lee.*

[91] On that approach, largely because of the inclusion of the word "only" any general power of amendment conferred on the court pursuant to s 81 would not permit the

making of an amendment which effectively (though not in express terms) extended the time limited in s 588FF(3).

[92] Mullins J also considered whether or not s 1322(4)(d) of the Act would empower the court to make the orders sought by the liquidators. She rejected the reasoning of Austin J in *Brown No 6*, and of Barrett J in *Re Aura Commercial Interiors Pty Ltd* [2002] NSWSC 380, and approved the approach taken by Rolfe J in *Star v National Australia Bank* in construing s 588FF(3) in an analogous way to which s 459G was construed by the High Court in *David Grant*. She therefore concluded that there was no power to make any order extending any time limit under s 588FF(3) in reliance on s 1322(4)(d) of the Act. With that reasoning and conclusion I agree.

[93] *Aura Commercial Interiors* is a strange case; there is no need for this court to consider the correctness of much of the reasoning therein. The company had been in administration for the whole of the three year period referred to in s 588FF(3). There was no liquidator who could bring any application pursuant to that section, but the administrator believed some transactions could be challenged as preferences if the company was wound up. In consequence the administrator applied under s 588FF(3)(b) a day before the three year period expired as an "interested person" within s 1322(4) for an order extending the time within which an application pursuant to s 588FF(3)(b) could be made. An order was made purportedly extending that time by 12 months. Barrett J, following *Star*, concluded that "s 1322(4)(d) could [not] be asserted as a basis on which the court could extend the period for the making of applications challenging voidable transactions under s 588FF(1). This is because that time limit is the subject of the particular extension mechanism provided for in s 588FF(3)(b)".

[94] That led his Honour to draw the distinction between the "two references" to a three year time period in s 588FF(3) – one in (a), the other in (b). He then concluded that "the restrictive words "may only be made" in s 588FF(3) apply only to constrain the making by a liquidator of an application challenging voidable transactions under s 588FF(1)". That led to the conclusion that those restricting words did not refer to the second period. That second period was within the scope of operation of s 1322(4)(d) and therefore the time within which an application for an extension of time under s 588FF(3)(b) could be made could be extended. That is the only portion of the reasoning relevant for present purposes.

[95] The only solace to all creditors of the company paid during the relevant period was that if a liquidator was appointed, and if he applied for an order extending time, that application would be "subjected to close scrutiny". The reasoning therein should not, in my view be followed.

[96] Reference should also be made to a later decision of Barrett J (*Sutherland v Dexion Pty Ltd* [2003] NSWSC 24) in which he followed and applied his reasoning in *Aura*. The company in that case had initially become subject to Part 5.3A administration and its affairs were subsequently governed by a deed of company arrangement. When it passed into a creditors voluntary winding up more than three years had elapsed since the "relation back day", the day on which it became subject to the Part 5.3A administration. In other words the period specified in s 588FF had expired before there was anyone competent to make the relevant application. That confirmed in the mind of that learned judge that there had to be some way found of extending the time.

[97] In my view the facts of *Sutherland* ought not be used as a ground for undermining the clear purpose and intent of s 588FF(3). The law requires that creditors be given detailed information as to the affairs of a company before a deed of company arrangement is approved. In essence by accepting such a deed the creditors elect to accept the perceived benefits of continuing trading rather than the consequences of liquidation. One of the matters that must be weighed up in making that decision is that certain benefits which might result from liquidation (such as recovery of voidable preferences) might be lost.

[98] In my respectful view the so-called "long form" of s 588FF(3) does not demonstrate that the words "may only be made" do not have any limiting effect on the final words of s 588FF(3)(b) "an application … made by the liquidator within those 3 years". Such words of limitation are infrequently used in the statute and when they are they must be given full effect. In my view analysing the provision in the way suggested by Barrett J undermines the clear legislative intent.

[99] Mullins J then went on to consider whether pursuant to s 81 she should in the exercise of discretion join Stramit and what the consequence of such a joinder would be. The reasons record that as early as March 1998 the liquidators had instructed solicitors to make demand on Stramit for recovery of the $1,426,655.00. It was noted that Stramit did not become aware of the order made on 7 September 2000 until the Statement of Claim in the action was served some 12 months later. Reference was then made to the problems faced by the liquidators in effecting the sale of the branches of the company and the other litigation with which they were concerned. It was also noted that the liquidators needed litigation funding which was not in place as at September 2000. The reasons also record that the liquidators in an affidavit filed 24 April 2002 deposed that if the order of 7 September 2000 had not been made they would have commenced proceedings against Stramit immediately. The reasons also record that on becoming aware of the decision in *Brown No 2* the solicitor for Stramit commenced taking the steps which ultimately led to the order of Chesterman J. By then the proceedings by the liquidators against Stramit had proceeded to the disclosure stage and the liquidators had incurred fees of between $20,000.00 and $30,000.00. All of those matters her Honour considered to be relevant so far as the exercise of the discretion was concerned. Mullins J then held that the "merits of the liquidators' claims must also be relevant to whether joinder of Stramit to the application filed on 31 August 2000 should be ordered." She therefore concluded:

> "Taking into account the fact that an order joining Stramit at this stage to the application of the liquidators filed on 31 August 2000 will deny Stramit the right to rely on the limitation defence otherwise given by s 588FF(3), the history of the proceedings between the liquidators and Stramit, the nature of the claims, the prospects of success favour the liquidators at this stage, the interests of the unsecured creditors of ABI, the fact that there is no personal fault on the part of the liquidators in bringing the joinder application at this stage, the interests of justice require an order to be made joining Stramit to the application filed on 31 August 2000, even though that will deny Stramit the right to raise the limitation period under s 588FF(3) of the Act as a defence ultimately to the claim by the liquidators in respect of the impugned payments."

[100] As I understand the reasoning her Honour was saying was that once the joinder was made pursuant to s 81 it operated as a joinder of Stramit to an application made within time and that in consequence it was not necessary to give further consideration to any power in the court to extend the time limitations in s 588FF(3).

[101] Given the conclusions I have reached it is not strictly necessary to review the ultimate exercise of discretion by Mullins J. However I should record that in my view, when proper weight is given to the time requirement in s 588FF(3) and the fact that the liquidators swore they were in a position to commence proceedings forthwith against Stramit if the order of 7 September 2000 was not made, the discretionary considerations should have led to a refusal to extend time. The liquidators knew by 31 August 2000 that the company was insolvent (affidavit Greig) and it is not clear what was meant by the later affidavit of Greig when he said the liquidators had a concern to "verify the issue of insolvency" and also to the provision of "proper particulars as to insolvency." The fact that litigation funding was not in place was clearly not a bar to commencing proceedings. There was no satisfactory explanation for the delay in commencing proceedings against Stramit and that should have resulted in an extension of time being refused.

[102] Mullins J reached her conclusion referring only to the terms of s 81 in its original form. It was, however, amended in 2002 by amending legislation which came into force on 16 August 2002. That amendment essentially provided that "rules of court may limit the circumstances in which amendments may be made". That effectively calls into play Rules 69, 74 and 377 of the UCPR as rules limiting the circumstances in which s 81 may apply. As already noted the hearing took place before Mullins J on 13 June 2002 and a decision was handed down on 1 October 2002. That means that at the time the decision was handed down s 81 had been amended, and the rules referred to limited the circumstances in which the section applied. It would seem to follow from that that s 81 could not be given the effect attributed to it by Mullins J where the application was governed by a provision of the Law or Act.

[103] Counsel for the liquidators submitted that inherent in the argument of Stramit was the proposition that s 81 was inconsistent with s 588FF(3). In order to overcome that counsel for the liquidators developed an intricate argument based on s 5G of the Act. I am not persuaded that the provisions of the Act referred to have the consequence of giving primacy to s 81. Even if s 81 had primacy that would not avail the liquidators for the reasons given above.

[104] Counsel for the liquidators also argued that it was not necessary (despite the concession made at first instance) that Stramit be a party to the application for an extension of time (presumably the contention was that it was sufficient if Stramit was aware of the application). In the circumstances the only rational conclusion is that Stramit would have to be a party to the application before an order extending time was binding on it.

[105] All of that reasoning results in the conclusion that the appeal should be allowed, the orders of 1 October 2002 and 25 October 2002 should be set aside, and in lieu thereof it should be ordered that the application of 5 June 2002 be dismissed.

Appeal 9833 of 2002

[106] In its initial defence Stramit admitted the allegation in paragraph 18 of the Statement of Claim in action S8117/01 that on 7 September 2000 Justice Mullins

ordered pursuant to s 588FF(3) that the limitation period in which this action could be commenced will expire on 11 September 2001. By an amended defence of 23 May 2002 Stramit seeks to withdraw that admission but needs the leave of the court pursuant to Rule 188 of the UCPR to do so. Given the order of Chesterman J of 16 May 2002, that leave should be granted and Stramit permitted to file and rely on the amended defence of 23 May 2002.

[107] Because of the conclusion she reached with respect to adding Stramit and extending time pursuant to s 588FF(3) Mullins J had no option but to dismiss Stramit's application filed 23 May 2002 for summary judgment in action S8117/01 pursuant to Rule 293 of the UCPR.

[108] In the light of the reasoning herein and orders I would make in appeals 5302/02 and 9833/02 it would follow that the liquidators have no real prospect of succeeding on their claim. In those circumstances it is appropriate to give judgment for Stramit, the defendant in action S 8117/01.

Orders

[109] The orders of the court should therefore be:

(1) Appeal No 5302 of 2002 dismissed with costs to be assessed.

(2) On Appeal No 9833 of 2002:

(a) Appeal allowed;

(b) set aside the orders of Mullins J of 1st and 25th October 2002;

(c) order that the application filed 5 June 2002 be dismissed;

(d) order that the respondents John Lethbridge Greig and Robert John Duff as liquidators of Australian Building Industries Pty Ltd (in liquidation) pay the costs of and incidental to the application and the appeal to be assessed.

(3) On Appeal No 9833 of 2002:

(a) Appeal allowed with costs to be assessed;

(b) set aside the order dismissing the application filed 23 May 2002;

(c) grant the appellant Stramit Corporation Limited leave to withdraw the admission of the matters alleged in paragraph 18 of the Statement of Claim filed 7 September 2001 and grant further leave to the appellant to file and serve its Amended Defence of 23 May 2002;

(d) judgment for the defendant Stramit Corporation Limited in action S 8117/02 with costs of and incidental to the application and action to be assessed.

[110] **JERRARD JA:** In this matter I have had the considerable advantage of reading the reasons for judgment and proposed orders of each of Williams JA and Fryberg J, and in which the relevant facts are described. They are in agreement on the outcome of the appeal 5302/02 from the order of Chesterman J made 16 May 2002. I respectfully agree with their Honours' conclusion, that Stramit had a right to be heard on the application filed by the liquidators on 31 August 2000, since Stramit was known by the liquidators to be a person whose rights and interests would be very much capable of being affected adversely by the ex parte order sought. The denial of Stramit's fundamental right to a reasonable opportunity to be heard[1] on the liquidators' application was what entitled it to an order ex debito justitiae from another judge of this court, granting Stramit relief against that denial of natural justice.[2]

Section 588FF(3)

[111] I agree with the view expressed by Williams JA that s 588FF(3) does not, as a general rule, authorise blanket applications made ex parte and without any identification in the application (or order made) of any person or persons against whom an application may ultimately be made for any one of the variety of orders provided for in s 588FF(1)(a) – (j). Section 588FF(1) requires the court to be satisfied that a transaction is voidable "because of s 588FE", which is a requirement that the court be satisfied either of the existence of one or more of the sets of circumstances accompanying an insolvent transaction of the company and described in s 588FE(2) to (5), or else the existence of circumstances making an unfair loan made before winding up. Not only does s 588FF(1) require satisfaction about these specific matters, but also the orders the court is empowered to make when so satisfied are ones directed to particular persons requiring specified acts, or orders releasing specified debts or security, or making specific declarations concerning or varying specified agreements. These are all orders requiring carefully prepared applications, and it seems incongruous that s 588FF(3) should be construed as allowing a (necessarily very specific) "application under subsection (1)" to be made within such extended period as the court orders, on an application brought ex parte in the broadest possible terms. Instead, s 588FF(3) will be construed more consistently with the particularity required in s 588FF(1) if s 588FF(3) is construed to require that any foreshadowed "application under subsection (1)", for the bringing of which an extension of time is sought, should itself be described in the application made 'under this paragraph' for that extension.

[112] While the terms of subsection (3) do not mandate the construction that an application under that paragraph specify the application under subsection (1) for which the relevant extension of time is sought[3], requiring that that be done in the ordinary course will go a long way towards avoidance of the problems which have arisen for liquidators and the courts, in matters such as this one and those litigated

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1 *Cameron v Cole* (1944) 68 CLR 571 at 589 per Rich J

2 *Hoskins v Van Den-Braak* (1998) 43 NSWLR 290 at 298

3 Or, as Austin J put it in *Brown v DML Resources (No.2)* (2001) 39 ACSR 219 at [33], do not literally require that construction.

before Austin J and reported as *Brown* (*No 2)* to *Brown (No 6).* It should only be where a liquidator can satisfy the court that the date of the liquidator's appointment, or the state of affairs of the relevant company, have resulted in the liquidator being unable to describe the nature of a possible application or applications to be brought and the identity of the potential respondent or respondents, that those circumstances take the case out of the general rule.

[113] The circumstances arising in this one would not be an example of that, as these liquidators knew of Stramit, the date and amounts of payments to it, and had already claimed to Stramit that the payments were voidable. The liquidators can be presumed to have had in mind the specific grounds to be relied on under s 588FE. An application by the liquidator on notice to Stramit as a party in late August 2000 would have required identification of those grounds, and enabled the court to be satisfied that they were sufficient to warrant an order extending the time. Instead, nearly two years passed before that application was made to Mullins J in 2002, and while the circumstances are unusual they demonstrate why the construction of s 588FF(3) which Williams JA favours and which Fryberg J supports should be adopted.

Were There Extant Proceedings?

[114] The critical point upon which those learned judges disagree is whether, as Chesterman J stated and Mullins J accepted, the order made by Chesterman J resulted in the liquidator's application to extend time filed 31 August 2000 remaining extant and undisposed of in respect of Stramit[4]. Williams JA holds that there were no such extant proceedings[5], and Fryberg J that there were[6]. I respectfully agree with the reasons and conclusions of Williams JA, and respectfully disagree with those of Fryberg J, and likewise respectfully disagree with those of Chesterman J, Mullins J, and Austin J as expressed by the latter in *Brown (No 3)* (2001) 188 ALR 469 at [29] – [30]. My reasons are as follows.

[115] Fryberg J describes the order made 16 May 2002 by Chesterman J as resulting in the liquidators being no longer entitled to all of the relief for which they applied on 31 August 2000. His Honour holds that the question whether that application had been finally disposed of can be resolved only by examining what occurred at the hearing. He also holds that what occurred was not that Chesterman J set aside the order as against Stramit with the intent of ensuring that the original application failed against that company, but rather that Chesterman J did so to enable a hearing to take place, should the liquidator wish its application re-argued.

[116] With due respect to that view, the application filed 31 August 2000 did not apply for any order for relief against Stramit. It asked only for an order that the time within which "an application" might be brought pursuant to s 588FF(1) of the *Corporations Law* be extended to end on 11 September 2001. No potential respondents were identified. The order made by Mullins J on 7 September 2000 was in similar general terms (extending the time for bringing "applications") and made no reference to Stramit or any respondent. That order enabled the liquidators to bring by 11 September 2001 Part 5.7B proceedings against any respondents they chose, on any s 588FE ground.

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4 Chesterman J at [37] and Mullins J at [7] – [8] of their respective judgments.

5 At [72] and [78] – [82] herein

6 At [145] – [150] herein

[117] Had Mullins J in her order made 7 September 2000 specifically excluded from the grant of leave both Stramit, and the other entity described in the evidence supporting the application before her Honour as a likely respondent to later s 588FF proceedings, on the ground that neither entity had been served with the application and should have been, the liquidators would have had various choices of action. They could have immediately commenced proceedings within time, at least against Stramit, as the liquidators now depose they were in a position to do. They could have appealed the order by Mullins J excluding Stramit. They could have brought an urgent 588FF(3) application on notice against Stramit, with the latter as a respondent. If the liquidators took none of those three steps, then whether or not they abandoned their original intention of possibly proceeding pursuant to s 588FF(1) against Stramit, no further step would remain to be taken by the liquidators, and no further listing or order by the court would be required, to dispose of the application filed 31 August 2000. The order made 7 September 2000 excluding Stramit and that other entity would stand as the final order of the court. With respect to Fryberg J, that position is different from that prevailing in *Re McLellan* [1979] Qd R 392, cited by His Honour, in which an originating summons was not dealt with on the return day by the Chamber Judge, nor adjourned for a hearing to a later day. As held by Andrews J, as he then was, that summons had enlivened the jurisdiction of the Court and there had been a lapse in formal procedure. There had not been any order made on that summons, let alone a final order.

[118] The situation when the ex parte order actually made by Mullins J was set aside on 16 May 2002 "in so far as it applies to Stramit Corporation Ltd" was the same, in my judgment, as the position that would have existed had the order made by Mullins J on 7 September 2000 specifically excluded Stramit. That position is that subject to appeal, the proceeding on the ex parte application inasmuch as it was an application to which Stramit should have been a respondent, was concluded by the order of Chesterman J but adversely to the liquidators. There was no extant but incomplete proceeding on that application in which some further step still remained to be taken, and no further order was required to dispose of that application, either against Stramit or as to the application made in general terms against all possible respondents.

[119] This has particular significance because of the nature of the application filed 31 August 2000, which needed to be made on or before 11 September 2000. Once that date had passed without any proper application by the liquidator against Stramit, no relevant application or order could be made. This distinguishes the position from that in, for example, the Family Court of Australia in the circumstances considered in *Taylor v Taylor,* and those the then Court of Bankruptcy dealt with in *Cameron v Cole* (1944) 68 CLR 571.

[120] In *Taylor,* the High Court by order set aside orders obtained against each party where that party had been absent from the hearing and without fault on that party's behalf, and the High Court ordered a rehearing of the original application. No relevant time limitations were referred to in the judgments, and the orders made were described as the orders that the Full Court of the Family Court should have made in that case when exercising its statutory powers as an appellate court.

[121] Chesterman J lacked power to order, and it would have been pointless for his Honour to order, a rehearing of the application filed 31 August 2000; and he did

not. In *Cameron v Cole*, in which three[7] of the five judges of the High Court considered the Court of Bankruptcy had jurisdiction to order a rehearing of a bankruptcy petition after a sequestration order made in the party's absence was annulled in that case, there was then still an application (by petition) against a named party upon which an adjudication was requested and relevant. Here there was not.

Section 1322(2)

[122] On the permutations and combinations of agreement and disagreement between Williams JA and Fryberg J in this appeal with each of Chesterman J and Mullins J, and likewise with the views of Austin J in the decisions in *Brown*, Rolfe J in *Star v National Australia Bank Ltd* (1999) 30 ACSR 583, and Barrett J in *Re Aura Commercial Interiors P/L* (2002) 20 ACLC 904 and in *Sutherland v Dexion (Australia) P/L* (2003) 21 ACLC 341, I express the following views. I respectfully agree with Williams JA that s 1322(2) of the Corporations Law could not be relied upon by the liquidators, both because the failure to give notice was more than a procedural irregularity, and because it caused a substantial injustice that could not be remedied otherwise than by the order Chesterman J actually made. Fryberg J agrees.

If There Were Extant Proceedings

[123] I also agree with Williams JA and with Mullins J that s 1322(4)(d) of the *Corporations Act* did not empower the court to make the orders sought by the liquidators in the application filed 5 June 2002. Those judges each agreed with the views expressed by Rolfe J in *Star v NAB*, in which that learned judge was dealing with an application pursuant to s 588FF(3). His Honour held[8] that it is a condition of bringing an application under s 588FF that the application must be made either within three years of the relation-back day, or within such extended period as was granted in consequence of an application made within that three year period. He held that s 588FF(3) contains its own formula for extending time, in subsection (3)(b), and that an application could not be made under s 1322(4)(d) to extend the time provided for by s 588FF(3)[9]. His Honour came to that conclusion because he considered the temporal requirements imposed a condition on the exercise by the court of its jurisdiction, and that once the three year period expired and there was no application made within it to extend the period, the rights conferred by s 588FF were lost.

[124] I respectfully agree with that view, expressed by Williams J, as he then was, in *Tagoori Pty Ltd* as being that s 588FF(3) imposes a time requirement as an essential condition of the right to apply to have a transaction set aside as a voidable preference, and expressed by his Honour in this case as being that the time prescription in s 588FF(3) constitutes an insurmountable boundary which cannot be overcome by recourse to a general power. This means that I respectfully disagree with the carefully and fully reasoned view to the contrary expressed by Fryberg J, who would apply his construction of s 588FF(3), and its relationship with s 1322(4)(d), to uphold the result reached by Mullins J in reliance by her on s 81 of the *Supreme Court Act* (Qld). I acknowledge that the views of Fryberg J have the

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7 Rich J at CLR 589, 590; Starke J at 593; McTiernan J at 600.

8 (1999) 30 ACSR 583 at [42]

9 (1999) 30 ACSR 583 at [67] – [68]

support of the equally carefully expressed reasons of Barrett J in *Aura* and *Sutherland,* and Austin J in *Brown No 6.* I respectfully consider that that approach gives insufficient force to the statutory command that an application under 588FF(1) may **only** be made (relevantly) within such longer period than three years after the relation-back day as the court orders on an application under s 588FF(3) by the liquidator within those three years after the relation-back day. The subsection is specific as to the period within which an extension can be applied for, and treating that period as capable of extension by an order made pursuant to 1322(4)(d) construes that subsection as if the word "only" either did not appear, or had no function or utility[10].

[125] One can test this argument by noting that the fact that proceedings SC8117/01 were commenced against Stramit on 10 September 2001 has no relevance when considering if there were still proceedings which survived against Stramit in SC7589/00 after the order of Chesterman J. (Those proceedings in SC8117/01 of course explain the application in SC7589/00 filed 5 June 2002 to join Stramit). On these appeals, the liquidators did not press with any force the argument that Stramit lacked a right to be heard in September 2000[11], preferring to accept that those proceedings affected Stramit, and to argue they were rendered incomplete. But the proceedings in SC7589/00 affected all persons with whom Australian Building Industries Pty Ltd entered into arguably avoidable transactions, not just those then known to the liquidators or against whom applications were contemplated.

[126] Accordingly, if the liquidators are correct in asserting the court had power in October 2002 to join Stramit in the proceedings SC7589/00, by reason of the application filed 5 June 2002, and to make orders effecting that pursuant to s 1322(4)(d), then the liquidators could equally ask the court now to join in those proceedings any person with whom the liquidators now consider the company entered then into a voidable transaction. On the liquidators' argument, there would be proceedings (SC7589/00) to which that person could still be joined. This would particularly be so if the liquidators only recently discovered the transaction, or the person's identity. The liquidators would then rely on either or both of an order under s 81 of the *Supreme Court of Queensland Act* adding the person as a party, and an order under s 1322(4)(d) of the *Corporations Act* extending the period in s 588FF(3)(b) within which applications could be brought against that person. This would completely defeat the object of the express time limitation in s 588FF(3).

[127] As Williams JA notes,[12] 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 588FF(3). However, that authority[13] distinguishes between amendment to a proceeding commenced within time, and the addition of a new defendant.[14] In *Rodgers* the Full Federal Court cited with apparent approval the remarks of Clarke JA in *Fernance v Nominal Defendant* (1989) 17 NSWLR 710 at 733, to the effect

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10 See *David Grant and Co v Westpac* at CLR 277

11 This was merely described as "not conceded" in the liquidator's outline in Appeal No 5302/02 at [19] and [30]

12 At [84] herein

13 Of the Full Federal Court in *Rodgers v Commissioner of Taxation,* and Rolfe J in *Star v NAB*

14 In *Trustee of the Property of Geoffrey Mahoney & Deborah Mahoney & Ors v McElroy & Ors* [2003] QCA 208, this Court was dealing with an amendment to a proceeding under the *Trade Practices Act* (Cth) commenced within time; and **not** an application to add a new respondent.

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 JA 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. In this matter Stramit got notice of it one year after the expiration of the relevant time period; and I agree with Williams JA that neither section 1322(4)(d) of the *Corporations Law,* nor s 81 of the *Supreme Court Act* 1991 (Qld), can by the exercise of the very general power conferred by those sections be used to overcome the specific time limitation prescribed in s 588FF(3).

[128] Dealing with s 81, for the reasons expressed by Fryberg J, I agree with his Honour that it was correct for Mullins J to apply s 81 as it stood at the time of the applications before her Honour, rather than as subsequently amended. Dealing with another matter raised by Fryberg J, while I find his reasons very persuasive for the view that rule 69(1) of the UCPR could be relied upon as a source of power to add Stramit in 2002 to the proceedings commenced by the application filed 31 August 2000, that matter was not argued in full on this appeal. I agree with him that if Rule 69(1) were available for use, the provisions of Rule 74(4) would render any such order futile.

[129] Likewise, there was no developed argument as to the interplay of Rules 74(4) and 74(5) with s 81 in its unamended form. In *Draney v Barry* [2002] 1 Qd R 415, this Court did not actually make any order, but instead invited the parties to draft one. The drafting of s 81 seems to infer a power by order to overcome defences pleading limitation periods.

Exercise of Discretion

[130] If the view be incorrect, that the very general power in s 81 yields to the express restrictions in s 588FF(3), then I would not interfere with the discretionary judgment of Mullins J. Her Honour identified the matters relevant to its exercise, and the result is not so plainly unreasonable as necessarily to be an error.

[131] I agree with the orders proposed by Williams JA.

[132] **FRYBERG J:** I have had the benefit of reading the reasons for judgment of Williams JA in draft. Subject to what follows I accept and rely upon the facts as stated by his Honour.

Appeal 5302/02 - from Chesterman J

[133] The appellants ("the liquidators") were appointed administrators of the company on 11 September 1997 and liquidators a little over two months later. Within four months of their appointment their solicitors began the correspondence described by Williams JA. Not only did they not then commence proceedings to recover the alleged preferential payments, they did not do so within the period of three years specified in s 588FF(3)(a) of the *Corporations Act*, a period described in the report of the Law Reform Commission recommending that section as reasonable. Just before the expiry of that period they applied for[15] and obtained ex parte an order extending the time to do so. Mr Greig deposed that "a number of substantial preferences exist" and he identified specifically payments to Stramit of around $1.4

[15] The application was filed on 31 August 2000.

million and to BHP Ltd of around $0.5 million. He gave no reason for not making those companies parties to the application, nor for not serving them. He did not disclose the correspondence. The order was not served on Stramit for over a year after it was obtained.

[134] After the order came to its attention, Stramit did not appeal against it. It applied in the Trial Division to vary it in effect by excluding Stramit from its operation. In an apparent attempt to comply with r 2.2(4) of the *Corporations Law Rules* the application asserted itself to be made "pursuant to s 588FF(3)(b) of the *Corporations Act* and r 995 and Schedule 1A of the *Uniform Civil Procedure Rules 1999* and more particularly rr 2.2(1)(b) and (4) of Schedule 1A". None of those provisions empowers a judge of the Trial Division to vary a final order made by another judge. However r 667 of the *Uniform Civil Procedure Rules* empowers the court at any time to set aside (although not, apparently, to vary) an order made in the absence of a party and for the purposes of that rule there is no restriction on how the court may be constituted. That rule applied to the case either by reason of r 3 of the *Uniform Civil Procedure Rules* or, if the application were to be regarded as brought "under the Corporations Law" (now the *Corporations Act*), by reason of r 1.3(2) of the *Corporations Law Rules*. In addition the court has inherent jurisdiction to vary or set aside an order made in such circumstances[16], and that jurisdiction can probably be exercised by any judge of the Trial Division[17].

[135] The application came before Chesterman J, who set aside the ex parte order in so far as it applied to Stramit. It was not argued either before him or in this appeal that he lacked jurisdiction to hear the application. Procedural uncertainties may therefore be put to one side. The issue for us is whether the ex parte order was rightly varied.

[136] The principle embodied in the expression *audi alteram partem* has been part of the common law at least since the 16th century. In *Cameron v Cole* Rich J expressed it in English: "a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case."[18] It has been traced to Seneca's *Medea*.[19] In *Brown v DML Resources Pty Ltd (No 2)* Austin J said:

> "The importance of the audi alteram partem rule of natural justice, especially in curial proceedings, can hardly be overstated. In *Cameron v Cole* Rich J described it as a 'fundamental principle', and in *Commissioner of Police v Tanos*, Dixon CJ and Webb J referred to it as a 'deep-rooted principle of the law'"[20].

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16 *Taylor v Taylor* (1979) 143 CLR 1.

17 There is a surprising lack of clear appellate authority on this point.

18 (1944) 68 CLR 571 at p 589; see also *In re Hamilton* [1981] AC 1038 at p 1045. The same is of course true of a person by whom a claim is made.

19 "Quicunque aliquid statuerit, parte inaudita altera, Aequum licet statuerit, haud aequus fuerit" - quoted in those words from *Boswel's Case* (1583) 6 Co Rep 48b at p 52a by Dixon CJ and Webb J in *Commissioner of Police v Tanos* (1958) 98 CLR 383 at pp 395-6. The attempt by Fortescue J in *R v University of Cambridge* (1723) 1 Strange 557 at p 567; 93 ER 698 at p 704 to trace it to *Genesis* iii is unconvincing; it was also unoriginal, the point having been made by the fourth-century bishop Lucifer of Cagliari: see J M Kelly, "Audi Alteram Partem", (1964) 9 *Natural Law Forum* 103 at p 109.

20 (2001) 52 NSWLR 685 at p 695; see also *Kioa v West* (1985) 159 CLR 550 at p 582.

I respectfully agree. The principle does not apply to every decision by every public authority in every circumstance; but "its application to proceedings in the established courts is a matter of course."[21]

[137] What is the consequence if an order is made in breach of the principle? If the judicial body in question is a superior court, the breach does not make the order a nullity[22]. It does however entitle the party denied natural justice to have the order set aside[23]. That party is so entitled *ex debito justitiae*, that is, as of right, not as a matter of discretion or subject to terms[24]. Like most other rights, that right may be waived[25], and it would not be enforced if to do so would constitute an abuse of process of court. If the order affects a number of parties it might be set aside as against the applicant only. That was what happened in the present case.

[138] For the liquidators Mr H Fraser QC submitted that the power of the court to set aside an order obtained without notice to a party affected was discretionary; and that whatever might have been the position in that regard at common law, the present case was covered by the corporations legislation, which meant it was necessary to have regard only to the terms of s 1322(2) of what is now the *Corporations Act.* In my judgment both submissions should be rejected.

[139] In relation to the first submission Mr Fraser referred to *Taylor v Taylor*[26]. He submitted that none of the judgments in that case describes the entitlement to have the order set aside as a right. I disagree[27], although on the facts of the case, the statements probably are technically *obiter*. That decision recognises the existence of a discretionary power to set aside orders made in the absence of a party even where that party was given a reasonable opportunity to present his case. It does not support an argument that the power is discretionary when there was no such opportunity. Mr Fraser also referred to a number of cases where irregularities had been waived but they did not in my judgment advance this argument.

[140] There are two reasons why I think the second submission should be rejected, although the second is in some respects simply the obverse of the first. First, nothing in s 1322(2) purports to abolish the common law rule. In *Commissioner of Police v Tanos*, Dixon CJ and Webb J said:

> "But the rule is subject to a sufficient indication of an intention of the legislature to the contrary. Such an intention is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must satisfactorily appear from express words of plain intendment."[28]

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21 C*ommissioner of Police v Tanos* (1958) 98 CLR 383 at p 396; see also *Cameron v Cole* (1944) 68 CLR 571 at p 589. Of course this is not inconsistent with the power to grant interim relief ex parte in appropriate cases.

22 *Cameron v Cole* (1944) 68 CLR 571 at pp 590, 598, 605; *Re Macks; Ex parte Saint* (2000) 204 CLR 158; *Uniform Civil Procedure Rules*, r 371.

23 *Cameron v Cole* (1944) 68 CLR 571 at p 591.

24 *Ibid*; *Hoskins v Van Den-Braak* (1998) 43 NSWLR 290 at p 298.

25 *Hodgens v Gunn* [1990] 1 Qd R 1.

26 (1979) 143 CLR 1.

27 See (1979) 143 CLR at p 4 (Gibbs J, with whom Stephen J agreed, citing *Grimshaw v Dunbar* [1953] 1 QB 408 at p 416), pp 15-6 (Mason J, with whom Aickin J agreed) and p 20 (Murphy J).

28 (1958) 98 CLR 383 at p 396.

No such words appear in the *Corporations Act*. Second, the section has no application in terms to the present case. "Procedural irregularity" does not adequately describe a breach of the *audi alteram partem* rule. Also, the section prevents the invalidation of proceedings because of procedural irregularities. No question of invalidity arose in relation to the ex parte order - it was an order of a superior court of record[29]; and "invalidate" is not a verb usually used to describe what the court does when it sets aside an order.

[141] For these reasons I have come to the conclusion that Stramit was entitled as of right to have the ex parte order set aside. No discretion fell to be exercised.

[142] I agree with Williams JA that it is not possible to distinguish in this context between identified and unidentified parties to voidable transactions. Like his Honour, I think the cases will be rare indeed in which a liquidator is unable within the statutory three-year period to identify the persons against whom proceedings *might* be brought under s 588FF. The numbers of such persons and transactions are unlikely to be so large as to render it impracticable to bring applications for an extension of time against them as respondents or to effect service of those applications. In an appropriate case an order for substituted service might be made or, unusually, an application against a representative party might be possible[30]. The possibility of rare hard cases does not induce me to discern in the *Corporations Act* any intention to abolish the *audi alteram partem* rule in respect of applications under s 588FF(3).

[143] In relation to the liquidators' waiver argument I agree with Williams JA.

[144] The appeal should be dismissed with costs.

Appeal 9833/02 – from Mullins J

Was the application of 31 August 2000 fully disposed of?

[145] The liquidators' original application, upon which the ex parte order was made, was for an order that:

> "Pursuant to Section 588FF(3) of the *Corporations Law*, the time within which an application may be brought under Section 588FF(1) be extended to end on 11 September 2001."

Despite the use of the singular "an application", it proceeded on the basis that the order sought related to multiple applications against the whole world, or at least against all persons allegedly liable under the named sub-section. That class included Stramit. The order sought was plainly intended to affect Stramit, to which specific reference was made in the affidavit material filed in support of the application. Indeed, the payments to Stramit were by far the largest of those identified by the liquidators. The ambit of the application was reflected in the order actually made:

> "THE ORDER OF THE COURT IS THAT:
>
> 1. Pursuant to Section 588FF(3) of the *Corporations Law*, the time within which applications may be brought under Section

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29 *Stone v ACE-IRM Insurance Broking Pty Ltd* [2004] 1 QdR 173.

30 *Uniform Civil Procedure Rules*, r 75.

> 588FF(1) by the applicants be extended to end on 11 September 2001."

That order, made on 7 September 2000, effectively gave the liquidators the whole of the relief which they sought in the application.

[146] On 16 May 2002 Chesterman J ordered "that the order of 7 September 2000 … be set aside in so far as it applies to Stramit Corporation Ltd." It is therefore incorrect to say that the order of 7 September 2000 has not been set aside. It has been set aside in part. That is not a statement of law; it is a statement of historical fact. With effect from 16 May 2002 at the very least, that order no longer affected Stramit. Probably the order of 16 May 2002 should be construed as setting aside the original order *ab initio*, lest it be argued that it was effective in the period up to that date; but that need not be decided at this point. Once the order was set aside in part, the liquidators no longer had all of the relief for which they had applied in the original application.

[147] Was the original application then finally disposed of? There is no doubt that even after 16 May 2002 so much of the order of 7 September 2000 as remained was a final order of the court. However that does not answer the question. Nor is it answered by the fact that the liquidators were no longer entitled to all of the relief for which they had applied. Both of these matters are relevant to the question, but they do not conclude it.

[148] When on an application a court makes a final order granting the applicant less relief than was sought in the application, the question whether the application has been finally disposed of can be resolved only by examining what occurred at the hearing. It may be that the court considered whether relief to the extent sought should be granted and decided that it should not. In that case the application has been disposed of, subject to an appeal by either (or any) party. On the other hand it may be that the court intended to deal with the application only in part and to leave part of it to be resolved at some future time. Often this will be reflected in an order adjourning the further hearing of the application to a date to be fixed, but an adjournment order is not essential.[31] The same result follows when an appeal court sets aside an order in part and remits the matter to the court below. Where a court does not decide part of an application on the merits the application has not been fully disposed of.

[149] In the present case Chesterman J did not set aside the order as against Stramit with the intent or for the purpose of ensuring that the original application fail against that company; in other words, on the merits. He did so to enable a hearing to take place. If there were any doubt about this his Honour expressly dispelled it in the penultimate paragraph of his reasons for judgment:

> "[37] Accordingly, I order that the order in so far as it applies to Stramit be set aside. The purpose of this order is to leave extant the liquidators' application to extend time but to remove from the order actually made the extension of time to

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[31] *Re McLellan* [1979] Qd R 392.

> commence proceedings against Stramit. The liquidators, if they so wish, must re-argue the application."

This was no mere footnote to his Honour's reasons. It was their culmination. It embodied the essence of his decision.

[150] It follows that when it came before Mullins J on 13 June 2002 the liquidators' application had not been fully disposed of. Her Honour so held. She was correct.

[151] That finding led her Honour to find that the case was covered by s 1383(3) of the *Corporations Act 2001*. From that she concluded that by reason of ss 7 and 8(2) of the *Corporations (Ancillary Provisions) Act 2001* (Qld), the liquidators' application which came before her on that date was to be treated as an application brought under s 588FF of the *Corporations Act*, not the *Corporations Law*. As I understood it, that conclusion was not challenged on appeal.

Making Stramit a party

[152] The next question was whether it was necessary not only to serve the application on Stramit but also to make Stramit a party to it. For the company Mr Sofronoff QC sought to pre-empt this question by a submission that the original application was a nullity, it not being authorised by s 588FF(3). He submitted that the subsection authorised only an application to obtain an extension of time in relation to a particular person and transaction. It followed that there was no application in existence to which Stramit could ever be added. He accepted that this argument was inconsistent with Stramit's submission to Chesterman J that it should have been named as a party in the application and served with it, but frankly conceded that the point had then been missed.

[153] For present purposes I am prepared to assume that the subsection does not authorise blanket applications. Like Williams JA I am inclined to the view that this assumption is correct, but it is unnecessary to decide the point here. Even if the section did not authorise an application in the terms of the liquidators' original application, it does not follow that that application was a nullity. Section 588FF contains nothing which purports to deal with the validity of originating applications filed in State Supreme Courts. In the period since this appeal was argued, this Court has decided that its proceedings (if defective) cannot be regarded as nullities if there is a remedial power capable of curing the defect: *Stone v ACE-IRM Insurance Broking Pty Ltd*[32]. The question of joinder cannot therefore be pre-empted by Stramit's submission.

[154] What governs who must be a party to the application and the processes of adding and dispensing with a requirement for a person to be a party? Neither the *Corporations (Queensland) Rules 1993* nor the *Corporations Law Rules* (which came into force on 8 September 2000) contains provisions dealing with these matters. Each contains a provision applying the general rules of the court in such a case, which directs attention to the relevant rules in the *Uniform Civil Procedure Rules*[33]. These contain provisions dealing with parties. Also, both are necessarily subject to s 81 of the *Supreme Court of Queensland Act 1991*, which may also affect joinder of parties. It is therefore unnecessary to determine which set of corporations

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32 [2004] 1 QdR 173.

33 *Corporations (Queensland) Rules 1993*, r 5, read with the *Acts Interpretation Act 1954*, s 14H(1)(b); *Corporations Law Rules*, r 1.3(2).

rules ought to be applied. *Prima facie* resort is to be had to the *Uniform Civil Procedure Rules* and/or to s 81.

[155] On behalf of the liquidators Mr Fraser submitted that even if it were necessary to serve the application on Stramit, it was not necessary to make it a party. He submitted that whilst the relief sought in the application had a potential effect on the rights of Stramit, the application was not properly characterised as relief claimed against Stramit. In my judgment that submission overlooks the effect of rr 26(2) and 62(1) of the *Uniform Civil Procedure Rules*. The former provides that an application must name as respondents all persons directly affected by the relief sought in the application. The latter provides that each person whose presence is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding must be included as a party. Stramit was so affected and its presence was necessary, for the reasons stated above. This submission should be rejected.[34]

[156] In the alternative the liquidators relied on rr 61 and 62(4) of the *Uniform Civil Procedure Rules* to submit that Mullins J should have dispensed with the requirement for Stramit to be included as a party. Those rules conferred power to do what the liquidators sought. Her Honour held that dispensing with the requirement was not an appropriate course to follow in this case, and having regard to the history of the matter, I think she was right. In any event, her decision was a discretionary one which was open to her. This submission too should be rejected.

Rule 69 of the Uniform Civil Procedure Rules

[157] Rule 69 of the *Uniform Civil Procedure Rules* provides:

> "69 (1) The court may at any stage of a proceeding order that –
>
> …
>
> (b) any of the following persons be included as a party –
>
> (i) a person whose presence before the court is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding;
>
> (ii) a person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding.
>
> (2) However, the court must not include or substitute a party after the end of a limitation period unless 1 of the following applies –
>
> (a) the new party is a necessary party to the proceeding because –
>
> (i) property is vested in the party at law or in equity and the plaintiff's or applicant's claimed entitlement to an equitable

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[34] Although this is the same result as that reached by Austin J in *Brown v DML Resources Pty Ltd (No 3)* (2001) 188 ALR 469, the wording of the rules considered by his Honour was different from that of the *Uniform Civil Procedure Rules*. For that reason the decision is not directly applicable on this point.

interest in the property may be defeated if the new party is not included; or

(ii) the proceeding is for the possession of land and the new party is in possession personally or by a tenant of all or part of the land; or

(iii) the proceeding was started in or against the name of the wrong person as a party, and, if a person is to be included or substituted as defendant or respondent, the person is given notice of the court's intention to make the order; or

(iv) the court considers it doubtful the proceeding was started in or against the name of the right person as a party, and, if a person is to be included or substituted as defendant or respondent, the person is given notice of the court's intention to make the order;

(b) the relevant cause of action is vested in the new party and the plaintiff or applicant jointly but not severally;

(c) the new party is the Attorney-General and the proceeding should have been brought as a relator proceeding in the Attorney-General's name;

(d) the new party is a company in which the plaintiff or applicant is a shareholder and on whose behalf the plaintiff or applicant is suing to enforce a right vested in the company;

(e) the new party is sued jointly with the defendant or respondent and is not also liable severally with the defendant or respondent and failure to include the new party may make the claim unenforceable;

(f) there has been a change in law or practice that requires, in the interests of justice, the inclusion or substitution of a party;

(g) for another reason the court considers it just to include or substitute the party after the end of the limitation period."

The term "limitation period" is defined to mean "a limitation period under the *Limitation of Actions Act 1974*."

[158] Mullins J wrote:

> "By setting out the circumstances in which a party can be joined after the end of a limitation period, r 69(2) impliedly authorises the inclusion of a party after a limitation period has expired. As r 69(2) does not apply to s 588FF(3) of the Act, as that provision does not provide for a limitation period under the *Limitation of Actions Act 1974*, there is nothing in r 69 itself to rely on to empower the court to join a party outside the limitation period specified in s 588FF(3)."

She did not further consider rule 69.

[159] In my judgment that analysis of the rule is not correct. Rule 69(1) establishes a general power to order the inclusion as a party of any person described in para (b) of the rule. Sub-rule (2) cuts down or limits the ambit of that power. It is not the source of a power to do anything. It lists the circumstances when the court must not exercise the general power conferred by sub-r (1). Its effect is that the power conferred in sub-r (1) may not be exercised after the expiry of a limitation period except as specified. Because of the definition of "limitation period" sub-r (2) has no application in the present case. It follows that, subject to the effect of any Commonwealth law to the contrary, r 69 conferred power to include Stramit as a respondent.

[160] In this respect the situation is similar to that which confronted Austin J in *Brown v DML Resources Pty Ltd (No 3)*[35], a decision given in the course of what Williams JA has described as a "disastrous debacle of litigation". In that decision Austin J said:

> "[T]he court's objective - to resolve the whole dispute between the parties, if it can, fairly and efficiently - was antithetical to the objectives of both sides. It is not unfair to say that the plaintiffs and the BP companies were engaged in a tactical battle, seeking to position themselves so that their opponents' best points would be deflated by the course which the proceeding will now take."[36]

In the present case the parties are guilty of no such conduct and cannot be seen as contributing to a debacle. That is not the similarity to which I refer. The similarity lies in part in the rules and in part in the circumstances of the case. Rule 74(4) of the *Uniform Civil Procedure Rules* provides that if an order is made including a person as a respondent, the proceeding against the new respondent starts on the filing of an amended copy of the originating process. Under Pt 8 r 11(3) of the New South Wales *Supreme Court Rules* 1970 the commencement date so far as concerned the new respondent was the earliest of the date of the amendment, the date of entry of appearance or the date of defence. Thus, the rules are similar in that the commencement of the proceedings did not relate back to the filing of the original application. The circumstances of the cases are similar in that, absent the possibility of an extension of time to make application under s 588FF of the *Corporations Act*, the inclusion of the additional respondent would be futile; the application would still be defeated.

[161] For the liquidators it was submitted that such an extension might be granted under s 1322 of the *Corporations Act*. It was not argued that an extension could be granted under the *Uniform Civil Procedure Rules*, nor that there should be any order under r 367 overriding the operation of r 74(4). Those possibilities may be left for another day. It is convenient to defer consideration of s 1322.

Section 81 of the Supreme Court of Queensland Act 1991

[162] In the alternative the liquidators sought an order joining Stramit under s 81 of the *Supreme Court of Queensland Act 1991*. That section is in these terms:

> "81 **Amendment for new cause of action or party**

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35 (2001) 188 ALR 469.

36 At p 472.

(1) This section applies to an amendment of a claim, anything written on a claim, pleadings, an application or another document in a proceeding.

(2) The court may order an amendment to be made, or grant leave to a party to make an amendment, even though—

(a) the amendment will include or substitute a cause of action or add a new party; or

(b) the cause of action included or substituted arose after the proceeding was started; or

(c) a relevant period of limitation, current when the proceeding was started, has ended.

(3) Despite subsection (2), the rules of court may limit the circumstances in which amendments may be made.

(4) This section applies despite the *Limitation of Actions Act 1974*."

No such section was contained in the Act when originally enacted. The section was inserted into the Act in 1998, at which time it did not contain what is now sub-s (3). That provision was inserted in 2002 and came into force on 16 August of that year. The hearing before Mullins J took place on 13 June and her Honour gave judgment on 1 October, deciding that Stramit should be added as a respondent. Unfortunately her attention was not drawn to the amendment and she proceeded on the basis of the section as it previously stood. The appeal to this division, being from a decision other than a final decision, is by way of an appeal in the strict sense[37] and we are obliged to apply the law as it stood on 1 October 2002[38].

[163] Section 81 is an unfortunate provision. It was one of a group of sections (ss 71 to 93J) contained in a new Part 7 inserted by the *Civil Justice Reform Act 1998*. Relevantly the long title of that Act described it as "an Act to enable the making of uniform civil procedure rules for the Supreme Court, District Court and Magistrates Courts and for certain related reforms to the civil jurisdiction of those courts …" and according to the Explanatory Memorandum, its objectives were:

" (a) to provide adequate powers and procedures for the making of uniform court rules for civil proceedings in the Supreme, District and Magistrates Courts in Queensland and to generally reform the rule making powers applicable to those courts

(b) to make necessary consequential amendments to other legislation that will be redundant or inconsistent with uniform court rules and to provide a sufficient basis in principal legislation for the uniform rules generally, especially in relation to the enforcement of court decisions".

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37 *Uniform Civil Procedure Rules*, r 765(2).

38 See generally *Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan* (1931) 46 CLR 73 at p 107.

The Memorandum explained the new Part in these terms:

> "*Clause 17* inserts Part 7 into the *Supreme Court of Queensland Act 1991*. Part 7 is an extensive part which applies to the Supreme Court, District Court and Magistrates Courts and establishes necessary provisions which will allow the introduction of uniform court rules."

The topics of parties and amendments have been dealt with by rules since the *Judicature Act*, and that was not about to change with the introduction of the *Uniform Civil Procedure Rules*. That fact, together with the terms of the long title and the Memorandum, would lead one to expect the section to resemble s 59(2B) of the *Federal Court of Australia Act 1976*, quoted in *Rodgers v Commissioner of Taxation*[39]. But the terms of the section do not simply enable or authorise the making of rules about parties and amendments. They confer power. Moreover the section was plainly not *intended* merely to be facultative as regards the rules. It was stated in the Memorandum:

> "**section 81** empowers a court to allow an amendment whether or not it adds a cause of action that arose after the proceedings were started. It also allows the substitution or addition of parties, even if a limitation period has expired since the proceedings were commenced. It overcomes situations such as where a company against which a proceeding has been commenced does not disclose that the proper defendant in a proceeding was a related company, until after the limitation period has expired."

If any confirmation of the fact that the section operates to confer power directly on courts were needed, that would provide it.

[164] Confusion about its relationship with *Uniform Civil Procedure Rules* is not the only example of clumsiness of thought in the section. Another, which is relevant for present purposes, is the assumption that parties are added by an amendment of court process. That assumption is inconsistent with both the previous *Rules of the Supreme Court* and with the *Uniform Civil Procedure Rules*. Under those rules amendment of court process is what is necessary after it has been decided that a party should be added. Under the section, however, it is clear that a new party may be added *by* amendment. Mullins J correctly so held.

[165] The interpretation of the section was considered by this Court only five months after it came into force on 1 July 1999. In *Draney v Barry*[40], the court unanimously held that s 81 created a source of power over and above that stated in r 376 of the *Uniform Civil Procedure Rules*. The members of the court differed as to how the discretion conferred by the section should be exercised, but that question may be deferred for the moment. *Draney* was a case about amendment to add a cause of action after the expiry of the limitation period, but the reasoning is equally applicable to an amendment adding a party. What is important for present purposes is to observe that none of the judges held that the section should be read down in the light of r 376, the rule dealing with adding causes of action after the expiry of the limitation period. Of course it would have been surprising had they done so. The

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39 (1998) 88 FCR 61 at p 64.

40 [2002] 1 Qd R 145.

only Act of Parliament over which the rules can now prevail is the *Supreme Court Act 1995*[41]. Almost by definition, the rules could not limit the circumstances in which amendments might be made under s 81.

[166] Although rr 69 and 376 could not when enacted validly have limited the circumstances in which amendments might be made under s 81, they might have been so drafted that upon their proper interpretation that was their effect. If so, they would have been saved from invalidity by the operation of s 9 of the *Acts Interpretation Act 1954*, and with the insertion of s 81(3) in its present form, might be given their full effect. It is therefore necessary to return to the terms of the relevant rule. The first point to notice is that r 69 is concerned with more than simply adding a party. It deals also with removing a party. Second, the rule is worded as an integrated conferral of power on the court. Sub-rule (2) is linked to sub-r (1) by the opening "However"; it does not operate as a stand-alone provision, as it would have to do to support the suggested interpretation. Third, it was enacted contemporaneously with s 81. It is in the highest degree improbable that it was intended to have a meaning which would require the invocation of s 9 of the *Acts Interpretation Act* to save it from invalidity.

[167] In my judgment r 69 is not a rule which limits the circumstances in which amendments may be made under s 81 of the *Supreme Court of Queensland Act 1991*.

[168] Even if this view is incorrect, there is nothing in r 69(2) to impose a limit in the circumstances of the present case. The definition of "limitation period" in the *Uniform Civil Procedure Rules* covers only a limitation period under the *Limitation of Actions Act 1974*. For the reasons already mentioned[42], the sub-rule cannot cut down the power of amendment by reference to a limitation period imposed under the *Corporations Act*. There is therefore no provision in the rules which limits the circumstances in which the proposed amendment may be made. Section 81(3) has no scope to operate in this case.

[169] It follows from what I have said so far that it was open to the liquidators to add Stramit as a respondent by amending the application. This brings me to a question which has troubled me considerably, mainly because it was not argued before us and was not considered by Mullins J. It is this: when a party is added by amendment under s 81, when do the proceedings commence as against that party? Section 81 gives no guidance to the answer. The rule which normally governs when amendments take effect, r 387, applies only to amendments made under part 3 of chapter 10 of the *Uniform Civil Procedure Rules*. I am unaware of any other provision relevantly dealing with the commencement of amendments. On the other hand, r 74(4) expressly provides that if an order is made including or substituting a person as a respondent the proceeding against the new respondent starts on the filing of the amended copy of the originating process. The context of r 74 suggests that it was envisaged as applying to cases where a party is added or substituted under r 69. However I see nothing in the context which would prevent its application to cases where a party is added under s 81. There is a need for such a provision and r 74 satisfies that need. In my judgment it should be applied in the present case. The result of its application is the same as that described above[43]: the

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41 *Supreme Court of Queensland Act 1991*, s 134.

42 Paras [157] and [159].

43 Paras [160] and [161].

amendment is futile unless an extension of time is to be granted under s 1322 of the *Corporations Act*.

[170] In the light of this conclusion it is unnecessary to deal with an argument advanced on behalf of Stramit that s 81 was inconsistent or irreconcilable with s 588FF(3), nor with the complex rebuttal of that argument advanced by the liquidators in reliance on s 9 of the *Corporations (Ancillary Provision) Act 2001* (Qld) and ss 5E and 5G of the *Corporations Act*. I would however expressly reserve for future consideration the position which would arise if the court were asked to add a party under s 81 (or r 69) and to give a direction pursuant to r 367 having the effect that the joinder was deemed to have taken place at an earlier date, inside the three-year limitation period. As presently advised I am unpersuaded that in such a case there would exist such an inconsistency or irreconcilability as would lead to the reading down or invalidity of s 81, taking into account s 79 of the *Judiciary Act* 1903 and the decision of this Court in *Trustee of the Property of Mahony v McElroy*[44]. Section 81 must be given the full force attributed to it in *Draney*. In such a situation different considerations would arise from those which arise in relation to extension of time under s 1322 of the *Corporations Act*[45].

Section 1322(4)(d) of the Corporations Act

[171] That brings me to s 1322(4)(d) of the *Corporations Act*. Before Mullins J on 13 June 2002 the liquidators sought orders under that section extending the time for making an application under s 588FF(3) to the date on which the order joining Stramit as a respondent should take effect or alternatively to 30 June 2002. The reason for the two options was evidently to cover the cases where the existing application continued and a fresh application was subsequently made respectively. There is no evidence, nor is it suggested, that a fresh application was in fact made by 30 June, so it would now be futile to make that order. If the liquidators are to succeed they must do so on the original application.

[172] Mullins J decided that the section could not be used to extend the time for making an application under s 588FF(3). Her Honour wrote that there existed conflicting decisions on the point. All were decisions at first instance. She concluded that she should apply the approach taken by Rolfe J in *Star v National Australia Bank Ltd*[46] in preference to that taken by Austin J in *Brown v DML Resources Pty Ltd (No 6)*[47]. Although the relevant parts of the reasons for judgment in the former case were technically obiter, they were considered statements and are entitled to be treated as such.

[173] The issue considered by Rolfe J was whether s 1322(4) could be used to extend the time provided under s 588FF(3)(a) to make an application under sub-s (1). His Honour thought the question indistinguishable from that which arose in the High Court in *David Grant & Co Pty Ltd (Receiver Appointed) v Westpac Banking Corporation*[48]. He wrote, "I do not see that there is any relevant distinction between the words in subs (2) [of s 459G] and those in subs (3)(a) [of s 588FF]".[49] He

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44 [2003] QCA 208.

45 Compare *Agtrack (NT) Pty Ltd v Hatfield* (2003) 7 VR 63; *PSL Industries Ltd v Simplot Australia Pty Ltd* (2003) 7 VR 106.

46 (1999) 30 ACSR 583.

47 (2002) 40 ACSR 669.

48 (1995) 184 CLR 265.

49 (1999) 30 ACSR 583 at pp 597-598.

concluded that an application could not be made under s 1322(4) to extend the time provided by s 588FF(3)(a).

[174] Austin J considered that issue, but he also considered the issue whether the former section could be used to extend the time provided under s 588FF(3)(b) to make an application under that subsection. This second issue was not considered by Rolfe J. It is however the issue in the present case[50]. Austin J decided that s 1322 could be used to extend the time for making an application both under s 588FF(1) and under s 588FF(3)(b).

[175] I do not propose to analyse these two decisions at length, but I should acknowledge with respect the assistance which I have gained from reading each of them. My reason for not undertaking such an analysis is, in the case of the decision of Rolfe J that we have to consider a different issue in the present case; and in the case of the decision of Austin J that the reasoning is extensive and some of it is not presently relevant. Moreover the issue is one which is likely to be considered by the High Court and it is therefore desirable that I express my own reasons as concisely as possible.

[176] I should also acknowledge the assistance which I have gained from the reasons of Barrett J in *Sutherland v Dexion Pty Ltd*[51]. That decision, delivered after the decision of Mullins J, made an order pursuant to s 1322(4)(d) extending the period within which an application under s 588FF(3)(b) might be made. In that case the company had been under administration for nearly three years when the liquidator was appointed and the relation-back day was more than three years before the date of the appointment. It was therefore never possible for the liquidator to comply with the times set out in s 588FF(3). Barrett J based his decision on two grounds. First he expressed difficulty in conceiving of any reason of legislative policy why creditors who accept a period of administration of that length should be denied, in an apparently arbitrary way, all chance of the benefits that might come from recoveries under the section. He held, "Such a drastic consequence is of itself some indication of legislative intention that s 1322(4)(d) should be available to allow that purely threshold issue [application under s 588FF(3)(b)] to come before the court in such a case."[52] He observed that Mullins J had no occasion to consider the significance of factual circumstances such as those in that case. Second, he held, on the basis of textual analysis, "There is thus nothing to indicate an intention that the period of three years allowed by para (b) for the making of an application of the kind referred to in para (b) is in any way put beyond the reach of the general provision in s 1322(4)(d)."[53]

[177] The first ground related to the particular circumstances of the case and, as Barrett J put it, to "one species of liquidator". In construing a statutory provision it is often helpful to have regard to the range of factual circumstances in which the provision might operate. Such a review may assist in avoiding a construction capable of producing absurdity or improbable unfairness. At the same time it is important to ensure that the construction process not be governed by a single example. When creditors enter into a deed of company administration they know (or ought to know) that they are delaying any possible liquidation of the company. They do so after

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50 See para [171].
51 (2003) 173 FLR 123.
52 At 127.
53 At 128.

having received a report from the administrator about the company's affairs and financial circumstances[54]. They may pass a resolution at any time terminating the deed[55] and any one of them may apply to the Court for an order terminating the deed if false or misleading information was given or omitted to be given which was material to the decision to vote in favour of the deed[56]. Finally (as was recognised by Barrett J[57]) they may be able to apply under s 447A to vary how s 446A operates in relation to the company by adding a suitable modification.

[178] These considerations lead me to the view that this particular example is of little assistance in construing s 588FF(3). I therefore turn to a consideration of the words of the subsection.

[179] Subsection (3) prescribes two time limitations. The first is the period within which an application must be brought under sub-s (1). The second is the period within which an application must be brought under sub-s (3)(b). In the first case the period prescribed is three years from the relation-back day or such longer period as the court orders. In the second case the period prescribed is three years from the relation-back day. If that were all there would be no problem regarding the application of s 1322. But it is not all. The present difficulty arises because of the presence in the opening words of the subsection of the expression "may only be made". How should the subsection be construed to take account of those words?

[180] In my judgment the words must be applied at least to the first of the two time limitations to which I have referred. On this point I agree with the views expressed by Rolfe J. Unless the words are applied in this sense they have in my view no substantial work to do. Unlike Austin J, I see no ambiguity in the words. I do not agree with his Honour's view that the words may be read to mean that the application to challenge a voidable transaction must be made within the time limits prescribed by sub-s (3) unless the Court makes an order under s 1322[58]. The section would have that meaning without the word "only". That word can have force only if applied to the first of the two time limitations. I reach this conclusion mainly by reference to the words, but also conscious of the decision in *David Grant & Co Pty Ltd (Receiver Appointed) v Westpac Banking Corporation*[59]. I accept that there are a number of grounds upon which that decision may be distinguished, but in my view it furnishes a persuasive analogy in respect of the first limitation period in s 588FF(3). The words of the section do not support Austin J's finding that "the fixing of a statutory time limit for the liquidator to make an application to challenge a voidable transaction is merely directed to ensuring that due and timely attention is given to this aspect of the liquidator's duties of administration"[60].

[181] However that is not this case. We are concerned with the second time limitation. It is coincidental that the period of this limitation is the same three years as the first limitation. Semantically it might just as easily have been set at two years or four years after the relation-back day. That is by-the-by. Subsection (3) is grammatically one sentence. It is a simple sentence, not a complex one; in other words it does not have more than one clause. It has only one verb, consisting of the words "may …

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54 *Corporations Act*, s 439A(4).
55 *Ibid*, s 445E.
56 *Ibid*, s 445D.
57 Para [14].
58 (2002) 40 ACSR at p 680.
59 (1995) 184 CLR 265.
60 (2002) 40 ACSR at p 678.

be made", which is modified by "only". The subject of the sentence is "An application under subsection (1)". That is the thing which is both authorised and limited by "may only be made".

[182] The power of the court to extend the time for making that application is conferred somewhat elliptically. A pedantic draughtsman might have placed a full stop after "orders" in para (b) and inserted a new sub-s (4) explicitly conferring a power on the court to order a longer period and stating a time within which an application for such an order must be made. Such pedantry is however unnecessary. Paragraph (b) plainly confers a power on the court to order a longer period and limits the time for the making of an application for such an order to three years after the relation-back day. That power is unconnected to the expression "may only be made". I see no reason in semantics or grammar to subordinate it to that expression. That expression in my judgment provides no reason why s 1322(4) should not be given its full force in relation to the second limitation period.

[183] But semantics and grammar are not the only tools of statutory construction. It is argued that if s 1322(4) applies to the second period, the whole point of the constraint on the first period may be frustrated. That point is said to be revealed in the report of the Law Reform Commission referred to above[61]. That report discloses an intention to shorten the limitation period from six years to three years. Whether it was the intention of the author that the shortened period should be immutable need not be considered. The Parliament expressly provided for its possible extension by order of the court. If anything frustrates an intention of the author of the report it is that provision. In my judgment the report does not provide a foundation for not applying s 1322(4) according to its terms.

[184] The construction which I have proposed does not negate the effect of the expression "may only be made" in relation to the first limitation period, nor does it frustrate the point of the constraint on the first limitation period. The result of that construction is not to reduce the section to the situation where the general power to extend time can be applied in respect of an application under sub-s (1). Instead, that construction means that the liquidator must jump through an extra hoop. An extra application must be made and an extra discretion exercised favourably if the liquidator is eventually to proceed under sub-s (1)[62]. Potential defendants thereby receive additional protection. A new norm is established from which deviation must be justified. In my judgment that result is both balanced and workable. It has the additional virtue that it is likely to reflect a compromise worked out in the Parliament and thus give effect to the result of the democratic process.

[185] I therefore conclude that Mullins J was wrong in deciding that there was no power to make an order extending any time limit under s 588FF(3) in reliance on s 1322(4)(d).

[186] There were two discretions to be exercised. The first was that under s 1322(4)(d). The second was that under s 588FF(3)(b). Technically the first has not been exercised. However her Honour, in considering whether to exercise the discretion under s 81 of the *Supreme Court of Queensland Act 1991*, undertook an extensive examination of all the circumstances which might affect the first discretion. In

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61 Para [133].

62 Although it must be acknowledged that many of the discretionary factors will often overlap, as they do in this case.

particular she had regard to the fact that the proposed order would destroy a defence based on the limitation period. Having regard to the many other matters which she took into account it is possible to say that her discretion miscarried only if undue primacy is given to the loss of the defence. That is not the correct approach to take in reviewing the exercise of a judicial discretion on appeal, or for that matter when exercising the discretion. Nor should an appeal court become involved in assessing whether the liquidators' explanation for the delay in commencing proceedings against Stramit was satisfactory. If we were to do that we would not be true to the principles in *House v The King*[63]. When one realises that Stramit alleged no prejudice other than loss of that defence, it is in my view clear that her Honour's exercise of discretion should be respected and followed.

[187] As her Honour observed, the matters relevant to the exercise of the discretion conferred by s 588FF(3)(b) were similar to those which she considered in relation to s 81. The submissions on behalf of Stramit did not distinguish among the various possible discretions. Once it is accepted that her Honour's first exercise of discretion was correct the same result must follow in relation to the second.

Orders

[188] An examination of the file shows that despite the fact that Mullins J ordered on 1 October 2002 that the originating application filed on 31 August 2000 be amended to add Stramit as the second respondent, this has not yet been done. No time was fixed by the order for the amendment to be made and none is fixed by the rules[64]. The extension of time should therefore be granted not to a fixed date, but in the terms of the application[65].

[189] In my judgment the orders should be varied by adding the following order before para 1:

> 1A Order that the period for making an application for an extension of time under s 588FF(3)(b) of the *Corporations Act* be extended to expire on the date on which para 1 of this order takes effect.

Otherwise the appeal should be dismissed with costs.

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[190] It follows that this appeal should be dismissed with costs.

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63 (1936) 55 CLR 499.

64 Rule 381 deals only with the case where the order gives a party leave to amend. It does not cover the present order.

65 See para [171].