SUPREME COURT OF QUEENSLAND

CITATION:	*Greig & Anor as liquidators of Australian Building Industries Pty Ltd (in liquidation) v Australian Building Industries Pty Ltd* [2002] QSC 138
PARTIES:	**JOHN LETHBRIDGE GREIG & ROBERT JOHN DUFF as liquidators of AUSTRALIAN BUILDING INDUSTRIES PTY LTD (in liquidation) ACN 009 340 952** (applicant) **v** **AUSTRALIAN BUILDING INDUSTRIES PTY LTD (in liquidation) ACN 009 340 952** (respondent)
FILE NO:	S7589 of 2000
DIVISION:	Trial
DELIVERED ON:	16 May 2002
DELIVERED AT:	Brisbane
HEARING DATE:	24 April 2002
JUDGE:	Chesterman J
ORDER:	**1. 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** **2. That the respondent pay Stramit Corporation Ltd's costs of and incidental to this application assessed on the standard basis**
CATCHWORDS:	CORPORATIONS LAW – Liquidation - Preference actions – Where liquidators granted extension of time to bring preference claim – Where application to extend time made ex parte CORPORATIONS LAW – Liquidation - Preference actions – Whether order granting leave could be set aside – Whether applicant was entitled to notice of the application to extend time – Whether principles of natural justice applied CORPORATIONS LAW – Liquidation - Preference actions – Whether failing to provide notice was a procedural irregularity – Whether delay in bringing application disentitled the applicant from seeking relief *Corporations Act*, s 588FA(1), s 588FF(1), s 1322

Corporations Law, s 1316
Rules of Court 1964, O 70 r 1 (Eng)
Rules of Court 1966, O 93 r 17 (Qld)
Uniform Civil Procedure Rules, 371

Annetts v McCann (1990) 170 CLR 596, (followed)
Ainsworth v Criminal Justice Commission (1992) 175 CLR 564, (followed)
Brown v DML Resources Pty Ltd (in liquidation) & Anor (No.2) (2000-2001) 52 NSWLR 685, (followed)
Brown v DML Resources (No. 6) 2002 NSWSC 6, (considered)
Cameron v Cole (1943-1944) 68 CLR 571, (followed)
Commissioner of Police v Tanos (1979) 143 CLR 1, (cited)
Craig v Kanssen [1943] 1 KB 256, (cited)
Dahozo Pty Ltd v Oz –US Film Productions Pty Ltd [1997] 24 ACSR 739, (considered)
Emanuele v Australian Securities Commission (1996-1997) 188 CLR 114, (considered)
Harkness v Bell's Asbestos & Engineering Ltd [1967] 2 QB 729, (considered)
Hoskins v Van Den-Braak (1998) 43 NSWLR 290, (considered)
Kioa v West (1985) 159 CLR 550, (cited)
Maxwell v Murphy (1956-1957) 96 CLR 261, (cited)
McKain v R.W. Miller & Co (SA) Pty Ltd (1991) 174 CLR 1, cited)
Oates v Attorney-General (Commonwealth) (1998) 85 FCR 348, (considered)
Perez v Transfield (Qld) Pty Ltd [1979] Qd R 444, (considered)
Poyser v Minors (1881) 7 QBD 329, (approved)
Re Broadway Motors Holdings Pty Ltd (in liquidation) & The Companies (NSW) Code (1986) 6 NSWLR 45, (approved)
Re Great Eastern Cleaning Services Pty Ltd & The Companies Act (1978) 2 NSWLR 278, (considered)
Re Handby (1966) 10 FLR 378, (distinguished)
Re Pembury Pty Ltd (1991) 4 ACSR 759, (approved)
Smurthwarte v Hannay [1894] AC 494, (cited)
Tagoori Pty Ltd (in liquidation) v Lee [2001] 2 Qd R 98, (approved)
Taylor v Taylor (1979) 143 CLR 1, (cited)
Testro Bros Consolidated Ltd; ex parte Attorney-General [1969] VR 199, (approved)
Wilde v Australian Trade Equipment Co Pty Limited (1980-1981) 145 CLR 590, (distinguished)

COUNSEL: Mr P.A. Keane with Mr P. Bickford for the applicant
Mr S. Doyle and R. M. Derrington for the respondent

SOLICITORS: Clayton Utz Lawyers for the applicant

Jones King Lawyers for the respondent

[1] **CHESTERMAN J:** On 11 September 1997 Messrs Greig & Duff ("the liquidators") were appointed voluntary administrators of Australian Building Industries Pty Ltd ("ABI"). On 14 November 1997 a meeting of ABI's creditors resolved that it be wound up and appointed the liquidators to the new role.

[2] On 3 March 1998 the liquidators' solicitors wrote to Stramit Corporation Ltd ("Stramit"):

> ". . . Payments were made to you by (ABI) 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 s 588FA(1) of the *Corporations Law* and as such are voidable against our client. Details of the unfair preferential payments . . . are . . .
>
> (a) 15 May 1997 - $567,445.53;
> (b) 22 August 1997 - $200,000;
> (c) 29 August 1997 - $659,210.19.
> Total - $1,426,655.72.
>
> Unless payment . . . is made . . . on or before Monday 9 March 1998 we have been instructed to issue recovery proceedings against you."

[3] On 6 March 1998 Stramit's solicitors replied:

> "Our client denies that any payments made to it to constitute an unfair preference . . . Please advise the basis or bases upon which you contend to the contrary. We await your further advices."

The liquidators did not reply.

[4] Section 588FF(1) of the *Corporations Act* (at the relevant times the *Corporations Law* was the relevant legislation but the provisions are identical and it is convenient to refer to the current Act):

> "(1) Where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of s 588FE, the court may make one or more of the following orders:
>
> (i) 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 sub-section (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."

[5] The relation-back day with respect to the liquidation of ABI was 11 September 1997.

[6] By an application filed on 31 August 2000 the liquidators sought an order that "the time within which an application may be brought under s 588FF(1) be extended to end on 11 September 2001". The application was heard on 7 September 2000, four days before the expiration of the time limit fixed by s 588FF(3). Although the application was brought by the liquidators and named ABI as respondent it was, in fact, heard *ex parte*.

[7] The liquidators deposed in an affidavit filed in support of their application that ABI:

> "Manufactured and marketed roll-formed steel roofing, fascia and rainwater goods . . . through a network of six manufacturing and sale centres based across regional Queensland and New South Wales.
>
> Despite (ABI) being a subsidiary of an audited public company, the records made available to us were incomplete and (our) staff have spent the best part of 12 months trying to reinstate these records, primarily in order to identify preference payments . . . find sufficient evidence to prove the date of insolvency, a necessity when bringing an application to recover a reference. This is still not complete, primarily because of the magnitude of the task . . . (We) have already identified from . . . investigations to date that (ABI) was insolvent and that a number of substantial preferences exist, including:
>
> > Stramit of around $1.4m; and
> > BHP Limited of around $500,000.
>
> . . . I am still in the process of reinstating the accounts to determine what other preference claims are available . . . and prove that (ABI) was insolvent when these payments were made."

[8] The liquidators did not inform the court of the exchange of correspondence in March 1998 or that they had not, as requested, given Stramit an explanation of the proposed preference claim.

[9] On 7 September 2000 the court ordered that the time within which applications might be brought under s 588FF(1) by the liquidators be extended so as to end on 11 September 2001 ("the order"). On 7 September 2001 the liquidators filed a claim in which they seek recovery of the payments made by ABI to Stramit, together with interest. The claim and statement of claim were served on Stramit on 10 September 2001. Para. 18 of the statement of claim pleads the fact that on 7 September 2000 the period within which the action could be commenced was extended to 11 September 2001.

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.

[10] By an application filed on 16 April 2002 Stramit applies for an order that the order be set aside or varied so as to exclude Stramit from its operation. As well Stramit seeks an order that its costs of the application be paid by the liquidators on an indemnity basis.

[11] Stramit submits that it has an unconditional right to have the order, so far as it applies to it, set aside because its rights were adversely affected by an application of which it was given no notice. It asserts that in the well known, but rather pejorative, phrase, it was denied natural justice. It has substantial support in the decision of Austin J in *Brown v DML Resources Pty Ltd (in liquidation) & Anor (No.2) (2000-2001)* 52 NSWLR 685 the facts of which are relevantly indistinguishable. It would be tedious and is, I think, unnecessary to refer at any length to his Honour's long and careful reasons which gave detailed consideration to the authorities, which establish the right of a person to be given notice of a proceeding, the result of which will deprive him of some right, interest or benefit. Primary reliance was placed on *Cameron v Cole* (1943-1944) 68 CLR 571, in which Rich J said (589):

> "It is a fundamental principle of natural justice, applicable to all courts . . . that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside."

To similar effect are *Commissioner of Police v Tanos* (1958) 98 CLR 383; *Taylor v Taylor* (1979) 143 CLR 1; *Kioa v West* (1985) 159 CLR 550; *Annetts v McCann* (1990) 170 CLR 596 and *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

[12] There are, in addition, cases of more immediate relevance to proceedings authorised by the *Corporations Act*. *Oates v Attorney-General (Commonwealth)* (1998) 85 FCR 348 was a case in which the Minister exercised his discretion given under s 1316 of the *Corporations Law* to allow a prosecution to be brought after the expiry of the five year period stipulated by that section. Subject to the exercise of the discretion, Oates was immune from prosecution because of the effluxion of time. The Full Federal Court held that his conditional immunity could not be removed unless, before the discretion was exercised, the Minister allowed him an opportunity to argue why time should not be extended.

[13] *Re Great Eastern Cleaning Services Pty Ltd and the Companies Act* (1978) 2 NSWLR 278 and *Dahozo Pty Ltd v Oz-US Film Productions Pty Ltd* [1997] 24 ACSR 739 both involved applications to reinstate defunct companies to the register. In both it was held that persons whose rights would be affected as a consequence by the reinstatement should be given notice of the application. In the former case, the Commissioner of Taxation had commenced proceedings against directors of the company to recover its tax liabilities. A precondition for the action was that the company had been dissolved. If it were reinstated, the Commissioner's action would have become incompetent. It was held he should have been given notice. The only reason for the reinstatement in *Dahozo* was to allow the company to prosecute an action against an identified individual whom, it was held, should be given the opportunity to resist the reinstatement. Bryson J said (24 ACSR 742):

> "However when it is known to the court that some person has an apparent interest in the reinstatement application, the court would ordinarily make a direction which would enable that person to resist, such as requiring service of notice of the application on a person, making the person respondent to the application or allowing the person to intervene."

His Honour dealt with the objection that the *Corporations Act* permits the making of orders in a variety of circumstances affecting companies which will, or are likely to, affect the rights of shareholders or creditors who are not required by the Act to be given notice and are commonly not given notice of the proceeding which seeks the order. He concluded (700):

> ". . . The distinction between Corporations Law cases where notification of the application is to be given to affected persons, and cases where the application can proceed on *ex parte* basis, is to be drawn by following the approach of Bryson J in *Dahozo* . . . At one extreme, there will be cases where it is plain that the application seeks relief against a person, and therefore that person should be a respondent . . . At the other extreme, there will be cases where the *Corporations Law* gives the court a discretion to permit an administrative step to be taken which would otherwise be prohibited but there is no need to join any respondent to the application . . . for one or more of several reasons. Those . . . may relate to such matters as the large number of affected persons, difficulty in identifying them, or the relatively insignificant effect of the order upon them. But even where it is not feasible to notify all affected persons, there may be one very small number . . . who have an interest in the application . . ."

[14] Having received the authorities Austin J then gave an affirmative answer to:

> "The question . . . whether this fundamental principle entitled a person who is affected by a general order not specifically directed to him, to insist on notice of the application for the order before it is made."

[15] 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. It points out that it had been specifically identified as the recipient of payments said to be preferences, and that the liquidators were satisfied that the case against Stramit was "very strong". The amount the liquidators anticipated recovering was very large. In addition the liquidators knew that Stramit had disputed their claim to the money. The result of the order was that Stramit lost the right to plead the three-year limitation. There is no doubt that but for the order Stramit would have had an unanswerable defence to the claim commenced on 7 September 2001. Similar facts led Austin J (702) to conclude that notice of the application to extend time should have been given to the recipient of the preference in that case.

[16] The liquidators argue that *Brown* was wrongly decided and should not be followed. They make three points:

(i) No provision of the *Corporations Act* requires a liquidator to give notice to prospective defendants of an application pursuant to s 588FF(3) in contrast to other provisions of the Act which do require service of particular applications (s 459G, s 465A and s 465C).

(ii) The rights of recipients of preferential payments are not affected by an order extending time: they are only affected if an action is in fact commenced against them.

(iii) The principle enunciated in *Brown* (and *Dahozo*) is not capable of objective application but depends upon subjective assessments by a liquidator whether and to whom notice should be given.

[17] I do not think there is substance in any of the objections. In my opinion the decision and reasoning in *Brown* are correct and should be followed. They are a salutary reaffirmation of the importance of hearing an affected party before making orders, and of the relevance of the principle to proceedings under the Act.

[18] The "fundamental principle of natural justice" is not to be displaced except by explicit language. According to Rich J in *Cameron* (589):

> "It was pointed out by Younger LJ in *Re Jordison* . . . that: 'the legislature is not, by the use of other than the clearest words, to be taken to have subverted in any statute fundamental principles whether of law or of equity. It is a matter of judicial obligation to the legislature itself that the court, in construing a statute, shall make that presumption.' *A fortiori*, in the absence of clear words, a statute should not be treated as depriving a court of the inherent jurisdiction possessed by every court to ensure that trials before it are conducted in accordance with the principles of natural justice."

In *Annetts* Mason CJ, Deane and McHugh JJ said (598):

> "The requirements of natural justice will only be 'excluded by plain words of necessary intendment' and 'that an intention on the part of the legislature to exclude the rules of natural justice was not to be assumed nor spelled out from indirect references, uncertain inferences or equivocal considerations'. "

Perhaps more pertinently, the High Court remarked in *Ainsworth* at 575 that the provision of an act which requires a particular procedure in specified circumstances does not exclude the obligation to afford "procedural fairness" in the exercise of statutory powers when the act is silent as to their mode of exercise.

Accordingly I cannot accept the liquidators' first submission.

[19] The liquidators' next point is no more convincing. 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. 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.

[20] The case of *Oates* is closely analogous. There the Minister's decision revived a liability to prosecution which had expired. Here the order extended a liability that was about to expire. In each a defence was lost by reason of the *ex parte* decision. It is notorious that applications pursuant to s 31 of the *Limitations of Actions Act* 1974 to extend a period of limitation are made on notice to the proposed defendant.

The fact that they are made after the expiration of a prescribed limit is, I think, a point of no real distinction.

[21] Accordingly in my opinion the right of Stramit not to be vexed by a claim brought three years after the relation-back period was affected to its detriment.

[22] The liquidators' third point is that, if *Brown* is followed, a difference in principle emerges between applications with respect to a specific transaction involving an identified payee and applications in which the court extends time generally to enable a liquidator to attack such transactions as he ascertains and thinks appropriate at any time within the extended period. In the former notice must be given to the identified payee whom it is proposed to sue, but in the latter notice cannot be given because members of the class of persons affected by the order are not sufficiently ascertained. The liquidators submit that the Act should not be construed so as to result in this distinction. The argument is essentially that, because notice cannot be given in all cases, the Act should be construed as not requiring notice in any case.

[23] There are two answers to this contention. The first has already been mentioned. If the exercise of the statutory power conferred by s 588FF(3) can diminish rights the fundamental legal principle is that the person whose rights may be affected must be given notice of the proposed exercise of power and that very clear words indeed are needed to render notice unnecessary. Impossibility, or even difficulty, in giving notice in some cases is not a sufficient legislative indication that notice should not be given in those cases where it is possible

Secondly, there is no inconvenience in construing s 588FF(3) so as to require notice to be given in those cases where a proposed defendant is identified when the application is made. It is not an unreasonable, and certainly not an unworkable, construction to require notice to be given whenever possible i.e., when the person whose rights will be affected by the extension is identified. It would be a poor justification for depriving such a person of notice that, in some other cases, notice cannot be given. It may be that, in those cases, provision should be made in an order extending time to allow a recipient to have the order set aside when it becomes aware of the extension. Whether this is done or not, in the case where an application to extend time is brought with respect to one or more ascertained recipients they should, I think, be given notice. I respectfully agree that *Brown* was rightly decided by reference to the authorities cited, all of which emphasised the principle, essential to an adversarial system of justice, that the court should not affect the rights or interests of one adversary without hearing from both. There is nothing in s 588FF(3) in particular or the *Corporations Act* more generally which makes it exempt from the operation of the principle.

[24] The liquidators also argue that a proposed defendant in a preference action will be sufficiently protected if the court exercising its supervisory control of liquidation determines, when hearing applications to extend time, should decide that the proposed defendant be given notice of the application, or include in the order liberty to apply to set the order aside. The difficulty with the submission is that it effects a substantial erosion of the rights of the person affected. The right becomes conditional upon the court thinking it should be recognised in a particular case. This is inconsistent with the nature of the right described in the authorities which regard it as unconditional and not a matter of discretion.

[25] The liquidators next argue that it would be futile to set aside the order because the action commenced within the extended time will remain on foot and be unaffected by the rescission of the order. The case principally relied upon is *Wilde v Australian Trade Equipment Co Pty Limited* (1980 – 1981) 145 CLR 590, the facts of which were that a company granted a charge over its property which was not registered within the time fixed by s 100 of the *Companies Act* 1961. An *ex parte* application by the grantee of the charge to extend the time for registration succeeded and the charge was registered within the extended time. The company was wound up and the liquidators successfully moved to have the order extending time set aside. The question was whether the charge nevertheless subsisted to make the chargee a secured creditor. The High Court held it did. Section 103(2) provided that the certificate of registration was conclusive evidence that the requirements as to registration had been complied with. Stephen, Murphy and Wilson JJ said (603-4):

> "So long as the earlier decision stands, and no stay is operative, it is a lawful decision and the action taken in reliance upon it is lawful . . . From the moment it is set aside the order can no longer provide the lawful justification for further action, but whether what has been done can be undone will depend upon the availability of appropriate remedies, to bring about the appropriate relief. . . . The order extending time was beyond recall so soon as registration had been effected in reliance upon it, and once those steps were taken the operation of the order could not be undone retrospectively. It follows that the validity of the registration was not dependent on the continued subsistence of the order extending time . . ."

There is no parallel in the present case. No statutory provision gives validity to the liquidators' action commenced after 11 September 2000. Its validity depends entirely upon the order extending time. An action to recover a preference must be commenced within three years from the relation back-day or such extended time as a court allows pursuant to s 588FF(3). If time is not extended the action must be commenced within the three years. The "time requirement" is "an essential condition of the right to apply to have a transaction set aside as voidable preference": Per Williams J in *Tagoori Pty Ltd (in liquidation) v Lee* [2001] 2 Qd R 98 at 99.

[26] The other case relied on by the liquidators, *Re Handby* (1966) 10 FLR 378 concerned a judgment on which a bankruptcy notice was based. The judgment debtor did not comply with the notice so that seven days after service he had committed an act of bankruptcy. The judgment was later set aside but it was held that the act which had occurred could not be disregarded. Gibbs J said (381):

> ". . . The critical time for determining whether an act of bankruptcy has been committed is the date on which the period limited by the bankruptcy notice expired . . . At the time . . . the judgment had not been set aside and remained a final judgment. Since the debtor had not by that date complied with the requirements of the notice, the act of bankruptcy was then completed. It is not possible to say that by reason of subsequent circumstances an act of bankruptcy once committed ceases to have been committed or it must be treated as though it had never been committed. Of course this does not mean that a sequestration order may be made if a judgment has been set

> aside in circumstances that show that the debtor was under no liability to the . . . creditor . . ."

This decision affords no parallel to the present case, which is not concerned with the "reality" of an act by reference to an order valid at the time, but whether the order, regardless of its dissolution, continues to deprive Stramit of the right to rely upon the statutory limitation.

[27] In the absence of a statute preserving the consequence of an act done pursuant to an order subsequently set aside, the position would be as Gibbs J described (in dissent) in *Wilde* at 595:

> "The voidable order . . . remained good until it was set aside, and supported what had been done under it . . . but once the order was set aside that support was removed; what remained was a charge registered out of time, with no order for extension of time continuing in existence."

[28] If the order is set aside the limitation period will revert to the original term of three years. There will be no futility in making the order sought by Stramit.

[29] The liquidators claim that the order is saved by s 1322 of the *Corporations Act* which provides:-

> "(1) In this section, unless the contrary intention appears:
>
> (a) a reference to a proceeding under this Act is a reference to any proceeding whether a legal proceeding or not; and
>
> (b) a reference to a procedural irregularity includes a reference to:
>
> (i) the absence of a quorum at a meeting . . .
>
> (ii) a defect, irregularity or deficiency of notice or time.
>
> (2) A proceeding under this Act 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 and by order declares the proceeding to be invalid.
>
> . . ."

They submit that Stramit has not been caused substantial injustice so that the order is valid. Stramit argues that the failure to give it notice of the application is not a "procedural irregularity" so the section does not apply. It relies upon another judgment of Austin J in the same sequence of litigation, *Brown v DML Resources (No. 6)* 2002 NSWSC 6 in which the judge said:

> "In the present case an application for extension of time was made in general terms within the three year period . . . but because the BP companies were denied natural justice and it became necessary to join BP Australia . . . as a party and . . . such a joinder would be deemed to take effect outside the three year period, any application for extension of time . . . will necessarily be outside the time limitation prescribed by s 588FF(3)(b).

> In my opinion one would not describe this problem as due to a 'procedural irregularity' upon any natural meaning of those words. The problem is not merely procedural, and is hardly an 'irregularity'. The statutory time limits . . . provide substantial protection to persons dealing with the company, by giving them immunity from proceedings with respect to voidable transaction."

[30] With respect I am not altogether convinced by this reasoning. It seems to me that the bringing of an application *ex parte* when it should have been brought on notice may aptly be described as irregular and is a question of procedure. The reasoning in *Brown No. 6* appears to proceed on the basis that some procedural defects are so serious in their consequences that they cannot properly be designated as "procedural irregularities". I do not think this is right as a matter of philology and would agree with Byrne J in *Re Pembury Pty Ltd* (1991) 4 ACSR 759, that s 1322 should be afforded a liberal interpretation to allow the court ample scope to uphold the results of proceedings, legal or corporate, which had not complied with the requisite rules but which have nonetheless not given rise to incurable injustice. At its simplest, procedure "denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer the machinery as distinguished from its product". Per Lush LJ in *Poyser v Minors* (1881) 7 QBD 329 at 333.

The classification of rights as "procedural" or "substantive" has often given rise to difficulty. It is no objection to the classification of a right as procedural that it "in reality must operate to impair or destroy rights in substance". Per Dixon CJ *Maxwell v Murphy* (1956-1957) 96 CLR 261 at 267; see also *McKain v R.W. Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 40.

[31] Stramit submits that a complete lack of notice as opposed to some insufficiency or inadequacy does not fall within the statutory definition of "procedural irregularity", and contrasts the use of "absence" in s 1322(1)(b)(i) with the words "defect, irregularity or deficiency" in s 1322(1)(b)(ii). It argues that the legislative intent was to distinguish between absence and inadequate presence. I do not accept this construction. It overlooks the fact that the particular examples given in s 1322(1)(b) are inclusive only and it unnecessarily restricts the remedial operation of the section. In *Testro Bros Consolidated Ltd; ex parte Attorney-General* [1969] VR 199 a failure to give notice of a meeting to a shareholder was regarded as a "deficiency" of notice as it was in *Re Broadway Motors Holdings Pty Ltd (in liq) and the Companies (NSW) Code* (1986) 6 NSWLR 45, where, at 57, Powell J referred to a number of other, similar, cases. None of these involved curial proceedings but I see no warrant for regarding what constitutes a defect or deficiency in notice differently depending upon the nature of the proceeding in question. That no doubt is relevant to the exercise of the power contained in s 1322(2), but not to whether there is a defect.

[32] Stramit's submission that some irregularities are so serious in their nature or consequence that they are to be regarded as nullities reopens a debate which was brought to an end 40 years ago by amendments to the *Rules of Court*, which had as their evident aim the eradication of the distinction. It had been productive of much sterile debate. In England in 1964 and Queensland in 1966 amendments to the *Rules of Court* (England O 70 r 1; Queensland O 93 r 17) provided that:

> "(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules whether in respect of time, place, manner, form or content or in any other respect, the failure should be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
>
> (2) . . . The court . . . may, on the ground that there has been such failure . . . and on such terms as to cost or otherwise as the court . . . thinks just, set aside either wholly or in parts proceedings in which the failure occurred, any step taken in those proceedings or any . . . judgment or order therein were exercised the powers under these Rules to allow such amendments . . . to be made and to make such order . . . generally as the court . . . thinks fit."

[33] In *Harkness v Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729 Lord Denning said of the new English rule (735):

> "This new rule does away with the old distinction between nullities and irregularities. Every omission or mistaken practice or procedure is henceforth to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice."

Less enthusiastically a Full Court in *Perez v Transfield (Qld) Pty Ltd* [1979] Qd R 444 came to the same conclusion.

The new rules are even more explicit. *UCPR* 371 provides that a failure to comply with the rules is an irregularity which does not render a proceeding, document or step taken, or order made in a proceeding a nullity. The court is given a wide range of powers to deal with irregularities. They include setting aside all or part of a proceeding or order and making any other order appropriate to overcome the problem caused by non-compliance with the rules. The *Corporations Law Rules* provide that:

> "1.3(2) The other rules of the court apply, so far as they are relevant and not inconsistent with these rules, to a proceeding in the court under the *Corporations Law* . . . that is commenced on or after the commencement of these rules."

Those rules were in force when the order was made. Whether or not they remain in force notwithstanding the repeal of the *Corporations Law* and the enactment of the *Corporations Act*, *UCPR* 371 is still applicable. It seems preferable to regard s 322 as applying to all shortcomings in procedure which then do not invalidate subsequent steps unless the court thinks they have produced a substantial injustice. Even if the section is read as not applying to some irregularities, the liquidators' failure to give Stramit notice of the application will be a non-compliance with the *UCPR* provision as to service so *UCPR* 371 will apply.

[34] Applying this approach, the order is valid unless the court forms the opinion that the irregularity has caused substantial injustice that cannot be remedied by any other order. According to Rich J in *Cameron* at 591 and Brennan CJ in *Emanuele v*

Australian Securities Commission (1996-1997) 188 CLR 114 at 120, there are some irregularities which are so fundamental as to require that an order obtained pursuant to them be set aside. There is a uniform insistence in the authorities that a failure to give notice to a party whose rights are diminished by an order made in his absence is of this character. This was the approach taken by the Court of Appeal in *Hoskins v Van Den-Braak* (1998) 43 NSWLR 290 in which the procedural law was identical in effect to O 93 r 17 and *UCPR* 371. Because of the jealous regard courts hold for the right of a defendant to be notified of a claim, judgments entered without notice have always been set aside. The cases insist that it is a matter of right and not of discretion. The construction of s 1322 which seems right to me would make the power contained in subsection (2) exercisable in only one way in circumstances of this kind. The court will be obliged to form the opinion that there has been substantial injustice which can be remedied only by setting aside the irregular proceeding.

[35] The liquidators argue that Stramit's conduct should disentitle it from relief because it delayed several months in bringing the application and has, in the meantime, defended the preference action and so caused the liquidators to incur costs. I would accept that there is an element of opportunism in Stramit's application. It knew of the order when served with the claim in September 2001. It did not then search the court file to discover the basis on which the court had been asked to extend time. It knew, of course, that it had not been given the opportunity to resist the extension. It made no complaint of prejudice until its solicitor read a report of *Brown* and realised then it might have lost a chance of value.

[36] In the end, none of this matters. The authorities are uniformally in favour of Stramit's application. Delay and indolence are no barrier to its success. See the discussion in *Craig v Kanssen* [1943] 1 KB 256 at 258-262 (which preceded the amendment to the Rules) especially the discussion of *Smurthwarte v Hannay* [1894] AC 494; *Taylor v Taylor* (1979) 143 CLR 1 and *Hoskins* at 298E which postdate the amendments. This approach appears to me to be consistent with a view taken by Gibbs J in *Taylor* at 8 where his Honour regarded the defective notice as an irregularity which, however required the judgment to be set aside, and the approach of the Full Federal Court in *Oates* at 361 C-D.

[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 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.

[38] Stramit also asks for an order that the liquidators should pay the costs of its application to be assessed on the indemnity basis. I can see no warrant for such an order. Stramit is entitled to its costs but there is no evidence of misconduct or arrogance on the part of the liquidators which would make it appropriate to order them to pay indemnity costs. Apart from the element of opportunism which I have noted on Stramit's part the liquidators appear to have acted on an understanding that it was appropriate to proceed *ex parte*. Their submissions refer to a number of instances where that has occurred. For the reasons given in *Brown* that practice should no longer be followed, but I do not think that the liquidators acted improperly or irresponsibly in proceeding as they did.