

# SUPREME COURT OF QUEENSLAND

CITATION: *Clout v Andi-Co Australia Pty Ltd & Ors* [2013] QSC 278

PARTIES: **DAVID LEWIS CLOUT IN HIS CAPACITY AS  
LIQUIDATOR OF PANNELLS APPLIANCES PTY  
LTD (IN LIQUIDATION) ACN 077 476 405  
(applicant)**  
**v**  
**ANDI-CO AUSTRALIA PTY LTD ACN 005 899 365 &  
ORS**  
**(first to fiftieth respondents)**

FILE NO: BS5447 of 2013

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 17 October 2013

DELIVERED AT: Brisbane

HEARING DATE: 12 July 2013

JUDGE: Mullins J

ORDER: **1. Pursuant to s 588FF(3)(b) of the *Corporations Act 2001* (Cth) (the Act), the period within which applications under s 588FF(1) of the Act may be made by the applicant against each of the first to sixth respondents, the tenth respondent, the fourteenth to sixteenth respondents, the eighteenth and nineteenth respondents, the twenty-first respondent, the twenty-third to twenty-sixth respondents, the twenty-ninth respondent, the thirty-first to thirty-fourth respondents, the thirty-sixth respondent, the fortieth and forty-first respondents, the forty-fourth respondent, the forty-sixth respondent and the forty-ninth and fiftieth respondents, or any “related entity” as that expression is defined in s 9 of the Act of any such respondent, is extended up to and including 17 April 2014.**

**2. The issue of the costs of the application is adjourned to a date to be fixed.**

CATCHWORDS: CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – EFFECT OF WINDING UP ON OTHER TRANSACTIONS – PREFERENCES – GENERALLY – where a company trading as a retailer of electrical goods wound up in a creditors’ voluntary winding up – where the liquidator investigated payments made to the respondents as suppliers as unfair preferences – where the liquidator applies pursuant to s 588FF(3)(b) of the

*Corporations Act* 2001 (Cth) for an order extending the period within which to apply to the court for an order that the transactions are voidable – where there is an absence of specific prejudice caused to the respondents – where there was a lack of funds in the liquidation – where the liquidator gave preference to paid work over unpaid work – where the liquidator has to seek advice on prospects and litigation funding before commencing proceedings – whether the liquidator should have undertaken these further steps before the expiry of the limitation period – whether it is fair and just in all the circumstances to extend the limitation period

*Corporations Act* 2001 (Cth), s 9, s 588FA, s 588FF

*BP Australia Ltd v Brown* (2003) 58 NSWLR 322, followed  
*Re Clarecastle Pty Ltd (in liq)* (2011) 85 ACSR 260, considered  
*Green v Chiswell Furniture Pty Ltd (in liq)* [1999] NSWSC 608, followed

COUNSEL: C A Johnstone for the applicant  
 E J Goodwin for the second respondent  
 D G Clothier QC for the tenth, eighteenth, twenty-ninth and thirty-second respondents  
 G Handran for the fortieth and forty-ninth respondents

SOLICITORS: Gadens Lawyers for the applicant  
 Minter Ellison for the second respondent  
 Results Legal for the tenth, eighteenth, twenty-ninth and thirty-second respondents  
 Sydney Legal Advisers for the fortieth and forty-ninth respondents

- [1] The applicant in his capacity as the liquidator of Pannells Appliances Pty Ltd (in liquidation) (Pannells) applies pursuant to s 588FF(3)(b) of the *Corporations Act* 2001 (Cth) (the Act) for an order extending the period within which applications under s 588FF(1) of the Act may be made by the applicant against each of the respondents to the application (except for the twentieth and thirty-third respondents which are deregistered) or any related party. The respondents are identified in Schedule 1 to these reasons. The second, tenth, eighteenth, twenty-ninth, thirty-second, fortieth and forty-ninth respondents opposed the application on the basis that the liquidator was not diligent in his investigation and there is therefore no adequate reason shown to extend the limitation period. The thirty-fifth respondent appeared by its solicitors at the hearing to convey that it would abide by the court's decision, but wished ultimately to be heard on costs, and its solicitors were given leave to withdraw at that stage. The thirty-sixth respondent notified the liquidator's solicitors that it would abide the court's orders.

### **The liquidation**

- [2] Pannells conducted a retail business selling electrical goods that up to 30 June 2009 was part of the Retravisio Group. From 1 July 2009 Pannells changed its buying group from Retravisio to National Associated Retailers of Australia (NARTA). Pannells then became a party to credit agreements with various suppliers of electrical and household appliances which had previously supplied Pannells through Retravisio. Whereas Retravisio had provided an accounting system for its members, that was not the case with NARTA.
- [3] The respondents from the first respondent through to the forty-second respondent were suppliers of electrical and household appliances to Pannells under credit agreements. The remaining respondents were either suppliers of services or other goods on credit terms.
- [4] The applicant was appointed administrator of Pannells on 17 June 2010 soon after one of the suppliers had retaken possession of its stock. The applicant became liquidator by way of a creditors' voluntary winding up on 22 July 2010.
- [5] Immediately on his appointment as administrator, the applicant's firm instructed a computer technology firm to attend Pannells' premises and carry out a full back up of the computer system. The computer technology firm was unsuccessful in completing that task, as all data was held by Retailers' Computer Services Pty Ltd (Retailers' Computer Services) in Adelaide. The employment of Pannells' staff was terminated and the records were moved to a warehouse owned by a related company for storage. Soon after, the warehouse was sold. Prior to the settlement, the liquidator's partner, Mr Ramsay, attended the warehouse to extract the books and records relevant to the liquidation.
- [6] The applicant in his report dated 14 July 2010 as administrator noted that his investigations suggested that there may have been a number of preferential payments, but if these were pursued in liquidation the deficiency in the statement of position made it unlikely that dividends would be paid to unsecured creditors. This report was prepared primarily from information received from the sole director of Pannells, Mr Pannell, and the books and records which the applicant was able to access during his appointment as administrator. The applicant recommended to all creditors, however, that they resolve to wind up Pannells, as that would provide opportunity to investigate fully the possibility of recovering antecedent transactions which may provide a dividend for unsecured creditors.
- [7] Between August and December 2010 the liquidator investigated claims in relation to employee entitlements with payments made in May 2011.
- [8] In January and February 2011 the liquidator successfully pursued the Australian Taxation Office for preferences and recovered \$70,000. In connection with that process, Mr Ramsay contacted Pannells' former accounts clerk, Ms Robertson, who advised that she had her own stand alone computer that was not linked to Retailers' Computer Services and this computer contained email correspondence, including demands and responses from creditors. The liquidator assumed the computer was in the warehouse that had been sold.

- [9] Between May and November 2011 the liquidator attempted to reconstruct Pannells' accounts to determine what payments had been made by Pannells during the relation-back period. The liquidator describes this as "a difficult and time-consuming task", because of the number of trading parties and the disorganised state of the records. The liquidator prepared a report dated 8 August 2011 that was presented to the meeting of creditors that approved the liquidator's claim for remuneration. The report noted that the liquidator's analysis at that stage had revealed that about 15 major creditors had received funds which exceeded \$2m during the relation-back period, but cautioned on the need to undertake a review of likely recoveries with a view to determining net benefit to unsecured creditors, as any creditor who disgorged a preferential payment would then be able to lodge a proof of debt for that amount. The report also noted that it would be necessary to prepare a solvency report, in order to proceed with any recovery action, if that was supported by the review. The cash balance in the liquidation at the date of the report was \$64,167.29.
- [10] The liquidator engaged solicitors on 17 November 2011 to review his working paper on possible unfair preferences.
- [11] On 13 January 2012 the solicitors and Mr Ramsay on behalf of the liquidator met with Ms Robertson, and obtained further general information in relation to the creditors of Pannells.
- [12] In February 2012 the liquidator lodged with ASIC the presentation of accounts and statement for the period from 22 July 2011 to 21 January 2012 which showed a cash balance held in the liquidation of \$18,649.38.
- [13] The solicitors provided preliminary advice to the liquidator on his working paper on 29 February 2012.
- [14] By March 2012 it was clear to the liquidator that there were not sufficient funds for recovery actions against the respondents.
- [15] In April 2012 the solicitors who had been acting on behalf of the liquidator agreed to continue to act on a speculative basis. There is some discrepancy in the material as to when the liquidator realised that there were not sufficient funds to pursue proceedings for unfair preferences. It is consistent with the liquidator's request of the solicitors in April 2012 to act on a speculative basis that it was by March 2012 that the liquidator had that realisation.
- [16] In May 2012 the liquidator's solicitors sent out 34 letters of demand to those of the respondents which could be identified from Pannells' records. There were 26 responses that denied liability. The liquidator did not have his solicitors respond to the responses received to the letters of demand, as the liquidator wanted to preserve the resources in the winding up.
- [17] By the end of May 2012 the liquidator stopped receiving remuneration for his fees as liquidator and for his staff.

- [18] The liquidator's solicitors advised the liquidator by the end of May 2012 that counsel was willing to act on a speculative basis in relation to claims against a limited number of respondents.
- [19] In the presentation of accounts and statement lodged by the liquidator with ASIC on 22 June 2012, the cash balance held in the liquidation was \$11,831.69.
- [20] In June 2012 the liquidator received some emails from Pannells' former accountant, Mr Lloyd, relating to correspondence with Pannells' creditors and discovered that there was a further source of information to be collected which were emails stored in a different location.
- [21] In July 2012 the solicitors, Mr Ramsay and an employee of the liquidator met with Mr Lloyd to ascertain his recollection of relevant transactions of Pannells.
- [22] The liquidator obtained from Retailers' Computer Services on 24 July 2012 a "Creditors Detailed Transaction Extract" comprising 650 pages.
- [23] Pannells had changed banks from Westpac Banking Corporation to National Australian Bank in February/March 2010. On 1 August 2012 the solicitors requested from Westpac copies of Pannells' bank statements. The liquidator received these bank statements on 10 September 2012.
- [24] The solvency report was completed by the liquidator in or about October 2012. The liquidator commented on the unreliability of the financial accounts, as there were discrepancies between the accounts produced when the company was in the Retravision group and those produced by Retailers' Computer Services. The liquidator noted that the monthly trial balances produced by Retailers' Computer Services were not relied on by the director or Mr Lloyd as they alleged that rebates and discounts were not credited.
- [25] Based on the liquidator's review of the company's records that were available to him and after analysing the company's financial information, the liquidator expressed the opinion in the solvency report that Pannells was not solvent at any time during the period 31 December 2009 to 17 June 2010. That was evidenced by suppliers progressively from 1 January 2010 withdrawing funding by stopping credit facilities. During the relation-back period Pannells entered into payment arrangements with five creditors and made part payments or payments of round sums to other suppliers. The internal credit status report for 1 April 2010 noted that 34 of 56 creditors had stopped credit.
- [26] In December 2012 the solicitors were instructed by the liquidator to make further inquiries of Mr Lloyd regarding the transactions during the relation-back period. Mr Lloyd was unable to respond to the solicitors' request that he review the information compiled in relation to the transactions until after the Christmas/New Year period. On 5 February 2013 Mr Lloyd emailed the solicitors with his comments in relation to the transactions.

- [27] In February 2013 the solicitors obtained fee estimates from various barristers of different levels of experience in relation to preparing an advice on prospects regarding claims against the respondents. The liquidator requested the solicitors to seek a more accurate fee estimate from counsel for an advice on prospects. That was obtained on 21 March 2013. It then came to the liquidator's attention that there was only about \$9,500 available in the liquidation to pay costs and outlays associated with the recovery actions and that was insufficient to meet counsel's fee estimate.
- [28] The presentation of accounts and statement lodged in June 2013 with ASIC by the liquidator for the period from 22 July 2012 to 21 January 2013 showed the cash balance held in the liquidation as \$9,472.19.
- [29] This application was filed on 14 June 2013.
- [30] The liquidator swore an affidavit that was filed on 14 June 2013 (the first affidavit) in support of the application. That affidavit was supplemented by another affidavit of the liquidator filed by leave on the hearing of the application (the second affidavit).
- [31] The liquidator's material reveals that Pannells' unsecured creditors claimed to be owed \$2,751,912.83 (which includes the debt claimed to be owed to the National Australia Bank that is unsecured of \$997,350.30). Proofs of debt have been provided by creditors for the purpose of creditors' meetings, but the liquidator has not undertaken ruling on the proofs, in order to avoid expense. The liquidator has no reason to dispute the proofs. Many of the unsecured creditors are included among the respondents.
- [32] The total amount of the payments to the respondents which the liquidator is seeking to challenge as preferences is approximately \$4.5m.

### **The liquidator's proposal for future action**

- [33] The liquidator explains that he has been hampered throughout the liquidation due to lack of funds. It delayed his giving instructions and preparing necessary reports, as he and his staff were working on a speculative basis. This meant that paid work took precedence and that the liquidator used staff to assist when work flow permitted.
- [34] The liquidator encountered some minor delays when he was waiting for Ms Robertson and Mr Lloyd to respond to requests for assistance. Their assistance was necessary because of the unsatisfactory state of the books and records of Pannells.
- [35] Although it had been the liquidator's intention to commence proceedings against the creditors in respect of the unfair preference claims prior to the expiry of the limitation period, he was not in the position financially to do so.
- [36] Because of the commercial implications of commencing proceedings against more than 40 respondents, including the costs implications if any of the creditors were to

raise a valid defence, the liquidator's view is that it is prudent and preferable to obtain counsel's advice on prospects and evidence in relation to the claims against some or all of the respondents before commencing proceedings.

- [37] The liquidator intends to make inquiries with financiers in relation to obtaining litigation funding to fund proceedings against the respondents. The liquidator deposes in the second affidavit that he has started investigating litigation funding options and which of the claims he is likely to pursue by way of litigation funding. He states that if he cannot obtain litigation funding, it is unlikely he would be in a position to prosecute the claims. If he is granted an extension of 12 months in which to commence action, he intends to approach litigation funders.
- [38] The liquidator foreshadowed in the first affidavit that he also needs further time to decide properly whether or not to bring the proposed proceedings, having regard to the responses made by some of the respondents that one or more of the payments form part of a running account. He also raised the need for further time to consider whether it was necessary or prudent to conduct public examinations of one or more of the respondents.
- [39] A number of the respondents have received payments in the relation-back period of relatively modest sums, as low as \$2,000. During the hearing, I questioned whether there should be a minimum amount that would be the subject of recovery action by the liquidator against any particular respondent, if the limitation period were extended. The liquidator nominated a figure of \$20,000.
- [40] Although the liquidator does not set out his calculation of the likely return to unsecured creditors, he does express the opinion that even taking account of the costs and risks of litigation, it is beneficial to the unsecured creditors as a group for recovery action to be taken in respect of the claimed preferences (which I infer must be qualified by the assessment of the potential running account defences). Because the gross amount claimed as preferences is so much greater than the total amount owed to unsecured creditors, that same conclusion must apply after excluding each of those recipients of alleged preferences in respect of which the claim is less than \$20,000.

**In what circumstances should the limitation period be extended?**

- [41] Although there is an express time limit set out in s 588FF(3)(1)(a) of the Act for bringing an application for relief in respect of a voidable transaction, there is power conferred by the court under s 588FF(3)(b) to extend that limitation period, provided the liquidator made the application for extension during the period provided for in paragraph (a) of s 588FF(3) of the Act. The question to be asked when considering whether or not the limitation period should be extended is what is fair and just in all the circumstances: *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 at [187] (*BP v Brown*).
- [42] What is fair and just is affected by the policy that underpins both the specification of the limitation period and the conferral of power to extend that limitation period. The reforms achieved by Part 5.7B of the Act and the reasons for confining the limitation period to three years and with power to extend that limitation period

limited to an application made before the limitation period expired are referred to in *BP v Brown* at [98] to [111]. Spigelman CJ referred at [112] to "... a broader public interest to be served by allowing persons who have had dealings with companies which become insolvent to conduct their commercial affairs with a degree of certainty about their exposure to having past transactions unravelled." Spigelman CJ stated at [115]:

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

- [43] Factors relevant to the question of whether it is fair and just in all the circumstances to extend the limitation period include the adequacy of the liquidator's explanation for delay, the prejudice caused to the respondents by the failure to take recovery proceedings against them before the expiry of the limitation period, the merits of the prospective proceedings and, where the merits of the prospective proceedings are unable to be assessed, a preliminary review of merits of the recovery proceedings: *Green v Chiswell Furniture Pty Ltd (in liq)* [1999] NSWSC 608 at [15]. A similar approach was approved in *BP v Brown* at [188] and [189].
- [44] The delay for which explanation must be given is the delay in commencement of the recovery proceeding and, even in the absence of specific prejudice arising from the delay, there is presumptive prejudice from the delay, such as deterioration in the memory of witnesses: *Re Clarecastle Pty Ltd (in liq)* (2011) 85 ACSR 260 at [218] (*Clarecastle*).
- [45] The liquidator bears the onus of showing why it is fair and just that the power to extend the specified limitation period of three years should be exercised in the liquidator's favour: *BP v Brown* at [183].

### **The respondents' submissions**

- [46] The primary submission of the respondents opposing the application is that the liquidator has not been diligent in pursuing the investigation and recovery of preferences and does not explain satisfactorily why investigations have not concluded and why proceedings have not been commenced within the three year period. The respondents took the approach of analysing the first affidavit and the second affidavit in detail and criticising the liquidator for not taking some steps at an earlier time and not pursuing investigations vigorously.
- [47] The liquidator's letter of demand to the second respondent was for two payments made in December 2009 and January 2010 for the total sum of \$82,494.05. The second respondent's solicitors asserted that the liquidator was unable to establish

that at the time those payments were made by the second respondent that Pannells was insolvent and also raised that the transaction was part of a continuing business relationship under s 588FA(3) of the Act. The amount that is potentially pursued by the liquidator against the second respondent extends to further payments made by Pannells to the second respondent during February, March and April 2010 and the total amount identified by the liquidator as paid to the second respondent during the relation-back period is now \$339,090.88.

- [48] The only affidavits relied on by the second respondent in this application are those of its solicitors. The second respondent does not raise any evidence of specific prejudice, if the application to extend the limitation period were successful.
- [49] The second respondent submits that it is not obvious that the liquidator has good prospects of succeeding against the second respondent for unfair preferences, as the second respondent was an ongoing trade creditor of Pannells and the liquidator has done nothing about making inquiries of the second respondent about its running account defence. It is also argued on behalf of the second respondent the vast majority of creditors would be pursued for unfair preferences to increase the dividend to those same creditors as unsecured creditors. The second respondent is amongst the unsecured creditors of Pannells. It is submitted that it is too late for the liquidator to be floating the possibility of conducting public examinations and the policy behind the existence of the limitation period favours certainty which should be applied for the benefit of the second respondent. It is submitted that if the liquidator discharged his onus of satisfying the court that an extension should be granted, the extension should be limited to a period of three months on the basis that period would be sufficient for the liquidator to obtain an advice on prospects, arrange the necessary funding and commence proceedings, if so advised.
- [50] The liquidator's letter of demand to the tenth respondent was for 12 payments made between December 2009 and March 2010 for a total sum of \$167,991.32 which is the amount that the liquidator is still seeking to pursue. The tenth respondent's solicitors requested copies of documents and information, so that the tenth respondent could consider the demand, and advised of their preliminary instructions that the liquidator's demand failed to have regard to the running account defence.
- [51] There was a similar response by the solicitors for the eighteenth respondent to the liquidator's letter of demand in respect of ten payments made to Pannells between January and April 2010, all of which (but for the last payment) were part payments of invoices. The total amount claimed of \$98,624.54 in the letter of demand is the amount that is still pursued by the liquidator.
- [52] The amount claimed by the liquidator from the twenty-ninth respondent in the letter of demand was \$91,372.22 comprising five payments between December 2009 and May 2010 which is still pursued by the liquidator. The twenty-ninth respondent engaged the same solicitors acting for the tenth, eighteenth and thirty-second respondents.
- [53] The liquidator's letter of demand to the thirty-second respondent was for \$367,231.39 in respect of seven payments between December 2009 and April 2010.

That is the amount that is still pursued by the liquidator. The thirty-second respondent's response was a denial that the payments were preferences.

- [54] The only affidavits relied on by the tenth, eighteenth, twenty-ninth and thirty-second respondents in opposing this application were from their solicitor and there was no evidence raised of specific prejudice in respect of the extension of the limitation period.
- [55] Mr Clothier of Queen's Counsel on behalf of the tenth, eighteenth, twenty-ninth and thirty-second respondents submitted that the liquidator had made a deliberate decision to delay investigations and to delay commencing recovery proceedings, because of prioritising paid work over unpaid work, and that is a significant factor against extending the limitation period: *Clarecastle* at [156].
- [56] Mr Clothier noted that the liquidator did not refer to seeking help from Mr Pannell in the course of his investigations in respect of preferences. Great emphasis was placed on the delays by the liquidator in obtaining the extensive financial transaction records from Retailers' Computer Services and the copies of the Westpac Bank statements. It is pointed out that by the time the limitation period expired, there had been nothing constructive done about obtaining external litigation funding, when that was an obvious step for the liquidator being able to commence recovery proceedings.
- [57] These respondents submit that the liquidator's application targets all the unsecured creditors of Pannells who received payments during the relation-back period without discriminating amongst them which suggests that the liquidator has not diligently investigated or pursued the alleged unfair preferences. It is therefore submitted that the lack of a rigorous assessment by the liquidator of the alleged preferences does not support the conclusion that it is in the interests of unsecured creditors to pursue them.
- [58] The liquidator in the first affidavit has set out a schedule of payments made to the fortieth respondent (Electrolux Pty Ltd) in the relation-back period. There are 37 payments between January and May 2010 for the total amount of \$924,036.77. The liquidator did not attach to the first affidavit a similar schedule of payments in relation to the forty-ninth respondent (Electrolux Home Products Pty Limited). After the application was served, Ms Hall from the solicitors acting for the fortieth and forty-ninth respondents telephoned a solicitor acting for the liquidator to advise that her instructions were that all payments detailed in the schedule of payments were paid to the forty-ninth respondent and not the fortieth respondent.
- [59] The fortieth and forty-ninth respondents have not filed any affidavits in opposing this application. There was therefore no evidence raised by them of specific prejudice in respect of the extension of the limitation period.
- [60] Although the fortieth and the forty-ninth respondents rely on the schedule of payments exhibited to the first affidavit to submit that there is no arguable or prospective claim raised against the forty-ninth respondent on the basis of the liquidator's material, that is a matter which appears to be within the knowledge of the fortieth and forty-ninth respondents to clarify, if the liquidator seeks that

clarification. These respondents submit that in any case there is no arguable claim against Electrolux, as the solvency report only mentions two payments being made in the relation-back period of \$44,268.12 and \$2,090.70 which were part payments, when the total amount shown as being paid to Electrolux during the relation-back period was \$924,036.77. The submission is also made that any extension should be no longer than absolutely necessary, as it unreasonably prolongs the uncertainty faced by the respondents as to whether recovery proceedings are brought against them.

- [61] Although the fourth respondent did not appear to oppose the application, it did send a letter to the liquidator's solicitors requesting that its objection to the extension on the ground that it was not reasonable, given the lack of diligence and unreasonable delay by the liquidator to progress the matter within the limitation period, be drawn to the attention of the court which the liquidator has done.

### **Is it fair and just to extend the limitation period?**

- [62] The lack of funds in the liquidation is a practical consideration that has some weight. Although still bound to perform his duties as liquidator, the lack of funds explains why the liquidator largely proceeded sequentially with tasks rather than attempting them concurrently. If the liquidator and his staff did not undertake paying work in other administrations at the same time, they would not have been in the position of being able to do the work that was done in this liquidation after they ceased taking remuneration. It is not the case that lack of funds resulted in little or no work being undertaken by the liquidator in the investigation of preferences before the expiry of the limitation period.
- [63] It is not significant that the liquidator has not referred to making inquiries of Mr Pannell after having his assistance in the completion of the initial report as administrator, when the liquidator has engaged Mr Lloyd and Ms Robertson to provide the information and assistance he required, particularly in the preparation of the solvency report. The solvency report took the liquidator time to prepare, but that was an essential step, if any of the impugned payments are to be pursued as preferences, and supportive of the liquidator's proposal to continue to pursue investigating at least some of the alleged preferences.
- [64] There is no doubt that the liquidator may have been able to undertake his investigations and the steps required of him to pursue recovery of unfair preferences in a more efficient and timely way, but this does not justify the finding urged by the respondents that the liquidator was not diligent to such an extent that such factor weighs heavily in the balance against an extension. The purpose of this application is not to review the liquidator's conduct of the liquidation against a standard of almost perfection. This application is about balancing the various factors that are relevant to whether it is fair and just to extend the limitation period and determining what the balance favours. The fact that the steps that the liquidator now wishes to take could have been undertaken before the expiry of the limitation period is a relevant factor, but not a reason itself not to extend the limitation period, if that is what the balance of the factors otherwise favours.

- [65] It is understandable for those respondents which are also unsecured creditors that their preference would be for the liquidator not to take recovery proceedings against them for alleged unfair preferences. That is not the approach that the liquidator is required to take, in considering the position of the unsecured creditors as a group. The respective gross amounts for alleged preferences and unsecured debts support the liquidator's opinion about the benefit of pursuing the alleged preferences, or at the least taking the further steps required to assess the likely success in pursuing the alleged preferences and litigation funding. It is not in the interests of the unsecured creditors to lose the benefit of the work that has been done by the liquidator before the expiry of the limitation period on recovery of unfair preferences which would be the result if the limitation period were not extended.
- [66] In view of the nature of the relationship of each of the respondents with Pannells and that it is likely that most of them will rely on the running account defence, this application is in the category of those where the merits of the prospective proceedings are unable to be assessed decisively. The solvency report provides some material that is relevant to the good faith defence for some of the respondents, but the issue of the running account defence (in respect of which the liquidator bears the onus of excluding) is one that may be determinative of many of the prospective claims. The extension of the limitation period is required to enable the liquidator to obtain the advices on prospects and evidence and the further information that he requires, before deciding which, if any, of the alleged preferences to pursue by proceedings.
- [67] Even though the respondents who actively oppose the application do not adduce evidence of specific prejudice, if the limitation period were extended, it is appropriate to proceed on the basis of presumptive prejudice. That is mitigated to a degree in respect of those respondents which received letters of demand in May 2012. Those respondents were on notice of the potential claim from that time which gave them the opportunity to preserve records and make inquiries of relevant employees. It is a relevant factor that there is an absence of specific prejudice: *BP v Brown* at [193].
- [68] Although the policy that favours certainty for the respondents as to when their exposure to potential recovery proceedings will end is a factor against the extension, where other factors support the extension, that policy can be addressed to some degree by confining the extension to the shortest feasible period.
- [69] Taking account of all these relevant factors in the circumstances, I am satisfied that the liquidator has discharged the onus of showing the balance of the factors favours an extension of the limitation period to enable him to obtain advice on the prospects of succeeding in recovering the alleged preference payments where the amount claimed against a respondent exceeds \$20,000 and, in particular, whether he can exclude that payments were not made as part of a running account between Pannells and the relevant creditor, and to pursue litigation funding, if that is required.
- [70] The liquidator does not suggest that further inquiries or investigations will alter the financial information he has about the quantum of the various payments that he alleges are preferences. In view of his reasonable concession that he would not pursue a claim that was less than \$20,000, there is little point in extending the

limitation period in respect of any respondent against which the claim is for less than \$20,000.

- [71] It is apparent from the inclusion as respondents of companies with similar names that the records of Pannells that are available to the liquidator are not precise as to the proper name of the specific creditor which received an impugned payment where the creditor may be within a group of companies. This is highlighted by the position of the fortieth and the forty-ninth respondents. Further investigations of the liquidator or inquiries to the relevant company group may clarify the precise entity which should be the party to any recovery proceeding. In those circumstances, it is reasonable to allow the extension of the limitation period against the relevant named respondents or any “related entity” as that expression is defined in s 9 of the Act.
- [72] When the application was filed the period of extension that was sought was 12 months from the expiry of the limitation period on 17 June 2013. Four months have elapsed since the filing of the application and the delivery of this judgment. A further six months should be feasible for the liquidator to obtain the advices he proposes to seek in conjunction with further inquiries about litigation funding options, and any further investigations that are advised, but without unduly delaying the commencement of any recovery proceedings he may be advised to pursue. The extension of the limitation period should therefore be until 17 April 2014.

### Orders

- [73] I will publish these reasons, make the order extending the limitation period, but give the parties an opportunity to consider the reasons before making submissions on the question of the costs of the application. To facilitate the parties’ reaching agreement on the appropriate orders for costs or at least agreement on a timetable for written submissions, I will adjourn the issue of the costs of the application to a date to be fixed.
- [74] The orders that I make are:
1. Pursuant to s 588FF(3)(b) of the *Corporations Act* 2001 (Cth) (the Act), the period within which applications under s 588FF(1) of the Act may be made by the applicant against each of the first to sixth respondents, the tenth respondent, the fourteenth to sixteenth respondents, the eighteenth and nineteenth respondents, the twenty-first respondent, the twenty-third to twenty-sixth respondents, the twenty-ninth respondent, the thirty-first to thirty-fourth respondents, the thirty-sixth respondent, the fortieth and forty-first respondents, the forty-fourth respondent, the forty-sixth respondent and the forty-ninth and fiftieth respondents, or any “related entity” as that expression is defined in s 9 of the Act of any such respondent, is extended up to and including 17 April 2014.
  2. The issue of the costs of the application is adjourned to a date to be fixed.

**Schedule 1**  
**List of respondents**

FIRST RESPONDENT	ANDI-CO AUSTRALIA PTY LTD ACN 005 899 365
SECOND RESPONDENT	BSH HOME APPLIANCES PTY LTD ACN 109 198 405
THIRD RESPONDENT	OLBERTZ HOLDINGS PTY. LTD. ACN 010 003 933 TRADING AS CREST ELECTRONICS
FOURTH RESPONDENT	DYSON APPLIANCES (AUST.) PTY LIMITED ACN 073 072 509
FIFTH RESPONDENT	EUROLINX PTY LIMITED ACN 001 473 347
SIXTH RESPONDENT	PR KITCHEN AND WASHROOM SYSTEMS PTY LTD (FORMERLY PR KITCHEN SYSTEMS PTY LTD) ACN 138 663 279 TRADING AS FRANKE TAPS
SEVENTH RESPONDENT	FUJITSU AUSTRALIA LTD ACN 001 011 427
EIGHTH RESPONDENT	FUJITSU AUSTRALIA WHOLESALE PTY LTD ACN 003 123 055
NINTH RESPONDENT	FUSUNGT A AUSTRALIA PTY. LTD. ACN 081 275 336
TENTH RESPONDENT	HAGEMEYER BRANDS AUSTRALIA PTY LTD ACN 001 375 686
ELEVENTH RESPONDENT	INGRAM MICRO AUSTRALIA PTY LTD ACN 063 397 437
TWELFTH RESPONDENT	INTERNATIONAL DYNAMICS AUSTRALASIA PTY LTD ACN 005 016 606
THIRTEENTH RESPONDENT	KNP PTY LTD ACN 125 448 651
FOURTEENTH RESPONDENT	MITSUBISHI ELECTRIC AUSTRALIA PTY LTD ACN 001 215 792
FIFTEENTH RESPONDENT	SCHWEIGEN PTY LTD ACN 124 141 322
SIXTEENTH RESPONDENT	SHARP CORPORATION OF AUSTRALIA PTY LTD ACN 003 039 405
SEVENTEENTH RESPONDENT	STRONG AUSTRALIA PTY LTD ACN 097 861 731
EIGHTEENTH RESPONDENT	SUNBEAM CORPORATION LTD ACN 000 006 771
NINETEENTH RESPONDENT	TEKA PTY. LTD. ACN 004 887 245
TWENTIETH RESPONDENT	TEKA AUSTRALIA PTY LIMITED ACN 106 637 450 (DEREGISTERED)
TWENTY-FIRST RESPONDENT	THINK APPLIANCES PTY LTD. ACN 095 751 447
TWENTY-SECOND RESPONDENT	VINTEC AUSTRALIA PTY LTD ACN 084 517 028 TRADING AS TRANSTHERM
TWENTY-THIRD RESPONDENT	WEBER-STEPHEN PRODUCTS CO. (AUSTRALIA) PTY. LTD. ACN 006 305 237
TWENTY-FOURTH RESPONDENT	WHIRLPOOL (AUSTRALIA) PTY. LIMITED ACN 003 578 023
TWENTY-FIFTH RESPONDENT	DE'LONGHI AUSTRALIA PTY LIMITED ACN 104 012 857
TWENTY-SIXTH RESPONDENT	PALSONIC CORPORATION PTY LTD ACN 000 474 108
TWENTY-SEVENTH RESPONDENT	HAIER AUSTRALIA PTY LTD ACN 108 983 553

TWENTY-EIGHTH RESPONDENT	ABEY AUSTRALIA PTY LTD ACN 004 589 879
TWENTY-NINTH RESPONDENT	BREVILLE PTY LIMITED ACN 000 092 928
THIRTIETH RESPONDENT	CONDARI PTY LTD ACN 056 577 765
THIRTY-FIRST RESPONDENT	FISHER & PAYKEL AUSTRALIA PTY LIMITED. ACN 000 042 080
THIRTY-SECOND RESPONDENT	PANASONIC AUSTRALIA PTY LIMITED ACN 001 592 187
THIRTY-THIRD RESPONDENT	SAMSUNG (AUST) PTY LTD ACN 001 380 589 (DEREGISTERED)
THIRTY-FOURTH RESPONDENT	SONY AUSTRALIA LIMITED ACN 001 215 354
THIRTY-FIFTH RESPONDENT	EUROSTYLE GROUP PTY LTD ACN 074 612 279 TRADING AS EURO APPLIANCES
THIRTY-SIXTH RESPONDENT	MIELE AUSTRALIA PTY. LIMITED ACN 005 635 398
THIRTY-SEVENTH RESPONDENT	TECHNIKA PTY LTD ACN 069 686 326
THIRTY-EIGHTH RESPONDENT	UNIDEN AUSTRALIA PTY. LIMITED ACN 001 865 498
THIRTY-NINTH RESPONDENT	ZIP HEATERS (AUST) PTY LTD ACN 000 578 727
FORTIETH RESPONDENT	ELECTROLUX PTY LTD ACN 000 015 136
FORTY-FIRST RESPONDENT	LG ELECTRONICS AUSTRALIA PTY LIMITED ACN 064 531 264
FORTY-SECOND RESPONDENT	ASKO APPLIANCES (AUST.) PTY. LTD ACN 007 007 329
FORTY-THIRD RESPONDENT	RAMTECH PTY LTD ACN 002 289 198
FORTY-FOURTH RESPONDENT	CREATIVE CONCEPTS ADVERTISING & MARKETING PTY LTD ACN 072 894 378
FORTY-FIFTH RESPONDENT	OFFICEMAX AUSTRALIA LIMITED ACN 064 777 224
FORTY-SIXTH RESPONDENT	WESFARMERS GENERAL INSURANCE LIMITED ACN 000 036 279 TRADING AS LUMLEY RETAIL WARRANTY
FORTY-SEVENTH RESPONDENT	PMP PRINT PTY LTD ACN 051 706 499
FORTY-EIGHTH RESPONDENT	PMP LIMITED ACN 050 148 644
FORTY-NINTH RESPONDENT	ELECTROLUX HOME PRODUCTS PTY LIMITED ACN 004 762 341
FIFTIETH RESPONDENT	FISHER & PAYKEL CUSTOMER SERVICES PTY LTD ACN 003 335 171