SUPREME COURT OF QUEENSLAND

CITATION:	*Greig & Anor v Australian Building Industries Pty Ltd (in liq)* [2002] QSC 298
PARTIES:	**JOHN LETHBRIDGE GREIG & ROBERT JOHN DUFF as liquidators of AUSTRALIAN BUILDING INDUSTRIES PTY LTD (in liquidation)** ACN 009 340 952 (applicants) **v** **AUSTRALIAN BUILDING INDUSTRIES PTY LTD (in liquidation)** ACN 009 340 952 (respondent) **JOHN LETHBRIDGE GREIG & ROBERT JOHN DUFF as liquidators of AUSTRALIAN BUILDING INDUSTRIES PTY LTD (in liquidation)** ACN 009 340 952 (plaintiffs) **v** **STRAMIT CORPORATION LTD** ACN 005 010 195 (defendant)
FILE NO/S:	S7589 of 2000 S8117 of 2001
DIVISION:	Trial Division
DELIVERED ON:	1 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2002
JUDGE:	Mullins J
ORDER:	**S7589 of 2000** **1. Pursuant to s 81 of the *Supreme Court of Queensland Act* 1991 the originating application filed on 31 August 2000 be amended to add Stramit Corporation Ltd (ACN 005 010 195) as the second respondent, despite the expiry of the limitation periods under s 588FF(3) of the *Corporations Act* 2001 (Cth) at the date of this order.** **2. Pursuant to s 588FF(3)(b) of the *Corporations Act* 2001 (Cth) the time within which an application may be brought by the applicants against Stramit Corporation Ltd (ACN 005 010 195) be extended to end on 10 September 2001.** **S8117 of 2001** **The defendant's application filed on 23 May 2002 be dismissed**

CORPORATIONS LAW – LIQUIDATION – LIQUIDATORS – liquidators filed application for extension of time to bring application under s588FF(1) of the *Corporations Law* on 31 August 2000 which was within 3 years of relation-back day – after commencement of *Corporations Act* 2001 (Cth) liquidators sought to join to the application for extension the creditor which would be affected by an order for extension – transitional provisions in *Corporations (AncillaryProvisions) Act* 2001 (Q) and s1383 *Corporations Act* 2001 (Cth) require application for extension to be taken to have been brought under s588FF(3)(b) *Corporations Act* 2001 (Cth)

CORPORATIONS LAW – PROCEDURAL REQUIREMENTS – Supreme Court of Queensland has jurisdiction to join party to application for extension pursuant to s588FF(3)(b) *Corporations Act* 2001 (Cth) – *Corporations Law Rules* (Q) silent on joinder of party to an existing application – the procedural laws of Queensland apply to the joinder of party – s81 *Supreme Court of Queensland Act* 1991 (Q) not inconsistent with s588FF(3) of *Corporations Act* 2001 (Cth) and provides source of power for court to order joinder in spite of lapse of time period in s588FF(3) *Corporations Act* 2001 (Cth) at date of order of joinder – *UCPR* not applicable

CORPORATIONS LAW – PROCEDURAL REQUIREMENTS – whether joinder should be ordered to existing application when limitation period under s588FF(3) *Corporations Act* 2001 (Cth) had expired after existing application had been filed – in interests of justice party should be joined to application even though the party will not be able to raise limitation period as defence to application under s588FF(1) *Corporations Act* 2001 (Cth)

CORPORATIONS LAW – PROCEDURAL REQUIREMENTS – whether extension of time under s588FF(3)(a) of the *Corporations Act* 2001 (Cth) able to be granted under s1322(4)(d) *Corporations Act* 2001 (Cth) – s1322(4)(d) *Corporations Act* 2001 (Cth) has no application to time periods in s588FF(3) *Corporations Act* 2001 (Cth)

Corporations Act 2001 (Cth)
Judiciary Act 1903 (Cth)

Acts Interpretation Act 1954
Civil Justice Reform Act 1998
Corporations (*Ancillary Provisions*) *Act* 2001
Corporations Law

Corporations Law Rules
Corporations (*Queensland*) *Rules* 1993
Limitation of Actions Act 1974
Supreme Court of Queensland Act 1991
UCPR r 69, r 74, r 293, r 375, r 376, r 377, r 995, Schedule 1A, Schedule 4

Re Aura Commercial Interiors Pty Ltd (2002) 20 ACLC 904
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541
Brown v DML Resources Pty Ltd (in liq) (No 3) (2001) 188 ALR 469
Brown v DML Resources Pty Ltd (in liq) (No 6) (2002) 40 ACSR 669
Cavetina Pty Ltd v Synthetic Dye Works Industries Pty Ltd (1994) 14 ACSR 274
David Grant & Co Pty Ltd (Receiver appointed) v Westpac Banking Corporation (1995) 184 CLR 265
Draney v Barry [2002] 1 Qd R 145
Rodgers v Commissioner of Taxation (1998) 28 ACSR 42
Rodgers v Commissioner of Taxation (1998) 88 FCR 61
Star v National Australia Bank Ltd (1990) 30 ACSR 583
Tagoori Pty Ltd (in liq) v Lee [2001] 2 Qd R 98

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Clayton Utz Lawyers for Stramit Corporation Ltd in S7589 of 2000 and the defendant in S8117 of 2001

[1] **MULLINS J:** On 11 September 1997 John Lethbridge Greig and Robert John 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 as such. The relation-back day with respect to the liquidation of ABI was 11 September 1997.

[2] On 31 August 2000 the liquidators commenced proceeding S7589 of 2000 by filing an originating application seeking an order that the time within which an application may be brought pursuant to s 588FF(1) of the *Corporations Law* ("the *Law*") be extended to end on 11 September 2001. That application was not on notice to any other party. On 7 September 2000 I made an order pursuant to s 588FF(3) of the *Law* that the time within which applications may be brought under s 588FF(1) by the liquidators in respect of the liquidation of ABI be extended to end on 11 September 2001.

[3] Relying upon that order the liquidators issued proceedings in various courts against various creditors including proceeding S8117 of 2001 in this Court against Stramit

Corporation Ltd ("Stramit") in which the liquidators claimed an order pursuant to s 588FF of the *Corporations Act* 2001 (Cth) ("the Act") declaring that the payments made by ABI to Stramit on 15 May and 22 and 29 August 1997 were void as being unfair preferences as and from the date on which each was made and an order directing Stramit to pay to ABI the sum of $1,426,655.72.

[4] Stramit filed a notice of intention to defend and defence on 26 October 2001. One of the allegations in the statement of claim which was admitted in the defence was that set out in para 18 of the statement of claim that the order was made on 7 September 2000 pursuant to s 588FF(3) that the limitation period would expire on 11 September 2001.

[5] On 16 April 2002 Stramit applied for an order to vary that made on 7 September 2000 in proceeding S7589 of 2000 which would have the effect of excluding an application by the liquidators against Stramit from the extension order.

[6] That application was heard by Chesterman J who delivered his reasons for judgment on 16 May 2002 and made the following orders:

> "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."

[7] The basis for setting aside the order of 7 September 2000 to the extent that it applied to Stramit was that the liquidators had obtained that order without giving notice of the application to Stramit. Chesterman J stated at para [37] of his reasons:

> "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."

[8] The effect of the order made by Chesterman J is that the liquidators' application filed on 31 August 2000 remains extant and undisposed of in respect of Stramit.

[9] At the hearing on 13 June 2002 the liquidators sought to re-argue the application filed on 31 August 2000 insofar as it related to Stramit. In order to do so, however, the liquidators also sought the following orders set out in the application filed on 5 June 2002 to overcome the fact that the application filed on 31 August 2000 did not name Stramit as a respondent:

> "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."

[10] In proceeding S8117 of 2001 Stramit purported to file an amended defence on 23 May 2002 in which it deleted the admission of the allegation in para 18 of the statement of claim and pleaded the order of Chesterman J made on 16 May 2002. Stramit also pleaded in this amended defence that the liquidators were required to bring the proceeding by no later than 11 September 2000 and did not file the claim until 10 September 2001. The liquidators therefore sought to amend their application filed on 5 June 2002 to seek an additional order:

> "4A. An order pursuant to *UCPR* R 371 setting aside the amended defence filed on 23 May 2002 in proceeding 8117 of 2001 on the ground that it was filed without the leave required by *UCPR* R 188."

[11] Stramit did not oppose leave being given to the liquidators to amend the application filed on 5 June 2002 by adding para 4A as set out above. Strictly speaking that order should be sought in proceeding S8117 of 2001 in which the amended defence was filed. In the interests of expediency, I will give leave in proceeding S8117 of 2001 for the liquidators to make an oral application in those terms. If it were necessary to do so, Stramit made an oral application for leave to withdraw the admission of para 18 of the statement of claim. In addition, Stramit had filed an application on 23 May 2002 in proceeding S8117 of 2001 seeking an order pursuant to r 293 of the *UCPR* that the liquidators' claim be dismissed and that Stramit had judgment against the liquidators for its costs of the application filed on 23 May 2002 and the claim on the grounds that the liquidators have no real prospect of succeeding on any part of their claim and there is no need for a trial of the claim.

What legislation applies to the liquidators' application

[12] The Act commenced on 15 July 2001. The liquidators' application filed on 31 August 2000 was therefore filed before the Act commenced. Submissions were made as to whether the *Law* or the Act applies to the liquidators' application insofar as it remains extant in respect of an extension of time to commence the proceeding against Stramit.

[13] The relevant date for determining which legislation applies to this application must be the date of hearing the application.

[14] Transitional provisions relating to the enactment of the Act in lieu of the *Law* are found in the *Corporations* (*Ancillary Provisions*) *Act* 2001 ("the *CAPA*").

[15] In *CAPA* the *Law* is within the expression "national scheme law of this jurisdiction". Section 7 of *CAPA* provides:

> "**7 National scheme laws**

> **(1)** The national scheme laws of this jurisdiction operate of their own force only in relation to-
> (a) matters arising before the relevant time; and
> (b) matters arising, directly or indirectly, out of matters mentioned in paragraph (a);
> in so far as those matters are not dealt with by the new corporations legislation, the new ASIC legislation or the cooperative scheme law.
>
> **(2)** Except as provided by subsection (1) and section 10, the national scheme laws of this jurisdiction have no operation of their own force at and after the relevant time."

[16] Section 7(1) of *CAPA* therefore preserves the *Law* only in relation to a matter arising before the commencement of the Act, insofar as that matter is not dealt with by the Act. Section 7(1) of *CAPA* therefore cannot apply to an application under s 588FF(3) of the *Law*, as that matter is dealt with in the same manner by the identically numbered provision in the Act.

[17] The effect of s 7 of *CAPA* is expanded upon in s 8 of *CAPA*. Relevantly ss 8(1) and (2) of *CAPA* provide:

> "**(1)** To the extent that a national scheme law of this jurisdiction ceases to operate of its own force because of section 7, the effect is that which would have resulted had this Act and that law been Commonwealth Acts in relation to which the *Acts Interpretation Act 1901* (Cwlth) as in force on 1 November 2000 applied.
>
> **(2)** Despite subsection (1), if by force of chapter 10 of the new Corporations Act or part 16 of the new ASIC Act a person acquires, accrues or incurs a right or liability in substitution for a pre-commencement right or liability, the pre-commencement right or liability is cancelled at the relevant time and ceases at that time to be a right or liability under a law of the State."

[18] Chapter 10 of the Act contains transitional provisions for providing for a smooth transition from the *Law* to the Act. Relevantly s 1383(1) of the Act provides:

> "This section applies to a proceeding, other than a federal corporations proceeding, in relation to which the following paragraphs are satisfied:
> (a) the proceeding was started in a court before the commencement; and
> (b) the proceeding was:
> (i) under a provision of the old corporations legislation of a State or Territory in this jurisdiction; or
> (ii) brought as, or connected with, a prosecution for an offence against a provision of the old corporations legislation of a State or Territory in this jurisdiction; and
> (c) the proceeding was not an enforcement proceeding, or an appeal or review proceeding, in relation to an order of a court; and

> (d) the proceeding had not been concluded or terminated before the commencement; and
> (e) either:
> (i) if the proceeding is a primary proceeding - no final determination of any of the existing rights or liabilities at issue in the proceeding had been made before the commencement; or
> (ii) if the proceeding is an interlocutory proceeding - this section applies to the primary proceeding to which the interlocutory proceeding relates."

[19] Definitions relevant to s 1383 of the Act are found in s 1382 of the Act. On the basis of the definitions of "interlocutory application", "interlocutory proceeding" and "primary proceeding" in s 1382(1) of the Act, the liquidators' application filed on 31 August 2000 was a primary proceeding. On that basis it was a proceeding which satisfied paras (a), (b) and (c) of s 1383(1) of the Act.

[20] Because the order of Chesterman J was not made until 16 May 2002, whether the conditions in paras (d) and (e) of s 1383(1) of the Act could be satisfied depends on the date at which satisfaction of those conditions is considered. As the issue did not arise until the hearing of the application before me on 13 June 2002, the appropriate time for considering the satisfaction of the conditions in paras (d) and (e) of s 1383(1) of the Act must be at the time of that hearing.

[21] At the time of the hearing on 13 June 2002 the condition in para (d) was satisfied, as the liquidators' application filed on 31 August 2000 insofar as it related to bringing a proceeding against Stramit had not been concluded. The only issue in respect of that application which remains extant is the extension of time to commence the proceeding against Stramit. 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. The condition in para (e) of s 1383(1) of the Act was therefore satisfied.

[22] The effect of the paragraphs in s 1383(1) of the Act being satisfied is that the transitional provision in s 1383(3) of the Act then applies:

> "A proceeding (the **new proceeding**) equivalent to the old proceeding is, on the commencement, taken to have been brought in the same court, exercising federal jurisdiction:
> (a) if subparagraph (1)(b)(i) applies - under the provision of the new corporations legislation that corresponds to the relevant old provision; or
> (b) if subparagraph (1)(b)(ii) applies - as, or connected with, a prosecution for an offence against the provision of the new corporations legislation that corresponds to the relevant old provision.
>
> To the extent that the old proceeding, before the commencement, related to pre-commencement rights or liabilities, the new proceeding relates to the substituted rights and liabilities in relation to those pre-commencement rights or liabilities."

The reference to "old proceeding" is a reference to the proceeding to which the section applies (s 1383(2)(a) of the Act) which in this matter is the liquidators' application filed on 31 August 2000 to the extent that it relates to the extension of time to commence proceedings against Stramit. The meaning of "pre-commencement right or liability" is found in s 1400(1) of the Act. The meaning of "substituted right or liability" is found in s 1400(2) of the Act.

[23] As s 1383 of the Act applies to the liquidators' application filed on 31 August 2000 insofar as it remains outstanding in relation to commencing the proceeding against Stramit, the effect of ss 7 and 8(2) of *CAPA* is that the liquidators' application against Stramit is treated as an application brought under s 588FF of the Act.

Section 588FF of the Act

[24] Section 588FF(1) of the Act empowers the court to make one or more orders set out in that subsection where, on the application of a company's liquidator, the court is satisfied that a transaction of the company is voidable because of s 588FE of the Act.

[25] Section 588FF(3) of the Act provides:

> "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 by the liquidator within those 3 years."

Issues

[26] 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: *Brown v DML Resources Pty Ltd* (*in liq*) *(No 3)* (2001) 188 ALR 469, 483-484. (It was submitted by the liquidators in the supplementary outline of submissions dated 17 June 2002 that the Court had power to make orders under s 588FF(3)(a) and (b) against Stramit without joining Stramit as a respondent to the application, relying on rr 61 and 62(4) of the *UCPR*. In light of the analysis in *Brown v DML Resources Pty Ltd (in liq) (No 3)* that is not an appropriate course to follow.)

[27] The parties, however, differ as to whether or not there is jurisdiction for the court to join Stramit to proceeding S7589 of 2000 at this stage.

[28] The liquidators rely on the procedural rules that apply to proceedings in this Court, particularly rr 69, 74(5) and 377(1)(b) *UCPR*, and also on s 81 of the *Supreme Court of Queensland Act* 1991 ("*SCA*"). The liquidators also rely on s 1322 of the Act in the same manner in which reliance was placed on that provision in *Brown v DML Resources Pty Ltd (in liq) (No 6)* (2002) 40 ACSR 669 ("*Brown v DML (No 6)*") and on the basis that it can be used to extend the time provided for in s 588FF(3)(a). It is submitted on behalf of Stramit that the decision in *Brown v DML (No 6)* should not be followed. It is also submitted on behalf of Stramit that the jurisdiction conferred by the Act in respect of an application for extension to bring an application pursuant to s 588FF(1) is found within s 588FF and that the procedural law of Queensland cannot be used to increase the scope of the jurisdiction conferred by s 588FF of the Act.

[29] If it is found that there is jurisdiction for the court to join Stramit to proceeding S7589 of 2000, the issue that must then be determined is whether that order should be made in the exercise of the court's discretion. Even if Stramit were ordered to be joined as a respondent to proceeding S7589 of 2000, there is then an issue between the parties as to whether the extension of time required under s 588FF(3)(b) of the Act should be made in respect of the liquidators' proceeding against Stramit.

Procedural rules

[30] Before considering the substantive contentions of each of the parties, it is necessary to ascertain what rules of court apply to this hearing of the liquidators' application filed on 31 August 2000.

[31] When the application was filed by the liquidators on 31 August 2000 and the order was made on 7 September 2000 the rules governing the application were the *Corporations* (*Queensland*) *Rules* 1993 ("the 1993 rules"). With effect from 8 September 2000 the 1993 rules were repealed and replaced by r 995 of the *UCPR* and Schedule 1A to the *UCPR* ("the *Corporations Law Rules*"). Upon the commencement of the Act, the *Corporations Law Rules* have been continued in effect, by virtue of s 11 of *CAPA* as if they were made under s 24 of *CAPA*.

[32] The liquidators rely on r 1.3(3) of the *Corporations Law Rules* to argue that it is the 1993 rules that apply, because the liquidators' application was filed before the commencement of the *Corporations Law Rules*. Rule 1.3(3) of the *Corporations Law Rules* provides:

> "(3) Unless the court otherwise orders, the rules applying to a proceeding in the court under the Corporations Law, or the ASC Law, as in force immediately before the commencement of these rules, continue to apply to a proceeding under the Corporations Law, or the ASC Law, that was commenced before the commencement of these rules."

[33] The problem with this argument is that it takes no account of the transitional provisions in *CAPA* and s 1383 of the Act and the effect of those provisions that the liquidators' application filed on 31 August 2000 insofar as it seeks an extension of time to commence proceedings against Stramit is now a proceeding under the Act. On that basis, it is no longer a relevant consideration that the liquidators' application was filed prior to the commencement of the *Corporations Law Rules*. As the liquidators' application relating to the extension of time to commence proceedings against Stramit is now a proceeding under s 588FF(3) of the Act, it must be the *Corporations Law Rules* which apply to that application.

[34] It is clear from s 24 of *CAPA* that rules of court will be made by the State with respect to proceedings and the practice and procedure of this Court under the Act. This implements s 79 of the *Judiciary Act* 1903 (Cth).

[35] There is no provision in the *Corporations Law Rules* dealing with the joinder of a party to an existing application. Rule 1.3(2) of the *Corporations Law Rules* provides that the other rules of the Supreme Court apply, insofar as they are relevant and not inconsistent with the *Corporations Law Rules*, to a proceeding in the Supreme Court under the Act that is commenced on or after the commencement of the *Corporations Law Rules*. As the liquidators' application seeking an extension of time to commence proceedings against Stramit is deemed to be a proceeding

under the Act, it must be treated as a proceeding which has commenced after the commencement of the *Corporations Law Rules*. The reference to other rules of the Supreme Court is to the *UCPR*.

Relevant case law

[36] Detailed written and oral submissions were made on behalf of both parties by reference to relevant authorities. In order to put those submissions in context, it is useful to summarise these authorities.

[37] In *Rodgers v Commissioner of Taxation* (1998) 28 ACSR 42, the liquidator of the relevant company sought an order under s 588FF(1) of the *Law* for the payment to the company of a sum representing the aggregate of the moneys paid to the respondent under certain transactions said to be voidable pursuant to s 588FE of the *Law*. The liquidator identified two additional payments to the respondent which he contended were voidable and wished to amend the application to increase the amount claimed in the proceeding to reflect the additional transactions. Branson J refused to give the liquidator leave to make the necessary amendments to the application and statement of claim on the basis that O 13 r 2 of the *Federal Court Rules* could not be given an effect which would circumvent the intention of s 588FF(3) of the *Law* which provided for a statutory prohibition on the bringing of an action and did not merely set a limitation period in the sense of providing a defence to a claim brought outside the periods of time specified by s 588FF(3) of the *Law*.

[38] The relevant provisions of O 13 r 2 which took their form after amendments made in 1994 when s 59(2B) was inserted into the *Federal Court of Australia Act* 1976 (Cth) were:

> "(1) Subject to the following provisions of this rule, the Court may, at any stage of a proceeding, on application by any party or of its own motion, order that any document in the proceeding be amended, or that any party have leave to amend any document in the proceeding, in either case in such manner as the Court thinks fit.
> (2) All necessary amendments shall be made for the purpose of determining the real questions raised by or otherwise depending on the proceeding, or of correcting any defect or error in any proceeding, or of avoiding multiplicity of proceedings.
> (3) Where an application to the Court for leave to make the amendment mentioned in subrules (4), (5), (6) or (7) is made after any relevant period of limitation current at the date of commencement of the proceeding has expired, the Court may, nevertheless, grant such leave in the circumstances mentioned in that subrule if it thinks it is just to do so.
> ...
> (7) An amendment may be made notwithstanding that the effect of the amendment will be to add or substitute a new claim for relief or another foundation in law for a claim for relief if the new claim for relief or foundation in law for that claim arises out of the same facts or substantially the same facts as those already pleaded to support existing claims for relief by the party applying for leave to make the amendment."

Section 59(2B) of the *Federal Court of Australia Act* 1976 provides:

> "The Rules of Court may make provision for:
> (a) the amendment of a document in a proceeding; or
> (b) leave to amend a document in a proceeding;
> even if the effect of the amendment would be to allow a person to seek a remedy in respect of a legal or equitable claim that would have been barred because of the expiry of a period of limitation if the remedy had originally been sought at the time of the amendment."

[39] That decision was overturned on appeal in *Rodgers v Commissioner of Taxation* (1998) 88 FCR 61. It was held by the Full Court of the Federal Court that the language of O 13 r 2 drew no distinction between "substantial" and "procedural" amendments, nor between elements of a claim and elements of a defence to a claim and regulated the position after a proceeding had been commenced. The Full Court held there was no inconsistency between O 13 r 2 of the *Federal Court Rules* and s 588FF(3) of the Law as the former was concerned with making an amendment to a pleading in an existing proceeding, but the latter was concerned with the commencement of a proceeding. The Full Court did not accept that s 59(2B) of the *Federal Court of Australia Act* 1976 was capable of having an operation in circumstances only where the limitation in question was of a procedural nature.

[40] The Full Court in *Rodgers v Commissioner of Taxation* considered the decision in *David Grant & Co Pty Ltd (Receiver appointed) v Westpac Banking Corporation* (1995) 184 CLR 265 ("*David Grant*"). That case concerned the time limitation on the making of an application to set aside a statutory demand made under s 459G of the *Law* and whether s 1322 of the *Law* authorised an extension of time for compliance with the relevant time limitation to be granted.

[41] Section 459G of the *Law* provided:

> "(1) **[Application to set aside statutory demand]** A company may apply to the Court for an order setting aside a statutory demand served on the company.
> (2) **[Time limit on application]** An application may only be made within 21 days after the demand is so served.
> (3) **[Requirements for effective application]** An application is made in accordance with this section only if, within those 21 days:
> (a) an affidavit supporting the application is filed with the Court; and
> (b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company."

[42] The leading judgment in *David Grant* was given by Gummow J, with whom all other members of the Court agreed. He stated at 277 in respect of the phrase "an application may only be made within 21 days" in s 459G(2) of the *Law*:

> "The force of the term 'may only' is to define the jurisdiction of the court by imposing a requirement as to time as an essential condition of the new right conferred by s 459G. An integer or element of the right created by s 459G is its exercise by application made within the time specified."

[43] The Full Court in *Rodgers v Commissioner of Taxation* observed at 67 in respect of this statement:

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

[44] Rolfe J of the Supreme Court of New South Wales had to consider the relationship between s 588FF(3) of the *Law* and the relevant provisions of the *Supreme Court Rules* 1970 (NSW) in *Star v National Australia Bank Ltd* (1990) 30 ACSR 583. The liquidator of the relevant companies had commenced a proceeding to set aside transactions alleged to be voidable pursuant to s 588FE of the *Law*. The liquidator sought to amend the claim in the proceeding to include an application against the same creditor to set aside further transactions alleged to be voidable. The application to amend was brought more than three years after the relation-back day and no application to extend the time under s 588FF(3) of the *Law* to bring the application in relation to the further transactions had been made within the three year period.

[45] Rolfe J concluded (at 597) that while there was some difference in wording between ss 459G and 588FF of the *Law*, each section required that an application may be made to the court for relief within a specified period from a specified and certain date and that having regard to the scheme of the *Law* and the terms of the explanatory memorandum for the *Corporate Law Reform Bill* 1992, which introduced both provisions into the *Law,* there was no relevant distinction between the provisions. Rolfe J therefore stated at 598:

> "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). I come to that conclusion because the temporal requirements impose a condition on the exercise by the court of its jurisdiction. Once the three year period expires and there is no application made within it to extend the period, the rights conferred by s 588FF are lost."

[46] Rolfe J also had regard in construing s 588FF(3) to the recommendation of the *Law Reform Commission's General Insolvency Inquiry* ("the Harmer Report") (para 688) which was adopted by the enactment of s588FF(3) which he considered supported his view as to the construction of s 588FF(3):

> "Actions by a liquidator to recover the proceeds of a void transaction, a preference, a transaction at an under value or a transaction with intent to defeat should be commenced within a reasonable time. The Commission proposed in DP32 (para 454) that a liquidator should have three years to commence such an action, although the Court might extend that time. Under the existing law the time period would be six years (for example, Bankruptcy Act s 127). Many submissions to the Commission complained about the sometimes inordinate delay in commencing proceedings in respect of voidable transactions. In addition there have been recent judicial observations critical of the general delays associated with the winding up of insolvent companies. It is therefore considered desirable to place liquidators under a more rigorous but, nonetheless,

> reasonable time limitation for taking action under these provisions. The Commission recommends accordingly."

[47] Although Rolfe J did not consider that the court had power under s 588FF of the *Law* to extend the time to make an application under that provision, he was able to dispose of the matter before him on the basis of the decision of the Full Court in *Rodgers v Commissioner of Taxation* that s 588FF(3) was concerned only with the initial application and not with an amendment to it. Rolfe J stated at 602:

> "I have come to the view that the legislation and rules under which amendments are permitted in this court are such that an application to amend a proceeding brought in compliance with s 588FF(3) may be granted, and that it is proper for me to follow the Full Court's construction of s 588FF(3) to the effect that it is not concerned with that topic, but only with the bringing of an original application. Far from being satisfied that it is wrong, I consider that it is correct and gives full rein to the extensive powers of amendment. The amendment provisions clearly have work to do, and they are unfettered by the restraints s 588FF(3) places on the commencement of original applications. There is, accordingly, no inconsistency between s 588FF(3) and the amendment provisions of this court."

Rolfe J gave leave to the liquidator to make the amendments to impugn the

additional transactions.

[48] Neither the decisions in *Rodgers v Commissioner of Taxation* nor *Star v National Australia Bank Ltd* appear to have been referred to Williams J (as he then was) in *Tagoori Pty Ltd (in liq) v Lee* [2001] 2 Qd R 98. The liquidator had commenced an action against one Richard Lee trading as Lees Electrical within the time period provided by s 588FF(3) of the *Law* in order to recover a preference. The creditor defended the claim on the basis that it was not he, but his company Lees Electrical (Qld) Pty Ltd, that had traded with the relevant company. The application to join Lees Electrical (Qld) Pty Ltd was made after the expiry of the period of three years provided for in s 588FF(3)(a) of the *Law*. The liquidator sought to rely on r 69 *UCPR* to enlarge the time for the joinder of Lees Electrical (Qld) Pty Ltd. Williams J considered that the wording of s 588FF(3) was identical with that found in s 459G(2) of the *Law* and applied *David Grant*. Williams J stated 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. This is not a case where a proceeding has been commenced and it is sought to make some amendment to the claim after the expiration of the time limited by the section.
>
> The addition of a company as a defendant to the action is commencing a fresh proceeding against that added defendant and that cannot be done once the time limit imposed by the section has expired."

[49] In view of the significance of the decision in *David Grant* in these cases, it is appropriate to set out in greater detail the reasoning in that case.

[50] Section 459G of the *Law* was contained within Part 5.4 which was inserted by the *Corporate Law Reform Act* 1992 (Cth) ("the 1992 Act"). Part 5.4 was enacted, as part of the implementation of the Harmer Report which was described by Gummow J at 270 as constituting "a legislative scheme for quick resolution of the issue of solvency and the determination of whether the company should be wound up without the interposition of disputes about debts, unless they are raised promptly". Gummow J observed at 271 that s 1322(4)(d) of the *Law* had preceded the 1992 Act and then at 276 that s 459G contained a specific limitation as to the time within which an application may be made which was a later and more specific provision inserted in the *Law* by the 1992 Act.

[51] Gummow J accepted the proposition that it was impossible to identify the function or utility of the word "only" in s 459G(2) if it did not mean what it said, making reference to the statement by McPherson JA in *Cavetina Pty Ltd v Synthetic Dye Works Industries Pty Ltd* (1994) 14 ACSR 274, 281:

> "That would raise the question whether it was open to the court acting under s 1322 to extend the period of 21 days specified in s 459G(2). To answer that question in the affirmative would, in my respectful opinion, deprive the word 'only' in s 459G(2) of all effect. If the word is not intended to have its literal meaning, then it is difficult to see what purpose was served by including it in subs (2) at all. The opposite conclusion would presumably have the result that s 459G(2) is to be read as if it provided 'An application may only be made within 21 days after the demand is served or *within such extended time as the court under s 1322 may order*'. Such a result could have been achieved by omitting the word 'only' altogether. Hence, it remains impossible to identify the function or utility of the word 'only' in s 459G(2) if it does not mean what it says, which is that the application is to be made within 21 days of service of the demand, and not at some time thereafter."

[52] Gummow J also stated (at 277) that it was significant that the scheme established by the new Part 5.4 contained specific provisions conferring upon the court an express power to extend time and referred to ss 459F(2) and 459R(2) of the *Law*. Gummow J at 278 referred to the presumption of insolvency under s 459C(2) of the *Law* which he described as "an important element of the scheme of Pt 5.4". Gummow J concluded at 278:

> "These matters emphasise the importance of s 459G as an integral part of the particular scheme established by Pt 5.4. Paragraph (d) of s 1322(4) empowers the court to make an order where the period concerned ended before the application to extend it is made. An application to set aside the demand made not within the twenty-one days specified in s 459G but within another period allowed pursuant to an order under s 1322(4), could not modify what otherwise would be the operation of the definition of the 'period for compliance' with the statutory demand set out in s 459F (2). That in turn would not change the answer to the question posed under s 459C (2) as to whether the court must presume the company to be insolvent because it had, within the period there specified, failed 'as defined by section 459F' to comply with the statutory demand.
>
> For these reasons, the requirement in s 459G that the application to the court for which it provides be made only within twenty-one days

> after service of the demand should not be treated as supplemented or qualified by the operation of s 1322(4)."

[53] The decision of Austin J of the Supreme Court of New South Wales in *Brown v DML (No 6)* was concerned with an application by the plaintiffs who were liquidators to join a creditor as a defendant in a proceeding which had been commenced after an order had been obtained *ex parte* under s 588FF(3)(b) of the *Law* extending the time for bringing proceedings against various persons including that creditor. The *ex parte* order had been set aside by Austin J to the extent that it affected that creditor. Under the relevant Supreme Court Rules, if the application had been made to join the creditor as a party to the application for extension of time, the joinder would have taken effect after the three year period. The plaintiffs were successful in invoking s 1322(4)(d) of the Act to extend the time for making an application under s 588FF(3)(b) to the date upon which the order for joinder of the creditor would take effect.

[54] Section 1322(4)(d) of the Act provides:

> "Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:
>
> …
>
> (d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting taking such a proceeding;
>
> and may make such consequential or ancillary orders as the Court thinks fit."

[55] Austin J reached the conclusion that the reasoning in *David Grant* did 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 (at 676). Austin J considered that the three year time limit in s 588FF(3) was not an integral part of any wider legislative structure (at 678) and stated at 679:

> "The legislative policy is to discourage liquidators from delaying or deferring action with respect to voidable transactions until their other tasks have been carried out. It is not a policy of setting up an inescapable time limit regardless of individual circumstances. It is not incompatible with the policy to allow the court to extend the time for the liquidator to make an application to challenge a voidable transaction. Indeed, s 588FF (3) (b) expressly acknowledges that the court may do so. Nor is it incompatible with the legislative policy, in cases where the prerequisites for the application of s 1322 are made out, for the court to permit an application to be made, for an extension of the time for making an application in respect of voidable transactions, after the expiration of the time limit set out in s 588FF (3) (b)."

[56] Austin J considered that if McPherson JA's observations in respect of the word "only" had wider application than s 459G, he disagreed with the observations and stated at 680:

> "In my opinion 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."

[57] Austin J concluded that on its proper construction, s 588FF(3) does not exclude the application of s 1322 and stated at 681:

> "Here, the legislative scheme of Pt 5.7B Div 2 was, as I have said, an evolution of previous provisions in companies and bankruptcy legislation, that had existed in some form or another for many years. The provision that became s 1322 was gradually extended over time so as to be available, by the time of the Companies Codes and then the Corporations Law, to extend time limits set by the legislation itself. In its modern form, s 1322 was already in place when the 1992 amendments introduced the present Pt 5.7B Div 2, but this is not a case where a new, specific and exclusive statutory scheme with its own time limits was superimposed upon a more general statutory structure. The situation is distinguishable from the new legislative scheme for statutory demands introduced in Pt 5.4. I regard the fact that s 1322 (in its present form) preceded s 588FF(3) (in its present form) as having no significance to the question of construction."

[58] Although this conclusion was contrary to that of Rolfe J in *Star v National Australia Bank Ltd*, Austin J expressly decided not to follow Rolfe J's view because of Austin J's analysis of the policy considerations and he disagreed with Rolfe J's conclusion that the statutory contexts of ss 459G and 588FF(3) were indistinguishable.

[59] The issue of whether the relevant Supreme Court rules applied to the joinder of the creditor to the plaintiffs' existing proceeding under s 588FF(1) had been dealt with by Austin J in *Brown v DML Resources Pty Ltd (in liq) (No 3)*. Austin J concluded that the order for joinder of the creditor would be made under the relevant Supreme Court Rules which would have had the effect that the date of commencement of the proceeding against the creditor would have been deemed to have been the date on which the amendment adding the creditor as a defendant was made. In respect of an argument that the rule in the Supreme Court Rules was a State law inconsistent with a Commonwealth statutory provision, Austin J stated at 486-487:

> "Section 588FF(3) refers to an 'application'. The meaning of that word, not defined by the Corporations Act, is left to be spelled out by the procedural rules of the courts in which such an application may be brought. Thus, it is for the rules of Court to stipulate that the application is by originating process, and to prescribe the form of the application. Equally, it is for the rules of Court to stipulate when a person may be joined as a party to such an application, and with what temporal consequences. Therefore there is no direct inconsistency between Part 8 rule 11(3) and s 588FF(3). Nor does the Corporations Act exhibit an intention on the part of the Commonwealth legislature to cover any relevant field. This is because s 5E(1) of the Act declares that the Corporations legislation is not intended to exclude or limit the concurrent operation of any law of a State - including,

> one may infer, a law with respect to Court procedure and the joinder of parties."

[60] That view was confirmed by Austin J in *Brown v DML (No 6)*, where he stated at 682:

> "The word 'only' in s 588FF (3) governs the time periods set by the subsection. But the subsection leaves it to the rules of the various Courts to explain what an 'application' is and when an application is "made".

[61] It was raised before Austin J that there were discrepancies between the rules of various courts with respect to joinder of defendants. Austin J concluded at 695:

> "However, inevitably there will be some differences in outcome in applications of all kinds brought under the Corporations Act, depending upon the identity and jurisdiction of the court in which the application is made. The Corporations Act leaves it to rules of the Federal and State Supreme courts (all which are 'courts' for the purposes of the Corporations Act: s 58AA) to determine the procedures by which an application is made, and to deal with ancillary matters such as the gathering of evidence by discovery and subpoenas. In the Federal Court and this court the respective Evidence Acts 1995 (Cth and NSW) apply, but in other Supreme Courts that legislation does not apply. And various adjectival state and Commonwealth laws could produce differences of outcome, quite apart from the elevated status of state laws conferred by Pt 1.1A of the Corporations Act. A degree of disuniformity is therefore inevitable from time to time."

[62] Unusual facts resulted in an application by the administrator of the relevant company in *Re Aura Commercial Interiors Pty Ltd* (2002) 20 ACLC 904 for an order under s 1322(4)(d) of the Act that the time within which any liquidator appointed to the company may bring an application seeking to extend time pursuant to s 588FF(3)(b) be extended to 20 April 2003. The day on which the application was heard was the last day of the three year period within which any application under s 588FF(1) of the Act could be made seeking to challenge voidable transactions. The company had no liquidator by whom an application under s 588FF(3)(b) could be made. Barrett J followed *Brown v DML (No 6)* in concluding that the period of three years where mentioned in s 588FF(3)(b) is a "period for … instituting or taking any proceeding under this Act" as referred to in s 1322(4)(d) and that the s 1322(4)(d) power is available to extend the period within which an extension of time under s 588FF(3)(b) may be made. It was an essential step in Barrett J's reasoning 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) and does not apply to the period of three years where it is mentioned in s 588FF(3)(b).

[63] It is apparent that these authorities are not all reconcilable. As I deal with the specific arguments raised on this application, I will indicate which and to what extent of the authorities that it is relevant to apply.

Application of rr 69, 74(5) and 377(1)(b) *UCPR* and s 81 *SCA*

[64] Section 588FF(3) of the Act sets the time period for an application pursuant to s 588FF(1) of the Act. At the very least it is necessary to have recourse to the rules of court which can be applied to that application. As set out above, I have concluded that it is the *Corporations Law Rules* which apply to the application.

[65] As the *Corporations Law Rules* do not deal with the joinder of a new party to an existing application under the Act, it is appropriate to consider whether any of the rules in the *UCPR* are relevant and not inconsistent with the Act and therefore able to be applied, relying on r 1.3(2) of the *Corporations Law Rules*.

[66] Rule 69(1) of the *UCPR* provides:

> "The court may at any stage of a proceeding order that –
>
> (a) a person who has been improperly or unnecessarily included as a party, or who has ceased to be an appropriate or necessary party, be removed from the proceeding; or
>
> (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."

[67] Rule 69(2) prohibits the court from including or substituting a party "after the end of a relevant limitation period" unless one of the matters set out in r 69(2) applies. The term "limitation period" is defined in the dictionary found in Schedule 4 to the *UCPR*. It is defined to mean "a limitation period under the Limitation of Actions Act 1974". Although s 32A of the *Acts Interpretation Act* 1954 states:

> "Definitions in or applicable to an Act apply except so far as the context or subject matter otherwise indicates or requires."

there is nothing in the context or subject matter of r 69 that would support reading the reference to "limitation period" other than as defined in Schedule 4 to the *UCPR*.

[68] 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).

[69] The liquidators rely on s 81 of the *SCA* which provides:

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

[70] Section 81 was inserted in the *SCA* by s 17 of the *Civil Justice Reform Act* 1998 which relevantly commenced on 1 July 1999 to coincide with the commencement of the *UCPR*. Section 17 inserted Part 7 into the *SCA*. It was stated in the explanatory memorandum which pertains to that Act that:

> "**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."

[71] In respect of Part 7 of the *SCA*, the explanatory memorandum stated:

> "The provisions in this part will work in conjunction with the new uniform court rules. These provisions are those parts of that scheme that it is most appropriate, in light of the fundamental legislative principles (FLPs), to reflect in principal rather than subordinate legislation."

[72] The effect of s 81 of the *SCA* was considered by the Court of Appeal in *Draney v Barry* [2002] 1 Qd R 145. That appeal was concerned with whether causes of action could be added after the expiry of the limitation period under r 376 of the *UCPR*. Pincus JA (with whom McMurdo P agreed on this aspect) considered that even if an application for adding a cause of action did not comply with r 376 which deals with amendment after the end of a relevant period of limitation, the court had power to do so under s 81 of the *SCA* stating at 156:

> "It gives the Supreme Court power to amend pleadings to include or substitute a new cause of action or add a new party; it does not include any provision restricting the scope of that power …
> Section 81 is on the face of it an independent source of power to allow an amendment so as to add a cause of action out of time – and, of course, to take other steps mentioned in the section. It is not easy to reconcile the terms of s 81, which came into force on 1 July 1999 (1999 SL 70), with the apparently more restrictive provision for amendment in r 376. …
> It is my opinion that when applications do not pass the test set out in r 376(4)(b) the court has a general discretion under s 81 of the *Supreme Court of Queensland Act* 1991 to add a cause of action out of time. In exercising that discretion, the court should have regard to the fact that the effect of adding a new cause of action out of time is equivalent to an evasion of the provisions of the *Limitation of Actions Act* 1974, so some adequate ground will be required, in order to justify such an amendment. Since the discretion given by s 81 is not, however, the subject of any express limitation, it appears to me that the court must always have a discretion to add a cause of action out of time where the interests of justice demand that."

[73] The other member of the Court in *Draney v Barry*, Thomas JA, also accepted that s 81 of the *SCA* conferred power to allow amendments to proceedings after a period of limitation had expired, but did not consider that the power should be exercised on principles different from those contained in the *UCPR* and, in particular, could not envisage any situation where a court would act upon any different principles under s 81 of the *SCA* than those upon which it was required to act by r 376. The statement in the explanatory memorandum which explains why provisions such as s 81 were inserted in the *SCA*, but also that they were intended to work in conjunction with the *UCPR* supports the approach of Thomas JA. In the light of the majority view, it is not now possible to apply the approach of Thomas JA.

[74] Although *Draney v Barry* involved the relationship between s 81 of the *SCA* and r 376 of the *UCPR*, the conclusion of the majority in respect of the independent operation of s 81 of *SCA* must be able to be applied to the relationship between s 81 and other rules of the *UCPR* which cover some aspect of the subject matter of s 81 of the *SCA*. As s 81 of the *SCA* expressly applies to amendment of an application to add a new party, it must be a source of power to amend an application in the Supreme Court to add a new party, apart from r 69 of the *UCPR*.

[75] That raises the issue whether s 81 of the *SCA* can apply to an application under s 588FF(3) of the Act. Unless there is inconsistency between s 81 of the *SCA* and s 588FF(3) of the Act, s 81 of the *SCA* must be part of the laws of Queensland relating to procedure which s 79 of the *Judiciary Act* 1903 makes applicable to a proceeding in the Supreme Court exercising federal jurisdiction.

[76] On the question of inconsistency, there is no substantial difference between provisions dealing with amendment to include additional claims and provisions dealing with the joinder of a new party. I therefore consider that I should follow the same approach taken by the Full Court of the Federal Court in *Rodgers v Commissioner of Taxation* which confined s 588FF(3) to regulating the timing of an application under s 588FF(1) or for the extension of time for making such an application. It is then permissible to have regard to the procedural laws of this State for determining whether the joinder of a new party can be effected. This is also consistent with the conclusion reached by Rolfe J in *Star v National Australia Bank Ltd* (at 602) and the approach of Austin J in *Brown v DML Resources Pty Ltd (in liq)(No 3)* (at 486-487), but inconsistent with the result in *Tagoori Pty Ltd (in liq) v Lee*. Apart from the fact that the Full Court's decision in *Rodgers v Commissioner of Taxation* and the decision in *Star v National Australia Bank Ltd* do not appear to have been referred to during the argument in *Tagoori Pty Ltd (in liq) v* Lee, there was no argument based on s 81 of the *SCA* advanced in that case.

[77] Section 81(2)(c) of the *SCA* permits the court to make an amendment to an application even though "a relevant period of limitation, current when the proceeding was starting, has ended". Section 81(3) of the *SCA* expressly provides that s 81 applies despite the *Limitation of Actions Act* 1974. There is no definition of "relevant period of limitation" for the purposes of the *SCA*. It is argued on behalf of Stramit that the reference to the *Limitation of Actions Act* 1974 in s 81(3) of the *SCA* must be taken to qualify the reference to "period of limitation" in s 81(2)(c) of the *SCA*. There is nothing in s 81 which itself suggests that the reference to "period of limitation" in s 81(2)(c) should be limited by the reference in s 81(3). In view of the remedial nature of s 81 of the *SCA*, it would be inappropriate to read down the words "period of limitation" in s 81(2)(c), as suggested by Stramit.

[78] As I have found that s 81 of the *SCA* is not inconsistent with s 588FF(3) of the Act, it is not necessary to deal with the arguments that were advanced by the parties on the assumption that s 81 of the *SCA* was directly inconsistent with s 588FF(3) of the Act.

[79] One issue that did not arise for consideration in *Draney v Barry* was whether an order for joinder made in reliance on s 81 of the *SCA* was subject to the provisions of the *UCPR* which would usually regulate the implementation of such an order. One view is that it is implicit in s 81 of the *SCA* that if an order is made pursuant to that provision, it is effective, even though the amendment resulting in the addition of a new party is ordered to be made when the relevant period of limitation that was current, when the proceeding was started, has ended. Another view is that where an order is made in reliance on s 81 of the *SCA*, the *UCPR*, to the extent that it provides for the consequences of such an order, are applicable.

[80] The differing outcomes that could result from these two views can be illustrated by reference to r 74 of the *UCPR* which deals with the steps which must be taken when an order is made "changing or affecting the identity or designation of a party". It provides for the filing and serving of the amended originating process and the serving of the relevant order. Rule 74(4) and (5) states:

> "(4) If an order is made including or substituting a person as a defendant or respondent, the proceeding against the new defendant or respondent starts on the filing of the amended copy of the originating process.
> (5) However, for a limitation period, the proceeding against the new defendant or respondent is taken to have started when the proceeding started against the original defendant or respondent unless the court otherwise orders."

[81] The reference to "a limitation period" in r 74(5) is dictated by the meaning given to "limitation period" in Schedule 4 of the *UCPR*. As the dictionary in Schedule 4 to the *UCPR* specifies that "limitation period" means a limitation period under the *Limitation of Actions Act* 1974 (and there is no basis in the context or subject matter of r 74 that would support giving a meaning to "limitation period" other than as provided for in the dictionary in Schedule 4 to the *UCPR*), r 74(5) could not be relied on in respect of the limitation period under s 588FF(3)(b) of the Act.

[82] The next issue that would arise would be whether r 74(4) of the *UCPR* would apply to an order made under s 81 of the *SCA* joining Stramit to the liquidators' application filed on 31 August 2000. If r 74(4) of the *UCPR* did apply, it would negate the effect of an order being made under s 81 of the *SCA* allowing the joinder of a new party to an existing application, despite a relevant limitation period having expired. If r 74(4) did not apply, it would mean that no effect was being given to rules of the *UCPR* which on their terms appear applicable to the sort of order which s 81 of the *SCA* permits to be made.

[83] But for the decision in *Draney v Barry*, I would have favoured the approach that the express rules in the *UCPR* which provide for the joinder of a party and the implementation of any such order were intended to provide the means for carrying into effect an order made in exercise of the power conferred by s 81 of the *SCA*. On the basis that s 81 of the *SCA* is an independent source of power to add a new party to an existing application and not circumscribed by the express provisions of the

UCPR on the same topic, the conclusion must follow, however, that there is no room for the operation of r 74 of the *UCPR* and an order amending an existing proceeding by adding a new party made pursuant to s 81 of the *SCA* takes effect as contemplated by s 81 of the *SCA*, removing any impediment that would otherwise exist as a result of an expired limitation period.

[84] The liquidators also seek to rely on r 377(1)(b) of the *UCPR* as a source of power for an order to be made amending the existing application by adding Stramit as a party with the leave of the court. Rule 377 provides for the procedure to be adopted for making amendments to an originating process. It is supplementary to rr 375 and 376 which are concerned with the power of the court to allow amendments. Rule 376 has no application as it applies when the amendment is made after the end of "a relevant limitation period" which takes its meaning from the definition in Schedule 4 to the *UCPR*. Although r 375 is unrestricted in its terms, it is difficult to suggest a basis on which it can be given an operation that is different to and not circumscribed by s 81 of the *SCA*.

[85] I have therefore concluded that s 81 of the *SCA* provides the 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 period in s 588FF(3)(b) of the Act, and that r 74 of the *UCPR* has no application to an order made which allows for the addition of a new party pursuant to s 81 of the *SCA*.

Whether order for joinder of Stramit should be made

[86] In order to deal with the matters relevant to the exercise of the discretion as to whether or not to order the joinder of Stramit, it is necessary to summarise the history of the liquidators' pursuit of the claims against Stramit.

[87] ABI was in the business of manufacturing and marketing roll-form steel roofing, fascia and rainwater goods. Stramit was a supplier to ABI of fabricated steel building products.

[88] The liquidators as early as 3 March 1998 instructed solicitors to make demand on Stramit for recovery of three payments which were alleged to be unfair preferential payments made in the relation-back period –

Date	**Amount**
15 May 1997	$567,445.53
22 August 1997	$200,000.00
29 August 1997	$659,210.19
Total	$1,426,655.72

[89] The liquidators' solicitors sent a further letter to Stramit's solicitors dated 12 March 1998 advising of instructions to issue proceedings against Stramit. Stramit's solicitors responded by letter dated 17 March 1998 advising that they had instructions to accept service of proceedings.

[90] It appears that Stramit did not become aware of the proceeding S8117 of 2001 or the order which I had made on 7 September 2000, until the claim and statement of claim were served on Stramit.

[91] The reasons that were advanced on the application that was heard by me on 7 September 2000 for seeking the extension under s 588FF(3)(b) were that it had taken 12 months after liquidation to effect the sale of all six branches of ABI; there were a large number of retention of title claims to be dealt with, one of which involving $700,000 was not resolved until May 2000; there was existing litigation by ABI in the form of an appeal to the Full Federal Court in relation to an action against Stramit that was eventually dismissed by consent in June 2000; there were a large number of debtors which were being pursued in litigation; and it had taken the liquidators' staff 12 months to try and reinstate the records of ABI in order to identify preference payments and find sufficient evidence relevant to proving the date of insolvency.

[92] The liquidators therefore decided it was necessary to obtain an extension of time in which to allow for issue of unfair preference proceedings, because their investigations into the insolvency of ABI were extensive and were not completed at the expiry of the limitation period. The records of ABI recovered by the liquidators amounted to approximately 180 boxes. It was also the liquidators' intention to obtain litigation funding and they believed that they would have more chance of successfully obtaining that funding, if they were able to present a comprehensive insolvency report.

[93] The liquidators' reason for making the application filed on 31 August 2000 on an *ex parte* basis which was not controverted was that they were advised by their solicitors that it was the practice at the time to make such applications on that basis.

[94] The liquidators' firm of chartered accountants prepared an extensive report dated 31 August 2001 to determine the date of insolvency of ABI. That report expressed the opinion that ABI was insolvent as at 31 December 1996, and perhaps as early as 12 July 1996, and sets out a number of transactions to support that opinion. The liquidators estimate that the time spent to compile the insolvency report was in excess of 550 "man hours" and that the liquidators' firm incurred approximately $120,000 in fees in relation to preparation of the report. It appears that the liquidators have used the report to obtain litigation funding for the proceeding against Stramit to recover the alleged preferences.

[95] The insolvency report was served by the liquidators on Stramit with the claim and statement of claim in proceeding S8117 of 2001 which were filed on 10 September 2001. Stramit's notice of intention to defend and defence were filed on 26 October 2001. The liquidators' reply was filed on 20 November 2001. On 22 November 2001 Stramit requested further and better particulars of the reply which were not supplied until 6 March 2002.

[96] The solicitor for Stramit became aware of the decision in *Brown v DML Resources Pty Ltd (in liq) (No 2)* (2001) 39 ACSR 219 in early March 2002 and briefed counsel to obtain advice in respect of making the application which was eventually filed on 16 April 2002 and determined by Chesterman J.

[97] Mr Greig, in his affidavit filed on 24 April 2002, deposes that if the order made by me on 7 September 2000 had not been made, he would have issued instructions to file the proceeding against Stramit immediately, based on the facts available to him at that time. Mr Greig's preference, however, (which was not unreasonable) was for bringing the proceeding when it could be properly particularised, as otherwise his

experience was that the proceedings were more costly and caused delay: para 14, affidavit J L Greig filed 6 June 2002.

[98] The proceeding by the liquidators against Stramit has proceeded to disclosure stage. The liquidators have incurred fees of between $20,000 and $30,000 in relation to preparation for disclosure. A total sum of $2m is being sought by the liquidators against creditors including Stramit. The liquidators estimate that if they recover that amount, subject to creditors' proving their claims, a return to unsecured creditors of at least 10 cents in the dollar would result.

[99] The purpose of this joinder application is to enable the liquidators to ultimately continue with proceeding S8117 of 2001 against Stramit. If the joinder order were made, Stramit will not be in a position of having to commence to investigate the liquidators' claims at this stage, as notice of the claims was given when the statement of claim was served on 11 September 2001. Although the liquidators did not pursue the claims against Stramit between the correspondence in March 1998 and service of the claim and statement of claim in September 2001 in a manner which gave Stramit notice of the liquidators' intention to keep pursuing claims, there is no material filed on behalf of Stramit which points to specific prejudice as a result of the delay until September 2001. Although Mr Sofronoff QC on behalf of Stramit made a submission based on the importance of limitation periods, relying on the observations of McHugh J in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 554-555, it remains a matter of giving weight to the fact that joinder outside a limitation period destroys a defence based on the limitation period, rather than treating the mere fact of joinder outside the limitation period itself as decisive of the application.

[100] 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. The liquidators' report dated 31 August 2001 together with the matters identified in the liquidators' outline of submissions (Ex 1) as relevant to a preliminary review of the merits of the claims support the submission of the liquidators that the prospects of success appear to be in their favour in respect of the claims against Stramit and that was not the subject of contrary submissions on behalf of Stramit. I therefore should proceed on the basis that the prospects of success of the liquidators justify their pursuit of the claims against Stramit.

[101] 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.

Application under s 1322(4)(d) of the Act

[102] Mr Fraser QC on behalf of the liquidators requested that all sources of power for making the orders sought by the liquidators be identified. Section 1322(4)(d) of the Act could be relevant to this application in two ways. First, it is relied on by the liquidators as providing an alternative source of power to enable the court to make an order pursuant to s 588FF(3)(a) extending the three year period for the liquidators to make the application under s 588FF(1) against Stramit. Second, if the order for joinder of Stramit were made relying on the *UCPR* (for which I have found no basis to do so), so that r 74(4) gave the order adding Stramit effect from the filing of the amended copy of the originating application, that would amount to a circumstance similar to that which resulted in Austin J in *Brown v DML (No 6)* relying on s 1322(4)(d) to extend the time for making an application for extension under s 588FF(3)(b) until the date on which the joinder took effect.

[103] There is conflicting authority as to whether or not the power conferred by s 1322(4)(d) of the Act can be used to extend time for making an application under s 588FF(3). As a preliminary matter, I have to decide whether I follow the approach of Austin J in *Brown v DML (No 6)* or the approach of Rolfe J in *Star v National Australia Bank Ltd*.

[104] Although the order made by Austin J in *Brown v DML (No 6)* applied s 1322(4)(d) to extending the time for an application under s 588FF(3)(b), Austin J was prepared to hold that s 1322(4)(d) was also available for extending the time for an application under s 588FF(3)(a). He stated at 689:

> "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."

[105] It is a matter of construction of s 588FF(3), as to whether or not s 1322(4)(d) can be used to extend the time limit under either paragraph. Section 588FF(3) is a distinctive provision in that it provides not only for the time limit for a proceeding to be commenced under s 588FF(1), but also provides for the time limit for making an application for an extension of that period. Section 588FF(3) can be characterised as a specific provision which provides for a time limit for bringing a particular application and for the time limit for bringing the application for an extension of the time limit for bringing the particular application.

[106] If s 1322(4)(d) of the Act could be relied on to extend the period of three years under 588FF(3)(a), it makes 588FF(3)(b) otiose. That is not critical, if that is the

construction that the context or legislative history of s 588FF(3) requires. It would be an odd result, however. The difficulty with that sort of result was recognised, in effect, and an attempt made to overcome it by Barrett J in *Re Aura Commercial Interiors Pty Ltd* by treating s 588FF(3)(b) as an indication that s 1322(4)(d) was not to apply to s 588FF(3)(a), but could apply to the same time period of three years under s 588FF(3)(b). That must be an unnatural construction of s 588FF(3), when the introductory words to paragraphs (a) and (b) in s 588FF(3) qualify both paragraphs.

[107] Those introductory words are "An application under subsection (1) may only be made". That provision was drafted at the same time as s 459G(2). Each provision was inserted in the *Law* for a distinct purpose identified by the Harmer Report. Even though I agree with the observations made by Austin J in *Brown v DML (No 6)* that each provision was part of a distinct legislative scheme and there are distinguishing features about each of the schemes, the fact remains that in the context of each respective legislative scheme, the timing of the making of the applications to which ss 459G(2) and 588FF(3) relate were intended to be the subject of specific reform.

[108] I have difficulty with the construction given by Austin J to s 588FF(3) which qualifies the word "only" by the addition of the words "unless the court is satisfied that a curative order should be made under s 1322" (at 680). The addition of that qualification makes the word "only" otiose and does not provide a reason for paragraph (b) being included in the provision.

[109] Austin J was able to distinguish the decision in *David Grant* on the basis that some of the matters relied upon by Gummow J in construing s 459G(2) could not apply to s 588FF(3). It is apparent in *David Grant* that Gummow J put forward all possible matters on which reliance could be placed in order to construe s 459G(2) as not permitting an application under s 1322(4)(d) to be made to extend the time limit otherwise provided for in s 459G(2). It is not necessarily apparent that if all those matters did not exist that Gummow J would not have come to the same conclusion in respect of s 459G(2). This was recognised by the approach of Rolfe J in *Star v National Australia Bank Ltd*.

[110] I have therefore concluded that I will apply the approach taken by Rolfe J in *Star v National Australia Bank Ltd* to construing s 588FF(3) in an analogous way to which s 459G(2) was construed in *David Grant*. That construction has the advantage of giving effect to the self-contained nature of s 588FF(3). There is no power to make any order in this matter extending any time limit under s 588FF(3) in reliance on s 1322(4)(d) of the Act.

Whether order for extension of time pursuant to s 588FF(3)(b) should be made

[111] The matters relevant to whether or not an order should be made against Stramit on the basis that it has been joined as a respondent to the liquidators' application filed on 31 August 2000 are similar to those which I identified as being relevant to whether or not the joinder order should have been made.

[112] For the same reasons that I concluded that it was appropriate to make the joinder order, I am prepared to extend the time under s 588FF(3)(b) of the Act within which an application may be brought by the applicants against Stramit under s 588FF(1).

[113] There were no submissions directed to the date to which that extension should be ordered. The only date that was identified in the application of the liquidators filed on 5 June 2002 was 30 June 2002 which presumably was chosen as a date being subsequent to the due date for the hearing of this application on 13 June 2002. As proceeding S8117 of 2001 was commenced on 10 September 2001, that appears to be the appropriate date to which the extension should be granted, as that would then regularise that proceeding.

Other matters

[114] As I will make the order which the liquidators require in respect of their application filed on 31 August 2000 extending the time within which the liquidators may bring their application under s 588FF(1) against Stramit until 10 September 2001, it follows that Stramit cannot be successful in its application for summary judgment in respect of proceeding S8117 of 2001. That application must be dismissed.

[115] As the making of the order pursuant to s 588FF(3)(b) of the Act will necessitate an amendment by the liquidators to the statement of claim in proceeding S8117 of 2001 which will require consequential amendments to the defence, there is no point in dealing with the liquidators' application pursuant to r 371 seeking an order setting aside the amended defence nor the application of Stramit seeking leave to withdraw the admission of the allegation in para 18 of the statement of claim.

Orders

[116] The orders which I make are:

S7589 of 2000

1. Pursuant to s 81 of the *Supreme Court of Queensland Act* 1991 the originating application filed on 31 August 2000 be amended to add Stramit Corporation Ltd (ACN 005 010 195) as the second respondent, despite the expiry of the limitation periods under s 588FF(3) of the *Corporations Act* 2001 (Cth) at the date of this order.

2. Pursuant to s 588FF(3)(b) of the *Corporations Act* 2001 (Cth) the time within which an application may be brought by the applicants against Stramit Corporation Ltd (ACN 005 010 195) be extended to end on 10 September 2001.

S8117 of 2001

The defendant's application filed on 23 May 2002 be dismissed.

[117] I will hear submissions from the parties on the question of costs.