IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S CI 2016 03434

IN THE MATTER OF CONVECTOR GRAIN PTY LTD (IN LIQUIDATION)

BETWEEN:

CONVECTOR GRAIN PTY LTD (IN LIQUIDATION) — Appellant

and

LAUREVILLE PTY LTD — Respondent

JUDGE:	Robson J
WHERE HELD:	Melbourne
DATE OF HEARING:	14 November 2017
DATE OF JUDGMENT:	8 February 2018
CASE MAY BE CITED AS:	Re Convector Grain Pty Ltd (in liquidation) (No 2)
MEDIUM NEUTRAL CITATION:	[2018] VSC 33

PRACTICE AND PROCEDURE – Appeal from decision of associate judge – Originating process seeking relief under s 588FF of the *Corporations Act 2001* (Cth) – Originating process amended prior to the return date but after the expiry of time for service – Application to amend return date to validate service – Discretion invalidly exercised – Appeal allowed – Rules 3.02 and 36.03 *Supreme Court (General Civil Procedure) Rules 2015* (Vic).

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr L Glick QC with Mr P Fary	Frenkel Partners
For the Respondent	Mr A P Trichardt	Charles Fice Solicitors

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HIS HONOUR:

Introduction

1 On 25 August 2016, Convector Grain Pty Ltd (in liquidation) and its liquidators issued an originating process against Laureville Pty Ltd ('Laureville') seeking orders under s 588FF(1) of the *Corporations Act 2001* (Cth) ('*Corporations Act*'). For ease of reference I will refer to the plaintiffs collectively as 'Convector Grain.'

2 The originating process filed on 25 August 2016 was one of eight originating processes filed on that day on behalf of Convector Grain, and was filed one day within the applicable three-year limitation period.[1] The return date endorsed on the originating process initially fixed the matter to be heard by an associate judge on 16 September 2016. The *Supreme Court (Corporations) Rules 2013* ('*Corporations Rules*') require an originating process to be served on a defendant '[a]s soon as practicable after filing ... and, in any case, at least 5 days before the date fixed for hearing.'[2] In this case, that meant that Convector Grain ought to have served the originating process on Laureville by 11 September 2016 at the latest. However, service was not effected by that date. On 3 November 2016, Laureville's solicitor received service of an amended originating process with the return date of 3 February 2017.

3 On 17 November 2016, Laureville filed and served an interlocutory process seeking orders that the amendments made to the originating process served on Laureville, which changed the hearing date from '16/9/16' to '3 February 2017', be wholly disallowed and that the originating process be set aside.[3] On 22 November 2016, Convector Grain filed and served an interlocutory application seeking orders to regularise the originating process under s 1322(2) of the *Corporations Act*, to amend the originating process by substituting a new hearing date for the first return of the

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1 See *Corporations Act* s 588FF(3)(a)(i).

2 *Corporations Rules* r 2.7.

3 Laureville sought the orders pursuant to *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 36.03(3), 2.01(2)(a)–(b) ('*General Civil Procedure Rules*').

originating process, and/or to extend the time for service of the originating process.

4 The interlocutory applications of Convector Grain and Laureville were heard by an associate judge on 23 November 2016.

5 The associate judge published his judgment on 16 August 2017.[4] On Laureville's application, his Honour ordered that the amendment to the originating process filed 25 August 2016, which sought to change the hearing date from 16 September 2016 to 3 February 2017, be set aside and that service of the originating process dated 25 August 2017 be set aside.

6 On Convector Grain's application, his Honour ordered that its interlocutory application of 22 November 2016, as amended, be dismissed.

7 By notice of appeal dated 30 August 2017, Convector Grain sought orders that the appeal be allowed and that the order of the associate judge of 16 August 2017 be set aside.[5] Convector Grain also sought orders that, among other things, Convector Grain have leave, *nunc pro tunc*:

(a) to make such orders as are necessary under r 2.04(1), r 3.02 or otherwise to regularise the originating process;

(b) to amend the originating process by substituting a new hearing date for the first return date of the originating process; and/or

(c) to extend the time for service of the originating process.

8 By notice of contention dated 18 October 2017, Laureville contended that the judgment of 16 August 2017 should be affirmed on a ground of fact or law which was erroneously decided on the following grounds:

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4 *Re Convector Grain Pty Ltd (in liquidation)* [2017] VSC 473 (16 August 2017) ('*Re Convector Grain (No 1)*').

5 Convector Grain sought to amend ground 5 of their grounds of appeal by summons dated 14 September 2017. Laureville opposed the amendment. In the circumstances it is unnecessary to decide the issue.

(a) in the application of s 1322(4)(d) of the *Corporations Act*;

(b) in stating that the prothonotary amended the return date;

(c) in finding that his Honour's associate at all times acted under his supervision;

(d) in allowing Convector Grain to rely on the affidavits sworn by Claudia Baskett on 22 November 2016, and Krystelle Hsu on 23 November 2016.

9 Laureville's written submissions dated 12 November 2017 submit that r 36.03 was the appropriate rule that had to be complied with to amend the originating process, and that it was not complied with. Although this point was not in Laureville's notice of contention, I allowed Laureville to argue it.

10 For the following reasons, I allow the appeal of Convector Grain. I order that the orders of the associate judge dated 29 August 2017 on the interlocutory application of Laureville be set aside. On the appeal against the orders made 29 August 2017 by the associate judge dismissing Convector Grain's interlocutory application of 22 November 2017, I order that the orders be set aside. In lieu thereof, I order and declare that the amendment to the return date made by the prothonotary was valid and effective to amend the return date of the interlocutory process from 16 September 2016 to 3 February 2017.

The decision of the associate judge

11 In his Honour's reasons of 29 August 2017, the associate judge set out the nature of the application made by Convector Grain under its originating process.[6] His Honour observed that r 2.7 of the *Corporations Rules* required service to be effected at least five days before the date fixed for the hearing, but that service was not effected by that time.

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6 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [1]–[3].

12 His Honour said that the question before him was whether the statutory regime and rules of court provided the Court with power to make such an amendment to the originating process.[7]

13 In his analysis, his Honour first examined the legislative scheme, considering the interplay between s 588F of the *Corporations Act*, *Corporations Rules* rr 1.3, 1.10, 2.3, 2.7, and *Supreme Court (General Civil Procedure) Rules 2015* ('*General Civil Procedure Rules*') rr 3.02, 5.12, 36.03, 46.05.1. His Honour also acknowledged that s 1322 of the *Corporations Act* had been the subject of argument.[8]

14 His Honour referred to the application of the *Corporations Rules* rr 1.3, 1.10 and 5.12 and the *General Civil Procedure Rules* to proceedings under the *Corporations Act*.

15 His Honour referred to *General Civil Procedure Rules* rr 3.02(1)–(2) which provide:[9]

> (1) The Court may extend or abridge any time fixed by these Rules or by any order fixing, extending or abridging time.[10]
>
> (2) The Court may extend time under paragraph (1) before or after the time expires whether or not an application for the extension is made before the time expires.

16 His Honour noted that O 36 of the *General Civil Procedure Rules* allows for the amendment of a writ or other originating process where the originating process has not yet been served on the other party.

17 Rule 36.03(1) relevantly provides that:[11]

> With leave of the Prothonotary or of the Court, a party may amend ... [an] originating process if—
>
> (a) the ... originating process has not been served on the defendant ...;
>
> (b) the party seeking to amend files an affidavit stating that service of

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7 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [6].

8 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [8]–[13].

the original ... originating process on the defendant ... has not occurred; and

(c) all sealed copies of the ... originating process and other documents filed with the ... originating process are returned to the Court.

18 Rule 36.03(3) relevantly provides that:

> Where a party amends ... [an] originating process in accordance with paragraph (1), the Court may, on application by any other party made within 21 days after service of the amended ... originating process on that party—
>
> (a) disallow the amendment; or
>
> (b) allow it either wholly or in part.

19 His Honour then outlined the background of the matter.[12] His Honour recounted correspondence between his Honour's associate and Convector Grain's solicitors, which had been exchanged both before and after the amendment.

20 Convector Grain's solicitors had contacted the Registry to amend the return dates of the originating processes. Registry had told the solicitors that the associate judge's approval was required for the prothonotary to make the amendments. By email dated 13 September 2016, Convector Grain's solicitors sought approval from his Honour to change the dates contained in the originating process in each of the eight proceedings. The next day his Honour's associate responded that she would 'arrange for an adjournment to be made.' Convector Grain's solicitors replied to correct the associate: an adjournment was unnecessary; it was merely approval to change the return dates that was sought. On the same day the associate responded to confirm that Convector Grain had approval to amend the originating processes, and that that email could be taken to the Registry as proof of that approval.

21 On 4 October 2016, Convector Grain's solicitors again wrote to his Honour's associate in relation to the return dates. The solicitors noted that the Court's records were incorrect in that they stated that the proceedings were 'adjourned by consent.' There was, however, neither adjournment nor consent, as the defendants had not at that

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12 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [14]–[23].

stage been served. Later that day the associate replied to Convector Grain's solicitors, confirming the return dates and thanking them for their clarification as to the issue of adjournments.

22 His Honour noted that at all times his associate acted under his supervision and upon his instructions.[13]

23 The reasons of the associate judge turned next to the applications before the Court: first, Laureville's application for the amendment to the return date to be wholly disallowed and for the originating process to be set aside; second, Convector Grain's application seeking to regularise the irregularities in procedure and allow the amendments. Convector Grain sought leave, *nunc pro tunc*:

(i) to make such orders as are necessary under s 1322(2) of the *Corporations Act* to regularise the originating process;

(ii) to amend the originating process by substituting a new hearing date for the first return date of the originating process; and/or

(iii) to extend the time for service of the originating process; and/or

(iv) to make such further or other order as the court considers appropriate.

24 Paragraph (i) was later amended by the addition of s 1322(4) of the *Corporations Act* and r 2.04(1) of the *General Civil Procedure Rules* (which provides for the dispensing of compliance with the rules) as possible alternative grounds for the regularisation of the originating process. Convector Grain sought from the associate judge leave to amend further paragraph (i) in order to rely on r 3.02 of the *General Civil Procedure Rules*. His Honour said that the request for this amendment had arisen because of the Court of Appeal judgment in *Horne v Retirement Guide Management Pty Ltd.*[14] That judgment

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13 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [17].

14 [2017] VSCA 47 (16 March 2017) ('*Horne*').

was handed down after the hearing before the associate judge, and overturned much of the earlier decision in *Re Australian Property Custodian Holdings Ltd (in liquidation)*,[15] which had previously rendered reliance on r 3.02 misplaced.

25 The associate judge addressed the affidavit filed in support of Laureville's application sworn by Christopher Anthony Charles on 16 November 2016.

26 Mr Charles deposed that Convector Grain made a demand in December 2014 that Laureville repay an unfair preference, followed by a denial of liability by Mr Charles in January 2015.

27 Mr Charles again wrote to the liquidators of Convector Grain in February 2015. There was no further correspondence in the matter until Convector Grain's solicitors wrote to Laureville's solicitors on 20 October 2015, to which Laureville responded on 28 October 2015.

28 Mr Charles deposed that there was no further correspondence until he received the originating process and supporting material under cover of a letter from Convector Grain's solicitors dated 3 November 2016.

29 Mr Charles noted that the originating process was served more than 70 days after the expiration of the three-year limitation period set by s 588FF. The associate judge noted that the three-year period applied to the institution of the proceeding, and not to the service of the originating process.

30 In his affidavit, Mr Charles made a number of observations about the originating process served on Laureville, including the following:

> (c) Thirdly, the words "amended pursuant to Order 36' were endorsed in manual script on the front page of the originating process in circumstances where the only substantive amendment was a change of hearing date. Such an amendment did not appear to me to satisfy any of three purposes justifying amendment which are prescribed by r 36.01(1)."

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15 [2015] VSC 745 ('*Re APCH*').

(d) Fourthly, the originating process did not show the date on which it was amended, or that leave was granted by either the Prothonotary or the Court.

(e) Fifthly, (and by reason of subparagraph (d), I could not determine whether the purported change to the hearing date had occurred after 16 September 2016 by which time it seemed to me the originating process would have expired.

31 In addition to what was set out by Mr Charles, his Honour noted that the alteration of the hearing date on the originating process was not sealed by the Court; nor was the original document (retained on the court file) amended in any way whatsoever.

32 After obtaining a copy of the court file, Mr Charles further deposed that r 36.03(1) had not been mentioned in any communication and that only r 46.05.1 (which provides for amendment of the return date of a summons) had been relied upon, and only after the authorisation to amend the return date had seemingly been given. Mr Charles also noted that there was no affidavit confirming that the originating process had not been served, as required by r 36.03(1)(b).

33 His Honour said that Mr Charles then wrote to Convector Grain's solicitors on 9 November 2016. Among other things, the letter stated:

> Steps taken and not taken to amend originating process
>
> 3. Your clients filed an originating process ... with only one day remaining of the three year period allowed for such an application to be made.
>
> 4. The originating process was issued and made returnable on 16 September 2016 but not served before that date. In choosing not to serve, your clients ignored Corporations Rule 2.7(1) which required the originating process to be served 'as soon as practicable after filing ... and, in any case, at least five days before the date fixed for hearing'.
>
> 5. Before the expiry of the three year limitation period your client did not apply under s 588FF(3)(b) to extend the period within which to make their application.

34 Mr Charles then made reference to the email correspondence between his Honour's chambers and the solicitors for the liquidators.

35 Mr Charles further noted that he could find no evidence that the amendment took place before 16 September 2016 (the initial return date) and noted that the originating process so served did not correspond to the filed originating process. The latter had not been amended and even today bears only the original hearing date.

36 His Honour noted that Mr Charles sought that the proceeding be discontinued; otherwise, Laureville would make an application pursuant to r 36.03(3) for the Court to disallow the amendment.

37 His Honour then referred to Convector Grain's two supporting affidavits. The first was that of Claudia Baskett, the practitioner with the overall control of the conduct of the proceeding, sworn on 22 November 2016; the second was that of Krystelle Hsu, who assisted Ms Baskett under her supervision, sworn on 23 November 2016.

38 Ms Baskett set out that the neglect of service was due to unrelated work commitments and preparations for a trial, as well as her part-time employment. Ms Baskett deposed that due to these factors, she was not able to review and sign off letters of service 'and their enclosures on any of the [other seven related proceedings] to be posted for service by 2 September 2016.' That day was the last date for Convector Grain to post the originating process to ensure that service would be effected at least five days before the return date.

39 Ms Baskett instructed her personal assistant to attend the Registry on 12 September 2016 to extend the time for the return date specified in each originating process.

40 His Honour said that Ms Hsu's affidavit further explained the pressure that Ms Baskett was under.

41 His Honour found that the affidavit of Ms Hsu to be unhelpful and that the affidavit of Ms Baskett did not really assist the Court in providing an explanation as to why the originating process was not served as soon as practicable, save that his Honour said that it could be distilled that Ms Baskett relied upon the pressure of other work. His Honour noted that it was clear that, after the email correspondence with his chambers,

a practitioner other than Ms Hsu attended to the file.

The parties' arguments

42 The learned associate judge then turned to the parties' arguments as follows. Convector Grain sought leave to add r 3.02 as a possible ground for regularising the process, by way of leave *nunc pro tunc*. Convector Grain submitted that such leave became possible only after the decision of the Court of Appeal in *Horne*.[16]

43 Convector Grain contended that r 3.02 provided the Court with sufficient discretion to amend the originating process. Convector Grain submitted that the discretion should be exercised in their favour or, if it had already been exercised, ought not be disturbed. Convector Grain relied on the following factors:

(a) the contention that a relatively small delay in service should invalidate the entire proceeding had little intrinsic merit;

(b) Convector Grain had proceeded on the basis that the steps taken by registry staff to alter the return date on the originating process were valid;

(c) the reasons for delay, while falling short of demonstrating service 'as soon as possible' was excusable;

(d) a refusal to make orders (if required) would have had a detrimental effect on creditors who would stand to benefit from a recovery;

(e) there was no evidence of any specific prejudice to the defendant; and

(f) while 'presumptive prejudice' was a relevant consideration, here it was outweighed by other considerations.

44 Convector Grain submitted that the refusal to grant an extension in *Horne* was distinguishable, because the delay in that case was around twelve months, whereas the delay in this case was around 10 weeks.

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16 [2017] VSCA 47 (16 March 2017).

45 Convector Grain also submitted that any irregularity in this matter was a procedural irregularity and fell under s 1322(2) of the *Corporations Act*, such that it did not invalidate the proceeding unless the Court declared so. Such a declaration of invalidity would only be possible where 'the Court was of the opinion that the irregularity had caused or may have caused substantial injustice that could not be remedied by any order of the Court.' Convector Grain submitted that any presumptive prejudice in this case did not rise to the level of 'substantial injustice.'

46 In the alternative, Convector Grain asked the Court to make a positive order under s 1322(4) of the *Corporations Act* to regularise (in effect) the originating process.

47 Laureville pointed out that the amended originating process differed from that on the Court file, and to the originating processes in a number of related proceedings. Those in the related proceedings were said to have been amended to read 'amended pursuant to Rule 36.01' and '3 February 2017', whereas the subject originating proceeding read 'amended pursuant to Order 36' and the date read '3/2/17'. Laureville contended that it was unclear who made the changes, when they were made, and on what authority. The first submission, then, was that there was no amendment to the return date, and that date having passed, service was ineffective.

48 Laureville claimed that, if there was an amendment, it was improper. Laureville submitted that r 36.03 of the *General Civil Procedure Rules* cannot have been the basis for the change, because that rule allowed amendment of an originating process only where an affidavit was provided stating that service had not yet occurred. There is no evidence of such affidavit in this matter.

49 Laureville also submitted that r 36.01 was not applicable, because that rule was limited to amending documents for certain purposes, none of which prevailed here. Laureville also submitted that none of the relevant emails referred to r 36.01.

50 Laureville submitted that the Court records at 4 October 2016 reflected an adjournment by consent, not an amendment of the originating process.

51 Laureville submitted that there 'is no objective and admissible evidence that leave was granted by either the Prothonotary' or by the associate judge.[17] Laureville cast doubt on the view that the Registry would not have insisted on compliance with the *General Civil Procedure Rules*, noted that leave had been given, amended the Court's copy of the originating process, and sealed the amendments. Laureville submitted that the amendments were improper and ought to be disallowed.

52 Laureville contended that the obligation of service was not complied with in this case. Laureville submitted that Convector Grain's application should be considered in light of the policy of the *Corporations Act* that members of the business community should have certainty in their dealings. This was particularly relevant here, Laureville asserted, because the proceeding was initiated only one day before the expiry of the three-year limitation period.

53 Laureville also submitted that s 1322(2) was not available here, as this case involved not a 'procedural' irregularity, but a simple failure to comply with the rules of service. It is said that '[n]on-compliance with the Rules has to be dealt with or "regularised" pursuant to the Rules'.[18] In any event, Laureville argued that s 1322(2) concerns the validity of a proceeding, not of an originating process. Substantial injustice was also said to be present, such that an order under s 1322(2) was not appropriate.

54 Similarly, s 1322(4) was said to be unavailable, for two reasons. First, Convector Grain was seeking an extension of a time fixed by the *Corporations Rules*, not by the *Corporations Act*. Second, the conditions in s 1322(6) were not met here, because there was no good reason why service was not affected.

55 Laureville submitted that Convector Grain did not base its application on r 3.02 but that, in any event, no extension ought to be granted under that rule. Laureville was not required to show prejudice, as the delay in time was itself generally prejudicial. An extension in those circumstances would amount to real prejudice, because

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17 Laureville, 'Written Submissions', 5 May 2017, [9(c)].

18 Laureville, 'Written Submissions', 5 May 2017, [11(e)] (emphasis removed).

Laureville would be deprived of a defence to the action. Laureville also pointed out that the relevant events in this matter occurred some three years and eight months prior to service, which is a considerable length of time. Convector Grain was said to have made their application for an extension of time only after Laureville's application to disallow the amendment. There was also no good reason for granting an extension, as Ms Baskett was simply too busy and wished to stagger the proceedings in this liquidation for her own convenience, with no regard to the rules of the Court, the rights of other parties or the position of the Court. As the failure to serve was said to be deliberate, any harm suffered by the liquidators was self-inflicted (albeit through their solicitors).

56 Laureville also submitted that there was no evidence, contrary to the liquidators' submission, that denial of an extension would have an adverse impact on creditors. Laureville submitted that this assumed — with no evidence — that the liquidators would make a successful recovery and that this would be passed on to the creditors (and not used up, for example, in satisfaction of the liquidators' fees).

Was there an amendment of the originating process?

57 His Honour said that there was argument between the parties as to whether the originating process was amended at all. He said that arguably, there was no amendment and there was a breach of the obligation of service on that ground alone.

58 His Honour held that whether or not the originating process was in fact amended did not matter in light of his conclusions. If the originating process was amended, he found that there was no power to make that amendment, nor should an improper amendment be regularised by him. His Honour held that if the originating process was not amended, then there was a breach of the obligation to serve at least five days prior to the original hearing date. His Honour held that he would not waive compliance with that rule in this case.

Rule 3.02

59 The associate judge granted leave to Convector Grain to amend its interlocutory process to rely upon r 3.02 of the *General Civil Procedure Rules*. He found that such an amendment was appropriate only after the decision in *Horne*, given that the decision of Judd J in *Re APCH*[19] previously rendered reliance on r 3.02 misplaced.

60 The associate judge held that r 3.02 would have been available to amend the return date. He said that the effect of such an amendment was to extend the time — fixed by the Rules — for the return of the originating process and, by extension, the outer limit for service of that originating process. He found that the decision in *Horne* makes it clear that r 3.02 was available for such a purpose. So, although r 3.02 was (and is) available, his Honour found that it ought not be employed here.

61 Contrary to Convector Grain's submissions that *Horne* was distinguishable, his Honour held that, in his view, there was no good reason for the delay in service in this case. As a result, the discretion to extend time should not have been exercised under r 3.02 at the time of the amendment to the originating process, and ought not be exercised now.

62 His Honour held that it was the duty of Convector Grain in this case to demonstrate that there was a good reason for an extension; but, as stated below, his Honour in substance failed to apply this test.[20] His Honour said that the principles to be applied in determining whether there is a good reason were as set out in *Savcor Pty Ltd v Catholic Protection International APS* as follows:[21]

> (i) It is the duty of the plaintiff to serve the writ promptly.
>
> (ii) There must be a good reason for the grant of an extension, and if the application is made after the period has expired the reason must be one of substance.

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19 *Re APCH Ltd (in liquidation) (No 3)* [2014] VSC 456 (17 September 2014) ('*Re APCH*').

20 *Horne* [2017] VSCA 47 (16 March 2017) [161].

21 (2005) 12 VR 639, 651–2 [41] (citations omitted) ('*Savcor*'), referred to with approval in *Horne* [2017] VSCA 47 (16 March 2017) [187].

(iii) It is not possible and indeed is unwise to attempt to define the circumstances which amount to a good reason. It is trite observation but not very helpful that whether or not it is a good reason must depend upon all the circumstances of the particular case. As a general proposition difficulties serving the writ within the 12-months period will usually establish a good reason, for example where the defendant is evading service, his whereabouts are unknown or some other difficulty is experienced in serving the defendant.

(iv) By reference to decided cases it is possible to compile a list of the circumstances which constitute a good reason. The cases also provide examples where the circumstances have not been a good reason to extend the period of validity. For example, it is not a good reason that negotiations are continuing between the parties, or legal aid has not been granted and the plaintiff is waiting for the grant. There are cases which say that the latter proposition is not a good reason. But in *Waddon v Whitecroft-Scovill Ltd* it was said delay caused by the authorities to grant aid may be a good reason. Other examples which have not found favour are difficulty tracing witnesses or obtaining evidence.

(v) The Australian cases differ from the English cases as to the effect of a limitation defence arising after the issue of a wait but before the application to extend the validity of the writ. The difference is traced by Stephen J in *Van Leek Australia Pty Ltd v Palace Shipping KK*. His Honour preferred the approach of the Australian and Canadian courts. He quoted with approval what Bray CJ said in *Victa Ltd v Johnson*. Bray CJ stated that there was no rule that a defendant acquired an absolute right to immunity when a writ issued within the limitation period is not served and in the meantime the period expires. The English cases had stated a test that if the limitation period had expired it was only in exceptional circumstances that the writ would be renewed. This is not the Australian position.

63 His Honour said that the evidence of the liquidators' solicitors as to delay went no further than reliance on the pressures of other work. His Honour said that in his view, this was not a good reason of 'substance.'[22] His Honour said that service in this case was capable of being effected by mail.[23] There was no difficulty in locating the defendant. Even if the partner with carriage of the matter was under work pressures and worked part-time, he accepted Laureville's point that another partner of the firm would be capable of signing off on a letter of service, even if he or she had little

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22 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [80].

23 *Corporations Act* s 109X(1)(a).

familiarity with the matter.

64 His Honour said that in *Horne*, the Court of Appeal held that it is the duty of the party seeking to extend time to demonstrate that there is no prejudice to the other party.[24] In his view, Convector Grain had failed to discharge that burden.

65 He said that the payments which are subject to Convector Gain's claims are alleged to have occurred between February and August 2013. That is at least three years and three months, and up to three years and eight months, prior to the date of service. His Honour said that the Court of Appeal recognised in *Horne* that there is presumptive prejudice by virtue of the effluxion of time.[25]

66 His Honour said that in *Horne*, the Court of Appeal also noted that it was a relevant consideration that the Court was approached to extend time only after expiration of the time for service.[26] He said that the same could be said in this case. The amendment to the return date was first sought on 13 September 2016, only three days prior to the initial return date of 16 September 2016. This was after the 'outer limit' for service set by *Corporations Rules* r 2.7 (five days before the return date).

67 His Honour said that, in summary, Convector Grain submitted that the delay was relatively small and excusable, that there was no evidence of specific prejudice, any presumptive prejudice was outweighed by other factors, Convector Grain relied on the validity of the actions taken by Registry staff, and a refusal of the extension will have an adverse impact on creditors.

68 Although the length of delay was relatively small, his Honour expressed the opinion that, nevertheless, Convector Grain had given no good reason of substance for that delay in service. He said that although Convector Grain may have relied on the

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24 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [81], citing *Horne* [2017] VSCA 47 (16 March 2017) [161].

25 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [82], citing *Horne* [2017] VSCA 47 (16 March 2017) [161].

26 *Horne* [2017] VSCA 47 (16 March 2017) [167].

validity of the actions of Registry staff, Convector Grain only requested that Registry staff act *after* the expiration of the time for service.

69 In relation to the potential adverse impact on creditors, his Honour agreed with Laureville that this assumed both that there would be a recovery and that this would have an effect on creditors' dividends (rather than being applied to the liquidators' fees), each of which he said was far from certain.

70 His Honour concluded that the bald assertion that 'other consideration[s]' outweigh the presumptive prejudice in this case could not be sustained.

Sections 1322(2) and 1322(4)(a)

71 His Honour held that s 1322(4)(a) was of no avail to Convector Grain. The judge held that under s 1322(2) he did have power to extend the time for service of the originating process, but that in his discretion he declined to do so for similar reasons to his refusal to extend time for service under *General Civil Procedure Rules* r 3.02.

Orders made

72 His Honour found that 'if there was an amendment made to the originating process, it ought not have been made.'[27] His Honour found that service had not been effected within time, and declined to exercise his discretion to extend it.[28]

73 On 29 August 2017, the associate judge made orders, in favour of Laureville's interlocutory process, that the amendment to the originating process seeking to change the hearing date be set aside, and that the proceeding be stayed permanently. On 30 August 2017, the associate judge made orders that Convector Grain's interlocutory application be dismissed.

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27 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [107].

28 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [108].

The grounds of appeal

74 Convector Grain filed extensive grounds of appeal. On the hearing of the appeal, however, Convector Grain relied on only one ground.

75 Mr Glick, one of Her Majesty's counsel, for Convector Grain, argued that the associate judge applied the wrong test in his decision in exercising his discretion whether or not to extend time for service of the originating process. Mr Glick submitted that the associate judge failed to take into account relevant considerations in asking simply whether there was a good reason for the solicitor's delay in serving the originating process.[29] Mr Glick submitted that other relevant factors should have been taken into account, such as the length of the delay, whether any special prejudice would be caused to the defendant, and whether the case itself had merit.

76 Mr Trichardt, appearing for Laureville, submitted that the associate judge did in fact take into account a range of factors.[30] While submitting that his Honour reached the correct result, Laureville nonetheless argued in its notice of contention that he did so under the wrong rule.[31] On Laureville's submission, the correct rule to apply in these circumstances is r 36.03, and not r 3.02. Laureville argued that no amendment had been effected at all, because Convector Grain failed to comply with the requirements of r 36.03.[32]

77 A further ground raised by Laureville's notice of contention is that the Court erred in allowing Convector Grain to rely on the affidavits of Ms Baskett and Ms Hsu, as they contain hearsay. The same objections was raised before the associate judge; his Honour noted that very little could be gained from the affidavit material and found the evidence

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29 Convector Grain, 'Submissions', 9 November 2017, 8 [32]; Transcript of Proceedings (14 November 2017) T31–3 (L Glick).

30 Transcript of Proceedings (14 November 2017) T100–1 (A Trichardt), citing *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [84].

31 Transcript of Proceedings (14 November 2017) T103 (A Trichardt).

32 Transcript of Proceedings (14 November 2017) T104 (A Trichardt).

admissible under s 60 of the *Evidence Act 2008*.[33]

78 Convector Grain submits that the evidence was admissible as hearsay, as an exception to the hearsay rule, for interlocutory proceedings as the requirements under r 43.03 of the *General Civil Procedure Rules*, or s.75 of the *Evidence Act 2008*, are satisfied.

Relevant rules

79 As mentioned above, r 2.7 of the *Corporations Rules* provides that the plaintiff must serve a copy of the originating process and any supporting affidavit on Laureville '[a]s soon as practicable after filing an originating process and, in any case, at least 5 days before the date fixed for hearing.'[34]

80 Rule 2.3(a) of the *Corporations Rules* relevantly provides that, on receiving an originating process, the prothonotary 'must fix a time, date and place for hearing and endorse those details on the originating process.'[35]

81 Rule 1.10 of the *Corporations Rules* relevantly provides that, unless otherwise provided:

> the rules of this Court that provide for the extension ... of a period of time fixed for the doing of any act or thing in relation to a proceeding apply to a proceeding to which these Rules apply.

82 The effect of r 1.10 is that, if a proceeding falls within the purview of the *Corporations Rules*, then that proceeding will also generally be subject to the extension and abridgment rules of the *General Civil Procedure Rules*.

83 The relevant extension and abridgment rule of the *General Civil Procedure Rules* is r 3.02, set out above.

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33 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [43].

34 *Corporations Rules* r 2.7(1)(a).

35 *Corporations Rules* r 2.3(a).

84 In this proceeding, counsel for Convector Grain did not address the issue of r 36.03 of the *General Civil Procedure Rules*, (set out above). On its face, r 36.03 appears to contemplate the situation that arises in these proceedings but, as discussed below, the Court of Appeal in *Horne*[36] applied *General Civil Procedure Rules* r 3.02 in extending the time for service of an originating process.

Was there an amendment?

85 As indicated above, the associate judge did not find it necessary to resolve the question of whether the originating process was amended; nor did his Honour decide which power, if any, had been exercised for the reason that his Honour's conclusions would have led to the same result whether or not there was an amendment under either power.

86 I find that it is necessary to decide the question of whether there was a valid amendment of the return date.

87 To address the issue of whether an amendment was made, it is necessary to answer two questions. First, there is the factual question of whether the prothonotary gave leave for the handwritten alterations to the originating process. Secondly, there is the legal question of whether those alterations represented a valid exercise of power capable of effecting an amendment.

88 In answer to the first question, I agree with the associate judge in finding that there is nothing to suggest that the amendment was not made with the leave of the prothonotary.

89 In Laureville's notice of contention, Laureville contends in ground 2 that:

> The Court erred in stating at [5] that the Prothonotary amended the return date on the Originating Process dated 25 August 2016 and not specifically finding that the return date was not amended, and should have found that:
>
> (a) there was no evidence that the Prothonotary amended the return date

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36 *Horne* [2017] VSCA 47 (16 March 2017).

on the said Originating Process; and

(b) the return date was not amended by the Prothonotary.

90 In Laureville's written submissions,[37] and in oral argument,[38] it contended that the handwritten alterations to the originating process were made not by the prothonotary but by someone else, namely Convector Grain's solicitor. The real issue, however is whether the prothonotary gave leave for time for service of the originating process to be extended. I am satisfied that the alterations to the originating process were made with the prothonotary's leave.

91 There is evidence that on 25 August 2016, Convector Grain's solicitor sought to have the return dates of eight originating processes amended by the prothonotary.[39] Seven of the eight were altered and received the prothonotary's stamp. The eighth, which is the subject of this proceeding, was unstamped. In my view, the absence of the stamp on the eighth is more likely due to human error by the prothonotary than due to any attempt at deceit by the solicitors for Convector Grain.

92 The second question is whether the alterations made to the originating process represent a valid exercise of power capable of effecting an amendment. Laureville has not satisfied me that the alterations were made by the prothonotary ultra vires. Under r 36.03(1), Convector Grain, as the party seeking to amend, was required: to return all sealed copies of the originating process to the Court; and to file an affidavit stating that service of the initial originating process on Laureville had not occurred. There is nothing to say that Convector Grain did not return all sealed copies of the originating process to the Court; however, it is clear that Convector Grain did not file the required affidavit.

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37 Laureville, 'Respondent's Outline of Submissions', 12 November 2017, 5 [13].

38 Transcript of Proceedings (14 November 2017) T132–3 (P Fary).

39 Affidavit of Claudia Anne Baskett (22 November 2016) 2 [6].

93 Is the requirement that the party seeking leave to amend must file the aforementioned affidavit[40] a mere procedural requirement, or is it a precondition to the existence of the prothonotary's power to give leave under r 36.03? In *Project Blue Sky Inc v ABC*,[41] the plurality in the High Court discussed the distinction between a procedural requirement and a jurisdictional marker:[42]

> Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory … [I]f the statutory condition is regarded as directory, an act done in breach of it does not result in invalidity.

94 As noted by Aronson, Groves and Weeks, '[w]hether a statute's procedural requirement … is to be treated as a jurisdictional marker is ultimately a constructional question whose resolution turns on text and context.'[43]

95 I am satisfied that the requirement in r 36.03 is a mere procedural requirement and does not go to the jurisdiction of the prothonotary to grant leave to a party to make an amendment of an originating process. The overarching purpose of the rules of this Court is to 'facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.'[44] Compliance with a mere procedural requirement can be waived.[45] To interpret the requirements of r 36.03 as anything other than procedural would run

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40 See *General Civil Procedure Rules* r 36.03(1)(b).

41 (1998) 194 CLR 355 ('*Project Blue Sky*').

42 *Project Blue Sky* (1998) 194 CLR 355, 389 [92] (McHugh, Gummow, Kirby and Hayne JJ).

43 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 355.

44 *Civil Procedure Act 2010* (Vic) s 7(1).

45 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 354.

counter to the overarching principle.

96 Accordingly, I find that under r 36.03(1) the prothonotary may choose to waive the requirement that the party seeking an amendment, in this case Convector Grain, file an affidavit stating that the originating process has not been served. Given that I have found no reason to doubt that the prothonotary gave leave for the amendment to the originating process, one may assume that the prothonotary waived the requirement to file a supporting affidavit.

97 Furthermore, I am not satisfied that his Honour's associate was not at all times acting under his Honour's supervision.

Which is the correct rule?

98 The reasons for judgment of the associate judge,[46] and the written and oral submissions of Convector Grain,[47] focused on r 3.02 of the *General Civil Procedure Rules*, although as noted, the associate judge did not decide which, if any, power had been exercised. As stated above, r 3.02(1) provides that the Court may extend any time fixed by the *General Civil Procedure Rules* or by any order. Laureville submitted that the associate judge had made an error in deciding the issue under r 3.02. Mr Trichardt, appearing for Laureville, submitted that r 3.02 is not applicable to the facts of this case, and that the correct rule is r 36.03.

99 Rule 3.02 only applies to times 'fixed by these Rules or by any order fixing, extending or abridging time.' The return date under r 2.7 of the *Corporations Rules* is not fixed by the *Corporations Rules*; rather, the return date is fixed by the prothonotary, or by any order fixing the time.

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46 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [76]–[87], [100]–[102].

47 See, eg, Convector Grain, 'Submissions', 9 November 2017, 3 [10]; Transcript of Proceedings (14 November 2017) T27–9 (L Glick).

100 The construction of r 2.7 referred to above, however, is somewhat at odds with the decision of the Court of Appeal in *Horne*. In that case, the Court of Appeal considered whether r 2.7 relevantly 'fixes' a time such that r 3.02 is enlivened.[48]

101 In *Horne*, the liquidators of a group of insolvent companies commenced proceedings against the defendants in order to recover property or compensation for the benefit of the company's creditors. The liquidators alleged that the defendants had been parties to voidable transactions under the *Corporations Act*.[49] The liquidators commenced the proceedings by originating process one day before the relevant limitation period expired.

102 An associate judge granted the liquidators an extension of time for serving the originating processes, which were subsequently served within that extended time limit. The defendants applied to have the orders granting the extension of time for service set aside. On the appeal, the judge at first instance granted the application on the grounds that the court lacked the power to extend the time for service of the originating processes, also finding that even if the Court did have the power, it ought not have been exercised in the circumstances of the case. The liquidators appealed. The central issue before the Court of Appeal was whether the Court was empowered to extend time.[50]

103 On that issue the Court of Appeal held that the Court had power under r 3.02 of the *General Civil Procedure Rules* to grant the extension. However, the judge at first instance had decided that the liquidators failed to show reasons capable of justifying an extension of time, and on appeal the liquidators failed to establish any error in the judge's exercise of discretion.

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48 *Horne* [2017] VSCA 47 (16 March 2017) [108]–[109], [111].

49 See *Corporations Act* s 588FF.

50 *Horne* [2017] VSCA 47 (16 March 2017) [1].

104 The Court of Appeal held that the words 'and, in any case, at least 5 days before the date fixed for hearing'[51] operate to 'fix' a time for the purposes of r 3.02. The Court of Appeal in *Horne* said that the phrase 'plainly fixes a time for the doing of an act or thing in relation to a proceeding.'[52] They held that time is fixed 'not by direct specification of dates but by reference to facts which will establish what the time limit is.'[53]

105 Rule 36.03 specifically provides that, with leave of the prothonotary or of the Court, a party may amend an originating process. However, the Court of Appeal in *Horne* did not mention r 36.03 at all in its reasons for judgment;[54] nor was r 36.03 discussed by the trial judge.[55]

106 In my opinion, there are grounds for arguing that r 36.03 is the appropriate rule where application is made by a party to extend the return date on an originating process. In view of the Court of Appeal's decision in *Horne*, I am not prepared to find that r 3.02 is not available to extend the return date for the first hearing of the originating process which determines the date by which the originating process must be served.

107 Under both rules, the decision to extend is a discretionary one. It was submitted, on behalf of Convector Grain, that the relevant test in exercising the discretion to extend the return date would be different under rr 3.02 and 36.03.[56] Of r 36.03, *Williams* remarks:[57]

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51 *Corporations Rules* r 2.7.

52 *Horne* [2017] VSCA 47 (16 March 2017) [111].

53 *Horne* [2017] VSCA 47 (16 March 2017) [108].

54 *Horne* [2017] VSCA 47 (16 March 2017).

55 *Re Australian Property Custodian Holdings Ltd (in liquidation)* [2015] VSC 745.

56 Transcript of Proceedings (14 November 2017) T125 (P Fary).

57 Bailey, David L and John K Arthur, *Civil Procedure Victoria* (LexisNexis Butterworths, 3rd ed, 2000) vol 1, 4164 [I 36.03.5] (emphasis added) ('*Williams*').

> Presumably a party making an application to disallow an amendment made in accordance with r 36.03(1) *must show some prejudice* to that party resulting from the amendment.

108 *Williams* infers from the *General Civil Procedure Rules* that where an amendment has been made, and the prospective defendant applies under r 36.03(3) to have the amendment set aside, the applicant bears the onus of establishing that it will suffer prejudice. *Williams* does not, however, cite any authority in support of this inference. In contrast, under r 3.02 it rests on the plaintiff to convince the court that it is in the interests of justice to extend the time limit. *Williams* remarks:[58]

> Although time fixed by the rules for taking a step in a proceeding may be extended by the court, the rules must prima facie be obeyed, and the court is not justified in extending the time except upon *proper material*. Were it otherwise, a party in breach would in effect have an unqualified right to an extension of time.

Did the associate judge err in the exercise of his Honour's discretion?

109 Convector Grain submits that the associate judge made an error of law in that his Honour misunderstood the test under which he was to exercise the discretion. In Convector Grain's submission,[59] his Honour decided the question of whether or not he should exercise his discretion by determining whether there was a 'good reason for the delay in service.'[60] In evidence submitted by Convector Grain, it appears that the cause of the delay was an oversight on the part of Convector Grain's solicitor.[61] The solicitor had failed to review and sign off on the letters of service in time for them be served at least five days prior to the return date, and she attributed this failure to 'other unrelated work commitments and preparations for a trial and the my [sic] employment on a part-time basis.'[62]

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58 *Williams* (LexisNexis Butterworths, 3rd ed, 2000) vol 1, 2316 [I 3.02.5] (emphasis added).

59 Convector Grain, 'Notice of Appeal from an Associate Judge', 30 August 2017, 5 [8(b)].

60 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [78].

61 Affidavit of Claudia Anne Baskett (22 November 2016) 2 [7].

62 Affidavit of Claudia Anne Baskett (22 November 2016) 2 [7].

110 The associate judge found that these factors did not constitute a good reason for the delay in service. His Honour further held that, because there was no good reason for the delay, the discretion to amend the return date should not have been exercised:

> [I]t is my view that there was no good reason for the delay in service in this case. *As a result*, the discretion to extend time should not have been exercised under r 3.02 at the time of the amendment to the originating process, and ought not be exercised now. So, while the Rule was (and is) available, it ought not be employed here.[63]

111 The words 'as a result' indicate that his Honour treated that question of whether the delay in service was justifiable, as the substantive consideration of the question of whether the discretion to amend the return date should be exercised.

112 The test applied by his Honour is evident from the following passage from his Honour's judgment:[64]

> I have expressed the view ... that there are powers available to the Court to extend the return date and, as a corollary, the time for service. Nevertheless, it is my view that those powers should not be exercised in this matter. Such powers ought to be used in accordance with *the rule that a good reason must be given for the delay in service*. Here, there has been no such reason given.

113 When considering the length of the delay, his Honour states:[65]

> While the length of delay was relatively small, I have expressed my opinion that there was, nevertheless, no good reason of substance given for that delay.

114 In my opinion, this approach was in error. The existence of good reasons for delay in service will be relevant to, but not the substantive consideration in the decision of whether or not to exercise the discretion to allow an extension of time for service.

115 The decision of the Full Court of the Supreme Court of Victoria in *Kostokanellis v Allen*[66] concerned a different discretion, but is nonetheless illuminating for the present case.

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63 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [78] (emphasis added).

64 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [104] (emphasis added).

65 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [85].

66 [1974] VR 596.

In that case, the solicitor for the defendant decided not to appear on the return of an application for final judgment, despite being instructed to defend, because the defendant had not sworn an affidavit and was out of Melbourne. The Full Court allowed an appeal against the refusal of the judge to set aside the order:[67]

> Whether ... the learned Judge should be regarded as having thought that the existence of a 'sufficient reason' was a condition precedent to the exercise of his discretion in favour of the appellant or not, we are satisfied that although it was undoubtedly a relevant matter for him to see what explanation the appellant gave for his non-appearance, the learned Judge gave inordinate preponderance to this factor in a way which precluded him from approaching the task of deciding the appellant's application according to correct principle.

116 The giving of a good reason for the delay in service is not a condition precedent to the Court's exercise of a discretion, whether that discretion arises under r 3.02 or under r 36.03, although it is clearly a relevant matter to take into account. As was said in *Savcor*, discussed above, the good reason test relates not to the failure to serve but to the reason for the Court to grant extension of time for service.

117 The discretion to extend the time for service, whether under r 3.02 or r 36.03, is unfettered and must be exercised flexibly with regard to the facts of this particular case.[68] Authorities have emphasised the interests of justice and the need for flexibility in exercising discretions to extend time. In *Spagnuolo v Mantra IP Pty Ltd*, Logan J held, in relation to a procedural rule of the Federal Court,[69] that:[70]

> the court's role is not one of taking a pedantic approach to time limits within the Rules, but rather one of deciding where, in the circumstances of the particular case, the interests of justice lie.[71] The decision in *Jess v Scott*[72] is authority for the proposition that the Court's power to extend time is a flexible

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67 *Kostokanellis v Allen* [1974] VR 596, 602.

68 *Palata Investments Ltd v Burt & Sinfield Ltd* [1985] 1 WLR 942.

69 *Federal Court Rules 2011* (Cth) r 35.13.

70 *Zocchi v R* [2000] 116 A Crim R 245, 246; *Parker v R* [2002] FCAFC 133 (17 May 2002) [13]; *SZOQS v Minister for Immigration and Citizenship* [2011] FCA 866 (2 August 2011) [15] (Collier J).

71 *Spagnuolo v Mantra IP Pty Ltd* [2012] FCA 1038 (10 September 2012) [11].

72 (1986) 12 FCR 187.

one, designed to enable substantial justice to prevail over technical default.

118 The discretion to extend time is given for the purpose of enabling the Court to avoid an injustice.[73] This requires that the Court determine whether justice as between the parties is best served by granting or refusing the extension which Convector Grain seeks.

119 The relevant matters for consideration include the length of the delay, the reasons for the delay, the chances of Convector Grain's case succeeding if an extension of time is granted, the degree of prejudice to Laureville if time is extended, and the blamelessness of Convector Grain.[74]

120 Laureville submitted that the associate judge did in fact take into account all the relevant circumstances in the exercise of his discretion.[75] Laureville points to the paragraph in his Honour's judgment where specific reference is made to the factors which Convector Grain submitted were relevant to the exercise of the discretion.[76] However, the paragraph pointed out by Laureville is merely his Honour's summary of Convector Grain's submission as to relevant factors.

121 His Honour sets out the principles to be applied in considering whether there is a good reason for an extension at paragraph [79] of his reasons, and considers these factors at paragraphs [85] to [87]. Nonetheless, from the reasons and the above quoted passages it is evident that the associate judge treats the lack of a good reason for the delay as the substantive factor in exercising the discretion.

122 As the examination of the authorities above demonstrates, lack of good reason for the delay in service should not be treated as the substantive reason for exercising the Court's discretion against extending the time for service.

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73 *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* [1978] VR 257, 263 (McInerney J).

74 See, eg, *CM Van Stillevoldt BV v El Carriers Inc* [1983] 1 WLR 207, 212–13.

75 Laureville, 'Respondent's Outline of Submissions', 12 November 2017, 12 [37].

76 *Re Convector Grain (No 1)* [2017] VSC 473 (16 August 2017) [60].

123 Accordingly, I find that the exercise of the discretion by the associate judge miscarried.

In re-exercising the discretion, should I extend the time for service?

124 Should the Court exercise its discretion to extend the period of time for the return date of the originating process, as the prothonotary gave leave, to enable service, which has now been affected, to be within time?

125 There is a presumptive prejudice to Laureville caused by Convector Grain's failure to serve on time.[77] Convector Grain does not challenge the existence of this prejudice.[78]

126 There are four factors which support the exercise of the discretion to extend time. First, the delay on serving the originating process was not long. In my estimation, the relevant delay is one of only three days: the time between 11 September 2016 (the date by which Convector Grain ought to have served the originating process on Laureville) and 14 September (the date on which the prothonotary changed the return date to 3 February 2017).

127 Secondly, Laureville has not shown that it has suffered special prejudice because of the delay, such as by changing its position on reliance that no originating process would be served.

128 Thirdly, if the Court refused to extend the time limit, then Convector Grain would lose the ability to proceed with the case against Laureville. The proceeding would be lost in circumstances where the liquidators, as they are obliged to do, have made investigations and stated their belief that the company was insolvent from at least 26 February 2013, after which time Laureville received payments from Convector Grain.[79] Convector Grain's claim, therefore, has a reasonable prospect of success. It is worth noting that, as submitted by Laureville, there was no evidence presented in

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77 See *Re APCH* [2014] VSC 456 (17 September 2014) [140]–[144].

78 Transcript of Proceedings (14 November 2017) T57-58.

79 Affidavit of Andrew Reginald Yeo in his capacity as joint and several liquidator of Convector Grain, made in support of originating process, dated 25 August 2016 [13], [18].

this proceeding as to where any recovered moneys would go: whether they would go towards the liquidators' costs, or whether they would reach the creditors.

129 Fourthly, it is relevant that the delay was caused not by the client's error, but by the solicitor's. Convector Grain made the argument that the conduct of the solicitor should not be visited upon the client.[80] In oral submissions, Laureville submitted that there are remedies available to clients against their solicitors, and that solicitors should otherwise be taken by the Court to represent fully the interests of their clients.[81] There are sound policy reasons for expecting a party's legal representation to be competent, and for treating them as such. It would be cumbersome and unmanageable for the courts to second-guess parties' solicitors. Solicitors are officers of the court, and the court is entitled to expect competency and professionalism from its officers. Notwithstanding this, I hold that the blamelessness of Convector Grain in this case is a relevant consideration in deciding whether or not to exercise the discretion to extend time. That a client should be barred from bringing an otherwise good cause of action because of the mistake of his solicitor is relevant, in that it affects the Court's assessment of how best to 'enable substantial justice to prevail over technical default.'[82]

Conclusion

130 In the circumstances of the present case, I find that the associate judge erred in allowing Laureville's application. I find that it is in the interests of justice to extend the time for service, and that, accordingly, and in all the circumstances of the case, Convector Grain has established that there is good reason for an extension of time for service. Thus, the appeal will be allowed, the order of the associate justice will be set aside, and the leave granted by the prothonotary to extend the return date will stand.

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80 Transcript of Proceedings (14 November 2017) T53.

81 Transcript of Proceedings (14 November 2017) T108.

82 *SZOQS v Minister for Immigration and Citizenship* [2011] FCA 866 (2 August 2011) [15].

131 I will hear the parties on costs.

CERTIFICATE

I certify that this and the 31 preceding pages are a true copy of the reasons for Judgment of Justice Robson of the Supreme Court of Victoria delivered on 8 February 2018.

DATED this eighth day of February 2018.

Associate