

BETWEEN:

MIGHTY RIVER INTERNATIONAL LIMITED
BVICN 1482079
Appellant

and

BRYAN HUGHES AND DANIEL BREDEKAMP AS DEED ADMINISTRATORS OF
MESA MINERALS LIMITED (SUBJECT TO DEED COMPANY ARRANGEMENT)
ACN 009 113 160
First Respondent

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MESA MINERALS LIMITED (SUBJECT TO DEED OF COMPANY ARRANGEMENT)
ACN 009 113 160
Second Respondent

RESPONDENTS' OUTLINE OF ORAL ARGUMENT

Part I: Certification: The respondents certify that this submission is in a form suitable for publication on the internet.

Part II: Outline of propositions

1. *Legislative purpose (RS[11]-[16]).* Section 444A(4) should be construed having regard to the objects of Pt 5.3A of the Act, which are set out in s.435A.
2. Pt 5.3A was introduced to vest control over the company's future in the requisite majority of creditors (RS[11], [16]).¹ The intention was to implement procedures which were informal, flexible, gave effect to speed of action, and moved away from a system requiring court approval before the scheme is effective (RS[12]-[15]).²

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¹ *Lehman Brothers Holding v Swan CC* (2010) 240 CLR 509 (*Lehman Brothers*) at 518-522 [20]-[33], especially at [30]; see also [37]-[38].

² *Lehman Brothers* at [33]; RS at [12]-[14]; Second Reading Speech at 2404, RFM tab 20 p.1048; Explanatory Memorandum, RFM tab 19 pp.843-844; *Harmer Report*, RFM 12 [56], 13 [62].

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Date: 19 June 2018

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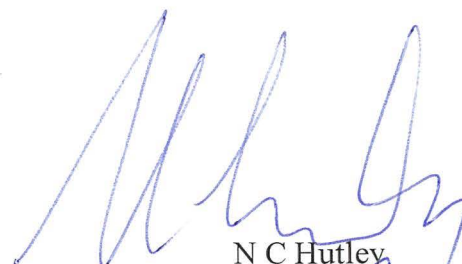
3. *Legislative text (RS[17]-[26]).* Section 444A(4)(b) does not introduce a requirement that every deed of company arrangement must provide for payment of creditors' claims or that the DOCA specify that there be property available for distribution (RS[17]-[18]).
4. The meaning of the "property" referred to in subsection (4)(b) is informed by
30 subsection (4)(h), so that the property referred to in (b) is property which will be realized to pay creditors' claims if the terms of the deed require that to occur.
5. Section 444A(4)(b) is not a normative provision. It is an adjectival clause identifying a thing with a characteristic – ie. property "that is available to pay". It describes property which is anticipated will be available to pay creditors in accordance with the deed, if the deed contains terms requiring payment.
6. Property of the company will only fall within the adjectival clause in subsection (4)(b) if there is an obligation under the terms of the deed to pay creditors' claims. If there is no obligation to distribute property under the terms of the deed, there is no need for the instrument "also" to specify property that is available to meet it.
- 40 7. Other aspects of s.444A and related provisions operate harmoniously with this construction.
8. First, the terms of the deed under s.444A(3) are to be distinguished from the matters that the instrument "must also specify" under s.444A(4). It is only necessary to specify the matters in s.444A(4) to the extent that they arise under the terms of the deed (RS[19]).
9. Secondly, the other terms of s.444A(4)(a) to (i), and related provisions in the Act,³ may be read consistently with the Respondents' construction, and support it (RS[8]).
10. Thirdly, the drafting of s.444A(4)(b) may be distinguished from the mandatory provisions which are expressly required to be included by ss.444DA and 444DB.
- 50 11. Subsection (4)(b) must also be construed with the s.435A objects, including to maximise the chances of an insolvent company to continue in existence. Subsection (4)(b) ensures that, if creditors' claims are to be paid, the instrument specify which of

³ Sections 435A, 439C, 445C, 445D, 445F, and 445FA.

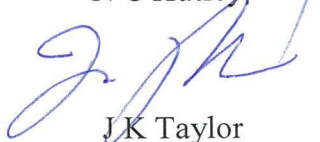
the company's property is anticipated to be made available for realisation for that purpose, and make it clear what property (if any) is to be excluded.

12. The Appellant's construction would hold a deed valid if it specified property of an insignificant value as being available to pay creditors' claims, whereas a deed must be void if it frankly specifies that no property is available to pay creditors' claims. That leads to absurd results and is inconsistent with the objects of Pt 5.3A (RS[6]).
13. *Extension of the convening period is irrelevant (RS[27]-[36]).* The fact that a deed may be characterised as a "holding" deed does not mean that it is beyond the objects of Pt 5.3A.
14. The Court should not introduce some implied limitation on creditors' power to enter into a deed which is related to the administrators' desire (if that be made out) to maintain the status quo through a deed rather than to extend the convening period.
15. The entry into a holding deed does not remove a "judicial safeguard" in favour of creditors who are not in the majority (RS[32], [35]-[36]). Pt 5.3A was a deliberate move away from court supervision and from a system which allowed individual creditors to disrupt insolvency administration. Further, the power to set aside or avoid deeds under ss.445D, 445G, and 600A remains.
16. Here, there were findings that the administrator recommended the DOCA because it enabled the company to preserve the listed shell, which he considered had value: J[85], [111] (RS[30]; AB36-7, 44). The DOCA had substantive utility beyond avoiding the need to apply to extend the convening period.

Dated: 19 June 2018



N C Hutley



J K Taylor