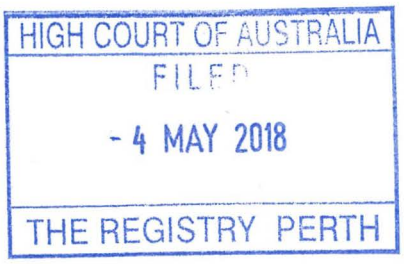
IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P8 of 2018

BETWEEN:

MIGHTY RIVER INTERNATIONAL LIMITED
(BVICN 1482079)
Appellant



and

MINERAL RESOURCES LIMITED
(ACN 118 549 910)
First Respondent

and

BRYAN HUGHES and DANIEL BREDENKAMP as
Deed Administrators of MESA MINERALS LIMITED
(ACN 009 113 160) (Subject to Deed of Company Arrangement)
Second Respondents

and

MESA MINERALS LIMITED (ACN 009 113 160)
(Subject to Deed of Company Arrangement)
Third Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

1. The first respondent ('**MRL**') certifies that this submission is in a form suitable for publication on the internet.

Part II: Statement of Issues on the Appeal

2. Two distinct points arise on this appeal:

   (a) whether the instrument prepared by the second respondents ('**Administrators**') did not comply with s.444A(4)(b) because cl 8 specified that 'Subject to any variation of this deed, there will be no property of the Company available for distribution to Creditors under this deed' ('**the no property point**');

   (b) if Mighty River succeeds in showing that the instrument did not comply, whether this court should exercise any discretion contained in s.445G or whether the matter should be remitted to the Court of Appeal ('**the discretion point**').

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Part III: Section 78B Notices

3. It is certified that MRL has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act* 1903.

4. It is considered that notice is not necessary at this stage, since any issue of discretion should be remitted. Should that not be the case, a question will arise whether this Court may receive evidence of the kind referred to in ***Allesch v Maunz*** (2000) 203 CLR 172 at 183 [30]-[31] given ***Eastman v R*** (2000) 203 CLR 1. This matter is dealt with at paragraphs 58ff below.

Part IV: Statement of Material Facts

5. In addition to the facts identified by Mighty River, there is a concurrent finding of fact that Mesa's ASX listing has some value, albeit undetermined, but potentially significant and that that value would be lost if Mesa is put into liquidation: J 85, AB 36-37; J 111, AB 44; FC 235, AB 132-3; FC 390, AB 179.

Part V: Statement of Argument in Answer

6. These submissions will deal with the two issues raised above in turn.

A. <u>The 'No Property' point</u>

A.1. Summary

7. In essence, the vice in Mighty River's construction is that it gives no work to the full statutory language 'the property <u>of the company</u> (whether or not already owned by the company when it executes the deed) <u>that is to be available</u> to pay creditors' claims' [emphasis added]. The omissions fundamentally change the meaning of s.444A(4)(b).

8. Mighty River's construction requires that every deed of company arrangement ('DOCA') must, irrespective of circumstance or context, and at all times in its life, contain a provision which makes *some* property *of the company* available for distribution to creditors. One dollar will do. Yet, at the same time, any property that the deed proposes to make available to pay creditors' claims that is <u>not</u> property 'of the company' is ignored, no matter how much there may be. Likewise, any property (whether of the company or not) that the deed contemplates might, subject to variation, become available to meet creditors' claims is to be ignored. As shown below, the contention that s.444A(4)(b) requires that at least one dollar of the company's property always be available for distribution to pay creditors' claims would invalidate many common types of deed, all of which clearly serve the purposes of Pt 5.3A.

9. No discernible statutory purpose or public benefit supports this reading, which is at odds with the statutory text. It produces arbitrary results, and is at odds with such authority as there is. In contrast, the statutory wording, context and purpose all support the conclusion of the Courts below that the instrument prepared in the present case satisfied s.444A(4).

10. Mighty River (at [44]) further invokes the concept of 'side-stepping' or 'outflanking' 'the process by which the Court supervises the voluntary administrator and the mandated investigations'. Close investigation reveals that Mighty River's assertion rests upon a misreading of s.439A, and an implied assumption as to the operation of Pt 5.3A that is not within Pt 5.3A and is contrary to its apparent purpose. That assumption is a like kind to that which this Court rejected in ***Lehman Bros Holdings v Swan CC*** (2010) 240 CLR 509 at 522 [34] ('***Lehman Bros***'). This argument will be dealt with separately below.

A.2. Statutory context

11. References to the Corporations Act are to the version in force as at 20 October 2016, when the DOCA was executed.[1] Sec 439A(1) requires the administrator of a company in administration to convene a meeting of the company's creditors within the convening period as fixed by s.439A(5) or as extended under s.439A(6). If a deed of company arrangement is proposed, a statement setting out details of the proposed deed must accompany the notice to creditors that convenes the meeting: s.439A(4)(c).[2]

12. At that meeting, creditors may resolve (a) 'that the company execute a deed of company arrangement specified in the resolution (even if it differs from the proposed deed (if any) details of which accompanied the notice of meeting)', (b) 'that the administration should end', or (c) 'that the company be wound up': s.439C. In this case, the creditors of Mesa resolved on 20 October 2016 to execute the deed of company arrangement proposed by the Administrators: FC 13, AB 66.

13. Sec 444A(4) dictates the contents of the 'instrument' that is to be prepared by the company's administrators following a meeting under s.439A at which the company's creditors resolve that the company execute a deed of company arrangement: s.444A(1). The instrument must set out the terms of the deed (s.444A(2)), and it must be executed as

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[1] Part 5.3A has since been amended. As set out at FC 34-37, AB 72-3, the only relevant amendment, to s.445F, had no effect on the appeal from the Master given the transitional provisions at s.1617(2)(e) (and definitions at s.1551) of the *Insolvency Law Reform Act* 2016 (Cth). The calling of meetings is now dealt with under s.75-15 of Sch 2 to the Act (Insolvency Practice Schedule (Corporations)).

[2] Although s.439A(3) and (4) were also repealed, the content of s.439A(4) was re-enacted without substantive change as Rule 75-225(3) of the *Insolvency Practice Rules (Corporations)* 2016. Rule 75-225(3)(b)(vii) is identical to s.439A(4)(c). The content of s.439A(3) is largely found in Rule 75-225(1)-(2).

provided for in s.444B, following which it becomes a deed of company arrangement: s.444B(6).

14. In the present case, the instrument was relevantly identical to the details of the proposed deed supplied with the notice of meeting: '*There will be no property of the Company available to creditors under the Recapitalisation DOCA to pay a dividend to any class of creditors.*' [AFM 94, 13/10/2016; see also AFM 38, 10/8/2016]. The notice also set out the process ultimately found in cl 15 of the DOCA, whereby the Administrators would provide a 'Report' outlining 'Proposals' they had received for restructuring Mesa, selling its assets or both, and then convene a further meeting of creditors pursuant to s.445F to vote on whether to accept a Proposal or to wind Mesa up [AFM 96; see also AFM 40].

A.3. Construction of s.444A(4)(b)

15. Sec 444A is one of four provisions of the Act that deal expressly with what provisions are to be included in a deed of company arrangement: ***Lehman Bros*** at 522 [34]. The other three provisions (ss.444A(5), 444DA and 444DB) are not in issue on this appeal. Sec 444A(4) requires that, in addition to setting out the terms of the deed (s.444A(3)), the instrument 'must also specify the following', which are set out in sub-secs (a) to (i). There are a number of important points to note about the construction of s.444A(4)(b).

16. First, s.444A(4)(b) is expressly limited in terms to 'property of the company'. It does not cover property that is to be made available to or distributed to creditors that never becomes part of the company's property, such as payments by a third party or a 'creditors' trust'. The phrase also does not cover property that, by its nature, cannot be property of the company (such as shares that the company might issue to creditors in exchange for their debts), or property of the company which is incapable of distribution to creditors (such as the company's status as being ASX-listed, assuming it is indeed property).

17. The language of (b) is thus not capable of supporting any proposition based around distributions to creditors generally, as it does not touch on significant potential sources of the property that may form part of a distribution or payment to creditors. It is limited only to property of the company, even noting the breadth given to that term in s.10 of the Act, and the phrase 'whether or not already owned by the company when it executes the deed'.

18. Secondly, Mighty River's construction misconstrues the language used in (b) by focussing on two words ('the property') to the exclusion of the rest. It is true that (b) does not use the same words to express conditionality as in (c), (e) and (f) ('any' or 'if any'), or in (d) ('to what extent'). Nevertheless, it is conditional. The phrase 'the property of the

company ... that is to be available to pay' is a gerundive that operates as an adjective; it denotes a potential subset of the company's property, but – depending on the provision made in the DOCA – all, some or none of the company's property may respond to that adjective. (That is, the potential subset may be the whole parent set, a true subset of the parent set, or an empty set.) The phrase covers whatever is to be made available, but it contains no assumption or obligation that anything *is* to be made available. On its ordinary English meaning, s.444A(4)(b) thus accommodates a situation where a DOCA provides that no property of the company is to be made available for distribution to creditors – ie where it specifies that nothing within the genus 'property of the company' is to be made available. The Court of Appeal was correct in adopting this conclusion: Buss P at FC 147-8, AB 109; Murphy JA at FC 221, AB 127; and Beech JA at FC 351, AB 165-6.

19. This reading receives some support from the decision of the Full Federal Court in ***Elliott v Water Wheel Holdings Ltd*** (2004) 209 ALR 682 at 693 [58]. The Court observed that 'is to be available' does not mean 'is available', which is how Mighty River reads the section: eg submissions [32], [34]-[35], [37]. The reasoning accepted by the Full Federal Court at ALR 693 [56] was set out at ALR 692 [50]-[53], and included at [50] that the purpose of the DOCA clause required by s.444A(b)(4) is 'to define in advance what property of the company should be made available to pay the claims of creditors and what should not'. While, as in that case, the requirement could be satisfied by specifying *all* assets of the company as at the time of distribution, it can equally be satisfied by specifying that no property of the company will be available for distribution either at all, or, as in this case, none *subject to the contemplated variation of the DOCA following the report required by cl 15(b) and any variation of the DOCA to 'accommodate the Recommended Proposal (or any other Proposal)'* at the s.445F meeting provided for: cl 15(c) [AFM 171].

20. Given that the definition of 'Recommended Proposal' in cl 15(b)(iii) is one the deed administrators consider 'is likely to result in a better return to creditors than either a liquidation of the Company or the acceptance of any other Proposal', the DOCA as executed contemplates a potential or intended realisation of Mesa's assets, or a sale or recapitalisation of Mesa, if a Proposal is received and approved by creditors, and the DOCA is accordingly varied. That, and the fact that cl 8 is itself conditional ('Subject to any variation of this deed...') is a reason that MRL will argue, if necessary, under s.445G(3) that the DOCA substantially complied with s.444A(4)(b). All along it has

proposed the receipt of Proposals and the potential variation of the DOCA (if creditors choose) to accept a Proposal and make a distribution to creditors accordingly.

21. Thirdly, in a liquidation situation, all property of the company would become available for distribution to creditors. That will extend in the ordinary course to property which the company comes into possession of (hence the parenthetical words in s.444A(4)(b)). It will not extend to property that the company does not or will not have, including property it cannot possess (such as its own shares), things that are not property capable of distribution (such as its ASX listing) or property of a third party, such as a person proposing to recapitalise the company or otherwise pay creditors directly under a DOCA.

22. Given that all creditors must vote on a DOCA, are bound by a DOCA if executed, and have the claims against the company that will be affected if a DOCA is executed, the clear policy imperative behind the statutory wording is to ensure that if the DOCA makes less property of the company available to creditors than would be the case in a liquidation, this is spelled out for creditors to know of and expressly approve. Hence the use of 'specify ... what is to be available'. The requirement of identification has an informational purpose and effect. It does not carry with it any obligation that some of the company's property be made available.

23. Fourthly, it must be noted that what must be specified in (b) has a binary character – once one specifies what of the company's property is to be available, one is necessarily also specifying what of the company's property is not to be available. If the section were worded in the alternative – 'specify the property of the company that is not to be made available' – the same functional result would obtain, but there could be no argument that every deed of company arrangement must make some property of the company unavailable for distribution. Yet that is the essence of Mighty River's construction.

24. Fifthly, Mighty River's submissions are pervaded by an assumption (also expressed as an assertion) that every deed of company arrangement must distribute *some property* to creditors, not just some property of the company: submissions [32], [36]-[37]. That assumption has no textual basis in the Act other than what is sought to be teased from s.444A(4)(b). There is no sound commercial or policy reason for it. It is creditors who vote on the terms of the DOCA and who are free to accept or reject a proposed DOCA that would distribute no property of the company to them if there is some other aspect of the DOCA that satisfies them. Indeed, in ***Patrick Stevedores v MUA*** (1998) 195 CLR 1 at 37 [49], the plurality of this Court said, in connection with Pt 5.3A of the then

Corporations Law (which was in relevantly identical terms), 'Although the creditors may resolve otherwise, the deed will ordinarily provide for the application of money received under the deed in the order of priorities that would apply in a winding up.' Ordinarily, not always; and subject to the creditors resolving otherwise, as occurred in this case.

25. Mighty River ignores the fundamental theme of Pt 5.3A, which is that creditors have control, via the meeting, over whether or not to enter into a deed of company arrangement, and if so what its terms are, subject to the protective role reserved to the Court under s.445D. This Court noted in ***Lehman Bros*** at 521 [31] that the legislation provides that 'effect is to be given to the will of the requisite majority of creditors who vote at the relevant meeting' and that one of the two premises of the provisions is that 'judgment about what is to happen to the subject company, and, in particular, the judgment about the commercial worth of any proposal for a deed of company arrangement, is committed to the body of all creditors'. If creditors decide that they are prepared to execute a deed that does not, on day one, guarantee a distribution of property of the company to them, because they consider some other course to have commercial merit, then they are and should be free to do so.

A.4. Purpose and context

26. No identifiable purpose is achieved by adopting Mighty River's construction. Mighty River conceded that, on its construction, s.444A(4)(b) will be satisfied if one dollar of the company's property is made available for distribution: T452, RFM 61, and FC 151, AB 109. Even leaving aside the question of quantum (noting that the amount in ***Parkview*** cited at Mighty River's submissions [60(a)] was $1000), there is no statutory or policy purpose served in requiring every deed of company arrangement to distribute at least some of *the company's* property. There is nothing 'better' about property by virtue of it being property of the company. There is no reason to insist that every deed must make some property of the company available, when the section is silent about property other than property of the company. A requirement that every DOCA must make available at least one dollar of the company's property for distribution to creditors, at all stages of the DOCA's existence, would invalidate a number of types of DOCA that are fully conformable with the objects of Pt 5.3A, including some that arose as a prospect on the evidence in this case. Five examples of this will now be given.

27. *Example 1: Deeds of company arrangement where the claims of some or all creditors are to be extinguished and replaced by equity in the company (or a company that acquires it)*

issued to them. Mr Hughes gave evidence that he had been involved in the implementation of deeds where creditors had received equity in the company or in other companies, and that he had received a proposal for Mesa from a potential buyer that would see Mesa's creditors obtaining equity in a third party (T178-9, RFM 49-50). Similar evidence was in the second notice of meeting: AFM 94. The issuance of shares in Mesa to creditors would not involve property of Mesa (***Pilmer v The Duke Group Ltd*** (2001) 207 CLR 165 at 179 [20]). Nor would issuing shares in another company. Yet Mighty River's construction would invalidate a DOCA providing for such a result unless $1 or more of the company's property was additionally made available for distribution to creditors – a triumph of form over substance. If creditors are satisfied with a proposal that their debts be exchanged for shares in a company, and vote to accept a DOCA providing for it, the purpose of Pt 5.3A is promoted.[3] This type of deed was used in ***In the matter of Paladin Energy Limited*** [2018] NSWSC 11 at [23], where only the claims of creditors who subscribed for notes (and who would be issued PEL shares pro rata) would be compromised, while 'all other creditor claims would not be compromised by that DOCA and would remain liabilities of PEL and payable in the ordinary course'.

28. *Example 2: Deeds of company arrangement where claims of the creditors against the company are extinguished and replaced by claims against a creditors' trust to which no property of the company is added, but which is instead funded from an alternative source.* There may be payments (or transfers of property) into the trust by third parties who then acquire the company's shares, whether to run it as a business or to pursue any claims the company has against third parties. Mr Hughes gave evidence of one such deed; 'Consolidated Minerals was a fantastic outcome. A lot of equity came into a trust for the benefit of the creditors, subsequently realised and a very good return.' (T179, RFM 50). In ***Commonwealth v Rocklea Spinning Mills Pty Ltd*** (2005) 145 FCR 220 at 228 [28], Finkelstein J said 'the company is not always the source of the funds that will go to creditors. There are instances where a third party will provide those funds. The most obvious examples are a parent company that wishes to avoid the liquidation of a subsidiary, a director who wishes to avoid disqualification under s 206D, and a third party that wishes to acquire the company in administration provided the claims of creditors are discharged.' Examples include ***Re Smith; Matrix Metals Ltd (in liq)*** [2011] FCA 1399

[3] The explanatory memorandum referred to at paragraph 31 below also referred to a DOCA implementing a debt for equity swap without any requirement to make available property of the company for distribution.

at [20]; ***Re Green*** (2011) 84 ACSR 215 at 238 [69]; ***Re Lindholm; Munday Group Pty Ltd v Tsourlinis Distributors Pty Ltd*** [2010] FCA 1488 at [5]. There is no justification for such a deed to be invalid unless $1 of the company's property is also added to the trust.

29. The 2005 ASIC regulatory guide on creditors' trusts cited by the trial judge at J 4, AB 9 was in evidence: CB 5/1144, RFM 15. It notes that a creditors' trust is commonly used for listed companies, the DOCA typically creates a trust, and '[t]he company and/or third parties promise to make one or more payments (or transfer other property) to the trustee in satisfaction of the creditors' claims against the company. In return, the creditors' rights against the company are extinguished'. It sets out at 1.23-1.25 guidelines for the use of creditors' trusts in 'holding DOCAs' for the protection of creditors. Bergin CJ in Eq dealt with such a deed in ***Re Green***, and correctly ruled at ACSR 238 [68]-[69] that it will not be an abuse of Pt 5.3A to recommend such a structure where it is consistent with the objects outlined in s.435A.

30. *Example 3: Deeds of company arrangement enabling a transfer of the company's shares from existing shareholders to a third party under s.444GA(1) of the Act.* Mr Hughes' evidence was that one purpose of the DOCA was to preserve flexibility for a sale of Mesa itself, rather than of its tenements, because a transfer of tenements can take more than a year to get governmental approval, and in this case would have triggered pre-emptive rights possessed by Auvex under its joint venture with Mesa (T172-3, RFM 47-48). Sec 444GA(1) provides that a transfer of shares order can be made when a company is subject to a DOCA. As noted in ***Weaver v Noble Resources Ltd*** (2010) 41 WAR 301 at 312 [70], a s.444GA order is usually made where there is no residual equity in the company, such that existing shareholders would receive nothing in a liquidation. Such orders can be made, as in that case, as part of a proposal to recapitalise the company, where, in addition to acquiring the shares, the transferee proposes a mechanism to produce a return to creditors better than in a liquidation. Mighty River's construction of s.444A(4)(b) would – illogically – prevent creditors being satisfied by payments from the transferee, or by receiving some of the shares in the company under the s.444GA order, unless $1 of the company's property were also made available to them. It should be noted that cases in which there is no residual value in the company's shares are more likely to be cases in which the company may lack distributable property that could be made available to creditors.

31. Indeed, the explanatory memorandum to the *Corporations Amendment (Insolvency) Act* 2007 that introduced s.444GA recognised the situation of an investor acquiring all shares in a company in return for a lump sum payment to creditors, with no suggestion that there had to be some property of the company distributed: see [7.54].

32. *Example 4: Deeds of company arrangement which impose a moratorium only, for example to allow the company to trade out of temporary cashflow difficulties.* This is one of three possibilities identified by Finkelstein J in ***Beatty v Brashs*** (1998) 79 FCR 551 at 554, and mentioned in the ***Rocklea Spinning Mills*** case at 229 [30], and was the kind of deed executed in ***Re Baseline Constructions Pty Ltd*** [2017] NSWSC 1018. It may be the simplest potential use of the DOCA process, and has obvious benefits for an otherwise viable company with cashflow difficulties: if the breathing space allows the company to remain in business and to pay out creditors in full, then both purposes in s.435A are served. The Full Court correctly considered that such deeds would be valid even if they involved no property of the company being available: Buss P at FC 152(b), AB 110; Murphy JA at FC 224, AB 128; and Beech JA at FC 363, AB 169.

33. *Example 5: Other deeds.* Mighty River's construction would prevent adoption of other kinds of deeds considered by creditors to have commercial utility because they do not involve making some property of the company available for distribution to them. In ***Beatty v Brashs***, deeds of company arrangement were executed for all companies in a corporate group that transferred their assets to Brashs, which assumed the liabilities of all of those companies and the deed for which then created notional funds: see at 552. That exercise would not be possible under Mighty River's construction, as at least a part of each company's assets would have to be made available to its own creditors. Similarly, Mighty River's construction would prevent DOCAs being executed for companies without distributable property – such as where all property is subject to retention of title – or would force realisation of assets (regardless of how disadvantageous it was commercially) where it is impracticable to distribute them directly to creditors, such as companies whose assets comprise intellectual property, tenements, choses in action or real property.

34. The above considerations are not academic. In the second report to creditors of 10 August 2016 in which the DOCA was proposed, the administrators disclosed Mesa's cash at bank, which was lower than their accrued fees and disbursements (AFM 88). Mesa's realisable assets were shares subject to escrow until February 2017 (Hughes [49], RFM

41), tenements, patents, property at Nullagine and possible proceeds of any successful action against its directors. Mr Hughes was alive to the many possible ways a transaction could have been structured (T178-9, RFM 49-50). His evidence was that '[w]ith Mesa and with all of the ASX-listed companies that I've been appointed over, there is always a very complicated structure that needs to be unwound and then put back together, in the best interests of all the stakeholders', and he proposed the DOCA because he considered it 'the most sensible way to then determine the best structure for all stakeholders going forward (T179, RFM 50).

35. In circumstances where a preferred manner to sell Mesa's tenements was a proposal involving a sale of Mesa itself rather than a sale of the tenements themselves, it can be seen that attractive commercial possibilities were available that would be denied by Mighty River's construction. One proposal actually received by Mr Hughes involved Mesa's creditors obtaining equity in the buyer (T178-9, RFM 49-50). Another possibility was a 'backdoor listing' where the acquirer would acquire Mesa (which would retain its ASX listing) by paying cash or equity to its creditors (T170-1, RFM 45-46).

36. Mighty River seeks pre-emptively to dismiss these kinds of deeds, and the consideration of them by the Court of Appeal, as 'hypotheticals' and a 'distraction': submissions [54]ff. That is not right on the evidence. But Mighty River also fails to address the issues thrown up by these deeds *as a matter of statutory construction*. It only offers assertions that these deeds would somehow be invalid for some other reason, but on examination those reasons are inadequate.

A.5. Response to other submissions by Mighty River

37. At [54], Mighty River asserts that a deed that made $1 of the company's property available 'does not engage with this DOCA' on the basis of an inchoate 'side-stepping' argument that will be dealt with further below. At [55], Mighty River asserts that such a deed would be liable to be set aside as unfair or prejudicial or as being in bad faith and contrary to the objects in s.435A. There is no basis for that assertion. Since, as Buss P recognised at FC 151, AB 110, Mighty River's concession as to the construction of s.444A(4)(b) requires making at least $1 of the company's property available to creditors, then all of the kinds of deeds set out above could only be effectuated by adding such provision. There is no reason to suspect, let alone assume, that such a DOCA would be invalid as being in bad faith or contrary to the objects of the Part simply by adding $1 of the company's property to them.

38. A proposal whereby creditors receive shares in a recapitalised company alongside a party recapitalising it, or where they are paid directly by an acquirer, or from a creditors' trust, 100% of their claim could not be said to be in bad faith or invalid. Its character would not change whether $1 of the company's property is, or is not, made available. The inutility produced by Mighty River's construction is patent. Nor is Mighty River correct to suggest at [55] that such a deed must fall foul of s.445D. Why would it if all creditors were paid 100%, or if there was a rational basis for thinking that they would do better under the DOCA than in a liquidation? The reason that Mighty River cannot respond to the examples without invoking *deus ex machina* is that the examples are unanswerable *as a matter of statutory construction.*

39. Similarly, at [60(a)], Mighty River asserts that 'it is far from clear that a "creditors' trust" is valid or that it complies with the provisions of Pt 5.3A'. That is a bold submission. It is contrary to Bergin CJ in Eq's decision in ***Re Green***. It is odd that a commercial mechanism the subject of an ASIC guide and evident in the cases (eg ***Re Creditors' Trust Deed established in the administration of Bevillesta Pty Ltd*** [2013] NSWSC 1258) and that has been voted on by creditors should be invalid for some unstated reason (if indeed any reason is supposed other than an implication sought to be found in s.444A(4)(b)). There are sound reasons to quarantine proposed payments to creditors from the insolvent company's assets, and for creditors to receive rights as beneficiaries of a trust in exchange for claims against the company if they so wish.

40. At [60(b)], Mighty River mischaracterises the example given by Buss P, which appears to be a variation of the trade-on moratorium deed. It supports MRL's construction if the creditors are paid after the DOCA is terminated.

41. At [60(c)], Mighty River again makes the bold submission that Pt 5.3A would not permit a DOCA whereby the claims of creditors are extinguished in exchange for receiving equity in either the company, or some other company – a course proposed in this case to Mr Hughes by a third party. No rational reason is advanced why such a deed should be valid if the creditors are also paid $1 of the company's property, but invalid if all they receive is equity. None exists. Such a result would clearly achieve the objects in s.435A if creditors received more than in a liquidation.

42. At [62], Mighty River can only assert that a moratorium-only deed is invalid as being 'a bald circumvention of sec 439A'. However, as set out earlier, it is perhaps the simplest use of a DOCA, and would provide an option not available prior to introduction of Pt

5.3A that would in appropriate circumstances maximise the chance of achieving both objectives in Pt 5.3A of saving the company and paying all creditors in full.

43. Finally, Mighty River's invocation of s.444A(4)(h) and s.444DA does not assist the task of construction when it is understood that s.444A(5) provides that a DOCA 'is taken to include the prescribed provisions, except so far as it provides otherwise'. The prescribed provisions are set out in Sch 8A of the Corporations Regulations 2001, cl 4 of which provides 'The administrator must apply the property of the company coming under his or her control under this deed in the order of priority specified in section 556, 560 or 561 of the Act'. An order of distribution will always be specified for the purposes of s.444A(4)(h). The order of distribution specified in the regulations is the minimum requirement imposed by s.444DA(1), which will also therefore be satisfied unless the DOCA makes alternative provision (noting also that the requirement in s.444DA(1) can be removed pursuant to s.444DA(2)).

A.6. Mighty River's 'side-stepping' argument

44. Although it is not identified as a discrete issue, Mighty River's argument relies in places upon an assertion that there is some statutory purpose that is being side-stepped or outflanked by the fact that, in the present case, the administrators (when proposing the DOCA) stated that the DOCA would 'essentially maintain the status quo of the administration' (eg submissions [9], [44]). Mighty River's arguments flow from an erroneous assumption as to the operation of Pt 5.3A that can be revealed as follows.

45. Sec 438A requires administrators, '*[a]s soon as practicable after the administration of a company begins*', to '*investigate the company's business, property, affairs and financial circumstances*' and to form an opinion about each of whether it would be in the interests of the company's creditors for the company (a) to execute a deed of company arrangement, (b) for the administration to end or (c) for the company to be wound up. Those opinions flow directly into s.439A(4)(b), as the notice of meeting must set out the opinions formed by the administrator, including the reasons for them (sub-s.(iv)) and such other information known to the administrator as will enable creditors to make an informed decision about each of the matters the subject of the opinions (sub-s.(v)).

46. The only statutorily-mandated 'investigations' that administrators are required to make are so as to form the opinion about each of those three matters. It is true that in this case the administrators wished to undertake further 'investigations' as to the possible sale of

Mesa's assets,[4] and the details of the claims that Mighty River had been asserting that Mesa possessed against its directors. However, unless those investigations were necessary to form the opinions mandated in s.438A, or the opinions and reasons mandated in s.439A, the statute does not require them to be pursued in an administration. They can, if the creditors so decide, be pursued under a DOCA. That is what occurred here. It is also what occurred in the DOCA in ***Sons of Gwalia Ltd v Margaretic*** (2007) 231 CLR 160, as described by Finkelstein J at (2006) 149 FCR 227 at 229 [3].

47. In the present case, as set out in the second notice to creditors at AFM 84 and 92-98, the administrators formed and expressed each of the opinions they were required to form under s.438A and to set out under s.439A. Their opinion was that it was not in the interests of the creditors for the administration to end or for Mesa to be wound up, and that it was in their interests to execute a DOCA of the kind proposed: AFM 97-8. Their reasons were set out. In short, they considered the DOCA would preserve the option of 'entering a subsequent DOCA (if appropriate) which has the potential to maximise the return to stakeholders which would not be available should the Company be wound up immediately', did not exclude the possibility of winding up Mesa in future, and would prevent the loss of Mesa's ASX listing (J 85, AB 36; AFM 94).

48. Their reasons were in turn supported by the evidence at trial. Mr Hughes' experience was that Mesa's listing could be worth between $400,000 to $800,000 (Hughes 23/12/16 [136]-[137] RFM 42), and that the DOCA was 'the most sensible way to then determine the best structure for all stakeholders going forward' (T179, RFM 50) because it preserved maximum flexibility for a commercial proposal to allow Mesa to be recapitalised (T187, T289, RFM 51, 521). The second notice to creditors recorded 'a strong level of interest' from 'parties interested in a recapitalisation of the Company encompassing the retention of its ASX listing' (AFM 89), a course foreclosed by a liquidation. Mr Hughes' evidence was that he considered the interests of creditors and considered none was disadvantaged by executing the DOCA (T294-5, RFM 53-54).

49. In those circumstances, Mighty River's submission in [44] that the 'sole purpose of this DOCA' was to side-step Court supervision under s.439A(6) is wrong and must be rejected. The evidence disclosed a proper basis on which the administrators could and did form the view that they could recommend the DOCA based on their opinions as to the

[4] They appointed a firm called PCF Capital, a leading specialist in the world in the area of mining assets, to market and try to sell Mesa's assets: Hughes [55], [59] RFM 41-42; AFM 28, 79.

three statutory options open to Mesa. It was therefore open to them to convene the meeting of creditors under s.439A and propose the DOCA. Moreover, their reasoning for proposing the DOCA was consistent with the purpose of Pt 5.3A, set out in s.435A.

50. Crucially, the trial judge considered that Mr Hughes 'impressed me as a witness of truth' (J81, AB 36), held that his conduct was 'exemplary' (J96, AB 40), rejected a submission that Mr Hughes had not brought an open mind to the administration because he favoured the DOCA from the start (J92, AB 39), and held that there was nothing to suggest that Mr Hughes' exercise of professional judgment that it was appropriate to have Mesa execute the DOCA miscarried (J113, AB 44). Mighty River has not challenged any of those findings now or below.

51. Mighty River's suggestion that the statute required Mesa to stay in administration while the additional 'investigations' proposed under the DOCA were carried out is at odds with the wording of s.438A and 439A. It is also at odds with a notable feature of the statutory regime identified by this Court in ***Lehman Bros***, '[t]he speed with which it is expected that an administrator and the creditors will act'; a meeting of creditors convened under s.439A may be adjourned from time to time, but the period of the adjournment (or the total of the periods of adjournment) must not (s.439B(2)) exceed forty-five business days.

52. Mighty River's argument seems to arise from an assumption that extensions of the convening period should and would be granted as necessary to allow investigations *beyond those set out in s.438A* to be undertaken. That is contrary to the statutory purpose as revealed in the explanatory memorandum to the *Corporate Law Reform Act* 1993, para 507: 'The Court will be given a power to extend these periods (proposed subsection (6)), though it is not expected that this power would be exercised frequently, since it is an important objective of the new provisions for creditors to be fully informed about the company's position as early as possible, and to have an opportunity to vote on its future as soon as possible.' In ***Patrick Stevedores v MUA*** (1998) 195 CLR 1 at 37 [47], the first feature of the operation of Pt 5.3A noted by the majority was that 'voluntary administration under Pt 5.3A is intended to be a temporary measure'.

53. That is, the statute positively contemplates that if a lengthy period is needed to conduct further investigations to formulate proposals to best achieve returns for creditors, that should be done (following the creditors' decision) in a DOCA, rather than just on applications between an administrator and the Court.

54. Although Mighty River relies on the ***Riviera*** case, it must be noted that it provides that

the extension granted under s.439A(6) is 'an extension commensurate with the administrator's task' (***Riviera*** at 355 [14]). That task is to carry out the investigations in s.438A(a) to form the opinions in s.438A(b), lodge (if the facts dictate) reports set out in s.438D, lodge the account set out in s.438E, and convene the meeting in s.439A. ***Riviera*** is not authority that *every* task that might be desirable to do to obtain a better return for a company, its members or creditors than in a liquidation *must be done while the company remains in administration*. Yet that is the assumption behind Mighty River [47]-[48], which narrows Pt 5.3A by unwarranted implication, contrary to ***Lehman Bros*** at 521-2 [31], [34] and 523 [37]. The administrator does not simply make a 'commercial decision'; once they have finished their task under s.438A, and can provide the reasoned opinions required by s.439A, they are entitled to propose a DOCA under s.439A as they did here. Mighty River is wrong to suggest their decision is 'at large and unfettered' (cf [48]). An administrator's task is clearly posed by ss.438A and 439A, and compliance with those sections is subject to challenge. In this case, Mighty River attacked the administrators' conduct of that task at trial, failed utterly, and has not appealed those findings.

55. Mighty River's submission at [50] that the rules governing extension of the convening period removes 'safeguards' if a DOCA is entered into is not to the point. The fact that a company passes from administration to a DOCA is contemplated and authorised by the Act. If an administrator forms the opinions in s.438A and propounds a DOCA that is accepted by creditors, then the statutory consequences of the company moving into the DOCA regime will follow. That includes creating new protections for creditors such as in ss.445D and 445G. That these provisions have a different onus and test to extension applications under s.439A(6) simply reflects the different stage the matter has reached once creditors take control and approve a DOCA.

56. Mighty River ignores that the consequences also extend beyond the creditors, as part of a statutory balancing of interests of the wider community. As noted by Austin J in ***Riviera*** at [10], 'an additional reason for reluctance to extend the convening period is that the statutory moratorium on the prosecution of proceedings against the company and on enforcement of rights by chargees and owners or lessors of property during administration should not be prolonged without good cause'. That point can be illustrated by comparing provisions such as s.440B and s.441D with s.444D.

57. A final point to note is that the concern with avoiding 'holding DOCAs' (ie DOCAs which have as a purpose further investigations) – even if valid – cannot translate into support

for Mighty River's 'no property' construction of s.444A(4). The types of deeds instanced at paragraphs 27-35 above may have no 'holding' or investigative character to them. Yet they would still be barred on the Mighty River construction (unless they attached $1 of company property in distributions).

B. The 'discretion point'

B.1. Summary

58. In its application for special leave, Mighty River accepted that the question of the operation of s.445G would need to be remitted if its appeal were successful (T10.291-298). Notwithstanding, it now seeks that this Court exercise that discretion: submissions [90]ff. This Court should not do so.

B.2. The matter should be remitted if Mighty River succeeds on s.444A(4)(b)

59. The record is not in a proper state to allow this Court to exercise the discretions in s.445G, and a constitutional issue may arise in ensuring that the discretion is exercised while affording procedural fairness to MRL and the administrators.

60. The history is this. At trial, Master Sanderson made an order in MRL's proceeding declaring the DOCA 'is not void'. He did not further consider either of the alternative orders sought by MRL (a validating order under sec 445G(3) and a variation of the DOCA to cure any non-compliance under sec 445G(4)): J 97, AB 41.

61. Although Mighty River opposed the making of both orders, it did not seek any positive finding of injustice to be made for the purpose of sec 445G(3)(b): T365, 454-5, RFM 58, 63-64. Rather, it rested its opposition to an order under s.445G(3) on the basis that substantial compliance could not be shown: T455, RFM 64. On the other hand, MRL submitted that there had been substantial compliance with s.444A(4)(b) and that no injustice would result for anyone bound by the deed if the contravention is disregarded: T329, T349-350; RFM 55-57. The Master made no finding that injustice would result.

62. As to s.445G(4), MRL advanced a form of words by which the DOCA could be varied,[5] which the Administrators did not actively oppose,[6] but the Master stated that further argument would be needed in the event that he came to consider whether any variation under s.445G(4) needed to be made: T446-7, 458, RFM 59-60, 65.

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[5] '[A]ll property that is to be obtained from the acceptance of any Proposal under cl 15(c) shall be distributed to creditors, in accordance with Sch 8A of the Corporations Regulations 2001 save where they have been varied by the express terms of the DOCA.'

[6] They suggested 'shall be available to pay creditors' claims' rather than 'shall be distributed to creditors': T446, RFM 59

63. The appeal to the Court of Appeal was, by reason of s.58 of the *Supreme Court Act* and Rule 25 of the *Supreme Court (Court of Appeal) Rules* 2005, an appeal by way of rehearing. That meant that the Court's powers were exercisable only where, having regard to all evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error (there being no statutory indication to the contrary), and the Court would have had power to receive new evidence but was not bound to do so: ***Allesch v Maunz*** (2000) 203 CLR 172 at 180 [23], 183 [30].

64. MRL's position was that if Mighty River was successful in establishing any contravention of Pt 5.3A, then the matter either needed to be remitted or the Court of Appeal would have needed to consider further the matters underlying s.445G(3) and (4). The Court of Appeal did not reach that step given its conclusion on s.444A(4)(b).

65. If discretion is reached, the matter should be remitted to the Court of Appeal, since, as set out in ***Jones v The Queen*** (1989) 166 CLR 409 at 414: 'tenable grounds of appeal, properly raised and argued in the court below, be dealt with by that court before the issues raised by those grounds are agitated in this Court' (see also ***Bank of SA Ltd v Ferguson*** (1998) 192 CLR 248 at 263 [35]).

B.3. Additional reason for remittal

66. The affidavit of Mr Ebbs sworn 3 May 2018 discloses that there are substantial additional matters relevant to the exercise of the discretion that ought to be before the Court that exercises any powers contained in s.445G. The interests of justice therefore dictate a remitter to the Court of Appeal, where application will be made to receive this evidence. That is the course identified in ***Allesch v Maunz*** (2000) 203 CLR 172 at 183 [30]: 'where circumstances have or are likely to have changed between the original hearing and the disposition of the appeal, it is not uncommon for an appellate court to remit the matter for rehearing rather than, itself, exercise the discretion in question'.

67. There are sound prudential reasons for the question of receipt and consideration of the proposed new material to be dealt with on a remitter, rather than in this Court. In addition, there is a question whether, given ***Eastman v R*** (2000) 203 CLR 1 at 11 [13], 26 [78], 54 [164], 63 [190], this Court would be limited to the record as before Master Sanderson in seeking to exercise the discretions in s.445G on this appeal. That may require the issuance of s.78B notices and further argument.

68. MRL considers that, as the possibility of this Court exercising the discretion for the first time and/or receiving the proposed fresh evidence is remote from the issues on which

special leave was granted, it is not necessary to issue s.78B notices at this time to test the ***Eastman*** issue.

69. Should the ***Eastman*** issue later arise, MRL would propose to argue that the central reasoning of ***Eastman*** – focussing on the Chapter III concept of 'appeal' – does not preclude receipt of fresh evidence where the Court, squarely within the appeal jurisdiction, exercises the ***Allesch v Maunz*** power. Put differently, s.37 of the Judiciary Act[7] validly authorises such a course.

B.4. This Court should not fragment the discretion question

70. It is submitted that it is not open for this Court to undertake part of this task, such as by making a declaration of voidness under s.445G(2) but remitting the question of orders under s.445G(3) and (4). For one, that would fragment the matter, and produce mischievous results if there was a delay between a declaration of voidness under s.445G(2) and a validating or variation order under s.445G(3) or (4). Additionally, such an action may unintentionally dispose of the matter without affording procedural fairness if 'the Court' identified in each of s.445G(2), (3) and (4) must be the same Court, such that no other Court could make an order under s.445G(3) or (4) if this Court made an order under s.445G(2).

71. Finally, if the matter is to be remitted, it is not appropriate or constitutional for this Court to offer an advisory opinion as to the interpretation or operation of s.445G. This Court (consistently with ***Jones***) should await considered reasons of the Court of Appeal.

B.5. Alternative submission

72. In the alternative, if this Court is minded to undertake the task (and the whole task) itself, then in the interests of justice this Court should list the matter for appropriate directions to receive the evidence of what has occurred since the date of the Master's decision that is relevant to exercise of the discretions contained in s.445G(2), (3) and (4). Those directions are likely to include orders respecting the issuance of s.78B notices, and further submissions on (a) whether the evidence can and should be received; and (b) how the discretion should be exercised.

Part VI: Estimate of Time Required

73. The first respondent would propose to coordinate with the second and third respondents

[7] 'The High Court in the exercise of its appellate jurisdiction may affirm reverse or modify the judgment appealed from, and may give such judgment as ought to have been given in the first instance...'

to ensure that all of the respondents' submissions on this matter and the related matter (P7 of 2018) will be concluded within two hours and 15 minutes.

Dated: 3 May 2018

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