IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No P7 of 2018

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA COURT OF APPEAL ACTION CACV 30 of 2017

BETWEEN:

**MIGHTY RIVER INTERNATIONAL LIMITED (BVICN 1482079)**
Appellant

and

**Bryan HUGHES & Daniel BREDENKAMP as deed administrators of MESA MINERALS LIMITED (ACN 009 113 160) (subject to deed of company arrangement)**
First Respondents

**MESA MINERALS LIMITED (ACN 009 113 160) (subject to deed of company arrangement)**
Second Respondent

## APPELLANT'S OUTLINE OF ORAL ARGUMENT

**Part I:**

The Appellant certifies that this outline of oral argument is in a form suitable for publication on the internet.

**Part II:**

1. Section 444A(4) and section 445G: context and purpose. A combination of speed, flexibility and creditors' control, together with mandatory minimum requirements and limited Court supervision and control, to achieve the objects in s 435A {AS [27]-[29]}.
2. Facts and the DOCA. The purpose of the DOCA was to avoid a Court application to extend the convening period {AS [12], [15], [20]}.

*Section 444A*

3. Text {AS [30]-[42]; AS Reply [6]}.
    a. "[T]he property of the company": includes property provided by third parties for distribution to creditors: *Lombe v Wagga Leagues Club* (2006)


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56 ACSR 387 at [66]; *Re Jick Holdings* (2009) 234 FLR 22 at [33] {AS [31]-[35]; AS Reply [8]}.

b. "If any". The absence of those words or similar is telling {AS [36]-[41]; AS Reply [6]}.

c. "[T]hat is to be available to pay creditors' claims." This has no work to do in a 'no property' deed. The same can be said about "to be distributed to creditors" in s 444A(4)(h); see also s 444DA(1) {AS [34]-[35]}.

4. Flexibility is not unlimited and Court involvement is recognised and expected: ss 435C(3), 439A(6)-(8), 440D, 445G, 445GA, Div 13 (especially 447A) {AS [63], [64]-[66]; AS Reply [7]}.

5. "Side-stepping": The purpose of the DOCA was to impermissibly avoid the need for a s 439A(6) application; s 439A(6) {AS [43]-[48]; AS Reply [7]}.

6. Onus: It is no answer to observe that it is open for a dissatisfied creditor to apply to terminate a deed under s 445D as this is a different application on different criteria with the onus falling on the aggrieved creditor {AS [49]-[50]}.

7. The $1.00 deed and other hypotheticals are a distraction, do not engage with this DOCA, and assume the validity of the hypotheticals without identifying their terms. The cases identified by the respondents do appear to involve the distribution of some property, and in any event the point was not taken or decided. If there is a good reason for a $1 or the other posited deeds, a Court order under s 447A is available: *BE Australia WD Pty Ltd v Sutton* (2011) 82 NSWLR 336 at [194] {AS [54]-[63]; AS Reply [7]}.

*Section 445G*

8. There is not and has never been a concession that this aspect of the appeal requires remittal. Special leave was granted on the issue. In the first instance it is a question of statutory construction. Only if the statutory construction issue is decided against the Appellant is a discretion engaged {AS Reply [9]-[15]}.

9. The proper construction of s 445G is that once the DOCA is found to have contravened the Part, it is void and must be declared so under s 445G(2), subject to a discretion which is only engaged if the conditions in s 445G(3)(a) and (b) are satisfied, the onus being on the person seeking to validate the DOCA {AS [69]-[88]; AS Reply [17]-[19]}.

10. *Emanuele v ASIC* (1995) 63 FCR 54 is wrongly decided. *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1997) (Court of Appeal) 140 FLR 247 at 249-250 and 268-269 and

*City of Swan v Lehman Brothers Ltd* (2009) (Full Court) 179 FCR 243 at [25], [124], [157]-[158], and ought be preferred {AS [79]-[88]}.

11. Substantial compliance. There can be no substantial compliance with the requirement in s 444A(4)(b). It is either complied with or it is not: *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1997) 140 FLR 247 at 249-250 and 268-269; *ST (2) Pty Ltd v Lockwood* (1998) 27 ACSR 667 at 670-673.

12. Injustice. It is not possible for the Court to be satisfied that Mighty River has suffered no injustice. At the very least, it lost the opportunity to be heard on an application to extend the convening period, on which application the question of how long the extension ought be would have been considered {AS [97]; AS Reply [19]}.

13. Remitter. If contrary to the above, the Court is satisfied that a discretion is engaged, then it is accepted that the appropriate course would be to remit the proceedings to the trial division of Supreme Court of Western Australia, with this Court having determined the question of the construction of s 445G {AS Reply [9]-[15]}.

14. Variation: s 445G(4). Mineral Resources says that it has an unresolved application to vary the DOCA pursuant to s 445G(4). Leaving aside the absence of any notice of contention or cross-appeal, the application must fail for at least the following reasons. First, there is not now and never has been any consent by the administrators to the variation, which is a requirement of the Act. Secondly, the variation power is only engaged if part of the DOCA is void, not the whole of the DOCA, as must be the case here. Thirdly, it is not possible to sever or separate cl 8 from the rest of the DOCA; cl 8 was integral to the proposal put to creditors (see *Lehman Bros* (Full Court) at [123], [154]-[155]) {AS Reply [20]}.

*Result*

15. The DOCA does not comply with s 444A(4). It is void. It cannot be saved by s 445G. The parties have always accepted that the company is insolvent. It is appropriate that the Court declare the DOCA void pursuant to s 445G(2) and proceed to wind up the company {AS Reply [16]}. Paragraphs 4(a), (b), (c) and (e) of the Notice of Appeal, P7 and P8 of 2018, Joint Core Appeal Book, 209 and 215}.

**Robert Newlinds**
**D R Sulan**
**P R Gaffney**
19 June 2018