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

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and

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

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

APPELLANT'S SUBMISSIONS

Part I: publication on the internet

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

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Part II: a concise statement of the issue or issues the appellant contends the appeal presents

2. This appeal raises the following issues:

    (a) Whether the deed of company arrangement (the **DOCA**) entered into by Mesa Minerals Limited (***Mesa Minerals***), which provides for "no property" to be available to be distributed to creditors, complies with the mandatory requirement set out in sec 444A(4)(b) of the *Corporations Act* 2001.[1]

[1] References to sections, Parts and Divisions are references to the *Corporations Act* 2001 unless otherwise stated.

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(b) If the answer to that question is no, whether on the proper construction of sec 445G, the DOCA is void.

Part III: whether notice should be given in compliance with section 78B of the *Judiciary Act* 1903

3. The appellant does not consider that notice is required or should be given under section 78B of the *Judiciary Act* 1903.

Part IV: citation of the reasons for judgment

10 4. The reasons for judgment of the Supreme Court of Western Australia (Court of Appeal) are reported as *Mighty River International Ltd v Hughes* (2017) 52 WAR 1; [2017] WASCA 152 (***FC***). The reasons for judgment at first instance are *Mighty River International Ltd v Hughes & Bredenkamp* [2017] WASC 69 (***J***).

Part V: narrative statement of the relevant facts

5. Mesa Minerals is listed on the ASX {Joint Court Appeal Book (**AB**) 129, FC [227]; Appellant's Further Materials (**AFM**) 19}. Mineral Resources Limited (***Mineral Resources***) holds some 60% of the issued share capital of Mesa Minerals {AB 139, FC [261]}. The appellant (***Mighty River***) holds some 13.5% of the issued share
20 capital of Mesa Minerals {AB 139, FC [261]}. There are common directors and officeholders of Mesa Minerals and Mineral Resources {AB 140, FC [262]; AB 10, J [7]; AB 26, J [55]}.

6. Mesa Minerals' key assets include {AB 140, FC [263]}:
   (a) a 50% joint venture interest in two manganese projects, with the other joint venture partner being a subsidiary of Mineral Resources;
   (b) certain mining tenements and a mining lease called the Boodarie Lease;
   (c) an interest in a facility agreement with the Pilbara Port Authority in respect of a berth at Utah Point, known as Lot 7.

7. On 13 July 2016, pursuant to sec 436A, Mesa Minerals' directors appointed the first
30 respondents (the now Deed Administrators) as voluntary administrators {AB 140, FC [267]}.

8. Mineral Resources was admitted as a creditor for voting purposes in the administration of Mesa Minerals for around $8m and Mighty River was admitted to prove for voting purposes in an amount of around $69,000 {AFM 142}.

9. From the time of appointment, the first respondents favoured Mesa Minerals entering into a 'holding' deed of company arrangement {AB 36, J [81]; AB 39, J [92]; AB 141, FC [269]}. The first respondents issued a report to creditors under sec 439A dated 10 August 2016 which proposed that the company enter into a deed of company arrangement in order to "*essentially maintain the status quo of the administration (i.e. extend the moratorium)*" {AFM 12}. The report stated that the deed of company arrangement proposed was "*essentially an extension of the Administration Period*" {AFM 37}.

10. During the period July 2016 – October 2016, Mighty River urged upon the first respondents that they ought to be investigating possible claims against Mesa Minerals' directors and Mineral Resources for the related party use by Mineral Resources of Mesa Minerals' assets prior to entering into administration {AB 141, FC [272]; AB 32-33, J [71]}. Those claims had been the subject of litigation concerning the production of documents at the time of the voluntary administrators' appointment {AB 10-11, J [8]-[9]; AB 140, FC [265]}.

11. Mighty River suggested to the first respondents that, if they needed further time prior to the second meeting of creditors to investigate those claims, they ought to apply to the Court under sec 439A(6) to extend the convening period, rather than hold the second creditors meeting and enter into the 'holding DOCA' {AB 141, FC [273]}.

12. The first respondents did not take up Mighty River's suggestion. Instead, they issued a supplementary sec 439A report dated 13 October 2016 which recommended that the creditors cause Mesa Minerals to enter into the DOCA {AFM 74, 80}. The report repeated the earlier statement that the purpose of the DOCA was to "*essentially maintain the status quo of the administration (i.e. extend the moratorium)*" {AFM 80} and that the DOCA "*is essentially an extension of the Administration Period*" {AFM 92}.

13. The second meeting of creditors was held initially on 17 August 2016 and then adjourned to 20 October 2016, on which day the creditors (over the objection of Mighty River) resolved that Mesa Minerals enter into the DOCA and appoint the first respondents as Deed Administrators {AB 142, FC [274]-[277]}. The DOCA was executed on 3 November 2016 {AB 142, FC [276]; AFM 159, 161, 164}.

14. The terms of the DOCA are set out in the judgment of Beech JA at AB 142-147, FC [277]-[294] {see also AFM 161}. The recitals to the DOCA stated that its objective was to (emphasis added):

> *"provide sufficient time for the Administrators to conduct further investigations into [Mesa Minerals'] property and affairs, and to explore the possibility of a restructure or recapitalisation of [Mesa Minerals] to determine the likely outcomes to creditors and form an opinion as to whether a deed of company arrangement or liquidation is in the best interests of creditors of [Mesa Minerals]."*

15. Clause 8 of the DOCA provided:

> *"Subject to any variation of this deed, there will be no property of [Mesa Minerals] available for distribution to Creditors under this deed."*

10 16. By clause 9, during the holding period, the Deed Administrators were to investigate claims and consider proposals to "reconstruct" Mesa Minerals.

17. Clause 10 provided for a moratorium of debts and claims against Mesa Minerals.

18. Clause 15 provided for regular reporting by the Deed Administrators to creditors during the "holding" period.

19. The investigation and the procuring of proposals by the Deed Administrators were to occur by the Sunset Date (which was defined as 3 May 2017). At that time the Deed Administrators were to provide a report and were to convene a meeting of creditors to determine whether the deed should be varied to accommodate a "Recommended Proposal" or whether the deed should otherwise be terminated with the result that
20 Mesa Minerals be placed into liquidation.

20. Mr Hughes, one of the Deed Administrators, acknowledged in cross-examination, and it was found, that the purpose of the DOCA was to avoid the need for a Court application to extend the convening period for the second creditors meeting {AB 10, J [5]}.

21. On 16 November 2016, Mighty River commenced proceeding COR 247 of 2016 in the Supreme Court of Western Australia. Amongst other things, Mighty River contended that the DOCA did not comply with the requirements of Pt 5.3A and, consequently, was invalid, and that a declaration should be made to that effect {AB 139, FC [257]}.

30 22. Mineral Resources commenced proceeding COR 13 of 2017 in the same Court. It sought a declaration to the effect that, pursuant to sec 445G(2), the DOCA was not void {AB 151, FC [303]}.

23. The two proceedings were heard and determined together. Sanderson M dismissed Mighty River's claim in COR 247 of 2016 {AB 45, J [117]; AB 47}. After initially

deciding that it was not necessary to make any orders in COR 13 of 2017 {AB 45, J [117]}, Sanderson M declared in that proceeding that the DOCA is not void pursuant to sec 445G(2), without giving any further reasons {AB 49-50}.

24. Mighty River appealed both decisions. The appeal in COR 247 of 2016 was given proceedings number CACV 30 of 2017 {AB 52}. The appeal in COR 13 of 2017 was given proceedings number CACV 31 of 2017 {AB 55}.

25. The Court of Appeal dismissed Mighty River's appeal from Sanderson M's dismissal in both matters {AB 185, 188}.

26. Mighty River has been granted special leave to appeal against both decisions of the Court of Appeal {AB 206, 211}. Proceeding P7 of 2018 is the appeal from the Court of Appeal's decision to dismiss Mighty River's appeal against Sanderson M's decision to dismiss Mighty River's claim in COR 247 of 2016 {AB 208-209}. Proceeding P8 of 2018 is the appeal from the Court of Appeal's decision to dismiss Mighty River's appeal against Sanderson M's decision in COR 13 of 2017 to declare that the DOCA was not void under sec 445G(2) {AB 214-215}.

Part VI: The appellant's argument

The scheme of Pt 5.3A

27. The voluntary administration scheme in Pt 5.3A has a number of features:
    (a) The objects of the scheme are set out in sec 435A.
    (b) Voluntary administrators are appointed by one of the methods provided for in sec 436A to sec 436C. They are typically appointed under sec 436A(1) after directors have resolved that in their opinion, the company is insolvent or likely to become insolvent at some future time, and that an administrator should be appointed.
    (c) The administration begins when an administrator is appointed (sec 435C(1)(a)) and normally ends when creditors resolve to end the administration, wind up the company, or enter into a deed of company arrangement (sec 435C(2)).
    (d) A central component of Pt 5.3A is the mandated requirement to hold the second creditors meeting within a short period of time after the company enters into voluntary administration. This period of time known as "the convening period" affects not only the status of the company, but also has significant effects on the rights of all creditors, lessors and others who deal with the company. The

administration automatically ends if the second creditors meeting is not held within the convening period (sec 435C(3)(b)).

(e) The convening period is 20 or 25 business days after the appointment of the administrator unless extended by the Court (sec 439A(5), (6)). The explanatory memorandum to the Corporate Law Reform Bill (the **Explanatory Memorandum**) at [507] expressed an expectation that the convening period would not be extended 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* 10 *possible.*"

(f) The primary duty of a voluntary administrator is to investigate the affairs of the company (s 438A), with a view to making a recommendation to a meeting of creditors, to be convened by the end of the convening period, "*about what should be done*" {Explanatory Memorandum [445], [463], [495], [506]}.

(g) To aid that task the administrator is given compulsory information gathering powers (sec 438A, 438B and 438C).

(h) The administrator is required to report to creditors as to the company's business, property, affairs and financial circumstances (s 439A(4)(a)) and provide a reasoned opinion as to whether it would be in the creditors' interests for the 20 company to execute a deed of company arrangement, or alternatively for the administration to end or the company be wound up (439A(4)(b)).

28. The second meeting of creditors held at the end of the convening period may resolve that (a) the company enter into a deed of company arrangement (b) the administration should end or (c) the company be would up (sec 439C). The legislature intended that the company's future status would be decided by the creditors at this meeting. So much is clear from sec 439A, sec 439C and the heading to Div 5.

29. If creditors resolve that the company enter into a deed of company arrangement the voluntary administration period comes to an end and the provisions of Pt 5.3A, Div 30 10 (which contains sec 444A) then apply.

The text of sec 444A

30. Section 444A, which appears in Div 10 of Pt 5.3A, specifies the mandatory requirements of deeds of company arrangements. Relevantly sec 444A(4)(b) provides that a deed of company arrangement must specify (emphasis added):

> "*<u>the property</u> of the company (whether or not already owned by the company when it executes the deed) <u>that is to be available to pay creditors' claims</u>.*"

31. Here the DOCA provides that unless the DOCA is varied, there will be no property of Mesa Minerals available for distribution to creditors under the DOCA {AB 143, FC [284]; AFM 168}.

32. This is contrary to the statutory command in sec 444A(4)(b). The plain words of the section required that the DOCA specify that there be property available for distribution: see *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39]. It is hard to envisage that the legislature intended that
10 an insolvent company could have no property (current or future) to distribute but yet still remain out of liquidation and no longer subject to Court supervision.

33. Whilst the words are plain, each of the members of the Court of Appeal held that "the property" as referred to in sec 444A(4)(b) captured "no property" {AB 109, FC [148] (Buss P); AB 127, FC [221] (Murphy JA); AB 165-166, [349]-[352] (Beech JA)}.

34. The requirement to specify "the property" cannot be satisfied by a statement in the deed that there is "no property". One cannot distribute "no property" let alone can creditors' claims be paid from "no property".

35. If "the property" is capable of including "no property", the requirement for the deed
20 to specify a mandatory distribution process (sec 444A(4)(h)) and to specify that the priority of employees be respected in the distribution process (sec 444DA) become nonsense.

36. Further, the use of the words "any" and "if any" in sec 444A(4)(c), (e) and (f), as compared to the use of the phrase "the property" in sec 444A(4)(b), means that the legislature intended that a deed *must* identify property to be available for distribution but need not necessarily include any moratorium or any conditions to the operation of a deed (as provided for in sec 444A(4)(c), (e) and (f)).

37. Accordingly, and contrary to the holding of the Court of Appeal, the absence of the words "if any" from sub-section (b) compels the conclusion that there must be some
30 property if the requirement is to be fulfilled {c.f. AB 112, FC [166]; AB 127-128, FC [222]; AB 166, FC [354]}.

38. The error in the Court of Appeal's approach in this regard is apparent in Buss P's reasoning at AB 112, FC [166] where his Honour held:

> *"So, even though s 444A(4)(b) does not include the words '(if any)' it is plain from the text that the provision requires the deed to specify what present or future property (if any) of the company is to be available for the purpose of being applied in or towards payment of creditors' claims."*

39. This approach illogically adds the words "if any" to sec 444A(4)(b) in circumstances where such words do not appear. The meaning is changed by adding those words. It is by this process that Buss P concludes that the meaning is "plain". To read the words "if any" into sec 444A(4)(b) is no answer to the submission that the absence of those words conveys a plain meaning. The absence of qualifying words "if any" in sec 444A(4)(b) must be seen to have been considered and deliberate.

40. Murphy JA and Beech JA place no significance on the absence of "if any" in sec 444A(4)(b) on the basis that, in their view, replacing the word "the" with the word "any" in sec 444A(4)(b) would not add to its meaning {AB 127-128, FC [222]; AB 166, FC [354]}.

41. This reasoning is circular. "Any property" is not synonymous with "the property". The meaning is changed by substituting "the" for "any". The two phrases are only synonymous if the person interpreting them has already decided that "the property" means "any property" (or "the property, if any"). That proposition is the very issue that the Court was called upon to decide and cannot logically be used, as Murphy and Beech JJA do, as a step in the Court's reasoning. To do so begs the question to be decided, or assumes the answer in the question.

42. The references by the Court of Appeal to sec 445FA {AB 113-114, FC [169]-[170]; AB 129, FC [224]; AB 171, FC [368]} do not advance the construction. That section says nothing about the requirements of a deed (c.f. sec 444A) – rather it is directed towards an occasion upon which the deed may be terminated. The references to 'dealing with creditors' claims' in sec 445FA(1)(c) may apply in a number of circumstances, for example, where a deed distinguishes between classes of creditors that have agreed not to accept a distribution of the deed funds but have nevertheless agreed to release their claims, or a situation where one class of creditors' claims are subordinated to others.

Statutory context and purpose

43. The statutory context and purpose is found in the scheme of Pt 5.3A and supports the appellant's construction of sec 444A(4)(b).

44. It will be remembered that the sole purpose of this DOCA was to avoid the need to approach the Court to extend the convening period and to extend the period of investigation in relation to Mesa Minerals' affairs. That purpose, to side-step or outflank the process by which the Court supervises the voluntary administrator and the mandated investigations, was itself beyond the objects of the Part.

45. The scheme of Pt 5.3A expressly provides that the voluntary administrator may apply to extend the convening period under sec 439A(6). By sec 439A(7), if the application is made after the end of the convening period, the Court is required to be satisfied that the extension is in the best interests of creditors before granting an extension. Thus the requirement to apply to the Court to extend the convening period provides an important safeguard in favour of creditors who are not part of a majority of creditors. A significant body of case law has developed as to the matters which the Court takes into account in determining whether to exercise its judicial discretion to extend the period: see *Re Riviera Group Pty Ltd* (2009) 72 ACSR 352 at [13]-[14].

46. In *Re Riviera*, Austin J at [14] recorded that where a substantial ground is established by the administrator to support an extension the Court tends to grant it "*provided that the evidentiary case has been properly prepared, there is no evidence of material prejudice to those affected by the moratorium imposed by an administration, and the Court is satisfied that the administrator's estimate of time has a reasonable basis*": see also *Re Palandri Ltd (No 2)* [2008] WASC 154 per Martin CJ at [16].

47. It is beyond strange that the legislature would enact a specific section dealing with extensions of the convening period (sec 439A(6)), including the safeguard of judicial supervision, which is capable of being rendered optional by a "commercial decision" (as it was described by Sanderson M) of the voluntary administrator to recommend a holding deed instead of, or as a proxy for, applying to the Court for an extension {AB 42, J [101]}. A holding deed would also allow a majority of creditors to, as a "commercial decision", remove another important safeguard that would apply in an extended administration: the obligation of the voluntary administrator to report to ASIC about suspected breaches of duty or law by the company's management (sec 438D).

48. Unlike the judicial exercise of discretion under s 439A(6)-(7), a "commercial decision" by the administrators to recommend a holding deed does not require the administrators to perform any particular balancing act or to take into account the

interests of stakeholders. Rather, the administrators' decision is at large and unfettered by the restraints which exist upon the exercise of the judicial discretion under sec 439A(6)-(7). Such a result cannot be correct.

49. Furthermore, if the resulting deed is permissible an aggrieved creditor or interested person is left to bring an application to set aside the deed under sec 445D, carrying with it the onus of persuading the Court to make an order based on one of the specific grounds set out in sec 445D. On such an application the deed administrator is not required to satisfy any onus, and is not required to explain why the extended "holding" period is seen to be in the interests of stakeholders (c.f. sec 439A(6)-(7)).

10 50. Thus it can be seen that the intended judicial protection to all stakeholders of requiring a Court order to extend the convening period is rendered wholly illusory on the Court of Appeal's construction of sec 444A(4)(b).

51. The Court of Appeal's conclusion that property is capable of meaning "no property" is also contrary to the express objects of Pt 5.3A set out in sec 435A.

52. This "no property" DOCA neither maximises the chance of the company or its business continuing nor does it result in a better return to creditors than a liquidation.

53. It is no answer to say that a varied or future deed may fulfil the objects of Pt 5.3A. The DOCA cannot rely for its validity on some unknown, unidentified deed which may or may not exist at some time in the future. To be valid, the DOCA, in its own
20 right and by its terms, must fulfil one of the purposes of sec 435A and must contain the mandatory terms. This DOCA did neither.

Hypotheticals

54. At AB 109-110, FC [151], Buss P suggests that, if Mighty River's construction were accepted, it would mean that $1 in value could be specified in the deed and it would satisfy the requirement of sec 444A(4)(b). This imagined example does not engage with this DOCA – which had as its purpose a desire to avoid a Court application to extend the convening period and a desire to extend the investigation period beyond the statutory voluntary administration period. That purpose is beyond the scope of the Part.

30 55. The answer to His Honour's example is that whilst a $1 deed could possibly satisfy the requirements of sec 444A(4)(b), such a deed would be liable to be set aside under other provisions of the *Corporations Act* 2001, for example, sec 445D, as unfair or prejudicial, or would otherwise be in bad faith and contrary to the statutory objects set out in sec 435A.

56. A further part of the Court of Appeal's analysis was to posit various examples or kinds of deeds of company arrangement which it is said would be void if Mighty River's construction of sec 444A(4)(b) is accepted.

57. The exercise was (and is) a distraction. The task is to determine whether the DOCA the subject of the proceedings complies with the section and the Part. The task is not to determine whether some other hypothetical deed is or would be valid.

58. Nevertheless, the appellant submits the following in respect of the hypotheticals.

59. Buss P posits at AB 110, FC [152], three examples of hypothetical deeds which, according to His Honour, would be impermissible if Mighty River's construction of sec 444A(4)(b) is accepted (see also Murphy JA at AB 128-129, FC [224]).

60. The reasoning is circular. His Honour says that the appellant's construction must be wrong because he assumes the hypothetical deeds are valid – but he does not cite any authority to support the validity of his hypothetical deeds, or explain why the hypothetical deeds would themselves comply with sec 444A(4)(b). Of course, each hypothetical deed would need to be analysed on their respective terms (if such terms existed) against the statutory requirements, but dealing with them as best as one can:

    (a) The first hypothetical deed put forward is a so-called "creditors trust" {AB 110, FC [152(a)]}. It is far from clear that a "creditors' trust" is valid or that it complies with the provisions of Pt 5.3A. In any event, much will depend on the terms of the deed and associated creditors' trust. If, for example, some or all of the relevant property which is to form the trust fund passes through the deed to the trustee then the deed would probably comply with sec 444A(4)(b). Indeed the creditors' trust structure used in *Parkview Constructions Pty Ltd v Tayeh* (2009) 71 ACSR 65 involved the "Settlement Sum" of $1000 being paid to the deed administrators in accordance with the deed which also involved the setting up of the creditors' trust in which further monies were to be paid by the company: see at [20]. In that way the "property" requirement of sec 444A(4)(b) was likely satisfied (although there was no issue in the case about the provision). On the other hand, a deed creating a creditors' trust providing for no property to be distributed to creditors would be as void as the DOCA in this case.

    (b) The second hypothetical deed seems to contemplate property of the company (i.e. the transfer of a capital asset by shareholders to the company) being utilised to generate income of the company (i.e. further property) which is then

available to pay creditors' claims {AB 110, FC [152(b)]}. The property referred to in sec 444A(4)(b) includes future property *"whether or not already owned by the company when it executes the deed"*, so it is not at all clear that this hypothetical deed is in fact a "no property" deed. This example is therefore irrelevant to the statutory construction exercise and Buss P's statement at AB 110, FC [153] that none of the examples involve present or future property is wrong.

(c) The third hypothetical deed – also posited by Murphy JA at AB 128-129, FC [224] and Beech JA at AB 170, FC [365] – contemplates a debt for equity swap {AB 110, [152(c)]}. The appellant does not accept that such a hypothetical deed would comply with the requirements of Pt 5.3A. To the extent that capital restructure deeds and sec 444GA have been utilised such deeds often involve the payment of creditors such that there is property available to pay creditors' claims as an integral part of the compulsory acquisition of shares: see *Weaver v Noble Resources Ltd* (2010) 41 WAR 301 at [44]-[46]; *Re Nexus Energy Ltd (subject to a deed of company arrangement)* (2014) 105 ACSR 246 at [15].

61. Murphy JA at AB 128, FC [224] posits a hypothetical "cash flow" deed as an example to illustrate that the distribution of "property" is not mandatory. Again this is circular reasoning, which assumes for the purposes of the argument that such a deed is valid and compliant with sec 444A(4)(b). One would have thought that a "cash flow" deed would involve the company receiving future property (the cash) and creditors being paid some of it. If it does, the deed would be valid. If not, it would be void.

62. Beech JA at AB 169-170, FC [363]-[366] posits a hypothetical "moratorium only" deed of company arrangement. Again, such a deed would not comply with sec 444A(4)(b). It would be even more antithetical to the objects of Pt 5.3A than the current one because it would be no more than a bald circumvention of sec 439A and do nothing to decide the company's future.

63. Moreover, if, in a particular company, there was a need for a "cash flow" deed or a "moratorium only" deed it is always possible to utilise sec 447A to amend the way that Pt 5.3A operated in respect of that particular company. The discretion given under that section is broad, subject only to any amendment being consistent with the objects of the Part: see *BE Australia WD Pty Ltd v Sutton* (2011) 82 NSWLR 336 at [194]. In this way it may be possible for a Court to amend sec 444A(4)(b) so as to

remove or otherwise amend the property requirement referred to in that section. But such considerations do not arise in the present case (there having been no sec 447A application brought by the Deed Administrators or Mineral Resources). This further points up why hypotheticals are ultimately unhelpful to the statutory construction exercise.

Flexibility

64. A further part of the Court of Appeal's reasoning was to the effect that Pt 5.3A contemplated that that creditors would be given broad flexibility to fashion deeds of company arrangement and the interpretation urged by Mighty River would detract from that flexibility. That is evident at AB 110, FC [152]; AB 128-129, FC [224]; and AB 166-170, FC [355]-[367].

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65. The short answer to that approach is that although the scope of possible deeds of company arrangement is broad, it is not unlimited. The Explanatory Memorandum at [577] recognised that the scope of potential deeds of company arrangements was to be very wide but that nonetheless, given the importance of such arrangements, Division 10 "*will specify certain minimum requirements*". It does not advance the analysis to observe that, subject to the minimum requirements, the scope of the operation of Pt 5.3A is wide: the construction of the text sets the minimum requirements.

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66. For similar reasons, the opinion of the Court of Appeal that the purpose of sec 444A is only to ensure that creditors will be in a position to make a fully informed decision at a creditors' meeting {AB 109, FC [149]; AB 127, FC [221]; see similarly AB 165-166, FC [351]} takes the matter no further. The section sets down some of the very few mandatory requirements of a deed of company arrangement, which is that certain matters be specified in the deed. If those requirements cannot be specified because it is not proposed that the deed will deal with certain matters then it follows that a deed of that kind cannot be entered into consistently with Pt 5.3A.

Section 445G(2) – proper construction

67. If the Court holds that the DOCA does not comply with sec 444A(4)(b), sec 445G becomes relevant.

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68. The Court of Appeal declined to address the arguments that arose as to the proper construction of this section in the light of their findings as to sec 444A(4)(b) {AB 94, FC [107]; AB 124-125, FC [206], [210]; AB 154-155, FC [311]}.

69. Section 445G operates as follows.

70. *First,* the jurisdiction to make an order under sec 445G is conferred where an applicant for such an order can show that there is doubt as to whether a deed of company arrangement was entered into in accordance with Part 5.3A or complies with Part 5.3A {sec 445G(1), *Deputy Commission of Taxation v* ***PDDAM*** *Pty Ltd* (1996) 19 ACSR 498 at 512; *Employers' Mutual Indemnity (Workers' Compensation) Limited v* ***JST Transport Services*** *Pty Ltd* (1997) 72 FCR 450 at 458B-C}.

71. *Secondly*, once the jurisdiction is conferred, the task for the Court is to apply the law to the facts as found to determine whether the deed (or a provision of it) is void or not void within the meaning of sec 445G(2). Thus the position is analogous to that of a Court asked to resolve doubts as to the construction of a will or other instrument {*PDDAM* at 512} and its purpose is "*to resolve uncertainties where there is doubt concerning the validity of a deed of company arrangement that was purportedly entered into under Pt 5.3A*" {*JST Transport Services* at 451F; see similarly the opinion of Kirby J in *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 195 CLR 636 (***MYT HCA***) at [64]}.

72. Subject to the operation of sec 445G(3), the deed must be declared to be void if the Court determines that the deed was not entered into in accordance with Part 5.3A or does not comply with Part 5.3A.

73. *Thirdly*, the fact that sec 445G(3) enables a Court to declare a deed to be valid despite a contravention of Pt 5.3A suggests that the mandatory requirements of Pt 5.3A are to be applied fairly strictly to deeds of company arrangement {*Commissioner of Taxation v* ***Comcorp Australia*** *Ltd* (1996) 70 FCR 356 at 390F-G (Carr J, with whom Lockhart J agreed at 358C); see, to similar effect, the opinion of Fitzgerald JA at [65] (with whom Davies AJA generally agreed at [89]) in *Joseph Khoury & Sons v* ***Zambena*** *Pty Ltd* (1999) 217 ALR 527}.

74. *Fourthly*, sec 445G(3) provides for a potential form of relief from the fact that the deed contravenes Pt 5.3A. If the Court looks at the ground of voidness and, in the course of doing so, is positively satisfied that there has been a contravention of Pt 5.3A, but is also satisfied of two further conditions (namely substantial compliance and no relevant injustice) then, instead of declaring the deed void under sec 445G(2), it may as a matter of discretion, validate the deed or a provision of it under sec 445G(3).

75. *Fifthly,* one does not get to the sec 445G(3) discretion unless the criteria in sec 445G(3) are met. They are the gateway to the discretion. To hold otherwise would be to deprive those criteria of any operation.

76. This construction is consistent with the Explanatory Memorandum at [610]-[611], which contemplates that the "*consequences of a deed of company arrangement being entered into in circumstances which involve a contravention of... Pt 5.3A*" is that it will be void unless the criteria in sec 445G(3) are met.

77. Most authorities have approached sec 445G on the basis that it does not allow a non-complying deed to be valid unless the criteria in sec 445G(3) are satisfied:

10 (a) In *Deputy Commissioner of Taxation v Comcorp Australia Limited* (1995) 13 ACLC 1671, Sundberg J declared that a deed was valid despite contraventions of Pt 5.3A, but only after finding that the sec 445G(3) criteria had been met: [1683]. On appeal in *Comcorp Australia*, each member of the Court considered that the deed could only be valid if the criteria in section 445G(3) were met and considered those criteria at some length. The Court found they had been met and dismissed the ground of appeal on this point {Lockhart J at 358C; Sheppard J at 367A-368E, 372D-G; Carr J at 390F-G, 395B-397G}.

(b) Similarly, in *Mulcon Pty Ltd v MYT Engineering Pty Ltd* (1996) 20 ACSR 606 at 610 and *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1997) 140 FLR 247

20 (***MYT NSWCA***) at 249-250 (Handley JA) and 268-269 (Powell JA), the Court did not validate a contravening deed because the criteria in sec 445G(3) had not been substantially complied with. (On appeal, a High Court majority held that there had been no contravention of Pt 5.3A and no question arose under sec 445G(3) {*MYT HCA* at [29]}.)

(c) In *City of Swan v* ***Lehman Brothers*** *Australia Ltd* (2009) 179 FCR 243, Stone J (at [25]) and Perram J (at [157]-[158]) both appeared to consider that the Court may only declare a contravening deed valid under sec 445G if the criteria in sec 445G(3) are met. Rares J held at [124] that no order could be made validating the contravening deed under sec 445G(3) because of the absence of substantial

30 compliance with Pt 5.3A.

(d) In *ST (2) Pty Ltd v* ***Lockwood*** (1998) 27 ACSR 667, there was an admitted contravention of Pt 5.3A and Balmford J held at 673:25-30 that there was no power to validate the deed under sec 445G because there was no substantial compliance with Part 5.3A.

(e) There are a number of other first instance decisions where a Court has approached the section on the basis that the Court has a discretion under sec 445G but that the Court must be satisfied that the criteria in section 445G(3) are met before it can declare a deed that contravenes Pt 5.3A to be valid.[2]

78. However, there is authority going the other way.

79. In ***Emanuele*** *v Australian Securities and Investment Commission* (1995) 63 FCR 54, the Full Court of the Federal Court held at 69C that the power in sec 445G was on all fours with the powers in sec 445D and such powers were discretionary to be exercised having regard to the interests of the creditors as a whole and the public
10 interest. It appears that the Court was referring to sec 445G(2) (the judgment at 67F-68B omits sec 445G(3) entirely).

80. If the discretion in sec 445G(2) is as broad as the Court in *Emanuele* appears to have contemplated, at least two consequences follow. The first would be that the task of the Court under sec 445G(2) is not to declare that, subject to the operation of s 445G(3), a deed or a provision of a deed is or is not void by the operation of Pt 5.3A of the *Corporations Act*; rather, the task would be to declare a deed to be void or not void if there is good reason to do so: c.f. *Zambena* at [65]. The second would be that the Court could declare a contravening deed not void if it thought it was in the public interests to do so, notwithstanding that the criteria in sec 445G(3) were not met.

20 81. The correctness of the approach in *Emanuele* was doubted, but ultimately followed as a matter of precedent, by the Full Court in *Zambena* at [66]-[67], [89]. The approach was then referred to with apparent approval in 3 first instance decisions.[3] There are two further cases in which the power in sec 445G was described as "discretionary", without citing *Emanuele* for that proposition.[4]

82. *Emanuele* was incorrectly decided. It should not be applied for the following reasons.

83. *First*, it is inconsistent with the text of sec 445G(3). If the scope of the discretion in sec 445G is as broad as that found in *Emanuele*, sec 445G(3) has no work to do.

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[2] *Greek Orthodox Community of Oakleigh and District Inc v Pizzey Noble Pty Ltd* (1997) 23 ACSR 274 at 282; *Australian Guarantee Corp v Lawrence* (1999) 17 ACLC 1226 at [36]; ***J Aron Corporation*** *v Newmont Yandal Operations Pty Ltd* (2004) 49 ACSR 97 at [31]-[32]; *Glazier Holdings Pty Ltd v Australian Men's Health Pty Ltd* [2000] NSWSC 253 at [169]; *Scott v Port Hinchinbrook Services Ltd* (2017) 320 FLR 46 at [88].

[3] *Commissioner of Taxation v Portinex Pty Ltd* (2000) 156 FLR 453 at [107]; *Natarajan v ACIB Accumulus Pty Ltd* (2006) 56 ACSR 356 at [78]; *Mediterranean Olives Financial Pty Ltd v Loaders Traders Pty Ltd (No 2)* (2011) 82 ACSR 300 at [120].

[4] *J Aron Corporation* at [31]-[32] (though see paragraph 77(e) and fn 2 above); *Molit (No 55) Pty Ltd v Lam Soon Australia Pty Ltd* (1996) 63 FCR 391 at 402D-E.

84. *Secondly*, and similarly, the Full Court in *Emanuele* paid no attention to sec 445G(3) and the effect that the section has on the construction of sec 445G as a whole. The subsection is in fact crucial to the interpretation of sec 445G because it clearly evinces an intention that orders could only be made to validate contravening deeds under sec 445G if the criteria in sec 445G(3) were met.

85. *Thirdly*, it is inconsistent with the Explanatory Memorandum at [610]-[611], which plainly contemplated that a contravening deed could only be validated by sec 445G if the criteria in sec 445G(3) are met.

86. *Fourthly*, it is inconsistent with the weight of authority. In three other intermediate appellate cases, one decided before *Emanuele* (*Comcorp Australia*) and two decided after *Emanuele* (*MYT NSWCA* and *Lehman Brothers*), the majority took the approach that a contravening deed could only be validated under sec 445G if the criteria in sec 445G(3) are met. As noted in paragraph 77, a number of first instance decisions have taken the same approach. Though the majority in *Zambena* followed *Emanuele,* it did so reluctantly, doubting its correctness and apparently preferring the construction set out in paragraphs 70 to 75 above: *Zambena* at [65]-[67], [89].

87. *Fifthly*, not applying *Emanuele* would not mean that *Emanuele* or any decisions following *Emanuele* came to the wrong conclusion. There is no case which the appellant has found in which a Court has validated a contravening deed under sec 445G without the criteria in sec 445G(3) being met. Conversely, if *Emanuele* was held to be correct then it would mean that cases like *Lockwood* that considered whether the criteria in sec 445G(3) had been satisfied may have come to the wrong conclusion, because in those cases the Court considered a lack of substantial compliance with Pt 5.3A to be dispositive of the application to validate the deeds.

88. *Sixthly*, not applying *Emanuele*, and adopting the construction set out in paragraphs 70 to 75 above, would not entail that sec 445G(2) and sec 445G(3) involves no exercise of discretion; it is just that the discretion is to be exercised under sec 445G(3) only if the mandatory criteria in that subsection are met.

Application in this case

89. A doubt has arisen as to whether the DOCA was entered into in accordance with, or complies with, Pt 5.3A (specifically sec 444A(4)(b)). Accordingly, the jurisdiction to make an order under sec 445G is enlivened {sec 445G(1)}.

90. The next question is whether, applying Pt 5.3A, the DOCA was entered into in accordance with, or complies with, sec 444A(4)(b). For the reasons set out above, it

was not and did not. Subject to the operation of sec 445G(3), the Court must declare it to be void.

91. The next question is whether it is open to the Court to make an order that the DOCA is valid notwithstanding the contravention of Pt 5.3A. That requires consideration of whether the criteria in sec 445G(3) are satisfied. The Court needs to be satisfied that both criteria are met before it could consider making an order that the DOCA is valid and so the onus falls on the respondents to satisfy the Court of those matters.

92. Here the criterion in sec 445G(3)(a) cannot be satisfied.

93. In cases where, as here, the contravened provision does not admit of "degrees of compliance" it cannot be "substantially" complied with and the "degrees of compliance" analysis in cases such as *Comcorp Australia* has no application; the requirement is one that *"is either complied with or it is not"* {*MYT NSWCA*, (Handley JA at 249-250; see also Powell JA at 268)}. This approach was set out in *Lockwood* with apparent approval: see 670-673.

94. Further, an order under sec 445G that the DOCA is valid notwithstanding the contravention of Pt 5.3A would involve the Court, ex post, making an order to the effect that a provision of Pt 5.3A (sec 444A(4)(b)) had no effect, which Powell JA {*MYT NSWCA* at 268-269} appears to have considered beyond the power conferred by sec 445G.

95. Similarly, an order under sec 445G that the DOCA is valid notwithstanding the contravention of Pt 5.3A would be prejudicial to the substantial carrying into effect of the general object of Pt 5.3A, which Sheppard J {*Comcorp Australia* at 368C-D} considered beyond the scope of sec 445G.

96. The criterion in sec 445G(3)(b) cannot be satisfied either.

97. If the DOCA is valid, Mighty River is bound by it. It is not possible for the Court to be satisfied that Mighty River has not suffered injustice. If the Deed Administrators had sought approval under sec 439A to extend the convening period, Mighty River would have had the protection of a judicial officer deciding whether there was a good reason for the extension and certainty about the length of the extension. That protection was denied to Mighty River by the contravention of Pt 5.3A and that denial is injustice in itself.

98. Finally, if (contrary to Mighty River's submissions) both criteria in sec 445G(3) are met, or if (contrary to Mighty River's submissions) the Court's discretion to validate a contravening deed is essentially unconstrained in the manner contemplated by

Emanuele, then the Court should nonetheless decline to exercise its discretion to declare the DOCA valid notwithstanding the contravention.

99. There is a significant public interest in ensuring that there be compliance with the mandatory requirements of the Act as to what must be specified and included in a deed of company arrangement. Where there is non-compliance a strong discretionary case must be made out by the respondents before the Court would grant any relief.

100. Moreover, a deed such as the DOCA is antithetical to the objects of Pt 5.3A, and this particular deed was entered into to avoid the consequences of sec 439A.

10 101. Finally, the deed is standing in the way of liquidation and there is a public interest in the affairs of the company and its demise being investigated by liquidators {*Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd* (2005) 226 ALR 510 at [289]-[290]; see also *Public Trustee (Qld) v Octaviar Ltd* (2009) 73 ACSR 139 at [178]-[182]}. To this end, the Federal Court was persuaded to grant the appellant access to Mesa Minerals' books and records in circumstances where the appellant was contending that Mesa Minerals might have claims against its directors for the way in which Mesa Minerals' assets had been used which might in turn have given the right to Mesa Minerals to proceed against Mineral Resources {AB 10-11, J [8]-[9]}.

102. In the alternative, if the Court is required to exercise a discretion and is not minded,
20 or does not consider the material sufficient, to exercise the discretion itself, the matter should be remitted to the Court of Appeal or the trial division of the Supreme Court of Western Australia to consider the exercise of the discretion.

Part VII: Precise form of order sought by the appellant.

103. Mighty River seeks the following orders:

(a) Appeal allowed with costs.

(b) Set aside the orders of the Court of Appeal and in lieu thereof make the following orders:

30 (i) Set aside the order made by Master Sanderson on 22 March 2017 in COR 247 of 2016 dismissing the Originating Process;

(ii) Declare that the DOCA is void or invalid;

(iii) Order that Mesa Minerals be wound up and Mr Hughes and Mr Bredenkamp be appointed liquidators;

(iv) In the alternative to (b) and (c), remit the matter to the Court of Appeal for further consideration.

(v) Costs.

Part VIII: Estimated number of hours required for the appellant's oral argument

104. Mighty River estimates that it will require 2.5 hours to present its oral argument in both appeals.

Dated: 6 April 2018

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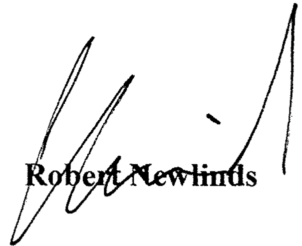

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