



HIGH COURT OF AUSTRALIA

Manager, Public Information

14 April 2010

LEHMAN BROTHERS ASIA HOLDINGS LIMITED (IN LIQUIDATION) v
CITY OF SWAN & ORS
LEHMAN BROTHERS HOLDINGS INC v CITY OF SWAN & ORS [2010] HCA 11

On 30 March 2010 the High Court pronounced orders dismissing appeals against a decision of the Full Court of the Federal Court which had held that a deed of company arrangement ("DOCA") for Lehman Brothers Australia Limited ("Lehman Australia") was void and of no effect. Today the High Court published its reasons for dismissing the appeals.

On 26 September 2008 administrators were appointed to Lehman Australia. Following the recommendation of the administrators, a majority of creditors in both number and value (which included other companies in the Lehman Group) passed a resolution that Lehman Australia execute a DOCA. On 12 June 2009 such a deed was executed by Lehman Australia, its administrators, and Lehman Brothers Asia Holdings Ltd ("Lehman Asia").

In proceedings before the Federal Court of Australia, several creditors of Lehman Australia (the first to third respondents in the High Court) claimed that the DOCA purported to provide a moratorium on and release of their claims against other companies in the Lehman Group. They submitted that such a release was not within the scope of Pt 5.3A of the *Corporations Act 2001* (Cth) ("the Act") and that they were therefore not bound by the DOCA. Section 444D(1) of the Act, which is in Pt 5.3A, provides that a DOCA "binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed". The creditors submitted that the word "claims" in s 444D(1) referred only to claims against the company the subject of the DOCA – here, Lehman Australia.

Justice Rares reserved the issue for the consideration of the Full Court of the Federal Court and on 25 September 2009 the Full Court held that the DOCA was void and of no effect. Justice Rares subsequently made a declaration that the DOCA was void and ordered that Lehman Australia be wound up by the Court.

Lehman Asia and Lehman Brothers Holdings Inc ("Lehman Holdings") were granted special leave to appeal to the High Court and on 30 March 2010 the Court pronounced orders dismissing both appeals. In its reasons delivered today, the Court held that there was no textual footing for reading the word "claims" in s 444D(1) as including claims against persons other than the company the subject of the DOCA. Lehman Holdings had submitted that the words "so far as concerns claims" required "the existence of a causal connection or association between the claim in question and a claim against the insolvent company" and that, because claims against it and other companies in the Lehman Group arose out of the same transactions as were the subject of the claims against Lehman Australia, the claims fell within the terms of s 444D(1). Lehman Asia focused on the interlocking nature of the claims and submitted that the impugned provisions in the DOCA should be seen as part of the "give and take" of a compromise arrangement of claims.

The Court held that even if it were accepted that it would be sensible to recognise that a creditor of one group of companies may have interlocking or dependent claims against one or more companies in the group, Pt 5.3A directs attention only to the particular subject company and does not deal with groups of companies. Section 444D(1) alone makes a DOCA binding on creditors. Since creditors are bound under s 444D(1) only to the limited extent identified in that provision, the fact that some creditors (even a majority in number and value) assented to giving up claims against another does not bind other creditors to do so. In making its decision, the Court said that nothing in the reasons should be understood as endorsing the criticisms made in this matter in the Full Court of the Federal Court of the earlier decision of the Full Federal Court in *Fowler v Lindholm* (2009) 178 FCR 563.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*