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 REPLY

### Part I: publication on the internet

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

### Part II: concise reply to the argument of the respondents

*Relevant facts*

2. The respondents' reliance upon the potential value of the ASX shell does not detract from the unchallenged finding that the purpose of this DOCA was to enable the administrators to avoid the need for a Court application to extend the convening period {AB, 10 J[5]}.
3. The question which arises on appeal is whether this "no property" DOCA which is used to advance such a purpose complies with the mandatory requirements of sec 444A(4)(b).


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| Date of document: | 25 May 2018 |
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*The construction of sec 444A(4)(b)*

4. Four points arise by way of reply on the proper construction of sec 444A(4)(b).

5. *First*, the respondents describe Mighty River's construction of sec 444A(4)(b) as "technical" or as an exercise in "form over substance". But the respondents accept (as they must) that the property sub-section is a mandatory requirement (see the opening words of the section) identifying what must be contained in a deed. There is no statutory warrant to describe the failure to adhere to the mandatory requirements of the section as "technical" or a matter of "form". This is all the more so where the DOCA operates as a proxy to apply to the Court to extend the convening period.

10 6. *Secondly*, contrary to the respondents' submissions, sub-sec (b) is not "conditional". The plain text of the section requires specification and identification of "the property of the company" that is to be available. The text is not in any way conditional and that conclusion is put beyond doubt when one considers the express "(if any)" words which feature in the other sub-sections (see sub-sec (c), (e) and (f)).

7. *Thirdly*, the various example deeds that the respondents contend would be invalidated if Mighty River's construction were accepted fails to engage with *this DOCA* which had its purpose of outflanking a Court extension application. So too the reliance on the $1 deed example. There is no suggestion in the cases relied upon by Mineral Resources at [27]-[33] that the issue of statutory construction under sec
20 444A(4)(b) was raised, argued or determined. The terms of the deeds the subject of the examples relied upon by Mineral Resources are not before the Court. Nor are the full circumstances or context known. For example, if a deed such as a debt for equity swap had some legitimate purpose consistent with the object of Pt 5.3A (as a vehicle for an arrangement delivering a substantive return of value to creditors) it may be unobjectionable as complying with the objects of the Part. If there is good reason to do so identified by a Court it could be validly implemented by sec 447A. No such application was made in this Court. By route of sec 447A the notion of "maximum flexibility" can possibly be achieved in this way.

8. *Fourthly*, Mineral Resources submits at [8] that Mighty River's construction of sec
30 444A(4)(b) has the effect "*any property that the deed proposes to make available to pay creditors claims that is not property 'of the company' is ignored*". That submission misunderstands the construction propounded by Mighty River. The property of the company that is to be available may originate from a third party such a director, shareholder, or some other third party. The source of the property is

beside the point: what is important is there must be some property of the company available at the time of payment.

*The remittal issue*

9. Mineral Resources at [58] wrongly asserts that Mighty River accepted in its applications for special leave that the question of the operation of sec 445G would need to be remitted if its appeals were successful.

10. Mighty River's position is (and has always been) that a remitter is only necessary or appropriate if this Court is required to exercise a general discretion. Mighty River has at all times contended that the proper statutory construction of sec 445G is that no general discretion arises because of the terms of sec 445G(2) and (3).

11. If Mighty River's submission is accepted, and if it is accepted that the respondents cannot satisfy the requirements of sec 445G(3), then there will be no occasion to remit the matter.

12. It follows that the attempt by Mineral Resources to introduce fresh evidence or to raise a constitutional question as to whether this Court is limited to the record before Master Sanderson is a distraction or design to avoid a winding up order {see Mineral Resources' submissions at [66]ff}. There was no suggestion at the Special Leave application that any constitutional point arises in determining the proper construction of sec 445G(2) and (3). It is also contrary to the position adopted by Mineral Resources before the Court of Appeal that conduct post-dating the DOCA was not relevant to the sec 445G inquiry {see Mineral Resources' Supplementary Submissions dated 7 June 2017 at [26]-[28]}.

13. The deed administrators do not suggest that fresh evidence is appropriate or that any constitutional point arises. It is the deed administrators along with Mesa which are parties to the deed (not Mineral Resources).

14. This Court should, consistently with the Special Leave granted, proceed to determine the issue of statutory construction identified by Mighty River. Only if the Court determines a general discretion arises ought the matter be remitted.

15. Further, if there is to be a remittal, contrary to Mineral Resources' submissions at [71] there is nothing 'advisory', inappropriate, or unconstitutional in this Court making findings as to the interpretation or operation of sec 445G before doing so. This Court has granted leave to appeal from the whole of both Court of Appeal decisions. The controversy before this Court is not hypothetical and is a dispute that raises issues of construction and application of law to facts found below. This Court

should decide those issues to quell aspects of the controversy. Such a result would not result in an impermissible advisory judgment: cf *Bass v Permanent Trustee Co* (1999) 198 CLR 334 at [47]-[49].

16. Moreover, at first instance and before the Court of Appeal, Mighty River sought a winding up order consequential on an order declaring the deed void. It is now suggested that such an order ought not be made in those circumstances. To not do so would leave the company, which is accepted to be insolvent, under the control of its directors for a limited time. That result ought not be countenanced.

*Proper construction of section 445G*

17. The deed administrators at [62] and Mineral Resources at [65]-[72] suggest that the question as to whether the preconditions set out in sec 445G(3)(a) and (b) have been satisfied is a matter of discretion. It is not.

18. The respondents have not discharged their onus of showing that the criterion in sec 445G(3)(a) is met. The matters set out in the deed administrators' submissions at [62(a)] do not establish substantial compliance. Assessing substantial compliance requires a practical comparison of what was done and what should have been done and determining whether it is fair to say there has been substantial compliance. The "no property" DOCA cannot substantially comply with sec 444A(4). Contrary to the deed administrators' submissions at [57]-[58], the analogy between this DOCA and a deed that fails to meet a strict time limit is apt. In each case, either a criterion is met or not.

19. The deed administrators' submissions at [62(b)] wrongly contend that the onus is on Mighty River to prove that there has been substantial injustice. That is a misreading of the section; the text of sec 445G proceeds on the basis that a DOCA that contravenes Pt 5.3A is void unless an order is made under sec 445G(3). Thus once the DOCA is void the onus falls on a party seeking to validate it to prove the criteria in sec 445G(3) are met. Here no effort was made to discharge the respondents' onus in showing that there has been no injustice.

20. Finally, the respondents suggest the DOCA might be saved by a variation under sec 445G(4). But the precise variation sought is not identified and any such variation requires consent of the deed administrators, which has not occurred.

Dated: 25 May 2018

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