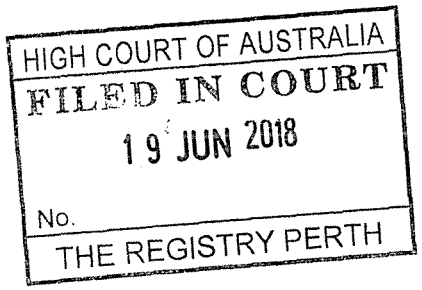
IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

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 OUTLINE OF ORAL ARGUMENT

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Part I: Certification

1. MRL certifies that this outline is in a form suitable for publication on the internet.

Part II: Outline of propositions that MRL intends to advance in oral argument

2. MRL supports the argument of the Administrators and adds or emphasises the following.

A. The 'No Property' point

3. *Text*: An available, and preferable, construction, merely as a matter of text, is that the critical words in s.444A(4)(b) serve an adjectival function. The 'property of the company' is divided into two sets; that which "is to be available to pay creditors' claims" under the DOCA and that which is not. Creditors must be squarely informed, and vote upon, what is to fall into each set. However, nothing in the text requires that any particular item of property fall into either set. Nor must either set be non-empty. Accordingly, a DOCA may specify that all of the company's property be available under it; or some; or none. Cl 8 of the DOCA therefore complies with s.444A(4)(b): RS [18].

4. *Immediate context*: This construction is consistent with the immediate statutory context. The various requirements in s.444A(4) are all directed to ensuring that, whatever else a DOCA contains, creditors turn their minds to key matters which may provide a different outcome to an immediate winding up. In a liquidation, all property of the company will be available for distribution to creditors. Section 444A(4)(b) ensures that creditors are informed whether, and how, a DOCA will deviate from that 'default' position. The same rationale explains the other mandatory requirements in s.444A(4): RS [21]-[22].

5. *Wider context*: The wider context of Part 5.3A supports the same conclusion. Creditors are given broad latitude to debate, and vote, on a DOCA which may offer a better outcome than an immediate winding up and thus achieve the objectives in s.435A. The Appellant accepts that creditors are not required to devote all property of the company to the DOCA and (it seems) accepts that they may agree upon non-property of the company being devoted to the DOCA. Once those steps are taken, nothing in the context supports the suggested limitation that 'at least some' of the company's property must at all times in the DOCA's life be devoted to it. There is nothing 'better' about property of the company such that some of it must always be available to pay creditors' claims. Note also s.444D, s.444GA, s.445A, s.445FA and Sch 8A to the *Corporations Regulations*: RS [24]-[26].

6. *Statutory purpose*: MRL has identified five types of real world DOCAs, evidenced by the cases, which in various ways achieve the objectives in s.435A without distributing any property of the company. It would make no sense to read s.444A(4)(b) as rendering such

deeds invalid unless they added a distribution of 'at least some' company property: RS [26]-[36].

7. *Inherent uncertainty*: The 'at least some' requirement is inherently uncertain in application. Literally, it would be satisfied by a DOCA distributing $1, or $100 or $1000, which would render it a pointless requirement. The Appellant suggests some requirement of 'substantiality' is achieved not through s.444A(4)(b) itself, but through the Court's power under s.445G to set aside oppressive deeds. But by what standard does the Court find a DOCA to be oppressive on this ground if all that s.444A(4)(b) itself requires is 'at least some'? Sorites paradox looms: RS [37]-[43].

10 **B. <u>Mighty River's 'side-stepping' argument</u>**

8. *The argument does not arise in the appeal:* The Appellant toys with an argument that a DOCA that permits deed administrators time to conduct any kind of further investigation (or other activity designed to improve returns to creditors) impermissibly 'side-steps' the Court's role under s.439A(6). This argument is not tethered to a separate ground of appeal nor to the construction of any particular provision in Pt 5.3A. It cannot produce the construction the Appellant seeks for s.444A(4)(b) because there is no necessary legal or factual connection between whether a given DOCA includes a 'further investigations' power as well as immediately distributing 'at least some' property.

9. *Limited scope of investigations in the administration period*: The only 'investigations'
20 that Pt 5.3A mandates must be carried out while a company is under administration are those set out in s.438A. Once an administrator has formed the requisite opinions about the options in (a), (b) and (c), a DOCA should be proposed. In the present case, the Appellant's attacks on that process of opinion formation failed at trial: RS [44]-[50].

10. *No requirement against further investigations under a DOCA*: Mandatory requirements for a DOCA, whether positive or negative, should not be read into Pt 5.3A: *Lehman Brothers.* The strict time limits in s.439A, and the limited, defined investigations required by s.438A, tell against any argument that administrators must keep a company in administration until every action that could be taken to potentially improve returns to creditors has been taken. The power to amend the DOCA is consistent with an ability to
30 conduct further investigations: RS [51]-[57].

11. *Functional difference between Court's role at each stage:* The administration stage is intended to be very short. The relationship between administrator and Court is ex parte. The Court guards the creditors' interest against the background that their debts are frozen

against their will; they have not yet voted; and often will not be heard. By contrast, where the creditors vote by requisite majority for a DOCA including, as here, a moratorium and further investigations power, the Act gives prima facie force to that act of creditor democracy and casts the Court in a limited role of review of that decision: RS [55].

C. Alternative submissions in the event the appeal succeeds

12. *Ordinary course is remitter:* If the Appellant succeeds on s.444A(4)(b), the Court should follow the ordinary course of remitting the matter for consideration of what orders should be made under s.445G since each of s.445G(2), (3) and (4) involve the exercise of a discretion which has not yet been reached in the Courts below. MRL wishes to argue that the DOCA should not be declared void; alternatively, that it should be validated; alternatively, that it should be varied to the form proposed by MRL in argument at trial or as amended on 15 September 2017: RS [59]-[65]. The discretions ought not be fragmented as the Appellant seeks: RS [70]-[71]

13. *Additional reason for remitter:* The Act requires the above discretions to be exercised on the basis of the DOCA as it currently stands and surrounding events as they currently are (see s.445H). MRL wishes to adduce evidence of events which have occurred since the decision of the Court of Appeal: RS [66] and Ebbs affidavit.

14. *Receipt of fresh evidence:* Under s.37 of the *Judiciary Act*, and as an incident of the exercise of its appellate jurisdiction, the Court may receive the fresh evidence for the adjectival purpose of deciding whether to remit (and arguably if the Court chooses not to remit), consistently with ***Eastman v R*** (2000) 203 CLR; see ***Gronow v Gronow*** (1979) 144 CLR 513 at 524-5, 530 and 540, and Mason CJ in ***Mickelberg v The Queen*** (1989) 167 CLR 259 at 268-271. Alternatively, the Court should refrain from exercising appellate jurisdiction, or revoke leave: ***Mickelberg*** at 270: RS [67]-[69], [72].

15. *Winding up not available:* No application to wind up was made below, and the discretions in ss.459P and 461(1)(k) cannot be exercised on these appeals.

Dated: 19 June 2018

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