HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

Matter No S1/2010

LEHMAN BROTHERS HOLDINGS INC APPELLANT

AND

CITY OF SWAN & ORS RESPONDENTS

Matter No S362/2009

LEHMAN BROTHERS ASIA HOLDINGS LIMITED
(IN LIQUIDATION) APPELLANT

AND

CITY OF SWAN & ORS RESPONDENTS

Lehman Brothers Holdings Inc v City of Swan
Lehman Brothers Asia Holdings Limited (in liquidation) v City of Swan
[2010] HCA 11
Date of Order: 30 March 2010
Date of Publication of Reasons: 14 April 2010
S1/2010 & S362/2009

ORDER

Matter No S1/2010

1. Appeal dismissed.

2. The appellant pay the costs of the first, second and third respondents.

Matter No S362/2009

1. Appeal dismissed.

2. The appellant pay the costs of the first, second and third respondents.

On appeal from the Federal Court of Australia

Representation

T F Bathurst QC with A J Payne SC and E A J Hyde for the appellant in S1/2010 and the seventh respondent in S362/2009 (instructed by Jones Day)

D L Williams SC with M J Steele for the seventh respondent in S1/2010 and the appellant in S362/2009 (instructed by DibbsBarker Lawyers)

N C Hutley SC with A P Coleman and D R Sulan for the first to third respondents in both matters (instructed by Piper Alderman)

B A J Coles QC with P Kulevski for the fourth to sixth respondents in both matters (instructed by Clayton Utz Lawyers)

S J Gageler SC, Solicitor-General of the Commonwealth with J W S Peters SC and O Bigos appearing as amicus curiae on behalf of Australian Securities and Investments Commission (instructed by Australian Securities and Investments Commission)

CATCHWORDS

Lehman Brothers Holdings Inc v City of Swan
Lehman Brothers Asia Holdings Limited (in liquidation) v City of Swan

Corporations – Statutes – Deed of company arrangement ("DOCA") – *Corporations Act* 2001 (Cth), s 444D(1), provided that a "deed of company arrangement binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed" – Where provisions of DOCA purported to provide for moratorium on and release of claims that might be made by company's creditors against persons other than the company – Whether such provisions of DOCA binding on company's creditors – Whether DOCA void.

Words and phrases – "so far as concerns claims", "deed of company arrangement".

Corporations Act 2001 (Cth), Pts 5.1, 5.3A, s 600A.

1 FRENCH CJ, GUMMOW, HAYNE AND KIEFEL JJ. On 30 March 2010, the Court made orders in each of these matters that the appeal be dismissed. In each appeal the appellant was ordered to pay the costs of the first, second and third respondents. What follows are our reasons for joining in those orders.

2 Part 5.3A of Ch 5 of the *Corporations Act* 2001 (Cth) ("the Act") provides for what the heading of the Part describes as "Administration of a company's affairs with a view to executing a deed of company arrangement". These two appeals concern the application of Pt 5.3A to Lehman Brothers Australia Ltd ("Lehman Australia").

3 Two other Lehman Brothers companies are parties to the proceedings in this Court: Lehman Brothers Holdings Inc ("Lehman Holdings") and Lehman Brothers Asia Holdings Ltd ("Lehman Asia"). Lehman Holdings is the ultimate parent company of both Lehman Australia and Lehman Asia. Lehman Holdings is the appellant in one appeal; Lehman Asia is the appellant in the other. Lehman Australia is the fourth respondent in each appeal.

4 In September 2008, Lehman Australia appointed administrators under Pt 5.3A of the Act. In June 2009, the administrators and Lehman Australia executed a Deed of Company Arrangement. The central issue in each appeal is whether creditors of Lehman Australia are bound by the Deed. That question should be answered "no".

5 To explain why the relevant issue should be expressed in the terms indicated, and answered "no", it is convenient to proceed by the following steps. First, something should be said about the facts that underlie these matters and to describe the development of the Deed. Next, it will be convenient to sketch the history of proceedings in the courts below. Then, reference must be made to a number of provisions of the Act, particularly those provisions of Pt 5.3A which will show the structure and operation of the Part. Finally, the relevant question of statutory construction should be identified and answered.

Some underlying facts

6 Lehman Australia procured companies which it controlled, and were specially incorporated for the purpose, to borrow money from investors. The investment arrangements were known as CDO (or collateralised debt obligation) instruments. The borrower issued a note to the investor. The borrowings were used by the special purpose company to acquire cash, bonds or other low risk financial instruments. It was intended that each special purpose borrower would make (and each did make) other transactions with other parties using the property acquired. The detail of those other transactions (and, in particular, the granting

of rights over that property) need not be examined. It is enough to observe of those other transactions that the special purpose company that had issued its note to the investor would acquire an interest in other CDO notes and would enter credit default swap agreements with a counterparty. The credit default swap agreements were intended to be the ultimate source of interest and principal payments to investors.

7 Argument of the appeals in this Court proceeded on the footing that the times for repayment of the notes issued by the special purpose companies have not arrived. So far as the material in this Court shows, there has been no default in payment of interest. Yet because of the sudden and steep decline in the realisable value of certain assets, which was a defining element of the global financial crisis that began in 2007, investors consider that they may not recover the face value of their debts. Some investors have made claims against Lehman Australia and other Lehman companies alleging, among other things, negligence, or misleading or deceptive conduct in connection with the investor's decision to invest. Other investors have foreshadowed similar claims.

8 In September 2008, Lehman Holdings, the ultimate holding company of both Lehman Australia and Lehman Asia, sought bankruptcy protection in the United States. Lehman Asia went into provisional liquidation. The directors of Lehman Australia resolved to enter administration under Pt 5.3A of the Act. Some months later, the administrators recommended that creditors resolve that Lehman Australia make a Deed of Company Arrangement rather than resolve that the company go into liquidation or that the administration end.

The development of the Deed of Company Arrangement

9 Ultimately, a form of arrangement proposed by Lehman Asia (itself a creditor of Lehman Australia) was adopted. Another proposal, made by another creditor of Lehman Australia (Gowing Brothers Limited), had advanced a different arrangement, but that proposal was withdrawn. It is sufficient for present purposes to describe some of the main features of the proposal advanced by Lehman Asia.

10 All of the property and assets of Lehman Australia were to comprise a "Deed Fund". From the Deed Fund there would be created a separate pool of funds for distribution among "Litigation Creditors" – those creditors, other than employees and general creditors, who had claims against Lehman Australia which arose before the commencement of the administration on 26 September

2008[1]. The Litigation Creditors are all investors of the kind earlier mentioned. The separate pool of assets for distribution among Litigation Creditors was to comprise a specified sum of money (proposed at first to be $36m but eventually agreed to be $43.2m), together with the proceeds of any insurance policy (including any claim against, or settlement with, the professional indemnity insurer of Lehman Australia). Priority creditors and general creditors would likely be paid in full.

11 The proposal for a deed along these lines was advanced by Lehman Asia on the footing that its making would bring litigation to an end, avoiding the attendant expense, delay and uncertainty, and provide an equitable return to creditors of all classes. An important element of the proposal was to identify what releases or indemnities would be given in return for rights against the separate pool of assets which came to be called the "Litigation Creditors' Fund". The nature and extent of what releases and indemnities were proposed changed between Lehman Asia's first proposal and the proposal ultimately put to creditors. The detail of those changes, and the negotiations that brought them about, need not be noticed beyond observing that doubt was expressed by the administrators about the enforceability of certain of the releases and indemnities first proposed.

12 A final form of proposed deed was put to a meeting of creditors on 28 May 2009. A majority in number (61 to 57) and in value ($256.7m to $70.2m) of creditors who attended the meeting voted in favour of the resolution. Although some attention was given in argument to the composition of the majority, and in particular to what was said to be the role of Lehman companies in procuring the Deed, that is not a matter that bears upon the issues that are to be decided in these appeals.

13 At the risk of undue abbreviation, the Deed provided that the investors who asserted a claim against Lehman Australia (the Litigation Creditors) retained their rights against the relevant special purpose companies that had borrowed money, compromised their claims against Lehman Australia, and ultimately

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1 The Deed defined "Litigation Creditors", in effect, as current or former clients of Lehman Australia who at 26 September 2008 had a claim against Lehman Australia arising from their purchase of collateralised debt obligations and other financial products from Lehman Australia, or pursuant to Lehman Australia's services or advice.

released other Lehman Entities[2] from claims arising from their investment that investors may have against those other entities.

14 Argument in this Court, and in the Court below, directed particular attention to three provisions of the Deed: cll 7.1, 9 and 11.5. The proper construction of those provisions is not now disputed. First, cl 7.1 gave the Deed Administrators sole conduct and control of any insurance claim which otherwise could have been conducted by a creditor of Lehman Australia in respect of insurance of Lehman Australia or a Lehman Entity other than Lehman Asia. Second, cl 9 operated to provide a moratorium in respect of a claim (or an insurance claim) by a Litigation Creditor against Lehman Entities. Third, cl 11.5 provided that, upon payment to Litigation Creditors of the final dividend from the Litigation Creditors' Fund, Litigation Creditors release all claims against Lehman Entities (other than the special purpose borrowing companies) and all insurance claims. As will later be explained, to the extent that the provisions of cl 9 provided for a moratorium in favour of Lehman Entities, and the provisions of cl 11.5 provided for release of claims against Lehman Entities, those provisions did not bind creditors.

Proceedings in the courts below

15 After the passing of the resolution requiring execution of the Deed, but before its execution, two local authorities who had voted against the resolution (City of Swan and Parkes Shire Council) instituted proceedings in the Federal Court of Australia challenging the validity of the Deed and the validity of the resolution to enter into the Deed, and claiming an order that the Deed be terminated pursuant to s 445D of the Act. A third local authority, Wingecarribee Shire Council, was later joined as the third plaintiff. Lehman Australia, the administrators of Lehman Australia (who had been named as Deed Administrators in the Deed) and Lehman Asia (then in liquidation) were named as defendants to the proceeding. Lehman Holdings was later joined as a defendant. It will be convenient to continue to refer to the three local authorities as "the plaintiffs". They are the first to third respondents in each of the appeals to this Court.

16 The plaintiffs alleged that the inclusion in the Deed of any or all of the three clauses mentioned earlier (cll 7.1, 9 and 11.5) entailed that the Deed was

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2 The Deed defined "Lehman Entity" as Lehman Holdings and any body corporate, not incorporated in Australia, that was partly or wholly owned, directly or indirectly, by Lehman Holdings at, or in the six months before, 15 September 2008.

not a "valid" deed under Pt 5.3A. The plaintiffs proposed that there be argued separate questions directed to the proper construction of each of the impugned provisions, and to whether Pt 5.3A authorised their inclusion in a Deed of Company Arrangement. The defendants opposed adoption of that course but Rares J ordered[3] that eight questions be determined separately from, and before the trial of, the proceedings and that those questions be reserved for consideration by a Full Court of the Federal Court. Three questions (numbered 1, 3 and 5) were directed to issues of construction of each of the impugned provisions. The answers to those questions yielded the now undisputed construction of the provisions that is mentioned earlier in these reasons. Three questions (numbered 2, 4 and 6) asked, in effect, whether, on the construction of the relevant clause that was ultimately adopted, the relevant impugned provision was "valid and binding on the creditors of [Lehman Australia], having regard to sections 435A, 444A, 444D, 444H and Part 5.3A of the Act".

17 The Full Court[4] (Stone, Rares and Perram JJ) answered "no" to each of the questions about the validity of the three impugned provisions (questions 2, 4 and 6). To the further question "Is the [Deed] void and of no effect?" the Court answered "yes".

18 These answers having been given by the Full Court, Rares J subsequently made a declaration that the Deed is void, and ordered that Lehman Australia be wound up by the Court.

19 By special leave, both Lehman Holdings and Lehman Asia appeal against so much of the orders of the Full Court as answered the questions about the validity of the impugned provisions of the Deed and the validity of the Deed as a whole. Despite the order for winding up, the controversy about validity of each of the impugned provisions (and the Deed) remains a live controversy between the parties.

Relevant provisions of the Act

Object and structure of Pt 5.3A

20 The object of Pt 5.3A of the Act is stated in s 435A as being:

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3 *City of Swan v Lehman Brothers Australia Ltd* (2009) 73 ACSR 86; [2009] FCA 784.

4 *City of Swan v Lehman Brothers Australia Ltd* (2009) 179 FCR 243.

"to provide for the business, property and affairs of an insolvent company to be administered in a way that:

(a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or

(b) if it is not possible for the company or its business to continue in existence – results in a better return for the company's creditors and members than would result from an immediate winding up of the company."

The general scheme of the Part is indicated by the headings of some of its divisions:

Div 1	ss 435A–435C:	"Preliminary"
Div 2	ss 436A–436G:	"Appointment of administrator and first meeting of creditors"
Div 3	ss 437A–437F:	"Administrator assumes control of company's affairs"
Div 4	ss 438A–438E:	"Administrator investigates company's affairs"
Div 5	ss 439A–439C:	"Meeting of creditors decides company's future"
Div 6	ss 440A–440JA:	"Protection of company's property during administration"
Div 7	ss 441A–441K:	"Rights of chargee, lienee, pledgee, owner or lessor"
Div 8	ss 442A–442F:	"Powers of administrator"
Div 9	ss 443A–443F:	"Administrator's liability and indemnity for debts of administration"
Div 10	ss 444A–444J:	"Execution and effect of deed of company arrangement"
Div 11	ss 445A–445H:	"Variation, termination and avoidance of deed"
Div 12	ss 446A–446C:	"Transition to creditors' voluntary winding up"
Div 13	ss 447A–447F:	"Powers of Court"

21 The Part is drafted in a way that emphasises the need for prompt action in implementing its provisions, and prompt decisions by creditors about the fate of a company to which administrators are appointed. As the statement of the object of Pt 5.3A in s 435A makes plain, the central concern of the Part is regulation of the administration of an insolvent company. A company may appoint[5] an

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5 s 436A.

administrator under the Part if the board resolves that the company is, or is likely to become, insolvent.

22 Section 435C(2) identifies the "normal outcome" of an administration as one of three: execution of a deed of company arrangement, a resolution by the company's creditors that the administration should end, or a resolution by the company's creditors that the company be wound up.

Administrator's powers and responsibilities

23 Once appointed, an administrator assumes control of the company's affairs[6] and acts as the company's agent[7]. The powers of other officers of the company are suspended[8]. Without the administrator's consent, or the leave of the Court[9], charges[10] and liens and pledges[11] cannot be enforced, distress for rent[12] cannot be carried out, and owners or lessors of property[13] used or occupied by, or in the possession of, the company cannot take possession of the property. No enforcement process[14] can be begun or proceeded with except with the leave of the Court.

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6 s 437A.

7 s 437B.

8 s 437C.

9 Section 58AA defines "Court" as any of the Federal Court of Australia, the Supreme Court of a State or Territory, the Family Court of Australia, or a court to which s 41 of the *Family Law Act* 1975 (Cth) applies because of a proclamation made under s 41(2) of that Act.

10 s 440B.

11 s 440BA.

12 s 440BB.

13 s 440C.

14 s 440F.

24 The administrator must "[a]s soon as practicable after the administration of a company begins" investigate[15] the company's affairs and form an opinion about which of the three "normal outcomes" of an administration would be in the interests of the company's creditors.

25 Within a very short period[16] after the administration begins (20 or 25 business days, unless extended), the administrator must convene[17] a meeting of creditors to be held within five business days before, or five business days after, the end of the convening period[18]. The administrator must give[19] creditors a statement setting out the administrator's opinion about whether it would be in the creditors' interests for the company to execute a deed of company arrangement, for the administration to end, or for the company to be wound up. The statement must set out[20] the administrator's reasons for those opinions, together with such other information known to the administrator as will enable the creditors to make an informed decision about those matters.

Creditors' meetings

26 A meeting of creditors convened under s 439A may be adjourned from time to time, but the period of the adjournment (or the total of the periods of adjournment) must not[21] exceed 45 business days.

27 The speed with which it is expected that an administrator and the creditors will act may suggest that Pt 5.3A was expected to find common application to small and medium enterprises. It would not be right, however, to draw from that observation a conclusion that the Part can have no application to larger or more complex enterprises. Nor does the promptness with which administrators and

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15 s 438A.

16 s 439A(5).

17 s 439A(1).

18 s 439A(2).

19 s 439A(4)(b).

20 s 439A(4)(b).

21 s 439B(2).

creditors must act under Pt 5.3A bear upon the issues of construction that arise in this case.

28 Division 10 of Pt 5.3A provides for the execution, and effect, of a deed of company arrangement. The provisions of the division are engaged[22] where, at a meeting of creditors convened under s 439A, the company's creditors resolve that the company execute a deed of company arrangement.

29 The Act itself says nothing about the way in which a creditors' meeting is conducted except by providing that the administrator is to preside[23]. Instead, these questions are dealt with by subordinate legislation: the Corporations Regulations 2001 (Cth) ("the Regulations"). In particular, subject to some presently immaterial exceptions, regs 5.6.12 to 5.6.36A apply[24] to the convening and conduct of (among other things) any meeting of creditors convened under Pt 5.3A of the Act. Those procedures depend upon creditors having submitted a proof of debt or claim[25]. Resolutions put to the vote are to be decided[26] on the voices, unless a poll is demanded before or on the declaration of the result of the voices. Resolutions put to a poll are carried[27] if a majority of creditors voting (whether in person, by attorney, or by proxy) vote in favour, and if the value of the debts owed by the company to those creditors is more than half the total debts owed to all the creditors voting. The person presiding at the meeting may cast[28] a casting vote.

30 Neither the Act nor the Regulations require division of creditors into classes. Instead, protection for the position of individual creditors, or groups of creditors, is provided by ss 445D and 600A of the Act. Section 445D gives the Court power to terminate a deed in various circumstances, including, in

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22 s 444A(1).

23 s 439B(1).

24 reg 5.6.11(2).

25 regs 5.6.11(1) and 5.6.23(1).

26 reg 5.6.19(1).

27 reg 5.6.21.

28 reg 5.6.21(4).

particular[29], where the deed is oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more creditors of the company, or is contrary to the interests of creditors as a whole. Section 600A gives the Court power to set aside a resolution passed at a creditors' meeting if the resolution would not have passed but for votes cast by creditors which are related entities of the subject company, and if the passing of the resolution is contrary to the interests of the creditors as a whole, or is likely to unreasonably prejudice the interests of the defeated creditors.

31 The point to be made about the provisions of the Act and the Regulations regarding creditors' meetings is that they provide that effect is to be given to the will of the requisite majority of creditors who vote at the relevant meeting. The provisions may be understood as proceeding from two related premises. First, judgment about what is to happen to the subject company, and, in particular, the judgment about the commercial worth of any proposal for a deed of company arrangement, is committed to the body of all creditors. Secondly, for the making of that decision, it is neither necessary nor appropriate to divide creditors into separate classes. The only substantial qualifications to the generality of these propositions are provided by the conferral on the Court of powers under ss 445D and 600A.

32 In proceeding from premises of the kinds identified, the Act and the Regulations give effect to principles not different in any material way from those that have long underpinned statutory compositions and arrangements in individual bankruptcy[30]. (Some of the history of those provisions is set out by Isaacs J in *Isles v Daily Mail Newspaper Ltd*[31].) The chief difference between Pt 5.3A and earlier provisions for statutory composition and arrangements in corporate insolvency[32] is the role played by the Court. Earlier provisions required court approval *before* the scheme was effective; Pt 5.3A provides for disallowance by the Court *after* the deed has been made.

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29 s 445D(1)(f).

30 See, for example, *Bankruptcy Act* 1898 (NSW), s 19; *Insolvency Statute* 1865 (Vic), ss 40-42; *Bankruptcy Act* 1892 (WA), s 17; *Bankruptcy Act* 1870 (Tas), s 27.

31 (1912) 14 CLR 193 at 203; [1912] HCA 18.

32 See, for example, *Joint Stock Companies Arrangement Act* 1870 (UK), s 2. Examples of similar provisions made in colonial legislation include *Companies Act* 1899 (NSW), s 160; *Companies Act Amendment Act* 1889 (Q), s 35; *Companies Act* 1893 (WA), s 174.

33 Of course, it is important to approach Pt 5.3A of the Act recognising that the adoption of a deed of company arrangement by majority affects the rights of dissentients. It is also important to recognise that the rights of dissentients against the company in question (and the rights of all others bound by the deed) are modified, even replaced, by the rights they have under the deed. But these are effects common to all forms of statutory arrangement and compromise. And such statutory arrangements have been a common feature of both personal and corporate insolvency legislation for a very long time.

Deeds of company arrangement

34 There are four provisions of the Act that deal expressly with what provisions are to be included in a deed of company arrangement. First, s 444A(4) of the Act provides that a deed of company arrangement *must* specify a number of matters. Only two of those matters need be mentioned. The deed must specify "the nature and duration of any moratorium period for which the deed provides"[33] and "to what extent the company is to be released from its debts"[34]. Secondly, s 444A(5) provides that the deed is taken to include certain prescribed provisions "except so far as [the deed] provides otherwise". The prescribed provisions are set out in Sched 8A to the Regulations. Two of those prescribed provisions may be noted – cl 5 dealing with discharge of debts, and cl 6 dealing with extinguishment of claims. They provide:

> "**5 Discharge of debts**
>
> The creditors must accept their entitlements under this deed in full satisfaction and complete discharge of all debts or claims which they have or claim to have against the company as at the day when the administration began and each of them will, if called upon to do so, execute and deliver to the company such forms of release of any such claim as the administrator requires.
>
> **6 Claims extinguished**
>
> If the administrator has paid to the creditors their full entitlements under this deed, all debts or claims, present or future, actual or contingent, due or which may become due by the company as a

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33 s 444A(4)(c).

34 s 444A(4)(d).

> result of anything done or omitted by or on behalf of the company before the day when the administration began and each claim against the company as a result of anything done or omitted by or on behalf of the company before the day when the administration began is extinguished."

Like the other prescribed provisions, the operation of cl 5 and cl 6 may be excluded by the deed providing otherwise. It is to be noted, however, that cl 5 and cl 6 deal respectively with debts or claims which creditors "have or claim to have *against the company*", and debts or claims "due or which may become due *by the company* as a result of anything done or omitted *by or on behalf of the company*" before an identified date (emphasis added).

35 Thirdly, s 444DA of the Act (inserted in the Act in 2007[35]) provides that, subject to some limited exceptions, a deed of company arrangement must contain a provision to the effect that, for the purposes of the application by the administrator of the property of the company coming under the administrator's control under the deed, eligible employee creditors are entitled to a priority at least equal to what they would have been entitled if the property were applied in accordance with ss 556, 560 and 561 (provisions that deal with proof and ranking of claims in a winding up).

36 Fourthly, s 444DB, also inserted in the Act in 2007 along with s 444DA, requires that a deed must provide that certain superannuation contribution debts are not admissible to proof.

37 Apart from the provisions that have been mentioned (s 444A(4) and (5), and ss 444DA and 444DB), the Act does not identify what provisions may or may not be contained in a deed of company arrangement. More particularly, apart from the references already noted to a moratorium period and the release of debts, the Act and the Regulations are silent about both the nature and the content of the "arrangement" between the company and its creditors that may be made by, and expressed in, a deed of company arrangement.

The question of construction: what claims may be compromised?

38 The provisions of the Act examined thus far in these reasons provide no compelling reason to confine the terms upon which creditors might agree to the compromise of claims against the company by the making of a deed of

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35 *Corporations Amendment (Insolvency) Act* 2007 (Cth), s 3, Sched 1, item 4.

arrangement under Pt 5.3A. The subject matter, scope and purpose of the provisions that have been mentioned readily yield the inference that the subject matter of the compromise or arrangement must be debts or claims against the company. And the debts or claims the subject of the compromise or arrangement can, and ordinarily will, extend to any debt or claim that would be provable in a winding up. That is, in the words of the provision identifying provable debts and claims[36], the debts or claims the subject of the compromise or arrangement, whether by way of moratorium or release, will be "all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date". But the question at issue in these appeals directs attention not just to what debts or claims are compromised, but to the terms and conditions on which they may be compromised. May they be compromised on terms that claims against a person other than the subject company are released? The Act is silent about what price can be exacted from creditors, with the agreement of a majority (by number and value), for the compromise of their claims.

39 The word "arrangement", when used in the collocation "deed of company arrangement", could readily be understood as encompassing many kinds of compromise[37]. A priori, there is no reason, or at least no compelling reason, to confine the ambit of the terms and conditions upon which a creditor may lawfully agree to compromise a debt or claim against the company. Prima facie, it is for the majority of creditors to decide what terms are an acceptable price for compromising their claims. That is, whether compromising debts or claims on particular terms and conditions is commercially more desirable than the company going into liquidation is, according to the structure and content of Pt 5.3A, a question for creditors. It is for them to make their own commercial judgment. That being so, the evident scheme of the Act is that the will of the requisite statutory majority is imposed on all creditors. Neither considerations of the speed with which such an arrangement must be proposed, agreed in and concluded, nor the observation that dissenting creditors are bound by the decision of a majority in number and value, require any narrow or confined reading of those provisions that govern the making and content of a deed of company arrangement.

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36 s 553(1).

37 cf *Re International Harvester Co of Australia Pty Ltd* [1953] VLR 669; *Re Buildmat (Australia) Pty Ltd and the Companies Act* (1981) 5 ACLR 689; *Re Glendale Land Development Ltd (In Liq)* [1982] 2 NSWLR 563, more fully reported at (1982) 7 ACLR 171.

40 In these circumstances, to ask whether particular provisions of a deed of company arrangement are "authorised" by Pt 5.3A, or are "valid", tends to divert attention from the critical question of statutory construction. That question is identified by recognising that the confinement of the reach of the provisions of Pt 5.3A which govern deeds of company arrangement is provided by the specification of who is bound by a deed, and the respect in which creditors are bound.

41 Two provisions of Pt 5.3A identify the binding effect of a deed of company arrangement. Section 444G makes a deed binding on the company, its officers and members, and the deed's administrator. Section 444D deals with the position of creditors. It provides:

"**Effect of deed on creditors**

(1) A deed of company arrangement binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i).

(2) Subsection (1) does not prevent a secured creditor from realising or otherwise dealing with the security, except so far as:

(a) the deed so provides in relation to a secured creditor who voted in favour of the resolution of creditors because of which the company executed the deed; or

(b) the Court orders under subsection 444F(2).

(3) Subsection (1) does not affect a right that an owner or lessor of property has in relation to that property, except so far as:

(a) the deed so provides in relation to an owner or lessor of property who voted in favour of the resolution of creditors because of which the company executed the deed; or

(b) the Court orders under subsection 444F(4).

(4) Section 231 does not prevent a creditor of the company from becoming a member of the company as a result of the deed requiring the creditor to accept an offer of shares in the company."

The determinative question in these appeals is what is meant by the provision of s 444D(1) that a deed "binds all creditors of the company, *so far as concerns claims arising on or before the day specified* in the deed" (emphasis added).

The Deed in this case

42 To explain the competing constructions of s 444D(1) that were advanced in argument, it is necessary to say something further about the Deed that is at issue in these appeals. It will be recalled that three provisions of the Deed were impugned by those parties who were plaintiffs in the Federal Court. All three provisions related to claims that might be made by Litigation Creditors that arose out of investments made by those creditors in collateralised debt obligations and other financial products marketed by, or acquired or purchased pursuant to services or advice provided by, Lehman Australia on or before the date identified in the Deed.

43 Clause 7 of the Deed related to "Insurance Claims" and "Insurance Proceeds". An "Insurance Claim" was identified in the Deed as "any claim for indemnity or other relief in relation to any insurance policy which insures or otherwise provides benefits to [Lehman Australia] or any Lehman Entity in connection with any [admissible claim against Lehman Australia under the Deed] or any claim, including any claim under statute, for the proceeds of, or a charge over the proceeds of, such insurance policy, but excluding any claim for indemnity under any insurance policy held by [Lehman Asia]". Clause 7 obliged the Deed Administrators to realise and get in all the proceeds of any Insurance Claim. As noted earlier, however, cl 7 gave the carriage of any Insurance Claim to the Deed Administrators, to the exclusion of Litigation Creditors. The Deed Administrators were given "an absolute discretion regarding the prosecution and resolution of any Insurance Claim". The proceeds of any Insurance Claims (referred to in the Deed as "Insurance Proceeds") were to be dealt with in accordance with cl 8 of the Deed, and thus were to form part of the Litigation Creditors' Fund.

44 Clause 9 of the Deed provided for a moratorium in favour of Lehman Australia and the Lehman Entities until the Deed's termination. Clause 11 provided that, upon payment in full of amounts payable under the Deed, Litigation Creditors (and also general creditors) released all claims not only against Lehman Australia, but also against all Lehman Entities (other than the rights preserved in favour of Litigation Creditors against the special purpose companies that had issued notes).

45 Thus, as noted earlier, the Deed provided first for a moratorium, and then for release, in respect of claims that Litigation Creditors had, not only against

Lehman Australia, but also against Lehman Holdings (and other Lehman Entities), arising out of the creditors' investments in collateralised debt obligations and other financial products marketed by, or acquired or purchased pursuant to services or advice provided by, Lehman Australia.

The competing constructions of s 444D(1)

46 Lehman Holdings submitted that the words "so far as concerns claims" in s 444D(1) "require the existence of a connection or association between the claim in question and a claim against the insolvent company". Lehman Holdings submitted that, because claims against it and against other Lehman Entities arose out of the same transactions as were the subject of the Litigation Creditors' claims against Lehman Australia, the claims against Lehman Holdings (and other Lehman Entities) were "claims arising on or before the day specified in the Deed" within the meaning of that expression in s 444D(1).

47 Lehman Asia submitted that a deed of company arrangement will "concern" a creditor's claim "if it provides for a regime of provisions which relate to that claim". At least this was so, the argument continued, in the case of an arrangement like that under the Deed which dealt with "the position of an insolvent company forming part of a group of companies with interlocking claims against them". Lehman Asia submitted that the impugned provisions were to be seen as part of the "give and take" of a compromise or arrangement of claims.

48 By contrast, those parties which had been plaintiffs in the Court below submitted that the clause "so far as concerns claims arising on or before the day specified in the Deed" marked out the limit of the binding effect of a deed of company arrangement. That is, they submitted that creditors were bound by the Deed, but only to the extent identified by that clause. This submission should be accepted.

Construction of s 444D(1)

49 In the course of argument, the Court was taken to a great deal of extrinsic material which was said to bear upon the question of how s 444D(1) should be construed. It is neither necessary nor desirable to rehearse the detail of those arguments. Nothing that was said in the report of the Australian Law Reform Commission concerning its General Insolvency Inquiry[38] (the "Harmer Report"),

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38 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988).

the draft Bill that was incorporated in the Harmer Report, or the several exposure drafts and explanatory memoranda relating to the legislation which now comprises Pt 5.3A of the Act, assists in resolving the disputed questions of construction and application of s 444D(1). Those sources do not assist because in none of them was any direct consideration given to the point which must now be decided.

50 In the Full Court of the Federal Court, some emphasis was given[39] to ss 444E to 444H and s 444J as indicating that a deed of company arrangement can deal only with claims against the subject company. It may be accepted that nothing in those sections points away from that conclusion. But the critical observation to make is an observation about the text of s 444D(1). That sub-section identifies who is to be bound by a deed of company arrangement ("all creditors of the company") but at once proceeds (by the "so far as concerns" clause) to limit the extent to which those creditors are to be bound ("so far as concerns" identified claims). Contrary to the submissions of Lehman Holdings and Lehman Asia, there is no textual footing for reading the word "claims", in the "so far as concerns" clause in s 444D(1), as including claims against persons other than the subject company. Even if it were accepted that, as Lehman Asia submitted, it would be sensible to recognise that a creditor of one of a group of companies may have interlocking, even dependent, claims against one or more other companies in the group, Pt 5.3A directs attention only to the particular subject company; it does not deal with groups of companies.

51 It may readily be accepted that any claims Litigation Creditors may have against Lehman Holdings or other Lehman Entities are claims that arise on or before the day specified in the Deed, and arise out of the same transactions as are the subject of those creditors' claims against Lehman Australia. It may also be readily accepted that if a claim is made against Lehman Holdings or another Lehman Entity, that company or those companies would very likely make a claim against Lehman Australia. And in that way, both Lehman Holdings and at least some other Lehman Entities are likely contingent creditors of Lehman Australia. And as contingent creditors of Lehman Australia, Lehman Holdings and the relevant Lehman Entities would be bound by the Deed.

52 But none of these observations confronts the critical observation that s 444D(1) limits the extent to which a deed of company arrangement binds creditors. Creditors are bound "so far as concerns claims" against the subject

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39 *City of Swan v Lehman Brothers Australia Ltd* (2009) 179 FCR 243 at 253 [39], 270 [84]-[85].

company that arose before a specified date. And it is s 444D(1) alone which makes a deed of company arrangement binding on creditors.

53 Because creditors are bound under s 444D(1) only to the limited extent identified in that provision, the assent of some creditors (even a majority by number and value of those who vote) to giving up claims against another does not bind other creditors to do so. No creditor is bound to give up such claims because the Act does not bind them beyond the limit prescribed by s 444D(1). More particularly, the Act does not bind creditors to give up a claim against a person other than the subject company – here, Lehman Australia.

54 In this respect, Pt 5.3A (and, in particular, s 444D(1)) stands in sharp contrast with Pt 5.1 of Ch 5 of the Act, which regulates arrangements and reconstructions. The provisions of Pt 5.1 (which derive ultimately from the *Joint Stock Companies Arrangement Act* 1870 (UK)) make[40] a compromise or arrangement binding on creditors (or on a class of creditors) if agreed to by a majority in number of the creditors (or class) whose debts or claims aggregate at least 75 per cent of the total amount of the debts and claims of the creditors (or class of creditors) present and voting, and if approved by order of the Court. Unlike s 444D(1), the provision of Pt 5.1 which makes certain compromises or arrangements binding on creditors (s 411(4)) does not qualify the extent to which creditors are bound. Beyond noting this contrast, it is neither necessary nor appropriate to go on to consider whether Pt 5.1 of the Act could have been engaged to achieve the result sought to be achieved by the Deed under consideration in these appeals. Nothing in these reasons should be understood as endorsing the criticisms made in this matter in the Full Federal Court of the earlier decision of the Full Federal Court in *Fowler v Lindholm*[41].

55 Effect must be given in the application of s 444D(1) to the words "so far as concerns claims arising on or before the day specified in the deed". Effect must be given to those words, recognising that the claims to which they refer are claims against the subject company. In the present case, the effect of those words is that creditors are not bound in respect of claims against Lehman Holdings or other Lehman Entities. That is, the provisions of cl 9 and cl 11.5 of the Deed which provided first for a moratorium, and then for a release, in respect of claims against Lehman Holdings or other Lehman Entities, did not bind creditors.

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40 s 411(4).

41 (2009) 178 FCR 563.

56 One further point should be made. The reasoning which requires the conclusion reached about cl 9 and cl 11.5 of the Deed may not necessarily lead to the same conclusion with respect to cl 7 of the Deed – the clause about insurance claims. It must be observed that cl 7 obliged the Deed Administrators to pursue insurance claims and that the claims to be pursued were claims for indemnity or other relief insuring or providing benefits in connection with any claim Litigation Creditors had against Lehman Australia. What was said to be offensive about the clause was that the Deed Administrators were given *sole* conduct and control of those claims. It is then to be recalled that the proceeds of any insurance claim were to form a part of the fund for distribution among Litigation Creditors whereas, in a liquidation, s 562 of the Act would see those proceeds applied in discharge of the particular Litigation Creditor's claim against Lehman Australia that was met by the insurer. Read in this context, it may be open to argue that cl 7 of the Deed bound creditors in respect of their claims against Lehman Australia. It is, however, not necessary to decide this question. That is not necessary because it was not submitted that any part of the Deed could, or should, be given effect if the provisions of cl 9 and cl 11.5 were not binding on creditors. That being so, the conclusion earlier expressed, that those two provisions do not bind creditors, is sufficient to require the further conclusion that the Deed as a whole fails.

57 HEYDON J. These reasons adopt the account of the factual circumstances, the procedural background, and the legislation to be found in the plurality judgment. They also adopt the abbreviations there employed.

58 In relation to the sale to the plaintiffs by Lehman Australia of CDO instruments the plaintiffs wish to make claims against Lehman Australia, which is insolvent and in administration. A Deed of Company Arrangement "binds all creditors of the company" pursuant to s 444D(1) of the Act. Hence it permits a majority of the creditors of a company who vote for a Deed of Company Arrangement to destroy rights of other creditors by terminating their rights to sue the company. That conclusion was not challenged by the plaintiffs, and is plainly correct. Thus, if the Deed approved by the creditors on 28 May 2009 had been limited to claims against Lehman Australia, it would have validly extinguished the claims which the plaintiffs wished to make in relation to the CDO instruments against Lehman Australia.

59 The plaintiffs also wish to pursue claims against various companies (including Lehman Holdings and Lehman Asia) other than Lehman Australia in relation to the sale to the plaintiffs by Lehman Australia of CDO instruments. Those latter claims include claims in negligence, claims for false, misleading or deceptive representations, contrary to s 12DA and s 12DB of the *Australian Securities and Investments Commission Act* 2001 (Cth), claims for breaches of fiduciary duty, and claims on a guarantee. Each of those claims – those rights to sue – is a chose in action. Even where the right to sue cannot be assigned, the fruits of the action may be. In that sense the claim is a right relating to property.

60 The question in these appeals was whether any provisions in Pt 5.3A of the Act permit a majority at a creditors' meeting who vote for a Deed of Company Arrangement to destroy the rights of minority creditors which consist of causes of action in negligence, or for false, misleading or deceptive representations, or for breach of fiduciary duty, or under a guarantee, against persons other than the company which is the subject of the Deed. But the essence of the present problem is not limited to that category of choses in action which comprises rights to sue on claims of the type just described. If the plaintiffs fail in these proceedings, it will follow that a Deed of Company Arrangement can validly provide that specialty debts or simple debts owed by a person other than the company subject to that Deed to a creditor of that company can be cancelled. The creditor of a company could have its right to sue its bank for monies on deposit with that bank cancelled. There is no doubt that specialty debts or simple contract debts – which can be charged, assigned or devised – are proprietary rights for most purposes of the general law.

61 Lehman Holdings, Lehman Asia, Lehman Australia and the Deed Administrators submitted that the legislative language did permit that course. The plaintiffs denied that. If the plaintiffs are not correct, there will have been,

as the Australian Securities and Investments Commission correctly submitted, "a significant intrusion into the individual rights of creditors."

62 Lehman Holdings, Lehman Asia, Lehman Australia and the Deed Administrators submitted that their construction was to be preferred because Pt 5.3A assumed and intended that the affairs of companies in administration should be worked out speedily, flexibly, informally, cheaply and creatively. It was submitted that it was important that if a majority of creditors thought that a Deed gave a better return than liquidation, their "commercial acumen and judgment" should prevail.

63 In *Mabo v Queensland [No 2]*[42] Deane and Gaudron JJ said that it is a rule of construction that "clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation". The rule exists because the compulsory acquisition or extinguishment of property rights – whether that acquisition or extinguishment is effected directly by the legislature, or by the executive acting under supposed legislative power, or, as here, by non-governmental entities taking advantage of a facility supposedly conferred by the legislature – is a serious thing. It is an even more serious thing if the compulsory acquisition or extinguishment is unaccompanied by fair compensation. That remains true however important it is that the affairs of companies in administration be worked out speedily, flexibly, informally, cheaply and creatively, and however much confidence majority creditors may have in their own commercial acumen and judgment.

64 On the arguments advanced by Lehman Holdings, Lehman Asia, Lehman Australia and the Deed Administrators it would be open to a company and its creditors to enter a Deed which extinguished the rights of minority creditors to sue persons other than the company without any fair compensation – for the grounds on which the Court may terminate a Deed of Company Arrangement under s 445D or set aside the relevant resolution under s 600A do not in terms include the absence of fair compensation. A Deed may extinguish the rights of minority creditors against the company itself without compensation, for although the rule of construction must be applied to the operation of the statute in that regard, the words are sufficiently clear and unambiguous. However, in relation to a contention that the statute permits the extinguishment of the proprietary rights of minority creditors against persons other than the company without fair compensation, the rule of construction poses the inquiry whether there are clear

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42 (1992) 175 CLR 1 at 111; [1992] HCA 23. The rule may also be stated as being that clear and unambiguous words must be used before legislation will be construed as expropriating or extinguishing valuable rights relating to property without fair compensation.

and unambiguous words supporting that quite different outcome. That is an inquiry which was not fruitful for those opposing the plaintiffs.

65 The submissions of Lehman Holdings, Lehman Asia, Lehman Australia and the Deed Administrators paid no regard to the rule of construction stated by Deane and Gaudron JJ. They approached the problem as if it were for the plaintiffs to find words prohibiting what the Deed of Company Arrangement did, rather than for them to find words permitting what it did.

66 Thus Lehman Asia criticised Rares J for relying on authorities asserting that the courts will not attribute to the legislature an alteration of common law principles unless this "is manifested according to the true construction of the statute", to use words approved by the whole Court in *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd*[43]. Lehman Asia submitted that it was not appropriate for the provisions of remedial legislation like Pt 5.3A to be read down by reference to a presumption which is "inconsistent with modern experience and borders on fiction". The language which Lehman Asia thus quoted was that of McHugh J in *Gifford v Strang Patrick Stevedoring Pty Ltd*[44]. But McHugh J was not applying that language to the rule of construction stated by Deane and Gaudron JJ in *Mabo's* case. *Mabo's* case is quite a recent case. What was said in it cannot be regarded as out of touch with modern experience. Nor, in this Court of all places, can it be regarded as bordering on fiction. As counsel for Lehman Holdings accepted, what McHugh J was discussing was not rights relating to property, but a particular and different category of "the common law rights of individuals". McHugh J said that there was a presumption that a statute was not intended to alter or abolish common law rights unless it evinced a clear intention to do so. But he said that the strength of the presumption varied: "The presumption of non-interference is strong when the right is a fundamental right of our legal system; it is weak when the right is merely one to take or not take a particular course of action." The latter category of rights he called "lesser rights". It was those lesser rights to which McHugh J applied the language quoted by Lehman Asia[45]. A proprietary right, or a right relating to property, is not in that category. As Mason J said in *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd*, the general presumption about common law rights "has added

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43 (1981) 147 CLR 677 at 682 per Mason J (Gibbs CJ, Murphy, Aickin and Brennan JJ concurring); [1981] HCA 65.

44 (2003) 214 CLR 269 at 284 [36]; [2003] HCA 33.

45 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 284 [36]. See also *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 298-299 [27]-[30]; [2001] HCA 14.

force in its application to common law principles respecting property rights."[46] A property right, or a right relating to property, is not a right "merely one to take or not take a particular course of action". Rather it is "a fundamental right of our legal system".

67 Lehman Holdings, Lehman Asia, Lehman Australia and the Deed Administrators contended that interference with the rights of creditors was "no novelty" in insolvency administration. The question is not whether it is novel. Nor is it whether the rights of other creditors under other statutes have been interfered with in the past. Instead the question is whether it is permissible for the rights of the plaintiffs in relation to persons other than Lehman Australia to be interfered with under the instant statute.

68 A key difficulty for those opposing the plaintiffs is that there were no clear and unambiguous words in the statute supporting their preferred outcome. One part of the submissions put against the plaintiffs endeavoured to sidestep this difficulty. It started with the premise that there was no express provision dealing with the compulsory releases of claims by minority creditors other than claims against the insolvent company. It drew from that premise the conclusion that in the absence of any provision prohibiting releases by minority creditors of claims against persons other than the insolvent company, the legislation should be construed so as to permit them. Even if the premise were sound, the conclusion does not follow. If the premise were sound, the correct approach would be to apply Deane and Gaudron JJ's rule of construction, and that would lead to the opposite conclusion. In any event, the premise is only sound in a very narrow sense. It is true that no single provision in express and unmistakably clear terms either authorises or prohibits the releasing in Deeds of Company Arrangement of the claims of creditors other than claims against the company in administration. If there had been, these proceedings would never have gone as far as they have. But, as is demonstrated in the plurality judgment, the statutory language in s 444D(1) sufficiently points against the meaning advocated by Lehman Holdings, Lehman Asia, Lehman Australia and the Deed Administrators[47].

69 Further, there is no indication adverse to the plaintiffs in the language creating the general structure of Pt 5.3A. To confer power on majority creditors of an insolvent company to take away the rights of minority creditors of that company against that company is one thing. To confer power on the majority creditors of a company to take away the rights of minority creditors of the company against persons other than the company is another thing – a much wider

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46 (1981) 147 CLR 677 at 683 (Gibbs CJ, Murphy, Aickin and Brennan JJ concurring).

47 See reasons of French CJ, Gummow, Hayne and Kiefel JJ at [50]-[55].

and potentially oppressive step. The absence of any explicit indication that the step was taken thus points strongly against the view that it was taken. The length and detail of the provisions that do appear in relation to the position between the creditors and the debtor company is in sharp contrast with the void in relation to the position between the creditors and debtors other than the company. There is no express suggestion in any other part of the Act that the claims of creditors of the company against persons other than the company had any materiality in relation to Deeds of Company Arrangement. Thus the objects stated in s 435A are limited to objects relating to the company and its creditors and members, not other companies. The topics about which an administrator is obliged by s 439A to give information to creditors before a creditors' meeting do not include the topic of creditors' claims against persons other than the company. Nor is that a topic which s 444A(4) requires to be dealt with in the instrument setting out the terms of the Deed of Company Arrangement. Thus s 444A(4)(b) requires a specification of what property of *the company* is available to pay creditors' claims – ie claims of creditors of *the company*. But it says nothing about what property of persons other than the company may be preserved from creditors' claims by their extinguishment. And s 444A(4)(d) requires specification of the extent to which *the company* is to be released from its debts, but not of the extent to which *persons other than the company* are to be released from their debts. The point is emphasised when the prescribed provisions included in the Deed by s 444A(5) are taken into account[48], for the Regulations, Sched 8A, cll 5 and 6, deal, and deal only, with the discharge of creditors' claims against *the company* and debts due from *the company*. While the list in s 444A(4) is not exhaustive, both the inclusions and the omissions are significant. The structure of s 444A(4)(b), (d) and (i), incidentally, suggests that in that sub-section "claims" means "claims against the company", and hence that it bears the same meaning in s 444D(1): thus s 444D(1) binds creditors of the company in relation to their claims against the company, not against other debtors. This conclusion is reinforced by s 444H, which provides that the Deed releases *the company* from a debt – not *persons other than the company*. Section 444E forbids a person bound by the Deed of Company Arrangement to begin or proceed with a proceeding against the company without the leave of the Court; but neither it nor any other provision forbids a person bound by the Deed of Company Arrangement to begin or proceed with a proceeding against another company owing money to the creditor. It would be extraordinarily anomalous if the creditor were able to sue the third party debtor, even though it could only sue the company itself with the leave of the Court. This suggests that the debts of companies other than the company subject to the Deed of Company Arrangement cannot be affected by it.

70 If that construction were not correct, another injustice would exist as between secured creditors of the insolvent company, and secured creditors of

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48 See reasons of French CJ, Gummow, Hayne and Kiefel JJ at [34].

persons other than the company. Section 444D(2) provides that s 444D(1) does not prevent a "secured creditor" from realising or otherwise dealing with the security unless the secured creditor voted for the resolution of creditors leading to the execution of the Deed of Company Arrangement or the Court so orders. The words "secured creditor" identify a sub-class within the class referred to in s 444D(1) – "all creditors of *the company*". It follows that the protection given to "secured creditors" by s 444D(2) is given only to secured creditors of the insolvent company, not secured creditors of persons other than the insolvent company. In consequence, if the plaintiffs' construction is wrong and creditors (secured and unsecured) of persons other than the insolvent company can have their rights affected by a Deed of Company Arrangement which they voted against, secured creditors of persons other than the insolvent company would be in a worse position than secured creditors of the insolvent company. That conclusion is not only unjust but also irrational. Its injustice and irrationality point to error in the process of reasoning which led to it. The error lies in rejecting rather than accepting the view that a Deed of Company Arrangement cannot affect the rights of those who are creditors of persons other than the insolvent company as such.

71 Further, words like "so far as concerns claims" in s 444D(1) are elastic words, capable of signifying a wide degree of connection in some contexts and a quite narrow degree in others. The rule of construction stated by Deane and Gaudron JJ, when applied to those words, suggests that they bear a narrow meaning conforming to the position of the plaintiffs. It suggests that the very wide construction advocated by Lehman Australia and the Deed Administrators by which the only limitation on the claims referred to in s 444D(1) is that they arise on or before a day specified in the Deed is erroneous. And it suggests that even the narrower connections advocated by Lehman Holdings and Lehman Asia are too wide[49]. In addition, the constructions propounded by those two parties, which look to connections or associations between the claim against the insolvent company and the other claim, or to interlocking claims against a group of companies of which the insolvent company is part, are nebulous and amorphous. They are tests which it would be very difficult for proposed Deed administrators and creditors to apply. That is particularly so since the statute creates no machinery enabling them to obtain, by compulsory means, information about the claims against persons other than the insolvent company with a view to assessing whether those claims satisfy the tests at all, let alone in the short time available (ie 20 or 25 business days after the administration commences, unless time is extended: s 439A(5)). They are problems accentuated where the tests are modified to turn on the possibility of contribution claims or apportionable claims – for this creates a need to inquire into different regimes under State, Territory and federal law. These are problems not readily capable of solution by reliance

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49 See reasons of French CJ, Gummow, Hayne and Kiefel JJ at [46]-[47].

on the right of creditors to apply to the Court under s 445D or s 600A after the Deed has been approved. That places a burden of proof on minority creditors; there is no requirement that the majority creditors justify their favoured course. Many creditors would lack the resources to institute proceedings. To protect the status quo pending examination of the merits of their applications, it would be necessary to hold up the speedy working out of the administration by interlocutory injunctions. Those injunctions could only be obtained at a price, often a dangerous price – offering an undertaking as to damages. These are formidable difficulties.

72 Nor do the extrinsic materials enable the statutory language to be given a meaning adverse to the plaintiffs. A fair amount of toil and time was devoted to assembling those materials and analysing them in argument. Despite this, there can be few cases in which extrinsic materials have been less useful – a large claim, but a true one. The materials were not directed to the present difficulty.

73 The Australian Securities and Investments Commission correctly submitted that the construction given by *Fowler v Lindholm*[50] to Pt 5.1 of the Act is not inconsistent with the construction given to Pt 5.3A by the Full Federal Court in these proceedings. The structure and the detailed terms of Pt 5.1 are quite different from those of Pt 5.3A. In particular, court approval in advance is always required by Pt 5.1; in Pt 5.3A the role of court approval is only belated and occasional – after the Deed of Company Arrangement has been entered, and even then only if a creditor complains. The much more ample oversight of the Court under Pt 5.1 contrasts with the significant things which can be done under Pt 5.3A without court sanction. Against that background there is no inconsistency between the proposition that under Pt 5.1 creditors can be bound in relation to debts owed by persons other than the company, and the proposition that under Pt 5.3A they cannot. It is unnecessary to decide whether *Fowler v Lindholm* is incorrect, and it is not here suggested that it is incorrect in any way. That is a question for another appeal specifically directed to the problem.

74 Reliance was placed on decisions concerning legislative provisions in other jurisdictions – the United Kingdom, Singapore, Canada and the United States. Some of the statutes were said to have features in common with Pt 5.1, some with Pt 5.3A. These decisions were not of assistance in construing Pt 5.3A, since all of the statutes on which they were based were worded differently.

75 In order 2 made by the Full Federal Court, an answer is given to question 2 which assumes that cl 7.1 of the Deed of Company Arrangement is not limited to claims by creditors against Lehman Australia. If it is so limited, cl 7.1 would not invalidate the Deed, and the appeals, even if they failed in every

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50 (2009) 178 FCR 563.

other way, would succeed to the extent that a different answer would have to be given to question 2. The same would be true if it were decided that it was unnecessary to answer question 2, for the Full Court's order would have to be modified to that limited extent in favour of each appellant. The notices of appeal did not raise any point that cl 7.1 was so limited. No notice of cross-appeal raising the point was filed by the fourth to sixth respondents. In those circumstances the appeals should be dismissed in their entirety.

76 Although Lehman Australia was not an appellant in either appeal, it adopted the same ultimate positions as the appellants, with at least equal and perhaps more vigour. Those acting for Lehman Australia also acted for the Deed Administrators. Together those three parties were the fourth, fifth and sixth respondents to both appeals. In no sense could their appearances in the appeals be described as submitting appearances. Had they taken an inactive part in the appeals, the appeals would have taken less time and the plaintiffs would have incurred fewer costs. There is no reason why the fourth, fifth and sixth respondents should not be in the same position in relation to costs as the appellants, for they placed themselves in the same interest.

77 The appeals should be dismissed. In each appeal, the costs of the first three respondents should be paid by the appellant and the fourth to seventh respondents.