HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, NETTLE, GORDON AND EDELMAN JJ

Matter No P7/2018

MIGHTY RIVER INTERNATIONAL LIMITED APPELLANT

AND

BRYAN HUGHES AND DANIEL BREDENKAMP
AS DEED ADMINISTRATORS OF MESA
MINERALS LIMITED & ANOR RESPONDENTS

Matter No P8/2018

MIGHTY RIVER INTERNATIONAL LIMITED APPELLANT

AND

MINERAL RESOURCES LIMITED & ORS RESPONDENTS

Mighty River International Limited v Hughes
Mighty River International Limited v Mineral Resources Limited
[2018] HCA 38
Date of Order: 19 June 2018
Date of Publication of Reasons: 12 September 2018
P7/2018 & P8/2018

ORDER

In each matter, the appeal is dismissed with costs.

On appeal from the Supreme Court of Western Australia

Representation

C R C Newlinds SC with D R Sulan and P R Gaffney for the appellant in both matters (instructed by Nova Legal)

N C Hutley SC with J K Taylor for the respondents in P7/2018 and the second and third respondents in P8/2018 (instructed by Clayton Utz)

J T Gleeson SC with B R Kremer for the first respondent in P8/2018 (instructed by Bennett + Co)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Mighty River International Limited v Hughes
Mighty River International Limited v Mineral Resources Limited

Companies – Voluntary administration – Deed of company arrangement – Where administrator required to form opinion about certain matters as soon as practicable after administration begins – Where administrator required to convene meeting of creditors within convening period – Where convening period may be extended by court order – Where company executed deed which imposed moratorium on creditors' claims while administrators conducted further investigations – Where deed provided no property of company available for distribution to creditors – Whether deed impermissibly extended convening period – Whether administrators formed the requisite opinions – Whether deed should have specified some property available for distribution to creditors – Whether deed a valid deed of company arrangement – Whether deed should be declared void.

Words and phrases – "arrangement alternative to liquidation", "convening period", "deed of company arrangement", "DOCA", "holding DOCA", "in the interests of creditors", "moratorium on claims", "property of the company available for distribution to creditors", "to be available to pay creditors' claims", "voluntary administration".

Corporations Act 2001 (Cth), Pt 5.3A, ss 438A, 439A, 444A, 445G.

KIEFEL CJ AND EDELMAN J.

Introduction

1 Part 5.3A of the *Corporations Act* 2001 (Cth) is concerned with "[a]dministration of a company's affairs with a view to executing a deed of company arrangement". It aims to maximise the chance of survival of the business of an insolvent company, or, if that is not possible, to provide a better return to creditors than would result from an immediate winding up of the company. These appeals concern the validity of a deed of company arrangement that, amongst other things, provided for a moratorium on creditors' claims, and contained a requirement that the administrators conduct further investigations and report to creditors concerning possible variations to the deed within six months. The administrators considered the deed to be in the interests of creditors and a better alternative than immediate liquidation.

2 At first instance before Master Sanderson in the Supreme Court of Western Australia, and on the appeals to the Court of Appeal of the Supreme Court of Western Australia, the relief sought by Mighty River International Limited ("Mighty River"), which was a creditor of Mesa Minerals Limited ("Mesa Minerals"), included a declaration that the deed was void. The various, sometimes interrelated, bases upon which this claim was made were that: (i) the deed was contrary to the object of Pt 5.3A; (ii) the deed invalidly sought to circumvent or sidestep the requirement in s 439A(6) for a court order extending the short convening period during which a second meeting of creditors must be convened by an administrator; and (iii) the deed did not comply with an alleged requirement in s 444A(4)(b) to distribute some property of Mesa Minerals. In oral submissions on the appeals to this Court, Mighty River made the new submission that the deed should be declared to be void because the administrators had failed to form the opinions required by s 438A(b) and, at the relevant time, s 439A(4).

3 On 19 June 2018, at the conclusion of oral submissions, the Court ordered that each of the appeals be dismissed with costs. These are our reasons for joining in that order.

Part 5.3A of the *Corporations Act*

4 Prior to 1992, there were four methods available to a company with solvency issues to deal with its affairs on a voluntary basis: (i) a scheme of arrangement; (ii) official management; (iii) creditors' voluntary winding up; and

(iv) Court winding up[1]. In 1988, the Australian Law Reform Commission's General Insolvency Inquiry ("the Harmer Report") identified two unsatisfactory aspects of the creditors' voluntary winding up process. First, there was an absence of ordered administration between the time of calling meetings and the appointment of a liquidator. Secondly, there was a lack of independent information about the financial affairs and conduct of the business of the company at the meeting of creditors[2].

5 The Harmer Report recommended that the existing form of creditors' voluntary winding up should be abandoned[3]. It recommended a new voluntary procedure that would have the benefit of speed and flexibility for creditors[4]. The Harmer Report recommended that the Court should not be required to sanction any part of the new procedure although it should have a general supervisory power, principally to remove an administrator, to give directions on meetings, and to avoid or terminate a deed[5]. The essence of the new procedure would be a short period of control by an administrator, followed by a meeting of creditors. One option at the meeting of creditors would be the entry into a deed of company arrangement[6].

6 The Harmer Report's recommendation was adopted in 1992 by the introduction of what is now Pt 5.3A of the *Corporations Act*[7]. Although Pt 5.3A implemented numerous changes to the creditors' voluntary winding up process, it continued the major underlying principle of existing legislation, namely, "orderly

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1 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 25 [45].

2 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 27 [49].

3 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 32 [57].

4 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 29-30 [54]-[56].

5 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 32 [56].

6 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 30-31 [56].

7 Australia, House of Representatives, Corporate Law Reform Bill 1992, Explanatory Memorandum at [21].

dealing with a company's affairs"[8]. Indeed, as the plurality of this Court observed in *Lehman Bros Holdings Inc v City of Swan*[9], the general premises of the administration process – including that the future of the company is committed to a body of all creditors as a whole – had "long underpinned statutory compositions and arrangements in individual bankruptcy". The chief difference between Pt 5.3A and earlier provisions for statutory composition and arrangements in corporate insolvency was "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." (emphasis in original)

7 The object of Pt 5.3A is set out in the opening section of the Part, s 435A. That object is to administer an insolvent company in a way that (a) maximises the chance of the company, or its business, continuing in existence, or (b) if that is not possible, provides a better return for the company's creditors and members than would result from an immediate winding up of the company. This object is pursued by an intended flexibility or, put another way, by a wide variety of different possible deeds of company arrangement[10]. These possibilities include extinguishing or varying debts and imposing moratoria on claims. As Finkelstein J observed in *Commonwealth v Rocklea Spinning Mills Pty Ltd*[11], "Pt 5.3A assumes that it might often be necessary to extinguish by composition or bar certain claims". Similarly, in the Explanatory Memorandum to the Bill that introduced what became Pt 5.3A, it was suggested that a deed of company arrangement may commonly provide for "some form of compromise of debts, such as repayment of debts by delayed instalments"[12]. Consistently with this object, Pt 5.3A creates a structured, sequential process for the creation and duration of a deed of company arrangement. Five steps should be emphasised in the sequential process that gives rise and effect to a deed of company arrangement.

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8 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 49 [97].

9 (2010) 240 CLR 509 at 521 [31]-[32]; [2010] HCA 11.

10 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992 at 2404; Australia, House of Representatives, Corporate Law Reform Bill 1992, Explanatory Memorandum at [448], [577].

11 (2005) 145 FCR 220 at 229 [30].

12 Australia, House of Representatives, Corporate Law Reform Bill 1992, Explanatory Memorandum at [577].

8 First, following the first creditors' meeting required by s 436E, a second creditors' meeting must be held within the convening period prescribed by s 439A(5). That convening period is either 20 or 25 business days depending upon the date when the administration begins. At the time of the events relevant to these appeals, notice of that meeting was required by s 439A(4) to be accompanied by a report about the company's affairs and a statement that included the administrator's opinion about various matters. Section 439A(6) provides that the Court may extend the convening period upon an application made during or after the convening period. By s 439B(2), as it then stood, the second creditors' meeting could be adjourned, but not for more than a total of 45 business days. By s 439C(a), at the second creditors' meeting the creditors may resolve that the company execute a deed of company arrangement. Section 444A(1) provides that if the creditors so resolve then s 444A applies.

9 Secondly, by s 444A(3), the administrator must prepare an "instrument" setting out the terms of the deed. The instrument is required to specify various matters. Where an instrument is prepared under s 444A, then s 444B(1) provides that s 444B applies.

10 Thirdly, by s 444B(5), the instrument must be executed by (i) the company and, (ii) either beforehand or as soon as practicable afterwards, the proposed administrator of the deed. By s 444B(2), the company must execute the deed within 15 business days after the end of the meeting of creditors or any further period as extended by the Court. If s 444B(2) is contravened, the effect of ss 444B(7), 446A(1)(b), and 446A(2) is that the company is taken to have resolved that it be wound up voluntarily.

11 Fourthly, if the company and the deed's proposed administrator execute the instrument within the required time, s 444B(6) provides that "the instrument becomes a deed of company arrangement". By s 444G, the deed of company arrangement binds the company, its officers and members, and the deed's administrator.

12 Fifthly, the deed of company arrangement can, in the circumstances provided in Div 11, be varied, terminated, or avoided. At the relevant time, by s 445A, the deed could be varied by a resolution passed at a meeting of creditors convened by the deed's administrator under s 445F. In addition to the administrator's power to terminate the deed in certain circumstances, the Court also has powers to terminate or avoid the deed.

13 As for termination, s 445D provides for various circumstances in which the Court can terminate a deed of company arrangement. In very broad terms, at the relevant time, those circumstances included where particular false or misleading information was given in a report or statement under s 439A(4), and where the deed or a provision of it, or an act or omission done or proposed to be

done under it, would result in oppression or unfair prejudice to one or more creditors, or would be contrary to the interests of the creditors as a whole. There was, and remains, a catch-all power for the Court to terminate a deed of company arrangement under s 445D(1)(g) "for some other reason". This could include an abuse of the provisions of Pt 5.3A, which abuse could also empower the Court to order, under s 447A(2)(b), that the administration of a company should end.

14 As for avoidance, under s 445G(2) the Court has a power, on application, to declare the deed, or a provision of it, void if it was not entered into in accordance with Pt 5.3A or if it did not comply with Pt 5.3A. An application to have the deed, or a provision of it, declared void can be brought by the administrator of the deed, a member or creditor of the company, or the Australian Securities and Investments Commission.

The administration of Mesa Minerals

15 Mesa Minerals is a mining company whose key assets include a 50% joint venture interest in two manganese projects. Mineral Resources Limited ("Mineral Resources"), the first respondent in the second appeal, is the parent company of the other joint venture partner. It holds almost 60% of the issued capital of Mesa Minerals. Mighty River holds just over 13.5% of the issued capital of Mesa Minerals.

16 On 13 July 2016, Mesa Minerals was placed into voluntary administration and Mr Hughes and Mr Bredenkamp, who are respondents in each of these appeals, were appointed as administrators ("the Administrators"). Section 435C(1)(a) of the *Corporations Act* has the effect that the administration of Mesa Minerals commenced on that date.

17 The first meeting of Mesa Minerals' creditors was held on 25 July 2016, within eight business days of the administration beginning, as required by s 436E(2) of the *Corporations Act.* The statutory purpose of that meeting was to consider whether a committee of creditors (now described in the *Corporations Act* as a committee of inspection) should be appointed (s 436E(1)) and whether to appoint someone else as administrator (s 436E(4)).

18 On 10 August 2016, the Administrators issued a notice to creditors of the second creditors' meeting, accompanied by a s 439A report and statement to the creditors in which they set out the creditors' options for the future of Mesa Minerals: (i) to end the administration; (ii) to wind up the company; or (iii) for Mesa Minerals to execute a deed of company arrangement. The Administrators opined that it was not in the creditors' interests for the administration to end, or for Mesa Minerals to be wound up, but that a "Recapitalisation DOCA", which they intended to present at the forthcoming meeting of creditors, was in the creditors' interests. The Administrators set out

the key terms of the proposed Recapitalisation DOCA, noting that its objective would be "to provide sufficient time for the Administrators to conduct further investigations ... and to explore the possibility of a restructure or recapitalisation".

19 On 13 October 2016, following an adjournment of the second meeting of Mesa Minerals' creditors, the Administrators provided a supplementary report to "provide[] an update on matters presented in the [s] 439A Report". The Administrators said that the primary focus since the adjournment was to investigate whether recovery claims against the directors of Mesa Minerals, which Mighty River suggested should be pursued, had any value. The Administrators described the investigations that had been conducted, including (i) whether the directors had failed to act in the best interests of Mesa Minerals by not progressing certain manganese projects, and (ii) whether the directors had acted to benefit Mineral Resources at Mesa Minerals' expense. The Administrators said that the investigations were "on-going and will continue during the proposed Recapitalisation DOCA period or the liquidation period depending upon which resolution for the future of the Company that creditors pass at the upcoming meeting". The Administrators again set out the three options available to the creditors at the forthcoming meeting and again expressed the opinion that the first two options were not in the best interests of the creditors but that the proposed Recapitalisation DOCA best served the interests of creditors.

20 The adjourned second meeting of creditors was held on 20 October 2016. A majority of creditors voted in favour of entry into the proposed Recapitalisation DOCA. On 3 November 2016, a deed of company arrangement was executed. It was described as a Deed of Company Arrangement – Recapitalisation ("the Deed"). The Deed was in the terms proposed by the Administrators. In the background section, it recited that its objective was to provide sufficient time for the Administrators to:

> "conduct further investigations into the Company's property and affairs, and to explore the possibility of a restructure or recapitalisation of the Company 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 the Company."

21 Clause 9 of the Deed included provisions that the Administrators were to "investigate any claims that they are aware the Company may have against any third parties", to "seek Proposals to reconstruct the Company with a view to reaching a position where the Company's securities may be re-quoted for trading on the ASX, including Proposals for the partial or full sale of the Company's assets", and, prior to any proposal being accepted, to convene a further meeting of creditors to put to them such a proposal, together with "the key terms of any

further deed of company arrangement (or proposed variation to this deed), creditors' trust deed or other mechanism designed to give effect to the Proposal". Under Pt 5.3A of the *Corporations Act*, this could only be achieved by a variation of the Deed.

22 Clause 10 of the Deed provided that there would be a moratorium, during which time no steps could be taken by creditors to wind up Mesa Minerals, institute or prosecute any proceedings, enforce debts, exercise any rights of set-off or defence, cross-claim or cross-action to which the creditor would not have been entitled on winding up, or commence arbitration against the company. The Deed also provided in cl 8 that, subject to its variation, "there will be no property of the Company available for distribution to Creditors under this deed".

23 By 3 May 2017, six months after the execution of the Deed, the Administrators were required to provide a report including the results of their investigations. Although a meeting of the creditors was convened on 3 May 2017, and a variation to the Deed was later executed, it is the Deed, executed on 3 November 2016, which was before the Master and the Court of Appeal, and with which this Court is concerned.

The proceedings in the Courts below

24 Mighty River's originating process sought orders against the Administrators and Mesa Minerals: (i) declaring that the Deed was of no force and effect; (ii) terminating or setting aside the Deed; and (iii) setting aside the resolution passed by the creditors at the second meeting. In turn, Mineral Resources sought relief against Mesa Minerals, the Administrators, and Mighty River, being (i) a declaration under s 445G(2) that the Deed was not void, or alternatively, (ii) an order under s 445G(3) validating the Deed.

25 At first instance, Master Sanderson dismissed Mighty River's claims and made a declaration that the Deed was not void. Mighty River's submissions before the Master included that the Deed was a "holding DOCA", which was not permitted by the *Corporations Act* because it was not consistent with: (i) the object of Pt 5.3A; (ii) the mandatory requirement that some property be available for distribution to creditors under s 444A(4)(b); or (iii) the role of the Court to extend the convening period[13]. The Master rejected these submissions, finding that: (i) the Deed was consistent with the object of Pt 5.3A; (ii) it was permissible for the Deed to provide that no property is available for distribution; and (iii) Pt 5.3A permits time to be extended by two "gateways" – an extension

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13 *Mighty River International Ltd v Hughes & Bredenkamp* [2017] WASC 69 at [5], [99]-[100], [103].

of time under s 439A(6) or a "holding DOCA". The Master said that underlying Mighty River's submissions was a claim that the creditors would not be disadvantaged by the liquidation process. He concluded that it was "hard to see any advantage to anyone from immediate liquidation"[14]. The liquidators would follow the same process of realising Mesa Minerals' assets as the Administrators, but with the difference that the listed shell would be destroyed.

26 Mighty River had initially alleged that the s 439A report omitted various material information. If accurate, that could have led to termination under s 445D. But Mighty River abandoned that s 439A claim before the Master[15]. Nevertheless, one ground of appeal to the Court of Appeal was that the Deed should be terminated under s 445D, for various reasons unrelated to the s 439A report[16]. That section permits termination in circumstances that included the provision to creditors, in the report or statement, of information that was false or misleading, or the omission of material information in the report or statement. None of those circumstances was relied upon by the Court of Appeal and no ground of special leave to this Court alleged that the Deed should have been terminated by the Court under s 445D.

27 In the Court of Appeal, the essential questions raised by the grounds of appeal were whether the Deed was invalid because (i) contrary to s 444A(4)(b), it did not specify some property of Mesa Minerals to be available to pay creditors' claims, or (ii) it created a moratorium period for creditors' claims and, without an order of the Court under s 439A(6), extended the time for investigation and preparation of a restructuring proposal by the Administrators beyond the convening period[17]. In separate judgments, each member of the Court of Appeal (Buss P, Murphy and Beech JJA) held that the Deed was valid. Their Honours held that s 444A(4)(b) only required specification of the extent to which the property of Mesa Minerals is to be made available for distribution to creditors[18]; this obligation was fulfilled by the provision in the Deed that "no property" be available for distribution. They also held that the Deed did not "sidestep" s 439A(6); although it permitted further investigations outside the convening period, it was consistent with the object of Pt 5.3A because it was directed

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14 *Mighty River International Ltd v Hughes & Bredenkamp* [2017] WASC 69 at [111].

15 *Mighty River International Ltd v Hughes & Bredenkamp* [2017] WASC 69 at [19].

16 *Mighty River International Ltd v Hughes* (2017) 52 WAR 1 at 24 [105(5)].

17 *Mighty River International Ltd v Hughes* (2017) 52 WAR 1 at 25-26 [110]-[111].

18 *Mighty River International Ltd v Hughes* (2017) 52 WAR 1 at 35-36 [148], 48 [221], 75 [349].

towards achievement of a better return to creditors than they would obtain on an immediate winding up[19].

Mighty River's appeal to this Court

28 Mighty River asserted that a deed described as a "holding DOCA" was not valid or should be declared to be void. The expression "holding DOCA", as described by Buss P, was apparently used to describe a deed that (i) did not specify property that will be available to satisfy the claims of the company's creditors, and (ii) had the express purpose of creating a moratorium period to allow for further investigations to consider whether to present a further proposal to creditors for restructure[20]. But, as Murphy JA observed, the label "holding DOCA" is best avoided[21]. It is not a legislative expression and, insofar as it purports to describe the purpose of the deed, the adjective directs attention away from the terms of the deed and purports to create an ill-defined sub-class of deed of company arrangement.

29 Shorn of the nomenclature of "holding DOCA", Mighty River had essentially two submissions. In logical order, the first was that the Deed was not a valid deed of company arrangement, principally because it was an agreed extension of time that had not been ordered by the Court under s 439A(6) and was contrary to the object of Pt 5.3A. The second submission was that, if the Deed was a deed of company arrangement, then it should have been declared void by the Master under s 445G(2). That sub-section includes a power for the Court to make an order declaring a deed of company arrangement to be void either "on the ground specified in the application [under s 445G(1)] or some other ground". The grounds upon which Mighty River relied were that the Deed contravened ss 438A(b) and 439A(4), or s 444A(4)(b), or both.

Was the Deed a deed of company arrangement consistent with the object of Pt 5.3A?

30 In written submissions, Mighty River said that the Deed was contrary to the object of Pt 5.3A and had "sidestepped" the required application to the Court for an extension of time under s 439A(6). Mighty River submitted that it was no answer to the alleged sidestepping of s 439A(6) that it could move for a court order under s 445D to terminate the Deed, because, under s 445D, Mighty River would bear the onus of persuading the Court that it should make

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19 *Mighty River International Ltd v Hughes* (2017) 52 WAR 1 at 44 [193]-[194].

20 *Mighty River International Ltd v Hughes* (2017) 52 WAR 1 at 6 [2].

21 *Mighty River International Ltd v Hughes* (2017) 52 WAR 1 at 46 [212].

such an order. Mighty River also submitted that the alleged sidestepping of s 439A(6) meant that the Deed was not a deed of company arrangement and therefore would not engage s 445G, and the Court would not be permitted to validate the Deed under s 445G(3).

31 If the Deed were, in reality, a deed of extension of time by creditors and not a deed of company arrangement, then s 445G, which is concerned with deeds of company arrangement, would not be engaged. The Deed would simply be invalid. It could not be declared valid under s 445G(3) on the basis that there had been substantial compliance with Pt 5.3A. However, Mighty River's submission that the Deed is not a deed of company arrangement, despite being formally constituted as such, is inconsistent with the general scheme of Pt 5.3A.

32 The scheme of Pt 5.3A treats the formation of a deed of company arrangement as a formal matter. The document prepared by the administrator is described as an "instrument", with various mandatory requirements. A deed of company arrangement exists, by s 444B(6), when the company and the deed's proposed administrator execute the instrument. However, the constitution of a deed of company arrangement merely by these formal elements does not mean that non-compliance with provisions of Pt 5.3A is without consequence.

33 Part 5.3A contains a carefully drafted regime to deal with contraventions of mandatory requirements in the execution process as well as additional rules that permit the formal deed to be terminated or set aside in a wide range of circumstances. An example concerning the execution process is that if the timing requirements for execution in s 444B(2) are contravened, then, as explained earlier, the company is taken to have resolved that it be wound up voluntarily. Or if, before execution, false or misleading material information is given to creditors then the deed can be terminated under s 445D(1)(a) or (b). Another example is that if a majority of creditors resolve under s 439C(a) to execute a deed of company arrangement that is prejudicial to the interests of a minority (s 445D(1)(f)), then, after the deed is formally constituted, the Court has power to terminate the deed. Even for events after execution, there are broad powers for the Court to terminate a deed including if the formally constituted deed cannot be given effect without "injustice" or "undue delay" (s 445D(1)(e)) or "for some other reason" (s 445D(1)(g)). If termination or avoidance occurs, s 445H provides that the termination or avoidance does not affect the previous operation of the deed. The essential protection of that provision is to ensure that "creditors and other parties affected by the operation of a deed of company arrangement will not be disadvantaged"[22].

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22 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 63 [125].

34 Mighty River's more particular submission that the Deed involved an impermissible sidestepping of s 439A(6) also cannot be accepted. Although an extension of time under s 439A(6) can only be obtained by a court order, as Mighty River accepted in oral argument an otherwise compliant instrument that becomes a deed of company arrangement can incidentally extend time for an administrator's investigations pending a subsequent variation to it. The Deed had that incidental effect. Although the s 439A report that was provided to creditors loosely characterised the proposed Deed as "essentially an extension of the Administration Period", that was only its incidental effect. The Deed created and conferred genuine rights and duties. By cl 9, the Administrators were required to investigate potential claims by Mesa Minerals against third parties, and to seek proposals, including by the exercise of various powers, for the restructure of Mesa Minerals with a view to re-quoting its securities for trading on the Australian Securities Exchange. By cl 15, the Administrators undertook to provide reports to the creditors on at least a bi-monthly basis and a final report within six months. The *quid pro quo* for these duties upon the Administrators was that, by cl 10, the creditors accepted a moratorium on their claims.

35 Mighty River's associated submission, that the Deed is contrary to the object of Pt 5.3A, requires a focus upon the most significant undertaking by the creditors. That undertaking is their agreement, by cl 10, to a moratorium on their claims. There are three reasons why that undertaking, and the Deed itself, are not contrary to the object of Pt 5.3A and do not invalidate the Deed. First, putting to one side the difficulties with Mighty River's submission that the object of Pt 5.3A can be treated as a condition of validity independently of the provisions of the Part, the operation of the Deed aims to fulfil the object of the Part by maximising the chance of Mesa Minerals' survival or otherwise providing a better return to creditors than would result from its immediate winding up. In the s 439A report and the supplementary report that preceded the Deed, the Administrators opined that it was not in the interests of creditors that Mesa Minerals be wound up. Even if an approved variation to the Deed caused all Mesa Minerals' assets to be sold to realise its debts, this would be preferable to winding up Mesa Minerals because, as the Master explained, the valuable listed shell would be preserved. There was evidence before the Master that the value of a listing could be between $400,000 and $900,000.

36 Secondly, the history of schemes of arrangement shows that it is a valid purpose for the Deed to provide for a moratorium on claims while Mesa Minerals' position was further assessed. The common premises shared by a scheme of arrangement and a deed of company arrangement, as described by the joint judgment in *Lehman Bros Holdings Inc v City of Swan*[23], make the former

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23 (2010) 240 CLR 509 at 521 [31]-[32].

an appropriate comparator for the valid operation of the latter. Prior to the introduction of Pt 5.3A, it had been recognised that a scheme of arrangement could be devised with the central or sole purpose of securing a moratorium on claims[24]. For instance, in *National Bank of Australasia Ltd v Scottish Union and National Insurance Co*[25], the scheme of arrangement that was "duly sanctioned by the Courts concerned" was prepared for the purpose of securing a moratorium to enable the company to "find its feet". When the company could not find its feet, a new scheme was prepared. In *F T Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd*[26], the New South Wales Court of Appeal unanimously allowed an appeal from the dismissal of a summons to convene a meeting of creditors, effectively sanctioning the scheme involved. The scheme was described by Street CJ[27] (with whom Samuels JA agreed[28]) as "essentially a moratorium scheme" involving "a three year deferment of the enforcement of any rights against the company, including the bringing of proceedings to wind it up"[29]. If a moratorium-only scheme was, and is, permissible, then *a fortiori* a deed, which is intended to be a more flexible device for managing a company's affairs, may provide predominantly, or solely, for a moratorium.

37 Thirdly, the provision of only a short convening period before the second creditors' meeting, thus reducing the period of the statutory stay under s 440D, is for the protection of the creditors. That speed and efficiency is not undermined if the creditors subsequently enter a deed of company arrangement to provide for a longer moratorium than would otherwise have been the case. Although the Harmer Report proposals had been based loosely upon the United States regime[30], the design for speed and efficiency, and the consequent reduction of the

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24 Langley, "The future role of creditors' schemes of arrangement in Australia after the rise of voluntary administrations", (2009) 27 *Company and Securities Law Journal* 70 at 72.

25 (1952) 86 CLR 110 at 112; [1952] AC 493 at 495.

26 (1977) 3 ACLR 69.

27 (1977) 3 ACLR 69 at 70.

28 (1977) 3 ACLR 69 at 73.

29 See also *Beatty v Brashs Pty Ltd* (1998) 79 FCR 551 at 554; *Re Metinvest BV* [2016] EWHC 372 (Ch) at [11]-[12]; *In the matter of BIS Finance Pty Ltd* [2017] NSWSC 1713 at [27].

30 Australia, House of Representatives, Corporate Law Reform Bill 1992, Explanatory Memorandum at [21].

period of statutory stay of creditors' claims, was one respect in which the proposals departed from the United States model. In the United States, a stay could be "prolonged for months, even years"[31], permitting a debtor to "hold a creditor hostage" as administrative and creditor expenses increase[32]. In contrast, the purpose of the short convening period in Pt 5.3A and the generally short period of the stay was to "strike[] the right balance between protecting the rights of creditors and providing a period to enable decisions to be taken about the affairs of a company"[33]. As the Attorney-General said in the Second Reading Speech to the Bill that introduced what became Pt 5.3A[34], the emphasis on "speed of action" for the administration and on "appropriate protection of creditors' interests" was "so that [creditors] will find that they are not unduly disadvantaged by the short moratorium proposed". Those objectives are not compromised if creditors choose, in a deed of company arrangement, to extend a moratorium beyond the period that they would otherwise have had outside an administration. Indeed, s 444A(4)(c) contemplates that a deed of company arrangement might include a further moratorium period.

Should the Deed have been declared void under s 445G(2)?

38 Apart from its dispute about the validity of the Deed, Mighty River's other submissions focused upon two particular allegations of contravention of Pt 5.3A. The first was an alleged contravention of s 444A(4)(b). That was almost the exclusive focus of Mighty River's written submissions. The second, raised briefly in oral submissions, was an alleged contravention of ss 438A(b) and 439A(4). For the reasons below, the Deed did not contravene those provisions.

The instrument did not contravene s 444A(4)(b)

39 The instrument prepared by the Administrators set out the terms of the Deed as required by s 444A(3). Section 444A(4) also required the instrument to specify matters including:

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31 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 49 [98].

32 Lewis, "Trouble Down Under: Some Thoughts on the Australian-American Corporate Bankruptcy Divide", [2001] *Utah Law Review* 189 at 227.

33 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 48 [95].

34 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992 at 2404.

"(b) the property of the company (whether or not already owned by the company when it executes the deed) that is to be available to pay creditors' claims;

...

(h) the order in which proceeds of realising the property referred to in paragraph (b) are to be distributed among creditors bound by the deed".

40 "[P]roperty" is defined in broad terms in s 9 as "any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action".

41 Mighty River submitted that s 444A(4)(b) required that the instrument specify *some* property to be available to pay creditors' claims. It submitted that the instrument prepared by the Administrators contravened s 444A(4)(b) because it provided that, subject to variation, "there will be no property of the Company available for distribution to Creditors under this deed". In contrast, the effect of the respondents' construction was that s 444A(4)(b) required that the instrument specify the property, *if any*, to be available to pay the creditors' claims.

42 Substantial submissions were made by the parties about the different linguistic considerations favouring either construction. For instance, favouring Mighty River's construction is the omission of the words "any" or "if any" in s 444A(4)(b), despite their presence in ss 444A(4)(c), 444A(4)(e) and 444A(4)(f). In contrast, favouring the respondents' construction, s 444A(4)(b) requires the instrument to specify the property of the company "that is to be available" to pay creditors' claims. It does not require the instrument to specify "some" property to be available to pay creditors' claims. Ultimately, neither construction strains the language of s 444A(4)(b) so as to make it implausible. In any event, the text must be considered in context and in light of its purpose[35]. The context and purpose of the sub-section support the respondents' construction.

43 The purpose of ss 444A(4)(b) and 444A(4)(h) is to direct attention to a subject that must be addressed in the instrument. That subject is the property, if any, that will be available to pay creditors' claims. The provisions are not concerned to prescribe some minimum obligation upon the administrator to distribute some property, however little, to creditors. The purpose can be seen in

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35 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2; *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936 at 940-941 [14], 944 [37]; 347 ALR 405 at 410, 414-415; [2017] HCA 34.

the Harmer Report, which said the following of the required provisions for a proposed deed of company arrangement, as s 444A enumerates[36]:

> "If a deed of company arrangement is agreed, it will be a simplified document of much less size and complexity than the present forms of 'scheme documents' that oppress creditors and others. The deed will incorporate (by simple reference) standard provisions contained in a schedule to the companies legislation, as well as many provisions of the legislation dealing with, for example, admissible claims, order of distribution to creditors and avoidance of antecedent transactions (such as preferences and similar voidable transactions)."

44 In other words, although the deed is to be a simplified document, the purpose of the nine paragraphs of s 444A(4) is to direct the attention of the creditors to those particular important matters that must be addressed in the instrument: (a) who will administer the deed; (c) and (d) any moratorium and release of debts; (e) and (f) conditions precedent and subsequent; (g) circumstances of termination; and (i) the date by which claims must have arisen to become admissible. All those matters are significant because they differ from the alternative of immediate winding up. Similarly, par (b) requires the property to be divided into two sets, property that is available to pay creditors' claims and, unlike a winding up, property that is not.

45 There are numerous examples of deeds of company arrangement that involve no property of the company being made available for distribution. These examples, many of which would have been expected at the time Pt 5.3A was enacted, are consistent with the intended flexibility of approach to deeds of company arrangement. That flexibility would be undermined if these deeds were required to provide for the distribution of some property of the company. One example is a deed of company arrangement providing for a debt for equity swap. The provision of equity, whether in the company[37] or in another company, does not involve making available for creditors any "property of the company"[38]. A second example is where creditors' claims are replaced with rights as

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36 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 31 [56].

37 *In the matter of Paladin Energy Ltd* [2018] NSWSC 11 at [23].

38 *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 179 [20]; [2001] HCA 31.

beneficiaries of a creditors' trust, with the trust funded by third parties[39]. Third parties who might fund such a trust include a parent of the company or a party who wishes to acquire the company with the creditors' claims discharged[40]. A third example is a transfer of shares in the company from members to creditors, with the written consent of the former, or where the administrator of the deed of company arrangement obtains the leave of the Court. A variant on this example is where an investor makes a lump sum payment to creditors in exchange for a transfer of some or all of the shares of members[41]. A fourth example, which is most pertinent in this case, is a deed of moratorium only, which allows the company to trade out of solvency difficulties[42].

46 In contrast with the clear legislative purpose that supports the respondents' construction, there is no purpose served by Mighty River's construction, which would result in a contravention of s 444A(4)(b) if "some" property were not available for creditors. On its face, Mighty River's construction would permit s 444A(4)(b) to be satisfied if property of merely nominal value were specified for distribution to creditors.

The Administrators did not contravene s 438A or s 439A(4)

47 The alternative submission of Mighty River, made briefly in oral argument, was that the Administrators had failed to comply with s 438A(b) and, consequently, s 439A(4), because they had failed to form the opinions that were required by those provisions. The implicit assumption in Mighty River's submission was that the Deed should have been declared void under s 445G(2) for this failure to form the required opinions.

48 Section 438A(b) provides that, as soon as practicable after the administration begins, the administrator must form an opinion about three matters: (i) whether it would be in the interests of the company's creditors for the company to execute a deed of company arrangement; (ii) whether it would be in the creditors' interests for the administration to end; and (iii) whether it would be in the creditors' interests for the company to be wound up.

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39 See, eg, *Munday Group Pty Ltd v Tsourlinis Distributors Pty Ltd* (2010) 5 BFRA 101 at 102 [5]; *Re Bevillesta Pty Ltd* (2011) 254 FLR 324 at 347-348 [69]; *Smith; in the matter of Matrix Metals Ltd (In Liq)* [2011] FCA 1399 at [20]-[23].

40 *Commonwealth v Rocklea Spinning Mills Pty Ltd* (2005) 145 FCR 220 at 228 [28].

41 See, eg, Australia, House of Representatives, Corporations Amendment (Insolvency) Bill 2007, Explanatory Memorandum at 100 [7.54].

42 *Commonwealth v Rocklea Spinning Mills Pty Ltd* (2005) 145 FCR 220 at 228 [30].

Section 439A relies, in part, upon s 438A(b). It is concerned with the duties of the administrator to convene the second creditors' meeting. At the relevant time, s 439A(4) required the following:

> "The notice given to a creditor under paragraph (3)(a) must be accompanied by a copy of:
>
> (a) a report by the administrator about the company's business, property, affairs and financial circumstances; and
>
> (b) a statement setting out the administrator's opinion about each of the following matters:
>
> (i) whether it would be in the creditors' interests for the company to execute a deed of company arrangement;
>
> (ii) whether it would be in the creditors' interests for the administration to end;
>
> (iii) whether it would be in the creditors' interests for the company to be wound up;
>
> and also setting out:
>
> (iv) his or her reasons for those opinions; and
>
> (v) such other information known to the administrator as will enable the creditors to make an informed decision about each matter covered by subparagraph (i), (ii) or (iii); and
>
> (c) if a deed of company arrangement is proposed – a statement setting out details of the proposed deed."

49 As noted earlier, before the Master Mighty River had abandoned its complaint that the s 439A report omitted various material information. The Court of Appeal did not conclude, and Mighty River did not allege in this Court, that the Deed should have been terminated under s 445D for any other contravention. The oral submission by Mighty River in this Court, that the Administrators had failed to form the opinions required by s 438A(b), was therefore one that, as Murphy JA had noted, had not been made in the Court of Appeal[43], and it was a submission that was more extreme than the submission that had been abandoned.

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43 *Mighty River International Ltd v Hughes* (2017) 52 WAR 1 at 55 [247].

50 The most basic difficulty with Mighty River's submission is that the 10 August 2016 report and statement by the Administrators under s 439A plainly concluded, in cl 13, with expressed opinions that "it is not in the interests of creditors that the administration end", "it is not in the interests of creditors that the Company be wound up", and "from the information available ... it is in creditors' interests that the Company execute a Recapitalisation DOCA [substantially in the terms of the Deed]" (emphasis in original). In effect, Mighty River's submission requires the conclusion that those expressed opinions could not have been genuinely held.

51 The opinions expressed by the Administrators were supported by 26 pages of substantial reasoning, including descriptions of their research and investigations. The Administrators considered the history and background of Mesa Minerals, the reasons for Mesa Minerals' financial difficulties (the decline in manganese prices and the withdrawal of future financial support by Mineral Resources), Mesa Minerals' employees' entitlements, its financial position and performance, and the progress of the Administrators' program of realising Mesa Minerals' assets (including an advertising campaign and the engagement of a company with a marketing platform for mining projects and an audience of more than 4,500 parties of interest). They observed that lawyers representing a creditor and shareholder of Mesa Minerals had alleged that the directors had failed to act in the best interests of the company and that it was intended that investigations into that issue be conducted during the period of the proposed Recapitalisation DOCA or liquidation. The Administrators explained that their experience in dealing with listed companies in similar circumstances demonstrated that there was, potentially, a significant benefit in retaining the listing, which could not be retained in a liquidation scenario.

52 The Administrators expressed the opinion that it was not in the interests of creditors for the administration to end because there would then be no orderly mechanism for realisation of assets and distribution to creditors, and creditors might have to petition the Court to have Mesa Minerals wound up at their own expense. The Administrators said that winding up was not in the interests of creditors because the proposed Recapitalisation DOCA would provide "additional time to explore possible options that may facilitate a better outcome for the benefit of all stakeholders" and "the option of liquidation will still be available following execution of the Recapitalisation DOCA in the event that a subsequent [variation to the] DOCA does not provide a superior outcome". The Administrators opined that the proposed Recapitalisation DOCA would not disadvantage any class of creditor and concluded that from the information available it was in the creditors' interests to execute the proposed Recapitalisation DOCA, which became the Deed.

53 The opinions expressed by the Administrators were no less genuine because they were based only upon "the information available". The requirement

in s 438A(b) that an administrator must form the relevant opinions as soon as practicable after the administration begins necessarily requires that the opinions might be formed without the administrator having fully investigated and assessed all relevant matters. Opinions have no fixed voltage. They can be expressed with varying degrees of confidence. They may depend upon the precise terms of the deed proposed. Section 439A(4) did not require the Administrators to provide a quantitative opinion comparing the likely financial recovery under each possible option.

54 There may be circumstances in which there is simply insufficient information for an administrator to express an opinion, even where an alternative is a deed that imposes a moratorium on creditors' claims to allow further time for investigation. In such a case, the only possibility is for the administrator to apply to the Court to extend the convening period under s 439A(6). For instance, in *Re Riviera Group Pty Ltd*[44], one of the administrators gave evidence that the complexity of the administration had precluded the preparation of a satisfactory report within the convening period. That was a sufficient basis for the Court to extend the convening period under s 439A(6).

55 In contrast, in this case, the Administrators' confidence that the proposed Recapitalisation DOCA was preferable to winding up Mesa Minerals was based upon the effect of (i) the terms of the proposed deed, and (ii) the possibility of varying it. That effect was assessed in light of their substantial research and investigations. Since the Deed was a genuine deed of company arrangement, and not an illegitimate extension of time without an order of the Court under s 439A(6), it was legitimate for the Administrators' opinions to be expressed by comparing the terms of the proposed deed with the options of ending the administration or winding up Mesa Minerals.

56 In oral submissions, Mighty River referred to a recital to the Deed, which explained that the objective of the Deed was for the Administrators to "form an opinion as to whether a deed of company arrangement or liquidation is in the best interests of creditors of the Company". This recital does not have the effect that the Administrators' previously expressed opinions in their report were not genuine. The recital is not expressed in the clearest language. For the reasons explained above, the Deed was a deed of company arrangement. In that context, properly construed the opinion described in the recital must be an opinion about whether to propose a variation of the Deed, which, at the relevant time, would have occurred pursuant to s 445A after a duly convened meeting under s 445F. This construction is consistent with cl 8 of the Deed, by which the absence of property available to creditors was expressed to be subject to any variation of the

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44 (2009) 72 ACSR 352.

Deed. It is also consistent with cll 9.3, 15(c), and 17 of the Deed, which recognise the possibility of a variation following a proposal by the Administrators at a further meeting of creditors.

Conclusion

57 The respondents' primary case was that the Deed was consistent with the object of Pt 5.3A and did not contravene any of the provisions of that Part as alleged. Alternatively, the respondents submitted that if any provision of Pt 5.3A was contravened then, as became common ground in oral submissions, the matter should be remitted to the Court of Appeal for consideration of whether to exercise the power under s 445G(3) to declare the Deed to be valid. For the reasons above, we accepted the respondents' primary case and joined in the orders of this Court dismissing the appeals with costs.

58 GAGELER J. My reasons for joining in orders dismissing these appeals at the conclusion of oral argument are substantially reflected in what Kiefel CJ and Edelman J have written, with which I completely agree and the terminology of which I am content to adopt. I write separately to explain in addition my rejection at the level of principle of the argument that the Deed was non-compliant with procedural requirements of Pt 5.3A.

59 The argument that the Deed was non-compliant with procedural requirements of Pt 5.3A had two strands. One was that there was non-observance of s 438A(b) and s 439A(4)(b), constituted by a failure of the Administrators to form and to communicate to creditors an opinion of the requisite character. The other was that there was impermissible circumvention of s 439A(6), constituted by a failure of the Administrators to seek from the Court an extension of the convening period for the second meeting of creditors so as to allow time for the Administrators to complete the investigations required of them by s 438A(a).

60 The two strands of the argument were interwoven to the extent that the opinion required to be formed and communicated to creditors in order for the second meeting of creditors to proceed was suggested to be one which needed to amount to a firm conclusion as to what course was ultimately in the best interests of the creditors. The scheme of Pt 5.3A was said to require such an opinion one way or the other within the convening period set by s 439A(5) or such an extension of the convening period as the Court was satisfied was in the interests of creditors to allow under s 439A(7) on an application under s 439A(6). As a "holding DOCA" which did no more than allow the Administrators further time to conduct further investigations and come back with a firm proposal, so the argument went, the Deed was an attempt to "side-step or outflank" the statutory process by which the Administrators were required by s 438A(a) to complete their investigations under the supervision of the Court.

61 My view was, and remains, that the argument was without merit. Fundamental to the scheme of Pt 5.3A, as recognised in the reasoning of the plurality in *Lehman Bros Holdings Inc v City of Swan*[45], is the policy of allowing creditors themselves to decide, in accordance with the majoritarian decision-making rules prescribed at the relevant time in Pt 5.6 of the Corporations Regulations 2001 (Cth) and now in Div 75 of the Insolvency Practice Rules (Corporations) 2016 (Cth), what course of action is in their own best interests. The purpose of the strict time limits on the convening of a meeting of creditors after a company is placed in administration is to allow creditors to make their own decision as to what course is in their own best interests as soon as is practicable.

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45 (2010) 240 CLR 509 at 521-522 [31]-[33]; [2010] HCA 11.

62 The appointment of an administrator under s 436A occurs simply as the result of a resolution of directors of the company. The immediate and automatic effect of ss 440D and 440F is to suspend the rights of creditors. The strict time limits for the convening of a meeting of creditors to decide the company's future under s 439A are designed to ensure that the process moves as quickly as practicable from the statutory moratorium on recovery by creditors to a position agreed by the majority of creditors in a resolution under s 439C.

63 The scheme of Pt 5.3A exhibits no reason why creditors should not be able to decide that it is in their own best interests that a deed of company arrangement be entered into which provides for an agreed moratorium on repayment of the company's debt while further investigations are conducted by a deed administrator under the deed with a view to coming up with a further proposal which could be reflected in an amendment to the deed capable of being agreed to by the creditors under s 445A at a subsequent meeting to be convened by the deed administrator under s 445F.

64 Of course, a deed of company arrangement which imposes a moratorium on repayment of debt while further investigations are conducted by a deed administrator has the potential to be contrary to the interests of a minority of creditors, just as the potential to be contrary to the interests of a minority of creditors is inherent in any deed of company arrangement. That is an eventuality which is addressed within Pt 5.3A by a range of provisions which empower the Court to make orders on the application of a creditor of the company, the company itself, or the Australian Securities and Investments Commission.

65 Sections 445D, 447A and 447E are of particular significance. By s 445D(1)(e), (f) and (g), the Court is empowered to make an order terminating a deed of company arrangement if satisfied that: effect cannot be given to the deed without injustice or undue delay; or the deed is contrary to the interests of creditors as a whole or is oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or some creditors; or the deed should be terminated for some other reason. Section 447A empowers the Court to make such orders as it thinks fit about how Pt 5.3A is to operate in relation to a particular company, including an order that the administration of a company that has executed a deed of company arrangement is to end because provisions of the Part are being abused or for some other reason. Section 447E empowers the Court to make such order as it thinks just if satisfied that the administrator of a deed of company arrangement has done an act or proposes to do an act that is or would be prejudicial to the interests of some or all of the creditors.

66 The only answer suggested in argument to the sufficiency of those remedial provisions to address injustice or inefficiency in the terms or administration of a "holding DOCA" was that they operate to place the onus on minority creditors to establish a basis for the intervention of the Court. So they do. That is how the statutory scheme has been designed to work. The need to

establish an affirmative basis for curial intervention is the price paid for a scheme designed to provide for "minimisation of expensive and time-consuming court involvement" and "flexibility of action at key stages in the administration process"[46]. The scheme works by empowering creditors, deciding by majority, to determine what is in the interests of creditors. And it works by keeping the Court out of the process of making and administering a deed of company arrangement unless an application for intervention is made and a ground for intervention is established.

67 The statutory scheme is that where (within the meaning of s 444A(1)) "at a meeting convened under section 439A, a company's creditors resolve that the company execute a deed of company arrangement" and (within the meaning of s 444B(1)) "an instrument is prepared under section 444A" as required by s 444A(3), that instrument becomes a deed of company arrangement by force of s 444B(6) when executed by the company and the proposed administrator and, as a deed of company arrangement, the instrument becomes binding on all creditors under s 444D(1). The word "under" in s 444B(1) refers to a document made in purported compliance with relevant procedural provisions.

68 Were actual compliance with relevant procedural provisions necessary for the existence of a deed of company arrangement, s 445G(2) – the provision in Pt 5.3A specifically designed to provide a remedy for non-compliance with provisions of that Part – would be self-defeating. That is because, in providing for the Court on application to make an order declaring a deed of company arrangement or a provision of a deed of company arrangement void by reason of non-compliance with procedural requirements leading up to the making of a deed of company arrangement (relevantly including any non-observance of s 438A or s 439A(4)(b) or impermissible circumvention of s 439A(6)), s 445G(2) only applies where a deed of company arrangement exists. "Section 445G(2)" might as well be relabelled "Catch-22".

69 Section 445H makes clear that an order declaring a deed of company arrangement or a provision of it void under s 445G(2), no less than an order terminating a deed of company arrangement under s 445D(1), takes effect only on and from the time of its making. In so doing, s 445H makes explicit the statutory scheme that a non-compliant deed of company arrangement remains a deed of company arrangement binding on the company, the administrator and the creditors unless and until the Court, on application, makes an order to the contrary.

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46 Australia, House of Representatives, Corporate Law Reform Bill 1992, Explanatory Memorandum at [449].

70 NETTLE AND GORDON JJ. The issue in these appeals was whether a so-called "Deed of Company Arrangement – Recapitalisation" ("the Deed") entered into by Mesa Minerals Ltd ("the Company") was a deed of company arrangement within the meaning of Pt 5.3A of the *Corporations Act* 2001 (Cth). For the reasons which follow, it was not. As will be explained, Pt 5.3A of the *Corporations Act* conceives of administration of a company and the variety of arrangements that may be made the subject of a deed of company arrangement as mutually exclusive. In substance, the Deed did no more than purport to extend the administration of the Company.

Relevant statutory provisions

71 The facts of these matters and the relevant statutory provisions are set out in full in the judgment of Kiefel CJ and Edelman J. For present purposes, it suffices to say of the statutory provisions that:

(1) Section 435A of the *Corporations Act* states that the object of Pt 5.3A is to provide for the business, property and affairs of an insolvent company to be administered in a way that maximises the chances of the company, or as much as possible of its business, continuing in existence, or, if that is not possible, in a way that results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

(2) Section 435C stipulates that the administration of a company is to begin upon the appointment of an administrator under s 436A, s 436B or s 436C, and that the administration is to end upon the first to happen after the administration begins of the events specified in s 435C(2) and s 435C(3).

(3) Section 435C(2) provides that the normal outcome of the administration of a company is that a deed of company arrangement is executed by the company and the deed's administrator, or that the company's creditors resolve under s 439C(b) that the administration should end, or that the company's creditors resolve under s 439C(c) that the company be wound up.

(4) Logically, it is to be expected that the only circumstances in which a company's creditors would resolve that the administration end, as opposed to the company executing a deed of company arrangement or the company being wound up, is where it is found in the course of an administration that the company is not insolvent or is no longer insolvent.

(5) Section 435C(3) relevantly provides that the administration of a company may also end because the convening period fixed by s 439A(5) for a meeting of the company's creditors under s 439A ends without a meeting

being convened in accordance with s 439A and without an application to the court for an extension of the convening period under s 439A(6).

(6) To ensure that a company's creditors are properly equipped to make a decision whether the company should execute a deed of company arrangement or whether the creditors should resolve that the administration should end or that the company be wound up, s 438A requires an administrator, as soon as practicable after the administration begins and in any event before the end of the convening period for a meeting of the creditors fixed by s 439A(5) or as extended under s 439A(6), to investigate the company's business, property, affairs and financial circumstances and to form an opinion as to whether it would be in the interests of the creditors for the company to execute a deed of company arrangement, or for the administration to end, or for the company to be wound up.

(7) Section 439A(1) requires an administrator to convene the meeting of the company's creditors within the convening period as fixed by s 439A(5), ordinarily within 20 business days after the administration begins or as extended by the court upon application under s 439A(6).

(8) Sub-sections (3) and (4) of s 439A require the administrator to provide the creditors with written notice of the meeting accompanied by a report by the administrator about the company's business, property, affairs and financial circumstances and a statement setting out the administrator's opinion as to whether it would be in the creditors' interests for the company to execute a deed of company arrangement, or for the administration to end, or for the company to be wound up. If a deed of company arrangement is proposed, s 439A(4)(c) also requires that the notice and the report be accompanied by a statement setting out details of the proposed deed.

(9) Section 447A(1) confers on the court a general power to make such order as it thinks appropriate in relation to how Pt 5.3A is to operate in relation to a particular company. Section 447A(4)(c) provides that an order may be made on the application of the administrator of the company.

Extending the convening period fixed by s 439A(5)

72 The period fixed by s 439A(5) for the convening of the meeting of the company's creditors is designedly brief. As the Full Court of the Federal Court

of Australia observed in *Commissioner of Taxation v Comcorp Australia Ltd*[47], it may be gathered from the terms of the legislation and the words of the Explanatory Memorandum and the Second Reading Speech that the emphasis of Pt 5.3A is on informality and flexibility and on speed of action. The procedure is not designed to allow for the kind of indefinite administrations which can occur under the United States' Ch 11 approach to corporate insolvency[48].

73 It is, however, recognised that it is not always practicable for an administrator to gather sufficient information within the convening period to form the requisite opinions under s 438A and communicate them in the notice given to creditors in accordance with ss 439A(3) and 439A(4). Accordingly, the courts are given specific power under s 439A(6), and also general power of varied application under s 447A(1), to extend the convening period. Consistent with the legislative intention of Pt 5.3A that the administration of a company be brought to an end within a short period of time, there is a presumptive expectation that extensions will be brief[49]. But over time the courts have come to recognise[50] that significant extra time may be required, and should be allowed, in

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47 (1996) 70 FCR 356 at 363 per Sheppard J, 379-380 per Carr J (Lockhart J agreeing at 358). See also *Deputy Commissioner of Taxation (Cth) v Pddam Pty Ltd* (1996) 19 ACSR 498 at 510.

48 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992 at 2404. See also Australia, House of Representatives, Corporate Law Reform Bill 1992, Explanatory Memorandum at [507]-[508].

49 See and compare *Mann v Abruzzi Sports Club Ltd* (1994) 12 ACSR 611 at 612; *Re Witta Coola Pastoral Co Pty Ltd* [1999] NSWSC 148 at [9]; *Re Allbuild Construction Co Pty Ltd (Administrators Appointed); Ex parte Featherby* [2000] WASC 227 at [5]-[7]; *Diamond Press Australia Pty Ltd* [2001] NSWSC 313 at [8].

50 See, for example, *Re Brash Holdings Ltd (Administrators Appointed)* (1994) 13 ACSR 793 at 794-795; *Re Ansett Australia Ltd (No 3)* (2002) 115 FCR 409 at 431-432 [78]; *Re Lift Capital Partners Pty Ltd (Administrators Appointed)* [2008] NSWSC 446 at [23]-[33]; *Re Octaviar Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2008] QSC 272; *Re Lehman Bros Australia Ltd* [2008] NSWSC 1132 at [20]; *Re Worrell, Storm Financial Ltd (Receivers and Managers Appointed)* (2009) 69 ACSR 584 at 594 [43]-[44]; *Re ABC Learning Centres Ltd (application by Walker) (No 7)* (2009) 71 ACSR 560 at 565-566 [26]-[28], [32]; *Re Lombe, Babcock & Brown Ltd (Administrators Appointed)* [2009] FCA 349 at [30]-[31], [33]; *Re Silvia, FEA Plantations Ltd (Administrators Appointed)* [2010] FCA 468 at [19]-[25]. See also *Re Riviera*

(Footnote continues on next page)

complex cases. Generally speaking, courts have been disposed to grant substantial extensions in cases where the administration has been complicated by, for example, the size and scope of the business, substantial offshore activities, large numbers of employees with complex entitlements, complex corporate structures and intercompany loans, and complex recovery proceedings, and, more generally, where the additional time is likely to enhance the return to unsecured creditors. Provided the evidentiary case for extension has been properly prepared, there has been no evidence of material prejudice to those affected by the moratorium imposed by the administration, and the administrator's estimate of time has had a reasonable basis, the courts have tended to grant extensions for the periods sought by administrators[51]. As Barrett J rightly observed in *Diamond Press Australia Pty Ltd*[52]:

> "The function of the Court on an application [for an extension under s 439A(6)] is ... to strike an appropriate balance between, on the one hand, the expectation that administration will be a relatively speedy and summary matter and, on the other, the requirement that undue speed should not be allowed to prejudice sensible and constructive actions directed towards maximising the return for creditors and any return for shareholders."

74 By contrast, it is notable that there is no provision for creditors to extend the length of the convening period. Although s 439B(2) provides that the meeting of creditors convened under s 439A may be adjourned from time to time, it expressly prohibits the adjournment, or the total of the periods of adjournment, exceeding 45 days. The evident purpose of Pt 5.3A is thus to confine administrations to the strict time limits laid down by Pt 5.3A subject only to such extensions as the courts may be satisfied are appropriate to be granted in

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Group Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed) (2009) 72 ACSR 352 at 355 [13].

51 *Re Riviera Group Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed)* (2009) 72 ACSR 352 at 355-357 [14], [17]-[18]. See and contrast *Re Tiaro Coal Ltd (Administrators Appointed)* [2015] NSWSC 2055 at [5]-[7].

52 [2001] NSWSC 313 at [10]. See also *Re Hayes, Estate Property Group Ltd (Administrators Appointed)* [2007] FCA 935 at [1]; *Georges, Re Midas Australia Pty Ltd (Administrators Appointed)* (2009) 27 ACLC 43 at 45 [11]; *Re Harrisons Pharmacy Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2013] FCA 458 at [13]; *Australian World-Wide Pty Ltd v Palmer* [2014] NSWSC 141 at [10]; *Re Freeman, Aquaint Holdings Ltd (Administrators Appointed)* [2016] FCA 831 at [9]-[12]; *Re Secatore, In-Fusion Management Pty Ltd (Administrators Appointed)* [2016] FCA 1072 at [12]-[17].

exercise of the specific power of extension conferred by s 439A(6) or the general power of varied application conferred by s 447A(1).

75 It cannot be assumed that there is an equal balance of power and symmetry of information between a company and its creditors. Both before a company goes into administration, and while the administrator's investigations are ongoing, creditors do not know the full picture. The asymmetry of information is one of the reasons creditors need protection. Part 5.3A provides that protection by empowering the court to supervise the granting of extensions. Moreover, any potential abuse of creditors is not met by a court taking action under s 445D(1)(f). The uncertainty and delay created would be contrary to the strict time limits evident in Pt 5.3A.

The essential nature of a deed of company arrangement under Pt 5.3A

76 As was observed by four members of this Court in *Lehman Bros Holdings Inc v City of Swan*[53], Pt 5.3A of the *Corporations Act* and the Corporations Regulations 2001 (Cth) give effect to principles not materially different from those which have long underpinned statutory compositions and arrangements in individual bankruptcy[54]. In effect, a deed of company arrangement is a "streamlined" version of an arrangement or reconstruction under Pt 5.1 of the *Corporations Act* for payment or satisfaction in whole or part of the debts of the company which is entered into as an alternative to the company being wound up in insolvency under Pt 5.4 of the *Corporations Act*[55]. It embodies the terms and conditions on which a company's creditors are lawfully agreed that, as an alternative to the company being put into liquidation, the creditors' debts or claims against the company shall be compromised[56] or to some extent resolved by arrangement falling short of compromise[57].

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53 (2010) 240 CLR 509 at 521 [32] per French CJ, Gummow, Hayne and Kiefel JJ; [2010] HCA 11.

54 See *Isles v Daily Mail Newspaper Ltd* (1912) 14 CLR 193 at 203 per Isaacs J; [1912] HCA 18.

55 *Commissioner of Taxation v Comcorp Australia Ltd* (1996) 70 FCR 356 at 363 per Sheppard J, 379-380 per Carr J (Lockhart J agreeing at 358).

56 *Lehman Bros Holdings Inc v City of Swan* (2010) 240 CLR 509 at 523-524 [38]-[39] per French CJ, Gummow, Hayne and Kiefel JJ.

57 See *Shaw v Royce Ltd* [1911] 1 Ch 138 at 148-149; *Re Guardian Assurance Company* [1917] 1 Ch 431 at 440 (reversed on appeal but not on this point: see [1917] 1 Ch 431 at 446ff, especially at 448 per Lord Cozens-Hardy MR,

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77 As was further observed in *Lehman Bros*[58], the word "arrangement" in the collocation "deed of company arrangement" encompasses many forms of compromise – likewise, no doubt, it may encompass many forms of arrangement falling short of compromise – and there is no compelling reason to confine the ambit of the terms and conditions of a compromise or arrangement upon which creditors may lawfully agree. The structure and content of Pt 5.3A connotes that the question of whether a compromise or arrangement of debts or claims on particular terms and conditions is commercially more desirable than the company going into liquidation is a question for the creditors. But it remains, by analogy with the kinds of arrangements contemplated by Pt X of the *Bankruptcy Act* 1966 (Cth)[59], that the essence of a Pt 5.3A deed of company arrangement is that it provide for an arrangement alternative to liquidation for the whole or partial payment or satisfaction of creditors' debts or claims against the company or, more generally, for the whole or partial resolution of creditors' debts or claims against the company by alteration of rights on one side or the other.

The execution of the Deed

78 Following the appointment of administrators in this case and the first meeting of the Company's creditors[60], the administrators concluded that they were unable to gather sufficient information within the convening period fixed by s 439A(5) to express the requisite opinions under s 439A(4). Instead of making an application, however, under s 439A(6) or s 447A(4)(c) for an extension of the convening period, they issued a report (and subsequently a supplementary report) to creditors recommending that the creditors agree at the meeting convened under s 439A ("the second meeting") to the execution of the Deed to extend the administration of the Company.

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450 per A T Lawrence J); *Re Opes Prime Stockbroking Ltd (No 2)* (2009) 179 FCR 20 at 29 [29].

58 (2010) 240 CLR 509 at 523-524 [39] per French CJ, Gummow, Hayne and Kiefel JJ.

59 See Australia, House of Representatives, Bankruptcy Legislation Amendment Bill 2004, Explanatory Memorandum at 4 [16]; *Bankruptcy Act* 1966 (Cth), Pt X (as at 28 May 2004).

60 See *Corporations Act* 2001 (Cth), ss 436A, 436E.

79 In the supplementary report, the purpose of the Deed was stated thus:

> "[the Deed] is essentially an extension of the Administration Period[61] to allow sufficient time for the Administrators to:
>
> - conduct further detailed investigations into the Company's business, property and affairs (including the matters identified in this report as requiring further investigation) to form an opinion on the likely outcome to creditors in the event the Company is wound up in liquidation; and
>
> - progress the process for the sale of the Company's assets and/or explore the possibility of a restructure and recapitalisation of the Company which may provide a more beneficial outcome for stakeholders than from the immediate winding up of the Company."

To the same effect, in the recitals to the Deed, it was declared that:

> "The objective of [the Deed] is to provide sufficient time for the Administrators to conduct further investigations into the Company's property and affairs, and to explore the possibility of a restructure or recapitalisation of the Company 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 the Company."

80 At the second meeting, which was first adjourned pursuant to s 439B(2) and then reconvened, the creditors resolved that the Deed be executed, and the Deed was executed some two weeks later.

The purported effect of the Deed

81 The essential terms of the Deed were as follows:

(1) Clause 9.2 provided that the administrators were to carry on the administration of the Company while seeking proposals to reconstruct the Company with a view to reaching a position where the Company's securities might be re-quoted for trading on the Australian Securities

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61 The supplementary report defined "Administration Period" as the period between the appointment of the administrators and the date upon which the administration of the Company ends.

Exchange, including proposals for partial or full sale of the Company's assets.

(2) Clause 9.3 provided that, before any proposal could be accepted, the administrators were required to convene a further meeting of the creditors and put the proposal to the meeting.

(3) Clause 10 imposed a moratorium on and deferral of debts until termination of the Deed.

(4) Clause 15 stipulated that the administrators were required to provide reports to the creditors, on at least a bi-monthly basis, of the progress of the investigations and recapitalisation process; and, ultimately, a report to the creditors outlining the results of the investigations, the proposals received and the proposal, if any, that in the view of the administrators was likely to result in a better return to the creditors than liquidation of the Company or acceptance of any other proposal.

(5) Clause 18 provided that the Deed would continue in operation until terminated by order of the court under s 445D of the *Corporations Act*; resolution of the creditors at a meeting convened under s 445F; or resolution of the creditors under s 445C(b) following a determination of the administrators that they considered that it was no longer practicable or desirable to carry on the business of the Company or to continue to implement the Deed.

82 In short, the Deed purported to effect essentially the same result as a court-ordered extension of the convening period under s 439A(6) or s 447A(1), except that the extension was determined by the creditors and was to be indefinite.

The Deed was not a deed of company arrangement within the meaning of Pt 5.3A

83 The Deed did not provide for an arrangement alternative to liquidation for the whole or partial payment or satisfaction of creditors' debts or claims against the Company or the whole or partial resolution of creditors' debts or claims against the Company by alteration of rights on one side or the other. In effect, it purported to provide for no more than the continuation of the administration of the Company and thereby the deferral to a later date of a decision whether the Company should execute a deed of company arrangement or be wound up or that the administration should end. As such, the Deed was not a deed of company arrangement within the meaning of Pt 5.3A, and it ran counter to the evident policy of Pt 5.3A that the only permissible extensions of the convening period fixed by s 439A(5) are those that are granted by the courts under s 439A(6) or s 447A(1).

84 The respondents submitted, in substance, to the contrary that, because the Deed provided for a moratorium on debts for the duration of the Deed, provided for the administrators to explore the possibility of restructuring or recapitalising the Company, and required the administrators to provide regular reports on their progress in excess of those required by Pt 5.3A, the Deed was essentially no different from a simple moratorium on debts, which, it was contended, was the paradigm "arrangement" contemplated by the drafters of Pt 5.3A.

85 That submission should have been rejected. The kinds of moratoria on debts which qualify as arrangements under Pt 5.3A are moratoria on debts alternative to liquidation which are calculated to enable a company to trade out of financial difficulties or which are coupled with full or partial releases of debts or claims in return for payment or some other consideration[62]. They are a means, analogous to arrangements that may be entered into by an individual under Pt X of the *Bankruptcy Act*[63], of avoiding liquidation. The moratorium on debts for which the Deed purported to provide was not an alternative to liquidation calculated to allow the Company to trade out of financial difficulties or otherwise to provide for the satisfaction in whole or part of outstanding debts or claims. Its only purpose and purported effect was to enable the Company to be kept, de facto, in administration and thereby to afford the administrators more time to seek proposals, which, if located, might only then be submitted to creditors for consideration as an alternative to liquidation.

86 The respondents further contended, in substance, that the arrangement for which the Deed provided was essentially no different from the kind of arrangement considered in *Comcorp*[64], where the company's creditors agreed to accept in full and final settlement of their debts the proceeds, *if any*, of a legal action brought against certain banks and receivers. In the respondents' submission, *Comcorp* showed that creditors are free to decide that a company will execute a deed like the Deed even though it does not guarantee an immediate, or possibly any, distribution of the company's property to creditors.

87 That submission should also have been rejected. The arrangement in *Comcorp* provided for creditors to accept terms in full and final settlement of their claims as an alternative to the winding up of the company. That is why it

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62 *Beatty v Brashs Pty Ltd* (1998) 79 FCR 551 at 554. See for example *National Bank of Australasia Ltd v Scottish Union and National Insurance Co* (1952) 86 CLR 110; [1952] AC 493; *F T Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd* (1977) 3 ACLR 69.

63 See *Bankruptcy Act* 1966 (Cth), s 188A.

64 (1996) 70 FCR 356 at 359, 361 per Sheppard J.

was a deed of company arrangement within the meaning of Pt 5.3A. The fact that it was possible that that arrangement might yield the creditors nothing in the result was beside the point. What mattered was that the creditors were prepared to give up their claims against the company, rather than wind up the company, in return for the chance that the arrangement might yield them a return. By contrast, as has been observed, the Deed did not provide, as an alternative to winding up the Company, for any commitment by creditors to compromise their debts or claims or to any resolution of debts or claims by arrangement of rights on one side or the other. In substance, the Deed purported to provide for no more than that the creditors would defer making a decision, until a later, unspecified date, whether they would then commit to such a compromise or arrangement rather than wind up the Company. For all that could be told at the time of execution of the Deed, there might never be such a compromise or arrangement. And that was not a matter of non-compliance that could be remedied by a court under one or more of s 445D, s 447A or s 447E.

No opinions formed in accordance with s 438A

88 The conclusion that the Deed was not a deed of company arrangement within the meaning of Pt 5.3A draws support from the requirement, imposed by s 438A, that, as soon as practicable after the commencement of an administration, the administrator must form an opinion as to whether it would be in the creditors' interests for the company to execute a deed of company arrangement or for the administration to end or for the company to be wound up, and from the requirement, imposed by s 439A, that the notice convening the meeting of the creditors under that section be accompanied by a statement setting out the administrator's opinion as to each of those matters.

89 Authority establishes that the administrator is required to express separate opinions about each of those matters but that they are alternatives[65]. So, if the creditors of a company resolve that the company execute a deed of company arrangement, the resolution will have the effect of bringing the administration to an end and the company will not be wound up[66]. Alternatively, if the creditors resolve that the company be wound up or that the administration should end, the company will not then, and may never, execute a deed of company arrangement. What is contemplated by Pt 5.3A, therefore, and in particular by s 439A, is that

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65 *Commissioner of Taxation v Comcorp Australia Ltd* (1996) 70 FCR 356 at 371-372 per Sheppard J, 390-391 per Carr J (Lockhart J agreeing at 358).

66 *Corporations Act* 2001 (Cth), s 435C(2)(a). See also *Commissioner of Taxation v Comcorp Australia Ltd* (1996) 70 FCR 356 at 371 per Sheppard J, 390 per Carr J (Lockhart J agreeing at 358).

administrators will within the convening period or any extension of it form opinions as to whether it would be in the interests of the creditors that the company execute a deed of company arrangement or that the company be wound up or that the administration should end, and provide the requisite opinions to the creditors. The creditors, so armed with those opinions, will at the meeting convened under s 439A, or after any permitted adjournment of it, make a choice, there and then and not otherwise, between the company executing a deed of company arrangement, the company being wound up, and the administration ending.

90 Here, the administrators were unable within the convening period to form the requisite opinions. Their investigations had not proceeded far enough for them to do so. The best they could offer the creditors was an opinion that:

> "from the information available, ... it is in creditors' interests that the Company execute [the Deed] ...
>
> We have formed our view on the basis that it would be premature for the Company to be wound up at the upcoming meeting as we believe [the Deed] allows the Administrators time to determine whether any alternative(s) exist and preserves the option of entering into a subsequent [deed of company arrangement] (if appropriate) which has the potential to maximise the return to stakeholders which would not be available should the Company be wound up immediately."

91 That opinion did not comply with s 439A(4)(b). An opinion that it would be in the creditors' interests for the Company to execute the Deed because it "allows the Administrators time to determine whether any alternative(s) [to winding up] exist and preserves the option of entering into a subsequent [deed of company arrangement when and if the Administrators come up with a proposal capable of returning more to the creditors than a winding up]" is self-evidently not an opinion that would enable the creditors to make a choice there and then between the Company executing a deed of company arrangement, the Company being wound up, and the administration ending. And since the recommendation that the creditors should resolve in favour of the execution of the Deed was not one which, if accepted, would have enabled the creditors there and then to make a choice between the Company executing a deed of company arrangement, the Company being wound up, and the administration ending, it logically follows that the Deed was not a deed of company arrangement within the meaning of Pt 5.3A.

The effect of s 444B(6)

92 The respondents contended regardless that, because s 444B(6) provides that an instrument prepared under s 444A and executed by the company and the

deed's proposed administrator becomes a deed of company arrangement upon execution, it must be taken that the Deed is a deed of company arrangement.

93 That is not so. Section 444B(6) is not a deeming provision but a timing provision. Its purpose is to provide for the point in time at which a deed of company arrangement takes effect. That has substantive consequences under ss 444C and 444D and, if such a deed of company arrangement is not executed until after the time stipulated in s 444B(2), has the consequence, perforce of ss 444B(7) and 446A(2), that the company will be taken to have passed a special resolution under s 491 that the company be wound up.

94 That s 444B(6) is a timing provision and not a deeming provision is borne out by the express stipulation in s 444A(1) that s 444A applies where a company's creditors resolve that the company execute a deed of company arrangement; or, to put it more directly, that s 444A does not apply unless a company's creditors resolve that the company execute a deed of company arrangement. Ex hypothesi, the Deed was not a deed of company arrangement. It follows that the creditors' resolution that the Company execute the Deed was not a resolution that the Company execute a deed of company arrangement within the meaning of s 444A(1). In turn, it follows that s 444A did not apply. The "instrument" referred to in s 444B(6) is an instrument which s 444A(3) requires an administrator to prepare setting out the terms of a deed of company arrangement which the creditors have resolved a company execute. Since s 444A did not apply to the Deed, the Deed was not such an instrument. It follows that s 444B(6) was not engaged.

No need for a deed of company arrangement to distribute property to creditors

95 It remains to mention that much of the parties' written and oral submissions before this Court, as before the courts below, was devoted to the appellant's contention that in order to constitute a deed of company arrangement a deed must provide for the distribution of at least some of the property of the company to its creditors. The contention was based on the requirement imposed by s 444A(4)(b) of the *Corporations Act* that the "instrument" specify the property of the company (whether or not already owned by the company when it executes the deed) that is to be available to the creditors.

96 For the reasons given by Buss P in the Court of Appeal, the contention should be rejected[67]. As the respondents submitted, there are many kinds of arrangements capable of being made the subject of a deed of company

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67 See, in particular, *Mighty River International Ltd v Hughes* (2017) 52 WAR 1 at 35-39 [137]-[171].

arrangement that do not involve a distribution of the company's property to its creditors. They include, for example, a simple moratorium of the kind earlier mentioned[68], a debt for equity swap[69], a creditors' trust[70], and a transfer of shares to a third party obligee[71].

97 So to recognise, however, does not detract from the conclusion that the Deed was not a deed of company arrangement. The discrimen of a deed of company arrangement within the meaning of Pt 5.3A of the *Corporations Act* is that it embody the terms and conditions on which a company's creditors are agreed, as an alternative to the company being wound up in insolvency under Pt 5.4, upon a compromise of their debts or claims against the company or an arrangement falling short of compromise for resolution of their debts or claims by alteration of rights on one side or the other. Such a deed may provide for the distribution of the company's property to creditors but it need not do so. In each case, it will be a matter for the creditors.

Conclusion and orders

98 But for the orders which have been made, we should have allowed the appeals with costs and ordered that orders 1 and 2 of the Court of Appeal of the Supreme Court of Western Australia in each matter be set aside. In their place, we should have ordered that the appeal to the Court of Appeal be allowed with costs and that order 1 of Master Sanderson be set aside. In lieu of that order, we should have declared that the Deed was not a deed of company arrangement within the meaning of Pt 5.3A. We should further have ordered that the matters be remitted to Master Sanderson for determination according to law.

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68 See *Beatty v Brashs Pty Ltd* (1998) 79 FCR 551 at 554. See generally *Re Baseline Constructions Pty Ltd (subject to a deed of company arrangement)* [2017] NSWSC 1018.

69 See *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 179 [20] per McHugh, Gummow, Hayne and Callinan JJ; [2001] HCA 31; *Re Paladin Energy Ltd (subject to Deed of Company Arrangement)* [2018] NSWSC 11 at [23].

70 See *Commonwealth v Rocklea Spinning Mills Pty Ltd* (2005) 145 FCR 220 at 228 [28]; *Munday Group Pty Ltd v Tsourlinis Distributors Pty Ltd* (2010) 5 BFRA 101 at 102 [5]; *Re Bevillesta Pty Ltd* (2011) 254 FLR 324 at 347-348 [69]; *Re Smith, Matrix Metals Ltd (in liq)* [2011] FCA 1399.

71 See *Weaver v Noble Resources Ltd* (2010) 41 WAR 301 at 306-307 [26], 311-312 [58], [64], [69]-[70]; *Re Elite Logistics Holdings Pty Ltd (subject to deed of company arrangement)* [2017] NSWSC 1830 at [6].