

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, KIRBY AND HAYNE JJ

MYT ENGINEERING PTY LIMITED & ORS

APPELLANTS

AND

MULCON PTY LIMITED

RESPONDENT

MYT Engineering Pty Limited v Mulcon Pty Limited (S117-1998)
[1999] HCA 24
13 May 1999

ORDER

1. *Appeal allowed with costs.*
2. *Orders of the Court of Appeal of New South Wales made on 6 August 1997 set aside.*
3. *In lieu thereof order:*
 - (a) *Appeal to the Court of Appeal allowed with costs.*
 - (b) *Orders of Bryson J made on 13 June 1996 set aside.*
 - (c) *In lieu thereof declare that the deed of company arrangement dated 28 September 1994 made between Martin John Green, Grant Edmonds, Robert Pullen, MYT Engineering Pty Limited ("the company") and Mulcon Pty Limited is not void for want of execution by the company in accordance with Pt 5.3A of the Corporations Law.*
 - (d) *Plaintiff to pay the defendants' costs of the proceedings before Bryson J.*

2.

On appeal from the Supreme Court of New South Wales

Representation:

D P Robinson with C R C Newlinds for the appellants (instructed by Cunich Lawyers)

A I Tonking for the respondent (instructed by Helliars City Solicitors)

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

CATCHWORDS

MYT Engineering Pty Limited & Ors v Mulcon Pty Limited

Corporations – Deed of company arrangement – Whether instrument required to be executed as a deed.

Corporations – Deed of company arrangement – Instrument not executed in accordance with company's articles of association – Whether instrument made by or on behalf of company – Whether instrument authenticated so as to bind company.

Corporations – Deed of company arrangement – Statute required instrument to be executed within specified time – Whether s 445G(3) of the Corporations Law applies when instrument not executed within specified time.

Words and phrases – "authenticated" – "deed" – "deed of company arrangement" – "executed by or on behalf of the company" – "substantially complied with".

Corporations Law, ss 182, 437C, 444B, 445G.

- 1 GLEESON CJ, GAUDRON, GUMMOW AND HAYNE JJ. On 28 September 1994, creditors of MYT Engineering Pty Limited ("MYT") resolved, pursuant to s 439C of the Corporations Law of New South Wales ("the Law"), that the company should execute a deed of company arrangement. The Law provides¹ that the administrator of the deed must prepare an instrument setting out the terms of the deed and (by s 444B(2)) that the company must execute the instrument within:

"(a) 21 days after the end of the meeting of creditors; or

(b) such further period as the Court allows on an application made within those 21 days".

On 29 September 1994, the two members of the board of MYT, Mr Pullen and Mr Edmonds, spoke by telephone. Mr Pullen and Mr Edmonds were the only shareholders in the company. (Mr Edmonds is the third appellant in this proceeding; Mr Pullen is not a party.) Mr Pullen said that he was on his way to the airport and would be away for six weeks. The primary judge found that the third appellant said to Mr Pullen, "I'll go and sign all the documents and tell them you are overseas. Is that OK?" and that Mr Pullen replied, "Yeah you put in the extra money and sign whatever is necessary to put it in place, but I don't know what the rush is about." The primary judge said that the third appellant "regarded this as giving him the full consent and agreement of Mr Pullen to sign all necessary documents for and on behalf of the company to finalise the Deed of Company Arrangement"². Accordingly, on 19 October 1994 (before the 21 day period had expired) the company seal was stamped on the document and its affixing was witnessed by one person - the third appellant - who purported to attest to the affixing of the seal both as a director and as secretary.

- 2 The company's articles of association required that every document to which the seal was affixed should be signed by a director and *countersigned* by another director or a secretary. Because there was no countersignature, the company's attempt to seal the document did not accord with the articles. It was, in that sense, ineffective³. Further, a person dealing with the company would not have been entitled to assume that the document had been duly sealed by the company. At the

1 s 444A(3).

2 *Mulcon Pty Ltd v MYT Engineering Pty Ltd* (1996) 14 ACLC 1054 at 1056; 20 ACSR 606 at 608.

3 *Equity Nominees Ltd v Tucker* (1967) 116 CLR 518; *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 169-170 per Brennan J.

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time, s 164(3)(e) of the Law provided for such an assumption only if the sealing of the document appeared to be attested by two persons⁴.

3 Notwithstanding what was done, the second appellant (who was the person named as administrator of the deed) took control of the company and administered its affairs as if the deed of company arrangement were in force. (All other parties to the instrument had executed it.)

4 Some months later the respondent, an unsecured creditor of the company that had agreed not to participate in the benefits to be provided under the deed of company arrangement to other unsecured creditors, learned for the first time what had been done to execute the instrument by, or for, MYT. (The respondent claimed to be a very large creditor of MYT. The deed of company arrangement provided that it would pursue its claim against MYT, but accept in full satisfaction of that claim any sum recovered from the insurers of MYT. It is, perhaps, not assuming too much to think that the respondent recovered nothing from the insurer and then sought ways to improve its financial position, but nothing turns on this.)

5 In October 1995, the respondent commenced proceedings in the Supreme Court of New South Wales seeking, among other things, a declaration that the administration of MYT had come to an end on 19 October 1994 - at the expiration of the 21 day period fixed by s 444B(2)(a). It contended that this result followed from s 435C(3)(f) of the Law, which provides that the administration of a company may end because the company contravenes s 444B(2) by failing to execute a proposed deed of company arrangement, and from s 446A of the Law. Section 446A(2) applies if "a company under administration contravenes subsection 444B(2) at a particular time"⁵ and provides that:

4 The provisions of the Law governing assumptions that may be made by persons dealing with companies have since been amended by the *Company Law Review Act* 1998 (Cth) as applied by the *Corporations (New South Wales) Act* 1990 (NSW), s 7. Among other things, changes have been made to reflect the possibility that a company may have only one officer. See ss 128, 129 of the Law. These changes do not affect the present matter.

5 s 446A(1)(b).

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"The company is taken:

- (a) to have passed, at the time referred to in paragraph (1)(a) or (b) or subparagraph (1)(c)(ii), as the case may be, a special resolution under section 491 that the company be wound up voluntarily; and
- (b) to have done so without a declaration having been made and lodged under section 494."

6 A cross-claim was filed (in the name of the administrator of the deed⁶) seeking orders under s 445G of the Law. So far as is presently relevant, that section provides:

"(1) Where there is doubt, on a specific ground, whether a deed of company arrangement was entered into in accordance with this Part or complies with this Part, the administrator of the deed, a member or creditor of the company, or the Commission, may apply to the Court for an order under this section.

(2) On an application, the Court may make an order declaring the deed, or a provision of it, to be void or not to be void, as the case requires, on the ground specified in the application or some other ground.

(3) On an application, the Court may declare the deed, or a provision of it, to be valid, despite a contravention of a provision of this Part, if the Court is satisfied that:

- (a) the provision was substantially complied with; and
- (b) no injustice will result for anyone bound by the deed if the contravention is disregarded.

..."

6 The cross-claim was treated in the proceedings below as filed on behalf of MYT. (See *Mulcon Pty Ltd v MYT Engineering Pty Ltd* (1996) 14 ACLC 1054 at 1058; 20 ACSR 606 at 610; *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1997) 15 ACLC 1057 at 1059; 25 ACSR 78 at 79.) There was, of course, doubt about the status of MYT. Was it in liquidation or was it subject to a deed of company arrangement? Theoretically these matters should have been reflected in the description of MYT as a party. But no point was taken about these matters and nothing turns on them.

7 The primary judge (Bryson J) declined to make an order under s 445G(3), holding that there had not been substantial compliance with the provisions of s 444B(2) requiring the company to execute the deed within 21 days⁷. Instead he ordered, pursuant to s 447A of the Law, that MYT had been under administration from 1 August 1994 until 19 June 1996 and that it be wound up as of 19 June 1996. (Why the date of 19 June 1996 was fixed does not appear from the papers; it was a little less than a week after the primary judge published his reasons for judgment.)

8 From this order the present appellants appealed to the Court of Appeal of New South Wales. That Court (Handley and Powell JJA, Dunford AJA), by majority, dismissed the appeal⁸. The appellants appeal to this Court by special leave. The grant of special leave was originally limited to the question whether s 445G(3) of the Law "has any application in a situation in which a deed has not been executed within the time required by the Law". As argument developed, however, it emerged that the appellants sought to contend that the steps that had been taken did constitute execution of the instrument by the company. (The appellants had contended, at first instance and in the Court of Appeal, that there had been execution "on behalf of" the company by a person authorised by resolution of the board of the company but that submission was not pressed in this Court. It is not necessary, then, to consider whether the conversation between the directors constituted a "resolution" for the purposes of s 445G(3).) The respondent did not oppose the appellants' application for leave to amend their grounds of appeal and an order was made granting that leave and the consequential enlargement of special leave to appeal. Because these amendments were made late in the presentation of oral argument, leave was given to the parties to file supplementary written submissions, and this they did.

The nature of a deed of company arrangement

9 Section 444B(2) speaks of a company "execut[ing] the instrument" that has been prepared by the administrator. (That instrument must set out the terms of the deed⁹ and must specify the matters identified in s 444A(4).) As was said in a different context by King CJ¹⁰, "[t]o execute a document is to do what the law requires to be done to give validity to the document". It follows that what is meant by a company "executing" the instrument depends, in part, upon whether the

7 (1996) 14 ACLC 1054; 20 ACSR 606.

8 (1997) 15 ACLC 1057; 25 ACSR 78.

9 s 444A(3).

10 *In the Estate of Williams, Deceased* (1984) 36 SASR 423 at 425.

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instrument must be executed as a deed. If it must, it may then be (as Powell JA pointed out in the Court of Appeal¹¹) that the instrument must be executed under seal¹² or, if executed by an agent, that authority to execute the instrument must be given by instrument under seal¹³. But, if the instrument need not be executed as a deed, those formalities need not be satisfied.

10 The dictionary to the Law refers to "deed" and to "deed of company arrangement"¹⁴. At the time of these events the Law provided that unless the contrary intention appears, the former "includes an instrument having the effect of a deed" and the latter means "a deed of company arrangement executed under Part 5.3A or such a deed as varied and in force from time to time". Although Pt 5.3A sometimes refers to the "instrument"¹⁵ or the "deed"¹⁶, the expression "deed of company arrangement" is used more frequently in the Part than are the other words we have mentioned - especially in Div 10 of Pt 5.3A (which deals with the execution and effect of a deed of company arrangement) and Div 11 (which deals with variation, termination and avoidance of a deed of company arrangement).

11 Nowhere does the Law state explicitly that the instrument must be executed and delivered as a deed or that it is, or is to take effect as, a deed (as opposed to a "deed of company arrangement"). Unlike Pt X of the *Bankruptcy Act* 1966 (Cth), there is no provision that an instrument not under seal, which if it had been under seal would have been a deed of arrangement, is void¹⁷. Further, the statutory definition of a deed of company arrangement is very different from the definitions of deed of arrangement and deed of assignment that are found in the *Bankruptcy Act*. In that Act, those terms are defined¹⁸ as "a deed ... providing for the

11 (1997) 15 ACLC 1057 at 1074; 25 ACSR 78 at 92.

12 *Conveyancing Act* 1919 (NSW), s 51A. But see also Corporations Law, s 182 as it stood at the relevant time.

13 *Harrison v Jackson* (1797) 7 TR 207 [101 ER 935]; *Berkeley v Hardy* (1826) 5 B & C 355 [108 ER 132].

14 s 9.

15 For example, ss 444A(3), (4) and (5); 444B(1), (2), (3), (5) and (6).

16 For example, s 444A(2) and (3).

17 *Bankruptcy Act*, s 213(2).

18 s 187(1).

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arrangement of the affairs of a debtor" and "a deed by which a debtor assigns all his or her divisible property". By contrast, the Law defines a deed of company arrangement as "a deed of company arrangement executed under Part 5.3A" rather than as "a deed" having certain characteristics or effects.

- 12 A conclusion that the instrument must be executed as a deed must depend, then, on drawing some inference from the use of the word "deed" in the composite expression "deed of company arrangement", or from applying the Law's dictionary meaning of "deed" in that expression. But the absence of any explicit reference in the Law to the formalities of execution and delivery that would be required if execution as a deed were intended is especially significant when regard is had to s 444B(6). That sub-section provides that:

"When executed by both the company and the deed's administrator, the instrument *becomes* a deed of company arrangement."

- 13 The use of the term "deed of company arrangement" can be explained as an allusion to the earlier forms of arrangement made, on the insolvency of individuals, by deed of arrangement¹⁹. Those instruments have long been called "deeds of arrangement", but they have not always been made by deed. The nineteenth century United Kingdom statutes that provided for their registration made plain that the instruments to be registered were instruments that effected any of several kinds of arrangement with creditors, whether or not the instrument concerned was under seal²⁰. And this usage was adopted in the first Commonwealth Bankruptcy Act - the *Bankruptcy Act* 1924 (Cth)²¹ - as well as in the earlier colonial bankruptcy legislation²² on which the Commonwealth legislation was based.

- 14 In the light of this history, we do not consider that any inference can be drawn from the use of the word "deed" in the expression "deed of company arrangement". When Pt 5.3A is read as a whole, its provisions do not require that a deed of company arrangement should be executed as a deed.

19 See, for example, the *Deeds of Arrangement Act* 1887 (UK).

20 *Deeds of Arrangement Act*, s 4(2).

21 s 190(2).

22 *Insolvency Act* 1915 (Vic), s 252(2) which, in turn, appears to have been based on the *Deeds of Arrangement Act*, s 4(2).

The significance of s 437C

- 15 When an administrator is appointed to a company (usually following the board of the company resolving that the company is, or is likely to become, insolvent and that an administrator should be appointed²³) the administrator takes control of the company's business, property and affairs²⁴ and the powers of the officers of the company are suspended²⁵. Section 437C(1) provides that:

"While a company is under administration, a person (other than the administrator) cannot perform or exercise, and must not purport to perform or exercise, a function or power as an officer of the company, except with the administrator's written approval."

- 16 As we have already noted, once the creditors of a company under administration resolve that the company execute a deed of company arrangement, the company must do that within the times limited under s 444B(2). But who is to effect that execution? Must execution be done by the administrator acting for the company, or (with the administrator's written approval) by officers of the company exercising some function or power ordinarily confided to them, or by someone appointed under s 444B(3)?

- 17 Section 444B(4) provides that sub-section (3) (the provision permitting the "board of the company ... by resolution [to] authorise the instrument to be executed by or on behalf of the company") "has effect despite section 437C, but does not limit the functions and powers of the administrator of the company". Does this express reference to s 437C mean that the only permissible means of execution of the instrument by the company are the three we have identified: by the administrator, or by officers of the company acting with the written authority of the administrator, or by the means contemplated by s 444B(3), that is, pursuant to authority conferred by resolution of the board?

- 18 A company can make a deed of company arrangement only while it is in administration. By requiring that "the company" execute the instrument, which upon execution by both the company and the administrator becomes a deed of company arrangement, Pt 5.3A requires a visible expression of the company's

23 s 436A(1). See also s 436B as to appointment by a liquidator and s 436C as to appointment by a chargee.

24 s 437A(1).

25 s 437C(1).

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assent to the terms that are recorded in the instrument. Further, by providing that the instrument becomes a deed of company arrangement when executed by *both* the company and the administrator, the legislation reveals an intention that the company's transition from being subject to administration to being subject to a deed of company arrangement should not depend exclusively on the wish of the creditors and the assent of the administrator. And indeed the provision in s 446A(1)(b) for what is to happen if the company contravenes s 444B(2) and does not execute the instrument within time (coupled with the explicit reference to this consequence in s 444B(7)) can only reinforce that conclusion. Of course, s 444B(4) and its express reference to s 437C can be said to suggest the contrary view, but the other considerations we have mentioned are, in our view, of greater weight. That is not to say that the company's assent to the instrument could not be expressed in any of the three ways we identified earlier; it could. But we do not accept that those are the only ways in which the company can execute the instrument prepared by the administrator. To hold that they are, would reduce the company's execution of the instrument to a mere matter of form.

- 19 If, then, the instrument prepared by the administrator need not be executed as a deed and can be executed by the company in any way in which any other instrument or agreement, not under seal, may be executed, the third appellant's act of affixing the company seal and signing in purported attestation of the affixing as both director and secretary takes on a different significance.

Execution by or on behalf of a company

- 20 At the time of these events, the Law provided:

"182(1) So far as concerns the formalities of making, varying or discharging a contract, a person acting under the express or implied authority of a company may make, vary or discharge a contract in the name of, or on behalf of, the company in the same manner as if that contract were made, varied or discharged by a natural person.

182(2) The making, variation or discharging of a contract in accordance with subsection (1) is effectual in law and binds the company and other parties to the contract.

...

182(6) This section does not affect the operation of a law that requires some consent or sanction to be obtained, or some procedure to be complied with, in relation to the making, variation or discharge of a contract.

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182(7) A document or proceeding requiring authentication by a company may be authenticated by the signature of an officer of the company and need not be authenticated under the common seal of the company.

... "26

21 In *Black v Smallwood* Windeyer J said²⁷:

"There is a difference between a man's own acts and acts done for him by another man. The difficulty of the distinction in the case of a corporation is that a corporation must manifest its acts and intentions by the actions and declarations of human beings: and ambiguities and limitations of language make it difficult sometimes to express the distinction between acts done by a person as executant of the will of a corporation and acts done by a person as agent for a corporation, his principal. That the word 'agent' is in each case apt to describe the actor helps to disguise their different legal characters.

I appreciate the force of what Walsh J said in the Supreme Court concerning the narrow differences in language upon which the decision in *Newborne v Sensolid (Great Britain) Ltd*²⁸ turned. But the distinction that differences in language reflect, sometimes not very clearly, is the distinction between the act of a man himself and acts done by another on his behalf. If in the case of a company the distinction is difficult to preserve, and may seem unreal, or merely verbal not conceptual, that is because the legal personality and capacity of the corporation are artificially created by law."

The references in s 182(1) to a person making "a contract *in the name of, or on behalf of*, the company" must be read in this light. So too, the reference in s 444B(3) to execution "*by or on behalf of* the company" and in s 444B(2) to the company "execut[ing] the instrument" must be approached having regard to the fact that "a corporation must manifest its acts and intentions by the actions and declarations of human beings"²⁹.

26 Following the amendments made by the *Company Law Review Act* 1998 execution of documents by a company is now dealt with in s 127 of the Law.

27 (1966) 117 CLR 52 at 61-62.

28 [1954] 1 QB 45.

29 *Black v Smallwood* (1966) 117 CLR 52 at 61 per Windeyer J.

- 22 Companies statutes in Australia have long provided for companies to make contracts in writing without the company affixing its seal to the writing³⁰. Until the introduction of the Companies Codes in 1982 those provisions spoke of a contract being made "on behalf of the company" by any person acting under its authority, express or implied. But the reference in such provisions to a contract being made "on behalf of" the company should not be permitted to obscure the fact that the person who signed the contract did so as "executant of the will"³¹ of the company. Thus, although distinction is to be drawn between "a case where the execution of a document by a company is effected by the subscription of the company's name followed by the signature of a director or directors as such and the case where the document is executed by an agent on behalf of a company"³², in each case the contract is the *company's* contract. As early in the development of company law as 1856, Pollock CB said, in *Aggs v Nicholson*³³, of the execution of a promissory note by a company:

"Considering the note independently of the statute referred to, looking only to the meaning of the words used, we think they purport to bind the company, and not the parties signing. Nobody doubts that that was the real intention, and why the law should regard popular language otherwise than popularly it is difficult to see, in this case at least. 'We, two of the directors of the Ark Society, on behalf of the society, promise to pay:' sealed with the seal of the society. *Had the words been, 'We, the society promise;' signed, 'P N - H W, for the society,' or on 'behalf of the society,' it would have been clear.* But we know well that the usage has been to say: 'I promise for A B' instead of saying, 'I, A B promise; signed for A B, C D,' and the words 'on behalf' clearly originate in the 7 & 8 Vict c 110." (Emphasis added)

30 See, for example, *Companies (New South Wales) Code*, s 80(1) (which was substantially in the same form as s 182(1) of the Law as it stood in 1994); *Companies Act* 1961 (NSW), s 35(1); *Companies Act* 1936 (NSW), s 348. The first provision taking the form adopted in the 1936 and 1961 New South Wales Acts may be that made by the *Companies Act* 1867 (UK), s 37(2) but earlier Joint Stock Company legislation dealt with how companies were to make contracts. See, for example, *Joint Stock Companies Act* 1844 (UK) (7 & 8 Vict c 110), ss 44 and 45.

31 *Black v Smallwood* (1966) 117 CLR 52 at 61 per Windeyer J.

32 *Black v Smallwood* (1966) 117 CLR 52 at 60 per Barwick CJ, Kitto, Taylor and Owen JJ.

33 (1856) 1 H & N 165 at 170 [156 ER 1161 at 1163].

(The reference to 7 & 8 Vict c 110 is to the *Joint Stock Companies Act* of 1844 and to s 45 which regulated the making by a company of bills of exchange or promissory notes. It provided that they should be "made or accepted ... by and in the names of two of the directors of the company on whose behalf or account the same may be so made or accepted, and shall be by such directors expressed to be made or accepted by them *on behalf of* such company".)

- 23 Section 182(1) and its legislative predecessors permitted a company to make some contracts in writing without affixing the company seal. But if the company seal is affixed to a contract that does not have to be sealed, and the sealing is not done or witnessed as the articles of association require, the document may nevertheless constitute a contract binding on the company. In *195 Crown Street Pty Ltd v Hoare*³⁴ a company executed a lease by affixing the seal. Contrary to the requirements of the company's articles of association, the affixing of the seal was not witnessed by two directors; it was witnessed by a director and a secretary. The Court of Appeal in New South Wales held that the document had been signed by the company. Asprey JA (with whom, on this point, Walsh JA agreed) said that³⁵:

"It is to be borne in mind that s 35(1)(b) [of the *Companies Act* 1961 (NSW)] contemplates that the document may be 'signed', that is to say, the name of the company may be inscribed, by a natural person. Such a signature can be affixed by that person in a variety of ways so long as what is done by him is performed with the intention of authenticating the document so as to be binding on the company under whose authority he is executing the document³⁶."

- 24 If, then, the deed of company arrangement is to be treated as a contract, its execution by affixing the company seal and attestation by an officer of the company, authorised to do so (in this case) by all the corporators and the members of the board, amounted to execution by the company notwithstanding that the document was not sealed in accordance with the company's articles. (All the corporators agreeing that the instrument should be executed, there is no separate

34 [1969] 1 NSW 193.

35 [1969] 1 NSW 193 at 202.

36 *McDonald v John Twiname Ltd* [1953] 2 QB 304 at 309, 315; *Goodman v J Eban Ltd* [1954] 1 QB 550.

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question about whether the company assented to it³⁷. The question is about the sufficiency of the manifestation of assent.)

25 It may be, however, that the deed of company arrangement is not simply a contract. No doubt a deed of company arrangement will contain stipulations and promises of a kind found in contracts between parties. But a deed of company arrangement is more than a set of promises between those who are parties to it. (The only essential parties to a deed of company arrangement are the company and the deed administrator³⁸.) First, it is a document that, on execution, effects a change in status of the company - from a company under administration to a company subject to a deed of company arrangement. Secondly, it is a document that contains terms that bind all creditors of the company "so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i)"³⁹. Those obligations stem from the combined operation of the deed of company arrangement and the Law, not from any contractual bargain between the persons bound, and are imposed on *all* creditors - not just those who voted in favour of any composition or moratorium reflected in the deed of company arrangement.

26 If, then, a deed of company arrangement is not a contract of the kind dealt with in s 182(1) (and we need not decide that question) the provisions of s 182(7) apply. That sub-section deals with a "document or proceeding requiring authentication by a company" and finds its statutory origin in provisions that deal with the "authentication" of registers or of summonses and other legal process⁴⁰. Section 182(7) of the Law (as in force at the time of these events) also applied to such documents, but its operation was not limited to such documents. First, it provided for authentication of a document or "proceeding" (a word not defined in

37 *In re Duomatic Ltd* [1969] 2 Ch 365; *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* [1992] 2 VR 279 at 315 and cases there cited.

38 s 444B(6).

39 s 444D(1).

40 *Companies Act* 1961 (NSW), s 35(2); *Companies Act* 1948 (UK), ss 36 and 455(1) (definition of "document").

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the Law's dictionary)⁴¹. Secondly, the definition of "document" in the dictionary was much wider than the earlier statutory definition. It provided that it includes⁴²:

- "(a) any paper or other material on which there is writing or printing or on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
- (b) a disc, tape or other article from which sounds, images or messages are capable of being reproduced; and
- (c) a disc, tape or other article, or any material, from which sounds, images, writings or messages are capable of being reproduced with or without the aid of any other article or device;

and without limiting the generality of the foregoing, includes any summons, order and other legal process and any notice".

The expressions "document" and "proceeding" are of such a width as to include a deed of company arrangement. Clearly it is, of course, a "paper ... on which there is writing or printing" and it may well be that it is properly characterised as a "proceeding" (but again we need not stay to consider that matter). The question then becomes what is meant in s 182(7) by "authenticate"?

27 In the present context it is used in the sense of giving or establishing legal validity to the document rather than as establishing its genuineness. Thus, it is used in the same sense as when Blackstone, in the first edition of the *Commentaries on the Laws of England*, said⁴³ of authenticating a deed:

"This neglect of signing [deeds], and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to authenticate a deed: and so the common form of attesting deeds - '*sealed and delivered*', continues to this day; notwithstanding the statute 29 Car II c3 before-mentioned revives the Saxon

41 See, however, in the different context of applications under s 1322 for orders dealing with irregularities in "a proceeding *under this Law*" *Link Agricultural Pty Ltd v Shanahan* (1998) 16 ACLC 1462 at 1478-1479 per Kenny JA and cases there cited; 28 ACSR 498 at 518.

42 s 9.

43 Book 2 at 306.

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custom, and expressly directs the signing, in all grants of lands, and many other species of deeds; in which therefore signing seems to be now as necessary as sealing, though it hath been sometimes held, that the one includes the other⁴⁴."

And Asprey JA used "authenticating" in the same sense when, in the passage from *195 Crown Street Pty Ltd v Hoare* we have set out earlier, he spoke of "authenticating the document so as to be binding on the company under whose authority he is executing the document"⁴⁵.

28 In this case the signature of the third appellant authenticated the document on behalf of MYT. The signature gave legal effect to the document (or to the "proceeding" if that is the better description of the company executing a deed of company arrangement). It expressed, in visible terms, the company's assent to the arrangement. That is, the company executed the deed and did so within the time fixed by the Law.

29 No question then arises of making an order under s 445G(3): there has been no contravention of Pt 5.3A. It follows that no question arises about whether an order could be made under that sub-section in a case where there has been the automatic transition into liquidation that follows from the operation of s 446A(1)(b). (It should be noted that some, perhaps all, of the difficulties in making an order under s 445G(3) might be met if it were a case proper for making an order under s 482 terminating the winding up.) Those are, however, not questions that need now be answered. It also follows from the conclusion that there was no contravention of Pt 5.3A that there was no occasion to make an order, as the primary judge did, under s 447A varying the operation of the Part. That order should be set aside, as should the order of the Court of Appeal of New South Wales dismissing the appeal to that Court. Although not sought in the original process, we consider that an order should have been made under s 445G(2) declaring the deed not void for want of execution by the company in accordance with Pt 5.3A.

30 We would allow the appeal to this Court with costs, set aside the orders of the Court of Appeal of New South Wales and in lieu order:

44 *Lemayne v Stanley* (1681) 3 Lev 1 [83 ER 545]; *Warneford v Warneford* (1727) 2 Str 764 [93 ER 834].

45 [1969] 1 NSW 193 at 202.

Gleeson CJ
Gaudron J
Gummow J
Hayne J

15.

1. Appeal allowed with costs.
2. Set aside the orders of Bryson J made on 13 June 1996 and in lieu:
 - (a) declare that the deed of company arrangement dated 28 September 1994 made between Martin John Green, Grant Edmonds, Robert Pullen, MYT Engineering Pty Limited ("the company") and Mulcon Pty Limited is not void for want of execution by the company in accordance with Pt 5.3A of the Corporations Law; and
 - (b) order the plaintiff to pay the defendants' costs.

31 KIRBY J. This appeal concerns the operation of Pt 5.3A of the Corporations Law ("the Law"). That Part deals, as its title states, with the "Administration of a Company's Affairs with a View to Executing a Deed of Company Arrangement".

32 During argument in this Court, the appellants embraced an approach to the meaning and operation of the Law which now carries the day for them. I am not convinced by the argument. I am therefore obliged to deal with the appeal on the basis originally advanced. But first, I will explain how the new argument arose. It illustrates an unusual course of events.

A new argument in the High Court

33 The new argument concerned whether the New South Wales Court of Appeal had erred by misconceiving the formalities required for the due execution of a deed of company arrangement and had failed to grant relief for the apparently ineffective execution of the deed by resort to s 182 of the Law. It was suggested that the Court of Appeal had proceeded on the erroneous assumption that, for a deed of company arrangement under the Law⁴⁶ to be valid, it required the compliance with the formalities proper to a deed at common law.

34 The new argument for the appellants was not raised by the summons and cross-claim which originally defined the issues between the parties. Nor was it apparently raised before the primary judge (Bryson J). Certainly, there is no hint in his reasons of any such contention⁴⁷. Only by the most benevolent construction of the notice of appeal to the New South Wales Court of Appeal could that document be understood as presenting the point for decision, and then not specifically⁴⁸. The differing opinions in the Court of Appeal, although covering many other relevant issues, addressed no express attention to the argument upon which the appellants now succeed.

35 No relevant suggestion appeared in the application for special leave to appeal to this Court. The new argument is also outside the limited ground upon which this Court originally granted special leave to the appellants. That ground was confined to the appellants' contention that "[t]he majority of the Court of Appeal should have found that Section 445G(3) is applicable in circumstances where a Deed of Company Arrangement is not executed within the twenty one (21) day period provided by Section 444B(2) of the Corporations Law". The orders sought

46 The Law, s 444B.

47 *Mulcon Pty Ltd v MYT Engineering Pty Ltd* (1996) 14 ACLC 1,054.

48 The grounds of appeal are set out in the reasons of Powell JA in the Court of Appeal. See *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1997) 15 ACLC 1,057 at 1,073.

by the appellants in their notice of appeal also make reference only to the relief that could be provided pursuant to s 445G(3) of the Law.

36 All of this notwithstanding, this Court entertained the application by the appellants to amend the grounds of appeal to add a ground "that the majority of the Court of Appeal erred in finding that there had been a contravention of section 444B(2) of the Corporations Law". Only then did the appellants embrace the claim to relief which has now attracted the support of the majority. The respondent did not assent to the amendment. Nor did it oppose it. It left it to the Court to decide whether the amendment should be allowed. The Court granted leave to amend. Necessarily, it thereby enlarged the grant of special leave to appeal.

37 Although, for want of opposition or proof of procedural unfairness, I was prepared to accede to the amendment, the foregoing chronicle is recorded for two reasons. First, and at the least, it would seem relevant to the cost orders which would be proper in providing relief to a party to a civil appeal in the ultimate court on the basis of an argument which that party did not advance, or did not advance clearly, in any of the proceedings in the courts below. Secondly, the suggested oversight of fundamental and simple propositions, seen for the first time when a case is brought under the scrutiny of this Court, affords a reason for caution on our part before such a suggestion is accepted. Constitutional and other legal points may sometimes be overlooked and perceived for a first time when a matter reaches this Court. So far as the Constitution is concerned, the nature of this Court's functions necessarily obliges it to have a closer familiarity with constitutional law than do other courts. But the Corporations Law is not in the same class as the Constitution. It is a statute with few equals for "complexity, disorganisation and sheer weight"⁴⁹. Those who enter upon its terrain infrequently should do so with extreme wariness.

38 This Court should ordinarily leave the elaboration of the Corporations Law to the courts for whom it provides regular fare. It should generally conserve its interventions to the resolution of disputes which have arisen between differing approaches to the Law, reflected in the decisions of different appellate courts. Section 445G of the Law is a case in point. Differences have arisen as to that section's operation. They may be found in the opinions of the majority and minority in the Court of Appeal in this case. They are also reflected in the opinions of the Full Court of the Federal Court of Australia, which divided in *Commissioner of Taxation v Comcorp Australia Ltd*⁵⁰. I do not doubt that such divisions contributed to the decision to grant special leave to appeal in this matter. Yet, in the outcome, those differences will not be resolved. The scope of s 445G will

49 CCH Australia, *Australian Corporations and Securities Legislation*, 10th ed (1999) at 1.

50 (1996) 70 FCR 356.

escape authoritative definition by this Court. Instead, the dispute between the parties will be decided on a basis not argued below and apparently contrary to the positions adopted by everyone until the matter reached this Court⁵¹.

Must a deed of company arrangement be a deed?

39 The facts, the issues and the legislative provisions relevant to a decision on the new argument of the appellants are set out in the reasons of the majority. I will not repeat them. A first, and essential, step in the reasoning is the conclusion that the use of the word "deed" in the expression "deed of company arrangement", appearing in Pt 5.3A of the Law, does not import a requirement that such deed must be executed and delivered as is legally necessary in the case of a deed at common law.

40 The majority consider, in effect, that a "deed of company arrangement" is *sui generis*. It is a special statutory instrument. Although called a "deed" in the Law, the majority concludes that this expression did not import a requirement that the instrument, prepared by the administrator, must be executed as a deed. On the contrary, it is the majority's opinion that such an instrument may be executed in a way that any other instrument or agreement, not under seal, can be executed. It is this reasoning which produces reliance upon the previously unmentioned s 182 of the Law. It leads to the conclusion that the apparently ineffective execution of the deed of company arrangement in this case was sufficiently "made" and "authenticated" in accordance with the provisions of s 182 of the Law.

41 The majority's conclusion sweeps away the problems which bedevilled the courts below. Moreover, it relieves this Court of the need to address the operation of s 445G upon the assumption that the execution of the deed of company arrangement was defective and needed the healing balm of that section to validate the defect, if it could. Once it is concluded that a deed of company arrangement is a special statutory instrument on the part of the company, more akin to a contract requiring neither sealing nor delivery (as the word "deed" would ordinarily connote), the difficulties raised by the respondent, which hitherto occupied so much judicial time, evaporate. Section 445G is required to do no more than to sustain a declaration that the "deed" in question was validly executed in conformity with the Law⁵².

42 I would like to embrace this construction of the Law. Its ingenuity makes it attractive. It cannot be said that the respondent's challenge to the due execution of

51 See *Mulcon Pty Ltd v MYT Engineering Pty Ltd* (1996) 14 ACLC 1,054 at 1,057-1,058; *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1997) 15 ACLC 1,057 at 1,059 per Handley JA, 1,074 per Powell JA, 1,079 per Dunford AJA.

52 The Law, s 445G(2).

the deed of company arrangement in this case glows with substantive merit. The respondent had purported to execute the deed as a party to its provisions on 24 October 1994. Later it caused a change to its terms to be initialled. The administration of the company in accordance with the deed was well advanced before the initiation of the present proceedings⁵³. It is uncontested that the only reason which led the respondent to raise its objection to the execution of the deed was a perception of its own interests in being able to set off a claim which it had against a costs order. This was something which it would not be able to do if the validity of the deed of company arrangement were upheld. These circumstances scarcely enliven an ardent desire to uphold the respondent's objection. However, the Law must operate in a myriad of circumstances, according to its purpose as disclosed in its language. It contains its own provisions for overcoming⁵⁴ or repairing⁵⁵ inconsequential defaults.

The formalities of execution of a deed are required

43 For a number of reasons, I do not accept that the proper construction of the Law supports a conclusion that a deed of company arrangement can be made without the formalities of execution and delivery required of the execution of a deed, as that word is ordinarily understood. My reasons for this conclusion are as follows.

44 First, the Law uses the word "deed" to describe the instrument, the execution of which brings into operation the reformed arrangements enacted by Pt 5.3A of the Law. Throughout that Part, the instrument is referred to simply as

53 The resulting claim for a declaration that the deed was not void was not commenced until 31 October 1995. This was 13 months after the adjourned meeting of creditors on 28 September 1994 resolved that the company should execute a deed of company arrangement.

54 The Law, s 445G.

55 The Law, s 1322. See *Brien v Australasian Memory Pty Ltd* (1997) 25 ACSR 1 at 30; *ST (2) Pty Ltd v Lockwood* (1998) 27 ACSR 667 at 672.

"the deed"⁵⁶ or "the instrument"⁵⁷. Sometimes the full expression "deed of company arrangement" is used⁵⁸. The fact that these expressions are used interchangeably suggests an assumption that the "deed of company arrangement" will be (as its name indicates) a "deed" in the usual sense in which that word is ordinarily used when appearing on its own. It would be very odd if the "instrument" described throughout the Part as "a deed", or "the deed", were not, in law, a deed. True, this could happen. But one would then expect very clear legislative language to give effect to such an unexpected result. Far from such a clear indication that the word is used in an atypical sense, there are a number of indications that the word "deed" is used in its ordinary legal sense.

45 In *Minister for Lands and Forests v McPherson*⁵⁹, in the context of the use of the word "lease" in a statute, I suggested that the use of a well-known legal expression in legislation would ordinarily, so far as not inconsistent with the statute, be taken to import the legal incidents commonly associated with that word. On the face of things, the word would attract the general law⁶⁰. Although this rule cannot be dogmatically applied, it is a sensible presupposition when approaching legislation which uses a technical expression with a well-established legal meaning. In this case, it reinforces the impression, otherwise indicated in Pt 5.3A, that where the Law uses the word "deed" and the expression "deed of company arrangement" it means that the instrument should be a "deed" within the ordinary meaning of that word and not a peculiar hybrid which amounts to something other than a "deed". If the latter had been Parliament's purpose, it would have said so in plain terms. Or it would have called the instrument something else, such as a "memorandum of company arrangement" or "minute" or "contract" or "compact". Or it would have used throughout the Part the neutral word which the drafter occasionally employs, viz "instrument" of company arrangement. By calling the "instrument" a "deed" it is not unreasonable to infer that it was intended to have the ordinary incidents of a "deed" at law.

46 Secondly, the provisions in Pt 5.3A arose out of a report of the Law Reform Commission proposing "a new procedure for dealing with the affairs of insolvent

56 See eg the Law, ss 444A(2), 444A(3), 444A(4), 444D, 444E, 444F(3), 445F(4), 445G(2), 445G(3) and 447D(2).

57 See eg the Law s 444A(4).

58 See eg the Law, ss 445A, 445B, 445C, 445D, 445F(1), 445G(1), 445G(4), 445H, 447C(1) and 447E.

59 (1991) 22 NSWLR 687 at 696.

60 cf *Wik Peoples v Queensland* (1996) 187 CLR 1 at 80.

companies"⁶¹. The main features of the new procedure involved the removal of detailed court supervision from such arrangements and the substitution of new arrangements under a creditor-appointed administrator. However, since there would be no court order to initiate the new arrangement binding the company, its creditors and those members of the public who dealt with it, the Law Reform Commission recognised the need for, and proposed, an alternative public act. Such an act would signify the adherence of the company to the arrangement which would thereafter govern its affairs.

47 It is in this context that the Commission proposed what it called a "deed of company arrangement"⁶². It specified the formalities to be observed⁶³ in initiating the voluntary administration thereby contemplated. It identified the elements that were to be contained within the instrument, which it described as "the deed"⁶⁴. It recommended a strict timetable for execution of this "deed". It went on to provide for the effect of the "deed" and for its avoidance and termination by the court. There is no suggestion in the Law Reform Commission's report, in the draft legislation annexed to it⁶⁵ or the explanatory memorandum which accompanied the Bill introducing the changes into the Law, that the instrument contemplated could be a mere agreement or contract by the company. The Commission specified a "deed". It must be assumed that that is what it meant and recommended to Parliament. It should also be concluded that Parliament knew what it was doing when it adopted the Commission's recommendation and used the word "deed" in the Law.

48 Thirdly, there are internal indications within Pt 5.3A of the Law that observance of the formalities of a "deed" is contemplated. A "deed" today is usually a document whereby a person performs solemn acts with respect to subject matters having particular legal consequences⁶⁶. The word and its incidents are thus entirely apt to the context of Pt 5.3A of the Law. The use of the word "execute" for the act of the company in approving the deed in s 444B(2) of the Law also suggests precisely the kind of formality that would attend the validation of the deed of company arrangement by the observance of the formalities required of a deed. In the case of a company, such formalities would require the affixation of the

61 *General Insolvency Inquiry*, Report No 45, vol 1 (1988) ("ALRC 45") at 25.

62 ALRC 45, vol 1 at 58, par [115].

63 ALRC 45, vol 1 at 35, par [63].

64 ALRC 45, vol 1 at 58, par [116].

65 ALRC 45, vol 2 at 24-25 (Draft legislation, cll VA35-VA39).

66 *R v Morton* (1873) LR 2 CCR 22; *Re A & K Holdings Pty Ltd* [1964] VR 257; cf *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361 at 366-369.

company's seal in the manner prescribed by the company's articles. The article governing the "execution" of a "deed" by the appellant company was one expressed in common form⁶⁷.

49 There are still further indications in Pt 5.3A that this was the formality required. By virtue of ss 437C and 437D, the administrator is, at the relevant time, the only person who can enter into transactions or dealings on the company's behalf. Yet, by the Law, the administrator is required to prepare the instrument which is to become the company's deed of arrangement. In respect of it, the company, as such, has one residual formal act to perform. The decision whether the company should execute the instrument reverts, by exception to the administrator's general control, to the company's board⁶⁸. Section 437C, in terms, forbids an officer of a company which is under administration, except with the administrator's written approval, performing or exercising (or purporting to perform or exercise) a function or power as such. The act of executing the deed, once resolved, has considerable significance for those dealing with the company⁶⁹. In the period after the deed is approved by the meeting of creditors and before it is executed, the creditors are effectively bound as if the deed had been executed⁷⁰. These considerations reinforce the conclusion which the words "deed" and "execute" would otherwise indicate. The formality to be observed is that ordinary to the execution of a deed by a company in a situation having considerable legal significance to the status and affairs of the company and to the rights of the public and persons dealing with the company.

50 Fourthly, an additional indication that the formality of execution by a deed is required (and that less formal assent is insufficient) appears in s 444B(3) of the Law. That sub-section, dealing with the execution of the deed of company arrangement, provides that "[t]he board of the company may, by resolution, authorise the instrument to be executed by or on behalf of the company". If all that were necessary for the company to be bound by the instrument were that it should observe the formalities appropriate to a written contract, s 444B(3) would be otiose. The deed could then be executed or made by the managing director so as to bind the company. So much is provided for in the general case by s 182(1) of the Law. Yet such conduct on the part of an officer of a company which is under administration is incompatible with the prohibition in s 437C(1) to which reference has been made. The provisions of Pt 5.3A, its apparent purposes and overall scheme, negate the possibility of a form of "execution" of the deed of company

67 The same requirements were considered in *Equity Nominees Ltd v Tucker* (1967) 116 CLR 518.

68 The Law, ss 444B(3) and (4).

69 *Equity Nominees Ltd v Tucker* (1967) 116 CLR 518 at 526.

70 The Law, s 444C(2).

arrangement by the acts of officers falling short of the formalities for which the Part explicitly provides.

51 Fifthly, having regard to the express provisions in Pt 5.3A for such formalities and the explicit description of the instrument as a "deed" it is, with respect, extremely difficult to accept that general provisions in Pt 2.3 Div 4 of the Law as to the manner of effecting other transactions on a company's behalf can override the specific requirements enacted by the Law for this very particular transaction. In any case, the provisions of s 182, upon which the appellants rely, appear to have a limited operation. In the context of s 182(7), "authentication" means something other than "making, varying or discharging" a contract in accordance with s 182(1). In that context, the word "authentication" would appear to mean making authoritative or valid or establishing as genuine. It does not readily encompass the particular and formal act of "execution" of a deed of company arrangement for which the Law expressly provides in s 444B. The history of s 182(7) is also instructive. It appears to be derived from s 35(2) of the *Companies Act* 1961 (NSW) and s 80(7) of the *Companies Code* and their predecessors⁷¹. Whatever may be possible in respect of the "making" or "authentication" of a contract by an operating company in normal circumstances, this can have no relevance to the execution of a deed of company arrangement contemplated by s 444B(3) of the Law. Any such action on the part of officers of the company is precluded, in the scheme of Pt 5.3A, by the terms of s 437C of the Law.

52 Sixthly, the appellant company did not intend (nor did its officers) to make or authenticate a written contract. They intended to execute the instrument as a deed. Such execution was effected by affixing the company seal purportedly "in accordance with its articles of association and the Corporations Law". This is what the attestation clause in the instrument stated. However, for the reasons explained by the majority and in the courts below, such execution was insufficient in law if observance of the formalities of a deed were required. A mere resolution to execute a document under seal does not amount to execution as such⁷². What was attempted here was execution by the company of a deed under its common seal, not some other form of execution or authentication of a document by or on behalf of the company. The attempt, retrospectively, to explain what the officers of the company did is not only inconsistent with their stated contemporaneous purposes. In my view, it is outside the permissible ambit of their authority once, as contemplated by Pt 5.3A of the Law, the administration of the company had commenced.

71 See Wallace and Young, *Australian Company Law and Practice* (1965) at 135.

72 *Equity Nominees Ltd v Tucker* (1967) 116 CLR 518 at 525-527; *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 169-170.

Relief is available under s 445G of the Law

53 The foregoing conclusions lead me to the opinion that execution of the deed of company arrangement as a deed was required under the Law. No other form of execution was permitted; nor was it attempted in this case. The only question then is whether s 445G of the Law is available to afford relief from the consequences of the objection belatedly raised by the respondent as to the validity of the deed. This was the issue upon which the Court of Appeal divided. It was the reason for the initial grant of special leave to appeal to this Court.

54 Because mine is a minority opinion, I will express my view on this point briefly. As the opinions in the Court of Appeal demonstrate⁷³, and as other judicial consideration of the problem indicates⁷⁴, the meaning of s 445G of the Law is not unarguably plain. I accept that different views may reasonably be reached on the two points upon which the appellants must succeed if their appeal is to be upheld upon the approach to the appeal which I regard to be necessary. Those two points concern (1) whether s 445G applies at all to a case where execution of a deed of company arrangement has been attempted but is invalidly effected; and (2) whether, after the expiration of the period referred to in s 444B(2) of the Law, it is possible for a court, under s 445G, to make an order having retrospective effect. The respondent, by its notice of contention, suggests that any such effect would amount to deeming that the provisions of s 446A of the Law have not taken effect, although otherwise by law they had.

55 The starting point for reasoning on these points requires that it be accepted that the conversation between Mr Pullen and Mr Edmonds on 29 September 1994 (described in the majority's reasons) constituted a meeting of the board of directors of the company. It must also be accepted that the consensus which they then reached constituted a resolution of the board which authorised the execution of the deed by or on behalf of the company. Each of the judges in the Court of Appeal was prepared to make these assumptions⁷⁵. In this Court the respondent did not contest that "although very informal and not recorded" the terms of the telephone conversation were "sufficient to amount to a resolution for the purposes of s 444B(3)". In the circumstances, I am prepared to proceed on that basis.

56 Clearly, the provisions of the Law for granting relief against insubstantial and meritless defaults concerning a deed of company arrangement must be construed

73 *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1997) 15 ACLC 1,057.

74 *ST (2) Pty Ltd v Lockwood* (1998) 27 ACSR 667.

75 *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1997) 15 ACLC 1,057 at 1,059 per Handley JA, 1,073-1,074 per Powell JA, 1,075 per Dunford AJA; cf *Smith v Paringa Mines Ltd* [1906] 2 Ch 193; *Bell v Burton* (1994) 12 ACLC 1,037 at 1,038.

broadly. No other approach would give effect to the obvious parliamentary purpose. Yet that purpose can only be derived from the language of the remedial provisions. It does not authorise a rewriting of the Law according to the whim of a court or even according to its feeling about the perceived requirements of the justice in the particular case⁷⁶. Where, as in the provision of a strict time for the execution of the instrument⁷⁷, Parliament has spoken specifically on a matter of clear importance to the overall scheme, the general power of validation of deeds in s 445G cannot be used to cure a specific time default. Put shortly, this was the point which divided the majority and minority on the first point in the Court of Appeal.

57 The majority concluded that a prerequisite to the application of s 445G of the Law was the lawful execution of a deed of company arrangement as a deed. Such an instrument was either executed in accordance with the Law or it was not. If it was not, s 445G was of no avail. There could not be "substantial compliance" with the legal requirements of execution of a deed. Such requirements were simple, clear and important⁷⁸. According to this view, an example of an insubstantial non-compliance to which s 445G(3) was addressed would be a failure to provide fully the kind of statement setting out the details of the proposed deed in conformity with s 439A(4)(c) of the Law. In such a case, it would be open to a court to compare the "statement required and the statement supplied" and to measure the "degrees of non compliance"⁷⁹. The majority did not consider that this was an analysis apt to the execution of the deed.

58 I acknowledge the force of this reasoning. However, it seems to me that the correct approach was that suggested by Burchett J in *Re Asset Risk Management Ltd*⁸⁰:

"[S]ubstantial compliance is a matter of degree. What the court is concerned with is the practical effect of what has been done, which should be compared with the practical effect the legislature appears to have sought to achieve. But each case is likely to raise its own problems, and it will always be necessary to apply afresh the statutory language."

76 cf *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265.

77 The Law, s 444B(2) (a period of 21 days is provided for).

78 *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1997) 15 ACLC 1,057 at 1,060 per Handley JA, 1,075 per Powell JA.

79 *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1997) 15 ACLC 1,057 at 1,060 per Handley JA.

80 (1995) 130 ALR 605 at 607.

This approach was accepted by Carr J in *Commissioner of Taxation v Comcorp Australia Ltd*⁸¹ when, with the concurrence of Lockhart J, he said:

"I should not be taken as suggesting that the matter of substantial compliance with each of these provisions is clear-cut or obvious. In each case the matter is one of degree. However my view is that, in respect of each relevant provision of the law concerned the practical effect of what has been done substantially equates with the practical effect which the legislature appears to have sought to achieve."

59 By providing as it did in s 445G of the Law, Parliament recognised the fact that, in this area, slips are likely to occur including in the execution of deeds of company arrangement. Discovered belatedly and raised (as in this case) without any apparent merit by a creditor seeking to secure an individual advantage, such defaults could occasion serious inconvenience and substantial injustice and loss to the company as a whole (and to its creditors, its employees and the public). On the face of things, then, s 445G would appear to be addressed to the very kind of problem that is presented by this case.

60 According to Powell JA, in the critique of Pt 5.3A of the Law with which he opens his reasons⁸², the facts in the present case are not "untypical". Powell JA's suggested solution was the repeal of the Part and a return to the familiar, comfortable pre-existing law which he considered "provided a well understood, speedy and efficient means of putting into place, and giving effect to, such compromises and arrangements"⁸³. However, an alternative solution, which Dunford AJA discerned as the purpose of Parliament in enacting s 445G, is to give that section a wide operation to respond to just such a case as the present.

61 But are the words of s 445G intractable, as the majority concluded - such that they defeat the broad operation of the section urged by the appellants? I think not. The context is certainly applicable. A doubt has arisen "on a specific ground, whether [the] deed of company arrangement was entered into in accordance with this Part". The words "in accordance with this Part" include reference to the requirement of execution of the instrument as a deed in accordance with s 444B of the Law appearing in the Part. Clearly, there had been an attempt, following a "meeting" and "resolution" of the board of directors, to execute the instrument presented by the administrator as a deed of company arrangement and to do so within time. The "doubt" was raised by the "specific ground" as to whether the

81 (1996) 70 FCR 356 at 396.

82 *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1997) 15 ACLC 1,057 at 1,061.

83 *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1997) 15 ACLC 1,057 at 1,061 per Powell JA.

means used to effect the execution had, in law, achieved that objective. The failure to achieve an execution of the deed as the law (and therefore Pt 5.3A of the Law) required amounted to "a contravention of a provision of this Part" within that phrase as used in s 445G(3) of the Law.

62 Whilst, upon one level, there may be no "doubt" about the validity of the execution, considered apart from s 445G, the enactment of that provision, and its clear purpose, denies such an absolute approach to the question of the validity of the deed. That question must, instead, be considered in terms of the criteria provided by s 445G(3). The "doubt" for which the Law provides a remedy must be tested against the dual criteria of substantial compliance with the applicable provision of Pt 5.3A and consideration of whether "no injustice will result for anyone bound by the deed if the contravention is disregarded". The judicial discretion, by order, to disregard the contravention necessarily accepts that a legal contravention has occurred.

63 In the context, therefore, and given the purpose of s 445G of the Law, there is no reason to withhold its validating operation from slips or mistakes in the execution of a deed of company arrangement. There seems no reason of principle why the section should not apply to such a case. There is every reason why it should. As Dunford AJA pointed out, the juxtaposition in s 445G(1) between the cases of doubt provided for, namely as to whether the deed was "entered into" and as to whether it "complies with" the Part, points to a construction which covers otherwise invalidating conduct in a genuine attempt to "enter into" the deed by executing it within the time stipulated⁸⁴.

64 This reasoning sustains the conclusion that the preconditions to the operation of s 445G of the Law, set out in sub-s (1), are established. It leaves it open for a declaration to be made as provided by sub-ss (2) or (3). The former sub-section permits the court, in effect, to declare the true legal position so as to dispel the doubt. The latter contemplates that a contravention of the requirements in Pt 5.3A has occurred and nonetheless allows a declaration to be made validating the deed notwithstanding that contravention.

65 Although it appears that the relief originally sought by the appellants in their summons was specified to lie under s 445G(2) of the Law, clearly only s 445G(3) is relevant to the circumstances of this case. That is the relief which was debated in the Court of Appeal. It is that relief which is sought in the notice of appeal to this Court. No injustice is done to either party by treating the case as falling under sub-s (3).

84 *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1997) 15 ACLC 1,057 at 1,079 per Dunford AJA.

66 In light of the conclusion which the majority reached in the Court of Appeal, no consideration was given in that Court to the question whether "injustice will result for anyone bound by the deed if the contravention is disregarded". Upon the approach which I favour, it remains for that Court to decide whether, in the circumstances, the provisions of Pt 5.3A of the Law were "substantially complied with" in the undoubted attempt by the company to execute the deed of company arrangement. Finally, it remains for the Court of Appeal to decide whether, as a matter of discretion, in the light of its decisions on the foregoing issues, the appellants are entitled to an order pursuant to s 445G(3) declaring the deed valid, notwithstanding the company's non-compliance with the provisions governing execution, ie non-compliance with s 444B(2) of the Law. The appellants did not contest these consequences. They asked that, if s 445G of the Law were held to be available in their case, this Court should remit the matter to the Court of Appeal to determine such questions. *Prima facie*, that is what should be done.

67 This conclusion brings me, finally, to the second point raised by the notice of contention. It concerns the scope of the power conferred by the Law to make orders which would have a retrospective operation to validate an otherwise invalid execution of the deed. The question is presented by the suggested operation of the Law, upon the failure to execute the deed of company arrangement validly within the 21 days specified. The respondent argued that the invalid purported execution of the deed, and the lapse of the 21 days, automatically terminated the voluntary administration of the company and placed the company into liquidation. To avoid that consequence, s 447A of the Law was invoked, in conjunction with the order sought under s 445G(3), to provide retrospective relief from what would otherwise be the consequences of the invalid execution of the deed.

68 It is enough for me to say on this point that I agree with the reasons of Dunford AJA in the Court of Appeal. Unless such retrospective relief could be given, the beneficial purpose of s 445G would be entirely robbed of its effectiveness in a case such as the present. That cannot have been the object of Parliament in enacting such a remedial provision. The alternative construction of the Law is available. It should be preferred.

Orders

69 By a different route I therefore come to the conclusion that the appeal should be allowed. In my opinion the order of the Court of Appeal should be set aside. In place thereof, it should be ordered that the remaining questions raised by the application of s 445G(3) of the Law, or alternatively s 447A of the Law, should be returned to the Court of Appeal to be disposed of by it conformably with this decision. The respondent should pay the appellants' costs in this Court. The costs in the Court of Appeal and, if relevant, at first instance should be provided for by the Court of Appeal having regard to the ultimate disposition of the appeal to it.