Validity of a 'holding' DOCA

Bernice Ng reports on

Mighty River International Limited v Hughes and anor (as deed administrators of Mesa Minerals Ltd) [2018] HCA 38

Introduction

In *Mighty River International Limited v Hughes and anor (as deed administrators of Mesa Minerals Ltd*) [2018] HCA 38, the High Court (Kiefel CJ and Edelman J, Gageler J agreeing; Nettle and Gordon JJ dissenting) considered the validity of a deed of company arrangement (DOCA) commonly known as a 'holding' DOCA.

The DOCA provided for a moratorium on creditors' claims, contemplated further investigations and a report to creditors concerning possible variations to the deed within six months, and provided that, subject to variation of the DOCA, there would be no property available for distribution to creditors. It was held to be a valid DOCA under Part 5.3A of the *Corporations Act 2001* (Cth) (Act).

The plurality disapproved of the term 'holding' DOCA because it did not appear in the Act and served to obscure proper analysis of the terms of a DOCA in determining its validity (at [28]).

Background Facts

Mesa Minerals Limited (subject to deed of company arrangement) (Mesa) is a listed mining company. Mighty River International Limited (Mighty River) was a shareholder and a creditor of Mesa.

The directors of Mesa resolved to appoint voluntary administrators (Administrators) ([2017] WASC 69, [11]). The Administrators subsequently issued a report to creditors (the s 439A Report) (at [18]). In that report, the Administrators opined that it was not in the interests of creditors for the company to be wound up or for the administration to end. They expressed the view that it was in the interests of creditors to resolve that Mesa execute a DOCA which:

- did not exclude the possibility of winding up Mesa in the future if that were ultimately determined to be in creditors' interests; and
- allowed the Administrators to explore a restructure and/or a recapitalisation of Mesa which may have provided a more beneficial outcome for creditors than an immediate winding up ([2017] WASC 69, [78]).

On 13 October 2016, the Administrators issued a supplementary report to creditors and repeated their earlier opinions (at [19]).

At the second meeting of creditors, Mesa's creditors resolved that Mesa enter into the DOCA proposed in the s 439A Report and the DOCA was subsequently executed (Mesa DOCA) (at [20]).

Mighty River's challenge to the Mesa DOCA

At first instance, Master Sanderson in the Supreme Court of Western Australia declared that the Mesa DOCA was not void. On Mighty River's appeal, the Supreme Court of Western Australia, Court of Appeal (Buss P, Murphy and Beech JJA) also held that the Mesa DOCA was valid.

In the High Court, Mighty River challenged the Mesa DOCA on three grounds:

(i) the Mesa DOCA was contrary to the object of Part 5.3A of the Act, most particularly by circumventing the requirement in s 439A(6) of the Act for a Court order extending the period during which the second creditors' meeting must be convened;

(ii) the Mesa DOCA did not identify the property of Mesa available to creditors for distribution, contrary to s 444A(4)(b) of the Act; and

(iii) the Mesa DOCA was void because the administrators had failed to form the opinions required by s 438A(b), and at the relevant time, s 439A(4) of the Act.

The Plurality (Kiefel CJ and Edelman J, Gageler J agreeing)

The plurality held that the Mesa DOCA was a properly constituted deed of company arrangement under Part 5.3A of the Act and fulfilled the formal requirements of Part 5.3A of the Act (at [31]-33]).

The plurality also found that an otherwise compliant instrument that becomes a DOCA that creates and confers genuine rights and duties can incidentally extend time for an administrator's investigations pending a subsequent variation to it (at [34]).

With regards to the creditors' moratorium on their claims and the Deed itself, the plurality held that the creditors' moratorium was not contrary to the object of Part 5.3A of the Act for three reasons. *First*, the Mesa DOCA maximised the chance of Mesa's survival or otherwise provided a better return to creditors than would result from its immediate winding up (at [35]). *Secondly,* prior to the introduction of Part 5.3A of the Act, historically, moratorium-only schemes of arrangement were valid. It followed that a DOCA (which is intended to be a more flexible device for managing a company's affairs) in similar terms was also permissible (at [36]). *Thirdly*, the objective of protecting creditors and providing a prescribed period of time within which the administrator is to convene a meeting of creditors to make decisions about the affairs of a company is not undermined if creditors choose to extend a moratorium beyond the period that would otherwise have applied (at [37]).

On the question of whether there was a requirement for a DOCA to provide for the distribution of company property to creditors, the plurality preferred the respondents' construction of s 444A(4)(b) of the Act, namely that, understood in the light of its context and purpose, the subsection required a DOCA to specify the property, *if any*, to be available to pay creditors' claims. The intended flexibility of DOCAs would be undermined if a DOCA was required to provide for the distribution of some property of the company (even of nominal value) (at [41] – [42], [45]). On this point, the minority agreed (at [95] – [97]).

The plurality also did not accept Mighty River's submission that the Administrators had failed to comply with ss 438A(b) and 439A(4) because they failed to form the opinions required by those provisions. It was clear from the s 439A Report, which included substantial reasoning and a description of the research and investigations, that the Administrators had formed the requisite opinions (at [47] – [56]).

Gageler J made additional observations, at the level of principle, of his rejection of the argument that the Mesa DOCA was non-compliant with the procedural requirements in Part 5.3A. His Honour opined that fundamental to the scheme of Part 5.3A is the policy that creditors themselves were to decide what was in their own best interests as soon as practicable. The scheme set out in Part 5.3A of the Act works by empowering creditors, deciding by majority, to determine what is in their best interests and keeping the Court out of the process of making and administering the DOCA, unless an application for intervention is made and a ground for intervention established. Further, s 445G(2) of the Act would have no utility if actual compliance with the procedural provisions in Part 5.3A were necessary for the existence of a DOCA (at [60]-[63], [66]).

The minority (Nettle and Gordon JJ)

The minority held that the Mesa DOCA was not a DOCA within the meaning of Part 5.3A because it did no more than purport to indefinitely extend the convening period under ss 439A(6) or 447A(1) (at [82]). The Mesa DOCA deferred to a later date the execution of a DOCA or the winding up of Mesa and did not provide for an arrangement alternative to liquidation or the whole or partial payment, satisfaction or compromise of creditors' claims against Mesa (at [83]).

The minority rejected the submission that the Mesa DOCA was like a simple moratorium consistent with Part 5.3A, because the moratorium contemplated under the Mesa DOCA was not an alternative to liquidation calculated to allow Mesa to trade out of financial difficulties or otherwise provide for the satisfaction in whole or in part outstanding debts or claims (at [85]).

The minority also stated that the Administrators' opinion in the s 439A Report to enter into the proposed DOCA was not an opinion that complied with s 439A(4)(b) (now r 75-225(3) of the *Insolvency Practice Rules (Corporations)*) because the opinion was not an opinion that would have enabled the creditors of Mesa to choose between Mesa executing a DOCA, being wound up or the administration ending (at [91]).