

5 MAY 2010

## Case Note: *Lehman Brothers Holdings Inc v City of Swan & Ors* [2010] HCA 11

### Overview

On 30 March 2010, the High Court delivered its decision in *Lehman Brothers Holdings Inc v City of Swan & Ors* [2010] HCA 11. The decision confirms the general understanding of the scope and effect of deeds of company arrangement – that they bind creditors only so far as creditors' claims relate to the relevant company.

### Background

In September 2008, Lehman Australia appointed administrators and later executed a deed of company arrangement. The deed established a separate pool of funds for distribution among 'litigation creditors' who had claims arising out of investments in collateralised debt obligations and other financial products marketed by or acquired or purchased pursuant to services or advice provided by Lehman Australia.

The deed provided first for a moratorium and then for a release in respect of claims that litigation creditors had not only against Lehman Australia, but also against other Lehman entities, arising out of their investments.

Relevantly, section 444D of the *Corporations Act 2001* (**Act**) provides that a deed of company arrangement binds all creditors of the company so far as concerns claims arising on or before the day specified in the deed.

### Decision

The High Court confirmed the Full Federal Court's decision that to the extent the provisions of the deed provided for a moratorium in favour of the other Lehman entities and for a release of claims against those entities, those provisions did not bind creditors of Lehman Australia.

The court found that section 444 identifies who is to be bound by a deed of company arrangement (namely creditors of the company) and then proceeds to limit the extent to which those creditors are to be bound. The court said there was no textual footing to include claims against a person other than the subject company, Lehman Australia.

The court observed that even if a creditor had interlocking, even dependant, claims against one or more of the other companies in the



group, part 5.3A of the Act directs attention only to the company under administration. It does not deal with groups of companies.

Justice Heydon said that if part 5.3A operated in the way contended by the Lehman entities, "it would follow that a deed of company arrangement could validly provide that specialty debts or simple debts owed by a person other than the company subject to that deed to a creditor of that company can be cancelled", resulting in "a significant intrusion into the individual rights of creditors". His Honour concluded that the objects stated in section 435A are limited to objects relating to the relevant company and its creditors and members, not other companies.

## Alternative Schemes of Arrangement

In obiter, the court observed that part 5.3A "stands in sharp contrast with part 5.1 of Ch 5 of the Act, which regulates arrangements and reconstructions. Unlike section 444D(1), the provision of part 5.1 which makes certain compromises or arrangements binding on creditors does not qualify the extent to which creditors are bound". However, the court noted that beyond this contrast it was not necessary or appropriate to consider whether part 5.1 could have been engaged to achieve the result sought to have been achieved by the deed of company arrangement.

The court did not expressly approve of *Fowler v Lindholm* [2009] FCAFC 125 in which the Full Federal Court found that a scheme of arrangement pursuant to part 5.1 could be used to alter the legal rights between creditors of the scheme company and third parties.

## Comment

The decision is unsurprising and confirms the general understanding of the scope and effect of deeds of company arrangement – that they bind creditors only so far as creditors' claims relate to the relevant company.

In large corporate structures where there is a multitude of claims against one or more entities in the group, consideration should be given to seeking court approval of a formal scheme of arrangement if a broad release of claims is sought.

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