IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S362 of 2011

ON APPEAL FROM THE NEW SOUTH WALES COURT OF APPEAL

BETWEEN:

INTERNATIONAL LITIGATION PARTNERS PTE LTD

Applicant

and

CHAMELEON MINING NL (RECEIVERS AND MANAGERS APPOINTED)

First Respondent

CAPE LAMBERT RESOURCES LIMITED

Second Respondent

ANDREW HUGH JENNER WILY

Third Respondent

DAVID ANTHONY HURST

Fourth Respondent

SECOND RESPONDENT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. In addition to the issues identified by the appellant (**ILP**) the appeal, by the notice of contention, raises the question whether the funding deed is a "financial product" because it is a "derivative" as defined in s 761D.

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3. The issue identified in sub-paragraph 2(b) of ILP's submissions only arises if there is "something" which would be a "financial product" because of Sub-Division B of Division 3 of Part 7.1 of the *Corporations Act* and that "something" is an "incidental component" of the relevant "facility", or is a "facility" which is "incidental" to one or more other facilities: s 763E(1)(a). There is consequently an issue whether the funding deed is an "incidental component" of a "facility" or "incidental" to another "facility" within the meaning of s 763E(1)(a). Neither that issue nor the issue identified in sub-paragraph 2(b) of ILP's submissions arise if the funding deed is a "derivative" as s 763E does not apply to a facility which is a "financial product" because of inclusion by s 764A[1].

10 **Part III: Section 78B of the *Judiciary Act 1903***

4. It is not necessary to give notice pursuant to s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

5. The second respondent (**Cape Lambert**) accepts the statement of facts in ILP's submissions and chronology. The following additional facts are also relevant.

6. ILP carries on the business of funding litigation in Australia. If the funding deed constitutes or relates to the provision of a "financial service" then ILP entered into the deed in the course of "carrying on a financial services business"[2].

7. Cape Lambert was a defendant and cross claimant in the proceedings at first instance, and was a successful cross-appellant in the Court of Appeal. Cape Lambert by its cross-claim
20 and cross-appeal advanced the contention that the first respondent (**Chameleon**) had rescinded the funding deed pursuant to s 925A and s 925B.

8. Class Order 10/333 as amended by Class Order 11/555 currently has operation until 29 February 2012. The class order is in terms an interim measure.

Part V: Legislation

9. Other than to also refer to s 761D of the Corporations Act, Cape Lambert accepts ILP's statement of applicable legislation.

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[1] See the closing words of s 763E(1)

[2] See trial judgment [2010] NSWSC 972 at [77]. As recorded by Giles JA at [27] it was not disputed in the Court of Appeal that ILP did carry on that business

Part VI: Argument in response to appellant's argument

The Relevant Legislation

10. The only part of the statutory scheme in issue is whether the funding deed is a "financial product" as defined by the statute. If it is then each of the other steps necessary to reach the conclusion that Chameleon effectively rescinded the funding deed under s 925A are accepted to be established. The relevant sections are set out below.

11. Subject to s 763E, s 764A and s 765A, a "financial product" includes a "facility" (widely defined in s 762C) through which, or through the acquisition of which, a person "manages financial risk": s 763A(1)(b).

10 12. A person "manages financial risk" if the person "manages the financial consequences" to "that person" of particular circumstances happening or "avoid[s] or "limit[s]" the financial consequences of fluctuations in receipts or costs: s 763C(a) and (b).

13. Section 764A sets out specific products that are financial products. A "derivative" is a "financial product" within by s 764A(1)(c). "Derivative" is defined in s 761D(1). Products identified in s 764A are "financial products" even if not within the broad definition in s 763A.

14. A "financial product" is "issued" when it is first issued, granted or otherwise made available to a person: s 761E(2).

15. Each person who is a party to a "financial product" which is a "derivative" is the "issuer"
20 of the "financial product": s 761E(5).

16. A person "deals" in a "financial product" if the person "issue[s]" a "financial product": s766C.

17. A person provides a "financial service" if the person "deal[s]" in a "financial product": s 766A(1)(b).

18. A person carries on a "financial services business" if the person carries on business providing a "financial service": s 761A.

19. A person who carries on a "financial services business" must hold an Australian Financial Services License (**AFSL**) covering the provision of the "financial services": s 911A.

20. Sections 925A, 925E and 925F apply when an agreement is entered into by a "non-licensee" (person who does not hold an AFSL covering the provision of the "financial service", here ILP) and a "client" (another person who also does not hold an AFSL, here Chameleon) which constitutes, or relates to, the provision of a "financial service" by the "non-licensee" and the agreement is entered into in the course of a "financial services business" carried on by the "non-licensee": s 924A.

21. A "client" may rescind an agreement with a "non-licensee" in the circumstances described in s 924A: s 925A(1).

22. When an agreement is rescinded under s 925A the agreement is not enforceable and the "non-licensee" is not entitled to remuneration: s 925E and s 925F.

Statutory Purpose

23. The objects of Chapter 7 of the *Corporations Act* are broadly identified in s 760A. The purpose is to protect those who acquire financial products and services. As can be seen from the types of products involved those persons necessarily will range from highly sophisticated corporations to relatively unsophisticated consumers. The degree of protection in some respects, which are not relevant to this appeal, varies depending on the classification of the person acquiring the "financial product" as a "retail client" or a "wholesale client"[3] or a "sophisticated investor"[4]. The type of client with whom the provider of the relevant financial product or service is dealing does not affect the requirement that the provider hold an AFSL.

24. In enacting Chapter 7 of the *Corporations Act* the legislature adopted some of the recommendations made in the Financial System Inquiry Final Report[5]. The intention was to reform the previously disparate regulatory obligations imposed on providers of a range of financial services and products and to apply a single regulatory regime to persons who provide those services[6]. The legislature intended to provide for a single regime applicable to "functionally similar products" including securities, futures, managed investment schemes, insurance, superannuation and retail banking products[7]. That single regime was

[3] Section 761G
[4] Section 761GA
[5] Financial Services Reform Bill 2001 Explanatory Memorandum (**Explanatory Memorandum**) paragraph 1.1
[6] Explanatory Memorandum paragraphs 1.3-1.5
[7] Explanatory Memorandum paragraph 2.30

intended to be a flexible regime which could meet the changing services which are and become available[8] and emerging products without the need to amend the legislation[9].

25. To achieve that purpose the legislature intentionally adopted a very wide definition of "financial product" which focused on the key functions performed by the types of financial products and services intended to be regulated[10]. The identification of those key functions is given further content and expanded by a series of specific inclusions, which can be supplemented by a regulation making power through which other products can be included within the class of "financial products"[11]. The wide definitions are then limited by specific exclusions, which can also be supplemented by a regulation making power and a power for ASIC to exempt products from the class of products defined as "financial products"[12].

26. The broad scope of the products and services intended to be within the definition (subject to the specific exclusions) is demonstrated by the reason expressed in the Explanatory Memorandum for enacting s763E (excluding incidental products). The legislature saw the likely need to exclude warranties and guarantees in contracts for the sale of goods from the deliberately broad definition of "financial product"[13]. That is, s 763E was seen as being necessary due to the deliberately broad reach of the definition of "financial product".

27. The Act does not provide guidance on the question of whether there was a legislative intention that a particular product be the subject of regulation by Chapter 7 of the *Corporations Act*. Nor is it generally applied by reference to the purpose of the facility. Instead attention is drawn first to whether a particular product has one (or more) of the key features identified by the definition of "financial product". That first stage of the inquiry also involves identifying if a particular product is specifically brought within the legislative scheme (whether or not it otherwise has one or more of those features). Second one must determine whether the product, although it does have one or more of the identified features, has been excluded from the regulatory scheme. The statutory question

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[8] Explanatory Memorandum paragraph 2.26
[9] Explanatory Memorandum paragraph 6.37
[10] In doing so the legislature adopted a drafting technique similar to the former regulation of prescribed interests (now managed investment schemes) in defining the concepts broadly. That technique has the consequence that the broad language should not be read down by reference to supposedly unintended consequences: *Australian Softwood Forests Pty limited v Attorney-General (NSW); ex rel Corporate Affairs Commission* (1981) 148 CLR 121 at 130 per Mason J, with whom Stephen J agreed
[11] Explanatory Memorandum paragraph 6.36
[12] Explanatory memorandum paragraphs 2.7 penultimate bullet point, 2.26 and 6.36
[13] Explanatory memorandum paragraph 6.46

is not whether the legislature intended to regulate the funding of litigation *per se*, but whether (subject to specific exception) the arrangement between the parties recorded in the funding deed has one or more of the features that are intended to be subject of the legislation[14]. What is clear is that it was intended that the general definition, being the starting point, was intended to be cast in the widest terms.

The funding deed and the charge

28. ILP advances an argument that the "facility", as defined by s 762C, includes both the funding deed and the charge.

29. ILP's characterisation of the charge as part of the "facility" should be rejected. Although contemplated by the funding deed, the charge was not given until some two months after the funding deed was entered into and after ILP had provided $250,000 by way of security for costs in the Federal Court proceedings. It is improbable that the legislature intended that the correct characterisation of a funding deed as a "financial product" would change from time to time depending on whether Chameleon entering into the charge. The legislative purpose already identified would be defeated or at least muddied if the application of Chapter 7 of the *Corporations Act* could change on the subsequent grant of a charge (on ILP's construction, assuming the charge to be significant, the funding deed immediately before the grant of the charge was a "financial product" and immediately after the grant of the charge it was not a "financial product").

30. Be that as it may, the question of whether the "facility" includes the charge or not is irrelevant to the application of the legislation to this particular product. The following submissions apply equally regardless of whether the charge is part of the "facility" or not.

The funding deed is a facility through which Chameleon "manages financial risk"

31. Each of the judges in the Court of Appeal correctly held that the funding deed was a facility through which Chameleon "managed financial risk" as defined in s 763C[15] and consequently was, subject to s 763E or one of the specific exclusions, a "financial product".

[14] Explanatory Memorandum paragraph 6.63
[15] At [42]-[45] per Giles JA, at [122] per Hodgson JA and at [209] per Young JA

32. Section 763C was deliberately cast in broad language. Full effect should be given to that language. So much is demonstrated both by the notes to s 763C and by paragraph 6.53 of the Explanatory Memorandum.

33. "Manages" in s 763C means "to handle, direct, govern, or control in action or use"[16]. Chameleon "manages" a relevant financial consequence by limiting or removing or delaying or "spreading" its exposure to that risk. Put another way, Chameleon manages a risk (handles, governs or controls the risk) by passing that risk to ILP through the operation of the funding deed[17]. The notes to s 763C support that construction. An insurance policy removes or limits the insured's exposure to the insured risk and a currency swap limits or removes the acquirer's risk of loss in entering into a foreign exchange transaction.

34. By the funding deed Chameleon "managed[s] the financial consequences to [Chameleon] of particular circumstances happening"[18]. The financial consequences managed by Chameleon include the insufficiency of return from the funded Federal Court proceedings to recover the money invested in the litigation, being ordered to pay the costs of one or more of the respondents to the funded litigation and the consequences (including cost of funds for payment of legal fees and a reduction of cash flow) of maintaining expensive litigation[19]. Other consequences include the financial cost of providing further security for costs (or the action being stayed) if security is ordered and the consequence of Chameleon being unable to fund the litigation.

35. By clause 2.1 of the funding deed, read with the definition of "Legal Costs", Chameleon "manage[d]" each of those risks by passing those risks onto ILP.

36. ILP advances two arguments against that conclusion. Both should be rejected.

37. First, ILP attempts to draw a distinction between a financial consequence which Chameleon was exposed to at the time the "facility" was entered into (to which ILP accepts s 763C applies) and a consequence that Chameleon was not exposed to when the "facility" was entered into, but to which it may be exposed in the future. That is not a distinction supported

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[16] Meaning 4, Macquarie Dictionary (Revised 3rd edition)
[17] As held by Giles JA at [42]
[18] Section 763C(a)
[19] At [42] per Giles JA; similarly at [122] per Hodgson JA

by the language of s 763C, the structure of the definition of "financial product" or the legislative intention disclosed in the Explanatory Memorandum.

38. Section 763C directs attention to whether the financial risk is managed, not when or how the risk is created. Moreover, if there are two categories of financial consequence, as submitted by ILP, s 763C applies to both categories. Section 763C refers to a person "manag[ing] the financial consequences... of particular circumstances happening". That language captures both possible consequences existing at the time of entry into the relevant facility and possible consequences that are only created after entry into of the relevant facility.

39. That is demonstrated by the examples in the note to s 763C. A manufacturer manages the consequence of a movement in the value of the Australian dollar if, before entering into a sale in US dollars, the manufacturer enters into a currency swap as a hedge against movements in the Australian dollar. The manufacturer also manages that same consequence if, after entering into a sale in US dollars, the manufacturer enters into the currency swap. ILP's construction has the improbable and irrational consequence that the order in which two transactions are entered into determines whether a "facility" is a "financial product". That construction, which is not compelled by the language of s 763C, should be rejected.

40. ILP's submission misconstrues how the Act operates. It works by reference to the features of the "facility", not by reference to whether the potential consequence is an existing risk or a future risk.

41. ILP's narrow and strained construction is not the solution adopted by the legislature to the potential overreach of the definition of "financial product". The legislature recognised the potential for the definition of "financial product" to overreach the class of products intended to be the subject of regulation. This potential is dealt with by the statute excluding incidental products (possibly excluding ILP's example of a take or pay contract) and by providing for specific exceptions (possibly excluding ILP's example of a factoring agreement which may be a "credit facility")[20]. ILP's argument is to the same effect as that rejected in *Australian Softwoods* at 130.

[20] Explanatory Memorandum paragraphs 6.46 and 6.53

42. Second, ILP argues that the funding deed is not an agreement between a financial institution and a retail investor. So much can be accepted, but is irrelevant. The legislature did not decide to regulate only dealings between institutions and retail investors[21]. By Chapter 7 of the *Corporations Act* all persons who provide financial products or services are subject to regulation. All persons who provide financial products or services require an AFSL: s 911A.

43. A distinction is drawn in Chapter 7 of the *Corporations Act* between a "retail client" and other persons who deal with the holder of an AFSL. That distinction is as to the disclosure that must be made: see Part 7.7. That is a distinction as to the extent of regulation, not the fact of regulation.

44. In entering into the funding deed, Chameleon "manages financial risk". It is in that respect analogous to an insurance policy. It has the characteristics of the products which are intended to be regulated by Chapter 7 of the *Corporations Act*. There is no reason to give the language of s 763C a strained construction to exclude litigation funding.

Section 763E – the funding deed is not an "incidental product"

45. Section 763E exempts a "facility", which otherwise would be a "financial product", from being characterised as a "financial product".

46. The purpose of s 763E is to ensure that the definition of "financial product" does not pick up a range of consumer transactions that have an element, but not the primary purpose, of, for example, managing financial risk[22].

47. In the Court of Appeal Giles JA and Young JA (Hodgson JA dissenting) correctly held that the exemption created by s 763E was not enlivened[23].Section 763E only operates to exclude a "facility" from being a "financial product" if two conditions are satisfied.

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[21] That distinction would have irrational results. For example, on ILP's distinction a workers compensation insurer would provide a "financial product" if dealing with a small business owner but not if dealing with Chameleon or any other listed company, and a stockbroker would require an AFSL to provide advice to Chameleon but not to provide advice to a director of Chameleon. Those types of distinction are the type of distinction which the Explanatory Memorandum shows the legislature intended to avoid

[22] Explanatory Memorandum paragraph 6.46

[23] Giles JA rejected the argument based on s763E at [91] as did Young JA at [199] and [209]. Hodgson JA at [125] held that s.763E applied

48. First, the part of the "facility" which is a "financial product" (the "something" referred to in the chapeau to s 763E(1)) must be an "incidental component" of the "facility" that has other components or it must be a "facility" that is incidental to one or more other facilities: s 763E(1)(a). This first limb does not, or does not directly, require the purpose of the funding deed to be identified and ILP's submissions, in relation of the first limb, as to the purpose of the funding deed are misplaced. Subparagraph (i) of the first limb requires identification of the "something" which objectively is characterised both as a component of a "facility" and as an incidental component. Subparagraph (ii) requires identification of a "facility" which is incidental to one or more other facilities.

10 49. Second, objectively the main purpose of the "facility" must not be a "financial product purpose" as defined in s 763E(2): s 763E(1)(b). The term "reasonable to assume" introduces an objective test. The parties' subjective intentions are irrelevant. The second limb requires the objective identification of the main purpose of the "facility" or the "incidental product" and of the other facilities. That does not introduce a criterion which admits to a number of different correct answers. There is only one main purpose, which is determined by an objective characterisation of the "facility" or facilities as a whole[24].

First Condition – s 763E(1)(b)

50. For the following reasons the first condition to the operation of s.763E is not satisfied.

51. First, perhaps other than the charge (if it is part of the "facility"), the funding deed is not a
20 "facility" that can be separated into components, one component of which "manages financial risk" and the other components of which do not.

52. The management of financial risk is not a component which is separate to the funding of the litigation[25]. They are one and the same thing, the former being the effect or characterisation of the later. Funding the litigation is managing the financial consequences to Chameleon of particular events happening (for example incurring a liability to pay legal fees or being required to pay another party's costs).

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[24] See also paragraph 6.46 of the Explanatory Memorandum; also *Samuel Holdings Pty Limited v Securities Exchange Corporation Limited* [2010] QSC 450 (2010) 80 ACSR 706 at [58]

[25] The distinction between the two stated by Hodgson JA at [125] is wrong and is based on a distinction between the purposes of the agreement identified at [124], which is to ask the wrong question

53. ILP's only obligation, to pay "Legal Costs" under clause 2.1 of the funding deed, is not severable into components. That is reflected in the drafting of the funding deed. ILP made one promise to pay the "Legal Costs", which included both the indemnity against any costs order against Chameleon and the promise to fund Chameleon's own legal costs. The consideration payable by Chameleon to ILP under the funding deed is a single sum, not separate sums one payable as consideration for the indemnity against any adverse costs order and one payable for the financing of the litigation. Nor is ILP's obligation a separate component to Chameleon's obligation to pay ILP. As a matter of commercial reality the two are interdependent: Chameleon's promise to pay is consideration for ILP's promise to fund the litigation.

54. That point demonstrates a further fallacy in ILP's submissions. There is no purpose of Chameleon obtaining "access to justice" which is capable of being divorced from ILP's promise to pay in clause 2.1. Clause 2.1 is the means by which Chameleon manages its financial risk and obtains access to the Courts. That is, managing financial risk and obtaining access to the Courts are two characterisations of the purpose[26] of the funding deed and in particular clause 2.1. The first is the characterisation required in the context of the application of the *Corporations Act* and the second a characterisation relevant to the question considered in *Campbell's Cash & Carry Pty limited v Fostif Pty Limited*[27].

55. The charge may be an example of an "incidental component" of a "facility". If the charge is part of the "facility", the charge is incidental to the funding deed in that it secures performance of Chameleon's obligations under the funding deed. Incidental means something "of secondary importance"[28]. The primary rights and obligations are created by the funding deed.

56. There is not a relevant "something" which is an "incidental component" of the funding deed. ILP's second construction argument[29] should be rejected.

57. Second, objectively the promise by the applicant to pay Chameleon's "Legal Costs" is not incidental, in the sense already described, to the other parts of the funding deed. In fact it is

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[26] "*Purpose*" in the sense of the end sought to be achieve: *News Limited v South Sydney District Rugby League Football Club Limited* [2003] HCA 45 (2003) 215 CLR 563 at [18] per Gleeson CJ
[27] [2006] HCA 41 (2006) 229 CLR 386
[28] Shorter Oxford English Dictionary
[29] ILP's submissions paragraphs 75-77

fundamental. The benefit of that promise is the only benefit which Chameleon receives under the funding deed, and in consideration for which it promises to pay the very considerable fee payable under the funding deed.

58. Third, if the "facility" is the funding deed (but not the charge), the only other "facility" there may be is the charge. The funding deed is not incidental to the charge. The funding deed stands alone, creating the parties' rights and obligations. The charge is dependent on the funding deed, in that it only secures performance of the funding deed. The charge is incidental to the funding deed. ILP's first construction argument[30] should be rejected.

59. Section 763E(1)(a) is not satisfied and s 763E has no application. The "something" that constitutes the "manag[ing] financial risk" is not an incidental component of a "facility" nor is the funding deed a "facility" incidental to other facilities. That conclusion accords with commercial reality. Objectively Chameleon entered into the funding deed to obtain the benefit which constitutes "manag[ing] financial risk", namely the promise to pay legal costs. It was to obtain that benefit that Chameleon agreed to pay the consideration promised in the funding deed. That benefit is not secondary or incidental to the funding deed.

Second Condition – s 763E(1)(b)

60. If, contrary to the foregoing, the "something" which "manages financial risk" is an incidental component or an incidental facility the second condition to the operation of s 763E is not satisfied.

61. The "main purpose" of the funding deed (or the funding deed and the charge) is to "manage financial risk" which is a "financial product purpose" as defined in s 763E(2). Purpose is the purpose of the "facility" or facilities, not of the persons entering into the "facility"[31]. In that context purpose means the end sought to be achieved by the funding deed[32]. Put another way, the section asks what is the "facility" intended to do?

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[30] ILP's submissions paragraphs 72-74

[31] ILP's submissions at paragraphs 85 to 88 are beside the point as they look to the asserted subjective purpose of ILP and Chameleon. ILP's submission point up the flaw in looking for a main subjective purpose of the parties: usually the purposes will be different (for example an insurer intends to profit and an insured intends to manage financial risk)

[32] *News Limited v South Sydney District Rugby League Football Club Limited* [2003] HCA 45 (2003) 215 CLR 563 at [18] per Gleeson CJ

62. The purpose of the "facility" is identified by reference to the "facility". In this case the "facility" is wholly in writing, namely the funding deed or the deed and the charge. In those circumstances the phrase "reasonable to assume" must direct attention only to the written terms of the funding deed. The question, on the terms of the funding deed, is whether the main end sought to be achieved by the funding deed is something other than "manag[ing] financial risk".

63. Clearly the end sought to be achieved by the "facility" is "manag[ing] financial risk". The benefit of the promise by ILP to pay the legal costs of the litigation in clause 2.1 of the funding deed is the sole benefit obtained by Chameleon, which manages the financial risk of the litigation. It is to achieve that end that Chameleon has agreed to pay the consideration provided for in the funding deed. No other end is achieved and there is no other reason to enter into the funding deed.

64. The analogy to administrative decision making employed by ILP is unhelpful. Chapter 7 of the *Corporations Act* has a practical everyday operation. The purpose of s 763E is to exempt certain facilities from regulation under Chapter 7 of the *Corporations Act*. Whether a "facility" is a "financial product", and consequently dealing in it is subject to regulation, is intended to have only one answer. That is, the "facility" either is or is not a "financial product". That is not a question which is intended to have more than one correct answer. The phrase "reasonable to assume" in that context requires determination, by reference to the terms of the "facility", of the objective purpose of the "facility".

The funding deed is not a "credit facility"

65. A "credit facility" is a specific exclusion from the class of facilities which are defined as a "financial product": s 765A(h)(i), defined by Regulation 7.1.06. The reason a "credit facility" is excluded from the definition of a "financial product" is that, at the time Chapter 7 was enacted, consumer credit was regulated by the Uniform Consumer Credit Code (**UCCC**) and all credit was intended to be regulated by the *Australian Securities & Investment Commission Act 2001* (Cth) (**ASIC Act**)[33]. Consequently the definition of "credit facility" substantially reflects the definition in the UCCC at the time Chapter 7 of the *Corporations Act* was enacted.

[33] Explanatory memorandum paragraph 6.83

66. Giles JA and Young JA correctly held that the funding deed is not a "credit facility"[34].

67. By Regulation 7.1.06(1)(a) a "credit facility" is relevantly a facility "for the provision of credit".

68. "Credit" is defined in Regulation 7.1.06(3). "Credit" means "a contract, arrangement or understanding" under which one of the two things prescribed in Sub-Regulation (a) occurs and which is the type of facility referred to in Sub-Regulation (b). That is, to be a "credit facility" the "facility" must be within both Sub-Regulations (a) and (b).

69. The funding deed is not a "facility" for the provision of "credit" within either limb of the definition of credit in Regulation 7.1.06(3)(a). On its proper characterisation it also is not within any of the types of arrangement referred to in Regulation 7.1.06(3)(b). The exclusion does not apply.

70. To be a "credit facility" there must be either an existing debt which is deferred by the funding deed (Regulation 7.1.06(3)(a)(i)) or a deferred debt must be incurred by entry into the funding deed (Regulation 7.1.06(3)(a)(ii)). Neither limb of the Regulation 7.1.06(3)(a) applies for the following three reasons.

71. First, there is no "debt".

72. The word debt does not have a precise or inflexible denotation. Its meaning is taken from the context and by reference to the statutory purpose[35]. The purpose of s 765A(h)(i) and Regulation 7.1.06 was to exclude a "credit facility" from regulation as a "financial product" because credit facilities were regulated by the UCCC and the ASIC Act: that is, to prevent double regulation. As paragraph 6.84 of the Explanatory Memorandum shows, the legislature intended that the exclusion apply to well recognised debt arrangements such as loans and credit cards. In the same way insurance policies are ordinarily not a credit facility although it is possible that at some stage in the future the insurer will pay to the insured moneys funding deed does not have the character of a debt or loan.

73. Chameleon may never have to pay any amount to ILP. ILP's obligation to pay legal costs may continue when Chameleon has no obligation to make any payment to ILP. For example, if Chameleon lost the Federal Court Litigation , ILP would be required to pay

[34] Giles JA at [80], Young JA at [218]-[220]; Hodgson JA dissenting at [136]-[137]
[35] *Hawkins v Bank of China* (1992) 26 NSWLR 562 at 572 per Gleeson CJ, at 578 per Kirby P

the respondents' costs (and further legal fees incurred by Chameleon negotiating or taxing those costs) with no obligation, contingent or otherwise, on Chameleon to repay those moneys. That arrangement is not a debt or a loan.

74. The funding deed imposes on Chameleon a contingent obligation to pay an uncertain amount of money to ILP, on the happening of an uncertain event (or events if there are multiple payments of the "Resolution Sum") at an unknown time or times. A contingent liability which is not a definite present obligation is not a debt for the purpose of the definition in Regulation 7.1.06[36]. So much had been established in relation to the UCCC before Chapter 7 of the *Corporations Act* was introduced[37]. As s 765A read with Regulation 7.1.06 was intended to divide regulation between the *Corporations Act* on the one hand and the UCCC and ASIC Act on the other, it should be assumed that parliament did not intend to adopt a different meaning to that already established in relation to the same phrase in the UCCC[38].

75. There is no obligation to make a future payment in a sum certain or which is capable of being readily reduced to certainty[39]. Chameleon's obligation, contingent on receipt of part of the "Resolution Sum", was to pay from the "Resolution Sum" legal costs paid by ILP (undoubtedly a frequently increasing sum) plus the greater of a percentage of recovery (the percentage increased over time) or three times costs incurred[40].

76. In the event of breach by Chameleon (for example of clause 8.3), at least before the "Resolution Sum" was fully recovered, ILP's remedy was to sue for breach of contract claiming specific performance or un-liquidated damages[41].

77. Even if some funding deeds, properly construed may be a "credit facility" this one is not. It is expressly recognised in the funding deed that the funding deed does not create a debt. Recital D contains an acknowledgement by Chameleon that the funding deed confers on

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[36] *Geeveekay* at [87]

[37] See *McKenzie v Smith* (1998) ASC 155-025 approved in *Geeveekay* at [86]

[38] In that circumstance there is particular reason to assume that parliament intended the words used to have the meaning that had earlier been attributed to them: *Re Alcan Australia Limited; ex parte Federation of Industrial Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106

[39] As is required for a debt: *Geeveekay Pty Limited v Director of Consumer Affairs Victoria* [2008] VSC 50 (2008) 19 VR 512 at [71] citing the well known judgment in *Alexander v Ajax Insurance Co Limited* [1956] VLR 436 at 445; see also *Young v Queensland Trustees Limited* (1956) 99 CLR 560 at 567

[40] Funding deed clause 1 definitions of "*Funding Fee*" and "*Percentage Payment*". Or in the event of a change in control of Chameleon legal costs incurred plus at least $9 million: clause 4 and definition of "Early Termination Fee"

[41] Those remedies are no consistent with a characterisation of the obligations as a debt: see *Shepherd v ANZ Banking Corporation Limited* (1996) 41 NSWLR 431 at 444-5 per Abadee AJA, Meagher JA agreeing

ILP an interest in the subject matter of the litigation, a characterisation which, due to clauses 3.2-3.8 and 8 of the funding deed, is correct and wholly inconsistent with a debtor/creditor relationship. The funding deed is not a loan but effects an assignment of an interest in or creation of an interest in Chameleon's causes of action.

78. Second, the funding deed is not a contract under which the payment of a debt owed by Chameleon to the applicant is "deferred".

79. The first limb of the definition of "credit" only applies to a debt which exists at the time the "facility" is entered into, the second limb applying to a debt created by the "facility"[42].

80. There was no existing debt owed by Chameleon to ILP which, by the operation of the funding deed, is deferred. The first limb of the definition is not engaged.

81. Nor is the funding deed a contract under which Chameleon "incurs a deferred debt". No debt is created (if a debt is ever created) until receipt of part of the "Resolution Sum". Nor is that debt (if it is a debt) ever deferred. The amount is payable at the same moment the obligation to pay is created by a relevant receipt.

82. Further, Chameleon may never have to pay an amount to ILP pursuant to the funding deed. "Incurs a deferred debt" does not include contingent or conditional debts which may not mature into a payable debt[43]. Although payable in the future, a deferred debt is an existing debt which had an existing obligation to pay.

83. The second limb of the definition of "credit" is not engaged.

84. Third, Hodgson JA's conclusion that the funding deed was a loan within Regulation 7.1.06(3)(b)(ix) or (x) and thus within the concept of "credit facility", whilst deserving weight, ought not be adopted.

85. Regulation 7.1.06(3)(b) is an inclusive list of examples of arrangements within the definition of "credit". The reference to a loan does not extend the meaning of "deferred debt". To be a loan within the regulation a facility must create a deferred debt or, perhaps, defer payment of an existing debt. Further, the funding deed is not in form or effect a loan

[42] *Geeveekay Pty Limited* at [57], in relation to the identical definition which at the time appeared in the *Consumer Credit Code*

[43] *Geeveekay Pty Limited* at [87])

(or financial accommodation) for the reasons already identified[44]. The proper characterisation of the funding deed is that it creates or assigns an interest in the Federal Court Litigation.

86. The "credit facility" exemption does not apply. The appeal should be dismissed.

Part VII: Argument on notice of contention ("Derivative")

87. A "derivative" is specifically included in the definition of "financial product" by s 764A(1)(c). The Court of Appeal should have held that the funding deed was a "derivative" as defined by s 761D. Subject to the credit facility argument (the incidental facility point does not apply to a "facility" specifically included by s 764A), the Court of
10 Appeal should have held that the funding agreement was a "financial product"[45].

88. The funding deed is an arrangement which meets each of the criteria in s 761D(1)(a) and (b)[46], which was accepted by the trial judge and each judge in the Court of Appeal. The matter in issue is whether it meets the criteria in s 761D(1)(c).

89. Section 761D(1)(c) has three elements.

90. First, the subject of s 761D(1)(c) is the amount of the consideration or the value of the arrangement.

91. Those are different concepts. The words "value of the arrangement" are redundant unless those words mean something different to "the consideration". "The consideration" is the same consideration which is referred to in s 761D(1)(a).

20 92. In this case "the consideration" received by Chameleon is the payment of legal costs by ILP, provision of security for costs by ILP and ILP's agreement to pay any costs Chameleon is ordered to pay. "The value of the arrangement" to Chameleon is different. It is the value of the ability to pursue the Federal Court litigation without having to pay costs, provide security or have the risk of paying the other parties' costs.

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[44] The funding deed does not have the features of a loan as described in *Brick and Pipe Industries Limited v Occidential Nominees Pty Limited* [1992] 2 VR 279 at 321 per Ormiston J

[45] Hodgson JA at [129]-[133] held that the funding deed was within the definition in s 761D(1) but that it was exempted from being a "derivative" because it was a contract for the provision of future services within s 761D(3)(b), Young JA at [238] held that the funding deed was not within s 761D(1) and consequently not a "*derivative*" but also held at [242] that it was not a contract for the provision of services, Giles JA at [72]-[75] held that the funding deed was a "*derivative*" and at [88] not a contract from the provision of services

[46] Regulation 7.1.04(1) prescribes one day as the period for the purpose of s 761D(1)(b)

93. "The consideration" payable to ILP is 40% of the proceeds of the Federal Court proceedings (or three times legal costs) or payment of the Early Termination Fee, plus a refund of costs paid. "The value of the arrangement" to ILP from time to time is the value of the opportunity to receive those amounts balanced against the costs and risks associated with a substantial piece of litigation.

94. Second, the subject (the consideration or the value) must be "ultimately determined, derived from or vary by reference to (wholly or in part)" the something else.

95. Grammatically, and as a matter of construction, "ultimately determined", "derived from" and "vary by" are different concepts. They are linked by the disjunctive "or". "Ultimately" conditions only "determined". The words in brackets, "wholly or in part", condition all three concepts. When the funding deed was entered into the value of the arrangement (or the consideration) was in part ultimately determined by, or derived from, or varied by something else.

96. The third element of s 761D(1)(c) is the "something else" which the (a) consideration or value of the arrangement (b) is in whole or part ultimately determined by or derived from or varied by reference to.

97. Considering those three elements together, the value of the arrangement to Chameleon is "derived from" or "varies by reference to" the "value or amount of" the costs of the litigation, the "value or the amount of" judgment in or a settlement of the Federal Court proceedings. Similarly, the amount of the consideration paid by Chameleon is "derived from" or "varies by reference to", in part if not wholly, those same factors although to a different extent. The value of the arrangement to ILP is "derived from" or "varies by reference to" those factors, although in a different way. The greater the recovery from the Federal Court proceedings, the greater the value of the arrangement to both ILP and Chameleon, and the greater the consideration paid by Chameleon but not by ILP. The consideration paid by ILP is also "derived from" or "varies by reference to" in whole or in part the "value or amount" of something else: the amount of costs it has to pay and the outcome of the litigation.

98. Again, the structure of s 761D(1) is inconsistent with any reading down of the section. The definition of derivative is intentionally very broad[47]. The repeated use of the

[47] CASAC Final Report paragraph 3.35

disjunctive "or" indicates that many arrangements were intended to be caught. That broad definition is then subject to a wide range of exceptions in s 761D(3) and for present purposes s 765A[48]. The legislative intention is for many products to be *prima facie* derivatives, but to then exempt many products from the definition[49]. Young JA's reasoning, where he accepts he is putting a gloss on the language, is inconsistent with legislative technique adopted[50]. The reasoning of Giles JA and Hodgson JA (in this respect) is consistent with the language and legislative method and should be preferred.

99. The funding deed is not a contract for the future provision of services and is not within the exception in s 761D(3). Although recital C to the funding deed refers to services other than the payment of money, no promise to provide any other service is contained in the funding deed. The funding deed is only a contract requiring the payment of money. That is not a service (if it were it is difficult to see what financial product would be a "deivative"[51]). Hodgson JA's reasoning at [133] erroneously characterises the payment of money as a service.

100. "Services" is not defined, but in the context of s 761D does not mean a promise to pay money. Giles JA's reasoning at [88] is correct. The correct characterisation of the funding deed is not as a contract for the future provision of services.

101. The funding deed is a "*derivative*" and subject only to the credit facility point a "*financial product*". ILP required an AFSL to deal in the funding deed. Chameleon had the right to and did rescind the funding deed.

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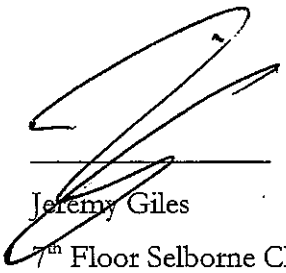
[48] The legislative technique was recognised in *Keynes v Rural Directions Pty Limited* [2010] FCAFC 100 (2009) 186 FCR 281 at [28]

[49] see paragraphs 6.72 of the Explanatory Memorandum, see also paragraph 6.68 for an explanation of the technique of defining "*derivative*" widely but then giving precedence to other products such as "*securities*"

[50] Young JA's reasoning is to the same effect as the argument rejected in *Australian Softwoods*, namely that the broad language must be read down because of the supposed unintended consequences. As in *Australian Softwoods* that reasoning should be rejected in favour of giving the language used its full force

[51] For example a credit default swap (and all the more so a "*naked*" credit default swap) which is squarely within s 761D and is the type of product intended to attract regulation involve nothing other than the payment of money. Examples could be multiplied.

Dated: 16 December 2011



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