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

Appellant
~~Applicant~~

and

CHAMELEON MINING NL

First Respondent

CAPE LAMBERT RESOURCES LIMITED

Second Respondent

ANDREW HUGH JENNER WILY

Third Respondent

DAVID ANTHONY HURST

Fourth Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The first respondent (**Chameleon**) agrees that the issues identified by the appellant (**ILP**) are raised by this appeal, subject to three matters which follow.

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3. First, in addition to whether the funding deed is a "financial product" as defined in s 763A of the *Corporations Act 2001* (Cth), because it is a facility through which a person manages financial risk, the notices of contention filed by the respondents raise the question whether the funding deed is a "financial product" through the separate route that it is a "derivative" as defined in s 761D. Subject to s 765A, a "derivative" is a "financial product" for the purpose of Chapter 7 of the Corporations Act: s 764A irrespective of the answers to the issues in paragraphs 2(a) and (b) of ILP's submissions.

4. Second, The issue identified in paragraph 2(b) of ILP's submissions is expressed in a compressed form. The question of what it is "reasonable to assume" will arise only if the terms of s 763E(1)(a) are satisfied. The paragraph requires the identification of "something" as being of the character described in sub-paragraph (i) or (ii); being an "incidental component" of the relevant "facility" (being a facility with other components), or is a "facility" which is "incidental" to one or more other facilities. Only if there is such a "something" does issue 2(b) arise.

5. Third, the overriding approach to the definition of "financial product" is described in s 762A. The structure of s 762A is that a facility is a financial product if it falls within Subdivision B, or within the specific descriptions contained in Subdivision C. Both are subject to the exclusions in Subdivision D. S 763E forms part of Subdivision B (the general definition) only. It does not qualify the specific inclusions in Subdivision C. Accordingly, if the funding deed is a "derivative", and therefore a specific inclusion by operation of s 764(1)(c), s 763E is irrelevant. It follows that the issue identified in paragraph 2(b) of ILP's submissions only arises if issue 2(a) is determined against ILP and the (notice of contention) issue of derivative is determined against the respondents.

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

6. Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Facts

7. Chameleon accepts as accurate the statement of facts contained in ILP's submissions and chronology. In addition, the trial judge found that ILP was in the business of doing the type of transactions that it did with Chameleon. This finding was not challenged on appeal.

8. ILP carries on the business of funding litigation in Australia (a fact found by the trial judge at [2010] NSWSC 972 at [77]). If the funding deed constitutes or relates to the provision of a "financial service" then it was entered into by ILP in the course of "carrying on a financial services business".

Part V: Legislation

9. Chameleon accepts ILP's statement of applicable legislation, save for the addition of s 761D of the Corporations Act (which, while not referenced by ILP as applicable, can in fact be found in ILP's Annexure).

Part VI: Argument in response to appellant's argument

10. ***Statutory scheme***: a person who carries on a "financial services business" is required hold an Australian Financial Services Licence ("AFSL") covering the provision of "financial services" by it: s 911A. A person will carry on a "financial services business" if carrying on business providing a "financial service": s 761A. A person provides a "financial service" if the person "deal[s]" in a "financial product": s 766A(1)(b). A person "deals" in a "financial product" if the person "issue[s]" a "financial product": s766C. A "financial product" is "issued" when it is first issued, granted or otherwise made available to a person: s 761E(2). Each person who is a party to a "financial product" which is a "derivative" is the "issuer" of the "financial product": s 761E(5).

11. 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") and a "client" (another person who also does not hold an AFSL) 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. A "client" (in this case Chameleon) may rescind an agreement with a "non-licensee" (ILP) in the circumstances described in s 924A: s 925A(1). 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.

12. The above matters are not in issue. The focus of this appeal is whether the funding deed, from which ILP claims an entitlement to remuneration, is a "financial product". The following sections require consideration in determining if the funding deed is a "financial product":

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

b. A person "manages financial risk" if the person manages the financial consequences to that person of particular circumstances happening or avoids or limits the financial consequences of fluctuations in receipts or costs: s 763C.

c. "something" that, but for the operation of 763E(1), would be a financial product, may not be if:

i. it is an "incidental component" of the a "facility" (being a facility with other components), or is a "facility" which is "incidental" to one or more other facilities (s 763E(1)(a)); and

ii. s 763E(1)(b) applies to it; and

iii. it is otherwise not within any of the specific inclusions in s 764A.

d. A "derivative" is also a "financial product", without reference to the analysis under (a)-(c) above: s 764A(1)(c). "Derivative" is defined in s 761D(1).

e. A "credit facility" within the meaning of the regulations (other than a margin lending facility) is not a "financial product": s 765A(h)(i). Reg 7.1.06(1) and (3) relevantly describe what is a credit facility.

13. ***Statutory purpose***: the objects of Chapter 7 are identified in s 760A. To the extent that extrinsic material may assist in interpretation of the legislation, the 1997 Final Report of the Wallis Enquiry and CLERP 6 (relied upon by ILP at paragraphs 19-24) are less helpful than the detailed and pertinent statement in the Explanatory Memorandum to the amending Bill. ILP references these in part (paragraph 32, and see later paragraphs 66 and 90) but they deserve greater attention.

14. The objects reflect the general outline of the Explanatory Memorandum to the Financial Services Reform Bill 2001. That outline commences:

> **1.1 The Financial Service Reform Bill (FSR Bill) is the culmination of an extensive reform program examining current regulatory requirements applying to the financial services**

industry. In particular, the draft Bill provides the legislative response to a number of recommendations of the Financial System Inquiry (FSI).

1.2 The FSI was a comprehensive stocktake of Australia's financial system structure and regulation. The broad policy direction for what were known as the CLERP 6 reforms, now contained in the FSR Bill, is consistent with the findings of the FSI.

1.3 The FSI found that financial system regulation was piecemeal and varied, and was determined according to the particular industry and the product being provided. This was seen as inefficient, as giving rise to opportunities for regulatory arbitrage, and in some cases leading to regulatory overlap and confusion.

1.4 To address these deficiencies, the FSI proposed that there be a single licensing regime for financial sales, advice and dealings in relation to financial products, consistent and comparable financial product disclosure, and a single authorization procedure for financial exchanges and clearing and settlement facilities.

1.5 The FSR Bill implements these proposals, and will put in place a competitively neutral regulatory system which benefits participants in the industry by providing more uniform regulation, reducing administrative and compliance costs, and removing unnecessary distinctions between products. In addition, it will give consumers a more consistent framework of consumer protection in which to make financial decisions. The Bill will therefore facilitate innovation and promote business, while at the same time ensuring adequate levels of consumer protection and market integrity.

15. The single regime was intended to be flexible, to meet change and innovation.[1] The three key elements of the reform were (a) product disclosure; (b) licensing and conduct of financial service providers; and (c) licensing of financial markets and clearing and settlement facilities.[2] In terms of disclosure, it was intended to address two major problems: (a) that "functionally similar products" are governed by disparate Acts and non-legislative instruments (itself creating difficulty in comparison through different disclosure requirements);[3] and (b) the fragmented and product specific nature of existing legislation hampering development of organisations offering a range of financial products due to inconsistent standards and high compliance costs.[4] In terms of licensing, a significant

[1] Explanatory Memorandum paragraph 2.26
[2] Explanatory Memorandum paragraph 2.25
[3] Explanatory Memorandum paragraph 2.30, 2.31
[4] Explanatory Memorandum paragraph 2.32

problem identified to be addressed was the product-specific nature of licensing, which was seen as creating problems in a financial sector that was rapidly consolidating.[5]

16. In relation to these three key elements, the Explanatory Memorandum records:[6]

> **... they all rely on a new definition of 'financial product', which replaces definitions in existing consumer protection legislation for securities, futures, insurance, superannuation, some banking products, and managed investments. The new definition is designed to be flexible, and starts with a general definition that focuses on three key functions provided by financial product, namely making a financial investment, managing a financial risk, and making non-cash payments. There is also a list of specific inclusions in the definition, and a list of specific exclusions. A regulation-making power provides further flexibility to include or exclude particular products from the regime as appropriate. This power will ensure the continuing relevance of the legislation as new financial products emerge.**

17. This is further reflected in the commentary recording the approach taken to defining financial product.[7] The legislative drafting technique used, adopting broad descriptions with specific exclusions, is not new. Due weight to the object and purpose of this form of drafting technique means that one ought not read down the broad language utilised to accommodate supposedly unintended consequences not accommodated by the specific exclusions.[8] The width of the broad description of financial product receives its due qualification in the broad range of products identified as specific exclusions (s 765A). Equally unhelpful are a priori assumptions whether particular arrangements might or might not need this type of regulation (cf Young JA at [206])

18. What is plain by the objects of the legislation, and the statutory drafting technique utilized to give effect to those objects, is that it is unhelpful to search for specific legislative intention as to whether a particular form of product was intended to fall within the general definition. Rather, the enquiry is whether one or more of the functional elements described in s 763A is present with respect to the particular product. Separate consideration then needs to be given to whether the financial product is incidental (s 763E), or whether a particular inclusion (s 764A) or exclusion (s 765A) applies.

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[5] Explanatory Memorandum paragraph 2.40
[6] Explanatory Memorandum paragraph 2.26
[7] Explanatory Memorandum paragraphs 6.36-6.38 (recorded in part at paragraph 32 of ILP's submissions); see also the penultimate paragraph to paragraph 2.7
[8] *Australian Softwood Forests Pty limited v Attorney-General (NSW); ex rel Corporate Affairs Commission* (1981) 148 CLR 121 at 130 per Mason J (Stephen J agreeing)

19. ***The relevance of the charge to the analysis***: the charge (although contemplated by clause 5 of the funding deed) was entered into two months after the funding deed and after the funding deed had been partially performed by ILP (by providing funds to satisfy a security for costs requirement).[9] It therefore could not be relevant to a proper characterization of the funding deed at the time it came into existence. The later execution of the charge could not change the character of the funding deed.

20. Further, even if the charge were to form part of an overall "facility" (s 762C), it is not a matter of any moment for the purposes of dealing with the issues raised on appeal. The existence of a charge to secure payment of the consideration which the funder might
10 receive is unsurprising in the context of a funding arrangement. It simply does not speak to the primary question of whether the facility enables the litigant to manage financial risk.

21. However, even if somehow relevant to the analysis, it does not matter. These submissions will proceed on the assumption that the charge does in fact form part of an overall "facility" for the purposes of s 762C.

22. ***A facility through which Chameleon "manages financial risk"***: there are two ways a party may "manage financial risk" (s 763C). In this case the focus is upon the first (s 763C(a)). That requires the identification of particular circumstances happening, and determining whether the funding deed enables Chameleon to manage the financial consequences of those circumstances.

20 23. There are three circumstances to which Chameleon was exposed in conducting the Federal Court litigation that, if they happened, would produce adverse financial consequences for Chameleon:

a. the risk of insufficient return from the litigation to cover legal cost expenditure;

b. the risk of adverse costs orders should the litigation prove to be unsuccessful;

c. the risk of adverse cash-flow impacts of funding the (undoubtedly expensive) litigation.

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[9] The dates of execution are correctly described in ILP's paragraphs 11 and 12. The trial judge loosely described them as being executed "simultaneously" (at [13]). This minor error is explicable given that the charge did not form any significant part of ILP's argument below.

24. All of these were managed by the funding deed. The ordinary meaning of "manage" includes "to handle, direct, govern, or control in action or use": see definition of "manage" in the Macquarie Dictionary (Revised 3rd edition). That definition amply describes the present case.

25. The financial consequences of the first circumstance are managed by only obliging Chameleon to make payment to ILP where there is a "Resolution" (receipt of a "Resolution Sum") (the obligation to pay under cl 3.1 only arises upon "Resolution"). Likewise with the second, by ILP paying the Legal Costs (cl 2.1, the definition of "Legal Costs" includes "Adverse Costs Order" which is separately defined). And again with the third, by ILP paying the solicitor/client costs incurred by Chameleon within 28 days of receipt of documentation requiring payment (Definition of "Legal Costs"; cl 2.1). The assumption of risk by ILP in these respects is the consideration for its ability to command the Funding Fee in return.

26. The matter can also be expressed this way:

    a. Immediately prior to the entry of the funding deed, Chameleon as the applicant in the Federal Court proceedings was in the position where the longer the proceedings continued the greater was its potential exposure to cost outcomes which might be unfavourable to it – whether the costs of its own lawyers, having to provide security for the costs of the respondents, adverse costs orders (if it lost), and costs on both sides of any appeal;

    b. Further Chameleon was in the position where, even if the proceedings turned out to be successful, it remained exposed to the risk that the amount of the recovery, whether in strict legal terms or depending on the finances of the respondent, were insufficient to cover Chameleon's own cost exposures;

    c. These were some of the "particular circumstances" which might happen, and which if they were to happen would expose Chameleon to "financial consequences", being the obligations to pay or meet the various amounts of legal costs;

    d. The deed enabled Chameleon to "manage" those "financial consequences" by creating a personal rights against ILP which allowed Chameleon to call upon ILP to bear those risks. This transfer of risk was both initial, and potentially final. It was initial in the sense that, from the time of entry of the deed, Chameleon no longer had to find from

its own resources the means to meet such financial consequences as and when they came home – it would simply call upon ILP to do so as when they came home. It was potentially final in the sense if the result of the action turned out to be unfavourable the ultimate financial burden would remain with ILP.

27. Each of the judges in the Court of Appeal held that the funding deed was a facility through which Chameleon "managed financial risk" as defined in s.763C[10] and consequently was, subject to s 763E or one of the specific exclusions, a "financial product". They were correct in so holding.

28. ILP (at paragraphs 48-59) seeks to build into the analysis the relevance of a settlement offer made within the Federal Court proceedings before the funding deed was entered. The suggestion is that the offer "negated" past risk and the funding deed was a means to "dispose" of past risk and then create a fresh opportunity of recovery and an attendant fresh possibility of risk. No such argument was made in either court below. The use of the settlement offer in this way opens up the factual matrix of the funding deed. On an application of the principles in *Suttor v Gundowda Pty Ltd*, this endeavor is not available to ILP at this late stage.

29. In any event, this argument, even if available, has ready answers:

    a. The text of s 763(a) does not support the distinction between "risks immanent within existing circumstances" (ILP submissions at para 48) and other risks. The focus is simply upon particular circumstances "happening" and their financial consequences. The word "happening" also speaks to the future, not just to the present.

    b. Further, contrary to ILP's submissions (at para 48), the examples given in the notes to s 763C do <u>not</u> support the argument that one is only concerned with risks immanent within existing circumstances. For example, a contract of professional indemnity insurance will often respond to a claim arising from an act or omission yet to occur, in respect of a retainer yet made at the time the insurance was arranged. A futures contract or currency swap may be taken out in advance of other dealing, so as to manage some of the risk of other dealings. Similarly in this case, the funding

[10] At [42]-[45] per Giles JA, at [122] per Hodgson JA and at [209] per Young JA

agreement may be taken out to not only manage current risk, but also further risk arising from the maintenance of the litigation.

c. Further, the premise for the new argument, that the risks identified by Chameleon are not to be properly characterized as "risks immanent within existing circumstances" is incorrect. All of the risks identified were in existence at the time the funding deed was entered into. They are part of the risk of litigation already on foot. The existence of an unaccepted settlement offer does not change the fact of the existence of those risks.

d. Contrary to ILP's submission at paragraphs 50 and 55, the deed does not result in Chameleon "disposing" of its existing litigation risk as some separate and anterior step to the deed then "creating" for Chameleon new risks as part of a package of new rights and obligations. Chameleon, as the applicant in the action, remains at all times the party exposed to the potential of adverse costs orders. Further, while the action continues, it as applicant would ordinarily have to find the funds to meet its own lawyers' and any security for costs ordered. What the deed does is give to Chameleon a series of contractual rights against ILP whereby it can call upon ILP to meet the financial consequences of those costs risks coming home. That constitutes "management" of those financial consequences.

e. Next, (see ILP submissions at para 58) the provision of examples that, depending upon the precise terms of the agreement may suggest that the legislation may have unintended consequences does not advance the analysis. The very structure of the legislation admits of that possibility. It is the reason that the legislature has identified a large number of general exclusions (s765A) and provided a mechanism for further exclusion, for unintended consequences (ss 765A(2), 765A(1)(y)).

f. Finally, (see ILP submissions at para 59) the fact that Chameleon may be a listed company, and sophisticated (there is no evidence one way or the other on the second matter), is of no moment. The structure of Part 7.1 does not lead to a conclusion that only the provision of financial products and services to retail investors was considered appropriate for regulation (cf the disclosure requirements in Part 7.7). Unsurprisingly, the focus is upon the person providing the financial product or service, not the recipient of that financial product or service.

30. ***The financial product is not incidental.*** s 763E(1)(a) requires the identification of "something" as being of the character described in sub-paragraph (i) or (ii); being an "incidental component" of the relevant "facility" (being a facility with other components), or a "facility" which is "incidental" to one or more other facilities.

31. On a plain reading of s 763E, it only applies where a single facility has separate components or there are two or more facilities. "Component" is not defined. The Explanatory Memorandum provides, by way of example, what is intended by the concept of components at paragraph 6.38:

> **Where a facility includes a number of components, only one of which is a financial product, the Chapter will only apply to the facility to the extent to which it consists of a financial product (proposed section 762C). For example, some banking products may involve dual credit and debit facilities. The Bill will only apply to the debit aspects of the facility and not the credit aspects.**

32. The example confirms what the statutory language makes clear: namely that what the draftsperson had in mind was that one agreement (a multi-component facility) may involve a number of distinct parts (components) capable of separate identification and classification, and thus susceptible of different regulatory response.

33. This is further explained at paragraph 6.46:

> **Proposed section 763E is intended 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. For example, the definition of 'managing financial risk' could potentially cover warranty periods or guarantees in contracts for the sale of goods, or card registration services with the incidental benefit that the consumer will not be liable of any unauthorized use of a credit card between the time the service is notified of the loss and the time the service notifies the issuing bank. Similarly, a security bond arrangement by a telecommunications provider, which provided for the payment of interest, could be a facility for the making of a financial investment. Under proposed section 763E where the financial product purpose (making the financial investment, managing a financial risk, or making a non-cash payment) is incidental to the main purpose of a facility, it is not to be regarded as a financial product.**

34. "Facility" is defined (s 762C) as including, inter alia "an arrangement or a term of an arrangement (including a term that is implied by law or that is required by law to be included)."

35. If one proceeds from the starting point that there is at least a "component" of a facility or a separate facility that manages financial risk by the promise of ILP to pay "Legal Costs" (cl 2.1), and that is "something" for the purposes of the introductory words to s 763E, the issue then becomes whether:

    a. One is able to discern a separate "component" or "facility" in the funding deed/charge; and, if so,

    b. The promise to pay "Legal Costs" is incidental to that other "component" or facility.

36. Turning first to a facility that comprises the funding deed and the charge. Accepting the possibility for the purposes of argument that one could characterize the charge as a separate component of that facility, one could not reasonably classify the promise to fund as incidental to the charge (the position would be the reverse – the charge secures the fulfillment of the promises by Chameleon to pay which are the consideration moving from it, and is incidental to those promises).

37. If one then confines attention to the funding deed itself, it is appropriately characterized as a promise to fund on terms, including terms obliging Chameleon to assist in the litigation and to pay monies upon the happening of certain events. All of Chameleon's promises are necessarily tied to, and the consideration for, ILP's promise to fund. Given that interrelationship of terms and consideration, it is impossible to separate components or classify the funding deed as comprising multiple facilities, much less can that be done in a way that the promise to fund (being the promise that manages risk) could be characterized as incidental to the consideration moving from Chameleon to ILP for the making of such promise.

38. A majority of the Court Below concurred with the conclusion that the funding deed could not be separated into components/facilities.[11] They were correct to do so.

39. The dissenting views of Hodgson JA ([122]-[126]) identify, and seek to prioritise, a number of purposes of the funding deed. The anterior and necessary analysis and identification of

[11] Giles JA at [91]; Young JA at [182], [199], [209]

components/facilities is not clearly present in this reasoning By proceeding without that necessary first step, Hodgson JA's analysis does not follow the statutory test.

40. The same error is found in the approach adopted by ILP in its submissions.

41. The above analysis has the result that the question posed at paragraph 2(b) of ILP's submissions does not arise for consideration, on the basis that s 763E(1)(b) does not arise unless s 763E(1)(a) is satisfied. However, even if it were engaged, the section does not assist ILP, for the reasons that follow.

42. The sub-section requires consideration of the "main purpose" of the facility or facilities (as the case may be). It does not direct attention to the purpose of the parties to that facility or facilities.[12] The words "reasonable to assume" call for an objective assessment of the purpose of the facility or facilities, the reference "to assume" simply being a recognition that a document has no mind, and therefore cannot have a purpose per se, and therefore one is concerned with an artificial construct requiring assumption. Given the objectives of Part 7.1 (discussed above), including that the words in part determine the need for licensing, those words ought not be construed as being a product of uncertainty, which would be the case if the purpose was capable of different character, dependent upon the subjective view of the person considering the question of purpose. The administrative law analogy sought to be employed by ILP is not appropriate in these circumstances.

43. The reference to "main purpose" admits of the fact that the facility or facilities may have more than one purpose. The legislation does not call for a strained analysis to prioritise, but simply to determine if one of multiple purposes is the "main" purpose. If there were two purposes of equal weight, one could not be the "main" purpose. Similarly, even if a particular purpose is greater than another, or more important, it would still not necessarily follow that it is the main (in the sense of principal or pre-eminent) purpose. A useful way of determining whether one purpose is the "main" purpose, and the other subsidiary, is by considering whether the facility or facilities would have been entered into if the purpose the subject of analysis did not exist. In this case, would there been a funding deed without the purpose of managing financial risk? Plainly not. The central feature of the funding deed was the payment of "Legal Costs", which is the very matter that manages risk.

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[12] See, the observations of Gummow J in *News Ltd v South Sydney District Rugby League Football Club Ltd* [2003] HCA 45; (2003) 215 CLR 563 at [59]

44. ILP contends that the "main" purpose (from Chameleon's perspective) is "access to justice" (ILP submissions paragraph 85). Care is needed in extrapolating from this statement, made in a very different context, to the statutory question involved here. In one sense, at a level of high generality, the existence of a funding agreement may contribute to "access to justice". Whether it does so, or how it does so, will depend on the particular terms of the document, the particular circumstances in which it was entered, and the particular alternatives reasonably available to the litigant in question.

45. In the same way with many financial products intended to be caught by the statute, this type of very broad enquiry could potentially be undertaken to identify very general outcomes. But this is not the test imposed by the statute.

46. No such enquiry into an "access to justice purpose" was undertaken by the courts below because ILP did not deem it relevant, and it was not relevant.

47. Correctly, there was no enquiry into whether Chameleon was unable or unwilling to maintain proceedings without such arrangement. What is plain, however, on a fair application of the text of the statute to the instrument is that a party entering into a funding deed of the nature the subject of the present proceedings is necessarily managing financial risk through the funder's promise to pay "Legal Costs".

48. ***The funding deed is not a "credit facility"***: A "credit facility" is a specific exclusion: s.765A(h)(i), defined by Regulation 7.1.06. The reason for its exclusion is to avoid overlap between regulation by Chapter 7, and consumer credit regulation (then regulated by the Uniform Consumer Credit Code (**UCCC**)), and the intention that all credit would be regulated by the *Australian Securities & Investment Commission Act 2001* (Cth) (**ASIC Act**)[13]. By reason of this, the definition of "credit facility" reflects the definition in the UCCC at the time Chapter 7 was enacted.

49. A "credit facility" is relevantly a facility "for the provision of credit": Regulation 7.1.06(1)(a). "Credit" is defined in Regulation 7.1.06(3) as "a contract, arrangement or understanding" under which there is 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 is here satisfied.

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[13] Explanatory memorandum paragraph 6.83

50. First, there is no "debt". Whilst the word "debt" is not a word of "precise and inflexible denotation",[14] and no universal definition can be given to it,[15] its meaning is to be taken from the context in which it appears, and by reference to the statutory purpose[16]. In this case, the purpose is to prevent multiple regulation. The Explanatory Memorandum records an intention that the exclusion apply to common arrangements, including loans and credit cards.[17]

51. The funding deed does not have the character of a debt or loan, for the following reasons:

    a. First, the funding deed imposes on Chameleon a contingent obligation to only pay an amount of money to ILP (not capable of ascertainment at the time the funding deed was entered into), on the happening of an event which may not occur (or events if there are multiple payments of the "Resolution Sum"). There is no obligation to make a future payment in a sum certain or which is capable of being readily reduced to certainty.[18] 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.[19] This conclusion reflects the long held meaning of the equivalent definition in the UCCC, held well before Chapter 7 was introduced.[20] In light of the object of regulatory separation, it is to be inferred that Parliament intended the meaning to be given to the Regulation would reflect the meaning given to the definition in the UCCC. To infer otherwise would be to attribute to Parliament an irrational intention – to have different meanings, resulting in regulatory overlap.

    b. Second, Chameleon may never be required to pay any sum to ILP if there be no "Resolution".

    c. Third, the terms of the funding deed are inconsistent with the existence of a debt. Recital D contains an acknowledgement by Chameleon that the funding deed confers on ILP an interest in the subject matter of the litigation (reflected in cll 3.2-3.8, 8). A loan does not involve the assignment or creation of an interest of

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[14] *Hawkins v Bank of China* (1992) 26 NSWLR 562 at 572 per Gleeson CJ
[15] *Re Elgar Heights Pty Ltd* [1985] VR 657 at 665
[16] *Hawkins v Bank of China* (1992) 26 NSWLR 562 at 572 per Gleeson CJ, at 578 per Kirby P
[17] Explanatory memorandum paragraph 6.84
[18] 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 *Alexander v Ajax Insurance Co Limited* [1956] VLR 436 at 445; see also *Young v Queensland Trustees Limited* (1956) 99 CLR 560 at 567
[19] *Geeveekay* at [87]
[20] See *McKenzie v Smith* (1998) ASC 155-025 approved in *Geeveekay* at [86]

this kind.[21] Further the funding deed provides no mechanism for recovery of any sum prior to "Resolution", being the end of a process in which Chameleon must perform certain obligations (cll 8.2-8.6). If Chameleon breaches those obligations, resulting in there being no "Resolution", ILP's remedy is not a claim in debt, but for specific performance or unliquidated damages. These remedies are not of the nature reflecting the existence of a debt.[22]

52. Second, the funding deed is not a contract under which a debt is "deferred". A debt can only be deferred if existing at the time the "facility" is entered into.[23] There was no debt owed by Chameleon to ILP existing at the time the funding deed was entered into, which, by operation of the funding deed is deferred.

53. Third, the funding deed is not a contract under which Chameleon "incurs a deferred debt". That requires the instrument to create the debt and defer it. Giving "defer" its ordinary English meaning, to "put off something to a later date, to postpose or to delay to doing of something",[24] what is in contemplation is not something that may never arise (depending upon the happening of a contingency), but something that will unavoidably arise.[25] No debt is created (if a debt is ever created) until receipt of part of the "Resolution Sum". The amount is payable at the same moment the obligation to pay is created by receipt. In no sense is it deferred.

54. The above analysis reflects the views of the majority of the Court Below.[26] Hodgson JA came to a different view at [136], apparently on the basis that all that was required was the possibility that a future debt may arise (so long as the contingency under which it could arise was not too remote). That analysis gives not work to the word "incurs" in the context of the existence of a "deferred debt".

55. This has the consequence that Hodgson JA's analysis of the potential operation of Regulation 7.1.06(3)(b)(ix) and (x) (at [137]) is of no moment (as Regulation 7.1.06(3)(a) is

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[21] As to the features of a loan, see *Brick and Pipe Industries Limited v Occidential Nominees Pty Limited* [1992] 2 VR 279 at 321

[22] *Shepherd v ANZ Banking Corporation Limited* (1996) 41 NSWLR 431 at 444-5

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

[24] *Geeveekay v Director of Consumer Affairs* (2008) 19 VR 512 at 528 [68]

[25] *Geeveekay v Director of Consumer Affairs* (2008) 19 VR 512 at 532-533 [86]-[87]; *McKenzie v Smith; Lenehan v Smith* (1998) ASC 155-025 at 148,590

[26] Giles JA at [80], Young JA at [218]-[220]

not satisfied). In any event, for the reasons identified, the funding deed is not in form or effect a loan (or financial accommodation).

Part VII: Argument on notice of contention

56. The definition of derivative in s 761D was intended to replace the existing definition of "futures contract" in the then proposed Corporations Act. It adopts the recommendations of the Companies and Securities Advisory Committee to focus attention upon the functions or commercial nature of derivatives, rather than attempting to identify all products that may be regarded as a derivative.[27] The functional definition is cast in wide terms, reflecting the legislative technique described earlier. Once again, the identified exceptions are wide ranging (the relevant exception, contracts for the future provision of services (s 765A) provides a good example of their width).

57. In the Court Below, consistently with the above, each of Giles JA and Hodgson JA correctly directed attention solely to the words of the definition. Both concluded that the funding deed satisfied the requirements of s 761D. Young JA's reasoning, which does put a gloss on the language, is inconsistent with the words used and the legislative technique adopted[28]. The reasoning of Giles JA[29] and Hodgson JA[30] (in this respect) is consistent with the language and the legislative scheme and should be preferred. Young JA fell into error in allowing himself to be influenced by the potential width of the definition in determining its ambit.[31]

58. The contest between the parties is whether s 761D(1)(c) is satisfied by the funding deed. It requires that:

- the amount of the consideration or the value of the arrangement
- is ultimately determined, derived from or varies by reference to (wholly or in part)
- the value or amount of something else (of any nature whatsoever and whether or not deliverable).

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[27] Explanatory memorandum paragraph 6.73; further discussion as to the history of the section is recorded in the judgment of Giles JA at [67]-[69]

[28] 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

[29] Giles JA at [71]-[74]

[30] Hodgson JA at [129], [130]

[31] Young JA at [238]

59. First, "consideration" and "value of the arrangement" are different. "Consideration" is the amount that one party provides to someone (reflecting s 761D(1)). "Value of the arrangement" involves a balancing of all benefits received and costs incurred by a party through the arrangement. Having regard to the terms of the funding deed, the amount of the "consideration" is, from ILP's perspective, the "Legal Costs" paid, and from Chameleon's perspective, the payments provided for under the funding deed upon the happening of described contingencies (cl 3.1 – upon Resolution; cl 4.2 – upon Change of Control; cl 10.2 – upon Resolution; cl 10.5(b) – upon termination by Chameleon for breach). The value of the arrangement is, from Chameleon's perspective, the "Legal Costs payment" plus the benefit of not needing to fund the "Legal Costs" itself less the obligation to make payment to ILP upon the happening of one or more of the contingencies; and from ILP's perspective, the contingent payments (if made) less the "Legal Costs" paid less the cost of funds to it attributed to the "Legal Costs".

60. Second, the expression "is ultimately determined, derived from or varies by reference to (wholly or in part)" describes the necessary relationship between the consideration or value of the arrangement on the one hand, and the value or amount of something else on the other. Each of "ultimately determined", "derived from" and "vary by" are to be given separate meaning, being linked by a disjunctive ("or"). The words in brackets, "wholly or in part", condition all three. The use of all three expressions is plainly an attempt to capture the necessary spectrum of relationship, and the words in brackets admit of the possibility that matters other than the "something else" may also influence consideration or value.

61. Third, one is concerned with the "value or amount of something else". The words "something else" point to something that is external to the arrangement. That "something else" can be of any nature whatsoever. The only necessary qualification is that the "something else" is capable of having a value or amount attributed to it.

62. There are two other matters that are relevant to the potential operation of the definition:

    a. First, the characterization of the arrangement is to be determined when entered into. The definition is concerned with the terms of the arrangement, not the performance of the arrangement;

b. Second, the definition does not require that the consideration or value of the arrangement need always be ultimately determined, derived or varied by "something else". If that was the intention, it could have been said expressly.

63. In terms of ILP, the consideration payable by it depends upon the costs incurred by Chameleon in the proceedings, the amounts ordered by the Court by way of security, and any amounts payable pursuant to adverse costs orders made by the Court (definition of "Legal Costs"). Each of those criteria relevantly qualifies as "something else". That is, itself, sufficient to satisfy the section.

10 64. In terms of Chameleon, the consideration payable by it is at least referable to the "Legal Costs", which necessarily means that all permutations have that as a reference point. In all but the "Early Termination" scenario, the obligation to pay "Legal Costs" is itself qualified by reference to the "Resolution Sum" being sufficient to cover the quantum of those costs (cl 3.9). It follows that in all but the "Early Termination" scenario, the consideration payable by Chameleon varies by the size of the "Resolution Sum". The "Resolution Sum" would qualify as "something else".

65. In terms of the two outcomes that oblige Chameleon to pay consideration in addition to Legal Costs, if ILP is entitled to either a "Funding Fee" or an "Early Termination Fee",
20 each of those amounts are calculated by reference to the value of something else. In terms of the "Early Termination Fee", one needs to first consider whether the "Change in Control" gave rise to a strike price, and if so, what that strike price was to determine if that limb applies. If it does, the question is whether the figure derived from it, exceeds $9m. The figure therefore has the potential to vary by reference to something else. In terms of the "Funding Fee", the consideration will vary by reference to whether the amount derived from applying the relevant percentage described in the definition of "Percentage Payment" to the "Resolution Sum", exceeds three times the sum of "Legal Costs". Again, these are external matters that qualify as "something else".

30 66. For these reasons, the funding deed satisfies the elements of s 761D(1)(c), with the result that the definition of "derivative" under s 761D is satisfied.

67. The only exception relied upon by ILP in the proceedings to date is s 761D(3)(b), which requires the funding deed to be characterized as a contract for the future provision of

services. Although recital C makes reference to services other than the payment of money, there is no operative promise contained in the terms of the funding deed to provide such services. Properly classified, the funding deed is only concerned with the payment of money. That is not a service for the purposes of the exclusion. To include the payment of money as qualifying as a contract for the future provision of services would mean that the exclusion would always apply where the arrangement involved the payment of money. To expand the meaning of s 761D(3)(b) to that extent would largely denude the section, deliberately cast in wide terms, of operation; particularly in respect of arrangements that one may consider central to any conception of derivative. It would defeat the purpose of the legislation. To the extent that Hodgson JA considered[32] that the payment of money could be the provision of service for the purposes of s 761D(3)(b), he fell into error. Giles JA's reasoning, that it does not,[33] reflects the plain intent of the Parliament. The exception does not apply.

Part VII

68. The notice of contention, to the extent required, therefore also supports the result in the Court Below.

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[32] Hodgson JA at [133]
[33] Giles JA at [88]