IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
BETWEEN

No. S362 of 2011

INTERNATIONAL LITIGATION PARTNERS PTE LTD
Appellant

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

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. The issues raised in the appeal are:

   (a) Does a litigation funding deed answer the description of a financial product, within the meaning of Part 7.1, Division 3, ss 762A – 762C, 763A and 763C of the *Corporations Act 2001* (Cth) (the **Act**), as a facility through which, or through the acquisition of which, a person manages financial risk?

10 (b) If such a litigation funding deed answers the statutory description of a financial product, is it "reasonable to assume" that any financial product purpose of the deed is an incidental purpose thereof, such that (barring inclusions specified by Part 7.1, Division 3, Subdivision C of the Act), the deed is not a financial product by operation of s 763E of the Act?

Dated 24 November 2011
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(c) If such a litigation funding deed answers the statutory description of a financial product, is it a credit facility within the meaning of s 765A(1)(h)(i) of the Act and reg. 7.1.06(1) and (3) of the *Corporations Regulations 2001* (Cth) (the **Regulations**), with the result that it is expressly excluded from being a financial product?

(d) Having regard to (a) – (c) above, is a person entering into a contract to fund litigation required to comply with the provisions of the Act engaged by the issuing of a financial product and the carrying on of a financial services business, including the requirement to obtain an Australian financial services licence (**AFSL**) pursuant to s 911A of the Act?

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903*

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

PART IV: CITATIONS

4. The primary judgment is reported at (2010) 79 ACSR 462.

5. The intermediate judgment is reported at (2011) 276 ALR 138.

PART V: FACTS

6. On 22 December 2004, the Supreme Court of New South Wales made an order for the winding up of Chameleon Mining NL (**CHM**) and the appointment of Mr Vouris as its liquidator.

7. On 11 May 2006, the liquidation of CHM was terminated: *Rupert Co Ltd v Chameleon Mining NL (In Liq)* [2006] NSWSC 415.

8. On 26 November 2007, CHM commenced proceedings number NSD 2355 of 2007 against Murchison Metals Limited (**Murchison**) and others in the Federal Court of Australia (the **Federal Court Proceedings**).

9. As at September 2008, CHM's legal expenses in the Federal Court Proceedings were approximately $1.5 million.[1]

10. On or about 10 October 2008, the directors of CHM were considering an offer of $2 million plus legal costs made by Murchison in respect of the Federal Court Proceedings. CHM's then solicitors, Atanaskovic Hartnell, had advised that CHM accept this offer.[2]

11. On 28 October 2008, CHM and International Litigation Partners Pte Ltd (**ILP**) entered into a funding deed, pursuant to which ILP was to fund the Federal Court Proceedings (the **Funding Deed**). The primary judge, Hammerschlag J summarises the principal terms of this agreement at (2010) 79 ACSR 462 [3] – [12], and annexes the entire agreement to his reasons.

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[1] Affidavit of Anthony Joseph Karam sworn 11 August 2010 at [14]
[2] Affidavit of Anthony Joseph Karam sworn 11 August 2010 at [16]

12. On 28 December 2008, CHM granted ILP a fixed and floating charge over all of its assets and undertakings (the **Charge**) in consideration for entering into the Funding Deed, as security for payment of moneys owed by it to ILP: cl. 5.1 Funding Deed.

13. On 10 August 2010, CHM entered into a "Terms Sheet" agreement with Cape Lambert Resources Ltd (**Cape Lambert**). Upon acceptance of the terms by CHM, Cape Lambert was entitled to nominate 50% of the board of CHM. The agreement provided a standby facility in an amount of $6.5 million in exchange for which CHM provided a charge over its assets. The identified purpose of the facility was to permit CHM to pay out ILP, such that, following discharge of the Charge, Cape Lambert's charge would be first ranking.

14. On 10 August 2010, CHM by letter disputed ILP's entitlement to any payment under the Funding Deed, on the basis that ILP was carrying on an unlicensed financial services business in Australia, while not the beneficiary of an exemption. CHM notified rescission of the Funding Deed pursuant to s 925A of the Act.

15. ILP was not, as at 10 August 2010, the holder of a current AFSL.

16. On 11 August 2010, ILP appointed receivers to CHM pursuant to its rights under the Charge and on the same day, CHM sought relief on an urgent interim basis in the Equity Division of the Supreme Court of NSW. The final hearing of CHM's claim was heard on 17, 18 and 19 August 2010. By judgment published on 31 August 2010, the primary judge upheld ILP's entitlement to engage in litigation funding in Australia absent an AFSL, upheld ILP's right to an early termination payment (later assessed at $8.6 million), but dismissed ILP's claim to a further payment in the order of $9 million.

17. ILP appealed and CHM cross-appealed from these orders. The Court of Appeal unanimously dismissed ILP's appeal; but was divided in its approach to the cross-appeal: Giles and Young JJA, writing separately, upheld the cross-appeal, Hodgson JA dissented.

18. On 23 June 2011, by legislative instrument (ASIC Class Order CO 11/555), the Australian Securities and Investments Commission (**ASIC**) varied ASIC Class Order CO 10/333, to exempt, from the requirements of Part 7.9 and ss 992A(1) and 911B(1) of the Act, a litigation funding arrangement for participating in, conducting and funding legal proceedings brought by or on behalf of a person, to the extent that the arrangement, or an interest in the arrangement, is a financial product other than an interest in a litigation funding scheme or proof of debt scheme.

PART VI: ARGUMENT

A THE GENESIS OF PART 7.1 OF THE ACT

19. In May 1996, the Commonwealth Treasurer established the Financial System Inquiry (the Wallis Inquiry), to examine the consequences of financial deregulation within Australia during the 1980s and to formulate regulatory arrangements capable of promoting efficient and cost-effective services for users of financial markets within Australia.

20. The Financial System Inquiry Final Report, issued in March 1997 (the **Final Report**), recommended the adoption of a functional approach to financial system regulation.[3] In describing the philosophy of this approach, Chapter 5, at §5.1.1 (pp. 179-180), said this:

> Financial contracts play a fundamental role in the efficient functioning of commerce, facilitating the settlement of trade and channelling resources efficiently across time and space. The basic elements of financial contracts are promises - promises to make payments at specified times, in specified amounts and in specified circumstances. Financial arrangements which take the form of trust relationships also involve promises - promises to manage assets in the best interests of beneficiaries.
>
> Financial promises are among those products and services which incorporate risk, including the risk that the promise will not be kept.
>
> The financial system provides the framework within which these promises are created and exchanged. Unlike the markets for most other goods and services, the exchange of many financial contracts takes into account both the explicit contractual promise and the varying risk that the promise will not be kept. Identifying, allocating and pricing risk is a key role of the financial system.
>
> The exchange of promises can take place directly between parties. This is feasible where the parties have efficient means of conducting transactions and access to the information necessary to make informed judgments, especially about risks inherent in financial promises.
>
> However, imperfections arise in financial markets because information is not complete, and transactions and information are not costless. In the presence of such imperfections, financial institutions have developed to supply information and transaction services, including the management of risk, wherever financial markets have been unable to do so directly.

21. Within this conceptual framework, financial institutions are understood as effecting the exchange of financial promises by providing a set of financial services.[4] Financial promises are, in turn, attended by different kinds and degrees of risk. These range from the inherent difficulty of honouring promises; to difficulties in assessing the creditworthiness of promisors, and the adversity which may be caused – both *inter partes* and through systemic, third party risks – if promises are breached.[5]

22. The role of a financial intermediary within this framework was explained in the Final Report as follows (§5.1.4, p. 185):

> Financial intermediaries interpose their balance sheet between the parties involved in exchanging financial promises. At one end of the spectrum, deposit taking intermediaries provide a full range of services. They offer liabilities that serve as means of payment, transform longer-term illiquid assets into shorter-term highly liquid liabilities, offer claims in divisible quantities, diversify risk and efficiently manage information needs. The

[3] ISBN 0 642 26102 4, located at: http://fsi.treasury.gov.au/content/FinalReport.asp. See further, *Report on the Regulations and ASIC Policy Statements Made Under the Financial Services Reform Act 2001: Parliamentary Joint Committee on Corporations and Financial Services* (ISBN 0 642 71185 2), October 2002, at [2.1] - [2.6]
[4] Final Report, §5.1.3, at p. 183
[5] *Ibid* §5.1.2, at p. 180

> depositor receives the full range of financial services, while the borrower enjoys the benefits of maturity transformation and informational efficiencies.

23. The sixth stage of the Corporate Law Economic Reform Program, *Financial Markets and Investment Products*, 1997 (**CLERP 6**)[6] was developed in response to certain recommendations of the Final Report. CLERP 6 proposed that:[7]

> A more efficient regulatory framework for the investment industry will be achieved by focussing on the functions of financial markets and products. A functional approach to regulation considers the economic functions served by financial markets and instruments and searches for the best regulatory structure to facilitate the performance of those functions.

24. One aspect of the proposed functional framework was the introduction of a single licensing regime for financial sales, advice and dealing, including, relevantly, in respect of intermediaries dealing in financial instruments.[8] The objective of so regulating intermediaries was to:

> provide protection for retail investors. Adequate licensing thresholds facilitate retail investor confidence that financial intermediaries have appropriate skills, experience and qualifications. Statutory obligations imposed upon intermediaries are designed to limit fraud and provide appropriate accounting for client instructions and funds.
>
> A related objective of licensing financial intermediaries is based on market integrity and prudential grounds. Financial advisers and dealers should have adequate resources to conduct their business and, in some instances, protect against the risk of contagion to other financial participants in the event of default. [9]

25. On 28 August 2001, aspects of these recommendations were passed into law by means of the *Financial Services Reform Act* 2001 (Cth),[10] now substantially reflected in Part 7.1 of the Act.

B THE STATUTORY SCHEME

26. Part 7.6 of the Act governs the licensing of providers of financial services. Section 911A provides that a person who carries on a financial services business[11] in this jurisdiction must hold an AFSL covering the provision of the financial services. Part 7.6, Division 4, Subdivision A of the Act prescribes matters relating to the application for, and granting of, an AFSL.

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[6] ISBN 0 642 26121 0
[7] *Ibid* at 30
[8] *Ibid* at 61-65 and generally Part 8; Proposal No. 5
[9] *Ibid* at 89
[10] The Act comprised the principal element of a legislative package also comprising the *Financial Services Reform (Consequential Provisions) Act 2001*, the *Corporations (Fees) Amendment Act 2001* and the *Corporations (National Guarantee Fund Levies) Amendment Act 2001.*
[11] The meaning of "carrying on" a financial services business is affected by s 761C of the Act.

27. The licensing regime is intended to secure the adequacy of capitalisation of providers of financial services, exclude untrained and unqualified persons from the financial services industry, and enforce compliance with ethical standards: *Cairnsmore Holdings Pty Ltd v Bearsden Holdings Pty Ltd* [2007] FCA 1822 at [32] per Jacobson J. These objectives find reflection at s 760A of the Act.

28. The obligations imposed upon the holder of an AFSL to secure these objectives are, in turn, principally prescribed by Part 7.6, Division 3 of the Act.

29. Operatively, within the current factual circumstances, a financial services business is a business of providing financial services: s 761A of the Act. A person provides a financial service if they deal in a financial product: s 766A(1)(b). Issuing a financial product constitutes dealing in a financial product: s 766C(1)(b). The meaning of issued, issuer and cognate terms is further affected by s 761E.

30. "Financial product" has the meaning given by Part 7.1, Division 3: s 761A. Division 3 provides a general definition of "financial product": s 763A(1). That definition has four relevant aspects:

    (a) a facility: s 762C;

    (b) through which or through the acquisition of which;

    (c) a person;

    (d) manages financial risk: s 763C(a).

31. This general definition is modified in several ways. *First*, it must be read subject to s 764A, which identifies facilities that (subject to s 762A(3)) are financial products. *Secondly*, it must be read subject to s765A, which identifies facilities which are not financial products, even where they fall within ss 763A or 764A. *Thirdly*, the definition has effect subject to s 763E (s 763A(1)): that is, it excludes incidental products; being products the main purpose of which is not a financial product purpose and which are not otherwise financial products due to the operation of s 764A. *Fourthly*, ASIC may declare a facility, interest or other thing not to be a financial product: s765A(2). *Fifthly*, the regulations may provide for the exclusion of a facility, interest or other thing: s765A(1)(y). *Finally,* the meaning of the term is affected by ss 761E, 762C and 763C(a) of the Act.

32. The Explanatory Memorandum to the *Financial Services Reform Bill 2001*, at [6.36] – [6.37], said this of the architecture of Part 7.1:

> 6.36 The Bill takes a three-part approach to the definition of financial product which is outlined in proposed section 762A:
>
> • a broad general definition of financial product which focuses on the key functions performed by financial products;
>
> • this general definition is then clarified or added to by a list of specific inclusions and a regulation-making power to include further products. The list of inclusions is not a catch all list, but rather provides examples of products that

> fall within the general definition. The list is also drafted in such a way that it will bring products within the regime whether they fall within the general definition or not;
>
> • the scope of both the general definition and the specific inclusions is then narrowed by a list of specific exclusions, a regulation-making power to exclude products and an ASIC exemption power;
>
> 6.37 This approach is intended to provide significant flexibility in defining the financial products that are to come within the regime and will be able to cater for emerging products without the need to amend the legislation.

33. By the combined operation of the above provisions, a financial product is a facility (which includes intangible property, an arrangement or term thereof, or a combination of such) having as its main purpose a financial product purpose, and through which, or through the acquisition of which, a person manages financial risk, by managing the financial consequences to them of particular circumstances happening.

34. The right of rescission conferred by s 925A of the Act is engaged in the circumstances described in s 924A(1). That provision in effect requires that a person (the non-licensee, here ILP) and another person (the client, here CHM), enter into an agreement that constitutes or relates to the provision of a financial service by the non-licensee, in the course of the non-licensee carrying on a financial services business. Under such conditions, and subject to s 925A(2) – (6), notification of rescission under s 925A(1) results in rescission of the agreement pursuant to s 925B.

C THE FUNDING DEED IS NOT A FINANCIAL PRODUCT

(1) The reasons of the Court of Appeal

35. In the Court below, Giles JA concluded that the Funding Deed was a facility through which, or through the acquisition of which, CHM managed the financial risk to it of the following circumstances occurring - insufficiency of return, imposition of "Adverse Costs Orders" and obtaining money for the payment of "Legal Costs" – by transferring the risk and money burden initially and perhaps forever to ILP: [33] – [45] especially at [37].

36. Hodgson JA reached a similar conclusion ([122]); as did Young JA ([209]), although His Honour acknowledged the doubt attending this conclusion: [206].

(2) The reasons of the primary judge

37. The primary judge concluded, at J[82] – [85], that the Funding Deed does not manage financial risk within the meaning of s 763C(a), reasoning as follows.

38. *First*, while, in one sense, the Funding Deed minimises one category of financial risk for CHM (being the risk that it will incur expense in prosecuting the Federal Court Proceedings, which will be wasted if a "Resolution Sum" equalling zero or any sum less than the costs expended) on no realistic view can it be said that it is a financial product whereby CHM manages that risk: J[83].

39. *Secondly*, the object of the Funding Deed is to enable CHM to prosecute the Federal Court Proceedings by having ILP pay costs and provide investigative and management services to assist in the Federal Court Proceedings: J[84].

40. *Thirdly*, pursuant to cl. 4 of the Funding Deed, CHM undertakes a risk of a significant payment unrelated to the fate of the Federal Court Proceedings (being payment of the "Early Termination Fee"). Similarly, in respect of ILP's ability to terminate in its discretion under cl.10.1 of the Funding Deed: J[85]. See further, J[108].

(3) The proper characterisation of the Funding Deed

41. In order to ascertain whether a financial product exists, it is necessary to identify: the relevant facility; its various elements and their purposes; the person said to be managing financial risk, and the financial consequences of particular circumstances happening, said to be so managed.

42. Within this analysis, ILP is taken to be the non-licensee and issuer of, and CHM the client, and acquirer of, a putative financial product, and ILP thereby the putative provider of financial services to CHM.

(a) The facility

43. Properly characterised,[12] the "facility" comprises both the Funding Deed and the Charge, which is in terms contemplated by cll. 1 and 5 of the Funding Deed; on which see the observations of the primary judge: (2010) 79 ACSR 462 at [13].

44. The question for determination is accordingly whether this scheme of instruments was a mechanism by which CHM managed the financial consequences to it of certain circumstances occurring.

(b) Managing financial risk

45. "Managing financial risk"[13] is a compound concept, which must be construed having regard to the text of s 763C, within the context of Part 7.1, and the general purpose and policy of the legislation, in particular its mischief: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, at 46 – 7, per Hayne, Heydon, Crennan and Kiefel JJ and authorities cited therein.

46. "Risk" is the object of the provision; "financial" describes the character of the risk; while "managing" describes the activity directed at this financial risk.

47. Section 763C amplifies these concepts in providing:

> For the purposes of this Chapter, a person ***manages financial risk*** if they:
>
> (a) manage the financial consequences to them of particular circumstances happening; or

[12] So much was accepted by Senior Counsel for the First Respondent at trial: T32/12.
[13] The same phrase appears in s 12BAA of the *Australian Securities and Investments Commission Act 2001* (Cth).

(b) avoid or limit the financial consequences of fluctuations in, or in the value of, receipts or costs (including prices and interest rates).

48. "Manage" connotes the activity of handling or seeking to control a continuing state of affairs. Managing risk involves taking steps to handle the existing chances of future adverse outcomes. It can, in this respect, be contrasted with steps which create future choices. The Act, in the notes accompanying s 763C, provides examples of the kinds of product which would qualify as financial products.[14] These examples – obtaining insurance, hedging a liability by obtaining a futures contract or entering into a currency swap – involve a client protecting itself against a risk immanent within its existing circumstances. They do not involve the creation, from nothing, of a set of circumstances attended by both the opportunity of recovery and the possibility of risk.

49. The evidence disclosed that, as at the date of entry into the Funding Deed, a settlement offer had been made by Murchison to CHM, which CHM had been advised by its solicitors to accept. CHM had the option of concluding the Federal Court Proceedings in consideration for a settlement sum. This option negated any residual exposure to financial or other risk on the part of – and conferred a benefit upon – CHM.

50. CHM did not avail itself of this option. Instead, it entered into the Funding Deed with ILP. So much was rational. For, on its true construction, through the Funding Deed, CHM disposed of any risk to it arising by or through the Federal Court Proceedings, while optimising its opportunities for recovery therein.

51. The principal obligation assumed by ILP under the Funding Deed is payment, pursuant to cl. 2.1, of the "Legal Costs", as that term is defined at clause 1. That definition comprehends payment by ILP of various kinds of costs, including "Security for Costs" and "Adverse Cost Orders", as further defined at cl. 1.

52. CHM's principal liability to ILP under the Funding Deed arises by operation of cl. 3 ("Funding Fee and Legal Costs Entitlement"). The effect of cl. 3.9 is to cap any liability of CHM to ILP to a sum not exceeding any Resolution Sum received by CHM through the Federal Court Proceedings. That is, CHM cannot owe to ILP monies it does not otherwise receive by resolution of the Federal Court Proceedings. As a result, circumstances beyond CHM's control do not expose it to any risk of net loss under the Funding Deed.

53. The only adverse outcome to which CHM is exposed under the Funding Deed is a circumstance wholly *within* its control; being termination under cl. 4.1 and payment of the early termination fee. This eventuality is not a risk, but an option CHM can elect to exercise; and, in the events which occurred, did exercise.

54. This analysis exposes two aspects of the transaction recorded in the Funding Deed and the Charge which make it misconceived to speak of CHM as managing financial risk through those instruments.

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[14] These examples, while not part of the statute (s 13(3) *Acts Interpretation Act 1901* (Cth)) can assist construction in circumstances of ambiguity: *The Ombudsman v Moroney* [1983] 1 NSWLR 317, per Street CJ at [325], Moffitt P agreeing at [333].

55. *First*, in so far as the Funding Deed disposed of CHM's existing litigation risk, and optimised its opportunity for future recovery, it is incorrect to speak of CHM managing risk through, or through the acquisition of, the Funding Deed.

56. "Managing" risk is not the same as creating risk, or coming to bear a risk pursuant to a contract or arrangement. A risk must exist before it can be managed. Where a contract creates a risk vis-à-vis the contracting parties, the terms of that contract specify the nature, scope and operation of the risks the parties have created and allocated as between themselves. The contract is not a facility though which, or through the acquisition of which, a person "manages" that risk. It is the mechanism by which that risk originates.

57. The monies advanced by ILP to CHM under the Funding Deed were a necessary premise both of recovery of benefit and of exposure to risk (for both parties). To the extent that the Funding Deed creates any genuine risk, it is a risk assumed by ILP. It is ILP which "hazards funds in litigation" (*Campbells Cash and Carry Pty Limited v Fostif Pty Limited* (2006) 229 CLR 386 at 434, [89] per Gummow, Hayne and Crennan JJ). However, any such risk is in turn limited or eliminated by the operation of the Charge and is a creature of the Funding Deed and not of ILP's pre-existing position.

58. This point can be put differently. The provisions of Part 7.1 of the Act do not apply to instruments by which parties create or facilitate a relationship attended by both a fresh opportunity of recovery and an attendant possibility of risk. Were they to do so, various ordinary commercial contracts would be caught. Many take or pay arrangements, under which one party agrees to purchase a certain volume of another party's goods or services, or to pay the equivalent price if the goods or services are not ultimately required, would be of this character; the "or pay" component being a facility which manages the supplier's risk. Each agreement whereby one party acquires the debt of another (at a discount or otherwise) would *ex facie* satisfy the statutory language. A factoring agreement, between a financier (the factor) and a supplier of goods or services (the client), under which the factor purchases the client's right to receive payment from the client's customers (debtors) would be caught. Nor do such instruments ostensibly fall within any exclusion stated in s 765A, or benefit from any exemption.

59. *Secondly*, entry into the Funding Deed involved an exchange of promises directly between a listed company (CHM) and a corporate litigation funding business (ILP). The transaction lacked any element of intermediation, and was unaffected by information asymmetries[15] or by any systemic or third party-risk. It was not a contract between a financial institutional and a retail investor. It was a contract *inter partes*, creating rights for ILP in a chose in action otherwise wholly within the control of CHM.[16]

60. Viewed through the functional prism of Part 7.1, and against its legislative history, the Funding Deed is not the kind of instrument the statute intends to capture. It does not manifest the mischief at which Part 7.1 is directed, as reflected in the discussion within the Final Report and CLERP 6, extracted above. ASIC's publication of Class Order 11/555 confirms that the Executive takes a similar view.

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[15] Or, alternatively, directly addressed these by imposing obligations of disclosure on CHM: cf cll. 7.4 and 8.2.

[16] Cf in this respect, affidavit of Anthony Joseph Karam dated 11 August 2010, [7]-[11]

61. If, contrary to the above, it is correct to conclude that each of these kinds of agreement may answer the literal language of the statutory scheme, this emphasises the importance of the chapeau to s 763A(1) – "This [section] has effect subject to s 763E".

62. Where one aspect of a contract or arrangement is capable of being characterised as having a financial product purpose, it is necessary to ascertain whether the arrangement evinces other purposes, and thereafter to accord relative priorities to these purposes, to which we now turn.

D ANY FINANCIAL PRODUCT PURPOSE OF THE FUNDING DEED IS AN INCIDENTAL PURPOSE

63. Section 763E contemplates two categories of exception from the class of financial products.

64. The first exception (an **incidental component**) arises where two conditions are met:

(a) something (the incidental product) is an incidental component of a facility that also has other components (s 763E(1)(a)(i)); and

(b) it is reasonable to assume that the main purpose of the facility, when considered as a whole, is not a financial product purpose (s 763E(1)(b)(i)).

65. The second exception (an **incidental facility**) arises where two conditions are met:

(a) something (the incidental product) is a facility that is incidental to one or more other facilities (s 763E(1)(a)(ii)); and

(b) it is reasonable to assume that the main purpose of the incidental product, and the other facilities, when considered as a whole, is not a financial product purpose (s 763E(1)(b)(ii)).

66. Section 763E(2)(b) defines a financial product purpose within s 763E as managing financial risk.

67. Section 762C provides that in Part 7.1, Division 3, "facility" includes intangible property; or an arrangement or term of an arrangement (including a term that is implied by law or that is required by law to be included); or a combination of intangible property and an arrangement or term of an arrangement.

68. The Explanatory Memorandum to the *Financial Services Reform Bill 2001* at [6.46] stated:

> 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 a financial risk. For example, the definition of "managing a 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 [sic] any unauthorised 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 ...is incidental to the main purpose of a facility, it is not to be regarded as a financial product.[17]

69. The application of s 763E directs attention to:

(a) the identity of the relevant facility;

(b) the notion of a component, as a part or element of a larger whole;

(c) the notion of an incidental product (the "something" which is an incidental component or facility) – being an element which accompanies other elements but is not a significant part of the whole; and

(d) the objective assessment required by the phrase "reasonable to assume".

(1) The relevant facility

70. As noted at [43] above, the totality of the facility in the current context is the Funding Deed alongside the Charge. The notion of a component can accordingly be construed in two different ways in the current context, which we address next.

(2) An incidental component

71. A "component" is a constituent part or element of a larger whole.[18] "Incidental", used adjectivally, means accompanying, but not a major part of, something;[19] or happening or likely to happen in fortuitous or subordinate conjunction with something else.[20]

72. The *first* available construction directs attention to the status and purpose of the Funding Deed as part of a broader scheme of facilities, which also includes the Charge. This construction attracts the operation of s 763E(1)(a)(ii) and (b)(ii).

73. The conclusion of Giles JA (at [91]) has no direct application to this case. Construing these two instruments together reveals that *if there be* any financial product purpose (*arguendo*, managing CHM's financial risk) this accompanies, but is ancillary to, other non-financial product purposes.

74. These non-financial product purposes include ILP advancing monies to CHM to secure access to justice for CHM: Recitals A and C; cll 2.1 and 6.1. In consideration for this, ILP acquires an interest in, and various kinds of control over, the chose in action consisting in the Federal Court Proceedings: Recital D; cll. 3, 6.1, 6.2, 7.1, 7.4, 7.5, 8, 13.2 – 13.3, 17.5. ILP in turn secures, via the Charge, the obligations and rights conferred by the Funding Deed: cl. 5.1.

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[17] To similar effect, [6.53] of the Explanatory Memorandum noted in respect of "managing a financial risk" as defined at s 763C: "Proposed section 763C is intended to bring within the regime as facilities for managing financial risk, products such as insurance contracts and derivatives. Concerns that the definition of 'managing a financial risk' might encompass such things as warranties and guarantees associated, for example, with the sale of goods that are only incidentally intended to manage a financial risk are addressed by proposed section 763E."

[18] *Macquarie Dictionary* (5th edition) (2009) noun meaning (2)

[19] *New Oxford Dictionary of English* (2001) adjective meaning 1

[20] *Macquarie Dictionary* (5th edition) (2009) adjective meaning 2

75. The *second* available construction directs attention to the parts or elements of the Funding Deed itself which relate to any financial product purpose. This construction attracts the operation of s 763E(1)(a)(i) and (b)(i).

76. In analysing a putative facility which is contractual in character, and having regard to s 762C, the identification of components directs attention to the various terms of the arrangement, and their relative significance in describing the purpose of the facility considered as a whole.

77. Upon this construction, the reasoning of Giles JA, with respect, again missteps. While "the purpose of the agreement" may be to "obtain litigation funding on the terms contained in it" it misses the force of s 763E to suggest that "those terms make it a financial product". It is necessary to look at the elements of that agreement – in particular its express terms and its recitals – to ascertain whether it has multiple purposes; if so, the relative ranking of those purposes and, in particular, its main purpose.

(3) Reasonable to assume

78. Hodgson JA at [126] correctly observes that the use of "reasonable to assume" invites an objective assessment of the terms of a facility to ascertain whether it evinces multiple purposes, and if so, the priority ranking of those. His Honour concludes that one reasonable view is that the funding of the litigation and the provision of a very large fee constituted the main purpose of the Funding Deed: [126]. Young JA, at [182], appears to acknowledge the possibility of plural and mutually reasonable views of the main and incidental purposes of the Funding Deed.

79. This statutory phrase "reasonable to assume" (which also appears in s 761B(c)[21]) imports an objective standard of reasonableness. It also introduces the notion of an assumption to be reached, it is to be inferred, by the Court, in characterising a putative financial product.

80. The adjective "reasonable" means agreeable to reason or sound judgment.[22] An "assumption" is a matter or thing which is accepted as true without proof,[23] or something taken for granted, a supposition.[24]

81. Turning first to the standard of reasonableness, in administrative decision-making, a wide range of possible approaches may be available without falling into legal error: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Others* (1996) 185 CLR 259 at 282 (per Brennan CJ, Toohey, McHugh and Gummow JJ); *Mahon v Air New Zealand* [1984] AC 808 at 820-821, per Lord Diplock, delivering the opinion of the Judicial Committee of the Privy Council.

82. That which is reasonable to assume is that which conforms with available evidence or inference, and which is not negated by evidence or inference to the contrary.

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[21] The phrase "reasonable to assume" arises within other, unrelated statutory contexts, which do not illuminate the current enquiry; cf s 45A(5) of the *Income Tax Assessment Act 1936* (Cth).
[22] *Macquarie Dictionary* (5th edition) (2009) adjectival meaning 2
[23] *New Oxford Dictionary of English* (2001) noun meaning 1
[24] *Macquarie Dictionary* (5th edition) (2009) noun meaning 2

83. Section 763E should be construed as conferring similar latitude upon the Court in applying the statutory language to a putative financial product. That is, that which is reasonable to assume as to the relative ranking amongst plural ostensible purposes of a financial product is that which the Court can, on sound bases – but absent evidence – conclude. This conclusion will permit of a range of acceptable outcomes, none of which is taken to be wrong, if based on sound reasoning, and not negated by contrary evidence.

84. This submission finds support in the terms of s 763A(2), which adopts a functional and objective approach to the characterisation of a financial product. It provides that, in looking at the purpose or use of a facility for the purposes of assessing whether it falls within the ambit of the Part, one has regard to the use or purpose to which it is commonly put, rather than the use or purpose, in fact, of the person using or acquiring it.[25]

(4) Assigning priority among plural purposes

85. Having regard to the above discussion, one reasonable, and the better, view is that the main purpose of the Funding Deed, vis-à-vis CHM, is "access to justice" (*Campbells v Fostiff supra* at 425, [65] per Gummow, Hayne and Crennan JJ). Similarly, the main purpose of the Funding Deed vis-à-vis ILP, is to "seek profit from assisting the processes of litigation" (ibid at 434, [89]). Neither of these purposes is a financial product purpose (*viz*, managing financial risk).

86. Any other purposes accompany, but are ancillary or subsidiary to, these principal purposes.

87. This construction does not require the statutory language to be read down: cf Young JA at [191]. Nor does it require a contention that there is any overall purpose, which being limited, justifies such a construction: cf *Australian Softwood Forests Pty Ltd and Others v Attorney-General for the State of New South Wales* (1980-1981) 148 CLR 121 at 130 per Mason J. Rather, the construction requires only that the express statutory language be given proper force.

88. The chapeau to s 763A(1) is, of course, in one respect otiose. Section 763A would naturally be read with and subject to s 763E: *K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at [315], per Mason J. Its inclusion, and the terms in which it is drafted – "has effect subject to" – convey that it is an internal mechanism which confines the width of the definition of "financial product" in order to avoid over-broad and absurd results.

E THE FUNDING DEED IS A CREDIT FACILITY AND HENCE EXCLUDED

(1) The credit facility exemption

89. Section 765A(1)(h)(i) provides that a credit facility within the meaning of the Regulations is not a financial product for the purposes of Chapter 7.

90. Credit facilities were expressly exempted from the class of financial products identified within Part 7.1 because the demarcation between credit and other forms of financial

[25] Cf, in respect of s 763A(2), the Explanatory Memorandum to the *Financial Services Bill 2001* at [6.44].

instruments was considered to be fine.[26] The Explanatory Memorandum to the *Financial Services Reform Bill 2001*, stated at [6.84] that: "fixed rate loans could have been regarded as a facility for managing a financial risk and credit cards would have been facilities for the making of non-cash payments."

91. Regulation 7.1.06(1)(a) of the Regulations relevantly defines the concept "credit facility" as:

> (a) the provision of credit:
>
> (i) for any period; and
>
> (ii) with or without prior agreement between the credit provider and the debtor; and
>
> (iii) whether or not both credit and debit facilities are available; and
>
> (iv) that is not a financial product mentioned in paragraph 763A (1) (a) of the Act; and
>
> (v) that is not a financial product mentioned in paragraph 764A (1) (a), (b), (ba), (f), (g), (h) or (j) of the Act; and
>
> (vi) that is not a financial product mentioned in paragraph 764A (1) (i) of the Act, other than a product the whole or predominant purpose of which is, or is intended to be, the provision of credit…

92. Regulations 7.1.06(3)(a) and (b)(ix) and (x) provide:

> ***credit*** means a contract, arrangement or understanding:
>
> (a) under which:
>
> (i) payment of a debt owed by one person (a ***debtor***) to another person (a ***credit provider***) is deferred; or
>
> (ii) one person (a ***debtor***) incurs a deferred debt to another person (a ***credit provider***); and
>
> (b) including any of the following:
>
> (i) any form of financial accommodation;
>
> …
>
> (ix) a financial benefit arising from or as a result of a loan;
>
> (x) assistance in obtaining a financial benefit arising from or as a result of a loan…

[26] Section 766C(7) provides that the regulations may prescribe conduct that is taken to be, or not to be, dealing in a financial product. Reg. 7.1.34(2)(a) exempts from the category, the enforcement of rights under a credit facility including the enforcement of rights by a person acting under a power of attorney.

93. Accordingly, reg. 7.1.06(3)(a) prescribes the character of a credit arrangement; while reg. 7.1.06(3)(b) provides non-exhaustive examples of the kinds of instrument which exhibit this character.

94. The text and structure of reg. 7.1.06(3)(a) correspond to the definition of "credit" in the State-based Uniform Consumer Credit Code, which commenced operation on 1 November 1996, and which was replicated by the *National Consumer Credit Protection Act 2009* (Cth).[27] The genesis of that definition and its construction within that statutory context is addressed by Bell J in *Geeveekay Pty Ltd and Others v Director of Consumer Affairs Victoria* (2008) 19 VR 512 at 519-533, at [34] – [92].

95. Regulation 7.1.06(3)(a)(i) (a contract under which payment of a debt owed by one person to another person is deferred) captures a circumstance in which payment of a debt that is owed is deferred. A question arises as to whether "debt" within this limb includes both a pre-existing debt and a debt created by or under the contract itself, or only the former. Construing the text in a commonsense fashion, consistent with the context and the statutory purpose and structure (as identified in [32] above) there is no warrant to read down the phrase to exclude a debt created by the contract itself.

96. Regulation 7.1.06(3)(a)(ii) (a contract under which one person incurs a deferred debt to another person) captures a circumstance in which, under a contract, a party incurs a debt which is postponed or delayed (and thereby deferred). The debt contemplated within this limb is a debt created, and then deferred, by the contract itself.

(2) Debt

97. "Debt" normally has one or other of two meanings: either an obligation to pay money or a sum of money owed: *Director of Public Prosecutions v Turner* [1973] 3 All ER 124 at 126.J per Lord Reid; which is now payable or will become payable in the future by reason of a present obligation.

98. While the word "debt" is not a word of precise and inflexible denotation: *Hawkins and Others v Bank of China* (1992) 26 NSWLR 562 at 572.C, per Gleeson CJ, it comprehends a contingent liability, and a liability which is conditional, as well as one which is present and absolute: *Ibid* at 572.D

(3) Incurs

99. The word "incurs" takes its meaning from its context and is apt to describe, in an appropriate case, the undertaking of an engagement to pay a sum of money at a future time, even if the engagement is conditional and the amount involved uncertain: *Hawkins and Others v Bank of China* (1992) 26 NSWLR 562 at 572.C, per Gleeson CJ at 572.D.

(4) Any form of financial accommodation

100. "Financial accommodation" is a broad concept.

101. In other statutory contexts, the notion of "financial accommodation" is defined to include: borrowing or raising money, including by assuming liabilities in consideration

[27] Schedule 1, Part 1, clause 3

thereof;[28] issuing, endorsing or otherwise dealing in promissory notes; drawing, accepting, endorsing or otherwise dealing in bills of exchange, and loans.[29]

102. Its application is directed to a circumstance – such as presently occurs – in which accommodation is provided to a person who is under a primary obligation to the person providing the credit: *Brownbill and Others v Esanda Finance Corporation* (1991) 31 FCR 153 at 158 per Morling, Neaves and Pincus JJ.

103. The breadth of the phrase "financial accommodation" is expanded by the words which qualify it. The pronoun "any" refers to one or some of a number of things, no matter how much or how many. The noun "form" connotes a type or variety of something, or a particular way in which a thing exists or manifests itself. Read together, "any form of financial accommodation" is a phrase of deliberately ample operation.

(5) A financial benefit arising from, or as a result of, a loan

104. Addressing the terms of the regulation in turn, the notion of a "financial benefit" arises elsewhere in the Act, including in Part 2E.2, s 229 ("Giving a financial benefit"). It is a phrase amenable to being given the broadest of interpretations: *HIH Insurance Ltd (In Prov Liq) and Others v Adler* (2002) 168 FLR 253 per Santow J at [181] – [182]; *Adler and Another v Australian Securities and Investment Commission* (2003) 179 FLR 1 per Giles JA at [309] and [312].

105. A loan is the transfer of an asset, typically funds, from a lender who controls the funds to a borrower in return for payment, typically in the form of interest.

106. The term of connection "arising from [a loan]" and the disjunctive causal phrase "or as a result of [a loan]" expand the operation of the notion of financial benefit.

107. Accordingly, to attract the operation of reg. 7.1.06(3)(b)(ix) and (x), an instrument must have the effect of conferring a financial benefit, and this must bear some causal nexus to a loan arrangement.

(6) The reasoning of the Court of Appeal

108. Giles JA concluded that the Funding Deed was not a credit facility on the basis that ILP promised to pay money for the benefit of CHM, but did not advance money to it and no debt was owed by CHM, payment of which was deferred ([80]).

109. However, a loan may exist absent an absolute right to repayment; where there is an advance of money or money's worth (in whatever form) upon the consideration of a promise to repay (upon whatever terms or conditions).[30]

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[28] *Public Authorities (Financial Arrangements) Act 1987* (NSW) ss3(1) and 4(1), incorporated into s3(1) of the *Treasury Corporation Act 1983* (NSW)

[29] Section 3(1) *Borrowing and Investment Powers Act 1987* (Vic); s 2 *Government Owned Corporations Act 1993* (Qld); s 83(1) *Stamp Duties Act 1920* (NSW)

[30] *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209, 216-7; *Ex Parte D* (1995) 17 ACSR 52 at 70 per Murray J; C L Pannam, *The Law of Money Lenders in Australia and New Zealand* (Sydney, Lawbook Company, 1964) p 6; *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* [1992] 2 VR 279 at 321-3 per Ormiston J.

110. Indeed, in various contexts, a loan may comprise money paid for, on account of, on behalf of or at the request of any person and any transaction (whatever its form or content) which in substance effects a loan of money: e.g., *Duties Act 1997* (NSW) s 206(a)(i) – (iv).

111. Young JA appeared to acknowledge that it was "possible to fit" the Funding Deed "within the literal wording of 'credit facility'" ([219]); but declined so to characterise the Funding Deed on the basis that there were other and perhaps more significant aspects to it: [211] – [220]. This does not sit comfortably with His Honour's reasoning at [182] and [208].

10 112. Hodgson JA correctly concluded that the Funding Deed was in substance a loan of the costs of the litigation funded, which must be repaid, in the not unlikely event that the Federal Court Proceedings are sufficiently successful ([137]); a contingency which need not be inevitable, but need merely not be too remote ([136]). In any event, the Funding Deed was a form of financial accommodation within the meaning of reg. 7.1.06(3)(b)(i): [137].

(7) The proper characterisation of the Funding Deed

113. The credit exclusion is attracted if, properly characterised, the Funding Deed is a contract, arrangement or understanding, under which payment of a debt owed by CHM to ILP (or another person) is deferred, or CHM incurs a deferred debt to ILP; including
20 by being any form of financial accommodation or assistance in obtaining, or *per se*, a financial benefit arising from or as a result of a loan.

114. The primary obligation imposed upon ILP by the Funding Deed is the advance, pursuant to cl. 2.1, of monies to CHM in respect of "Legal Costs", as that term is defined at cl. 1. The Funding Deed is essentially an advance of monies by ILP because it directly confers a financial benefit upon CHM. Credit is thereby extended by ILP to CHM. This credit takes the form either of financial accommodation or a loan.

115. By clause 3.1, CHM defers repayment to ILP of the debt created by payment by ILP on behalf of CHM of the Legal Costs. ILP obtains a contingent interest in a sum of money: cl 1(a) – (d) definition of "Percentage Payment", [31] and cl 6.2.

30 116. ILP provides financial accommodation to CHM by funding the Federal Court Proceedings subject to later repayment of one or more of a series of sums of money.

117. The transaction can also be depicted as follows. ILP confers a financial benefit arising from a loan, by way of a limited recourse loan.[32] The loan consists in the transfer of funds from ILP pursuant to cl. 2.1, in return for payment (in the form of the "Funding Fee") pursuant to cl. 3.1(b), to be returned in one sum at the maturity of the loan, pursuant to cll. 3.7 and 3.8.

118. Correlatively, CHM incurs a debt, by undertaking an engagement to pay a sum of money at a future time, being the repayment of "Legal Costs" and payment of the "Funding Fee" and a proportion of any "Resolution Sum": cll. 3.1 – 3.9.

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[31] A term which is defined in a manner which recognises the time value of money.

[32] Under which no personal liability attaches to CHM, and ILP's only recourse is to the profits of the Funding Deed, i.e., the proceeds, if any, of the litigation.

119. CHM thereby incurs an obligation to pay a sum of money to ILP: *R v Brown* (1912) 14 CLR 17; contingent upon the occurrence of a future event: *Director of Public Prosecutions v Turner* [1973] 3 All ER 124; *Federal Commissioner of Taxation v Gosstray* [1986] VR 876; *Re William Hockley Ltd* [1962] 2 All ER 111, per Pennycuick J; *Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455, per Kitto J at 459 and Owen J at 461.

120. That obligation is incurred either at the time of entry into the Funding Deed, in which event payment of the debt is deferred, or at the time of the transfer of funds to CHM by ILP, in which event it is a deferred debt: *Shephard v ANZ Banking Corporation Ltd* (1996) 41 NSWLR 431; *Hawkins & Ors v Bank of China* (1992) 26 NSWLR 562.

121. Payment of the debt is deferred, pursuant to cl. 3.1(a), until "Resolution" of the Federal Court Proceedings, and pursuant to cl. 3.7, until the "Repayment Date".[33] The loan, in turn, is secured by the Charge: cf cl. 2.1 of the Charge.

PART VII: LEGISLATION

122. The following provisions are relevant to the argument in this case. They appear in the Annexure in the form they took at the time of the hearings and decisions below and at the date of these submissions. They have not been materially amended since then.

123. *Corporations Act 2001* (Cth), Chapter 7, Part 7.1, Divisions 1 – 4, particularly at ss 761A, 761E, 762A, 762C, 763A, 763C, 763E, 764A, 765A, 766A, 766C, and Part 7.6, particularly at ss 911A, 924A and 925A.

124. *Corporations Regulations 2001* (Cth), Chapter 7, Part 7.1, Division 1, particularly at reg. 7.1.06(1) and (3).

PART VIII: ORDERS SOUGHT

125. The appeal be allowed.

126. Orders 2 – 10 of the Court of Appeal of 3 June 2011 be set aside (save in so far as Order 9 relates to the costs of the appeal) and in lieu thereof, the following orders be made:

    (a) within 30 days of judgment, the First Respondent pay an early termination fee of $9,000,000.00 to ILP pursuant to clause 4.2 of the Funding Deed;

    (b) the First and Second Respondents pay the Appellant's costs of the appeal to the High Court and the cross-appeal to the Court of Appeal.

127. Such further or other orders as the Court thinks fit.

Dated: 24 November 2011

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[33] The Funding Deed contains provisions which are ordinary incidents of a loan agreement, *viz*: conditions precedent: cll 7.6 and 7.7; repayment obligations: cl 3.1; availability period: cll 2 & 9; representations and warranties: cl 7; negative pledge: cl 7.3, and a drawdown mechanism: cl 2. The manner in which the "percentage payment", as defined in clause 1, escalates with the effluxion of time, has the character of an interest payment.

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