INTERNATIONAL LITIGATION PARTNERS PTE LTD v CHAMELEON MINING NL (RECEIVERS AND MANAGERS APPOINTED) & ORS
(S362/2011)

Court appealed from: New South Wales Court of Appeal

[2011] NSWCA 50

Date of judgment: 3 June 2011

Special leave granted: 28 October 2011

This matter concerns the interpretation of a Litigation Funding Agreement. International Litigation Partners Pte Ltd ("ILP") entered into an agreement ("the Funding Agreement") to fund litigation commenced by Chameleon Mining NL ("Chameleon") in the Federal Court. The Funding Agreement included an Early Termination clause which specified that the agreement could be terminated (subject to a fee being paid) if a Change in Control of Chameleon occurred. In the absence of such a termination, ILP was entitled to a Funding Fee calculated as a percentage of any sum ultimately awarded upon the resolution of the proceedings.

In August 2010 a Change in Control of Chameleon occurred when Cape Lambert Resources ("CLR") acquired a significant say in Chameleon's affairs. At that time, Chameleon gave notice to ILP of the rescission of the Funding Agreement pursuant to section 925A of the *Corporations Act* 2001(Cth) ("the Corporations Act"). Relevantly, that section gave a statutory right of rescission to a party when a non-licensed person had agreed to provide it a financial product. (At no stage was ILP ever licensed to deal in financial products.) ILP contested the rescission and claimed both the Early Termination Fee and the Funding Fee.

On 31 August 2010 Justice Hammerschlag held that the Funding Agreement was not a financial product and it could not therefore be rescinded. His Honour therefore found that ILP was entitled to the Early Termination Fee but not the Funding Fee.

On 15 March 2011 the Court of Appeal (Giles, Hodgson & Young JJA) dismissed ILP's appeal, but allowed Chameleon's cross-appeal. All Justices agreed that the Funding Agreement could be rescinded if it was a financial product. It would not however be considered a financial product if it was incidental to another facility, the main purpose of which was not a financial product purpose. Their Honours however disagreed as to whether the financial product aspect of the Funding Agreement was in fact incidental. Justices Giles and Young held that the financial product aspect was not an incidental component of the facility. It was a main purpose. Justice Hodgson however disagreed. Differing majorities also found that the Funding Agreement was not a derivative (Young and Hodgson JJA, Giles JA dissenting), or a credit facility (Giles & Young JJA, Hodgson JA dissenting).

All Justices however held that when properly construed, ILP's obligations and entitlements under the Funding Agreement ceased when the Change of Control of Chameleon occurred. ILP was therefore only entitled to the Early Termination Fee.

The grounds of appeal include:

- The Court should have found that the Funding Agreement did not involve management of the financial risk of Chameleon and hence did not constitute a financial product within the meaning of section 763A(1)(b) of the *Corporations Act.*

On 17 November 2011 CLR filed a notice of contention, the ground of which is:

- The Funding Agreement was a “financial product” (within the meaning of that term in section 763A, read with section 764A, of the *Corporations Act*) as the Funding Agreement was an arrangement which was a “derivative” (as defined by section 761D of the Corporations Act) and was not a contract for the provision of future services.

On 21 November 2011 Chameleon filed a notice of contention, the grounds of which include:

- The Court below failed to decide that the Funding Agreement between ILP and Chameleon concerning the Federal Court proceedings No. NSD 2355 of 2007 was a derivative within the meaning of section 761D of the *Corporations Act*, and, for this reason, a financial product within the meaning of section 764(1)(c) of the *Corporations Act*.