HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN AND BELL JJ

INTERNATIONAL LITIGATION PARTNERS PTE LTD APPELLANT

AND

CHAMELEON MINING NL (RECEIVERS AND MANAGERS APPOINTED) & ORS RESPONDENTS

International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)
[2012] HCA 45
5 October 2012
S362/2011

ORDER

1. *Appeal allowed.*

2. *Set aside orders 2, 3, 6, 7, 9 and 10 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 3 June 2011, save for so much of order 9 as relates to the costs of the appeal to that Court, and, in their place, order that:*

   (a) *judgment in the sum of $8,381,144.30 be entered for the appellant against the first respondent;*

   (b) *the first respondent pay interest on the judgment sum of $8,381,144.30 to the appellant as follows:*

      (i) *pursuant to s 100 of the* Civil Procedure Act *2005 (NSW), the first respondent pay interest on the judgment sum from 10 August 2010, being the date on which the Early Termination Fee became payable, up to the date of entry of judgment; and*

(ii) *pursuant to s 101 of the* Civil Procedure Act *2005 (NSW), the first respondent pay interest on the judgment sum from the date of entry of judgment up to the date of payment.*

3. *The first respondent pay the appellant's costs of the appeal to this Court and of the cross-appeal to the Court of Appeal.*

4. *The security provided by the appellant, as a condition of the grant of special leave to appeal given by this Court on 28 October 2011, be released.*

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with R C A Higgins for the appellant (instructed by Ashurst Australia)

J T Gleeson SC with M A Jones SC and M L Bennett for the first respondent (instructed by Swaab Attorneys)

C R C Newlinds SC with J C Giles for the second respondent (instructed by Lavan Legal)

Submitting appearance for the third and fourth respondents

CATCHWORDS

International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)

Corporations – Credit facility – Derivative – Financial product – Financial service and markets – Financial service providers – Licensing and regulation – Where litigation funding agreement purportedly rescinded by reason of the lack of a financial services licence – Whether litigation funding agreement a financial product – Whether litigation funding agreement a credit facility.

Words and phrases – "credit facility", "financial product", "financial service", "litigation funding agreement".

Corporations Act 2001 (Cth), ss 760A, 761A, 761D, 761EA, 762A-762C, 763A, 765A, 766A-766E, 911A, 924A, 925A, 925E.
Corporations Regulations 2001 (Cth), reg 7.1.06.

1 FRENCH CJ, GUMMOW, CRENNAN AND BELL JJ. This appeal from the Court of Appeal of the Supreme Court of New South Wales (Giles and Young JJA; Hodgson JA dissenting)[1] turns upon the construction of provisions in Ch 7 in the *Corporations Act* 2001 (Cth) ("the Act") and regulations made thereunder[2].

Chapter 7 of the Act

2 Chapter 7 is headed "Financial services and markets". The "main object" of Ch 7 is stated in s 760A as the promotion of:

> "(a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
>
> (b) fairness, honesty and professionalism by those who provide financial services; and
>
> (c) fair, orderly and transparent markets for financial products; and
>
> (d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities."

3 Chapter 7, in the form relevant to these proceedings, was included in the Act by Sched 1 to the *Financial Services Reform Act* 2001 (Cth) ("the Reform Act"). In the second reading speech on the Bill for the Reform Act[3], the Minister for Financial Services and Regulation referred to the Financial System Inquiry Report ("the Wallis Report")[4] and said that it had "concluded that the complex and fragmented regulatory framework was creating inefficiencies for financial service providers and confusion for consumers".

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1 *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2011) 276 ALR 138.

2 References in these reasons to the Act are to the form taken at the critical date, which, as will appear, was 10 August 2010.

3 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 5 April 2001 at 26521-26526.

4 Australia, Financial System Inquiry, *Financial System Inquiry Final Report*, (1997).

4 The Minister went on to say:

> "[The Wallis Report] recommended the introduction of a single licensing regime for all financial sales, advice and dealing and the creation of a consistent and comparable product disclosure framework. ...
>
> [The bill] will create a streamlined regulatory regime for financial markets and clearing and settlement facilities.
>
> The bill recognises that it is no longer possible for different financial institutions, services and products to be regulated under separate regulatory frameworks.
>
> The bill will ensure that Australia's regulatory framework keeps pace with current developments in the financial services industry.
>
> The bill will remove regulatory barriers to the introduction of technological innovations and assist Australia's financial services industry to meet the technological challenge posed by the spread of e-commerce. ...
>
> Many financial service providers are already subject to regulatory frameworks governing licensing, disclosure and other conduct obligations. However, these frameworks vary across different industry sectors. This fragmentation increases compliance costs and reduces industry efficiency.
>
> The bill seeks to harmonise these diverse requirements within a single overarching framework that will apply to all financial service providers.
>
> The bill will replace a substantial amount of existing legislation, hence its size. ...
>
> The framework will also be capable of flexible implementation so that it can apply differently to different products where this difference can be justified within the overall objectives of the regulatory framework."

5 The legislative scheme implemented by the Reform Act has two significant characteristics. One is overinclusiveness. Rights and liabilities are drawn in overtly broad terms, on the footing that instances of overreach which become apparent in the administration of the legislation may be remedied by adjustments to the Act made not by remedial legislation but by exercise of powers conferred upon the Executive Government or bodies such as the Australian Securities and Investments Commission. The second characteristic is the creation by the legislation of rights and liabilities by means of criteria which

reflect fluid market and economic usage rather than any ascertainable and stable meaning in the law.

6 Part 7.1 of the Act (which includes s 760A) is headed "Preliminary" and contains complex definitional provisions. These are relevantly supplemented and qualified by Pt 7.1 Div 1 (regs 7.1.02-7.1.10) of the Corporations Regulations 2001 (Cth) ("the Regulations").

7 Part 7.6 of Ch 7 of the Act (ss 910A-926B) establishes a scheme for the licensing of providers of "financial services". Section 925A is of critical importance. It applies (by dint of s 924A) to an agreement with a client entered into in the course of a "financial services business" by a non-licensee who does not hold a licence and is not exempt from the requirement to do so, where the agreement constitutes or relates to the provision of a financial service by the non-licensee. Section 925A empowers the client to give to the non-licensee a written notice stating that the client wishes to rescind the agreement. This has the effect given by s 925E that the non-licensee is not entitled to enforce the agreement or to rely on it by way of defence or otherwise as against the client.

The litigation

8 At stake in this Court is the entitlement of the appellant ("ILP") to recover from the first respondent ("Chameleon") an "Early Termination Fee" pursuant to cl 4.2 of a deed dated 28 October 2008 between Chameleon and ILP ("the Funding Deed")[5]. Chameleon is a mining company whose shares are listed on the Australian Securities Exchange. ILP is a corporation based in Singapore. It undertook in the Funding Deed to fund litigation which Chameleon had instituted on 26 November 2007 in the Federal Court of Australia against Murchison Metals Ltd and others, claiming compensation for alleged breaches of statutory and fiduciary duties. The obligations owed by Chameleon to ILP under the Funding Deed were secured by a fixed and floating charge dated 28 December 2008 ("the Charge").

9 While at all material times ILP carried on in Australia what the primary judge (Hammerschlag J) described as the business of funding litigation[6], it was not the holder of an Australian financial services licence under Pt 7.6 of the Act.

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5 The full text of the Funding Deed is annexed to the reasons of the primary judge: *Chameleon Mining NL v International Litigation Partners Pte Ltd* (2010) 79 ACSR 462 at 481-491.

6 (2010) 79 ACSR 462 at 475 [77].

10 The Federal Court litigation came to a hearing in September and October 2009 and judgment was reserved[7]. Thereafter there were disagreements between ILP and Chameleon primarily concerning legal representation and settlement negotiations in the Federal Court litigation. On 10 August 2010, Chameleon and the present second respondent ("Cape Lambert") agreed that Cape Lambert would provide to Chameleon a "Standby Facility" of $6.5 million and would be entitled to appoint half of the board of directors of Chameleon. It has not been disputed that this agreement effected a "Change in Control" of Chameleon within the terms of cl 4.1 of the Funding Deed and so triggered the obligation of Chameleon under cl 4.2 to pay the Early Termination Fee. The Early Termination Fee was defined to mean an amount equal to "the Legal Costs (including Security for Costs)" expended by ILP up to the date of termination under cl 4.1 and a further amount being the higher of $9 million or the value of 20 per cent of the share capital of Chameleon at the "strike price" of its shares by the acquirer of the Change in Control[8].

11 As a counter-attack, on 10 August 2010, the critical date, Chameleon gave a notice of rescission of the Funding Deed, and relied upon s 925A of the Act as the source of its power to do so. In response, on 11 August 2010, ILP appointed the present third and fourth respondents as receivers to Chameleon in exercise of powers conferred by the Charge.

12 From the litigation which then ensued in the Equity Division of the Supreme Court of New South Wales the appeal to this Court arises. The third and fourth respondents, as receivers to Chameleon, entered submitting appearances. Cape Lambert supported the submissions of Chameleon and added its own submissions.

13 Upon an expedited final hearing in the Equity Division one of the issues concerned the entitlement of ILP to the Early Termination Fee. In his decision delivered on 31 August 2010 the primary judge granted a declaration that ILP was entitled to payment of the Early Termination Fee less any sums previously

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7 Comprehensive reasons were delivered on 20 October 2010: *Chameleon Mining NL v Murchison Metals Ltd* [2010] FCA 1129. Judgment on appeal was given by the Full Court on 21 February 2012: *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296.

8 Chameleon has taken no point that the Early Termination Fee has the character of a penalty against which equity would grant relief. Nothing in these reasons is to be taken as indicating any view on that subject.

paid to it. The Court of Appeal, however, by majority, disagreed and on cross-appeals by Chameleon and Cape Lambert a declaration was made that ILP was not entitled to payment of the Early Termination Fee.

14 For the reasons which follow, the conclusion reached by Hodgson JA in his dissenting judgment was correct, the appeal by ILP should be allowed and judgment should be entered in its favour for the Early Termination Fee.

The issues

15 Section 911A(1) imposes the licensing requirement upon "a person who carries on a financial services business in this jurisdiction". The expression "financial services business" means "a business of providing financial services" (s 761A). The term "financial service" has the meaning given by Pt 7.1 Div 4 (ss 766A-766E). This relevantly includes dealing in a "financial product" (s 766A(1)(b)).

16 Division 3 of Pt 7.1 (ss 762A-765A) is headed "What is a financial product?" Subdivision A (ss 762A-762C) is headed "Preliminary". Section 762B provides that Ch 7 applies to that component of a facility that is a financial product, to the exclusion of any other components of the facility. Section 762A provides an "Overview" of the operation of subdivs B, C and D as follows:

> "*General definition*
>
> (1) Subdivision B [ss 763A-763E] sets out a general definition of *financial product*. Subject to subsections (2) and (3), a facility is a financial product if it falls within that definition.
>
> *Specific inclusions*
>
> (2) Subdivision C [s 764A] identifies, or provides for the identification of, kinds of facilities that, subject to subsection (3), are financial products (whether or not they are within the general definition).
>
> *Overriding exclusions*
>
> (3) Subdivision D [s 765A] identifies, or provides for the identification of, kinds of facilities that are not financial products. These facilities are not financial products:
>
> (a) even if they are within the general definition; and

(b) even if they are within a class of facilities identified as mentioned in subsection (2)."

17 Accordingly, subdiv B provides a general definition of "financial product" in s 763A(1); a financial product includes a "facility" (which includes a contract, agreement, understanding or scheme (s 761A, s 762C)) through which a person "makes a financial investment" or "manages financial risk" (s 763A(1)(a) and (b)).

18 However, even if it otherwise falls within the general definition of financial product in s 763A, or subdiv C applies and it is otherwise identified as such by a specific inclusion listed in s 764A, a facility to which subdiv D applies and is within the specific exclusions provided in s 765A is not a financial product for the purposes of Ch 7 of the Act. One such exclusion (identified in s 765A(1)(h)(i)) is "a credit facility within the meaning of the regulations (other than a margin lending facility [as defined in s 761EA(1)])".

19 ILP submits that the Funding Deed answers the statutory description of a "credit facility", with the result that the whole of Ch 7, including the rescission provision in s 925A upon which Chameleon relied to deny any obligation to pay the Early Termination Fee, was not engaged.

20 If that submission respecting the operation of subdiv D is not accepted, alternative submissions are presented by ILP. One is that in any event subdiv B was not satisfied; the Funding Deed was not a "financial product", in particular, because it was an "incidental product" and so excluded by s 763E(1) from the term "financial product". Another submission by ILP fixes upon subdiv C. It is that, contrary to the submission by Cape Lambert on its Notice of Contention, the Funding Deed is not a "derivative". Derivatives are one of the specific things designated by s 764A(1)(c) as "financial products" for the purposes of Ch 7. The term "derivative" is given a lengthy definition by s 761D; this relevantly excludes "a contract for the future provision of services" (s 761D(3)(b)).

Credit facility?

21 The reasons of the Court of Appeal, no doubt reflecting the emphasis in submissions made at that stage of the litigation, gave detailed attention to the application to the Funding Deed of subdivs B and C.

22 However, it is convenient first to consider the submission by ILP that subdiv D is engaged as the Funding Deed answers the description of a "credit facility", placing it wholly outside Ch 7.

23 Under the subheading "Exclusion of credit", the Revised Explanatory Memorandum to the Bill for the Reform Act stated that credit facilities were not covered by the definition of "financial product" and noted that to the extent that they were consumer credit, they would be regulated by the State-based Uniform Consumer Credit Code ("the UCCC")[9]. Section 5E of the Act is designed to achieve the concurrent operation of State and Territory laws, where there is no direct inconsistency between them. (The UCCC was displaced by the *National Consumer Credit Protection Act* 2009 (Cth)[10].)

24 Paragraph 6.92 of the Revised Explanatory Memorandum read:

> "Although credit is not specifically included in the regime either by the general definition or the list of specific inclusions, it is possible that certain credit arrangements could have fallen within elements of the general definition. For example, 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. For this reason credit facilities are specifically excluded from the definition of financial product (proposed subparagraph 765A(1)(h)(i)). The regulations will define what is a credit facility for the purposes of the provisions. Generally any facility that would be regarded as credit (and not just consumer credit) for the purposes of the UCCC will be prescribed by the regulations."

25 Section 765A(1)(h)(i) excludes from the term "credit facility" a margin lending facility, but it has not been contended that the Funding Deed was of that character. Otherwise, content to the expression "credit facility" is relevantly given by reg 7.1.06 of the Regulations.

26 Subject to exclusions which do not apply, the provision of "credit ... for any period", with or without prior agreement between the credit provider and the debtor and whether or not both credit and debit facilities are available, is a "credit facility" (reg 7.1.06(1)(a)). The term "credit" is defined in reg 7.1.06(3)(a) as *meaning* a contract, arrangement or understanding under which payment of a debt to the credit provider "is deferred", and as *including* "any form of financial accommodation" (reg 7.1.06(3)(b)(i)). The use in this way of the concept "means and includes" is to avoid any doubt that what is identified by the inclusion falls

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9 Australia, Senate, Financial Services Reform Bill 2001, Revised Explanatory Memorandum at 43 [6.91]-[6.92].

10 Schedule 1, which is the National Credit Code, commenced on 1 April 2010.

within the scope of the designated meaning of "credit"[11]. The result is that a contract, arrangement or understanding that is *any* form of financial accommodation is "credit", and its provision "for any period" will be a "credit facility".

27 The appeal is most readily disposed of by concentration upon the issue whether by the Funding Deed ILP provided to Chameleon any form of financial accommodation in the sense just discussed.

28 The expression "a contract, arrangement or understanding ... [for] *any* form of financial accommodation" (emphasis added) is of considerable width of denotation. For example, an agreement by a bank to lend its name to a bill of exchange for the accommodation of its customer provides a form of financial accommodation, as is reflected in the expression "accommodation bill"[12]. The same may be said for the provision of a guarantee of the obligations to the creditor of the principal debtor. The extension by a bank to a customer of an overdraft facility provides a form of financial accommodation in respect of the presently undrawn portion of the overdraft. Further, the inclusion of the words "arrangement or understanding" indicates that regard may be had to matters of substance as well as of form.

The Funding Deed

29 The principal obligation undertaken by ILP in the Funding Deed was its agreement in cl 2.1 to pay the "Legal Costs" within 28 days of receipt of written notification requiring payment. "Legal Costs" were defined as all costs associated with procuring the files of Chameleon's previous solicitor in the Federal Court proceedings, and all future agreed legal costs and disbursements incurred by Chameleon and ILP in relation to those proceedings or any appeal (cl 1). Upon resolution of the proceedings in favour of Chameleon, whether by settlement or judgment, ILP would be entitled (cl 3.1(a)) to "Repayment" of the Legal Costs it had paid in accordance with cl 2.1; ILP also would be entitled to payment of the "Funding Fee" (cl 3.1(b)). This was an amount being the higher of three times the costs incurred by ILP under cl 2.1 and the "Percentage Payment" out of the "Resolution Sum", being the gross amount received upon

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11 See *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329-330; [1996] HCA 31; *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at 159 [32]; [2008] HCA 45; Pearce and Geddes, *Statutory Interpretation in Australia*, 7th ed (2011) at 252 [6.65].

12 *Bills of Exchange Act* 1909 (Cth), s 33.

settlement or judgment in the proceedings. The "Resolution Sum" was to be held by Chameleon's solicitors on trust for ILP, as to so much thereof as was due to ILP under the Funding Deed (cl 3.3).

30 Hodgson JA was of the view that what the Funding Deed provided to Chameleon was a form of financial accommodation[13]. This was so, in our opinion, notwithstanding that ILP was to pay the Legal Costs incurred by Chameleon rather than advancing to it the moneys to enable it to do so.

31 In its submissions, Cape Lambert emphasised that reg 7.1.06(1)(a)(i) defined "credit facility" for s 765A(1)(h)(i) of the Act as "the provision of credit ... for any period". This was said to require identification in the Funding Deed of a period of time when there was money owing by Chameleon but not payable. This reflected too narrow a view of what might amount to the provision for a period of "credit" by a form of financial accommodation. This is true also of the submission made by Chameleon that "financial accommodation" postulated an obligation by Chameleon to pay money which was deferred, the deferral representing the accommodation. A bank overdraft may be subject to a term that it be repayable on demand by the bank, but the facility is one of accommodation for that period which elapses before the demand is made.

32 Clause 2.1 of the Funding Deed contained a present promise by ILP to pay the Legal Costs within 28 days of receipt of written notification. The temporal limitation upon the performance of that promise was that the notification relate to costs in relation to the Federal Court proceedings or any appeal from a judgment or order therein. For its part, Chameleon undertook to make the payments identified in cl 3.1 if the Federal Court proceedings yielded a receipt whether by way of settlement or judgment.

Conclusion

33 The Funding Deed was a "credit facility", being for the provision for a period of a form of financial accommodation of Chameleon by ILP. The exclusion provision in s 765A(1)(h)(i) of the Act was satisfied.

34 This makes it unnecessary to consider the alternative submissions by ILP. These are predicated upon the Funding Deed not being a "credit facility".

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13 (2011) 276 ALR 138 at 161 [137].

Orders

35 The appeal should be allowed. The first respondent should pay the appellant's costs of the appeal to this Court and of the cross-appeal to the Court of Appeal. Orders 2, 3, 6, 7, 9 and 10 of the orders of the Court of Appeal made on 3 June 2011 should be set aside (save for so much of order 9 as relates to the costs of the appeal to the Court of Appeal) and in place thereof it should be ordered that:

a. judgment in the sum of $8,381,144.30 be entered for the appellant against the first respondent;

b. the first respondent pay interest on the judgment sum of $8,381,144.30 to the appellant as follows:

(i) the first respondent pay interest on the judgment sum, pursuant to s 100 of the *Civil Procedure Act* 2005 (NSW), from 10 August 2010, being the date on which the Early Termination Fee became payable, up to the date of entry of judgment; and

(ii) the first respondent pay interest on the judgment sum, pursuant to s 101 of the *Civil Procedure Act* 2005 (NSW), from the date of entry of judgment up to the date of payment.

36 These orders reflect the short minutes filed by ILP on 25 June 2012, by leave, after the conclusion of the hearing of the appeal.

37 An order also should be made for the release of the security that ILP provided in compliance with the condition attached to the grant by this Court of special leave.

38 HEYDON J. The background and the relevant legislation are set out in the joint judgment. I adopt the abbreviations for the legislation and the agreement between the parties there employed.

The facts

39 The appellant, alas, is a litigation funder. It entered a Funding Deed with the first respondent by which it agreed to fund the first respondent's conduct of certain litigation in which the first respondent's solicitors had changed.

40 The appellant agreed in the Funding Deed to pay the "Legal Costs" within 28 days of receiving a written notification demanding payment and substantiating documentation if required (cl 2.1). The "Legal Costs" were costs associated with procuring legal files from the first respondent's previous solicitor as well as certain future agreed legal costs and disbursements (cl 1). Thus the appellant did not supply the first respondent with money for it to pay the "Legal Costs" incurred by the first respondent's lawyers. Instead it paid the money directly to the lawyers. It would not be reimbursed until either the proceedings reached "Resolution" (cl 3.1) or there was a Change in Control of the first respondent (cl 4.1). In the latter event, the appellant was entitled to immediate payment by the first respondent of the Early Termination Fee as defined in cl 1 (cl 4.2).

41 By reason of dealings between the first respondent and the second respondent, there was a Change in Control of the first respondent. The first respondent disputed the appellant's entitlement to the Early Termination Fee, and purported to rescind the Funding Agreement under s 925A of the Act, on the ground that the appellant entered into the Funding Deed in the course of the appellant's "financial services business", which it carried on without a licence (s 911A of the Act).

The statutory structure

42 A "financial services business" is a business which provides "financial services" (s 761A of the Act). The expression "financial service" includes dealing in a "financial product" (s 766A(1)(b) of the Act).

43 The appellant denies that it has dealt in a "financial product". A "credit facility" within the meaning of the Regulations is not a "financial product" (s 765A(1)(h)(i) of the Act). Pursuant to reg 7.1.06(1)(a), a "credit facility" includes "the provision of credit" for any period. Regulation 7.1.06(3)(b)(i) provides that "credit" includes "any form of financial accommodation". In ordinary usage, "accommodation" means anything which supplies a want.

Conclusion

44 The crucial issue is thus whether the appellant provided the first respondent with any form of financial accommodation. The first respondent

needed lawyers to conduct its litigation. Lawyers would not do so unless paid. The first respondent had a want of money to pay them. The appellant supplied that want by paying the first respondent's lawyers directly. The accommodation so supplied extended for the period marked by cl 3.1, unless cl 4.1 came into operation earlier. The second respondent submitted that the definition of "credit facility" in the Act and the Regulations required identification of a period of time when there was money owing but not payable. Clauses 3.1 and 4.2 identified times when the money would be both owing and payable. That is sufficient to satisfy the words "the provision of credit … for any period" (reg 7.1.06(1)(a)(i)). What was given was financial accommodation for the periods defined in cll 3.1 and 4.2. The first respondent submitted that "credit" required an "element of a definite unavoidable obligation but with a concept of deferral". This construction imposes restrictions on the definition of credit considered in the context of a facility for providing credit in the form of "financial accommodation" which are not present in the statutory language. "Accommodation" is a wide expression. As the appellant submitted, the words "any" and "form" in the expression "any form of financial accommodation" indicate that it is an expression to be construed amply.

Orders

45 The orders proposed in the joint judgment should be made.