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Australian and New Zealand Case Law Update – Australia

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1 One of the difficulties of the topic is that it involves much reading and analysis, but provides little of general application. Bearing that in mind, I propose to spend most of my time discussing the decision of the Full Court of the Federal Court of Australia in *Leveraged Equities Ltd v Goodridge*[1].

2 The significance of that decision lies partly in what it has to say about assignment and novation of commercial agreements (or, more accurately, of rights and obligations under commercial agreements), and partly from the fact that the High Court of Australia has dismissed an application for special leave to appeal, although without endorsing all aspects of the reasoning of the Full Court[2].

3 To the extent that time permits, I will move to a very recent decision of the Court of Appeal of the Supreme Court of Queensland, *Platinum United II Pty Ltd v Secured Mortgage Management Ltd (in liq)* [3] (dealing with the question of whether there is any obligation to make discretionary advances under a commercial loan facility agreement), the decision of the High Court in *Public Trustee of Queensland v Fortress Credit Corporation (Aust) 11 Pty Ltd* [4] (dealing with the question of whether the conversion of an

* Judge, Supreme Court of New South Wales. I acknowledge with thanks the contributions of my tipstaff, Ms Karen Petch and of the tipstaff to the Honourable Justice Barrett, Mr Nicholas Mirzai, to the preparation of this paper.
[1] [2011] FCAFC 3.
[2] [2011] HCATrans 154.
[3] [2011] QCA 162.
[4] [2010] HCA 29; (2010) 241 CLR 286.

existing unsecured liability into a secured liability 'varied' the terms of, and the rights and liabilities arising under, an existing charge or created a new charge), the decision of the Court of Appeal of New South Wales in *International Litigation Partners Pte Ltd v Chameleon Mining NL* [5] (dealing with the question of whether a litigation funding agreement is a financial product, derivative, or a credit facility) and, perhaps, some recent single judge decisions: *Brighten Pty Limited v Bank of Western Australia Limited*[6]; *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd*[7]; *Re Australian Property Custodians Holdings Ltd; ex parte Horne*[8]. Once all that has been done, I will turn to the wider lessons that may be derived from the cases.

***Goodridge*: the facts, the issues and the decision at first instance**

4 Mr Ross Goodridge, a barrister, made a margin lending loan and security agreement ("LSA") with Macquarie Bank Limited in May 2003. As one would expect, the LSA contained provisions permitting Macquarie to make a margin call on short notice, and authorising Macquarie to sell securities if the margin call was not satisfied within the specified time.

5 Initially, Mr Goodridge used the facility to acquire shares in listed companies. However, by late 2008, his "portfolio" consisted of only one investment: more than 5,600,000 units in the Macquarie Countrywide Trust ("Trust").

6 In January 2009, Macquarie sold its margin loan book to the appellant Leveraged Equities Limited. The transaction was, and the documents pursuant to which it was effected were, complex. There was an intermediate sale of the assets to BNY Trust Company of Australia Ltd and an on-sale to Leveraged Equities.

[5] [2011] NSWCA 50.
[6] [2010] NSWSC 133
[7] [2010] NSWSC 233
[8] [2010] VSC 492

7 A month later, on 5 February 2009, Mr Goodridge's assets in the Trust had a market value of a little of $1,000,000.00, and his loan balance was about $860,000.00. Leveraged Equities made a margin call on 5 February 2009. Mr Goodridge made arrangements to satisfy that margin call by directing an imminent distribution from the Trust, of the order of $174,000.00, to be credited to Leveraged Equities in satisfaction of the margin call. For reasons beyond Mr Goodridge's control, those instructions were not carried out, and the distribution was paid into his cash management account. That did not matter a great deal, because Leveraged Equities was able to, and did, draw on that account in satisfaction of the margin call.

8 By 23 February 2009, the market value of units in the Trust had dropped further. It is clear from the findings of the primary judge (Rares J) that officers of Leveraged Equities were becoming uncomfortable with its exposure to Mr Goodridge and his single-security portfolio[9]. On 23 February 2009, Leveraged Equities made what it said were two margin calls: one, by email sent at 2:05pm; and the other, by email sent at 6:29pm. There was an intermediate email (sent at 3:57pm) confirming the earlier margin call and asking how it would be satisfied.

9 The principal issues before the primary judge (leaving aside issues as to the efficacy of the arrangements made between Macquarie and BNY, and questions of unconscionable conduct) were in substance:

(1) did the transactions and transaction documents between Macquarie, BNY and Leveraged Equities effect an assignment and novation of the contract between Mr Goodridge and Macquarie, so that Mr Goodridge and Leveraged Equities became parties to a contract on the terms of the LSA, and so that Leveraged Equities was able to enforce the relevant provisions of the LSA against Mr Goodridge?

(2) Were the asserted margin calls made on 23 February effective (or was either of them effective), so that Mr Goodridge was required to comply with them according to their terms?

(3) Regardless of the efficacy of the margin calls, was Leveraged Equities in any event entitled to sell units in the Trust so as to bring Mr Goodridge's loan balance into compliance?

10 Clause 21.2 of the LSA provided that Macquarie could assign, transfer, novate or otherwise deal with in any manner all or any part of the benefit of the LSA and any of its rights, remedies, powers, duties and obligations under it, to any person, "without the consent of the Borrower".

11 Somewhat mysteriously, despite the width of cl 21.2, cl 21.4 authorised Macquarie or its assignee or transferee "to assign its rights and novate its obligations under this Agreement, or any part of this Agreement, to any trustee or manager of any securitisation programme".

12 On 7 January 2009, Macquarie made a "Transfer Proposal" to BNY, as acquiring trustee. By cl 5 of that proposal, once BNY held the benefit of the "Assigned Assets", Macquarie thereupon and without the need for any further act assigned all its legal right, title and interest in those assets to BNY.

13 By cl 6 of the proposal, the parties agreed that with effect on and from the "Assignment Date", BNY "will assume the duties, obligations and liabilities of MBL under or in respect of each Assigned Asset".

14 Put simply, the case for Leveraged Equities was that cl 21 of the LSA authorised assignment and novation, and that this was precisely what was effected by the transfer proposal of 7 January 2009.

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[9] *Goodridge v Macquarie Bank Limited* [2010] FCA 67 at [35] and following.

15 Then, on 8 January 2009, BNY as "outgoing trustee," Leveraged Equities as "incoming trustee" and another company associated with Leveraged Equities and its parent as "manager" entered into a "Deed of Termination and Appointment", the effect of which was intended to be that Leveraged Equities would become trustee of the trust (of which the assigned assets, including Mr Goodridge's LSA, were assets) in place of BNY.

16 Leveraged Equities' case was that the 8 January deed had the effect of assigning and novating to it, as incoming trustee, the benefits and obligations accruing and arising under the assigned assets, including Mr Goodridge's LSA.

17 There was an issue as to notice. It is not necessary to deal with this.

Reasoning: novation

18 Rares J considered the question of novation[10]. The steps in his Honour's reasoning were, in substance:

(1) it is essential for the existence of a contract that there be a voluntary assumption by each party to it of a legally enforceable duty to the other [11]: *Australian Woollen Mills Pty Ltd v The Commonwealth*[12]; *Ermogenous v Greek Orthodox Community of SA Inc*[13]*.*

(2) Novation is the making of a contract between A and C in consideration of the discharge of a previous contract made between A and B, so that under the new contract C assumes the obligations to A that B had under the earlier contract[14]: *Olsson v Dyson* [15].

[10] At [87] and following.
[11] At [104].
[12] (1954) 92 CLR 424 at 457.
[13] (2002) 209 CLR 95 at 105 [24] – [25].
[14] [2010] FCA 67at [106].

(3) There are no particular formal requirements to achieve a novation; and it may be sufficient if the relevant intention (objectively ascertained) can be spelled out of several contractual documents, or several clauses in the one contractual document[16]: *Federal Commissioner of Taxation v Sara Lee Household and Body Care (Australia) Pty Ltd*[17].

(4) Because novation is a transaction by which all parties to a contract agree that a new contract is substituted for an existing contract, and involves the extinguishment of one set of obligations and the creation of substituted obligations, intention (express or implied) is crucial to show novation[18]: *Fightvision Pty Ltd v Onisforou*[19].

(5) Accepting that, in searching for intention to novate, the court should not take a narrow or pedantic approach, particularly in the case of commercial arrangements[20], nonetheless there was here no consent from Mr Goodridge to became a party to a new contract, because the prospective consent given by cl 21 did not identify any such new contract[21].

(6) By cl 21, Mr Goodridge authorised Macquarie to act on his behalf to bind him to a novated contract with a third party[22]; but in this case there was as a matter of fact no novation from BNY to Leveraged Equities[23], so that even if there had been a novation of the LSA from Macquarie to BNY, there was no further novation from BNY to Leveraged Equities.

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[15] (1969) 120 CLR 365 at 388 – 391 (Windeyer J).
[16] [2010] FCA 67 at [108].
[17] (2000) 201 CLR 520 at 532 – 533 [16-18].
[18] At [112].
[19] (1999) 47 NSWLR 473 at 491-492 [78].
[20] [2010] FCA 67at [112], citing *Fightvision* at 493 [86] and *Upper Hunter County District Council v Australian Chilling and Freezing Co Pty Ltd* (1968) 118 CLR 429 at 437.
[21] At [116].
[22] At [117].
[23] At [119] presumably referring back to [89] and following.

(7) Consent to any novation or assignment should not be implied from the events of February 2009[24].

Reasoning: assignment

19 Rares J dealt with the question of assignment separately from the question of novation: not surprisingly, since novation deals with what is in substance the transfer of the burden of contractual obligations from one person to another, whereas assignment deals with the transfer of property, namely the thing in action constituted by the benefit of a contractual promise.

20 Rares J started with the proposition that there was a distinction between "the nature of an assignment" on the one hand, and "the consequence of giving notice of the assignment" on the other[25]. No question of notice, or for that matter of effect in equity in the absence of notice, can arise unless there is something capable of being categorised as an assignment: namely, "an immediate disposition of a legal or equitable right, title or interest"[26].

21 The primary reason that Rares J gave for rejecting the respondents' case based on assignment was that the rights and obligations under the LSA were so interconnected that the rights were incapable of separate assignment. This arose, his Honour held, because the LSA did not provide for "a static or unchanging liability due by Mr Goodridge to" Macquarie, but included, whilst there was no default, a right to "draw down further on the margin loan up to [the] limit" if there were sufficient security[27]. Because, in his Honour's view, there had been no novation of Macquarie's obligations under the LSA to Leveraged Equities, the consequence of any assignment would have been a "tripartite putative relationship in which there w[as] one lender, [Macquarie], and a different assignee creditor, Leveraged Equities": a situation which was "byzantine to

24 At [122] - [124].
25 At [168].
26 Ibid.
27 At [175].

say the least"[28]. That produced, in his Honour's view, an "unworkable situation"[29] and hence, a situation in which it was "impossible… to bifurcate the lending obligations and rights"[30].

22 Thus, whilst "the courts should strive to give effect to commercial dealings and contracts"[31], there could be no "separation of [Macquarie's] existing legal right to a debt and supporting security owed by Mr Goodridge from its continuing obligation to lend to him"[32]. Thus there was no effective assignment.

23 His Honour also held, as a question of fact, that no notice of the assignment had been given, and thus, even if there were an assignment, it could not be effective at law because the requirements of s 12 of the *Conveyancing Act* 1919 (NSW) had not been satisfied[33].

Reasoning: the margin calls

24 The issues as to the efficacy of the margin calls said to have been made on 23 February 2009 turned in large part on cll 5.1 and 5.2 of the LSA. Those provisions had been amended, pursuant to Macquarie's unilateral right to do so subject to the giving of notice (which Rares J found had been done)[34]. By cl 5.1, if the total loan balance exceeded or in Macquarie's opinion was likely to exceed the aggregate of the "Market Based Limit" (of the securities) and the "Buffer", then Macquarie might in its discretion require Mr Goodridge to pay a sum up to the amount by which the total loan balance exceeded, or was likely to exceed, the market based limit. By cl 5.2, Mr Goodridge was required to comply with any such margin call by 2:00pm on three business days after it was made "unless otherwise notified by Macquarie Bank Limited in its absolute discretion".

[28] At [177]; see also at [184].
[29] At [188]; see also [177] and [184].
[30] See at [192].
[31] At [196].
[32] At [200].
[33] At [147].
[34] At [12].

25 The market based limit of the securities was derived by applying a lending ratio (which might vary from time to time) to the market value of the underlying securities at any given time; and the buffer was a percentage of that market based limit as determined by Macquarie from time to time. By cl 7.1 of the LSA, Macquarie had the right to require Mr Goodridge to make payments due under the LSA in any manner that Macquarie might determine, "including by way of a direct debit authority". A direct debit authority was indeed given by Mr Goodridge: in his application form.

26 The first margin call (in view of the conclusions of the Full Federal Court, I will not refer to the "purported" or "alleged" margin calls) specified an amount a little over $130,000.00, and asked Mr Goodridge to advise "how this will be satisfied by 2:00pm tomorrow". The second margin call made on 23 February, for a little over $190,000.00, specified that the amount of the margin call "must be satisfied by COB tomorrow" and asked Mr Goodridge to advise how this would be done.

27 It was Mr Goodridge's case, which Rares J accepted, that had he been given the time specified by cl 5.2 of the LSA to meet the margin calls, he could have raised the necessary funds by way of loan[35]. The issue was whether, on its proper construction, cl 5.2 of the LSA authorised Leveraged Equities to require that the amount of a margin call be paid in less than the stipulated time. Rares J held that it did not[36]. His Honour gave several reasons:

(1) the obvious meaning of the concluding words of cl 5.2 was to excuse Mr Goodridge from compliance if the lender so determined; i.e, if the lender told him that he need not comply within the time specified[37].

[35] See at [62].
[36] At [64] for the reasons following at [65] to [72].
[37] At [66].

(2) The construction for which Leveraged Equities argued did not fit with the other provisions of the LSA, specifically with the right given to Mr Goodridge to satisfy any margin call by providing further security by 2:00pm on the following business day[38].

(3) Clause 5.2 did not in express words authorise the lender to fix a shorter time for compliance; and the construction for which Leveraged Equities contended was inconsistent with explanations given to Mr Goodridge and other borrowers when cl 5.2 was amended. As his Honour said, "[t]he right of a banker to require a customer to pay a debt on demand is significantly different to its right to require the customer to pay the debt after… a particular period of notice"[39].

Reasoning: cl 5.7

28 Clause 5.7 of the LSA gave rights, which appeared to be in addition to those arising under cll 5.2 and 5.4 following a margin call. For convenience, I set out cl 5.7, and the following subcl, cl 5.8:

> 5.7 Without limiting the Bank's rights following a Margin Call, if at any time the Total Loan Balance exceeds the aggregate of the Market Based Limit and the Buffer, the Borrower and the Securities Owner irrevocably authorise the Bank (and its officers and agents), as their respective several attorney, to sell or redeem (at the Bank's discretion) all or any part of the Secured Property as would produce sufficient funds to enable the Borrower to satisfy a Margin Call. If it becomes necessary to sell Securities which are listed for quotation on the ASX, such Securities may be sold through any broker nominated by the Bank at the broker's prevailing private client brokerage rates.
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> 5.8 The Borrower is responsible for monitoring the Total Loan Balance and the Market Based Limit and is liable for payment of any Margin Call at the time at which the relevant Margin Call arises, irrespective of when or whether or not any notice to pay a Margin Call is given by the Bank.

[38] At [67], [69] – [70].
[39] At [68].

29 Leveraged Equities submitted before Rares J and the Full Court that cl 5.7 gave an independent right to sell securities at any time after a margin call had been made, regardless of whether the time for compliance with the margin had arrived. Rares J rejected that argument, because "[i]t produces a very unreasonable and uncommercial result"[40]. That uncommercial result arose, his Honour held, because, following a margin call, Mr Goodridge had various alternative ways that he could satisfy it; and an immediate sale would cut across the exercise of those rights[41].

30 Thus, his Honour concluded, cl 5.7 operated only when the time for compliance with a margin call had arrived and Mr Goodridge did not comply[42]. His Honour observed that the LSA was "a carefully drawn document that, in general, offers broad rights and powers to the Bank, which drafted it"[43]. As his Honour pointed out, if the drafting did not do what the lender wanted then it could protect its position by redrafting its terms; the court should not go beyond the ordinary and natural meaning of the words used in an attempt to give even wider powers to the lender[44].

The decision of the Full Court

31 The principal judgment was given by Jacobson J. Finkelstein J agreed with Jacobson J, as did Stone J. However, Stone J made "some short additional observations". It is convenient to start by pointing out her Honour's criticisms of the documentation:

> This appeal turned in large part upon issues of construction which would not have arisen had the Loan and Security Agreement (LSA) been competently drafted. As Jacobson J has commented, the difficulties in this litigation owe much to the fact that the language used in the documentation of the contractual arrangements between the parties lacks clarity. It is difficult to understand how the imprecision and ambiguity of

[40] At [74].
[41] At [75] – [76].
[42] At [77].
[43] At [82]
[44] At [82].

> the documentation could have escaped the scrutiny of competent and sophisticated parties and their advisors. Some few examples will suffice to make the point[45].

32 As her Honour pointed out, "any uncertainty on the point could have easily have been avoided by an explicit reference to the lender's right to require compliance within a period of less than 3 days". Again, as her Honour pointed out[46], the issues under cl 5.7 "would not have arisen had this clause explicitly referred to the fact that a lender could [sell the borrower's securities] without giving notice to the borrower and without making a margin call".

33 It is easy to be wise after the event, but it cannot be said that the wording of the relevant provisions of the LSA was clear and unambiguous. Where parties negotiate a contract on equal terms, and without any suggestion of a vitiating factor, they may bargain for such terms as they wish; and as the decision in *Platinum United*[47] makes clear, if an extremely one sided contract results from that process, the fact that it is one sided, and favours inordinately the interests of one party over the other, is not a bar to enforcement according to its terms (objectively ascertained).

34 There is an obvious interest in certainty. Parties to any contract should know, without the need for litigation, what are their rights and liabilities under it. Although that is true of all contracts, it is a matter of particular significance in substantial commercial contracts, particularly those which are used for numerous dealings (as here, between a bank and numerous borrowers). If a party to such a contract wishes to have strong rights, it should stipulate for them in clear and unambiguous language, so that the other party can accept or reject the proffered contract, depending on its assessment of the value of the benefits that might flow to it from acceptance. In short, confused and unclear drafting helps no one.

[45] At [3].
[46] At [6].

35 Since the point of this paper is not to give a lecture about Drafting 1.01, I will move on to the substance of the Full Court's decision.

Unconscionability

36 Perhaps the issue of unconscionability deserves first, but brief, mention. Mr Goodridge argued that ss 12CA and 12CB of the *Australian Securities and Investment Commission Act* 2001 (Cth) applied, and that the conduct of Macquarie and Leveraged Equities was either unconscionable under the general law (so as to fall within s 12CA) or unconscionable within the wider provisions of s 12CB. Rares J appeared to hold that the services provided to Mr Goodridge under the LSA were of a kind ordinarily acquired for personal, domestic or household use (s 12CB(5))[48]. That was because Mr Goodridge's stated purpose for entering into the facility was to provide for his retirement[49].

37 This issue was dealt with briefly in the Full Court. Jacobson J pointed out that when Mr Goodridge entered into the LSA, he had acknowledged that the funds would be applied wholly or predominately for business or investment purposes, and that his evidence as to subjective purpose was not relevant[50]. In any event, Jacobson J said, absent some conduct on the part of Leveraged Equities or Macquarie which amounted to taking improper advantage of Mr Goodridge (and, in his Honour's view, there was no such conduct), there was nothing unconscionable in Leverage Equities' protecting itself against a fall in the value of its securities by exercising the legal rights given to it for that very purpose[51].

38 The first reason given is sufficient to dispose of the case based on s 12CB. The second can only relate to the case based on s 12CA, and on the general law concept of unconscionability which that section picks up. It

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[47] [2011] QCA 162
[48] [2010] FCA 67 at [211].
[49] See at [211], [210].
[50] [2011] FCAFC 3 at [416].
[51] At [417].

may very well be correct; but it is, if I may say so, an extremely summary way of disposing of what in many cases is a complex factual question[52].

Reasoning: novation

39 In relation to novation, the Full Court departed from the reasoning of Rares J in two respects. First, and to the extent that Rares J had concluded that it was not possible for one party to a contract prospectively to authorise the other party unilaterally to novate it[53], the Full Court said that his Honour's approach was wrong in principle[54]. Secondly, to the extent that Rares J had not entirely rejected the possibility of prospective consent to novation, but had held that the contract to be created by novation was one "on uncertain and unidentified terms, or was not sufficiently identified[55], the Full Court thought that sufficient certainty was given by the wording of cll 21.2 and 21.4 of the LSA[56].

40 I start with the question of principle: is possible, by appropriate contractual drafting, to give prospective consent to a novation so that, when the novation is effected, it is binding on the person who gave the consent?

41 It is not entirely clear that Rares J had answered the question that I have just stated at the level of principle. I have summarised the steps in His Honour's reasoning at para 18 above. His Honour was sceptical of the proposition for which Leveraged Equities contended: that there could be prospective consent, or the waiver of any need to consent, to novation[57]. In the following paragraphs, Rares J expressed doubt that there could be a novation without actual consent to the proposed transaction[58]. However, the essence of his Honour's reasoning was that neither clause of the LSA

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[52] I note that when the High Court refused special leave to appeal, it expressed no view on this aspect of the Full Court's reasoning: [2011] HCATrans 154 at [7].
[53] See [2010] FCA 67 at [103], [106].
[54] [2011] FCAFC 3 at [302] – [317]
[55] [2010] FCA 67 see at [120] (from which the quoted words come), [116].
[56] [2011] FCAFC 3 at [328] for the reasons given from [318] - [328]
[57] [2010] FCA 67 at [100].
[58] At [101]-[102]

relied upon, cl 21.2 or cl 21.4, "gave the bank authority to novate to any person without Mr Goodridge's consent"[59].

42 Thus, as Moore-Bick LJ pointed out in *Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd*[60], it does not appear that Rares J entirely rejected the possibility that there could be advance consent to a novation[61]. On a close reading, it may well be that all that Rares J was saying was that, if this were possible, it did not occur in the present case: particularly because the subject matter of the postulated novation was too nebulous or uncertain to form the basis of a contract by novation. (Hence, I think, the need for Rares J to deal with and distinguish the old case of *Carlill v Carbolic Smoke Ball Co*[62], dealing with acceptance of offers to all the world and the creation thereby of a contract without the offeror's knowing of the acceptance. His Honour contrasted this situation with "[t]he nebulous words of cll 21.2 and 21.4" which did not, in his Honour's view, identify any particular contractual relationship or consideration for a novation"[63].)

43 Certainly, in *Habibson's Bank* at first instance, Cooke J thought that Rares J had denied the proposition that a party to a contract could consent in advance to its novation, saying that this view was "wholly uncommercial", a "purist point", and contrary to the proper development of the law of contract[64].

44 The Full Court pointed out that there was authority contrary to the view expressed (at least tentatively) by Rares J on the question of principle. One was the decision of Finn and Sundberg JJ in *Pacific Brands Sport and Leisure Pty Ltd v Underworks Pty Ltd*[65]. Their Honours there stated, admittedly by the way, a number of "relatively non-contentious

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[59] At [103].
[60] [2010] EWCA Civ 1335.
[61] At [22].
[62] [1893] 1 QB 256.
[63] At[120].
[64] *Habibson's Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd* [2010] EWHC 702 (Comm) at [28].
[65] (2006) 149 FCR 395.

propositions"[66] in relation to novation. One of those was that whilst novation will ordinarily require the agreement of the parties to the novated contract, the original contract might, on its proper construction, authorise one party to put another contracting party in its place without the need for further express agreement.

45 Further, in *Argo Fund Ltd v Essar Steel Ltd*[67]*,* Aikens J observed that it was possible to create a fresh contract by novation of an existing contract, without the need for further express agreement, where the original contract itself contained the mechanism (advance consent) for that to occur[68].

46 Jacobson J referred to these and other authorities, and concluded that if Rares J had intended to answer the question of principle in the negative, he was in error[69]. In other words, the decision of the Full Court is authority for the proposition that, in principle, a properly drafted novation provision in a contract may enable one party to replace itself with a substituted party by novation, without the need for further consent from, or a fresh tripartite contract involving, the other party.

47 Jacobson J moved next to the terms of cll 21.2 and 21.4[70]. The question essentially was whether the subject matter of the novation was sufficiently defined, in the LSA, to give content to any advance consent which Mr Goodridge had given by the terms of cl 21.2.

48 I should step aside for a moment and note that the words used by cl 21.2 were that the lender could assign, transfer, novate and otherwise deal with all or any part of the benefit of the LSA, and any of its rights, remedies, powers, duties and obligations under it, "without the consent of" Mr Goodridge. It may sound a little strange to talk of a clause which purports to authorise something to be done without consent as being a clause in

[66] At [32]
[67] [2005] 2 Lloyds Rep 203.
[68] At [50], [51].
[69] [2011] FCAFC 3 at [302] and following.
[70] [2011] FCAFC 3 at [318] and following.

which consent is given to the doing of that thing. This semantic difficulty is perhaps more apparent than real. I think the better view of cl 21.2, in so far as it referred to the specified acts being done without the consent of Mr Goodridge, is that it meant without his express consent to any of those acts, given at the time they were undertaken or proposed to be undertaken. Put shortly, cl 21.2 effectively operates as giving consent by Mr Goodridge to the specified acts being performed or undertaken by Macquarie in the future without his further express contemporaneous consent to those acts. It is in this, somewhat perplexing, sense that I suggest that cl 21.2 gave Mr Goodridge's advance consent to any future assignment, novation or dealing falling within it.

49 Coming back to the reasoning of Jacobson J: it is clear that his Honour found the language of cll 21.2 and 21.4 less than satisfactory[71]. The ultimate question, as his Honour identified, was whether cll 21.2 and 21.4 sufficiently described, as his Honour said, what it was to which prospective consent had been given[72]. Jacobson J answered that question by saying that Mr Goodridge consented, by the mechanism of cl 21.2, "to the introduction of a new lender who was substituted for Macquarie on the same terms and conditions as the LSA" [73]. Thus, his Honour concluded, there was no uncertainty about the terms and conditions of the new contract to which Mr Goodridge had in advance consented to be a party[74].

50 If I may say so, with respect, this conclusion involves some creative interpretation. Clause 21.2 was not limited (and hence cl 21.4 was not limited) to a novation of the whole of the LSA. As I have now noted twice, what could be assigned was the whole or any part of the benefit of the LSA. What could be novated was any or all of Macquarie's rights, remedies, powers, duties and obligations under the LSA. On its face, cl 21.2 contemplated that there could be assignment of some only benefits, and novation of some only obligations. How one proceeds from there to

[71] See at [320] and following, noting in particular [322] and [324].
[72] At [325].
[73] At [327].
[74] At [328].

say that, on its proper construction, cl 21.2 is limited to authorising in advance novation of the whole of the LSA is not explained. Perhaps I should not dilate on this point, for fear of being found to be another purist who has wholly uncommercial views inconsistent with the proper development of the law of contract.

Reasoning: assignment

51 The Full Court held that the relevant rights were assignable. This arose, in their Honours' view, because "the question is essentially one of construction of the contract"[75], and the express provisions of the LSA specifically provided for the assignment of all or any part of the benefit of the LSA, and all or any rights, remedies, and powers there under, without the consent of Mr Goodridge[76].

52 Thus, according to the Full Court, on the proper construction of the relevant terms of the LSA, the alleged inseverability of right and obligation was not a reason for denying assignability. The conclusion that the rights were capable of assignment meant, necessarily, that the assignment that was effected, was valid at least in equity, because there is no requirement for notice to perfect an equitable assignment (notice is of course relevant to questions such as priorities, and to whether the assignment is effective in law)[77].

53 The Full Court concluded, contrary to Rares J, that notice of the assignment had been given. There was evidence of "a reliable system for despatching documents… and evidence that the system was followed"[78] and "no evidence that the letters were returned, or of any defect in the system"[79].

[75] At [363].
[76] At [357], referring in particular to cl 21.2 of the LSA.
[77] At [386].
[78] At [397]
[79] At [397].

54 Thus, the statutory presumption of delivery, flowing from (among other things) s 160 of the *Evidence Act* 1995 (Cth) was raised unless there was some reason to raise a doubt about the presumption; and there was no such reason[80].

55 Thus, on the view taken by the Full Court, the assignment was effective at law as well as in equity.

Reasoning: the margin calls

56 Jacobson J commenced his discussion of the proper construction of cl 5 by referring to the nature of the relationship between Macquarie and Mr Goodridge. Rares J had characterised that relationship as being one of banker and customer[81]. However, Jacobson J said, the relevant relationship was that "of lender and borrower under a special form of revolving credit facility…"[82]. Thus, his Honour said:

> The proper construction of cl 5 is therefore informed by the fact that the parties to the LSA were parties to a margin lending agreement under which both borrower and lender had substantial exposure to movements in the market price for the securities which formed Macquarie's security for the advances[83].

57 Against that background, Jacobson J said:

> Clause 5 was one of a number of provisions in the LSA which were intended to give protection and assurance to the lender that the loan would be repaid in full despite the volatility and unpredictability of markets for listed securities[84].

58 Further, his Honour said:

> A deterioration in the market price was intended to be at the risk of the borrower and the provisions of cl 5 were intended to protect the lender against that risk by imposing an obligation to satisfy

[80] At [400].
[81] [2010] FCA 67 at [77].
[82] [2011] FCAFC 3 at [138].
[83] Ibid.
[84] At [139].

> margin calls in accordance with the terms of that clause. Thus the risk of deterioration in the market was transferred to the borrower by the entitlement of the lender to make a margin call. The price of a failure to satisfy a call was that the borrower was in default under cl 13... [85].

59 All this may be accepted. But it may be accepted, equally, that one of the purposes of cl 5 was to provide the borrower, Mr Goodridge, with time to meet a margin call and a variety of ways in which he could do so. The first of those matters is shown most clearly by the amendment to cl 5.2 in April 2004[86], increasing the period for satisfying a margin call from 1 to 3 business days. The second is shown by clauses such as 5.3 and 5.4 (a margin call may be satisfied by the provision of additional securities) and 5.5 (a margin call may be satisfied by payment of cash)[87].

60 To say that cl 5 is intended to protect the lender against a decline in the market value of the underlying securities is true enough. But that simple statement does not recognise, let alone do justice to, the range of subjects with which individual subclauses of cl 5 are concerned. Read as a whole, it is clear from cl 5 that, although the balance may well be tilted in favour of the lender, nonetheless it contains important rights that are intended to provide some degree of assurance for a borrower, in the position of Mr Goodridge, faced with a sudden drop in the value of his securities.

61 Jacobson J observed that cl 5 was not "expressed in a way which leaves it free from debate"[88], and thus that it was "the failure of the draftperson(s) of the scheme to express it in the clarity of language which ought to be expected from such a document, that give rise to the difficulties which have arisen in this litigation"[89].

62 His Honour then set out, in summary form, the elements of cl 5, including the rights (or perhaps more alternatives) that it gave to Mr Goodridge to

85 At [142].
86 To which Rares J referred at [2010] FCA 67 at [12].
87 Rares J referred to those clauses at [14].
88 [2011] FCAFC 3 at [151].
89 At [152]

satisfy any margin calls[90]. He observed, as Rares J had done, that there were different time limitations within the different subclauses of cl 5, and stated that those inconsistencies bore on the question of construction[91].

63 Jacobson J then turned specifically to cl 5.2[92]. That clause too, his Honour said, involved difficulties. As his Honour said:

> The discretion conferred on the lender to "otherwise notify" the borrower is of wide import but it is silent as to whether the lender may notify the borrower of a shorter period for compliance than the three business days specified in the operative part of the clause[93].

64 In his Honour's view, there were three reasons why cl 5.2 did so operate:

(1) first, restricting the proviso to extension of time would be make it otiose because a lender in Macquarie's position could always, as a matter of discretion, extend the time for compliance with any contractual obligation owed by a borrower[94].

(2) Secondly, his Honour said, the form that cl 5.2 now bears was introduced by way of amendment. The effect of the amendment was to increase the time for compliance from one business day to three. As cl 5.2 was drafted originally, there was no proviso to "otherwise notify". (This may be seen as also supporting the first of his Honour's reasons.) Thus, the extension of the time for compliance from one business day to three "unless otherwise notified" suggests, his Honour said, that the purpose of the proviso, and its meaning, was to permit Macquarie to reduce the time for compliance if it wished to do so[95].

[90] At [153] and following.
[91] At [161].
[92] At [167] and following.
[93] At [167].
[94] At [169]
[95] At [171].

(3) Thirdly, his Honour said, that construction of the proviso gained some support from the commercial purpose and objects of the transaction, and of cl 5 as one of the stipulations giving effect to the transaction: harking back to what his Honour had said as to the protections that cl 5 was intended to assure to Macquarie[96]. His Honour supported this by reference to authority; it is not necessary to go to the cases to which his Honour referred.

65 His Honour recognised that when cll 5.2 and 5.4 were read together, inconsistency arises if cl 5.2 is construed so as to permit Macquarie, should it wish to do so, to require a margin call to be paid on demand[97]. But his Honour said that this was not the issue; the issue was whether the proviso to cl 5.2 had that effect. If I may say so, there is an element of circularity in this aspect of his Honour's reasons.

66 Thus, Jacobson J concluded, the proviso to cl 5.2 should be construed in the manner for which Macquarie and Leveraged Equities contended. It followed that the margin calls were not ineffective because they did not allow three business days for compliance[98].

Reasoning: clause 5.7

67 Again, Jacobson J commented on the drafting of cl 5.7: his Honour did not consider it "to be entirely clear"[99].

68 However, as his Honour said, the condition for the exercise of the cl 5.7 power was different from the condition for the exercise of the cl 5.1 power (to make a margin call). The power conferred by cl 5.7 depended on the existence of an objective fact: namely, that the total loan balance exceeded the aggregate of the market based limit and the buffer. That is correct. But it may be said, equally, that cl 5.1 had two alternative

[96] At [172] and following.
[97] At [180].
[98] At [181].
[99] At [182].

conditions for the exercise of the power to make a margin call. One of those was, likewise, a matter of objective fact: that the total loan balance exceeds the aggregate of the market based limit and the buffer. The other, which was a true alternative, was that in Macquarie's opinion it was likely to do so[100].

69 Another point of difference identified by Jacobson J was that the power of sale conferred by cl 5.7 was narrower by that conferred in the event of failure to meet a margin call[101]. That is undoubtedly correct.

70 Jacobson J said that the differences between cll 5.1 and 5.7 suggested that cl 5.7 had different work to do[102]. The difficulty, his Honour said, was to determine when the power given by cl 5.7 was enlivened[103].

71 His Honour did not agree with the interpretation given by Rares J. That was because, in essence, Rares J held that Macquarie could only sell under cl 5.7 once Mr Goodridge had failed to meet a margin call[104]. But failure to meet a margin call was in itself an event of default and there was thus a right to sell without the need for cl 5.7. Presumably, as Jacobson J said (in my view correctly), cl 5.7 was not inserted into the LSA to deal with the consequences of failure to meet a margin call[105].

72 The real problem with cl 5.7 arose from its introductory words, which were followed by the power to sell or redeem the underlying securities. The clause read, in part:

> Without limiting the Bank's rights following a Margin Call, if at any time the Total Loan Balance exceeds the aggregate of the Market Based Limit and the Buffer, … the Bank… [is authorised] to sell or redeem… all or any part of the Secured Property as would

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[100] At [183] and following.
[101] At [187] – [190].
[102] At [191].
[103] At [192].
[104] AT [194].
[105] At [199] - [200].

> produce sufficient funds to enable the Borrower to satisfy a Margin Call. …[106]

73 It will be seen that the concept of "Margin Call" appears twice: first, in the introductory words intended to preserve all other rights of Macquarie, and secondly in directing the extent of the authority to sell: namely, to produce enough money to meet a Margin Call.

74 Rares J had considered that the words "if at any time" which were the starting words of the grant of authority to sell had to be read in conjunction with the immediately preceding words "following a Margin Call", and thus concluded that the power to sell was only enlivened once a margin call had been made. Jacobson J said that this approach transposed the language of the clause and read it in a syntactically inconsistent way[107]. His Honour pointed out, and I agree, that the words "if at any time" qualify the circumstances in which the power to sell is enlivened.

75 However, the real difficulty arises from the purpose for which the power of sale is given: to produce enough funds to satisfy a margin call. As I understand the reasoning of Jacobson J, his Honour considered that those words referred to a margin call whether or not it had been communicated. That view appears to have based on the circumstance that a margin call could be made where the total loan balance exceeded the aggregate of the market based limit and the buffer.

76 I have to say that this approach to construction is not without its difficulties. I do understand that the "*contra proferentem*" rule is not in fashion these days, and that there are good reasons why this is so. But, equally, it is a little difficult to understand why a power given for the purpose of satisfying a margin call can be exercised even where, although the right to make a margin call has been enlivened, no such call has been made.

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[106] At [5]
[107] At [196].

77 That is, perhaps, a way of pointing out the real difficulties of reconciling the inconsistent provisions with which cl 5, read overall, abounds. It is the court's duty, in construing such provisions, to attempt to read them harmoniously and to make sense of them all[108]. In the process of performing that aspect of the task of construction on cl 5, something or other has to give. If there were some residual room for the *contra proferentem* rule to operate, this might perhaps be an example where it should have been applied.

Platinum United v Secured Mortgage Management

78 This appeal concerned a commercial loan facility agreement made:

(1) to refinance an existing loan facility; and

(2) thereafter, at the discretion of the lender, to provide construction funding for a residential unit development.

79 The appellants (plaintiffs), the borrowers, sued the respondent (defendant) as lender, alleging that the respondent had breached its obligations under the agreement by failing to provide progressive funding for the cost of construction. The claim was struck out, on the basis that under the agreement the respondent had an absolute discretion whether or not to provide finance. The appellants appealed.

80 The argument focused on cll 2.2, 2.4 and 2.5 of the loan agreement, and with the interest obligation set out in cl 5.2.

81 By cl 2.2, the purpose of the loan was stated to be:

> …assisting with refinance of the existing loan facility and thereafter to provide, at the discretion of the Lender, progressive funding against the cost of construction of [the specified development]…

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[108] *Australian Broadcasting Commission v Australasian Performing Right Association Limited* (1973) 129 CLR 99 at 109 (Gibbs J).

82 By cl 2.4, the loan facility was to be "drawn in one lump sum and then made available to the borrower progressively…".

83 By cl 2.5.1, the balance of the "Cash Advance" (presumably, after refinancing the existing loan facility) was to "to be made available at the Lender's absolute discretion to be drawn down progressively by the Borrower".

84 By cl 5.2.1(f), interest was payable from the date of the first drawdown "on the full amount of the Cash Advance as if it had been drawn in one lump sum"; and that was so, as the paragraph stipulated, "[e]ven though the loan is drawn down progressively against the value of construction".

85 The "Cash Advance" was defined to mean the whole principal amount of the facility together with capitalised interest, costs and fees.

86 Fraser JA gave the principal judgment. Chesterman JA agreed, and Fryberg J agreed "generally".

87 Fraser JA noted that cl 2.5.1 conferred an "absolute discretion", and noted that it was implicit in the nature of an absolute discretion, to do or refrain from doing something, that the party on whom the absolute discretion was conferred had no obligation to act reasonably in its exercise[109]. However, his Honour said, the question in this case was a different one: namely, whether the discretion given was whether or not to provide progressive construction finance[110].

88 His Honour noted the principles relevant to the construction of commercial contracts[111]. They are well known, and I will not repeat them.

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[109] [2011] QCA 162at [5].
[110] Ibid.
[111] At [6].

89 The principal argument for the appellants was that because the loan facility was to be drawn in one lump sum, there was no discretion whether or not to advance any part of it; at most, the discretion related to the timing of the payment of advances[112]. However, as Fraser JA pointed out, the purpose of cl 2.4 (specifying that the amount of the facility be drawn in one lump sum) was to identify the basis for calculation of interest, and the cross-reference to the "purposes set forth in clause 2.2 hereof" picked up the discretion to provide construction funding, which was amplified in cl 2.5.1[113].

90 The appellants argued that if the agreement were to be so construed, then the respondent's lending obligations, at least in relation to construction finance, were illusory. This, the appellants said, was a manifestly absurd result. Fraser JA concluded that although the relevant provisions of the agreement favoured the respondent over the appellants, that was at most a "reflection of the parties' apparently unequal bargaining positions", and not something "so obviously unreasonable as to justify the significant departure from the text"[114] which would be required if the appellants' view of the discretion were correct.

91 The significance of this decision can be shortly stated. The process of construction of commercial contracts should strive to give them an operation consistent with business commonsense, and to avoid manifestly absurd results. However, the fact that application of the ordinary processes of construction demonstrates that a contract is significantly one sided does not, of itself, suggest that the construction is wrong, or justify departure from the ordinary English meaning of the words used. More generally, the decision reinforces the proposition that when the parties to a contract confer an "absolute discretion" on one of them to do, or not to do, a particular act, they should be taken to have intended that the words they used should operate according to their ordinary meaning, with the result

[112] At [7]-[8].
[113] At [8].
[114] At [12].

that the discretion, in relation to its subject matter, is not constrained by considerations of good faith or reasonableness.

Public Trustee v Fortress Credit Corporation

92 I understand that the decisions of the primary judge[115] and of the Queensland Court of Appeal[116] have been discussed earlier, and I will look briefly at the way the High Court[117] dealt with the issue.

93 You will recall that Fortress agreed to lend money to Octaviar Castle Pty Limited and that the parent company, Octaviar Limited, guaranteed that loan. The guarantee was secured by a fixed and floating charge over the assets of Octaviar in favour of Fortress, and that charge was duly registered. The charge secured payment by Octaviar to Fortress of all "Secured Money". That expression was defined to mean all moneys that were or might became payable by Octaviar "under or in relation to a Transaction Document". That expression was defined to mean, among other things, any document which Fortress and Octaviar agreed in writing was a Transaction Document.

94 Subsequently, Fortress lent money to a company, Young Village Estates Pty Limited (YVE). Octaviar guaranteed that loan also. Subsequently, Octaviar and Fortress agreed in writing that the YVE guarantee was a Transaction Document for the purposes of the charge.

95 In due course, the indebtedness of Octaviar Castle to Fortress was repaid. The charge was not discharged. Fortress contended that the charge remained on foot, and secured the liability of Octaviar to Fortress on the YVE guarantee (which liability had not been discharged).

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115 *Re Octaviar Limited; Re Octaviar Administration Pty Limited* [2009] QSC 37.
116 *Public Trustee of Queensland v Octaviar Limited* [2009] QCA 282.
117 (2010) 241 CLR 286

96 Section 266(3) of the *Corporations Act* 2001 (Cth) provided that, where a charge has been varied so as to increase the debt or increase the liabilities secured by it, and the company giving the charge is wound up or put into administration or executes a deed of company arrangement, then the charge is void as a security, to the extent of the increase in the debt or liability, unless notice was given within the timeframe specified.

97 The primary judge held that the charge was void as a security, to the extent that it purported to secure the liability of Octaviar to Fortress under the YVE guarantee. The Court of Appeal allowed an appeal from the decision of the primary judge. The High Court dismissed the appeal from the Court of Appeal.

98 The starting point in the reasoning of the High Court was that the definition of Transaction Document was "ambulatory", and included both documents that, at the time the charge was executed, had already been agreed to be Transaction Documents, and documents that thereafter were agreed to be Transaction Documents. Thus, the court said, "[t]he charge, from the time of its creation, always encompassed a liability that might be or become owing under a document that was or became a Transaction Document by the parties agreeing so in writing". It followed in turn, their Honours said, that "[t]he charge always secured that "prospective liability"[118].

99 Their Honours then pointed out that the result of the dealings in relation to the YVE guarantee was that in due course it became, when hitherto it had not been, a Transaction Document. But this, they said, "did not vary the meaning of Transaction Document… and consequently the meaning of Secured Money…"[119]. Section 266 was concerned with variations in the terms of a charge; a variation to the class of Transaction Documents did not involve either a variation to the terms of the charge or to the rights and obligations to which the terms of the charge gave rise[120].

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[118] At [22].
[119] At [23].
[120] Ibid.

100 Further, their Honours said, the “terms of the charge”, for the purposes of the *Corporations Act*, were the terms contained in the written instrument and any further terms which might be implied in fact [121]. That was consistent with the underlying purpose of registration of charges: to give those who are contemplating lending money to a company the ability to find out whether there are charges and if so, their terms.

101 The practical significance of this decision is that it focuses attention on the wording of the legislative scheme, and confines the statutory consequences of non-registration accordingly. Thus, it has the effect of validating the drafting technique employed in this case, and no doubt in hundreds of other transactions over recent years.

International Litigation Partners v Chameleon Mining

102 The appellant (defendant below), ILP, agreed to fund litigation commenced by the first respondent (plaintiff below), Chameleon, in the Federal Court. At no time was ILP licensed to deal in financial products for the purposes of Ch 7 of the *Corporations Act* 2001 (Cth). The funding agreement provided that it could be terminated if there were a change of control of Chameleon, and that if that happened, a termination fee would be paid. Otherwise, ILP was entitled to a funding fee calculated in accordance with whatever sum might be awarded to Chameleon on resolution of the proceeding.

103 A change in control of Chameleon occurred in August 2010, when a company known as Cape Lambert Resources Limited acquired, among other things, the right to appoint 50% of Chameleon’s board of directors. When that happened, Chameleon purported to give ILP notice of rescission of the funding agreement. It relied on s 925A of the *Corporations Act*. The underlying assumption was that the funding

[121] At [27].

agreement was a financial product provided by ILP when it was not licensed to do so, nor exempt from being licensed.

104 The primary judge held, in substance, that Chameleon was not entitled to rescind the funding agreement, and that in the circumstances it was obliged to pay Chameleon only the early termination fee and not any funding fee[122].

105 The Court of Appeal held, by majority (differently constituted on different sub-issues, and for varying reasons) that the funding agreement was a financial product and, thus, that Chameleon's rescission was valid. However, the Court of Appeal held (unanimously) that, in the events that had happened, the primary judge was correct to conclude that only the early termination fee was payable.

106 I propose to focus on the reasoning involving "financial product".

107 The starting point is of course s 763A of the *Corporations Act*, which (subject to s 763E and also to s 762B), provides that a financial product is a facility through which, or the acquisition of which, a person does one or more of:

(1) making a financial investment;

(2) managing financial risk; or

(3) making non-cash payments.

108 Those three categories are dealt with in, respectively, s 763B (financial investment), s 763C (financial risk) and 763D (non-cash payments).

109 The court held that the funding agreement was a financial product because, through it, Chameleon managed financial risk. As Hodgson JA

put it, the funding agreement "was a facility through which CHM managed financial risk…, in that it managed the financial consequences to itself of certain things happening (namely, adverse costs orders and loss of litigation, and possibly also, the incurring of its own costs through pursuit of the litigation)…" [123].

110 Giles JA pointed out that the relevant inquiry is not whether the purpose or a purpose of entering into the funding agreement was something other than the management of financial risk, but whether, by the agreement, Chameleon did so[124]. It is an inquiry into the way in which the funding agreement operates, not into the purposes of the funded party (in this case, Chameleon) in seeking to manage its financial risk in that way[125].

111 The real divisions of opinion in the Court of Appeal arose in relation to the operation of ss 763E and 762B. For convenience, and acknowledging that all of you will have those sections at your mental fingertips, I set them out:

> 763E What if a financial product is only incidental?
>
> (1) If:
>
> a) something (the ***incidental product***) that, but for this section, would be a financial product because of this Subdivision is:
>   i. an incidental component of a facility that also has other components; or
>   ii. a facility that is incidental to one or more other facilities; and
>
> b) it is reasonable to assume that the main purpose of:
>   i. if subparagraph (a)(i) applies—the facility referred to in that subparagraph, when considered as a whole; or
>   ii. if subparagraph (a)(ii) applies—the incidental product, and the other facilities referred to in that subparagraph, when considered as a whole;
>
>   is not a financial product purpose;
>
> the incidental product is not a financial product because of this Subdivision (however, it may still be a financial product because of Subdivision C).
>
> (2) In this section:
> ***financial product purpose*** means a purpose of:

[122] *Chameleon Mining NL v International Litigation Partners Pte Limited* [2010] NSWSC 972.
[123] [2011] NSWCA 50 at [122].
[124] At [38] and following, in particular at [44].
[125] Ibid.

a. making a financial investment; or
b. managing financial risk; or
c. making non-cash payments.

762B What if a financial product is part of a broader facility?

If a financial product is a component of a facility that also has other components, this Chapter, in applying to the financial product, only applies in relation to the facility to the extent it consists of the component that is the financial product.

112 Both sections have at their heart the idea that a financial product may be a component of a facility that has other components (which other components, by necessary implication, are not individually, and do not together amount to, a financial product). For s 763E to operate, the financial product must be no more than "an incidental component" of the overall facility. The limitation imposed by the word "incidental" is not to be found in s 762B.

113 The consequences of the two sections are different. If s 763E applies (and it applies if, among other things, the overall purpose[126] is not a "financial product purpose") then the incidental product is not a financial product because of Subdiv B of Div 3 of Ch 7 (which is the subdivision including sections 763A and following). If s 762B applies, Ch 7 applies to the facility: but only to the extent that it consists of the financial product.

114 Thus, the consequence, if s 763E applies, is that the incidental component is relevantly not a financial product, even though, standing alone, it would be. By contrast, if s 762B applies, the "financial product" component remains a financial product, but the rest of the overall facility is not.

115 As was apparently raised in the course of argument[127], s 762B appears to apply where a facility has severable parts, one of which is a financial product and the others of which are not, whereas s 763E applies where the financial product is incidental to, but not severable from, the overall facility. That, no doubt, is why s 763E applies only where, among other

[126] In referring to "overall purpose", I am combining the alternative elements set out in s 763E(1)(b), referring back to the two limbs of para (a).

things, the financial product is “incidental” to the overall facility, whereas s 762B may apply even if the financial product component of the overall facility is more than incidental.

116 Once it is concluded that Chameleon entered into the funding agreement to manage the financial risk to itself (in terms of its own costs and adverse costs) of prosecuting the Federal Court proceeding, it is difficult to see how that could have been merely “incidental” to some other and larger purpose, and thus how s 763E could operate. Equally, if severability is the key to s 762B (and I think that this must be so), it is difficult to see what other purposes there were from which the purpose of managing financial risk could be severed. Giles JA said as much in his brief reasons dealing with ss 762B and 763E[128].

117 In relation to s 762B, the obvious problem, from ILP’s perspective (and this may explain why ILP had not referred to s 762B in its written submissions[129]) is that even if s 762B applied, the exemption that it provides would extend to the non-financial product components, but not to the component that was a financial product. Thus, as Giles JA put it, the section would have “no relevant exclusory effect”[130]. Alternatively, as Young JA put it, if s 763E did not apply then, even if s 762B did apply, the rights of the “consumer” would still apply to the severable financial product component[131].

118 I do not propose to analyse the disparate strands of reasoning in more detail, because they were very closely connected to the particular facts and to the terms of the funding agreement. I will conclude with the warning given by Young JA:

> … if you find wide words in a statute to protect the investing public, and the circumstances of the case come within the literal words

[127] Young JA at [173].
[128] At [92].
[129] See Giles JA at [90].
[130] At [92].
[131] At [183].

> [sic], there is no reason to read down those general words, unless, at least, one can "glean from the legislative provisions an overall purpose which, being limited in scope, justified a reading down of the definition. …[132]

119 Whilst not wishing to return to Elements of Drafting 1.01, this case affords yet another example of the dangers in proceeding to litigation on ill-drafted documents.

Brighten v Bank of Western Australia

120 The plaintiffs sought a declaration that particular events of default had not occurred under a facility agreement and mortgage, and sought an interlocutory injunction restraining the defendant bank from appointing receivers.

121 The plaintiffs were guarantors of a loan made to a company to enable it to purchase the Fairmont Resort at Leura. The borrower fell into default. The court appointed a receiver on 11 December 2009, but the order appointing the receiver limited his powers. In particular, it reserved "the day to day operation, control, management and administration of the hotel / business" to the plaintiff Brighten, provided that "there shall be full transparency and supply of information to the Receiver so as to enable him to have as complete an understanding of the business as he thinks is necessary".

122 The bank sought to appoint receivers on an unrestricted basis – i.e., in effect, to oust Brighten from the day to day operation, control, management and administration of the hotel / business.

123 The essential question was whether it had been open to the bank to find, in its absolute discretion, that there had been events that had a material

[132] At [208], invoking the reasoning of the High Court in *Australian Softwood Forests Pty Limited v Attorney General for New South Wales* (1981) 148 CLR 121 at 129 – 130.

adverse effect on the business, assets and financial condition of Brighten and the borrower[133].

124 Einstein J concluded that “it is quite plain that the plaintiffs failed dismally in their efforts to show that they have a serious, not a speculative case which has a real possibility of ultimate success” [134]; and likewise, they “failed dismissally in their efforts to show that the balance of convenience is in favour of continuing… [the status quo]… up to a final hearing”[135].

125 Further, and as what I would have thought was in any event a dispositive consideration, the Court pointed out that the plaintiffs had not brought into court the amount of the mortgage debt, as the price for restraining the bank’s exercise of its powers of sale[136]: *Inglis v Commonwealth Trading Bank of Australia*[137].

126 This decision is important because it emphasises that, even on an interlocutory application, an exercise of an “absolute discretion” requires very substantial grounds of challenge, and it reinforces the ongoing importance of *Inglis*.

127 It may interest you to know what has happened since Einstein J handed down his judgment. On 16 March 2011, Hammerschlag J entered judgment in favour of the bank against Brighten and Mr Kwok in the sum of about $13.5 million[138]. On 19 July 2011, Hammerschlag J dismissed an application by Brighten to extend the time for compliance with a statutory demand served upon it by the bank[139]. In the meantime, Brighten and Mr Kwok had sought an order for preliminary discovery of documents against the receivers, to see if there was some cause of action for negligence in connection with the receivers’ sale of the Resort. On 20 July 2011, I

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[133] At [30].
[134] At [45].
[135] At [45].
[136] At [50].
[137] (1972) 126 CLR 161.
[138] *Brighten & Ors -v- Bank of Western Australia Limited* [2011] NSWSC 816.
[139][2011] NSWSC 801.

dismissed that application, on the basis that there was no reason to think that Brighten and Mr Kwok had any claim against the receivers. Presumably, the last steps in this litigious saga will be applications for the making of a winding up order for Brighten, and a sequestration order against Mr Kwok.

Buzzle Operations v Apple Computer Australia

128 Buzzle was a reseller of Apple products. It entered into a reseller agreement with Apple, and gave a charge over its assets, in return for which Apple provided stock on credit. Buzzle failed. Apple appointed receivers. Buzzle went into liquidation.

129 The liquidators sought to challenge a number of payments, on various bases:

(1) relying on s 267 of the *Corporations Law* (as it then was), on the basis that Apple was an "officer" or "associated person" of Buzzle;

(2) the payments in question were "uncommercial transactions" (s 588FB, s 588FF of the *Corporations Law*); Apple relied on s 588FG;

(3) Apple and its finance director were shadow directors of Buzzle and accordingly, were liable pursuant to s 588G for more than $12 million of liabilities said to have been incurred through insolvent trading whilst they were directors; and

(4) Alternatively, by reason of the relationship flowing from the shadow directorships, the payments were unfair preferences, and voidable pursuant to s 588FE.

130 The decision is fact – driven, and the reasoning of White J requires close attention to be paid to the facts.

131 As to the first issue (based on s 267), White J held that Apple was not an officer or associated person of Buzzle simply because of Apple's ability to affect Buzzle's financial position through crystallisation of the charge. His Honour said that the definition of "officer" in s 9 of the *Corporations Law*:

> should be taken as referring to a person who, in his or her management of the affairs of the corporation, has the capacity to affect significantly the corporation's financial standing[140].

132 Further, his Honour held that Apple or its finance director could only be an "associated person" of Buzzle if they were "acting in concert" and with a common object or purpose[141]. His Honour held that there was no common purpose and the existence of the charge did not provide one.

133 Significantly, White J held that Apple did not become an officer or associated person simply because, in its position as chargee, it required Buzzle to make certain changes to its business practices. That was because, his Honour found, the ultimate decision to accept or reject the recommendation remained with Buzzle, and its board and had the ability to control that decision[142].

134 As to the uncommercial transaction argument based on s 588FB, White J held that the payments in question were not uncommercial transactions, but in any event, if they were, the defences were made out. The Court of Appeal overturned the former conclusion[143], but upheld the latter[144].

135 The defence was made good because the payments were made in good faith and without grounds for suspecting insolvency, and Apple did not in fact suspect insolvency at the times the payments were made[145].

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140 At [126].
141 At [135].
142 At [127] to [129].
143 [2011] NSWCA 109 at [3],[287].
144 At [171].
145 At [159].

136 As to the "shadow director" point, White J noted that there was nothing inherently incongruous in a body corporate's becoming a shadow director, because, by definition, there was no valid appointment and hence no requirement that a shadow director be a natural person[146]. His Honour held that to be a shadow director, the person or corporation must instruct the directors how to act, and in effect be in control of the board[147]. If the board of a company, acting independently, is able to conclude as a matter of its own judgment that a transaction on which a third party insists is in the best interests of the company, the third party will not be a shadow director simply because it does so insist[148].

137 It may be noted that although the Court of Appeal upheld the decision on this point, their Honours considered that the focal question was to look at who is controlling the decisions of the company, and not to look at the finer detail of the influence of the putative shadow director on particular aspects of the company's activity[149].

Australian Property Custodian Holdings

138 Section 436C(1) of the *Corporations Act* authorises "[a] person who is entitled to enforce a charge on the whole, or substantially the whole, of a company's property" to appoint, by writing, an administrator of the company if the charge has become and remains enforceable. In this case, a secured creditor pursuant to a registered charge appointed the applicants as administrators of the company. The first question was whether the appointment was valid. The second question was whether, if the answer to the first question were "no", s 447A should be utilised to validate the appointment with retrospective effect.

139 The company was the trustee of a trust. The assets that were the subject of the charge did not include the assets held by the company in its

146 [2011] NSWSC 801 at [231].
147 At [241] – [242].
148 At [243].
149 [2011] NSWCA 109 at [205].

capacity as trustee. Nor did they include the sum of $5 million held by the company on deposit at the National Australia Bank. That sum was so held by the company as a condition of its Australian Financial Services License.

140 As a matter of arithmetic, the charged assets were about 68% of the company's total assets. Sifris J held that the charge was not over the "whole or substantially the whole of the company's property" but was merely "over a significant part of the company's assets" [150].

141 A wider submission had been put to Sifris J[151]. The submission appears to have been that, for the purposes of s 436C(1), the "property" of the company should be taken to include not only property held by it beneficially, but also property held by it as trustee: that is to say, property in which it had the legal, but no beneficial, interest. That was, I think, an ambitious submission. Where a trustee is authorised to raise money, for the purposes of execution of the trusts, on the security of the trust property, that is one thing. But where a trustee wishes to raise money for its own purposes, on the security of its own assets, that is another. In the latter situation, the lender should be able to take security over all the assets owned by the trustee in its personal capacity, knowing that it can enforce that security in the usual way (including, in the case of a registered charge, by appointment of administrators). The lender would not be entitled to have recourse to the assets held by the trustee as trustee. It is difficult to understand why, for the lender's security to be enforceable (by the appointment of administrators), the charge should be required to extend to assets that cannot properly be subject to it and to which the lender could not properly have recourse. Such a construction of s 436 (1) would seem to encourage breaches of trust, and to put lenders at risk of being complicit in those breaches. But since Sifris J did not venture on this question, I will say no more.

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[150] [2010] VSC 492 at [8].
[151] See at [9].

142 I turn to s 447A. By subs (1), the court is authorised to “make such order as it thinks appropriate about how this Part is to operate in relation to a particular company”. As Sifris J observed, that section “has been interpreted very broadly by the courts”, but its “precise ambit and extent… has yet to be worked out” [152].

143 Sifris J expressed doubt that s 447A was “broad enough to overcome the defect in the appointment arising out of the limited Charge despite the fact that the requirement in s 436C that the appointee be entitled to enforce the charge over the whole or substantially the whole of the company’s property is a specific precondition to the validity of the appointment…”[153].

144 I share his Honour’s reservations. The power given by s 447A(1) is one to make orders about how Part 5.3A of the *Corporations Act* operates in relation to a particular company. It assumes that the Part (or a particular provision of the Part) has been engaged. It is at least arguable, as Sifris J pointed out, that where the operation of the Part, or of a particular section, is not engaged then s 447A has no work to do[154]. It is equally arguable that s 436C(1) is not engaged at all except where the appointment comes within its terms: that is to say, except where the appointment is made by a secured creditor who holds security over the whole or substantially the whole of the company’s property.

145 The alternative course that commended itself to Sifris J, was to use s 447A to validate the appointment of the administrators pursuant to s 436A. That section authorises a company to appoint an administrator where its board has resolved that it is or is likely to become insolvent, and that an administrator should be appointed. Sifris J said that it “was the clear intention of the directors of the company” to appoint administrators; that was “what they always had in mind and what was always intended to be achieved on the day, one way or another”[155]. Thus, as his Honour said:

[152] At [24].
[153] At [27]; and note also [22].
[154] At [27].
[155] At [22]

> An appointment was always contemplated by the directors of the company in circumstances that but for the defective appointment would have been made. All relevant matters that needed to be considered for a valid s 436A appointment were considered, but not implemented for the reason given. I propose to implement it by recourse to s 447A of the Act. It ought to be done because everyone intended it to be done and acted on the basis that it was done[156].

146 As Sifris J said, either the directors or the court could appoint administrators "today"[157]. The question was whether s 447A should be used to validate the defective appointment, which would have the effect of regarding or treating as valid that which was, in fact, invalid. A number of decisions were analysed[158] which led Sifris J to the conclusion that s 447A could be utilised to validate, in effect retrospectively, that which had been at the time it was done invalid. Sifris J said:

> If the section can be used to cure a defective appointment which is probably void *ab initio*, it should be used where in all the circumstances an appointment was intended and indeed assumed to have taken place[159].

147 If I understand the reasoning correctly, Sifris J was prepared to use s 447A to validate the appointment of the administrators, as though that had been done by s 436A, but not to confirm or authorise their appointment by a secured creditor who did not fall within the terms of the statutory grant of power that alone would have authorised it to appoint administrators. This is a fine distinction; but it may be that, in any event, a similar result could have been reached under s 1322(4).

Conclusions

148 It is difficult to draw any general principles from the disparate collection of cases that I have dealt with in this paper. One recurrent theme is that of

[156] At [28].
[157] At [30].
[158] At [31] to [34].
[159] At [36].

the importance of careful and precise drafting. The courts do what they can to give meaning to contractual documents. However, in doing so, the courts seek to find the intention of the parties, objectively ascertained. That exercise is carried out by seeking to ascertain the meaning that the words used by the parties in their contract would have to a reasonable third person who knew all relevant facts prior to and surrounding the making of the contract. I have no doubt that, in some cases, the construction so arrived at (and, as a matter of legal technique, properly arrived at) may not reflect what the parties actually intended. If the parties express their intentions in clear, precise and unambiguous words, there is little likelihood that the courts will arrive at a construction different from the actual (corresponding) intention of the parties.

149 The courts seek to make sense of contractual bargains. That is why particular clauses are interpreted in context, and by reference to all other relevant provisions of the contract. One of the prime functions of construction is to attempt to render different provisions of the contract harmonious. Another function is to seek to give meaning to each and every provision. Again, the courts will be aided, in performing those tasks, if the parties use clear, precise and unambiguous language.

150 The decision of the Full Federal Court in *Goodridge* is of particular significance in that it demonstrates that the courts should give effect to the parties' objectively ascertained contractual intention, even if the outcome may seem harsh. That is shown even more forcefully by the decision in *Platinum United.* The courts are often faced with the submission that a particular outcome is "uncommercial". But that submission begs the question: "from whose perspective?" Black letter interpretation focuses on the words used in their context, and assumes that the consequences were intended. It promotes a measure of certainty. From my perspective, that is preferable to subjective considerations, and partisan appeals to "uncommerciality".

151 In considering the operation of statutory protections enacted for the benefit of "consumers", it is necessary to understand that the courts will give as wide a meaning to such provisions as their language will reasonably allow. Thus, if a particular factual situation falls within such a statutory provision, it is likely that the courts will hold that the statutory provision is applicable.

152 Equally, where a dispensing or validating power is given in wide terms, the courts will seek to administer it accordingly, and not to read it down. Having said that, it is always best (although, no doubt, a counsel of perfection) to seek to avoid a situation where it is necessary to invoke dispensing or validating powers.

153 May I conclude by saying that it has been a pleasure to attend this part of your conference, and to have had the opportunity to speak to you?