SHORT PARTICULARS OF CASES
APPEALS

COMMENCING MONDAY, 18 JUNE 2012

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PLAINTIFF M47/2012 v DIRECTOR GENERAL OF SECURITY & ORS (M47/2012)

Date Special Case referred to Full Court: 6 June 2012

The Plaintiff is a national of Sri Lanka. He attempted to travel by boat from Indonesia to Australia, but the boat was intercepted. The Plaintiff entered Australia at Christmas Island as the holder of a special purpose visa which expired in December 2009. After the expiry of that visa he was detained on Christmas Island, pursuant to s 189(3) of the *Migration Act* 1958 (Cth) (the Act). He was later transferred to mainland Australia. He applied for a protection visa. He has been found to be a refugee. However he has been refused a visa because the Fourth Defendant ("the Minister") was not satisfied he had met public interest criterion 4002 in Schedule 2 of the *Migration Regulations* 1994. This was as a result of an adverse security assessment issued by ASIO, which organisation is controlled by the First Defendant. While he is an unlawful non-citizen the Plaintiff remains in detention. The Defendants contend, and the Plaintiff disputes, that the legal basis for that detention is ss 189 and 196 of the Act. While the Defendants do not propose to remove the Plaintiff to Sri Lanka, there is at present no other country to which the Plaintiff can be sent. The Third Defendant (the Secretary) and the Minister have taken, and continue to take, steps to identify a country to which to remove the Plaintiff pursuant to s 198 of the Act.

The Plaintiff filed an application for an order to show cause in this Court and Hayne J has referred the Special Case agreed by the parties to the Full Court.

The Plaintiff contends that s 198(2) does not apply to a person to whom Australia owes protection obligations both under the Act and the Refugees Convention. The Plaintiff maintains that neither Articles 32(1) nor 33(2) of the Convention apply to him to allow either his expulsion or *refoulement*. Criterion 4002 does not reflect those Articles as they are embodied in the Act. He also contends that as there is no power to remove him, his continued detention is not for a statutory purpose and therefore unlawful. If s 198(2) does apply, it is contended that removal is not reasonably practical and his detention is unlimited and unlawful. The Plaintiff contends that the construction of the Act reflected in this Court's decision in *Al-Kateb v Godwin* (2004) 219 CLR 562, is incorrect and seeks to challenge that decision. The Plaintiff further submits that, because of a failure to put to him critical issues on which the ASIO adverse assessment turned, that decision is attended by a failure to accord procedural fairness and is therefore invalid.

The Australian Human Rights Commission seeks leave to intervene. Another person, in a similar position to this Plaintiff, Plaintiff S138/2012, also seeks leave to intervene.

The questions reserved by the Special Case signed by the parties include:

- In furnishing to 2012 assessment, did the First Defendant fail to comply with the requirements of procedural fairness;

- Does s 198 of the *Migration Act* 1958 (Cth) authorise the removal of the Plaintiff, being a non-citizen;
    - to whom Australia owes protection obligations under the Refugees Convention as amended by the Refugees Protocol; and
    - whom ASIO has assessed poses a direct or indirect risk to security;

  to a country where he does not have a well-founded fear of persecution for the purpose of Article 1A of the Refugees Convention as amended by the Refugees Protocol;
- Do ss 189 and 198 of the *Migration Act* 1958 (Cth) authorise the Plaintiff's detention?

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

Court appealed from: New South Wales Court of Appeal
[2011] NSWCA 50

Date of judgment: 3 June 2011

Special leave granted: 28 October 2011

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

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

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

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

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

The grounds of appeal include:

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

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

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

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

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

BECK v WEINSTOCK & ORS (S56/2012)

Court appealed from: New South Wales Court of Appeal
[2011] NSWCA 228

Date of judgment: 17 August 2011

Special leave granted: 10 February 2012

The third respondent, LW Furniture Consolidated (Aust) Pty Ltd ("the company"), was incorporated in 1971 under the *Companies Act* 1961 (NSW) ("the Act"). Its Articles of Association ("Articles") described four classes of preference shares, "A" to "D", and ten classes of ordinary shares. The only shares ever issued were of classes "A", "C" and "D", none of which had voting rights attached. Class "A" shares had priority over all others upon a winding up of the company. Shares of classes "C" and "D" were of an equal, lesser, rank and the company could redeem them upon the death of their holder(s). Class "A" shares were issued to Mr Leo Weinstock when the company was incorporated. Eight class "C" shares were later issued to Mr Weinstock's wife, Mrs Hedy Weinstock. On 6 July 2004 Mrs Weinstock died. The company's directors then resolved to redeem her shares for $1 each. If the shares were not redeemable, they would have been valued at millions of dollars upon a winding up of the company. Ms Tamar Beck, who was one of Mrs Weinstock's executors (and her daughter), claimed that the shares could not be redeemed because they were not "preference shares" within the meaning of the Act.

On 17 September 2010 Justice Hamilton held that the shares could not be redeemed by the company because they were not in fact preference shares. His Honour held that in order for them to be preference shares, other shares with inferior rights must exist. He held that it did not matter that the company's Articles provided for inferior shares. Such shares must be on issue and thus in existence.

On 17 August 2011 the Court of Appeal (Giles JA & Handley AJA, Young JA dissenting) upheld an appeal by the company and members of the Weinstock family. The majority held that the class "C" shares had been validly issued and that they carried the rights described in the Articles. This was because the company's Articles defined the types of shares and gave the directors power to issue them. Their Honours found that a court could not hold that the shares had been issued with rights different from those set out in the Articles. To do so would require an amendment to the Articles, which neither the directors nor a court had power to do. The majority held that the non-existence of ordinary shares merely prevented the *enjoyment* of the full rights of class "C" shares as preference shares. They found therefore that the company could redeem the shares that had been held by Mrs Weinstock. Justice Young however held that the company could not redeem the shares. His Honour found that those shares would have been preference shares only if other shares with inferior rights had existed at the time when the class "C" shares were issued.

The ground of appeal is:

- The Court below erred in holding that eight “C” class shares in the company were redeemable preference shares for the purposes of the *Corporations Act* 2001 (Cth) notwithstanding that there were never any other shares on issue in the company by reference to which the “C” class shares conferred a preference.