

Section 5 of the 1855 Act admitted the possibility of concurrent legislation 'to define in any different manner' the boundary, and it can be argued that the whole of that section, including the proviso mentioned, declares 'the limits' of the colonies. On this view, concurrent legislation would not seek to 'increase, diminish or otherwise alter the limits' of the States which, under section 123 of the Constitution, can only be done by Commonwealth legislation after successful referenda in each State. It is also possible that the Governors by a joint instrument, with the advice of their Executive Councils, may consensually 'determine' the common boundary pursuant to section 5 of the Imperial Queensland Government Act 1861, which unlike the Imperial Colonial Boundaries Act 1895 was not expressly amended or repealed by the Commonwealth of Australia Constitution Act 1900.

The difficulty is that the Court in *Hazlett's Case* refused to decide 'whether the principles of prescription may operate under the Constitution so as to confirm a boundary line which was not settled as at 1901';³⁰ or whether the executive powers implied in the 1855 Act survived that date. Apart from certain ambiguities in the former phrase, the Court's reluctance seems to signal the possibility that section 123 of the Constitution may be given overriding effect to the detriment of pre-existing powers. Such a possibility is purely speculative, however, and it is perhaps regrettable that the decision gives no clear indication to the States how they may now remedy the unfortunate results which it has produced.

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MUNNA BEACH APARTMENTS PTY LTD v. KENNEDY AND OTHERS¹

Investor protection — Interest — Investment contract — Offer for sale of home unit with undivided share in common property — Companies Act 1961 (Qld) ss 76, 81 — Building Units and Group Titles Act 1980 (Qld).

In several recent cases the Supreme Court of Queensland had to decide whether an offer for sale of a home unit, together with an undivided share in the common property of an apartment building was an offer of an 'interest' under the Companies Act 1961 (Qld). The matter came before McPherson J. His reasoning in one of the cases, *Munna Beach Apartments Pty Ltd v. Kennedy and Others*, led him to the view that an 'interest' had not been offered. That reasoning served also for the other cases² in which he reached a similar conclusion. When the matter was taken on appeal to the

³⁰ (1982) 43 A.L.R. 1, 15.

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¹ (1982) 7 A.C.L.R. 257.

² The cases additional to *Munna Beach Apartments Pty Ltd v. Kennedy and Others* were: —

Brisbane Unit Development Corporation Pty Ltd v. Deming No. 456 Pty Ltd and Others (1982) 7 A.C.L.R. 265;

Brisbane Unit Development Corporation Pty Ltd v. Sokala Pty Ltd and Another (1982) 7 A.C.L.R. 276;

Brisbane Unit Development Corporation Pty Ltd v. Sinum Nita Nominees Pty Ltd and Another (1982) 7 A.C.L.R. 282;

Brisbane Unit Development Corporation Pty Ltd v. Brisbane Townhouse & Unit Specialists Pty Ltd and Another (1982) 7 A.C.L.R. 286.

Full Supreme Court (Douglas, Sheahan and Connolly JJ.), that Court also decided that an 'interest' had not been offered.

In *Munna Beach Apartments Pty Ltd v. Kennedy and Others*, the issue arose in an action for specific performance of a contract for the sale of a unit, brought by the seller against the buyer. The buyer relied on the defence of illegality. The buyer's argument was that section 81 of the Companies Act 1961 (Qld) prohibited any person except a company (defined in section 76 to mean a public company, thus excluding the plaintiff proprietary company), from issuing or offering to the public for purchase any 'interest'.³

The subject matter of the contract of sale consisted of (i) an estate in fee simple in proposed Lot 45 on a proposed Building Units plan then still to be registered under the Building Units and Group Titles Act 1980 (Qld), and (ii) one undivided share in the common property of the building. The alleged illegality was involved in the offer for sale of the undivided share in the common property. Under the Building Units and Group Titles Act shares in the common property would be held by all the proprietors as tenants in common proportional to the number of lots each held; each proportional share would be appurtenant to a lot held so as not to be transferable separately from the lot and so as to be transferable by any transfer of the lot, without express reference to the undivided share. Control of the common property would be vested in a body corporate, comprising the proprietors of lots, which would come into existence upon registration of the building units plan. Subject to those provisions of the Building Units and Group Titles Act the rights of the proprietors in respect of the common property depended on the general law relating to tenancies in common. In the present context, the right of possession in common with other co-owners would be relevant.

The buyer's argument, before McPherson J., that the offer of an undivided share was an offer of an 'interest' rested on paragraph (c) of the statutory definition of 'interest'. That definition in section 76 of the Companies Act 1961 (Qld) was as follows:

'Interest' means any right to participate or interest whether enforceable or not and whether actual prospective or contingent —

- (a) in any profits assets or realisation of any financial or business undertaking or scheme whether in the State or elsewhere;
- (b) in any common enterprise whether in the State or elsewhere in which the holder of the right or interest is led to expect profits rent or interest from the efforts of the promoter of the enterprise or a third party;⁴ or
- (c) in any investment contract

³ In the current companies and securities industry legislation that which was designated an 'interest' in the former legislation is now referred to as a 'prescribed interest'. The definition of the new term is substantially the same as that contained in the older legislation considered in the *Munna Beach Apartments* case. See Companies Act 1981 (Cth), s. 5 and State Companies Codes, s. 5 as well as Securities Industry Act 1980 (Cth), s. 4 and State Securities Industry Codes, s. 4. Under the companies legislation, Part IV Division 6, 'prescribed interests' may be offered to the public only by a public company under the terms of an approved deed and subject to other provisions designed to protect investors. Under the securities industry legislation a dealer in 'securities' (which term includes 'prescribed interests') is required to be licensed and certain dealings in 'securities' are regulated. *E.g.* s. 68 of the securities industry legislation prohibits short selling of securities subject to some exceptions. On short selling, see Deutsch R., 'Short Selling' (1983) 1 *Company and Securities Law Journal* 142.

⁴ The wording of paragraph (b) was apparently inspired by the language of Murphy J. in *Securities and Exchange Commission v. W.J. Howey Co.* (1970) 328 U.S. 293, 298-9, when interpreting the expression 'investment contract' appearing in the definition of 'security' in s. 2 of the Securities Act 1933 (U.S. Congress) but not itself defined in that legislation. Murphy J. said: 'An investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person

whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset, but does not include —

- (d) any share in or debenture of a corporation;
- (e) any interest in or arising out of a policy of life insurance;
- (f) an interest in a partnership agreement unless the agreement or proposed agreement —
 - (i) relates to an undertaking, scheme, enterprise or investment contract promoted by or on behalf of a person whose ordinary business is or includes the promotion of similar undertakings, schemes, enterprises or investment contracts, whether or not that person is, or is to become, a party to the agreement or proposed agreement; or
 - (ii) is or would be an agreement, or is or would be within a class of agreements, prescribed by the regulations for the purposes of this paragraph; or
- (g) any prescribed right or interest or any right or interest of a prescribed class or kind declared by regulation to be an exempt right or interest for the purposes of this Division.

Section 76 also contained a definition of 'investment contract' as follows: —

'Investment contract' means any contract scheme or arrangement which in substance and irrespective of the form thereof involves the investment of money in or under such circumstances that the investor acquires or may acquire an interest in or right in respect of property whether in the State or elsewhere which under or in accordance with the terms of investment will or may at the option of the investor be used or employed in common with any other interest in or right in respect of property whether in the State or elsewhere acquired in or under like circumstances.

McPherson J. noted that, presumably, the buyer eschewed reliance on paragraph (a) because once the building units plan became registered, the assets, including the common property, ceased to be part of 'any financial or business undertaking or scheme' within paragraph (a) and the buyer would have no continuing dependence on the promoter's undertaking. Paragraph (b) was also irrelevant because, presumably, each buyer would not be possessed of any right to participate in any common enterprise in which he would be led to expect profits, rent or interest from the efforts of the seller or a third party.

McPherson J. initially approached the issue by a literal interpretation of the definition of 'investment contract'. He observed that the definition required a contract involving three elements, namely, (i) it should involve the investment of money; (ii) the investment should be in or under such circumstances that the investor acquires (or may acquire) an interest in or right in respect of property; and (iii) the interest or right (under or in accordance with the terms of the investment) will (or may at the option of the investor) be used or employed in common with any other interest in or right in respect of property acquired in or under like circumstances.

As to (i) McPherson J. noted that it was not to the point that there be an individual who by reason of his making a contract becomes involved in an investment of money. The contract itself had to involve investment. Investment in its widest meaning was the 'laying out of money in the purchase of some species of property, usually of a permanent character'.⁵ The expression 'laying out' and the context in which 'investment' appeared in the definition implied that some form of return, whether of the money itself or by way of income or profit or otherwise, is expected

invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise'. Later courts abandoned use of the word 'solely'.

⁵ A definition approved in *The Commissioner of Taxes v. The Australian Mutual Provident Society* (1902) 22 N.Z.L.R. 445, 450.

or is in contemplation. In the case before him the contract did not contemplate any such form of return and so was not one which involved 'the investment of money'.

McPherson J. held that although element (ii) was present element (iii) was missing. The buyer would acquire an estate in fee simple as tenant in common in the common property, together with the right as an incident thereof, to use that common property. However, it could not be said that the estate in fee simple, a legal abstraction, would be 'used or employed' by one tenant 'in common with' any other such estate in fee simple or interest in the common property. If, instead, attention were focused on an incident of the estate, namely, the right to go upon the physical land, the third element would still not be supplied for several reasons. First, even if two or more of the tenants in common elected or agreed to go upon the land simultaneously, their simultaneous use would not be use 'in common': each would be severally exercising his individual right. Secondly, the common use required by the definition was common use 'under or in accordance with the terms of investment' and there was nothing in the contract of sale which contemplated that the proprietors would combine to go upon the common property.

By interpreting the definition of 'interest' literally, McPherson J. was following the pronouncement of Mason J. in *Australian Softwood Forests Pty Ltd v. A.-G. for New South Wales*⁶ that the wide definition of 'interest' in section 76 could not be restricted 'by reference to the supposedly unintended consequences of a literal reading on everyday commercial transactions'.⁷

Not only was a literal approach justified by the language of the definition of 'interest' being so wide as not to disclose any identifiable legislative policy, but also a decision by a court that an item fell within the definition was not the final word. Under section 76 of the Companies Act 1961, the Executive could make regulations declaring a right or interest, or a right or interest included in a class or kind of rights or interests to be an exempt right or interest and thereupon it would be taken outside the definition.

In the *Munna Beach Apartments* case McPherson J., after concluding on the basis of his literal interpretation that the seller had not offered an 'interest', supported that conclusion by reference to cases in the United States dealing with the distinction between an interest which is an investment contract⁸ and an interest in a real estate transaction. That distinction, according to Hart J. of the Supreme Court of Illinois in *State v. Silberberg*,⁹ depended on the individual control which the buyer has over the property or business venture in which he acquired the interest.

If the purchaser is to share in the gross proceeds or net profits of operations managed by the one who is disposing of the interest, the instrument evidencing the interest transferred is generally held to be an investment contract. . . . On the other hand, if the purchaser of real property with others is to occupy the premises and conduct the enterprise, the instrument evidencing his interest is generally not an investment contract or a security.

American decisions had not been thought to be helpful by the Victorian Full Court in *Wade v. A Home Away Pty Ltd*¹⁰ when considering paragraphs (a) and (b). McPherson J. found justification for using them in relation to paragraph (c) in the reference found only in the definition of 'investment contract' to the 'substance' of a scheme or arrangement. In his view that reference invited examination of the nature of the right offered at the expense of attention simply to the form in which it was

⁶ (1981) 6 A.C.L.R. 45, 51. Discussed by Salter B., 'Thoughts on Australian Softwoods' [1982] *Australian Business Law Review* 125.

⁷ See also *Wade v. A Home Away Pty Ltd* [1981] V.R. 475, 477 per Young C.J.

⁸ *Supra* n. 4.

⁹ (1956) 139 N.E. 2d 342, 344.

¹⁰ [1981] V.R. 475.

cast. Under that approach, with the support of the American decisions, he was able to conclude that since buyers of units were not intended to share in the proceeds or profits of the vendor arising from the construction of the units the contract of sale was not in substance an 'investment contract' and was not, by virtue of section 81, prohibited or rendered illegal.

Finally, McPherson J. referred to a possible line of argument which had not been followed up that the Building Units and Group Titles Act 1980, with its provisions plainly envisaging that building units would be constructed and sold to the public, represented a special measure which the Legislature intended to prevail over the more general Companies Act. Because the point had not been argued he expressed no opinion on it.

In the case¹¹ taken on appeal to the Full Court, Connolly J. delivered a judgment in which Douglas and Sheahan JJ. concurred. First, he held that paragraph (a) of the definition of 'interest' was not applicable for the reason that there was nothing about the ownership of a unit and a share in common property which answered the description 'financial or business undertaking or scheme'. Management and maintenance of the property through the body corporate did not answer the description 'financial or business undertaking or scheme'. The promoter's activity amounted to a 'financial or business undertaking or scheme' but what a purchaser would acquire was something which, on sale, would cease to be an asset of the promoter's financial or business undertaking or scheme. Secondly, he decided that paragraph (b) of the definition could not apply because the only common enterprise in which the unit holders would be involved was the running of the building and there was no suggestion in the case of any expectation of profits, rent or interest from the efforts of the promoter or a third party. Thirdly, the expression 'investment contract' was not attracted for two reasons: payment of the purchase price for real estate is not aptly described as the investment of money in circumstances in which the investor acquires an interest in property, and there was no evidence in the case which showed that the property comprised in the home units, together with the shares in the common property, were to be used or employed in common with other interests in property.

Neither McPherson J., at first instance, nor the Full Court had to consider whether an 'interest', as defined, was confined to an interest which offered a prospect of economic advantage as opposed to an advantage of personal enjoyment. A limitation along those lines has been adopted by the United States Supreme Court¹² in relation to the expression 'investment contract' appearing without further legislative elucidation in the definition of 'security' in section 2 of the Securities Act 1933.¹³ The limitation did not commend itself to the Victorian Full Court in *Wade v. A Home Away Pty Ltd*.¹⁴

The judgment of McPherson J. in the *Munna Beach Apartments* case is particularly valuable because paragraph (c) of the definition of 'interest' has previously lacked any significant reported judicial interpretation. On the other hand, paragraphs (a) and (b) have been the subject of numerous decisions.

The width of the definition of 'interest' is necessary because unlike other legislation protecting investors and consumers, the legislation on 'interests' has been residual. Whereas the legislation on sale of goods, consumer protection, sale of life insurance and offerings of shares and debentures is concerned with specific items having settled legal characteristics, the legislation on 'interests' has had to be framed in general terms so as to embrace all other later developed forms of arrangement in which the

¹¹ *Deming No. 456 Pty Ltd and Others v. Brisbane Unit Development Corporation Pty Ltd* (1983) A.C.L.C. 821.

¹² *United Housing Foundation, Inc. v. Forman* (1975) 421 U.S. 837.

¹³ *Supra* n. 4.

¹⁴ [1981] V.R. 475.

public may be invited to participate. So wide is the definition of 'interest' that it could comprehend such diverse items as fractions of the beneficial interest under a trust (such as a unit trust, property trust or cash management trust), schemes to raise produce of various kinds (such as forestry and nut schemes), shares in the financing of theatrical ventures, shares in the ownership and management of competing animals (such as racehorses), certain franchising schemes, holiday resort time-sharing arrangements and even contracts of employment which carry a right to share in profits by way of bonuses. If some of these do not involve a mischief calling for regulation under the companies legislation or the securities industry legislation it is open to the executive to use its power to make regulations to grant exemption,¹⁵ or for the National Companies and Securities Commission to grant exemption.¹⁶ It would, perhaps, be an improvement in the legislation if there were inserted more explicit reference to the machinery for obtaining a clearance and some statement of the criteria¹⁷ to be applied by the executive or the National Companies and Securities Commission in determining whether a clearance should be given.

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O'REILLY v. COMMISSIONER OF STATE BANK OF VICTORIA¹

Administrative Law — Existence of power — Validity of exercise of discretion — Distinction between delegation of power and exercising power through agents — Alter ego principle.

INTRODUCTION

Where one person objects to the performance of a function by another, one obvious way in which the former could seek to impugn the action would be to challenge the existence of the latter's power to so act. To resolve a dispute as to the validity of the performer's action, the court will have resort in the first place to the source² from which it is alleged that the power of performance is derived. The role of the court is to then decide to whom it is that the source gives the power to act.

Where a statute expressly confers the power of performance of a function to A, and it is not A but B who ostensibly has performed the function, then a complaint that the power has not been validly exercised³ would *prima facie* be well founded.⁴

¹⁵ Companies Act 1981 (Cth), s. 5(1) and State Companies Codes, s. 5(1). *E.g.* in Victoria on 5 May 1981 regulations were made under the Companies Act 1961. They have the title Companies (Lake Eildon) Regulations 1981 and have the effect of exempting a particular holiday resort time-sharing scheme.

¹⁶ Companies Act 1981 (Cth), s. 176 and State Companies Codes, s. 176.

¹⁷ Compare the legislative statement of criteria to be considered by the National Companies and Securities Commission when deciding whether to exempt a person from compliance with the take-overs legislation or whether to modify the application of that legislation: see Companies (Acquisition of Shares) Act 1980 (Cth), s. 59 and State Companies (Acquisition of Shares) Codes, s. 59.

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¹ (1982) 44 A.L.R. 27.

² In the field of administrative law, the source of the power will almost invariably be an enactment — either an Act of Parliament or delegated legislation.

³ Another way of expressing this complaint is to say that B had no power to act.

⁴ *Re Reference under Section 11 of the Ombudsman Act 1976 for an Advisory Opinion* (1979) 2 A.L.J. 86, 93 per Brennan J.