SUPREME COURT OF QUEENSLAND

CITATION:	*Australand Corporation (Qld) P/L v Johnson & Ors* [2007] QCA 302
PARTIES:	**AUSTRALAND CORPORATION (QLD) PTY LTD** ACN 003 251 803 (applicant/respondent) **v** **EVAN RITCHIE JOHNSON and DEBRA ANN JOHNSON** (seventh respondent/first appellant) **ROBERT JOHN DELFORCE and JULIE CHRISTINE DELFORCE** (tenth respondent/second appellant) **GREGORY ALAN MYTTON and ADRIENNE RUTH MYTTON** (twentieth respondent/third appellant) **KAH YAO PIH** (forty-third respondent/fourth appellant)
FILE NO/S:	Appeal No 1956 of 2007 SC No 8521 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 September 2007
DELIVERED AT:	Brisbane
HEARING DATE:	22 and 23 August 2007
JUDGES:	Jerrard and Keane JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. Appellants to pay the respondent's costs of the appeal**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – REPEAL – GENERALLY – where contracts voidable under s 1073 *Corporations Law* – where s 1073 *Corporations Law* repealed by *Managed Investments Act 1998* (Cth) – where appellants gave notice of avoidance after repeal – whether appellants' right of avoidance survived repeal – whether right of avoidance was an "accrued right" within meaning of s 8 *Acts Interpretation Act 1901* (Cth) – whether repealing legislation revealed intention contrary to s 8 *Acts Interpretation Act*

Acts Interpretation Act 1901 (Cth), s 8
Corporations Law, s 9, s 1073, s 1018(1), s 1064(1), s 1065
Corporations Law s 9, s 601MB, s 1451, s 1452, s 1454
Managed Investments Act 1998 (Cth), s 2, Sch 1, Sch 2

Abbott v Minister for Lands [1895] AC 425, applied
Attorney-General for Queensland v Australian Industrial Relations Commission (2002) 213 CLR 485, applied
Attorney-General (Quebec) v Expropriation Tribunal (1986) 1 SCR 732, applied
Barminco Investments Pty Ltd v O'Brien [2006] WASCA 88, distinguished
Butcher v Henderson (1868) LR 3 QB 335, considered
Chang v Laidley Shire Council [2007] HCA 37, cited
Chief Adjudication Officer v Maguire [1999] 2 All ER 859; [1999] 1 WLR 1778, distinguished
Claydon v Attorney-General [2002] NZCA 283, cited
Colley v Futurebrand FHA Pty Ltd [2005] 63 NSWLR 291, distinguished
Ellison v Lutre Pty Ltd (1999) 88 FCR 116, distinguished
Esber v The Commonwealth (1992) 174 CLR 430, distinguished
G F Heublein and Bro Incorporated v Continental Liqueurs Pty Ltd (1962) 109 CLR 153, applied
Hamilton Gell v White [1922] 2 KB 422, distinguished
Langman v Handover (1929) 43 CLR 334, considered
Foran v Wight (1989) 168 CLR 385, considered
Mathieson v Burton (1971) 124 CLR 1, cited
Maxwell v Murphy (1957) 96 CLR 261, applied
Moray County Council v McLean [1962] SLT 236, distinguished
Ogden Industries Pty Ltd v Lucas (1967) 116 CLR 537, cited
Re Commissioner for Railways [1998] 2 Qd R 339, distinguished
Resort Management Services Ltd v Noosa Shire Council [1997] 2 Qd R 291, distinguished

COUNSEL: W Sofronoff QC SG, with D Collins SC and D A Skennar, for the appellants
L F Kelly SC, with D B O'Sullivan, for the respondent

SOLICITORS: Slater & Gordon for the appellants
McCullough Robertson for the respondent

[1] **JERRARD JA:** This appeal is against declaratory orders made on 7 February 2007, that the purported avoidance by the appellants of contracts with the respondent was of no effect. That purported avoidance was on 8 September 2003, in exercise of a right given by s 1073(2) of the *Corporations Law*, although the section was repealed by the *Managed Investments Act 1998* (Cth) as and from 1 July 1998. The issues before the learned trial judge and on appeal were whether the appellants had, in terms of s 8 of the *Acts Interpretation Act 1901* (Cth), an acquired or accrued right under s 1073, which survived the repeal of that section; and whether the repealing Act showed a contrary intention.

[2] That *Acts Interpretation Act* relevantly provides in s 8:

> "**8 Effect of repeal**
>
> Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not:
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
>
> (b) affect the previous operation of any Act so repealed, or anything duly done or suffered under any Act so repealed; or
>
> (c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed; or
>
> (d) affect any penalty forfeiture or punishment incurred in respect of any offence committed against any Act so repealed; or
>
> (e) affect any investigation legal proceeding or remedy in respect of any such right privilege obligation liability penalty forfeiture or punishment as aforesaid;
>
> and any such investigation legal proceeding or remedy may be instituted continued or enforced, and any such penalty forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

[3] The appellants are some of a much larger number of purchasers of apartments in a building known as the Sovereign Hotel in Surfers Paradise. The apartments were bought subject to a lease granted by the respondent Australand to a related company Sovereign Management (Qld) Pty Ltd ("Sovereign") for 15 years, requiring the latter company to use the premises as a "strata title hotel apartment". Sovereign entered into a management agreement with Touraust Hotels Pty Ltd ("Touraust"), appointed to manage the hotel for Sovereign's benefit.

[4] When the hotel opened in 1997 the appellants as apartment owners were entitled to rent for the first four years of the 15 year lease at a fixed percentage of the price at which the apartment was offered for sale. For those four years the rent was guaranteed by Australand. Thereafter it was quantified on a different basis and not guaranteed, and by late 2001 was not as profitable as indicated to the appellants in Australand's marketing material. The learned trial judge found that what Australand had offered the purchasers constituted a prescribed interest as defined in s 9 of the *Corporations Law*. That was because it satisfied each of the elements of a participation interest as defined in s 9. Those conclusions are not challenged in any way on the appeal. That finding meant the respondent had contravened s 1018(1) of that law, by offering for subscription "securities" without a prospectus having been lodged, had contravened s 1064(1) by offering for subscription or purchase a prescribed interest when Australand was not a public corporation, and contravened s 1065 by issuing or offering for subscription a prescribed interest without an approved deed. Those conclusions were conceded before the learned judge.

[5] The *Corporations Law* provided, at the time the appellants entered into their contracts with Australand, as follows, in s 1073:

> "**1073(2)[contract voidable]** Where:
>
> (a) an offer of a prescribed interest for subscription has been made; or

(b) an invitation to subscribe for a prescribed interest has been issued;

in contravention of a provision of this Law, a contract entered into by any person (other than the management company) to subscribe for the prescribed interest as a result of the acceptance by the person of the offer, or the acceptance of an offer made by the person pursuant to the invitation, is voidable at the option of that person by notice in writing given to the management company."

The learned trial judge's findings included findings having the effect that the appellants had not known the facts giving rise to the right, or of the right, as at the date of repeal.

[6] Sections 1018, 1064 and 1065 of the *Corporations Law*, and s 1073, were in Part 7.12 – Division 5 of that law. The *Managed Investments Act 1998*, by s 4 and s 143 of Schedule 2, repealed Division 5 of Part 7.12 of the *Corporations Law* ("the repealed provisions"). The repealed provisions defined a prescribed interest to include a participation interest, and further defined that term. They forbade (by s 1018(1)) offering a subscription, or issuing an invitation to subscribe for, securities of a corporation unless a prospectus had been lodged, which complied with the requirements of the law. "Securities" were defined to include prescribed interests. Those repealed provisions also forbade the issue or offer for subscription or purchase of a prescribed interest unless an approved deed was in force (s 1065), and by s 1066 trustees or representatives appointed for the purposes of the deed were required. Section 1069 provided for covenants which were to be contained in the approved deed. Those were required to bind the trustee or representative, and a management company. The management company was required, in respect of each approved deed, to keep a register of the holders of prescribed interests (s 1070(1)), and to lodge a return at the end of each financial year listing the holders of prescribed interest in each deed (s 1071).

[7] Section 1073A(3) provided some limited relief to a management company against a notice in writing voiding a contract with it. That section provided:

"1073A(3) [**Court to be satisfied**] If, on an application under subsection (1), the Court is satisfied that:

(a) the offer or invitation that led to the contract being entered into contravened section 1018, but only because of a contravention of Division 2 of Part 7.12 (or of regulations in force for the purposes of a provision of that Division) that:

(i) was minor or insubstantial; and

(ii) has not materially prejudiced, and is not reasonably likely to prejudice materially, the interest of the person who gave the notice under subsection 1073(2); and

(b) in all the circumstances, it is just and equitable to declare the notice to have had no effect;

the Court may by order so declare."

[8] The repeal of Division 5 of Part 7.12 was done as part of a process by which the regulation of prescribed interests achieved by the *Corporations Law* in that Division was replaced by the regulation of managed investments schemes, as defined in the *Managed Investments Act*. Transitional provisions were inserted in the

Corporations Law by the *Managed Investments Act 1998*, which by s 1451 defined "new Law" to mean "this Law as in force after the commencement", and "old Law" to mean "this Law as in force immediately before the commencement". The commencement was on 1 July 1998; s 1451 also defined a registered scheme to mean a managed investment scheme registered under s 601EB of the new Law. That section provided for registration.

[9] Section 1452 provided that:

> "This Division applies to interests that, immediately before the commencement, were prescribed interests to which … Division 5 of Part 7.12 of the old Law applied ... and that are interests in a managed investment scheme as defined in section 9 of the new Law. It also applies to the undertaking to which the interests relate and to the trustee or representative and the management company in relation to the interests."

[10] Section 1454 provided:

> "(1) The old Law continues to apply to the interest, the undertaking, the trustee or representative and the management company, for the period of 2 years starting on the commencement, unless, before then, the undertaking becomes a registered scheme.
>
> (2) The ASC may extend that period of 2 years if the undertaking is to be wound up at a fixed time after the 2 years and the ASC thinks it would be unreasonable to require the undertaking to become a registered scheme before being wound up.
>
> (3) Except for the purposes of applying to register the undertaking as a managed investment scheme under the new Law and dealing with the application, the new Law does not apply to the interests, the undertaking, the trustee or representative and the management company while the old Law continues to apply to them.
>
> (4) If the undertaking becomes a registered scheme within the period of 2 years referred to in subsection (1), section 601FC(4) of the new Law applies to the registered scheme for the remainder of that period as if the prescribed interests that are still covered by an approved deed because of subsection (1) of this section were interests in a registered scheme."

[11] The learned trial judge concluded s 1073 was engaged, because the respondent had relevantly offered a prescribed interest for subscription, that being a participation interest as defined in the repealed legislation. The respondent did not challenge that conclusion. The judge was accordingly satisfied that each appellant had been entitled to avoid their contracts of purchase, and the question was whether that right was lost by the repeal of the repealed provisions, or by the terms of the repealing Act. On the first question the judge held that the appellants were entitled to give notices of avoidance pursuant to s 1073 immediately prior to its repeal, and that could be described as a right, but the question was whether it was a right within the more limited category of a right "acquired" or "accrued". The judge ultimately concluded that it was not, but was a right akin to that described in *Abbott v Minister*

for Lands [1895] AC 425 at p 431, namely a right to take advantage of an enactment, not intended to be exercisable after the repeal.

[12] The judge's reasoning included the observation, accepted by the appellants, that because the right claimed was a right said to be enforceable by one party to a contract against the other party, it was to be expected that the right of the one party would be the converse of an obligation or a liability of the other. The judge went on to consider Australand's position as at the date of the repeal, and observed that its obligation at that date was to perform its contract. It was not under any obligation to accept a re-conveyance of an apartment or to make restitution to any purchaser, because any such obligation or liability was yet to arise, no notice having been given by any appellant. That meant any obligation or liability it incurred to make restitution arose after the repeal of the law which was its source. Likewise, as at the date of the repeal, each appellant was entitled to the performance of his or her contract and the ownership of the apartment (and the receipt of rents and profits), and had no right to repayment of the price or any other restitution. That right would depend upon giving notice in writing of an election to avoid, which had not happened.

The principles

[13] The general principles to apply were not disputed by the parties, nor those that were generally settled in the following cases. In *Butcher v Henderson* (1868) LR 3 QB 335 the plaintiff had obtained a verdict on 12 August 1867 and was entitled to a judgment with no costs; but if he obtained a certificate or order, was entitled to an order for costs. He had not obtained such an order, nor signed a judgment by 1 January 1868, when the sections entitling him to a certificate and costs were repealed. He claimed the costs, and the claim was upheld. Blackburn J wrote at 338 that:

> "... though when a statute is repealed, it is as to new matters as though it had never existed, yet as to transactions already completed under it, it still has full effect ... And we think that when, as in the present case, the plaintiff had under the then existing statutes become entitled to a judgment to recover the sum for which he had a verdict and no costs, unless he got an order, the transaction was complete, and the repeal of the statutes could not operate to give him a right to a different judgment."

[14] In *Abbott v Minister for Lands* [1895] AC 425 the *Crown Lands Alienation Act 1861* (UK) had provided in s 22 that holders in fee simple of lands granted by the Crown in areas not exceeding 280 acres might make conditional purchases of adjoining lands (not exceeding with the lands held in fee simple 320 acres), which were not to be subject to the residence condition applicable to conditional purchases of non-adjoining land. That residence requirement in s 13 of that Act had entitled any person to tender for land for conditional sale by selection, for not less than 40 and not more than 320 acres, subject to a requirement in s 18, that before a grant of fee simple could be obtained, there should be three years bona fide continuous residence either of the original purchaser or of his alienee or alienees.

[15] In 1884 the *Crown Lands Act* of that year was passed, and it repealed the *Crown Lands Act 1861,* subject to a saving provision which read:

> "Provided always that notwithstanding such repeal –

> (b) All rights accrued and obligations incurred or imposed under or by virtue of any of the said repealed enactments shall subject to any express provisions of this Act in relation thereto remain unaffected by such repeal."

The 1884 Act had even more stringent conditions as to residence. Mr Abbott had bought 40 acres of Crown land in 1871, under the 1861 Act; and another 40 acres of adjoining land in 1873. In 1892 he applied for the conditional purchase of another 150 acres adjoining the holding formed by his first two purchases. That application was disallowed, and he contended on an appeal that although s 22 of the 1861 Act had been repealed, and had no counter-part in the 1884 Act, the saving provision enabled him to make an additional conditional purchase, as if s 22 remained in force.

[16] The Lord Chancellor, delivering the judgment of the Privy Council, wrote that s 22 had the substantial effect that, whilst it limited the fee simple holder of land to conditional purchases of which the land so held in fee simple should not exceed 320 acres, it dispensed with the condition of residence on the lands conditionally purchased. The Privy Council considered it fallacious to say that the section conferred on the fee simple holder of land the "right" to make conditional purchases, and that the argument for the appellant was too broad. Their Lordships considered it necessarily went:

> "... to this extent, that all the enactments of the Act of 1861 of which any one could before their repeal have taken advantage continue for an indefinite time in force and may notwithstanding the repeal still be taken advantage of."[1]

[17] They continued (at [1895] AC p 431):

> "It has been very common in the case of repealing statutes to save all rights accrued. If it were held that the effect of this was to leave it open to any one who could have taken advantage of any of the repealed enactments still to take advantage of them, the results would be very far reaching.
>
> It may be, as Windeyer J observes, that the power to take advantage of an enactment may without impropriety be termed a 'right.' But the question is whether it is a 'right accrued' within the meaning of the enactment which has to be construed.
>
> Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words 'obligations incurred or imposed.' They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued' within the meaning of the enactment."

---

1 At [1895] AC 431.

[18] The observation in *Abbott v Minister for Lands* that s 22 did not confer a "right" to make conditional purchases, as opposed to giving a right to absolve an applicant like Mr Abbott from the condition of residence, was relied on by the appellants to distinguish the facts in that important decision from those in this matter. But the facts remain very close. Mr Abbott had had a right to acquire adjoining lands without being subject to a residence condition, to which other applicants for fee simple were subject; and the statute giving that right had been repealed. On that repeal he lost the unexercised right; the Privy Council considered it could not properly be called a "right accrued".

[19] In *Hamilton Gell v White* [1922] 2 KB 422 the English Court of Appeal considered a matter in which a Notice to Quit had been given under the *Agricultural Holdings Act 1914* (UK) to a tenant, by a landlord who wanted to sell. The Act provided that such a notice was to be treated as an unreasonable disturbance within s 11 of that Act, and the tenant was entitled to compensation, upon various terms and conditions. One was that the tenant should give notice of an intention to claim compensation within two months after the receipt of the notice, and another that the tenant should make his claim for compensation within three months after quitting the holding. The tenant gave the relevant notice of the intent to claim compensation within the time limited; but before the tenancy had expired, s 11 of the Act was repealed. The tenant subsequently made the claim within the three months previously allowed. A strong Court of Appeal – Bankes, Scrutton, and Atkin LJJ – upheld the tenant's claim, in reliance on s 38 of the *Interpretation Act 1899,* which relevantly provided that:

> "... where ... any Act ... repeals any other enactment ... the repeal shall not affect any right ... acquired ... under any enactment so repealed."

The court held that the tenant had acquired a right under s 11, because it was a right not dependent upon some act of the tenant's own (as that court held had been the case in *Abbott v Minister for Lands*), but which had depended upon the act of the landlord, namely the giving of a Notice to Quit in view of a sale.

[20] In *Maxwell v Murphy* (1957) 96 CLR 261 the High Court heard an appeal involving the *Compensation to Relatives Act 1897-1946* (NSW). A widow had brought a proceeding in respect of the death of her husband, who was killed on 19 March 1951. The *Compensation to Relatives Act 1897-1946* provided at that time that every action under it should be commenced within 12 months of the death of the deceased, and that not more than one action should lie. The Act was amended as from 16 December 1953, by a provision that the words "twelve months" be omitted and the words "six years" inserted. On 30 November 1954 the widow brought, for the first time, her action in respect of her husband's death in March 1951. The High Court held by majority that the amendment did not operate to revive the widow's right to maintain an action, which had expired or been barred as and from 19 March 1952.

[21] Dixon CJ wrote (at CLR 266):

> "If the *Interpretation Act* does not apply, the rule of the common law on the subject must receive effect. In the first place it must be borne in mind that at common law the repeal of a statute or statutory provision means that the law must be applied as if the provision had never existed. This is subject to an exception, variously expressed,

> as to past matters. Lord *Tenterden* CJ used the expression 'transactions past and closed': *Surtees v Ellison.*[2] Lord *Campbell* CJ said: '... all matters that have taken place under it before its repeal are valid and cannot be called in question': *Reg v Inhabitants of Denton*."[3] The phrase of Blackburn J was 'transactions already completed under it' – *Butcher v Henderson*[4].
>
> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred, in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed. The basis of the distinction was stated by *Mellish* LJ in *Republic of Costa Rica v Erlanger*.[5] 'No suitor has any vested interest in the course of procedure nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done.'[6] The distinction is clear enough in principle and its foundation in justice is apparent. But difficulties have always attended its application."

[22] His Honour went on (at CLR 268):

> "The rule or rules governing the presumption against the operation of new laws upon rights that have already accrued or immunities that have already been established or acquired must be reconciled or accommodated with the rule that the repeal of a provision makes it as if it had never been enacted. It is to this that the exceptions, already described, of the former rule are directed. In the case cited above, *Butcher v Henderson,*[7]this is clearly put by Blackburn J as follows:
>
> "The maxim alike of law and justice is, '*Nova constitutio futuris formam imponere debet, non praeteritis,'* and therefore, though when a statute is repealed, it is as to new matters as though it had never existed, yet as to transactions already completed under it, it still has full effect'."[8]

---

2 (1829) 9 B & C 750, at p 752 [109 ER 278 at p 279].
3 (1852) Dears. 3, at p 8 [169 ER 612, at p 614].
4 (1868) LR 3 QB 335, at p 338.
5 (1876) 3 Ch D 62.
6 (1876) 3 Ch D at p 69.
7 (1868) LR 3 QB 335.
8 (1868) LR 3 QB, at p 338.

Maxwell v Murphy is an authoritative example of the loss of a right by the failure to exercise it within the time permitted. The right was not revived by the latter amendment to the legislation, because it had ceased to exist.[9]

[23] In *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537, Windeyer J wrote of the provisions of s 7(2) of the *Acts Interpretation Act 1958* (Vic) – relevantly expressed in the same terms as s 8 – as follows, at CLR 584:

> "The words 'any right privilege obligation or liability acquired accrued or incurred', which the *Acts Interpretation Act* uses, and the same words when used by judges, are all general and abstract terms... The word 'liable' here at once attracts the idea of a 'liability'. But it is not necessary to be a disciple of Hohfeld, or wedded to the terminology of his analysis of legal rights and duties, to see that both words are, using his phrase, 'chameleon-hued'. And it is necessary to be cautious in going from the word 'liable' as used in s 5(1) to the word 'liability' as used in other contexts. 'Liability' can be, and often is, used as a synonym for 'duty' or 'obligation'; but Sir George Paton in his book *Jurisprudence, 3rd ed (1964),* by Professor Derham p 242, uses it in an opposed sense. 'Obligation', he says, 'should be sharply distinguished from liability. Obligation relates to what a person ought to do because there is a duty laid upon him: liability to what he must do because he has failed to do what he ought.' The term 'liabilities' when used to describe unpaid debts reflects this meaning. For Salmond and Hohfeld 'liability' has still another meaning. It describes a person's liability to be, by the power of someone else, made subject to a duty. In that sense it is the opposite of 'immunity'. It seems to me that without descending to too much refinement there are at least three main senses in which lawyers speak of a liability or liabilities. The first, a legal obligation or duty: the second the consequence of a breach of such an obligation or duty: the third a situation in which a duty or obligation can arise as the result of the occurrence of some act or event. It is in the third sense that s 5(1) speaks of an employer as liable to pay compensation in accordance with the Act. But I do not think it is the sense in which it is said that an amending Act does not disturb existing liabilities arising out of past transactions. That to my mind describes a liability having become complete by past events rather than a situation in which some future event must occur to make the effect of past events create a completed liability."

[24] Mr Sofronoff QC, senior counsel for the appellants, referred this Court to the third edition of *Jurisprudence,* by RWM Dias,[10] at p 248 and following, and to the description therein of the analysis of jural relations by the American jurist Hohfeld in his work *Fundamental Legal Conceptions.* That was as part of a submission that the appellants' rights could be described as a power to alter the legal relationship between each appellant and the respondent. Interesting as the argument was, it did not assist in deciding whether the power continued until the date the appellants claimed to exercise it.

---

9 Per Dixon CJ at CLR 268 and 269.

10 Published 1970 by Butterworths, London.

[25] Windeyer J made further reference to Hohfeld in *Mathieson v Burton* (1971) 124 CLR 1. The issue in that appeal was whether the respondent retained or had lost a right of continued residence in premises leased to her deceased father. The right was given by s 83A of the *Landlord and Tenant (Amendment) Act* 1952 (NSW) and the issue was whether the right survived amendment of that Act in 1968. The rights given by s 83A was to a child of a lessee, living with a lessee at the time of the lessee's death, and to whom the statute gave the "like right" to continue in possession of the premises, until probate or letters of administration of the estate of the deceased lessee were granted. The lessee died in 1958 and in 1969 (no probate or letters of administration being granted) the appellant began an action in ejectment against her, which failed. Windeyer J wrote (at CLR 12):

> "We are not engaged in an exercise in analytical jurisprudence, or with the classification, expressed in terms of correlatives and opposites, that delights and attracts both disciples and critics to Hohfeld. It was said that s 83A(1) created immunities not rights. But I fail to see why an immunity, or exemption from legal consequences, should not be called a right or privilege once it has taken effect and is not merely inchoate. Before 1968 the respondent had 'the like right' to continue in possession of the premises as her father had had. ... This right was not, strictly speaking, an estate or interest in land. But that is immaterial. It was in jurisprudential language perhaps best classified as a power; but that does not put it outside the family of rights."

[26] Gibbs J wrote in that case (at CLR 23):

> "In my opinion when the Act of 1968 was passed the respondent had an existing right to continue in possession of the subject premises. That right had arisen out of, and had been defined by reference to, facts that had occurred before the Act of 1968 was passed."

His Honour later added.

> "The presumption of the common law is that this right, having been acquired, should not be affected by the provisions of s 4(h) of the Act of 1968 which clearly dealt with matters of substantive law and not with matters of procedure. The same presumption would arise if s 8(b) of the *Interpretation Act of 1897* (NSW) applied. That section in referring to a right acquired or accrued does not preserve a power to take advantage of an enactment, assuming that that may properly be described as a right (*Abbott v The Minister for Lands*), and does not apply where there is merely a hope or expectation that a right will be created (*Director of Public Works v Ho Po Sang*); but it does protect anything that may truly be described as a right, 'although that right might fairly be called inchoate or contingent' (*Free Lanka Insurance Co. Ltd v Ranasinghe).* " (Citations omitted).

In that case the statute expressly described the lessee's child having a "right". The right had been claimed and exercised, and was not lost by the repeal or amendment of the statute that had given it.

[27] In *Esber v The Commonwealth* (1992) 174 CLR 430 the appellant had been in receipt of weekly payments in excess of $50 as compensation under the *Compensation (Commonwealth Government Employees) Act 1971* (Cth), as a result

of an injury suffered when in the army. He applied to redeem his weekly payments under s 49 of that Act, so that he might receive a lump sum in lieu of those. The application was rejected but he applied for a review of that decision. He was given leave to apply out of time to the Administrative Appeals Tribunal ("AAT") to review the decision. Before the date of hearing, the 1971 Act was repealed and replaced by the *Commonwealth Employees Rehabilitation and Compensation Act 1988* (Cth), which provided that weekly payments over $50 were not redeemable. The joint judgment of Mason CJ and Deane, Toohey, and Gaudron JJ held, (at CLR 440) regarding s 8 of the *Acts Interpretation Act* that:

> "Once the appellant lodged an application to the Tribunal to review the delegate's decision, he had a right to have the decision of the delegate reconsidered and determined by the Tribunal. It was not merely 'a power to take advantage of an enactment'. Nor was it a mere matter of procedure; it was a substantive right. Section 8 of the *Acts Interpretation Act* protects anything that may truly be described as a right, 'although that right might fairly be called inchoate or contingent'. This was such a right. It was a right in existence at the time the 1971 Act was repealed. That being so, and in the absence of a contrary intention, the right was protected by s 8 of the *Acts Interpretation Act* and was not affected by the repeal of the 1971 Act." (Citations omitted).

[28] Mr Sofronoff QC accepted those cases stated applicable principles, but submitted that the learned trial judge erred in two respects. The first was in mis-analysing the position in Hohfeldian terms when seeking to define a corresponding liability, which was adjunct to the rights claimed by the appellants; the second was in the construction of the transitional provision. Regarding the first argument, Mr Sofronoff QC submitted, in what he described as an exercise in analytical jurisprudence, that the appellants under s 1073(2) enjoyed a power to affect the liability of the other contracting party – the respondent – which he contended constituted a right within the meaning of s 8 of the *Acts Interpretation Act.* Mr Sofronoff QC enlarged on that submission by reference to the jurisprudence established by Hohfeld, in the course of a submission which accepted the observation of the learned trial judge, that a right in the appellants would ordinarily result in a corresponding duty or liability in the respondent.

[29] Mr Sofronoff QC conceded that what his argument then described as a power to affect the other party's liability only resulted in a right to demand the return of the money paid by the appellant to the respondent, and the re-conveyance to the respondent of the apartments, if and when the power was exercised. It had not been exercised before the relevant laws were repealed. Nevertheless, Mr Sofronoff submitted that the right to affect the legal relationship was a right which had "accrued" or been "acquired" within the meaning of s 8 of the *Acts Interpretation Act*.

[30] Mr Sofronoff QC referred to a considerable number of case authorities, as did Mr Kelly SC for the respondent. Mr Sofronoff QC suggested that an example of a court holding that a right to avoid a contract, given by statute, although unexercised, survived the repeal of the statute giving the right, could be found in the decision of the Full Court of the Federal Court in *Ellison v Lutre Pty Ltd and Anor* (1999) 88 FCR 116. That decision was primarily concerned with whether or not the holder of the right to avoid had lost the right by having elected to affirm the contract. That

decision also involved the repealed provisions of the *Corporations Law*, like this one; but a critical difference is that in that case the Notice to Avoid was given on 7 January 1997[11], 18 months before the relevant repeal. Accordingly, the references scattered throughout the judgment of the Full Federal Court, of a comparison of rights of avoidance or loss of that right by a contrary election, are to a right purportedly exercised before the repeal.

[31] Mr Sofronoff QC also referred to *Chief Adjudication Officer and Anor v Maguire* [1999] 1 WLR 1778, as an example of an intermediate appellate court finding an acquired right, which survived a statutory repeal. It was a decision on which the appellants particularly relied. The case concerned a Mr Maguire, who had suffered an injury which qualified for a special hardship allowance then granted by s 60 of the *Social Security Act 1975* (UK). Payment of the benefit required a claim for it, to be made within three months (after diagnosis or such extended time if good cause was shown). On 1 October 1996 that allowance was repealed, and although Mr Maguire's necessary diagnosis occurred before the repeal date, he had not claimed for the allowance. The issue was:

> "the position of a claimant who before the repeal of (the allowance) satisfied all the preconditions to entitlement to the benefit save only that of making the requisite claim, such claim then being made within the prescribed period albeit after repeal. More particularly the issue is whether such a claimant has an acquired or accrued right within the meaning of section 16(1)(c) of the *Interpretation Act 1978*. Section 16 provides:
> "(1) ... where an Act repeals an enactment, the repeal does not, unless the contrary intention appears ...
> (c) ... affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment ..."[12]

[32] The judgment in the UK Court of Appeal, after referring to inter alia *Abbott v Minister for Lands* [1895] AC 425, *Hamilton Gell v White* [1922] 2 KB 422, *Director of Public Works v Ho Po Sang* [1961] AC 901, *Re Moray County Council* [1962] SLT 236, and *Free Lanka Insurance Co Ltd v Ranasinghe* [1964] AC 541, accepted the contention that all a claimant needed to do under the repealed provision to acquire a right capable of being saved by s 16 of the *Interpretation Act* was to suffer the relevant degree of disability through the specified accident or disease, at which point nothing could destroy an eventual right to be paid the benefit, provided only that that person came to claim it within the prescribed or extended time.[13] Accepting that decision is an example of an acquired right which survived repeal of the statute which created it, it does not follow that the appellants here acquired a right which survived repeal. In *Maguire's* case the repealed provision was replaced by another, with similar conditions but separate benefits, which Mr Maguire was paid on and from the introduction of that new provision. His claim was only for the period up to the date of repeal, during which he had suffered the condition but not yet claimed the benefit. The legislation giving him the right to a benefit protected him against some of the consequences of ill health and injury, and he was held to have acquired the right because he experienced that injury or ill health. That differs in quality from the right to avoid a contract enjoyed by the appellants, who also

---

11 See (1999) 88 FCR 116 at 120.
12 This quotation is from the judgment of Simon Brown LJ at 1779, 1780.
13 Simon Brown LJ at 1787F; Waller LJ at 1788 H; Clarke LJ at 1790 B.

enjoyed the ownership of the units and income from them until the date of repeal of the repealed provisions, and thereafter. The decision in *Maguire* does not establish that an unexercised right to affect legal relations with another party is an acquired right of the sort in *Maguire*.

[33] In *Maguire,* Simon Brown LJ, after reviewing the authorities, quoted with approval at p 1786 from the judgment of Lord Woolf in *Plewa v Chief Adjudication Officer* [1995] 1 AC 249 at 259-260 to this effect:

> "Inchoate rights, obligations and liabilities are covered by (c). This was established by *Free Lanka Insurance Co Ltd v Ranasinghe* [1964] AC 541. In that case the Privy Council had no difficulty in construing the Ceylon Interpretation Ordinance 1900 as including an inchoate or contingent right and the same approach should be adopted to the interpretation of 'right,' 'obligation,' or 'liability' in section 16 of the Act of 1978. That section clearly contemplates that there will be situations where an investigation, legal proceeding or remedy may have to be instituted before the right or liability can be enforced and this supports this approach."

[34] A little later, Simon Brown LJ wrote at 1788 that:

> "... whether or not there is an acquired right depends upon whether at the date of repeal the claimant has an entitlement (at least contingent) to money or other certain benefits receivable by him, provided only that he takes all appropriate steps by way of notices and/or claims thereafter."[14]

If those statements describe Mr Maguire's right as an inchoate right or a contingent right, it was a right to financial compensation by the State for an apparently irreversible physical condition. It differed in nature and quality from the commercial choice available to the appellants, as at the date of repeal. *Maguire* is an example of a right to a financial benefit which Mr Maguire had, although he had taken no steps to enjoy the right.

[35] The appellants also placed significant reliance on *Barminco Investments Pty Ltd v O'Brien* [2006] WASCA 88. Simplifying the facts a little for ease of description, Mr O'Brien had suffered a disability in the course of his employment prior to 5 October 1999, which under the then applying legislation had the result that his right to recover common law damages was conditional upon his being given leave to commence proceedings. Leave could only be given subject to certain conditions. On 5 October 1999 the relevant legislation was repealed and replaced by other laws, and on 3 September 2004 Mr O'Brien was given leave, under s 93D(4) of the repealed laws, to commence an action against Barminco Investments in respect of his disability. Barminco appealed that order, which was made after the decision of the High Court in *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1. That decision involved a consideration of much of the same legislation. In that case Mr Dossett had a pending application for leave at the time the legislation was repealed on 5 October 1999, and when the new legislation came into force. Steytler P wrote in *Barminco v O'Brien* at [14] that Mr O'Brien had, on 5 October 1999, a common law right to bring proceedings against his employer, which right had been

---

14 At [1999] 1 WLR 1788.

subjected to a partial legislative restriction brought about by the requirement to obtain leave, which, in turn, was conditioned by the requirements of s 93D.

[36] The learned judge added that the question which arose was whether a subsequently enacted and more restrictive legislative regime applied to his common law right. After reference to *Abbott v Minister for Lands*, *Resort Management Services Limited v Noosa Shire Council* [1997] 2 Qd R 291, *Mathieson v Burton* (1971) 124 CLR 1, *Hamilton Gell v White* [1922] 2 KB 422, *Chief Adjudication Officer v Maguire*, and *Re Moray County Council* [1962] SLT p 236, the President concluded (at [32]) that Mr O'Brien had a real and ascertainable right defined by reference to past events, being the fact of the injuries which led to his disability, which he alleged was brought about by his employer's negligence. His right was one to recover damages arising out of a cause of action given to him by the common law. Because that cause of action had arisen before the repeal, he had an accrued right into which the legislature had (before the repeal) laid some statutory inroads. He was entitled to enforce that right by making a claim in accordance with the then legislative provisions. He had that right notwithstanding that he had taken no steps to exercise it, and it was an accrued right prior to the repeal. The President considered that in *Dossett,* Gummow, Hayne, and Heydon JJ had regarded the relevant "rights" as those given by the common law, in tort, to persons such as Mr O'Brien.

[37] Steytler P considered that those must be accrued rights. McLure JA agreed with Steytler P, and Pullen JA wrote a separate judgment concurring in the result, but specifically agreeing that Mr O'Brien had a right under the general law to sue for damage, existing before the repeal in 1999, and thus a cause of action in tort and a consequential right to sue. It had accrued before the 1999 amendment (at [77], in the reasons for judgment).

[38] That reasoning does not help these appellants. Their rights to avoid a contract differed from an accrued cause of action at common law. The repeal of the provisions governing the leave conditions in 1999 in Mr O'Brien's matter, and the substitution of other provisions, had no effect on what was considered to be the accrued common law right. Here, the repeal of the statute removed the source of the right.

[39] The appellants also relied on *Esber v The Commonwealth of Australia* (1992) 174 CLR 430. On appeal the joint judgment of Mason CJ, Deane, Toohey and Gaudron JJ relevantly held that (at CLR 440):

> "If it be assumed that the appellant did not have a right to redemption in the sense first discussed, he had a right to have his claim to redemption determined in his favour if the delegate had wrongly refused his claim … Once the appellant lodged an application to the Tribunal to review the delegate's decision, he had a right to have the decision of the delegate reconsidered and determined by the Tribunal. It was not merely 'a power to take advantage of an enactment'. Nor was it a mere matter of procedure, it was a substantive right." (Citations omitted).

Their Honours added that s 8 of the *Acts Interpretation Act* protected anything that might truly be described as a right, although that right, might fairly be called inchoate or contingent. They wrote: (at CLR 440, 441):

> "This was such a right. It was a right in existence at the time the 1971 Act was repealed. That being so, and in the absence of a contrary intention, the right was protected by s 8 of the *Acts Interpretation Act* and is not affected by the repeal of the 1971 Act."[15]

[40] Mr Esber had taken a step to assert what was found to be his right, to have the AAT determine his application that it review the delegate's decision, namely he had applied to the Tribunal to review the decision. He had exercised his right, in a way the present appellants had not; his right was accordingly protected by s 8, it having accrued or been acquired. The appellants rely on the remarks describing accrued rights as including inchoate or contingent rights, but in so describing it the joint judgment also described the right as existing. The facts in that case reveal that Mr Esber had taken the necessary steps to claim and assert the right, before the statutory repeal.

[41] The appellants also relied on this Court's decision in *Resort Management Services Limited v Noosa Shire Council* [1997] 2 Qd R 291. In that case this Court heard an appeal in which a land owner's estate or interest in land had been injuriously affected by an amendment to a town planning scheme. Section 33(10)(a) of the *Local Government Act 1936* (Qld) gave a land owner so affected a right of compensation from the local authority if the land owner made a claim within the prescribed time. In that case the landowner's estate or interest was injuriously affected by a planning scheme amendment taking effect on 15 December 1990. Four months later, on 15 April 1991, s 33 was repealed. The headnote informs that on 14 December 1993, but within the time which had been allowed by the now repealed s 33, the land owner lodged a claim with the local authority for compensation for injurious affection. The Council contended the land owner had no accrued right.

[42] Section 20(1)(c) of the *Acts Interpretation Act 1954* (Qld) was relevantly in the same terms as s 8(1)(c) of the *Acts Interpretation Act* (Cth). This Court rejected the local authority's argument that s 33(10)(a) did no more than confer the possibility of compensation, and this Court held that the injurious affection of the land owner's land by the commencement of the amended planning scheme, was sufficient to allow a right within the meaning of the *Acts Interpretation Act 1954* to be acquired or to be accrued. The principal judgment was written by Fryberg J, who wrote (at p 303) that:

> "... a statutory right available to the public in general is not likely to be taken to be an accrued right under s 20 unless the claimant has taken appropriate steps, or some event has happened, to enable him or her to take advantage of the right by the date of repeal. By that step, a person's right becomes specific rather than general. The conclusion in *Abbott v Minister for Lands* is consistent with the view of the function of s 20 advanced above."

[43] Fryberg J considered that although the land owner had not taken any step toward availing itself of its right to compensation as at the date of the repeal, the earlier injurious affection of its land was the happening of an event specified by the statute, sufficient to allow a right within the meaning of s 20 to be acquired or to accrue. It

---

15 At CLR 440-441.

was not merely a statutory precondition of a right to compensation; it was an event by which the statutory right became so specific as to bring it within the ambit of s 20. His Honour also held that making a claim within the prescribed time (a timely claim) was not one of the elements defining the right, but was merely a condition of its exercise. The land owner had a right to compensation, subject to the adoption of procedures prescribed by the statute for working out that right.

[44] McPherson JA wrote[16] that:

> "… the question whether or not a 'right' survives the repeal or amendment of the statute that created or conferred it depends on the nature of that right, as well as the meaning to be ascribed to that word in s 20(1)(c) considered in the context of decided authorities and of analogies that fairly arise from them."

[45] The land owner in that case had suffered a financial loss, that being the extent of the injurious affection of the value of the land by the amended town planning scheme. This Court held that the statutory right of compensation given in those circumstances had accrued as at the date of repeal of the section, that right being subject to the adoption of prescribed procedures. The land owner's position was similar to that of the pensioner in *Maguire*, in that damage was suffered and a right of compensation was given by statute. The right remained after the statute giving it was repealed, the damage remaining.

[46] Mr Sofronoff QC conceded in argument that *Colley v Futurebrand FHA Pty Ltd* (2005) 63 NSWLR 291 was an example of a right which did not accrue, and which became merely a general right to take advantage of a statute. In that case the New South Wales Court of Appeal considered the effect of s 106 of the *Industrial Relations Act 1996* and s 108A. Section 106 empowered the Industrial Relations Commission to make orders granting relief from unfair contracts. Section 108A, which took effect on 24 June 2002, relevantly provided that an application could not be made for an order under that division if it related to a contract of employment under which the remuneration package exceeded a specified cap. Section 30(1) of the *Interpretation Act 1987* (NSW) was in the same terms as s 8(c) of the *Acts Interpretation Act* (Cth). In *Colley*, that claimant commenced proceedings in the Industrial Relations Commission claiming relief under s 106, on the ground that a contract of employment entered into on 15 May 2002 and terminated on 18 May 2003, was unfair. The remuneration exceeded the cap. Handley JA, with whom Giles JA agreed, held that s 106 did not confer defined rights on a party to an unfair contract, and that it did no more than confer jurisdiction on the Commission to grant particular relief.[17]

[47] His Honour went on to hold (at [19]) that subject to any contrary intention in the repealing or amending legislation, s 30 (of the *Interpretation Act*) preserved rights which had been acquired or had accrued under the repealed or amended Act. He later held that, given the only right expressly conferred by s 106 was a right to apply to the Commission for specific relief, a would be applicant had the right to apply for an order, nothing more.[18] His Honour wrote that the filing of an application under s 106 caused a right to accrue, because the applicant acquired a legally enforceable right to have the Commission hear and determine the application according to law

---

16 At Qd R 295.
17 At 63 NSWLR 295, [13].
18 At 63 NSWLR 298, [30].

(citing *Esber v The Commonwealth*); and held (at [31]), that that was a new right, different from a mere right to take advantage of the section. He added that there was no other act or event which could convert the general right to take advantage of s 106 into an accrued or acquired right, and that until an application under s 106 was made, the right under that section could fairly be characterised as a mere right to take advantage of the section, to use the language of Lord Herschell LC in *Abbott v Minster for Lands* (at [32] and [33]). Accordingly, no accrued or acquired right survived the enactment of s 108A. His Honour also held that in any event, s 108A(1) disclosed a contrary intention which excluded both the common law presumption and s 30(1) of the *Interpretation Act*. That was because that contrary intention appeared with reasonable certainty.

[48] That decision reminds of the necessity to determine the nature of the right alleged, and whether it is accrued or acquired. In the recently published decision in *Chang v Laidley Shire Council* (2007) 81 ALJR 1598; [2007] HCA 37, the joint judgment of Hayne, Heydon and Crennan JJ wrote (at [116]) of the need to identify a right that has been acquired or has accrued under the relevant legislation before it was amended, and that:

> "**117**. Terms like 'right', 'interest', 'title', 'power' or 'privilege' when used in the context of a general interpretation provision like s 20 are to be understood by reference to the statute that has been amended or repealed. They are terms that are not used 'solely in any technical sense derived exclusively from property law or analytical jurisprudence'."[19]

[49] Mr Sofronoff QC submitted the learned trial judge had correctly held that the appellants had a right which entitled them to avoid the contracts of purchase, but was in error in holding that that was not a right which had been acquired or accrued. In support of the argument that the event giving rise to the right which accrued was the contravention of the repealed provisions of the law when contracting with the appellants, Mr Sofronoff QC referred to the decision in *Re Moray County Council* [1962] SLT 236. In that matter s 111 of the *Housing (Scotland) Act 1950* enabled local authorities to make contributions towards the cost of improvements to private dwellings. Section 114(2) provided that in the event of a sale by the owner of a dwelling which had received an improvement grant within a period of 20 years, an appropriate proportion of any sums paid by the local authority by way of improvement grant, together with compound interest, should, on being demanded by the local authority, become payable to it by the owner for the time being. A 1959 amending act amended s 114(2) by repealing the provision requiring repayment on sale. Section 38(2)(c) of the *Interpretation Act 1889* (UK) provided in similar terms to s 8(c) of the *Acts Interpretation Act* (Cth).

[50] A land owner had applied on 24 May 1955 for improvement grants in respect of four cottages, and in May 1956 the improvement grants were paid. In October 1956 the land owner sold the four cottages, a fact unknown to the local authority until December 1959. The authority then claimed for repayment of the appropriate proportions of the improvement grants. Lord Hunter, giving the judgment of the Outer House, held that under the *Interpretation Act 1889* the local authority acquired a right to repayment of the appropriate proportion of the grant on the sale

---

19 The joint judgment was citing from *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 68 [96] per Gummow and Hayne JJ.

of the cottages, and an obligation was incurred by the owners to make that repayment, and no contrary intention appeared in the repealing Acts. Lord Hunter deduced three propositions from the authorities.

[51] The first was that a mere abstract right to take advantage of a statutory enactment was not a 'right acquired' or a 'right accrued'. The second was that even if a person has taken steps to put statutory machinery in motion, the statutory proceedings may only by the date of repeal have reached the stage where that person has a hope or expectation of acquiring a right, which was not a right accrued, or acquired (His Lordship held that the decision in *The Director of Public Works v Ho Po Sang* [1961] AC 901 was such a case). The third proposition was that where statutory machinery had been set in motion and the statute was afterwards repealed, there might be a right acquired or accrued under the statute, although at the date of repeal further steps were still necessary to prove that the actual right did exist at the date of repeal. An example of that was *Hamilton Gell v White* [1922] 2 KB 422. His Lordship concluded that in the case under appeal, there was a right "acquired" or "accrued" when the sale occurred in 1956, because the law then conferred on the local authority a right to demand payment of the appropriate proportion, and obliged an owner to make it. He held that the condition of demand for payment by the authority was a condition, not of the acquisition of the right, but of its enforcement.

[52] In that regard, the result resembles that in *Resort Management Services v Noosa Shire Council.* The Moray County Council had acquired a right to compensation, and could enforce that right by demand. As to that, Mr Sofronoff QC submitted that the appellants in this matter had a right to avoid the contract, which right was exercised or enforced by giving notice. He also submitted the instant case was on all fours with the position in *Re Commissioner for Railways* [1998] 2 Qd R 339.

[53] In *Re Commissioner for Railways* de Jersey J (as His Honour then was) had to consider the effect of s 222(1) of the *Electricity Act 1976* (Qld). That section (repealed by the *Electricity Act 1994*) had provided:

> "**222. Matters affecting Government railways**
>
> (1)(a) An Electricity Authority shall not lay down an electric line or other works or alter or remove an electric line or other works on, under or over a railway (as defined by the *Railways Act 1914-1972*) vested in the Commissioner for Railways nor break up a railway (as so defined) except in terms of an agreement made between the Electricity Authority and the Commissioner for Railways.
>
> (b) Where such an agreement is made, the Commissioner for Railways may require the Electricity Authority to remove or relocate an electric line or other works erected pursuant thereto or pursuant to a determination of the Governor in Council under this section on, under or over railway property in terms of such agreement or determination or of a further agreement and, if there is no contrary provision in the agreement, determination or further agreement, such removal or relocation shall be at the cost of the Electricity Authority."

[54] In that matter Queensland Rail had owned land at Mackay over which a railway line had been built. The Mackay Electricity Corporation had installed electric cables in the land in 1981, with the consent of Queensland Rail. The railway line was

removed from the land in 1993 but not the electric lines, and Queensland Rail now wanted to sell the land. It contended that the Electricity Corporation should remove the lines from the land at the Corporation's expense.

[55] de Jersey J held that because laying of the electricity lines was done with the consent of the Commissioner for Railways, it was done with the "Commissioner's agreement", within the meaning of s 222(1)(a). He held the Commissioner for Railways thereby acquired an inchoate right (the term came from *Free Lanka Insurance Co. Ltd v Ranasinghe* [1964] AC 541 at 552 and *Esber v The Commonwealth* (1992) 174 CLR 430 at 440) to the removal of the railways line, a right the Commissioner would assert by communicating his requirement. That right arose by force of s 222(1)(a), upon the Commissioner agreeing to the laying of the line. The fact that to pursue the right the Commissioner needed to assert his requirement did not mean that the right was not a substantive one available for exercise by the Commissioner. Accordingly, the Commissioner had a right acquired before the repeal of the section in 1994, and preserved by s 20(2)(c) of the *Acts Interpretation Act 1954* (Qld). The learned judge disagreed with the submission for the authority that the right of the Commissioner was no more than a power, and accepted that the Commissioner acquired a right, upon agreeing to the laying of the line, to require an authority to remove them at its cost. That right was preserved by s 20(2)(c) of the *Acts Interpretation Act*.

[56] In that matter something of substance had been done to the Commissioner's property, the land, namely laying electric cables, which now affected the value of it. Those facts are an example of what Mr Sofronoff QC submitted to be a right which had accrued by force of events. It was a right to have the Commissioner's land restored to its previous state. That was a right different to the appellants' right here, to give a notice avoiding their contracts.

[57] Mr L Kelly SC, the respondent's senior counsel submitted that in this matter each appellant's right was to give a notice, and that it was not an accrued or acquired right; and that in any event the transitional provisions had clearly provided to the contrary of the right remaining available. Mr Kelly also referred to many of the decisions to which the appellants had referred, and to others as well. Those included *Robertson v City of Nunawading* [1973] VR 819, and the observations therein by the Victorian Full Court (at 825) that:

> "The mere *locus standi* of a member of the community to take advantage of an enactment is not a right within the principle being discussed, for otherwise there could be no effective repeal or amendment of any such enactment: cf *Abbot v Minister of Lands*, [1895] AC 425, at p 431. There must be a specific right. Resort to the enactment by the making of an application under it which looks to an expectancy of benefit from the application is not itself productive of such a right."

[58] The respondent also relied on remarks in the Canadian Supreme Court in *Attorney-General (Quebec) v Expropriation Tribunal* [1986] 1 SCR 732 at 742. In that matter the Government of Quebec had expropriated certain immovables in 1970, pursuant to the provisions of the *Code of Civil Procedure*. Three years later the rules of the code on expropriation were replaced by a new system, and after the *Expropriation Act* came into force the Government unilaterally discontinued, in reliance on Article 797 of the *Code of Civil Procedure*. Article 797 allowed the

relevant Minister to declare immovables were no longer required, which then reverted to the expropriated party. The Minister had deposited such a declaration in 1979. Under the new Act an expropriating party could always discontinue, but only with the authorisation of the Expropriation Tribunal. The question on appeal was whether the Government could, as it did in 1979, file a unilateral discontinuance in the registry in respect of the expropriations made in 1970, or whether it had to obtain the Tribunal's authorisation.

[59] The Supreme Court held (at 742) in a judgment delivered by Chouinard J that:

> "In the past the Crown had an unlimited right. That right is now subject to authorization being given. To the extent that the Tribunal can reject a discontinuance or allow it subject to conditions, the legislative amendment in our view ceased to be purely a matter of form.
>
> In my opinion the right which the Crown had to unilaterally discontinue, and which it had not exercised at the time the new Act came into effect, is not a vested right.
>
> A vested right is one which exists and produces effects. That does not include a right which could have been exercised but was not, and which is no longer available under the law. The courts and scholarly commentators distinguished between a vested right and what they call either a possibility or an option."

That succinct statement is an accurate summary of the case law cited by the parties, and it points to the answer in this one.

[60] The respondent also relied on the observation in the Supreme Court of Canada in *Gustavson Drilling (1964) Limited v Minister of National Revenue* [1977] 1 SCR 271 at 282, in the majority judgment given by Dickson J, that:

> "No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.
>
> The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued: *Abbott v Minister of Lands* at p 431; *Western Leaseholds Ltd v Minister of National Revenue* [1961] CTC 490 (Exch.); *Director of Public Works v Ho Po Sang* [1961] 2 All ER 721 (PC)."

[61] The respondent also referred to the remarks in the New Zealand Court of Appeal in *Foodstuffs (Auckland) Limited v Commerce Commission* [2002] 1 NZLR 353 at [41] that a decision by Parliament to introduce new policies was not to be frustrated by allowing the old law to cast an inappropriately lengthy shadow over activity in the future.

[62] The respondent's basic position was that the appellants were wrong in arguing they had acquired or accrued rights to avoid the contracts of sale at the time of repeal of

s 1073, submitting that that right only arose on giving a notice. Taking that step was significant, because it obliged each appellant to give up title to an apartment, and to restore the respondent to its original position, as best the parties could.

[63] The respondent also made submissions in support of four categories of cases referred to in the judgment of the Court of Appeal in Victoria in *Adelaide Brighton Cement Ltd v Victorian Rail Track* [2007] VSCA 10, at [42]-[46], where that court cited the arguments of counsel for the respondent in that case. The first category was one where a right of an individual to take advantage of a statute in the form in which it stood before amendment or repeal did not survive, in circumstances where no acts had been done towards availing the individual of that right. The Victorian Court of Appeal referred (in a footnote to that category) to *Abbott v Minister for Lands, Director of Public Works v Ho Po Sang, Free Lanka Insurance Co Limited v Ranasinghe, Mathieson v Burton, Robertson v City of Nunawading,* and *Esber v Commonwealth.* The respondent submitted the appellants fell within that category. The second category identified was one where a fully formed right existed, but had not been exercised as at the date of repeal. In that category repeal did not extinguish the right. The respondents in that matter (in the Victorian Full Court) contended that *Re Commissioner for Railways* was an example of that category.

[64] A third category identified was one where facts had occurred giving rise to a cause of action, but it was necessary to commence court proceedings to enforce that cause of action. If it existed, it would survive repeal of the legislation giving rise to the cause of action, provided that all that was absent was a failure to get a court decision to enforce it. A fourth category was one where the facts giving rise to the cause of action had not occurred prior to the repeal, but occurred subsequently to it. Two examples given in argument in the Victorian Full Court were *Director of Public Works v Ho Po Sang* and *Robertson v City of Nunawading* [1973] 1 VR 819.

[65] The attempt in *Adelaide Brighton Cement v Victorian Rail Track* to describe categories of rights, and the earlier attempt in *Re Moray County Council*, are both valuable contributions, but they may not give much more assistance in any one case than is gained from the statements in *Abbott v Minister for Lands*, in *Attorney-General (Quebec) v Expropriation Tribunal*, *Maxwell v Murphy*, and *Resort Management Services v Noosa Shire Council*. That is, it is easier to identify rights which do not survive repeal than to classify rights which do. The right of election to avoid given to these appellants, exercisable by notice in writing, never given, not intended to be given at any time until well after repeal of the statute, was simply no longer available after the repeal. It could have been exercised, but was not.

[66] The appellant's option to avoid their contract with the respondent, exercised by giving notice in writing to it, derived from s 1073(2). When the section was repealed, there was no source for that right. Absent any transitional provision, it was a right to take advantage of an enactment, as described in *Abbott*. I agree with the learned trial judge that it did not survive repeal of s 1073(2). I also agree that the transitional provisions put the matter beyond argument and against the appellants.

The transitional provisions

[67] Mr Kelly SC emphasised the provisions in s 1452, as to the application of the division to prescribed interests under the "old law", that were also interests in a

managed investment scheme in the new law. Referring to s 1454, he submitted that there were four possible circumstances that could exist. Those submissions were not challenged by the appellants.

[68] The first one was that a person had a prescribed interest which was not capable of becoming a managed investment scheme. On Mr Kelly's argument, the old law ceased to apply to that person on 1 July 1998, and that person's contract was from then on otherwise unregulated by the Act.

[69] The second circumstance was that of a prescribed interest holder, whose interest was capable of becoming a managed investment scheme. If so the new law applied from 1 July 1998. The third possibility was a prescribed interest holder who was subject to the transitional regime and the old law; and the fourth circumstance was a prescribed interest which became registered as a managed investment scheme during the two years of the transitional period, thereafter the new law applied.

[70] Mr Kelly SC submitted there was no situation in which both the old law and new law applied at the same time. He referred to the appellants' written submission, which in paragraph 11 thereof conceded that the learned trial judge was correct in the learned judge's understanding of the operation of the transitional provisions, as stated at paragraph [91] of the reasons for judgment. That paragraph relevantly read:

> "[91] Section 1454 was intended to provide a transition period during which 'existing prescribed interest schemes (might) be reorganised to satisfy the new requirements.'[20] At least for that purpose, the repeal of the prescribed interest provisions was effectively postponed for up to two years. But significantly, that postponement included ss 1073 and 1073A. This was a clear expression of an intent to preserve any right to elect to avoid pursuant to s 1073, together with the consequential rights and jurisdictions from s 1073A. But at the same time, this operation of ss 1073 and 1073A was given a limited life, which was the transition period defined by s 1454. Yet upon the respondent's argument, s 1073(2) had a continuing operation after 1 July 1998 quite apart from s 1454 saying so, and a continuing operation beyond 1 July 2000 despite s 1454. The respondent's argument did not explain how the operation of ss 1073 and 1073A would be different during the transition period from its operation after that period, in a case in which s 1454 applied."

[71] The appellants accepted the transition period was to allow reorganisation of prescribed interests that could become managed investment schemes, but suggested it was limited to that purpose. For example, no provision was made with respect to ongoing criminal liability for offences constituted by breaches of the repealed provisions, committed before repeal. That is true, but of no consequence, because liability to criminal prosecution would remain. That point does not affect the force of the argument that the transitional provisions allowed the repealed law to continue in force for two years in which it would apply to prescribed interests capable of becoming registered managed investment schemes. Thereafter it would not apply to those prescribed interests. No legislative purpose can be found for continuing the

---

20 The learned judge referred to the explanatory memorandum of the Managed Investments Bill 1997 at clause 5.1.

old law for prescribed interests which were not managed investment schemes, after the expiration of that two years.

[72] Mr Kelly SC referred to *Attorney-General (Qld) v AIRC* (2002) 213 CLR 485 at 492, where Gleeson CJ wrote that the *Acts Interpretation Act* (Cth) made repeated reference to the concept, central to statutory construction, of intention. Mr Kelly SC also referred to the passage in that case in the joint judgment of Gaudron, McHugh, Gummow and Hayne JJ at [52], that:

> "The operation of the presumption that accrued rights are unaffected by a repealing statute is, by s 8 of the *Interpretation Act*, expressly subject to the appearance of a 'contrary intention'. Therefore, where the provisions of a repealing statute are clearly inconsistent with the survival of accrued rights, those provisions are controlling, and any presumption erected by s 8 is displaced."

[73] The transitional provisions allowing the old law to apply for two years to prescribed interests capable of becoming managed investment schemes, with the right of avoidance continuing to apply, is inconsistent with the survival of that right after those two years for those prescribed interests. It is also inconsistent with the survival of that right for prescribed interests which were not capable of becoming managed investment schemes, after 1 July 1998. In *G F Heublein and Bro Incorporated v Continental Liqueurs Pty Ltd* (1962) 109 CLR 153 the judgment of Dixon CJ, Taylor and Windeyer JJ held (at CLR 161) that close consideration of the express provision made by a transitional provision in a statute under consideration in that case induced Their Honours to think that the express provision which was made with respect to applications pending under an earlier Act must be read as exhaustive, and leaving no room for the application of s 8 of the *Acts Interpretation Act*. The same reasoning applies in this matter.

[74] I agree with what Keane JA has written about the transitional provisions and the respondent's notice of contention. I also agree with the orders proposed by Keane JA.

[75] **KEANE JA:** In 1996 and 1997, the appellants entered into contracts with the respondent under which, as the learned trial judge held, the appellants acquired rights constituting "prescribed interests" as defined by the then provisions of the *Corporations Law*[21] in contravention of that law. The contracts in question were voidable by the appellants under s 1073 of the *Corporations Law*. Section 1073 of the *Corporations Law* was repealed by the *Managed Investments Act 1998* (Cth) ("the MIA"). The MIA commenced on 1 July 1998, but transitional provisions continued the operation of s 1063 to s 1076 of the *Corporations Law* ("the old Law") until 1 July 2000. The appellants sought to exercise the right of avoidance conferred on them by s 1073(2) of the old Law by notice in writing on 8 September 2003.

[76] The respondent commenced proceedings for declarations that the appellants' notices were not validly given pursuant to s 1073(2) of the old Law and that the notices were ineffective to avoid the appellants' contracts with the respondent. The learned trial judge held that, although the contracts had originally been voidable by the

---

[21] The *Corporations Law of Queensland*, being the law set out in s 82 of the *Corporations Act (1989)* Cth) which was made applicable in Queensland by s 7 of the *Corporations (Queensland) Act 1990* (Qld.)

appellants, that right of avoidance was no longer exercisable as at 8 September 2003. The appellants counter-claimed for a declaration that their notices of avoidance were effective and for orders for the restoration of the parties to their respective pre-contractual positions. The learned trial judge rejected the appellants' counter-claims.

[77] The appellants contend that his Honour erred in failing to conclude that the appellants' right of avoidance survived until the date of its purported exercise. In this regard, they rely upon the contention that their right of avoidance was an "accrued right" within the meaning of s 8 of the *Acts Interpretation Act 1901* (Cth).[22] The appellants also argue that the legislation which repealed s 1073 did not reveal an intention contrary to s 8 of the *Acts Interpretation Act*. The respondent seeks to uphold the decision below, and also contends, in the alternative, that any right of avoidance in the appellants was lost by reason of an election on their part to affirm the contracts prior to 8 September 2003.

[78] In my respectful opinion, the decision of the learned trial judge must be upheld for reasons which may be stated briefly. The power conferred on the appellants by s 1073(2) of the old Law to avoid their contracts with the respondent did not survive the repeal of that provision, save insofar as it was expressly continued by the transitional provisions; so that when the appellants sought to avoid the contracts, that power was no longer available to justify that course. It must be kept in mind that the question ultimately concerns the intention of the Parliament, apt to be expressed in transitional provisions, as to the extent to which the appellants' rights of avoidance upon contravention of the old Law survived the repeal of the old Law. In this regard, the operation of s 8(c) of the *Acts Interpretation Act* is expressed to be subject to a contrary intention on the part of the legislature. As Gleeson CJ noted in *Attorney-General for Queensland v Australian Industrial Relations Commission*,[23] the scheme of the *Acts Interpretation Act* "is to state general principles that apply unless a contrary intention is manifested in a particular Act". Because it is necessary to address the elaborate arguments developed by the parties on the hearing of the appeal, a more elaborate discussion of the reasons which had led me to this conclusion is necessary. I propose to address the arguments which arise on the appeal after summarising:

(a) the effect of the contracts between the appellants and the respondent;
(b) the relevant provisions of the old Law, the MIA and the *Acts Interpretation Act*; and
(c) the reasons for the conclusions of the learned trial judge.

The contracts

[79] In 1996 and 1997, the respondent developed land at Ferny Avenue, Surfers Paradise, by the construction of two towers containing 153 residential apartments, a restaurant, a shop and swimming pools. It is known as the Sovereign Hotel.[24] The development was subdivided by the registration of a building units plan on

---

22 By virtue of s 10 of the *Corporations Law of Queensland*, it was the Commonwealth *Acts Interpretation Act* and not the *Acts Interpretation Act 1954* (Qld) which applied to the *Corporations Law of Queensland.*

23 (2002) 213 CLR 485 at [8].

24 *Australand Corporation (Qld) Pty Ltd v Johnson & Ors* [2007] QSC 13 at [1].

14 October 1997 so that each of the residential apartments became a freehold property.[25]

[80] Prior to the registration of the plan of subdivision, the respondent granted a registered lease over the development to a related company, Sovereign Management (Qld) Pty Ltd ("Sovereign") which was obliged to use the premises as a "strata titled hotel apartment". The lease was for a term of 15 years commencing shortly after registration of the plan. The respondent's contracts with the appellants provided that the fee simple title to each apartment would be subject to the lease in favour of Sovereign with Sovereign being obliged to pay rent to the new apartment owner. Under each contract, the purchaser authorised the respondent to grant leases over the common property.[26] Prior to the registration of the plan of subdivision, Sovereign appointed Touraust Hotels Pty Ltd ("Touraust") to manage the hotel for Sovereign's benefit[27] for 15 years from the opening of the hotel.[28]

[81] Under the lease, an apartment owner was entitled to be paid rent of between seven and eight per cent of the price of the apartment during the first four years of the term. This obligation of Sovereign was guaranteed by the respondent. After the first four years, the amount of rent payable to each of the appellants depended upon the net income derived by Sovereign from each apartment. The payment of this rent was not guaranteed by the respondent.[29]

[82] By the end of 2001, it had become clear that the rent payable to the appellants was less than expected. On 8 September 2003, the owners of 85 apartments sought to rescind the contracts under which they had acquired ownership of their apartments in reliance upon, inter alia, s 1073 of the *Corporations Law*.[30]

The old Law

[83] Section 1018(1) of the old Law proscribed the offering of subscriptions for securities of a corporation unless a complying prospectus had been lodged and registered with the then Australian Securities Commission ("ASC"). In this regard, the term "securities" was defined to include "prescribed interests".[31] It was common ground that no prospectus was lodged by the respondent in relation to the appellants' contracts.

[84] Section 1064(1) and s 1065 of the old Law were also relevant in that they proscribed the offer of a subscription or purchase of any prescribed interest by a person other than a public corporation, and unless there was a deed approved by ASC in place. The respondent was not a public corporation and there was no deed approved by ASC in relation to the contracts.

[85] Section 1073(2) provided as follows:

> "Where:
>
> (a) an offer of a prescribed interest for subscription has been made; or

---

25 [2007] QSC 13 at [2].
26 [2007] QSC 13 at [13].
27 [2007] QSC 13 at [3].
28 [2007] QSC 13 at [21].
29 [2007] QSC 13 at [4].
30 [2007] QSC 13 at [5].
31 By s 92(1)(c) of the *Corporations Law*.

(b) an invitation to subscribe for a prescribed interest has been issued;

in contravention of a provision of this Law, a contract entered into by any person (other than the management company) to subscribe for the prescribed interest as a result of the acceptance by the person of the offer or the acceptance of an offer made by the person pursuant to the invitation, is voidable at the option of that person by notice in writing given to the management company."

Reference should also be made here to the terms of s 1073A which provided as follows:

"**Section 1073A Court may affirm voidable contract where breach is not material**

1073A(1) Within 21 days after a person gives a notice under subsection 1073(2), the management company may apply to the Court for an order declaring the notice to have had no effect.

1073A(2) The Court may extend the period within which the management company may apply under subsection (1), even if the notice under subsection 1073(2) has taken effect.

1073A(3) If, on an application under subsection (1), the Court is satisfied that:

(a) the offer or invitation that led to the contract being entered into contravened section 1018, but only because of a contravention of Division 2 of Part 7.12 (or of regulations in force for the purposes of a provision of that Division) that:

(i) was minor or insubstantial; and

(ii) has not materially prejudiced, and is not reasonably likely to prejudice materially, the interests of the person who gave the notice under subsection 1073(2); and

(b) in all the circumstances, it is just and equitable to declare the notice to have had no effect;

the Court may by order so declare.

1073A(4) On an application under subsection (1), the onus of proving the matter referred to in subparagraph (3)(a)(ii) is on the management company."

[86] Section 9 of the old Law defined the term "prescribed interest" to mean:

"(a) participation interest; or

(b) a right, whether enforceable or not, whether actual, prospective or contingent and whether or not evidenced by a formal document to participate in a time-sharing scheme …"

[87] Section 9 of the old Law defined the term "participation interest" as follows:

"'**participation interest**' means any right to participate, or any, interest:

(a) in any profits, assets or realisation of any financial or business undertaking or scheme whether in Australia or elsewhere;

(b) in any common enterprise, whether in Australia or elsewhere, in relation to 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; or

(c) in any investment contract;

whether or not the right or interest is enforceable, whether the right or interest is actual, prospective or contingent, 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) such a right that is a right to participate in a time-sharing scheme;

(e) any share in, unit of a share in, or debenture of, a body corporate;

(f) any interest in, or arising out of, a life policy within the meaning of the *Life Insurance Act 1995*;

(g) 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) subject to section 85, 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; ..."

The MIA

[88] On 1 July 1998, s 2 of the MIA repealed Div 5 of Pt 7.12 of the old Law, this being the division of the old Law which consisted of s 1063 to s 1076.

[89] The MIA introduced a new scheme of statutory regulation of investment schemes. It is common ground that, subject to the effect of the transitional provisions to which I will turn directly, arrangements of the kind created by the contracts between the appellants and the respondent were no longer rendered voidable at the option of the purchaser.

[90] The MIA, by Sch 1 and Sch 2, amended the *Corporations Law* to insert a new Ch 5C. The new s 1454 of the *Corporations Law* ("the new Law") continued the operation of the "old Law" being the *Corporations Law* in force immediately prior to the commencement of Ch 5C.[32] Section 1454 was in the following terms:

---

32 Section 1451 of the *Corporations Law*.

> "(1) The old Law continues to apply to the interests, the undertaking, the trustee or representative and the management company, for the period of 2 years starting on the commencement, unless, before then, the undertaking becomes a registered scheme.
>
> (2) ASIC may extend that period of 2 years if the undertaking is to be wound up at a fixed time after the 2 years and ASIC thinks it would be unreasonable to require the undertaking to become a registered scheme before being wound up.
>
> (3) Except for the purposes of applying to register the undertaking as a managed investment scheme under the new Law and dealing with the application, the new Law does not apply to the interests, the undertaking, the trustee or representative and the management company while the old Law continues to apply to them.
>
> (4) If the undertaking becomes a registered scheme within the period of 2 years referred to in subsection (1), section 601FC(4) of the new Law applies to the registered scheme for the remainder of that period as if prescribed interests that are still covered by an approved deed because of subsection (1) of this section were interests in a registered scheme."

[91] It may be noted that "the new Law" referred to in s 1454 referred to the *Corporations Law* as in force after the commencement of the MIA.

[92] Section 1452 of the new Law provided for the application of s 1454 in the following terms:

> "**Division applies to prescribed interests in existence immediately before commencement**
>
> This Division applies to interests that, immediately before the commencement, were prescribed interests to which:
>
> (a) Division 5 of Part 7.12 of the old Law applied; or
>
> (b) that Division would have applied but for the operation of subparagraph 7.12.04(c)(ii) of the Corporations Regulations;
>
> and that are interests in a managed investment scheme as defined in section 9 of the new Law. It also applies to the undertaking to which the interests relate and to the trustee or representative and the management company in relation to the interests."

[93] Insofar as the effect of s 1452 was to continue the application of the old Law to interests which were also interests in a managed investment scheme as defined in s 9 of the new Law, s 9 of the new Law defined the term "managed investment scheme" as follows:

> "**managed investment scheme** means:
>
> (a) a scheme that has the following features:
>
> (i) people contribute money or money's worth as consideration to acquire rights (**interests**) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not)

(ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the **members**) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders)

(iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions); or

(b) a time-sharing scheme; ..."

[94] Section 9 of the new Law also defined the term "interest" as follows:

"**interest** in a managed investment scheme means a right to benefits produced by the scheme (whether the right is actual, prospective or contingent and whether it is enforceable or not)."

[95] The requirements of s 1018 of the old Law were applied to interests in managed investment schemes by the amendment of the definition in s 9 of "marketable security" to omit "prescribed interest" and substitute "interest in a managed investment scheme". Section 601MB of the new Law provided for the avoidance of certain contracts involving interests in managed investment schemes. It was in the following terms:

"**Voidable contracts where subscription offers and invitations contravene this law**

(1) If:

a) a managed investment scheme is being operated in contravention of subsection 601ED(5) and a person (the **offeror**) offers an interest in the scheme for subscription, or issues an invitation to subscribe for an interest in the scheme; or

b) a person (the **offeror**), in contravention of Part 7.12, offers an interest in a registered scheme for subscription, or issues an invitation to subscribe for an interest in a registered scheme;

a contract entered into by a person (other than the offeror) to subscribe for the interest as a result of the person accepting the offer, or of the acceptance of an offer made by the person in response to the invitation, is voidable at the option of that person by notice in writing to the offeror.

(2) If the person gives a notice under subsection (1), the obligations of the parties to the contract are suspended:

a) during the period of 21 days after the notice is given; and

b) during the period beginning when an application is made under subsection (4) in relation to the notice and ending when the application, and any appeals arising out of it, have been finally determined or otherwise disposed of.

(3) Subject to subsection (6), the notice takes effect to void the contract:

a) at the end of 21 days after the notice is given; or

b) if within that 21 days, the offeror applies under subsection (4) - at the end of the period when the obligations of the parties are suspended under paragraph (2)(b).

(4) Within 21 days after the notice is given, the offeror may apply to the Court for an order declaring the notice to have had no effect.

(5) The Court may extend the period within which the offeror may apply under subsection (4), even if the notice has taken effect.

(6) On application under subsection (4), the Court may declare the notice to have had no effect if it is satisfied that, in all the circumstances, it is just and equitable to make the declaration."

The *Acts Interpretation Act*

[96] Of central importance to this litigation is s 8 of the *Acts Interpretation Act 1901* (Cth).[33] It provides as follows:

"**Effect of repeal**

8. Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not:

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any Act so repealed, or anything duly done or suffered under any Act so repealed; or

(c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed; or

(d) affect any penalty forfeiture or punishment incurred in respect of any offence committed against any Act so repealed; or

(e) affect any investigation legal proceeding or remedy in respect of any such right privilege obligation liability penalty forfeiture or punishment as aforesaid;

and any such investigation legal proceeding or remedy may be instituted continued or enforced, and any such penalty forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

The decision of the learned trial judge

[97] The rent payable to the appellants under the leases depended, after the first four years of the leases, upon the income generated from the apartment as part of the business of the hotel. Unsurprisingly, therefore, the learned trial judge resolved in the appellants' favour the issue whether the contracts created "prescribed interests" as defined in the old Law. In this appeal, the respondent does not challenge this conclusion, or the conclusion that the respondent contravened each of s 1018(1), s 1064(1) and s 1065 of the old Law.

---

33 By virtue of s 10 *Corporations Law of Queensland*.

[98] The learned trial judge also resolved against the respondent the issue whether s 1073 of the old Law rendered the contracts voidable, notwithstanding that they had been completed by the parties. The respondent does not seek to contest the correctness of this conclusion in this appeal.

[99] His Honour resolved against the appellants the issue whether the appellants' entitlement to avoid the contracts survived the repeal of s 1073 of the old Law. In this regard, his Honour said:

> "… In *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537, 584, Windeyer J said that 'liability' in this context 'describes a liability having become complete by past events rather than a situation in which some future event must occur to make the effect of the past events create a completed liability' (See also *Total (Australia) Ltd v Registrar of Companies* [1969] VR 821, 823 (Full Court)).
>
> In a case such as the present, the preservation of rights in conjunction with the preservation of obligations or liabilities has a particular significance. The right claimed is a right said to be enforceable by one party to a contract against the other party. In this context it is to be expected that the right of one party would be the converse of the obligation or liability of the other. Therefore, it is relevant to consider Australand's position, insofar as any obligation or liability under s 8 is concerned.
>
> As at the date of the repeal, what was the obligation or liability of Australand? Its obligation was to perform its contract. The obligation remaining to be performed at that point was its guarantee of the payment of rent during the first four years of the lease. It was under no obligation to accept a re-conveyance of an apartment or to make restitution to a purchaser. Any such obligation or liability was yet to arise. It was, in terms of what Windeyer J said in *Ogden* (*Ogden Industries* in the passage set out above), 'a situation in which some future event must occur to make the effect of past events create a completed liability'. One such 'future event' was a notice of avoidance under s 1073(2). And as at the date of repeal, Australand was not relevantly *liable* to a purchaser. Australand was susceptible to the creation of obligations to make restitution and to accept a re-conveyance. But it is not a susceptibility, but rather an existing obligation or a liability already incurred, which is preserved by s 8.
>
> If Australand was not then subject to a relevant obligation or liability, it would follow from the respondents' argument, that in some way Australand incurred an obligation or liability at a point in time, after the repeal of the law which is its source. That conclusion is awkward at least. And logically, the absence of a relevant obligation or liability of Australand would indicate the absence of an accrued right in a purchaser.
>
> At the date of the repeal, a purchaser's entitlement was to the performance of his or her contract, and of course to the ownership of the real property. At that point, a purchaser had no right to repayment of the price or to any other restitution. That restitutionary right did not exist because the purchaser had not acted to take advantage of the (repealed) enactment. So the right which each respondent now claims (for restitution of what it has paid to Australand upon a

> re-conveyance of the apartment) is not a right which any respondent enjoyed at the relevant date. It would be unrealistic to say that a purchaser, at the date of the repeal, had a conditional right to restitution, i.e. a right to restitution conditional upon his or her own future election. Understandably the respondents' argument is not put in that way. They say that the relevant right was not the restitutionary right, but the right to avoid the contract pursuant to s 1073. But this was a right to take advantage of the then enactment, without there having been any act by a purchaser 'towards availing himself of that right' (*Abbott* in the passage cited)."[34]

[100] The appellants argue that two errors emerge from this passage: first, that his Honour erred in seeking to identify a liability correlative to the right propounded by the appellants; and, secondly, that his Honour erred in characterising the right to avoid the contract conferred by s 1073(2) of the old Law as no more than the right or power to take advantage of that enactment which, while unexercised, did not give rise to the accrual or acquisition of a right of the kind referred to in s 8(c) of the *Acts Interpretation Act*.

[101] The learned trial judge went on to hold that, in any event, the transitional provisions of the new Law made it clear that any right of avoidance conferred by s 1073(2) of the old Law expired on 1 July 2000. His Honour said:

> "Apart from the transitional provision, s 1452, my view would be that the right to elect to avoid a contract was not an accrued right but was, like that in *Abbott*, a 'right to take advantage of the enactment'. Ultimately of course, the question is whether Parliament intended that an unexercised right to avoid could be exercised after the repeal, or some other point in time. My view that such a right was not intended to be exercisable after the repeal and as late as 2003 is fortified by the transitional provisions.
>
> Section 1454 was intended to provide a transition period during which 'existing prescribed interest schemes (might) be re-organised to satisfy the new requirements' (Explanatory Memorandum, *Managed Investments Bill* 1997, cl 5.1). At least for that purpose, the repeal of the prescribed interest provisions was effectively postponed for up to two years. But significantly, that postponement included ss 1073 and 1073A. This was a clear expression of an intent to preserve any right to elect to avoid pursuant to s 1073, together with the consequential rights and jurisdiction from s 1073A. But at the same time, this operation of ss 1073 and 1073A was given a limited life, which was the transition period defined by s 1454. Yet upon the respondents' argument, s 1073(2) had a continuing operation after 1 July 1998 quite apart from s 1454 saying so, and a continuing operation beyond 1 July 2000 despite s 1454. The respondents' argument does not explain how the operation of ss 1073 and 1073A would be different during the transition period from its operation after that period, in a case to which s 1454 applied.
>
> The Parliament could have chosen to exclude ss 1073 and 1073A from the 'old Law' which was kept alive for a limited time by s 1454, and instead s 1454 could have provided for the continuing operation

---

34 [2007] QSC 13 at [83] – [87] (citations footnoted in original).

of those provisions, indefinitely, in the way that the respondents suggest occurred. But clearly, this enactment expressed a different intention, which is that beyond the transition period, ss 1073 and 1073A would have no operation. Section 1073 would thereafter be ineffective as the legal basis for a purported avoidance of a contract and s 1073A would provide no basis for any right or jurisdiction.

As already discussed, the transitional provisions applied only to schemes which were also managed investment schemes. Some prescribed interest schemes, and very arguably this one, were not affected by s 1454. The apparent intention was that they would become relevantly unregulated, and that in particular, they would not be affected by the operation of ss 1073 and 1073A continued by s 1454. For them, it could not have been intended that contracts involving interests should still be susceptible to avoidance, and indefinitely, whilst schemes requiring regulation, and therefore within s 1454, would be susceptible to avoidance but only for a limited time. The more likely intent is that contacts for interests in these prescribed interest schemes which did not require the protection of the managed investments regime did not require the benefit of the repealed s 1073.

The results of what I see was the operation of s 1454 were that if the respondents' scheme was a managed investments scheme, the respondents were allowed two years in which to take advantage of s 1073, but not beyond then. That period could have been shortened by the undertaking becoming registered as a managed investments scheme. But in that event, investors would have had the protection that came with registration and from what had to be demonstrated to the ASC in order to obtain it. If a scheme within s 1454 was not registered within that two years, the new Law would thereafter apply to it, and whilst contracts could not then be avoided, the scheme would be liable to be wound up as an unregistered scheme, whether upon the investor's application or otherwise (*Corporations Law* s 601EE). Alternatively, if the scheme was not one within s 1454, this was because the Parliament did not consider it appropriate that it have any continuing regulation. In those cases, it is unremarkable that contracts involving interests should no longer be avoidable.

The respondents say that this construction would have produced unfair consequences in a case where, unlike theirs, a contract for the subscription for a prescribed interest was made very near to the expiry of the two year period. In such a case, it is said that there would be a limitation of the right to avoid which was so unreasonable that it could not have been intended. In my view, that example is not sufficient to displace what I think is the clear effect of the transitional provisions. And as to that example, two things may be noted. First, the transitional provisions would apply only to interests in schemes in existence at the commencement of the two years, so that contracts involving the *subscription* for such interests and made nearly two years later, but before the registration of the scheme under the new Law, would be relatively rare. Secondly, in

> any such case, the new interests would have the benefit of a winding up of the scheme at the end of the transitional period."[35]

[102] The appellants argue that the learned trial judge erred in his understanding of the transitional provisions in failing to appreciate that they "said nothing about pre-existing liabilities" of the respondent under s 1073(2) of the old Law.

[103] His Honour also made findings in relation to the issue as to whether the appellants' right of avoidance was lost in any event by virtue of an election on their part to affirm the contract. The principal findings made by the learned primary judge were summarised by his Honour as follows:

> "… If a binding election required a knowledge of the right to avoid, as well as of the facts creating that right, none of these respondents knew, or at least is proved to have known, of that legal right until July 2003. I infer also that by the time Slater and Gordon wrote on 16 July 2003, the respondents knew of the facts from which that right existed (i.e. if it did exist notwithstanding the repeal) apart from the fact that there was no exemption. Mr and Mrs Johnson and Mr Pih knew the facts of the contravention of s 1018, apart from the absence of a relevant exemption, from December 2001. Each respondent knew of the facts constituting the contravention of s 1064 effectively from the outset, but certainly from December 2001 which is the beginning of the period in which there was an election upon Australand's argument. And each respondent did not know of the absence of an approved deed and therefore of the facts constituting breach of s 1065 at least from the beginning of that period. It is not proved that they knew that until shortly before the letter from Slater and Gordon of July 2003."[36]

[104] As I have noted, the respondent contends that this issue should have been resolved in the respondent's favour. But the respondent does not seek to challenge the learned trial judge's finding that each of the appellants did not know of the absence of an approved deed until shortly before the letter of rescission of 8 September 2003. Rather, the respondent contends that the appellants knew sufficient facts to justify their avoidance of the contract at an earlier time, and that they must, therefore, be taken to have elected to affirm the contract at that earlier time.

The arguments on the appeal

Did entitlement to avoid the contracts survive the repeal of s 1073?

[105] In challenging the learned trial judge's conclusion that the appellants' entitlements to avoid their respective contracts expired upon the repeal of s 1073 of the old Law or the expiration of the transitional period provided under the new Law, the principal argument advanced on behalf of the appellants is that the learned trial judge erred in failing to conclude that s 8(c) of the *Acts Interpretation Act* preserved the appellants' right of avoidance as "a right acquired [or] … accrued" under the old Law. Ancillary to the appellants' principal argument is the contention that the transitional provisions of the new Law did not limit the effect of s 8(c).

---

35 [2007] QSC 13 at [90] – [95].

36 [2007] QSC 13 at [112].

[106] The appellants argue that, although the appellants did not take any step to avail themselves of the right of avoidance conferred by s 1073(2) of the old Law, the taking of a step, such as the giving of the notice in the way prescribed by s 1073(2), was not a condition of the right of avoidance, and that this right accrued when the contract for the subscription was made in contravention of the old Law. The appellants' argument, as articulated in their written submissions, is that:

> "once the contract of sale was entered into by the acceptance of the illegal offer or invitation made in contravention of the Law the right existed and continued to exist until exercised or abandoned … As at the date of the repeal the realisation of the right to avoid the contract was not dependent upon any exercise of discretion by a third party. There was an existing entitlement to exercise the right by giving the notice in writing."

[107] Mr Sofronoff QC, who appeared with Mr Collins SC and Ms Skennar of counsel for the appellants, described the right said to have accrued to each appellant under s 1073(2) in two ways. First, it was said that the accrued right was the right to give a notice of avoidance. It should be said immediately that the learned trial judge accepted that s 1073(2) conferred such a right,[37] but since no correlative liability was incurred under it, it was no more than a power to take advantage of the enactment. His Honour held that this right disappeared, subject to the transitional provisions of the new Law, upon the repeal of the statutory provision which authorised the giving of the notice. Mr Sofronoff criticised his Honour for seeking to identify an accrued right by identifying a corresponding liability as an erroneous exercise in Hohfeldian analysis. Mr Sofronoff also argued that the liability of the respondent correlative to this right, while not a liability to restore the appellants to their position prior to contract, was a liability in the respondent to be made liable to restore the appellants to the pre-contractual position.

[108] The second way in which s 1073(2) was said to have given rise to an accrued right was that the appellants had an accrued, albeit inchoate or contingent, right to be restored to their pre-contractual position. It was accepted that this right was dependent upon the exercise of the choice by each appellant to give up their assets and return them to the respondent. It was also accepted that, at the time of the repeal of s 1073(2), none of the appellants had made this choice. It was argued, however, that the circumstance that each appellant's right to be restored to his or her pre-contractual position was dependent on the choice to give up their assets meant that this right was an accrued right properly so called even though it was at the same time inchoate or contingent or conditional.

Right accrued or acquired: the right to give a notice of avoidance

[109] The point of departure for any discussion of the effect of the repeal of a statute upon legal rights and duties is that explained by Dixon CJ in *Maxwell v Murphy*[38] where his Honour said:

> "In the first place it must be borne in mind that at common law the repeal of a statute or statutory provision means that the law must be applied as if the provision had never existed. This is subject to an exception, variously expressed, as to past matters. Lord Tenterden CJ used the expression 'transactions past and closed': *Surtees v Ellison*

---

37 [2007] QSC 13 at [76].

38 (1957) 96 CLR 261 at 266 – 267.

> [29] at p.279. Lord Campbell CJ said: '... all matters that have taken place under it before its repeal are valid and cannot be called in question': *Reg v Inhabitants of Denton* [30] at p 614. The phrase of Blackburn J was 'transactions already completed under it' - *Butcher v Henderson* [31] at p 338.
>
> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."

[110] If the relevant right is no more than a right or power adversely to affect the legal position of another, then the right or power to affect the rights or liabilities of others disappears when the statute conferring the right or power is repealed. Section 8(c) of the *Acts Interpretation Act*, in speaking of a "right accrued" under an Act, is not speaking of a mere right conferred by an Act of which a person may take advantage should he or she choose to do so, but of a right which may be enforced by the person who propounds the right against a person said to be under a liability which corresponds to the right. The concern of s 8(c) is that, in the absence of a contrary intention, the legislature is not to be taken to intend to deprive those with a complete and enforceable right of the benefit of that right simply because the law's mechanisms of enforcement have not finally vindicated the accrued entitlement at the time of repeal.

[111] Generalising from the decided cases cited by the parties, and the observations of Hayne, Heydon and Crennan JJ in the recent decision of the High Court in *Chang v Laidley Shire Council*,[39] the most important point to emerge is the proposition that the operation of s 8(c) and its analogues cannot be understood without a clear understanding of the nature of the right said to have accrued under a particular statute.[40] The idea that the extent of a party's right or interest is commensurate with the nature of the orders which a court may make to protect or enforce the right or interest is one which has long been familiar to lawyers.[41] In considering the operation of s 8(c) of the *Acts Interpretation Act*, one may test the suggestion that a party has an accrued right by asking what order could be made by a court in favour of that party had the court come to pronounce on the liability of the other party prior to the repeal of the statute which conferred the right.[42]

[112] Under s 1073 of the old Law, the respondent could have become liable to restore each appellant to the appellant's pre-contractual position only upon the appellant choosing to avoid the contract. In the absence of the exercise of such a choice by an appellant, the appellant owned, and remained entitled to retain, the unit in the hotel and the respondent remained entitled to retain the price for which it had transferred the unit to the appellant. Each appellant's right of avoidance is meaningful in the

---

39 (2007) 81 ALJR 1598 at 1619; [2007] HCA 37 at [116] – [117].

40 See esp *Esber v The Commonwealth* (1992) 174 CLR 430 at 440. *Resort Management Services Ltd v Noosa Shire Council* [1997] 2 Qd R 291 at 301.

41 *Tailby v Official Receiver* (1888) 13 App Cas 523 at 546 – 549; *Brown v Heffer* (1967) 116 CLR 344 at 349; *Legione v Hateley* (1983) 152 CLR 406 at 446; *KLDE Pty Ltd v Commissioner of Stamp Duties (Qld)* (1984) 155 CLR 288 at 297.

42 *Butcher v Henderson* (1868) LR 3 QB 335 at 338; *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537 at 584; *Attorney-General (Quebec) v Expropriation Tribunal* [1986] 1 SCR 732 at 742.

sense of being vindicated by an order of a court, only insofar as each side can be ordered by a court to restore the other party to its pre-contractual position. At most for the appellants, it might be said that the contracts were "susceptible of"[43] being avoided by the exercise of the choice conferred by s 1073 of the old Law to avoid the contract; but to say that is distinctly not to say that the respondent had incurred a liability to restore the purchase price of the units to the appellants or that any of the appellants had acquired a right to require it to do so. On the appellants' approach, it cannot be said that the respondent had incurred a liability at all save by the awkward and unconvincing circumlocution that the respondent was under a liability to be made liable to restore the purchase price to each appellant.

[113] The submission for the appellants equates the "right acquired [or] accrued under an Act" with a "right conferred by an Act", or "a right arising from an Act" and the "liability incurred under an Act" with a "susceptibility to the creation of a liability". The appellants' submission would have the effect of preserving the right conferred by, or arising from, the Act after its repeal. The respondent argues that, as Keith J said in *Claydon v Attorney-General*:[44] "A right simply cannot continue to arise under a provision which is no longer in force." To put the respondent's point another way, the right conferred on each appellant by s 1073 was a right to choose to terminate the contract; but the contract could not be terminated until the choice was exercised, and the repeal of s 1073 removed the appellants' right to choose to terminate the contract before it was exercised by any of the appellants.

[114] Mr Kelly SC, who appeared with Mr O'Sullivan of counsel for the respondent, was able to marshal statements of high authority to support the respondent's position. Thus, in *Abbott v Minister for Lands*, Lord Herschell LC said:

> "It has been very common in the case of repealing statutes to save all rights accrued. If it were held that the effect of this was to leave it open to anyone who could have taken advantage of any of the repealed enactments still to take advantage of them, the result would be very far-reaching.
>
> It may be as Windeyer J observes, that the power to take advantage of an enactment may without impropriety be termed a 'right.' But the question is whether it is a 'right accrued' within the meaning of the enactment which has to be construed.
>
> Their Lordships think not, and they are confirmed in the opinion by the fact that the words relied on are found in conjunction with the words 'obligations incurred or imposed.' They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued' within the meaning of the enactment."[45]

---

43 [2007] QSC 13 at [85].
44 [2002] NZCA 283; [2004] NZAR 16 at [44].
45 [1895] AC 425 at 431.

[115] Similarly, in *Mathieson v Burton*, Gibbs J said that the:

> "section in referring to a right acquired or accrued does not preserve a power to take advantage of an enactment, assuming that that may properly be described as a right (*Abbott v The Minister for Lands* [1895] AC 425 at p 431)."[46]

[116] In *Esber v The Commonwealth*, Mason CJ, Deane, Toohey and Gaudron JJ said that an "accrued right" within the meaning of the statute was "not merely 'a power to take advantage of an enactment'".[47]

[117] It is, I think, manifest from the text of s 8(c) itself that the accrued or acquired right which it postulates is a right in one person in respect of which a correlative liability has been incurred by another person. Within the text of s 8(c), the concept of "a right … acquired or accrued" is matched by an "obligation or liability … incurred"; the collocation of "right … acquired or accrued" with "obligation or liability … incurred" is a contextual indication that a "right" within s 8(c) presupposes a correlative liability. That relationship, and its implications for a correct understanding of what is involved in an accrued or acquired right, have been recognised at least since the decision of the Privy Council in *Abbott's Case*. For the learned trial judge to recognise, and give effect to, that relationship was not to engage in an inappropriate exercise in analytical jurisprudence; it was simply to acknowledge that s 8(c) is not intended wholly to reverse the principle referred to in the first paragraph of the citation from the reasons of Dixon J in *Maxwell v Murphy* at paragraph [109] above but is intended to ensure that substantive rights which are enforceable by a court do not cease to be enforceable as an unintended consequence of the repeal of a statute.

[118] The appellants criticise the approach of the learned trial judge as founded on an inappropriately jurisprudential analysis of the language of s 8(c) of the *Acts Interpretation Act*. In support of their argument, the appellants rely upon the statement of Pullin JA in *Barminco Investments Pty Ltd & Anor v O'Brien*:[48]

> "The meaning of the word 'right' in the phrase 'right … accrued' does not call for a narrow conception of a right: *Carr v Finance Corporation of Australia Ltd (No 2)* (1982) 150 CLR 139 at 151. In considering whether a right exists, the Court is 'not engaged in an exercise in analytical jurisprudence, or with the classification, expressed in terms of correlatives and opposites, that delights and attracts both disciples and critics to Hohfeld': *Mathieson v Burton* (1971) 124 CLR 1 at 12 per Windeyer J."

[119] In my respectful opinion, it is abundantly clear that his Honour was not engaged in Hohfeldian analysis. His Honour was not saying that s 1073(2) could not be said to be a "right" because it exhibited characteristics which would cause it to be more appropriately classified under some other rubric by Professor Hohfeld. Rather, his Honour was engaged in the interpretation of the expression "right acquired or accrued" in a statutory context which collocates an "accrued right" with an "obligation or liability incurred". His Honour was reasoning in a way which has been orthodox since at least 1895 when the Privy Council in *Abbott's Case* took the

---

46 (1971) 124 CLR 1 at 23.
47 (1992) 174 CLR 430 at 440.
48 [2006] WASCA 88 at [76].

same approach.[49] Neither Pullin JA nor Windeyer J in *Mathieson v Burton* was urging a departure from this approach. Each was concerned to say no more than that "an accrued right" was nonetheless a right even though it might equally, or perhaps more aptly, be described in some other way, as, for example, in *Mathieson v Burton*, an "immunity".

Right accrued or acquired: the contingent right to be restored

[120] The appellants' broader description of the right conferred by s 1073(2) of the old Law (and preserved by s 8(c) of the *Acts Interpretation Act*) as a contingent right to be restored does not pay sufficient regard to the language by which the right is created.[50] Section 1073(2) provides that the offending contract is "voidable **at the option** of [the buyer] by notice in writing given to the management company".

[121] Unless and until the buyer chooses to avoid the contract, the seller remains entitled to retain the consideration paid by the buyer, and the buyer remains entitled to the benefit of the property acquired under the contract. A court can make no order to alter that position. Unless and until the buyer chooses to have the parties restored to their former position, the buyer has no right to have his or her money repaid because the buyer retains the asset acquired with that money.[51]

[122] It may be accepted that statements of high authority support the proposition that s 8(c) of the *Acts Interpretation Act* operates to preserve an accrued right even if it be "inchoate" or "conditional" or "contingent",[52] but where the creation of any right at all to be restored to one's pre-contractual position means choosing to give up an existing and inconsistent right, it is, I think, a misuse of language to say that a right to be restored has accrued to a claimant who has not made the choice. The appellants' rights to be restored to their pre-contractual position were not contingent in the sense that they were dependent merely upon proof to a court of the factual basis for the claim; rather, until the choice was made to avoid the contracts, the respondent's liability to restore the purchase price to each appellant was not contingent or conditional but prospective only. It might never be incurred.[53]

[123] The approach of the appellants ignores the crucial issue thrown up by s 1073(2) of the old Law, namely that, unless and until the buyer makes an effective choice to restore the parties to their pre-contractual position, the vendor has a right to retain the purchase price of the unit just as the buyer has a right of ownership of the unit. An appellant's right of ownership is diametrically inconsistent with a right to have his or her money repaid. This is an issue of substance not of form. As a matter of substance, a buyer who does not choose to restore the parties to their pre-contractual position will usually have no right to have the purchase price repaid. In such a case, a court could not make orders for the repayment of the price paid under each contract; and that would be because the appellant had not exercised the choice afforded by the old Law. The exercise of that choice necessarily involved a readiness and willingness to restore to the respondent the assets acquired by the appellants under their contracts.

---

49 Cf *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537 at 584.

50 Cf *Resort Management Services Ltd v Noosa Shire Council* [1997] 2 Qd R 291 at 295 and 301.

51 *Ellison v Lutre Pty Ltd* (1999) 88 FCR 116 at 124 – 125 [37]. See also *Attorney-General (Quebec) v Expropriation Tribunal* [1986] 1 SCR 732 at 742.

52 Cf *Free Lanka Insurance Co Ltd v Ranasinghe* [1964] AC 541 at 552; *Esber v The Commonwealth* (1992) 174 CLR 430 at 440.

53 Cf *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 532.

[124] The appellants' approach is at odds with fundamental considerations of substantive fairness mirrored in the equitable maxim that he or she who seeks equity must do equity. A court of equity would not make an order for the restoration of the appellants to their pre-contractual position unless and until the appellants were ready, willing and able to return the assets they had purchased from the respondent to it. To illustrate this point, reference may be made to the observations of Rich and Dixon JJ in *Langman v Handover*:

> "'So, if a bill be filed by the obligor in an usurious bond, to be relieved against it, the Court, in a proper case, will cancel the bond, but only upon terms of the obligor refunding to the obligee the money actually advanced. The reasoning is analogous to that in the previous cases. The equity of the obligor is to have the entire transaction rescinded. The Court will do this, so as to remit both parties to their original positions: it will not relieve the obligor from his liability, leaving him in the possession of the fruits of the illegal transaction he complains of.' In such cases the equity is founded, not upon the necessity of protecting the party's legal rights, but upon his willingness to resign them in order that he may be restored to the position he occupied before he embarked upon the transaction which turns out to be unlawful."[54]

[125] Their Honours went on to say:

> "… as in the case of the statute against usury, the illegality of the transaction embodied in the outstanding instruments gave the borrower no equity, save to be remitted to his former position. Indeed, there appears to be no sound distinction, in this respect, between the effect of the two pieces of legislation. In each case the borrower is absolved from his contractual obligation, because the lender has offended against statutory provisions directed to the protection or the advantage of the borrower or his class. In each case the borrower's equity must rest on some thing other than the legal right or immunity given by statute. It is the situation created by the statute which gives the innocent party an equity to be restored to his former position. But such a ground of equity involves an offer of restitution. This is made clear by Lord *Selborne* in *Jervis v Berridge* ((1873) 8 Ch App at 358). In dealing with a bill to rescind for fraud, he says:– 'I confess I was surprised to hear the argument that, in such a case as the present, an offer, upon the face of the bill, to repay the moneys expended by the demurring defendant, was necessary; my impression, during many years' practice at the Bar, having always been to the contrary. In that impression, as to what is, at least, the modern practice of the Court, I am confirmed by several of the authorities which were mentioned at the Bar ... There are, indeed, certain cases where a defendant has incurred forfeitures or penalties, or where the controversy relates to usurious or other unlawful transactions, in which the whole *locus standi in curia* of the plaintiff

---

54 (1929) 43 CLR 334 at 354.

> is dependent on an election, which must be declared by the bill, to forgo legal rights for the sake of equitable remedies.'"[55]

[126] These values also inform the principles of common law which regulate contracts for the sale of land. Under the usual form of contract for the sale of land, the obligation of each party to tender performance is concurrent on the readiness, willingness and ability of the other side to do the same. A party may enforce a right to performance by the other party only if the first party is ready, willing and able to perform its correlative obligations.[56] As Dawson J said in *Foran v Wight*:[57]

> "… the obligation of the purchasers to pay the purchase price or the balance of the purchase price was simultaneous with the obligation of the vendors to deliver a conveyance. That is to say, they were mutual or concurrent obligations, the performance of each being conditional upon the performance of the other."

[127] Important values of mutual fairness are reflected in these equitable and common law principles. These considerations of substantive fairness explain why the entitlement of an appellant to be restored to his or her pre-contractual position could be enforced by a court only upon the appellant manifesting his or her readiness, willingness and ability to restore the property acquired under the contract to the respondent. These considerations suggest that, under s 1073(2), any substantive right in an appellant to recover the price paid by the appellant should be coeval with an effective recognition of the right of the seller to the recovery of the property. The latter right can arise only as a matter of the buyer's choice, and, until that choice is made, the buyer can have no enforceable right to the recovery of the purchase price. These values of substantive fairness are distinctly in opposition to the appellants' view of the operation of s 1073(2) of the old Law.

[128] Accordingly, if regard is had to the nature of the right conferred by s 1073(2) of the old Law, it is apparent that any right in an appellant to be restored to the position prior to contract does not begin to arise before an effective choice is made by the buyer to restore its asset to the vendor in return for repayment of the purchase price. Before that choice is made, each appellant is fully entitled to ownership of that appellant's unit; that right is the very antithesis of a right to have the purchase money restored. The appellants' submission could be accepted only if the true nature of the right of avoidance conferred by s 1073(2) is ignored and the section is allowed a distinctly unprincipled operation.

Analogies and authorities

[129] The appellants sought to support their alternative descriptions of the right conferred by s 1073(2) of the old Law by analogy with the right conferred on the holder of an option to purchase land. They argued that, while the optionee will not have a right to compel a transfer of the land until the option is exercised and the optionee is ready, willing and able to pay the purchase price, the right to make the choice to exercise the option is naturally referred to as a "right", and the optionor is liable to

---

55 (1929) 43 CLR 334 at 356 (citation footnoted in original). See also *Lodge v National Union Investment Company Limited* [1907] 1 Ch 300; *Lejo Holdings Pty Ltd v Deutsche Bank (Asia) AG* [1988] 2 Qd R 30 esp at 40 – 43.

56 *Palmer v Lark* [1945] Ch 182 at 184 – 185; *Dainford v Smith* (1985) 155 CLR 342 at 365; *Sunbird Plaza v Maloney* (1988) 166 CLR 245 at 275 – 276.

57 (1989) 168 CLR 385 at 450.

become liable to transfer the land. But, of course, it is well understood that the choice conferred by an option does not survive the expiry of the term of the option which confers that right, and the liability in the optionor to transfer the land is not enforceable by a court unless the option is, in fact, exercised and an enforceable obligation to pay the purchase price is assumed by the optionee who is ready, willing and able to perform that obligation. The analogy does not assist the appellants.

[130] While the option conferred on an appellant remained unexercised, the appellant had no right which could be enforced by an order of the court against the respondent so as to change any of the rights and duties which then constituted the relationship between the parties. That the court might have declared, in favour of the appellants, that the appellants had the benefit of the statutory option, as Mr Sofronoff suggested, would not itself have changed, in any way, the specific rights and duties which constituted the relationship between the parties until the right of avoidance was actually exercised.

[131] The appellants seek to propound their right as one analogous to the rights identified as accrued or acquired rights in cases such as *Hamilton Gell v White*,[58] *Yorkshire Dyeware and Chemical Co Ltd v Melbourne and Metropolitan Board of Works*,[59] *Resort Management Services Ltd v Noosa Shire Council*,[60] *Esber v The Commonwealth*,[61] *Re Commissioner for Railways*,[62] *Re Moray County Council*,[63] *Chief Adjudication Officer v Maguire*[64] and *Barminco Investments Pty Ltd v O'Brien*.[65] The cases relied upon by the appellants were cases where the right said to have accrued in the plaintiff was one which gave rise to a liability which could have been enforced by an order of the court or tribunal against the party which had incurred the corresponding liability had a court pronounced on the position before the repeal of the statute in question.

[132] The authorities relied upon by the appellants are distinguishable from the present case. In *Colley v Futurebrand FHA Pty Ltd*,[66] Handley JA, with whom Giles JA agreed, discussed a number of the cases on which the appellants seek to rely. Handley JA was particularly concerned with the New South Wales analogue of s 8(c) of the *Acts Interpretation Act* and the power conferred by s 106 of the *Industrial Relations Act (1996)* (NSW) upon the Industrial Relations Commission to make orders granting relief from unfair contracts. Handley JA said:

> "Mr Neil relied strongly on *Resort Management Services Ltd v Noosa Shire Council* [1997] 2 Qd R 291, a decision of the Queensland Court of Appeal. The company owned land which was injuriously affected by an amendment to the local planning scheme in December 1990 and it had a right to compensation if a claim was made within three years. In April 1991, the section conferring that

---

58 [1922] 2 KB 422.
59 [1968] VR 277.
60 [1997] 2 Qd R 291.
61 (1992) 174 CLR 430.
62 [1998] 2 Qd R 339.
63 [1962] SLT 236.
64 [1999] 2 All ER 859.
65 [2006] WASCA 88.
66 (2005) 63 NSWLR 291.

right was repealed. The company then made its claim within the three years but the council argued that it had no accrued right when the repealing Act commenced.

Fryberg J, who gave the principal judgment, said (at 303–304) that a statutory right available to the public in general is not likely to be an accrued right unless the claimant has taken appropriate steps, or some event has occurred, which makes that right 'specific rather than general'. He also referred (at 304) to the distinction drawn by Atkin LJ in *Hamilton Gell v White* [1922] 2 KB 422 at 431 between an abstract right given to a class and a specific right acquired by a member on the happening of some event.

He held (at 305) that the commencement of the amended planning scheme and the injurious affection it caused operated on the general right to confer a specific right on the company subject to lodgement of the claim within three years which was preserved notwithstanding the repeal. When the events occurred the company had a defined cause of action for compensation subject to lodging its claim. As Fryberg J said (at 308):

> '… Making a timely claim is not one of the elements defining the right but is merely a condition of its exercise. The function of the condition is not to limit the class of people who would otherwise acquire the right … That is why this case differs from cases like *Continental Liqueurs Pty Ltd v G F Heublein and Bro Inc* [(1960) 103 CLR 422] where commencement of proceedings is the factor that marks out those who have rights … from the public in general … who merely have a right to take advantage of an enactment.'

Mr Neil also relied on *Chief Adjudication Officer v Maguire*, where the repealed provisions created an entitlement to a special hardship allowance if a claim was made within three months. Such an entitlement was held to be a right which had accrued or been acquired prior to the repeal. Simon Brown LJ said (at 1787–1788; 868–869):

> '… A mere hope or expectation of acquiring a right is insufficient. An entitlement … even if inchoate or contingent, suffices. The fact that further steps may still be necessary to prove that the entitlement existed before repeal, or to prove its true extent, does not preclude it being regarded as a right …
>
> What to my mind all these cases establish is essentially this: that whether or not there is an acquired right depends upon whether at the date of repeal the claimant has an entitlement (at least contingent) to money or other certain benefit receivable by him, provided only that he takes all appropriate steps by way of notices and/or claims thereafter.'

Clarke LJ said (at 1790; 870–871):

> '… on the facts which I have assumed, a claimant acquired a right under the section when he satisfied the substantive criteria. The existence of that right did not

> depend upon the making of a claim … the fact that the right may be characterised as contingent on some future event, namely, the making of a claim, is not relevant provided that it can fairly be said that Mr Maguire had a right and not merely a hope or expectation at the date of the repeal.'
>
> Mr Fernon SC, for the company, submitted that all the claimant had when s 108A took effect was a mere right to take advantage of an enactment which was not preserved by s 30(1)(c).
>
> Given that the only right expressly conferred by s 106 is a right to apply to the Commission for specific relief, a would be applicant, as Meagher JA said in *Fisher v Madden as Receiver and Manager of Dataflow Computer Services Pty Ltd* (at 183 [12]) 'has the right to apply for an order, nothing more'. Even if the contract is unfair and an experienced practitioner could give some estimate of the likely order, there is, as Meagher JA said (at 183 [12]), no 'right to a quantifiable order'. The claimant had no ascertainable right or entitlement defined by reference to past facts similar to the rights to compensation in *Hamilton Gell v White* (see at 297 [25] supra) and *Resort Management Services Ltd*, the right to the hardship allowance in *Chief Adjudication Officer v Maguire* (see at 297 [27] ff supra), or the land rights claim in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act* (1988) 14 NSWLR 685.
>
> The filing of an application under s 106 causes a right to accrue because the applicant acquires (*Esber* (see at 296 [16] supra); *Gerrard* (see at 296 [17] supra)) a legally enforceable right to have the Commission hear and determine the application according to law. This is a new right, different from a mere right to take advantage of the section.
>
> There is no other act or event which can convert the general right to take advantage of s 106 into an accrued or acquired right. This is not a case where a right or entitlement automatically accrues or is acquired on an event such as an unfair dismissal, the injurious affection of land (*Resort Management Services Ltd*), the giving of a notice to quit (*Hamilton Gell v White*), or an illness causing a special disability (*Chief Adjudication Officer v Maguire*)."

[133] To take, by way of another example, the decision of Lord Hunter in *Re Moray County Council* on which the appellants placed particular reliance, that was a case where the right to recover the debt had accrued even though demand had not been made at the date of repeal. While demand was a step necessary for the enforcement of the right it was not regarded as an element of the right: the right which had accrued was a right to demand payment of the money. This case was concerned with legislation which entitled local authorities to demand repayment of a proportion of contributions made towards the improvement of private dwellings in the event that the owner of an improved dwelling voluntarily alienated it within 20 years of receiving the initial contribution. A grant was made by the local authority and, in the same year, unbeknown to the local authority, the owner alienated the property. By the time the local authority became aware of the alienation and claimed repayment of the relevant proportion of the contribution, the

statutory provision requiring the repayment had been repealed. Lord Hunter held that the right to recover the contribution accrued when voluntary alienation occurred. His Lordship said:

> "In the recent case in the Privy Council of *Director of Public Works v Ho Po Sang* ([1961] AC 901), their Lordships' Board considered the meaning and effect of portions of section 10 of the Interpretation Ordinance of Hong Kong, which corresponds with section 38 of the [Interpretation Act] 1889. The first proposition, which I think is recognised in the advice given by the Board, is that the mere abstract right to take advantage of a statutory enactment, if 'right' it can properly be called, is not a 'right acquired' or a 'right accrued' within the meaning of section 38(2)(c) of the Act of 1889 [subsequently re-enacted as section 16(1)(c) of the Act of 1978]. A leading authority for this proposition is *Abbott v Minister for Lands* [1895] AC 425, where emphasis was placed on the conjunction of the words 'right acquired' or 'right accrued' with the words 'obligation incurred'. The second proposition which, in my opinion, emerges from *Director of Public Works v Ho Po Sang* is that, even if a person has taken steps to put statutory machinery in motion, the statutory proceedings may only by the date of repeal have reached the stage when he has a hope or expectation of acquiring a right. In such a case it almost goes without saying that there is no right 'acquired' or 'accrued', and it was held that *Director of Public Works v Ho Po Sang* was just such a case. The third proposition which I derive from this case cited is that, where statutory machinery has been set in motion and the statute is afterwards repealed, there may be a right 'acquired' or 'accrued' under the statute, although at the date of repeal further steps are still necessary to prove that the right did in fact exist at the date of repeal and even to prove the measure of the obligation incurred. The case in this last category from which I have obtained most assistance is *Hamilton Gell v White* [1922] 2 KB 422), cf *Heston and Isleworth Urban District Council v Grout* [1897] 2 Ch 306. These cases, in my opinion, also establish that a right can at any rate in certain circumstances be a 'right acquired' although it may at the date of repeal still be of a contingent nature, and this seems also to be recognised (although it may be obiter) in *Director of Public Works v Ho Po Sang* … the right to demand payment of the appropriate proportion of the improvement grants plus interest upon the occurrence of a certain event, that event being … a voluntary alienation within the statutory period."[67]

The proof of matters of fact on which a right and its extent depends may sensibly be said to be a condition of the enforcement of the right or a contingency upon which the right is dependent while not preventing an enforceable right from accruing. This makes sense in a context in which it is concern about inevitable delay in the curial enforcement of a right which is an important aspect of the *raison d'etre* of s 8(c) of the *Acts Interpretation Act* and its analogues. It is one thing to say that a right has accrued when all that is left for it to be given effect is the operation of procedural machinery for its enforcement and that it is, accordingly, inchoate or conditional or contingent; it is another thing altogether to say that a conditional

---

67 (1962) SLT 236 at 239 – 240.

right has accrued while the party asserting the right maintained a choice to hold and enjoy a diametrically opposed right.[68]

[134] In summary in relation to the primary issue in the appeal, the issue must be resolved against the appellants, whether the issue is approached broadly as the appellants urge, or as an exercise in analytical jurisprudence as the respondent urges.

The transitional provisions

[135] Strictly speaking, my conclusion in relation to the primary issue in the appeal makes it unnecessary to address the issue whether the transitional provisions enacted by the MIA expressed an intention to work a result contrary to s 8 of the *Acts Interpretation Act*. That having been said, for the sake of completeness, I should also say that I respectfully agree with the reasons of the learned primary judge on this issue, which have been set out above.

[136] The appellants in their initial outline of submissions expressly accepted as correct the understanding of the operation of the transitional provisions stated by his Honour in the second paragraph of the excerpt from his Honour's reasons at paragraph [101] above. The appellants contend, however, that the transitional provisions were intended to enable prescribed interest schemes which had been operating legally to continue in operation under the old Law until they could be brought into compliance with the new Law during the two year period. But the respondent points out that the provisions of s 1454(1) are not so confined as the appellants' argument requires. The language of s 1454(1) is perfectly general: it is not susceptible to a reading down whereby it would not encompass the application of s 1073(2) of the old Law to the appellants' prescribed interests. On the other hand, if s 1454(1) does not apply to the appellants' interests because they are not also within the definition of managed investment interests, the repeal of s 1073(2) means that it no longer applies at all to those interests.

[137] In the appellants' outline in reply, it was conceded that "any right to elect to avoid pursuant to s 1073 was preserved during that [two year] period." If the transitional provisions operate in this way, it is tolerably clear that the right of avoidance is available to a purchaser for two years **and no longer**. Once it is accepted that the transitional provisions operate to preserve any right conferred by s 1073(2) of the old Law for a period of two years, the transitional provisions cannot be regarded as manifesting an intention other than that any right to avoid for contravention of the prescribed interest provisions of the old Law should not be exercisable after the expiration of that period. In *Attorney-General for Queensland v Australian Industrial Relations Commission*,[69] Gaudron, McHugh, Gummow and Hayne JJ said:

> "The operation of the presumption that accrued rights are unaffected by a repealing statute is, by s 8 of the [Acts] Interpretation Act, expressly subject to the appearance of a 'contrary intention'. Therefore, where the provisions of a repealing statute are clearly inconsistent with the survival of accrued rights, those provisions are controlling, and any presumption erected by s 8 is displaced."

---

68 *Attorney-General (Quebec) v Expropriation Tribunal* [1986] 1 SCR 732 at 742.

69 (2002) 213 CLR 485 at [51] – [53]. See also *G F Heublein and Bro Inc v Continental Liqueurs Pty Ltd* (1962) 109 CLR 153 at 159, 161 – 162.

[138] On the hearing of the appeal, the appellants withdrew the concession made in their outline in reply, and argued that the transitional provisions did not deal at all with the subject of the appellants' rights under s 1073(2) of the old Law. But s 1454(1) of the new Law provides that the old Law "continues to apply to the interests … for the period of two years …". The argument advanced orally on behalf of the appellants can be accepted only if this language is not apt to preserve the efficacy of s 1073(2) of the old Law for the period of two years. But there can be no doubt that the statutory provisions of the old Law which rendered defeasible the interests held by the appellants are provisions of the old Law which are apt to apply, without any straining of language, to the interests issued to the appellants. In my respectful opinion, the concession made in the appellants' outline in reply was correctly made. Accordingly, if it be accepted that s 1452 operated to apply s 1454 to the interests held by the appellants, then it is clear that s 1073(2) ceased to be available to the appellants as a source of a right of avoidance after the expiration of two years. If, on the other hand, the interests held by the appellants were not comprehended by s 1452 and s 1454(1), then s 1073(2) had no continuing operation at all.

[139] In an attempt to argue that the transitional provisions were not as comprehensive as the general language of s 1454(1) suggests, the appellants made the point that there could be no doubt that a criminal liability was incurred by the respondent immediately upon the contravention of the old Law and that this criminal liability was unaffected by the repeal of the old Law. This argument does not assist the appellants to counter the respondent's argument that s 1454(1) served to preserve the right conferred by s 1073(2) of the old Law for two years and no more. Section 1311 of the old Law imposed criminal liability for contraventions of the Law: this provision was not repealed by the new Law. It continued to render previous contraventions punishable as offences. Any liability of the respondent to punishment for contravention of the old Law was complete upon the contravention and the contravener remained liable to punishment; but to say that does not advance the argument that the apparently comprehensive language of s 1454(1) was not intended to make exhaustive provision for, inter alia, the civil liabilities of the respondent for its contravention of the old Law.

The notice of contention

[140] It is also unnecessary to resolve the issue raised by the respondent's notice of contention. I should, however, record my doubt that, in the absence of a finding of fact that an appellant knew of the want of an approved deed, in respect of the respondent's invitations to the public to enter into the contracts, there was a basis for concluding that that appellant had made a binding election to affirm his or her contract. There may be something to be said for the view urged by the respondent, but the present case is not an occasion to resolve the issue.

Conclusion and orders

[141] The conclusion of the learned trial judge was correct; and the appeal should be dismissed.

[142] The appellants should pay the respondent's costs of the appeal.

[143] **PHILIPPIDES J:** The factual background to the appeal and relevant legislation is set out in the reasons for judgement of Jerrard JA and Keane JA and I need only deal briefly with them. The appellants appeal against declaratory orders made by the learned primary judge that the appellants' purported avoidance of contracts

entered into with the respondent in 1996 and 1997, by notice given on 8 September 2003 in reliance on s 1073(2) of the *Corporations Law*, was of no effect.

[144] Section 1073(2) of the *Corporations Law* provided as follows:

> "1073(2) [**Contract voidable**] Where:
>
> (a) an offer of a prescribed interest for subscription has been made; or
>
> (b) an invitation to subscribe for a prescribed interest has been issued;
>
> in contravention of a provision of this Law, a contract entered into by any person (other than the management company) to subscribe for the prescribed interest as a result of the acceptance by the person of the offer, or the acceptance of an offer made by the person pursuant to the invitation, is voidable at the option of that person by notice in writing given to the management company."

[145] Section 1073 was contained in Division 5 of Part 7.12 of the *Corporations Law* ("the old law") which was repealed by the *Managed Investments Act 1998* (Cth), the repeal taking effect as from 1 July 1998, although a transitional provision continued the operation of the prescribed interests provisions (ss 1063-1076) in some cases for up to two years from the date of repeal, that is up to 1 July 2000.

[146] The learned trial judge found that the contracts created "prescribed interests", a finding that is not challenged on appeal. At the trial it was conceded by the respondent that, if the contracts of sale were sales of "prescribed interests" as defined in the old law, there had been a contravention by the respondent of the provisions of the old law. Before the trial judge the appellants argued that they were entitled to avoid the contracts in reliance upon s 1073(2), notwithstanding its repeal, since they had accrued rights which were unaffected by the repeal of the old law. In this regard they relied upon s 8(c) of the *Acts Interpretation Act 1901* (Cth).

[147] The issues raised before the trial judge thus included whether the appellants had "accrued rights" within the meaning of s 8(c) of the *Acts Interpretation Act* pursuant to s 1073(2) of the old law, the effect of the transitional legislation and whether that legislation evinced a "contrary intention" for the purposes of s 8 of the *Acts Interpretation Act*. The respondent contended that there was such a "contrary intention" and that any right to avoid the contracts under s 1073(2) of the old law which had not been exercised by the end of the transitional period was lost. A further issue raised was whether, if there existed accrued rights which remained unaffected by the *Managed Investments Act*, there had been an election to affirm the contracts.

[148] Section 8 of the *Acts Interpretation Act 1901* (Cth), provides:

> "**Effect of repeal**
> Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not:
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
> (b) affect the previous operation of any Act so repealed, or anything duly done or suffered under any Act so repealed; or

(c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed; or

(d) affect any penalty forfeiture or punishment incurred in respect of any offence committed against any Act so repealed; or

(e) affect any investigation legal proceeding or remedy in respect of any such right privilege obligation liability penalty forfeiture or punishment as aforesaid;

and any such investigation legal proceeding or remedy may be instituted continued or enforced, and any such penalty forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

[149] The learned trial judge held the appellants had no accrued right to avoid the contracts and additionally that the transitional provision resulted in any right under s 1073(2) not being available to be exercised after 1 July 2000.

[150] The major criticism levelled at the trial judge's reasoning that at the date of the repeal of s 1073 there was no right which had accrued to the appellants was that he incorrectly analysed the nature of the appellants' right by seeking erroneously to categorise the correlative liability of the respondent by what was described as Hohfeldian jurisprudential principles. Such an approach to the analysis of rights was criticised in *Mathieson v Burton* (1971) 124 CLR 1 at 12, where resort to the Hohfeldian notion of "immunity" as a means of denying the existence of an accrued right was rejected by the court.

[151] However, it is abundantly clear from the learned trial judge's reasons that his Honour was not engaged in any abstract jurisprudential analysis, but rather seeking to identify the nature of the right that it was asserted by the appellants had accrued by considering the matter in terms of the correlative liability flowing from it. That was clearly a relevant and useful approach; as was said in *Attorney-General (Quebec) v Expropriation Tribunal* [1986] 1 SCR 732 at 742, "A vested right is one which exists and produces effects". In the same vein, his Honour observed at [84]:

> "The right claimed is a right said to be enforceable by one party to a contract against the other party. In this context it is to be expected that the right of one party would be the converse of the obligation or liability of the other. Therefore, it is relevant to consider Australand's position, insofar as any obligation or liability under s 8 is concerned."

[152] In analysing the situation from that perspective and concluding that the appellants had no accrued right to avoid the contracts, the learned trial judge stated at [85] to [87]:

> "As at the date of the repeal, what was the obligation or liability of Australand? Its obligation was to perform its contract. The obligation remaining to be performed at that point was its guarantee of the payment of rent during the first four years of the lease. It was under no obligation to accept a re-conveyance of an apartment or to make restitution to a purchaser. Any such obligation or liability was yet to arise. It was, in terms of what Windeyer J said in *Ogden*, 'a situation in which some future event must occur to

> make the effect of past events create a completed liability'. One such 'future event' was a notice of avoidance under s 1073(2). And as at the date of repeal, Australand was not relevantly *liable* to a purchaser. Australand was susceptible to the creation of obligations to make restitution and to accept a re-conveyance. But it is not a susceptibility, but rather an existing obligation or a liability already incurred, which is preserved by s 8.
>
> …
>
> At the date of the repeal, a purchaser's entitlement was to the performance of his or her contract, and of course to the ownership of the real property. At that point, a purchaser had no right to repayment of the price or to any other restitution. That restitutionary right did not exist because the purchaser had not acted to take advantage of the (repealed) enactment. So the right which each respondent now claims (for restitution of what it has paid to Australand upon a re-conveyance of the apartment) is not a right which any respondent enjoyed at the relevant date. It would be unrealistic to say that a purchaser, at the date of the repeal, had a conditional right to restitution, i.e. a right to restitution conditional upon his or her own future election. Understandably the respondents' argument is not put in that way. They say that the relevant right was not the restitutionary right, but the right to avoid the contract pursuant to s 1073. But this was a right to take advantage of the then enactment, without there having been any act by a purchaser 'towards availing himself of that right'."

[153] The appellant's argument on appeal was that the right under s 1073(2) had accrued upon the entering into of the contract involving a prescribed interest in contravention of the old law. It was said that the right was an accrued one, albeit contingent and the right asserted was placed on two footings; it was said that the right involved was "a right to take a step to affect legal relations" or alternatively a right "to recover the purchase price", contingent on the giving of notice under s 1073(2).

[154] Section 8(c) protects an accrued right even though it be inchoate or contingent: *Free Lanka Insurance Co Ltd v Ranasinghe* [1964] AC 541 at 552; *Esber v The Commonwealth* (1992) 174 CLR 430 at 440. However, in so far as it was contended that the right pursuant to s 1073 was a right to avoid the contract, which vested on the entering into of the contract in contravention of the provisions of the old law, but which was contingent on the giving of the notice, the trial judge correctly dismissed the contention, identifying the right asserted, in the words used in *Abbott v Minister for Lands* [1895] AC 425 at 431, as a mere right in the appellants to take advantage of an enactment, without any acts done towards availing themselves of that right before the repeal of the enactment. In those circumstances, the "right" asserted fell short of an "accrued right" for the purposes of s 8(c).

[155] A large number of cases were referred to by both appellants and respondent as to when a right could be considered to become an accrued right. Many of the cases turn on the nature of the legislative provisions in question in each case. What is

clear, as Brennan J observed in *Esber* at 446, is that to determine whether a right is "accrued under" a repealed Act for the purposes of s 8(c) it is necessary "to ascertain the nature of the right by reference to the provisions under which it is said to have accrued" (see also *Chang v Laidley Shire Council* [2007] HCA 37 at [116]). This is particularly pertinent in respect of the second basis upon which it was asserted that there was an accrued right, that is, that there was a right to recover the purchase price contingent on the giving of notice.

[156] It is apparent from the terms of s 1073(2) that the giving of a notice under s 1073(2) is the means of communication of an election to avoid the contract and until such an election had been made and communicated, it could not be said that the matter falls within the well established category of "transactions past and closed" which remain unaffected by the repeal of an Act: *Maxwell v Murphy* (1957) 96 CLR 261 at 267. The right and consequent liability arising under s 1073(2) is fixed by reference to the giving of a notice, upon the decision to exercise the option conferred by the statute to avoid the contract. As to this, the learned trial judge's conclusions, that "the right which each [appellant] now claims (for restitution of what it has paid to [the respondent] upon a re-conveyance of the apartment), is not a right which any [appellant] enjoyed at the relevant date" and that it "would be unrealistic to say that a purchaser, at the date of the repeal, had a conditional right to restitution, i.e. a right to restitution conditional upon his or her own future election", are unimpeachable. At the date of the repeal of the old law, the appellants had no right or entitlement defined by reference to past events. The present case is thus distinguishable from cases such as *Hamilton Gell v White* [1922] 2 KB 422 and *Resort Management Services Ltd v Noosa Shire Council* [1997] 2 Qd R 291.

[157] The learned trial judge's reasoning and finding that there was no accrued right as at the date of the repeal of the old law cannot be faulted. I agree with what Jerrard JA and Keane JA have said in that regard in their respective judgments. That conclusion is sufficient to dispose of the appeal, which should be dismissed with costs.