SUPREME COURT OF QUEENSLAND

CITATION:	*Australand Corporation (Qld) Pty Ltd v Johnson & Ors* [2007] QSC 013
PARTIES:	**AUSTRALAND CORPORATION (QLD) PTY LTD (ACN 003 251 803)** (applicant) **v** **EVAN RICHARD JOHNSON AND DEBRA ANN JOHNSON** (seventh respondent) **and** **JOHN DELFORCE AND JULIE CHRISTINE DELFORCE** (tenth respondent) **and** **GREGORY ALLEN MYTTON AND ADRIENNE RUTH MYTTON** (twentieth respondent) **and** **KAH YAO PIH** (forty-third respondent)
FILE NO/S:	BS 8521 of 2003
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	7 February 2007
DELIVERED AT:	Brisbane
HEARING DATE:	28-29, 31 August and 1, 5, 11-14, 19 September 2006
JUDGE:	Philip McMurdo J
ORDER:	**1. It is declared that the purported avoidance of their contracts with Australand Corporation (Qld) Pty Ltd by each of the respondents, Evan Richard Johnson and Debra Ann Johnson, John Delforce and Julie Christine Delforce, Gregory Allen Mytton and Adrienne Ruth Mytton, and Mr Kah Yao Pih, was of no effect.** **2. The counterclaim by each of those respondents will be dismissed.**
CATCHWORDS:	CONTRACTS – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH –

REPUDIATION AND NON-PERFORMANCE – ELECTION AND RESCISSION – EFFECT OF ELECTION NOT TO RESCIND – applicant asserts that respondents elected to affirm the contracts prior to the purported avoidance by the respondents in 2003 – whether statutory right to avoid may be lost by affirmation – whether knowledge of facts entitling avoidance sufficient to give rise to affirmation – whether conduct amounting to affirmation of one ground for avoidance precludes avoidance on a later discovered independent ground.

CONTRACTS – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – ELECTION AND RESCISSION – STATUTE GIVING RIGHT TO AVOID CONTRACT – whether s 1073(2) *Corporations Act* 1989 (Cth) provides a right to avoid a concluded contract – whether right survives repeal of statute

CORPORATIONS – INTERESTS OTHER THAN SHARES OR CHARGES – OFFER OR ISSUE TO PUBLIC - PRESCRIBED INTEREST – applicant developed land and constructed hotel – applicant registered building unit plans – applicant entered into 15 year lease of hotel apartments to related company – lessee entered into a management agreement with third company– applicant offered hotel apartments for sale subject to the terms of the apartment leases– respondents entered into contracts for the purchase of hotel apartments – respondents guaranteed rent for a four year period – rent then determined upon income and outlays of particular apartment – whether offer of "prescribed interest" under *Corporations Act* 1989 (Cth).

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – INTERPRETATION ACTS AND CLAUSES – PARTICULAR ACTS AND ORDINANCES – COMMONWEALTH – whether an entitlement to avoid the contract was an accrued right expressly preserved by s 8 of the *Acts Interpretation Act* 1901 (Cth) so to remain unaffected by repeal of the prescribed interest provisions

STATUTES – ACTS OF PARLIAMENT – OPERATION AND EFFECT OF STATUTES – IN GENERAL – transitional provisions – *Managed Investments Act* 1998 (Cth) – whether right to avoid the contracts of sale pursuant to the prescribed interest provisions of the *Corporations Act* 1989 (Cth) survived the repeal of parts of the Corporations Law – whether entitlement to avoid the contract lost upon the expiry of transitional period provided by the *Managed Investments Act* 1998 (Cth).

Acts Interpretation Act 1901 (Cth)

Corporations Act 1989 (Cth)

Managed Investments Act 1998 (Cth)

Trade Practices Act 1974 (Cth)

Corporations (Queensland) Act 1990 (Qld)

Abbott v Minister for Lands [1895] AC 425, discussed

Australian Softwood Forests Proprietary Ltd & Ors v Attorney-General (NSW) (1982) 148 CLR 121, applied

Co-operative Building Society of South Australia Ltd v Australian Securities Commission (1993) 10 ACSR 89, applied

Cvetanoski & Ors v Filaria Pty Ltd [2002] ACTSC 103; (2002) 171 FLR 194, distinguished

Elder's Trustee and Executor Company Limited v Commonwealth Homes & Investment Co Ltd (1941) 65 CLR 603, considered

Ellison v Lutre Pty Ltd [1999] FCA 399; (1999) 88 FCR 116, considered

Esber v The Commonwealth (1991) 174 CLR 430, considered

Jones v Acfold Investments Pty Ltd (1985) 6 FCR 512, considered

Lutre v Ellison (1997) 151 ALR 626, considered

Maunder-Hartigan v Hamilton (1984) 8 ACLR 937, distinguished

Maxwell v Murphy (1957) 96 CLR 261, considered

Munna Beach Apartments Pty Ltd v Kennedy [1983] 1 Qd R 151, considered

Ogden Industries Pty Ltd v Lucas (1967) 116 CLR 537, applied

Oxfordshire CC v Oxford City Council [2006] UKHL 25; [2006] 2 AC 674, considered

Sargent v ASL Developments Ltd (1974) 131 CLR 634, discussed

Streeter v Pacific-Seven Pty Ltd (1985) 9 ACLR 790, considered

COUNSEL:	J C Bell QC with L F Kelly SC and D A Kelly for the applicant D Collins SC, with D A Skennar, for the respondents
SOLICITORS:	McCullough Robertson for the applicant Slater Gordon for the respondents

[1] **McMURDO J:** The applicant is Australand Corporation (Qld) Pty Ltd and was previously called Walker Corporation (Qld) Pty Ltd. In 1996/1997, it developed land which it owned at Ferny Avenue, Surfers Paradise by building what became known as the Sovereign Hotel. The hotel consists of two towers containing 153 apartments and other buildings such as a restaurant, a shop and swimming pools.

[2] Each apartment is the subject of a separate freehold title under a strata title subdivision. Australand had entered into contracts for the sale of most of the apartments by the time the plan was registered on 14 October 1997, and those contracts were then completed.

[3] The structure for the use of these apartments as a hotel was as follows. Prior to registration of the plan, Australand granted a lease over the site and caused it to be registered. The lessee was a related company called Sovereign Management (Qld) Pty Ltd ("Sovereign"). The lease was for a term of 15 years, to commence shortly after registration of the building units plan, with an option to renew for a further ten years. The lease anticipated the registration of the plan and Australand's conveyances of the individual lots by providing for rent to be then paid by Sovereign to the individual owners. Each contract of sale provided that the apartment would be sold subject to the lease. The lease required Sovereign to use the premises as a "strata titled hotel apartment". Also prior to the registration of the plan, Sovereign entered into a management agreement with a company called Touraust Hotels Pty Ltd ("Touraust"), by which Touraust was appointed as the manager of the hotel which it was to operate for Sovereign's benefit. Accordingly, from when the hotel opened in 1997, it was operated by Touraust on behalf of Sovereign, which occupied each apartment pursuant to the lease originally granted by Australand.

[4] The lease provided that the apartment owner would be paid rent during the first four years of the term at certain percentages (varying between seven and eight percent) of the price at which the apartment had been offered for sale. For those four years, payment of the rent was guaranteed to the purchaser by Australand. For year five and onwards, the quantification of the rent was quite different, and its payment was not guaranteed by Australand. From that point, the amount of the rent depended upon the income derived by Sovereign in relation to that particular apartment and the expenses attributed to it.

[5] By the end of the fourth year, which was near the end of 2001, the hotel was not as profitable as had been indicated by the marketing material which Australand had provided to prospective purchasers. It was clear that the return from a purchaser's ownership of the apartment, which was the rental, was less than had been forecast. So many purchasers took legal advice with a view to obtaining compensation or some other redress. Ultimately, on 8 September 2003, Messrs Slater and Gordon, on behalf of the owners of some 85 apartments, purported to rescind the contracts under which those owners had purchased. With three exceptions, the stated basis for that rescission was that Australand had offered the apartments for sale in contravention of what had been the "prescribed interest" provisions of the

Corporations Law[1] which had been replaced by the *Corporations Act* 2001 (Cth) by then[2]. According to those provisions, which had been repealed in 1998, where a contract had resulted from the offer of a prescribed interest in contravention of their requirements, the contract was voidable at the option of the innocent party. They had also provided that a court could order that such an avoidance should have no effect, if the contravention had been minor or insubstantial, it had not materially prejudiced the interests of the person who had sought to avoid and it was just and equitable for the avoidance to be given no effect.

[6] Australand then commenced these proceedings seeking declarations that the owners were not entitled to avoid their contracts or alternatively orders that the avoidance of the contracts should be given no effect.

[7] Some owners brought their own proceedings against Australand, claiming not only a contravention of the prescribed interest provisions of the *Corporations Law* but also relief for alleged contraventions of s 52 of the *Trade Practices Act* 1974 (Cth). Some owners also claimed damages against Australand for negligent misstatements as to the likely income from their apartments. Many of the owners' proceedings were commenced in other courts but were transferred to this court under the cross-vesting laws.

[8] I directed that the proceedings between Australand and a small number of owners be tried in advance of the other cases. There are issues of law which are common to all claims by or against owners, and to a substantial extent, the facts are the same. So it was hoped that by a judgment involving a few of the owners, the litigation involving the others might be avoided or at least reduced in its scope.

[9] Within the group whose cases were to be tried first, there were some who claimed under the *Trade Practices Act*. Shortly after the trial commenced, it was conceded that their claims under the *Trade Practices Act* were statute barred and must fail. There were two within this group who also claimed damages for negligence, and the trial continued with evidence being given in relation to those claims, before those claimants, who are Mr Savage and Mr and Mrs Carey, settled all of the claims and cross-claims between them and Australand. That left effectively four owners within this trial. They are Mr and Mrs Johnson, Mr and Mrs Delforce, Mr and Mrs Mytton and Mr Pih. At the same point in the trial, Australand withdrew its application to have the avoidance of any contract declared as ineffective.

[10] What remains in this trial is Australand's claim for a declaration that those owners were not entitled to avoid their contracts, for which the issues are as follows:

a) Was the right or interest offered to prospective owners a "prescribed interest" as defined in the *Corporations Law*? If it was, then it is conceded that there was a contravention by Australand which, until a contract was completed by the purchaser's payment in exchange for a conveyance, entitled the purchaser to avoid the contract pursuant to s 1073 of the *Corporations Law*.

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[1] *The Corporations Law of Queensland* being the Corporations Law set out in s 82 of the *Corporations Act* 1989 (Cth) applied as a law of Queensland by the *Corporation (Queensland) Act* 1990 (Qld), s 7

[2] The three contracts made after that repeal were purportedly avoided pursuant to s 601MB of the *Corporations Law*, which was inserted as from 1 July 198 by the *Managed Investments Act* 1998 (Cth)

b) If a purchaser was entitled to avoid the contract, was that entitlement lost upon completion of the contract?

c) What was the effect of the repeal of the prescribed interest provisions of the *Corporations Law* (upon the enactment of the *Managed Investments Act* 1998 (Cth)) upon any entitlement to avoid a contract existing but not exercised prior to that repeal?

d) Was any entitlement to avoid a contract, if not lost upon the repeal of the prescribed interest provisions, nevertheless lost upon the expiry of a certain transitional period provided by the *Managed Investments Act*?

e) If those questions are answered in favour of the purchaser, was the entitlement to avoid the contract nevertheless lost by what Australand says was in each case an election to affirm the contract, at some time between about the end of 2001 and the purported avoidance by purchasers in September 2003?

[11] Within this judgment, these issues are to be determined between Australand and the parties involved in this trial: Mr and Mrs Johnson, Mr and Mrs Delforce, Mr and Mrs Mytton and Mr Pih. I have not tried any part of a case between Australand and any other owner. Before going to these issues, I will discus the terms of the relevant documents.

The contract of sale

[12] The same form of contract was used for all sales. The property sold was the registered ownership of a lot in a building units plan, subject to the registered lease to Sovereign.

[13] The purchaser agreed that prior to completion, Australand was entitled to grant or make leases, licences or easements over the common property and shared facility agreements for the provision of facilities and services. The purchaser appointed Australand to attend and vote as the purchaser's attorney at all meetings of the Body Corporate, to the exclusion of the purchaser. This authority was irrevocable and was to remain in place until the expiration of the lease in favour of Sovereign (or until the occurrence of certain other events not presently relevant). Australand guaranteed the payment of rent and the performance of the other obligations of Sovereign under the lease during the first four years of the lease. Each of the two towers was to be the subject of a Building Units Plan but it was agreed that the towers were to be designed to appear and to operate as one development and with common access ways and facilities.

The lease to Sovereign

[14] Upon registration of the Building Units Plan, each lot became subject to the lease granted to Sovereign. For years 5 to 15 of its term, rent was payable in an amount described as the "market rental" for that lot, which according to the lease, was deemed to be the amount equal to the "net room revenue" of that apartment for the preceding rental year. So, for example, the rent payable for the fifth year was the amount of the net room revenue for that apartment for the fourth year.

[15] The net room revenue for an apartment was defined as:

> "An amount equal to the gross room revenue derived by the tenant in respect of that lot from conducting the demised premises as an hotel, less the lot outgoings without limiting the generality including applicable hotel operating costs, Body Corporate charges and all other charges payable by the tenant hereunder."

The term "gross room revenue" was not defined but its meaning is uncontroversial. It was the revenue received by Sovereign for the use of that apartment as a hotel room. Nor was the term "lot outgoings" defined. But the term "Outgoings" was defined, as effectively all expenses and outgoings attributed to the use of the demised premises. Where an outgoing was not specific to those premises, ie to the individual apartment, Sovereign may make an apportionment which in its opinion is appropriate. The outgoings were defined to expressly include fees payable under the management agreement (between Sovereign and Touraust).

[16] The lessor expressly acknowledged that he or she had no right to reside in the apartment, but was given the right to occupy it for up to ten nights per year at a discount of the advertised hotel rate.

[17] Sovereign agreed to pay all outgoings. It was not to use or permit the premises to be used for any purpose other than as an hotel apartment. The lessor agreed that Sovereign was entitled to appoint an hotel operator and agreed specifically to the appointment of Touraust.

[18] The lessor authorised Sovereign to deduct monies from the rent and allocate them to what was called an equipment reserve account, which was an account required to be kept according to the agreement between Sovereign and Touraust.

[19] Sovereign was entitled to vary the terms of the lease if the same variation was agreed to by the lessors of at least ninety per cent of all apartments.

Other leases

[20] Other facilities for the hotel such as a tour desk, staff facilities, reception area and meeting facilities are located within Lots 1 and 2 in one of the registered plans. A coffee shop and bistro is within another lot. These three lots were leased by Australand to Sovereign under leases, again each for a term of 15 years with an option to extend for a further 10 years. Nominal rent is payable and Sovereign must pay all outgoings.

Hotel Management Agreement

[21] Under this agreement, Sovereign engaged Touraust as the "Manager", to "operate and manage the said resort for (Sovereign) and provide marketing, administration and other services in relation thereto." The engagement was for a term of 15 years from the opening of the hotel.

[22] Sovereign agreed to pay Touraust what was called a "Basic Management Fee", being one per cent of the total revenue of the hotel, and what was called an "Incentive Fee", being an amount of up to nine per cent of the Gross Operating Profit of the hotel. That was defined as the revenue of the hotel less all "Operating Costs", which were defined as all operating costs according to relevant accounting standards. But it was also agreed that Sovereign would be entitled to retain for itself a half share of these fees. Clause 2 of Special Conditions within the Schedule to this agreement provides:

> "**2. Share of Management Fees for Lessee**
>
> Subject to Special Condition 3, the Lessee shall be entitled to retain for itself a 50% share of all amounts payable to the Manager in respect of Basic Management Fees, Incentive Fees and amounts payable in consequence of terminations under Parts 4A, 14 and 15."

It was expressly agreed that the parties would not be in partnership or in a joint venture and nor would Touraust have a lease from Sovereign.

[23] It was Sovereign which was to carry on the hotel business, albeit through the management of Touraust. That is shown by terms in relation to the so called Operating Account to which all revenue and from which all operating costs were to be paid. Clause 7.5 provided that Touraust was to pay operating costs, its own fees and all "costs and expenses incurred by the Manager on behalf of the Lessee" (Sovereign) from that account, and that after payment of instalments to the Equipment Reserve Account, Touraust was to pay to Sovereign "the available cash surplus". And it was Sovereign, not Touraust, which at its expense had to obtain and keep in force all necessary licences and permits, including liquor licences, as may be required for the operation of the hotel (clause 2.6). Touraust was to keep full and adequate books and records reflecting the results of the operation of the hotel which were to be audited by an auditor nominated by Touraust and approved by Sovereign (clause 6.1). Touraust was to regularly prepare a budget for the operation of the hotel which might be approved or disapproved by Sovereign (clauses 7.1 and 7.1A). So although it was agreed that Touraust would have "absolute control and discretion in the operation of the hotel" and, through the payment of the Incentive Fee, an interest in its profitability, the hotel was a business to be conducted by Sovereign. It appears that Sovereign's profit from that business would come from its retention of one half of the fees otherwise payable to Touraust.

Prescribed Interests

[24] Section 1018(1) of the *Corporations Law* provided that a person was not to offer for subscription, or issue invitations to subscribe for, securities of a corporation unless a complying prospectus had been lodged and registered. Section 92(1) defined "securities" to include "prescribed interests". Australand concedes that it offered the interests which investors acquired by buying their apartments, and that no prospectus was lodged. Accordingly, if what was offered constituted a prescribed interest, it is conceded that there was a contravention of s 1018.

[25] Section 1064(1) of *The Corporations Law* provided that a person, other than a public corporation, was not to make available, offer for subscription or purchase, or issue an invitation to subscribe for or buy, any prescribed interest. Australand was not a public corporation and again the question is whether there was a prescribed interest.

[26] Section 1065 of the *Corporations Law* provided that a person was not to issue, offer for subscription or purchase or issue invitations to subscribe for or buy, any prescribed interest unless there was a deed that was an approved deed (as provided for in the statute). It is conceded that there was no approved deed at the relevant time, and again the question is whether there was a prescribed interest.

[27] 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."*

[28] The apartment owners say that they contracted to subscribe for a prescribed interest by entering into the contracts to purchase their apartments. Australand makes no argument as to whether that involved a subscription (for an interest). Section 9 of the *Corporations Law* defined the term "subscriber" as follows:

> "*'Subscriber', in relation to securities, means, in the case prescribed interests, any person accepting an offer, or making an offer pursuant to an invitation in respect of, or subscribing for or buying, any such prescribed interests*".

Accordingly, Australand concedes that s 1073(2) was engaged if there was a prescribed interest.

[29] Section 9 of the *Corporations Law* defined "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…*"

The owners no longer argue that this was a time-sharing scheme. The issue then is whether there was a "participation interest". That term was also defined by s 9 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; ...*"

[30] The owners argue that they acquired a participation interest, and thereby a prescribed interest, according to each of paragraphs (a), (b) and (c) of that definition.

Paragraph (a) of the definition of "participation interest"

[31] The definition of "participation interest" was the same as the definition of "interest" in s 76 of the *Uniform Companies Act* of 1961, which was considered in *Australian Softwood Forests Proprietary Ltd & Ors v Attorney-General (NSW)* (1982)

148 CLR 121. In relation to paragraph (a) of the definition, Mason J (with whom Gibbs CJ and Stephen J agreed) there said.[3]

> "In attempting to apply the statutory definition of "interest" to the transactions already outlined, we must ask ourselves, first, whether there is a "financial or business undertaking or scheme" and, secondly, what are its elements. We begin with the circumstance that the words in question are of very wide import. For example, all that the word "scheme" requires is that there should be "some programme, or plan of action" (*Clowes v. Federal Commissioner of Taxation*). The next step is that, in contradistinction to s. 26(a) of the *Income Tax Assessment Act* 1936, as amended, which, as *Clowes* shows, is directed to a profit-making undertaking or scheme carried on by the taxpayer, the statutory definition is not concerned with the identity of the person or persons who carry it on. It is not material that the person who offers the "interests" to the public does not himself carry on the undertaking or scheme. Nor does it matter that by subscribing for an interest a member of the public will constitute himself as one who is engaged in carrying on the enterprise.
>
> Nor again does it matter that the subscriber by accepting the offer constitutes himself as one who executes some elements of the scheme and derives from so doing a financial advantage which is not earned by other participants whose activities relate to other elements in the scheme. It is not an objection to an enterprise qualifying as an undertaking or scheme that it consists of a number of parts or elements, the participation of individual parties being limited to one of these parts or elements, their profit or remuneration being derived from the particular activities in which they engage. There is nothing in the notion of an undertaking or scheme that requires or implies that there is joint participation in everything comprised in the plan or that there must be a share or pooling of profits or receipts."

Mason J then emphasised the breadth of the definition in this passage[4]:

> "There are real difficulties in the suggestion that the court can read down the very comprehensive definition of "interest" by reference to the supposedly unintended consequences of a literal reading on everyday commercial transactions. The definition is so general and all-embracing that it is impossible to say that it necessarily excludes particular transactions which appear to be covered by the general words. The hazards of adopting such a course are not dispelled by the absence of a supporting context. It would be different if we could glean from the legislative provisions an overall purpose which, being limited in scope, justified a reading down of the definition. Unfortunately in this case the search for a legislative purpose takes us back to the very words of the definition for the intended scope of the operative provisions depends so heavily on the comprehensive language of that definition. As Young C.J. observed in *A Home Away Pty. Ltd. v. Commissioner for Corporate Affairs*, in discussing

[3] (1980-1981) 148 CLR 121 at 129
[4] (1980-1981) 148 CLR 121, 130

> the meaning of "interest" as defined in s. 76 (1): 'If it were said that we should give effect to the purpose Parliament wished to achieve, we must first ascertain the purpose and that can only be ascertained from the language used'."

[32] Several cases have involved whether these prescribed interest provisions applied to transactions involving the purchase of a strata title apartment and the consistent judicial view has been that there is no prescribed interest simply from the ownership of the lot, with a share in the common property: some other right or interest must be acquired: *Brisbane Unit Development Corporation Pty Ltd v Deming No 456 Pty Ltd (No 2)* [1983] 2 Qd R 92, 101 102; *Munna Beach Apartments Pty Ltd v Kennedy* [1983] 1 Qd R 151; *Jones v Acfold Investments Pty Ltd* (1985) 6 FCR 512, 520.

[33] In *Maunder-Hartigan v Hamilton* (1984) 8 ACLR 937, a majority of the Full Court of the Supreme Court of Western Australia held that there was no prescribed interest acquired from the purchase of a unit in a proposed strata title development, under which the units were to be leased back to a professional management group under a long-term lease for use together as a holiday resort. These leases were for a fixed rent. Unlike the present case, the rent was not a function of profit in any sense.

[34] In *Jones v Acfold Investments*, the purchasers were not bound to lease their units but there was a management agreement providing for the care and administration of the common property and an agency agreement whereby each unit holder could, if he or she chose, use the services of a certain letting agent. The Full Federal Court held that there was no "interest", in the sense of any of the paragraphs of the definition.

[35] In *Co-operative Building Society of South Australia Ltd v Australian Securities Commission* (1993) 10 ACSR 89, Jenkinson J held that there was a prescribed interest offered to and acquired by purchasers of units in a serviced apartment complex in circumstances in some respects similar to the present case. A purchaser was bound on completion of the contract to accept an assignment by the vendor of a management and letting agreement, by which the apartment owner relinquished any right of occupation and the manager was obliged to let the apartment and others within the development. The manager was to have the unfettered use of the common property as was necessary to carry on its letting and management business. The unit owner was entitled to a share in the gross revenue received by the manager from the letting of all apartments, and each apartment had an agreed proportionate entitlement to that revenue. So unlike the present case, the apartment owners were entitled to payments quantified by reference to the receipts from the letting of all apartments. In the present case, the rent to an apartment owner is calculated from the receipts for that particular apartment. And unlike the present case, all receipts were to be banked to an account, the funds in which would be held by the manager as trustee for and on behalf of all apartment owners. Each owner's proportion of the gross revenue was to be paid after deducting that owner's corresponding proportionate responsibility for relevant expenses. Jenkinson J held that this involved a business undertaking or scheme under which those who purchased units had a right to participate in its profits so as to provide a prescribed interest within paragraph (a) of the definition. He further held that there was a prescribed interest

within each of paragraphs (b) and (c) of the definition. As to paragraph (a), what could be the significant differences between that case and the present are the elements of that scheme by which an owner benefited from the letting of all apartments and had a proprietary interest in the account to which those proceeds were paid.

[36] In *Cvetanoski & Ors v Filaria Pty Ltd* (2002) 171 FLR 194; [2002] ACTSC 103, Crispin J held that in one respect, what was there acquired by purchasers of individual apartments in an hotel building, did involve a prescribed interest. The apartments were leased back to a manager who was also entitled to use the common property. An annexure to the lease provided that subject to approval of a deed and registration of a prospectus (as required by the prescribed interest provisions), the lessee agreed to offer to the lessor a certain share in the profits from the hotel. Crispin J said that this particular provision within the annexure to the lease did involve an offer of a right to participate in the profits of the hotel business and accordingly constituted an offer of a prescribed interest. However, he held that this did not entitle the purchasers to avoid their contracts of purchase pursuant to s 1073(2), because none of the purchasers had in fact accepted the offer contained within that provision of the lease and the contracts they had made therefore involved no subscription for a prescribed interest. Again that case is somewhat different from the present, because what was offered was a share in simply the profits of the hotel rather than an entitlement to a payment quantified by the particular receipts from the letting of the investor's apartment.

[37] Australand also relies upon cases involving franchise agreements, and in particular the judgment of de Jersey J in *Streeter v Pacific-Seven Pty Ltd* (1985) 9 ACLR 790, holding that there was no "interest" conferred upon persons who under a franchise agreement had a right to use certain of the franchisor's assets and where the relevant "profits" were those to be derived by the plaintiffs themselves in the conduct of their own business. As to an argument that the franchisee had a right to "participate in profits", his Honour said:[5]

> "… the word 'profits', when read in this context and particularly in conjunction with the words 'right to participate or interest' should not be interpreted as extending to profits arising solely as a result of the efforts of the purchaser of a business… the profits envisaged as arising from this undertaking would be profits derived as a result of the efforts of the plaintiffs, with involvement on the part of the defendant being, with regard to the making of profit, no more than indirect and supportive. On that basis, I cannot conclude that *this agreement* would give the plaintiffs any interest or right to participate in the profits of the undertaking: that entitlement would arise independently, in consequence of the plaintiffs' independent profit making efforts."

[38] As Mason J said in *Australian Softwood Forests* in relation to paragraph (a) of the definition, the first question is whether there is a "financial or business undertaking or scheme" and if so, what are its elements. Australand does not dispute that there was some undertaking or scheme. But it argues that there was an undertaking or

[5] (1985) 9 ACLR 790, 793 - 794

scheme only in one or two respects: first, that there was a business undertaking conducted by Touraust in "operating an hotel business", and second, that there was an undertaking by Australand in the construction and sale of apartments. And as to the suggested undertaking of Touraust in operating the hotel, Australand says that the purchasers had and have no rights to participate or any interest in the profits, assets or realisation of that undertaking, especially because there was no contract or arrangement between them and Touraust. Their agreements were with Australand and their leases are grants to Sovereign, not Touraust. As to Australand's undertaking in the construction and sale of apartments, it relies upon the authorities, discussed above, that such an undertaking does not involve an acquisition by the purchaser of an apartment of a prescribed interest.

[39] But in the submission about Touraust, Australand misstates the position of the operation of the hotel. For the purposes of para (a) of the definition, there is a business undertaking or scheme by which this hotel is conducted. But contrary to the submission it is Sovereign, not Touraust which conducts the hotel business. An element of that scheme or undertaking is the use of the apartments by Australand as the hotel accommodation. The leasehold interest in an apartment is an "asset" of that scheme or undertaking. But an owner has no right to participate or an interest in that asset, i.e. the leasehold. Nor is an owner given any right to participate or an interest in the "realisation" of the scheme: if and when this hotel closes, an apartment owner will have no right to a share of what is realised from the hotel business. The critical question, for para (a) of the definition, is whether an owner has been given the right to participate or an interest in any *profits* of the scheme or undertaking which is the business of the hotel.

[40] The lease does not provide that an owner is to be paid a certain share of the profits from the operation of the hotel as a whole. Had the lease so provided, it would be clear that there would be a right to participate or an interest in the profits of the scheme. Instead the lease provides for a rent which is an assessment of the profitability of the individual apartment. Yet the notion of a distinct profit attributable to an individual apartment is artificial, because there is no distinct business which is conducted for each apartment. The expenses or "outlays" of the hotel business are not the aggregate of distinct expenses for each apartment, because for the most part distinct expenses are not incurred. The apartments are resources which together are used by Sovereign in the one business, which is the conduct of the hotel. As the promotional materials made clear, the apartments were not intended to be individually marketed to potential guests; they were to be promoted together as units within a single place of accommodation. The "Net Room Revenue" for an apartment could be fairly described as the assessed contribution from that apartment to the profits of the hotel.

[41] Sovereign could be expected to derive income from this hotel beyond that derived from the provision of accommodation: for example, there is the coffee shop/bistro. But the evident intent of this scheme is that the profits (after Management and Incentive fees) from the core business of the hotel, which is the provision of accommodation, should be paid to the owners of the apartments and in shares corresponding with the relative contributions of the apartments to the derivation of those profits.

[42] Conceivably the accommodation business as a whole could be unprofitable, but an individual apartment might have a Net Room Reserve because, as it happened, that apartment was relatively well patronised. In that case, the apartment owner would be paid a return which would not involve a participation or interest in the profits of the hotel business, because there would be no such profits. There could also be cases where an individual owner receives no rental because there is no Net Room Revenue for his or her apartment, although the hotel is profitable for the same period. That possibility simply illustrates that an owner's right to participate in the hotel profits is a qualified right.

[43] An owner's investment had potential benefits of two kinds. The first was the income to be derived over the term of the lease and any extension of that term. The second was an increase in the capital value of the apartment. Because, for at least 15 years, the apartment could be used only as a room in the hotel, the prospect of a capital gain was obviously dependent upon the apartment's potential to earn income or in other words, the profitability of the hotel business. So in substance, an investor was investing in an hotel business. Apartments were promoted upon the basis of certain likely returns which would be common to all apartments (at least of the same size and within the same tower). Rooms of the same design and size were to be offered at the same price. The circumstances which might affect the hotel's profitability would be common to all apartments. A decision to invest would be made logically upon an expectation of profits from the hotel business, or more precisely the business of the provision of accommodation in the hotel, which after payments to Sovereign and Touraust, were to be passed on to the apartment owners.

[44] Australand and Touraust, through the payment of fees which, at least for the Incentive Fee, are quantified according to hotel profits, have an interest in the profits of the scheme or undertaking. But only some of the profits are enjoyed by them. The balance of the profits are ultimately for the benefit of apartment owners. That is the substance of the matter although rent is according to the revenue from the particular apartment. That is simply a means of allocating the profits between the owners, by an assessment of the relative contribution of the apartment to the profits of the undertaking.

[45] Australand cites the judgment of Pidgeon J in *Maunder-Hartigan*[6] for the proposition that within para (a) of this definition, the term "profits" cannot mean a payment of rent. However, what Pidgeon J there said was in the context of that scheme, where the rent was fixed and it was not in any sense a function of profit.

[46] In my conclusion, s 1073 was engaged, at least because there was a prescribed interest within paragraph (a) of the definition.

Pagragraph (b) of the Definition of Participation Interest

[47] In *Australian Softwood Forests*, Mason J said of this paragraph[7]:

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6 (1984) 8 ACLR 947, 954

7 (1980-1981) 148 CLR 121, 133

> "The argument is that in order to constitute a "common enterprise" there must be a joint participation in all the elements and activities that constitute the enterprise. I do not agree. An enterprise may be described as common if it consists of two or more closely connected operations on the footing that one part is to be carried out by A and the other by B, each deriving a separate profit from what he does, even though there is no pooling or sharing of receipts of profits. It will be enough that the two operations constituting the enterprise contribute to the overall purpose that unites them. There is then an enterprise common to both participants and, accordingly, a common enterprise."

[48] Australand concedes that there is an expectation of rent from the efforts of "a third party", which it says is Touraust in its management of the hotel, and that the expectation is in relation to an enterprise. But it argues that there is no common enterprise. There are six matters which Australand relies upon in that argument.

[49] First, it is said that in the case of a common enterprise, it would be expected that the fortunes of those would fluctuate in equal proportion according to the success of the enterprise, but here some owners could do relatively better than others depending upon the patronage of their apartments. Second, the rent to be paid in any case is not quantified relatively to other rents in the building. Third, that there is no contractual relationship between the owners of units *inter se.* Fourth, purchasers have a passive role: nothing is required of them in the operation of the enterprise. The fifth point is that there is said to be no business carried on by an owner as a result of the purchase of the unit. Lastly, it is said that the interest of each purchaser is simply a separate and individual interest, which is the ownership of the apartment.

[50] Investors have a right to participate or an interest in the profits of the enterprise, which is this hotel business, as I have discussed for paragraph (a) of the definition. In turn, that is the matter which is significant for the characterisation of the enterprise as a common enterprise. Each apartment owner takes a risk of profit or loss, and in that sense is an entrepreneur[8]. A person can participate or have an interest in an enterprise by assuming a risk of profit or loss without at the same time performing some active role. There is an enterprise here in which the owners, as well as Australand and Touraust, bear that risk. And it is an enterprise in which an owner participates by the provision of the resource of his or her apartment to be used in common with the other apartments. There is an enterprise, the hotel business, in which each owner is involved upon the basis that other owners are involved in the same way. In substance, their fortunes are affected in the same way by the success or otherwise of the enterprise. There is therefore a sufficient commonality between them, or alternatively between an investor and Australand, for this enterprise of the hotel to be a common enterprise in this sense.

[51] Paragraph (b) of the definition also made this a prescribed interest.

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[8] That being one meaning of "entrepreneur": Oxford English Dictionary (2nd Ed)

Paragraph (c) of the definition

[52] The term "Investment Contract" was defined by s 9 of the *Corporations Law* as follows:

> "any contract, scheme or arrangement that, in substance and irrespective of its form, involves the investment of money in or under such circumstances that the investor acquires or may acquire an interest in, or right in respect of, property, whether in this jurisdiction or elsewhere, that, under, or in accordance with, the terms of the investment will, or may at the option of the investor, be used or employed in common with any other interest in, or right in respect of, property, whether in this jurisdiction or elsewhere, acquired in or under like circumstances."

[53] In *Munna Beach Apartments* McPherson J said that there were three necessary elements of an investment contract"[9]:

> "In order to satisfy that description it is necessary that the contract be one (1) which involves the investment of money; (2) in or under such circumstances that the investor requires (or may acquire) an interest in or right in respect of properties; (3) which (under or in accordance with the terms of the investment) will (or may at the option of the investor) be used or employed in common with any other interest in or right in respect of property acquired or under like circumstances."

Australand concedes that elements (1) and (2) are satisfied but says that (3) is not.

[54] In *Munna Beach,* the argument was that the interest of a purchaser of a strata title apartment in the common property, was property to be used or employed in common with the like interests in the common property held by other purchasers. As to that, McPherson J said[10]:

> "In order to attract the definition, the right must be exercised 'in common with' others, and that isn't done simply by exercising the common right contemporaneously, or in pursuit of a pre-concert with others… the common use of the right must be one which takes place 'under or in accordance with the terms of the investment'. Now, there is nothing in the contract of sale, viewed as the terms of the investment, which either requires or contemplates that the proprietors or any of them will on any occasion or occasions combine to go upon the common properties; and even if they in fact do so, it cannot be fairly described as the use of that property which is undertaken 'under or in accordance with the terms of the investment.'"

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[9] [1983] 1 Qd R 151, 154
[10] [1983] 1 Qd R 151, 154

[55] In *Maunder-Hartigan*, Pidgeon J rejected an argument that because of the lease by each owner of an apartment to the operator of the resort there was an investment contract, for these reasons[11]:

> "The fact that at the time each relevant piece of land was purchased it was subject to one lease in respect of the whole of the land so that unsubdivided lots are still subject to that encumbrance is not in my view sufficient to bring it within the terms of the definition. Purchasing a fee simple subject to a leasehold is again a legal conception and it would not be natural or accurate to say that 'the terms of the investment' are the cause of its being employed in common with the estates in fee simple in respect of the other land the subject of the initial encumbrance. The rent, being the product of the investment of money, arises from the lease of lot 5 and not from any common use or employment."

That might involve too narrow a view of "the terms of the investment", at least if applied to the present case. The contract under which an owner invested here was the contract of sale. But that contract itself made extensive reference to the use of the apartment within the hotel as well as to the lease. Even limiting "the terms of the investment" to the terms of the contract, in the present case, according to those terms the investor was required to have the apartment used in common with all other apartments. In the present case, it can be said that an apartment is employed in common with others in accordance with the terms of the contract of sale, and so in accordance with the terms of the investment.

[56] A further question is whether there is a use or employment of the investor's interest in or right in respect of property, in common with other interests or rights. One right acquired by an apartment owner in respect of his or her property, the apartment, is the right to have it used in the hotel business. The reasoning of Jenkinson J in *Co-Operative Building Society of South Australia v ASC*[12] is applicable here. As Jenkinson J there held, the right to have the apartment used in the hotel business is a right that under the terms of investment was to be used in common with the corresponding rights of other owners which had been acquired in or under like circumstances.

[57] It follows that there was a prescribed interest also in the sense of paragraph (c) of the definition.

[58] Accordingly, these owners were entitled to avoid the contracts of purchase. The question is then whether that right was lost for any of the reasons advanced by Australand.

Avoidance of contracts after conveyance

[59] In *Lutre v Ellison* (1997) 151 ALR 626, O'Loughlin J held that a person who had purchased real property under a contract, which had been voidable pursuant to

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[11] (1984) 8 ACLR 937, 955

[12] (1993) 10 ACSR 89, 100

s 1073, lost that right of avoidance by having made a binding election, after the conveyance, to retain the property. O'Loughlin J noted that there was no argument to the effect that a right to avoid under s 1073 had been earlier lost by the completion of the contract of sale[13]. His judgment was upheld on appeal: *Ellison v Lutre Pty Ltd* (1999) 88 FCR 116, but again, the point was not argued. Rather, the Full Court assumed that the right to avoid could still exist some years after the conveyance.

[60] Australand argues that the right, if any, was lost after the conveyance. It argues by analogy with the rescission of a contract for the sale of land on the ground of innocent misrepresentation, for which it says that the traditional view is that that such contracts cannot be rescinded after conveyance, citing *Seddon v North Eastern Salt Company Ltd* [1905] 1 Ch 326; *Wilde v Gibson* (1848) 1 HLC 605; 9 ER 897 and *Kramer v Duggan* (1955) 55 SR (NSW) 385.

[61] It is far from clear that the context of a contract induced by an innocent misrepresentation is analogous to one which is procured by a contravention of statutory provisions for the protection of the investing public. The question would not be assisted by reference to *Seddon*'s case. It involves the interpretation of s 1073.

[62] Section 1073 relevantly 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.*
>
> ***1073(3) [Obligations of parties suspended]*** *The obligations of the parties to a contract are suspended:*
>
> *(a) during the period of 21 days after a notice is given under subsection (2) in relation to the contract; and*
> *(b) during the period beginning when an application is made under subsection 1073A(1) in relation to a notice so given and ending when the application, and each appal (if any) arising out of it, have been finally determined or otherwise disposed of.*

[13] (1997) 151 ALR 626, 631.

1073(4) [When subsection (2) notice takes effect] *Subject to an order under subsection 1073A(3), a notice under subsection (2) of this section takes effect:*

(a) *unless within 21 days after the notice is given, the management company applies under subsection 1073A(1) in relation to the notice – at the end of those 21 days; or*

(b) *otherwise – at the end of the period during which the obligations of the parties to the contract are suspended because of paragraph (3)(b) of this section.*"

[63] This point, which was not strongly argued by Australand, is not immediately persuasive. The terms of s 1073 did not indicate such a limitation on the right of avoidance, and there was no apparent policy reason for it, especially within a statute concerned with the protection of the investing public and where, as discussed below, the right of avoidance is subject to the doctrine of election. Ultimately, it is unnecessary to resolve this question, because of my conclusion on the next issue which is the effect of the repeal of s 1073 upon any (unexercised) right to avoid.

Repeal of s 1073

[64] The respondents purported to avoid their contracts on 8 September 2003 in reliance upon s 1073, which had been repealed in 1998 by the *Managed Investments Act* 1998 (Cth). It repealed Division 5 of Part 7.12 of the *Corporations Law* which had contained ss 1063-1076. The repealing Act commenced on 1 July 1998 (being the date in which the *Company Law Review Act* 1998 (Cth) commenced: *Managed Investments Act* s 2). There was a transitional provision which in some cases continued the operation of the prescribed interests provision (ss 1063-1076)for up to two years from the repeal, i.e. until 1 July 2000. Australand says that any right to avoid under s 1073 which had not been exercised by the end of that transitional period was lost[14].

[65] There is no argument that by any statutory provision which replaced s 1073, the respondents were entitled to avoid their contracts. Their case is that they each had an "accrued right" to avoid pursuant to s 1073, so that its repeal did not affect that right having regard to s 8 of the *Acts Interpretation Act* 1901 (Cth). Although the *Corporations Law of Queensland* was a law of Queensland, it provided that the *Acts Interpretation Act* 1901 (Cth) was applicable to it and that the *Acts Interpretation Act* 1954 (Qld) was not[15].

[66] The *Managed Investments Act* introduced a new regulatory regime for investment schemes which were managed investment schemes as defined. This replaced the regime which had regulated schemes involving prescribed interests. It is unnecessary here to describe the policy reasons for this change[16]. Clearly the new

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[14] *Managed Investments Act* s4, Schedule cl. 143

[15] *Corporations Law of Queensland*, s10

[16] Which are summarised in the Explanatory Memorandum to the *Managed Investments Bill* 1997

regime was intended to regulate much of the field which had been regulated as prescribed interests. But interests in managed investment schemes were not defined identically to prescribed interests. Nor were interests which were prescribed interests deemed to be interests in managed investment schemes. So whilst many prescribed interest schemes were made ultimately subject to the new regime, there were some which were not and which, it must be inferred, were intended to become relevantly unregulated.

[67] All of this was effected by amendments of the *Corporations Law*[17]. A new Chapter 5C was inserted to regulate managed investment schemes. As mentioned, the prescribed interest provisions were repealed. But a transitional provision, *Corporations Law* s 1454, continued the operation of what it described as the "old Law", (meaning the *Corporations Law* as in force immediately prior to the commencement of Chapter 5C[18]). Section 1454 was as follows:

> "*(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) 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 subsection (1), section 601 FC 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.*"

(The "new Law" meant the *Corporations Law* as in force after the commencement of the *Managed Investments Act*).

[68] The application of s 1454, as a provision of the new Division 11 of the *Corporations Law*, was according to s 1452:

[17] As contained in Schedules 1 and 2 to the *Managed Investments Act*
[18] *Corporations Law* s 1451

"***1452 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."

[69] So the old Law continued to apply but only to interests which were also interests in a managed investment scheme as defined in s 9 of the new Law. That definition was 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; …"

Section 9 of the new Law also contained this definition:

*"**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).*"

[70] Managed investment schemes were required to be registered by the then ASC[19]. Unregistered schemes were liable to be wound up, on the application of the ASC, the scheme's operator or a member of the scheme[20]. The requirements for a prospectus, and in particular *Corporations Law* s 1018, were made applicable to interests in managed investment schemes[21].

[71] A managed investment scheme was to be operated by a so-called responsible entity, which was to be a public company and the holder of a certain licence. The broad equivalent of the repealed s 1065, which had required an approved deed, was the requirement for registration of the managed investment scheme. The ASC was empowered to exempt a person from a provision of the new Law or to modify or vary its effect[22]. Section 601MB provided for the avoidance of certain contracts relating to interests in managed investment schemes, as follows:

> "***601MB 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 party 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.*

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[19] *Corporations Law* A601ED
[20] *Corporations Law* A601EE
[21] By amending the definition in s 9 of "marketable security" to omit "prescribed interest" and substitute "interest in a managed investment scheme".
[22] *Corporations Law* s 601QA

(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.*"

[72] The respondents do not argue that s 601MB is a basis for the avoidance of their contracts. They say that it applied only to contracts made after the commencement of the new Law.

[73] Australand's argument asserted that the transitional provision, s 1454, applied if there were prescribed interests here, although that was not developed by reference to the definition of a managed investment scheme. The respondents' position on this point was equivocal. But as they pointed out, at least arguably there was no managed investment scheme here because the relevant "contributions" in this case could be regarded as the money paid by purchasers, i.e. the purchase price for the apartments, and those moneys were not to be pooled or used in the common enterprise. So it is far from clear that s 1454 had any operation in these cases. But that point need not be resolved. If s 1454 did apply, the old Law had ceased to operate after 1 July 2000, well prior to the purported avoidance of contracts on 8 September 2003. Nor is it necessary to determine that matter in relation to Australand's argument, to which I will return, that s 1454 expresses an intention to displace the effect of s 8 of the *Acts Interpretation Act*.

[74] I turn to the question of whether the right of avoidance, provided by s 1073 of the old Law, was an accrued right in the sense of s 8. In this discussion, it is irrelevant whether the effective date of repeal was 1 July 1998 or 1 July 2000.

[75] The common law as to the effect of repeal of a statute was summarised by Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261 as follows[23]:

"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

[23] (1957) 96 CLR 261, 266-267

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 (1).* 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* (2). The phrase of Blackburn J was "transactions already completed under it" – *Butcher v Henderson* (3).

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."

[76] That exception as to "past matters" is also the result of the *Interpretation Acts*. The relevant provision here is s 8 of the *Acts Interpretation Act* 1901 (Cth), 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."

[77] The meaning of provisions such as s 8, and of its terms "right, privilege, obligation or liability accrued or incurred" is informed by the common law, and by the various expressions of the exception of "past matters", some of which were cited by Dixon CJ in that passage in *Maxwell*. To these could be added the expression used by Viscount Dunedin in *Clement v D Davis & Sons Ltd*[24] of "vested rights and liabilities which are complete in themselves."

[24] [1927] AC 126, 131 adopted by Stephen J in *Geraldton Building Co Pty Ltd v May* (1976-1977) 136 CLR

[78] The reason for this exception, whether derived from the common law or in this case from s 8[25], must be kept in mind in considering its scope in a particular case. But for this exception, the consequences of treating the repealed law as never having existed could be drastic in removing what had been the legal foundation for past transactions and events. On the other hand, a change in the law, and in particular the repeal of a law, in many cases is likely to affect people adversely in the sense that they were more advantaged, in their then circumstances, prior to the repeal than after it. The reason for this exception is not to protect everyone in that category, by giving the repealed law some lingering operation so that no-one who could have taken advantage of that law will be disadvantaged by its repeal.

[79] The respondents were entitled to give notices of avoidance pursuant to s 1073 immediately prior to its repeal. That entitlement could be described as a right. But the question is whether it was a right within the more limited category of a right "acquired" or "accrued" in the relevant sense.

[80] The difference between rights acquired or accrued and other rights was explained by the Privy Council in *Abbott v Minister for Lands* [1895] AC 425. Legislation had entitled landowners such as Mr Abbott to apply to purchase Crown land adjoining their land without having to satisfy a residential requirement. After the repeal of that legislation, a new statute permitted him to apply to purchase such land, but on condition of a residential requirement. After that repeal, he applied to purchase adjoining land, and his application was refused because he did not satisfy the residential requirement. He claimed that at the date of the repeal he had an accrued right to apply to purchase without the residential requirement, which therefore was unaffected by the repeal. In rejecting that argument, Lord Herschell L.C. said[26]:

> "It has been very common in the case of repealing statues 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."

379, 400

[25] The common law principles being "affirmed by s 8": *Esber v The Commonwealth* (1991-1992) 174 CLR 430, 445

[26] [1895] AC 425, 431

[81] As is said by reference to *Abbott* in Pearce & Geddes *Statutory Interpretation in Australia* (5th Edition)[27]:

> "… The repeal of any Act must affect 'rights' in the general sense as the law with henceforward be different from what it was. If the Interpretation Act section were to preserve these 'rights' the effect of the repeal would be rendered nugatory. This distinction between an accrued right and a right in the nature of a power to take advantage of an enactment has been consistently accepted."

[82] Thus in *Mathieson v Burton* (1970 – 1971) 124 CLR 1, 23, Gibbs J said (of an equivalent provision to s 8) that the:

> "section in referring to a right required 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 in *Esber v The Commonwealth* (1991 – 1992) 174 CLR 430, Mason CJ, Deane, Toohey and Gaudron JJ, in holding that the right there claimed was an accrued right, described it as "not merely 'a power to take advantage of an enactment'"[28]. That was Mr Esber's substantive right to have an application to the Administrative Appeals Tribunal determined in accordance with the law which had been repealed only after he had lodged the application. By lodging the application, he had in fact done what was necessary to take advantage of the enactment, and a right had thereby accrued or been acquired. Similarly, in *Oxfordshire CC v Oxford City Council* [2006] 2 AC 674, 720 Lord Rodger of Earlsferry said of an amending statute that:

> "Since the purpose of legislation is to alter the existing legal situation, there is no presumption that it will not alter rights which individuals have, but have not exercised."

But in the consideration of this difference, it must be noted that s 8 does protect a right "although that right might fairly be called inchoate or contingent"[29].

[83] In that passage in *Abbott*, reference was made to the preservation by that section of both accrued rights and "obligations incurred or imposed". In Lord Herschell's view, the meaning of "a right accrued" was confirmed by the use of that term in conjunction with that preservation of obligations. The corresponding words in s 8 are "obligation or liability … incurred under any Act so repealed". In relation to s 8 or equivalent provisions relating to obligations or liabilities, a similar distinction to that explained in *Abbott* has been employed. 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

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[27] At [6.8]

[28] (1991 – 1992) 174 CLR 430 at 440; see also *re: Commissioner for Railways* [1998] 2 Qd R 339, 345

[29] *Esber v The Commonwealth* 174 CLR 430 at 440, *Free Lanka Insurance Co Ltd v Ranasinghe* [1964] A.C. 541, 552

some future event must occur to make the effect of the past events create a completed liability"[30].

[84] 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.

[85] 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*[31], "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.

[86] 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.

[87] 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"[32].

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[30] See also *Total (Australia) Ltd v Registrar of Companies* [1969] VR 821, 823. (Full Court)
[31] *Ogden Industries* in the passage set out above.
[32] *Abbott* in the passage cited.

[88] A further difficulty with the respondents' argument is the former s 1073A. It was in these terms:

> "***Section 1073A Court may affirm voidable contract where breach is not material***
>
> ***1073A(1) [Section 1083(2) notice ineffective]*** *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) [Extension of time limit]*** *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) [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 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) [Onus of proof]*** *On an application under subsection (1), the onus of proving the matter referred to in subparagraph (3)(a)(ii) is on the management company.*"

This was relevant to cases where the contravention was of the prospectus requirements. It did not avail where a contract was avoided on other grounds. Although the present cases involve those other grounds, the question of statutory interpretation, and the relevance of s 1073A, has to be approached more generally. If satisfied of the matters in s 1073A(3), the court had to consider whether, in all the circumstances, the avoidance should be allowed. Now if a purchaser was able to elect to avoid after the date of the repeal, by giving the notice previously permitted by s 1073, what would have been the position with respect to the former s 1073A? It is far from clear that it was intended that the statutory jurisdiction which had been conferred by s 1073A was to continue for the purpose of such cases. Had it been intended to preserve indefinitely the statutory jurisdiction which had been conferred by the repealed law, in cases where a party purported to avoid under the former s 1073 pursuant to an entitlement to do so which predated the repeal, the expression

of that intention, in all of its complexity, would have been expected to be clear, rather than by no express provision and the suggested effect of s 8(c). And it is unlikely to have been intended that the right to avoid under s 1073 would be preserved but no longer qualified by the jurisdiction under s 1073A. Perhaps the respondents would say that Australand's right to apply under s 1073A was at the date of repeal an accrued right (although it was a right which depended on a notice of avoidance under s 1073, which had not and was not certain to be given). Assuming that the jurisdiction under s 1073A was so preserved, the exercise of that jurisdiction would be problematical. In particular, the court would be asked to assess what "in all the circumstances … is just and equitable", not by reference to the purposes and policy of an existing law, but a law which the Parliament had seen fit to repeal.

[89] The respondents' argument pointed to the Australand case that the respondents later made a binding election to affirm their contracts. As the respondents say, that election necessarily involves alternative rights. But that is not to say that the right to avoid was an accrued right in required sense.

[90] 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.

[91] Section 1454 was intended to provide a transition period during which "existing prescribed interest schemes (might) be re-organised to satisfy the new requirements"[33]. 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.

[92] The Parliament could have chosen to exclude ss 1073 and 1073A from the "old Law" which was kept alive for a limited time by s1454, and instead s 1454 could have provided for the continuing operation 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.

[33] Explanatory Memorandum, *Managed Investments Bill* 1997, cl 5.1

[93] 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.

[94] 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[34]. 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.

[95] 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 affect 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.

[96] Accordingly, the effect of the repeal of s 1073 was to put paid to the respondents' rights to avoid, from no later than 1 July 2000.

Election

[97] Because the respondents' rights to avoid their contracts were lost by the repeal of s 1073, the question of a binding election to affirm the contracts, which Australand alleges was made after that repeal, does not arise. However, should I be wrong

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[34] *Corporations Law* s 601EE

about that, it is appropriate that I make findings of fact relevant to Australand's election case.

[98] It is necessary to first summarise the legal arguments. In *Ellison v Lutre Pty Ltd* (1999) 88 FCR 116, the Full Court of the Federal Court held that the right to avoid a contract under s 1073 could be lost by an election to affirm it. The respondents here did not concede the correctness of that conclusion, but offered no argument as to why it was wrong. The substantial argument here was as to the knowledge required by a person before he or she became bound by an election. In *Ellison* that question did not have to be decided, but the Full Court expressed the view that knowledge of the facts giving rise to the right to avoid was required but knowledge of the legal right itself was not[35]. Australand relied upon that obiter dicta, whilst the respondents strongly argued that, in the particular statutory context of s 1073, a binding election should require also a knowledge of the legal right. They argued that this followed from the proper construction of s 1073, and that an election involving the exercise of a statutory right, even a statutory right to avoid a contract, is relevantly different from a right to avoid a contract conferred by the contract itself [36]. And Australand appeared to submit that not even a knowledge of all of the facts giving rise to the right was required, because of what it suggested was the effect of what Mason J said in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 658:

> "The justification for imputing to the affirming party a binding election in these circumstances, though he be unaware of his alternative right, is that, having a knowledge of the facts sufficient to alert him to the possibility of the existence of his alternative right, he has acted adversely to the other party and that, by so doing, he has induced the other party to believe that performance of the contract is insisted upon."

So Australand argued that the required knowledge was not of the facts from which the right existed but only so much of the facts as to put the party on some alert.

[99] There were several grounds for the avoidance of these contracts under s 1073. As discussed earlier, there was the contravention of s 1018, the contravention of s 1064 and the contravention of s 1065. The respondents submitted that it was necessary for them to have the relevant knowledge in relation to all of those grounds before it could be said that there was a binding election. They relied upon *Elder's Trustee and Executor Company Limited v Commonwealth Homes & Investment Co Ltd* (1941) 65 CLR 603, where the court (Rich ACJ, Dixon and McTiernan JJ) said at 616:

> "Where there are two independent grounds entitling a party to rescind or disaffirm, we do not think that, because a party having knowledge of the facts giving rise to one of them so conducts himself that he must be taken to have affirmed, he therefore is precluded on

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[35] (1999) 88 FCR 116, 128-129

[36] The respondents relied upon the judgment of Stephen J in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 645 together with *Kirstel Estate Pty Ltd v Melevende* [1965] VR 433, 435 and *Terry Pfeiffer v Connors* [2000] NSWSC 452 as authority for that difference. Australand relied in particular on the Full Court's conclusion in *Ellison* and on the judgment of Mason J in *Sargent v ASL* at pp 657-658.

> discovery of the other from rescinding or disaffirming. We are not dealing with a case where there is an actual decision taken to adopt or affirm the contract of membership by a person who knows that he may if he choose avoid it."

[100] As to the breach of s 1018, each respondent must be taken to have known of the terms of the contract and otherwise of the facts by which the investment involved a prescribed interest. Mr and Mrs Mytton and Mr and Mrs Delforce each gave evidence, which I accept, that they did not know that there was no prospectus. That evidence was unchallenged. Accordingly, they did not know of a fact which was essential to the right to avoid on the basis of a contravention of s 1018.

[101] Mr Pih and the Johnsons were in a different position. By November 2001 Mr Pih was active within a certain group of owners who were expressing their concerns about their poor returns and who were exploring the alternatives available to them. Mr Pih had written to Touraust to express his dissatisfaction with the returns and to seek accounting information. Meetings of some owners took place in December 2001. There was then the Annual General Meeting of owners in which they discussed the collection of a fighting fund to "fight the case". Money was thereafter contributed by some owners to this fund, and a committee was formed to provide information to contributors. Mr Johnson, the Myttons and the Delforces were contributors and Mr Pih provided them with information.

[102] On 12 December 2001 Mr Johnson sent an email to Mr Pih, a Ms Noble and a Mr Burke. That refers to a document created when the apartments were being promoted, which recorded discussions between representatives of Australand and others, including solicitors, in which the absence of a requirement for a prospectus, because of a perceived absence of "pooling" of income or expenses, was noted. The document recorded this advice as having been given to those involved with the marketing of the apartments:

> "A prospectus is therefore not required and it is important to remember this and refrain from any allusion to pooled income when speaking to potential investors."

After setting out that part of the document in his email, Mr Johnson went on to say that "distribution of pooled income is in fact about to occur and this is the way we are about to be paid for the rest of the year at least. This should be the basis of a complaint to ASIC asking them to investigate. I think a prospectus should have been issued." So Mr Johnson, and I would infer Mrs Johnson, knew from at least December 2001 that there had been no prospectus. So did Mr Pih have that knowledge from then, by the receipt of the email.

[103] Ms Noble was a solicitor employed by a Brisbane firm. She was involved not because the firm had been retained, but because her parents owned one of the apartments. Mr Pih gave evidence that he had discussions with Ms Noble in late December 2001 when he says he wrote the words "Managed Investments Act" as they appear on his copy of a letter from Australand (dated 31 July 2001). Mr Pih said that it was Ms Noble who alerted him to the *Managed Investments Act*. His evidence was that he believed that the *Managed Investments Act* applied to certain

of the owners, depending upon the dates of their purchases. But I am not prepared to infer that he knew, or more precisely that he believed, that the absence of a prospectus then gave him a right to avoid under what had been s 1073 of the *Corporations Law*. By this stage, he was obviously very dissatisfied with his investment. Had he been alert to the argument that the contract could be avoided under s 1073, he would have pursued that argument, at least in his correspondence. The same goes for Mr and Mrs Johnson. Mr Johnson had legal advice in respect of his situation from late 2001. But more likely than not he was unaware of the argument based upon the prescribed interests provisions of the *Corporations Law*. Mr Delforce said he had legal advice from December 2001 as did Mrs Mytton. But again, I infer that they were not aware of this point. And as I have said, the Delforces and the Myttons were unaware of the absence of a prospectus.

[104] On 2 January 2002 a letter was sent to unit owners by their committee, which had been edited by Ms Noble and approved by, amongst others, Mr Pih. It said that the committee was in the process of selecting legal representation "and taking legal actions against all those involved in the sale of the units for misleading conduct." After referring to the *Trade Practices Act*, and the (then) three year limitation period under that Act, the letter said that "ASIC/ACCC/Banking Ombudsman/Law Society – we are also looking into other avenues of seeking redress through various institutions". Messrs MacGillivrays were engaged by Mr Pih as solicitors for the group after this letter was sent. Advice was given by them, for the benefit of all contributing owners, and MacGillivrays wrote to Australand in June 2002. But in that letter, nothing was said as to the absence of a prospectus, or anything else in relation to the prescribed interest provisions or a possible avoidance pursuant to s 1073. I infer that the advice given by MacGillivrays made no reference to an argument that the contracts could be avoided under the former s 1073. And the absence, in January 2002, of the knowledge of the s 1073 argument, is evidenced by that letter written by the committee. It shows that the legal action then contemplated had a different legal basis (the *Trade Practices Act*). That letter's reference to "seeking redress through various institutions" suggests that there was some proposal to put pressure upon Australand by making complaint to these institutions, and not by a legal argument for some payment or repayment by Australand.

[105] A further fact which was relevant to the suggested right to avoid was the existence of an exemption and of its terms. By s 1084 of the *Corporations Law*, the ASC was given power to exempt a person or persons, either generally or as otherwise provided in the exemption, and conditionally or otherwise, from compliance with all or any of the provisions of certain Divisions of the *Corporations Law* and Regulations made for the purposes of those provisions. One such Division was Division 5: the prescribed interest provisions. (As it happened, Australand at one stage saw fit to obtain an exemption for this scheme which ASIC issued in January 2000[37]. Australand ultimately abandoned any argument as to the effectiveness of this exemption as an answer to the respondents' case for rescission). The existence of an exemption at a relevant time would have been a critical fact, because depending upon its scope, it would have meant that there was no relevant contravention of the prescribed interest provisions and thereby no right

[37] The exemption was in terms which purported to relieve relevant persons from compliance with both the *Managed Investments Act* and certain of the prescribed interest provisions which were said to be still operative according to s 1454

of avoidance under s 1073. The respondents argued that the absence of an exemption was a fact which had to be known for there to have been an election. Australand seemed not to agree with that proposition. Indeed, Australand did not plead that the absence of an exemption was known to any of the respondents and made no argument to that effect. Its position appeared to be that knowledge of the facts constituting the contravention, such as the absence of a prospectus, was sufficient knowledge at least to alert an owner to the existence of the right to avoid. I need not discuss whether the absence of knowledge as to an exemption would be fatal to the alleged election. But on the factual question, it is not proved that a respondent knew of the absence of any exemption, until Slater and Gordon were told of that on 29 July 2003. It is to be noted that the contracts were avoided shortly after that.

[106] The respondents had been entitled to avoid by reason of a breach of s 1064. Each of the respondents has admitted by the Defence that he or she knew that Australand was not a public corporation. That fact is established.

[107] As to s 1065, each of the present respondents gave evidence that he or she did not know of the absence of an approved deed. In each case, the evidence was unchallenged and I accept it.

[108] I turn then to other facts alleged by Australand. Australand pressed for a number of factual findings, which did not seem to be obviously relevant either to the knowledge of any respondent or to the question of whether the respondents had acted in a way which constituted a clear election to affirm. But I shall discuss them. I accept that by early August 2001, each of the respondents had received notice that the return from his or her apartment was of the order of 2.42% and that this was far less than each owner had expected from the material used by Australand to market the apartments. I accept also that in late November 2001, each respondent received a notice that the net room revenue payable for the financial year ending 30 June 2002 was likely to be 0.69%, based on the performance of the hotel in the financial year ended 30 June 2001. Mr Pih said that he was by then shocked and that "it crossed his mind that he wanted to give the apartment back because it was the wrong deal". And the respondents admit that by late December 2001, they believed that Australand had engaged in misleading and deceptive conduct in relation to the forecasted returns prior to their contracts being made.

[109] Throughout 2002, each respondent continued to receive rent by monthly instalments. Mr Pih and Mr Johnson claimed tax relief on the basis of their ownership. No enquiry was made of the applicant (or it appears of anyone else) as to whether there had been an exemption issued in relation to this scheme. It was not until 16 July 2003 that the respondents, through Slater and Gordon, enquired of the applicant as to whether there was such an exemption. Australand asked for the inference to be drawn that until then the respondents had not made any investigations as to the existence or otherwise of any exemption. I would not be prepared to draw that inference; but significantly I was not asked by Australand to find that the absence of an exemption, effective for those contracts, was known earlier.

[110] I have mentioned already the letter from MacGillivrays to Australand in June 2002. MacGillivrays there wrote that Australand, as guarantor of Sovereign's obligations as lessee, was required by the owners to "ensure that all of the breaches arising in connection with the guarantee period are rectified within the relevant time periods." MacGillivrays wrote that if Australand failed to "satisfactorily perform [its] obligations under the Guarantee and Indemnity, [the respondents] will avail themselves of their full range of rights against your company."

[111] Australand ultimately sought a finding that from December 2001 the respondents knew, amongst other things, "of misrepresentations having been made prior to the Sale Agreements". That seems to involve a concession that there were such misrepresentations, which was a point which was strongly contested until the respondents abandoned their claims under the *Trade Practices Act*. If it is not clear from what I have already said, I accept that from December 2001 (and probably earlier) each of the respondents knew that the returns were less than had been represented and believed that there had been some misrepresentation by Australand.

[112] I will endeavour to summarise these findings by reference to the legal arguments. 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.

[113] I have referred to what appeared to be an argument by Australand, based upon a passage from the judgment of Mason J in *Sargent*[38], that knowledge of some of the facts creating the legal right may be sufficient if knowledge of them would alert the party to the remaining facts and to the existence of the legal right. I find it difficult to make any findings by reference to an argument which is that certain facts, if unknown, ought to have been known. If I have understood that submission correctly, I think it misstates the effect of Mason J's judgment. Although that judgment has been applied often (see e.g. re: *Hoffman; ex parte Worrell v Schilling* (1989) 85 ALR 145, 151; *Molotu Pty Ltd v Solar Power Ltd*; unreported NSW Supreme Court, 3619 of 1989) it has not been understood in that way. Nor was it so understood in the judgment of the Full Court in *Ellison*. Instead, in *Sargent*, Mason J expressly adopted the view of Sir Frederick Jordan CJ in *O'Connor v SP Bray Ltd* (1936) 36 SR (NSW) 248 that (as Mason J expressed it at 657):

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[38] (1974) 131 CLR 634, 658

> "It is the general rule that a person may be held to have elected with knowledge of the facts giving rise to the existence of the alternative right, though unaware of the existence of that right …"

[114] And as to the facts of the conduct of the respondents, relied upon as the conduct constituting an election over a period commencing in about December 2001, the facts themselves are uncontroversial. There was no express affirmation: Australand's case was that there was an election from a course of conduct involving the continued acceptance of rent, a demand for strict performance under the rent guarantees (contained in MacGillivrays' letter) and what Australand says was a "continued failure to exercise the option until September 2003".

The respondents' claims in restitution

[115] I should record that there was no factual issue in relation to what relief should be given to the respondents had the avoidance of their contracts been upheld. The arguments concerned whether they should have their transaction costs (e.g. stamp duty) and what should be the rate of interest which should apply to the moneys to be repaid to them. As to the interest rate, neither party tendered any evidence or asked for any particular finding.

Orders

[116] It will be declared that the purported avoidance of their contracts with Australand Corporation (Qld) Pty Ltd by each of the respondents Mr and Mrs Johnson, Mr and Mrs Delforce, Mr and Mrs Mytton and Mr Pih was of no effect. The counterclaim by each will be dismissed. I will hear the parties as to costs.