High Court of Australia

Australian Softwood Forests Pty Ltd v Attorney-General (NSW); Ex Rel Corporate Affairs Commission [1981] HCA 49; (1981) 148 CLR 121 (18 September 1981)

HIGH COURT OF AUSTRALIA

AUSTRALIAN SOFTWOOD FORESTS PTY. LTD. v. ATTORNEY-GENERAL (N.S.W.); EX REL. CORPORATE AFFAIRS COMMISSION [1981] HCA 49; (1981) 148 CLR 121

Companies

High Court of Australia

Gibbs C.J.(1), Stephen(2), Mason(3), Murphy(4) and Wilson(5) JJ.

CATCHWORDS

Companies - Issue or offer of interests to the public - Pine plantation scheme - Agreements made through salesmen without advertising or initial solicitation - Whether interests - Whether issue or offer to the public - Companies Act 1961 (N.S.W.), ss. 76(1), 81(1).

HEARING

1980, December 4; 1981, September 18. 18:9:1981

APPEAL from the Supreme Court of New South Wales.

DECISION

1981, September 18.

The following written judgments were delivered: -

GIBBS C.J. I have had the advantage of reading the reasons for judgment conclusion that in the present case the appellant issued or offered to the public for subscription or purchase an interest within the meaning of s. 76 of the Companies Act 1961 (N.S.W.), as amended, and am in general agreement with the reasons given by my brethren for reaching this conclusion. However, I do not consider that it is necessary in the present case to decide

whether a grower under the scheme obtained an interest in the nature of a profit a prendre. Clearly each grower had an interest in the timber on severance and had a right to participate in the realization of the scheme. In addition I agree that there was a "common enterprise" within par. (b) of the definition of "interest" contained in s. 76. (at p125)

2. With all respect, Hutley J.A. was not correct in saying that declarations "are little more than prefatory averments to the grant of an injunction". In my opinion it was proper to grant a declaration in the present case although it is now agreed that an injunction is not an appropriate remedy. (at p125)

3. I would dismiss the appeal and allow the cross appeal. I would set aside the order for an injunction and make declarations with regard to Plantations No. 66A to 70A inclusive. (at p125)

STEPHEN J. I would dismiss this appeal. I do so for the reasons appearing in the judgment of Mason J., save that, it being conceded in argument that a grower will obtain a profit a prendre in respect of land allocated to him, I have found it unnecessary myself to consider that particular aspect. (at p125)

MASON J. This is an appeal from the N.S.W. Court of Appeal which dismissed an appeal from a decision of Helsham C.J. in Eq. The Corporate Affairs Commission ("C.A.C."), for whom the Attorney-General for New South Wales ex relatione the C.A.C. was later substituted, had sought declarations that: (1) the interests of various growers under agreements with the first three appellants for the purchase, planting and tending of pinus genus plants on certain land were "interests" within the meaning of Div. 5 of Pt IV of the Companies Act 1961 (N.S.W.), as amended ("the Act"); and (2) the acquisition by the growers of these interests and the circumstances preceding this acquisition involved an issue or offer to the public of those interests for subscription or purchase or an invitation to the public to subscribe for or purchase the interests. (at p126)

2. If this were the position the appellants would have breached requirements imposed in Div. 5 of Pt IV of the Act. The C.A.C. also sought injunctive relief. (at p126)

3. Helsham C.J. in Eq. granted a declaration that in relation to their respective agreements with the first three appellants each grower, when the agreement became binding, obtained an actual, prospective or contingent interest in the assets of a business undertaking or scheme within the meaning of par.(a) of the definition of "interest" in s.76 (1) of the Act and that in the acquisition by the growers of their interest and in the circumstances preceding such acquisition there was involved an issue or offer to the public for subscription or purchase. His Honour also restrained the appellants from issuing or offering to the public for subscription or purchase or inviting the public to subscribe for or purchase any interest under any agreement relating to the purchase, planting and care of pinus genus plants on the relevant land except in accordance with the provisions of Div. 5 of Pt IV of the Act. (at p126)

4. In the Court of Appeal Hutley J.A. (with whom Reynolds and Samuels JJ.A. agreed) held that the scheme involved the creation of "interests" within s. 76 of the Act, probably on a

wider basis than at first instance, and that the provisions of Div. 5 of Pt IV had been breached. However, his Honour considered that: "This is not a proper case for declarations which are little more than prefatory averments to the grant of an injunction." Instead he proposed an injunction similar in substance but different in form from that originally awarded. However, this injunction was not included in the formal order announced by the Court. Presumably the omission was an oversight. (at p126)

5. The case was first argued on the basis of a statement of agreed facts which were summarized by Helsham C.J. in Eq. The first three appellants (labelled "the company" as each did the same thing) owned plantations considered suitable for growing pine trees. A plan divided the plantations into a number of portions with fire breaks between blocks of portions and around the perimeter of the plantation. (at p126)

6. A person wishing to participate in this venture ("the grower") agrees with the company to take up one or more portions. The company agrees to allocate the grower a specified portion or portions and he agrees to buy from the company a certain number of trees which it will plant, tend and maintain until maturity. The grower pays a purchase price for the trees and a sum, payable by monthly instalments, for planting etc. Upon maturity, or when the trees are marketable in the opinion of the company, it notifies the grower who must then within six months cause the trees on his portion to be felled and removed at his risk and expense "as his property". Unless he notifies the company of his intention to do this within one month of service of the company's notice he is deemed to have appointed the fourth appellant as his agent to fell and remove the trees. An agreement to be entered into between the grower and fourth appellant sets out the conditions of agency. Once appointed by that agreement the fourth appellant becomes the exclusive agent to fell, remove and dispose of the trees as timber and pays the growers 80 per cent of the net proceeds of realization. In the event of loss of the trees by fire due to negligence of the company the grower is only entitled to have his portion replanted by the company. (at p127)

7. The summons sought declarations with respect to nine plantations but the statement of agreed facts does not touch on three of them. This is of no moment in this appeal. The point was neither raised in the notice of appeal to the Court of Appeal nor drawn to the attention of this Court in the special leave application. The respondent has accepted in argument that a declaration with respect to one of the plantations would be sufficient. (at p127)

8. Helsham C.J. in Eq. stated that the public became involved in the venture through salesmen, called brokers, who were appointed to procure persons to sign up with the company. His Honour found that the brokers: "operate by learning of interested persons in three ways, (1) where such a person has made contact with the company, which refers him to a broker, or (2) where such a person contacts a broker directly (usually via a grower), or (3) where the broker calls on him. The company does not advertise or make, other than as above, personal approaches to solicit growers." (at p127)

9. Finding (3) omits a qualification in the agreed facts which stated as the third method of contacting growers that: "such persons are approached by a broker at the request of an existing grower to whom - usually, if not invariably - a request has previously been made by

such person that the broker be asked to call when next in the area." Nevertheless, as will be seen, this omission does not affect the answers to the question whether an issue, offer or invitation was made "to the public" within Div. 5 of Pt IV of the Act.

(1) "Interest" within s. 76 of the Act. (at p127)

10. The definition of "interest" in s. 76 (1) of the Act is wider than "interest" in its ordinary legal sense. Section 76 (1) provides that in Div. 5 of Pt IV of the Act, unless inconsistent with the context or subject matter:

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

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

(b) in any common enterprise whether in the State or elsewhere in which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party; or

(c) in any investment contract,

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 . . . "

The definition goes on to exclude:

"(d) any share in or debenture of a corporation;

(e) any interest in or arising out of a policy of life insurance;

(f) an interest in a partnership agreement, unless the agreement or

proposed agreement -

(i) relates to an undertaking, scheme, enterprise or investment contract promoted by or on behalf of a person whose ordinary business is or includes the promotion of similar

undertakings, schemes, enterprises or investment contracts, whether or not that person is, or is to become, a party to the agreement or proposed agreement; or

(ii) is or would be an agreement, or is or would be within a class of agreements, prescribed by the regulations for the purposes of this paragraph; or

(g) a prescribed right or interest or a right or interest of a prescribed class or kind declared by the regulations to be an exempt right or interest for the purposes of this Division".

"Investment contract" is defined by the same sub-section to mean:

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

Paragraph (a) of the Definition of "Interest". (at p129)

11. 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 [1954] HCA 10; (1954) 91 CLR 209, at p 225). 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. (at p129)

12. 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. (at p129)

13. Apart from any considerations which may be derived from the general context in which the statutory definition appears, there is no very good reason for reading the words down. The context is that of prohibitions against issuing or offering to the public for subscription or purchase or inviting the public to subscribe for or purchase "interests" unless there is in force in relation to them an approved deed and unless there is provided information similar to that which is prescribed in connexion with an offer to the public of shares. Indeed, the prospectus provisions of the Act are applied to offers to the public of "interests" as if they were shares (s. 82 (2)). This context supplies no reason for denying that the proposed activities constitute a "financial or business undertaking or scheme" within the meaning of the statutory definition. (at p130)

14. That a very wide meaning should be given to "interest" is attested by the exclusion from the statutory definition of shares and debentures (par. (d)), interests in life assurance policies (par. (e)) and, subject to some qualification, interests in partnership agreements (par. (f)). The presence of the power to exempt by regulation other rights or interests from the definition (par. (g)) is also of telling significance. (at p130)

15. 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 [1981] VicRp 48; (1981) VR 475, at p 478 , in discussing 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". (at p130)

16. What is the nature of the grower's rights under his agreement with the company? Do they amount to a profit a prendre or to a licence coupled with an interest? An examination of these questions will assist us in deciding whether the grower has a right to participate or an interest in the assets of the undertaking or scheme. (at p130)

17. A profit a prendre is generally described as a right to take something off another person's land (Duke of Sutherland v. Heathcote (1892) 1 Ch 475), or to take something out of the soil, including portion of the soil itself (In re Refund of Dues under Timber Regulations (1935) AC 184, at p 193). The right to take timber off another person's land has given rise

to a problem of classification. The general rule was that in the case of fructus naturales (which included growing timber) if the property was to pass to the purchaser before severance from the soil, but the thing was to remain in the land for further growth, an agreement for the sale of the timber was a contract for the sale of an interest in land; aliter if property was to pass after severance - then it was a contract for the sale of goods (Voumard, Sale of Land in Victoria, 3rd ed. (1978), pp. 54-55; Marshall v. Green (1875) 1 CPD 35). Accordingly, if the trees were to be left on the land for the advantage of the purchaser so that he would derive benefit from further growth, then the contract was for the sale of an interest in land. If, on the other hand, the purchaser was to enter and take the timber immediately, he would derive no benefit from the land and the contract was one for the sale of goods. This was the criterion stated by Lord Coleridge C.J. in Marshall v. Green (1875) 1 CPD, at pp 38-39 . (at p131)

18. In Lavery v. Pursell (1888) 39 Ch 508 Chitty J. held that a contract for the sale of the building materials on a house, possession of the premises to be given to the purchaser for the purpose of taking down and removing the materials within two months was a contract for the sale of an interest in land. Subsequently the expression "goods" was defined in s. 5 of the Sale of Goods Act 1923 (N.S.W.) as amended, to include: "all chattels personal other than things in action and money. The term includes emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." (at p131)

19. It may be the presence of this definition that has induced courts in later cases to hold that a contract for the sale of growing timber under which the purchaser has the right to enter the land, cut and remove the timber immediately is a contract for the sale of goods. This is presumably on the footing that the property in the timber passes when it is severed from the land under the contract of sale. See McCauley v. Federal Commissioner of Taxation [1944] HCA 18; (1944) 69 CLR 235, at pp 238,248 ; Kursell v. Timber Operators and Contractors Ltd. (1927) 1 KB 298 . In most of the cases the right to cut and remove timber was not created by a deed or formal instrument appropriate to the creation of a profit a prendre. Consequently, the right of the purchaser to enter upon the land to cut and remove timber has been classified as an equitable profit a prendre, something of the nature of a profit a prendre or as an irrevocable licence coupled with an interest. See Mills v. Stokman [1967] HCA 15; (1967) 116 CLR 61 . (at p131)

20. Mills v. Stokman itself is an illuminating illustration. The owners of land, part held under Torrens title and part under common law title, entered into a written agreement under common seal with W. whereby for value they sold to him all the slate on the land and authorized him to enter upon the land for the purpose of cutting and removing the slate. The slate was contained in a pile of material that had previously been excavated. The Court of Appeal held that the slate was chattels because it had previously been severed from the land and because it was agreed to be severed from the land. This Court decided otherwise. First, it held that the pile had become physically integrated with the land and was part of it. Secondly, it held that, though the parties had incorrectly assumed that the slate was severed, they had not agreed that it would be severed. Accordingly, the agreement was not

one for the sale of goods; it was, according to Barwick C.J. (with whom Taylor J. agreed), in equity "the grant of a profit a prendre" (1967) 116 CLR, at p 71 , according to McTiernan J. "a valid equitable profit a prendre" (1967) 116 CLR, at p 75 , according to Kitto J. "an interest in the nature of a profit a prendre, an irrevocable licence coupled with an interest" (1967) 116 CLR, at p 77 and according to Menzies J. who dissented in part, "a profit a prendre in equity or some similar property right" (1967) 116 CLR, at p 79 . In reaching his conclusion Barwick C.J. thought it important that W. did not agree to remove the slates (1967) 116 CLR, at p 77 . See also Stratford v. Mole and Lea (1941) 24 TC 20, esp at pp 31-33 . (at p132)

21. The contract contains several indications that the grower acquires an interest in land, even if it is not a profit a prendre in the strict sense. The company sells and the grower buys the trees, delivery to be made when required for planting (cl. 1). The company agrees to care for the trees until they reach maturity or become marketable as timber (cl. 3). The trees are referred to as "the trees of the Grower", evidently in the sense that he has, or is to have, proprietary rights in them (cl. 7). These provisions read with the entire contract indicate that the evident intention of the parties was that the grower was to have a continuing interest in the land which would culminate in his severance and removal of the trees. They do not support the view that the grower's only interest was a chattel interest arising on severance. (at p132)

22. The principal argument against the grower having a profit a prendre is that it is an obligation on his part, not a right, under the contract to cut and remove the trees. All the instances given in the text books and legal dictionaries of profits a prendre are of "rights" to take something off the land of another. I have not been able to discover a case in which an obligation to take something off a person's land has been considered to be a profit a prendre. But I do not think that this negates the possibility that the grower's rights amount to an interest in the nature of a profit a prendre. Property in the trees evidently passes to him before planting and their growth in the ground is for his benefit. The fact that he has an obligation, rather than a right, to cut and remove them at maturity on notice from the company is not in the circumstances of this case inconsistent with his having an interest in land. As he has an interest in land and a licence to enter the land in order to take possession of the fruits of his interest, what he has is something in the nature of a profit a prendre, if not a profit a prendre in the strict sense. (at p133)

23. If the grower has an interest in the nature of a profit a prendre then he has an interest in the assets of the scheme. Indeed, he has such an interest even if the scheme be confined to the growing of the trees on the plantation so that the activities of the grower in cutting the timber and removing it stand apart from the scheme because they are not carried out by the company. (at p133)

24. If, contrary to my own view, the grower has no interest in the land, he nevertheless has an interest in the timber on severance and that, having regard to the wider ambit of the scheme which I prefer, is sufficient to satisfy the requirements of par. (a) of the statutory definition. Further, association of the word "interest" with the expression "right to participate"

provides additional support for the view that it has a larger content than that of a proprietary interest.

Paragraph (b) of the Definition of "Interest". (at p133)

25. Although, in the light of the conclusion I have reached in connexion with par. (a), it is unnecessary for me to examine this question, I do so because it was fully argued. 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. (at p133)

26. For this reason also the interest acquired by the grower falls within statutory definition.

Paragraph (c) of the Definition of "Interest". (at p134)

27. I have no need to deal with this paragraph.

(2) Was there an Issue, Offer or Invitation to the Public? (at p134)

28. It is common ground that if an issue, offer or invitation was made to the public there have been breaches of ss. 81, 82 and 83 of the Act. (at p134)

29. The appellants submit that the words in question require that there be a making known to the public, by some form of public solicitation, e.g. by advertisement, circular or letter, that the relevant interest is available for subscription or purchase. They argue that the only sensible meaning for "issue" in the context is "proffer" and that, being part of the composite

phrase "issue or offer" it adds very little, if anything, to "offer". The suggested justification for giving the word little or no meaning is that although one could let the public know that interests are available for subscription or purchase it is impossible to actually issue an "interest" within the meaning of s. 76 to "the public". (at p134)

30. I do not accept that "issue" had such a limited meaning. It is clear that the word is sufficiently large in content to embrace the process by which the grower secures a binding contract. And I see no difficulty in saying that interests are issued to the public if, as will be seen to be the case, there are many instances in which an interest is allotted to an individual, the individual being selected or identified as the recipient of the interest by reference to his being a member of the public. (at p134)

31. The statement of agreed facts shows that the agreements are in standard form. It is accepted that the documents are prepared by the appellants who distribute them to the brokers. Once a grower comes in contact with a broker by any of the methods disclosed in the statement of agreed facts it is unrealistic to say that an offer for subscription or purchase, or at least an invitation to subscribe for or purchase, an interest is not thereafter made to the grower. It is true that the standard form of agreement does not bind the company until "it is recorded in the books of the Company in Sydney as an Agreement binding on the Company" (cl. 17). Thus, as a matter of strict contract law, it is correct to say that the grower makes the "offer" which the company accepts and that the company's use of a standard form agreement only gives rise to an invitation to treat. However, it is my opinion that "offer" is not used in its strict contractual sense. See Attorney-General (N.S.W.) v. Mutual Home Loans Fund of Australia Ltd. (1971) 2 NSWLR 162, at p 165 ; affirmed on appeal Mutual Home Loans Fund of Australia Ltd. v. Attorney-General (N.S.W.) [1973] HCA 61; (1973) 130 CLR 103, at pp 118, 120 . (at p135)

32. In any event the circumstances are sufficient to involve an invitation to subscribe for or purchase an interest even if, contrary to my own view, "offer" should be read in its strict contractual sense. (at p135)

33. However, the real question is whether what has occurred gives rise to an issue, offer or invitation to the public. When we look to the three ways in which, according to the statement of facts, growers come into negotiation with the company and enter into contracts with it, the circumstances justify the conclusion that there was an issue and offer to the public or an invitation to the public. As Helsham C.J. in Eq. noted, the brokers were engaged on behalf of the company on a commission basis; each broker was allotted an area and his job was to introduce to the company prospective purchasers already signed up by him on a standard form of agreement for which he got a commission. Four thousand or so persons have already been signed up and accepted. (at p135)

34. Although the company through the brokers negotiated with members of the public individually, the persons signed up were approached as members of the public. The facts do not suggest that the company or the brokers looked to a particular class of person as growers. The documents contain no hint of any restriction to a class or group of persons having some common characteristic or qualification, except that of possessing the money

with which to buy the trees. It is worth recalling the remarks of Kitto J. in Lee v. Evans [1964] HCA 65; (1964) 112 CLR 276, at p 287 . His Honour there said:

"I see no reason to doubt that the statement of an invitation even to one person only may be seen, when considered in the light of all the circumstances, to be part of, even though only the first step in, the communication of the invitation to the public generally, so that if the lone hearer were to tell some stranger of it the stranger would be right in treating it as open to acceptance by him no less than by the hearer. . . . I think it is going too far to say that proof of an invitation given to a person as a member of the public is necessarily proof of an invitation to the public. If a person, wishing to obtain a loan, makes his request to a stranger whom he picks at random in the street, it remains, I think, a question of fact whether his invitation is to the public or to the selected individual only . . . (T)he distinction must not be overlooked between the case of an invitation which itself is open to acceptance by any member of the public who may be interested and the case of an invitation which itself is open to acceptance by a specific individual only but, if declined by him, is likely to be followed by similar invitations to other specific individuals in succession until an acceptor is found. The first of these is a case of an invitation to the public; the second, in my opinion, is not." (at p136)

35. Accordingly there was in my opinion an issue and offer of an interest to the public for subscription or purchase and an invitation to the public to subscribe for or purchase an interest within the meaning of s. 76.

(3) Relief. (at p136)

36. Subject to one outstanding question, the consequence of all this is that the appeal must be dismissed. The outstanding question to which I briefly referred at the outset is the proposal in the judgment of Hutley J.A. that an injunction slightly different in form should be substituted for the declarations and injunction granted by Helsham C.J. in Eq. The parties now unite in submitting that a declaration alone is the appropriate relief in the light of conclusions I have reached. In the circumstances the relief granted should be limited to declarations in respect of Plantations Nos. 66A to 70A inclusive. (at p136)

37. I would dismiss the appeal. (at p136)

MURPHY J. One of the most widespread and successful of the species of fraud known in Australia and elsewhere as "the investment racket" is the forest or plantation variety. In a simple version the investor victim is induced to pay either outright or by deposit plus

instalments for an area of land as part of a scheme in which trees will be planted and harvested on this and other investors' land. The investor expects that when the trees are fully grown he will receive a handsome reward from the produce. The schemes are generally designed so that all the investors will ever receive are the pieces of paper constituting the agreements. (at p136)

2. Legislatures here and overseas have made increasingly stringent "blue sky" laws to protect prospective investors in such schemes (see Securities and Exchange Commission v. W. J. Howey Co. [1946] USSC 115; (1946) 328 US 293 (90 Law Ed 1244) ; Radiata Forestry Development Co. Pty. Ltd. v. Evans (1977) 3 ACLR 82; (1978) ACLC 29, 663). In response, promoters design increasingly more sophisticated schemes in attempts to circumvent the laws. (at p136)

3. Division 5 of Pt IV of the Companies Act, 1961 (N.S.W.), as amended, prohibits a company from making issues or offers to the public for subscription or purchase or from inviting the public to subscribe for or purchase any interest, without first fulfilling certain statutory requirements designed to protect the public. These protective provisions apply whether the scheme is sound, foolish or fraudulent. (at p137)

4. The legislature has defined "interest" extremely widely but to avoid any unintended effect has included specific exemptions and made provision for other exemptions by regulation. In the present case, the investor "grower" acquires an "interest" as defined by the Act and the scheme is caught by the provisions of Div. 5. This case is not concerned with the soundness or otherwise of the scheme promoted by the appellants, and on the assumption that the scheme is otherwise bona fide, the issues or offers are nevertheless a contravention of the Act. (at p137)

5. I agree with Wilson J.'s conclusions and generally with his reasons. The Supreme Court granted an injunction against further issues or offers by the defendants, but refused declarations that the agreements are caught by the legislation. Both forms of relief are appropriate. The injunction is appropriate because the respondent asserts its right to issue the agreements without conforming to the requirements of the Companies Act 1961 (N.S.W.), Div. 5. It has already procured signatures and acceptances from more than 4,000 persons. This represents more than $200,000 in deposits and promises to pay instalments of well over a million dollars. Presumably all those who have been party to offences against the Companies Act in relation to the issues are liable to criminal proceedings at least with the consent of the Minister (see s. 381). In these circumstances, and because the respondent did not press in this Court for the injunction, I agree that the relief be confined to appropriate declarations. The appeal should be dismissed. (at p137)

WILSON J. This is an appeal by special leave from the unanimous decision of the Court of Appeal of the Supreme Court of New South Wales (Reynolds, Hutley and Samuels JJ.A.) dismissing an appeal from Helsham C.J. in Eq. There is a cross appeal by the respondent with respect to the form of relief granted by the Court of Appeal. (at p137)

2. Each of the first three appellants ("the plantation company") is the owner of land suitable for growing pine trees. Such areas are described in the facts of this case as plantations. Each plantation is divided into a number of portions, each portion being thought to be capable of accommodating approximately three hundred pine trees. The agreed statement of facts provides details concerning six plantations, containing altogether more than 9,000 portions. The procedure employed by each plantation company is the same. Brokers are engaged, each with responsibility for recruiting participants from within a defined locality. His task is to interview any person in his area who wishes to participate in the scheme, secure the execution by him of an agreement with the plantation company in question and payment of the moneys required, and forward the agreement and the money to the company for acceptance by it. If the agreement is accepted, that person is known as a grower. The agreement provides for the allocation to the grower of one or more portions as the case may be of the land comprised in a plantation, and for the purchase by him of three hundred infant trees for each portion. The company undertakes to plant the trees, and to tend and maintain them until maturity, and the grower undertakes not to interfere in that work. The grower pays to the company the sum of $50.00 for each three hundred trees, plus a sum of $340.00 for planting and tending, the latter sum being payable by monthly instalments over a period of years. (at p138)

3. Upon maturity, or when the trees are in the opinion of the company marketable, the company is to notify the grower; the grower must within six months thereafter cause the trees on his portion to be felled and removed at his risk and expense as his property, but he must have given notice to the company of his intention to do this within one month of service upon him of the notice from the company of maturity or marketability; in the absence of such notice to the company, he is deemed to have appointed another named company, the fourth appellant ("the agency company") as his agent to fell and remove the trees and to dispose of the same as timber at such price as it can reasonably obtain and to pay him 80 per cent of the net proceeds of realization. The relationship between the grower and the agency company is the subject of a separate agreement, which, it would seem, the grower is obliged to complete when entering into the agreement with the plantation company. (at p138)

4. The agreement between the plantation company and the grower records that the company has entered into a trust deed, and that the trustee under that deed will act as the representative of the grower. In the trust deed the company covenants to perform its obligations under the agreement, and the deed gives the trustee in the event of breach by the company the right to enter and perform those obligations. (at p138)

5. Clearly there is but one scheme involved in all this. Details are given of six plantations, which are obviously worked as one. All four appellant companies are wholly owned subsidiaries of Percheron Investments Pty. Ltd., which owns the equipment which is used on the plantations. The agency company employs about forty-five persons in the planting and maintenance of the plantations and in administration and other related duties. Both the parent company and the agency company make appropriate charges on each of the plantation companies for equipment used and work done. (at p139)

6. The question that has arisen is whether in these circumstances the appellants are required to comply with the provisions of Div. 5 of Pt IV of the Companies Act 1961 (N.S.W.) ("the Act"). In general terms, those provisions seek to protect the investing public by controlling the manner in which 'interests', other than shares or debentures, are issued or offered to the public. Section 81, so far as material, provides:

"(1) No person, except a company or an agent of a company authorised in that behalf under the seal of the company, shall issue or offer to the public for subscription or purchase or shall invite the public to subscribe for or purchase any interest."

"Interest" is defined in s. 76 (1), as is the term "Investment contract":

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

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

(b) in any common enterprise whether in the State or elsewhere in which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party; or

(c) in any investment contract,

whether or not the right or interest is evidenced by a formal document and

whether or not the right or interest relates to a physical asset, but does not include -

(d) any share in or debenture of a corporation;

(e) any interest in or arising out of a policy of life insurance;

(f) an interest in a partnership agreement, unless the agreement or

proposed agreement -

(i) relates to an undertaking, scheme, enterprise or investment contract promoted by or on behalf of a person whose ordinary business is or includes the promotion of similar undertakings, schemes, enterprises or investment contracts, whether or not that person is, or is to become, a party to the agreement or proposed agreement; or

(ii) is or would be an agreement, or is or would be within a class of agreements, prescribed

by the regulations for the purposes of this paragraph; or

(g) a prescribed right or interest or a right or interest of a prescribed class or kind declared by the regulations to be an exempt right or interest for the purposes of this Division.

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

The words "a company" in s. 81 refer to a public company. (at p140)
7. Mr. Bainton Q.C., counsel for the appellants, argues that these provisions have no application to his clients. In the first place he says that the growers do not acquire an "interest" within the meaning of that term as defined by the Act; in the second place he says that in any event, there was no issue or offer to the public for subscription or purchase nor was there any such invitation to the public. On the other hand, Mr. Bannon Q.C., counsel for the Corporate Affairs Commission, points to the breadth of language with which the concept of 'interest' is defined. He argues that the present scheme is caught under any or all ofest' is defined. He argues that the present scheme is caught under any or all of that the agreed facts detailing the different ways in which growers are recruited establish an "issue or offer to the public for subscription or purchase". (at p140)

8. I agree with Helsham C.J. in Eq. and the members of the Court of Appeal that the agreement confers on a grower an interest in the assets of a business undertaking or scheme. Each plantation company is engaged in a business undertaking; furthermore, it seems to me that there is clearly a "scheme": Clowes v. Federal Commissioner of Taxation [1954] HCA 10; (1954) 91 CLR 209 . It is conceded that the grower enjoys a profit a prendre in respect of that portion of the land which is allocated to him. It is immaterial whether the grower owns the trees from the moment they are appropriated to the contract or only at maturity, as Helsham C.J. in Eq. was inclined to think. Both the land and the growing trees form assets of the scheme. Although the growers have no right under the agreement to enter the land during the growing period, they can call on the trustee to protect their interests and to ensure that the trees are properly cared for. Both the land and the growing trees constitute "assets . . . of any . . . business undertaking or scheme". Furthermore, it is immaterial that upon maturity ownership of the trees on severance vests in the grower and his interest in the land is extinguished. The time for considering the existence of an "interest" is the time when the arrangement is implemented. (at p141)

9. In the light of this conclusion, it is unnecessary to consider whether the arrangement creates an "interest" pursuant to pars. (b) or (c). However, I may say that I would find little difficulty in perceiving the existence of a common enterprise between the individual grower

and the plantation company. It is an enterprise in which the grower furnishes a capital sum with which the infant trees are acquired and makes a regular contribution over a lengthy period of time to the costs of fostering growth; on the other hand the owner of the land makes available that without which the growth could not take place, and is responsible for the care and nurture of the trees. It is from the efforts of the promoter of the enterprise that the grower, the holder of the interest, is led to expect profits. Whether or not the arrangement also constitutes an "investment contract" is a question of greater difficulty, the definition of such a contract raising a number of issues which it is neither necessary nor profitable to discuss. (at p141)

10. Whether there was in this case an issue or offer to the public of an interest for subscription or purchase is a question of some difficulty. The facts on which an answer must depend are set out in a statement of agreed facts as follows:

"8. Persons described as 'brokers' are appointed by the defendant Percheron Acceptance Corporation Pty. Limited to operate generally in particular areas. The form of broker's agreement which is entered into with the said persons is annexed hereto and marked 'D' . . . .

9. The method by which contracts . . . are entered into with 'growers' is that either - (a) such a person makes contact with one of the defendant companies seeking to enter into a grower's agreement and is referred by that company to a broker operating in the area where such person lives and with whom he has further discussions which may lead to his entering into a grower's agreement; or (b) such persons make a direct approach to a broker usually on the recommendation of an existing grower to whom such person is or has become known and by whom the name of the broker is furnished; or - (c) such persons are approached by a broker at the request of an existing grower to whom - usually, if not invariably - a request has previously been made by such person that the broker be asked to call when next in the area.

10. Except as is stated in the preceding paragraph none of the defendants takes any steps, either by advertising or personal approach, to solicit clients to execute agreements for the sale planting and tending of pinus genus plants on the said Plantations.

. . . ".

The form of broker's agreement referred to in par. 8 is to the effect that the broker is given the right within the allotted area to seek or solicit orders from prospective clients who wish to buy trees to be planted on a plantation. The broker arranges for the client to complete the form of agreement and pay the necessary moneys and he then forwards them to the company. The agreement is not binding on the company until accepted by it. The broker is remunerated by reference to the number of trees the sale of which arises from the broker's

"sole initiative". It is expressly provided that "the Broker shall not publish or distribute or cause to be published or distributed any advertisement circular or other advertising matter relating to the sale of trees in accordance with the provisions of this Agreement". (at p142)

11. In the Court of Appeal, Hutley J.A., with whom the other members of the Court agreed, dealt summarily with the question of an invitation to the public by referring to the description in the judgment of Helsham C.J. in Eq. of the method of wining growers, and commenting that once the accuracy of that description was conceded the matter became unarguable. However, in arguing the appeal to us, Mr. Bainton submitted that his Honour's description was inaccurate in so far as he summed up the third method of recruiting growers outlined in par. 9 of the agreed facts with the simple statement "where the broker calls on him". It was argued that such a summation overlooks a material element, namely, that such an approach is made at the request of an existing grower to whom usually, if not invariably - a request has previously been made by such person that the broker be asked to call. If attention is confined to the precise description in par. 9, I would have to say, with respect to his Honour, that I think Mr. Bainton's point is well made. The impression conveyed by par. 9 is that the broker does not exercise any initiative at all in the way of approaching prospective growers. He deals only with persons who are referred to him by the company, or with persons who come to him usually on the recommendation of an existing grower, or with persons whom he approaches at the request of an existing grower. It is unnecessary to consider whether, so interpreted, the facts in par. 9 establish an invitation, offer or issue "to the public" because that paragraph does not stand alone. It must be read with par. 8, which exhibits the form of broker's agreement. As I have already noted in referring to that agreement, it speaks of contracts with growers arising from the broker's "sole initiative", and contemplates the broker's role as one in which he seeks or solicits orders (cf. cll. 4 and 12). (at p143)

12. Essentially, Mr. Bainton's submission on this question is that because there was no advertising, no public solicitation, then it cannot be said that there was an issue or offer to the public. He argued that "issue" means no more than "proffer" and so adds little to "offer". There must, he says, be a making known to the public at large, or to a sufficiently large element of the public so that any of them may come in and take up the offer. On the other hand, Mr. Bannon argues that it is not the manner in which the offer is made, but the character of the person to whom it is addressed. Is he invited in his character as a member of the public or by reasons of his standing in a special relationship to the invitor? (at p143)

13. In Lee v. Evans [1964] HCA 65; (1964) 112 CLR 276 this Court had occasion to consider the meaning of the phrase "invitation to the public" in a South Australian statute. The judgments in that case emphasise that the determination of the true nature of an invitation is a question of fact and degree dependent upon the particular enactment and the circumstances of each case. The manner in which the invitation is conveyed, whether by public advertisement or by personal solicitation is not decisive. But, however conveyed, to be an invitation or offer to the public, it must be general in the sense of being available to be acted upon by any member of the public. After stating such a proposition, Kitto J. continued (1964) 112 CLR, at p 287 :

"I am not intending to hold, however, that the size of the immediate audience is necessarily conclusive of the question whether the invitation is an invitation to the public. That is a question of the true scope of the invitation. . . . an invitation even to one person only may be seen, when considered in the light of all the circumstances, to be part of, even though only the first step in, the communication of the invitation to the public generally, so that if the lone hearer were to tell some stranger of it the stranger would be right in treating it as open to acceptance by him no less than by the hearer."

Taylor J. said (1964) 112 CLR, at p 290 :

". . . it is necessary to draw a distinction between the essential character of the invitation and the manner of its communication or publication and it is the former element and not the latter which is ultimately of critical importance . . . ".

The same point is made succinctly by Wynn-Parry J. in Governments Stock and Other Securities Investment Co. Ltd. v. Christopher (1956) 1 WLR 237, at p 242 in a case in which he held that an offer to shareholders to purchase shares was not an offer to the public: ". . . the test is not who receives the circular, but who can accept the offer put forward." (at p144)

14. The facts show that at the material time 4,866 agreements had been made between growers and the plantation companies covering 7,871 portions. It is obviously a scheme that largely depends for its promotion on communication by word of mouth, with existing growers playing a significant role. But brokers are not required to confine their efforts to prospective growers who satisfy any particular criterion. Any member of the public may become a grower provided that he or she pays the requisite fee and executes the agreement, and provided, of course, that the company accepts the agreement. It was not suggested in argument that this latter requirement affects the character of the invitation or offer. Having regard to the number of participants the fact that the sole characteristic which they have in common is that they are members of the public, the nature of the scheme, and the protective purpose of the legislation, I conclude that the circumstances were such as to establish an offer to the public of an interest for subscription or purchase or an invitation to the public to subscribe for or purchase any interest. In the context of this case I do not find it necessary to consider the precise scope and meaning of the word "issue" in s. 81. (at p144)

15. It remains to consider the propriety of the grant of an injunction, and the cross appeal of the respondent. The cross appeal seeks the restoration of the declarations made at first instance. Helsham C.J. in Eq. granted both declarations and injunctions. The Court of Appeal took the view that the declarations were no more than an unnecessary preface to the grant of an injunction, and it varied accordingly the order from which the appeal was brought. In this Court there was no suggestion that the conduct with which the case has been concerned was continuing and the respondent did not press for the injunction to be maintained. However, it did press for the restoration of the declarations made by Helsham C.J. in Eq. I agree that this would be a proper course to follow, save that no declaration should be made respecting Plantations 65A, 71A, 72A and 73A. There is no satisfactory

evidence before the Court touching these plantations, and the relief should therefore be confined to the remaining five plantations to which the agreed facts referred. (at p145)

16. I would therefore dismiss the appeal save that the order for an injunction should be set aside, and allow the cross appeal. I would make declarations in the terms that I have indicated. (at p145)

ORDER

Appeal dismissed with costs.
Cross appeal allowed with costs.

Order of the Supreme Court of New South Wales (Court of Appeal) varied by setting aside the order for an injunction, and by substituting for such order declarations in the terms made by Helsham C.J., in Eq. but limited to Plantations 66A, 67A, 68A, 69A and 70A.