

# DEFINING A PARTNERSHIP: THE TRADITIONAL APPROACH VERSUS AN INNOVATIVE DEPARTURE - DO QUEENSLAND APPEAL COURT DECISIONS POINT TO THE NEED FOR A REVIEW OF THE TRADITIONAL APPROACH TO INTERPRETATION ADOPTED BY AUSTRALIAN COURTS?

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## INTRODUCTION

Australian partnership legislation when it was first enacted adopted legislative provisions that were a 'substantial transcript'<sup>1</sup> of the *Partnership Act 1890* (UK). All of this legislation, since its inception, has contained a general definition of a partnership. Prior to the passing of the *Partnership Act 1890* (UK), a partnership was defined in a variety of ways but there was no authoritative definition of the word.<sup>2</sup> Indeed, Lord Lindley in his seminal text on partnership law provided 18 definitions of partnership drawn from various sources.<sup>3</sup>

It is the purpose of this article to examine the definition of a partnership under the *Partnership Act 1891*(Qld) against the background of three Queensland appeal court decisions that have previously received little or no comment.

There are four parts to this article.

The first part discusses some general principles relevant to the existence of a partnership.

The second part discusses the focal provisions of the *Partnership Act 1891*(Qld) that deal with the definition and existence of a partnership relationship. In particular, it focuses on the pivotal provision of s 5 (1) that deals with the general definition of a partnership. As each Australian jurisdiction has an equivalent provision in its partnership legislation, particular emphasis is placed on the traditional approach of Australian courts to the interpretation of this provision.

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<sup>1</sup> *Hocking v Western Australian Bank* (1909) 9 CLR 738, 743. (Griffith CJ)

<sup>2</sup> EH Scamell, *Lindley on Partnership* (13<sup>th</sup> ed, 1971) 4-5.

<sup>3</sup> KL Fletcher , *Higgins and Fletcher The Law of Partnership in Australia and New Zealand* (8<sup>th</sup> ed, 2001) 21 referring to *Lindley on Partnership* (5<sup>th</sup> ed, 1888) 2-4.

The third part examines the three relevant Queensland appeal court decisions of *Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd*<sup>4</sup>, *Whywait Pty Ltd v Davison*<sup>5</sup> and *Marshall v Marshall*<sup>6</sup>.

The fourth part critically analyses these decisions in the light of the principles outlined in the earlier parts of the article.

In both the third and fourth parts of this article, particular emphasis is placed on the innovative approach adopted by McPherson JA in each of the decisions.

A conclusion is then reached as to whether these Queensland appeal court decisions point to the need for a review of the traditional approach to the interpretation of the definition of a partnership adopted by Australian courts.

## **I GENERAL PRINCIPLES RELEVANT TO THE EXISTENCE OF A PARTNERSHIP**

### **A Interpretation of Partnership Legislation**

Prior to the enactment of partnership legislation generally, the law relating to partnership had its genesis in case law embodying the rules of the common law and equity.<sup>7</sup> In England, prior to the *Partnership Act 1890* (UK), this case law benefited from the coming into force<sup>8</sup> of the *Supreme Court of Judicature Act 1873*<sup>9</sup> as it fused the administration of these rules.<sup>10</sup>

Australian partnership legislation is generally stated to be legislation 'to declare and amend the law of partnership'.<sup>11</sup> Generally, it is also provided that the 'rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of the Act'.<sup>12</sup>

The Privy Council considered the interpretation of the *Partnership Act 1895* (WA) in *Cameron v Murdoch*.<sup>13</sup> It took the view that the 'purpose and effect of the Act were largely to codify the law of partnership as at the date of its passing'.<sup>14</sup> The Court used

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<sup>4</sup> [1989] 2 Qd R 87.

<sup>5</sup> [1997] 1 Qd R 225.

<sup>6</sup> [1999] 1 Qd R 173.

<sup>7</sup> Fletcher, above n 3, 5-6.

<sup>8</sup> On November 1, 1875.

<sup>9</sup> 36 & 37 Vict., c.66.

<sup>10</sup> Fletcher, above n 3, 6.

<sup>11</sup> *Partnership Act 1891* (Qld).

<sup>12</sup> *Partnership Act 1891* (Qld) s121.

<sup>13</sup> (1986) 60 ALJR 280.

<sup>14</sup> *Ibid* 286.

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the expression 'largely to codify' because of the inclusion in the legislation of the provision expressly preserving the previous case law that it referred to as 'in the nature of a sweeping up provision'.<sup>15</sup> Consequently, the Court took the view that 'when a question of partnership law arises, it is the express provisions of the Act to which regard should first be had, and that it is only after such regard has been had that consideration should be given to the effect if any of the sweeping up provision ...'<sup>16</sup>

Predominantly, partnership legislation is largely declaratory of the law.<sup>17</sup> This means that essentially it did not try to modify case law decided before the enactment of partnership legislation. It must follow that this case law can be relied upon to clarify the intention of the legislature.<sup>18</sup> Judicially it has been said that ' " unless the law has been purposely altered, which in a codifying Act is a rare exception, the decisions are still the material from which the rule of law has been generalized."'<sup>19</sup> It is, therefore, not unusual for case law decided after the enactment of partnership legislation to refer to cases which preceded its enactment on the issue of interpretation.<sup>20</sup>

### **B The Real Intention of the Parties**

The general principle traditionally adopted by the courts in each case in determining the existence of a partnership is to ascertain the common or real intention of the parties.<sup>21</sup> The express intention of the parties is important but it is not conclusive.<sup>22</sup> Rather the courts look to the substance of the relationship between the alleged partners.<sup>23</sup> This is elicited from the terms of the true agreement between the parties as evidenced by any contemporaneous documentation and the surrounding

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<sup>15</sup> Ibid 286.

<sup>16</sup> Ibid 286.

<sup>17</sup> *British Homes Assurance Corporation v Paterson* [1902] 2 Ch 404, 410.

<sup>18</sup> Fletcher, above n 3, 17; Geoffrey Morse, *Partnership Law* (3<sup>rd</sup> ed, 1995) 4.

<sup>19</sup> *Powell v Powell* (1932) 32 (NSW) 407, 413 Long Innes J referring to Sir Fredrick Pollock in the *Preface to his Digest of the Law of Partnership*.

<sup>20</sup> R Baxt, L Bialkower, R Morgan, *Guidebook to Partnership Law* (2<sup>nd</sup> ed, 1984) 6.

<sup>21</sup> *Elkin & Co Pty Ltd v Specialised Television Installations Pty Ltd* (1959) 69 SR (NSW) 165,168 (Court of Appeal); *Fliway -AFA International Pty Ltd v Australian Tax Commissioner* (1992) 39 FCR 446; *Amadio Pty Ltd v Henderson* (1998) 81FCR 149, 172-73 (Full Federal Court); *The Duke Group Ltd (in liq) v Pilmer* (1998) 16 ACLC 567, 811.(Mullighan J)

<sup>22</sup> *Deputy Commissioner of Taxation v Tuza* (1997) 35 ATR 32; *The Duke Group Ltd (in liq) v Pilmer* (1998) 16ACLC 567, 810; Stephen Graw, *An Outline of the Law of Partnership* (2<sup>nd</sup> ed; 2001) 20.

<sup>23</sup> *The Duke Group Ltd (in liq) v Pilmer* (1998) 16ACLC 567, 810, 811; (1999) 17 ACLC 1329, 1486 (Court of Appeal).

circumstances at the time of entry into the agreement.<sup>24</sup> The whole scope of the agreement must be considered before any presumption of intention can properly be made.<sup>25</sup>

### **C Clauses Labelling a Relationship**

The issue of the existence of a partnership 'is not to be decided merely by what the parties called each other, or by the way in which they referred to their relationship vis-a-vis one another.'<sup>26</sup>

A relationship is not a partnership simply because the relevant parties describe themselves as partners<sup>27</sup> or call their governing deed 'Covenants of Partnership'.<sup>28</sup> The Courts take the view that 'where some of the necessary elements of a partnership do not in fact exist, a relationship will not become a partnership merely because the parties say so.'<sup>29</sup>

Conversely, the absence of an express declaration of partnership or of the word partnership or some equivalent is not a bar to the court holding that a partnership exists if that is the proper conclusion from an examination of the real substance of the relationship.<sup>30</sup>

### **D Relevance of the Existence of a Partnership Between Alleged Partners and a Third Party or Between Alleged Partners**

The question of determining the existence of a partnership arises in a number of areas.

First, it may be necessary to inquire whether the relationship constituted by an agreement is a partnership as between the alleged partners to it and third parties.<sup>31</sup>

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<sup>24</sup> *Re Beard & Co; Ex parte The Trustee* (1915) 1HBR 191,194; *Mc Kenzie v Mc Kenzie* (1921) NZLR 319, 324; *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149, 173; PR Webb & Anne Webb, *Principles of the Law of Partnership* (5<sup>th</sup> ed, 1992) 3, 13.

<sup>25</sup> *Mollwo, March & Co v The Court of Wards* (1872) 4 LRPC 419, 433; *Ex parte Delhasse. Re Megevand* (1878) 7 Ch D 511, 515-16, 525, 528.

<sup>26</sup> *Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505,506 (Barwick CJ); See also *Ex parte Delhasse. Re Megevand* (1878) 7 Ch D 511,525,532; *Re Ruddock* (1879) 5 VLR 51, 58; *The Duke Group Ltd (in liq) v Pilmer* (1999) 17 ACLC 1329, 1486.

<sup>27</sup> *Ballans v Kleinig* [1925] SASR 227, 230; *Playfair Development Corporation Pty Ltd v Ryan* (1969) 90 WN(NSW) 504, 511(Street J); *The Duke Group Ltd (in liq) v Pilmer &* (1998) 16 ACLC 567, 810-811.

<sup>28</sup> *Playfair Development Corporation Pty Ltd v Ryan* (1969) 90 WN (NSW) 504, 511.

<sup>29</sup> *The Duke Group Ltd (in liq) v Pilmer & Ors* (1999) 17 ACLC 1329, 1486.

<sup>30</sup> *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd Ltd* (1996) SLT 186, 191-92.

<sup>31</sup> *Walker v Hirsch* (1884) 27Ch D 460, 467-468 (Cotton LJ);

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This is sometimes referred to as the 'outsider question'.<sup>32</sup> It is commonly about recovery of a debt or other liability from a person on the basis that the person is a partner.<sup>33</sup> Generally, the issue is whether an alleged partner is liable on a contract not entered into by or with its express authority but rather with its implied authority to transact all matters of business relating to the partnership.<sup>34</sup> It is an issue whether the act of the alleged partner has made the person who actually entered into the contract its agent for the purpose of entering into the contract. If the relationship of partnership exists in law, then each partner as between itself and the creditors of the firm is liable for all the debts of the firm whatever may be the arrangements between the partners *inter se* as to how the losses are to be borne.<sup>35</sup>

Second, it may be necessary to inquire whether the relationship constituted by an agreement is a partnership between the alleged partners themselves.<sup>36</sup> This is sometimes referred to as the 'insider question'.<sup>37</sup> It usually arises when one person seeks to enforce a duty or obligation against another on the basis that they are partners.<sup>38</sup> Ultimately, even if a partnership is found to exist, the issue is what rights the contract entered into between the parties has given to one against the other.<sup>39</sup> Where the agreement is silent, the *Partnership Act 1891(Qld)*<sup>40</sup> applies certain default rules.<sup>41</sup> It does not, however, impose itself upon a contract so as to require that, *inter se*, the rights and duties of the parties thereto shall be other than those stipulated in the terms of their contract.<sup>42</sup> It generally permits all the partners to consent to vary the terms of the legislation in so far as it relates to their mutual rights and duties.<sup>43</sup> Other sections, such those relating to some specific fiduciary duties of partners<sup>44</sup>, are also subject to contrary agreement.

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<sup>32</sup> Morse, above n 18, 27.

<sup>33</sup> Ibid.

<sup>34</sup> *Walker v Hirsch* (1884) 27Ch D 460, 468.

<sup>35</sup> E R Hardy Ivamy and DR Jones, *Underhill's Principles of the Law of Partnership* (12<sup>th</sup> ed, 1986) 2.

<sup>36</sup> *Walker v Hirsch* (1884) 27Ch D 460, 467-468.

<sup>37</sup> Morse, above n 18, 28.

<sup>38</sup> Ibid.

<sup>39</sup> *Walker v Hirsch* (1884) 27Ch D 460, 467-468.

<sup>40</sup> Section 27(1).

<sup>41</sup> *Khan v Miah* [2000] 1 WLR 2123.(House of Lords)

<sup>42</sup> *Beckingham v The Port Jackson & Manly Steamship Company* (1957) SR (NSW) 403, 410.

<sup>43</sup> Section 22.

<sup>44</sup> Sections 32, 33.

It follows that arguments relevant in an action relating to an outsider question are not necessarily relevant to the decision of a case involving an insider question.<sup>45</sup>

## **II FOCAL PROVISIONS OF THE PARTNERSHIP ACT 1891 (QLD) DEALING WITH DEFINITION AND EXISTENCE OF A PARTNERSHIP RELATIONSHIP**

The focal provisions relating to the definition and existence of a partnership are ss 5-6.

Chapter 1 Part 2 comprising ss 3-5 is headed 'Interpretation'.

Under the marginal heading of 'Definitions', s 3 provides that '[t]he dictionary in the schedule defines particular words used in this Act.'

Section 5 is in the following terms:

### Meaning of Partnership

Partnership is the relation which subsists between persons carrying on business in common with a view of profit.

(1A) Partnership includes an incorporated limited partnership.

(2) However, the relation between members of any company or association that is-

- (a) incorporated under the Corporations Act; or
- (b) formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter;

is not a partnership within the meaning of this Act.

In the dictionary it states that 'incorporated limited partnership means a partnership formed under chapter 4'. It also states that 'limited partnership, without reference to an incorporated limited partnership, means a limited partnership formed under Chapter 3'.

Chapter 2 Part 1 comprising ss 6-7 is headed 'Nature of partnership'. Section 6, in so far as it is relevant to discussion in this article, is in the following terms:

### 6 Rules for deciding existence of partnership

(1) In deciding whether a partnership does or does not exist, regard must be had to the following rules:-

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<sup>45</sup> *Beckingham v The Port Jackson and Manly Steamship Company* (1957) SR (NSW) 403,410.

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- (a)---
- (b) the sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived;
- (c) the receipt by a person of a share of the profits of the business is prima facie evidence that the person is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make the person a partner in the business...

These rules provide further assistance in judging whether there is a partnership in a particular case. They are expressed in a negative rather than a positive form.<sup>46</sup> They are not rigid rules.<sup>47</sup>

The rest of Part 2 of this article discusses two issues. First, there is a consideration of the interpretation of s 5 as the definition of a partnership. Second, there is an examination of the principal elements of s 5(1).

### **A Interpretation of Section 5 of the Partnership Act 1891(Qld) as the Definition of a Partnership**

The traditional approach to the interpretation of s 5 as the definition of a partnership comprises a number of tenets. First, s 5(1) provides the legal definition of what constitutes a partnership.<sup>48</sup> Second, s 5(1) provides the only general definition of a partnership.<sup>49</sup> Third, this definition is 'a distillation of ...prior statements of the common law.'<sup>50</sup>

This definition of a partnership in s 5(1) of the *Partnership Act 1891 (Qld)* has an equivalent provision in each Australian jurisdiction.

The *Partnership Act 1891(Qld)* was amended on 12 October 2004.<sup>51</sup> The major policy objective of this amending legislation was to provide for the ability to create a particular body corporate, called an incorporated limited partnership, so as to provide 'the preferred legal structure for international capital investment'.<sup>52</sup> A

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<sup>46</sup> *Jolley v Federal Commissioner of Taxation* (1989) 86 ALR 297, 306.

<sup>47</sup> EDeards and R Deards, *Partnership Law* (1999) 3.

<sup>48</sup> *Ibid* 1; Fletcher, above n 3, 21; Morse, above n 18, 1.

<sup>49</sup> *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* (1996) SLT 186, 191.

<sup>50</sup> *Jolley v Federal Commissioner of Taxation* (1989) 86 ALR 297, 306.

<sup>51</sup> *Partnership and Other Acts Amendment Act 2004 (Qld)*.

<sup>52</sup> Explanatory Notes, *Partnership and Other Acts Amendment Bill 2004 (Qld)* 1, 2.

subsidiary purpose appears to have been the repeal of the *Partnership (Limited Liability) Act 1988* (Qld) and the incorporation into the *Partnership Act 1891*(Qld) of a new Chapter 3 relating to limited partnerships.<sup>53</sup>

The legislation amended s 5 in a number of respects. First, it altered the marginal heading for s 5 from 'Definition of a Partnership' to 'Meaning of partnership'. Second, it introduced s 5(1A). Third, it deleted s 5 (3) which provided that ' [a] limited partnership formed under the Mercantile Act 1867 as amended or the Partnership (Limited Liability) Act 1988 is a partnership within the meaning of this Act, and the rules of law declared by this Act apply to such a limited partnership except so far as the express provisions of that Act are inconsistent with such rules.'

It is strongly arguable that the amending legislation did not alter the three generally accepted tenets regarding the interpretation of s 5.

First, it is suggested that the alteration of the marginal heading for s 5 from 'Definition of a Partnership' to 'Meaning of partnership' does not impact upon the interpretation of s 5. The heading to the section is certainly part of the Act.<sup>54</sup> It may be arguable that the new marginal heading 'Meaning of partnership' might equate to the use of the words 'Partnership means'. The relevant rule of statutory interpretation is that if the word 'means' is used in relation to a definition of a word, it is generally meant to be an exhaustive statement of what is encompassed by the word.<sup>55</sup> This argument would tend to support the second tenet of the traditional approach to the interpretation of s 5. However, the permitted use of the explanatory notes to the amending legislation to assist in the ascertainment of the meaning of s 5<sup>56</sup> confirms that this alteration is neutral. The explanatory notes make no mention of the alteration to the section heading for s 5. This suggests that this amendment is simply one directed to tidying up the section. Indeed, the reason for the alteration may be no more than that many of the 'Definitions' for specific chapters of the Act now appear in the dictionary in the only schedule to the Act. In contradistinction to this the 'Meaning of partnership', that is a fundamental concept for the whole Act, remains in the opening part of the Act that deals with 'Interpretation' generally.

Second, the wording of s 5(1) itself was not amended. It still commences with the words 'Partnership is...' which is clearly indicative of a definition.

Third, the new provision s 5(1A) states that 'Partnership includes an incorporated limited partnership'. The relevant rule of statutory interpretation is that if 'the word

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<sup>53</sup> Explanatory Notes, Partnership and Other Acts Amendment Bill 2004 (Qld) 3, 11.

<sup>54</sup> *Acts Interpretation Act 1954* (Qld) s14 (1).

<sup>55</sup> AI MacAdam and TM Smith, *Statutes*, (1993, 3<sup>rd</sup> ed) 198.

<sup>56</sup> *Acts Interpretation Act 1954* (Qld) s14 B.



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“includes” is used in a definition section, it is generally used to enlarge the meaning of the word it describes, that is to say to bring within the word something that would not otherwise be within it.<sup>57</sup> It is suggested that s 5(1A), like the inclusion that appeared in the former s 5(3), does not affect the traditional approach to the interpretation of s 5(1).

Fourth, s 5 retains an exclusory element in s 5(2) whereby companies or incorporated associations are expressly excluded from the provisions of the Act. This exclusory element exists because the statutory definition is ordinarily wide enough to include corporate bodies that are carrying on a business with a view of profit.<sup>58</sup> It is suggested that this exclusory element and the inclusory element in s 5(1A), tend to confirm the second tenet of the traditional approach to the interpretation of s 5(1) that it provides an exhaustive definition.

### **B Analysis of the Principal Elements of Section 5(1) of the Partnership Act 1891(Qld)**

While the definition in s 5(1) is cast in deceptively straightforward language<sup>59</sup> it has given rise to many problems of interpretation.<sup>60</sup>

The analysis of whether a particular relationship is a partnership is often considered in terms of 3 essential elements arising from s 5(1) namely<sup>61</sup>: ‘carrying on business’; carrying on business ‘in common’; and carrying on business ‘with a view of profit’. The phrases ‘in common’ and ‘with a view of profit’ both qualify the words ‘carrying on business’.<sup>62</sup>

Another element implicit in the definition of a partnership is the existence of a valid agreement between the parties. This element is discussed first.

#### **1 Relation Which Subsists Between Persons**

Section 5(1) refers to ‘the relation which subsists between persons’. It does not expressly require a contractual relationship between the parties.<sup>63</sup> However, the word

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<sup>57</sup> *Savoy Hotel Co v London County Council* [1900] 1 QB 665, 669; *Cohns Industries Pty Ltd v Deputy FCT* (1979) 24 ALR 658, 661; MacAdam and Smith, above n 55, 198.

<sup>58</sup> Fletcher, above n 3, 36; Graw, above n 22, 15.

<sup>59</sup> Morse, above n 18, 1; Fletcher, above n 3, 21.

<sup>60</sup> Fletcher, above n 3, 21.

<sup>61</sup> *The Duke Group Ltd (in Liq) v Pilmer* (1999) 17 ACLC 1329, 1486, 1491; *Thames Cruises Ltd v George Wheeler Launches* [2003] EWHC 3093, [45]; RC I’Anson Banks, *Lindley and Banks on Partnership* (18<sup>th</sup> ed, 2002) 8; Morse, above n 18, 1.

<sup>62</sup> *Newstead (Inspector of Taxes) v Frost* [1978] 1 WLR 1441, 1450. (Buckley LJ)

<sup>63</sup> *Hurst v Bryk and Others* [2000] 2 WLR 740, 748. (Lord Millett)

'relation' implies that a partnership is not a legal entity in its own right separate to that of the partners but rather a relationship based on a contract between two or more persons.<sup>64</sup> The requirement of a contractual relationship is also implicit from other provisions in the Act.<sup>65</sup>

It has been said that a partnership, 'although often called a contract, is more accurately described as a relationship resulting from contract.'<sup>66</sup> While partnership is a consensual arrangement based on agreement, it is more than a simple contract; it is a continuing personal as well as commercial relationship.<sup>67</sup>

## 2 Carrying On Business

Under s 5(1) unless there is a carrying on of business all other elements, whatever importance they might otherwise possess, are immaterial.<sup>68</sup>

### (a) Definition Of Business

The Act does not define the terminology of 'carrying on business'. It does, however, define the concept of 'business' rather vaguely<sup>69</sup> as 'including every trade, occupation or profession'.<sup>70</sup> The use of the term 'includes' in the definition indicates that it is not an exhaustive list of what is to be regarded as a business for the purposes of the legislation.<sup>71</sup>

Case law suggests that the concept of a business refers to the ordinary meaning of the term. This denotes 'activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis'.<sup>72</sup> It follows that virtually any venture conducted on commercial

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<sup>64</sup> Morse, above n 18, 1; Deards & Deards, above n 47, 1.

<sup>65</sup> *Davis v Davis* [1894] 1Ch 393, 396; I'Anson Banks, above n 61, 15.

<sup>66</sup> *Dreyfus v The Commissioners of Inland Revenue* (1929) 14 TC 560, 573. (Lord Hanworth MR); I'Anson Banks, above n 61, 15.

<sup>67</sup> *Hurst v Bryk and Others* [2000] 2WLR 740, 747-48.

<sup>68</sup> *Newstead v Frost* [1979] 2 All ER 129,137; R Burgess, and G Morse, *Partnership Law and Practice* (1980) 3.

<sup>69</sup> Webb & Webb, above n 24, 4.

<sup>70</sup> *Partnership Act 1891* (Qld) s 3, Schedule, Dictionary.

<sup>71</sup> Graw, above n 22, 7.

<sup>72</sup> *Hope v Bathurst City Council* (1980) 144 CLR 1, 8-9; *Pioneer Concrete Services Ltd v Galli* [1985] VR 675, 705; Fletcher, above n 3, 22.

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lines will be regarded as a business for this purpose.<sup>73</sup> If it is not of a commercial nature then the venture is not a business even though it may produce a profit.<sup>74</sup>

### *(b) Badges Of Business*

Partnership case law has accepted that case law considering whether a taxpayer has been carrying on a business for income tax purposes affords some useful guidance in this context.<sup>75</sup>

The issue of whether a particular activity constitutes carrying on a business is often a difficult one involving questions of fact and degree.<sup>76</sup> The test is largely objective.<sup>77</sup> There are a number of factors that are relevant but no one factor is decisive.<sup>78</sup> The relevant factors have been referred to as the 'badges of business'.<sup>79</sup> Some of these factors are: the nature of the venture activities, particularly whether they have the ultimate purpose of profit making;<sup>80</sup> the repetition and regularity of activities and whether they are of a permanent character;<sup>81</sup> the organization of activities in a businesslike manner reflected, for example, in the use of a business account or at least a bank account;<sup>82</sup> and the scale of the activity<sup>83</sup> or volume of operations and amount of capital employed.<sup>84</sup>

Some activities may be excluded from the concept of business because they do not have a significant commercial purpose or character.<sup>85</sup>

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<sup>73</sup> *British Legion v Commissioners of Inland Revenue* (1953) 35 TC 509, 514, 516; *Khan v Miah* [1998] 1 WLR 477,491(Buxton LJ); *Thames Cruises Ltd v George Wheeler Launches & Another* [2003] EWHC 3093, [46]; *I'Anson Banks*, above n 61, 8; *Burgess & Morse*, above n 68, 3.

<sup>74</sup> *Burgess & Morse*, above n 68, 3.

<sup>75</sup> See eg *Minter v Minter* (2000) BPR 18,133, 18,150-151.

<sup>76</sup> *Evans v Federal Commissioner of Taxation* (1989) 89ATC 4540, 4454. (Hill J)

<sup>77</sup> *Ibid* 4556.

<sup>78</sup> *Ibid* 4555.

<sup>79</sup> *Ferguson v Federal Commissioner of Taxation* (1979) 9ATR 873, 876-7.

<sup>80</sup> *Ibid*; *Thomas v Federal Commissioner of Taxation* (1972) 3 ATR 165; *Evans v Federal Commissioner of Taxation* (1989) 89ATC 4540, 4555.

<sup>81</sup> *Ferguson v Federal Commissioner of Taxation* (1979) 9ATR 873, 876-7; *Hope v Bathurst City Council* (1980) 144 CLR 1, 9; *Evans v Federal Commissioner of Taxation* (1989) 89ATC 4540, 4555.

<sup>82</sup> *Jones v Federal Commissioner of Taxation* (1932) 2 ATD 16, 18-19 (Evatt J).

<sup>83</sup> *Evans v Federal Commissioner of Taxation* (1989) 89ATC 4540, 4555.

<sup>84</sup> *Ferguson v Federal Commissioner of Taxation* (1979) 9ATR 873, 876-7.

<sup>85</sup> *Ibid*.

*(c) Single Ventures*

The expression 'carrying on' implies a repetition or continuity of acts or transactions either in fact or at least in intention.<sup>86</sup>

The Act has always implicitly accepted that a partnership may be entered into for a single adventure or undertaking.<sup>87</sup>

Contemporary partnership case law suggests that there may still be the carrying on of a business that amounts to a partnership even though the parties are engaged in a single venture or undertaking of short duration.<sup>88</sup> This case law suggests that while continuity of activities is an important factor in determining whether a business is being carried on it is no longer a decisive factor.<sup>89</sup> A single purpose joint venture even though it be an isolated activity does not for that reason avoid being a partnership if otherwise it satisfies the criteria for a partnership in the sense of a commercial enterprise with the object of gain or profit.<sup>90</sup>

**3 In Common**

This fundamental requirement of the definition often causes the most difficulty in the case law.<sup>91</sup>

*(a) Meaning Of Element*

*(i) Single Or Joint Business Required*

This element requires the carrying on of a single or joint business by the alleged partners for their common benefit rather than the carrying on of separate and distinct businesses of each<sup>92</sup> or the business of one person only.<sup>93</sup>

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<sup>86</sup> *Smith v Anderson* (1880) 15 Ch D 247, 277-78, 279-280; *Ballantyne v Raphael* (1889) 15 VLR 538; *Re Griffin*; *Ex parte Board of Trade* (1890) 60 LJQB 235, 237.

<sup>87</sup> *Partnership Act 1891*(Qld) s 35(1)(b); *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 15 (Dawson J).

<sup>88</sup> *Mann v D'Arcy* [1968] 2 All ER 172; *Canny Gabriel Jackson Advertising Pty Ltd v Volume Sales (Finance ) Pty Ltd* (1974)131 CLR 321; *Chan v Zacharia* (1984) 154 CLR 178,196 (Deane J); *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1; *Conroy v Kenny* [1999] 1 WLR 1340, 1345. (Court of Appeal )

<sup>89</sup> Graw, above n 22,10.

<sup>90</sup> *Canny Gabriel Jackson Advertising Pty Ltd v Volume Sales (Finance ) Pty Ltd* (1974)131 CLR 321; *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) Ltd (1985) 157 CLR 1, 11 (Mason, Brennan, Deane JJ), 15 (Dawson J); *Minter v Minter* (2000) BPR 18,133, 18,148.

<sup>91</sup> Baxt, Bialkower and Morgan, above n 20, 23.

<sup>92</sup> *Checker Taxicab Co Ltd v Stone* (1930) NZLR 169,174; *Walker West Developments Ltd v FJ Emmett Ltd* (1978) 252 EG 1171 (Court of Appeal); *The Duke Group Ltd (in liq) v Pilmer & Ors*

## DEFINING A PARTNERSHIP: THE TRADITIONAL APPROACH VERSUS AN INNOVATIVE DEPARTURE

### (ii) Approaches By Courts As To Meaning Of Element

This element does not require that alleged partners all personally participate in the daily workings of the business or take an active part in the management of the firm.<sup>94</sup>

Whether a business is carried on in common by alleged partners has been the subject of different approaches by the courts.

One approach is reflected in the decision of the Full Court of the Supreme Court of South Australia in *The Duke Group Ltd ( In Liquidation ) v Pilmer*.<sup>95</sup> There the Court held that the element of 'in common' implies two requirements.<sup>96</sup> Firstly, it requires an agency relationship in the sense that an alleged partner must stand in the relation of principal to the persons who carry on the business.<sup>97</sup> Secondly, it requires the existence of mutual rights and obligations inherent in a partnership relationship. It is this mutuality of rights and obligations between persons who carry on business together or on whose behalf the business is carried on that distinguishes partnership from other relationships.<sup>98</sup> These rights and obligations may be used as a guide as to whether a partnership exists but none is decisive.<sup>99</sup> They may be varied or excluded by agreement.<sup>100</sup> The Court saw both the requirements of agency and mutuality reflected in the South Australian statutory equivalents<sup>101</sup> of ss 5- 6 of the *Partnership Act 1891 (Qld)*.<sup>102</sup>

A second approach is reflected in a line of Australian High Court decisions<sup>103</sup> and some English<sup>104</sup> case law. This approach insists only that the above second requirement be met. It requires that the parties have accepted some level of mutual

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(1998) 16ACLC 567,811; *Thames Cruises Ltd v George Wheeler Launches & Another* [2003] EWHC 3093, [47]; *Burgess & Morse*, above n 68, 4; *I'Anson Banks*, above n 61, 11.

<sup>93</sup> *Ex parte Tennant. Re Howard* (1877) 6 Ch D 303, 315 (Cotton LJ); *Badeley v Consolidated Bank* (1888) 38 Ch D238, 249,261; *Re Whiteley*; *Ex parte D Smith & Co* (1892 ) 66 LT 291, 293-94; *Re Beard & Co*; *Ex parte The Trustee* (1915) 1HBR 191,194; *Burgess & Morse*, above n 68, 4.

<sup>94</sup> *The Duke Group Ltd (in liq) v Pilmer* (1998) 16 ACLC 567, 811; (1999) 17 ACLC 1329, 1492.

<sup>95</sup> (1999) 17ACLC 1329. ('*The Duke Group Ltd*')

<sup>96</sup> *Ibid* 1494.

<sup>97</sup> See also *Lang v James Morrison & Co Ltd* (1911) 13 CLR 1, 11 (Griffith CJ).

<sup>98</sup> *The Duke Group Ltd (in liq) v Pilmer* (1999) 17 ACLC 1329, 1494.

<sup>99</sup> *Ibid*.

<sup>100</sup> *Ibid*.

<sup>101</sup> *Partnership Act 1891 (SA)* s 1, s2.

<sup>102</sup> *The Duke Group Ltd (in liq) v Pilmer* (1999) 17 ACLC 1329, 1493.

<sup>103</sup> *Canny Gabriel Jackson Advertising Pty Ltd v Volume Sales (Finance ) Pty Ltd* (1974)131 CLR 321; *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) (1985) 157 CLR 1.

<sup>104</sup> *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* (1996) SLT 186, 195.

rights and obligations as between themselves as regards the business.<sup>105</sup> It also emphasizes that that 'there is no one provision or feature which can be said to be absolutely necessary to the existence of a partnership, so that the absence of that feature inevitably negates the existence of a partnership or joint venture.'<sup>106</sup>

*(iii) Meaning Of Mutuality Of Rights And Obligations*

The essence of this requirement is that the parties have accepted some level of mutual rights and obligations as between themselves as regards the business<sup>107</sup> rather than the underlying assets.<sup>108</sup> Persons are partners if the agreement governing their relationship, fairly construed as a whole, gives them the rights and imposes on them the obligations of partners.<sup>109</sup> Put in another way, the issue is whether the contract exhibits the indicia or hallmarks of a partnership.<sup>110</sup>

Australian courts have described the indicia of a partnership. In *'The Duke Group Ltd'* the Full Court accepted that the mutual rights and obligations of partners are usually the subject of agreement but if not are contained in the Partnership Act.<sup>111</sup> The rights include the right to: participate in management; share in profits and assets; decide about the composition of the partnership; indemnity from partnership assets; interest on capital contributions in certain circumstances; retire at will; and assign a partnership share.<sup>112</sup> The obligations include: bearing losses equally; rendering accounts; keeping the books at the place of partnership; using partnership property only for partnership purposes; and fiduciary obligations owed from one partner to another.<sup>113</sup> It is also an indicium of partnership where the alleged partners regard their respective obligations under the agreement as being joint rather than as being separate and distinct.<sup>114</sup>

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<sup>105</sup> I'Anson Banks, above n 61, 10.

<sup>106</sup> *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* (1996) SLT 186, 195; See also Morse, above n 19, 6.

<sup>107</sup> *Thames Cruises Ltd v George Wheeler Launches & Another* [2003] EWHC 3093, [49]; I'Anson Banks, above n 61, 10.

<sup>108</sup> I'Anson Banks, above n 61, 10, n 19.

<sup>109</sup> *Ex parte Coral Investments Pty Ltd* [1979] Qd R 292; *Connell v Bond Corporation Pty Ltd* (1992) 8 WAR 352.

<sup>110</sup> *Canny Gabriel Jackson Advertising Pty Ltd v Volume Sales (Finance ) Pty Ltd* (1974) 131 CLR 321,326-327; *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) Ltd (1985) 157 CLR 1, 11 (Mason, Brennan, Deane JJ).

<sup>111</sup> (1999) 17 ACLC 1329, 1492.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Television Broadcasters Ltd v Ashton's Nominees Pty Ltd (No 1)* (1979) 22 SASR 552, 565-66.

## DEFINING A PARTNERSHIP: THE TRADITIONAL APPROACH VERSUS AN INNOVATIVE DEPARTURE

### 4 With A View Of Profit

This element emphasizes that the business must be a commercial venture with the object of making profits.<sup>115</sup>

#### *(a) Meaning Of Element*

##### *(i) Purpose Of Ultimate Profit*

There is a carrying on of business with a view of profit if the parties intend that it will ultimately earn profits even though there is the expectation that there will be losses in the short term.<sup>116</sup>

##### *(ii) Sharing Of Profits As A Requirement Of Partnership*

Section 5(1) requires 'a view of profit'. There are different interpretations as to these words.

One appropriate interpretation is that the definition refers to a business with a view to profit which must be carried on in common.<sup>117</sup> On this interpretation the fact that parties carry on business jointly with a view of profit is not enough to make them partners.<sup>118</sup> This interpretation is bolstered by reference to case law decided prior to the enactment of partnership legislation.<sup>119</sup> Under this interpretation it is not essential, however, that there be profits actually made or received by the parties because a business could cease before that point in time.<sup>120</sup> Some case law says that this follows because the element only requires that there be a 'view of profit'.<sup>121</sup>

There is Australian<sup>122</sup> and English<sup>123</sup> case law that supports this interpretation.

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<sup>115</sup> *The Duke Group Ltd (In Liq ) v Pilmer* (1998) 16 ACLC 567, 812.

<sup>116</sup> *Minter v Minter* (2000) 10 BPR 18,133; Graw, above n 22, 1.

<sup>117</sup> Morse, above n 18, 13.

<sup>118</sup> Hardy Ivamy & Jones, above n 35, 5.

<sup>119</sup> Eg. *Pooley v Driver* (1876) 5 Ch D 458,472; See also Fletcher, above n 3, 32-34.

<sup>120</sup> *Khan v Miah* [1998] 1 WLR 477.

<sup>121</sup> Ibid 486.

<sup>122</sup> *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 15-16 (Dawson J); *Cummings v Lewis* (Unreported, Federal Court of Australia, Wilcox J, 2 August 1991) BC9102942, 113 (An appeal against the decision was dismissed: *Cummings v Lewis* (1993) 41 FCR 559).

<sup>123</sup> *Walker West Developments Ltd v FJ Emmett Ltd* (1978) 252 EG 1171; *Blackpool Marton Rotary Club v Martin* [1988] STC 823, 830.

A contrary interpretation is that the words require only a profit motive and not necessarily a share in the profits for each partner ie only the business needs to be carried on 'in common', not necessarily the profits.<sup>124</sup>

There is Australian<sup>125</sup> and English case law<sup>126</sup> that supports this interpretation.

*(iii) Meaning Of Profit*

The concept of 'profit' is not defined in the Partnership Act. However, Australian case law has adopted the view that the word 'profit' connotes a gain or increase measured by a comparison of the financial position at different points in time. Case law holds that it refers to a net pecuniary gain. This means the net gain resulting after payment of all expenses involved in generating the gain since profit is not co-extensive with gross trading receipts.<sup>127</sup> Case law holds<sup>128</sup> that this approach is based on the statutory rules for determining the existence of a partnership<sup>129</sup> relating to persons sharing gross returns and persons in receipt of a share of the profits from the business.<sup>130</sup>

### III EXAMINATION OF QUEENSLAND APPEAL COURT DECISIONS

The third part of this article examines the three relevant Queensland appeal court decisions of *SJ Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd*<sup>131</sup>, *Whywait Pty Ltd v Davison*<sup>132</sup> and *Marshall v Marshall*<sup>133</sup>.

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<sup>124</sup> I'Anson Banks, above n 61, 12-13; Morse, above n 18, 13.

<sup>125</sup> *The Duke Group Ltd (In Liq ) v Pilmer* (1999) 17 ACLC 1329, 1495.

<sup>126</sup> *Stekel v Ellice* [1973] 1 All ER 465. (Megarry J)

<sup>127</sup> *Cummings v Lewis* (Unreported, Federal Court of Australia, Wilcox J, 2 August 1991) BC9102942, 112; *The Duke Group Ltd (In liq) v Pilmer* (1998)16 ACLC 567, 814; (1999) 17 ACLC 1329,1495.

<sup>128</sup> *Cummings v Lewis* (Unreported, Federal Court of Australia, Wilcox J, 2 August 1991) BC9102942, 112-13; *The Duke Group Ltd (In liq) v Pilmer* (1998)16 ACLC 567, 814.

<sup>129</sup> See II FOCAL PROVISIONS OF THE PARTNERSHIP ACT DEALING WITH DEFINITION AND EXISTENCE OF A PARTNERSHIP RELATIONSHIP

<sup>130</sup> *Partnership Act 1891(Qld)* s 6(1)(b),(c).

<sup>131</sup> [1989] 2 Qd R 87 ('Mackie').

<sup>132</sup> [1997]1 Qd R 225 ('Whywait').

<sup>133</sup> [1999] 1 Qd R 173 ('Marshall').



## DEFINING A PARTNERSHIP: THE TRADITIONAL APPROACH VERSUS AN INNOVATIVE DEPARTURE

### **A Decision of 'Mackie'<sup>134</sup>**

#### **1 Parties**

In this case, the first and second defendant companies, Dalziell Medical Practice Pty Ltd and Savage Medical Practice Pty Ltd, carried on the business of radiology as partners pursuant to a deed of partnership. The directors of the first defendant were Dr H A Dalziell (Dalziell) and his wife L Dalziell. The directors of the second defendant were Dr JM Savage (Savage) and Dalziell.

There was also a service trust arrangement in relation to the practice. Organ Imaging Pty Ltd (Organ) provided to the first and second defendants various services for which it was paid as trustee of a trust under the name The Organ Imaging Trust. Under the trust deed, units in the trust were held, as to half of the number each, by Dalziell & L Dalziell as trustees of the Dalziell Family Trust and by Savage as trustee of the Savage Family Trust. All of these persons were defendants in the action.

From some time late in 1984 Dr SJ Mackie (Mackie), the third plaintiff, was employed as a radiologist by the partnership. SJ Mackie Pty Ltd, Mackie's corporate emanation, was the first plaintiff.

#### **2 Deed Of Partnership**

The deed of partnership was headed 'unit partnership'.

Clause 5.1 provided that each partner 'shall be deemed to hold units in the partnership', and 'shall be entitled to share in partnership assets and profits and be responsible for liabilities and losses in proportion to the number of those units'. Clause 6.1 provided for a register of unit holders. Clause 6.4 provided that when the register was signed by a unit holder, 'he shall at all times thereafter be deemed to have agreed to be bound by the terms and conditions of the deed'.

By Clause 7.1 all transfers of units were to be effected in the manner approved by a supervisory committee and the name of the transferee was to be entered in the register in lieu of that of the transferor. Clause 7.2 provided that 'No assignment transfer or conveyance of any unit in the partnership is effective unless the assignee agrees to be bound as a partner of the partnership by the terms of this agreement.'

The supervisory committee referred to in Clause 7.1 was described in Clause 13.1. It provided that it was to consist of 2 members to be appointed by the partners, or such other number of members as the partners should unanimously determine, the first members being Dalziell and Savage. Further sub-clauses of Clause 13 specified the

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<sup>134</sup> [1989] 2 Qd R 87.

procedure for appointment and removal of committee members as well as other matters related to it.

### **3 Plaintiff's Claim**

The plaintiffs claimed there was a partnership in existence between the first plaintiff and the first and second defendants. The first plaintiff sought an account of profits and a share in the goodwill of the partnership.

### **4 Decision At First Instance**

The trial judge, Dowsett J, found that Mackie returned to the radiology practice early in 1985 on the basis that if he proved suitable he would be offered a partnership. He further found that the first plaintiff was offered and accepted a partnership in the practice commencing from 1 July, 1985 whereupon Mackie ceased to be an employee. For at least two months Dalziell, Savage and Mackie proceeded as if the first plaintiff was an equal partner.

Dowsett J also found that it was agreed that an associate of Mackie, Rostangle Pty Ltd (Rostangle), would acquire a beneficial interest in the service trust after 1 July.

The accountants and solicitors for the parties continued to work towards the preparation of documents regarding the disposition to Mackie of units in the partnership, membership of the supervisory committee, details of the purchase price of \$90,000 and the amount of the deposit to be paid for entry into the partnership, and amendments to the existing partnership deed. Dowsett J found that these were efforts directed towards the recording of Mackie's admission into the partnership. However, the first plaintiff's name was never entered in the register of unit holders. Further, a new partnership deed was not completed.

Subsequently on 8 November, as a result of differences between the parties the first and second defendants issued a formal notice to the first plaintiff whereby Mackie was excluded from the practice.

Dowsett J held that upon this exclusion the partnership was dissolved. He held that Mackie or the first plaintiff was entitled to an account of profits of the partnership from 1 July to 8 November 1985 and to participate in the partnership goodwill.

### **5 Appeal Of Defendants**

The defendants appealed. Their primary complaint was that Dowsett J incorrectly decided that the first plaintiff became a partner.<sup>135</sup>

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<sup>135</sup> Ibid 89.

## DEFINING A PARTNERSHIP: THE TRADITIONAL APPROACH VERSUS AN INNOVATIVE DEPARTURE

The defendants submitted that: the agreement was that the partnership relationship was to be regulated in accordance with the pre-existing deed of partnership;<sup>136</sup> until there were taken the necessary steps envisaged by that deed for becoming a partner, the parties were not bound by any informal partnership agreement that might have been arrived at between them;<sup>137</sup> and it was the common intention of the parties that they should not be bound by any partnership agreement until the necessary documents had been settled by the legal and accounting advisers and were executed by the parties.<sup>138</sup>

The defendants challenged Dowsett J's findings to the extent only that they were said to be inconsistent with documentary evidence or incapable of sustaining inferences drawn from the primary facts.<sup>139</sup> They relied upon the fact that the first plaintiff's name was never entered in the partnership register of units. Additionally, they relied upon various documents that were said to demonstrate that throughout the parties were still engaged in the process of negotiating the terms of the first plaintiff's entry into partnership.<sup>140</sup>

### 6 Decision Of Full Court

The Full Court of the Supreme of Queensland comprising Macrossan J, McPherson J and Shepherdson J held that there was a partnership in existence between the first and second defendants and the first plaintiff. McPherson J provided reasons for judgment with which both Macrossan J and Shepherdson J agreed.

McPherson J considered that the defendants' submission started with the principles discussed in *Masters v Cameron*<sup>141</sup> and sought to fit the case into the third class of cases outlined in that decision.<sup>142</sup> McPherson J accepted that in the case before the Court, no express formula such as 'subject to contract' was used.<sup>143</sup> It followed that if the Court was to discover the common intention of the parties it was required to identify the competing inferences capable of being drawn from the conduct of the parties during the relevant period.<sup>144</sup>

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<sup>136</sup> Ibid

<sup>137</sup> Ibid

<sup>138</sup> Ibid 89, 92.

<sup>139</sup> Ibid 88.

<sup>140</sup> Ibid 93.

<sup>141</sup> (1954) 91 CLR 353, 360-364.

<sup>142</sup> *Mackie* [1989] 2 Qd R 87, 92.

<sup>143</sup> Ibid 92.

<sup>144</sup> Ibid 93.

McPherson J held that from 1 July 1985 the parties, in the persons of the principals Dalziell, Savage and Mackie, plainly regarded themselves as having entered into the relation of partners. This was the case although the parties' accountants and solicitors were continuing to prepare documents that were undoubtedly required as a formal record of partnership arrangements.<sup>145</sup>

McPherson J referred to three main factors that pointed to the conclusion of partnership.<sup>146</sup> First, there was evidence of the purchase price and amount of the deposit to be paid for entry into the partnership, and that the commencing date for it was to be 1 July 1985. Second, soon after that date, Dalziell and Savage welcomed Mackie into the partnership and informed him that he would henceforth receive payment as a partner. Before that time Mackie had been paid a fixed amount recorded in the wages book, as an employee or independent contractor. Thereafter, he received regular payments in a different amount which corresponded to similar amounts received by Dalziell and Savage during the same period, and particular employee benefits were terminated. Additionally, in August 1985 the unit holders of the service trust and Rostangle, which did not become a unit holder, each received two payments totalling \$20,000 from the trustee. Dalziell signed one cheque for Rostangle. Savage signed the other cheque. Here McPherson J noted that in accordance with s 6(3) of the *Partnership Act 1891 (Qld)*,<sup>147</sup> the receipt of a share of the profits of a business is itself prima facie evidence that the recipient is a partner in the business. Third, Mackie attended partnership meetings after 1 July including one at which questions concerning retention of staff and equipment in the practice were much debated before decisions were reached upon them.

Mc Pherson J concluded the discussion on the existence of partnership with the following remarks:<sup>148</sup>

A partnership is, as s.5 of the Partnership Act expresses it, the subsistence of a "relation" between persons carrying on business for profit. The essence of that relation is as James LJ recognized in Baird's Case, one of "mutual trust and confidence of each partner in the skill, knowledge, and integrity of every other partner": see *Re Agriculturist Cattle Insurance Company*, Baird's Case (1870) Lr Ch App 725, 732-33; *Birtchnell v Equity Trustees, Executors and Agency Co. Ltd* (1929) 42 CLR 384, 407-408. Once a relation of that kind is found to subsist between persons carrying on such a business, a partnership exists between them: *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1. It

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<sup>145</sup> Ibid 94-5.

<sup>146</sup> Ibid 94.

<sup>147</sup> Now renumbered as s 6(1)(c).

<sup>148</sup> Ibid 95. Emphasis is added by the author.

## DEFINING A PARTNERSHIP: THE TRADITIONAL APPROACH VERSUS AN INNOVATIVE DEPARTURE

is plain that from 1 July 1985, until it was admittedly terminated on 8 November, the relation between the parties was of that kind.

### **B Decision of 'Whywait'**<sup>149</sup>

#### **1 Parties**

Whywait Pty Ltd, the plaintiff, was a plumbing contractor. The Davisons, the defendants, were the owners and developers of two building sites.

#### **2 Partnership Agreement**

The defendants entered into a written contract headed 'Partnership Agreement' with one Cheers that they would combine to construct and sell four townhouses on specified land of which the defendants were to become registered proprietors. The agreement provided that the defendants should buy and pay for the designated land on which the townhouses were to be built. (Clause 1) The defendants were to receive interest at 20% on moneys advanced to the 'joint venture'. (Clause 5) Cheers was responsible for managing the site and for the construction work including the provision of working drawings and engaging a builder with whom he was to jointly supervise construction. The builder was to be engaged for a fee approved by the joint venture parties. Cheers was also required to obtain quotations to present to the joint venture parties for acceptance. (Clause 6) The parties were to share equally in the net profit from the sale of each unit once final costs and outlays had been accounted for and after the defendants had received interest at 20% on funds invested by them. (Clause 3)

#### **3 Plaintiff's Claim**

After the date of the partnership agreement, the defendants entered into a written building contract with a named builder to construct the townhouses. Later, a second building contract was entered into between the same parties to build a house at another location. In the course of carrying out the building work, Cheers engaged the plaintiff to do plumbing work at the 2 building sites. Subsequently, Cheers disappeared. The plaintiff claimed against the defendants for the work done and materials supplied at the two building sites.

The defendants raised two questions affecting liability in answer to the plaintiff's claim.<sup>150</sup> One question was whether Cheers had the actual authority of the defendants to contract for the work to be done. The second question was whether, if such

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<sup>149</sup> [1997] 1 Qd R 225.

<sup>150</sup> Ibid 228-229.

authority was absent, Cheers had nevertheless been held out by them as having their authority, and so had ostensible authority to contract on their behalf.

#### **4 Decisions Below Court of Appeal**

The matter was initially heard before the Queensland Building Tribunal. It first decided that Cheers had been held out by the defendants to the plaintiff as having authority to act on their behalf. It then also held that there was a partnership between the defendants and Cheers based on the terms of the partnership agreement. It ordered that the defendants pay the plaintiff the amount claimed together with interest.

The defendants obtained leave of the District Court to appeal against the Tribunal's decision. Newton DCJ held that the plaintiff did not rely for payment upon any ostensible authority on the part of Cheers to arrange for work to be performed. He left unresolved the question of whether there was a partnership between the defendants and Cheers. He allowed the appeal and 'annulled' the order made by the Tribunal against the defendants. The plaintiff appealed.

#### **5 Appeal Of Plaintiff**

The appellant argued that the relationship between the respondents and Cheers was one of partnership with the result that Cheers had actual or implied authority to engage the appellant on their behalf under s 8 of the *Partnership Act 1891*(Qld).

The respondents argued that their relationship with Cheers was that of joint venturers rather than partners. Accordingly, they were not liable for transactions entered into by Cheers unless it was shown that they held him out as being their partner or agent.

#### **6 Decision Of Court Of Appeal**

The Court of Appeal comprising Macrossan CJ, Pincus JA and McPherson JA held that there was a partnership in existence between the respondents and Cheers. The Court delivered a joint judgment.

The Court considered that the question of liability depended initially on whether there was a partnership between the respondents and Cheers.<sup>151</sup> If there was, then s. 8 of the Partnership Act invested Cheers with actual authority to act on behalf of the firm.

On the question of the existence of a partnership, the Court focused on three matters.

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<sup>151</sup> Ibid 229.

## DEFINING A PARTNERSHIP: THE TRADITIONAL APPROACH VERSUS AN INNOVATIVE DEPARTURE

First, it held that the mere use in clauses 5 and 6 of the agreement of the expression 'joint venture' was essentially neutral. It did not exclude a partnership in the sense of the Partnership Act, as every such partnership involved a joint venture.<sup>152</sup>

Second, the Court of Appeal addressed the issue of the application of the definition of a partnership under s. 5(1) in the following terms:<sup>153</sup>

Despite the marginal heading to the section<sup>154</sup> s 5(1) savours of a description rather than a definition. What is to be gathered from that provision is that a partnership is a "relation". It is the nature of the relation that is critical. In *Birtchnell v Equity Trustees, Executors & Agency Co.* (1929) 42 CLR 384, 407-8, Dixon J stressed the element of "mutual confidence that the partners will engage in some particular kind of activity or transaction for the joint advantage only". His Honour's statement to that effect corresponds to remarks by James LJ in *Re Agriculturist Cattle Insurance Co., Baird's Case* (1870) LR 5 Ch App 725, 732-33 ( James LJ). A joint venture does not ordinarily exhibit that element of mutual confidence whether to the same extent or at all.

Consequently, the Court considered that it could 'scarcely be doubted that in this case a relation of mutual confidence existed between Cheers and the Defendants, even if, for the latter, it was a confidence that as events turned out, was thoroughly abused by Cheers.'<sup>155</sup>

Third, the Court nonetheless adopted the approach that where the issue is not the parties relations with each other but between themselves and a third party, the requirements of the statutory definition in s 5(1) must be satisfied. It followed that there must be a carrying on in common of a business with a view of profit.<sup>156</sup>

The Court noted that it was not argued that a single venture enterprise was incapable of constituting a 'business', and in fact the parties carried the enterprise beyond the original venture by building a house at another location.<sup>157</sup>

The Court held that a business was being carried on in common having regard to clauses 1, 3 and 6.<sup>158</sup>

The Court considered that the parties also agreed to conduct a business of building the townhouses for profit. They were not, within the meaning of s 6(b) of the

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<sup>152</sup> Ibid 231.

<sup>153</sup> Ibid.

<sup>154</sup> Definition of 'Partnership'.

<sup>155</sup> [1997] 1 Qd R 225, 231.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

*Partnership Act 1891* (Qld), simply sharing 'gross returns', but agreed to share net profits in accordance with s 6(c).<sup>159</sup> The Court noted that whether after the depredations of Cheers, any such profit was ever realised by the defendants did not appear. The Court considered, however, it was enough that they had such profits in view.<sup>160</sup>

The Court held that the requirements of the statutory definition were satisfied. The agreement therefore constituted a partnership between the respondents and Cheers. The result was that under s.8 each partner became the agent of the firm comprising the respondents and Cheers for acts done for the purpose of the partnership business. Cheers therefore had authority conferred by s 8 to bind the respondents.

## **C Decision Of Marshall** <sup>161</sup>

### **1 Parties**

JE Marshall, the first defendant, and his company No limit Pty Ltd, the second defendant, carried out certain building work on the land of the plaintiff, JD Marshall.

### **2 Plaintiff's Claim**

The plaintiff entered into two building contracts. One was with a builder, licensed under the *Queensland Building Services Authority Act 1991* (Qld),<sup>162</sup> for the purchase of a house to be constructed. The other was with the first defendant, an unlicensed builder, and the second defendant for extras in relation to the house. The builders had constructed several homes over a period of two years. The licensed builder performed all the carpentry work as well as supervising the building work generally. The first defendant arranged quotes, materials and subcontractors.

The primary basis of the plaintiff's claim was that she had made payments to the first defendant under a mistake of law in that she believed that the first defendant, as a licensed builder under the QBSA Act, was legally entitled to them whereas as an unlicensed builder he was not so entitled.

The first defendant claimed that he was within an exception under s 42(6) of the QBSA Act in that he was an unlicensed builder who had carried out building work 'in partnership with' a licensed builder.

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<sup>159</sup> These provisions have now been renumbered as s 6(1)(b) and (c).

<sup>160</sup> [1997] 1 Qd R 225, 231.

<sup>161</sup> [1999] 1 Qd R 173.

<sup>162</sup> Hereinafter referred to as the QBSA Act.



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### 3 Decision At First Instance

Hall DCJ found that the first defendant, was not a licensed builder, and therefore, by carrying out the building work, contravened the QBSA Act.<sup>163</sup> Further, he held that because of the QBSA Act<sup>164</sup>, the first defendant was not entitled to any payments for having done the work.<sup>165</sup> Hall DCJ held that in making the payments the plaintiff mistakenly believed that the first defendant was entitled to the payments by law.<sup>166</sup>

Hall DCJ rejected the first defendant's claim that he was protected under s 42(6). He concluded 'that the relationship between the defendant and (the licensed builder) was a loose one, more in the nature of a joint venture'.<sup>167</sup>

Hall DCJ ordered the reimbursement of the payments with a deduction for the true value of the work based on the first defendant's entitlement to recover on a *quantum meruit* basis.

### 4 Appeal Of Defendants

One ground of appeal related to the appellants' contention under s 42(6). It was argued that s 42(6) did not require the existence of a strict partnership known to law but recognised a somewhat looser relationship.

### 5 Decision Of Court of Appeal

The Court of Appeal held that even though the term 'partnership' was not defined in the QBSA Act there was no particular reason why it should not adopt its well established meaning under the Partnership Act. The Court held that there was not a building partnership in existence between the appellants and the licensed builder.

Pincus JA and de Jersey J in a joint judgment considered that the conclusion of the primary judge that the first appellant and the licensed builder were not carrying on a business in partnership was reasonably open for the following reasons:<sup>168</sup>

Strong indications against the existence of a partnership were, as he found, that there was "on no occasion...a real division of profits" (compare s 5(1) Partnership Act), and that neither party was responsible for the other's work (cf. s 12 Partnership Act as to the liability of partners). But all of the considerations to which he referred combined to provide ample warrant for his ultimate conclusion.

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<sup>163</sup> [1999] 1 Qld R 173, 181 referring to the judgment of Hall DCJ.

<sup>164</sup> QBSA Act s 42(3).

<sup>165</sup> [1999] 1 Qld R 173, 181 referring to the judgment of Hall DCJ.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid 182.

The primary judge found that there was no real division of profits because, although the licensed builder was paid a substantial sum in respect of each contract relating to his building licence, 'any accounting between the alleged partners, designed to achieve equality between them, was an act of grace rather than a matter of entitlement as partners'.<sup>169</sup> This was so whether a particular contract resulted in a sale at a significant profit, or a substantial loss.

There were a number of other considerations referred to by the primary judge that Pincus JA and de Jersey J set out in an extract in their joint judgment.<sup>170</sup> First, each of the alleged partners conducted all of their dealings with building industry participants such as suppliers and subcontractors not as a joint entity but in their own individual or trade names. There was no joint banking or trading account with suppliers. Second, there was no partnership name or business address or phone number. Third, there was never a partnership tax return completed.

McPherson JA delivered a separate judgment. One reason for this related to the defence under s 42(6) of the QBSA Act. McPherson JA commenced his judgment on this point with the following relevant statement:<sup>171</sup>

... the essential feature which distinguishes a partnership from other arrangements, such as a joint venture, by which two or more persons carry on business together is the existence of that element of mutual trust and confidence which each partner possesses in the skill, knowledge and integrity of every other partner. See *Re Agriculturist Cattle Insurance Co.(Baird's Case)*(1870) LR 5 Ch App 725, 732-33. As was recognised in that case, the result of the relationship between partners is that each partner is constituted the agent of the other or others for the purpose of carrying on the partnership business. The law was so, long before the Partnership Act of 1891 was enacted.

Mc Pherson JA considered that there was 'no evidence at the trial to suggest that the relationship between the first defendant and (the licensed builder) was such as to constitute them agents for or partners of the other in the business of building.'<sup>172</sup> He considered that this was clear from the extract of findings of the primary judge set out in the reasons of the other members of the Court of Appeal. He concluded that everything pointed 'to the fact that the defendant and (the licensed builder) carried on separate businesses of their own, even though it may be that they often worked in conjunction performing different aspects of the same building jobs.'<sup>173</sup> The evidence

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<sup>169</sup> Ibid 181 referring to the judgment of Hall DCJ.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid 179.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

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of their association fell well short of supporting a carrying on of a business in partnership.<sup>174</sup>

### IV CRITICAL ANALYSIS OF QUEENSLAND APPEAL COURT DECISIONS

This analysis does not seek to impugn the final decision of the appeal court in any of the three cases discussed above on the issue of the existence of a partnership. The writer takes the view that in the first two decisions the appeal court correctly decided that there was a partnership in existence whereas in the third decision it correctly decided that there was no partnership.

The purpose of this part is to critically analyse the reasoning supporting each decision for it is this reasoning that is referred to by other Queensland courts as well as courts in other Australian jurisdictions from time to time. This analysis focuses particularly on the innovative contribution of McPherson JA to the issue of determining whether a relationship constituted by an agreement is or is not a partnership relationship.<sup>175</sup>

#### A Analysis Of 'Mackie'

In '*Mackie*'<sup>176</sup>, Mc Pherson J in the leading judgment in the extract set out earlier in this article adopted an interpretation of s 5(1) that emphasized the 'relation' between alleged partners. He held that the essence of that relation is one of mutual trust and confidence of each partner in every other partner and cited *Re Agriculturist Cattle Insurance Company, Baird's Case*<sup>177</sup> and *Birtchnell v Equity Trustees, Executors and Agency Co. Ltd*<sup>178</sup>. He held that if a relation of that kind is found to exist between persons carrying on a business for profit then a partnership exists between them and cited *United Dominions Corporation Ltd v Brian Pty Ltd*.<sup>179</sup>

Initially, it is useful to consider each of the cases referred to by McPherson J in his judgment.

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<sup>174</sup> Ibid 179-180.

<sup>175</sup> Mc Pherson AJ set out the main tenets of his thesis on the issue of determining whether a relationship constituted by an agreement is or is not a partnership relationship rather than a joint venture in a paper entitled 'Joint Ventures' in PD Finn (ed), *Equity and Commercial Relationships* (1987) 19.

<sup>176</sup> [1989] 2 Qd R 87.

<sup>177</sup> (1870) LR Ch App 725, 732-33. ('*Baird*')

<sup>178</sup> (1929) 42 CLR 384, 407-408. ('*Birtchnell*')

<sup>179</sup> (1985) 157 CLR 1. ('*United Dominions*')

## 1 Case Law Referred To By McPherson J

In *'Baird'*<sup>180</sup> James LJ held that in the case of a joint stock company the executors of a deceased shareholder succeeded to the full liability of their shareholder. Their liability was not limited to debts incurred before the death of the testator unless the deed of settlement excluded or limited that liability. James LJ refused to apply to joint stock companies those principles applicable to ordinary partnerships. James LJ distinguished ordinary partnerships from joint stock companies. He then proceeded to make the following relevant statement:<sup>181</sup>

Ordinary partnerships are by the law assumed and presumed to be based on the mutual trust and confidence of each partner in the skill, knowledge, and integrity of every other partner. As between the partners and the outside world ( whatever may be their private arrangements between themselves), each partner is the unlimited agent of every other in every matter connected with the partnership business, or which he represents as partnership business, and not being in its nature beyond the scope of the partnership. A partner--- may bind the partnership by contracts to any amount---

James LJ considered that as this was 'the relation between partners' a Court would not permit a partner to introduce another as a partner without the consent of all the partners.<sup>182</sup> It was because 'these were the ordinary law and consequences of an ordinary partnership' that joint stock companies came into existence.<sup>183</sup>

In *'Birtchmell'*<sup>184</sup> 3 partners carried on the business of land and estate agents. Two of the partners sued the executor of the third partner, Porter, for an account of profits based on breach of fiduciary duty. A majority of the High Court<sup>185</sup> held that in entering into a particular agreement with a client of the firm Porter had acted in breach of his fiduciary duty and that his estate must account for any profits received under it. It was in this context that Dixon J made the following relevant statement:<sup>186</sup>

The relation between partners is, of course, fiduciary. Indeed, it has been said that a "stronger case of fiduciary relationship cannot be conceived than that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that they are partners in the first instance: it is because they continue to trust one another that the business goes on." - per Bacon VC *Helmore v Smith ( No 1)* 35 Ch D 436 at 444.

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<sup>180</sup> (1870) LR Ch App 725.

<sup>181</sup> Ibid 733.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

<sup>184</sup> (1929) 42 CLR 384.

<sup>185</sup> Isaacs, Rich and Dixon JJ.

<sup>186</sup> (1929) 42 CLR 384, 407-408.

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The relation is based, in some degree, upon a mutual confidence that the partners will engage in some particular kind of activity or transaction for the joint advantage only. In some degree it arises from the very fact that they are associated for such a common end, and are agents for one another in its accomplishment. Lord Blackburn found in this consideration alone sufficient reason for the fiduciary character of the partnership relation- *Cassel v Stewart* 6AC 64 at p79.

In *'United Dominions'*<sup>187</sup> the appellant, United Dominions Corporation Ltd (UDC), the first respondent, Brian Pty Ltd (Brian), and the second respondent, Security Projects Ltd (SPL), were engaged in negotiating a joint venture for the purpose of land development.

Draft joint venture agreements were circulated among the proposed participants.

The participating share of each joint venturer was settled. SPL was the project manager and main participant. UDC was to provide 90% of the project finance. The venture commenced and the prospective participants, including Brian, made financial contributions to SPL for the project. SPL purchased land to be developed. Afterwards, SPL mortgaged that land as security for borrowings from UDC for the proposed joint venture. All this occurred before the joint venture agreement was finalized.

Unknown to Brian, the mortgages executed by SPL on behalf of the joint venturers contained a collateralization clause securing other amounts borrowed by SPL from UDC for purposes unrelated to the joint venture.

A shopping centre was then built on the land and it was sold at a substantial profit. Later, SPL defaulted under the mortgages and was wound up. Brian received neither repayment of its contribution nor payment of its agreed profit share. UDC claimed an entitlement to retain the whole profit because of the collateralization clause in each mortgage executed by SPL since other projects of SPL, that were unconnected with Brian, were unsuccessful.

Brian claimed an account of profits on the basis that each collateralization clause breached the fiduciary duty that UDC owed to it as a joint venturer.

The High Court held that a partnership existed between the joint venturers. Mason, Brennan and Deane JJ in a joint judgment made the following relevant statement:<sup>188</sup>

Under the agreement, the participants were joint venturers in a commercial enterprise with a view to profit. Profits were to be shared. The joint venture

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<sup>187</sup> (1985) 157 CLR 1.

<sup>188</sup> Ibid 11.

property was held upon trust. The participants indemnified the managing participant (SPL) against losses. The policy of the joint enterprise was ultimately a matter for joint decision. Apart from the absence of any reference in the agreement to “partnership” or “partners”, the relationship between the participants under the agreement exhibited all the indicia of, and plainly was, a partnership: cf. *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 at 326-327.

The High Court therefore took the view that the joint venturers were in a fiduciary relationship from when the formal agreement was executed.<sup>189</sup> It held that this fiduciary relationship was not prevented by the limiting of the partnership to one joint undertaking. Mason, Brennan and Deane JJ elaborated as follows:<sup>190</sup>

In such a case, the joint venturers will be under fiduciary duties to one another, including fiduciary duties in relation to property the subject of the joint venture, *which are the ordinary incidents of the partnership relationship*,<sup>191</sup> though those fiduciary duties will be moulded to the character of the particular relationship: see generally *Birtchnell v Equity Trustees, Executors and Agency Co. Ltd* (1929) 42 CLR 384, 407-409.

The High Court then held that UDC stood in a fiduciary relationship to Brian when SPL executed the mortgages in favor of UDC even though no formal joint venture agreement was entered into until after that time. It held that a fiduciary relationship may, and ordinarily will, exist between prospective partners who have already embarked on the partnership business before the precise terms of any partnership agreement have been settled.<sup>192</sup> The relationship between UDC and Brian was based on the same mutual trust and confidence as if a formal partnership deed had been executed.<sup>193</sup> Likewise, the High Court considered that the same principles applied to participants in a proposed partnership to carry out a single joint undertaking.<sup>194</sup>

In applying these principles the High Court held that when SPL gave the first of the mortgages to UDC the arrangements between the participants went far beyond the stage of mere negotiation as they were consistent with the terms of the formal agreement they intended to execute and were therefore done in furtherance of the joint venture.<sup>195</sup> First, each had agreed to be and been accepted as, a participant in any proposed joint venture. Second, each had made or agreed to make financial

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<sup>189</sup> Ibid 11.

<sup>190</sup> Ibid 11.

<sup>191</sup> Emphasis provided by the author.

<sup>192</sup> (1985) 157 CLR 1.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid 12.

<sup>195</sup> (1985) 157 CLR 1, 6-7, 12-13 .

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contributions towards the cost of the project. Third, SPL had embarked upon its duties as manager and was expending monies to advance any proposed joint venture with the knowledge and consent of Brian and UDC. It was acting as agent for the proposed participants and as trustee of those funds with which it had already been entrusted. Fourth, from Brian's perspective, it was a fundamental element of the fiduciary relationship that then existed that the subject land, that was purchased with joint venture funds for joint venture purposes, would be held available for any ensuing joint venture and that Brian, would remain able to participate in the net profits in accordance with its relevant joint venture share.

The High Court held that UDC had acted in breach of its fiduciary duty not to obtain any collateral advantage in relation to the proposed project for itself without the knowledge and informed consent of the other participants. Consequently, it could not rely on the mortgage or the collateralization clause to deny Brian's entitlements under the joint venture agreement.

### 2 Analysis Of The Approach Of McPherson J

'Mackie'<sup>196</sup> involved an action between alleged partners in that the first plaintiff sought an account of profits and a share in partnership goodwill from the first and second defendants. It therefore involved the issue of determining the existence of a partnership as an insider question rather than an outsider question. However, McPherson J did not expressly restrict his approach to interpretation to cases involving an insider question.

The judgment requires critical comment in a number of respects.

First, McPherson J, in adopting an interpretation that emphasized the essence of the relation between partners as one of mutual trust and confidence, did not adopt the traditional approach of the courts to the interpretation of s 5(1).<sup>197</sup> More specifically, he rejected the first and second tenets of this approach that s 5(1) is the legal definition of a partnership and that it is an exhaustive definition. Additionally, McPherson J did not analyse s 5(1) in terms of its essential elements.<sup>198</sup> In particular, McPherson J eschewed reference to case law that emphasized that the 'relation' between partners is one that is contractual in nature<sup>199</sup> and to the requirement of carrying on a business 'in common'.<sup>200</sup>

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<sup>196</sup> [1989] 2 Qd R 87.

<sup>197</sup> See II A *Interpretation Of Section 5 As The Definition Of A Partnership*.

<sup>198</sup> See II B *Analysis Of The Principal Elements Of S5(1)*.

<sup>199</sup> See II B 1 *Relation Which Subsists Between Persons*.

<sup>200</sup> See II B 3 *The Requirement Of Carrying On A Business In Common*.

Curiously though, McPherson J, in holding that there was a relationship of mutual trust and confidence between the first plaintiff and the first and second defendants and therefore a relationship of partnership between them relied upon three key indicia of a partnership that are ordinarily discussed under the requirement of carrying on a business 'in common'. These indicia were that the first plaintiff took an interest in the capital of the business, was in receipt of a share of the profits and took an active part in the management of the partnership business.

Second, McPherson J in adopting an interpretation that emphasized the essence of the relation between partners as one of mutual trust and confidence and citing '*Baird*'<sup>201</sup> and '*Birtchnell*'<sup>202</sup> was clearly referring to the fiduciary relationship existing between partners. In the paragraph cited by McPherson J from '*Baird*'<sup>203</sup> James LJ explained the basis of the fiduciary relationship between partners.<sup>204</sup> In the paragraph cited by McPherson J from '*Birtchnell*'<sup>205</sup> Dixon J provided an even more detailed explanation of the basis of this fiduciary relationship. However, neither of these cases concerned the issue of the existence of a partnership. Further, McPherson J did not cite the rest of the passage from the judgment of James LJ in '*Baird*'.<sup>206</sup> This emphasized another aspect of the 'relation' between partners namely, that each partner is the unlimited agent of every other in all matters connected with the partnership business.

Third, McPherson J adopted the correct approach to the interpretation of partnership legislation in respect of the use that could be made of case law decided prior to its enactment.<sup>207</sup> McPherson J first considered the language of s 5(1). It has already been noted that s 5(1) has generated many problems of interpretation. Consequently, it would be permissible for a court to rely upon case law decided before the enactment of partnership legislation to clarify the legislature's intent. However, McPherson J referred only to '*Baird*'<sup>208</sup> which was decided prior to the commencement date of the *Supreme Court of Judicature Act 1873*. McPherson J disregarded a number of prominent cases relating to the issue of determining the existence of a partnership as an insider

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<sup>201</sup> (1870) LR Ch App 725, 732-33.

<sup>202</sup> (1929) 42 CLR 384, 407-408.

<sup>203</sup> (1870) LR Ch App 725, 732-33.

<sup>204</sup> Fletcher, above n 3, 152.

<sup>205</sup> (1929) 42 CLR 384, 407-408.

<sup>206</sup> (1870) LR Ch App 725, 732-33.

<sup>207</sup> See I A *Interpretation Of Partnership Legislation*.

<sup>208</sup> (1870) LR Ch App 725, 732-33.



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question that were decided after the commencement date of that Act. None of these cases adopted the approach of McPherson J.<sup>209</sup>

Fourth, McPherson J's statement that if a relation of mutual trust and confidence 'is found to exist between persons carrying on a business for profit then a partnership exists between them' based on the decision of *'United Dominions'*<sup>210</sup> is far too simplistic for a number of reasons. Firstly, in that case the High Court found that a partnership existed based on the indicia of a partnership referred to in the passage set out previously.<sup>211</sup> Those indicia did not include a fiduciary relationship. It is very clear that the Court did not first determine that there was mutual trust and confidence between the alleged partners and then decide that a partnership existed.<sup>212</sup> Secondly, the High Court held that there was a fiduciary relationship between the prospective partners based on mutual trust and confidence where they had already embarked on the partnership business before the settlement of the partnership agreement. The factors identified by the Court as establishing this fiduciary relationship were distinct from the indicia of a partnership that it emphasized although the two were not entirely mutually exclusive. Thirdly, the High Court held that the principles that govern whether a fiduciary relationship exists before any joint venture agreement has been settled are the same for prospective partners and prospective joint venturers.<sup>213</sup> Fourthly, it is clear from the other passage previously cited from the joint judgment of the High Court that fiduciary duties 'are the ordinary incidents of the partnership relationship'<sup>214</sup> rather than the essence of it.

### **B Analysis Of 'Whywait'** <sup>215</sup>

*'Whywait'* <sup>216</sup> involved an action where the appellant, a plumbing contractor, claimed against the respondents for work done and materials supplied at two building sites on the basis that they were in a partnership with the person who ordered the work and materials. It therefore involved the issue of determining the existence of a partnership as an outsider question.

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<sup>209</sup> Eg. *Ex parte Tennant. In re Howard* (1877) 6 Ch D 303 (Court of Appeal); *Walker v Hirsch* (1884) 27 Ch D 460 (Court of Appeal); *Alexander Adam v William Newbigging* (1888) 13 HLC 308, 316.(Lord Halsbury LC)

<sup>210</sup> (1985) 157 CLR 1.

<sup>211</sup> See n 188.

<sup>212</sup> RA Ladbury, 'Commentary' in PD Finn (ed), *Equity and Commercial Relationships* (1987) 37, 46.

<sup>213</sup> *Ibid.*

<sup>214</sup> See n 190.

<sup>215</sup> [1997]1 Qd R 225.

<sup>216</sup> *Ibid.*

This analysis comments on the three matters that were the focus of the Court.

As to the first matter, the Court's statement that the use of the expression 'joint venture' did not exclude a partnership is clearly correct in light of the principles outlined earlier regarding clauses in agreements giving a label to a relationship.<sup>217</sup>

As to the second matter, the Court's approach to the interpretation of s 5(1), that emphasized the essence of the relation between partners as one of mutual trust and confidence, clearly reflects the principles put forward by McPherson JA in *Mackie*.<sup>218</sup> It is clear, however, from the remainder of the Court's judgment that this approach is to be restricted to cases involving the issue of determining the existence of a partnership as an insider question.

This part of the Court's judgment requires critical comment in a number of respects.

Firstly, the initial three critical comments made about the Full Court's judgment in *Mackie*<sup>219</sup> also apply here. The fourth critical comment is not relevant because the Court of Appeal did not cite '*United Dominions*.'<sup>220</sup>

Secondly, the Court of Appeal's approach that a joint venture is distinguishable from a partnership because a 'joint venture does not ordinarily exhibit that element of mutual confidence whether to the same extent or at all'<sup>221</sup> is not strictly correct. This is apparent from '*United Dominions*'<sup>222</sup>. In that case the High Court emphasized that joint ventures, unlike partnerships, are not fiduciary relationships *per se*.<sup>223</sup> Nonetheless, the Court took the view that a fiduciary relationship may arise in a joint venture that is not a partnership.<sup>224</sup> Mason, Brennan and Deane JJ in their joint judgment considered that '...whether or not the relationship between joint venturers is fiduciary will depend upon the form which the particular joint venture takes and upon the content of the obligations which the parties to it have undertaken.'<sup>225</sup> They held that there was a fiduciary relationship on the evidence. They considered that it did not matter 'for present purposes, whether that relationship is seen as that which may exist between prospective partners or joint venturers before the terms of any partnership or joint venture agreement have been settled or whether it is seen as a

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<sup>217</sup> 1 C *Clauses Labelling A Relationship*.

<sup>218</sup> [1989] 2 Qd R 87.

<sup>219</sup> *Ibid*.

<sup>220</sup> (1985) 157 CLR 1.

<sup>221</sup> [1997] 1 Qd R 225, 231.

<sup>222</sup> (1985) 157 CLR 1.

<sup>223</sup> *Ibid*. 10,16.

<sup>224</sup> *Ibid*. 10-11, 16.

<sup>225</sup> (1985) 157 CLR 1, 11.

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limited preliminary partnership or joint venture to investigate and explore the possibilities of an ultimate joint venture or ventures.<sup>226</sup>

As to the third matter, where the Court of Appeal adopted the approach that in a case involving an outsider question the essential elements of the statutory definition in s 5(1) must be satisfied, the Court adopted the traditional approach to the interpretation of s 5(1). Undoubtedly, this part of the Court's judgment reflects a balance provided by Macrossan CJ and Pincus JA to the approach adopted by McPherson J in *'Mackie'*.<sup>227</sup> This becomes abundantly clear when the later decision of *'Marshall'*<sup>228</sup> is considered.

In this part of its judgment the Court correctly identified the essential elements of s 5(1). Further, the Court correctly applied those elements to the case before them. It correctly found that there was a 'carrying on business' having regard to the evidence that there was more than one venture. It was clearly cognizant of case law relating to the legal nature of single venture enterprises.<sup>229</sup> The Court correctly found that there was the carrying on of a business of building townhouses 'in common' based upon the relevant clauses in the agreement. It was also open to the Court to adopt the view that the element 'with a view of profit' required that under the agreement there be a purpose of sharing net profits.<sup>230</sup> The Court's reference to the concept of profit as net profit rather than gross trading receipts was clearly correct.<sup>231</sup> It correctly found that this element was met.

Nonetheless, the judgment would have been far stronger if the Court had provided more detailed reasons in relation to the elements of s 5(1). In relation to the element of 'carrying on business', the Court considered only one badge of business<sup>232</sup> in determining whether the ventures were carried out along commercial lines. In relation to a business 'in common', the Court did indicate in an earlier part of its judgment that it was seeking to differentiate between a joint venture and a partnership. However, the Court did not expressly list the indicia of a partnership<sup>233</sup> that it considered were exhibited by this contract. In relation to 'with a view of

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<sup>226</sup> Ibid 13.

<sup>227</sup> [1989] 2 Qd R 87.

<sup>228</sup> [1999] 1 Qd R 173.

<sup>229</sup> See II B 2 (c) *Single Ventures*.

<sup>230</sup> See II B 4 (a) (ii) *Sharing Of Profits As A Requirement Of Partnership*.

<sup>231</sup> See II B 4 (a)(iii) *Meaning Of Profit*

<sup>232</sup> See II B 2 (b) *Badges Of Business*

<sup>233</sup> See II B 3 (iv) *Meaning Of Mutuality Of Rights And Obligations*

profit', the Court did not consider the competing interpretation that only a purpose of profit is required for a partnership relationship to exist.<sup>234</sup>

### C Analysis of 'Marshall'<sup>235</sup>

'Marshall'<sup>236</sup> involved an action where the respondent claimed a sum of money for payments made to the first appellant because being unlicensed he was not legally entitled to them under the QBSA Act. The first appellant claimed that he was entitled to the payments because he was 'in partnership with' a person who was licensed under the QBSA Act. It therefore involved the issue of determining the existence of a partnership as an outsider question.

#### 1 Joint Judgment Of Pincus JA And de Jersey J

Pincus JA and de Jersey J in concluding that it was reasonably open that there was not a carrying on of a business in partnership implicitly adopted the approach that the requirements of the statutory definition in section 5(1) must be satisfied. Where they stated that a strong indication against the existence of a partnership was 'that there was "on no occasion...a real division of profits" (compare s 5(1) Partnership Act)<sup>237</sup> their judgment was clearly referring to the final element of s 5(1) 'with a view to profit'. The other indications they referred to such as the absence of joint liabilities or obligations and the absence of a joint banking or trading account, were implicitly directed to the issue of the indicia of a partnership under the requirement of carrying on a business 'in common'.<sup>238</sup>

The joint judgment would have been far stronger if it had provided more detailed reasons in relation to the elements of s 5(1). First, it made no reference to 'carrying on business' or the badges of business. Second, it made no express reference to carrying on business 'in common'. As part of this discussion the judgment could have indicated that it was seeking to distinguish a partnership from some other kind of relationship such as a joint venture. While it is evident from a passage set out earlier in the joint judgment that the primary judge made this distinction the joint judgment did not specifically approve this part of the passage. Third, the joint judgment implicitly adopted the interpretation that 'with a view to profit' requires 'a real

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<sup>234</sup> See II B 4 (a) (ii) *Sharing Of Profits as a Requirement of Partnership*

<sup>235</sup> [1999] 1 Qd R 173.

<sup>236</sup> Ibid.

<sup>237</sup> Ibid 182.

<sup>238</sup> See II B 3 (iv) *Meaning Of Mutuality Of Rights And Obligations*.

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division of profits'. This is not consistent with either of the interpretations currently adopted by the courts.<sup>239</sup>

### 2 Judgment of McPherson JA

McPherson JA made no specific reference to s 5(1). In emphasizing the element of mutual trust and confidence as 'the essential feature which distinguishes a partnership from other arrangements, such as a joint venture---'<sup>240</sup>, it is clear that he again adopted the interpretation to s 5(1) first advanced in '*Mackie*'<sup>241</sup> and repeated as obiter dicta in '*Whywait*'.<sup>242</sup> In this case McPherson JA extended the operation of this interpretation. He did not limit it to cases involving the issue of determining the existence of a partnership as an insider question as did the Court in '*Whywait*'<sup>243</sup> but directly applied it to a case involving an outsider question.

McPherson JA did, however, make one qualification to his approach to interpretation. He again cited *Baird*<sup>244</sup> but on this occasion he also emphasized the other indicia of the partnership 'relation' outlined by James LJ in his judgment.<sup>245</sup> He emphasized that as between the partners and the outside world each partner is the unlimited agent of the others in carrying on the partnership business. In concluding that the alleged partners carried on separate businesses, he found there was no evidence that constituted the alleged partners 'agents for or partners of the other in the business of building.'<sup>246</sup> He therefore adopted the approach, that in a case involving an outsider question, a partnership is distinguishable from other types of commercial relationships in that it exhibits the essential feature of mutual trust and confidence and the indicia that each partner is constituted the agent of the others in carrying on the partnership business.

The judgment of Mc Pherson JA requires critical comment in addition to those relevant comments already outlined in '*Mackie*'<sup>247</sup> and in '*Whywait*'.<sup>248</sup>

McPherson JA, in holding that there was no relationship of mutual agency or of mutual trust and confidence between the alleged partners emphasized that they were carrying on separate businesses. Under the traditional approach to the interpretation

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<sup>239</sup> See II B 4 (a) (ii) *Sharing Of Profits As A Requirement Of Partnership*.

<sup>240</sup> [1999] 1 Qld R 173,179.

<sup>241</sup> [1989] 2 Qd R 87.

<sup>242</sup> [1997] 1 Qd R 225.

<sup>243</sup> [1997] 1 Qd R 225.

<sup>244</sup> (1870) LR 5 Ch App 725, 733.

<sup>245</sup> See n 181.

<sup>246</sup> [1999] 1 Qd R 173, 179.

<sup>247</sup> [1989] 2 Qd R 87.

<sup>248</sup> [1997] 1 Qd R 225.

of s 5(1), the element of carrying on business 'in common' requires the carrying on of a single business rather than separate businesses.<sup>249</sup> Additionally, and somewhat curiously, McPherson JA relied upon the same evidence that the majority relied upon in their joint judgment to reach his conclusion. This evidence revealed a lack of other key indicia of a partnership such as the absence of joint liabilities or obligations and the absence of a joint banking or trading account.

### **D Relevance Of A Fiduciary Relationship Between Alleged Partners In Determining The Existence Of A Partnership Relationship Under The Traditional Interpretation Of S 5(1)**

In '*Mackie*'<sup>250</sup> and in '*Whywait*'<sup>251</sup> each appeal court adopted an interpretation of s 5(1) that, in a case involving the issue of determining the existence of a partnership as an insider question, the essential feature of a partnership is the existence of mutual trust and confidence which each partner places in the others. In '*Marshall*'<sup>252</sup> McPherson JA applied this same interpretation to a case involving an outsider question.

Earlier in this article, it was suggested that under the traditional approach to the interpretation of s 5(1) the existence of a fiduciary relationship is only one non-essential indicium of the existence of a partnership.<sup>253</sup> This interpretation is borne out by illustrative case law.<sup>254</sup>

In *United Tankers Pty Ltd v Moray Pre-Cast Pty Ltd*,<sup>255</sup> the plaintiff took action against three defendants in respect of the hiring of cranes and the provision of labour to a business with the registered name of Moray Pre-Cast. It was alleged that the third defendant, Sayer, was liable only as a member of a partnership comprising himself and the second defendant, Moran, that existed prior to the incorporation of the first defendant. The case therefore involved the issue of determining the existence of a partnership as an outsider question. Mackenzie J, of the Supreme Court of Queensland, held that an agreement by Sayer, to contribute money to the business to be used as its working capital did not necessarily make him a partner in the business. This was so where, having regard to the remainder of the agreement and the conduct of the parties, the contribution was consistent with Sayer being entitled to an interest in the business once it was incorporated rather than an immediate interest as a

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<sup>249</sup> See II B 3 (a) (i) Single Or Joint Business Required.

<sup>250</sup> [1989] 2 Qd R 87.

<sup>251</sup> [1997] 1 Qd R 225.

<sup>252</sup> Ibid.

<sup>253</sup> See II B 3 (iv) *Meaning Of Mutuality Of Rights And Obligations*

<sup>254</sup> See also *Keith Murphy Pty Ltd v Custon Credit Corporation Ltd* (1992) 6 WAR 332, 338-339.

<sup>255</sup> [1992] 1 Qd R 474.

## DEFINING A PARTNERSHIP: THE TRADITIONAL APPROACH VERSUS AN INNOVATIVE DEPARTURE

partner. Under the remainder of the agreement Sayer was to be entitled to a one-third interest in the company, by virtue of an equal shareholding with the second defendant and another person, and a directorship.<sup>256</sup> Other indicia confirmed that Sayer was not a partner.<sup>257</sup> Firstly, prior to incorporation, Sayer did not take any significant role in the affairs of the partnership business. He was not made a signatory of any partnership bank account. However, after incorporation he was made a signatory of the company's cheque account and on its behalf he went to suppliers seeking to make credit arrangements. Secondly, he did not take any of the benefits of a partner, such as remuneration, while the partners continued to do so. Thirdly, the proposition that the agreement was not workable without there being a fiduciary relationship, that may arise where it is alleged that there is a partnership or joint venture, was not established before the Court.

### CONCLUSION

The issue of whether a relationship constituted by an agreement is a partnership can arise as an outsider question or an insider question.

The general principle traditionally adopted by the courts to determine the existence of a partnership is to ascertain the real intention of the parties from the whole scope of their true agreement. The question whether or not there is a partnership does not depend on any mere label attached to that relationship by the alleged partners.

In determining the existence of a partnership, Australian courts also look specifically to the focal provisions of the relevant partnership legislation equivalent to ss 5 and 6 of the *Partnership Act 1891* (Qld).

The traditional approach of Australian courts to the interpretation of the equivalent of s 5(1) of the *Partnership Act 1891* (Qld) is that it is the legal definition of a partnership and that it is exhaustive. Under this approach, Australian courts determine whether a particular business structure is a partnership by considering it in terms of the 3 essential elements contained in this section.

In applying this traditional approach, Australian courts have adopted different approaches in deciding whether the requirement of a business 'in common' is met. Perhaps the better approach is that this element requires that the parties have accepted some level of mutual rights and obligations as between themselves as regards the business. Persons are partners if the agreement governing their relationship exhibits the indicia or hallmarks of a partnership. The emphasis to be placed on particular indicia may vary as to whether the issue of determining the

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<sup>256</sup> [1992] 1 Qd R 474, 475-76.

<sup>257</sup> *United Tankers Pty Ltd v Moray Pre-Cast Pty Ltd* [1992] 1 Qd R 467, 473, 475.

existence of a partnership is an outsider question or an insider question. However, while these indicia are to be used as a guide as to whether a partnership exists none is decisive. It follows that under the traditional approach, the existence of a fiduciary relationship is only one non-essential indicium of the existence of a partnership. This approach is certainly borne out by illustrative case law. It is also consistent with the principle that fiduciary obligations of partners may be varied or excluded by agreement.

The traditional approach to the interpretation of s 5(1) of the *Partnership Act 1891* (Qld) was adopted by the Court of Appeal in *'Whywait'*<sup>258</sup> and implicitly by the majority of the Court of Appeal in *'Marshall'*.<sup>259</sup> Both of these cases related to an outsider question.

The traditional approach was eschewed by the Full Court in *'Mackie'*<sup>260</sup> and the Court of Appeal in obiter dicta in *'Whywait'*<sup>261</sup> in relation to the issue of determining the existence of a partnership as an insider question. It was also eschewed by McPherson JA in *'Marshall'*<sup>262</sup> in relation to the issue of determining the existence of a partnership as an outsider question. This alternative approach emphasizes the element of mutual trust and confidence as the essential feature which distinguishes a partnership from other arrangements.

It has been noted that before the enactment of partnership legislation there was no authoritative definition of a partnership and that the definition of a partnership in s 5(1) of the *Partnership Act 1891* (Qld) or its equivalent in other Australian jurisdictions is a distillation of the common law. It is suggested that at this point in the history of Australian partnership legislation there needs to be uniformity of approach in the interpretation of this pivotal provision. The traditional approach to the interpretation of this provision provides a uniform approach that is applicable to both outsider questions and insider questions. This uniformity of approach provides protection against Australian courts making inconsistent decisions in this important area of commercial law.

The alternative approach to the interpretation of this pivotal provision championed by McPherson JA is certainly innovative. However, it is not supported by relevant case law or leading text writers. More importantly, it is suggested that there is no reason in principle for this alternative approach to prevail.

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<sup>258</sup> [1997] 1 Qd R 225 .

<sup>259</sup> [1999] 1 Qd R 173 .

<sup>260</sup> [1989] 2 Qd R 87.

<sup>261</sup> [1997] 1 Qd R 225.

<sup>262</sup> [1999] 1 Qd R 173.



## DEFINING A PARTNERSHIP: THE TRADITIONAL APPROACH VERSUS AN INNOVATIVE DEPARTURE

In conclusion, the Queensland Appeal Court decisions discussed in this article do not point to the need for a review of the traditional approach to the interpretation of the definition of a partnership adopted by Australian courts.