No. 843 – SEC v. Howey Co.

1. You voted this way. Mr. Justices Frankfurter and Reed dissented.

2. I have glanced through this very hurriedly, but I did not want to hold it up.

3. The discussion of Congressional intent on page 3 seems to me wrong. I am sure it was not so well known or generally accepted rule as to be a "custom" kind of thing. It seems to me a misapplication of this particular rule of Congressional intent.

4. It is for the SEC and the courts to determine investment contracts as a judicial interpretation. The SEC's interpretation deserves respect. The question here is – was its interpretation right and the CCA's in error.

WHM

SUPREME COURT OF THE UNITED STATES.

NO. 843.—OCTOBER TERM, 1945.

Securities and Exchange Commission, Petitioner, vs. W. J. Howey Company and Howey-in-the-Hills Service, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 20, 1946.]

Mr. Justice FRANKFURTER dissenting.

"Investment contract" is not a term of art; it is a conception dependent upon the circumstances of a particular situation. If this case came before us on a finding authorized by Congress that the facts disclosed an "investment contract" within the general scope of § 2(1) of the Securities Act, 48 Stat. 74, 15 U. S. C. § 77(b) 1, the Securities and Exchange Commission's finding would govern, unless, on the record, it was wholly unsupported. But that is not the case before us. Here the ascertainment of the existence of an "investment contract" had to be made independently by the District Court and it found against its existence. 60 F. Supp. 440. The Circuit Court of Appeals for the Fifth Circuit sustained that finding. 151 F. 2d 714. If respect is to be paid to the wise rule of judicial administration under which this Court does not upset concurrent findings of two lower courts in the ascertainment of facts and the relevant inferences to be drawn from them, this case clearly calls for its application. See *Allen v. Trust Company of Georgia*, 327 U. S. —. For the crucial issue in this case turns on whether the contracts for the land and the contracts for the management of the property were in reality separate agreements or truly separate parts of a single transaction. It is clear from its opinion that the District Court was warranted in its conclusion that the record does not establish the existence of an investment contract:

> ". . . the record in this case shows that not a single sale of citrus grove property was made by the Howey Company during the period involved in this suit, except to purchasers who actually inspected the property before purchasing the same. The record further discloses that no purchaser is required to engage the Service Company to care for his property and that of the fifty-one purchasers acquiring citrus property during this period, only forty-two entered into contracts with the Service Company for the care of the property." 60 F. Supp. at 442.

Simply because other arrangements may have the appearances of this transaction, but are employed as an evasion of the Securities Act, does not mean that the present contracts were evasive. I find nothing in the Securities Act to indicate that Congress meant to bring every innocent transaction within the scope of the Act simply because a perversion of them is covered by the Act.

May 17, 1946

Memorandum to the Conference re No. 843 – S.E.C. v. Howey Co.

I am making the following minor changes in my opinion:

1. The last sentence on page 3 is being changed to read as follows:

> The legal issue in this case turns upon a determination of whether, under the circumstances, the land sales contract and the service contract together constitute an "investment contract" within the meaning of §2(1). An affirmative answer brings into operation the registration requirements of §5(a), provided that such a security is non-exempt under §3 and that the transactions involved are non-exempt under §4.

2. I am changing the second sentence of the second paragraph on page 4 so that the paragraph will begin as follows:

> By including an investment contract within the scope of §2(1) of the Securities Act, Congress was using a term the meaning of which had been crystallized by clear and consistent judicial interpretation. It is therefore reasonable to attach that meaning to the term as used by Congress, especially since such a definition is consistent with the statutory aims.

3. I am adding a new paragraph just before the last one on page 6:

> This conclusion is unaffected by the fact that some purchasers choose not to accept the full offer of an investment contract by declining to enter into a service contract with the respondents. The Securities Act prohibits the offer as well as the sale of unregistered, non-exempt securities._/ Hence it is enough that the respondents merely offer the essential ingredients of an investment contract.
>
> _/ The registration requirements of §5 refer to sales of securities. Section 2(3) defines "sale" to include every "attempt or offer to dispose of" a security for value.

Frank Murphy