

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY**

No. M 128 of 2010

BETWEEN:

**EQUUSCORP PTY LTD (ACN 006 012 344)
(FORMERLY EQUUS FINANCIAL SERVICES LTD)
Appellant**

and

IAN ALEXANDER HAXTON

Respondent

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RESPONDENT'S SUBMISSIONS

PART I: INTERNET CERTIFICATION

1. The respondent certifies that these submissions are in a form suitable for publication on the Internet.

20 **PART II: ISSUES**

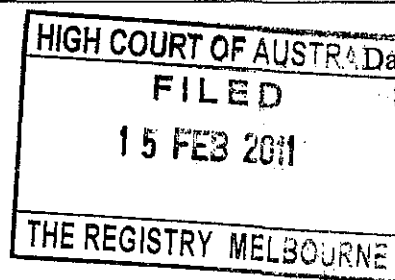
2. The respondent adopts the statement of issues in paragraphs 2 to 5 of the written submissions in appeal M 129 of 2010 (**Bassat Submissions**).
3. In this appeal, there is one additional issue: can a claim for restitution of moneys paid under an illegal contract succeed where the contractual claim for those moneys is statute-barred?

PART III: SECTION 78B NOTICES

4. The respondent certifies that it considers there is no reason for notice to be given to Attorney-Generals in compliance with sec 78B of the *Judiciary Act* 1903 (Cth).

Filed on behalf of the respondent
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PART IV: FACTS

5. The respondent adopts paragraphs 7 to 13 of the Bassat Submissions, but otherwise agrees with the statement of facts in the appellant's written submissions in this appeal.

PART V: APPLICABLE STATUTES

6. The respondent adopts paragraphs 14 and 15 of the Bassat Submissions.

PART VI: ARGUMENT

- 10 7. In this appeal, the principal reason why restitution should be refused is that the contractual claim was statute-barred. In case the respondent requires a notice of contention to raise this point, a draft is attached and the respondent will seek leave to file and rely on it.
8. In this case Byrne, J. held at trial that the appellant's claim in contract was statute-barred by sec 14(1)(a) of the *Limitations Act* 1969 (NSW).¹ The Court of Appeal upheld that holding.² No appeal has been brought from the Court of Appeal on this point. Instead, the appellant seeks to avoid the application of the statute by relying on its own (or at least its assignor's) illegality to found a claim for restitution. The claim for restitution itself is not statute-barred because, if it arose at all, it did so only upon the respondent's assertion by his defence that he was not bound by the contract.³ By the fortuitous circumstance of Rural Finance's non-compliance with the Companies Code, and the further fortuitous circumstance that the respondent asserted that he was not bound by the contract, the appellant says it can recover in restitution what the statute would have barred it from recovering in contract.
- 20 9. That cannot be correct and there are a number of reasons why it is not. First, it is doubtful that the respondent's assertion that he was not bound by the contract had any legal effect. By that time claims under the contract were statute-barred. The statute imposes a substantive, not merely procedural, bar.⁴ To assert, as the respondent did in paragraph 37 of his defence, that the contract was unenforceable against him because

¹ *Equuscorp Pty Ltd v Bassat* (2007) 216 FLR 1 at 32 [118].

² *Haxton v Equuscorp Pty Ltd* (2010) 265 ALR 336 at 349 [62] (Dodds-Streeton, J.A.).

³ There is an interesting question, though it does not arise in this case, whether sec 14(1)(a) bars claims in restitution after 6 years as claims in "quasi contract" as the New South Wales Court of Appeal has held: *Coshott v Lenin* [2007] NSWCA 153.

⁴ Section 63(1) of the *Limitation Act*; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 509 (Dawson J); cf *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1.

of non-compliance with the Companies Code, was therefore superfluous. It had no legal effect and therefore could not have given rise to the claim for restitution which the appellant relies on.⁵

10. Secondly, since the claim in contract could not have been enforced against the respondent when the claim for restitution is alleged to have arisen, it cannot be said that the respondent is bound in equity to repay the moneys to the appellant. At that point, the respondent had no contractual liability to the appellant and so he cannot have been bound in conscience to make the payment.
11. Thirdly, the assimilation by sec 14(1)(a) of the *Limitations Act* of the limitation periods for both contract and quasi contract suggests an intention that time should run concurrently for claims in both contract and restitution. In the normal course this would be so, for example, where a contractual claim was defeated by the statute of frauds but a claim for restitution was nevertheless available.⁶ Because of the unusual circumstance in this case that the claim for restitution did not arise until the filing of defences (if it arose at all), the appellant effectively gets an extension of the limitation period beyond that which applied to the underlying contractual claim.
12. Finally, this is a case in which the contract and the statute of limitations exhaustively cover the parties' liabilities and obligations. There is no gap-filling role for restitutionary principles.⁷ The case is really no different from *Equuscorp Pty Ltd v Bassat* (No M15 of 2010) in which special leave was refused. In that case, the investor had made his first two principal repayments on time and so had the benefit of the non-recourse provision of the contract. Since the contract exhaustively dealt with the parties' rights and liabilities, there was no role for restitution. Here it is the same except only that, in addition to the contract, regard should be had to the statute of limitations.
13. The respondent otherwise relies on the submissions in appeal M 129 of 2010 (*Bassat*).

⁵ At the least, the respondent's illegality defence constituted an alternative basis upon which the respondent relied to avoid the contract and the respondent is free to abandon that basis and rely wholly on the statute of limitations, thus preventing the claim for restitution from arising: see paragraphs 27 and 28 of the second further amended defence at AB 19.

⁶ See *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 233 (Brennan, J.).

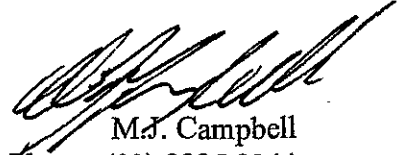
⁷ *Lumbers v W Cook Builders Pty Ltd* (2008) 232 CLR 635; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 545 [75] (Gummow, J.).

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