



## HIGH COURT OF AUSTRALIA

8 March 2012

EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LTD) v  
IAN ALEXANDER HAXTON

EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LTD) v  
ROBERT SAMUEL BASSAT

EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LTD) v  
CUNNINGHAM'S WAREHOUSE SALES PTY LTD

[2012] HCA 7

Today the High Court, by majority, dismissed five appeals from the Court of Appeal of the Supreme Court of Victoria, which had held that Ian Alexander Haxton, Robert Samuel Bassat and Cunningham's Warehouse Sales Pty Ltd ("the respondents") were not liable to repay funds advanced under loans held by Equuscorp Pty Ltd ("Equuscorp"). Equuscorp was not a party to the original loan agreements with the respondents, but was assigned the loan agreements as an arms length financier.

The respondents had invested in tax driven blueberry farming schemes promoted by Anthony and Francis Johnson ("the schemes"), by which members of the public could claim tax deductions for amounts invested in farming enterprises. The farming activities were conducted in north-east New South Wales. Under the schemes, each of the respondents executed a management agreement, by which Johnson Farm Management Pty Ltd, a company controlled by the Johnsons, agreed to perform the respondents' farm maintenance and harvesting obligations for an annual fee. Fees could be prepaid in whole or in part, and it was expected that these fees were tax deductible. Each of the respondents also entered into a loan agreement with Rural Finance Pty Ltd ("Rural"), a company also controlled by the Johnsons, to finance their prepayment of the management fees. Contrary to s 170(1) of the *Companies Code* ("the Code") of each respondent's home State, no valid prospectus in respect of the schemes had been registered when the respondents were offered what was a "prescribed interest" within the meaning of that section.

None of the respondents received any proceeds from the sales of farm produce after 1 July 1991 and no repayments were made in reduction of the loans. In 1995, Equuscorp, which had previously granted loan facilities to the group of companies controlled by the Johnsons, sold the farm land as mortgagee in possession. Rural sold the loan agreements between itself and the respondents to Equuscorp in May 1997, under an asset sale agreement. Pursuant to this agreement, Rural executed a deed assigning to Equuscorp its interests under the loan agreements and the amounts of the debts owing ("the Deed"). The Deed was expressed to include an "absolute assignment" of the legal right to debts and interests under the loan agreements and "all legal and other remedies".

Between November 1997 and March 1998, Equuscorp commenced proceedings against investors, including the respondents, under the loan agreements. Due to the breach of s 170(1) of the Code, the primary judge held that the loan agreements were unenforceable, on account of the illegality of the investment schemes. As an alternative to claiming under the loan agreements, Equuscorp sought restitution of the funds advanced as money had and received. In relation to that claim, the primary judge held that the respondents were liable to make restitution to Rural, and that the Deed assigned to Equuscorp the benefit of the respondents' liability to make restitution. On appeal, the Court of Appeal held that the right to claim for restitution had not been available to Rural and was therefore unavailable to Equuscorp, and, in any event, the Deed did not effectively assign such relief. Equuscorp appealed, by special leave, to the High Court of Australia. The scope of the appeals was limited to the availability of restitution; it was not disputed that the loan agreements were unenforceable for illegality.

The High Court, by majority, dismissed the appeals, with the result that the respondents are not liable to repay Equuscorp the funds advanced under the loan agreements. Equuscorp characterised its claim as arising from a "failure of consideration", contending that Rural had advanced funds under the loans on the basis that the agreements were enforceable. As that state of affairs did not exist, it was contended that the respondents would be unjustly enriched if they did not make restitution. By majority, the High Court rejected this submission, holding that an entitlement to restitution from the respondents would stultify the policy and objects of the Code, being the protection of investors in the position of the respondents. There was therefore no cause of action available for Rural to assign to Equuscorp. The High Court held further that, if Rural had a right to restitution, such a right was capable of being assigned to Equuscorp. The decision of the Court was evenly divided on the question of whether the Deed assigned Equuscorp any right to restitution.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*