HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN, KIEFEL AND BELL JJ

Matter No M128/2010

EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LTD) APPELLANT

AND

IAN ALEXANDER HAXTON RESPONDENT

Matter No M129/2010

EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LTD) APPELLANT

AND

ROBERT SAMUEL BASSAT RESPONDENT

Matter Nos M130/2010, M131/2010 & M132/2010

EQUUSCORP PTY LTD (FORMERLY EQUUS FINANCIAL SERVICES LTD) APPELLANT

AND

CUNNINGHAM'S WAREHOUSE SALES PTY LTD RESPONDENT

Equuscorp Pty Ltd v Haxton
Equuscorp Pty Ltd v Bassat
Equuscorp Pty Ltd v Cunningham's Warehouse Sales Pty Ltd
[2012] HCA 7
8 March 2012
M128/2010, M129/2010, M130/2010, M131/2010 & M132/2010

ORDER

In each appeal, the order of the Court is:

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation

B W Walker SC with R M Peters for the appellant in each matter (instructed by Lander & Rogers Lawyers)

J D Merralls QC with M D Rush for the respondents in M129/2010, M131/2010 and M132/2010 (instructed by Hillhouse Burrough McKeown Pty Ltd)

M R Pearce SC with M J Campbell for the respondents in M128/2010 and M130/2010 (instructed by Hillhouse Burrough McKeown Pty Ltd)

CATCHWORDS

Equuscorp Pty Ltd v Haxton
Equuscorp Pty Ltd v Bassat
Equuscorp Pty Ltd v Cunningham's Warehouse Sales Pty Ltd

Restitution − Restitution of benefits derived from unenforceable or illegal contracts − Recovery of money paid as money had and received − Respondents invested in tax driven blueberry farming schemes − Respondents borrowed funds to pay farm management fees − Each investment a "prescribed interest" under *Companies Code* of each respondent's home State ("Code") − Contrary to s 170(1) of Code, no valid prospectus registered when prescribed interests offered − Farming schemes collapsed − Respondents did not repay loan funds − Loan agreements unenforceable against respondents due to illegality − Whether restitution of loan funds available − Whether failure of consideration − Whether respondents' retention of loan funds unjust.

Personal property − Alienation of personal property − Assignment of choses in action − Assignment of right to restitution − Deed of assignment included assignment of legal right to debts and "all legal and other remedies" − Whether right to restitution capable of assignment − Whether deed of assignment assigned right to restitution.

Words and phrases – "bare right of action", "chose in action", "failure of consideration", "legal and other remedies", "money had and received", "prescribed interest", "unjust enrichment".

Companies Code, ss 170, 174.
Property Law Act 1974 (Q), s 199(1).
Judicature Act 1873 (UK), s 25(6).

FRENCH CJ, CRENNAN AND KIEFEL JJ.

Introduction

1 Equuscorp Pty Ltd ("Equuscorp"), the appellant in these appeals, seeks the assistance of this Court to recover money advanced under loan agreements which were made in furtherance of an illegal purpose. They were an important part of a number of failed tax driven investment schemes in which members of the public were invited to invest in a blueberry farming enterprise ("the schemes"). The attraction for investors was that non-farmers could invest in farming businesses and claim amounts expended on farming enterprises as tax deductions in relation to their non-farming incomes. The invitations to invest in the schemes were made in contravention of the requirements of the law regulating the issue of prescribed interests.

2 Equuscorp was not a party to the loan agreements. They were made by Rural Finance Pty Ltd ("Rural"), which was a member of a group of companies controlled by the promoters of the schemes. Equuscorp, as an arms length financier of the group, took an assignment of the loan agreements from the receivers and managers of Rural after the enterprise collapsed. It sued the investors under the loan agreements. The agreements were found to be unenforceable for illegality, having been made in furtherance of an illegal purpose. Equuscorp claimed in the alternative for restitution of the advances made under the agreements as money had and received.

3 The Court of Appeal of the Supreme Court of Victoria held that the right to claim for restitution had not been available to Rural and, therefore, was not available to Equuscorp and that, in any event, the assignment of the loan agreements did not extend to the right to claim such relief. Equuscorp has appealed to this Court against the decisions of the Court of Appeal in five cases affecting three investors in the schemes. Its argument in support of the appeals involved the following propositions:

(i) That Rural had a right to claim against the respondents for money had and received on account of the receipt by them of advances under the loan agreements notwithstanding the unenforceability of those agreements.

(ii) That if Rural had a right to claim for money had and received, that right could be assigned – this proposition was in answer to notices of contention filed by the respondents asserting that the restitutionary claims were not assignable.

(iii) That, if a cause of action for money had and received as against each of the respondents was assignable, it had been assigned to Equuscorp.

For the reasons that follow the first and third of those propositions fail. The illegality that rendered the loan agreements unenforceable also deprived Rural of the right to claim for money had and received by way of advances under those agreements. The restitutionary rights, had they existed, would have been assignable but on the proper construction of the deed of assignment ("the Deed") were not assigned to Equuscorp. The appeals should be dismissed with costs.

Factual background

4 Each of the respondents invested in the schemes promoted over the course of several financial years during the mid to late 1980s by brothers Anthony and Francis Johnson. The farming activities were conducted on land at Blueberry Hill, between Coffs Harbour and Grafton in the north-east of New South Wales ("the land"). The registered proprietor of the land was Corindi Blueberry Growers Pty Ltd ("CBG") which was controlled by the Johnson brothers. Over the course of time investments were made in the schemes in five separate tranches in June 1987, January 1988, June 1988, March 1989 and May 1989. Each of the respondents in these matters invested in at least one of these tranches. Despite some differences in relevant documentation the schemes contained common elements. They were:

- investors were invited to execute a farm agreement with CBG, whereby each investor acquired rights in respect of a part of the land ("the farm") for a consideration of $1 per annum for six years and 35% of the net profit of the farm for the seventh to 12th years inclusive. The investor was obliged to maintain the plants on its farm and to harvest the blueberry crop;

- to discharge those obligations investors entered into a management agreement with Johnson Farm Management Pty Ltd ("JFM") which would perform the investor's maintenance and harvesting obligations for an annual fee fixed for the first six years and thereafter calculated on a recovery plus profit-share basis. JFM, like CBG, was controlled by the Johnson brothers[1]. Fees could be prepaid in whole or in part. Prepayment attracted a discount and it was expected that management fees were tax deductible expenditure;

---

1 Francis Johnson ceased formally to be a director of JFM on 24 June 1988. However, the litigation was conducted on the agreed basis that the Johnson brothers controlled all relevant companies at all material times.

- investors could, at their option, enter into a loan agreement with Rural whereby Rural would finance the investor's prepayment of management fees to JFM under the relevant management agreement;

- each investor also entered into a sale agreement with another company controlled by the Johnson brothers, Kathleen Drive Stone Fruit Growers Syndicate No 1 Pty Ltd ("the buyer"), whereby the first five years' produce from the blueberry farms was presold to the buyer at a guaranteed price.

The schemes were designed so that – upon entering into a farm agreement, a management agreement, a loan agreement and a sale agreement, each with a counterparty controlled by the Johnson brothers – an investor obtained an interest in a blueberry farm and the blueberry farming business, with the hope of future profits and capital appreciation, together with the immediate benefit of a significant tax deduction which could be claimed against non-farming income.

5 The loan agreements, each of which was for a term of years[2], contained similar elements but also varied between the schemes in important respects. The relevant elements may be summarised as follows:

- in each case the investor was required to make two initial repayments of capital, three and six months from the date of execution of the agreement;

- each of the loan agreements, except that used for the 1988-1989 year, contained a non-recourse provision such that if the investor made the initial payments Rural's right to repayment of the balance would be met only by recourse to the proceeds of fruit sales. The non-recourse provision was conditioned upon compliance with certain terms, such as making the initial payments by the due date;

- the loan agreements each authorised the buyer to pay the proceeds of the sale of fruit to Rural;

- each loan agreement contained a provision charging the investor's interest in the farm, or the net proceeds of the farm, as security for the repayment by the investor of the principal and interest due to Rural under the loan agreement ("Investor Charge"). Each investor was required, on request, to

---

2 Five years in the case of each loan agreement, save for that used in the January 1988 scheme, for which the term was six years.

execute a mortgage, charge or crop lien over the investor's interest in the farm ("Investor Mortgage"); and

- the loan agreements used in June 1988 and in 1988-1989 included an acceleration provision which made the balance of the loan and interest immediately due and payable upon a default in payment of the principal or interest. The acceleration provision was not present in the forms of loan agreements used for the other schemes.

6 The making of the loans followed a familiar and circular path. Rural would draw a cheque on its bank account payable to the investor for the amount of the investor's prepayment to JFM. The investor was directed to endorse the cheque in favour of JFM in performance of the investor's prepayment election. JFM would then bank the cheque into Rural's bank account[3]. None of the investors who are respondents to these appeals gave Rural an Investor Mortgage. The respondents to these appeals, other than Mr Bassat, did not make the initial repayments on time. In those loan agreements which contained a non-recourse provision, that provision was not engaged. The acceleration provision was engaged[4].

7 The collapse of the schemes was preceded on 7 January 1991 by the grant by CBG to Equuscorp of a registered mortgage over the land. The mortgage covered each of the respondents' farms. Three days later Equuscorp registered charges over the assets of CBG, JFM, the buyer and Rural in order to secure a grant of loan facilities to companies in the Johnson group[5]. None of the investors received any proceeds from the sales of fruit after 1 July 1991 and no repayments were made in reduction of the loans[6].

---

3 *Equuscorp Pty Ltd v Bassat* (2007) 216 FLR 1 at 34 [129], 35 [135]. It was not suggested that the round robin nature of the payments associated with the loan agreements meant that they were shams or had not involved the payment of "real money": see *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at 486-488 [46]-[54]; [2004] HCA 55.

4 (2007) 216 FLR 1 at 12 [43], 13 [48], 31 [116]; *Haxton v Equuscorp Pty Ltd* (2010) 265 ALR 336 at 397-400 [335]-[349].

5 (2007) 216 FLR 1 at 4 [7]; (2010) 265 ALR 336 at 345 [34].

6 (2007) 216 FLR 1 at 7 [24]; (2010) 265 ALR 336 at 345 [35].

8 In the exercise of its powers under the various charges which it held, Equuscorp appointed receivers and managers to the assets of Rural[7], JFM, CBG and the buyer[8]. Equuscorp sold the land as mortgagee in possession in October 1995[9]. In so doing it acted under its own mortgage and mortgages in favour of the State Bank of New South Wales which had been assigned to it. Rural did not take any action under any of the Investor Charges. The charge it had granted to Equuscorp barred it from doing so[10]. Rural was wound up by resolution of its creditors on 6 March 1996[11].

9 On 16 May 1997 by an asset sale agreement Rural sold the loan agreements between itself and the investors to Equuscorp. Pursuant to the agreement, Rural executed the Deed assigning its interests under the loan agreements to Equuscorp and the amounts of the debts owing thereunder. The investors were given written notices of the assignment in November 1997. Between November 1997 and March 1998 Equuscorp commenced proceedings against the investors.

10 It was not in dispute on these appeals that the loan agreements were unenforceable on account of the illegality of the schemes. Contrary to s 170(1) of the *Companies Code* ("the Code") of each investor's home State, no prospectus, or valid prospectus, had been registered when the investors were offered what was a "prescribed interest" within the meaning of that section.

Procedural history

11 Equuscorp commenced proceedings against each of the respondents in the Supreme Court of Victoria. Its claims were for "loss and damage" for breach of the loan agreements and for money had and received. The respondents relied upon statutory time limitations in respect of those loan agreements which had acceleration provisions which had been engaged ("the limitation defence"). They also raised the defence of illegality ("the illegality defence") based on the contraventions of the Code by the schemes' promoters. In answer to the claims for money had and received, the respondents contended generally that restitution

---

7 On 29 August 1991: (2007) 216 FLR 1 at 4 [7]; (2010) 265 ALR 336 at 345 [33].

8 On 14 March 1993: (2007) 216 FLR 1 at 4 [7]; (2010) 265 ALR 336 at 345 [33].

9 (2010) 265 ALR 336 at 345 [36].

10 (2010) 265 ALR 336 at 345 [38].

11 (2007) 216 FLR 1 at 4 [7]; (2010) 265 ALR 336 at 345 [33].

was not an available remedy and in particular that they had not been enriched except to the extent of the tax benefits derived from the schemes such that in all the circumstances it would not be unjust for them to retain the balance of the amounts loaned ("the restitution defence"). They also contended that the causes of action were not assignable ("the assignability defence") and that, as a matter of the proper construction of the Deed, had not been assigned ("the assignment defence"). The primary judge, Byrne J, held that the invitation to each of the respondents to invest in the schemes had involved a breach of s 170(1) of the Code. Equuscorp conceded before his Honour that, if that were the case, the agreements entered into by the respondents for the acquisition of their interests would be illegal and unenforceable as against the respondents[12].

12 The primary judge held:

- The limitation defence succeeded in those cases in which the acceleration provision had been enlivened[13].

- The illegality defence succeeded – the loan agreements were all unenforceable on the ground of illegality[14]. This was on the stated basis that, although "technically severable" from the other agreements, the loan agreements would not have been offered to the respondents except as "part of the scheme". The parties could not be taken to have intended that the loan agreements would stand when the rest of the scheme fell away[15].

- The restitution defence, based on the argument that a failure to repay the loan was not in all the circumstances unjust, succeeded where the loan agreement contained a non-recourse provision[16].

- As to the restitution defence, the provisions of the Code did not preclude the claims for money had and received[17]. Rural had had a right to make

---

12 (2007) 216 FLR 1 at 27 [100].

13 (2007) 216 FLR 1 at 30-32 [114]-[118].

14 (2007) 216 FLR 1 at 26-30 [95]-[113].

15 (2007) 216 FLR 1 at 29-30 [112]; *Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394 at 412 per Kirby P, 443-445 per McHugh JA; *Australian Breeders Co-operative Society Ltd v Jones* (1997) 150 ALR 488 at 538-540 per Wilcox and Lindgren JJ.

16 (2007) 216 FLR 1 at 38 [144], [146].

17 (2007) 216 FLR 1 at 37 [140]-[141].

such claims except in those cases in which the terms of the loan agreement itself, eg a non-recourse provision, had the effect that the principal would not have been repayable by the investor[18].

- The assignment defence failed – where restitutionary relief was available to Rural, the right to claim such relief had been assigned under the Deed[19].

- The primary judge did not deal with the assignability defence.

13 The Court of Appeal rejected the assignability defence[20] but upheld the restitution[21] and assignment[22] defences. In the result, following the decision of the Court of Appeal, the position of the three respondents in the five appeals to this Court was as follows:

Respondent	**Scheme**	**Non-recourse Provision**	**Acceleration Provision**	**Statute Barred**	**Whether Restitution Ordered**
Haxton	1988-1989	No	Yes	Yes	Ordered by Byrne J but reversed by Court of Appeal
Bassat	1988-1989	No	Yes	No	Ordered by Byrne J but reversed by Court of Appeal
CWS	June 1988	Yes	Yes	Yes	No
CWS	1986-1987	Yes	No	No	No
CWS	January 1988	Yes	No	No	No

---

18 (2007) 216 FLR 1 at 38-39 [146]-[150].

19 (2007) 216 FLR 1 at 33 [127].

20 (2010) 265 ALR 336 at 338 [1] per Ashley JA, 339 [2], 340 [9] per Neave JA, 386-392 [274]-[310] per Dodds-Streeton JA.

21 (2010) 265 ALR 336 at 356-385 [102]-[271] per Dodds-Streeton JA.

22 (2010) 265 ALR 336 at 392-397 [311]-[329] per Dodds-Streeton JA.

14 On 3 September 2010, Equuscorp was granted special leave to appeal against the decisions of the Court of Appeal in relation to the three respondents.

Grounds of appeal and notices of contention

15 By its grounds of appeal in each case, Equuscorp contended that the Court of Appeal erred in holding:

- that Rural did not have a prima facie entitlement to restitution from the respondents of the amounts advanced pursuant to the unenforceable loan agreements;

- that it was not unjust to allow the respondents to retain the balance of the amounts advanced by Rural pursuant to the unenforceable loan agreements; and

- that the Deed did not assign to Equuscorp any rights or remedies of Rural based on restitution to recover from the respondents the amounts advanced pursuant to the unenforceable loan agreements.

16 By notice of contention, each of the respondents asserted that the restitution claims were not capable of assignment at law. In addition, Haxton and Cunningham's Warehouse Sales Pty Ltd ("CWS") in matter number 130/2010 contended that the Court of Appeal should have held that the claim for money had and received under the contract could not be made when the contractual claim for repayment of the money was barred by s 14(1)(a) of the *Limitation Act* 1969 (NSW).

The asset sale agreement

17 The asset sale agreement, which was dated 16 May 1997, was made between Rural by its receivers and managers and Equuscorp. The "Asset" the subject of the sale was defined in the agreement as:

> "The investor loans regarding the Blueberry Project at Corindi, NSW more particularly described in Annexure 'A' being loans between RURAL FINANCE PTY LTD ACN 008 584 638 (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) and others."

The total purchase price was $500,000 excluding a deduction for collections since 1 April 1997. The face value of the debts under the loan agreements, as found by the primary judge, was $52,584,005[23].

18 By cl 3 of the agreement it was provided that:

> "On Completion the Vendor shall sell or assign as sole beneficial owner, and the Purchaser shall purchase or take an assignment of, the Asset for the Total Purchase Price and upon and subject to the terms of this Agreement. If the Asset is a book debts [sic] or rights of actions [sic], the Purchaser will render to the Vendor no less than seven days before Completion Date a Bare Assignment of the book debts or rights of action together with Notices of Transfer addressed to the relevant debtor for approval and execution by the Vendor."

Clause 13 provided that the agreement should be governed by, and be construed in accordance with, the laws of Queensland for the time being in force. The parties also agreed, by cl 13, to submit to the non-exclusive jurisdiction of the courts of Queensland.

The Deed

19 The Deed was executed between Rural as assignor and Equuscorp as assignee. Recital A to the Deed referred to persons or corporations identified, in the schedule to the Deed, as borrowers, under investor loans, indebted to Rural in amounts set out in the schedule. The amounts were defined as "debts" for the purposes of the agreement.

20 The operative part of the Deed provided:

> "1. Pursuant to clause 5.2(a) of the Asset Sale Agreement, Rural, as legal and beneficial owner, hereby sells, assigns, transfers and sets over the debts, its interests under the loan contracts, its interests under the guarantees and its interests under the securities, free from all encumbrances to Equus and all interest due and becoming due on the debts for Equus to hold absolutely ('the assignment').
>
> 2. The assignment is an absolute assignment intended to take effect immediately as a legal assignment of, inter alia,

---

23 (2007) 216 FLR 1 at 4 [8].

(a) the legal right to such debts, interests under the guarantors [sic] and its interests under the securities and all interest due and becoming due on the debts.

(b) all legal and other remedies for these matters in the preceding sub-paragraph (a).

(c) the power to give good discharge for those matters referred to in sub-paragraph (a) without the concurrence of Rural."

Illegality and the Code

21 Section 170(1) of the Code and associated provisions underpinned the finding by the primary judge that the loan agreements were unenforceable for illegality. Section 170(1) appeared in Div 6 of Pt IV of the Code at the time that the schemes were entered into and provided:

> "A company or an agent of a company shall not issue to the public, offer to the public for subscription or purchase, or invite the public to subscribe for or purchase, any prescribed interest unless a statement in writing in relation to that prescribed interest has been registered by the Commission under Division 1."

The "statement" was required to set out "prescribed matters" including extensive information about the relevant investment[24]. Section 174(1) provided, inter alia, that a person shall not contravene or fail to comply with a provision of s 170 and imposed a penalty of $20,000 or imprisonment for five years or both. Section 174(2) provided:

> "A person is not relieved from any liability to any holder of a prescribed interest by reason of any contravention of, or failure to comply with, a provision of this Division."

It was not an offence against the Code to take up a prescribed interest which was issued or offered to the public or the subject of an invitation to the public in contravention of s 170(1).

---

24 Code, s 170(4). The "prescribed matters" were prescribed by reg 51 of the Companies Regulations and listed in Pt 1 of Sched 6 to those Regulations. Part 2 of Sched 6 set out reports to be included in the statement.

22 Division 6 of Pt IV of the Code entitled "Prescribed interests" (ss 164-177) was a descendant of s 10 of the *Companies Act* 1955 (Vic)[25]. Section 10 later became s 63 of the *Companies Act* 1958 (Vic). That section and associated provisions were reflected in Div 5 of Pt IV of the *Uniform Companies Acts* and the Seventh Schedule to those Acts. The immediate predecessor of s 170 of the Code was s 82 of the *Uniform Companies Acts*. Their policy was obvious enough. It was to protect members of the public by requiring prior disclosure of information relevant to their investment decisions[26]. Provisions of that kind have a long lineage in corporate regulation[27].

23 The effect of the prescribed interest provisions on agreements associated with the issue of such interests in contravention of the Code was primarily a matter of statutory construction, but also involved the application of the common law. As appears from the joint judgment in this Court in *Miller v Miller*[28], and the decisions of this Court cited in that judgment, an agreement may be unenforceable for statutory illegality where:

(i) the making of the agreement or the doing of an act essential to its formation is expressly prohibited absolutely or conditionally by the statute[29];

---

25 Enacted to implement a recommendation of the Statute Law Revision Committee of the Victorian Parliament in a report delivered in October 1954.

26 *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201 at 210 per Mason ACJ, Wilson, Deane and Dawson JJ; [1985] HCA 64; *Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394 at 402 per Kirby P, 421 per Mahoney JA.

27 *Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394 at 421 per Mahoney JA.

28 (2011) 242 CLR 446 at 458 [26]; [2011] HCA 9.

29 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 423 per Mason J, Aickin J agreeing at 436; [1978] HCA 42; *Nelson v Nelson* (1995) 184 CLR 538 at 552 per Deane and Gummow JJ; [1995] HCA 25.

(ii) the making of the agreement is impliedly prohibited by statute[30]. A particular case of an implied prohibition arises where the agreement is to do an act the doing of which is prohibited by the statute[31];

(iii) the agreement is not expressly or impliedly prohibited by a statute but is treated by the courts as unenforceable because it is a "contract associated with or in the furtherance of illegal purposes"[32].

In the third category of case, the court acts to uphold the policy of the law, which may make the agreement unenforceable. That policy does not impose the sanction of unenforceability on every agreement associated with or made in furtherance of illegal purposes. The court must discern from the scope and purpose of the relevant statute "whether the legislative purpose will be fulfilled without regarding the contract or the trust as void and unenforceable."[33] As in the case when a plaintiff sues another for damages sustained in the course of or as a result of illegal conduct of the plaintiff, "the central policy consideration at stake is the coherence of the law."[34]

24 The making of the loan agreements was not expressly prohibited by the Code. The primary judge did not discuss in his reasons whether their making was impliedly prohibited. There was evidently no submission before his Honour that the making of the loan agreements was prohibited as conduct by Rural making it liable as an accessory to primary contraventions of the Code[35]. It

---

30 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 423 per Mason J.

31 *Nelson v Nelson* (1995) 184 CLR 538 at 552 per Deane and Gummow JJ.

32 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 432 per Jacobs J; *Nelson v Nelson* (1995) 184 CLR 538 at 552 per Deane and Gummow JJ.

33 *Miller v Miller* (2011) 242 CLR 446 at 459 [27].

34 *Miller v Miller* (2011) 242 CLR 446 at 454 [15].

35 Section 38(1) of the *Interpretation Code*, introduced, for the Australian Capital Territory, by the *Companies and Securities (Interpretation and Miscellaneous Provisions) Act* 1980 (Cth) and adopted by the States and Territories, provided:

> "A person who aids, abets, counsels or procures, or by act or omission is in any way directly or indirectly knowingly concerned in or party to, the

(Footnote continues on next page)

appears that the primary judge held the loan agreements to be unenforceable as against the respondents on the common law ground that they were made in furtherance of an illegal purpose. The precise basis of their unenforceability was not further explored in the Court of Appeal.

25 In *Nelson v Nelson*, Deane and Gummow JJ observed, in relation to contracts associated with or in furtherance of illegal purposes, that[36]:

> "[t]he formulation of the appropriate public policy in this class of case may more readily accommodate equitable doctrines and remedies and restitutionary money claims than is possible where the making of the contract offends an express or implied statutory prohibition." (footnote omitted)

That observation involves the rejection of any inflexible or rigid rule excluding non-contractual claims in cases involving contracts unenforceable for illegality. In this case, the answer to the question whether it would have been open to Rural to pursue claims for money had and received under the loan agreements depends upon a number of factors but critically upon whether vindication of those claims would have frustrated or defeated, or have been inconsistent with, the statutory purpose of the provisions of the Code relating to the issue of prescribed interests. The requirement of coherence in this area of the law is not satisfied by the mere exclusion of an implied legislative intention to render unenforceable a contract made in furtherance of a contravening purpose. Unenforceability flows from the application of the common law informed, inter alia, by the scope and purpose of the relevant statute.

Whether restitutionary relief was available

26 Equuscorp's restitutionary claims, as argued in this Court, depended entirely upon the unenforceability of the loan agreements. Had the agreements been enforceable, it is unlikely that the restitutionary claims could have been brought[37].

> commission of an offence against any relevant Code shall be deemed to have committed that offence and is punishable accordingly."

36 *Nelson v Nelson* (1995) 184 CLR 538 at 552.

37 Relief may be granted in respect of benefits provided under an existing contract depending upon how the claim fits with the contract: *Lumbers v W Cook Builders Pty Ltd (In liq)* (2008) 232 CLR 635 at 663 [79] per Gummow, Hayne, Crennan and Kiefel JJ; [2008] HCA 27 and see *Roxborough v Rothmans of Pall Mall*

(Footnote continues on next page)

27 The loan agreements were unenforceable because they were made in furtherance of an illegal purpose. That conclusion was not challenged in the Court of Appeal nor in this Court. The policy considerations informing the common law, discussed earlier in these reasons, must be taken to have required that conclusion. The question that follows is how the common law would have affected Rural's right to pursue restitutionary relief.

28 Equuscorp based its claims for money had and received on what it said was a "total failure of consideration". It submitted that Rural had advanced money under the loan agreements on the basis that they were enforceable. That was a state of affairs, it was argued, which was always unsustainable. As a result, the respondents were unjustly enriched. The argument directs attention to the nature of the claim for money had and received and its interaction with the common law relating to illegal transactions.

29 The claim for money had and received was an offshoot of the old form of action of indebitatus assumpsit which, by the 17th century, had superseded the action of debt[38]. The requirement of a promise to fit the claim within the old writs led to the creation of what Lord Atkin described as "fantastic resemblances of contracts … in order to meet requirements of the law as to forms of action"[39]. So the action came to be thought of as resting upon an implied contract. The implied contract theory was rejected in Australia by this Court in *Pavey & Matthews Pty Ltd v Paul*[40] as "but a reflection of the influence of discarded fictions"[41]. It was rejected in England in *Westdeutsche Landesbank Girozentrale*

Australia Ltd (2001) 208 CLR 516 at 558 [108] per Gummow J; [2001] HCA 68, a case in which there was no relevant contractual remedy. See also *Steele v Tardiani* (1946) 72 CLR 386 at 402 per Dixon J; [1946] HCA 21.

38 Stoljar, "The Doctrine of Failure of Consideration", (1959) 75 *Law Quarterly Review* 53 at 55.

39 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 29 and see *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 63 per Lord Wright.

40 (1987) 162 CLR 221 at 227 per Mason and Wilson JJ, 246-257 per Deane J; [1987] HCA 5.

41 (1987) 162 CLR 221 at 256 per Deane J.

v Islington London Borough Council[42]. It came to be displaced by the concept of unjust enrichment[43]. Unjust enrichment was described by Deane J in *Pavey & Matthews*[44] as:

> "a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case".

It is not a "definitive legal principle according to its own terms"[45]. Nor was it such when first propounded in legal scholarship. It was[46]:

> "an *ex post facto* explanation of decisions that had already been reached, an organisational category separate from contract. The substance of the law still had to be found in its concrete emanations".

30 In *David Securities Pty Ltd v Commonwealth Bank of Australia*[47], this Court explained the part played by unjust enrichment in a claim for money had and received (in that case for recovery of a payment made under mistake of law). That explanation may be expressed, at a fairly high level of abstraction, as an approach to determining such claims. In summary:

---

42 [1996] AC 669 at 710 per Lord Browne-Wilkinson. See also *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] AC 561 at 603-604 [107] per Lord Nicholls of Birkenhead.

43 *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673; [1988] HCA 17.

44 (1987) 162 CLR 221 at 256-257.

45 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 156 [151]; [2007] HCA 22, quoting *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 378-379 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; [1992] HCA 48.

46 Ibbetson, "Unjust Enrichment in English Law", in Schrage (ed), *Unjust Enrichment and the Law of Contract*, (2001) 33 at 46.

47 (1992) 175 CLR 353.

- recovery depends upon enrichment of the defendant by reason of one or more recognised classes of "qualifying or vitiating" factors;

- the category of case must involve a qualifying or vitiating factor such as mistake, duress, illegality or failure of consideration, by reason of which the enrichment of the defendant is treated by the law as unjust;

- unjust enrichment so identified gives rise to a prima facie obligation to make restitution;

- the prima facie liability can be displaced by circumstances which the law recognises would make an order for restitution unjust.

Unjust enrichment therefore has a taxonomical function referring to categories of cases in which the law allows recovery by one person of a benefit retained by another. In that aspect, it does not found or reflect any "all-embracing theory of restitutionary rights and remedies"[48]. It does not, however, exclude the emergence of novel occasions of unjust enrichment supporting claims for restitutionary relief. It has been said of Lord Mansfield's judgment in *Moses v Macferlan*[49] that it was his view that "the grounds for obtaining relief in money had and received were not to be considered static and the remedy could be made available in any case in which money had been paid in circumstances where it was unjust for the defendant to retain it."[50] Nor is the emergence of general principle precluded when "derived from judicial decisions upon particular instances"[51]. These appeals, however, focus upon the particular category of case involving "failure of consideration".

---

48 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 544 [72] per Gummow J.

49 (1760) 2 Burr 1005 [97 ER 676].

50 Maddaugh and McCamus, *The Law of Restitution*, 2nd ed (2004) at 82 and see *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 553 [95] per Gummow J.

51 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 158 [154], quoting Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 544 [72].

31 Failure of consideration is one of the factors that makes retention of a benefit prima facie unjust. It was recognised by Lord Mansfield[52] as a ground for a claim for money had and received. It was a criterion of recoverability which survived the rejection in the United Kingdom and Australia of the implied contract theory. This Court has, on more than one occasion, described failure of consideration in terms set out by the late Professor Birks[53]:

> "Failure of the consideration for a payment … means that the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself."

32 As Gummow J pointed out in *Roxborough v Rothmans of Pall Mall Australia Ltd*[54], failure of consideration for the purpose of a claim for money had and received is not confined by contractual principles[55]. In that case there had been no failure of performance by Rothmans of any promise it had made. There was no question of repudiation by it of its contractual obligations. The question was whether it was "unconscionable" for Rothmans as the recipient of payments to retain them in circumstances in which it was not specifically intended or especially provided that it should so enjoy them[56]. The question of unconscionability, as his Honour explained, derived from the general equitable notions which found expression in the common law count for money had and received[57]. This Court acknowledged in *Australia and New Zealand Banking*

---

52 *Moses v Macferlan* (1760) 2 Burr 1005 at 1012 [97 ER 676 at 681].

53 Birks, *An Introduction to the Law of Restitution*, rev ed (1989) at 223 and see *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 382; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 389 per McHugh J; [1993] HCA 4; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 525 [16] per Gleeson CJ, Gaudron and Hayne JJ, 557 [104] per Gummow J.

54 (2001) 208 CLR 516.

55 (2001) 208 CLR 516 at 556-557 [103]-[104].

56 (2001) 208 CLR 516 at 557 [104]. The terminology of "conscientious" and "unconscionable", in relation to retention of a benefit, also appeared in the joint judgment of Gleeson CJ, Gaudron and Hayne JJ at 528-529 [23]-[24].

57 (2001) 208 CLR 516 at 555 [100], referring to *Muschinski v Dodds* (1985) 160 CLR 583 at 619-620 per Deane J; [1985] HCA 78.

Group Ltd v Westpac Banking Corporation[58] that "contemporary legal principles of restitution or unjust enrichment can be equated with seminal equitable notions of good conscience" albeit the action itself is not for the enforcement of a trust. The reference to conscionability in this context, however, does not mean that whether enrichment is unjust is to be determined by reference to a subjective evaluation of what is fair or unconscionable. As the Court reiterated in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[59]:

> "recovery rather depends on the existence of a qualifying or vitiating factor falling into some particular category." (footnote omitted)

33 Failure of consideration as a basis for a claim for money had and received may arise from a number of causes. One cause is illegality. Where a payment is made under a contract which is unenforceable for illegality, the unenforceability of the agreement may constitute a failure of consideration which is capable of supporting a claim for recovery of the payment. It is not necessary for present purposes to expatiate upon the concept of "total failure of consideration" debated in the submissions to this Court, its amelioration by the concept of apportionment of consideration and the question whether "total failure of consideration", however understood, is necessary to a claim for money had and received based upon failure of consideration[60]. What is important for present purposes is the interaction between the foundation for the claims for money had and received in this case and the policy of the common law which renders unenforceable an agreement made for the furtherance of an illegal purpose.

34 The outcome of a restitutionary claim for benefits received under a contract which is unenforceable for illegality, will depend upon whether it would be unjust for the recipient of a benefit under the contract to retain that benefit. There is no one-size-fits-all answer to the question of recoverability. As with the question of recoverability under a contract affected by illegality the outcome of the claim will depend upon the scope and purpose of the relevant statute. The central policy consideration at stake, as this Court said in *Miller*, is the coherence of the law. In that context it will be relevant that the statutory purpose is

---

58 (1988) 164 CLR 662 at 673.

59 (2007) 230 CLR 89 at 156 [150] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ.

60 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 382-383 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 557-558 [105]-[107] per Gummow J.

protective of a class of persons from whom the claimant seeks recovery. Also relevant will be the position of the claimant and whether it is an innocent party or involved in the illegality.

35 Much judicial and academic ink has been spilt on this topic, which exercised the minds of Roman jurists in the days of the Republic[61]. It elicited the cri de coeur of Lord Chief Justice Wilmot in 1767, "no polluted hand shall touch the pure fountains of justice"[62], and the more temperate offering of Lord Mansfield, who wrote of a plaintiff's need to "draw [his] remedy from pure fountains."[63]

36 The importance of policy in determining the effect of illegality upon a restitutionary claim was central to Lord Mansfield's observation in *Holman v Johnson*[64]:

> "It is not for [the defendant's] sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say."

There were often compelling policy arguments on both sides. In listing reasons for and against the grant of relief in relation to illegal transactions, Professor John Wade, writing in the *Texas Law Review* in 1946, said that[65]:

> "The balancing process … leaves on one side the view that a court should not help a man who has engaged in an illegal transaction out of the predicament in which he has placed himself, and on the other the view that a court should not permit unjust enrichment of one person at the expense of another. Of these two arguments, each of which seems most nearly

---

61 Grodecki, "In Pari Delicto Potior est Conditio Defendentis", (1955) 71 *Law Quarterly Review* 254 at 254-256.

62 *Collins v Blantern* (1767) 2 Wils KB 341 at 350 [95 ER 847 at 852].

63 *Lowry v Bourdieu* (1780) 2 Doug 468 at 470 [99 ER 299 at 300]; see generally Wade, "Benefits Obtained Under Illegal Transactions – Reasons For and Against Allowing Restitution", (1946) 25 *Texas Law Review* 31.

64 (1775) 1 Cowp 341 at 343 [98 ER 1120 at 1121].

65 Wade, "Benefits Obtained Under Illegal Transactions – Reasons For and Against Allowing Restitution", (1946) 25 *Texas Law Review* 31 at 60.

> determinative upon its side of the question, neither takes precedence upon logical analysis." (footnote omitted)

The search then is for a principled basis for determining whether or not relief is to be allowed.

37 Professor Birks, in an article published in 2000, proposed as a criterion for the grant or refusal of restitutionary relief in relation to an illegal contract[66]:

> "Would allowing that cause of action to be maintained make nonsense of the refusal to enforce the contract?"

He characterised the question as one about self-stultification of the law. As he correctly pointed out on such an approach[67]:

> "The inquiry is constantly an inquiry into consistency and rationality, not into turpitude."

Birks described contracts of loan as providing the paradigm at the strong end of the spectrum of self-stultification[68]:

> "Against a person who will not repay a loan, the claim in contract and a personal claim in unjust enrichment on the ground of failure of consideration appear to yield substantially the same performance."

So in *Boissevain v Weil*[69] Lord Radcliffe said of such a case[70]:

> "A court that extended a remedy in such circumstances would merit rather to be blamed for stultifying the law than to be applauded for extending it."

---

66 Birks, "Recovering Value Transferred Under an Illegal Contract", (2000) 1 *Theoretical Inquiries in Law* 155 at 203.

67 Birks, "Recovering Value Transferred Under an Illegal Contract", (2000) 1 *Theoretical Inquiries in Law* 155 at 203.

68 Birks, "Recovering Value Transferred Under an Illegal Contract", (2000) 1 *Theoretical Inquiries in Law* 155 at 169.

69 [1950] AC 327.

70 [1950] AC 327 at 341.

38 The negative goal of avoiding self-stultification in the law may be expressed positively as the objective of maintaining coherence in the law as discussed by this Court in *Miller*. That approach is consistent with the proposition in the Third Restatement on Restitution and Unjust Enrichment that[71]:

> "Restitution will also be allowed, as necessary to prevent unjust enrichment, if the allowance of restitution will not defeat or frustrate the policy of the underlying prohibition."

The point is also made in the Restatement that[72]:

> "[d]ifferent rules govern the availability of restitution in connection with agreements that are merely 'unenforceable' … and agreements that are unenforceable because they are 'illegal'".

That distinction is important and is reflected in the distinction between §31 and §32 of the Restatement which deal with unenforceability and illegality respectively. In a statutory setting, of course, both categories of case can be brought under a general rubric conditioning enforceability upon statutory purpose and associated public policy considerations. Moreover, as acknowledged in the Restatement[73]:

> "[l]ying somewhere astride these familiar classifications are cases in which the claimant has violated a statute whose objectives might be regarded as both procedural and substantive".

Nevertheless, the making of an agreement which is unenforceable for illegality throws up a distinct suite of issues affecting the availability of restitutionary relief in respect of benefits received under the agreement.

39 There has been some consideration by intermediate courts of appeal of the availability of restitutionary relief in respect of loan agreements affected by illegality arising out of the prospectus requirements of companies legislation and

---

71 *Restatement of the Law, Third: Restitution and Unjust Enrichment*, (2011) §32(2) at 505-506.

72 *Restatement of the Law, Third: Restitution and Unjust Enrichment*, (2011) §31, Comment b at 483.

73 *Restatement of the Law, Third: Restitution and Unjust Enrichment*, (2011) §31, Comment b at 483.

thereby held unenforceable. The reasoning in those cases, however, focussed upon considerations applicable to unenforceable agreements generally, rather than the specific issues which arise in the case of agreements unenforceable for illegality.

40 In *Hurst v Vestcorp Ltd*[74], McHugh JA observed that nothing in ss 83 and 86 of the *Companies Act* 1961 (NSW), the precursors of s 170 of the Code and its associated provisions, indicated "that the legislature intended that a loan of money made to an investor who takes up an interest is not recoverable as a matter of restitution."[75] The question of restitution had not been argued in that case either before the primary judge or in the Court of Appeal. His Honour referred to *Pavey & Matthews* for the proposition that a quantum meruit may be payable in respect of work done under a contract "even though a statute declares that the contract is unenforceable."[76] *Pavey & Matthews* was not a case about illegality. The unenforceability considered in that case derived from failure to comply with a statutory condition of enforceability – a requirement for building contracts to be in writing imposed by s 45 of the *Builders Licensing Act* 1971 (NSW). Deane J said of s 45[77]:

> "[t]he section does not make an agreement to which it applies illegal or void."

There was, as Mason and Wilson JJ pointed out in the same case[78], no "compelling analogy" between s 45 and the prohibitory money lending legislation in issue in *Mayfair Trading Co Pty Ltd v Dreyer*[79].

41 The observation by McHugh JA in *Hurst* that in some cases restitution is available in respect of benefits obtained under an unenforceable contract was uncontroversial. His Honour's reasons for judgment in *Hurst* did not include a consideration of the particular questions raised where a contract is unenforceable

---

74 (1988) 12 NSWLR 394.

75 (1988) 12 NSWLR 394 at 445, Kirby P agreeing at 417-418.

76 (1988) 12 NSWLR 394 at 445.

77 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 262.

78 (1987) 162 CLR 221 at 229.

79 (1958) 101 CLR 428 at 458; [1958] HCA 55.

because of illegality involving contravention of a statutory prohibition or furtherance of an illegal purpose involving such contraventions.

42 Equuscorp referred to decisions of the Full Court of the Federal Court in *Australian Breeders Co-operative Society Ltd v Jones*[80] ("*ABCOS*") and *Amadio Pty Ltd v Henderson*[81]. Both of those decisions concerned, amongst other things, loan agreements rendered unenforceable because of their connection to an illegal scheme to offer prescribed interests without complying with the requirements of the New South Wales and Victorian Codes respectively.

43 In *ABCOS*, Wilcox and Lindgren JJ correctly observed that when a statute discloses an intention to exclude restitution "no prima facie obligation to make restitution will arise from the illegality flowing from contravention of the statute." Their Honours saw "nothing in the Code that suggests an intention to exclude the remedy of restitution, in the case of a breach of s 169."[82] They agreed with McHugh JA in *Hurst* and found the reasoning of Mason and Wilson JJ in *Pavey & Matthews* to be applicable. In so doing, their Honours did not consider the specific issue of the availability of restitutionary relief where a contract is unenforceable for illegality[83]. The need to maintain coherence in the law, discussed by this Court in *Miller*, and to avoid stultification of statutory prohibitions by the common law, discussed by Birks, was not referred to in *ABCOS*.

44 *ABCOS* was applied by the Full Federal Court in *Amadio*[84]. That case concerned a scheme to attract investors to form a syndicate to purchase a commercial building in Melbourne. The owner of the building gave a firm of solicitors an option to purchase the building. The solicitors marketed the scheme. No prospectus was registered. The owner, Amadio, lent the syndicate a sum of money secured by a mortgage, executed by each investor. The scheme failed. Complex litigation followed. The primary judge held that the Code had been contravened and that the mortgage and associated guarantee were

---

80 (1997) 150 ALR 488.

81 (1998) 81 FCR 149.

82 (1997) 150 ALR 488 at 541. Section 169 prohibited persons other than companies or their authorised agents from issuing or offering or inviting the public to subscribe for prescribed interests.

83 (1997) 150 ALR 488 at 541.

84 (1998) 81 FCR 149.

unenforceable. Amadio made a restitutionary claim against the investors for repayment of money which it had lent to them. The Full Court treated the claim as analogous to that considered in *ABCOS*. The Full Court agreed with the conclusion expressed in the joint judgment in that case that there was nothing in the Code that suggested an intention to exclude restitutionary relief in the case of a breach of ss 169-171. Their Honours said[85]:

> "Thus, as *Hurst*, *O'Brien* and *Australian Breeders Co-operative* demonstrate, the unenforceability of a contract entered into as a consequence of a breach of the prescribed interest provisions arises by reason of the policy of the statute and not by reason of a direct statutory prohibition against such contracts."

Again, the analysis in *Amadio* did not engage with the questions relevant to the effect of illegality on restitutionary relief discussed earlier in these reasons. It may be said also that the factual position in *Amadio* was complex, with claims on both sides for restitutionary relief. That is not to say that the decision was incorrect. It offers, however, little guidance in the resolution of these appeals.

45 Had a right to claim restitution for money had and received been available to Rural in this case, it would have been able to recover by such claims what the policy of the law denied it in respect of the loan agreements. Rural was not an arms length financier. It was part of the closely related group of companies that were involved in the promotion of the schemes. The loan agreements were an integral part of the schemes and in so far as they involved the issue of invitations and offers to investors to take up prescribed interests without the benefit of the protections required by the Code, furthered that illegal purpose. As in the *Hurst* case, while not essential to the investments, the loans made the investments more attractive. Recovery from the investors would have been recovery from persons whose protection was the object of the statutory scheme. The respondents were not in pari delicto with Rural. The failure of consideration invoked by Equuscorp was the product of Rural's own conduct in offering the loan agreements in furtherance of an illegal purpose. This is a clear case in which the coherence of the law, and the avoidance of stultification of the statutory purpose by the common law, lead to the conclusion that Rural did not have a right to claim recovery of money advanced under the loan agreements as money had and received. There was therefore no right to claim such relief available for assignment to Equuscorp. In any event, for the reasons that follow, any such rights, if they had existed, would not have been assigned by the Deed.

---

85 (1998) 81 FCR 149 at 194 per Northrop, Ryan and Merkel JJ.

Whether Rural's claims for restitution were assignable

46 The primary judge found that Rural's rights to claim for restitutionary relief were assigned by the Deed. His Honour did so on the unexamined premise that the rights were assignable. In the Court of Appeal, Dodds-Streeton JA, after a careful review of the authorities, correctly concluded that they offered no clear guidance on the question. Her Honour held that the better view was that the rights were assignable[86]. In so holding, she recognised that the nature of the restitutionary right, informed by equitable considerations and subject to defences such as change of position, could pose difficulties for an assignee. These, however, were problems which would affect the availability and nature of the remedy, rather than constituting an absolute barrier to assignment.

47 Gummow and Bell JJ point out in their joint reasons[87] that it might be said that Rural's claims against the respondents for money had and received only accrued when the respondents pleaded the unenforceability of the loan agreements in their defences. As their Honours observe, however, the provision of value by Equuscorp under the asset sale agreement would have overcome the difficulty that the claims were mere expectancies at the time the Deed was executed. The questions which remain are whether such claims are assignable and whether they were the subject of assignment.

48 The respondents submitted that a claim for money had and received is not a "chose in action" but a "bare right of action" and therefore not assignable. The concept of the chose in action has a tangled historical background, linked closely to questions of assignability which, in turn, reflected logical concerns about the personal nature of contractual and delictual rights and policy concerns about maintenance[88]. O R Marshall, writing in 1950, observed that historically the question whether something was a chose in action was independent of the question whether it was assignable[89]. Then confusion arose:

> "A thing in action is not assignable; that which is not assignable is a thing in action. This is a vicious circle. There is no test for determining a chose

---

86 (2010) 265 ALR 336 at 392 [310].

87 Reasons of Gummow and Bell JJ at [76].

88 Holdsworth, "The History of the Treatment of *Choses* in Action by the Common Law", (1920) 33 *Harvard Law Review* 997, especially at 1015-1016.

89 Marshall, *The Assignment of Choses in Action*, (1950) at 24.

> in action or assignability apart from their interrelation." (footnote omitted)

Marshall argued that the assignability of choses in action depended upon a positive common law prohibition which has gradually been relaxed. That the relaxation did not extend to tortious actions was, he suggested, a survival of the objection that the subject matter of a grant must be certain.

49 In *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*, Gummow, Hayne and Crennan JJ observed that[90]:

> "The distinction between the assignment of an item of property and the assignment of a bare right to litigate was regarded as fundamental to the application of the law of maintenance and champerty. But drawing that distinction was not always easy. And it was a distinction whose policy roots were not readily discernible, the undesirability of maintenance and champerty being treated as self-evident." (footnotes omitted)

50 In *Ellis v Torrington*[91], Scrutton LJ referred to the common position of Courts of Law and Equity in opposition to the assignment of "a bare right of action, a bare power to bring an action"[92]. Such an assignment was seen "as offending against the law of maintenance or champerty or both."[93] That opposition was qualified however[94]:

> "[E]arly in the development of the law the Courts of equity and perhaps the Courts of common law also took the view that where the right of action was not a bare right, but was incident or subsidiary to a right in property, an assignment of the right of action was permissible, and did not savour of champerty or maintenance."

---

90 (2006) 229 CLR 386 at 428 [74]; [2006] HCA 41.

91 [1920] 1 KB 399.

92 [1920] 1 KB 399 at 411.

93 [1920] 1 KB 399 at 411.

94 [1920] 1 KB 399 at 411.

The attenuated role of maintenance and champerty in relation to assignability was acknowledged by Lord Mustill in *Giles v Thompson*[95] who spoke of them as maintaining a living presence in only two respects, first as the source of the rule against contingency fees and, secondly, as the ground for denying recognition to the assignment of a "bare right of action". Of the latter, Lord Mustill said it was, in his opinion, "best treated as having achieved an independent life of its own."[96]

51 The criteria for assignability of causes of action were widened by the decision of the House of Lords in *Trendtex Trading Corporation v Credit Suisse*[97]. The non-assignability of a bare right to litigate was still treated as a fundamental principle. Nevertheless, Lord Roskill said[98]:

> "But it is today true to say that in English law an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty, which, as has often been said, is a branch of our law of maintenance."

The application of criteria of assignability to restitutionary claims has remained uncertain. However, as is pointed out in Smith, *The Law of Assignment*[99]:

> "[a]s with tortious causes of action, restitutionary claims can arise independently of any prior relationship between the parties. That said, a restitutionary claim can be so intertwined with a contract, that a legitimate interest may be easy to establish." (footnote omitted)

The author points out that the question has received very little consideration either in the case law or in text books.

---

95 [1994] 1 AC 142.

96 [1994] 1 AC 142 at 153.

97 [1982] AC 679.

98 [1982] AC 679 at 703. For an elaboration of *Trendtex* see *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499.

99 Smith, *The Law of Assignment – The Creation and Transfer of Choses in Action*, (2007) at 335 [12.106].

52 Australian authority on the assignability of restitutionary rights is sparse. In *Mutual Pools & Staff Pty Ltd v The Commonwealth*[100], Mason CJ observed, without elaboration, that a claim for restitution of taxes mistakenly paid was not based on a contractual right and was not assignable[101]. On the other hand, Brennan J referred to a debt owed by the Commonwealth under an agreement or in restitution as "a common law chose in action vested in the plaintiff and assignable by it."[102]

53 A restitutionary claim for money had and received under an unenforceable loan agreement is inescapably linked to the performance of that agreement. If assigned along with contractual rights, albeit their existence is contestable, it is not assigned as a bare cause of action. Neither policy nor logic stands against its assignability in such a case. The assignment of the purported contractual rights for value indicates a legitimate commercial interest on the part of the assignee in acquiring the restitutionary rights should the contract be found to be unenforceable. Equuscorp fell into the category of a party with a genuine commercial interest in the restitutionary rights. Notwithstanding the difficulties that may attend the claims having regard to particular circumstances and defences which might affect their vindication, the better view is that adopted by the Court of Appeal, namely, that the restitutionary claims were assignable. The question that next arises is whether they were assigned.

Assignment under s 199 of the *Property Law Act* 1974 (Q)

54 In its statements of claim in each of the proceedings against the respondents, Equuscorp pleaded that Rural, by its receivers and managers, "absolutely assigned its interests in the Loan Agreement to the Plaintiff" and that by reason of the assignment Equuscorp had become "absolutely entitled to all of Rural's right title and interest in the sum owing under the Loan Agreement." Both the primary judge and the Court of Appeal dealt with the question of assignment as a matter of the construction of the Deed. Equuscorp, in its submissions to this Court, pointed to s 199(1) of the *Property Law Act* 1974 (Q) and the "unmistakable" interrelationship between that provision and cl 2 of the Deed. It is that interrelationship and the adoption, in cl 2(b), of the language of s 199(1) that defeats the construction for which Equuscorp contends based upon an argument about the commercial purpose of the Deed.

---

100 (1994) 179 CLR 155; [1994] HCA 9.

101 (1994) 179 CLR 155 at 173.

102 (1994) 179 CLR 155 at 176.

55 Section 199(1) provides:

> "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor … is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice –
>
> (a) the legal right to such debt or thing in action; and
>
> (b) all legal and other remedies for the same; and
>
> (c) the power to give a good discharge for the same without the concurrence of the assignor."

Section 199(1), like analogous provisions in other States of Australia, was modelled upon s 25(6) of the *Judicature Act* 1873 (UK) which was re-enacted as s 136 of the *Law of Property Act* 1925 (UK)[103]. The ancestry of s 199(1) informs its construction.

56 At one time, as discussed in the previous section of these reasons, the assignment of a chose in action was effectively prohibited as "the occasion of multiplying of contentions and suits"[104]. The prohibition had vanished by the time the *Judicature Act* 1873 came to be enacted. However, as Windeyer J explained in *Norman v Federal Commissioner of Taxation*[105], there remained a procedural residue which the statute was designed to overcome, namely[106]:

> "an assignee of a legal debt could not in his own name bring an action against the debtor to recover the debt. The original creditor must be the

---

103 *Bluebottle UK Ltd v Deputy Commissioner of Taxation* (2007) 232 CLR 598 at 617 [50]; [2007] HCA 54 and see *Conveyancing Act* 1919 (NSW), s 12; *Property Law Act* 1958 (Vic), s 134; *Law of Property Act* 1936 (SA), s 15; *Property Law Act* 1969 (WA), s 20; *Conveyancing and Law of Property Act* 1884 (Tas), s 86; *Law of Property Act* (NT), s 182; *Civil Law (Property) Act* 2006 (ACT), s 205.

104 *Lampet's Case* (1612) 10 Co Rep 46b at 48a per Coke CJ [77 ER 994 at 997].

105 (1963) 109 CLR 9; [1963] HCA 21.

106 (1963) 109 CLR 9 at 27.

plaintiff on the record. He remained in law the owner of the chose in action."

57 Section 25(6) operated as a "machinery" provision which rendered debts and other legal causes of action directly assignable[107]. A cause of action assigned under the subsection could therefore be brought by an assignee in its own name[108]. The substantive law relating to assignments was not altered. A chose in action not assignable at common law prior to the enactment of s 25(6) was not rendered assignable by its enactment[109]. Equitable assignments were not affected[110].

58 In order that s 199(1) apply to effect an assignment at law of a "debt or other legal thing in action" it is necessary that:

- the assignment be or purport to be absolute[111];
- the assignment must not purport to be by way of charge only[112];

---

107 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 28 per Windeyer J. Section 25(6) dealt specifically with a particular matter of variance between the rules of equity and the rules of law so that s 25(11), providing generally for the rules of equity to prevail over the rules of law save for matters "herein-before particularly mentioned", did not apply: *Torkington v Magee* [1902] 2 KB 427 at 430 per Channell J.

108 *Torkington v Magee* [1902] 2 KB 427 at 435 per Channell J (Lord Alverstone CJ and Darling J agreeing at 429). See also *Marchant v Morton, Down & Co* [1901] 2 KB 829 at 832; *In re Westerton; Public Trustee v Gray* [1919] 2 Ch 104 at 111-112; *Anning v Anning* (1907) 4 CLR 1049 at 1080 per Higgins J, referring to s 5(6) of the *Judicature Act* 1876 (Q); [1907] HCA 13.

109 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 at 424 per Lord Lindley; Smith, *The Law of Assignment – The Creation and Transfer of Choses in Action*, (2007) at 267 [10.06]; Starke, *Assignments of Choses in Action in Australia*, (1972) at 58 [81].

110 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 461 per Lord Macnaghten.

111 *Durham Brothers v Robertson* [1898] 1 QB 765 at 771 per Chitty LJ; see also *Hughes v Pump House Hotel Co Ltd* [1902] 2 KB 190 at 196 per Cozens-Hardy LJ.

112 *Durham Brothers v Robertson* [1898] 1 QB 765 at 771 per Chitty LJ; see also *Hughes v Pump House Hotel Co Ltd* [1902] 2 KB 190 at 196 per Cozens-Hardy LJ.

- the assignment must be in writing under the hand of the assignor;
- express notice in writing must be given to the debtor.

The satisfaction of those conditions was not in issue in these appeals.

59 As appears from its text, s 199(1) provides two mechanisms for the assignment of rights at law:

- pursuant to s 199(1)(a) as the legal right to a debt or thing in action; or
- pursuant to s 199(1)(b) as a legal or other remedy for the legal right to a debt or other thing in action assigned pursuant to s 199(1)(a).

The availability of the second mechanism to support the assignment of a cause of action for money had and received depends upon the construction of s 199(1)(b). That was the mechanism invoked by Equuscorp in its submissions.

Whether the Deed assigned restitutionary claims

60 The primary judge held that Rural's rights to claim for money had and received were assigned to Equuscorp by operation of cl 2(b) of the Deed[113]. His Honour did not refer to s 199 of the *Property Law Act*. He accepted the submission by Equuscorp that the assignment was expressed in broad terms with the evident intention of giving Equuscorp the right to recover, by whatever remedy was available, the loan debts. He accepted that there would be little purpose in the receivers and managers of Rural selling off the contractual rights and reserving to Rural the common law rights so closely associated with the contractual rights[114].

61 The Court of Appeal held that the language of the Deed, construed according to its ordinary meaning and in its total context, including the asset sales agreement, indicated that the assignment was limited to the loan contracts, debts, guarantees and securities. No basis for the implication of a term extending the assignment to alternative restitutionary rights or remedies was identified[115].

---

113 (2007) 216 FLR 1 at 33 [127].

114 (2007) 216 FLR 1 at 33 [126]-[127].

115 (2010) 265 ALR 336 at 396 [325].

The Court held that the reference in cl 2(b) of the Deed to "all legal and other remedies" was, "in context, merely an element of a composite phrase which expressly related back to the loan contracts and associated securities"[116].

62 Equuscorp submitted that by virtue of s 199(1)(b) the Deed was effectual in law to transfer to Equuscorp "all legal and other remedies for" the debts and interests under the loans. That term, it submitted, encompassed the causes of action for money had and received in respect of irrecoverable debts or unenforceable loans. Equuscorp submitted that the Court of Appeal's construction of cl 2(b) of the Deed defied commercial sense and well known principles for construing contracts and interpreting legislation which seek to avoid commercial inconvenience. The submissions should be rejected.

63 The scope of the term "legal and other remedies" in s 25(6) of the *Judicature Act* 1873, from which s 199(1) is descended, was described by Lord Esher MR in *Read v Brown*[117]:

> "the words mean what they say; they transfer the legal right to the debt as well as the legal remedies for its recovery."

At the heart of that observation, supported by the words "for the same", was the proposition that the relevant legal and other remedies were those which could be invoked to enforce the debt or chose in action assigned. Consistently with that proposition the assignment of a judgment debt has been held to attract the right to invoke garnishee procedures[118]. The assignment of a debt owing by a company enables the assignee to petition for the winding up of the company for, by s 25(6)[119]:

> "new rights [were] given to the assignees of debts, and all legal and other remedies for the assertion of those rights".

64 Because of the illegality which infected the schemes, the loan agreements were unenforceable and any debts owing pursuant to them irrecoverable. Actions

---

116 (2010) 265 ALR 336 at 396 [324].

117 (1888) 22 QBD 128 at 132, Fry and Lopes LJJ agreeing at 132 and 133 respectively.

118 *Goodman v Robinson* (1886) 18 QBD 332.

119 *In re The Premier Permanent Building, Land and Investment Association; Ex parte Stewart* (1890) 16 VLR 20 at 24.

for recovery of money had and received under the agreements were not actions to enforce the agreements. So much is obvious. It also appears from the decision of this Court in *Pavey & Matthews.* In that case, the Court accepted the principle that an action in quantum meruit, brought as a restitutionary claim for services rendered under an unenforceable contract, did not involve enforcement of the contract[120]. That principle extended to other restitutionary claims in respect of benefits received under contracts which, for one reason or another, are unenforceable. As Deane J said[121]:

> "The quasi-contractual obligation to pay fair and just compensation for a benefit which has been accepted will only arise in a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable. In such a case, it is the very fact that there is no genuine agreement or that the genuine agreement is frustrated, avoided or unenforceable that provides the occasion for (and part of the circumstances giving rise to) the imposition by the law of the obligation to make restitution."

Clause 2(b) adopted the language of s 199(1)(b) with its inherent limitations and should be construed accordingly. Rural's rights to claim for money had and received, if they existed, would not have been transferred to Equuscorp by operation of cl 2(b) as a legal remedy within the meaning of s 199(1)(b).

65 Clause 1 of the Deed relevantly assigned Rural's debts and "its interests under the loan contracts". Equuscorp did not rely upon it. In any event, neither of those terms was apt to encompass non-contractual claims for restitutionary relief. The Deed was not expressed in terms of restitutionary rights.

66 The question whether the asset sale agreement and the Deed made pursuant to it may be said to amount to an assignment, for value, of restitutionary rights which may arise in the future in connection with the monies advanced under the loan agreements, and thus amount to an agreement to assign them, which equity would recognise[122], was not considered in the court below and was not raised in argument on these appeals.

---

120 (1987) 162 CLR 221 at 227 per Mason and Wilson JJ, 257 per Deane J.

121 (1987) 162 CLR 221 at 256.

122 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 24, 33 per Windeyer J.

Conclusion

67 For the preceding reasons the appeals should be dismissed with costs.

68 GUMMOW AND BELL JJ. These five appeals by Equuscorp Pty Limited ("Equuscorp") were heard together and are brought against decisions of the Victorian Court of Appeal (Ashley, Neave and Dodds-Streeton JJA)[123] in related appeals. The Court of Appeal dealt with eight appeals, the decisions in three of which are not before this Court.

69 In 1998, Equuscorp sued the respondents in the Supreme Court of Victoria as assignee of Rural Finance Pty Limited ("Rural") under a written assignment for value ("the Assignment") which was dated 30 October 1997 and executed on behalf of Rural by its receivers and managers. Written notice of the Assignment had been given by Equuscorp to the respondents in November 1997.

70 The Assignment was executed in performance of what in substance was a covenant for further assurance in an asset sale agreement dated 16 May 1997, the governing law of which was stated in cl 13 thereof to be that of Queensland. The litigation has been conducted on the footing that: (i) this also was the proper law of the Assignment, (ii) the intrinsic validity of the Assignment was governed by its proper law[124], and (iii) s 199 of the *Property Law Act* 1974 (Q) selected for its operation instruments with a Queensland proper law. Section 199 is modelled on the familiar provision made in s 25(6) of the *Judicature Act* 1873 (UK)[125] for absolute assignments of presently existing debts and other legal choses in action[126].

71 The receivers and managers had been appointed to Rural by Equuscorp in 1991 under a registered charge it held over the assets of Rural. Rural was wound up on 6 March 1996 pursuant to the resolution of its creditors at a meeting convened under s 439A of the Corporations Law. Neither the liquidator nor the receivers were joined as parties to the litigation. The objective sought to be achieved by Equuscorp in the Supreme Court litigation was the recovery of: (i) moneys representing principal and interest Equuscorp claimed to be due and owing by the respondents under written loan agreements which they had made with Rural in the period 1987-1989, and which had been assigned to Equuscorp as described above; and (ii) interest on that outstanding balance at the rate of 17 percent per annum as provided in the loan agreements.

---

123 *Haxton v Equuscorp Pty Ltd* (2010) 265 ALR 336.

124 This view of the appropriate choice of law rule has strong support: *Dicey, Morris and Collins on the Conflict of Laws*, 14th ed (2006), vol 2 at 1184 [24-054].

125 36 & 37 Vict c 66.

126 *Bluebottle UK Ltd v Deputy Commissioner of Taxation* (2007) 232 CLR 598 at 617-618 [50]-[51]; [2007] HCA 54.

72 The primary judge (Byrne J) held that each of the five loan agreements now the subject of the appeals to this Court was "unenforceable for illegality"[127]. However, in the alternative, Equuscorp had claimed the same amounts as money had and received by the respondents to the use of Equuscorp. It is this alternative claim, not that in contract, and the anterior question of the effectiveness of the Assignment in this respect, which provide the subject matter of the grants of special leave to Equuscorp to appeal to this Court.

73 The principal relief Equuscorp seeks are judgments for orders "in a sum to be determined". Such orders would be interlocutory in character[128].

The Assignment

74 The Court of Appeal[129], differing from Byrne J[130], held that while "a robust construction" was applicable to "commercial documents", the subject matter of the Assignment did not extend to alternative rights and remedies which were predicated upon the unenforceability of the loan agreements.

75 The reasoning of Byrne J is to be preferred and should be accepted. Clause 1 of the Assignment assigned the debts of Rural and its interests under the loan agreements. This did not catch the claims Rural might have to recover from the borrowers upon an action for money had and received. But the effect of cl 2 was that the instrument was to take effect as an immediate and absolute legal assignment not only of the subject matter of cl 1 but also of all "other remedies for these matters". Any action for money had and received was a remedy "for these matters" in the sense that it arose out of or by reason of the failure of the loan agreements. There would have been little sense for the receivers and managers to retain these restitutionary actions and for Equuscorp to pay for some but not all of the rights of Rural against the borrowers.

76 It may be said that the actions by Rural against the respondents for money had and received only accrued[131] after the Assignment, when in the course of the

---

127 *Equuscorp Pty Ltd v Bassat* (2007) 216 FLR 1 at 32 [120].

128 *Computer Edge Pty Ltd v Apple Computer Inc* (1984) 54 ALR 767; [1984] HCA 47.

129 (2010) 265 ALR 336 at 396 [325].

130 (2007) 216 FLR 1 at 33 [127].

131 *Commonwealth Homes and Investment Co Ltd v Smith* (1937) 59 CLR 443 at 463, 466; [1937] HCA 73.

subsequent litigation the respondents, by their defences, pleaded that the loan agreements were unenforceable at their option. However, even if the actions for money had and received were to be regarded as no more than expectancies at the date of the Assignment, the presence of the value given by Equuscorp to the receivers and managers of Rural in equity would have immediately transferred the equitable title to the choses in action to Equuscorp when the actions accrued[132].

77 A further analysis, which may avoid any issues arising from the absence of Rural as a party to the enforcement of an equitable assignment of a legal chose in action, was offered by Equuscorp and is as follows. Section 420(2)(g) of the Corporations Law empowered the receivers and managers of Rural to convert its "property ... into money". "Property" was so defined in s 9 as to include any legal or equitable estate or interest, whether present or future, vested or contingent[133]. The legislative end in view is the turning to account of all property of the company, including expectancies, in the course of the conduct of the receivership so as to remove the company from any further involvement as a necessary party in any subsequent litigation brought by the purchaser against an obligor – here, the respondent investors.

78 However that may be, an action by an equitable assignee without joining the assignor is not a nullity; the action may be liable to be stayed pending joinder, but no such application for a stay has been made in the present litigation[134]. The authorities considered by Lord Collins of Mapesbury in *Roberts v Gill & Co*[135] indicate that any outstanding assignor must be joined before final judgment can be obtained by the assignee, but that has been held not to be necessary where the assignee is seeking interlocutory relief. As noted above, if Equuscorp were to obtain the relief it seeks in these appeals, this would not be final in nature.

79 Finally, the Assignment was not open to the objection that it dealt with no more than "bare" rights of action and so attracted the statements of principle in

---

132 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 24-25; [1963] HCA 21.

133 cf *Kennon v Spry* (2008) 238 CLR 366 at 397-398 [91]-[92], 408 [126]; [2008] HCA 56.

134 See *Weddell v JA Pearce & Major* [1988] Ch 26 at 38-41; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 88-89 [41]; [1998] HCA 11.

135 [2011] 1 AC 240 at 262-263 [64]-[67].

Poulton v The Commonwealth[136]. It has long been held that an exception exists where the assignee has an interest in the suit[137], and a genuine and substantial commercial interest is now regarded as sufficient[138]. In the present litigation this was satisfied by the charge which Equuscorp held over the assets of Rural to secure the indebtedness of Rural; the recovery on the restitutionary claim would, as counsel put it, "fill the gap created by the debts imploding under illegality".

80 That, however, leads to the question whether in the present litigation any action for money had and received lay against the respondents. First, something more must be said respecting the facts and the course of the litigation.

81 It is convenient to describe the relevant facts giving rise to the "illegality" which is said to infect the actions for money had and received in addition to (as Byrne J held and is not challenged) the actions in contract brought by Equuscorp as assignee.

The investment schemes

82 Byrne J referred[139] to an announcement on 15 April 1986 by the federal government that it would abandon a proposal to "quarantine" deductible expenses incurred in farm production, so that those expenses would remain deductible in respect of all taxable income, not only that derived from farming activity.

83 His Honour continued[140]:

> "The consequence of this was that non-farmers were permitted to embark upon farming activities and to invest money in those activities, even when these activities were not profitable in the year of investment. The benefit accruing to the investor was an immediate deduction against non-farm income and the prospect of future income and capital appreciation as the farm became productive.

---

136 (1953) 89 CLR 540 at 571, 602; [1953] HCA 101.

137 *Ellis v Torrington* [1920] 1 KB 399 at 406.

138 *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 at 703; *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2004) 220 ALR 267 at 280-285 [42]-[61].

139 (2007) 216 FLR 1 at 3 [1].

140 (2007) 216 FLR 1 at 3 [1]-[4].

> Such an investment was the more attractive when the taxpayer was not obliged to put up his own money to obtain this deduction. A number of farm investment schemes with this characteristic were devised by enterprising promoters, among whom were Anthony James Johnson and members of the Johnson family.
>
> According to the literature circulated to would-be investors in 1987, the Johnson organisation had acquired and begun to develop a farming and tourist complex at Blueberry Hill, some 570 km north of Sydney. The property was owned by Corindi Blueberry Growers Pty Ltd ['Growers'] which was undertaking a development in conjunction with Johnson Farm Management Pty Ltd ['Management']. At that time the directors of [Growers and Management][141] were Mr AJ Johnson and his brother Francis Edward Johnson.
>
> In the financial years 1986/7, 1987/8 and 1988/9, the Johnsons sought to attract investors in the Blueberry Hill project by offering a series of schemes which included among their attractions the prospect that the amounts invested would be deductible for income tax purposes."

84 Each of these schemes involved the investor paying money to Growers to purchase an interest whether in a joint venture (the interest of Cunningham's Warehouse Sales Pty Ltd ("Cunningham's"), the respondent in appeal M131 of 2010), in a leasehold (the interest of Cunningham's as respondent in appeal M132), or in a licence (the interests of Mr Haxton and Mr Bassat as respondents in appeals M128 and M129 respectively, and of Cunningham's as respondent in appeal M130).

85 The investor would engage Management to maintain and harvest the crop and pay it an annual fee for doing so. These charges were pre-paid by the investor upon entering the scheme. The produce, which would be the property of the investor, would be sold at an agreed guaranteed price for five years, to a company, the directors of which were Mr F E Johnson and probably his brother Mr A J Johnson, and which traded as "Johnson Farms" ("the Buyer"). The proceeds of the sale would be shared between the investor and Growers.

---

141 According to the company search the date of appointment of Mr F E Johnson as director of [Management] was unknown. He ceased to hold that office on 24 June 1988.

86 With respect to the loan agreements, the primary judge noted[142]:

> "A particular feature of these schemes and the feature which gives rise to this litigation, is that the Johnson Group also offered finance to investors on very attractive terms. In short, [Rural], a company registered in 1983 whose directors in 1987 were Mr AJ Johnson and Mr FE Johnson, would lend to the investors for five years the amount of the maintenance/harvest charges to be pre-paid to [Management] and the interest payable under the loan. The only outlay required of the borrower personally was two relatively small capital repayments. The loan also provided that the guaranteed proceeds of the harvest sales over the first five years would be applied to repay the balance of the loan, including the pre-paid interest. The expected result of this was that the investor, for this modest outlay, would receive a tax deduction to the full value of the loan and interest and the prospect of further farm income after five years and, ultimately, the capital value of the interest in the project."

87 Equuscorp held registered charges over the assets not only of Rural, but also of Growers, Management and the Buyer, and in 1993 it appointed receivers and managers of the assets of those companies also.

The litigation

88 The immediate circumstances of the litigation in the Supreme Court were described by Byrne J as follows[143]:

> "On 30 October 1997, [Rural] assigned to [Equuscorp] its loan [agreements] with the investors. The face value of these 638 loans as at 30/8/1997 was $52,584,005. The consideration given for the assignment was $500,000.
>
> [Equuscorp] then set about collecting these loans. In March 1998, it filed some 550 writs against certain investors. The pleadings in these cases raised a number of issues and eight of these proceedings have been selected for trial on the basis that the issues raised in them might assist the parties in the remaining proceedings to achieve a resolution of their disputes. I am to determine at this trial all issues in these selected

---

142 (2007) 216 FLR 1 at 4 [6].

143 (2007) 216 FLR 1 at 4 [8]-[9].

> proceedings with respect to the [Equuscorp] claims against the investors[144] other than quantum."

Five of these eight proceedings have reached this Court.

The Companies Code

89 To the actions brought against them by Equuscorp, Mr Haxton pleaded that his interest was a "prescribed interest" within the meaning of s 5(1) of the *Companies (New South Wales) Code* and that Growers had offered such interests to the public without registering with the National Companies and Securities Commission ("the NCSC") a statement in writing as required by s 170(1); Mr Bassat and Cunningham's put on defences in the same terms, save that they relied upon the corresponding provisions of the *Companies (Victoria) Code*. The loan agreements were alleged, as a result, to be unenforceable at the option of the borrower.

90 The *Companies Act* 1981 (Cth) made provision only for the corporate law of the Australian Capital Territory (s 3) but was "applied" by State legislation including that of New South Wales and Victoria to which reference has been made. The term "the Code" will be used to identify the legislation of both States.

91 Part IV Div 6 (ss 164-177) of the Code was headed "Prescribed Interests". Section 170(1) imposed a prohibition in the following terms:

> "A company or an agent of a company shall not issue to the public, offer to the public for subscription or purchase, or invite the public to subscribe for or purchase, any prescribed interest unless a statement in writing in relation to that prescribed interest has been registered by the [NCSC] under [Part IV Div 1]."

Part IV Div 1 (ss 94-109) provided for the issue of prospectuses, and, in particular, for registration by the NCSC (s 103). Section 174(1) created an offence of contravention of s 170, the penalty for which was $20,000 or imprisonment for five years or both. The offence provision in s 174(1) was to be construed (by force of s 572(1)) as applying to any person who was "in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention".

---

144 Not the counterclaims.

92 The legislation did not specify the consequences for the civil liabilities of those involved in contravention of s 170(1), save for the important statement in s 174(2):

> "A person is not relieved from any liability to any holder of a prescribed interest by reason of any contravention of, or failure to comply with, a provision of this Division."

93 Sections 170 and 174 had been preceded in New South Wales and Victoria respectively by ss 83 and 86 of the *Companies Act* 1961 (NSW) and ss 83 and 86 of the *Companies Act* 1961 (Vic). Mahoney JA, in *Hurst v Vestcorp Ltd*[145], said the following of s 86(2) of the New South Wales statute:

> "In my opinion, s 86(2) is a provision generally of this kind. Its purpose is to preserve, to the extent stated, the position of the innocent interest holder. It does not, in my opinion, operate to relieve an invitor from obligations imposed on him by that interest or from the effects of his own illegality."

Furthermore, McHugh JA[146] said of contracts made "as the result" of breach of s 86(1) that:

> "Section 86(2) supports the view that one of the purposes of s 86(1) is to strike down such contracts because it provides that contravention of a provision of the Division does not relieve from 'liability to any holder of an interest'. That subsection assumes that but for its provisions a contract made in breach of the Division would not be enforceable."

94 References in this context to illegality and unenforceability, as descriptive of the impact upon civil liabilities of a statutory prohibition, with an attendant criminal sanction, require the taking of some care. The following observations in *Brooks v Burns Philp Trustee Co Ltd*[147] by Windeyer J are in point:

> "The words used do not matter if the actual legal result they are used to express be not in doubt or debate. But it has always seemed to me likely to lead to error, in matters such as this, to adopt first one of the familiar legal adjectives – 'illegal', 'void', 'unenforceable', 'ineffectual', 'nugatory' –

---

145 (1988) 12 NSWLR 394 at 429.

146 (1988) 12 NSWLR 394 at 443.

147 (1969) 121 CLR 432 at 458; [1969] HCA 4. See also *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 38 [36]-[37]; [2001] HCA 44.

> and then having given an act a label, to deduce from that its results in law. That is to invert the order of inquiry, and by so doing to beg the question, and allow linguistics to determine legal rights. That need not happen if words be used, as Hobbes said that by wise men they should be, only as counters to reckon with; but reckoning becomes difficult if the values of counters are not constant."

In *Amadio Pty Ltd v Henderson*[148], the Full Court of the Federal Court correctly cautioned against the use of the term "void" with respect to contravention of the prescribed interest provisions of the Code, particularly given the terms of s 174(2), which have been set out above.

The policy of the Code

95 Reference was made in argument on the present appeals to the decision of the Full Court of the Federal Court in *Australian Breeders Co-operative Society Ltd v Jones*[149], approved of in *Amadio*[150], that, in cases of contravention of the prescribed interest provisions of the Code, the Code did not "expressly indicate that a lender of money, under a transaction made unenforceable by [the prescribed interest provisions], may not obtain a restitution order against the borrower" and that there was "nothing in the Code that suggests an intention to exclude the remedy of restitution" as available to the financier. However, these decisions were reached without regard to the fully developed body of authority in this Court which is now expounded in *Miller v Miller*[151].

96 If a statute expressly forbids the doing of a particular act then the making of an agreement to do that act may be treated as impliedly prohibited by the statute. That was not the case with the loan agreements upon which Mr Haxton, Mr Bassat and Cunningham's were sued. However, that is not the end of the matter. What was said in the joint reasons in *Miller v Miller*[152] in the following passage is relevant here:

> "But in addition to, and distinct from, cases where a statute expressly or impliedly prohibits the making or performance of a contract,

---

148 (1998) 81 FCR 149 at 191-192.

149 (1997) 150 ALR 488 at 541.

150 (1998) 81 FCR 149 at 193-194.

151 (2011) 242 CLR 446; [2011] HCA 9.

152 (2011) 242 CLR 446 at 457-458 [25].

are cases 'where the policy of the law renders contractual arrangements ineffective or void even in the absence of breach of a norm of conduct or other requirement expressed or necessarily implicit in the statutory text'[153]. In cases of the latter kind the refusal to enforce the contract has been held[154] to stem:

> 'not from express or implied legislative prohibition but from the policy of the law, commonly called public policy[155]. Regard is to be had primarily to the scope and purpose of the statute to consider whether the legislative purpose will be fulfilled without regarding the contract as void and unenforceable[156].'"

Their Honours added[157]:

> "As McHugh J explained[158] in *Nelson v Nelson*, to approach the doctrine of illegality in this way, in cases where the statute in question does not expressly or impliedly prohibit the contract or trust, or the doing of some particular act that is essential for carrying it out, recognises that the legal environment in which the doctrine now operates is much more regulated than once it was. Moreover, as McHugh J also pointed out[159], Lord Mansfield's statement in *Holman v Johnson*[160] that '[n]o Court will lend its aid to a man who founds his cause of action upon an immoral or

---

153 *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 179 [71] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; [2008] HCA 3.

154 *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 227 per McHugh and Gummow JJ; [1997] HCA 17.

155 *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 429-430, 432-433; [1978] HCA 42; *Nelson v Nelson* (1995) 184 CLR 538 at 551-552, 593, 611; [1995] HCA 25.

156 *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 434.

157 *Miller v Miller* (2011) 242 CLR 446 at 458-459 [27].

158 (1995) 184 CLR 538 at 611.

159 (1995) 184 CLR 538 at 611.

160 (1775) 1 Cowp 341 at 343 [98 ER 1120 at 1121].

> an illegal act', by its all-embracing generality, fails to take sufficient account of the different ways in which questions of illegality may arise. Hence the emphasis given in *Nelson v Nelson*[161], and in both *Fitzgerald v F J Leonhardt Pty Ltd*[162] and *International Air Transport Association v Ansett Australia Holdings Ltd*[163] to the discernment, from the scope and purpose of the statute, of whether the legislative purpose will be fulfilled without regarding the contract or the trust as void and unenforceable. But implicit in, indeed at the very heart of, that process lies the recognition that there are cases where the breach of a norm of conduct stated expressly or implied in the statutory text requires the conclusion that an obligation otherwise created or recognised is not to be enforced by the courts."

The decision of the primary judge

97 Byrne J concluded that each of the investments, in respect of which the loan agreements now before this Court had been made, "breached s 170" and added[164]:

> "It was accepted by counsel for [Equuscorp] that such a conclusion would carry with it the consequence that the agreements for the acquisition of those interests were illegal and unenforceable against the investors. They conceded, further, that the investors might, at their option, terminate or rescind these agreements. Finally, it was accepted that, in their defences filed in 1999, each of the investors did in fact terminate the agreement."

His Honour then proceeded[165]:

> "The remaining issue in this case is whether the illegality and its consequent impact upon the agreement made by the investors for the acquisition of the prescribed interests affect also the loan agreements. It is well established that, in this statute or others which have equivalent prohibitions, a contract entered into as a direct consequence of the prohibited activity is tainted and will not be enforced. This has led the courts to conclude that, in schemes such as the present, the

---

161 (1995) 184 CLR 538 at 570, 616-618.

162 (1997) 189 CLR 215 at 227.

163 (2008) 234 CLR 151 at 180 [72].

164 (2007) 216 FLR 1 at 27 [100].

165 (2007) 216 FLR 1 at 27-28 [102].

> unenforceability attaches not only to the agreements which make up the scheme, but also those which provide the finance for it, at least where the finance providers are implicated in the scheme. This is because the finance agreement was entered into as a direct consequence of the illegal act[166] and because the financial transaction was an essential part of the scheme so that it cannot be seen sensibly to stand without the scheme[167]."

His Honour then concluded that each of the five investments with which these appeals are concerned "was entered into as a direct consequence of a breach of s 170", and added[168]:

> "Nor is there any room for doubt that each of the loan agreements was entered into as part of the investment schemes. It would follow from this that the loan agreements were also unenforceable against the investors unless they can be seen as severable from the transaction.
>
> The relationship between [Rural] and Mr AJ Johnson, Mr FE Johnson, [Growers], [Management] and the Buyer is such that [Rural] cannot present itself as an innocent third party unconnected with the schemes."

Money had and received

98 However, as noted earlier in these reasons, in the alternative, Equuscorp had pleaded against Mr Haxton, Mr Bassat and Cunningham's a claim for money had and received to its use. It is these claims which are pressed on the appeals by Equuscorp in this Court.

99 The first line of defence by the respondents is that the scheme and purpose of Pt IV Div 6 of the Code, with particular reference to ss 170 and 174, is at odds with permitting against holders of prescribed interests an action for money had and received by them under loan agreements which were entered into as a direct consequence of contravention of s 170. That submission should be accepted and it is dispositive of the appeals, but several points should first be made.

---

166 *Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394 at 412-413 per Kirby P, 443 per McHugh JA.

167 See, too, *O'Brien v Melbank Corporation Ltd* (1991) 7 ACSR 19 at 31-32 per Fullagar J, 48-49 per McGarvie J, 67 per O'Bryan J; *Australian Breeders Co-operative Society Ltd v Jones* (1997) 150 ALR 488 at 535-538 per Wilcox and Lindgren JJ.

168 (2007) 216 FLR 1 at 28 [103]-[104].

100 The first point is that, unlike the position under the foreign exchange regulations considered by Lord Radcliffe in *Boissevain v Weil*[169], s 170 of the Code did not by its terms forbid and render illegal either the contractual promise by the respondents to repay the moneys lent, or the very act of borrowing independently of the contractual promise. If s 170 had done so, then it would have struck both the contractual and restitutionary claims. But s 170 did not, and the decision of Byrne J to refuse to enforce the loan agreements was based upon considerations of the kind discussed in the extracts from *Miller v Miller* set out above.

101 The second point is to recognise the fallacy of an assumption that contractual and restitutionary issues can readily be collapsed[170], so that, on the grounds just mentioned, to refuse to Equuscorp a contractual remedy necessarily denies the action by Equuscorp against the investors for money had and received. It was accepted in *David Securities Pty Ltd v Commonwealth Bank of Australia*[171] that the existence of "illegality" *may* provide a qualifying or vitiating factor which enlivens a restitutionary action. The availability of such an action where there is an ineffective contract will determine whether the existing distribution of gains and losses is to lie undisturbed.

102 The distinction between a contractual and a restitutionary action is illustrated in *Commonwealth Homes and Investment Co Ltd v Smith*[172], by the rejection of the limitation defence pleaded to the action for money had and received in contrast to the limitation period applicable to the action in contract. Even if, in the present litigation, the claims in contract by Equuscorp were statute barred or extinguished (as Byrne J held was the result in the matters which are now the subject of appeals M128 and M130[173]), the actions for money had and received would not suffer the same fate; they accrued only on the assertion by the respondents in their defences filed in 1999 that they were not bound by the loan agreements. Equuscorp correctly submits that, by itself, the difference in the applicable limitation regimes does not require denial of its actions for money had and received.

---

169 [1950] AC 327 at 341.

170 A point made by Maddaugh and McCamus, *The Law of Restitution*, 2nd ed (2004) at 512-513.

171 (1992) 175 CLR 353 at 379; [1992] HCA 48.

172 (1937) 59 CLR 443 at 463, 466.

173 (2007) 216 FLR 1 at 32 [118].

103 The determinative issue, as Equuscorp accepted, is whether the policy of the statute law represented by Pt IV Div 6 of the Code denies any scope for an action for money had and received. In that regard, guidance is provided by the statement by Professor Palmer in his treatise *The Law of Restitution*[174]:

> "The illegality of the transaction will preclude recovery of damages for breach, or any other judgment aimed at enforcement of the contract, and the problem is whether the plaintiff can nonetheless obtain restitution of values transferred pursuant to the contract. The fact that public policy prohibits enforcement of the contract is not a sufficient reason for allowing one of the parties to retain an unjust enrichment at the expense of the other. Such a retention is warranted only when restitution is in conflict with overriding policies pursuant to which the transaction is made illegal."

That statement requires qualification to include within its scope circumstances where a contract is ineffective, not by reason of "illegality" sourced in a statute, but where the statute requires compliance with formalities which have not been observed by the parties, or restricts legal capacity, as does the doctrine of ultra vires.

104 The *Restatement of the Law Third, Restitution and Unjust Enrichment*, adopted and promulgated in 2010, deals separately with "Unenforceability" (§31) and "Illegality" (§32), but to relevantly similar effect. A person who renders performance under an agreement that cannot be enforced against the recipient by reason of the failure to satisfy an extrinsic requirement of enforceability, such as the *Statute of Frauds* 1677[175] ("the Statute of Frauds"), does not have a restitutionary claim against the recipient if the allowance of that claim "would defeat the policy of the law that makes the agreement unenforceable" (§31(2)). A person who renders performance under an "illegal" agreement may not obtain restitution if the allowance of restitution will "defeat or frustrate the policy of the underlying prohibition" (§32(2)).

105 Given the range of statutory regimes, the decided cases yield varied outcomes in restitutionary actions. The cases in which actions were successfully brought on common indebitatus counts, notwithstanding failure by the plaintiff to comply with the writing requirement of s 4 of the Statute of Frauds, were

---

174 (1978), vol 2 at 171. See also Dietrich, *Restitution: A New Perspective*, (1998) at 120-122.

175 29 Car II c 3.

discussed by Deane J in *Pavey & Matthews Pty Ltd v Paul*[176]. They, and the decision of the Supreme Court of Canada in *Deglman v Guaranty Trust Co of Canada and Constantineau*[177], may be supported on the ground that the policy of the Statute of Frauds was "neutral" and did not require the random conferral of windfall benefits upon defendants who pleaded the statute to an action in contract but were also sued for money had and received or a quantum meruit[178].

106 These decisions upon the Statute of Frauds may be compared with *Pavey & Matthews*. In that case, there was no written agreement between the owner and the builder as required by s 45 of the *Builders Licensing Act* 1971 (NSW), but the owner had undertaken to pay a reasonable remuneration, and such a sum was recovered on a quantum meruit. The case was determined by Mason and Wilson JJ upon an examination of the policy and purpose of s 45[179]. The statutory purpose did not extend to enable the owner to request and accept the work but to decline to pay for it. As Deane J put it[180], there was no legislative intent to penalise the builder beyond making the agreement itself unenforceable against the other party. In his analysis of *Pavey & Matthews*, Professor Ibbetson[181] responds as follows to the criticism that the measure of recovery in the case meant that in reality there was enforcement of the contract outlawed by the statute:

> "Although the quantum meruit recovered by Pavey is in fact identical to what had been promised under the contract, this is wholly coincidental and completely independent of the parties' agreement. If he had been promised a determinate sum, still his recovery would only have been on a quantum meruit. Moreover, in order to entitle him to the restitutionary action he has to show that the benefit has been freely accepted by the defendant; if the action were straightforwardly on the contract no such free acceptance would be necessary."

---

176 (1987) 162 CLR 221 at 246-257; [1987] HCA 5.

177 [1954] SCR 725.

178 McCamus, "Restitutionary Recovery of Benefits Conferred under Contracts in Conflict with Statutory Policy – The New Golden Rule", (1987) 25 *Osgoode Hall Law Journal* 787 at 852-853.

179 (1987) 162 CLR 221 at 228-229.

180 (1987) 162 CLR 221 at 262.

181 "Implied Contracts and Restitution: History in the High Court of Australia", (1988) 8 *Oxford Journal of Legal Studies* 312 at 326.

107 More recently, in *Yaxley v Gotts*[182] the English Court of Appeal considered the requirement now made in absolute terms by s 2 of the *Law of Property (Miscellaneous Provisions) Act* 1989 (UK) that a contract for sale of land can only be made in writing which incorporates all the terms the parties have expressly agreed. It was held that an oral agreement nevertheless might give rise to a constructive trust because such trusts were saved by s 2(5) of that Act. But the Court of Appeal saw no scope for the doctrine of proprietary estoppel. Robert Walker LJ said[183]:

> "Parliament's requirement that any contract for the disposition of an interest in land must be made in a particular documentary form, and will otherwise be void, does not have such an obviously social aim as statutory provisions relating to contracts by or with moneylenders, infants, or protected tenants. Nevertheless it can be seen as embodying Parliament's conclusion, in the general public interest, that the need for certainty as to the formation of contracts of this type must in general outweigh the disappointment of those who make informal bargains in ignorance of the statutory requirement. If an estoppel would have the effect of enforcing a void contract and subverting Parliament's purpose it may have to yield to the statutory law which confronts it, except so far as the statute's saving for a constructive trust provides a means of reconciliation of the apparent conflict."

108 In *Nelson v Nelson*[184] McHugh J referred to *Kiriri Cotton Co Ltd v Dewani*[185], where the Privy Council upheld an action by a tenant for money had and received to recover a premium the tenant had paid, contrary to a rent restriction law, to obtain the lease. McHugh J cited this as an example of the class of cases where recovery was permitted because the statutory scheme rendering a contract or arrangement illegal was enacted for the benefit of a class including the claimant.

109 The respondents correctly submit that this principle applies here but to the opposite effect. This is because the prospectus provisions were not enacted for the protection of Rural and the other Johnson interests, but for the protection of the respondents as investors in the prescribed interests.

---

182 [2000] Ch 162.

183 [2000] Ch 162 at 175.

184 (1995) 184 CLR 538 at 604-605.

185 [1960] AC 192.

Conclusions

110 The explanation of the money lending cases[186] given by Mason and Wilson JJ in *Pavey & Matthews*[187] is in point here. Their Honours said:

> "The relevant provisions in those cases explicitly rendered unenforceable contracts executed by the money-lender. The statutes were directed at making unenforceable an obligation to repay money already lent and a security already given in respect of such an obligation. It was not possible to interpret these provisions so that they left on foot any quasi-contractual causes of action on the part of the lender. Request and receipt by the borrower of the money lent were integral elements in a situation in which the contract and all securities were expressed to be unenforceable. *An additional feature of the money-lending cases is that the legislation was designed to protect borrowers by imposing onerous obligations on money-lenders to comply with the statutory requirements*." (emphasis added)

111 The prospectus provisions have a long history. This was traced by Mahoney JA in *Hurst v Vestcorp*[188] to the mid-19th century. As Heerey J later remarked[189] when dealing with the prospectus provisions of the Code, so seriously did the legislature regard these provisions, including s 170, that a breach not necessarily fraudulent and not necessarily causing monetary loss nevertheless could result in a five year term of imprisonment. This supports the conclusion that in a case such as is presented by these appeals, the investors who received prescribed interests should not be in the same position as if Pt IV Div 6 of the Code had not been enacted or had been complied with by Rural, and the loan agreements had been effective in accordance with their terms. The respondents correctly submit that to permit recovery on the actions for money had and received would stultify the statutory policy evident in Pt IV Div 6 of the Code. We agree with what is further said on this point by French CJ, Crennan and Kiefel JJ at [45] in their reasons. Equuscorp, as successor to Rural, in these circumstances cannot complain that the loss is left to lie where it has fallen.

---

186 *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428; [1958] HCA 55; *Deposit & Investment Co Ltd v Kaye* (1962) 63 SR (NSW) 453. See also *Kasumu v Baba-Egbe* [1956] AC 539.

187 (1987) 162 CLR 221 at 229-230.

188 (1988) 12 NSWLR 394 at 421.

189 *Henderson v Amadio Pty Ltd (No 1)* (1995) 62 FCR 1 at 189.

Other issues

112 Equuscorp sought to locate the appropriate "vitiating factor" for its restitutionary action not in "illegality" but in what was said to be "total failure of consideration" in the sense given that expression by Deane J in *Muschinski v Dodds*[190]. His Honour there referred to cases:

> "where the substratum of a joint relationship or endeavour is removed *without attributable blame* and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it." (emphasis added)

The respondents correctly point out that the emphasised words distinguish the present situation from that in cases such as *Roxborough v Rothmans of Pall Mall Australia Ltd*[191], and would be fatal to the application of such a principle in these appeals. In truth, this consideration throws one back to the threshold issue of statutory interpretation, discussed above, which is determinative of the appeals.

113 Something further should be said here respecting the relief Equuscorp sought in this Court, namely judgments "in a sum to be determined". This reflects the unsatisfactory course of the litigation. The respondents had counterclaimed seeking recovery of the sums paid and repaid pursuant to the loan agreements. A sufficient "vitiating factor" would appear to have been their mistake of law[192] as to the enforceability of those agreements. But consideration of the counterclaims was deferred and they were not before Byrne J. This meant that what Equuscorp in this Court called "just allowances" were suggested as providing "counter-restitution" in the actions by Equuscorp, when in truth ordinary curial procedures would have led effectively to the set-off of judgments on the cross-claims.

114 The term "counter-restitution" has been used in this Court[193] but, without further analysis[194], is an unfortunate expression for several reasons. It is another

---

190 (1985) 160 CLR 583 at 620; [1985] HCA 78. See also the reference to "the collapse of a bargain" in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 555 [101]; [2001] HCA 68.

191 (2001) 208 CLR 516.

192 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

193 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 383.

expression, along with those recently disfavoured in *Lumbers v W Cook Builders Pty Ltd (In liq)*[195] by Gummow, Hayne, Crennan and Kiefel JJ, which provides a framework for analysis at too high a level of abstraction. In the present litigation, the term, as pointed out above, distracts attention from the regular operation of established litigious procedures. It also distracts attention from a principled consideration of the question raised by McHugh and Gummow JJ in *Fitzgerald v F J Leonhardt Pty Ltd*[196]. This, in short, is the degree of flexibility in fashioning the just measure of recovery on an action such as that for money had and received, given that, while it is a legal action not an equitable suit, it is settled in Australia that the action is a liberal action in the nature of a bill in equity[197]. In the present litigation, for example, were Equuscorp to succeed, a question would arise as to the relevance and quantification of any offsetting "tax benefit" which the respondents had received before the investment scheme collapsed[198].

Orders

115 The appeals should be dismissed with costs.

---

194 See, for example, the further analysis in Roach, "Counter-Restitution for Monetary Remedies in Equity", (2011) 68 *Washington and Lee Law Review* 1271 at 1291-1297.

195 (2008) 232 CLR 635 at 661 [75], 662-663 [78]; [2008] HCA 27.

196 (1997) 189 CLR 215 at 231.

197 *National Commercial Banking Corporation of Australia Ltd v Batty* (1986) 160 CLR 251 at 268; [1986] HCA 21; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 525 [15]-[16], 539-540 [62]-[63], 543 [71], 548-555 [83]-[100].

198 cf *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149 at 199-200.

116 HEYDON J. The relevant transactions are set out in the preceding judgments. Those transactions are redolent of tax avoidance, suggest a preference for the beauty of the circle to the bluntness of the straight line, and indicate a single group of minds in control of superficially different entities. There is about them something of the night. However, it was not squarely suggested that the transactions were shams or that their somewhat murky atmosphere was relevant to the legal issues in these appeals. Those issues are four in number.

117 Did the *Companies (New South Wales) Code* ("the Code") prohibit actions for money had and received by Rural Finance Pty Ltd against the respondents? If not, did those actions lie? If so, were those causes of action capable of assignment to the appellant? If so, were they actually assigned to the appellant?

Effect of the Code

118 Rural Finance Pty Ltd entered contracts of loan with investors – the respondents and people like them. Corindi Blueberry Growers Pty Ltd offered prescribed interests to the public for subscription or purchase and issued them despite there being no registration with the National Companies and Securities Commission of a valid statement in writing in relation to those prescribed interests[199]. Both offer and issue were contrary to s 170(1) of the Code. Corindi Blueberry Growers Pty Ltd, and perhaps others, thus committed an offence against s 174(1) of the Code[200].

119 The only provision the Code made in relation to civil liability was s 174(2), which provided that a person was not relieved from any liability to any holder of a prescribed interest by reason of a contravention of s 170(1)[201]. Hence Rural Finance Pty Ltd remained liable to investors under the loan contracts[202].

120 One possible outcome is that, independently of the Code, and subject to a controversy to be discussed below[203], Rural Finance Pty Ltd had a right to recover the loans so far as they had not been repaid as money had and received. If so, subject to another controversy to be discussed below[204], that right was an

---

199 See above at [89].

200 See above at [91].

201 For s 174(2), see above at [92].

202 *Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394 at 429 and 443.

203 See below at [134]-[149].

204 See below at [150]-[159].

assignable chose in action and therefore in a sense a property right. In deciding what the effect of the Code was, it is necessary to bear in mind a principle of statutory construction that legislation is not to be construed as cutting down or destroying property rights without clear words. Thus in *Mabo v Queensland [No 2]* Deane and Gaudron JJ said[205]: "clear and unambiguous words [must] be used before there will be imputed to the legislature an intent to … extinguish valuable rights relating to property without fair compensation". And in *Marshall v Director General, Department of Transport* Gaudron J (Hayne J concurring) said[206]:

> "Although the rule that legislative provisions are to be construed according to their natural and ordinary meaning is a rule of general application, it is particularly important that it be given its full effect when, to do otherwise, would limit or impair individual rights, particularly property rights."

121 This approach to statutory construction has been applied to problems of the kind which these appeals exemplify. In *St John Shipping Corporation v Joseph Rank Ltd* Devlin J said[207]:

> "A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication, or 'necessary inference,' as Parke B put it,[208] that the statute so intended. If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another, which may easily be broken without wicked intent."

122 As the appellant correctly submitted, the starting point of the inquiry is that a party's rights are unaffected by a statute unless the statute indicates clearly

---

205 (1992) 175 CLR 1 at 111; [1992] HCA 23.

206 (2001) 205 CLR 603 at 623 [38]; [2001] HCA 37.

207 [1957] 1 QB 267 at 288.

208 *Cope v Rowlands* (1836) 2 M & W 149 at 159 [150 ER 707 at 711].

which rights are affected, and how[209]. There is a passage in McHugh J's judgment in *Nelson v Nelson*[210] which supports this proposition. This passage is useful for several purposes, and it is hoped that this may excuse the length of the quotation:

> "If courts withhold relief because of an illegal transaction, they necessarily impose a sanction on one of the parties to that transaction, a sanction that will deprive one party of his or her property rights and effectively vest them in another person who will almost always be a willing participant in the illegality. Leaving aside cases where the statute makes rights arising out of the transaction unenforceable in all circumstances, such a sanction can only be justified if two conditions are met.
>
> First, the sanction imposed should be proportionate to the seriousness of the illegality involved. It is not in accord with contemporaneous notions of justice that the penalty for breaching a law or frustrating its *policy* should be disproportionate to the seriousness of the breach. The seriousness of the illegality must be judged by reference to the *statute* whose terms or policy is contravened. It cannot be assessed in a vacuum. The *statute* must always be the reference point for determining the seriousness of the illegality; otherwise the courts would embark on an assessment of moral turpitude independently of and potentially in conflict with the assessment made by the *legislature*.
>
> Second, the imposition of the civil sanction must further the *purpose of the statute* and must not impose a further sanction for the unlawful conduct if *Parliament* has indicated that the sanctions imposed by the *statute* are sufficient to deal with conduct that breaches or evades the operation of the *statute* and its *policies*. In most cases, the statute will provide some *guidance*, express or inferred, as to the *policy of the legislature* in respect of a transaction that contravenes *the statute or its purpose*. It is this *policy that must guide* the courts in determining, consistent with their duty not to condone or encourage breaches of the statute, what the consequences of the illegality will be. Thus, the *statute* may disclose an *intention*, explicitly or implicitly, that a transaction contrary to *its terms or its policy* should be unenforceable. On the other

---

209 *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 413; [1978] HCA 42; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 262; [1987] HCA 5; *Nelson v Nelson* (1995) 184 CLR 538 at 614; [1995] HCA 25; *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 230 and 250; [1997] HCA 17; cf the *Yango Pastoral* case at 423 and 430.

210 (1995) 184 CLR 538 at 612-613 (footnotes omitted).

> hand, the *statute* may inferentially disclose an *intention* that the only sanctions for breach of the *statute or its policy* are to be those specifically provided for in the *legislation*." (emphasis added)

One theme sounded in this passage is the primacy of legislative language in solving the problem under discussion. It is the legislative language which reveals the policy of the statute, its purpose, its guidance, its intention.

123 Section 174(2) of the Code preserved the liability of Rural Finance Pty Ltd to the borrowers under the loan contracts. It follows that all other liabilities and all corresponding rights under the loan contracts did not survive s 170(1). Hence the investors were entitled to resist enforcement of what would otherwise have been their obligations to repay the loans to Rural Finance Pty Ltd. As the appellant now concedes, the obligations were, in that sense, "unenforceable"[211]. The obligations to repay are said to be unenforceable because they are contractual obligations falling into that category of obligations which Jacobs J described as "associated with or [made] in the furtherance of illegal purposes"[212]. In *Nelson v Nelson*[213], Deane and Gummow JJ said that an example of the category to which Jacobs J referred arose where "the mode of performance adopted by the party carrying out the contract contravenes statute, although the contract was capable of performance without such contravention". The present cases fall within that category. The investors had a contractual duty to supply money. They sourced that money in loans from Rural Finance Pty Ltd. But the promoters of the scheme could have permitted the investors to fund their acquisitions of prescribed interests by borrowing from third party financiers without any connection with or knowledge of the fact that prescribed interests were being offered without a prospectus. Or the promoters could have permitted the investors to have used their own assets. There would have been no loan contracts contravening the Code if either course had been followed.

124 In *Nelson v Nelson*, Deane and Gummow JJ went on to say of this class of case[214]:

---

211 *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149 at 193. It is unnecessary to examine whether the concession was correct; it is supported by that and other authority.

212 *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 432.

213 (1995) 184 CLR 538 at 552.

214 (1995) 184 CLR 538 at 552.

> "the courts act not in response to a direct legislative prohibition but, as it is said, from 'the policy of the law'. The finding of such policy involves consideration of the scope and purpose of the particular statute."

The contrast between direct legislative prohibition and the policy of the law is not a contrast between what the statute provides and some entirely extra-statutory doctrine. The "policy of the law" is to be found in the "scope and purpose" of the statute. The scope and purpose of the statute depend solely on the meaning of its language.

125 It is in that light that other references in the authorities to the "policy of the law" are to be read. Thus in *Vita Food Products Inc v Unus Shipping Co Ltd (in liq)* the Privy Council, speaking through Lord Wright, said[215]:

> "the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

But a little later he said of the provision at issue in that case[216]:

> "It is not obligatory, nor does failure to comply with its terms nullify the contract contained in the bill of lading. This … is the true construction of the statute, having regard to its scope and its purpose and to the inconvenience which would follow from any other conclusion."

Deane and Gummow JJ made a similar point in *Nelson v Nelson*[217]. Their Honours observed: "the question of illegality is bound up with the view taken of the underlying policy of the Act." That policy depends on the legislative language. In the same case Toohey J said[218]: "it is necessary to identify the policy which underlies the relevant provisions of the Act". In *Fitzgerald v F J Leonhardt Pty Ltd*[219], in discussing the relevant "policy of the law", McHugh and Gummow JJ said: "Regard is to be had primarily to the scope and purpose of the statute to consider whether the legislative purpose will be fulfilled without

---

215 [1939] AC 277 at 293.

216 [1939] AC 277 at 295.

217 (1995) 184 CLR 538 at 559. See also at 563.

218 (1995) 184 CLR 538 at 593.

219 (1997) 189 CLR 215 at 227.

regarding the contract as void and unenforceable". This passage was quoted by five Justices in *International Air Transport Association v Ansett Australia Holdings Ltd*[220] as support for their immediately preceding reference to "the policy of the law render[ing] contractual arrangements ineffective or void even in the absence of breach of a norm of conduct or other requirement expressed or necessarily implicit in the statutory text."[221] References in *Miller v Miller*[222] to the "policy of the law" are also linked to "the scope and purpose of the statute".

126 For the following reasons the Code did not prevent Rural Finance Pty Ltd from recovering in any action for money had and received available to it, even though it prevented that company from suing on the loan contracts.

127 First, while the Code could have negated, in express language, the possibility of pursuing actions for money had and received for loans which had not been repaid, it did not do so[223].

128 Secondly, if the need for clear words to extinguish property rights is borne in mind, no implication to that effect can be found in the Code either.

129 Thirdly, the respondents advocate construing the legislation so as to negate an action for money had and received. That construction would deprive Rural Finance Pty Ltd of its property rights to that extent. It would vest their economic value in other persons – the investors who had borrowed the money. Those investors were willing participants in the unenforceable contracts, in the sense that their loans were associated with and in furtherance of schemes not accompanied by valid prospectuses. This is so whether the investors knew of the facts making them unenforceable or not. The consequence of s 174(2) is that if not all of a particular loan had been advanced at a time when the s 170(1) problem came to light, the lender could be compelled to advance the balance even though the investor so accommodated was not obliged to repay either what had already been advanced or what the lender was compelled to advance. Yet the investors would have obtained the benefit of the tax deductions, if that is what they desired, and would have acquired the prescribed interests. If the Code were to be construed as precluding recovery of the money advanced and to be advanced as money had and received, it would be extremely unjust in its operation. That points against a construction having that consequence.

---

220 (2008) 234 CLR 151 at 180 [72]; [2008] HCA 3.

221 (2008) 234 CLR 151 at 179 [71].

222 (2011) 242 CLR 446 at 457-459 [25]-[27]; [2011] HCA 9.

223 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 229-230.

130 Fourthly, although the failure to comply with s 170(1) was a serious matter, it was punishable by onerous sanctions. One was the heavy penalty of $20,000 at a time when that was a lot of money. The other was the heavier penalty of five years' imprisonment. As the respondents submitted, these sanctions were "severe" since they were capable of being imposed "even if the conduct was not fraudulent and no investor suffered any loss." That, taken with the effect of s 174(2), is a statutory indication that the sanctions so imposed were sufficient to deal with the breach.

131 Fifthly, the schemes had two aspects. One ensured large deductions. The other enabled large groups of investors collectively to participate in agricultural activity for profit. Any would-be investors who had sufficient money of their own could invest it in the schemes. The loan contracts were important in facilitating the tax deductions. But they were not integral to the profit-making aspect of the schemes. Any would-be investors who wished to borrow from an independent third party lender rather than Rural Finance Pty Ltd could borrow in that way and claim a tax deduction for the interest, though in a different way from that which the schemes contemplated. To construe the Code as preventing an action for money had and received by Rural Finance Pty Ltd in relation to money advanced under a part of the schemes which was not logically integral to them is an extreme construction. Where is the language to warrant it?

132 Sixthly, actions on the loan contracts had different elements from actions for money had and received, and different limitation periods. The unavailability of the latter does not follow from the unenforceability of the former.

133 If the submissions of the respondents opposing this outcome were upheld, it would be necessary to overrule or disapprove statements in numerous authorities[224]. The primary argument which the respondents advanced for doing so was that to permit an action for money had and received would "stultify the intent of the legislature, and make nonsense of its position in relation to the illegal contract." It was said that the purpose of the legislation "was to ensure that information, conforming to certain minimum standards, be provided to the public so that investment decisions are made on informed and accurate bases. Company promoters might also be deterred from making unscrupulous inducements." Coupled with that submission was a submission that the respondents were part of the class protected by the legislation. It is desirable not to exaggerate the weakness of that class in this particular case. Many of its members are likely to have been wealthy and, like the respondents, are likely to

---

224 *Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394 at 445-446; *O'Brien v Melbank Corporation Ltd* (1991) 7 ACSR 19 at 58; *Australian Breeders Co-operative Society Ltd v Jones* (1997) 150 ALR 488 at 540-541; *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149 at 194.

have borrowed large sums: their attraction to tax deductibility would have stemmed from their liability to the highest marginal rate of income tax. Some are likely to have relied on professional advisers (like Mr Haxton, who consulted Coopers & Lybrand). Some quite possibly knew about the legal requirement for prospectuses. Subject to those considerations, these submissions about the purpose of the legislation are correct as far as they go in relation to many members of the protected class in other fields. But it does not follow that the legislation goes further in protecting that class than imposing criminal sanctions and rendering the contracts of loan unenforceable. It is true that an anomalous result is relevant to statutory construction. The combination of specificity in s 174(1) and (2) and silence in other respects suggests, however, that there is no sufficient anomaly between preventing enforcement of the loan contracts and permitting recovery of unpaid advances as money had and received.

Were actions for money had and received available to Rural Finance Pty Ltd?

134 An action for money had and received in the circumstances of the present case requires at least a failure of consideration. There was a failure of consideration. "Failure of consideration" in this context has been described in this Court as meaning "the failure to sustain itself of the state of affairs contemplated as a basis for the payments" made by Rural Finance Pty Ltd[225]. That contemplated state of affairs was that the loan contracts were enforceable. In one sense, that state of affairs never existed. In another sense, it ceased to exist when the respondents pleaded in their defences in these proceedings that their loan contracts were unenforceable at their option. From that time onwards the investors had made it plain that even if they had until then been performing their obligations under the loan contracts in whole or in part without being compelled to do so by a process of "enforcement", they would cease to thereafter.

135 The trial judge supported the conclusion that there had been a failure of consideration by finding that "it could not be inferred that a fair and reasonable person in the positions of the investor and Rural Finance, respectively, would intend that the loan might stand when the rest of the scheme fell away."[226]

136 The Court of Appeal held that no actions for money had and received were available to Rural Finance Pty Ltd on the ground that there was no *total* failure of consideration. The Court of Appeal's reasons for that view do not have to be investigated, because it was not necessary that there be a total failure of consideration.

---

225 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 557 [104] per Gummow J; [2001] HCA 68.

226 *Equuscorp Pty Ltd v Bassat* (2007) 216 FLR 1 at 30 [112].

137 As Sir Guenter Treitel says, the supposed requirement that there be a total failure of consideration is now much qualified. One of these qualifications supports the view that it "should … no longer apply where the [payer] has *no* remedy, or no satisfactory remedy, for breach (eg by way of action for damages[227]) in respect of the part left unperformed by the payee"[228]. Sir Guenter's reasoning has been approved in this Court[229]. On that view, there is no requirement of total failure, since Rural Finance Pty Ltd has no remedy other than for money had and received.

138 The Court of Appeal held that it was not unjust for the investors to retain the loan funds. Six reasons were given[230]. In large measure the respondents supported and elaborated on them. To them should be added three others advocated by the respondents, which will be analysed as the seventh, eighth and ninth reasons. It is no criticism to say that perhaps the nine reasons overlap to some extent. None of them, however, negate injustice done to Rural Finance Pty Ltd, and taken together they do not negate that injustice.

139 The first reason was: "the investors entered the investment schemes without the protection of an adequate prospectus". This explains why the loan contracts were unenforceable. It does not explain why retention of the loan monies was not unjust. Further, the respondents did not demonstrate how an adequate prospectus would have helped them or would have avoided the failure of the project.

140 The second reason was that the investors:

> "made the requisite direct payments of capital pursuant to loan agreements which provided that the balance of the loan would be discharged by the application of proceeds of sale (guaranteed by a Johnson Group company) of the blueberries (grown and harvested under a management agreement with another Johnson Group entity)".

---

227 The footnote in Peel (ed), *Treitel on the Law of Contract*, 13th ed (2011), par 22-004 at 1134 reads: "Or, in the case of a loan of money, by way of action for the agreed sum."

228 Peel (ed), *Treitel on the Law of Contract*, 13th ed (2011), par 22-004 at 1134 (emphasis in original).

229 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 558 [107], which quotes the corresponding passage from the 10th ed (1999) at 979.

230 *Haxton v Equuscorp Pty Ltd (formerly Equus Financial Services Ltd)* (2010) 265 ALR 336 at 386 [272].

This is irrelevant. It deals with the monies which the investors repaid, but not with the monies which they retained.

141 The third reason was: "it was not disputed that the loans would not have been offered or accepted but for the wider schemes and that the loan agreements were not intended to stand if the schemes failed". This explains why Rural Finance Pty Ltd was entitled to sue for money had and received, but does not explain why it was just that it should fail.

142 The fourth reason was that "the projects failed". But they did not fail entirely or immediately. They operated for several years as they were expected to. In the end they failed, but this failure is causally unrelated to why the funds were advanced. The investments in the projects carried the obvious commercial risks associated with the type of agricultural activity involved. The fact that the investments failed, for reasons which are unclear but are probably at least in part attributable to those risks, does not make it just for the investors to resist returning the monies lent to them. The respondents supplemented what the Court of Appeal said by submitting that there was no surviving value in their hands of the investments or the loans. But they did for a time have the advantage of the loans, the consequential tax advantages, and the prospect, ultimately illusory, of profit from the schemes.

143 The fifth reason was that "the investors irrevocably lost their entire interest in the schemes pursuant to the enforcement of Rural's (legally unenforceable) security interests". This reason is factually inaccurate. As the Court of Appeal stated in a different part of its judgment, Rural Finance Pty Ltd did not enforce its securities over the respondents' interests conferred in the loan contracts[231]. The appellant sold the land as mortgagee in possession, pursuant to other mortgages. In any event, if there had been no assignment to the appellant by Rural Finance Pty Ltd, there would have been no injustice in Rural Finance Pty Ltd recovering the balance of the unpaid loan funds. The assignment, the appellant's appointment of receivers and managers, and the appellant's sale of the land cannot create an injustice which would not otherwise exist.

144 The sixth reason was: "there is no evidence that the investors invested in order to obtain, or did obtain, any taxation benefit from their participation in the schemes." This submission is inconsistent with the trial judge's findings. He found that the benefit of the schemes to the investor was an immediate deduction against non-farm income and the prospect of future income and capital appreciation as the farm became productive. The trial judge also found that the expected result of the particular schemes was that the investor, for a modest outlay, would receive a tax deduction to the full value of the loan and interest, the

---

231 See below at [154]-[155].

prospect of further farm income after five years and, ultimately, the capital value of the interest in the project. The Court of Appeal did not seek to demonstrate that that latter finding, which was supported by specific evidence, was wrong. Indeed, the Court of Appeal echoed the finding. It even quoted it. The Court of Appeal also said that there was "no evidence of whether any investor received any and if so what taxation benefit from participation in the schemes."[232] In fact there was evidence from which it could be inferred that two of the three investors involved in these appeals claimed a tax deduction for interest payments. The third investor was silent on that point. But, life in the world of schemes like those involved here being what it was, it can be inferred from the proposition that investors expected to receive tax deductions that they sought them. There is nothing to suggest that they did not obtain them. Indeed, counsel for the respondents conceded to the Court of Appeal that the respondents received tax benefits of an unknown quantity. In any event, an intention to get a benefit is irrelevant; what matters is what benefit was actually obtained.

145 The seventh reason was that the loan contracts were in substance nothing more than a mechanism by which the respondents entered into investments, and the enrichment of the respondents was therefore not the face value of the loans, but the right to participate in the schemes. But the respondents could not have participated (unless they used their own funds or obtained an outside loan) without the Rural Finance Pty Ltd loans.

146 An eighth group of reasons comprised the following. The loans were advanced as part of round robin transactions whereby no money changed hands. The investors received cheques from Rural Finance Pty Ltd which they immediately endorsed to Johnson Farm Management Pty Ltd in prepayment of management fees. Johnson Farm Management Pty Ltd then returned the cheques to Rural Finance Pty Ltd. This resulted in debts being recorded in Rural Finance Pty Ltd's books to Johnson Farm Management Pty Ltd. The cheques provided by Rural Finance Pty Ltd to the respondents, which it directed be endorsed over to Johnson Farm Management Pty Ltd, had no funds to support them. There was no evidence of Johnson Farm Management Pty Ltd ever calling on Rural Finance Pty Ltd to enforce the loans. The respondents submitted that whatever benefits they received were not received at the expense of either Rural Finance Pty Ltd or the appellant. Even on the assumption that these submissions are factually correct, an assumption which the appellant contested, they do not deal with the fact that the loans were not shams, but real loans. They had to be real loans in order to justify the tax deductions for the interest paid on them. From those real loans the respondents derived tax advantages and the right to participate in the

---

232 *Haxton v Equuscorp Pty Ltd (formerly Equus Financial Services Ltd)* (2010) 265 ALR 336 at 346 [39] per Dodds-Streeton JA (Ashley and Neave JJA concurring).

schemes. The respondents wish to resist restoring the unpaid parts of those real loans from which they gained those real advantages.

147 The ninth reason was that the appellant only paid $500,000 for an assignment of the 638 loans with a face value of $52,584,005. That does not render the resistance of the respondents to repayment of the loans just.

148 Two respondents advanced a specific submission resting on the circumstance that the contractual claims against them were not only rendered unenforceable by the Code, but were also statute-barred. They contended that no action for money had and received could lie because the contract exhaustively covered the parties' rights and liabilities, because they no longer had any liability in contract, and because the investors' purported acts of avoidance of the contracts were nullities and no claim could be predicated on them. However, it was the Code which rendered the contracts unenforceable, and once the respondents chose to allege that they were not bound by them, the claims for money had and received were based on that state of affairs. To treat the contractual limitation defence as barring the claims for money had and received is, as the appellant correctly submitted, to rely on a false analogy.

149 For those reasons an action for money had and received brought by Rural Finance Pty Ltd would have succeeded.

Was Rural Finance Pty Ltd's action for money had and received capable of assignment?

150 The respondents submitted that an action for money had and received was not an assignable chose in action, but only a bare right of action which was not assignable. They relied on three authorities.

151 The first authority was *Poulton v The Commonwealth*[233]. It contains dicta by Williams, Webb and Kitto JJ to the following effect:

> "if it were true that the Commonwealth were guilty of conversion of the Donlons' wool, it would be the Donlons alone who could elect to waive the tort and take the proceeds of sale. This would be so, both because there was not in fact any purported assignment to the plaintiff of the right of action for the tort, and because, according to well-established principle, the right was incapable of assignment either at law or in equity".

The plaintiff's theory of that case was that if he waived the right to sue the Commonwealth for conversion he could recover the value of the amount which

---

233 (1953) 89 CLR 540 at 602; [1953] HCA 101.

the Commonwealth had received as money had and received[234]. On one reading, the dicta in *Poulton's* case say that not only was the right of action for the tort unassignable, but so was the right to recover on account for money had and received. At trial, Fullagar J said that the purported assignment was ineffective because "even actual causes of action in tort are not assignable at law or in equity", and also because "the document did not purport to assign any such cause of action."[235]

152 The second authority relied on was *Mutual Pools & Staff Pty Ltd v The Commonwealth*[236]. Mason CJ referred to an assumption in *Werrin v The Commonwealth*[237] that a claim for recovery of taxes mistakenly paid was not assignable. His Honour cited *Poulton's* case in a footnote[238]. Brennan J, on the other hand, considered that whether the claim of the plaintiff in the *Mutual Pools* case to a refund of sales tax paid pursuant to invalid legislation was regarded as owing as a debt or as recoverable in an action for money had and received, it was property[239].

153 The third authority was *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*[240]. It contains a statement to the effect that there was a serious question whether the Court of Appeal of the Supreme Court of New South Wales in that case was correct to say that certain causes of action for money had and received were historically claims in debt and readily assignable. That statement was supported by reference to the *Mutual Pools* case[241] and to *Poulton's* case[242].

154 The dicta in *Poulton's* case in the Full Court are to be assessed in the light of their Honours' reference to *Dawson v Great Northern and City Railway*[243].

---

234 *Poulton v The Commonwealth* (1953) 89 CLR 540 at 548.

235 *Poulton v The Commonwealth* (1953) 89 CLR 540 at 571.

236 (1994) 179 CLR 155; [1994] HCA 9.

237 (1938) 59 CLR 150; [1938] HCA 3.

238 (1994) 179 CLR 155 at 173.

239 (1994) 179 CLR 155 at 176.

240 (2006) 229 CLR 386 at 484 [260]; [2006] HCA 41.

241 (1994) 179 CLR 155 at 173 and 176.

242 (1953) 89 CLR 540 at 602.

243 [1905] 1 KB 260 at 270-271.

Collins MR, Stirling LJ and Mathew LJ said that an assignment of a chose in action which was obnoxious to the law relating to champerty and maintenance was bad at law and in equity. "An assignment of a mere right of litigation is bad …; but an assignment of property is valid, even although that property may be incapable of being recovered without litigation". Here the Deed of Assignment assigned property in addition to the actions in money had and received. That property included Rural Finance Pty Ltd's unenforceable "debts", its unenforceable "interests under the loan contracts" and the indebtedness. Even if they are put to one side by reason of their unenforceability, as perhaps they should be, the property purportedly assigned also included Rural Finance Pty Ltd's "interests under the guarantees and its interests under the securities". No "interests under the guarantees" were identified in argument. However, if Rural Finance Pty Ltd had had "interests under … securities" amounting to charges over property, they would have been interests in property. It was not submitted that they were affected by the breach of s 170(1) of the Code. Clause 4 in one of the Loan Agreements provided:

> "(i) The Borrower hereby charges his net proceeds from the Farm and charges any and all of his interest in the Farm with repayment of the Principal Sum and interest …
>
> (ii) The Borrower shall on request execute a mortgage charge or assignment over his interest in the Farm and the income therefrom and such other documents as the Lender may reasonably require in order to secure the Loan."

There were different but not dissimilar clauses in four other Loan Agreements. In oral argument in chief the appellant submitted:

> "There are two forms of security there. There is the charge in 4(i) and the possibility of a mortgage charge or assignment in clause 4(ii). There was no such request or execution under 4(ii). However, of course, there is the charge in 4(i) … There was never any enforcement of that security."

The appellant submitted in its written Submissions in Reply that even if a cause of action in conversion is incapable of assignment, the assignment of the causes of action for money had and received was an incident of the assignment by the Deed of Assignment of the security interests, that is, those referred to in cl 4(i).

155 However, it was orally submitted for the respondents, in relation to that submission by the appellant, that it was unclear what the property was to which the assignment of the causes of action for money had and received was attached. "It might be said to be the securities, but in fact as the appellant points out no securities were actually entered into. The only securities that were held were the contractual charge." In fact the appellant had not submitted that *no* securities had been entered into, only that no cl 4(ii) securities had been entered into. The

respondents did not explain why "the contractual charge", that is, the cl 4(i) charge, was not a form of property sufficient to sustain the appellant's argument. However, in view of the fact that the appellant's argument was rather under-analysed on both sides, it is undesirable that the outcome should turn on that point in isolation.

156 There is a different point which favours the appellant. *Poulton's* case predates *Trendtex Trading Corporation v Credit Suisse*, where Lord Roskill (Lords Edmund-Davies, Fraser of Tullybelton and Keith of Kinkel concurring) said[244]:

> "[A]n assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty, which, as has often been said, is a branch of our law of maintenance."

In *Poulton's* case no argument was presented that there was any "genuine commercial interest" associated with the supposed assignment. There is a "genuine commercial interest" here, because the appellant was on 10 January 1991 granted a charge over the assets of Rural Finance Pty Ltd (which included rights to sue for money had and received) to secure the indebtedness of Rural Finance Pty Ltd to the appellant. The assignment of 30 October 1997 was a means by which the appellant recovered part of the assets which that charge gave it as security for Rural Finance Pty Ltd's indebtedness to it. Hence what was said in *Poulton's* case is distinguishable.

157 It is to be noted that in the footnote in Mason CJ's judgment in the *Mutual Pools* case in which he cited *Poulton's* case, he also cited the *Trendtex* case, prefacing the citation with "cf"[245]. This suggests that his Honour may have seen the dicta in *Poulton's* case as not applying where a "genuine commercial interest" can be located in association with an assignment.

158 Finally, the statement in the *Campbells Cash and Carry* case was part of an obiter dictum in a dissenting judgment that raised a question about a matter asserted by the Court of Appeal on a point not argued in that Court. The question was based on what was said in *Poulton's* case and the *Mutual Pools* case. The statement was not dealing with a case in which there was any "genuine commercial interest" in a *Trendtex* sense.

---

244 [1982] AC 679 at 703.

245 (1994) 179 CLR 155 at 173 n 57.

159 The respondents also submitted that a claim for money had and received is a personal one, infused with equitable notions of conscience, requiring a detailed analysis and balancing of the particular merits of the case, and so personal in nature as to be incapable of assignment. They cited authority relating to the non-assignability of the benefit of a contract involving personal skill and confidence[246]. This case has nothing to do with the assignment of the benefit of a contract involving personal skill and confidence. And the circumstance that, like other legal rights, a claim for money had and received might rest on a detailed analysis of matters of fact that call for judgment does not prevent the right, once established, from being assignable.

Were the causes of action for money had and received actually assigned?

160 The trial judge was correct to hold that cl 2(b) of the Deed of Assignment, in assigning "all legal and other remedies" for the "debts" assigned by cll 1 and 2(a), assigned the claims for money had and received, for this was a remedy enabling the appellant to get back the money advanced even though a claim on the loan contracts themselves would fail.

161 The respondents attacked the trial judge's reasoning by adopting that of the Court of Appeal. As is often the case with questions of construction, the matter is one of impression. The Court of Appeal treats "these matters" in cl 2(b), ie the "debts" in cl 1, narrowly. On its construction the only "legal and other remedies" are those which support a claim on the loan contracts. The trial judge's construction is wider. It concentrates on the recovery of the economic equivalent of the "debts" by actions in money had and received. The Court of Appeal was correct to say that an action in money had and received, being predicated on the unenforceability of the loan contracts, is fundamentally different from an action on the loan contracts. But it is difficult to see any commercial point in cl 2(b) unless it bears the wider meaning. The assignment by the receivers and managers of Rural Finance Pty Ltd vested remedies seeking money in the form of damages for breach of contract or in the form of recovery in debt in the appellant. Why, the appellant rhetorically asked, should they have done that while leaving remedies by way of actions for money had and received seeking to recover the same sums of money with themselves? Why would the appellant pay for assets which included those of Rural Finance Pty Ltd's rights against the borrowers which were valueless – for "unenforceable" loans are valueless – but not for those which were valuable?

---

246 *Devefi Pty Ltd v Mateffy Perl Nagy Pty Ltd* (1993) 113 ALR 225 at 234-235.

Orders

162 The appeals should be allowed with costs and consequential orders should be made.