IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M 129 of 2010

BETWEEN:

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

and

10 **ROBERT SAMUEL BASSAT**
Respondent

RESPONDENT'S SUBMISSIONS

PART I: INTERNET CERTIFICATION

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

20 **PART II: ISSUES**

2. Are restitutionary remedies available for moneys paid to a borrower under a contract of loan rendered illegal by sec 170(1) of the *Companies Code*?

3. If they are, upon what principles or considerations is restitution in such cases determined?

4. In particular, is it sufficient for a claimant for restitution of moneys paid under an illegal contract to establish a total failure of consideration or must some further matters be present?

5. If Rural Finance Pty Ltd had a claim for restitution against the respondent, was that claim:

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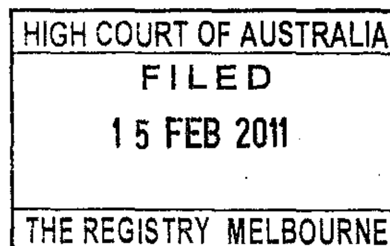

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(a) capable of assignment at law, and if so

(b) actually assigned to the appellant?

PART III: SECTION 78B NOTICES

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

PART IV: FACTS

7. The appellant's Haxton submissions at paragraphs 9 to 53 contain statements of fact about the general operation of the schemes. The appellant's narrative is contested in the following respects.

8. At paragraph 36 of its submissions, the appellant asserts that "at no time did Rural enforce any of the Investor Charges". This was not the subject of any evidence at trial. The point was raised for the first time in oral argument before the Court of Appeal when senior counsel for the appellant, "*stepping outside the evidence of the case*",[1] informed the Court about the appellant's priority rights and the apparent effect of those rights on Rural Finance's securities. The absence of evidence about Rural Finance's enforcement of securities over the investors' interests was not surprising because, at trial, the appellant never pointed to "total failure of consideration" as the reason why the investors should make restitution of amounts outstanding under their loan contracts with Rural Finance.[2] This submission was not made until the hearing in the Court of Appeal. In addition, it should be noted that Rural Finance did deal with the securities by assigning them to the appellant for consideration.[3]

9. At paragraph 42, the assertion that Ian Haxton, the respondent in M 128 of 2010, "*claimed*" tax deductions is not strictly correct. Ian Haxton's brother and accountant, Charles Haxton, in paragraph 47 of his witness statement,[4] said that Ian Haxton "would have disclosed project income and claimed the expenses associated with the investment including the interest on the Rural loan". There was no other evidence on this question.

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[1] AB 671-672; (T49.21-31 to T50.1-16).

[2] *Haxton v Equuscorp Pty Ltd* (2010) 265 ALR 336 at 353 [88], 397 [330] (Dodds-Streeton, J.A.). *Contra* Appellant's Haxton submissions at [85].

[3] AB 417.

[4] AB 437 at [46]-[47].

10. As to paragraph 44 of the appellant's Haxton submissions, the respondents contend that while the tenor of John Cunningham's evidence was that tax benefits were expected from the involvement of Cunningham's Warehouse Sales Pty Ltd in the schemes, there was no evidence that any such benefits were in fact derived and, if so, in what amount.[5] The appellant's reference to Byrne, J.'s questioning of Mr Cunningham relies on trial transcript that was excluded from the appeal book as being irrelevant.[6] The two pages of transcript relied on by the appellant (attached to these submissions) do not add to Mr Cunningham's limited evidence on this issue.

11. The respondents draw attention to one other matter in relation to the investors' "tax benefits". At the trial, the appellant's claim for restitution was pleaded exiguously,[7] opened with like brevity,[8] and made subsidiary and in the alternative to its debt claims.[9] Senior counsel for the respondents challenged the sufficiency of the pleading of restitution but was prepared to proceed if the respondents were permitted to raise matters in defence.[10] Byrne, J. accepted the appellant's submission that the respondents could not rely on matters in defence without pleading them but gave the respondents leave to amend their defences.[11] Paragraph 20A was subsequently added.[12] The concession in paragraph 20A(c) of the amended defences (that any benefit obtained by the respondents was limited to tax benefits they derived from the investment) was made because Byrne, J. said that he would grant an adjournment at the respondents' expense if the concession was not made.[13]

12. In these circumstances, and contrary to the appellant's submissions,[14] it was open to the Court of Appeal to conclude[15] that there was no evidence of any benefits to the investors of tax deductions from their investments.

13. On the basis that the quantum of tax benefits, if any, be determined later (if the appellant established a right to restitution), paragraph 20A(c) was drawn in the terms

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[5] AB 460-461, pars 17, 18.
[6] AB index, item 59.
[7] At AB 13 [20] and AB 36 [4A(d)] (M128); AB 64 [20] and AB 88 [4A(d)] (M129); AB 109 [21] and AB 136 [4A(d)] (M130); AB 161 [21] and AB 187 [4A(d)] (M131); AB 211 [21] and AB 235 [4A(d)] (M132).
[8] AB 501; T19.1-16.
[9] *Haxton v Equuscorp Pty Ltd* (2010) 265 ALR 336 at 353 [88] (Dodds-Streeton, J.A.).
[10] AB 510 ff; T59.1 ff; *Equuscorp Pty Ltd v Bassat* (2007) 216 FLR 1 at 33- 34 [128].
[11] AB 521-526; T163.10-T168.21. The appellant replied to the defences pleaded to the claim for restitution giving some detail of its claim in restitution in the replies, though not alleging total failure of consideration.
[12] AB 17-18 (M128); AB 69-70 (M129); AB 115-116 (M130); AB 167-168 (M131); AB 217-218 (M132). The relevant paragraph in appeals M131 and M132 is 21A.
[13] AB 525-526, T167.6-T168.16.
[14] Appellant's Haxton submissions at [42]-[44] and [107].
[15] *Haxton v Equuscorp Pty Ltd* (2010) 265 ALR at 340 [8] (Neave, J.A.) and 346 [39] (Dodds-Streeton, J.A.).

set out therein. No concession was ever made that any investor obtained a tax benefit of a certain amount or value.[16] Byrne, J. ultimately found it unnecessary to consider the issue, as he concluded that any tax benefit was not relevant in assessing whether the investors' received an enrichment at Rural Finance's expense.[17]

PART V: APPLICABLE STATUTES

14. In his reasons for judgment, reported in the Federal Law Reports,[18] Byrne, J. referred only to the *Companies (Victoria) Code.*[19] The respondents confirm that the Code was, at the relevant times, in relevantly identical terms in each Australian State, in the form attached to the appellant's Haxton submissions. Each respondent pleaded the Code of
10 his or its State of residence.

15. The respondents do not concede that the *Property Law Act* 1974 (Qld) is applicable to the assignments. The assignments were made by deed. The respondent is not aware of any evidence of where the deeds were executed.

PART VI: ARGUMENT

Illegality and restitution

16. Between June 1987 and May 1989, the respondents entered into a number of agreements, as a result of which they obtained interests in schemes for the production and sale of blueberries.[20] At the trial of this proceeding, the agreements were found to have been illegal and unenforceable.[21] In contravention of the *Companies Code*, the
20 promoters of the scheme had failed to lodge prospectuses with the National Companies and Securities Commission,[22] or failed to meet the requirements of the Code in relation to the contents of prospectuses issued.[23]

17. The appellant contends that the respondents must now make restitution of the value of moneys advanced to them under loan agreements entered into with Rural Finance (as

[16] AB 525-526, T167.6-T168.12.
[17] *Equuscorp Pty Ltd v Bassat* (2007) 216 FLR 1 at 33-34 [128].
[18] *Equuscorp Pty Ltd v Bassat* (2007) 216 FLR 1. The appellant's submissions refer only to the media neutral citation of the case: [2007] VSC 553.
[19] (2007) 216 FLR 1 at 23 [87] ff. Each respondent pleaded the Code of his or its State of residence.
[20] *Equuscorp Pty Ltd v Bassat* (2007) 216 FLR 1 at 4 [11] – 6 [17].
[21] *Equuscorp Pty Ltd v Bassat* (2007) 216 FLR 1 at 30 [112]; *Haxton Equuscorp Pty Ltd* (2010) 265 ALR 336 at 349 [60]-[61].
[22] M128 of 2010 [Haxton 5154]; M129 of 2010 [Bassat 4540]; M131 of 2010 [CWS 5189]; M132 of 2010 [CWS 8277]. *Equuscorp Pty Ltd v Bassat* (2007) 216 FLR 1 at 26 [95]-[97].
[23] M130 of 2010 [CWS 5223]. *Equuscorp Pty Ltd v Bassat* (2007) 216 FLR 1 at 26 [95]-[97]; *Haxton Equuscorp Pty Ltd* (2010) 265 ALR 336 at 349 [59]-[60].

part of the schemes). In each case the appellant seeks the unpaid balance of the loan agreement together with interest.[24] Though pleaded simply as a "claim for money had and received to the use of the plaintiff",[25] the appellant further contends that the basal reason why restitution should be awarded is that Rural Finance advanced loan moneys to the investors on a consideration which totally failed.[26]

18. In determining whether a defendant has received an enrichment which is unjust, the plaintiff must identify "a qualifying or vitiating factor falling into some particular category".[27] The importance of identifying the applicable category of the case has been emphasised a number of times.[28] Although "total failure of consideration" is such a recognised category of case,[29] this Court has never accepted that it provides a sufficient basis for imposing an obligation on a defendant to make restitution of moneys received under an illegal and unenforceable contract. Where there is an illegal contract, the starting point is the statement of Chambre, J. in *Brisbane v Dacres*: "The rule is, that when [the defendant] cannot in conscience retain it, he must refund it, if there is nothing illegal in the transaction: the case is different where there is an illegality".[30] Where there is illegality, *in pari delicto potior est conditio defendentis.*[31] The application of this rule has resulted in relief being denied in many cases.[32] Here the plaintiff and defendants were not even *in pari delicto*. The plaintiff (appellant) or its assignor was *in delicto*. The defendants (respondents) were not at fault.

19. The appellant's submissions ignore this. The appellant simply asserts a right to restitution based on a total failure of consideration, being the "state of affairs

[24] Appellant's Haxton submissions at [61] (M 128 of 2010); other submissions at [13] (M129 of 2010); at [13] (M130 of 2010); at [13] (M131 of 2010); at [13] (M132 of 2010). By reason of the orders sought in these appeals, the appellant accepts that, if successful, interest should be calculated in the manner determined by the trial judge: *Equuscorp Pty Ltd v Bassat* (2007) 216 FLR 1 at 39 [151].

[25] AB 13 [20] (M128); AB 64 [20] (M129); AB 109 [21] (M130); AB 161 [21] (M131); AB 211 [21] (M132).

[26] Appellant's Haxton submissions at [85].

[27] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 156 [150], adopting *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673 per Mason, C.J., Wilson, Deane, Toohey and Gaudron, JJ.; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379 per Mason, C.J., Deane, Toohey, Gaudron and McHugh, JJ. See also *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256-257 per Deane, J.

[28] *Ibid.*

[29] *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 524-525 [14]-[16] per Gleeson C.J., Gaudron and Hayne, JJ.

[30] *Brisbane v Dacres* (1813) 5 Taunt 143 at 158 [128 ER 641 at 647]. (His dissent in that case was vindicated in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.)

[31] If the parties are equally at fault, the condition of the defendant is the stronger: *Smith v Bromley* (1760) 2 Doug 696n at 696 [99 ER 441 at 443] (Lord Mansfield); *Holman v Johnson* (1775) 1 Cowp 341 at 343 [98 ER 1120 at 1121] (Lord Mansfield).

[32] Goff and Jones *The Law of Restitution*, 7th ed. (2007) par 24-002, pp 605-608 and the cases referred to in fn 8; Wade, 'Restitution of Benefits Obtained under Illegal Transactions – Reasons For and Against Recovery' (1946) 25 *Texas L R* 31. See also *George v Greater Adelaide Land Development Co Ltd* (1929) 43 CLR 91.

contemplated as the basis for the advance by Rural"; that is, "that the Loan Agreements were enforceable".[33] But there is a problem with this approach. If one starts from a premise that the "consideration" for an advance of money is the enforceability of a loan agreement, it will follow *a fortiori* in every case that where such an agreement is rendered unenforceable because of illegality, a "total" failure of consideration will have occurred. And that is so even if the parties' performance of the contract cannot be apportioned.[34] It should not be accepted that a *prima facie* claim for restitution is established when, in the context of an illegal and unenforceable contract one party "has paid money to another and not received what he hoped to

10 get."[35] Something more is required. The common law's answer has been the *in pari delicto* rule and the formulation of a number of exceptions to it.

20. The exceptions to the rule, or the circumstances in which parties are not *in pari delicto*, were identified by McHugh, J. in *Nelson v Nelson*:[36]

> First, the courts will not refuse relief where the claimant was ignorant or mistaken as to the factual circumstances which render an agreement or arrangement illegal. Second, the courts will not refuse relief where the statutory scheme rendering a contract or arrangement illegal was enacted for the benefit of a class of which the claimant is a member. Third, the courts will not refuse relief where an illegal agreement was induced by the defendant's fraud, oppression or
> 20 undue influence. Fourth, the courts will not refuse relief where the illegal purpose has not been carried into effect. (footnotes omitted)

21. None of the exceptions apply to the facts of these appeals.[37] Therefore restitution should be denied.

22. In case it is thought that the *in pari delicto* rule and its established exceptions are no longer determinative in cases of illegal contracts,[38] there is another problem with the

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[33] Appellant's Haxton submissions at [87].

[34] A pre-condition to dispensing with the requirement of "total" failure of consideration in respect of the entire bargain: *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 382; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 557-558 [105]-[109] (Gummow, J.).

[35] *Deposit & Investment Co Ltd v Kaye* (1962) 63 SR (NSW) 453 at 459 (Walsh, J.).

[36] (1995) 184 CLR 538 at 604-605, and referred to in *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 229 (McHugh and Gummow, JJ.). Although McHugh, J. appears to refer to exceptions as applying only to the *ex turpi* rule, the sources referred to in fn 251 of the judgment consider them to be exceptions to the *in pari delicto* rule as well (McCamus, 'Restitutionary recovery of benefits conferred under contracts in conflict with statutory policy - the new golden rule' (1987) 25 *Osgoode Hall L J* 787 at 797-800; Wade, 'Restitution of benefits acquired through illegal transactions' (1947) 95 *U Pennsylvania L R* 261). See also *George v Greater Adelaide Land Development Co Ltd* (1929) 43 CLR 91 at 101 (Knox, C.J.).

[37] There was no evidence from any persons involved with the Johnson Group of companies, and in particular Rural Finance, about their knowledge of the circumstances which rendered the contracts of loan illegal. Cf. Appellant's Haxton submissions at [87] where it is asserted that the parties were not aware "that the Loan Agreements were enforceable."

way in which the appellant has framed its claim for restitution based on a "total failure of consideration". That is, in short, that in equating the relevant "consideration" with the state of affairs which failed to sustain itself (ie. the enforceability of the loan agreements), the appellant seeks to expand, without justification, the accepted boundaries of a claim based on total failure of consideration. The appellant cannot, as it seeks to do,[39] find any support for its contention in the passages from the joint judgment of Gleeson, C.J., Gaudron and Hayne, JJ., or the judgment of Gummow, J., in *Roxborough v Rothmans of Pall Mall Australia Ltd.*[40]

10 23. In that case, the Justices relied on what Deane, J. said in *Mushinski v Dodds* to conclude that when money is paid pursuant to a contract, it would involve too narrow a view of certain general equitable notions "to limit failure of consideration to failure of contractual performance".[41] In *Mushinski v Dodds*, Deane, J. had said that general equitable notions found expression in the common law count for money had and received in circumstances where "the substratum of a joint relationship or endeavour *is removed without attributable blame*"[42] (our emphasis). He concluded that, in those circumstances, equity will not permit the recipient of money or other property contributed by one party on the basis of a joint relationship or endeavour to unconscionably retain that benefit.[43] However, in the present cases, the relevant

20 substratum for which the appellant contends (the enforceability of the loan agreements) never existed because of the Johnson Group's failure to comply with the conditions of issuing prescribed interests to the public, in contravention of sec 170 of the Code. "Blame" for the state of affairs which eventuated is to be solely attributed to the promoters of the schemes. *Roxborough,* by contrast, was a case in which the substratum of one aspect of the parties' contracts was removed without attributable blame: the decision in *Ha v New South Wales*[44] rendered the *Business Franchise Licences (Tobacco) Act* 1987 (NSW) invalid as imposing a duty of excise contrary to sec 90 of the Commonwealth Constitution. The extension of "total failure of consideration" to the present case, in the manner proposed by the appellant, should be

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[38] Although in a different contexts, see *Nelson v Nelson* (1995) 184 CLR 538 at 611 (McHugh, J.) and *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 229-231 (McHugh and Gummow, JJ.).
[39] Appellant's Haxton submissions at fn 109.
[40] (2001) 208 CLR 516.
[41] (2001) 208 CLR at 525 [16]; see also at 557 [104].
[42] (1985) 160 CLR 583 at 620.
[43] (1985) 160 CLR 583 at 620.
[44] (1997) 189 CLR 465.

rejected as not only being inconsistent with the decided cases, but also being wrong in principle.

24. There are a number of additional reasons why it would not be "unjust" for the respondents to retain the value of the outstanding loan contracts. Before turning to those reasons, however, it is necessary that they be placed in context. Here, the appellant brings a claim for money had and received. This claim, though a legal one, is a liberal action in the nature of a bill in equity.[45] As such, it depends largely on an assessment of whether "it is equitable for the plaintiff to demand or for the defendant to retain the money".[46]

10 25. Considerations of equity and good conscience apply most acutely when it is a party's own act or omission which has produced the unenforceability of a contract, and recovery is then sought in a claim for restitution of benefits transferred pursuant to it. This was recognised in *Boissevain v Weil*,[47] a case in which a contract of loan was entered into in contravention of the *Defence (Finance) Regulations* 1939 (UK). The defendant, a British subject but resident in occupied France, sought a loan from the plaintiff to use in purchasing for her son, a Jew, exemption from being deported to Germany. The regulations prohibited this borrowing. Although not pleaded, the plaintiff contended that he could recover from the defendant the money lent as money had and received upon the footing "that he had made to her a payment for which the 20 consideration wholly failed".[48] His appeal to the House of Lords was dismissed unanimously. In his speech, Lord Radcliffe stated that:

> [W]hen the transaction by which the money has reached the respondent is actually an offence by our laws, the matter passed beyond the field in which the requirements of the individual conscience are the determining consideration... [I]f this claim based on unjust enrichment were a valid one, the court would be enforcing on the respondent just the exchange and just the liability, without her promise, which the Defence Regulation has said that she is not to undertake by her promise. 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.[49]

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[45] *Moses v Macferlan* (1760) 2 Burr 1005, 1008, 1012 [97 ER 676 at 678, 680–1] (Lord Mansfield); *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 540 [62]–[63], 543 [71], 548-555 [83]–[100] and the cases referred to in those passages.

[46] *Campbell v Kitchen & Sons Ltd and Brisbane Soap Co Ltd* (1910) 12 CLR 515 at 531 (Barton, J.); see also at 538 (O'Connor, J.).

[47] [1950] AC 327.

[48] [1950] AC 327 at 335.

[49] [1950] AC at 341.

26. Since restitution, though a common law remedy, is informed by equitable principles, it is the substance of the transactions which matters, not their form.[50] In the present cases, the implementation of the loans and related transactions took place by way of a round robin of cheques. As Byrne, J. found,[51] a loan was made by Rural Finance to each investor by a cheque which was immediately endorsed in favour of Johnson Farm Management Pty Ltd (**JFM**) as a pre-payment by the investor of management fees owed to that company. The cheque was then deposited in Rural Finance's account, resulting in its becoming indebted to JFM for that amount. These transactions were all recorded by book entries with no actual money changing
10 hands.[52] Indeed, because the Rural Finance bank account had no funds to support the cheque,[53] even though the transaction between Rural Finance and the investors was that of a loan, the "benefit" received by investors under the loan agreement was not the provision of or access to money, but the right to participate in the schemes.[54] In practical, or economic terms, it was the first two principal repayments which constituted the respondents' investments, rather than the "loan", which was notional only. *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*[55] does not preclude consideration of these matters as the claim in that case was confined to contract.

27. Further matters of substance should be noted. First, it is not now Rural Finance which seeks to recover the amount of the loans made to the respondents, but the appellant,
20 the assignee of its debts. Byrne, J. observed that despite the face value of the 638 loans assigned to the appellant being $52,584,005, the appellant paid only $500,000,[56] or less than one cent in the dollar. Secondly, in the circumstances of the investment described above, where there was a round robin of cheques with no funds to support them, the question arises whether any enrichment of the investors (if enriched at all) was truly at the expense of Rural Finance. Only if Rural Finance were called on to pay out the deposits to JFM could this be said. There was no evidence of any such

[50] *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 674; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 376 (Deane and Dawson, JJ).
[51] (2007) 216 FLR at 34 [129].
[52] (2007) 216 FLR 1 at 34 [129].
[53] (2007) 216 FLR 1 at 34 [129].
[54] In *Akron Securities Ltd v Iliffe* (1997) 143 ALR 457 at 470 (New South Wales Court of Appeal), Mason, P. said of a similar financing arrangement that it was artificial to regard the borrowers as having received the loan moneys from the financier since "the loan agreement was part of a package of interlocking financial arrangements"', "importantly, the money 'advanced' to the borrowers was instantly directed by them to be applied towards the venture".
[55] (2004) 218 CLR 471.
[56] (2007) 216 FLR at 4 [8].

calls. To adopt the language of the pleading, there was no money had and received by the respondents to either the appellant's or Rural Finance's use.

28. The appellant has presented its written submissions in this Court as responsive to the respondents' submissions in the Court of Appeal.[57] The appellant contends that what it calls the respondents' "Restitution Defence" should be rejected because, not only was there a total failure of consideration, but upon its proper construction the Code did not preclude the grant of a restitutionary remedy.[58]

29. When deciding whether a statute impliedly renders a contract illegal, unenforceable or void, a close examination of the scope and purpose of the Act is required.[59] This analysis was undertaken by Byrne, J., following which he held that the loan agreements between Rural Finance and the respondents were illegal and unenforceable.[60] His conclusion was consistent with a number of other "prescribed interest" cases in which contracts of loan had been held to be illegal and unenforceable following contravening provisions similar to sec 170 of the Code.[61] As Byrne, J's finding was not challenged on appeal, there is no basis for the appellant now to contend that the contracts underpinning the schemes "must be given legal effect".[62]

30. The appellant's allied submission that the Court should assess whether restitution should be awarded based on whether "it would be an affront to enforce legal or equitable rights arising from the contract"[63] should also be rejected. The cases cited by the appellant do not support that proposition. In *Fitzgerald v FJ Leonhardt Pty Ltd*[64] the Court did not have to examine the appellant's claim for restitution because the parties' contract was neither illegal nor unenforceable. *Nelson v Nelson*[65] was a case in equity's exclusive jurisdiction. The question was whether a mother, who had conveyed property to her son and daughter to obtain a collateral benefit under the *Defence Service Homes Act* 1918 (Cth), had a beneficial interest in the proceeds of its

[57] Appellant's Haxton submissions at [48] and [62]ff.
[58] Appellant's Haxton submissions at [83].
[59] *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410; *Nelson v Nelson* (1995) 184 CLR 538 at 552ff (Deane and Gummow, JJ.); *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215.
[60] *Equuscorp Pty Ltd v Bassat* (2007) 216 FLR 1 at 30 [112].
[61] eg *Hurst v Vestcorp Ltd* [1998] 12 NSWLR 394; *O'Brien v Melbank Corporation Ltd* (1991) 7 ACSR 19; *Australian Breeders Co-operative Society Ltd v Jones* (1997) 150 ALR 488; *Henderson v Amadio Pty Ltd (No 1)* (1995) 62 FCR 1 at 185-189; *Henderson v Amadio Pty Ltd (No 2)* (1996) 62 FCR 221; *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149.
[62] Appellant's Haxton submissions at [108]. See also [77].
[63] Appellant's Haxton submissions at [78].
[64] (1997) 189 CLR 215.
[65] (1995) 184 CLR 538.

sale. There being no contract between the parties, the issue was whether the policy of the Act told against the relief being sought. It was held that the scheme of the Act did not prevent a declaration being made in the mother's favour, but only if she was "prepared to do equity according to the requirements of good conscience".[66] Terms were imposed accordingly.[67] The appellant also relies on *Pavey & Matthews Pty Ltd v Paul*.[68] But that was not a case in which the contract in issue was illegal; it was merely unenforceable.[69] Moreover it was a *quantum meruit* case and there was clear evidence that the work had been done and accepted.

31. In this case, an award of restitution would stultify the intent of the legislature, and make nonsense of its position in relation to the illegal contract. Section 170 of the Code prohibited the offer of prescribed interests unless a prospectus was prepared and lodged with the National Companies and Securities Commission.[70] The evident purpose of the section, when read together with sec 174 and Part IV Div 6 of the Code more generally, 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. In this way, the section had both a beneficial and a protective effect. In this case, the appellants seek restitution in circumstances where the very vice against which sec 170 was designed to protect has arisen, and the assistance which the section was intended to afford investors has been denied. The severe sanctions imposed by sec 174 indicate how serious Parliament considered a contravention of sec 170 to be: imprisonment, and a fine, even if the conduct was not fraudulent and no investor suffered any loss. The respondents submit that the words of sec 170, when read in light of the scheme and purpose of Div 6 of the Code and the Act as a whole, militate against a conclusion that the legislature intended any free-standing right of restitution to remain in the circumstances of these appeals.

[66] *Nelson v Nelson* (1995) 184 CLR 538 at 571 (Deane and Gummow, JJ.).
[67] *Nelson v Nelson* (1995) 184 CLR 538 (1995) 184 CLR 538 at 571-573 (Deane and Gummow, JJ.), 597-598 (Toohey, J.), 618 (McHugh J.).
[68] Appellant's Haxton submissions at [83].
[69] *Pavey & Matthews* (1987) 162 CLR 221 at 262 (Deane, J.).
[70] The section has a long lineage, as Mahoney, J.A. pointed out in *Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394 at 421. The origins of Part IV Div 6 are said to be "found in recommendations made by the Statute Law Revision Committee of the Victorian Parliament in October 1954", which was asked by the Attorney-General to examine "anomalies in the statute law which appear to permit (a) persons interested in the promotion and/or direction of companies; and (b) firms - to engage in fraudulent practices, with a view to reporting upon the measures deemed necessary to afford adequate protection to shareholders, creditors, and members of the public": Companies and Securities Law Review Committee *Prescribed Interests*, Discussion Paper No 6, May 1987, Appendix (i) (http://www.takeovers.gov.au/content/Resources/cslrc/cslrc_discussion_paper_no_6.aspx).

32. But even if this construction were not to be accepted, the question of whether the Code permits a claim for restitution (as has been held in some of the "prescribed interest" cases[71]) is not the end of the inquiry. Rather, it is just the beginning. It is then for the court to determine whether, having regard to the terms of the claim, the defences alleged, and in light of all the evidence, the equities of the case require restitution to be made.[72]

33. In *Pavey & Matthews*,[73] Deane, J. stated that:

> It would be contrary to the general notions of restitution or unjust enrichment if what constituted fair and just compensation for the benefit accepted by the other party were to be ascertained without regard to any *identifiable real detriment sustained by that other party* by reason of the failure of the first party to ensure that the requirements of the statutory provision were satisfied. (our emphasis).

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34. The same considerations apply whether in a claim for a *quantum meruit* or for money had and received. As Lord Mansfield said in *Moses v Macferlan*[74]: the defendant "may go into every equitable defence, upon the general issue; he may claim every equitable allowance... he may defend himself by everything which shews that the plaintiff, ex æquo & bono, is not intitled to the whole of his demand, or to any part of it."

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35. Because Rural Finance's loan agreements were in substance nothing more than a mechanism by which the respondents entered into investments in the Blueberry Farm, and the cheque provided by Rural Finance and endorsed over to JFM had no funds to support it, the enrichment received by the investors was not the face value of the loan. Instead, as stated above, it simply provided a right to participate in the schemes. This right was accepted in each case the subject of these appeals. The respondents' investments subsequently failed entirely. There is no evidence of any traceably surviving value in the hands of the respondents arising from the investments or the loan agreements.

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[71] *Hurst v Vestcorp Ltd* [1998] 12 NSWLR 394; *O'Brien v Melbank Corporation Ltd* (1991) 7 ACSR 19; *Australian Breeders Co-operative Society Ltd v Jones* (1997) 150 ALR 488; *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149 (where restitution was ordered in favour of investors in an illegal scheme). See the discussion of each of those cases in *Haxton v Equuscorp Pty Ltd* (2010) 265 ALR 336 at 375 [196]ff (Dodds-Streeton, J.A.).

[72] See the proposed orders of McHugh, J.A. in *Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394 at 446D.

[73] (1987) 162 CLR 221 at 263.

[74] (1760) 2 Burr 1005 at 1010 [97 ER 676 at 679].

36. The evidence in relation to the respondents' receipt of tax benefits is set out in Part IV of these submissions. In any event, the respondents agree with the appellant[75] that evidence of any intent to obtain a tax benefit is irrelevant to whether the respondents are required to return moneys outstanding under the loan agreements. Furthermore, even if a tax benefit was obtained, it was not received at the expense of Rural Finance or the appellant. The appellant therefore has no basis on which it should be bought to account or made the subject of claim for restitution.

37. The fundamental question in this aspect of the appeal is whether the respondents are "obliged by the ties of natural justice and equity to refund the money".[76] Because, as earlier stated, money had and received is in its nature a bill in equity, a compendious inquiry is required. The Court should have regard to all the circumstances of the case, including that the loan contracts were entered into without compliant prospectuses in contravention of sec 170 of the Code; the substance of the transactions, including the fact that no funds actually changed hands; the fact that the schemes failed and the investors suffered loss; and the circumstances in which the appellant now seeks to enforce its claim for restitution. The respondents contend that in light of these matters, as well as the policy of the Code, the way in which the appellant has sought to rely on the category of "total failure of consideration", and the long-standing operation of the *in pari delicto* rule, the appeals should be dismissed.

Restitutionary rights not assignable

38. The appellant asserts that what it calls the "Assignability Defence" was dismissed by the Court of Appeal and further, that that defence is not an issue in these Appeals.[77] The respondents do not accept either assertion.

39. The Court of Appeal did not express a decided view on the issue of whether a claim in restitution is capable of assignment.[78] In the leading judgment, Dodds-Streeton, J.A. reviewed the relevant High Court authorities and said: "There is no unambiguous, authoritative statement indicating that the restitutionary claims in this case, if established, were capable of assignment. On balance, the preponderance of the

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[75] Appellant's Haxton submissions at [106].
[76] *Moses v Macferlan* (1760) 2 Burr 1005 at 1012 [97 ER 676 at 681] (Lord Mansfield).
[77] Appellant's Haxton submissions at [52]
[78] Ashley, J.A. stated at [1] that he agreed with the reasons of Dodds-Streeton, J.A. in his decision to dismiss Equuscorp's appeals and allow the investors' appeals. Neave, J.A., while expressly agreeing with the reasons of Dodds-Streeton, J.A., (see [2]), said at [9] that it was unnecessary to decide on the issue of assignability of restitutionary claims.

admittedly sparse and relatively oblique indications by the High Court tends to throw doubt on, rather than affirm, that proposition."[79]

40. The respondents will seek the Court's leave, if necessary, to rely on the attached Notice of Contention to present the following argument on the point.

41. In *Pavey & Matthews*,[80] this Court rejected an implied contract analysis in determining when a claim arises *quasi ex contractu*. The obligation to make restitution is one imposed by law, and is independent of rights arising under contract or in tort.[81]

42. A right to claim restitution is not a chose in action, as is a right to claim for breach of contract, nor is it a property right. It is a bare right of action and is not assignable. The following cases support that conclusion: *Poulton v The Commonwealth,*[82] *Mutual Pools & Staff Pty Ltd v The Commonwealth*[83] and *Campbell's Cash & Carry Pty Ltd v Fostif.*[84] In their joint judgment in *Poulton*, Williams, Webb and Kitto, JJ. stated, in respect of the plaintiff's purported assignment of a right of action for the tort of conversion and resultant claim for moneys had and received, that the claim must fail because the right of action for the tort, and by implication the claim for moneys had and received, was incapable of assignment.[85] In *Mutual Pools*[86] Mason, C.J. considered the meaning of the term "acquisition of property" in the course of determining the plaintiff's claim for a refund of sales tax paid by it pursuant to invalid legislation. He referred to Dixon, J.'s judgment in *Werrin v The Commonwealth,*[87] which considered a claim for restitution in respect of taxes mistakenly paid in similar circumstances, observing that the court in *Werrin* had assumed but not decided that the restitutionary claim was not assignable and therefore did not amount to property for the purpose of sec 51(xxxi) of the Constitution. Brennan, J, by contrast, considered that whether the plaintiff's claim was regarded as one of debt or in

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[79] Dodds-Streeton, J.A. then considered *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 and *TS & B Retail Systems Pty Ltd v 3 Fold Resources Pty Ltd (No 3)* (2007) 158 FCR 444 and said at [310] that a lender's restitutionary claim to recover funds advanced under an unenforceable loan contract "appears, on the better view, to be capable of assignment, particularly if the lender has a general commercial interest of the kind recognized in *Trendtex*".
[80] (1987) 162 CLR 221.
[81] (1987) 162 CLR at 250, 252-253 and 255-257.
[82] (1953) 89 CLR 540.
[83] (1994) 179 CLR155.
[84] (2006) 229 CLR. 386.
[85] (1953) 89 CLR at 602.
[86] (1994) 179 CLR at 173.
[87] (1938) 59 CLR 150.

restitution it was a common law chose in action capable of assignment.[88] In *Fostif,* Callinan and Heydon, JJ, in a dissenting judgment that considered a representative proceeding based on litigation funding to be an abuse of process, stated that a serious question was raised about the correctness of the *obiter dicta* of Mason, P.[89] in his judgment in the Court of Appeal, that a cause of action for money had and received was readily assignable.[90] In the related footnote they specifically referred to the joint judgment in *Poulton.* In *Trendtex*, the House of Lords considered that a bare right of action would be assignable if the potential assignee had a substantial interest in the success of the litigation. *Trendtex* does not appear to represent the considered position of the law in Australia on the issue of assignment of restitutionary claims. The problem which has been observed is that "[t]he difficulty is that the proposition urged [namely, to follow the *Trendtex* doctrine] is inconsistent with *Poulton v The Commonwealth* and it is not easy for courts below the High Court legitimately to depart from the considered dicta of three High Court justices."[91]

43. A claim for money had and received is a personal one infused with equitable notions of conscience,[92] closely connected to the original parties from and to whom value has been transferred. An assessment of whether it is equitable for the plaintiff to demand the return of money requires evidence of the peculiar nature and circumstances of the transaction, the positions of the parties, followed by a balancing of the relative merits of their claims. In these cases there was no evidence whether, for example, the Johnson company directors knew of the prospectus provisions of the Code but decided to ignore them in any event. By analogy with cases of assignments of contractual chose in action,[93] the personal nature of any restitutionary rights possessed by Rural Finance meant that they were not capable of assignment.

Construing the Deed of Assignment

44. If, however, it is considered that restitutionary claims are capable of being assigned, it is submitted that on the proper construction of the Deed of the Assignment[94] and the Asset Sale Agreement[95] **(ASA)** no such claims were assigned. The respondents adopt

[88] (1994) 179 CLR at 176.
[89] (2005) 63 NSWLR 203 at 232 [122].
[90] (2006) 229 CLR at 484 [260].
[91] *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th ed. (2002) par [6-480].
[92] *Australia & New Zealand Banking Group Ltd v Weatpac Banking Corporation* (1988) 164 CLR 662 at 673; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 per Gummow, J. at 551-555.
[93] See eg *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* (1993) 113 ALR 225 at 234-235.
[94] AB 415-426.
[95] AB 402-414.

the reasons expressed in paragraphs 311 to 325 of the judgment of Dodds-Streeton, J.A. in the Court of Appeal.[96]

45. The appellant's critique of the Court of Appeal's construction of the Deed and the ASA identifies what is said to be an "unmistakeable" inter-relationship between the language of sec 199 of the *Property Law Act* 1974 (Qld) and cll 1 and 2 of the Deed, with the analysis focused on the terms of cl. 2(b) of the Deed. It submits that construed in accordance with established principles that strive to avoid "commercial inconvenience," the word *"for"* as it appears in cl. 2(b) means *"in respect of or with reference to; regarding"* so as to bring the appellant's restitutionary claims within the
10 purview of cl. 2(b).[97]

46. That construction is not maintainable.

47. The assignment of the *"debts"* was effected by cl. 1 of the Deed. That there was no assignment of any restitutionary right is apparent from the terms of cl. 1, which confine the *"debts"* assigned to those defined in Recital A as arising *"under certain investor loan contracts"* described in Annexure A to the ASA. The appellant is therefore forced to rely on cl. 2(b) in its attempt to extend the subject matter of the assignment to include the claimed right to restitution. However, the terms of cl. 2(b) provide only that the assignment under cl. 1 is an absolute assignment intended to take effect immediately as a legal assignment of *"all legal and other remedies for the*
20 *matters set out"* in cl. 2(a). Those matters only cover *"the legal right to such debts"* referred to in cl. 1. Clause 2 does not add to what is assigned by cl. 1. It qualifies cl. 1 by explaining or describing the nature of the assignment.

48. Moreover, if it is thought that cl. 2(b) does assign remedies *"for"* the debts referred to in cl. 2(a), Deane, J. in *Pavey & Matthews* made clear that while the claim in restitution for amounts owing under an unenforceable contract might be regarded as a claim for a debt, it is not a claim for the debt under the contract. It arises independently of the contract by operation of law.[98] Accordingly, Rural Finance's right of restitution is not a remedy *"for"* the contractual debt. It is, rather, a remedy *instead of, or in replacement of,* the contractual debt which is available when the
30 contractual debt is not enforceable. The appellant's submission that a common

[96] *Haxton v Equuscorp Pty Ltd* (2010) 265 ALR at 391-399.
[97] Appellant's Haxton submissions [71]-[73].
[98] *Pavey & Matthews* (1987) 162 CLR at 250, 252-253 and 255-257.

meaning of the word *"for"* is *"in respect of or with reference to; regarding"* does not assist it in bridging this fundamental distinction.[99]

49. Finally, the principles of construction to which the appellant refers,[100] which enjoin a court construing a contract or interpreting legislation to do so in a manner that avoids commercial inconvenience, apply only when the language under consideration is ambiguous.[101] The language of the Deed and ASA is unambiguous. While the appellant may consider the result commercially inconvenient or unjust it has not pointed to any ambiguity in either the language of the Deed or the ASA that could justify the construction submitted by it.

10 50. Nor does it, by evidence or otherwise, establish the commercial inconvenience or the injustice of which it complains. It is quite possible that the commercial arrangement struck by the parties was that Rural Finance would retain any rights of restitution. A number of factors support this: the uncertainty about assignment of rights of restitution; the meagre consideration paid for the debts; the terms of the assignment itself.

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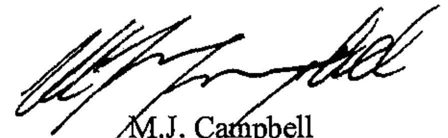

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[99] Appellant's Haxton submissions at [72].
[100] Appellant's Haxton submissions at [71] and fn 89.
[101] *Australian Broadcasting Commission v Australasian Performing Right Association* (1973) 129 CLR 99 at 109 per Gibbs J: "If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust."

1 in your mind; is that right?---Correct.
2 Did you have any reason to think that Mr Johnson's solvency was
3 any better than his company's solvency?---Probably not.
4 How did you think a guarantee from Rural Finance, Johnson Farm
5 Management and Mr Johnson, each of doubtful solvency, was
6 of any use to you?---Because of the fact that it was
7 concerned with Rural Finance and we were happy with
8 the situation at the time or we wouldn't have gone for it.
9 Did you disclose the existence of this document to the
10 Australian Taxation Office?---I couldn't recall.
11 You couldn't recall?---No.
12 Go back to page 279?---Yes.
13 Can you recall whether you ever got from any of the Johnson
14 group or Mr Johnson the indemnity or whatever you would
15 like to call it which would assist in the event of a
16 taxation battle?---No, I can't recall.
17 You can't recall?---No.
18 HIS HONOUR: What was the nature of the indemnity? I know this
19 is not your letter, but you discussed it with Mr Tuckey.
20 What did you want in this document? Assuming that they
21 were prepared to give you everything you wanted, what
22 would you hope to get?---Your Honour, the taxation bit,
23 I can't say anything or recall what it is.
24 No, I'm not asking about the tax matter. But the letter says
25 about arranging an indemnity to assist in the event of a
26 taxation battle. That could be all sorts of things. What
27 did you understand at that time that you were after from
28 the Johnson people in the nature of the indemnity that is
29 referred to here?---Your Honour, I suppose we were asking
30 that if they got involved in any taxation situation that
31 we weren't involved with it. All we wanted was an

1 investment originally which didn't quite turn out the way
2 we wanted it.
3 So you are not asking for money to help you fight the Tax
4 Commissioner?---Not at all. Not at all.
5 But if there was a problem with this deduction, it would be a
6 matter between you and the Tax Office, wouldn't it?---Yes,
7 correct.
8 And you would have to decide whether you were going to fight
9 the Tax Office or wear their decision if they rejected
10 your deduction?---Yes.
11 Is this the battle you are talking about?---Unfortunately
12 I don't recall the letter, Your Honour, and the battle,
13 that's in Bill Tuckey's words. Certainly it has
14 Cunningham's Warehouse Sales on the top. Bill wrote the
15 letter. I really can't recall what the taxation battle
16 would have been. As I said, Bill was my accountant and
17 company secretary.
18 HIS HONOUR: Yes.
19 MR COUPER: Mr Cunningham, can we move to a different topic.
20 Can I ask you to go to page 305 of that volume, please.
21 This is a letter to Cunningham's Warehouse Sales dated
22 28 June 1992 from Kathleen Drive Stonefruit Growers'
23 Syndicate No. 1?---Yes.
24 Look at paragraph 75 of your statement. Is it the case that you
25 received and read that letter about the date it bears,
26 28 June 1992?---Yes, it does say that.
27 The letter relates to the obligation of Kathleen Drive
28 Stonefruit Growers under its fruit purchase agreements
29 with Cunningham's Warehouse Sales to buy fruit at fixed
30 prices from the date of your investment for five years; do
31 you understand that?---Yes, I do.