

2012

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Radhika Withana
Baker & McKenzie

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Keywords

restitutionary remedies, illegal contract

CASE NOTE

THE AVAILABILITY OF RESTITUTIONARY REMEDIES IN THE CONTEXT OF AN ILLEGAL CONTRACT:

EQUUSCORP PTY LTD V HAXTON; EQUUSCORP PTY LTD V BASSAT; EQUUSCORP PTY LTD V CUNNINGHAM'S WAREHOUSE SALES PTY LTD (2012) 286 ALR 12

RADHIKA WITHANA *

I INTRODUCTION

Equuscorp Pty Ltd v Haxton; Equuscorp Pty Ltd v Bassat; Equuscorp Pty Ltd v Cunningham's Warehouse Sales Pty Ltd [2012] HCA 7 (*'Equuscorp'*) involved five appeals heard together, which raised for consideration the scope of restitutionary remedies available to the appellant, Equuscorp Pty Limited (Equuscorp). By majority the High Court of Australia dismissed the appeals, with the result that the respondents were not liable to pay Equuscorp funds advanced under certain loan agreements. The majority emphasised policy considerations in determining whether restitutionary remedies were available in the context of an illegal contract. The decision has also, for the first time in the High Court, unanimously recognised the 1981 House of Lords authority of *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 (*'Trendtex'*) in relation to the assignability of a bare cause of action in contract. Australian authority for the proposition – before this decision in *Equuscorp* – was recognised by the Court as being 'sparse'.¹ In following *Trendtex*, the High Court has now recognised the assignment of a bare cause of action in contract where the assignee has a genuine commercial interest in the enforcement of the cause of action as valid, ending the indeterminacy that existed in this area of law in Australia. A bare right to litigate remains unassignable. It is unfortunate that, despite unanimity in this respect, the Court divided equally on the question of whether the words 'all legal and other remedies' in the deed assigning the loan agreements effectively assigned the

* General Associate, Baker & McKenzie, Sydney; BA (Hons, Class 1), Ph D (UNSW); LLB (Hons, Class I) (USYD). The author was Associate to the Hon. Justice Kiefel AC in 2011 when the appeals the subject of the decision in this case note were heard before the Full Court. All opinions and errors are exclusively those of the author.

¹ (2012) 286 ALR 12 at 32 [52] (French CJ, Crennan and Kiefel JJ.).

restitutionary remedies under those agreements. This will have practical ramifications for those drafting debt assignment agreements and looking to ensure that complete assignment of a debt and its associated rights and remedies occurs so as to maximise the options available to recover monies loaned in the event of default.

II BACKGROUND FACTS

The investments that gave rise to the dispute involved certain tax-driven schemes in which the respondents invested, in relation to blueberry farming activities conducted in north-east New South Wales. The venture was tax-driven in the sense that the respondents could claim tax deductions for amounts invested in such farming enterprises. A company controlled by the promoters of the scheme undertook the farming activities for an annual management fee to be pre-paid by the respondents pursuant to individual agreements between the company and each of the respondents. The management fee had the added advantage of being claimable as a tax deduction in relation to the respondents' non-farming incomes. To finance their prepayment of the management fees and make the investment advantageous from a tax perspective, each of the respondents also entered into a loan agreement with Rural Finance Pty Ltd (Rural), a company also controlled by the schemes' promoters. Justice Heydon, in his Honour's inimitable style, observed that the transactions entered into were 'redolent of tax avoidance, suggest a preference for the beauty of the circle to the bluntness of the straight line' having about them 'something of the night'. However, as his Honour noted, it was 'not squarely suggested that the transactions were a sham or that their somewhat murky atmosphere was relevant to the legal issues in these appeals.'²

Following the collapse of Rural, the loan agreements were assigned, pursuant to an asset sale agreement (the Agreement), by Rural's receivers and managers to Equuscorp as one of the arms-length financiers of the group of companies (including Rural) controlled by the promoters of the schemes. Pursuant to the Agreement, Rural executed a deed assigning to Equuscorp its interests under the loan agreements and the amounts of the debts owing (the Deed). The Deed purported to make an 'absolute assignment' of the legal rights to debts and interests under the loan agreement, and by cl 2(b), 'all legal and other remedies'.

Equuscorp commenced proceedings between November 1997 and March 1998 in the Supreme Court of Victoria against, inter alia, the respondents under the loan agreements. The primary judge, Byrne J, held the loan agreements were unenforceable, on account of the illegality of the investment schemes.³ The illegality

² Ibid 48 [116].

³ *Equuscorp Pty Ltd v Bassat* (2007) 216 FLR 1, 32 [120].

arose because the invitation by the schemes' promoters to the respondents was a 'prescribed interest' for the purposes of s 170 of the *Companies Code* (the Code) and, contrary to this provision, no valid prospectus in respect of the schemes had been registered at the time of the invitation. As a prospectus in respect of the schemes was not registered, which was in breach of s 170(1) of the Code of each investor's home state, the loan agreements were unenforceable owing to their illegality under the Code.⁴

As an alternative to a claim under the loan agreements, Equuscorp sought restitution of the funds advanced under the loans pursuant to a claim for money had and received. Byrne J accepted both that a claim for restitution could be, and was, effectively assigned to Equuscorp. Accordingly, the respondents were liable to make restitution to Rural, and the Deed assigned to Equuscorp the benefit of the respondents' liability to make restitution.⁵

On appeal, the Court of Appeal of the Supreme Court of Victoria (Dodds-Streton JA, with whom Ashley and Neave JJA agreed) overturned the trial judge's decision, holding that restitution had not been available to Rural (as the assignor) and therefore was not available to Equuscorp (as the assignee) and that in any event, there had not been a valid assignment of the restitutionary relief under the Deed.⁶

III THE APPELLANT'S AND RESPONDENTS' CONTENTIONS

As French CJ, Crennan and Kiefel JJ observed, Equuscorp's restitutionary claims as argued in the High Court were wholly dependent upon the unenforceability of the loan agreements owing to them being made in furtherance of an illegal purpose.⁷ The scope of the appeals in the High Court was limited to the availability of restitution. Equuscorp contended that: (1) 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 under the unenforceable loan agreements; (2) that it was not unjust to allow the respondents to retain the balance of the amounts advanced by Rural under the unenforceable loan agreements; (3) 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 under the unenforceable loan agreements.

Each of the respondents submitted, by notice of contention, that the restitution claims were not capable of assignment at law. Some of the respondents also contended that the Court of Appeal should have held that the claim for money had and received

⁴ Ibid 28 [103].

⁵ Ibid 33 [127].

⁶ *Haxton v Equuscorp Pty Ltd* (2010) 265 ALR 336.

⁷ (2012) 286 ALR 12 at 23 [26]-[27].

CASE NOTE: THE AVAILABILITY OF RESTITUTIONARY REMEDIES IN THE CONTEXT OF AN ILLEGAL CONTRACT: *EQUUSCORP PTY LTD V HAXTON*

under the contract could not be made when the contractual claim for repayment of money was barred by NSW limitation law.⁸

Equuscop based its claims for money had and received on there being a ‘total failure of consideration’. It submitted that Rural had advanced money under the loan agreements on the basis that they were enforceable, which was an unsustainable state of affairs, and accordingly the respondents were unjustly enriched.

IV THE REASONS

A *The theoretical basis for restitutionary claims*

French CJ, Crennan and Kiefel JJ explained the provenance of claims for money had and received and the impact this made on the theoretical basis on which it was thought such claims rest. As their Honours explained, claims for money had and received were initially underpinned by the theory of implied contract. This was founded in part on procedural imperatives, being crafted in the seventeenth century to resemble claims in contract in order to meet the requirement as to forms of action in the old writs for an action of *indebitatus assumpsit* of which claims for money had and received were an offshoot.⁹ In Australia, the High Court in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (*‘Pavey’*)¹⁰ rejected the implied contract theory as the basis for claims for money had and received in favour of the concept of unjust enrichment.

As their Honours observed, the concept of unjust enrichment has been variously understood in the Australian authorities. For Deane J in *Pavey* it was ‘a unifying legal concept’ having multiple purposes: (1) to explain why the law recognises instances where fair and just restitution should be paid for a benefit derived by the party who seeks restitution; and (2) to assist in determining whether the law should recognise an obligation to make fair and just restitution in a new category of case.¹¹ *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 recognised it was not a ‘definitive legal principle according to its own terms’¹², but rather was an ‘approach’ to determine claims for money had and received.¹³ French CJ, Crennan and Kiefel JJ added to this list by describing unjust enrichment as having a ‘taxonomical function’ in the sense of ‘referring to categories of cases in which the

⁸ *Limitation Act 1969* (NSW) s 14(1)(a) – the limitation period for contract claims is six years from the date on which the cause of action accrues.

⁹ (2012) 286 ALR 12 at 23[29].

¹⁰ (1987) 162 CLR 221, 227 (Mason and Wilson JJ, Deane J).

¹¹ *Ibid* 256-257.

¹² (1992) 175 CLR 353, 378 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

¹³ (2012) 286 ALR 12 at 23 [29] (French CJ, Crennan and Kiefel JJ).

law allows recovery by one person of a benefit retained by another'.¹⁴ Whilst the notion of unjust enrichment was not a 'catch-all theory' of restitutionary rights and remedies, the concept did not preclude the possibility of it extending to new occasions of unjust enrichment supporting claims for restitutionary relief.¹⁵

B *Unjust retention of a benefit*

As French CJ, Crennan and Kiefel JJ explained, these appeals were narrowly focused upon the particular category of case, involving failure of consideration, a vitiating factor, making the retention of the benefit unjust.¹⁶ The appellant argued that for restitutionary claims based on failure of consideration, there had to be total failure of consideration. There were differing approaches to this question.

French CJ, Crennan and Kiefel JJ in their reasons, and Heydon J in his Honour's separate reasons, agreed that an action for money had and received requires at least a failure of consideration. Gummow and Bell JJ did not address whether a failure of consideration, total or otherwise, was required for a restitutionary claim, finding that it raised the same threshold issue of statutory interpretation, namely, whether the policy of the law prevents a restitutionary claim for money given under an agreement made in breach of the Code,¹⁷ such that the issue of failure of consideration need not be considered.

French CJ, Crennan and Kiefel JJ accepted that one way in which failure of consideration might arise is the illegality of the contract. They thus reasoned that questions of whether there needed to be total failure of consideration for a claim of monies had and received based upon failure of consideration 'could be put to one side' as the focus of inquiry was the relationship between the foundation for the restitutionary claims in this case and the policy of the common law by which an agreement made in furtherance of an illegal purpose is unenforceable.¹⁸ Accordingly, the determination of a restitutionary claim for benefits received under a contract

¹⁴ Ibid 24 [30].

¹⁵ Ibid.

¹⁶ Ibid 25 [31].

¹⁷ Ibid 47 [112].

¹⁸ Ibid 25 [33]. Their Honours explained the compatibility of the unjust enrichment theory of restitution with acceptance of failure of consideration as a factor weighing in favour of a restitutionary claim, on the basis that failure of consideration was grounded in equitable principles of unconscionability, as well as contractual principles. They referred to Gummow J's elucidation in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 of the unconscionable nature of retaining a benefit the purpose for which has failed and to the general equitable notions that rest behind the concept of unconscionability: at (2012) 286 ALR 12 at 25 [32].

CASE NOTE: THE AVAILABILITY OF RESTITUTIONARY REMEDIES IN THE
CONTEXT OF AN ILLEGAL CONTRACT: *EQUUSCORP PTY LTD V HAXTON*

unenforceable for illegality centres on whether it would be ‘unjust for the recipient of a benefit under a contract to retain that benefit.’¹⁹ In answering this question ‘the central policy consideration at stake, as this Court said in [*Miller v Miller* (2011) 242 CLR 466], is the coherence of the law’ a relevant consideration being that ‘the statutory purpose is protective of a class of persons from whom the claimant seeks recovery.’²⁰ Gummow and Bell JJ similarly viewed the question of whether it was unjust for a party to retain the benefit through the prism of the relationship between the restitutionary claims and the policy of the law rendering a transaction illegal. Their Honours held that the retention of a benefit is warranted (ie not unjust) – as in this case – in circumstances where a contract is rendered ineffective, not by reason of illegality sourced in a statute per se, but where the statute requires compliance with formalities that have not been observed by parties to the contract.²¹

Heydon J reasoned that, in the circumstances of the present case, an action for money had and received required at least a failure of consideration, which in this case occurred in that there was a ‘failure to sustain itself of the state of affairs contemplated as a basis for the payments’ made by Rural, namely, that the contracts be enforceable. Whilst his Honour accepted the loan agreements were unenforceable due to their illegality, he did not accept that restitutionary remedies were precluded by such illegality²² (see the discussion below under the sub-heading of the effect of the Code on restitutionary remedies).

His Honour addressed squarely the question of whether there was a requirement for total failure of consideration in a claim for money had and received, stating that there was no such requirement. His Honour relied on Sir Guenter Treitel's proposition that there is no such requirement where the payer (in this case Rural) has no or no satisfactory remedy for breach for the part left unperformed by the payee. His Honour said this proposition was approved by the High Court in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.²³

Heydon J did not view the answer to the question of whether it was just for the respondents to retain the benefit received under the loan agreements as tied to the question of whether restitutionary claims were precluded owing to their illegality. In response to nine reasons given by either the Court of Appeal or by the respondents as to why it would not be unjust for the respondents to retain the loan funds, His Honour gave nine reasons as to why it would be unjust:

¹⁹ Ibid 26 [34].

²⁰ Ibid.

²¹ Ibid 44 [103].

²² Ibid 53 [134].

²³ Ibid 54 [137].

(2012) 24.1 BOND LAW REVIEW

1. the fact that the respondents entered into the schemes without the protection of an adequate prospectus does not explain why the loan contracts were unenforceable or why retention of the loan monies was unjust;
2. that whilst there was a mechanism to deal with the monies which the investors repaid, there was no mechanism for dealing with monies which were retained by investors;
3. the fact that the loan agreements were not intended to stand if the schemes failed explains why Rural was entitled to sue for money had and received, but does not explain why it was just that it should fail;
4. the fact that the scheme failed did not make it just for the investors to resist returning the monies lent to them;
5. as Rural did not, as a matter of fact, enforce its securities over the respondents' interests under the loan contracts so as to effect an irrevocable loss of the interests in the scheme, there was no injustice created by Rural's assignment to Equuscorp, Equuscorp's appointment of receivers and managers and its sale of the land;
6. what matters for assessing whether an action for money had and received was available to Rural is whether the respondents obtained a benefit from participating in the scheme and it is irrelevant whether the respondents intended to obtain a benefit or not. Accordingly as there was no evidence that the respondents did not benefit from participating in the scheme it was not unjust for Rural to seek recovery of the money had and received by the respondents;
7. the loan contracts did not merely give the respondents a right to participate in the scheme, but also gave them a financially material benefit in the absence of funds contributed personally or obtained elsewhere;
8. just because loans were advanced as part of transactions whereby no money actually changed hands did not mean that a benefit was not given or received. Rather, real loans were given and received from which the respondents derived tax advantages and the right to participate in the schemes and it would accordingly be unjust to Rural to allow the respondents to resist restoring the unpaid parts of real loans from which real advantages were gained;
9. the fact that the appellant only paid a small proportion of the face value of the loans assigned to it from Rural does not make it just for the respondents to resist repayment of the loans.

CASE NOTE: THE AVAILABILITY OF RESTITUTIONARY REMEDIES IN THE
CONTEXT OF AN ILLEGAL CONTRACT: *EQUUSCORP PTY LTD V HAXTON*

His Honour also found that the contractual limitation defence was no bar to claims for money had and received.²⁴

C *Illegality and the effect of the Code*

The issues in the appeals arose from the appellant's alternative pleading in its initial claim against the respondents, grounded in a claim for money had and received where the contract was rendered void for illegality owing to the failure to ensure compliance with s 170 of the Code. Section 170 did not by its terms forbid and render illegal the respondents' contractual promise to repay the loan monies. Rather, the determinative issue was whether the policy of the statute law (represented by Pt IV Div 6) denies any scope for any restitutionary claim, such as here, for money had and received.

French CJ, Crennan and Kiefel JJ in their reasons and Gummow and Bell JJ in their separate reasons found in favour of the respondents with respect to Equuscorp's claim for money had and received, thus preventing the appellant from recovering money on its alternative claim in restitution. The majority viewed the respondents as a class to be protected by the Code and found against the appellant. This is to be contrasted with Heydon J's observation that 'it is desirable not to exaggerate the weakness of that class in this particular fact. Many of its members are likely to have been wealthy and, like the respondents, are likely to have borrowed large sums: their attraction to tax deductibility would have stemmed from their liability to the highest marginal rate of income tax.'²⁵

In determining whether it would have been open to Rural to pursue claims for money had and received under the loan agreement, French CJ, Crennan and Kiefel JJ identified the critical question as being whether vindication of such restitutionary claims would have frustrated, defeated or been inconsistent with the statutory purpose of the provisions of the Code relating to the issue of the prescribed interests.²⁶ This was, as Gummow and Bell JJ noted, dispositive of the matter.²⁷ Both the decisions of French CJ, Crennan and Kiefel JJ and Gummow and Bell JJ referred²⁸ to the Court's decision in 2011 in *Miller v Miller* (2011) 242 CLR 466 (*'Miller'*)²⁹ relating to illegality in contracts and trusts, which emphasised the central policy consideration of 'the coherence of the law'³⁰ in determining the availability of

²⁴ Ibid 54-56 [139]-[148].

²⁵ Ibid 53 [133].

²⁶ Ibid 22 [25].

²⁷ Ibid 43[99].

²⁸ Ibid 26 [34] (French CJ, Crennan and Kiefel JJ); [95] (Gummow and Bell JJ).

²⁹ (2011) 242 CLR 466, 457-458 [24]-[74].

³⁰ *Equuscorp* [2012] HCA 7 [34] (French CJ, Crennan and Kiefel JJ).

restitutionary claims for benefits received under a contract unenforceable for illegality. In doing so, the majority denied the relevance of decisions, referred to by the appellant, in the Full Court of the Federal Court of Australia in *Australian Breeders Co-Operative Society v Jones* (1997) 150 ALR 488 ('ABCOS'), approved in *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149 ('Amadio'), both of which concerned loan agreements rendered unenforceable because of their connection to an illegal scheme to offer prescribed interests without complying with the requirements of the Code as enacted in each relevant state. For Heydon J, to find in favour of the respondents (as the majority did) required 'overruling or disapproving' statements in numerous authorities, including ABCOS and Amadio.³¹ However, for the majority, ABCOS and Amadio offered 'little guidance in the resolution of these appeals' as they did not engage with the issue of the effects of illegality on restitutionary relief and were decided before *Miller*, which represented the 'fully developed body of authority'³² on the question of restitution and contractual illegality. In this respect it would appear the majority neither overruled nor disapproved ABCOS and Amadio, but found them to be distinguishable or overtaken by more recent authority.

In applying *Miller*, the majority emphasised considerations arising from the policy of the law, in this case the Code, in determining whether contractual arrangements are rendered ineffective or void, even in the absence of a breach of a norm of conduct or other requirement, whether found in the statutory text expressly or by necessary implication. In this context, it was relevant that the statutory scheme rendering a contract or arrangement illegal was enacted for the benefit of a class, namely the respondents as investors in the prescribed interests, and not enacted for the protection of Rural and other interested parties.³³ French CJ, Crennan and Kiefel JJ stated that this was a 'clear case' in which 'the coherence of the law and the avoidance of stultification of statutory purpose of the common law' denied Rural a right to claim recovery for money had and received.³⁴

Gummow and Bell JJ emphasised two considerations with respect to their conclusion that allowing the appellants' claim for money had and received would be contrary to the policy of the law underpinning s 170 of the Code. First, s 170 of the Code did not by its terms forbid and render illegal either the contractual promise by the respondent to repay the money lent or the very act of borrowing independently of the contractual promise, which would have precluded both the contractual and restitutionary claims. Secondly, whilst the existence of an illegal contract may provide a vitiating factor enlivening a restitutionary action, contractual and

³¹ Ibid 53 [133] (Heydon J).

³² Ibid 41[95] (Gummow and Bell JJ).

³³ Ibid 26 [34] (French CJ, Crennan and Kiefel JJ);46 [108]-[109] (Gummow and Bell JJ).

³⁴ Ibid 29 [45]. Gummow and Bell JJ also agreed with this point: see 47 [111].

CASE NOTE: THE AVAILABILITY OF RESTITUTIONARY REMEDIES IN THE
CONTEXT OF AN ILLEGAL CONTRACT: *EQUUSCORP PTY LTD V HAXTON*

restitutionary issues cannot be readily collapsed.³⁵ Their Honours observed that in an action for money had and received there is generally 'a degree of flexibility in fashioning the just measure of recovery' as it is a legal action not an equitable suit and also a 'liberal action in the nature of a bill in equity'.³⁶

By denying that contractual and restitutionary issues can be readily collapsed, Gummow and Bell JJ answered the respondents' contention that, because the contractual claim for repayment of money was statute barred, the appellant's restitutionary claim under the contract for money had and received could not be made.³⁷ The restitutionary claims accrued at a different time to the contractual cause of action, arising only on the assertion in the respondents' defences filed in relation to the first instance proceeding (in 1999) that the loan agreements did not bind them. Accordingly, it was no answer to the appellant to assert that because contractual claims were statute barred, the restitutionary claims were as well.³⁸

For Heydon J, the overriding principle driving the determination of whether illegality of the contract by virtue of the Code had the effect of denying the efficacy of a cause of action for money had and received, was statutory construction. That is, legislation is not to be construed as cutting down or destroying property rights without clear words.³⁹ As his Honour stated, it is 'the primacy of legislative language'⁴⁰ that is necessary for answering the question; it is 'the legislative language which reveals the policy of the statute, its purpose, its guidance, its intention'⁴¹; and 'the policy of the law' is to be found in the 'scope and purpose' of the statute', which 'depend solely on the meaning of its language'⁴². This emphasis on the statute flowed from his Honour's view that the nature of Rural's right to recover the unpaid portion of the loans from the respondents as money had and received was an assignable chose in action⁴³ and thus a property right. His Honour observed that references in *Miller* to the 'policy of the law' are also linked to the scope and purpose of the statute.⁴⁴

³⁵ Ibid 43-44 [100]-[102].

³⁶ Ibid 47 [114].

³⁷ Ibid 44 [102].

³⁸ Heydon J also accepted action on the loan contracts and the restitutionary claims had different limitation periods and the claims were not one and the same: Ibid [132].

³⁹ Ibid 49 [120].

⁴⁰ Ibid 50 [123].

⁴¹ Ibid.

⁴² Ibid 51 [124].

⁴³ See the discussion below as to the reasoning on the assignability in equity of a cause of action.

⁴⁴ (2012) 286 ALR 12 at 51 [125].

Following such an approach to statutory construction, his Honour outlined six reasons as to why the Code did not prevent Rural from recovering in any action for money had and received, even if the contract was unenforceable due to illegality: (1) the Code did not contain an express prohibition precluding an action for money had and received for loans which had not been repaid; (2) no implication to extinguish property rights was discernable in the Code; (3) the construction contended for by the respondents to negate an action for money had and received would deprive Rural of its property rights to that extent and would be unjust in its operation; (4) statutory indications (such as the penalty imposed for breach of the Code being \$20,000 for each instance and up to 5 years imprisonment) that the sanctions were sufficient to deal with the breach; (5) no language in the Code justified a construction of the Code that prevented an action for money had and received by Rural in relation to money advanced under parts of the schemes that were not logically integral to them; and (6) the unavailability of actions for money had and received does not follow from unenforceability of the loan contract.⁴⁵

D Assignability of the cause of action for money had and received

All members of the Court accepted *Trendtex* as widening the criteria for the assignability of causes of action – whilst still preserving the non-assignability of a bare right to litigate – to circumstances where the assignee had a genuine commercial interest in enforcement.

Trendtex related to the assignment of a contractual cause of action.⁴⁶ In the leading judgment, delivered by Roskill LJ (with whom Edmunds-Davies, Fraser and Keith LLJ agreed), his Lordship re-affirmed the fundamental principle of English law that a bare right to litigate cannot be assigned. His Lordship carved out an exception to this general principle. Where the assignment is of a property right or interest, or if the assignee has a genuine commercial interest in taking the assignment and enforcing the cause of action for his or her own benefit, the assignment is effective and is not an assignment of a bare cause of action, or as savouring of maintenance.⁴⁷

All members of the Court recognised that there was no Australian authority on the question of the validity of an assignment of a cause of action. French CJ, Crennan and Kiefel JJ observed that Australian authority on the assignability of restitutionary rights is ‘sparse’⁴⁸, referring only to *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 (*‘Mutual Pools’*) as dealing, unsatisfactorily, with such issues.

⁴⁵ Ibid 52- 53 [127]-[132].

⁴⁶ In *Giles v Thompson* [1994] 1 AC 142, the *Trendtex* principle was extended to tortious causes of action.

⁴⁷ *Trendtex* [1982] AC 679, 696 - 697; 703.

⁴⁸ (2012) 286 ALR 12 at 32 [52].

CASE NOTE: THE AVAILABILITY OF RESTITUTIONARY REMEDIES IN THE CONTEXT OF AN ILLEGAL CONTRACT: *EQUUSCORP PTY LTD V HAXTON*

They observed that the 'application of criteria of assignability to restitutionary claims has remained uncertain.'⁴⁹ Gummow and Bell JJ expressly rejected the relevance of *Poulton v The Commonwealth* (1953) 89 CLR 540 ('*Poulton*') in such a situation.⁵⁰ Heydon J also found that *Poulton* as well as *Campbells Cash and Carry v Fostif Pty Limited* (2006) 229 CLR 386 did not assist in a case where an assignee obtains a genuine commercial interest in enforcing a claim for money had and received, and found the other, *Mutual Pools*, not determinative of such issues.⁵¹

All members of the Court agreed that there was a genuine commercial interest in the assignment of the claim by Rural to Equuscorp. French CJ, Crennan and Kiefel JJ reasoned that the restitutionary claim was inescapably linked to the performance of the loan agreement, and if assigned along with contractual rights, was not assigned as a bare cause of action, there being a legitimate commercial interest of the assignee (Equuscorp) in acquiring the restitutionary rights should the contract not be enforceable. Gummow and Bell JJ found the genuine commercial interest to exist in Equuscorp's charge held over the assets of Rural to secure Rural's indebtedness.⁵² Likewise for Heydon J, given that before the date of assignment the appellant had been granted a charge over the assets of Rural – including rights to sue for money had and received – to secure the indebtedness of Rural to the appellant, the assignment at a later date was a means by which the appellant recovered parts of the assets which that charge gave it, as security for Rural's indebtedness to it.⁵³

E *The effectiveness of the assignment of the cause of action*

The trial judge and the Court of Appeal had differing approaches and conclusions as to whether Rural had validly made a legal assignment of its cause of action to Equuscorp. At first instance, it was held that Rural's restitutionary claims were assigned to Equuscorp by operation of cl 2(b) of the Deed which purported to assign '[a]ll legal and other remedies' from Rural to Equuscorp. Byrne J held, without reference to s 199 of the *Property Law Act 1974* (Qld) (the Act), that it made no sense for Rural to see the contractual rights and reserved to Rural the common law rights closely associated with the contractual rights.⁵⁴ On the other hand, the Court of

⁴⁹ Ibid 31 [51].

⁵⁰ Ibid 38 [79].

⁵¹ Ibid 58-59 [156]-[158]. Heydon J observed that Mason CJ's judgment in *Mutual Pools* cited *Poulton*, but cited *Trendtex* as a comparator to *Poulton*, which Heydon J said was suggestive of Mason CJ's recognition that *Poulton* was not applicable where a genuine commercial interest for the assignee in the assignment existed: at 59 [157].

⁵² Ibid 38 [79].

⁵³ Ibid 59 [156].

⁵⁴ *Equuscorp Pty Ltd v Bassat* (2007) 216 FLR 1, 33 [126]-[127].

Appeal concluded that the assignment was limited to the loan contracts, debts and associated guarantees and securities, and the phrase 'all legal and other remedies' in cl 2(b) of the Deed did not extend to alternative restitutionary rights or remedies.⁵⁵ In the High Court, Equuscorp argued that, by s 199(1)(b) of the Act,⁵⁶ the Deed was effectual in law to transfer to Equuscorp 'all legal and other remedies' for the debts and interests under the loans, encompassing both rights under the contracts and common law restitutionary rights associated with the contract.

The Court divided evenly on whether there had been an effective assignment of the cause of action.⁵⁷ Given the Court has, in an earlier decision, accepted that evenly divided opinions of the High Court are not binding authority,⁵⁸ it is questionable what precedential quality either position in this case will have in future cases dealing with similar facts and/or issues.

French CJ, Crennan and Kiefel JJ affirmed the conclusion of the Court of Appeal but on very different grounds to that Court. Their Honours found, contrary to the submissions of the appellant, that it was the interrelationship between cl 2(b) (and in particular the phrase 'all legal and other remedies' used therein) of the Deed and s 199(1) of the Act that defeated the construction contended for by Equuscorp. Gummow and Bell JJ, and Heydon J in his Honour's separate decision found in favour of Equuscorp, without reference to the relationship between the Deed and the Act.

French CJ, Crennan and Kiefel JJ observed that the construction of the words 'all legal and other remedies' in the Deed was informed by the ancestry of this phrase in, namely, s 25(6) of the *Judicature Act 1873* (UK) and its re-enactment as s 136 of the *Law of Property Act 1925* (UK). Their Honours observed, referring to the 1888 English decision of *Read v Brown* (1888) 22 QBD 128⁵⁹ on the interpretation of the term 'legal and other remedies' which confined the phrase to the transfer of legal rights to the debt and the legal remedies for its recovery, that the relevant legal and other remedies were those 'which could be invoked to enforce the debt or chose in action assigned.'⁶⁰ Accordingly, their Honours found that the alternative action of restitution was not seeking to enforce the loan agreements, but rather to utilise a separate restitutionary remedy. This restitutionary remedy would only be available

⁵⁵ *Haxton v Equuscorp Pty Ltd* (2010) 265 ALR 336, 396 [325].

⁵⁶ A clause of the Agreement selected Queensland law as the proper law of the contract.

⁵⁷ The matter was heard by six Justices.

⁵⁸ *Re Wakim ex parte McNally* (1999) 198 CLR 511, 540[1] (Gleeson CJ). Cf *Judiciary Act 1903* (Cth) s 23(2)(a).

⁵⁹ (1888) 22 QBD 128, 132 (Lord Esher MR); Fry and Lopes LJ agreeing at 132 and 133 respectively.

⁶⁰ (2012) 286 ALR 12 at 34 [63].

CASE NOTE: THE AVAILABILITY OF RESTITUTIONARY REMEDIES IN THE
CONTEXT OF AN ILLEGAL CONTRACT: *EQUUSCORP PTY LTD V HAXTON*

where the loan agreements were unenforceable due to illegality, arising from the money had and received by the respondents. Accordingly, the right to restitution was not assigned to Equuscorp by Rural under the Deed.⁶¹ In so finding, their Honours have extended the proposition that claims of restitution do not involve enforcement of the contract, which previously had been recognised by the High Court in *Pavey* in the context of claims for restitution for services under an unenforceable contract, to other kinds of contracts such as loan agreements. Their Honours observed that this principle recognised in *Pavey* 'extended to other restitutionary claims in respect of benefits received under contracts which, for one reason or another, are unenforceable.'⁶²

Gummow and Bell JJ agreed with the trial judge that the Deed assigned both the contractual rights (the debts) and rights closely associated with the contract rights, such as the right to claim for money had and received. Their Honours concluded, having regard to the Deed alone, that cl 1 of the Deed assigned the debts of Rural and its interests under the loan agreements, but did not catch the claims Rural might have to recover from the borrowers on an action for money had and received. This was captured by cl 2, the effect of the clause assigning not only the subject matter of cl 2 but also all 'other remedies for these matters'. An action for money had and received was a remedy 'for these matters' as it 'arose out of or by reason of the failure of the loan agreements.'⁶³ Their Honours reasoned that such a construction was to be preferred as it made little commercial sense for Equuscorp to pay for some but not all of the rights of Rural against the borrowers. It was no defence to say that the actions by Rural against the respondents for money had and received only accrued after the assignment upon the respondents' pleading the unenforceability defence, as in equity the value given by Equuscorp to the receivers and managers of Rural would have immediately transferred the equitable title to the choses in action to Equuscorp when the actions accrued.⁶⁴

Heydon J also took what might be described as a commercially pragmatic approach to the question of whether there had been a valid assignment. His Honour also preferred the trial judge's wider construction of 'debt' referred to in cls 1 and 2(a) of the Deed, in which the debt related to the economic equivalent of the 'debts' by actions in money had and received to that of the narrow constructions of 'debt' by the Court of Appeal which was referable to the claim on the loan contract. Accordingly, the phrase 'all legal and other remedies' in cl 2(b), assigned the claims for money had

⁶¹ Ibid 34-35 [63]-[64].

⁶² Ibid 35 [64].

⁶³ Ibid 37 [75].

⁶⁴ Ibid 37 [75]-[76].

and received, even though a claim on the loan contracts themselves would fail.⁶⁵ His Honour reasoned that the trial judge's construction was to be preferred, as absent such a construction the commercial rationale for the clause would be meaningless. It would not be commercially sensible for the assignment by the receivers and managers of Rural to vest in the appellant's remedies seeking money in the form of damages for breach of contract or in the form of recovery in debt, whilst leaving the remedies by way of actions for money had and received with Rural; or for the appellant to pay for assets including those of Rural's rights against the borrowers which were valueless (the 'unenforceable' loans) but not for those which were valuable.⁶⁶

V CONCLUSIONS

The decision confirms that restitutionary remedies will not be available where recovery in a restitutionary claim for money had and received would diminish the coherence of the law. Specifically, where a contract or arrangement is rendered illegal by a particular statutory scheme, the question of recovery in restitution will depend on construing the relevant statute, and in particular, whether the policy of the statute indicates that it was enacted for the benefit of a class against whom recovery in restitution is sought. In such a situation it will not be unjust for the benefit obtained under an illegal contract to be retained by the party against whom restitution is sought, such that recovery in restitution is denied on grounds arising from considerations of the policy of the law and the need to ensure coherence of the law.

The decision is also a welcome addition to the Australian jurisprudence as to the validity of an assignment of a cause of action in contract. Until *Equuscorp* there had been no definitive position under Australian law on this point, and moreover there were differing approaches between courts with State supreme courts broadly supportive of the *Trendtex* position,⁶⁷ the Federal Court not uniformly so,⁶⁸ and High

⁶⁵ Ibid 59 [160].

⁶⁶ Ibid 59 [161].

⁶⁷ For example: *Re Timothy's Pty Ltd and The Companies Act* [1981] 2 NSWLR 706; *Monk v Australia & New Zealand Banking Group Ltd* (1994) 34 NSWLR 148; *South Australian Management Corporation v Shehan* (1995) 16 ACSR 45; *Beatty v Brashs Pty Ltd* [1998] 2 VR 20; *Singleton v Freehill Hollingdale & Page* [2000] SASC 278; *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2005) 220 ALR 267; *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG* [2008] QSC 141, [76]; *Haxton v Equuscorp Pty Ltd* (2010) 265 ALR 336, 392 [310].

⁶⁸ For example: *Park v Allied Mortgage Corporation Ltd* (1993) ATPR (Digest) 46-105; *National Mutual Property Services (Aust) Pty Ltd v Citibank Savings Ltd* (1995) 132 ALR 514; *Chapman v Luminis* (No 4) (2001) 123 FCR 62; *Deloitte Touche Tohmatsu v Cridlands Pty Ltd* (2003) 134 FCR 474; *Salfinger v Nuigini Mining (Australia) Pty Ltd* (No 3) [2007] FCA 1532.

CASE NOTE: THE AVAILABILITY OF RESTITUTIONARY REMEDIES IN THE
CONTEXT OF AN ILLEGAL CONTRACT: *EQUUSCORP PTY LTD V HAXTON*

Court authority limited and unsatisfactory. Indeed as Dodds-Streeton JA noted in the Court of Appeal judgment, '[t]here is no unambiguous, authoritative statement indicating that the restitutionary claims in this case, if established, were capable of assignment' and moreover, '[o]n balance, the preponderance of the admittedly sparse and relatively oblique indications by the High Court tends to throw doubt on, rather than affirm, that proposition.'⁶⁹ The decision by the High Court in *Equuscorp* now clarifies the position of Australian law, confirming, following *Trendtex*, that a bare cause of action (at least in relation to claims in contract) can be effectively assigned where the assignee has a legitimate commercial interest in its enforcement.

However, the case leaves several questions unanswered. First, whether a *total* failure of consideration is needed for a restitutionary claim remains undecided. A majority (French CJ, Heydon, Crennan and Kiefel JJ) accepted that an action for money had and received requires, at a minimum, failure of consideration. However, a (different) majority were also of the view that the present case was not the occasion to address the question of whether a total failure of consideration was necessary for a restitutionary claim. French CJ, Crennan and Kiefel JJ stated that it was not necessary in this case to address this issue, given that the resolution of matters turned on the relationship between the availability of a restitution claim and the policy of the law rendering unenforceable illegal contracts.⁷⁰ Similarly, Gummow and Bell JJ were of the view that considerations relating to whether or not total failure of consideration was necessary for a restitutionary claim raised the same threshold issues of statutory interpretation, namely, whether the policy of the law prevents a restitutionary claim for money given under an agreement made in breach of the Code, and accordingly did not address the question of whether total failure of consideration needed to be demonstrated before successfully claiming in restitution.⁷¹ Whilst Heydon J, in the minority, was more definitive in his conclusion that a total failure of consideration was not necessary for a restitutionary claim, the lack of a majority opinion on this matter means this will not be the last word on the issue and final determination of which will have to wait until the issue arises again and is dealt with in more detail by a majority of the Court.⁷²

Similarly, we may well have to wait for another case to finally settle what words will be effective to assign the rights and obligations associated with the contract (which includes the debt itself) *and* restitutionary remedies together, given that the Court

⁶⁹ *Haxton v Equuscorp Pty Ltd* (2010) 265 ALR 336, [305].

⁷⁰ (2012) 286 ALR 12 at 25 [33].

⁷¹ *Ibid* 47 [112].

⁷² Notwithstanding the minority view is from a jurist of 'continued reputation': Cf *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & Ors v The Commonwealth of Australia* [2012] HCATrans 92, 18 April 2012, line 6305.

was evenly divided on the question. If the approach adopted by French CJ, Crennan and Kiefel JJ is to be favoured, the phrase 'all legal and other remedies' – derived from earlier English statutes – will not be effective to transfer *both* rights associated with the enforcement of a contract, as well as restitutionary remedies should the contract itself be unenforceable, the latter said by their Honours to be unrelated to the enforcement of the contract and thus not picked up by the phrase for the purpose of assignment. Given the ubiquity of the phrase in property legislation in other States throughout Australia⁷³, use of the phrase will prove to be problematic if parties are seeking to effect the valid assignment of restitutionary remedies along with the rights and obligations related to the contract's enforcement.

Debt assignment in advanced economies, especially in sectors such as property and banking, remain a popular mechanism by which businesses reduce risk exposure and/or improve liquidity, notwithstanding some cautious retraction following the global financial crisis. From a practical perspective, until the uncertainty relating to the effectiveness of assigning restitutionary claims by phrases such as 'all legal and other remedies' is finally determined, lawyers may well have to adopt a precautionary approach to drafting assignment agreements by expressly providing for the assignment of non-contractual rights, such as by specifically referring to restitutionary relief for monies had and received, given that unspecific language no matter how broad may run the risk of being read down by a court if the approach of French CJ, Crennan and Kiefel JJ is preferred. It would not, however, be surprising if courts preferred the more commercially pragmatic approach of Gummow, Heydon and Bell JJ so as to construe 'all legal and other remedies' to allow for the assignment of the debt and associated restitutionary remedies, should the contract itself become unenforceable. However, ultimate resolution of this question remains for another day.

⁷³ For example: *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.