16/05; [2005] VSC 110

SUPREME COURT OF VICTORIA

EQUUSCORP PTY LTD v VAN DER ROSS & ANOR

Harper J

7 September 2004; 20 April 2005

CIVIL PROCEEDINGS – PURCHASE OF INTEREST IN A TIME-SHARE VENTURE – SOME PAYMENTS MADE BY PURCHASER – ASSIGNMENT OF BENEFIT OF LOAN CONTRACT – CLAIM BY ASSIGNEE FOR OUTSTANDING MONEYS PAYABLE UNDER LOAN CONTRACT – NO EVIDENCE OF CONSIDERATION UNDER LOAN CONTRACT – MISLEADING AND DECEPTIVE CONDUCT RAISED AS A DEFENCE – WHETHER SUCH DEFENCE STATUTE BARRED – ASSIGNEE'S CLAIM DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR.

Van Der Ross (VDR) agreed in writing to purchase a time-share resort in 1991. The original lender attempted to assign its interest to Equus Financial Services. VDR made payments pursuant to the agreement but ceased them when the time-share development collapsed. Equus issued proceedings against VDR claiming the outstanding payments under the loan contract despite the fact it was not a party to the contract. In the counterclaim, VDR alleged misleading and deceptive conduct by the promoters of the Scheme together with unconscionable conduct and sought an amount by way of damages plus a declaration that the contract was void and unenforceable. Equus claimed that the matters raised in the counterclaim were barred by the Statute of Limitations. The magistrate found that there was no failure of consideration. However, the magistrate found that having regard to Equus' conduct, VDR was entitled to avoid the contract pursuant to the provisions of s87 of the *Trade Practices Act* (Act). Upon appeal by Equus—

HELD: Appeal dismissed.
1. Equus' cause of action arose not under the contract to purchase the time-share interest but under the contract to finance the purchase of that interest. As no evidence was led before the Magistrate to prove payment of the principal sum by the financier to the vendor, Equus failed to prove an essential element of its case. Accordingly, it would be unjust to order that VDR "repay" loan funds that were never directly received by Equus and may never have been paid out on their behalf.

2. *Obiter*: It was open to the Magistrate to hold that representations made by the financier either directly or through an agent induced VDR to enter into the loan contract. In those circumstances VDR were entitled to a declaration that the loan contract had been rescinded. A necessary consequence was that VDR would have been obliged to pay Equus the balance of the principal amount borrowed. However, the provisions of s87 of the Act were not relevant to the counterclaim given the Magistrate's finding that VDR suffered no loss or damage. Further, the Statute of Limitations does not apply to matters raised only by way of defence.

HARPER J:

1. This is an appeal under s109 of the *Magistrates' Court Act* 1989 from a judgment of a Magistrate delivered on 9 December 2003 in the Magistrates' Court at Melbourne. It illustrates how the difficulties of a difficult case can be compounded, and its simplicities overlooked, if the relevant law is not carefully analysed.

2. The proceedings were initiated by a finance company as long ago as 22 April 1994. The then plaintiff, Equus Financial Services Ltd[1] ("Equus") is the present appellant. It claimed under a loan contract to which it was not a party. The original lender was one of a group of companies whose business it was to develop time-share resorts. In this case, the location was Yarrawonga: a delightful holiday destination, but under-rated compared with Miami and Monaco.

3. The venture did not fulfil the hopes of those behind it. Liquidation has been the fate of some if not all of the companies in the group. As a result, Frederick and Sheila Van Der Ross, the present respondents and the defendants to the original proceedings, have never taken advantage of the time-share that, on 12 January 1991, they agreed to purchase from a vendor whose identity is not certain, but which was probably a corporation called Club Resorts Ltd. The financier was another corporation, admittedly linked to the vendor within the meaning of the expression "linked

credit provider" as defined in s73(14) of the *Trade Practices Act* 1974. Its name was Club Resorts (Finance) Ltd ("CRF"). The amount financed was, as the statement of claim alleges, $10,490.00. By the terms of the relevant loan contract, this sum was to be repaid over a period of 84 months. Interest was charged at 23.4% per annum, with payments fixed at the rate of $254.88 per month. The total amount payable was therefore $21,409.92.

4. If CRF ever intended to be the actual provider of financial accommodation to the respondents, it quickly resiled from that position. Even before the relevant loan contract came into existence CRF assigned, or attempted to assign, to Equus whatever interest it had in the relevant contract. It seems that some time later each of the vendor and CRF and the development at Yarrawonga collapsed, or at least escaped the reach of the respondents. It is probably the case that the vendor in fact received the purchase price of the respondents' time-share, doubtless discounted to reflect the intervention of the financiers. What for practical purposes is certain is that the respondents will never receive that which they contracted to buy. Their time-share may or may not now exist; but, if it does, it is no longer available for them. Equus, nevertheless, claims to be entitled to that which, so many years ago, the respondents contracted to repay. It points to the irrelevance of the fact that, if it succeeds, the respondents will in one sense pay for nothing. Its case is that, in return for an assignment of its debt, it put CRF in funds. It is now entitled to recover the amount paid, with interest.

5. The case is pleaded for Equus in a statement of claim that was delivered with the Complaint by which the proceeding began. In essence, it is a simple claim in debt. The *Trade Practices Act* is irrelevant to it. The respondents nevertheless introduced that legislation not only by their counterclaim, but also by their defence. It was a move which obscured the real issues so effectively that thereafter neither the practitioners nor the Magistrate were able to recognise them.

6. The loan contract is said by paragraph 3 of the statement of claim to be "dated the 24th day of January 1991 ('the said date')." A copy is in evidence before me. It is signed "for and on behalf of the credit provider", which "hereby certifies that this is a true copy of the loan contract ... given to the debtor for his own use." Far from being dated 24 January 1991, however, the copy bears but one date; and this is the date upon which it was signed by the respondents: 12 January that year.

7. The statement of claim is internally inconsistent. The sum of $9,761.36 is allegedly owing under a loan contract pursuant to which the respondents were the borrowers. The "Credit Provider" is first identified as CRF. Despite this, the statement of claim then alleges that a contract, the one said to be dated 24 January 1991, was made between Equus "as Credit Provider" and Mr and Mrs Van Der Ross. By this contract "the Credit provider" [sic; the reader is left to work out whether this is Equus or CRF] "agreed to lend to the Defendant/s [sic] and the Defendant/s agreed to borrow from the Credit Provider the sum of $10,490.00 ('the amount financed') for a term of 84 months."[2]

8. The statement of claim goes on to allege, by paragraph 5, that *"[o]n the said date* [24 January 1991] *and pursuant to the terms of the loan contract, the amount financed was (a) advanced by the credit provider to the defendants; and (b) received and accepted by the defendants"* (my emphasis). This allegation is, by paragraph 5 of the respondents' defence, denied. But it had to be made. It is, of course, central to Equus' right to recover: unless the person seeking to recoup the alleged debt can prove, or unless the debtor admits, that the lender actually lent the amount said to represent the principal of that debt, the claim must fail. And the onus or burden of proof remains entirely with Equus. Mr and Mrs Van Der Ross having denied the allegation, Equus had no option but to attempt to make it good.

9. This is not a point of merely technical significance. Its importance may be easily demonstrated. In the absence of an allegation in the statement of claim to the effect of that set out above, that pleading would not disclose a cause of action against the respondents. It would for that reason be the proper subject of a "strike out" application. Were such an application made, it would be no defence to argue that Equus itself had given good consideration for the assignment. That merely goes to the state of its relationship with CRF. It has nothing to do with the relationship between Equus and the respondents.

10. In this context, another point should be noted. Despite the inept draftsmanship exhibited by the statement of claim, it is clear that its initial identification of CRF as the "Credit Provider" was correct, at least to the extent that, if credit was provided by anyone, that person was CRF. Equally, the later identification of Equus as such was wrong.

11. In the meantime, however, it is appropriate to return to the statement of claim. Paragraph 7 of that document alleged that "the Credit Provider" had on 16 January 1991, "absolutely assigned in favour of the plaintiff all of its right title and interest in and the benefit of the loan contract to the plaintiff."[3] This was some eight days earlier than the date given in the statement of claim as the date of that very contract. Notice of the assignment was said to have been given to the respondents on the same day.

12. A notice bearing that date is in evidence. It informs the respondents that CRF has assigned to Equus "various interests under the loan contract ... dated 12 January 1991 ... and [that] you are required to continue to ... make all future payments of moneys due under the loan contract to Club Resorts ... or as Equus ... may direct".

13. In the light of the above, it is perhaps reasonable to assume that, despite the statement of claim, the case for Equus is that the original contract was made on 12 January between the respondents and CRF. Such an assumption, however, would quickly run into the difficulty that, according to the Magistrate, certain facts were not in dispute. One of these was that the "offer by the [respondents] to enter into a loan contract to borrow the full purchase price was accepted by [CRF] on 22 January 1991."[4] At all events, it is clear that whatever rights the financier had under the contract were on 16 January assigned to Equus; but by the terms of the assignment the respondents were for the time being to continue to make payments to the original lender.

14. At this point, CRF and Equus were working hand in hand. That this is so is clear from a Deed dated 31 August 1990 made between those two entities. It included the following

> "The assignor carries on the business of lending money with or without security for the purpose of financing the purchase of interests in various time-share resorts.
> The assignor proposes to enter into various relevant agreements to provide finance for the acquisition by various parties of interests in time-share resorts and from time to time to offer the debts arising from such relevant agreements to the assignee.
> Subject to the terms and conditions herein contained, the assignee has agreed to take an assignment from the assignor of such debts ...
> 2.1 Where the assignor forwarded to the assignee:
> 2.1.1 a request to purchase in the form provided in Annexure ('the request to purchase');
> 2.1.2 a copy of the relevant agreement signed by the customer;
> 2.1.3 a completed credit application;
> the assignee shall make an offer to accept an assignment of the debt. The assignee's offer shall be made by forwarding to the assignor a request to purchase with the purchase amount as set out herein and duly signed by the assignee. ...
> 7.1 On debts purchased by the assignee, the assignor shall use its best endeavours to procure that each customer shall make all payments when and as they fall due. Subject thereto, the assignor shall have authority to collect all payments and other monies payable in respect of any debt and where the assignor received any such monies the assignor shall receive them in trust for the assignee provided that such authority may be terminated by the assignee upon 7 days' notice to the assignor at any time."

15. During the period beginning on 7 March 1991 and ending on 15 September 1993, the respondents continued, with a few exceptions, to pay the monthly instalments for which the loan contract provided. Then they stopped. Default notices under s107 of the *Credit Act* 1984 were served. A certificate issued pursuant to s55B of the *Evidence Act* 1958[5] by Mary Fugaro, an Administration Manager, discloses that a total of $8,156.16 made up of 30 instalments of $254.88 and one of $509.76 was received by or on behalf of Equus during that period.[6]

16. In the meantime, the development at Yarrawonga did not proceed with the despatch that the respondents thought was required. By September 1993 they had had enough. Hence their failure to continue making the instalment payments that, until then, had been regularly transmitted. They thought, wrongly as the Magistrate held, that there had been a total failure of consideration on the part of the original vendor.

17. On a date that is not available to me, the respondents issued a defence and counterclaim. The denial contained in paragraph 5 of that pleading, to which I referred above,[7] is supplemented by their prayer for relief. In it, they seek damages "limited to $25,000" and "a declaration that the whole of the loan contract is void and unenforceable" either pursuant to s87 of the *Trade Practices Act* or on general law grounds. In the substantive body of the defence they also plead that that contract "is a tied loan contract for the purposes of the … Act". This is carried through in the counterclaim with an allegation of conduct by CRF in contravention of that Act.

18. It is the case of Mr and Mrs Van Der Ross, as alleged in their defence, that they attended a meeting on 12 January 1991. It was called to promote time-share resorts. According to the respondents, a Mr Kevin Gaw was present at that meeting and acted on behalf of a number of entities, defined collectively as "the promoters", which included CRF (but not Equus). They signed the loan contract on that day, induced to do so by the following representations made by the servants or agents of "the promoters, or one or some of them":

> (a) if the respondents paid the sum of $10,490 over a period of time they would have purchased a time-share unit at Club Yarrawonga;
> (b) there were only 3 or 4 units left to be purchased ("the remaining units");
> (c) the developer wished to sell the remaining units at a special price as more money was required for the construction of a further stage of the development;
> (d) the price of the unit being offered to the Respondents was a special price for that day only (the "sale price");
> (e) the sale price was lower than would ordinarily be the case;
> (f) the normal or ordinary price for the unit was $20,000, alternatively substantially greater than the sale price;
> (g) there was a strong demand for the units;
> (h) the respondents were entitled on purchase of the unit to use their entitlements in respect of the unit at any time;
> (i) the respondents were entitled on purchase of the unit to use their entitlements in respect of the facilities of other time-share resorts at any time;
> (j) if the respondents did not wish to use their entitlements in respect of the unit during a particular year they could transfer those entitlements to be used at any time in the future;
> (k) upon purchase of the unit, and in consideration of the purchase, all fees associated with membership of the time-share arrangement would be waived;
> (l) upon purchase of the unit, and in consideration of the purchase, maintenance fees for the first 2 years would be waived;
> (m) all of the details required for insertion in the loan contract standard form document were not available at the meeting;
> (n) if the respondents signed the loan contract standard form document the remaining details would be inserted by Mr Gaw at a later date and those details would not impose any obligations on the respondents other than the obligations that had been discussed at the meeting.

19. According to the respondents, each of the representations was false. Not only that, but the promoters were negligent in making them. Moreover, by virtue of s13 of the *Sale of Land Act* 1962, the representations were deemed to have been made with knowledge of their falsity. The conduct of the promoters was engaged in with the implied consent or agreement of Equus, which was a linked credit provider of, *inter alia*, CRF; and the loan contract was a tied loan contract under the *Credit Act* 1984 (as well as having the same status under the *Trade Practices Act*). The respondents say they have not used any of the facilities at Club Yarrawonga or any other related time-share facility. As such, they allege that the loan contract was not only voidable at their option, but has been and is now avoided – something which happened, at the latest, upon service of the defence. They plead that on this basis they are not liable to Equus for anything.

20. His Honour dismissed both claim and counterclaim. Equus has appealed. The respondents have not. The statement of claim, and the respondents' defence to it, therefore remain highly relevant. The counterclaim does not, except to the extent that it explains certain aspects of the judgment below.

21. By paragraph 2 of his order of 3 March 2004, Master Wheeler settled the question of law to be decided upon the appeal. As settled, it took the following form:

> "Did the learned Magistrate err in the exercise of his discretion in respect of section 87 of the *Trade Practices Act* in setting aside the loan contract rather than assessing damages?"

Despite this the Master also noted under "Other Matters" the following:

> "5. The question of law to be decided is:
> (a) whether as a result of the learned Magistrate's finding in regard to the misrepresentations the loan contract could be avoided or should have been the subject of an award for damages in favour of the appellant [sic] and any claim of the respondents [sic] should be set off against the respondents' claim for damages arising from the misrepresentations?"

22. I will return to the question of law as set out in paragraph 2 of the Master's order. That set out under "Other Matters" can be put to one side. It does not make sense. It seems that the word "appellant' and the word "respondent" where first appearing have been transposed; but even if that be assumed, it is difficult to understand what the order means. Given the above assumption, the question of law asks whether the appellant's claim for a liquidated sum should be set off against the respondents' claim for damages arising from misrepresentations about the loan contract. But a set-off is a defence; and a plaintiff's claim for a liquidated sum cannot be a defence to a counterclaim for damages flowing from the entry into a loan contract which was induced by misrepresentations – or, for that matter, by conduct in breach of the *Trade Practices Act*.

23. In their counterclaim, the respondents alleged misleading and deceptive conduct by the promoters, together with unconscionable conduct, alternatively conduct in contravention of s51AA, or alternatively of s51AB, of the *Trade Practices Act*. In the proceedings in the Magistrates' Court they claimed damages of $25,000 and sought a declaration under s87 of the Act that the loan contract was in its entirety void and unenforceable. They also sought such a declaration generally as well as a declaration that no credit charge was payable by them in respect of the loan contract.

24. Equus delivered a reply and defence to counterclaim. It there alleged, among other things, that the limitation periods in respect of the matters pleaded in the defence and counterclaim had expired before that document was issued. Whatever relevance this might have had in relation to the counterclaim, it is irrelevant to any issue arising pursuant to Equus' own claim. The statute of limitations does not apply to matters raised only by way of defence.

25. On 9 December 2003, the Magistrate delivered written reasons for judgment. Relevantly for present purposes, his Honour found there was not a failure of consideration.[8] In doing so, after quoting from the judgment of Balmford J in *Equuscorp Pty Ltd v Jeffree*[9], he indicated that he agreed with the submissions put by the appellant in that case, which reflected those put by Equus before him, that the consideration comprised the land and the time-share, both of which had been received in full. Accordingly, the failure to complete the building and operate it as a time-share did not amount, in his Honour's opinion, to a failure of consideration. This was therefore no reason for dismissing Equus' claim.

26. In coming to this conclusion, the Magistrate examined the wrong contract. Equus' cause of action arises not under the contract to purchase a time-share interest, *but under the contract to finance the purchase of that interest*. And, as the respondents assert[10] and the appellant does not explicitly deny,[11] no evidence was put before his Honour to prove payment of the principal sum by the financier to the vendor. Nor was any such evidence put before me either as having been tendered in the Magistrates' Court or as being tendered for the first time on appeal. I must therefore proceed on the basis that Equus failed to prove an essential element of its case.

27. It is true that the point was not taken on appeal. Nor, one must assume, was it taken at first instance. I confess that it did not occur to me until I came to prepare these reasons for judgment. I therefore invited each side to put written submissions to me about it. Each took advantage of that invitation. It is apparent on reading the submissions thus received that Equus has never attempted to prove, let alone made good, the allegation contained in paragraph 5 of its statement of claim. In the circumstances, I cannot simply assume that the "Credit Provider" actually provided the credit. And it would be unjust to order the respondents to "repay" loan funds that were never directly received by them and may never have been paid out on their behalf.

28. As a consequence, the appeal must fail. For the sake of completeness, however, and out of respect for the arguments debated on appeal, I will deal, as did his Honour, with each of the representations that were pleaded.

29. In addition to those representations, the Magistrate took into account a representation "as to interest rate and ultimate cost of the loan". This representation was not pleaded; but no point about this was taken on the appeal. The Magistrate found that the representation set out in sub-paragraph (a) of paragraph [18] above was not made.[12] However, he was satisfied that the representations as I have reproduced them in sub-paragraphs (b), (c), (d), (e), (f) and (l) of that paragraph were made. Of these, his Honour found the representations in sub-paragraphs (b) and (g) to be (arguably) puffery. He could not be satisfied that those in sub-paragraphs (h), (i), (j) or (k) were not "a combination of subsequent reconstruction and misunderstanding by the [respondents] at the time"; and those in sub-paragraphs (m) and (n) were also "unclear". At best, the representation reproduced as (l) in paragraph [18] above was inaccurate, because "maintenance fees were in fact charged from the outset o[13]the agreement." [13]

30. There remain the representations reproduced in sub-paragraphs (c), (d), (e) and (f), together with the unpleaded representation about interest rates. His Honour held that they were not only made, but also misled the respondents. His Honour's analysis of these and of the last-mentioned sub-paragraphs appears in several passages at pp11-13 of his reasons. His Honour said:

> "Significantly the defendants also gave evidence that Mr Gaw represented to them that the interest rate to be paid on the loan, which would form the basis of the calculations of the credit charge, would 'be less than that currently charged by the banks'. There was no evidence, other than the recollection of the [respondents], as to the prevailing rate of bank interest; their recollection was that it was in the region of 17-18 percent and the plaintiff did not take issue with this.
> ...
> The evidence of the two [respondents] was consistent with respect to most of the representations as pleaded, including representations concerned with the interest rate and credit charge to be applied.
>
> The [respondents] impressed me as being truthful and, allowing for the passage of time, reliable witnesses. I accept that the representations did induce the [respondents] ... into entering into the contract with the vendor and the loan contract with [CRF].
>
> I should perhaps point out in passing, that the representations made to the [respondents] concerning the interest rate on the loan contract may well have been a representation made by [CRF] as much as by the vendor.
> ...
> In my opinion representations (c), (d), (e) and (f) go beyond what might be described as mere 'puffery' and misled the [respondents] to believe that the value of their bargain was much greater than in fact it was.
> ...
> In my opinion therefore the [respondents] did rely upon the misleading and deceptive representations made by the vendor in accordance with the above analysis, and in particular the representations as to interest rate and ultimate cost of the loan, such representations induced the [respondents] into entering the contract to purchase the time-share interest."

31. Although these passages are not entirely clear, I read them as demonstrating that his Honour found (a) that the respondents were told that the interest rate they would be charged would be less than that currently available from banks; (b) that that representation was, and those designated (c) – (f) above were, misleading and deceptive; and that therefore all were misrepresentations; (c) that the respondents believed them; and (d) that they were induced by them to enter into both the contract to purchase the time-share and the loan contract. I note too the Magistrate's reference to the possibility that the representation concerning the interest rate *may well have been* made by CRF. This is not inconsistent with his Honour's finding that Mr Gaw was the individual with whom, in the main, the respondents dealt, and that he was employed by the vendor of the time-share. The evidence also points to his having been an agent of CRF for the purposes of making the representations. He was certainly the agent of that company in signing the loan contract on its behalf. More particularly, the conclusion that the representation about interest rates was made on behalf of both the vendor and the financier is consistent not only with the evidence available to me, but also with his Honour's finding that that representation induced the respondents to enter into the loan contract. Most significantly of all, it is consistent with the Magistrate's decision to dismiss the claim. In these circumstances I should, I think, proceed on the basis that it was open to his Honour to hold, and he did hold, that representations made by CRF either directly or through an agent induced the respondents to enter into the loan contract.

32. Before turning to the counterclaim, his Honour briefly considered, and equally swiftly

dismissed, (a) an allegation that the conduct of the vendor was unconscionable in contravention of s51AA or 51AB of the *Trade Practices Act* and (b) an allegation of negligence. His Honour continued:

> "However the conduct of the vendor otherwise, is such that the [respondents] are entitled to an order under section 87 of the *Trade Practices Act* allowing them to avoid the contract with the vendor. As this is a tied loan contract, the consequence is that the [respondents] may also avoid the loan contract. This leaves the question of the counterclaim...[14]

33. Two points should be made about this passage. First, his Honour relied upon s87 of the *Trade Practices Act* as a basis for dismissing Equus' claim, not the respondents' counterclaim. Secondly, the basis for reliance upon s87 could only have been the misrepresentations discussed in paragraph [30] above. These included representations about the rate of interest chargeable under the loan contract. CRF was a party to that contract. Accordingly, the question whether it was "tied" or not is irrelevant.

34. Given that there is no appeal against his decision to dismiss the counterclaim, I merely note here his Honour's bases for that decision: first, that no "[p]articulars of ... damages were ... given, and no evidence was given as to the [respondents'] loss and damage";[15] and, secondly, that "the [respondents'] damages claim against [Equus] is barred by the operation of" s82 of the *Trade Practices Act*, which at the relevant time provided that an action under it may be commenced within three years after the cause of action accrued.

35. Equus relied upon the first of these findings as the basis for a submission that "the learned Magistrate erred in law when he ordered pursuant to s87 of the *Trade Practices Act* ... that the loan contract was void *ab initio*".[16] Having found that damages had not been proved, it was not open to his Honour to call upon that section. According to the submission, an order under s87 "may only be made if the court finds that a party has suffered or is likely to suffer loss and damage."[17] The submission cited, as authority for that proposition, *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*.[18] In the joint judgment of Gaudron, Gummow and Hayne JJ in that case, their Honours noted that "orders may be made under s87 only upon the court finding that a party to the proceeding has suffered, or is likely to suffer, loss or damage."

36. This submission is correct, but it is in the end no answer to the proposition that the Magistrate arrived at the right destination after taking the wrong route. His Honour did hold that the respondents were entitled to avoid the loan contract. It was on that basis that Equus' claim was dismissed. But that had everything to do with the claim, and nothing to do with the counterclaim. It ought to have had nothing to do with s87, either.

37. As I have already remarked, Equus invoked not the *Trade Practices Act* but the general law. The respondents were (and are) entitled to resist Equus' claim by every means open to them under the general law. And the general law "does not impose, as a requirement for effective rescission, that a party who has been induced to enter into a contract by a misrepresentation must have suffered loss and damage in the sense of a loss for which a pecuniary award may be made."[19] It is sufficient that the innocent party suffered the detriment of being bound to a contract induced by a misrepresentation or misrepresentations.

38. That is this case. It was found here that the respondents were induced to enter into the loan contract by a number of misrepresentations. It is true that Equus was not a party to the loan contract when first it was made. The interest which an assignee takes under an assignment is, however, subject to equities. That is so whether the assignment is statutory or equitable. The assignee's interest is therefore subject to any defences which were available to the debtor as against the assignor which arise out of the contact assigned. The assignee can receive only whatever rights the assignor had at the time of the assignment, and if these rights are subject to reduction or extinction, the assignee can be in no better position than the assignor.[20]

39. Under the law of contract, the representee, as the party misled, is permitted to rescind the contact *ab initio*, provided that the parties can be restored, substantially, to their pre-contractual positions. In this case, the respondents rescinded the loan contract when Equus was served with their defence. All that is required for the parties to be substantially restored to their pre-contractual positions is that the respondents pay to that company the balance of the principal sum.

40. A time-share is an interest in land for the purposes of s2 of the *Sale of Land Act* 1962. By s13 of that Act, if in any action commenced in respect of the sale of any land it is proved that any representation made on such sale was false, and that it induced a party to the action to enter into a contract to purchase the land, the representor shall be deemed to have knowledge of the fact that the representation was false. There are exceptions, but they are inapplicable to this appeal. Section 13 was pleaded in paragraph 21 of the respondents' defence. It provides a further justification for the Magistrate's decision.

41. I now return to the question of law as framed by the Master. It did not reflect the real question for determination on appeal. It can, and in my opinion should, for that reason be put to one side.

42. In the result, the respondents would, had the question of consideration not already been answered in their favour, have been entitled to a declaration that the loan contract has been rescinded. A necessary consequence, however, would have been an order that they pay to Equus the balance of the principal amount borrowed. According to my calculations, this amounted to the sum of $2,333.84 ($10,490.00 - $8,156.16).

43. Given the absence of evidence that the amount allegedly borrowed had ever been paid, however, there can be no outcome other than that the appeal be dismissed.

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[1] Equus Financial Services Ltd converted to a proprietary company on 29 March 1996 and changed its name to Equus Corp Pty Ltd on 29 April 1996 (Exhibits "DIC-9" and "DIC-10").
[2] Statement of claim, para. 3.
[3] Ibid., para. 7.
[4] Reasons for judgment of the Magistrate (undated), p2.
[5] Exhibit "DIC-2" to the affidavit of David Ivo Chapman sworn 23 December 2003.
[6] I note that the certificate was not put forward as constituting proof of indebtedness. Even if it had, there is the difficulty that it was Equus' certificate; but Equus was not the "Credit Provider".
[7] See para. 8 of the judgment.
[8] Page 9 of his Honour's reasons (exhibit "DIC-3").
[9] [2001] VSC 212 at [20] to [22]; [2001] ATPR 41-825
[10] Respondents' supplementary submissions dated 15 April 2005.
[11] Further submissions of the appellant dated 15 April 2005.
[12] Page 12 of his Honour's reasons (exhibit "DIC-3").
[13] Ibid, p13.
[14] Page 14 of his Honour's reasons (exhibit "DIC-3").
[15] Ibid.
[16] Appellant's outline of submissions, para. 3.
[17] Ibid, para. 4.
[18] [2002] HCA 41; (2002) 210 CLR 109 at 125 (para. 46); (2002) 192 ALR 1; (2002) 23 Leg Rep 2; [2002] ATPR 41-894; 76 ALJR 1461.
[19] *Demagogue Pty Ltd v Ramensky* [1992] FCA 557; (1992) 39 FCR 31 at 32; (1992) 110 ALR 608; [1993] ATPR 41-203.
[20] See Greig & Davis *The Law of Contract* (1987) at p1020.

APPEARANCES: For the Appellant Equuscorp Pty Ltd: Mr J Twigg, counsel. Kelly & Chapman, solicitors. For the Respondents: Mr D Klempfner, counsel. MD Klotz, solicitors.
