LOCAL COURT

New South Wales

Downing Centre Sydney

J SOARS

23/8/17

Jurisdiction:	Civil
Parties:	Bendigo and Adelaide Bank Limited v M Howard
File number:	2016/00192620
Hearing dates:	11 April 2017, 25 May 2017, 19 July 2017 and 23 August 2017
Date of Decision:	23 August 2017
Magistrate:	JA Soars
Representation:	Mr D Gration and Ms F Ashworth (Plaintiff) and Mr Horobin (Defendant)

Reasons for Decision

1 The Plaintiff's counsel described this matter in opening as "*in some ways a straight forward debt recovery matter*". In reality it is far more complicated than that. The complications include that the loan was made in the context of a managed investment scheme offered to investors by the Great Southern Group which collapsed in 2009, that the loan monies were not paid to the Defendant but alleged to have been paid directly for the purchase of olive groves, that the Plaintiff is not the original lender but the successor in title from the alleged assignee of rights from the alleged original lender, that the advance occurred in June 2006 but proceedings were not commenced by the Plaintiff against the Defendant until approximately 10 years later in June 2016 giving rise to limitation arguments, that there were alleged defects in the execution by the Defendant of a finance application in his selection of the identity of the lender, that there were delays in the preparation of formal documentation by way of a Loan Deed that was not entered into until 20 June 2007 and that the Defendant has not admitted that the original advance was made.

2 The Plaintiff in this matter claims as successor in title from an alleged assignee from the alleged original lender the principal sum of $24,490 plus interest and costs relating to an alleged advance made on the Defendant's behalf in 2006.

3 The Plaintiff indicated at the hearing that its primary claim was under a Loan Deed and that it had alternative claims based on an alleged Loan Agreement and claims based on unjust enrichment and/or restitution and/or money had and received.

4 The parties have asked me to deal with issue of liability in this judgment and to reserve argument on interest and costs to a later date as further submissions may need to be made depending on my findings.

5 Notwithstanding the relatively small amount in dispute, the Plaintiff's claim in these proceedings raises a multiplicity of issues for determination. The Statement of Issues and Agreed Facts that was filed by the parties was superseded by the late service of

further evidence by the Plaintiff and additional issues raised by the Defendant at the hearing.

6 In summary and by reference to the pleadings and the arguments raised at the hearing, the issues for determination are as follows:

Issue 1 – Loan Deed

1. Is the Plaintiff entitled to recover the amounts claimed in the Amended Statement of Claim (**ASC**) for principal, interest and costs under the Loan Deed dated on or about 20 June 2007 alleged to have been made between ABL Nominees Pty Ltd (**ABL**) and the Defendant (**Loan Deed**)?

Sub issues

a. Did the Defendant by his execution of the Finance Application validly give a power of attorney for the execution of a Loan Deed on behalf of the Defendant as borrower with the predecessor to the Plaintiff as lender?
b. Was the alleged loan advance of $24,490 advanced by ABL Nominees?
c. Were the rights of ABL Nominees as lender under the Loan Deed validly assigned to the Plaintiff?
d. Are the Plaintiff's claims under the Loan Deed statute barred?

Issue 2 – Loan Agreement (alternative claim)

1. Is the Plaintiff entitled to recover the amounts claimed in the ASC for principal, interest and costs under a Loan Agreement alleged to have been entered into on or about 15 June 2006 between ABL Nominees and the Defendant (**Loan Agreement**)?

Sub issues

a. Was there a Loan Agreement entered into and if so on the terms of the Loan Deed?
b. Were the funds totalling $24,490 advanced by ABL Nominees?
c. Were the rights of ABL Nominees as lender under the Loan Agreement assigned to the Plaintiff?
d. Are the Plaintiff's claims under the Loan Agreement statute barred?

Issue 3 – claims based on unjust enrichment and/or money had and received (alternative claim)

2. Is the Plaintiff entitled to recover the alleged loan advance to the Defendant on the basis that the Defendant has been unjustly enriched by the Loan Advance/the Plaintiff is entitled to restitution of the Loan Advance plus interest and costs as money had and received?

Sub issues

a. Does the Local Court have jurisdiction to deal with these claims of the Plaintiff?
b. Was the Loan Advance advanced by ABL Nominees?
c. Were the rights of ABL Nominees as lender to the claims based on unjust enrichment and/or restitution and/or money had and received assigned by ABL Nominees to the Plaintiff?
d. Are the Plaintiff's claims based on these causes of action statute barred?

7 After briefly outlining the factual background, I will deal with each issue and sub-issue in turn.

8 I note that the Plaintiff has to prove the matters in respect of which it bears an onus according to the civil standard on the balance of probabilities.

Background

9 The alleged loan by ABL Nominees said to be a predecessor of the Plaintiff, on behalf of the Defendant was made in the context of a tax effective investment said to have been entered into shortly before the end of the financial year in 2006. The investment involved the Great Southern Group which offered managed investment schemes to investors and collapsed in 2009.

10 Great Southern Managers Limited (**GSMAL**) established the Projects in accordance with a relevant Product Disclosure Statement. A copy of the Product Disclosure Statement (**PDS**) for the Great Southern 2006 Organic Olives Income Project was in evidence. At

pages 118-119 it contained the proforma Grovelot Application and Direct Debit Request (**Direct Debit Request**)(which on its face said it was to be used only if using "Great Southern Finance" (Section 5 of the Application Form)) and which was a request to pay Great Southern Finance Pty Ltd (**GSF**).

11 The Defendant admitted in the Amended Defence, and it was recorded in the Joint Statement of Agreed Facts and Issues in Dispute, that:

a On or about 15 June 2006 the Defendant made an application to GSMAL to purchase 3 grovelots in the Great Southern 2006 Organic Olives Income Project for a price of $24,000, exclusive of GST (**Grovelot Application**);

b In the Grovelot Application the Defendant stated amongst other things that he also applied to GSF or to a preferred financier of GSMAL to borrow an amount of $24,000 to finance the purchase of his grovelots, that he was an existing investor with Great Southern and that he required loan repayments to be debited from his Commonwealth Bank account and specified his bank branch and account number;

c On or about 15 June 2006 the Defendant made an application for finance in connection with his purchase of the 3 grovelots in an amount of $24,000 plus loan fees of $490 a total of $24,490 (**Finance Application**).

12 On the Finance Application which was signed by the Defendant the box for "Grovelots" had been crossed, the form had been completed to indicate the purchase of 3 Grovelots at $8,000 each for a total of $24,000 and that the "loan amount" would be $24,000 and loan fees of $490 and that the total amount financed would be $24,490.

13 The Finance Application contained 3 alternatives in relation to the lender and loan terms:

a Box 1 identified the lender as Great Southern Finance Pty Ltd for inter alia Grovelots on a principal and interest basis over either a 3, 4, 5, 7 and 10 year period;

b Box 2 identified the lender as Great Southern Finance Pty Ltd as lender for Woodlots only on an interest only and then principal and interest basis over either a 2(and 2), 2(and 3), 3(and 4) and 3(and 7) year period;

c Box 3 identified the lender as ABL Nominees Pty Ltd for Grovelots or combined loans on an interest only initial period and then principal and interest over either a 2(and 2), 2(and 3), 3(and 4) and 3(and 7) year period.

14 The Defendant had crossed the entry in Box 2. The lender for box 2 was "Great Southern Finance Pty Ltd". This box was said to apply for "Woodlots" only, not "Grovelots". The loan was for a 3 year interest only loan and then 7 years principal and interest.

15 This gives rise to the error alleged by the Plaintiff that the Defendant made by selecting box 2 and GSF as lender.

16 The Defendant signed a Direct Debit Request form dated 15 June 2006 as part of the Grovelot Application which authorised GSF to deduct monthly payments from his Commonwealth Bank account. Loan repayments were made from this account to GSF from 31 July 2006 until 2009.

17 The Defendant gave evidence by affidavit and at the hearing that he had deliberately chosen GSF as lender on the Finance Application because he believed that was the company managing the project's finance. In cross examination the Defendant confirmed that he had deliberately chosen GSF as lender and not ABL Nominees.

18 The Finance Application and Grovelot Application were required under the PDS to be submitted by 15 June 2006 in order to be accepted. The evidence of the Defendant was that he faxed a partial copy of the Finance Application and Grovelot application on 15 June 2006. He also sent a complete copy of these documents by mail on a later date.

19 The evidence of Mr. Flamer-Smith the Manager Legal and Resolutions Great Southern Collections employed by the Plaintiff, who joined the Plaintiff in 2009, in his first affidavit was that the Defendant's Finance Application and Grovelot Application were accepted and approved by ABL on or about 15 June 2006. Mr. Flamer Smith conceded, however, under cross-examination that the Defendant's loan was approved by GSF on behalf of ABL Nominees, not by ABL Nominees itself, although this was not pleaded in the ASC.

20 The matters relied upon by the Plaintiff to establish the loan advance to the Defendant are disputed and are addressed in more detail below, as is the basis on which the Plaintiff alleged that the loan by ABL Nominees to the Defendant was assigned to Adelaide Bank Limited which became the Plaintiff.

21 While the Defendant contested that any rights to the loan to the Defendant had been validly assigned from ABL Nominees to Adelaide Bank Limited, the Defendant did not raise any issue that the Plaintiff (Bendigo and Adelaide Bank Limited) is the successor in title to Adelaide Bank Limited following a merger between these banks.

22 The parties accepted that the applicable case authority on the civil onus of proof is *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 per McDougall JA in the leading judgment at [55] who held that:

> *The position may be summarised as follows:*
>
> *(1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;*
>
> *(2) Where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;*
>
> *(3) Where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non-existence of a fact, or inconsistent with its existence, be excluded before the fact can be found; and*
>
> *(4) A rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue.*

Issue 1 – Loan Deed - Is the Plaintiff entitled to recover the amounts claimed in the Amended Statement of Claim for principal, interest and costs under the Loan Deed dated on or about 20 June 2007 alleged to have been made between ABL and the Defendant (Loan Deed)?

(a) ***Did the Defendant by his execution of the Finance Application validly give a power of attorney for the execution of a Loan Deed on behalf of the Defendant as borrower with the predecessor to the Plaintiff as lender?***

23 The Plaintiff alleged in the ASC that the Loan Deed was executed pursuant to power of attorney granted by the Defendant. This was denied by the Defendant.

24 The Defendant raised a number of arguments as to why the Defendant was not bound by the power of attorney, being that:

a No effective power of attorney had been granted because the Defendant only accepted the terms on the pages of the Finance Application that he faxed on 15 June 2006 (which did not include the page which contained section 6 the power of attorney);

b As the Finance Application was not expressed to have been executed as a deed, the power of attorney contained in it had not been properly executed and did not take effect as a Power of Attorney;

c The attorney GSF on behalf of the Defendant was on notice of any limitations in its authority from the manner of execution of the Finance Application (such as that the power of attorney only authorised the signing of a Loan Deed with GSF as lender (not with ABL Nominees) due to the ticking of Box 2 by the Defendant and selection of GSF as lender.

Defendant's alleged failure to accept the terms of the power of attorney

25 The Defendant signed and returned only some of the pages of the Finance Application by fax on 15 June 2006 (which did not include section 6 the power of attorney) and returned the document by post, although his evidence was confused as to what pages were contained in the documents that he returned by post.

26 The Defendant may still be bound by the section 6 the power of attorney section if the terms in relation to the power of attorney were incorporated by reference into the document signed by the Defendant such that he is bound by them.

27 The parties agreed that the principles on whether terms are incorporated have recently been conveniently set out in *Ange v First East Auction Holdings Pty Ltd* [2011] VSCA 335 in the leading judgment by Sifris AJA at [51]-[57].

28 Applying the principles set out in the *First East Auction case*, the terms of the power of attorney formed part of and were incorporated in the Finance Application that was signed and returned by the Defendant by fax, even though all of those pages containing the power of attorney were not returned on the faxed copy of the Finance Application in evidence. On the evidence I infer that the Defendant had a complete copy of the Finance Application on 15 June 2006, or could have asked for a complete copy, and was no notice of the terms of the document which were incorporated by reference and is thereby bound by the signed copy he returned. In those circumstances I find that the Defendant is bound by the terms of the power of attorney which formed part of the Finance Application.

Alleged invalid execution of the power of attorney and failure to sign it as a deed

29 The Defendant did not refer the court to the source of the alleged obligation that in order to be valid the power of attorney it had to be executed as a deed.

30 The Plaintiff argued that even if there was a requirement that the power of attorney be executed as a deed, then this was satisfied by reason of the power of attorney being on p9 of the application and containing the statement "(h) the Power of Attorney is executed as a deed" and the application being signed by the Defendant with a witness "S Masrey" to his signature thereby complying with the requirements for execution of a deed.

31 Section 38(1) of the *Conveyancing Act* 1919 (NSW) states that no particular form of words is required in order to execute a document as a deed and the court was not referred to any other applicable legislation by the Defendant.

32 In *400 George Street (Qld) Pty Ltd v BG International Ltd* [2010] QCA 245, Muir JA in the leading judgment of the Queensland Court of Appeal stated that the words used in a document "executed as a deed" and "by executing this deed" unequivocally expressed an intention that the document was a deed rather than an agreement.

33 Applying the persuasive reasoning in the *400 George Street* case I am satisfied that the reference to "executed as a deed" on p9 of the Finance Application and the fact that the Defendant signed the Finance Application which included the power of attorney and his signature was witnessed by an apparently independent witness satisfies any requirement for execution of the power of attorney as a deed.

Did the power of attorney in the Finance Application authorise the entry into of the Loan Deed with ABL as lender (as opposed to with GSF)? - should the Court correct the alleged error in the Finance Application in the selection of the lender in box 2/alleged misnomer in the selection of the lender, as a matter of construction?

34 The Defendant's argument was that if the power of attorney did not authorise the attorney (GSF) to enter into the Loan Deed as attorney for the Defendant with a Lender of ABL Nominees, then as ABL had left the approval of the loan to its agent GSF, it was on notice through that agent/attorney that the attorney did not have authority to enter into a Loan Deed with ABL Nominees as lender.

35 The Plaintiff submitted that GSF was acting as agent for the borrower (the Defendant) when it executed the Loan Deed and it was entitled to the benefit of clause 6(g) of the power of attorney and was not required to enquire whether the power was being properly exercised or that circumstances had arisen to authorise the exercise of that power.

36 Mr. Flamer Smith gave oral evidence at the hearing that it was GSF that had accepted and approved the Defendant's loan on behalf of ABL Nominees, not ABL Nominees itself.

37 The Plaintiff sought to rely on the Defendant's "concession" by his counsel at the hearing that it was not the Plaintiff's case that GSF was the lender, the issue was whether the loan was made. While the Defendant stated that it did not contend the loan was made by GSF, it was putting the Plaintiff to proof that ABL Nominees advanced the loan monies and I don't think anything more can be made of that statement and it does not preclude the raising of this argument.

38 As identified in the factual background above, the Defendant in his evidence said that he deliberately chose GSF as the lender, when he ticked the box in relation to "woodlots", although conceded that he wanted grovelots.

39 When this issue arose during argument the Plaintiff contended that the court could correct as a matter of construction this "obvious" error by the Defendant in selecting this box when he intended to choose box 3 with the lender being ABL Nominees as the terms of the loan in box 3 were comparable terms in box 2 and they applied to grovelots. It was agreed that the Local Court does not have equitable jurisdiction to rectify the Finance Application on the grounds of mistake, and none of the parties had asked it to do so in their pleadings.

40 The parties accepted that the most recent case authority binding on this court setting out the principles on when it is appropriate for the court to correct errors in a document as a matter of construction is *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Limited* [2015] NSWSC 176. Kunc J set out at [49] the principle that applied as to when the court would correct as a matter of construction a misnomer, as being whether the misnomer was the product of a mistake in the circumstances in which it would have been plain to all who are concerned with the relevant document as to who the party was that was referred to in the document. Kunc J also held at [61] that the process of correction of an error, including a misnomer is still an exercise in interpretation.

41 The focus of attention is therefore not on the subjective intention of the parties but the objective intention of the parties.

42 The Plaintiff argued that the Defendant clearly wanted an interest only loan for the initial period and therefore intended to choose box 3, with ABL Nominees as the lender.

43 There is another possibility, being that the Defendant in completing the Finance Application and choosing box 2 intended to choose GSF as lender, ie. objectively determined would have chosen a principal and interest loan with GSF rather than accept ABL as a lender on an interest only basis. Or the Defendant could have chosen not to proceed at all if informed that GSF did not agree to make interest only loans for grovelots for an initial period and hence an error had been made in the Finance Application.

44 In the circumstances I am not satisfied that objectively determined the Defendant chose ABL Nominees as the lender and merely made a misnomer or error by ticking box 2 which specified GSF as the lender. Whoever approved the Defendant's Finance Application (it was said to be GSF on behalf of ABL Nominees) did not check the completion of the form thoroughly enough and did not notice the discrepancy.

45 It follows that I am not satisfied that the Court should rectify the Finance Application as a matter of construction so that it reads as if the Defendant had ticked box 3 and chosen ABL Nominees as the preferred lender of GSMAL as the lender.

46 Mr. Flamer Smith's evidence was that GSF approved the Defendant's loan on behalf of ABL Nominees. That makes GSF ABL Nominee's agent in respect of the loan. Any knowledge of the agent GSF as to the terms of Finance Application or Power of Attorney were therefore deemed to be knowledge of ABL Nominees as GSF's principal.

47 Given that I have found that the Finance Application as signed by the Defendant did not authorise entry into of a Loan Agreement with ABL Nominees as lender as the

Defendant had expressly stated that it wanted the preferred lender of GSMAL (GSF) as his lender, I deal now with the authority issues.

48 I find that the Power of Attorney given by the Defendant by reason of the way that the Defendant had ticked box 2 on the Finance Application, only authorised the execution of a Loan Deed in favour of GSF as lender, not ABL Nominees.

49 I was not taken to any authorities on this point, but I think as a matter of general principle that ABL Nominees is generally fixed with the knowledge of its agent GSF as to these limitations. ABL Nominees is therefore not in the position of a third party entitled to rely on the Loan Deed executed by GSF under what is an apparently valid power of attorney but is fixed with any knowledge of GSF as to the limitation of GSF's authority as attorney to execute the Loan Deed under the power of attorney.

50 GSF as attorney was not authorised to sign the Loan Deed signed on 20 June 2007 in favour of ABL Nominees as lender, and as GSF was acting as ABL Nominee's agent in relation to the loan transaction, ABL Nominees was on notice of this lack of authority of GSF as attorney. It follows that ABL Nominees was on notice of GSF's lack of authority to execute the Loan Deed which named ABL Nominees as the lender as the Defendant attorney, and that the Loan Deed as executed by the purported attorney GSF was not binding on the Defendant.

Other arguments

51 The Defendant also raised a number of other arguments in relation to the power of attorney which I can deal with briefly:

a the power of attorney should be struck down as offending against public policy because the attorney could use it to confer a benefit on itself and this was against public interest – no proper basis for this assertion was provided. The Plaintiff relied on clause (c) of the power of attorney which permitted the exercise of the power even if it involves a conflict of interest. I reject the Defendant's argument;

b The Lease Management Agreement purported to be executed on behalf of the Defendant by GSMAL as his duly appointed attorney. The power of attorney in accordance with its terms appointed ABL and GSF and each director company secretary and attorney of the same as the attorney. Hence the Lease Management Agreement was not validly executed. The Defendant did not develop how this rendered the Loan Deed invalid and I reject this argument; and

c The Defendant did not know he was giving a power of attorney. The Finance Application clearly stated this and was before the Defendant in full when he signed it. I reject this argument.

(a) Was the Loan Advance of $24,490 advanced by ABL Nominees?

52 The Plaintiff alleges in para 1G of its Amended Statement of Claim that following the approval and acceptance of the Finance Application and the Grovelot Application (said to have taken place on or about 15 June 2006), funds totalling $24,490 were advanced by ABL Nominees for the Defendant's purchase of 3 Grovelots in the Great Southern 2006 Organic Olives Income Project. This allegation was not admitted by the Defendant in his Defence.

53 At hearing the Defendant's counsel confirmed that the issue was whether ABL Nominees had made the loan – the Defendant's position was that ABL did not make the loan and the evidence did not support a contention that it had and that the Defendant was putting ABL Nominees to proof to prove the advance.

54 Given the non admission of the alleged loan pleaded in paragraph 1G of the Statement of Claim, the Plaintiff was put to proof in relation to all of the factual matters pleaded. These include the date of the alleged loan, the amount of the alleged loan and the identity of the alleged lender.

55 Evidence by way of affidavit and orally at the hearing was given by Mr Flamer Smith of the Plaintiff (who conceded that he had no direct knowledge of the events, having not been employed by the Plaintiff until 2009) was that ABL Nominees had not approved the Defendant's loan but that GSF had approved the Defendant's loan on behalf of ABL Nominees.

56 The Plaintiff submitted that the court could rely on the acknowledgment in the Loan Deed by the Defendant (by his attorney) of the loan advance having been made by ABL Nominees. The Plaintiff accepted that it could only rely on this acknowledgement if I find the Loan Deed to have been validly executed by the Defendant's attorney and to be binding.

57 The Plaintiff submitted that the court could infer that there was a loan advanced to the Defendant from the documents establishing that according to the records of the Great Southern Group grovelots had been allocated to him.

58 The Plaintiff contended that every document in evidence was consistent with the advance having been made on 15 June 2006 and that I should accept Mr. Flamer-Smith's evidence that the records show that the advance came from ABL Nominees.

59 The Plaintiff also submitted that the Defendant had accepted that "if there was a lender, it was ABL Nominees, not GSF". However, I do not think that a concession to that effect was made by the Defendant's counsel, rather then Defendant said that his client did not positively contend that GSF was the lender, but put the Plaintiff to proof as to whether the Plaintiff could establish that ABL Nominees made the advance.

60 It is important to note that the Plaintiff did not produce any business records of ABL Nominees that directly supported the contention that a loan had been made by it on the Defendant's behalf following acceptance on 15 June 2006. All of the evidence relied

upon was indirect and Mr. Flamer Smith was not an employee of ABL in 2006 and so did not have direct knowledge of these matters.

61 The position is also complicated by the unpleaded contention of the Plaintiff that GSMAL originated the loan to the Defendant on behalf of ABL Nominees and its reliance on an Origination Notice dated 22 June 2006 and Settlement Report said to include the Defendant's loan.

62 Further, there were documents in existence inconsistent with the contention that ABL Nominees made a loan to the Defendant by paying monies to GSMAL on his behalf following acceptance on 15 June 2006. The Origination Notice dated 22 June 2006 is inconsistent with a loan having already been made by ABL Nominees to the Defendant until after 22 June 2006. There was no document in evidence which established that ABL Nominees (as opposed to some other entity within Adelaide Bank Limited) accepted the offer in the Origination Notice and paid the amount to purchase the loans. Given the non admission of 1G, in my view it was critical that the Plaintiff establish not only that a loan was made, but that the entity that made the purported loan was ABL Nominees. It was not sufficient for the Plaintiff to assert that the Defendant did not assert that the loan was made by any other entity. This confuses the onus of proof in the light of the non admission. It was for the Plaintiff to prove that there was an advance as pleaded and that the advance was made by ABL Nominees (as opposed to some other entity in the Adelaide Bank Ltd group).

63 I am not satisfied that the Plaintiff has established on the balance of probabilities that ABL advanced $24,490 to GSMAL for the purchase of grovelots by way of loan on behalf of the Defendant on or about 15 June 2006. On the documents before me, the structure was that ABL would only advance if it accepted an offer by GSMAL to originate loans. The only evidence of an offer was of one made on 22 June 2006. There was no direct evidence before me that ABL Nominees accepted that offer or paid the purchase price for the originated loans and I find that I am unable to infer these matters from the documents in evidence.

64 I am not satisfied that the Plaintiff has established on the balance of probabilities that on or about 15 June 2006 funds totalling $24,490 were advanced by ABL Nominees for the Defendant's purchase of 3 Grovelots in the Great Southern 2006 Organic Olives Income Project as pleaded in paragraph 1G, in particular I am not satisfied that ABL Nominees has proved on the balance of probabilities that it was the entity that advanced the funds or that they were advanced on or about 15 June 2006.

(c) Were the rights of ABL Nominees under the Loan Deed validly assigned to the Plaintiff?

65 Given my findings that the Plaintiff has not satisfied me that the loan advance was made by ABL Nominees and my findings in relation to the power of attorney, this issue does not arise. For completeness however I will deal with this issue.

66 It was pleaded in paragraph 5(a) of the ASC that with effect from on or about 23 June 2006 ABL Nominees assigned all of its rights under the Loan Agreement and the Loan Deed to Adelaide Bank Limited. This was not admitted by the Defendant.

67 The Plaintiff relied on the following:

a Clause 2 of the LSSD permitted GSMAL to "originate" loans on behalf of ABL Nominees by delivering an Origination Notice to ABL Nominees (and see the Recitals to the LSSD "Background" section);

b GSMAL gave an Origination Notice dated 22 June 2006 to ABL Nominees (**Exhibit 3**) (**Origination Notice**) stating that it intended to originate in the name of [the Lender] ABL Nominees as agent for the Lender certain loans, which according to Mr. Flamer Smith's evidence attached a Settlement Report (pp170-176 of exhibit SFS-1) which included a reference to the Defendant's loan. [Paragraph 11 of that letter in respect of "Future Loan Rights" extended the assignment to any future rights arising in respect of assigned loans];

68 The Defendant contended that the purported assignment was not valid because:

a The Plaintiff has not proved that ABL Nominees made the loan advance;

b The Plaintiff pleaded that the purported loan was advanced by ABL Nominees. It does not plead that it was originated by GSMAL and did not lead any evidence of that origination, other than by the Origination Notice. The Defendant's loan does not meet the definition of an "Originated Loan" under the LSSD;

c As a consequence the purported loan by ABL Nominees does not fall within the definition of "loan" to which the letter of offer to assign dated 14 June 2006 refers;

d The rights under the Loan Deed were mere expectancies at the time of the assignment and needed to be assigned in writing with notice to the debtor, and none was given (s23C of the *Conveyancing Act* 1919 NSW or s20 of the *Property Act* 1969 (WA));

e Any rights under the Loan Agreement were present property to be assigned in law required the assignment to be in writing with notice to the debtor (s12 of the *Conveyancing Act* 1919 NSW or s20 of the *Property Act* 1969 (WA)); and

f Adelaide Bank Limited did not receive the rights to the Defendant's loan by assignment and hence those rights did not pass to the Plaintiff following the amalgamation of Adelaide Bank Limited and Bendigo Bank Limited based on the *nemo dat* principle.

69 The Plaintiff relied on the following to establish that the Defendant's loan was assigned by ABL Nominees to the Plaintiff:

a ABL Nominees by letter dated 14 June 2006 to the Plaintiff (**Offer Letter**) (Exhibit SFS-1 at pp165-168) set out the terms on which it may offer to assign to the Plaintiff its rights to, relevantly, "Originated Loans" under the LSSD. Paragraph 11 of the Letter referred to "Future Loan Rights" and was to the effect that the assignment would include any future rights arising in respect of assigned loans. The assignment of the loans was made on the terms of the letter not on the terms of the LSSD;

b The Defendant's loan was an "Originated Loan" as defined in the LSSD and had been originated by GSMAL;

c GSMAL had given an origination notice to ABL Nominees dated 22 June 2006 and had provided a Settlement Report referred to in the Origination Notice which included the Defendant's loan;

d As soon as the Loan Deed was executed on 26 June 2007 the rights under it were assigned in accordance with paragraph 11 of the Offer Letter;

e On 23 June 2006 a Sale Notice was sent by ABL to the Plaintiff which included the Defendant's loan (Exhibit SFS-1 p169);

f Mr. Flamer Smith's evidence was that the Plaintiff paid the purchase price to ABL referred to in the Sale Notice of $4,615,073 on 23 June 2006 (para [27] first Flamer Smith Affidavit);

g The Defendant was notified of the assignment and transfer by letter dated 30 April 2009 (Exhibit SFS-1 at p189) and by further letter dated 25 August 2009 (p56 of the exhibit to FS Affidavit). The assignment by the Plaintiff took effect in

> equity and then on an fro the giving of notice in writing to the Defendant was perfected into a legal assignment.

70 The Defendant contended that the Plaintiff having not pleaded that GSMAL originated the loan on behalf of ABL Nominees but having pleaded that funds totalling $24,490 were advanced by ABL Nominees for the Defendant's purchase of 3 Grovelots in the Great Southern 2006 Organic Olives Income Project, was not now able to rely on this assertion, neither could it prove that the loan was an originated loan as this had not been pleaded.

71 The Defendant fairly referred me to the case of *Dare v Pulham* 1982 44 ALR 117 which establishes that where there is a disconformity between the evidence and the particulars furnished at trial, if evidence to support the broader case was admitted without objection, then it was too late to complain that the evidence went outside of the particulars.

72 I note that the Plaintiff's evidence in relation to origination being the Origination Notice and the matters referred to in Mr. Flamer Smith's affidavits were admitted without objection and so to the extent to which the Plaintiff's case may have gone outside of the pleading, particularly in relation to the circumstances of the assignment, the parties are bound by the way the case was conducted at trial.

73 The Origination Notice expressly provided:

> *If the Lender [ABL] agrees to make such loans [loans originated by GSMAL in the name of the Lender as agent for the Lender each loan identified in the Settlement Report] it may do so by paying the Origination Amount in relation to this Origination Notice of $21,182, 262.23 to the Originator on the Closing Date as set out in clause 2.6A ...*

74 This is also consistent with clause 2.6A of the LSSD which effectively provides the Lender with an option but not an obligation to fund each loan in the Settlement Report accompanying the Origination Notice.

75 The Plaintiff's position was that it did not need to expressly prove acceptance of the offer contained in the Origination Notice or payment by ABL Nominees of the purchase price to establish that the Defendant's loan was an Originated Loan. The Plaintiff relied on business records that established amounts totalling $21,182, 262.23 had been paid, but conceded that those records did not identify ABL Nominees expressly as having made the payments. The Plaintiff also submitted that the court could be satisfied that the loans were assigned from the Sale notice and the payment pursuant to it.

76 The Defendant submitted that proving that the Defendant's loan was an Originated Loan was an essential matter for the Plaintiff to prove the assignment was valid and that there was no evidence that ABL Nominees ever accepted the offer to originate loans or paid the purchase price specified for these loans in the Origination Notice.

77 I am not satisfied on the balance of probabilities that the Plaintiff has established that the Defendant's loan was an "Originated Loan" in accordance with the LSSD which is an essential matter for it to establish to make out that the Defendant's loan was assigned to Adelaide Bank Limited. In particular I am not satisfied that the Plaintiff has discharged its onus of establishing that ABL Nominees accepted the offer in the Origination Notice or paid the purchase price for the loans to be originated of $21,182,262.23 to GSMAL and it follows that I am not satisfied that it held the rights to the Defendant's loan and was able to assign them to Adelaide Bank Limited.

78 I am therefore not satisfied that the Defendant's alleged loan was an "Originated Loan" as defined in the LSSD and I am therefore not satisfied that the Defendant's alleged loan was further validly assigned by ABL Nominees to Adelaide Bank Limited.

79 It was also necessary for the Plaintiff to establish that Adelaide Bank Limited paid the purchase price under the sale notice in respect of the assignment of $4,615,073 to ABL Nominees. I note that Mr. Flamer Smith gave evidence of this by affidavit and annexed a business record which he says supports that this payment was made (even though it does not expressly state payment was made to ABL Nominees rather it refers to a trust). The Plaintiff bore the onus of establishing these matters in order to make out the validity of the assignment and I am not satisfied on the balance of probabilities that it has done this, given that Mr. Flamer Smith had no direct knowledge of these matters.

80 In relation to the Defendant's argument as to the alleged lack of notice of the assignment, I note that the assignment was perfected by notice first given in 2009 and so do not accept the Defendant's submissions in this regard.

81 The Plaintiff also contended that restitutionary rights had been assigned to the Plaintiff under the sale notice and the letter dated 14 June 2006 by use of the words "the entire right, title and interest into under the loan".

82 The Defendant's position was that it did not disagree with this reasoning, but its primary position was that the Defendant's loan had not validly been assigned because it was not an "originated loan" within the meaning of the Loan Sale and Service Deed (**LSSD**) made between GSF, ABL Nominees, Adelaide Bank Limited and GSMAL.

(c) Are the Plaintiff's claims under the Loan Deed statute barred?

83 The Defendant conceded at the hearing that if the Plaintiff was entitled to rely on the Loan Deed to recover the amounts claimed in the ASC that its claims in this regard being based on a Deed and a 12 year limitation period and would not be statute barred by reason of s16 of the *Limitation Act* 1969 (NSW).

Issue 2 – alternative claim under the alleged Loan Agreement - *Is the Plaintiff entitled to recover the amounts claimed in the Amended Statement of Claim for principal, interest and*

costs under a Loan Agreement alleged to have been entered into on or about 15 June 2006 between ABL Nominees Pty Ltd (ABL) and the Defendant (Loan Agreement)?

(a) Was a Loan Agreement on the terms of the Loan Deed entered into as between ABL and the Defendant?

84 Such a Loan Agreement would only arise if by reference to the matters pleaded in the ASC as giving rise to the Loan Agreement, such an agreement on the terms of the Loan Deed arose in accordance with the usual principles.

85 The Finance Application refers to the terms of the "proposed loan" as being "as per the attached Loan Deed" (see under "Risk Disclosure Statement & Declaration"). The Defendant relied upon the fact that the form of Deed attached to the Finance application was blank as to interest and payment amounts and therefore the agreed terms were too uncertain.

86 Construed objectively in accordance with applicable principles, I find that the parties had no intention to enter into a loan agreement based only on the terms of the Finance Application and incorporating the terms in the pro forma Loan Deed. The intention was for the applicant, by reason of executing the Finance Application to appoint attorneys to enter into a Loan Deed.

87 Further, construed objectively and noting my finding above that the alleged error or discrepancy which arose because the Defendant selected GSF as the lender as per box 2 in the Finance Application should not be corrected as a matter of construction to refer to ABL Nominees as the lender, no Loan Agreement on the terms alleged came into existence between ABL Nominees as lender and the Defendant as borrower.

(b) Were the funds totalling $24,490 (Loan Advance) advanced by ABL?

88 I have addressed this issue above and repeat those findings here.

(c) Were the rights of ABL under the Loan Agreement validly assigned to the Plaintiff?

89 I have addressed this issue above and repeat those findings here. I am not satisfied on the balance of probabilities that any rights were validly assigned to the Plaintiff as I am not satisfied that the Plaintiff's loan to the Defendant was an Originated Loan or that the assignment was valid for the reasons stated.

(d) Are the Plaintiff's claims under the Loan Agreement statute barred?

90 Given my findings that there was no binding Loan Agreement and in relation to the assignment, this issue does not arise. For completeness however I will deal with it.

91 In *Chidiac v Maatouk* [2010] NSWSC 386 Ward J (as her honour then was) at [230]-[238] set out the authorities for the principle that for a loan repayable on demand, without more, the cause of action arises at the date of the advance. See also *Chapman v Colson* [2015] NSWSC 120 per Harrison AssJ at [11]-[18].

92 Here, the loan advance was alleged to have been made on or about 15 June 2006 and this was the date on which the cause of action arose in simple contract.

93 It was agreed between the parties that the statute of limitation applying to a debt claim under a contract not founded on a deed is 6 years running from the date on which the cause of action first accrued to the Plaintiff (or person through whom the Plaintiff claims)(s14 of the *Limitation Act* 1969 (NSW)).

94 The Plaintiff did not commence proceedings against the Defendant based on a demand for payment until more than 10 years after the date of the advance in June 2016.

95 A simple contract claim based on the advance being repayable on demand was therefore statute barred on and from 2012.

96 The Plaintiff relied on payments by the Defendant as admissions in relation to the alleged loan. I also note that a payment will only have the necessary character of an admission for the purposes of s54(2) of the *Limitation Act* 1969 (NSW) if it amounts to a non-verbal admission that the debt was due (and see *Chidiac* per Ward J (as her honour then was) at [239]-[255]). Given the Finance Application named GSF as the lender, and the payments were made to GSF, I do not find that the payments had the necessary character as admissions as to the debt said to be due to ABL Nominees.

97 I find therefore that the Plaintiff's cause of action based on the loan payable on demand arose at the time of the advance in June 2006 and its claim under the alleged Loan Agreement was statute barred when it commenced these proceedings.

Issue 3 – claims in restitution for unjust enrichment and/or moneys had and received

(a) Does the Local Court have jurisdiction to deal with the Plaintiff's claims for restitution for unjust enrichment and/or money had and received?

98 Initially the Defendant contended that this Court does not have jurisdiction to deal with a claim for restitution based on unjust enrichment and/or money had and received as these were equitable claims.

99 For completeness I note that the Defendant accepted that by reason of the decision of Beech-Jones J in *Albanis v Eleftheriou* [2014] NSWSC 416 at [26]-[28] (as recently followed by Schmidt J in *Simone v Kola (No 2)*[2017] NSWSC 821), that the Plaintiff's claims in this regard are money claims in respect of which the Local Court has jurisdiction pursuant to s30 of the *Local Court Act* (a "money claim" being referred to in s29A). The Plaintiff's claim for restitution based on unjust enrichment and/or money had and received were therefore accepted as being money claims within the jurisdiction of this court.

(b) ***Was the Loan Advance advanced by ABL?***

100 I have addressed this issue above and repeat those findings here.

(c) Were the rights to the claims for restitution for unjust enrichment and/or money had and received validly assigned by ABL NOMINEES to the Plaintiff?

101 I have addressed this issue above and repeat those findings here.

Are the Plaintiff's claims for restitution for unjust enrichment and/or claim for money had and received statute barred?

102 Given my findings that the Plaintiff has not satisfied me that the loan advance was made by ABL Nominees, my findings in relation to the power of attorney, and in relation to the assignment this issue does not arise. For completeness however I will deal with this issue.

103 The Defendant submitted that the Plaintiff's claims in this regard should be regarded as quasi contractual in nature and therefore fell within s14(1)(a) of the *Limitation Act* 1969 (NSW) and had a limitation period of 6 years arising from the date of the advance and had therefore expired relying on *Coshott v Lenin* [2007] NSWCA 153 per Mason P at [29] and *Torrens Aloha Pty Ltd v Citibank NA S28/1997* [1997] FCA 77 per Sackville J.

104 The Plaintiff accepted the Defendant's contention that *Coshott v Lenin* [2007] NSWCA 153 per Mason P at [29] was authority for the proposition that a claim based on quantum meruit should be treated as a claim in quasi contract for the purposes of s14(1)(a) of the *Limitation Act* 1969 (NSW), but contended that that a claim in quantum meruit did not cover all restitutionary claims.

105 The Plaintiff also submitted that a contractual limitation defence does not apply to an action for moneys had and received and that in relation to its restitutionary claim based on unjust enrichment, any limitation period would begin to run only from the date the Defendant asserted in his defence that he was not bound by the Loan Deed, relying on *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 noting that French CJ, Crennan and

Kiefel JJ's did not address the question of limitation periods and the comments of Gummow and Bell JJ at [102] and Heydon J in dissent at [148].

106 In my view the the *Equuscorp* case can be distinguished on the facts in that the contractual rights there were unenforceable due to non-compliance with a legal code, which is not the case here. Further I don't think that there is any consensus expressed in that case by the High Court on the approach that should be taken to application of limitation provisions to claims such as those by the Plaintiff.

107 I also rely on Ward J (as her honour then was) in *Chidiac* at [258]-[259] in what were strictly obiter but persuasive findings, following the Full Federal Court decision of *Torrens Aloha Pty Ltd v Citibank NA* [1997] FCA 77; (1997) 72 FCR 581; (1997) 144 ALR 89; (1997) 35 ATR 36 that a cause of action for a restitutionary claim where the unjust retention of the benefit is based on a failure of consideration, arises upon the payment of the money or the receipt of the benefit.

108 I therefore find applying the reasoning in *Coshott v Lenin* and *Chidiac* which is binding on me that the Plaintiff's claims, both based on moneys had and received and unjust enrichment, should be treated as claims in quasi contract for limitation purposes. Those claims arose from the date of the advance or enrichment in June 2006, and are statute barred under the *Limitation Act* 1969 (NSW), having been brought outside the 6 year period.

Conclusions

109 As noted above, the parties have asked me to deal with issue of liability in this judgment and to reserve argument on interest and costs to a later date as further submissions may need to be made depending on my findings.

110 For the reasons set out above, I give judgment for the Defendant. I will hear the parties on costs.

J SOARS