ANNEXURE 3

10.3 LEGAL EXPLANATION OF POSSIBLE RESTITUTION ACTION BY THE S A RESERVE BANK

In the event of the Reserve Bank wishing to institute an action to recover monies which it loaned/donated to Bankorp/ABSA, it would be precluded from so proceeding on a contractual action for the reason that the underlying agreement between the parties would be void and unenforceable. Accordingly it would need to proceed by way of an enrichment action.

Briefly, an enrichment action is launched by a party which devolves upon another, at its own expense, a benefit whereby the other party is unjustifiably enriched to recover from that other the benefit itself (or so much as remains of the benefit) or its equivalent in value. The essence of the action is that enrichment of the other party must have been unjustified, that is, must have been *sine causa*. In a case where the enrichment action derives from an agreement which is void and unenforceable (as has been found to be the case with the agreements between the Reserve Bank and Bankorp), the enrichment is necessarily *sine causa* and the action on which the claimant would be required to proceed would either be the *condictio ob turpem vel iniustam causam* or the *condictio indebiti*.

The requirements of the *condictio ob turpem vel iniustam causam* are:

- The ownership of the property must have passed with the transfer.
- The transfer must have taken place in terms of an illegal agreement, that is an agreement whose conclusion, performance or object is prohibited by law or is contrary to good morals or public policy.
- In general terms the plaintiff must be free from turpitude, although this rule has been relaxed *where it is necessary to prevent injustice or to promote public policy*. See Jajbhay v Cassim Ltd 1939 AD 537. See in general JG Lotz in *The Law of South Africa* vol. 9 (first re-issue) at paras 82-83 and DP Visser in *Wille's Principles of South African Law* (8th ed.) at 636 ff.

It would appear that the *condictio ob turpem vel iniustam causam* finds application only in those cases where the agreement is void for illegality. It may be that the concept of illegality in terms of which *condictio ob turpem vel iniustam causam* is

applicable may be considered not relevant in this case, in particular because of the requirement that Bankorp (and later ABSA) must have had knowledge of the illegality at the time of receipt of the loan. It would appear that this may no longer be a requirement of our law. See FNB v Perry NO and others 2001 (unreported decision of the SCA). The point may well be academic because, as Schutz JA said in McCarthy Retail Ltd v Shortdistance Carriers CC 2001 (unreported judgement of the SCA), too much time is spent identifying the correct *condictio* or *actio* rather than analysing the existence of the requirements for an enrichment action (para 10). Thus if this is not the appropriate *condictio*, consideration could be given to the *condictio indebiti* as the appropriate enrichment action.

In terms of the *condictio indebiti*, plaintiff may recover money or other property transferred in intended payment or performance of a non-existent debt. The requirements are as follows:

- Ownership of the property must have been transferred by the act of the parties.
- Transfer must have taken place in circumstances where there was no legal or natural obligation to give it.
- Transfer must have been given in the mistaken belief that the debt was due, involuntary, under duress or by a person of limited capacity to act.
- The *condictio indebiti* is enforceable against the recipient and against nobody else.

Of significance to the present facts may be the finding of the Appellate Division in Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992(4) SA 202 (A) in which it was found that South African law makes no distinction in the application of the *condictio indebiti* between a mistake of law and a mistake of fact. Accordingly a debt paid as a result of a mistake of law can be recovered provided the mistake is found to be excusable in the circumstances of the particular case.

The following caution by Hefer JA (as he then was) at 224 F must be borne in mind, namely *It is not possible nor would it be prudent to define the circumstances in which an error of law can be said to be excusable or, conversely, to supply a compendium of instances where it is not. All that need be said is that, if the payer's conduct is so slack that he does not in the Court's view deserve the protection of the law he should, as a matter of policy, not receive it. There can obviously be no rules of thumb;*

conduct regarded as inexcusably slack in one case need not necessarily be so regarded in others, and ***vice versa****. Much will depend on the relationship between the parties; on the conduct of the defendant who may or may not have been aware that there was no* ***debitum*** *and whose conduct may or may not have contributed to the plaintiff's decision to pay; and on the plaintiff's state of mind and the culpability of his ignorance in making the payment.*

It is not necessary for this Panel to provide a definitive answer as to which of the *condictios* is applicable to the facts of this case. Suffice it to say that there is an enrichment action available to the Reserve Bank, more than that the conclusion that the loan breach the legislation proves to be correct.

This conclusion requires one important qualification. The claimant's right to proceed with the *condictio* would be limited by the *par delictum* rule which literally means "in equal guilt the position of the possessor or defendant is the stronger", that is where the parties are in equal guilt the claimant party will not succeed with the *condictio* for the recovery of the other party's unjustified enrichment. Guilt is construed as turpitude or impropriety and the party guilty of turpitude or impropriety is termed to be *turpis persona*. In South African law however the *par delictum* rule is not applied in all circumstances to defeat a *condictio*. The application of the rule is a question for a decision by the Court exercising its discretion. Following the decision of Jajbhay v Cassim, *supra*, the Courts have relaxed the rule in order "to prevent injustice or to satisfy the requirements of public policy".

Thus on the assumption that the Bank were to proceed with a *condictio* for the recovery of the monies loaned/donated to Bankorp, the latter would inevitably seek to defend itself on the grounds of the *par delictum* rule alleging that the conclusion of the contract and the conduct of the Reserve Bank was tainted by turpitude or impropriety. It would be far less likely that it could sustain an argument that it had not been enriched. If Bankorp was able to prove such turpitude or impropriety the *par delictum* rule could be applied to defeat the claim, save where the Reserve Bank was able to show that either justice or the public interest dictated otherwise. In this case in this context the *dictum* of Diplock LJ in Hardy v Motor Insurers Bureau 1964 (2) QB 745 at 767 is relevant: *The Court's refusal to assert a right even against the person who has committed the anti-social act, will depend not only on the nature of the anti-social act but also on the nature of the right asserted. The Court has to weigh the gravity of the anti-social act and the extent to which it will be encouraged by enforcing the right*

thought to be asserted against the social harm which will be caused if the right is not enforced. In their work *The Law of Restitution* (5th ed.), Goff and Jones at 634 submit that this is the proper test to employ in circumstances where a Court is required to determine whether it is in the public interest or the interests of justice to defeat the claim.

In the context of the facts of the Bankorp loan, it would clearly not be in the public interest nor in the interest of justice to prevent the Reserve Bank (all the other relevant requirements of law having been met) from recovering money which ultimately belongs to a body performing a public function.

There is, however, another aspect to the unlikely success of the invitation of the *par delictum* rule. As Visser submits (Wille et. al. 1991: 636), a better view would be that not all illegal contracts contain an element of turpitude. In the present case there is absolutely no evidence to suggest that the Bank concluded any of the relevant contracts with an element of turpitude. The available evidence indicates that the Bank genuinely and honestly believed that it was so empowered to act. The detailed evidence provided by Dr Stals in the enquiry in terms of section 417 of the Companies Act into the affairs of Tollgate Holdings Ltd provides clear proof for the conclusion that the Reserve Bank acted without any turpitude in this matter. Accordingly the conduct of Bankorp (and later ABSA) is irrelevant and on the basis of the documented evidence available to the Panel, the *par delictum* rule would not be available to the defendant in this case. Thus were the balance of the analysis in this Report to be correct, a claim would be available to the Bank to review the amount of the debt plus interest to the extent allowed by the *in duplum* rule.