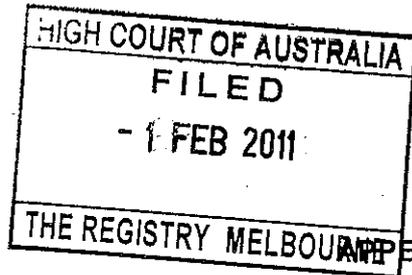


BETWEEN:

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

and

**CUNNINGHAM'S WAREHOUSE SALES PTY LTD**  
Respondent



APPELLANT'S SUBMISSIONS

**PART I:**

- 20 1. The Appellant (**Equuscorp**) certifies that these submissions are in a form suitable for publication on the internet.

**PART II:**

2. Equuscorp adopts paragraphs 2 to 5 of its submissions in appeal M128 of 2010.

**PART III:**

3. Equuscorp certifies that no notice is required under section 78B of the Judiciary Act 1903.

**PART IV:**

4. Equuscorp adopts paragraphs 7 to 8 of its submissions in appeal M128 of 2010.

**PART V:**

**Introduction**

- 30 5. Equuscorp adopts paragraphs 9 to 53 of its submissions in appeal M128 of 2010.

**Facts Specific to CWS**

6. CWS entered into its suite of documents for the 1987-1988 Scheme on 28 June 1988<sup>1</sup>. There was no valid prospectus.

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<sup>1</sup> The Farm Agreement is at ABXX, the Management Agreement at ABXX, the Sale of Fruit Agreement at ABXX and the Loan Agreement is at ABXX.

7. Clauses 1 and 8 of CWS' Farm Agreement<sup>2</sup> granted CWS a 12 year licence of its Farm on the Land. Clause 2<sup>3</sup> contained CWS' obligation to pay Fees. Clauses 4.2 and 5.2<sup>4</sup> contained CWS' maintenance and harvesting obligations.
8. CWS' obligation to pay Fees, and its right to elect to prepay the first year's Fees and receive a discount if it did, was contained in clause 2<sup>5</sup> of the CWS' Management Agreement. Those discounted Fees were \$445,060.
9. CWS borrowed the \$445,060 from Rural. Clause 3A<sup>6</sup> of CWS's Loan Agreement specified the five year term. CWS' obligations to make the Initial Repayments was in clause 3C(i)<sup>7</sup> and the obligation to repay the balance was in clause 3C(ii)<sup>8</sup>.  
10 Clause 4(iii) was the non-recourse provision. By clause 3C(iv)<sup>9</sup> CWS authorised the Buyer to pay from sales of fruit amounts it owed to Rural. By clause 4(i) CWS gave the Investor Charge. CWS gave no Investor Mortgage pursuant to clause 4(ii). The 1.5% discount on the otherwise applicable interest rate which was offered for prepayment of Fees was in clause 6<sup>10</sup>. Clause 7 was the default clause which contained the acceleration provision<sup>11</sup>.
10. CWS paid the first of the Initial Repayments after it was due<sup>12</sup>, with the result that the acceleration provision operated to make the loan repayable on in October 1988<sup>13</sup>.
11. CWS paid Rural \$84,000 by the Initial Repayments, \$242,420 from the proceeds  
20 of fruit sales in the 1989, 1990 and 1991 financial years and by a payment of \$52,920 of interest on 28 June 1988. CWS made no payments after 30 June 1991<sup>14</sup>.
12. By letter dated 20 November 1997 CWS was given notice of the assignment to Equuscorp of Rural's interest under the CWS Loan Agreement and the debt owed under it<sup>15</sup>.

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<sup>2</sup> ABXX.

<sup>3</sup> ABXX.

<sup>4</sup> ABXX.

<sup>5</sup> ABXX.

<sup>6</sup> ABXX.

<sup>7</sup> ABXX.

<sup>8</sup> ABXX.

<sup>9</sup> ABXX.

<sup>10</sup> ABXX.

<sup>11</sup> ABXX.

<sup>12</sup> VSC at [48].

<sup>13</sup> VSC at [116] and ALR at [335]-[349].

<sup>14</sup> VSC at [17]; Agreed Facts [10].

<sup>15</sup> ABXX; Agreed Facts [15].

13. Equuscorp commenced its proceeding against CWS on 27 March 1998 seeking to recover the \$184,480 balance of the loan then outstanding.

**PART VI:**

14. Equuscorp adopts paragraphs 62 to 108 of its submissions in appeal M128 of 2010.

**PART VII:**

15. The legislation upon which Equuscorp relies is annexed to its submissions in appeal M128 of 2010.

**PART VIII:**

- 10 16. The Orders which Equuscorp seeks are:
- 16.1. the Appeal is allowed;
  - 16.2. set aside the Orders of the Court of Appeal made on 29 January 2010 and in lieu thereof order that the Applicant's Appeal to that Court is allowed with costs;
  - 16.3. the Respondent pays the Appellant's cost of and incidental to the Appeal.

Dated 1 February 2010

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Bret Walker  
Phone (02) 8257 2527  
Fax (02) 9221 7974



Robert Peters  
Phone (03) 9225 6943  
Fax (03) 9225 8020

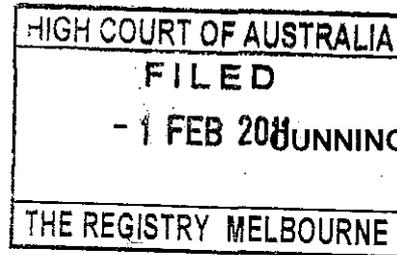
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Counsel for the Appellant

BETWEEN:

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

Appellant



and

**JUNNINGHAM'S WAREHOUSE SALES PTY LTD**  
Respondent

APPELLANT'S CHRONOLOGY

Part I<sup>1</sup>:

Equuscop certifies that these submissions are in a form suitable for publication on the internet.

Part II<sup>2</sup>:

Date	Event
00.05.85 – 00.05.88	CBG granted the registered mortgages over the Land or part of it to the Commonwealth Bank <sup>3</sup> .
00.00.86	The Johnsons begin to promote tax driven investments in blueberry farming schemes <sup>4</sup> .
00.12.86 – 00.11.92	CBG granted registered mortgage over the Land or part of it to State Bank of New South Wales <sup>5</sup> .
28.06.88	<i>CWS enters into its Farm Agreement, Management Agreement, Sale of Fruit Agreement and Loan Agreement for the 1987-1988 Scheme. There was no prospectus. At this time CWS borrowed \$445,060 from Rural<sup>6</sup>.</i>

<sup>1</sup> This chronology adopts the definitions contained in the Appellant's submissions in M128 of 2010 ("M128 AS").

<sup>2</sup> Facts specific to proceeding M130 have been italicised.

<sup>3</sup> M128 AS [29]

<sup>4</sup> M128 AS [9]

<sup>5</sup> M128 AS [14]

<sup>6</sup> Appellant's submissions in M130 of 2010 ("M130 AS") [6] and [9]

Date	Event
28.09.88	<i>CWS' first principal repayment under the Loan Agreement falls due.</i>
22.11.88	<i>CWS makes its first principal repayment under the Loan Agreement of \$42,000 of principal late<sup>7</sup>.</i>
15.12.88	<i>CWS makes its second repayment under the Loan Agreement of \$42,000 of principal on time.</i>
07.01.91	CBG grants Equuscorp a registered mortgage over the Land (including each of the Respondents' Farms) <sup>8</sup> .
10.01.91	Charges are registered by Equuscorp over the assets of CBG, JFM, Rural and the Buyer. These charges are granted to secure loan facilities granted by Equuscorp to companies in the Johnson Group <sup>9</sup> .
30.06.91	<p>Up to this date the net proceeds from the sale of the Investors' fruit were paid to Rural in accordance with the various Loan Agreements.</p> <p><i>To this date CWS has paid the following in repayment of the principal balance:<sup>10</sup></i></p> <ul style="list-style-type: none"> <li>(a) <i>\$84,000 by direct payments of capital;</i></li> <li>(b) <i>\$52,920 by prepayment of interest; and</i></li> <li>(c) <i>\$242,420 from the proceeds of the sales of the farm produce in the financial years 1989, 1990 and 1991.</i></li> </ul>
01.07.91	<p>From this date, none of the Investors receive proceeds from sales of fruit and no repayments are made in reduction of the loans<sup>11</sup>.</p> <p><i>From this date CWS made no repayments of principal or interest due under the Loan Agreement.</i></p>
29.08.91	Equuscorp appoints two receivers and managers of the assets of Rural pursuant to the Rural charge <sup>12</sup> .

<sup>7</sup> M130 AS [10]

<sup>8</sup> M128 AS [29]

<sup>9</sup> M128 AS [30]

<sup>10</sup> M130 AS [11]

<sup>11</sup> M128 AS [31]

<sup>12</sup> M128 AS [32]

Date	Event
14.03.93	Equuscorp appoints two receivers and managers of the assets of JFM, CBG and the Buyer pursuant to the charges registered over their respective assets. <sup>13</sup>
22.04.94	A transfer of the CBA and SBNSW Mortgages to Equuscorp is registered. <sup>14</sup>
00.10.95	Equuscorp, as mortgagee in possession under the CBA and SBNSW and Equuscorp Mortgages, sells the land containing the blueberry farms. <sup>15</sup>
06.03.96	Rural is wound up pursuant to the resolution of its creditors at a meeting convened under s 439A of the Corporations Law. <sup>16</sup>
16.05.97	ASA between Rural (by its receivers and managers) and Equuscorp is entered. Rural agrees that on completion it will sell to Equuscorp the loans between Investors and Rural. <sup>17</sup>
30.10.97	By the Deed Rural purports to assign its interests under the loans to the Investors described in the ASA and the amounts of indebtedness thereunder to Equuscorp. <sup>18</sup>
00.11.97	Investors are given written notice of the assignment. <sup>19</sup>
20.11.97	<i>CWS is given notice of the assignment to Equuscorp of Rural's interest under the CWS Loan Agreement and the debt owed under it.</i>
27.03.98	<i>Equuscorp commences its proceeding against CWS seeking to recover the \$184,480 balance of the loan then outstanding.</i> <sup>20</sup>

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<sup>13</sup> M128 AS [33]

<sup>14</sup> M128 AS [34]

<sup>15</sup> M128 AS [35]

<sup>16</sup> M128 AS [38]

<sup>17</sup> M128 AS [39]

<sup>18</sup> M128 AS [40]

<sup>19</sup> M128 AS [40]

<sup>20</sup> M130 AS [13]

1<sup>st</sup> February 2011

Bret Walker  
Phone (02) 8257 2527  
Fax (02) 9221 7974



Robert Peters  
Phone (03) 9225 6943  
Fax (03) 9225 8020

Counsel for the Appellant