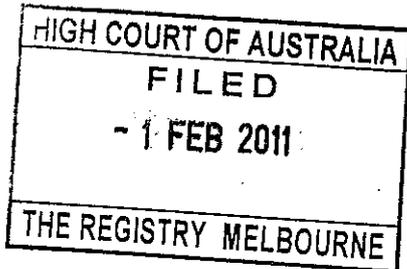


BETWEEN:

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:

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

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 15 January 1988¹. There was no prospectus.
7. Clauses 1 and 8 of CWS' Farm Agreement (described in this Scheme as a "Lease")² granted CWS a 10 year lease of its Farm on the Land. Clause 2³

¹ The Lease is at ABXX, the Maintenance Agreement at ABXX, the Letter of Offer at ABXX and the Loan Agreement is at ABXX.

contained CWS' obligation to pay Fees. Clauses 4.2 and 5.2⁴ 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 2⁵ of CWS' Management Agreement (described in this Scheme as a "Maintenance Agreement"). Those discounted Fees were \$450,880.
9. CWS borrowed the \$450,880 from Rural. Clause 3A⁶ of CWS' Loan Agreement specified the six year term. CWS' obligations to make the Initial Repayments was in clause 3B(i)⁷ and the obligation to repay the balance was in clause 3B(ii)⁸. Clause 3B contained the non-recourse provision. By clause 3B(ii)⁹ CWS authorised the Buyer to pay first from sales of fruit JFM's Fees and then amounts he owed to Rural. By clause 3C(i) CWS gave the Investor Charge. CWS gave no Investor Mortgage pursuant to clause 3C(ii). The discount on the otherwise applicable interest rate which was offered for prepayment of Fees was in clause 3A(iii) and 4¹⁰. Clause 5 was the default clause (which did not contain an acceleration provision)¹¹.
10. CWS paid both the Initial Repayments after they were due¹², with the result that the loan was repayable in January 1994¹³.
11. CWS paid Rural \$79,072 by the Initial Repayments, \$177,200 from the proceeds of fruit sales in the 1989, 1990 and 1991 financial years. CWS made no payments after 30 June 1991¹⁴.
12. By letter dated 20 November 1997 CWS was given notice of the assignment to Equuscop of Rural's interest under the CWS Loan Agreement and the debt owed under it¹⁵.

² ABXX.

³ ABXX.

⁴ ABXX.

⁵ ABXX.

⁶ ABXX.

⁷ ABXX.

⁸ ABXX.

⁹ ABXX.

¹⁰ ABXX.

¹¹ ABXX.

¹² VSC at [43] and [48].

¹³ VSC at [116]

¹⁴ Agreed Facts [10].

¹⁵ Agreed Facts [15].

13. Equuscorp commenced its proceeding against CWS on 30 November 1997 seeking to recover the \$277,184 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 Appellant'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

20

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



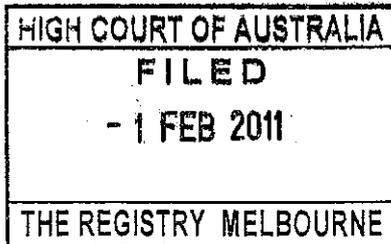
Robert Peters
Phone (03) 9225 6943
Fax (03) 9225 8020

30

Counsel for the Appellant

BETWEEN:

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



and

CUNNINGHAM'S WAREHOUSE SALES PTY LTD
Respondent

APPELLANT'S CHRONOLOGY

Part I¹:

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

Part II²:

Date	Event
00.05.85 – 00.05.88	CBG granted the registered mortgages over the Land or part of it to the Commonwealth Bank ³ .
00.00.86	The Johnsons begin to promote tax driven investments in blueberry farming schemes ⁴ .
00.12.86 – 00.11.92	CBG granted registered mortgage over the Land or part of it to State Bank of New South Wales ⁵ .
15.01.88	<i>CWS enters into its Loan Agreement, Lease, Maintenance Agreement and Letter of Offer for the 1987-1988 scheme. At this time CWS borrowed \$450,880 from Rural⁶.</i>
15.04.88	<i>CWS' first principal repayment under the Loan Agreement falls due⁷.</i>

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

² Facts specific to proceeding M132 have been italicised.

³ M128 AS [29]

⁴ M128 AS [9]

⁵ M128 AS [14]

⁶ Appellant's submissions in M132 of 2010 ("M132 AS") [6] and [10]

⁷ M132 AS

06.06.88	<i>CWS makes its first repayment under the Loan Agreement of \$40,000 of principal late⁸.</i>
15.07.88	<i>CWS' second principal repayment under the Loan Agreement falls due.</i>
08.11.88	<i>CWS makes its second repayment under the Loan Agreement of \$39,072 of principal late⁹.</i>
07.01.91	CBG grants Equuscorp a registered mortgage over the Land (including each of the Respondents' Farms) ¹⁰ .
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 ¹¹ .
30.06.91	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. <i>To this date CWS has paid the following in repayment of the principal balance¹²:</i> <i>(a) \$79,072 by the initial direct payments of capital; and</i> <i>(b) \$177,200 from the proceeds of the sales of the farm produce in the financial years 1989, 1990 and 1991.</i>
01.07.91	From this date, none of the Investors receive proceeds from sales of fruit and no repayments are made in reduction of the loans. ¹³ <i>From this date CWS made no repayments of principal or interest due under the Loan Agreement.</i>
29.08.91	Equuscorp appoints two receivers and managers of the assets of Rural pursuant to the Rural charge ¹⁴ .
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

⁸ M132 AS [10]

⁹ M132 AS [10]

¹⁰ M128 AS [29]

¹¹ M128 AS [30]

¹² M128 AS [53]

¹³ M128 AS [31]

¹⁴ M128 AS [32]

	assets ¹⁵ .
22.04.94	A transfer of the CBA and SBNSW Mortgages to Equuscorp is registered ¹⁶ .
00.10.95	Equuscorp, as mortgagee in possession under the CBA and SBNSW and Equuscorp Mortgages, sells the land containing the blueberry farms ¹⁷ .
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 ¹⁸ .
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 ¹⁹ .
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 ²⁰ .
00.11.97	Investors are given written notice of the assignment ²¹ .
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 it²².</i>
30.11.97	<i>Equuscorp commences its proceeding against CWS seeking to recover the \$277,184 balance of the loan then outstanding²³.</i>

¹⁵ M128 AS [33]

¹⁶ M128 AS [34]

¹⁷ M128 AS [35]

¹⁸ M128 AS [38]

¹⁹ M128 AS [39]

²⁰ M128 AS [40]

²¹ M128 AS [40]

²² M132 AS [12]

²³ M132 AS [13]

Dated 1 February 2011

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

A handwritten signature in black ink, appearing to read "Robert Peters".

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

Counsel for the Appellant