

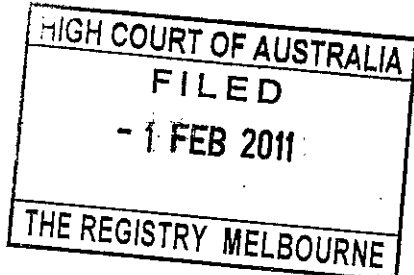
BETWEEN:

**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 1986-1987 Scheme on 29 June 1987<sup>1</sup>. There was no prospectus.
7. Clause 1.3 of CWS' Farm Agreement (described in this Scheme as a "Joint Venture Deed")<sup>2</sup> granted CWS a tenancy in common with CBG in the Farm on the Land.
8. CWS' obligation to pay fees, and its right to prepay them and receive a discount if it did was contained in clauses 3 and 10<sup>3</sup> of the CWS Management Agreement (described for this Scheme as a "Maintenance Agreement"). Those discounted Fees were \$200,000
9. CWS borrowed \$220,000 from Rural. Clause 3A<sup>4</sup> of CWS' Loan Agreement specified the five year term. Clause 3B(iii) was the non-recourse provision. By clause 3B(ii)<sup>5</sup> CWS authorised the Buyer to pay from sales of fruit amounts it owed to Rural. By clause 3C(i) CWS gave the Investor Charge. CWS gave no Investor Mortgage pursuant to clause 4(ii). The 4% discount on the otherwise applicable interest rate which was offered for prepayment of Fees was in clause 3A(iii)<sup>6</sup>. Clause 7 was the default clause (which did not contain an acceleration clause)<sup>7</sup>.
10. CWS paid both the Initial Repayments after they were due<sup>8</sup>, with the result that the the loan was full-recourse and repayable on 31 March 1992.
11. CWS paid Rural \$40,000 by the Initial Repayments, and \$202,400 from the proceeds of fruit sales in the 1988, 1989, 1990 and 1991 financial years. CWS made no payments after 30 June 1991<sup>9</sup>.

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<sup>1</sup> The Joint Venture Deed is at ABXX, the Management Agreement at ABXX, the Sale of Fruit Agreement at ABXX and the Loan Agreement is at ABXX, the Pooling Agreement is as ABXX and the Option to Purchase Shares is at ABXX.

<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> VSC at [48].

<sup>9</sup> Agreed facts [10].

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>10</sup>.
13. Equuscorp commenced its proceeding against CWS on 27 March 1998 seeking to recover the \$62,470 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:**


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

**PART VIII:**

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.

20 Dated 1 February 2010

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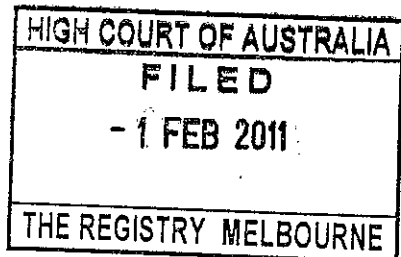
Counsel for the Appellant

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<sup>10</sup> Agreed facts [15].

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Appellant



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

APPELLANT'S CHRONOLOGY

**Part I<sup>1</sup>:**

Equuscorp 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> .
29.06.87	<i>CWS enters into its Joint Venture Deed, Maintenance Agreement, Pooling Agreement, Option to Purchase shares, Sale of Fruit Agreement and Loan Agreement for the 1986-1987 Scheme. At this time CWS borrowed \$220,000 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 M131 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 M131 of 2010 ("M131 AS") [6] and [9]

30.09.87	<i>CWS' first principal repayment under the Loan Agreement falls due.</i>
01.10.87	<i>CWS makes its first repayment under the Loan Agreement of \$20,000 of principal late<sup>7</sup>.</i>
31.12.87	<i>CWS' second principal repayment under the Loan Agreement falls due.</i>
13.01.88	<i>CWS makes its second repayment under the Loan Agreement of \$20,000 of principal late<sup>8</sup>.</i>
07.01.91	<i>CBG grants Equuscorp a registered mortgage over the Land (including each of the Respondents' Farms)<sup>9</sup>.</i>
10.01.91	<i>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>10</sup>.</i>
30.06.91	<i>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. To this date CWS has paid the following in repayment of the principal balance<sup>11</sup>:</i> <i>(a) \$40,000 by the initial direct payments of capital; and</i> <i>(b) \$202,400 from the proceeds of the sales of the farm produce in the financial years 1988, 1989, 1990 and 1991.</i>
01.07.91	<i>From this date, none of the Investors receive proceeds from sales of fruit and no repayments are made in reduction of the loans<sup>12</sup>. From this date CWS made no repayments of principal or interest due under the Loan Agreement.</i>
29.08.91	<i>Equuscorp appoints two receivers and managers of the assets of Rural pursuant to the Rural charge<sup>13</sup>.</i>

<sup>7</sup> M131 AS [10]

<sup>8</sup> M131 AS [10]

<sup>9</sup> M128 AS [29]

<sup>10</sup> M128 AS [30]

<sup>11</sup> M131 AS [11]

<sup>12</sup> M128 AS [31]

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>14</sup> .
22.04.94	A transfer of the CBA and SBNSW Mortgages to Equuscorp is registered <sup>15</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>16</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>17</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>18</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>19</sup> .
00.11.97	Investors are given written notice of the assignment <sup>20</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 \$62,740 balance of the loan then outstanding<sup>21</sup>.</i>

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<sup>13</sup> M128 AS [32]  
<sup>14</sup> M128 AS [33]  
<sup>15</sup> M128 AS [34]  
<sup>16</sup> M128 AS [35]  
<sup>17</sup> M128 AS [39]  
<sup>18</sup> M128 AS [39]  
<sup>19</sup> M128 AS [40]  
<sup>20</sup> M128 AS [40]  
<sup>21</sup> M131 AS [13]

Dated February 2011

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

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