HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND CALLINAN JJ

Matter No B93/2003

EQUUSCORP PTY LTD & ANOR	APPELLANTS
AND	
GLENGALLAN INVESTMENTS PTY LTD	RESPONDENT

Matter No B94/2003

EQUUSCORP PTY LTD & ANOR	APPELLANTS
AND	
CODD	RESPONDENT

Matter No B95/2003

EQUUSCORP PTY LTD & ANOR	APPELLANTS
AND	
ANDERSON	RESPONDENT

Matter No B96/2003

EQUUSCORP PTY LTD & ANOR	APPELLANTS
AND	
PRENDERGAST	RESPONDENT

Matter No B97/2003

EQUUSCORP PTY LTD & ANOR APPELLANTS

AND

THORNTON RESPONDENT

Matter No B98/2003

EQUUSCORP PTY LTD & ANOR APPELLANTS

AND

HGT INVESTMENTS PTY LTD RESPONDENT

Equuscorp Pty Ltd v Glengallan Investments Pty Ltd
Equuscorp Pty Ltd v Codd
Equuscorp Pty Ltd v Anderson
Equuscorp Pty Ltd v Prendergast
Equuscorp Pty Ltd v Thornton
Equuscorp Pty Ltd v HGT Investments Pty Ltd
[2004] HCA 55
16 November 2004
B93-98/2003

ORDER

Orders in each matter

1. *Appeal allowed.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 27 September 2002 and, in place thereof, order that:*
   (a) *the appeal to that Court is allowed;*
   (b) *the orders of the primary judge made on 30 November 2001 and 5 March 2002 are set aside; and*
   (c) *the matter is remitted to the Supreme Court of Queensland for further consideration of the issues not decided at trial.*
3. *Appellants have 14 days from the date of these orders to make written submissions as to costs and the respondents have a further 14 days to make written submissions in answer.*

On appeal from the Supreme Court of Queensland

Representation:

P A Keane QC with S S W Couper QC for the appellants (instructed by Gadens Lawyers)

D R Cooper SC with C L Francis for the respondents (instructed by Lees Marshall & Warnick)

CATCHWORDS

Equuscorp Pty Ltd v Glengallan Investments Pty Ltd

Contract – Loan – Written agreement and prior oral agreement – Written agreement inconsistent with terms of alleged prior oral agreement – No allegation of mistake or claim to rectification – Borrower bound by written agreement.

Contract – Loan – Direction to lender to apply money lent in payment of moneys due from borrower to third party – Series of connected and legally effective transactions creating and satisfying debts – One of those transactions satisfying amount due from borrower to third party – No payment by cheque or cash – Does a loan require the transfer of "real money" – Whether loan made as agreed.

Practice and Procedure – Appeal and new trial – Remitter for further consideration.

1 GLEESON CJ, McHUGH, KIRBY, HAYNE AND CALLINAN JJ. As the 1989 financial year ebbed away, each respondent in these appeals considered making a "tax effective" investment. On the last day of May 1989, Mr Alastair Hassell, a marketing consultant for a group of companies associated with Mr Tony Johnson ("the Johnson Group"), sent to one of the respondents, Mr Barry Thornton, a circular entitled, "Precisely What is the Best Farming Investment this Year?". The circular suggested that the answer to this question was "the Red Claw (fresh water crustacean) Project in northern Queensland" to be conducted by the Johnson Group as a "large-scale aquaculture project".

2 Each of the respondents determined to invest in this project. All were associated, in one way or another, with Mr Thornton and a company then called GWA Pty Ltd. The case against Glengallan Investments Pty Ltd, Mr Thornton's family's investment company, has been taken as typical of the claims against all respondents. No distinction has been drawn in argument between the respondents. None need be drawn in these reasons. Together, the respondents sought to acquire over 3,700 units in the project and to borrow more than $3.2 million for that purpose.

3 The circular explained that the minimum investment was 5 units at $868 each ($4,340) and that, of that sum, $4,280 was tax deductible in the initial financial year. If the investment was "fully borrowed", and one year's interest was prepaid, "an investor would have an initial cash outlay of $781 and a deduction of $5,061".

4 The circular pointed out that an application for investment in the venture could be made only "through the registered Prospectus". So much followed from the provisions of the then applicable companies legislation (Div 6 of Pt IV of the *Companies (Victoria) Code*). What was being offered to the public was a prescribed interest. A prospectus was issued on 16 June 1989, 14 days before the end of the financial year. It, too, described the taxation consequences that were said to follow from investing in the project. If the deductions described in the circular, and in the prospectus, were to be obtained in the 1989 financial year, time was short.

5 The prospectus described the proposed structure of the venture. An investor in the venture bought units in a limited partnership to be registered under the *Partnership (Limited Liability) Act* 1988 (Q). The terms of each partnership were recorded in a partnership deed made between Eagle Star Trustees Ltd ("Eagle Star"), Forestell Securities (Australia) Ltd ("Forestell") and others. Forestell was the "General Partner"; Eagle Star was the "Representative". Forestell, as General Partner, was given authority to manage the partnership

project and the business of the partnership. Eagle Star agreed to act as representative of each of the partners: those who were registered as the holders of units in the partnership.

6 More than one partnership was formed. (The number of partnerships was at the discretion of the General Partner, Forestell.) Up to 80,000 units could be issued. The minimum subscription, which had to be received before the project commenced, was 4,000. The prospectus said that, subject to the minimum subscription being received, the first partnership would commence business on 30 June 1989.

7 The partnership deed authorised Forestell, as General Partner, to retain Johnson Farm Management Pty Ltd ("JFM") as manager of the project. A form of management agreement was annexed to the partnership deed. By that management agreement, JFM was obliged to meet all costs, expenses and outgoings of the partnership in its first year, but JFM was to be paid a management fee. If the fee was prepaid (that is, before 30 June 1989) the fee was $833 for each unit issued in the partnership. Forestell made a further agreement with JFM and with Farmer Johnson Aquaculture Ltd ("FJA") by which FJA agreed that it would grant a "grow out pond lease" and a "facilities licence" in respect of each partnership. The annual rent under the grow out pond lease was $20 per unit; the annual licence fee was $3 per unit.

8 Thus, by the various agreements described, each investor would pay $868 per unit; $833 would be paid to JFM; and $23 would be paid for rent and licence fees. The balance of $12 was to be available to buy crayfish stock. It was this last sum (a total of $60 for each 5 units subscribed) that the circular had said would not be tax deductible.

9 On the last day of the financial year, each respondent applied for units. Each executed a written loan agreement, agreeing to borrow the whole of the purchase price for the units from the second appellant ("Rural Finance"). The first and principal question in these appeals is whether Rural Finance lent the respondents the amounts agreed. (The first appellant ("Equuscorp") sued as assignee of the loans.) Deciding whether Rural Finance lent money to the respondents will require consideration of a series of connected transactions that took place at the offices of a Melbourne branch of Westpac Banking Corporation on 30 June 1989.

10 On their face, those transactions (a round robin) appeared to be intended to constitute a payment from Rural Finance to Eagle Star of the amount of each respondent's investment, Eagle Star's payment of those amounts to Forestell,

Forestell's payment of the amounts to JFM and FJA, and those companies' deposit of the sums paid with Rural Finance as an interest bearing deposit. The respondents say there was no loan, or at least no loan of what they called "real money".

11 When sued by Rural Finance and Equuscorp in the Supreme Court of Queensland for money lent, the respondents answered by saying they were not indebted, because no money was lent. Alternatively, they said that they had been misled or deceived and they challenged the validity of the assignments from Rural Finance to Equuscorp.

12 At trial, the respondents succeeded in their defence that there had been no loan[1]. The primary judge (Helman J) concluded that the transactions at the offices of Westpac were "book entries ... made to create an 'audit trail'"[2] and that each of the transactions was[3] "a complete artifice or façade" and a "charade". The respondents' contentions about misleading or deceptive conduct and about the validity of the assignments were not decided.

13 An appeal by Rural Finance and Equuscorp to the Court of Appeal of Queensland[4] failed. Williams JA, who gave the principal reasons of the Court, concluded[5] that "it was fundamental to the performance of the various agreements associated with the venture that real money flow from the [respondents] to those entities responsible for conducting the enterprise".

14 By special leave, Rural Finance and Equuscorp now appeal to this Court. The appeal should be allowed.

The appellants' case in the courts below

15 The appellants' case against the respondents was simple. They alleged that on 30 June 1989, Rural Finance made written loan agreements with each

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1 *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2001] QSC 464.

2 [2001] QSC 464 at [28].

3 [2001] QSC 464 at [29].

4 *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2002] QCA 380.

5 [2002] QCA 380 at [111].

respondent. By each of those agreements, Rural Finance agreed to lend, and the relevant respondent agreed to borrow, a sum which the borrower directed the lender to apply "in payment of the Application Moneys [for units] and otherwise in accordance with the Borrower's obligations under the [Partnership] Deed". The appellants alleged that Rural Finance had done this but that each respondent had defaulted in the repayments of principal and interest.

The respondents' case in the courts below

16 The respondents' case was much more complex. First, they alleged that the loan agreements were made in June 1989 but were wholly oral. Each was said to be constituted by a number of conversations taking place between early June 1989 and 30 June 1989 "but *prior to* the execution of the Loan Agreement" (emphasis added). The respondents alleged that it was a term of these agreements (referred to in the pleadings as the "operative agreement[s]") that the liability of each respondent was limited. It was said that liability was limited to one payment on 30 June 1989 and two subsequent payments on 30 September 1989 and 31 December 1989, and that, thereafter, "the income generated by the limited partnership would be applied in extinguishment of the balance of the ... loan". It is convenient to refer to this allegation of limited liability as the "limited recourse" point.

17 The primary judge held[6] that the respondents should succeed on the limited recourse point. He accepted the oral evidence given by certain witnesses for the respondents about the conversations on which they relied and concluded that the operative agreements alleged by the respondents governed the relations between the parties. On appeal, however, it was held[7] that the finding that the terms of the loan were agreed upon orally could not stand.

18 The second argument advanced by the respondents was that Rural Finance had not provided a cheque, or paid cash, to Eagle Star for the units and, therefore, had not made the alleged loan to the respondents. This may be called the "real money" point and on this point the respondents succeeded both at trial and in the Court of Appeal.

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6 [2001] QSC 464 at [15].

7 [2002] QCA 380 at [89].

19 Thirdly, the respondents alleged that they had entered the operative agreements and subsequently signed the written loan agreements relying on representations: (a) that the liability of the respondents was limited in the manner described earlier; and (b) that Rural Finance "had sufficient funds to lend" to the respondents by way of a payment to enable the respondents to acquire the relevant number of units in the limited partnership. Each of these representations was said to be misleading and the respondents contended that they were entitled to rescind, and had rescinded, the operative agreements. Further, if, contrary to the respondents' principal contention, the written loan agreements bound the respondents, the first representation was alleged to constitute misleading or deceptive conduct, contrary to s 52 of the *Trade Practices Act* 1974 (Cth), and the respondents claimed damages. The second representation was also alleged to be false and misleading "in that [Rural Finance] did not have sufficient funds to lend to [the respondents] and did not in fact lend any funds" to them. Again the respondents claimed damages for misleading or deceptive conduct. This group of points may be called "the misleading or deceptive conduct points". Neither the trial judge nor the Court of Appeal found it necessary to decide any of them.

20 Finally, the respondents alleged that the purported assignments by Rural Finance to Equuscorp of the respondents' debts were ineffective either because the respondents were not indebted, or because the assignments were conditional, and failed for want of fulfilment of the conditions.

The appeal to this Court

21 The first three of these points arise on the appeal to this Court. Equuscorp and Rural Finance, as appellants, submit that the courts below erred in their conclusion on the real money point. The respondents, by notice of contention, allege that, even if that is so, they have the answer that the loan was a limited recourse loan and they have met their limited obligations. They further submit that the misleading or deceptive conduct points, and the points about the validity of the assignments, have not been decided and should now be remitted for further consideration by the courts of Queensland if they otherwise fail in the appeal.

22 It will be necessary to say something further about the facts. Having first done that, it will be convenient to begin with the limited recourse point, even though it arises by way of notice of contention. That will require examination of what were the agreements between the parties. Only then will it be appropriate to consider whether Rural Finance performed those agreements.

Some further aspects of the facts

23 Not all who invested in the project borrowed from Rural Finance. Some paid cash for their units. Overall, about $13 million was raised from investors. Of that, about $2 million was subscribed by investors who did not borrow from Rural Finance. There was little or no evidence that showed how the sums invested by those who did not borrow from Rural Finance were dealt with on or before 30 June 1989. So far as the evidence went, there was no reason to think that their money was treated in any significantly different way from the amounts subscribed by those who borrowed from Rural Finance. Were this so, it would suggest that some of the respondents' arguments about the economic effect of the transactions were open to question. The evidentiary foundation for investigating this aspect of the matter, however, is not extensive. It will be convenient to leave it to one side and focus only upon the transactions to which the respondents were party.

24 There was evidence at trial given by Mr Hassell, the marketing consultant who introduced the respondents to this investment, that in June 1989 there were other "tax effective" farming investments being offered to the public. At least some of these were being offered in conjunction with an offer of "non-recourse loans". Indeed, the Johnson Group had previously made offers of prescribed interests in a blueberry venture which limited the liability of investors to the obligation to pay one year's interest and one repayment of a part of the capital sum borrowed. The remaining liability was to be paid for and discharged from what was referred to as the "proceeds" of the initial crop of fruit and a "Sale of Fruit Agreement". In the prospectus for that venture this arrangement was referred to as "the non-recourse nature of the Loan". The respondents alleged that the loan agreements they made with Rural Finance were of the same kind.

25 By June 1989, however, the Australian Tax Office was expressing at least concern about the effect of such arrangements. On 26 June 1989, JFM sent a circular about the Red Claw Project addressed to "Accountants and Advisors and Existing Blueberry Clients only". In that circular it was said that "[t]he proliferation of guaranteed forward income projects [had] recently attracted detailed scrutiny by the Sydney ATO". It went on to claim that, in 1987, JFM had been the first to introduce "guaranteed farm income". But it concluded that:

> "Due both to this proliferation and to Sydney ATO's current views, [JFM] decided in May 1989 to abandon 'safe' investor loans and 'forward minimum income' attachments in favour of 'full investor risk' coupled with highly conservative project profit forecasts."

The respondents' allegations that their liability was limited are at odds with these statements and the history recorded in the circular of 26 June 1989 as lying behind them.

26 The prospectus, the agreements referred to in the prospectus, and the documents executed by the respondents, were all consistent with the description given in the circular of 26 June 1989 of the arrangements to be made. Neither the prospectus nor the written loan agreement suggested any limitation on the liability of the borrower and neither suggested that any warranty was given that the estimation of future receipts or profits would be realised. Instead, the prospectus said on its cover that "[t]his Investment may be considered speculative as unpredictable adversities could occur which might affect either production costs or volumes". As events turned out, the warning was well based. The venture failed. Not insignificant among the reasons for failure were such unpredictable adversities as stock losses and finding that, because ponds built to keep the stock leaked, a lot of time and money had to be spent sealing them.

27 There were some communications after 30 June 1989 which were said to suggest that the respondents' liability was limited. In particular, there was a letter from Rural Finance dated 29 November 1989 seeking payment of a "second (and final) loan repayment" in relation to the "investment in the Red Claw Project" and offering a rebate if that sum was paid before its due date.

28 Against that may be set what was said in 1993 to the Australian Tax Office by accountants acting for at least some of the respondents. In response to a Position Paper prepared by the Tax Office, after conducting an audit of Red Claw Partnerships, the accountants were at pains to point out to the Tax Office that borrowers from Rural Finance "remain[ed] liable for capital repayments and interest payments in relation to the loans". Any limitation of recourse was said to be no more than a limitation of the security in respect of the loan. (How those two apparently conflicting propositions were to be reconciled was not apparent from what was said in the accountants' letter.)

29 In addition, there were several other documents or communications said to bear on this issue. Of these, only one group need be noticed: documents entitled "Guarantee" executed under seal by JFM and Mr Johnson and signed "for and on behalf of" Rural Finance by Mr Johnson. These documents were given, or sent, to the respondents in December 1989. They provided that "we, the undersigned hereby guarantee and indemnify [the respondents] as follows". There followed three clauses. First, it was said that "the only payments to be made" by the respondents were to be payments described as prepaid interest, and two principal repayments. It was then said that "no further payment will be made by [the

respondents] beyond the above" to JFM, Rural Finance, "or any other party". Finally, allowing for certain verbal infelicities, it was said that the "undersigned" guaranteed and indemnified the respondents against "any claims or demands by [JFM] or Rural Finance ... or any other party in respect of the Red Claw Project or the said loan agreement in excess of the abovementioned amount".

30 The difficulties in construing these documents are evident. Were they releases? Were they a contract of suretyship? The difficulties were not made less by the respondents' contention on appeal that the documents did not accurately record the agreement that had been made between the parties in June 1989. Rather, the documents were used in argument, both on appeal to this Court and in the courts below, as a basis for suggesting the correctness of the respondents' fundamental contentions that the operative agreements were oral, were made before the written loan agreements were executed, and contained provisions limiting the liability of the respondents. It is convenient to turn at once to these fundamental contentions without pausing to examine how, or whether, these several conflicting pieces of evidence might be reconciled.

Written agreements or oral?

31 Debate in the courts below, about whether the loan agreements were wholly oral, as the respondents alleged, or wholly written, as Equuscorp and Rural Finance contended, proceeded upon the premise that the critical question was whether the primary judge should have acted on his acceptance of oral evidence given on the respondents' behalf of some conversations that were said to have occurred before the written loan agreements were signed. That, in turn, was seen as a question to be decided by reference to whether subsequent events (including those we have mentioned) made it more or less probable that during these conversations some consensus was reached that the loans were "limited recourse". But behind these arguments lies a more fundamental issue which the respondents' contentions did not address, whether in the courts below or on appeal to this Court.

32 It is, and always has been, common ground that each of the respondents executed a written loan agreement on 30 June 1989. The respondents alleged that the "operative agreement" was not contained in that writing. It was said that the relevant agreement was reached earlier and was wholly oral. Yet it was *not* said that the written agreement should be rectified. It was *not* said that a defence of *non est factum* was available. It was *not* said that the written agreement was executed by mistake, or that its execution was procured by misrepresentation as to its contents or effect. (The misrepresentation alleged was as to what had been said in the conversations, not what the document was or provided.)

33 The respondents each having executed a loan agreement, each is bound by it. Having executed the document, and not having been induced to do so by fraud, mistake, or misrepresentation, the respondents cannot now be heard to say that they are not bound by the agreement recorded in it[8]. The parol evidence rule[9], the limited operation of the defence of *non est factum*[10] and the development of the equitable remedy of rectification[11], all proceed from the premise that a party executing a written agreement is bound by it. Yet fundamental to the respondents' case that the operative agreements between the parties were wholly oral, and reached earlier than the execution of the written agreements, was the proposition that the written agreements subsequently executed not only *may* be ignored, they *must* be. That is not so. Having executed the agreement, each respondent is bound by it unless able to rely on a defence of *non est factum*, or able to have it rectified. The respondents attempted neither.

34 There are reasons why the law adopts this position. First, it accords with the "general test of objectivity [that] is of pervasive influence in the law of contract"[12]. The legal rights and obligations of the parties turn upon what their words and conduct would be reasonably understood to convey, not upon actual beliefs or intentions[13].

35 Secondly, in the nature of things, oral agreements will sometimes be disputable. Resolving such disputation is commonly difficult, time-consuming, expensive and problematic. Where parties enter into a written agreement, the Court will generally hold them to the obligations which they have assumed by that agreement. At least, it will do so unless relief is afforded by the operation of

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8 *L'Estrange v Graucob Ltd* [1934] 2 KB 394.

9 *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133.

10 *Petelin v Cullen* (1975) 132 CLR 355.

11 *Taylor v Johnson* (1983) 151 CLR 422.

12 *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 549 per Gleeson CJ.

13 *Gissing v Gissing* [1971] AC 886 at 906 per Lord Diplock; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441 at 502 per Lord Diplock.

statute or some other legal or equitable principle applicable to the case. Different questions may arise where the execution of the written agreement is contested; but that is not the case here. In a time of growing international trade with parties in legal systems having the same or even stronger deference to the obligations of written agreements (and frequently communicating in different languages and from the standpoint of different cultures) this is not a time to ignore the rules of the common law upholding obligations undertaken in written agreements. It is a time to maintain those rules. They are not unbending. They allow for exceptions. But the exceptions must be proved according to established categories. The obligations of written agreements between parties cannot simply be ignored or brushed aside.

36 The conclusion that the respondents are bound by the written loan agreements may leave open the possibility that an earlier consensus reached by the parties was in each case a collateral agreement (made in consideration of the parties later executing the written agreement[14]), but that has never been the respondents' case. In another case it may leave open the possibility that the contract is partly oral and partly in writing[15]. But that cannot be so here. The oral limited recourse terms alleged by the respondents contradict the terms of the written loan agreement. If there was an earlier, oral, consensus, it was discharged and the parties' agreement recorded in the writing they executed[16]. It is the written loan agreement which governed the relationship between Rural Finance and each respondent.

37 It is as well to add, however, that it may be doubted that the evidence at trial revealed that the parties reached any consensus about the loan being a "limited recourse" loan that would be sufficiently certain to admit of enforcement. For the reasons given earlier, it is not necessary to reach this point in order to decide this aspect of the case. It is enough to say that the oral evidence given by certain witnesses, which the primary judge accepted as true, was evidence which, when examined in transcript, appears to have been far less than definite about who agreed what, with whom. So, to take only one example,

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14 *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133; *De Lassalle v Guildford* [1901] 2 KB 215.

15 *Maybury v Atlantic Union Oil Co Ltd* (1953) 89 CLR 507 at 517.

16 *Gordon v Macgregor* (1909) 8 CLR 316 at 322-323; *Masters v Cameron* (1954) 91 CLR 353 at 360-361.

the written statement of Mr Thornton, which stood as his evidence in chief, described a conversation with Mr Hassell in which it was said that there would be "a written document guaranteeing that the loans are limited recourse" and that Mr Johnson had "confirmed what Alastair [Hassell] had told" Mr Thornton. This conversation was critical to the contention that "limited recourse" terms were agreed. But what was meant by limited recourse? For whom were Mr Hassell and Mr Johnson acting? The evidence about these questions was far from precise.

38 The respondents attached significance to the documents dated 19 December 1989 and headed "Guarantee" which were sent to Mr Thornton. Yet those documents, created nearly 6 months after the written loan agreements had been executed, appeared to assume that the borrower was liable to repay the loan in full. They provided that Mr Johnson and JFM would guarantee and indemnify the borrower against payments further than those which the respondents alleged to be the limit of their liability. It was accepted in argument that an agreement in that form did not record an agreement of the kind the respondents alleged. The agreement they alleged limited their liability to the making of certain payments; it did not provide for their looking to another party to indemnify them against a continuing obligation. Yet the respondents made no complaint about these documents when they were received. They did not then suggest that the documents failed to record the agreements that, on their case, had been reached much earlier.

39 Of no less significance than these evident imperfections in the proof of what was said to be an earlier consensus constituting the agreements between the parties, providing that the loans should be "limited recourse", is that the respondents' argument inevitably posed a question presenting a dilemma which could not be resolved to their advantage. If there was an earlier oral agreement providing for limits to the respondents' liability to repay the sums lent, why did the respondents execute the written loan agreements? They could not say that those written loan agreements were shams. If they said that, the inference that the written agreements were executed to deceive the taxation authorities would be all too readily available, and no other competing inference appears to be open. But neither could the respondents assert that they were agreements collateral to the principal oral agreements. If the earlier oral agreements limited the respondents' liability in the way they alleged, the later written agreements were inconsistent with that limitation. Yet they did not seek rectification of the written agreements.

40 The only way to reconcile the earlier oral arrangement the respondents alleged and the written loan agreements they executed would be to understand

the limitation of recourse to the respondents as a limitation which was to be effected by the Johnson interests undertaking some secondary liability to the respondents to save them harmless if the venture did not produce profits sufficient for the respondents to meet their obligations under the loan agreements. But such an agreement (perhaps of a kind intended to be effected by the Guarantees of December 1989) would give the respondents no answer to the lender's claim for repayment; it would do no more than give the respondents a right against other parties.

41 The respondents' contention about limited recourse therefore fails. The agreements between Rural Finance and the respondents were recorded wholly in the written loan agreements.

42 Did Rural Finance perform its obligations to lend the respondents the sums referred to in those loan agreements?

The real money point

43 It was of the first importance to all who invested in this venture, not only that they pay for their units by 30 June 1989, but that the money they paid be applied in the manner described in the prospectus and the agreements referred to in the prospectus. Only if the money they paid was applied in that way would the investors be able to claim the tax deductions that had been spoken of in the circular and were described again in the prospectus. Only then would their investment be "tax effective". And, as the circular had pointed out, that tax effect was enhanced if the investment was "fully borrowed". By prepaying interest on the loan (at $781 for each 5 units) the investor would claim a deduction of $5061, but outlay only $781 of the investor's own money.

44 The prospectus and its associated documents made clear that the amounts which investors subscribed, or at least all but $12 per unit, would be paid to JFM or FJA before 30 June 1989 as prepayment of management fees and lease and licence fees. If those sums were not paid, the partnerships (which were not to commence business until 30 June 1989) would sustain no loss during that financial year, and the partners could claim no share of a partnership loss.

45 It was against that background that the several transactions were effected at Westpac on 30 June 1989. There was no dispute about what the transactions were. Pursuant to written authorities signed by Mr Johnson as Managing Director of Rural Finance, Rural Finance's account at Westpac was debited with two amounts ($7,910,084 and $3,634,316) and Eagle Star's account was credited with these amounts. Westpac recorded these transactions in debit and credit

notes. Cheques were drawn by Eagle Star on its account in favour of Forestell and paid to the credit of Forestell. Forestell drew cheques in favour of JFM and FJA for amounts calculated at $845 per unit payable to JFM (for the management fee of $833 and the price of crayfish stock of $12) and $23 per unit payable to FJA (for lease and licence fees). The intention was that the funds received by JFM and FJA would be transferred to Rural Finance pursuant to written authorities given by those companies and argument, both on appeal and in the courts below, has proceeded on the assumption that this was done.

46 Each of these transactions was legally effective. None of the transactions that took place on 30 June 1989 could be said to be a sham. The primary judge was wrong to characterise them, as he did by his references to "artifice", "façade" and "charade", as shams. "Sham" is an expression which has a well-understood legal meaning. It refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences[17]. In this case, debts were created and satisfied[18] at all points in the chain until, at its end, Rural Finance owed JFM and FJA certain sums, and the respondents owed Rural Finance certain sums. And of most particular relevance to the present matters, in accordance with its obligations under the written loan agreements, Rural Finance had applied the money it lent in payment of the application moneys due from the respondents for the units being bought.

47 The contrary view reached in the Court of Appeal was much influenced by that Court's earlier decision in *Australian Horticultural Finance Pty Ltd v Jekos Holdings Pty Ltd*[19]. Perhaps that decision may be understood as turning upon its particular facts. If, as the respondents contended in these matters in the Court of Appeal, it stands for some more general principle – that there is no "loan" unless there is "real" money lent – it is wrong and should be overruled.

48 As the expression "real money" might suggest, the point which the respondents sought to make in these matters appeared to be one about the economic rather than the legal effect of the transactions in question. That is, the

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17 *Sharrment Pty Ltd v Official Trustee* (1988) 18 FCR 449.

18 *Fletcher v Federal Commissioner of Taxation* (1991) 173 CLR 1 at 13-14; *In re Harmony and Montague Tin and Copper Mining Co* (*Spargo's Case*) (1873) LR 8 Ch App 407 at 411-412.

19 [1997] QCA 440.

respondents' contention appeared to be a complaint that no "real" capital was brought into the partnerships. And as the prospectus made plain, the purpose of issuing units was to provide working capital for the venture.

49 The economic proposition that no "real" capital was brought into the venture (or that no "real" money was lent) depended upon an unstated premise that the obligations which Rural Finance owed JFM and FJA, to repay the interest bearing deposits the latter companies had made, were obligations that could not, or would not, be met. As mentioned earlier, it is a proposition that would not readily accommodate the fact that some investors did not borrow the amounts they invested and it may well be that the money they invested was dealt with in the same way as the respondents' application moneys were applied. But again, as mentioned earlier, this point may be left to one side.

50 Had JFM and FJA deposited the moneys they received on 30 June 1989 with a bank rather than with a related company, the contention that there was no real money raised would evidently fail. Thus, the point which the respondents sought to make in this regard was one dependent not only upon pointing to the relationship between Rural Finance and the depositing companies (JFM and FJA) but also upon a premise that Rural Finance would not, or could not, meet its obligations.

51 Even if that premise had been made good, it would not demonstrate that no loan had been made by Rural Finance. It would show only that JFM and FJA had made an improvident investment of *their* funds. It was not suggested that the payments made to JFM and FJA contravened any provision of the agreements governing the relationships between the respondents as unit holders and other participants in the venture. Indeed, for the reasons given earlier, the making of those payments was a step of critical importance to the respondents. It was the making of those payments that was thought to produce the tax consequences they sought. Nor was it suggested that the deposit with Rural Finance of the funds received by JFM and FJA contravened any provision of the agreements which governed the relationships between the parties. These are reasons sufficient to conclude that the courts below erred in deciding that Rural Finance did not lend money to the respondents. But there is a further, separate, point which should be made.

52 To say that Rural Finance "would not or could not meet its obligations" poses the further question: when? Presumably that would have to be answered by saying: when the money was lawfully demanded. But it is not a question that permitted or required the answer: 30 June 1989. The capital raised was not to be

expended then. Hence, whether Rural Finance could have met a demand on 30 June 1989 is not to the point.

53 What happened after 30 June 1989 showed, in any event, that the premise for this aspect of the respondents' argument (that Rural Finance would not, or could not, repay the interest bearing deposits made by JFM and FJA) was false. Rural Finance repaid at least $5 million of those interest bearing deposits. That it raised the money to do so by factoring its debts may or may not have been commercially sensible. But the fact is that it did repay significant amounts of the interest bearing deposits.

54 The respondents' contention that Rural Finance could not pay what it owed depended, in large part, on the fact that the venture as a whole failed. That failure may well have been affected by a lack of sufficient working capital to cope with unexpected events like the need to seal ponds against leakage. But it is not necessary to explore these questions. The relevant fact is that the premise for this branch of the respondents' argument was not made good. Even if made good, it would not have denied the legal effect of the several transactions that took place at Westpac on 30 June 1989.

55 It is not necessary, then, to reach a further point which Rural Finance and Equuscorp sought to make. They contended that the respondents, having learned about what happened at Westpac on 30 June 1989, chose to "affirm" the transaction. There was dispute about when the respondents first learned of the way the transaction had been effected on 30 June 1989 and about whether steps then taken by the respondents constituted their adopting the benefit of those transactions. These disputes need not be resolved. It should be noted, however, that the appellants' contentions about what they described as "affirmation" of the agreements would have required close consideration of the legal basis for the conclusion asserted to follow. It was not said that the respondents were estopped from contending that there was no loan[20]. There was not said to have been some election made between competing and inconsistent rights[21]. In the end, the point appeared to be no more than a forensic point about the respondents' delay in

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20 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641; *Legione v Hateley* (1983) 152 CLR 406; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *The Commonwealth v Verwayen* (1990) 170 CLR 394.

21 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634; *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26.

complaining about what had happened. It is, however, unnecessary to pursue this question.

56 It follows that the appeals must be allowed with costs. What consequential orders should be made? Should the matters be remitted for further argument of the misleading or deceptive conduct points, and the points about the validity of the assignment, and decision of those aspects of the matter by the courts of Queensland? The appellants submitted that remitter was futile.

The misleading or deceptive conduct points

57 As noted earlier in these reasons, the respondents contended that they had entered the so-called operative agreements, and later signed the written loan agreements, relying on two misrepresentations. The first was said to be that their liability was limited in the manner alleged, and the second that Rural Finance had sufficient funds to lend to the respondents but in fact did not. What should be done about these claims?

58 It is necessary to recall that the primary judge accepted evidence given on the respondents' behalf about what was said, before the respondents executed the written loan agreements, on the subject of limiting the respondents' liability. The Court of Appeal's conclusions about the consequences that followed from that acceptance were directed to identifying what was the agreement between the parties rather than to the issues whether the statements about limited recourse were operative misrepresentations, or constituted misleading or deceptive conduct. Those issues require consideration not only of what was said, but also whether what was said misled the respondents. And neither at trial nor on appeal has there been any real attention given to whether what was said constituted misleading or deceptive conduct by *Rural Finance*, as distinct from the individual speaker, or some company in the Johnson Group other than Rural Finance. Nor has there been any focus upon what causal connection, if any, there was between the misleading representations allegedly made about limited recourse, earlier in June 1989, and the subsequent execution of the written loan agreements by, among others, Mr Thornton, a chartered accountant whom the primary judge found[22] to be "a businessman of considerable experience".

59 The respondents' claims that there were operative misrepresentations and that the respondents were misled or deceived in this particular respect have not

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22 [2001] QSC 464 at [23].

been decided by the primary judge or by the Court of Appeal. They should not be decided for the first time in these appeals. Rather, they should be decided at first instance and accordingly these questions should be remitted to the Supreme Court of Queensland for consideration conformably with the reasons of this Court.

60 If the respondents' claims about misrepresentation and about misleading or deceptive conduct concerning limited recourse are to be remitted for further consideration at first instance, it is prudent to remit the claims concerning the alleged representation about "real" money. The conclusion reached earlier in these reasons about the real money point may suffice to prevent the respondents succeeding on this account. And further examination of the alleged misrepresentation about limited recourse may show that the evidence led at trial was insufficient to establish the respondents' claims of misrepresentation and of contravention of s 52 of the *Trade Practices Act*. These, however, are matters better reserved for further argument before the Supreme Court of Queensland, together with the limitation defence which the appellants pleaded. So, too, any remaining question about the effect of the assignments from Rural Finance to Equuscorp should be remitted for further consideration.

61 It will be for the Supreme Court of Queensland to decide whether the further hearing of the matter can or should be by the primary judge. The order for remitter is not an order for retrial. As in *Murphy v Overton Investments Pty Ltd*[23], we express no view about whether, if either side were to apply for leave to reopen their case to lead further evidence, that application should be granted or the parties confined to the case each made at trial.

Conclusion and orders

62 The appeals should be allowed. The several orders of the Court of Appeal of Queensland made on 27 September 2002 should be set aside and the appeals to that Court allowed. The orders of the primary judge should be set aside. The matters should be remitted to the Supreme Court of Queensland for further consideration of the issues not decided at trial conformably with the reasons of this Court.

63 The appellants asked for an opportunity to make further submissions in relation to any costs orders that might be made. The appellants should have

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23 (2004) 78 ALJR 324; 204 ALR 26.

14 days from the making of these orders to make any written submissions on that subject that they desire to make and the respondents a further 14 days to make any submissions in answer.