SUPREME COURT OF QUEENSLAND

CITATION:	*Equuscorp P/L & Anor v Glengallan Investments P/L; Equuscorp P/L & Anor v HGT Investments P/L; Equuscorp P/L & Anor v Thornton; Equuscorp P/L & Anor v Prendergast; Equuscorp P/L & Anor v Anderson; Equuscorp P/L & Anor v Codd* [2002] QCA 380
PARTIES:	**EQUUSCORP PTY LTD** ACN 006 012 344 (first plaintiff/first appellant) **RURAL FINANCE PTY LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)** ACN 008 584 638 (second plaintiff/second appellant) **v** **GLENGALLAN INVESTMENTS PTY LTD** ACN 009 836 364 (defendant/respondent)
	EQUUSCORP PTY LTD ACN 006 012 344 (first plaintiff/first appellant) **RURAL FINANCE PTY LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)** ACN 008 584 638 (second plaintiff/second appellant) **v** **HGT INVESTMENTS PTY LTD** ACN 009 951 080 (defendant/respondent)
	EQUUSCORP PTY LTD ACN 006 012 344 (first plaintiff/first appellant) **RURAL FINANCE PTY LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)** ACN 008 584 638 (second plaintiff/second appellant) **v** **BARRY THORNTON** (defendant/respondent)
	EQUUSCORP PTY LTD ACN 006 012 344 (first plaintiff/first appellant) **RURAL FINANCE PTY LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)** ACN 008 584 638 (second plaintiff/second appellant) **v**

BRIAN JAMES PRENDERGAST
(defendant/respondent)

EQUUSCORP PTY LTD ACN 006 012 344
(first plaintiff/first appellant)
RURAL FINANCE PTY LIMITED (RECEIVORS AND MANAGERS APPOINTED) (IN LIQUIDATION)
ACN 008 584 638
(second plaintiff/second appellant)
v
CYRIL WILLIAM ANDERSON
(defendant/respondent)

EQUUSCORP PTY LTD ACN 006 012 344
(first plaintiff/first appellant)
RURAL FINANCE PTY LIMITED (RECEIVORS AND MANAGERS APPOINTED) (IN LIQUIDATION)
ACN 008 584 638
(second plaintiff/second appellant)
v
EDWIN THOMAS CODD
(defendant/respondent)

FILE NO/S:	Appeal No 11475 of 2001 Appeal No 11476 of 2001 Appeal No 11477 of 2001 Appeal No 11478 of 2001 Appeal No 11479 of 2001 Appeal No 11480 of 2001 SC No 1688 of 1991 SC No 1689 of 1991 SC No 1690 of 1991 SC No 1691 of 1991 SC No 1692 of 1991 SC No 9485 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	15 May 2002 16 May 2002
JUDGES:	Williams JA, Mackenzie and Chesterman JJ Separate reasons for judgment of each member of the Court; each concurring as to the orders made

ORDER: **Appeals are dismissed with costs**

CATCHWORDS: CONTRACT – GENERAL CONTRACTUAL PRINCIPLES - CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS - where investor/respondents entered into a loan agreement with the second appellant for the purposes of acquiring units in a limited partnership in an aquaculture investment scheme with purported taxation and self-funding benefits – where venture failed and there was no profit from which to repay the balance of loan monies – whether the true nature of the agreement was for a limited recourse loan or not - whether the learned trial judge erred in finding that the operative agreements determining the terms of the loans were oral agreements of limited recourse loans – whether executed deeds were varied by oral agreement – held the agreement was that constituted by deeds of loan

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSIDERATION – FAILURE OF CONSIDERATION – whether the second appellant/lender performed its obligations pursuant to the loan agreements where the loans made by it involved a round robin of transactions – whether the terms of the loan agreement executed required the second appellant to advance real money by way of loan and apply that money for the acquisition of units in the venture in circumstances where the only source of capital funds for the venture was from the sale of units – *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* followed - whether provisions within the loan agreement of a promise to pay was sufficient discharge of the investor's obligations to pay for the acquisition of the units – consideration of the term 'lend' – *Australian Horticultural Finance Pty Ltd v Jekos Holdings Pty Ltd* followed

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – ELECTION AND RECISSION – LOSS OR WAIVER OF RIGHT TO RESCIND – whether the respondents affirmed the loan agreements after becoming aware that no real money was lent such that they became liable to repay the loan monies in accordance with the agreement – whether the learned trial judge erred in finding that no agreement, affirmation, acquiescence or waiver was made – where the appellants cannot rely on conduct by the respondents to support the appellants' claim of affirmation of the loan agreement where that conduct essentially relates to obligations pursuant to a partnership deed to which the appellants were not parties – where the conduct of the respondents in keeping the loan agreement on foot despite the continued failure of the second appellant to advance real

money did not extinguish the respondents' right to terminate

CONTRACTS – PARTICULAR PARTIES – PRINCIPAL AND AGENT – CREATION OF RELATIONSHIP OF AGENCY – AGENCY CREATED BY OTHER MEANS – IMPLICATION OF AGENCY FROM PARTICULAR CIRCUMSTANCES – where director of second appellant instructed his brother to manage the company – whether the learned trial judge erred in finding the brother was an agent of the second appellant and therefore had authority to offer and execute on behalf of the company guarantees of a limited recourse loan

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – EVIDENCE - whether on an appeal against final judgment it was open to the appellants to challenge the correctness of an interlocutory order – *Pioneer Industries Pty Ltd v Baker* followed

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – EVIDENCE - consideration of the effect and operation of r 227(2) of the *UCPR* – whether a document disclosed pursuant to the rule may be tendered as evidence against the party making disclosure without the need to otherwise establish its admissibility

Evidence Act 1977 (Qld), s 92
Partnership (Limited Liability) Act 1988 (Qld), s 11
Uniform Civil Procedure Rules 1999 (Qld), r 227(2), r 211

Australian Horticultural Finance Pty Ltd v Jekos Holdings Pty Ltd (Supreme Court of Queensland Writ Nos 612-622 of 1992, judgment 17 May 1996), considered
Australian Horticultural Finance Pty Ltd v Jekos Holdings Pty Ltd [1997] QCA 440; CA Nos 4078-4717 of 1996, 9 December 1997, considered
Bowes v Chaleyer (1923) 32 CLR 159, followed
Cobham v Frett [2001] 1 WLR 1775, distinguished
Commissioner of Taxation v Lau (1984) 54 ALR 167, distinguished
Commissioner of Taxation v Lau (1984) 6 FCR 902, distinguished
DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423, followed
Frost v Knight (1872) L.R. 7 Ex 111, followed
Goose v Wilson Sandford & Co (U.K. Court of Appeal, 13 February 1998), distinguished
Hoyt's Pty Limited v Spencer (1919) 27 CLR 133, followed
Mamm v Barclays Bank International (1977) QB 790, distinguished

Masters v Cameron (1954) 91 CLR 353, followed
Maybury v Atlantic Union Oil Co Ltd (1953) 89 CLR 507, referred to
Moylan v Nutrasweet Co [2000] NSW CA 337, distinguished
Ogle v Comboyuro Investments Pty Ltd (1976) 136 CLR 444, followed
Pioneer Industries Pty Ltd v Baker [1997] 1 Qd R 515, followed
R v Maxwell (NSW Court of Criminal Appeal, 23 December 1998), distinguished
Sargent v ASL Developments Pty Ltd (1974) 131 CLR 634, considered
Sinclair Scott & Co Ltd v Naughton (1929) 43 CLR 310, followed
Tyler v Custom Credit Corporation Ltd (in liq) [2001] QSC 495, followed
Wilson v Thornbury [1875] LR 10 Ch App 239, referred to

COUNSEL: P A Keane QC, with S S W Couper QC, for the appellants
D Cooper SC, with C Francis, for the respondents

SOLICITORS: Gadens Lawyers for the appellants
Lees Marshall Warnick for the respondents

[1] **WILLIAMS JA:** These are appeals from a judgment of a judge of the Trial Division delivered on 30 November 2001 dismissing the actions brought by the plaintiffs in each of the six proceedings which were heard together. In each matter the claim was for money owing pursuant to a loan agreement made on 30 June 1989 by each defendant as borrower with the second plaintiff as lender. The first plaintiff sued as assignee of the second plaintiff's rights under each of the agreements.

[2] It was not in dispute at the trial that, if the plaintiffs proved an enforceable loan agreement in the terms they asserted, the following amounts were owing by the defendants as at 21 February 2000, the first day of trial:

	$
Glengallan Investments Pty Ltd	1,056,081.37
HGT Investments Pty Ltd	1,056,081.37
Barry Thornton	2,745,811.56
Brian James Prendergast	528,040.68
Cyril William Anderson	1,795,338.33
Edwin Thomas Codd	316,824.41

Interest would of course have accrued subsequent to that date.

[3] Thornton was a director of Glengallan Investments Pty Ltd and HGT Investments Pty Ltd, and he and Prendergast, Anderson and Codd were all associated with the GWA group of companies. Thornton and Prendergast were qualified accountants.

[4] It should also be noted that KG Schroder, called as a witness by the defendants, was also an accountant employed in the GWA group; he had entered into a similar loan

agreement with the second plaintiff, but the litigation with respect to his position was being conducted in the District Court.

[5] The critical issues at the trial were:

(i) What were the terms of the loan agreements made between the second plaintiff and each of the defendants on 30 June 1989;

(ii) Did the second plaintiff perform its obligations pursuant to those agreements.

(iii) If the second plaintiff did not perform its obligations, nevertheless did the defendants affirm those agreements so that each was liable to repay the full amount of the notional loan.

[6] It was the contention of the defendants that the terms of the loan agreements made on 30 June 1989 meant that the second plaintiff had only "limited recourse" with respect to repayment. On the case for the defendants each was only obliged to make two repayments of principal amounting to about one sixth of the notional loan; the balance of the loan was to be repaid out of the profits of the venture into which the loan funds were invested. In broad terms the learned trial judge found that the terms were as contended for by the defendants and that, as each had repaid all that was legally owing thereunder to the plaintiffs, the actions failed.

[7] Further, or alternatively, the defendants alleged that the second plaintiff has never performed its obligations pursuant to the loan agreements in that real money has not been advanced, that such repudiation had been accepted by the defendants, and that in consequence the plaintiffs have no right to sue for repayment of principal and interest. Suffice it to say that there were findings by the learned trial judge that the second plaintiff did not fulfil its obligations pursuant to the loan arrangement (whatever be its terms) and, as there has been no affirmation by any of the defendants, the plaintiffs were not entitled to succeed on their claim.

[8] The plaintiffs challenge all the findings of fact which enabled the learned trial judge to arrive at those ultimate conclusions. In order to succeed they must not only establish that the learned trial judge erred in making the findings which he did with respect to the terms of the agreements, but this court must also be persuaded to reverse the findings that the second plaintiff did not meet its obligations under the loan arrangements and that there was no affirmation by the defendants.

[9] The trial was somewhat unusual in that the plaintiffs did not lead any oral evidence as to the negotiations which led to the various agreements of 30 June 1989. The only oral evidence called by the plaintiffs came from:

(i) PD Coulthard and E Pietrzykowski who in mid-1989 were employees of Westpac Bank; each gave evidence of the transactions which, on the case for the plaintiffs, constituted the making of loans in compliance with the obligations of the second plaintiff pursuant to the loan agreements of 30 June 1989;

(ii) DM Anderson, a partner in the accounting firm KPMG. Other accountants in that firm were appointed receivers of the second plaintiff on 26 July 1991;

(iii) WD Thompson, a solicitor, who in 1991 was retained by the defendants. He gave evidence under subpoena and produced notes of a telephone conference on 15 May 1991 which, on the case for the plaintiffs, was relevant to the issue of affirmation;

(iv) KR Humphrys who was also called pursuant to a subpoena. He was an investor in the relevant venture, and had some discussions with Prendergast late in 1991; that evidence was relevant to the issue of affirmation.

[10] The case for the plaintiffs was essentially based on numerous documents which were tendered; they relied solely on documentary evidence to establish the terms of the loan agreements. Their case on the other issues also relied heavily on documentary evidence.

[11] The defendants called the following witnesses, some of whom one would ordinarily have expected to be antagonistic to their cause:

(i) GM Johnson who became a director of the second plaintiff on 29 June 1989. He took over from Anthony James (Tony) Johnson, his brother, who at all material times was a director of Johnson Farm Management Pty Ltd, Farmer Johnson Pty Ltd and Farmer Johnson Aquaculture Limited. Tony Johnson was the driving force behind the venture in question;

(ii) MR Collins, who at the material time was a director of the company, Forestell Securities (Aust) Limited, which played a significant role in implementing the venture in question;

(iii) M Stewart-Hesketh, who at material times was an executive in the employ of the first plaintiff;

(iv) RJ Lynch, an accountant, who was engaged to settle the prospectus and other marketing information with respect to the venture in question;

(v) AB Hasell, who was the salesman employed to sell units in the venture in question and who negotiated the relevant agreements with the defendants. The learned trial judge found that at all material times he was acting on behalf of the second plaintiff and there is no reason to question that conclusion;

(vi) The defendants Thornton, Prendergast and Codd and their associate Schroder;

(vii) The solicitor for the defendants, IC Marshall;

(viii) An accountant with Ernst & Young, KJ Armstrong.

[12] The learned trial judge, in broad terms, gave greater weight to oral testimony (in particular from Thornton, Hasell, and Prendergast) than he did to the documents; by accepting their oral evidence he effectively put a gloss on the interpretation of the loan agreements signed by the defendants which they would not have carried but for that evidence.

[13] The trial commenced on 21 February 2000, and the evidence concluded on the ninth day, 2 March. Closing addresses of counsel were delivered on 8 March and the decision was reserved. On 20 April 2000 the solicitors for the plaintiffs wrote to the defendants alleging non-disclosure of certain documents and advising of the

possibility of an application being made to re-open the trial for the purposes of conducting further cross-examination. After an exchange of correspondence the plaintiffs filed an application on 22 May 2000 seeking an order for further and better disclosure. (The defendants contend the plaintiffs were aware of the documents in question in the course of the trial, but there is no point in canvassing that contention further on the hearing of the appeal).

[14] The matter was mentioned before the learned trial judge on 1 June when 10 and 11 July were fixed for the hearing of the application. On 26 September the learned trial judge published his reasons for ordering that the defendants make further disclosure. The documents were in the main said to be relevant to the issue as to the terms of the loan agreements and the oral evidence relating thereto. There was additional argument before him on that day. Then on 6 October 2000 the learned trial judge heard applications from the defendants for a stay of his order of 26 September; there was also an injunction in place temporarily restraining Arthur Andersen, who had been accountants at a material time for the defendants, from producing for inspection documents sought by the plaintiffs. On 13 October 2000 the defendants appealed against the order of 26 September. That appeal was heard on 22 February 2001, with the Court of Appeal publishing reasons for dismissing the appeal on 30 March 2001. Further disclosure was then made mainly from the file of Arthur Andersen, but the defendants claimed privilege with respect to some documents. That resulted in an application being filed on 1 May 2001 for consequential orders against the defendants enforcing the order of 26 September 2000. That application was heard by the learned trial judge on 16 May, and after hearing substantial argument the matter was adjourned. A further hearing of that application took place on 5 June.

[15] On 18 July 2001 the learned trial judge delivered reasons dismissing the claim of privilege made by the defendants. In the course of those reasons his Honour observed that the issues raised were "legitimate ones for proper consideration". In consequence on 1 August further documents were produced by the defendants. The matter was then brought on before the learned trial judge on 22 August when each side made submissions as to the future course of the trial. On 24 August 2001 the plaintiffs filed an application for an order that the trial be re-opened. That application was heard on 10 September, and after hearing argument from both sides the learned trial judge ordered that the trial be re-opened.

[16] There was argument on that date as to the plaintiffs' right to tender documents pursuant to Rule 227(2) of the UCPR – a matter to which it will be necessary to refer later – and decision on that point was reserved. That decision was handed down on 14 September 2001; the learned trial judge ruled against the tender pursuant to that rule of the documents in question. Thornton was called that day to give further evidence, was further cross-examined, and some further documents were tendered by counsel for the plaintiffs from the recently discovered material. Prendergast was available to give evidence but was not required by the plaintiffs; some of the documents in question could prima facie have been tendered through him. There followed further oral submissions by counsel for all parties and the trial was then adjourned for decision. As already noted judgment on all the issues raised at trial was delivered on 30 November 2001.

[17] In written outline of argument on appeal counsel for the plaintiffs contended that the delay between the conclusion of the bulk of the evidence at trial (8 March 2000) and

the date of judgment (30 November 2001) was so protracted, though not the fault of the trial judge, that his findings of fact should be treated by this court with reserve; they should be the subject of more intense scrutiny. Though the argument contained in the outline was not made the subject of further oral submissions, the contention was not abandoned.

[18] In support of the argument reference was made to a number of decisions including *Goose v Wilson Sandford & Co* (U.K. Court of Appeal, 13 February 1998), *Moylan v Nutrasweet Co* [2000] NSW CA 337 and *R v Maxwell* (NSW Court of Criminal Appeal, 23 December 1998). To those could be added a reference to the decision of the Privy Council in *Cobham v Frett* [2001] 1 WLR 1775. In each of those cases the delay between hearing and judgment was attributable to some fault on the part of the trial judge. In a number of the cases, representations had been made on behalf of the parties to a more senior judge requesting information as to when the judgment would be handed down. Promised dates were not met. In those cases there was not mere delay in delivering judgment; there was a basis for concern, sometimes evident from the reasons ultimately produced, that the trial judge had difficulty in fulfilling the obligation of delivering a timely judgment. That is clearly not the case here; nothing could be further from the truth.

[19] Within three months of reserving his decision (the time frame within which judges of this court endeavour to deliver judgment) the learned trial judge was aware that an application was to be made to re-open the trial. For all one knows he could well have virtually completed writing his reasons when he became aware of that fact; it is, of course, not appropriate to make any inquiries in that regard. Thereafter, over a period of more than 12 months, the matter was regularly back before him for further argument. The documents at the centre of the disputes during that period were relevant to the credibility of the defence witnesses, particularly with respect to their testimony as to the terms of the loan agreements made on 30 June 1989. That was the critical area of factual dispute between the parties. The hearings during that period meant that all of the evidence relevant to that issue was again highlighted for the learned trial judge.

[20] Far from operating to defeat careful, rational analysis of the evidence those later hearings would have given the learned trial judge the opportunity of further evaluating any tentative conclusions he may have reached.

[21] Whilst credibility issues were important, namely whether the defence witnesses should be believed when they put a gloss on documents, the case did not hinge upon the acceptance of one body of oral evidence over another body of oral evidence contradicting it. There was, as usual, a full transcript of evidence (and most argument) available to the learned trial judge. He had all the documents which were so critical to the contention of the plaintiffs. Those matters distinguish this case from the cases relied on by the plaintiffs.

[22] In the circumstances of this case the delay between the conclusion of the initial hearing and ultimate judgment does not require this court to approach the findings of fact made by the learned trial judge in any special way.

[23] When the issue is that of considering documents in the light of oral evidence given by witnesses who were considered prima facie to be honest and reliable, not

contradicted by other oral evidence, this court is in as good a position as the trial judge to determine the ultimate questions of fact.

[24] Before proceeding further it is necessary to set out the detail of the investment venture in question. The Johnson group of companies (including the second plaintiff, Johnson Farm Management Pty Limited and Farmer Johnson Aquaculture Limited) operated or were associated with a number of investment schemes with purported taxation benefits in the late 1980s. Prior to the venture which is central to this litigation the Johnson group had created and marketed the "Blueberry Hill Development" and in 1989 it was believed that that venture was generating significant profits and returning taxation benefits to investors in it. Because Thornton (and to a lesser extent other defendants) knew details of the Blueberry project and was influenced by its apparent success to enter into the venture in question it is necessary to refer briefly to some of its features.

[25] Pursuant to that scheme an investor entered into an agreement to farm and be responsible for a minimum of 700 blueberry trees with the Farm Owner. The Farm Manager agreed to do all the necessary work in consideration of payment of a fee by the investor. After the first two years that fee was payable from income generated by the project. The investor was to pay the capital amount to acquire the trees, plus the management fees and enhancement fees in the first year. The prospectus provided that an investor could borrow up to 100% of the management fees and enhancement fees for the first year. The first year's interest on the loan had to be paid either at a discount rate in advance or in arrears at a higher rate. According to the marketing literature:

> "The balance of the Loan i.e. approximately 81% of principal plus interest is paid from farm income in the first five years and this part of the Loan is non-recourse."

The marketing literature also included a pro forma Loan Agreement. Clauses 1 and 2 thereof provided that the lender (the second plaintiff in these proceedings) agreed to lend the Principal Sum and in consideration of the receipt thereof the borrower "undertakes to repay the Principal Sum in accordance with the terms of this Agreement". Clause 3A provided that the balance of the Principal Sum should be repaid within five years of the date of the loan agreement. Then it was provided in Clause 3C as follows:

> "(i) The Borrower shall repay to the Lender the respective sums specified in . . . Schedule 2 three (3) months from the date hereof and six (6) months from the date hereof respectively in reduction of the Principal Sum;
>
> (ii) The balance of the Principal Sum . . . shall be repaid to the Lender by direct deduction from the income received by the Borrower from the Farm . . .
>
> (iii) The Borrower shall have the right on any day . . . to repay to the Lender . . . the whole of the balance of the Principal Sum."

[26] If the agreement stopped there it would be clear that the borrower remained liable at all times for repayment of the amount of the loan plus interest, but it was recognised and hoped that after the first two initial payments profits from the venture would

repay the balance of the loan. But if the venture failed, or the profits were not sufficient to repay all of the loan and interest, the borrower would have to meet the shortfall. But the agreement did not end there. Clause 4(iii) was in these terms:

> "Notwithstanding anything hereinbefore or hereinafter contained and subject expressly to . . . the due performance by the Borrower of the conditions imposed on him by Clause 5 hereof, then the Lender shall have no right of recourse against the Borrower and the Borrower shall have no other personal liability for payment of the balance of the Principal Sum or Interest owing under Clauses 3B(i) and (ii) or any other costs, charges or expenses whatsoever in respect of the balance of the Principal Sum other than out of the income from the farm as provided in sub-clause 3C(ii) hereof."

[27] For present purposes it can be assumed that the provision just quoted overrode the earlier terms of the agreement, and on that basis it followed that if the venture failed the borrower was not legally obliged to meet any shortfall in repayment of the balance of the loan.

[28] Given the apparent success of the Blueberry project in 1988-9 the Johnson group then began marketing an aquaculture scheme called the "Red Claw" project. Initially Thornton was shown a draft prospectus, but shortly before he signed the necessary documentation he was in possession of the prospectus which had been duly lodged with the National Companies and Securities Commission. The following overview of the structure of the venture is taken from that prospectus.

[29] The purpose of the Red Claw Project was to form and generate profits from a series of partnerships, each of which would carry on the business of the farming, harvesting and marketing of freshwater crayfish. Each partnership would carry on its business on land near Innisfail. Each partnership project was to be carried on for a period of twelve years. Each partnership would be a limited partnership constituted pursuant to the provisions of the *Partnership (Limited Liability) Act* 1988 (Qld). Those who invested money in the project would be the "Limited Partners", and the "General Partner" would manage all the business affairs of each partnership. Each limited partnership would lease from the Farm Owner the ponds in which the crayfish were to be farmed. Each limited partnership would contract through the General Partner to engage the Farm Manager to manage the farm interests. The contribution made by an investor was to be measured by reference to a number of units in the limited partnership. The prospectus provided:

> "The subscription money for one unit in a limited partnership is $868 and the minimum subscription per Investor is five units."

[30] The minimum number of units which had to be subscribed before the project commenced was 4000; that is 4000 for each limited partnership. Until such time as the minimum subscription had been received the monies were to be held by the "Investors' Representative" which body was to represent the interests of all the investors.

[31] The prospectus then disclosed the following:

> (a) The Investors' Representative was Eagle Star Trustees Limited which was said to be a member of the Eagle Star Insurance Group of Companies;

(b) The General Partner was Forestell Securities (Australia) Limited which was said to have had 'many years experience as the manager of a number of investment projects in the agricultural sector';

(c) The Farm Manager was Johnson Farm Management Pty Limited;

(d) The Farm Owner was Farmer Johnson Aquaculture Limited.

[32] Included in the prospectus was a document described as "Expert's Report on Taxation Considerations" prepared by Ernst and Whinney, Chartered Accountants. The following extracts therefrom are significant for present purposes:

> "We are informed that the proposed activities of each partnership are to be carried out on a commercial basis and scale with a view to deriving profit. Under the Partnership Deed a partnership is not permitted to commence business prior to the Investors' Representative receiving a minimum subscription from prospective partners.
>
> . . .
>
> Each partnership should be entitled to deductions in terms of Section 51 of the ITAA for the following expenses:
>
> (i) Licence fee paid to the Farm Owner under the Facilities Licence Agreement;
> (ii) Lease rental paid to the Farm Owner under the Grow Out Pond Lease;
> (iii) Management fees paid to the Farm Manager under the Management Agreement;
> (iv) Annual fees payable to the Investors' Representative;
> (v) Purchase of crayfish;
>
> . . .
>
> Section 82KL deals with transactions where deductions are claimed and expenditure is recouped (i.e. the taypayer obtains benefits additional to those intended to be received in respect of the expenditure incurred). So long as there is no recoupment of expenses (e.g. no intention that borrowings made by each partnership or borrowings made by the Investing Partners to take up their partnership units shall not be repaid, and the loans are in fact repaid), it is our opinion that this Section will not have application."

[33] Under the heading Key Legal Data in the prospectus and the sub-heading Minimum Subscription the following appeared:

> "All monies subscribed by applicants will be refunded if the minimum subscription of 4000 partnership units is not received within four months of the date of this prospectus. No allotment of

> partnership units will be made pursuant to this prospectus until the whole of the minimum subscription is received in cash."

[34] The prospectus also contained instructions on how to invest and application forms. Payment was to accompany the application form and it was stated that the cheque should be in Australian dollars, crossed "Not Negotiable" and made payable to Eagle Star Trustees Ltd.

[35] It is not without significance for present purposes that the prospectus did not deal with the question of the investor borrowing funds for the purpose of acquiring units in the venture; on the face of the prospectus any borrowing by an investor would be a separate matter for the investor to negotiate with a lender.

[36] Prendergast was involved with Thornton in most of the negotiations with respect to the investment by all of the defendants but clearly Thornton was the principal negotiator. It was accepted for purposes of the litigation that at all material times Thornton had full authority to bind all defendants; any knowledge he had constituted knowledge by each of the defendants. In consequence it is sufficient to concentrate on Thornton's involvement in the discussions leading up to the defendants committing themselves to the Red Claw project on 30 June 1989.

[37] In about March/April 1989 Hasell was engaged by the Johnson group to market the Red Claw project. Insofar as there were opportunities still available for investment in the Blueberry project he also marketed that scheme. He had previously been a stockbroker and in that capacity had had dealings with Thornton and the GWA Group.

[38] In about April/May 1989 the defendants, were looking for "a speculative investment opportunity which offered reasonable tax incentives". As a result of restructuring the GWA group the defendants had available cash and were looking for appropriate investment opportunities. Thornton spoke to a number of financial advisers at about that time, one of whom was Hasell. Thornton placed their first relevant conversation as being in early May. There was discussion about the Blueberry project which Hasell said was a "limited recourse investment where you only have to pay a small amount of money up front and the tax benefits are much better." Thornton was given some brochures regarding the Blueberry venture. According to Thornton he was particularly interested in that venture because of the limited recourse aspect. At that time the Blueberry project was almost fully subscribed and there was insufficient capacity for that project to provide the investment opportunity Thornton and those he represented wanted. It was in those circumstances that Hasell mentioned the Red Claw project. The first document Thornton received from Hasell was that headed "Precisely What is The Best Farming Investment This Year?" That document roughly set out the structure of the project (which has been detailed above) and made representations as to the anticipated return and initial taxation benefits. It mentioned that a potential investor could borrow funds and indicated probable return after repaying the whole of the loan. Significantly for present purposes when giving an example of the profit which would be returned the document stated:

> "In this instance an investor would have an initial cash outlay of $781 and a deduction of $5,061."

[39] Thornton became interested in the Red Claw project after reading that material. He arranged for Hasell to give him a more extensive presentation in relation to it. That occurred probably early in June 1989. On that occasion a draft of the prospectus was discussed. Hasell stated that the literature showed that the project was "based on the self-funding nature of the project" as had been the position with the Blueberry venture.

[40] In his reasons for judgment the learned trial judge accepted the oral evidence of Hasell, Prendergast and Thornton as "true". It has already been observed that there was no evidence to the contrary of that given by each of those three as to what was said leading up to the signing of documents on 30 June 1989. In consequence, careful consideration must be given to their evidence as to the terms of those conversations, and then the court must consider their legal effect.

[41] According to Thornton after looking at the documents he made a remark to Hasell along the lines:

> "This does not state that there will be no legal requirement on me to pay loan repayments out of my own pocket if the project turns out not to be self-funding."

Hasell's response was to the effect that all the Johnson group projects had been totally self-funding and that is why that risk was not addressed in the written material.

[42] Amongst the documents in the possession of the defendants was that put out by the Johnson group, headed "Important Late News" and bearing date 26 June 1989. Thornton said he could not specifically recall the document, or any detailed conversation with Hasell about it. But it is a significant document because ultimately the defendants availed themselves of the finance referred to therein. Previously the defendants had been advised that the Johnson group had an arrangement with three banks that loans would be available to approved investors, but some time in June the banks withdrew from that arrangement. That led to the circulation of the document "Important Late News". One would think that it must have been a document on the table when there was discussion between Thornton and Hasell about recourse where profits from the project were insufficient to repay borrowings. The concept of limited recourse would only be of significance where the investment monies were borrowed from a company associated with the project.

[43] The document headed "Important Late News" indicated that the second plaintiff, Rural Finance Pty Ltd, would advance six year loans to approved borrowers to purchase units in the Red Claw project. The loans were being offered on the following terms:

> "Interest – 18% pa – Year 1 interest payable in advance by the Investor personally, subsequent interest payable from projected Project cash, yearly in arrears.
>
> Principal – Up to 100% of Red Claw investment may be borrowed (Minimum Loan $20,000). Loan principal is repayable in part (approx 16.4%) from Investor cash during the first six months. The balance is repayable over five years from projected Project cash.

> Security – the loan is secured against the borrower's interest in the Project. The loan is not non-recourse and the Project profits are not guaranteed."

[44] After giving an illustration of the taxation effect of investing consequent upon borrowing on those terms the document set out details of "how to proceed". If an investor took up the offer it was said that the second plaintiff would pay the loan proceeds direct to Eagle Star Trustees Ltd by 30 June 1989 as subscription moneys for units in the venture.

[45] That document also contained a number of paragraphs under the heading "Taxation Department Policy". Therein it was said that the ATO was scrutinising the proliferation of "guaranteed forward income projects". It stated that the ATO wanted "an investor to bear operating business risk prerequisite to gaining tax deductions." The document then expressed the view that the Johnson group did not accept the ATO stance and suggested it may not stand up to legal challenge. Then the following significant paragraph appeared:

> "Due both to this proliferation and to Sydney ATO's current views, Johnson Farm Management Pty Limited 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."

[46] It seems clear that when Thornton and Hasell discussed the consequences of insufficient profits being generated to repay the loan they did so in the light of the contents of the document headed "Important Late News". The conversation only makes sense if they were considering a proposal which involved the defendants borrowing from a company which was prepared to recognise that repayment of principal was expected to come out of the profits of the venture.

[47] I now return to Thornton's evidence as to the negotiations between himself and Hasell. When Thornton asked were the loans intended to be full recourse loans, Hasell replied that "the answer to your question is yes, but this problem has never arisen" or words to that effect. When Thornton pressed for a limited recourse loan Hasell responded:

> "I think I can get you a guarantee from Johnson Farm Management that the project will be self-funding and that there will be no recourse by the lender after the initial payments and that all that would be required to be paid would be the first payment of interest and two payments of principal like the Blueberry project. I'll talk to Tony Johnson about this and let you know."

That ended what was frequently referred to in evidence and argument as the first pleaded meeting.

[48] Later there was a telephone discussion between Thornton and Hasell in which the former said that the project "looks interesting". By this time Thornton had a better idea of what the other defendants were interested in investing and informed Hasell of that. Later still there was another telephone call in which, according to Thornton, Hasell said:

> "I have spoken to Tony Johnson who has agreed to your proposal. Rural Finance will be offering all of you the loans for the Red Claw

> investment as well as any Blueberry investment on a limited recourse basis and all the documentation ought to be available within the next few days."

[49] There was no major inconsistency or discrepancy between the evidence of Thornton and Hasell in regard to the content of their discussions during that period. In his statement Hasell indicated that he implied to Thornton that the Johnson group would stand behind the loan; if all went well the project would be self-funding, but the Johnson group would stand behind the loan. He also concedes that in at least one conversation he represented to Thornton that Johnson Farm Management would guarantee to the defendants that the deal was a "non-recourse loan". He understood that that was something which would be worked out between the defendants and the Johnson group and later put into writing. Hasell's evidence is not as precise as Thornton's as to the sequence of meetings and the occasions on which particular statements were made.

[50] It is agreed by all that on 30 June 1989, the last day for making the investment if there were to be taxation benefits for the financial year ending on that date, Hasell met Thornton and Prendergast in the former's office and presented them with a number of documents, including a Loan Agreement. It was generally understood that the Application for units and the Loan Agreement would have to be completed by each defendant that day. Thornton objected that he was not being given sufficient time to peruse the documentation; he intimated he was only going to invest if the loans were limited recourse and there was no possibility of them being assigned.

[51] It is now necessary to turn to the Loan Agreement which was presented to Thornton and which ultimately was signed on that day by or on behalf of each of the defendants.

[52] The Agreement named the second plaintiff as the lender. It recited that the borrower had applied for a certain number of units in the limited partnership and that the "Lender has agreed to lend to the Borrower and the Borrower has agreed to borrow from the Lender the principal sum as specified in this Agreement, for the purpose of allowing the Borrower to acquire the said units." There was then reference to the "Deed" between Forestell Securities (Australia) Limited as General Partner and Eagle Star Trustees Limited as Representative; terms defined in that Deed carried the same meaning for purposes of the Loan Agreement. Clause 8 then provided:

> "Subject to the acceptance of the Application of the Borrower pursuant to the provisions of the Deed, the Lender hereby agrees to lend to the Borrower the Principal Sum."

Clause 9 provided the "Principal Sum shall be . . . applied in payment of the Application Moneys . . . under the Deed."

[53] The term of the loan was for six years and at the end of the term "the Borrower shall pay to the Lender so much of the Principal Sum as has not been repaid." The document then provided (reading together Clause 11 and Schedule 4) that regular payments should be made in reduction of the Principal Sum. Clause 13 provided

that the Borrower should have the right at any time to repay the whole of the balance of the Principal Sum. Clause 12 was in these terms:

> "Without reducing the obligation of the Borrower pursuant to Clause 11, the Borrower by his execution hereof hereby authorises and directs the Representative and the General Partner to pay any part of the Partnership income to which the Borrower becomes entitled to the Lender, firstly in reduction of any interest accrued or due but unpaid in respect thereof and secondly in reduction of the Principal Sum."

[54] Clause 24 conferred on the Lender the right to assign its rights and obligations under the Agreement to another party. Finally it should be noted that Clause 15 provided the governing law of the Agreement was that of the Australian Capital Territory, and the parties submitted to the jurisdiction of the courts for that Territory.

[55] According to Thornton on reading that document he said to Hasell that the loans were not limited recourse and there was an assignment clause in the agreement. In reply Hasell said words to the effect that that must be a mistake and he would ring Tony Johnson and speak to him about it. It is agreed that Hasell telephoned Tony Johnson and had a conversation with him in the presence of, but not in the hearing of, Thornton. Hasell's evidence as to the words actually used in the telephone conversation and in conveying that to Thornton is extremely vague. The evidence of Thornton (statement exhibit 107) is that, after speaking for some time on the telephone, Hasell said:

> "Tony has said he will provide you with a written document guaranteeing that the loans are limited recourse and because they are limited recourse loans, there is nothing to assign and you shouldn't be concerned about an assignment to a third party."

[56] Thornton then took the telephone from Hasell and spoke to the person he believed to be Tony Johnson. His evidence is that he cannot recall Johnson's words but "it would have been to the effect that he was prepared to confirm what Alastair (Hasell) had said." That concluded the telephone conversation. The learned trial judge made the following finding with respect to that telephone conversation:

> "Mr Anthony Johnson to whom Mr Thornton spoke on the telephone while the meeting was in progress, assured Mr Thornton that it would not be necessary to provide that the loans were not assignable because 'being limited recourse loans there was really nothing to assign'. . . . Mr Anthony Johnson also promised to provide Mr Thornton with documents confirming that the loans were limited recourse loans."

That is a bold finding particularly given that neither Hasell or Thornton gave evidence they recalled Tony Johnson using those words. The finding is solely based on what Thornton said in his statement he recalled Hasell saying to him after the phone conversation. As it is on Thornton's case the most critical time in the negotiations it is surprising he cannot recall what Tony Johnson said to him over the phone. Indeed under cross-examination (T/s 566) Thornton admitted he had forgotten the phone conversation with Tony Johnson for a period of time until he was reminded of it by Hasell; it was apparently because he had forgotten it he did not refer to that conversation in his affidavit sworn 27 November 1991 (Exhibit 98).

[57] Returning to the discussion on 30 June as indicated by the evidence. After the phone conversation Hasell said words to the effect that he was also an investor in the project and that he was "getting a guarantee from Rural Finance for my loan." [There was also evidence that Hasell represented to at least one other investor (Reinicke) on 30 June 1989 that Tony Johnson "will give a personal guarantee" that only two repayments of principal would have to be made.]

[58] At trial there was an issue whether Tony Johnson had authority at that time to speak on behalf of the second plaintiff as he had resigned as a director the previous day. The learned trial judge found that on 30 June Tony Johnson "had authority to manage the business of the second plaintiff"; he also expressly found that on 30 June Tony Johnson was "acting as the agent of the second plaintiff". That finding was undoubtedly based on the evidence of Gregory Johnson that on becoming the principal director of the second plaintiff on 29 June he "instructed my brother to be the manager of that company" and that he authorised Tony to give people guarantees on behalf of the second plaintiff. On appeal the plaintiffs challenged these findings but there is no basis for interfering with them.

[59] In his reasons the learned trial judge said that an "oral agreement was reached then between Mr Thornton, acting on behalf of himself and the other defendants, and Mr Hasell on behalf of the second plaintiff". Immediately after that sentence his Honour dealt with the telephone conversation referred to above and then went on to detail the amount each defendant was to borrow.

[60] His Honour then went on to say that the -

> "unconditional liability of each of those defendants was to be limited to three payments: the first on 30 June 1989, the second at the end of September 1989 and the third and final payment (which was to be equal to the second) at the end of December 1989. The first payment was to be a pre-payment of interest and the second and third payments were to be repayments of principal. After those payments had been made the defendants were to remain liable to repay the money they had borrowed and to pay interest, but only from their shares in the profits of the project . . ."

[61] A few paragraphs later on in his judgment his Honour said: "On 30 June 1989 a document entitled 'Loan Agreement' was executed by or on behalf of each defendant." Then he went on to say: "There was no provision in the loan agreement documents for limited-recourse of the kind agreed to orally, but the documents were executed by or on behalf of the defendants on the understanding that the further documents promised by Mr Anthony Johnson would be provided." Rather surprisingly there was no finding as to when in relation to the conversations referred to the loan agreements were executed.

[62] By the terms of the documents executed that day each of Glengallan Investments Pty Ltd and HGT Investments Pty Ltd acquired 500 units in the partnership, Thornton 1300 units, Prendergast 250 units, Anderson 850 units, and Codd 150 units. By the loan agreements each of Glengallan Investments and HGT Investments borrowed $434,000, Thornton $1,128,400, Prendergast $217,000, Anderson $737,800, and Codd $130,200. The terms of the Loan Agreements were

as indicated above; no amendments were made consequent upon the discussions before execution.

[63] It will be necessary to return to these findings subsequently.

[64] According to Thornton he pressed for the further documentation after 30 June 1989 but it was not immediately forthcoming. He did receive some good reports from Hasell about the progress of the venture. In August 1989 a letter was received from Johnson Farm Management including documentation for use by the defendants in preparing their tax returns for the year ended 30 June 1989. That recorded the pre-payment of interest, showed the relevant share each defendant had in the partnership, and incorporated a financial forecast for the twelve year life of the project. Later in that month certificates were received evidencing the number of units held by each defendant in the partnership together with other material relevant to the completion of their income tax returns. On or about 29 September 1989 cheques were drawn to meet the first repayment of principal due from each defendant. Then a letter dated 29 November 1989 was received from the second plaintiff to which extensive reference was made at trial and on the hearing of the appeal. Relevantly it said "we wish to remind you that your second (and final) loan repayment in relation to your investment in the Red Claw Project falls due in December 1989". It went on to indicate that early payment would result in a rebate of interest. Each defendant duly met the obligation to make that repayment of principal.

[65] The learned trial judge gave significant weight to the letter of 29 November 1989, and in particular the inference contained therein that only two repayments of principal had to be made by the defendants. On the appeal counsel for the plaintiffs contended that it was significant that in his reasons the learned trial judge did not refer to another letter from the second plaintiff dated 6 November 1990. That letter was sent to each of the defendants, and was signed by Kathy O'Leary, who also signed the letter of 29 November 1989. The letter of 6 November 1990 asked each investor to sign and return an acknowledgment of the loan contract. Though none of the defendants signed and returned the document, none made any adverse response upon its receipt. The acknowledgement each defendant was asked to sign was in these terms:

> "I/We confirm that a loan contract exists in accord with the copy provided by you and I/We agree and confirm that all Interest and Principal repayments are entirely My/Our responsibility and are quite separate and apart from the project funded by the above loan."

[66] The submission by counsel for the plaintiffs on appeal was that by not objecting to that the defendants were impliedly acknowledging that the assertions made therein by the second plaintiff were correct. At least, on that submission, the contents of the letter of 6 November 1990 counter-balanced any inference which might be drawn from the earlier letter of 29 November 1989 alone.

[67] It was also submitted by counsel for the plaintiffs on appeal that the learned trial judge gave undue weight to the letter of 29 November 1989 given a passage in the report of the Receivers and Managers of the second plaintiff dated 16 August 1991. That report was tendered at trial by the defendants. The passage in question suggested that the letter of 29 November 1989 was sent to the defendants in error; the writer acted under a mistaken belief that the position with the Red Claw Project

was as existed under another project being conducted by the Johnson group. Though the passage is to be found in a document tendered by the defendants, it was not supported by any oral evidence given at trial, and in the circumstances little weight should be attached to the statement in question. In those circumstances it could not be said that the learned trial judge erred in not attaching significant weight to the assertion in the report.

[68] The defendants lodged income tax returns for the year ended 30 June 1989 claiming deductions in accordance with the material they had received from Johnson Farm Management. (Exhibit 18).

[69] Ultimately on 19 December 1989 Hasell delivered to Thornton an envelope containing a number of documents. There were six documents each headed "Guarantee"; one with respect to each of the defendants. Relevantly the Guarantee provided:

> "In consideration of . . . entering into the acquisition of . . . units in the Red Claw Project, with Johnson Farm Management Pty Limited and applying for a loan from Rural Finance Pty Limited for . . . we the undersigned hereby guarantee and indemnify . . . as follows:
>
> 1. That the only payments to be made by . . . will be as follows:
>
> Prepaid Interest – Due 30/06/89 of $ . . .
> Principal Repayment – Due 30/09/89 of $ . . .
> Principal Repayment – Due 31/12/89 of $ . . .
>
> 2. That no further payment will be made by . . . beyond the above to Johnson Farm Management Pty Limited, Rural Finance Pty Limited or any other party.
> 3. Against any claims or demands by Johnson Farm Management Pty Limited or Rural Finance Pty Limited or any other partner in respect to the Red Claw Project or the said loan agreement in excess of the abovementioned amount."

[70] The agreement was then executed under seal by Anthony J Johnson personally and Johnson Farm Management Pty Ltd. Against the words:

> "The Common Seal of Rural Finance Pty Limited was hereunto affixed by authority of a resolution of the Board of Directors in accordance with Memorandum and Articles and Association in the presence of"

appeared the words "for and on behalf of" over the signature of Anthony J Johnson, but no seal of that company was affixed.

[71] On reading the documents Thornton concluded that "their terms seem to me to confirm the limited recourse nature of the loan." He said he noted "that the guarantees did not mention the non-assignment issue" but "still believed that, as suggested by Tony Johnson, the loans were not worthy of assignment." He also said under cross-examination that he "couldn't understand why they called it a guarantee except that that was the term that Tony Johnson had used in that

discussion that I had with him on 30 June confirming the arrangement whereby he said he guarantees the arrangement is a limited recourse arrangement".

[72] Thornton did not seek any legal advice with respect to the documents, and they were apparently merely lodged with the papers of each of the defendants.

[73] During 1990 and the early part of 1991 the defendants received favourable reports from Johnson Farm Management as to the progress of the venture. Though a circular dated 20 November 1990 referred to an ATO audit it suggested that investors would have no worries. The Red Claw Investor Circular January 1991 referred to some production problems which would probably result in no profit being achieved for the year ended 30 June 1991, but it painted an optimistic picture for the ensuing year. That circular also referred to the ongoing ATO audit of the project. Then came the Red Claw Project report of May 1991. It again referred to some problems which had set the project back and indicated there could be a change in the General Partner. But again the overall position was represented as being satisfactory. That document also referred in some detail to the ATO audit. It should also be noted that with respect to the ATO audit Johnson Farm Management Pty Limited in a notice to investors dated 14 March 1991 said:

> "This closing stage of the audit involves an ATO examination of the nature of each loan between Red Claw investors and Rural Finance Pty Limited (RF). From discussions with ATO officers, it is known that ATO's attention is attracted to this area because their examination of RF to date suggests to them that RF may have loaned too much too easily to Red Claw investors in 1989. The implication in ATO's mind seems to be that the loans might not be repayable by the investor personally, but might be part of a non-recourse device to gear up tax deductions.
>
> To protect the deductions already claimed, there is now an onus on RF and on each Red Claw investor/borrower to demonstrate that the loans are genuine."

[74] On each occasion when reference was made in those documents to the ATO audit it was said, expressly or impliedly, that the critical issue from the ATO's viewpoint was that the investors remained liable for repayment of borrowed funds. The documents, again either expressly or impliedly, indicated that the second plaintiff was contending that as the loans were not non-recourse there was no problem. Despite receiving each of those documents the defendants did not raise with the second plaintiff their contention that the loans were of limited recourse and that the lender's interests were not assignable.

[75] Under cover of letters dated 27 March 1991 each defendant received a Notice of Assignment from the second plaintiff to the first plaintiff. The Notice asserted that on 8 January 1991 the second plaintiff assigned to the first plaintiff "its interest under the loan agreement it has with you dated 30th day of June 1989 including its rights to monies and you are hereby directed to make all payments of monies due under the loan agreement" to the first plaintiff. Thornton gave evidence that he was "worried" on receiving that notice. According to him he telephoned Tony Johnson and asked for an explanation, asserting that he thought he had a limited recourse arrangement and there was nothing to assign. According to him Johnson responded by saying that it was "all very complex" and he wouldn't understand it.

[76] The defendants in April 1991 consulted Morris Fletcher & Cross, their then solicitors, about the assignment. Those solicitors wrote separate letters to each of the plaintiffs and Johnson personally on 18 April 1991. In the letter to the first plaintiff the following passage appeared:

> "We draw your attention to the amended terms of the Loan Agreement as indicated in a Deed dated 19 December 1989 ("the Variation"). Copies are attached for your records. Our clients' obligations with respect to the loans are therefore set out in the Loan Agreement of 30 June 1989 and the Variation of 19 December 1989. . . . The Variation is headed 'Guarantee' and records the terms of the Loan Agreement as varied. . . . The obligations are those which exist under those two documents and are not of a non-recourse nature."

[77] The letters to the second plaintiff and Johnson were in identical terms and acknowledged the right of the second plaintiff to assign its interest under the Loan Agreement. The letters went on to assert that:

> "This acknowledgement in no way amounts to a waiver of their rights under the Loan Agreement and variation to that agreement evidenced in a deed headed 'Guarantee' and dated 19 December 1989."

[78] The writer of those letters, the solicitor Thompson, was called by the plaintiffs at trial, but was not cross-examined with a view to establishing that he had been mistaken in setting out the position (or his instructions) in those letters. There was then no assertion of an oral agreement on 30 June 1989.

[79] In relation to the documents headed "Guarantee" the learned trial judge relevantly concluded:

> "The significance of those documents is as evidence corroborating the oral evidence as to the true nature of the loan agreements, and not as establishing transactions distinct from the loan agreements. . . . The documents were not, on my assessment of the evidence, variations of the agreements of 30 June 1989, but rather evidence of their true nature, as I have explained."

[80] He then specifically referred to the assertion in the letter of 18 April 1991 to the first plaintiff that the obligations of the defendants "are not of a non-recourse nature" and said:

> "Having heard all of the evidence relevant to this subject, I conclude that when the oral parts of the agreement are taken into account, the obligations would more accurately have been described as: not of a non-recourse nature, but rather of a limited-recourse nature."

[81] It will be necessary to return again to those conclusions reached by the learned trial judge.

[82] The Deputy Commissioner of Taxation continued his interest in the taxation position of investors in the project. When the ATO audit was completed a "position paper" was prepared in June 1993 and forwarded to the General Partner for consideration. In due course a copy was made available to Arthur Andersen, then the Chartered Accountants acting for the defendants, and that firm was asked to prepare a response on behalf of the defendants. The response was shown to

Prendergast before being sent. In the response dated 9 July 1993 Arthur Andersen sent to the ATO on behalf of the defendants the following passages of relevance for present purposes appeared:

> "Our clients . . . entered into a loan arrangement with Rural Finance Pty Ltd (RF) which was in the first instance a full recourse loan i.e. in the event of default, the lenders would have recourse to all assets of the borrowers. . . . Pursuant to this loan arrangement, the borrowers made the first interest payment and the first two repayments of loan principal. However, prior to the second loan repayment being made, the borrowers renegotiated the terms of the loan arrangement with RF such that the loans were intended to become of a limited recourse nature. As previously explained to your officers, our clients were desirous from the outset of their participation in the Project to limit their commercial risk. We are advised that RF was prepared to agree to the limited recourse facility on account of the genuine expectation of profits being generated as stated in the prospectus.
>
> The intended effect of the limited recourse feature of the revised loan facility was that the ability of RF to recover the principal and interest (after the second loan repayment) was restricted to the borrowers' share of income from the Red Claw Project (the Project) and the borrowers' share of the Project's assets. By agreeing to a limited recourse loan facility RF had only limited the security in respect of the loan. At no stage was a release given to the borrowers such as they would not be liable to meet any capital repayments or interest payments in respect of the loan. The loans remained legally enforceable and all other rights and obligations of the parties as to the loan agreement were unaffected by the abovementioned variation to the terms of the loan i.e. the borrowers remain liable for capital repayments and interest payments in relation to the loans."

[83] Thornton asserted in evidence that that response to the ATO was forwarded without his knowledge and approval. He said he was so concerned by what Arthur Anderson had said in that response that he immediately dispensed with their services.

[84] In taxation returns for year ended 30 June 1991 the defendants claimed deductions based on their investment in the Red Claw Project. In 1994 the Commissioner disallowed deductions claimed in the 1989 returns but each defendant lodged a formal objection thereto. (Exhibit 20).

[85] To complete the factual narrative it is necessary to record that because of inadequate capital funds the crayfish venture became a total failure in 1992. In July 1991 receivers were appointed to the second plaintiff. The defendants made no payments of interest or in reduction of capital pursuant to the Loan Agreements other than those made in 1989. No profits had been generated by the venture which had been applied in discharge of the obligations of the defendants pursuant to the Loan Agreements.

[86] It is against that background that the terms of the agreement of 30 June 1989 have to be determined.

[87] In order to deal with the submissions by the appellants with respect to the findings by the learned trial judge as to the terms of the agreement it is necessary to set out the following further extracts from his reasoning:

> "The plaintiffs rely on the loan agreement documents in bringing this action. . . .
>
> On behalf of the plaintiffs it was submitted that it should not be found that the loan agreements were as contended for by the defendants, and that, at best for the defendants, it should be found that the discussions on 30 June 1989 resulted in an agreement by Mr Anthony Johnson to guarantee that the income from the project would be sufficient to meet the defendants' liabilities under the loan agreements.
>
> An arrangement of the kind contended for on behalf of the plaintiffs would have revealed Mr Thornton to have been extremely gullible to say the least. He is a businessman of considerable experience, and I do not accept that he was so gullible as to expose himself and his associates to a risk of the magnitude inherent in a mere personal guarantee. The agreements sworn to by Mr Thornton were entered into without the precaution of documents dated 30 June 1989 as evidence of them, so to that extent he was trusting, but the events of that day took place in an eleventh-hour rush to take advantage of the taxation benefits of transactions entered into before the end of the financial year. Important too was the trust Mr Thornton placed in Mr Hasell with whom he had prior dealings.
>
> It is true that, to the extent the documents received by or on behalf of the defendants from Johnson Farm Management concerning the Red Claw Project are inconsistent with the contention that the loan agreements were limited-recourse loans, those inconsistencies support the plaintiffs' case. It is similarly supported by the defendants failing, as they did, to record any dissent from the contents of circulars concerning the project sent by Johnson Farm Management in November 1990, January 1991, and May 1991 (exhibits 54, 61, and 56 respectively), all of which refer to assessment of the project by the Australian Taxation Office. . . .
>
> Of greater weight in my assessment is, however, the oral evidence of Messrs Hasell, Thornton and Prendergast confirmed as it is by the letters of 29 November 1989. . . . The evidence of Messrs Hasell, Thornton, and Prendergast is also a greater weight than any inference that might be drawn from the defendants' treatment of their transactions in connection with the Red Claw project in their tax returns (see exhibits 18, 19 and 20) and any inference that might be drawn from Mr Hasell's record of his dealings with another person interested in investing in the Red Claw Project, Mr Robert Reinicke: see exhibit 128. It is not in the least improbable that, in their anxiety to obtain much needed money from the defendants on 30 June 1989, those representing the second plaintiff were prepared to enter into limited recourse loan agreements with the defendants while not

> doing so with less substantial and astute investors. That course of events seems all the more probable when one learns that the second plaintiff had nothing to lend, as I shall explain."

[88] The real issue is whether, even given favourable credibility findings, the learned trial judge was justified in concluding that the operative agreements determining the terms of the loans were oral agreements reached between Thornton, acting for himself and the other defendants, and Hasell on behalf of the second plaintiff. In that context one must bear in mind that his Honour did not make an express finding as to when the oral agreements were reached in relation to the signing of the written Loan Agreements. Probably not much weight can be attached to the fact that when dealing with the events of 30 June 1989 the learned trial judge first recorded the "oral agreement" (para [9] of his judgment) and then later refers to the signing of the document entitled "Loan Agreement" (judgment para [13]). There is no specific finding that the documents were signed by Thornton in the belief that they recorded an agreement in the terms found by the learned trial judge. A chartered accountant reading the documents would clearly appreciate that there was a significant difference between the terms contained therein and the terms of an agreement such as found by the learned trial judge. In the circumstances there would have to be overwhelming evidence favouring some antecedent oral agreement before the conclusion could be reached that the terms of the loan were other than those set out in the executed Loan Agreements. (cf *Maybury v Atlantic Union Oil Co Ltd* (1953) 89 CLR 507 at 517-8).

[89] A consideration of all the evidence (bearing in mind the finding in favour of the credibility of Thornton, Prendergast and Hasell) leads to the conclusion that the finding of the learned trial judge that the terms of the loan were agreed upon orally cannot stand. The considerations which point to a conclusion contrary to that reached by the learned trial judge are the following:

(i) The Loan Agreements signed on 30 June 1989 expressly provided that the borrower would repay all of the principal sum;

(ii) There was no mention in the Prospectus of "non-recourse" or "limited recourse" with respect to any borrowed funds;

(iii) The report from Ernst and Whinney in the Prospectus suggested there would be no problem with taxation deductions provided that there was no intention that borrowings made would not be fully repaid;

(iv) The document headed "Precisely What is The Best Farming Capital Investment This Year?" referred to borrowing to cover investment costs, and calculated profit "after fully repaying the loan plus interest". There was no reference therein to "non-recourse" or "limited recourse" with respect to borrowings in order to make the investment;

(v) The document headed "Important Late News" contained a paragraph dealing with "Taxation Department Policy". In that section the indication was that borrowing for the investment involved "full investor risk";

(vi) In the conversation recorded in paragraph [47] herein, Hasell responded to Thornton's pressing for "limited recourse" by referring to a guarantee from Johnson Farm Management;

(vii) After reading the Loan Agreement on 30 June 1989 there was the telephone call during which both Hasell and Thornton spoke to Tony Johnson. The findings made by the learned trial judge as to what was then said could not constitute the making of an oral agreement between Thornton and Tony Johnson; indeed the learned trial judge did not say that. From a legal perspective those conversations (dealt with in paragraphs [55] and [56] hereof) could amount to no more than an intimation that Tony Johnson would provide a guarantee that the loans would in practical terms be of limited recourse;

(viii) The taxation returns lodged by the defendants did not suggest that the borrowings were other than fully repayable, and the books of account showed the loans as liabilities;

(ix) The failure of the defendants to respond to the letter of 6 November 1990 seeking an acknowledgment the borrower was entirely responsible for loan repayments;

(x) The guarantee documents delivered to the defendants on 19 December 1989 were premised on the fact that the loans were fully repayable, but Anthony J Johnson, Johnson Farm Management Pty Ltd and the second plaintiff would indemnify the defendants with respect to loan repayments other than those due on 30 September 1989 and 31 December 1989;

(xi) The defendants did not raise with the second plaintiff their contention that the loans were of limited recourse after receiving documents in 1991 dealing with the ATO audit in which it was suggested there might be a problem because loans to investors might not be repayable by the investor personally;

(xii) The letters written by Morris Fletcher & Cross in April 1991 do not support an oral agreement varying the terms of the executed agreements and expressly state that the obligations with respect to the loans were "not of a non-recourse nature";

(xiii) The response by Arthur Andersen of 9 July 1993 to the ATO does not suggest an oral agreement varying the terms of the executed agreements and therein there was no suggestion that any release was given to the borrowers such as would render them not liable to meet capital repayments with respect to the loans.

[90] It is true that one can refer to other considerations supporting an agreement along the lines of the oral agreement as found by the learned trial judge; the Blueberry venture provided for limited recourse loans to investors, Hasell regularly referred to the venture being "self funding", and the letter of 29 November 1989 suggested some such agreement. None of those matters, alone or taken together, are decisive. Generally the use by Hasell in the course of oral negotiations leading up to 30 June 1989 of the terms "limited recourse" or "self funding" is not decisive; that is particularly so when those expressions were used frequently in conjunction with the term "guarantee".

[91] In the course of his reasons the learned trial judge said with respect to the documents dated 19 December 1989:

> "The significance of those documents is as evidence corroborating the oral evidence as to the true nature of the Loan Agreements, and not as establishing transactions distinct from the Loan Agreements. . . . The documents were not, on my assessment of the evidence, variations of the agreements of 30 June 1989, but rather evidence of their true nature, as I have explained."

[92] With due respect to the learned trial judge I have difficulty seeing that the documents of December 1989 are corroborative of, or indicative of the true nature of, an oral agreement as found by the learned trial judge. If the loan agreement was of a limited recourse nature in that repayments of principal, other than the payments due in 1989, were only to be made out of profits of the project, what was the point in the three parties providing a guarantee and indemnity with respect to any additional demands on the defendants for repayment of principal? The documents of 19 December 1989 would only have practical effect if there was a legal liability in the defendants to make payments of principal other than those specified as payable in 1989. Whatever the legal effect of the documents of 19 December 1989 be, they do not evidence the "true nature" of some earlier agreement between the parties the terms of which were that the defendants had only to make two repayments of principal.

[93] It is not now doubted that extrinsic evidence (parol testimony) cannot be received to contradict, vary, add to or subtract from the terms of a written contract. But evidence is admissible to establish that the terms of an agreement between the parties were partly oral and partly in writing. So much is clear from the judgment of Isaacs J in *Hoyt's Pty Limited v Spencer* (1919) 27 CLR 133 especially at 142-3. As was there said, it must be shown that the document was not intended as the complete record of the bargain between the parties before oral evidence could be admitted to alter or qualify what was recorded therein. To similar effect is the reasoning in *Sinclair Scott & Co Ltd v Naughton* (1929) 43 CLR 310 at 316-7. The question is not dissimilar to that considered by the High Court in *Masters v Cameron* (1954) 91 CLR 353 especially at 360-1. The critical question is whether the parties gave their final consent to the terms by which they were to be bound as a complete and exhaustive statement of their rights and liabilities by executing the written document. The learned trial judge here only impliedly considered that question. As already noted his reasons do not address the consequence of the defendants signing the loan agreements. The difficulty in saying that there was some antecedent oral agreement to which each written agreement was subject is highlighted by the fact that the terms of the oral agreement as found are not clearly established by the words used by Thornton and Hasell. As already noted it is not clear whether the learned trial judge found that the oral agreement was reached prior to or after the telephone discussion with Tony Johnson on 30 June. If one ignores the sequence of findings as stated in his reasons and accepts the reality that such agreement, if made, must have been reached subsequent to the telephone conversation, there are no words emanating from Thornton which amount to a binding acceptance of specified terms of a loan. The only act or statement amounting to an acceptance for contractual purposes established by the evidence is the act of signing the loan agreements. The terms of the loan as stated in those written documents were clear and precise. On the findings made by the learned trial judge, at best for the defendants, all they had from Tony Johnson was a promise to

provide some additional documents "confirming that the loans were limited recourse loans". What that limitation was to be was not specified in the findings made with respect to the telephone conversation and in consequence it is difficult to see how, on those findings, it could be held that there was some collateral oral agreement.

[94] The evidence, and indeed the findings of fact made by the learned trial judge, do not support the conclusion that the operative agreement was an oral one reached between Thornton and Hasell or an agreement partly in writing (the loan agreements executed) and partly oral (some oral agreement between Thornton and Hasell).

[95] The evidence clearly establishes that the loan agreements between the parties were those executed on 30 June 1989 by Thornton on his own behalf and on behalf of the other defendants. Subsequently, in December 1989 Tony Johnson, Johnson Farm Management Pty Ltd, and perhaps the second plaintiff, provided to the defendants a guarantee and indemnity in terms of which they indemnified the defendants against repayments of principal other than those due on 30 September 1989 and 31 December 1989. But the provision of that guarantee and indemnity did not in any way vary the fundamental liability of the defendants to the second plaintiff pursuant to the written loan agreements.

[96] Given all those considerations the only conclusion reasonably open is that the terms of the loan were those set out in Loan Agreement executed on 30 June 1989 and that the defendants remained liable to repay the loans in full. It is not necessary for present purposes to consider further the possible legal ramifications of the collateral agreement of December 1989.

[97] It follows that the finding of the learned trial judge that the operative agreement was an oral one reached between Thornton and Hasell at some time on or about 30 June 1989 cannot stand. The terms of the loan agreement were those set out in the Loan Agreement signed by or on behalf of each defendant on 30 June 1989.

[98] I have already referred to the decision of the learned trial judge of 14 September 2001 with respect to the attempt by counsel for the plaintiffs to tender documents from the Arthur Andersen file pursuant to r 227(2). That ruling is the subject of a ground of appeal. Counsel for the defendants submitted that it was necessary for the plaintiffs to obtain leave to appeal on that ground because it was out of time; he submitted that time commenced to run from the making of the ruling. In *Pioneer Industries Pty Ltd v Baker* [1997] 1 Qd R 515 this court held that on an appeal against a final judgment it was open to the appellant to challenge the correctness of any interlocutory order made as a step in the proceedings leading up to that judgment. The ruling in question here was such an interlocutory order and leave is not required before the ground of appeal can be considered.

[99] As already noted after the ruling some additional documents were tendered, but it precluded the tendering as of right the documents which are conveniently described in the relevant reasons. The plaintiffs contend that the documents, if admitted, would be extremely relevant to the credibility of Thornton and Prendergast, and therefore would have a material bearing on whether or not the conclusion was open that the terms of the loan agreement were to be found in an oral agreement entered into between Thornton and Hasell, that is the loans were of limited recourse. Though I have come to the conclusion that on the existing evidence the finding that

there was such an oral agreement cannot be upheld, it is nevertheless desirable that a decision be made on the ground of appeal relating to the admissibility of the documents in question.

[100] Rule 227(2) of the UCPR is in the following terms:

> "A document disclosed under this division that is tendered at the trial is admissible in evidence against the disclosing party as relevant and as being what it purports to be."

[101] That is an adaptation of a rule found in the disclosure rules inserted into the Rules of the Supreme Court on 1 May 1994, consequent upon a recommendation from the Litigation Reform Commission. Order 35.18 was in terms:

> "If a document disclosed under this Order is tendered at the trial, it is admissible in evidence against the disclosing party as relevant and as being what it purports to be."

[102] It is only the introductory words which are changed, but it would appear that in either form the rule has the same effect. Put in simple terms, the submission of counsel for the plaintiffs is that a document disclosed pursuant to the rules may be tendered as evidence against the party making disclosure without the need to otherwise establish its admissibility. The submission from the other side is that the document in question must be shown to be admissible before it can be tendered; once its admissibility is established then it goes into evidence "as being what it purports to be". The rule does away with the necessity for further proof of authenticity as a pre-requisite to admission.

[103] For present purposes it is sufficient to have regard to one of the documents which counsel for the plaintiffs sought to tender and which the learned trial judge ruled was inadmissible unless supported by other evidence. There was a meeting between Prendergast and officers of the ATO at which an accountant from Arthur Andersen was present. That accountant made notes of what was said during that meeting and that document was kept in the Arthur Andersen file. It was disclosed consequent upon the orders for further discovery and inspection made in the course of the trial. There was no suggestion the maker of the document was not available to give evidence. Counsel for the plaintiffs sought to tender the document as evidence of admissions by Prendergast. The document was clearly hearsay and there was nothing in the *Evidence Act* 1977 which afforded a basis for admissibility. The contention was that r 227(2) effectively altered the law of evidence so that the document was admissible. The learned trial judge refused to hold that the rule in question had effected such a substantial change to the law of evidence.

[104] Since *Wilson v Thornbury* [1875] LR 10 Ch App 239 it has generally been recognised that (absent any special rule) disclosure in an affidavit of documents only admits that the pieces of paper are in the possession of the party, it does not amount to an admission of the genuineness of the document. That is overcome by the rule in question saying that the document, if admitted, is evidence "as being what it purports to be". Further, r 211 requires a party to disclose documents "directly relevant" to an allegation in issue; it says nothing about admissibility. In order to get a document into evidence it may in many instances be necessary to call a particular witness; the rule in question does not obviate the necessity of so doing.

[105] Some simple examples demonstrate the correctness and reasonableness of the ruling made by the learned trial judge. Suppose a traffic accident is witnessed by a bystander who then hands to the driver of one of the vehicles a document saying:

> "I saw you go through the red light. Bill Jones".

If the driver to whom that note was given kept it in his file on the accident it would be a document relevant to an issue in subsequent proceedings relating to the accident. It would therefore be discoverable, but, if Bill Jones could not be located to give evidence, the other driver could not tender the document as of right pursuant to s 227 against the driver making disclosure of it as evidence tending to establish who went through the red light. It would be clear hearsay and inadmissible. (If Jones could not be found the document may be admissible pursuant to s 92(2) of the *Evidence Act* 1977, but that is a different issue.)

[106] The decision of the learned trial judge in this case was followed and applied by Muir J in *Tyler v Custom Credit Corporation Ltd (in liq)* [2001] QSC 495. There counsel for the plaintiff sought to tender a real property valuation disclosed by the defendant pursuant to the *Uniform Civil Procedure Rules* but where the author was not being called as a witness. Muir J held that r 227(2) did not operate to make the document admissible against the disclosing party on the issue of the valuation of the land. The decision is obviously correct. A bank or finance house may well have on a particular file numerous documents containing a statement as to the value of some property, sometimes without any indication whether the maker of the statement was qualified as a valuer. Such documents may well be regarded as relevant and therefore documents which had to be disclosed, but they would not be admissible on the issue of the value of the property without calling the maker and establishing qualifications as an expert.

[107] In the present case, as already noted, Prendergast was available to be further cross-examined on 14 September 2001 but counsel for the plaintiffs elected not to proceed in that way. The learned trial judge had ordered that the trial be re-opened and in consequence the plaintiffs had the opportunity of calling such further oral evidence as may have been required in order to establish the admissibility of the documents in question. They chose not to proceed in that way.

[108] It follows that there was no improper refusal on the part of the learned trial judge to admit evidence and the ground of appeal in question is not made out.

[109] I turn now to the second major issue in the appeal, namely the question whether the second plaintiff performed its obligations pursuant to each of the loan agreements. It is convenient to set out at this stage the findings of the learned trial judge in that regard:

> "On 26 July 1991 Messrs Phillip Hennessy and Michael Dwyer … were appointed receivers and managers of the second plaintiff by the first plaintiff. On or about 10 February 2000, parts of the report of the first plaintiff dated 23 November 1992 concerning the second plaintiff by Messrs Hennesy & Dwyer were produced to the solicitors for the defendants. … I accept the report as accurate. … The second plaintiff, it was reported, "superficially appears to be a finance company in the usual sense i.e. obtaining deposit funds at interest from third parties which allow it to provide finance at a margin over and above the deposit rate to unassociated entities under

> varying terms with different levels of security". But, the receivers and managers continued, "we say superficially because Rural does not actually "loan money" in other than a theoretical sense". There follows a description of the pattern of the "loans" made by the second plaintiff, which involved a "round robin of transactions", and "little or no actual cash was ever held by Rural". The second plaintiff "had no staff, no office equipment or other physical assets. Its only assets were cash at bank and loans to investors in projects connected with the JFM Group. …
>
> On 30 June 1989 the second plaintiff had no funds – by way of overdraft or otherwise – on which to draw to make the loans it had agreed to make to the defendants. On that day book entries were made to create an "audit trail". … The audit trail was created at the offices of the Westpac Bank … Debit notes to the second plaintiff's account at that bank showed sums of $7,910,084 and $3,634,316 leaving the second plaintiff's account, and credit notes to the Eagle Star Trustees account showed those sums moving into its account …. By cheques drawn on Eagle Star Trustees account those sums then appeared to pass to the Forestell Securities (Australia) Account, and from there to Johnson Farm Management and Farmer Jones Aquaculture and then back to the second plaintiff by way of "deposit" of the non-existent funds. … Forestell Securities (Australia) had no funds from which to meet the cheques it used to pay Johnson Farm Management and Farmer Jones Aquaculture, apart from those notionally deposited to its credit by Eagle Star Trustees.
>
> Each loan agreement required, counsel for the defendant submitted, "a real loan of real monies", and did not contemplate transactions of the kind shown by the audit trail, each of which was "a complete artifice or facade" and a "charade". I accept those submissions as correct.
>
> … Whatever it was the second plaintiff provided to the defendants on 30 June 1989 it was not money.
> . . .
>
> In accordance with the loan agreements . . . the second plaintiff's obligation to each defendant was to pay real money as application moneys for units in a Red Claw partnership. It did not. Therefore it did not lend the promised money."

[110] It is sufficient to say that those findings of fact were amply supported by the evidence; it is only necessary to add that exhibits 34, 35, 36, 37, 38, 39 and 40, together with the evidence of Coulthard and Pitrzykowski provide the basis for the findings made.

[111] It is the contention of the defendants that the terms of the Loan Agreement executed by each of them required the second plaintiff to advance real money by way of loan and apply that money for the acquisition of units in the venture. Clause 9 of the Loan Agreement included a direction from the defendants that the second plaintiff should apply the loan monies in "payment of the Application Moneys" for units in

the venture pursuant to the defendants' obligations under the Deed governing the venture. In other words real money was to be borrowed and advanced to Johnson Farm Management Pty Ltd and Farmer Johnson Aquaculture Limited to enable those companies to conduct the venture and generate profits for the defendants. There are a number of considerations which clearly establish that it was fundamental to the performance of the various agreements associated with the venture that real money flow from the defendants to those entities responsible for conducting the enterprise. Those considerations include:

(i) The defendants were induced to become involved in the venture because of representations made by or on behalf of the second plaintiff and its associated companies that the enterprise would generate profits for the benefit of investors. It was clear from a reading of the Prospectus and other associated documents, that capital funds were required to make the venture operational as a prerequisite to profits being generated. The only source of capital funds was the money paid for the acquisition of units in the venture. Without the injection of sufficient capital funds the venture would not be a success and investors would lose what they had put in. In those circumstances it was obvious to the defendants, and all reasonable prospective investors, that real money had to be injected into the project through the acquisition of units therein;

(ii) The prospectus provided that the "subscription money for one unit in a limited partnership is $868.00". That suggested that nothing other than real money could be used to acquire a unit in the venture;

(iii) The prospectus also stated under the heading "Minimum Subscription" that: "All monies subscribed by applicants will be refunded if the minimum subscription of 4,000 partnership units is not received within four months of the date of this Prospectus. No allotment of partnership units will be made pursuant to this Prospectus until the whole of the minimum subscription is received in cash." It then went on to state that payment accompanying an application for units was to be by cheque in Australian dollars payable to Eagle Star Trustees Ltd. All of that, but particularly the use of the expression "received in cash", indicated that only real money would suffice as payment for units;

(iv) The Deed restated all those provisions of the Prospectus. It referred, for example, to the requirement that "payment" for units be by "cheque made payable to the Representative" and to the fact the Representative had to hold such funds in trust until a minimum subscription was received;

(v) The report from Ernst & Whinney in the Prospectus referred to the fact that it was necessary that the partnership be carried out on a commercial basis for taxation benefits to accrue. That was an indication that the investment had to be genuine, and that the venture had to have sufficient capital to operate reasonably on a commercial basis;

(vi) The document headed "Precisely What is the Best Farming Investment This Year?" contained by way of illustration of return of profit a calculation based upon an investor having "an initial cash outlay of $781.00". Again that was an indication that investment had to be by cash – real money.

[112] The plaintiffs did not dispute the detail of the transactions which they contended constituted a valid enforceable loan by the second plaintiff to the defendants. Counsel for the plaintiffs referred in particular to the various sub-clauses contained in Section 5 of the Deed; therein there was a reference to the application funds being "paid or to be paid" by each applicant who is a partner. It was submitted that such provisions indicated that a promise to pay was a sufficient discharge of the investor's obligations to pay for the acquisition of units. Having regard to all of the provisions of the documents relevant to the venture that argument must be rejected. In *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 the High Court at 429 recognised that a "court may admit evidence of surrounding circumstances in the form of 'mutually known facts' 'to identify the meaning of a descriptive term' and it may admit evidence of the 'genesis' and objectively the 'aim' of a transaction to show that the attribution of a strict legal meaning would 'make the transaction futile'." Applying that principle to this case, one is entitled to have regard both to the nature of the investment, and the mutual understanding that the capital necessary to make the venture profitable would come from money provided by investors, in construing the terms of the Loan Agreement and determining the obligations of the Lender thereunder and what constituted "payment" for units. Looked at in that light, when the Loan Agreement states that "the Borrower has agreed to borrow from the Lender the principal sum as specified in this Agreement for the purpose of allowing the Borrower to acquire the said units" and that "Subject to the acceptance of the Application of the Borrower pursuant to the provisions of the Deed, the Lender hereby agrees to lend to the Borrower the Principal Sum" it must be taken as meaning that real money would find its way pursuant to Clause 9 of the Loan Agreement into the venture by way of capital. So far as the defendants were concerned there was no money "to be paid" at some time in the future on their behalf for the acquisition of units; on entering into the Loan Agreement their obligation to pay for the units was satisfied by the second plaintiff paying the loan funds into the venture. If the second plaintiff did not provide the venture with that money then (subject to the argument on ratification to be dealt with later) no loan moneys had been advanced which the second plaintiff could seek to recover from the defendants.

[113] It is true that, consequent upon what happened, the second plaintiff showed the loan accounts in its books as an asset, and it may be that at all times the second plaintiff had a belief that it could sell those assets (choses in action) and thereby generate funds for use in the venture. But there is no evidence to suggest that any of the defendants had any knowledge of that as at 30 June 1989. The learned trial judge found that "it was not until long after 1991 that the defendants became aware of the fact that the second plaintiff had no real money to lend on 30 June 1989". The evidence will be examined later; for present purposes it is sufficient to say that finding cannot be challenged.

[114] There is remarkable similarity, in quite a number of ways, between the facts of this case and those considered by the court in *Australian Horticultural Finance Pty Ltd v Jekos Holdings Pty Ltd*. That matter was determined at first instance by Dowsett J

(Supreme Court of Queensland Nos 612-622 of 1992, judgment 17 May 1996) and his decision was upheld on appeal by McPherson JA, Thomas and de Jersey JJ (CA Nos 4078-4717 of 1996, judgment 9 December 1997). That case involved what was known as the Okari venture. The scheme was almost identical to that in issue here, save that the development was of a macadamia and herb farm and not farming crayfish. Interestingly Hasell was a marketer of that scheme, and the investors, who were plaintiffs in the actions, were companies in the GWA group.

[115] In that case the documentation provided that investors could borrow funds from a particular financier to enable them to acquire interests in the venture. Again the capital necessary to make the venture viable was to come from the acquisition of those interests. In that case the financier had no funds and the loans were "done by an exchange of cheque transactions". Dowsett J held that in the circumstances there was no payment of the principal sums such as to give the financier the right to recover the principal amounts referred to in the loan agreements. The following extract indicates his Honour's reasoning:

> "Each plaintiff claims to recover from the defendant the amount paid by way of pre-payment of interest either because there was never any agreement for loan concluded between the parties in question or if there was, because the defendant did not advance any moneys pursuant to it. The defendant asserts that there were such agreements, that the relevant 'round-robin' transactions discharged its obligations thereunder and that it is therefore entitled to retain the pre-paid interest and counter-claim for the outstanding principal and interest. . . . Much of this case depends upon the significance of the defendant's participation in the 'round-robin' transactions. If there was an agreement between each of the plaintiffs and the defendant, it obliged the defendant to lend to the plaintiff in question the sum specified in the Deed of Loan signed by the plaintiff, by paying that sum to the Representative. The defendant claims that it discharged these obligations by engaging in the 'round-robin' transactions, but I do not agree. There is no sensible way in which it can be said that the 'round-robin' transactions amounted to payment of the principal sum to the Representatives. . . . In those circumstances, if there were enforceable agreements for loan, whether pursuant to the Deeds of Loan or otherwise, the defendant failed to advance the funds as required by those agreements. The plaintiffs were therefore entitled to terminate the agreements as they have done."

[116] On appeal, McPherson JA, with whom the other members of the court agreed, relevantly said:

> "The critical question on these appeals, which is whether the loans were in fact made at all, turns on the effect of a series of acts or steps some of which were taken on 29 June and others on 4 July 1990. . . . what is described as a 'round-robin' of cheques was arranged. . . . In this way the amounts supposedly credited by depositing the cheques delivered in each instance were returned to the source from which they had originally come . . .. It was by this means that the defendant claimed to have lent to the plaintiffs the principal sums. . . . In the end, however, the question is whether the defendant as Lender did, . . . 'lend' the Principal Sums to each investor or

> Borrower and 'pay' those sums to Permanent Trustee Australia as Representative in terms of . . . those Deeds. Unless there was in fact a payment to the Representative, there was no loan capable of satisfying clause 13 of the Deed.
>
> The Deed of Loan does not define the term 'lend', and it must therefore receive its ordinary meaning considered in the context of the transaction it was designed to serve. A distinction exists between an agreement to lend, such as that comprised in the Deed of Loan in this case, and the actual lending that constitutes performance of such an agreement which is what the defendant asserts is the effect of the 'round-robin' of cheques delivered, credited and debited on 29 June and 4 July 1990. There are surprisingly few judicial statements as to the meaning of the word 'lend'; but it may be noticed that in *Kinney v Hynds* (1897) 49 P 403, 404 (Wyo), it was said that:
>
> > 'Money lent is an expression which is popularly quite well understood, and it has no different legal or technical definition. It means the delivery of money to another, to be returned or repaid.'
>
> That accords with the meaning given to the expression by CL Pannam, The Law of Money Lenders in Australia, at 6, which is 'a payment of money to or for someone on the condition that it will be repaid'."

[117] In consequence the decision of Dowsett J was upheld; no moneys were in fact lent and in consequence the purported lender was not legally entitled to recover the amount of the alleged loan. I adopt all that was said by McPherson JA as to the meaning of "lend" in this context.

[118] *Jekos* was similar to the present case in that the investors appreciated that to be successful the venture required capital derived from the acquisition of interests in it. The obligation of the lender in *Jekos* to pay funds to the Representative was similar to the second plaintiff's obligation under cl 9 of the Loan Agreement here. In those circumstances, particularly when the relevant documentation referred to "cash", it could not be said that all the parties to the transaction acquiesced in the "round-robin" transaction and agreed it should have legal effect according to its tenor. That is what distinguishes the decision in *Commissioner of Taxation v Lau* (1984) 54 ALR 167 at first instance and (1984) 6 FCR 902 on appeal. That is also the basis upon which McPherson JA distinguished *Lau* in *Jekos*. The circumstances considered in *Mamm v Barclays Bank International* (1977) QB 790 were very different to the facts here.

[119] It follows, subject to the plaintiffs' argument on affirmation or ratification, that as the plaintiffs have not performed their obligation to lend money they have no legal entitlement to sue for and recover the principal sum referred to in each Loan Agreement.

[120] That leaves for consideration the issue whether the defendants affirmed the loan agreements after becoming aware of the true position so that they became liable to

repay principal and interest in accordance with the terms of those loan agreements. The learned trial judge concluded that the evidence did not establish any "agreement, affirmation, acquiescence, or waiver upon which the plaintiffs can rely." That conclusion is challenged by the plaintiffs on this appeal.

[121] It is clear that on 7 January 1991 the first and second plaintiffs entered into an agreement recorded in a deed which provided that all of the second plaintiff's right, title and interest in the loan agreements with the defendants was assigned to the first plaintiff. (The assignment also involved loan agreements with investors other than the defendants). The "initial consideration" paid for the assignment of each of the loan agreements with a defendant was $1. The agreement went on to provide that if the borrowers acknowledged to the assignee (first plaintiff) indebtedness under the loan agreements and made repayments pursuant thereto the second plaintiff, as assignor, was entitled to additional consideration calculated in accordance with a formula contained in the deed of assignment; it is not necessary to set out that detail here. (The relevant deed was an exhibit at trial).

[122] I have already referred to the fact that under cover of letters dated 27 March 1991 each defendant received a Notice of Assignment from the second plaintiff to the first plaintiff. Those notices directed the defendants to "make all payments of moneys due under the loan agreement" to the first plaintiff. The letter in response from the defendants' then solicitors, Morris Fletcher and Cross has also been referred to above.

[123] By May 1991 it was obvious to those responsible for the management of the Red Claw project that insufficient funds were available to make the project viable. The next significant event for present purposes is a telephone conference which took place on 15 May 1991. Thornton, Prendergast and Schroder were present at one end together with their solicitor from Morris Fletcher and Cross, WD Thompson. At the other end of the line were Tony Johnson and Hesketh; the latter representing the first plaintiff. Thompson made notes of that conversation and was called by the plaintiffs to give evidence with respect to what was said. He said in evidence the notes were made during the conference and the typescript thereof was made later that day. The document was admitted pursuant to s 92 of the *Evidence Act*. Thompson gave no oral evidence expanding on or explaining in any way the contents of the document. The learned trial judge quoted some passages from the document in his reasons; the following extracts from the document are relevant for present purposes.

[124] Hesketh opened by saying "Red Claw is cash poor and only has funds for two weeks". There is then a note that "Equus is trying to upgrade 79 accounts worth $5.9M. Purchased for $1 each." Hesketh wanted to keep the project alive but needed "$800K to complete construction of 138 ponds". Johnson is recorded as saying: "$5.8M in loans outstanding part of which carries guarantees. In budget the deficit needed to build 24 more ponds out of 47 required and bring new ponds and existing into profit you think is $1.5M to 30/6/92." Thornton queried the "value of loans". Hesketh is recorded as replying: "$2.5-$2.6 M in addition to the loans subject to the guarantees. Equus will continue to disburse against loans which you upgrade." Johnson is then recorded as providing the following information:

> "Gross subscription $15M.
> Cash investors 2M
> RF Loans 13M

> $7M of loans sold and yielded $6M cash.
> Balance of $8M. (This is $5.8M mentioned above)."

Later Johnson is recorded as providing the following information:

> "Gross subscription was $15M.
> It was paid to partnership.
> $15M comprised $13M which partners individually borrowed + $2M in cash. Partnership received $15M and paid it to JFM as prepayment.
>
> JFM put $2M to project and $13M on IBD in RF.
>
> So $13M went around in circle. Intent was to sell off non-guaranteed RF loans."

[125] It seems that Johnson was interested in obtaining further funds from the defendants and there was a discussion about that possibility, but no agreement was reached.

[126] Schroder also made some notes of what was said at that meeting, but he did not record any mention of "money going around in a circle". In oral evidence he could not recollect any such statement being made at that meeting.

[127] In his reasons for judgment the learned trial judge said:

> "Mr Thornton and Mr Prendergast did not recall mention of a round-robin either, so that it could be that that part of Mr Thompson's record is a conclusion he drew rather than a record of a statement made."

However, as pointed out by counsel for the plaintiffs in this court, during cross-examination Thornton said that he trusted Thompson's notes to be "a statement of the truth", though he couldn't recall mention of a round-robin. The learned trial judge then went on to find as follows:

> "In any event, that part of Mr Thompson's record does not justify a conclusion that the defendants then became aware of the artificiality of the transactions of 30 June 1989; the mention of an interest bearing deposit would suggest clearly that real money was involved in the transactions."

Even with the qualification that Thornton trusted the accuracy of Thompson's notes, that finding by the learned trial judge is reasonably supported by the evidence. It must be remembered this was a telephone conference, and no documents were available to those representing the defendants. The matter is not to be judged with hindsight. By the time of trial everyone was aware that the second plaintiff had no funds and nothing more than an "audit trail" was created on 30 June 1989. The statements made in the telephone conversation of 15 May 1991 were equivocal. Assuming it was said that $13M went around in a circle it was also said that there was $13M held on an interest bearing deposit in the second plaintiff. Based on that evidence alone one could not conclude, as contended for by the plaintiffs, that the defendants were made aware from 15 May 1991 that "real

money" had not been put into the project for the acquisition of units therein by them.

[128] The learned trial judge next considered a conversation which took place late in 1991 (after October) between Prendergast and an investment advisor named Humphrys, who was subpoenaed to give evidence on behalf of the plaintiffs. Humphrys himself became an investor in the Red Claw project in June 1989, and was also responsible for a number of his clients becoming investors. He had discussions with Johnson in the early part of 1991 about the viability of the venture because of the shortage of funds. Later in the year Johnson asked him to have some discussions with the defendants to see if more capital could be obtained from that source. In consequence he had a meeting with Prendergast some time after October 1991. Humphrys was very vague as to what was said during that meeting; he could only refer to the general effect of the conversation. Prendergast's recollection of it was also vague. Humphrys said that in the conversation he raised the issue that monies "borrowed from Rural Finance initially had been put together in what was termed then a back to back funding arrangement". According to him that drew the response from Prendergast: "This is very similar to project financing". Those matters were recorded by the learned trial judge in his reasons, but he made no more specific finding with respect to that conversation. However it is significant that a few paragraphs later his Honour found "that it was not until long after 1991 that the defendants became aware of the fact that the second plaintiff had no real money to lend on 30 June 1989". Implicitly therefore his Honour found that the conversation between Humphrys and Prendergast late in 1991 did not make the defendants aware of the fact that the second plaintiff had not performed its obligations under the loan agreement. There is no basis for upsetting that finding.

[129] Then the learned trial judge dealt with the submission by counsel for the plaintiffs that the letter of 27 November 1992 from the defendants' accountants to the Deputy Commissioner of Taxation evidenced knowledge of the second plaintiff's lack of funds on 30 June 1989. That submission was rejected and there is no basis for overturning that conclusion. Again one has to be careful in not reading more into the contents of the letter given that it is now known that the second plaintiff never had funds to lend.

[130] The finding was that it was only in December 1995 when Thornton was being cross-examined at the trial of the Jekos Holdings matter that he first became aware of the "suggestion" that the loans made to the defendants "were not made by the provision of real funds". Again that is a finding which was clearly open on the evidence and the plaintiffs have not advanced any argument warranting its being overturned.

[131] The learned trial judge then rejected the contention of the plaintiffs that the defendants could not rely on the alleged failure of the second plaintiff to provide real money because what was done by the second plaintiff was done with their agreement, affirmation or acquiescence. That submission was rejected primarily because the conduct relied on as amounting to "agreement, affirmation or acquiescence" pre-dated the defendants becoming aware of the true situation.

[132] Though the learned trial judge found that the first "suggestion" to the defendants that the loans were not made by the provision of real funds occurred in December 1995, he went on to find that it was not until shortly before the trial that the "facts became clear". He recorded that "details of what had happened at the Westpac

Bank on 30 June 1989 gradually" became known but it was not until the report of the receivers and managers of the second plaintiff became available on or about 10 February 2000 that the "facts became clear". It is in those circumstances that the defendants contend that they were not aware of the facts entitling them to elect to terminate the Loan Agreements because of the non-performance by the second plaintiff until early 2000, shortly before the trial. All those findings were supported by evidence and there is no basis for this court interfering with them. The submission is that by the amended defence and counter claim delivered 21 January 2000 the defendants accepted the second plaintiff's non-performance as repudiation of the contract.

[133] But even if that were not so the plaintiffs would not be entitled to succeed in recovering principal and interest pursuant to the Loan Agreement. The conduct relied upon by the plaintiffs as evidencing agreement, affirmation, acquiescence or an election to proceed with the loan transaction essentially relates to the defendants' position as holders of units pursuant to the Red Claw Partnership Deed. The case for the plaintiffs is that with knowledge of the round-robin arrangement in June 1989 the defendants asserted rights as unit holders pursuant to that Deed. But that cannot amount to an affirmation of or election to be bound by the terms of a Loan Agreement with another party where that other party failed to meet its obligation of lending money. Even if by their conduct the defendants were no longer entitled to deny they were bound by the rights and obligations attaching to the holder of units pursuant to that Deed, it does not follow that they are not entitled to rely on non-performance by the second plaintiff of its obligations under the Loan Agreements in proceedings where the plaintiffs are seeking to recover principal and interest pursuant to those Loan Agreements. The second plaintiff is not a party to the Red Claw Partnership Deed and it could not rely on the conduct by the defendants relevant only to rights and obligations pursuant to that Deed. Affirmation by the defendants of the Red Claw Partnership Deed could not constitute an election to treat the Loan Agreements as enforceable against them notwithstanding total failure of performance by the other party thereto. The first plaintiff is in no better a position than the second plaintiff.

[134] Further, even if it be that by conduct the defendants affirmed the Loan Agreements with the second plaintiff after knowledge of circumstances entitling them to accept repudiation, that would not convert a non-existent liability (because the lender failed to advance money) into a liability to repay principal and interest. At worst for the defendants their conduct in keeping the contracts for loan alive meant that all parties thereto had their respective rights, obligations and liabilities thereunder. In other words there was a continuing obligation on the second plaintiff to advance real money in accordance with the terms of the Loan Agreements and continued failure to do so kept alive the defendants' right to terminate. A failure to terminate in those circumstances did not mean that the defendants had lost the right to contend that as they had not been lent the money as promised they had no obligation to repay the principal sum. Such a conclusion is supported by statements in *Frost v Knight* (1872) L.R. 7 Ex 111 at 112, *Bowes v Chaleyer* (1923) 32 CLR 159 at 197 and *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444 at 450-1. Further, in my view, there is nothing in *Sargent v ASL Developments Pty Ltd* (1974) 131 CLR 634 which requires a contrary conclusion.

[135] It follows that even if it was found that as early as 1991 the defendants had knowledge of the round-robin transaction on 30 June 1989 (that is, the failure of the

second plaintiff to advance real money) the plaintiffs would not be entitled to succeed in the action. Monies pursuant to the Loan Agreements still have not been advanced and the defendants have put an end to the Loan Agreements if only by seeking the relief sought in the counterclaim in these proceedings.

[136] Therefore the learned trial judge was correct in concluding that the plaintiffs' claims must fail because there was no money lent to the defendants and no agreement, affirmation, acquiescence, or waiver upon which the plaintiffs could rely to establish liability in the defendants in those circumstances.

[137] The appeals should be dismissed with costs.

[138] **MACKENZIE J:** The issues in the appeal are comprehensively examined in the reasons for judgment of Williams JA. I agree with his conclusion that the accumulation of facts itemised by him provides a compelling reason for finding that the learned trial judge's findings that there was an oral agreement entered into concerning the true nature of the loans cannot stand.

[139] Williams JA also itemises a number of reasons why the "round robin" transactions which created an "audit trail" but provided no actual money did not constitute due performance of the agreements. The reasoning in *Australian Horticultural Finance Pty Ltd v Jekos Holdings Pty Ltd* (SC No 612 of 1992 and SC No 622 of 1992, Dowsett J, unreported, 17 May 1996; and CA No 4078 of 1996 and CA No 4717 of 1996, unreported, 9 December 1997) at first instance and on appeal supports this conclusion. I agree with his analysis and conclusions on this aspect of the matter.

[140] The remaining core issue is that of affirmation. Like Chesterman J, I have some reservations about the finding of fact about the earliest time at which the defendants became aware of the fact that no actual money was involved in the transactions on 30 June 1989. In respect of the earliest occasion, the contemporaneous note by Mr Thompson, the solicitor, appears to be part of an attempt to record or at least summarise what was said during a telephone meeting on 15 May 1991. Beyond that, it is in the realms of speculation whether it is a statement of a conclusion drawn by him as to the nature of the transactions or something actually said, in the absence of direct evidence from him on the issue. The fact that Thornton and Prendergast could not recall a "round robin" being mentioned during the meeting is evidentially neutral.

[141] The fact that someone confesses to a defective memory can cover a range of possibilities. On the assumption that the solicitor's note is accurate, which is not challenged, and even if it is a comment rather than a record of what was said, it is not easy to contemplate as a significant possibility that the issue was not discussed with the clients, who were astute businessmen. On the other hand, the note also records that, in some respects, the conversation was capable of implying that actual money was involved.

[142] It is not necessary to finally resolve the question whether it was open to the learned trial judge to find as he did, in respect of this occasion or the later occasions discussed by Williams JA and Chesterman J since, for the reasons given by Williams JA, I agree that the failure to carry out the terms of the agreements by actually advancing money is fatal to the defendant's case on this issue.

[143] The reasons of Williams JA also demonstrate that the kinds of concerns that may arise in cases where there has been a long delay in delivering judgment do not arise in this case. I agree with his conclusion in that regard.

[144] With regard to the interpretation of r 227(2) *UCPR*, in my view, the natural reading of the rule is that it precludes a disclosing party from challenging admissibility on the grounds of relevance and relieves the party tendering the document of the need to prove that the document is what it purports to be. It does not purport to vary in other respects the rules of evidence or statutory bases of admissibility to allow a party to have a document the contents of which are liable to be objected to successfully on other recognised grounds admitted in evidence.

[145] I agree that the appeals should be dismissed with costs to be assessed.

[146] **CHESTERMAN J**: I agree with Williams JA that these appeals should be dismissed. With one reservation I agree with his Honour's reasons for proposing that order.

[147] The trial judge rejected the appellants' submissions that the respondents (and, in particular, Mr Thornton) knew that no money had been advanced by Rural Finance Pty Limited ("Rural Finance") to provide the purchase monies for the respondents' units in the limited partnership and to provide the partnership with the capital necessary for the success of its venture and that, despite that knowledge, they affirmed the loan agreement with Rural Finance. I agree with Williams JA that the appellants' submissions that the respondents affirmed their loan agreements with the result that they should be liable to repay the money which was never, in fact, lent, should be rejected. I am not, however, as confident as his Honour that the findings of the trial judge as to the respondents' knowledge that money was not advanced can escape criticism.

[148] The trial judge found that "It was not until long after 1991 that the [respondents] became aware of the fact that the second [appellant] had no real money to lend on 30 June 1989", and that "None of the [respondents] had any knowledge of what was done at the Westpac Bank on 30 June 1989 at any material time …".

[149] The appellants mounted a spirited attack on this finding. The criticism appears to have substance.

[150] The terms of exhibit 49 and the circumstances surrounding it are set out in the reasons for judgment of Williams JA. The exhibit appears to be cogent evidence of the fact that during the telephone conference Mr Johnson said, as Mr Thompson recorded:

> "$15M comprised $13M which partners individually borrowed plus $2M in cash. Partnership received $15M and paid it to JFM as prepayment. JFM put $2M to project and $13M on IBD in RF. So $13M went around in circle. The intent was to sell off non-guaranteed RF loans."

Mr Thompson testified that the exhibit was a typed copy of handwritten notes he made during the conference. He was not cross-examined. The format of the document attributes the words I have quoted to Mr Johnson. They do not appear to be a narrator's comment.

[151] The trial judge was reluctant to accept the accuracy of the contemporaneous note because neither Thornton nor Prendergast said they could recall a "round robin" being mentioned, or the fact that the money advanced by Rural Finance was returned to it by way of investment and so "went round in a circle". I myself would doubt that the absence of such a recollection many years later should cast doubt upon a contemporaneous record of a conversation the veracity of which was not challenged.

[152] The appellants point out that Mr Thornton and Mr Prendergast were shown to have been erroneous in their testimony that they did not discover the ephemeral nature of the advance made by Rural Finance until late in 1999. Their solicitor, Mr Marshall, admitted in cross-examination that he became aware in 1996 following discovery of documents in the litigation, that the advance purportedly made by Rural Finance on 30 June 1989 consisted of "a round robin cheque transaction". It was, he considered, most unlikely that he would not have passed on that information to Mr Thornton. Confirming his evidence is a letter (exhibit 147) written by Mr Marshall on 20 August 1996 to the solicitors for the appellants advising them that he had recently learnt that "no monies were ever advanced by Rural Finance as the loans were effected by round robin style transactions …".

[153] Knowledge gained by the respondents in 1996 of the true nature of the advance made by Rural Finance in June 1989, cannot be relevant to whether the respondents affirmed the loan agreement in 1991, 1992 or 1993, but it does provide a basis for hesitating to accept Mr Thornton's evidence that he knew nothing of the round robin until 1999.

[154] The appellants rely also upon exhibit 53, a letter dated 29 May 1991 from "Farmer Johnson" to Mr Hasell on behalf of the respondents. The letter read:

> "1. … We are responsible to both construct and to maintain the project.
>
> 2. Funds were received … to carry out the … work. We … lodged substantial funds on an interest bearing deposit … with Rural Finance … with the intent to draw down as … works progressed.
>
> …
>
> 4. Rural Finance … agreed to progressively sell its loan receivables portfolio to fund progressive return over interest bearing deposit as and when we required funds … Rural Finance has been selling its receivables for the past year to the extent of approximately six million dollars.
>
> …
>
> 6. Rural Finance's remaining loan portfolio … consists of approximately a further six million dollars in outstanding loan principal, of which most is due to be repaid by borrowers in the period June 1992 to June 1994.
>
> …
>
> 10. In January 1991 … Rural Finance … assigned all its subject remaining six million dollar portfolio (being 79 separate loan contracts) to Equus Financial Services Limited for $79 (being $1 per loan contract) …"

[155] This letter, and its significance, were not mentioned by the trial judge in his reasons. It appears to be important. Paragraph 14 of the letter sounded a note of urgency. It said:

> "The basic position with the Red Claw project is that an otherwise sound operation is in imminent danger of collapse because loans made by Rural Finance Pty Ltd to Red Claw investors cannot be converted to cash mainly due to the economic recession in this country today."

[156] The conference recorded in exhibit 49 was convened for the same reason. The project was in immediate danger of foundering from lack of funds. Although there was some coyness in the explanations given by the Messrs Johnson for the partnership's impecuniosity it was made obvious that the great bulk of application monies had not been made available to the partnership and that Rural Finance, which was said to have received the monies by way of deposit, did not, in fact, have any money which it could repay to the partnership. The reference to money "going in a circle" and of Rural Finance raising money by selling its loan portfolio point unequivocally to the sham nature of the loan transaction.

[157] It may be accepted that before a party to a contract can be said to have affirmed it in circumstances where he might have rescinded it, he must have had sufficient knowledge of the facts giving rise to the right to rescind to have exercised a conscious choice about what he should do. See *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 642 and 658. It is not enough that the party be put on notice that there might be a factual basis of rescinding. There must be actual knowledge of the facts.

[158] The evidence suggests that Mr Thornton, a very successful businessman and qualified accountant, did not lack shrewdness or business acumen. If he did not understand from what he was told at the conference and from exhibit 53 why the project was deprived of capital it is inconceivable that he would not have asked. There are, therefore, substantial grounds for thinking that in May 1991 he was made aware that no money had changed hands between Rural Finance and the partnership and that was why it stood on the brink of collapse. It is not necessary to decide whether the contrary findings of fact made by the trial judge should be varied. Whether or not the respondents knew in May 1991 that no funds had been advanced by Rural Finance two years earlier the conduct relied upon as constituting affirmation of their loan agreements is not sufficient for the purpose of making them liable to repay a non-existent debt.

[159] The acts which are said to constitute affirmation were summarised by the trial judge in para 45 of his Honour's reasons. They were that:

(a) On 24 September 1991 the respondents recommitted themselves to an action that they had commenced in the Supreme Court in the ACT seeking declarations that they had performed their obligations under the loan agreements by repaying part of the money Rural Finance had agreed to lend. The point is that the respondents were confirming the validity of the loan agreements whilst stating that they had no outstanding obligations under them.

(b) In December 1991, February 1992 and September 1992 the respondents attended partners' meetings and voted as holders of units represented by the full amount of the applications monies though that

part of the money which was to be provided by Rural Finance had not been paid.

(c) The respondents claimed deductions in their tax returns for the years 1991, 1992 and 1993 on the basis that they had incurred liabilities to the full extent of the amounts which Rural Finance had respectively agreed to lend to them.

(d) For the same years two of the respondents, Glengallen Investments Pty Ltd and HGT Investments Pty Ltd, recorded as liabilities the full amount of the loans which were to have been made to them or on their behalf by Rural Finance.

[160] A further incident of affirmation was alleged to have arisen from a memorandum (exhibit 80, 25 May 1991) which was said to evidence the respondents negotiating "on the basis that the loans were on foot". I think it safe to ignore this particular because the memorandum does not appear capable of amounting with sufficient clarity to an act of affirmation.

[161] The loan agreements, pursuant to which the respondents were sued, were each made between Rural Finance and the respondents. The agreements recited that the respondents had applied for a certain number of units in a limited partnership and that Rural Finance had agreed to lend the principal sums specified for the purpose of allowing the respondents to acquire the units. By clause 8 Rural Finance agreed to lend to each respondent the principal sum which, by clause 9, was to be applied in payment of the application monies and otherwise in accordance with the respondents' obligations under the partnership deed (as particularly defined).

[162] The partnership deed was made between Forestell Securities (Australia) Limited, Eagle Star Trustees Limited, the respondents (*inter alia*), Australian Eagle Insurance Company Limited, Eagle Star Insurance Company Limited and Eagle Star Holdings PLC. Rural Finance was not a party. The deed defined "application monies" to mean all money paid by the respondents (*inter alia*) for units. By clause 3.3 every person who wished to apply for a unit in the limited partnership had to complete and deliver to the general partner an application for units and a cheque made payable to the representative in payment of the price for each unit applied for. When the minimum subscription for units had been met, and the safeguards provided for in the deed had been satisfied, the representative was to pay the application monies to the general partner for the purposes of the partnership and any subscribers/applicants would be issued with the number of units commensurate with the amounts they had paid.

[163] The respondents were issued with the number of units referrable to the amounts actually paid by them together with the amounts each had agreed to borrow from Rural Finance.

[164] The acts said to constitute affirmation were the exercise of rights by the respondents consistent only with their being owners of that number of units rather than the smaller number of units which had been paid for from their own monies. The respondents voted at partnership meetings the full value of their issued units; they claimed tax deductions in respect of that interest in the partnership and their liability to repay Rural Finance.

[165] The first described act of affirmation is not of this character. It should be discussed separately. The conduct of the litigation against Rural Finance was not, however, an affirmation that the loan agreements remained on foot. It is true that the respondents did not seek to rescind the agreements but their proceedings were the antithesis of an affirmation that the respondents owed money under the agreements. They sought a declaration that the agreements were at an end, because they had been discharged by performance. They were wrong in their contentions but they were not claiming that the agreements remained effective.

[166] There are, I think, fundamental difficulties in accepting the submission that the respondents have by their conduct summarised in para 19 affirmed the loan agreements. In this sense the affirmation alleged is an election to keep the loan agreements on foot rather than to rescind them for Rural Finance's failure to perform its obligation to lend the money. As Cockburn CJ said:

> "But in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract … but also to take advantage of any supervening circumstance which would justify him in declining to complete it."

Frost v Knight (1872) LR 7 Ex 111 at 112 quoted with approval by Starke J in *Bowes v Chaleyer* (1923) 32 CLR 159 at 197. To the same effect is the judgment of Barwick CJ in *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444 at 450-1.

[167] As Williams JA has explained the loan agreements obliged Rural Finance to make an advance of money to the representative to purchase units in the partnership. Rural Finance did not perform, no doubt giving rise to a right in the respondents to rescind the agreement. If they affirmed the agreements they kept them in existence so that each party was obliged to perform their terms. The respondents would be obliged to repay the monies advanced on their behalf, but only after they had, in fact, been advanced.

[168] The artificiality which would result from this analysis shows, I think, that affirmation (or election) as a principle cannot apply in these circumstances. According to *Williston on Contracts*, 3rd Edition, Vol 5, para 687:

> "The commonest case of election in the law of contracts arises where, with knowledge of a breach of condition or a defence excusing performance, a promisor either refuses or continues to accept performance from the other party. As the only theory upon which the benefit of such performance can be rightfully received is on the assumption of an election to continue the contract, that assumption is made if the injured party accepts further performance."

This exposition of the principle shows that affirmation does not apply to this case. The respondents did not accept further performance by Rural Finance of its obligations under the agreements. The whole point is that Rural Finance did not perform the agreements at all.

[169] According to Stephen J in *Sargent* at 641:

> "The doctrine only applies if the rights are inconsistent the one with the other and it is this concurrent existence of inconsistent sets of right which explains the doctrine; because they are inconsistent neither one may be enjoyed without the extinction of the other and that extinction confers upon the elector the benefit of enjoying the other, a benefit denied to him so long as both remained in existence."

[170] It is true that the respondents only had rights with respect to, or arising out, of the numbers of units in the partnership they claimed if a larger amount had been paid as application monies for them than they themselves had paid. But the disconformity between the number of units in respect of which the respondents exercised rights, and the number of units for which they paid, does not amount to an inconsistency of rights in the sense that must be established for the doctrine of election to operate. The rights exercised in respect of the units were exercised against the members of the limited partnership. Rural Finance was not a party to the partnership deed. The exercise of rights against the partners was not inconsistent with the assertion of a right against a non-partner arising out of a different agreement. The respondents did not have the right to choose between owning so many units or being lent so much money. If the money were not paid on their behalf they did not own the units. This is so whether or not the respondents chose to affirm or rescind the loan agreements for Rural Finance's failure of performance. If they had affirmed the agreement they would still not have owned the units until they were paid for. The respondents were not asserting rights to the units and rights to something inconsistent with their ownership of the units. They were asserting rights which they did not have because of the non-payment of most of the application monies. This case is quite different to that of an innocent party to a contract who does have the right to bring it to an end or to insist that the other party perform.

[171] Moreover the doctrine of election operates in a contractual framework. It determines which set of rights should apply in a given situation. The content of the rights is fixed by reference to the terms of the agreement made by the parties. The result of an election to affirm a contract is not to impose upon the party a greater burden than the contract imposed. The loan agreements did not oblige the respondents to pay the principal sums borrowed before the advances had been made. Affirmation cannot operate to create a debt when no money has been paid in the first place.

> "The common law … never did conceive of indebtedness in a sum certain for an executed consideration as a mere breach of contract: it is rather the detention of a sum of money …"

Per Dixon CJ, McTiernan and Taylor JJ in *Young v Queensland Trustees Ltd* (1956) 99 CLR 560 at 567.

[172] As I have said, I agree that the appeals should be dismissed with costs.