

TO THE INVESTOR AS ADDRESSED

1 February 2012

**EQUITITRUST INCOME FUND ARSN 089 079 854 (“EIF”)  
(RECEIVER APPOINTED) (“The Fund”)**

## **1. Introduction/Court Order**

As you will be aware from previous correspondence and Equititrust Ltd’s website, I was appointed as interim Receiver on 21 November 2011 and on 23 November 2011 as Receiver of the Fund assets and the person responsible for ensuring the winding up of the Fund in accordance with the terms of its constitution.

I attach a copy of the judgement in this respect which includes the two court orders setting out the terms of the appointments.

In summary, the Court has ordered that the Fund be wound up in accordance with its constitution. The constitution provides that the procedure for the winding up of the Fund is that the Manager must convert to money all Assets, deduct all proper costs and then distribute the money to each Member in proportion to the Member’s interests in the Scheme.

The making of the orders followed an application by Equititrust Ltd (the responsible entity of the Fund) to the Supreme Court of Queensland to appoint a temporary replacement responsible entity to the Fund and if this was not approved to appoint a liquidator to wind up the Fund. The application was brought by the then directors of the responsible entity.

The judge refused the application for a temporary replacement responsible entity and ordered the Fund be wound up pursuant to the terms of its constitution as detailed in the attached court orders.

On 21 November 2011 the then directors of the responsible entity resigned during the course of the judge hearing the application. As that left the responsible entity without any directors and as there was a hearing in Sydney that day in relation to a winding up application against Equititrust Ltd with no one available to provide instructions, Mark Mclvor, Stacey Mclvor and Ross Honeyman were appointed as directors. Stacey Mclvor subsequently resigned as a director on 16 December 2011 and, according to forms lodged with the ASIC, David Hickie was appointed on 12 January 2012.

This report summarises the key issues which have arisen since my appointment and the key steps taken by me since my appointment.

## **2. Secured creditors**

There are two secured creditors that have the ability to appoint Receivers over the Fund assets at any time and who continue to reserve their rights in relation to same.

Notwithstanding their ongoing rights in this respect, I have agreed with both banks, subject to certain conditions, to allow ongoing payments in respect of Fund expenses for the purposes of the winding up of the Fund. The first secured creditor has insisted on repayment at the earliest opportunity. Therefore, in order to allow for the orderly winding up of the Fund the bank with second priority has agreed to replace the first ranking secured creditor's bank guarantees totalling approximately \$1.1M. It is hoped that the documentation of this arrangement will occur shortly.

The total debt to the banks, including the bank guarantees, is approximately \$9.5M.

### **3. Staff/Consultants and Services Agreement**

Immediately following my appointment, I reviewed the staffing levels (including consultants) with the CEO of Equititrust Limited and identified that substantial savings could be made in relation to the ongoing costs in this respect.

In the circumstances, I requested the CEO and Mark McIvor prepare a proposal for a planned reduction in staff/consultants and other costs for the purposes of the winding up for my approval.

Prior to my appointment the total expenses for the four months ended 31 October 2011 were \$2.059M in this respect (an average of \$514k per month and over \$6M per annum).

Since my appointment and as a result of the review undertaken the costs were reduced to \$147K per month with further reductions expected as properties are realised and further savings can be identified.

As the staff and consultants were not engaged directly by Equititrust Limited, it was agreed to document the arrangements by way of a services agreement between Equititrust Limited, GCP (HQ) Pty Ltd ("GCP")(the service provider), the Receiver and the previous service provider, ECG Administration Pty Ltd ("ECG").

As, prior to my appointment, there was no written agreement entered into regarding the provision of services, it was agreed to transfer all staff and consultants to GCP (a company setup by the CEO).

The agreement, which was executed on 20 December 2011, also provides that no amendments can be made to the staff/consultants engaged without my approval. Notwithstanding this, Mark McIvor advised the CEO that he had terminated him on 13 January 2012 and without any consultation with me. I am presently considering the position in this respect.

### **4. Draft Audited Accounts for the year ended 30 June 2011**

Excerpts from the Fund's draft audited accounts as at 30 June 2011 follow in Sections 4.1 to 4.3 below. These figures are subject to review and sign-off by the Responsible Entity and auditors and may materially change. The Receiver has not audited or otherwise reviewed the figures for accuracy and does not accept any responsibility for the figures or any reliance placed on the figures.

The adopted value of the assets may materially change and are not fully supported by professional valuations.

#### 4.1 Statement of comprehensive income

	2011 \$	2010 \$
<b>Revenue</b>		
Interest income	30,327,145	36,378,860
<b>Total revenue</b>	<b>30,327,145</b>	<b>36,378,860</b>
<b>Expenses</b>		
Impairment losses - mortgage loans	(167,510,994)	(1,855,596)
Management fees - Responsible Entity	(2,810,045)	(4,460,638)
Scheme expenses reimbursed to Responsible Entity	(6,077,334)	-
Other expenses	(62,948)	-
<b>Total expenses</b>	<b>(176,461,321)</b>	<b>(6,316,234)</b>
<b>Profit/(loss) from operating activities before finance costs</b>	<b>(146,134,176)</b>	<b>30,062,626</b>
<b>Finance costs</b>		
Interest expense	(3,388,056)	(3,094,533)
Distributions to investors	(9,718,837)	(16,436,359)
Return on Responsible Entity's subordinated investment	-	(10,531,734)
<b>Total finance costs</b>	<b>(13,106,893)</b>	<b>(30,062,626)</b>
<b>Decrease in obligations to unit holders</b>	<b>(159,241,069)</b>	<b>-</b>
<b>Represented by:</b>		
Absorption by subordinated unitholders	40,000,000	-
Absorption by ordinary unitholders	119,241,069	-
<b>Net comprehensive income</b>	<b>-</b>	<b>-</b>

I comment on the key issues arising from the above, as follows:

- The impairment losses for the year are \$167M (2010 \$1.8M);

- The management fee of 1.5% of gross assets plus GST is not payable to the Responsible Entity (Equititrust Ltd) when interest distributions are not being paid to investors. I understand payments ceased in February 2011 in this respect. The previous board had agreed to waive the \$2.8M fee for the year ended 30 June 2011 as previously advised to investors however the current board has sought to reinstate this. I have asked Mark McIvor to provide an explanation in this respect however his reply is awaited;
- When the management fee is no longer payable then pursuant to the Fund's constitution, the Responsible Entity is entitled to reimbursement of expenses. Expenses totalled \$6M in the 2011 financial year in this respect compared to the management fee in the 2010 year of \$4.46M;
- Due to the subordinated nature of the Responsible Entity's \$40M investment, the first \$40M of impairment losses was absorbed by the Responsible Entity with the balance of \$119M attributable to ordinary investors.

## 4.2 Statement of Financial Position

	2011 \$	2010 \$
<b>Assets</b>		
Cash and cash equivalents	77,321	19,800,774
Other receivables	144,038	1,668,485
Mortgage loans and accrued interest	106,480,922	259,675,256
<b>Total assets</b>	<b>106,702,281</b>	<b>281,144,515</b>
<b>Liabilities</b>		
Financial liabilities measured at amortised cost:		
Overdraft	233,444	-
Accounts payable	3,850,821	1,417,578
Distributions payable	140,407	1,970,639
Interest bearing liabilities	18,083,722	35,000,000
<b>Total liabilities (excluding net assets attributable to investors)</b>	<b>22,308,394</b>	<b>38,388,217</b>
<b>Net assets attributable to investors - liability</b>	<b>84,393,787</b>	<b>242,756,198</b>
<b>Net assets</b>	<b>100</b>	<b>100</b>
<b>Equity</b>	<b>100</b>	<b>100</b>

I comment on the key issues arising from the above, as follows:

- Mortgage loans and investments were written down to \$106M at the year end with net assets attributable to investors of \$84M (2010 \$242M);
- The secured creditors were reduced from \$35M to \$18M during the year. Since the year end, NAB's facilities have been reduced from \$15M to \$8.4M.

### 4.3 Statement of Cash Flows

	2011	2010
	\$	\$
<b>Cash flows from operating activities</b>		
Interest received - mortgage loans	5,283,080	32,705,888
Interest received - cash and cash equivalents	259,176	457,432
Distributions paid to investors	(11,549,069)	(17,342,774)
Interest paid	(3,388,056)	(3,225,131)
Return on Responsible Entity's subordinated investment	-	(13,244,244)
Management fee	-	(4,070,936)
Scheme expenses	(6,338,459)	-
Net cash flows (used in)/from operating activities	(15,733,328)	(4,719,765)
<b>Cash flows from investing activities</b>		
Advances on existing mortgage loans	(16,054,689)	(44,427,143)
Mortgage loans repaid	27,868,740	89,069,931
Net cash (used in) investing activities	11,814,051	44,642,788
<b>Cash flow from financing activities</b>		
Proceeds from issue of redeemable units - investors	3,034,319	6,914,051
Payments on redemption of redeemable units - investors	(2,155,661)	(10,675,129)
Proceeds from borrowings	2,583,722	-
Repayment of borrowings	(19,500,000)	(29,000,000)
Net cash from financing activities	(16,037,620)	(32,761,078)
Net increase in cash and cash equivalents	(19,956,897)	7,161,945
Cash and cash equivalents at 1 July	19,800,774	12,638,829
<b>Cash and cash equivalents at 30 June</b>	<b>(156,123)</b>	<b>19,800,774</b>

I comment on the key issues arising from the above, as follows:

- Interest received on mortgage loans was \$5M (2010 \$32M) with mortgage loans repaid of \$27.8M (2010 \$89M);
- Borrowings were reduced by a net amount of \$17.5M (2010 \$29M).

#### **4.4 Investors Unit Price of \$0.44 as at 30 June 2011**

As notified by Equititrust Ltd on 22 December 2011, on the recommendation of its auditors KPMG and as adopted by the board, it was agreed to write-down the mortgage loans with the result that the investors' unit price was calculated at \$0.44.

For further details, please visit the company's website [www.equititrust.com.au](http://www.equititrust.com.au).

This does not take into account future operating costs and Receivers fees and therefore the likely final return is likely to be less. An estimated return as at 31 December 2011 is included at Section 6 below.

### **5. Loan Book Realisation Strategy**

In determining the most appropriate realisation strategy for each property asset, there are a number of competing priorities and issues to consider, so as to realise the optimum return to investors, as follows:

- Both secured creditors (loans/bank guarantees totalling \$9.5M) seeking repayment as soon as possible;
- Other loans to the Fund looking for repayment. M M Holdings Pty Ltd ATF The Mclvor Superannuation Fund is currently owed approximately \$2.6M in this respect;
- The unsecured creditors of the Fund which total \$8.8M as at 31 December 2011, including rates and land taxes of \$7.2M. A number of these creditors are pressing for payment. There are competing priorities to ensure the terms of the bank facilities are maintained and to ensure other creditors do not take enforcement action;
- The holding costs of the assets, including rates, land tax, time value of money, ongoing overheads to realise assets. Whilst the costs of managing the Fund have reduced from approximately \$6M per annum to less than \$1.5M (plus Receiver's fees - see section 7 below), they remain sizeable;
- Any opportunities available to add value to the asset, e.g. improving the DA, developing the property, adding to the marketability of the property, resolving outstanding issues that are detrimental to potential purchasers. The ability to spend funds on these issues is currently restricted due to the secured creditors' position and other creditors pressing for payment.

I have reviewed and discussed the realisation strategies with the loan officers, the CEO and Mark Mclvor and have taken into account the issues noted above. The results of this review are that a number of sale campaigns are to commence shortly with the current status of the portfolio, as follows:

- Two contracts of sale have been entered into totalling \$1.15M although both are currently subject to finance;
- Negotiations are taking place in relation to two conditional offers received totalling \$4.725M;
- Steps are being taken to market properties with an estimated selling price of between \$27.8M and \$34.2M;

- There are ongoing sales at an industrial sub division although progress is slow. This strategy needs further consideration with a view to progressing further sales;
- The three remaining properties with estimated selling prices totalling between \$46M and \$59M require consultancy advice to develop the most appropriate realisation strategy. There are significant challenges to overcome in relation to these assets which ultimately will have a material effect on the amount recovered for investors.

In addition to the realisation of the physical assets, there are a number of ongoing legal actions to recover funds for the benefit of investors.

The realisation of the loan book will be commented on in more detail in future reports and as and when realisations are made in this respect.

## 6. Estimated Outcome to Investors as at 31 December 2011

	Low \$000's	High \$000's
<b>Total estimated selling prices</b>	<b>93,315</b>	<b>119,065</b>
Less: Selling costs - marketing and agents fees (3.5%)	(3,266)	(4,167)
Secured creditors	(12,100)	(12,100)
Land Tax and Rates	(7,200)	(7,200)
Other unsecured creditors	(1,600)	(1,600)
Receivers fees	(115)	(115)
<b>Estimated net amount available to investors as at 31 December 2011</b>	<b>69,034</b>	<b>93,883</b>
Total investors units	203,635	203,635
<b>Estimated return in the dollar</b>	<b>\$0.34</b>	<b>\$0.46</b>

The estimated selling prices have been prepared and provided to me by management based on their knowledge of the files, previous valuations held and feedback from sales campaigns, selling agents and other property experts. These may materially change and will be reviewed on a regular basis.

The above table does not take into account future operating costs, interest on bank loans until repaid in full, future Receivers fees and rates and land tax after 31 December 2011. It also excludes any legal recoveries against borrowers, valuers or other third parties.

## **7. Receiver's Remuneration and Expenses**

Fees incurred from the date of my appointment on 21 November 2011 until 29 January 2012 (ten weeks) are \$175,708.50 plus GST and outlays as detailed in the attached remuneration summary.

My fees will be subject to approval by the court in due course.

I note that Equititrust Limited have appealed the judgement pursuant to which I was appointed as receiver and person responsible for ensuring the Fund is wound up in accordance with the constitution of the Fund. Substantial costs and fees have been incurred in my dealing with the issues raised by Equititrust Limited as to the nature and extent of my appointment. No date has yet been set for the hearing of the appeal. Notwithstanding the appeal by Equititrust Limited I will continue to act pursuant to the orders made that the Fund be wound up.

## **8. ASIC Investigations/Suspension of Australian Financial Services Licence**

On 20 October 2011, ASIC officers exercised search warrants at the offices of the Responsible Entity in relation to documents relevant to ASIC's investigation of historical matters. A number of the seized documents are the subject of claims for legal professional privilege.

I have met with ASIC in this regard and agreed a protocol to protect investors interests in this respect.

ASIC has advised me that if there are any concerns or issues investors would wish to raise, they should contact ASIC's hotline on 1300 300 630.

### ***ASIC consent order***

On 27 October 2011, ASIC obtained orders by consent of the Responsible Entity from the Supreme Court. These orders include that until the Responsible Entity ceases to be in breach of clause 6 of its Australian Financial Services Licence (which related to net tangible assets of the Responsible Entity) and lodges outstanding audited annual financial reports and compliance audits for the Schemes for which it is Responsible Entity, the Responsible Entity is subject to a range of restraints including, inter alia, modifying the Constitution of the Scheme, issuing of new interest in the Scheme, and entering into related party transactions without providing ASIC with 21 days notice.

### ***Suspension of Australian Financial Services Licence***

On 7 December 2011, the Australian Financial Services Licence of the Responsible Entity was suspended by ASIC until 6 December 2012. Notwithstanding this suspension the Responsible Entity may continue to act as responsible entity of the Scheme in order to effect the winding up of the Scheme. The Responsible Entity remains subject to its relevant ongoing obligations while it continues to be the Responsible Entity.

## **9. Responsible Entity Insurance**

Insurance policies of the Responsible Entity expired on 21 November 2011, resulting in the Responsible Entity being in breach of its Australian Financial Services Licence. As at the date of this report, the directors of the Responsible Entity have not been successful in arranging alternative appropriate insurance.

## 10. Social Security Update

As noted on Equititrust's website on 29 September 2011 and 22 December 2011, the responsible entity has been in correspondence with the Department of Families, Housing, Community Services and Indigenous Affairs to request an exemption from social security deeming rules to assist pensioners who are income and asset tested and hold investments in the EIF.

The Minister has declined to assist although investors should keep Centrelink informed of any changes in unit value so that their position can be reassessed.

Any investors experiencing severe financial hardship should contact Centrelink on 13 23 00.

## 11. Ongoing Reporting


My intention is to provide monthly reports to investors in relation to the ongoing progress of the receivership. In order to save costs, future reports will be posted on the updates page of the website [www.equititrust.com.au](http://www.equititrust.com.au).

Please note that prior to finalising this report I provided a copy of the report to Equititrust Limited as Responsible Entity for it to comment on the content of the report. I have not received any written comments from Equititrust Ltd regarding the contents of the report.

## 12. Queries

Should you have any queries in the above respect, please contact Andrew Want on (07) 3237 5711 or Jayden Coulston of this office on (07) 3237 5890.

Yours faithfully



David Whyte  
Receiver

Enc.

**REMUNERATION SUMMARY**  
**Equititrust Income Fund (Receiver Appointed)**  
**21 November 2011 to 29 January 2012**

Employee	Position	Rate	Total		Administration		Assets		Creditors		Employees		Investigations		Trade-on	
			Units	Total \$	Units	\$	Units	\$	Units	\$	Units	\$	Units	\$	Units	\$
Fielding, Andrew	Partner	545	0.20	109.00	0.20	109.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Newman, Helen	Partner	545	0.60	327.00	0.60	327.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Whyte, David	Partner	545	238.50	129,982.50	9.80	5,341.00	33.90	18,475.50	31.70	17,276.50	0.20	109.00	5.30	2,888.50	157.60	85,892.00
Brushe, David	Manager	375	76.20	28,575.00	14.30	5,362.50	51.30	19,237.50	0.90	337.50	0.00	0.00	0.00	0.00	9.70	3,637.50
Want, Andrew	Senior Accountant II	260	50.80	13,208.00	48.20	12,532.00	1.10	286.00	1.50	390.00	0.00	0.00	0.00	0.00	0.00	0.00
Coulston, Jayden	Accountant I	210	14.40	3,024.00	6.90	1,449.00	6.60	1,386.00	0.30	63.00	0.00	0.00	0.10	21.00	0.50	105.00
Pembroke, Elle	Accountant I	210	2.30	483.00	2.30	483.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
<b>TOTAL</b>			<b>383.00</b>	<b>175,708.50</b>	<b>82.30</b>	<b>25,603.50</b>	<b>92.90</b>	<b>39,385.00</b>	<b>34.40</b>	<b>18,067.00</b>	<b>0.20</b>	<b>109.00</b>	<b>5.40</b>	<b>2,909.50</b>	<b>167.80</b>	<b>89,634.50</b>
			<b>GST</b>	<b>17,570.85</b>												
			<b>TOTAL INC GST</b>	<b>193,279.35</b>												
<b>AVERAGE HOURLY RATE</b>				<b>458.77</b>	<b>311.10</b>		<b>423.95</b>		<b>525.20</b>		<b>545.00</b>		<b>538.80</b>		<b>534.17</b>	

**DISBURSEMENT REPORT**

**Equititrust Income Fund (Receiver Appointed)**  
**21 November 2011 to 29 January 2012**

Item	
NSW Power of Attorney Transfer fee	90.45
Travel - Mileage	1,059.04
Mobile Internet	53.63
Postage	6.88
Search Fee	274.45
<b>Sub Total</b>	<b>1,484.45</b>
<b>GST</b>	<b>148.45</b>
<b>TOTAL</b>	<b>1,632.90</b>

SUPREME COURT OF QUEENSLAND

*Duplicate*

REGISTRY: Brisbane  
NUMBER: 10478/2011

In the matter of **EQUITITRUST LIMITED ACN 061 383 944**

Applicant: **EQUITITRUST LIMITED ACN 061 383 944**

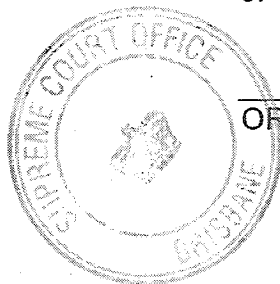
Before: Justice Applegarth

Date: 21 November 2011

Initiating document: Application filed 15 November 2011, and oral application made by the Australian Securities and Investments Commission on 21 November 2011

**THE ORDER OF THE COURT IS THAT:**

1. Pursuant to section 601ND (1)(a) of the *Corporations Act 2001* (Cth) (the "Act"):-
  - (a) Equititrust Limited ACN 061 383 944 be directed to wind up the Equititrust Income Fund ARSN 089 079 854, established by Deed Poll dated 9 August 1999 ("EIF");
  - (b) Equititrust Limited ACN 061 383 944 be directed to wind up the Equititrust Priority Class Income Fund ARSN 089 079 729 established by Deed Poll dated 9 August 1999 ("EPCIF").
2. David Whyte ("**Mr Whyte**") be appointed pursuant to section 601NF(1) of the Act to take responsibility for ensuring that:-
  - (a) the EIF is wound up in accordance with its constitution; and
  - (b) the EPCIF is wound up in accordance with its constitution.
3. Pursuant to section 601NF(2), that Mr Whyte:-



ORDER:

Filed on behalf of the Applicants

TUCKER & COWEN  
Solicitors  
Level 15  
15 Adelaide Street  
Brisbane, Qld, 4000.  
Tele: (07) 300 300 00  
Fax: (07) 300 300 33

- (a) have access to the books and records of Equititrust Limited which concern the EIF and the EPCIF;
  - (b) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in effecting the winding up of the EIF;
  - (c) be indemnified out of the assets of the EPCIF in respect of any proper expenses or costs incurred in effecting the winding up of the EPCIF;
  - (d) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the winding up of the EIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EIF in respect of such remuneration; and
  - (e) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the winding up of the EPCIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EPCIF in respect of such remuneration.
4. Pursuant to sections 1101B(1) and 1101B(5) of the Act, Mr Whyte be appointed as:-
- (a) a receiver of the property of the EIF; and
  - (b) a receiver of the property of the EPCIF,
- until 4:00pm on Wednesday 23 November 2011, or further earlier order.
5. That nothing in this Order prejudices the rights of the National Australia Bank Limited, Commonwealth Bank of Australia Limited or Bank of Scotland International Ltd, pursuant to any securities any of them hold over Equititrust Limited or the EIF.
6. That by 4pm on Tuesday 22 November 2011, Equititrust Limited publish on its website ([www.equititrust.com.au](http://www.equititrust.com.au)), in pdf form, by way of notice to members of the EIF and EPCIF a copy of this Order, which publication shall be sufficient notice to members of the EIF and EPCIF of this Order.
7. There be general liberty to apply to any person affected by these Orders, including liberty to apply for further directions in accordance with section 601NF(2) of the Act.
8. The parties appearing on this application, save for ASIC, be paid their costs of and incidental to this Application, to be assessed on the standard basis, out of the EIF.
9. The oral application of ASIC be adjourned to 10:00am on Wednesday 23 November 2011.

Signed:

A handwritten signature in dark ink, consisting of several overlapping loops and a final vertical stroke on the right side.

*Duplicate*

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: BS 10478 of 2011

IN THE MATTER OF EQUITITRUST LIMITED ACN 061 383 944

Applicant: EQUITITRUST LIMITED ACN 061 383 944

AND

Respondents: THE MEMBERS OF THE EQUITITRUST INCOME FUND  
ARSN 089 079 854 AND THE MEMBERS OF THE EQUITITRUST  
PRIORITY CLASS INCOME FUND ARSN 089 079 729

ORDER

Before: Justice Applegarth

Date: 23 November 2011

Initiating document: Application filed 15 November 2011 and Oral Application made 21  
November 2011

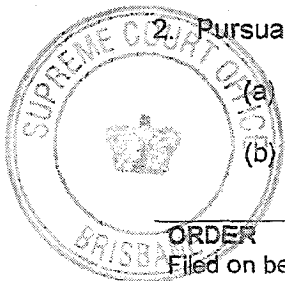
THE ORDER OF THE COURT IS THAT:

1. Pursuant to s.1101B(1) of the *Corporations Act 2001* (Cth) (*the Act*) David Whyte (*Mr Whyte*) be appointed as:

- (a) a receiver of the property of the Equititrust Income Fund (*EIF*); and
- (b) a receiver of the property of the Equititrust Priority Class Income Fund (*EPCIF*).

2. Pursuant to s.601NF(2) of the Act David Whyte (*Mr Whyte*) be appointed as:

- (a) a receiver of the property of the Equititrust Income Fund (*EIF*); and
- (b) a receiver of the property of the Equititrust Priority Class Income Fund (*EPCIF*).



ORDER

Filed on behalf of the Intervener

Australian Securities & Investments Commission  
Hugh Copley, Litigation Counsel

Form 59 Rule 661

Level 20, 240 Queen Street, Brisbane Qld 4000  
Tel: (07) 3867 4700  
Fax: (07) 3867 4725  
Ref: KRodgers (11-40025)

3. Pursuant to s.1101B(1) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to Order 1 above, the powers set out in s.420 of the Act in addition to the powers set out in s.1101B(8)(a) to (c) of the Act.
4. Pursuant to s.601NF(2) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to Order 2 above, the powers set out in s.420 of the Act and the powers set out in s.1101B(8)(a) to (c) of the Act.
5. Pursuant to s.1101B(1) of the Act, Mr Whyte in respect of the appointment made in Order 1 above:
  - (a) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in acting as receiver of the property of the EIF;
  - (b) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in acting as receiver of the property of the EPCIF;
  - (c) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the receivership of the property of the EIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EIF in respect of such remuneration;
  - (d) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the receivership of the property of the EPCIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EPCIF in respect of such remuneration.
6. Pursuant to s.601NF(2) of the Act, Mr Whyte in respect of the appointment made in Order 2 above:
  - (a) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in acting as receiver of the property of the EIF;
  - (b) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in acting as receiver of the property of the EPCIF;
  - (c) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the receivership of the property of the EIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EIF in respect of such remuneration;
  - (d) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the receivership of the property of the EPCIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EPCIF in respect of such remuneration.
7. That nothing in this Order prejudices the rights of the National Australia Bank Limited, Commonwealth Bank of Australia Limited or Bank of Scotland International Ltd, pursuant to any securities any of them hold over Equititrust Ltd or the property of the EIF.

8. That by 4pm on Thursday 24 November 2011, Equititrust Ltd publish on its website ([www.equititrust.com.au](http://www.equititrust.com.au)), in pdf form, by way of notice to its members of the EIF and EPCIF a copy of this Order, which publication shall be sufficient notice to members of the EIF and EPCIF of this Order.
9. That the parties appearing on this application, save for ASIC, be paid their costs of and incidental to this Application, to be assessed on the standard basis, out of the EIF.
10. There be general liberty to apply to any person affected by these Orders, including liberty to apply for further directions in accordance with s.601NF(2) of the Act.

Registrar:

A handwritten signature in black ink, consisting of a large, stylized letter 'A' with a vertical line extending downwards from its right side.

# SUPREME COURT OF QUEENSLAND

CITATION: *Re Equititrust Ltd* [2011] QSC 353

PARTIES: **EQUITITRUST LTD**  
**ACN 061 383 944**  
(applicant)  
v  
**THE MEMBERS OF THE EQUITITRUST INCOME  
FUND AND THE EQUITITRUST PRIORITY CLASS  
INCOME FUND**  
(respondents)

FILE NO: BS 10478 of 2011

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING  
COURT: Supreme Court at Brisbane

DELIVERED ON: 23 November 2011

DELIVERED AT: Brisbane

HEARING DATE: 21 and 23 November 2011

JUDGE: Applegarth J

ORDERS: **Orders for two registered schemes to be wound up pursuant to s 601ND of the *Corporations Act 2001* (Cth), for the appointment of a person to take responsibility for ensuring that each registered scheme is wound up and for the same person to be appointed as a receiver of the property of each scheme.**

CATCHWORDS: CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – where company applied to Court for the winding up of two registered schemes of which it was the responsible entity and for the appointment of a temporary responsible entity – where circumstances of urgency exist due to impending lapse of insurance for officers of company – where directors indicated that they would resign upon lapse of insurance – where the administration of the schemes had broken down and the schemes’ purposes could no longer be accomplished – where the company was in breach of the *Corporations Act 2001* (Cth) and of conditions of its financial services licence – whether the Court had jurisdiction to appoint a temporary responsible entity – whether the Court should order the winding up of the schemes – whether the Court should appoint a receiver to the property of each scheme

*Corporations Act 2001 (Cth)* s 601FA, s 601FN, s 601FP, 601ND, s 601NF, s 1101B

*Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd* [2001] WASC 339 cited  
*Capelli v Shepard* (2010) 264 ALR 167; [2010] VSCA 2 cited  
*Re Crust 'N' Crumb Bakers (Wholesale) Pty Ltd* [1992] 2 Qd R 76 cited  
*Joye v Beach Petroleum N.L.* (1996) 67 FCR 275 cited  
*Mier v FN Management Pty Ltd* [2006] 1 Qd R 339; [2005] QCA 408 discussed  
*Re PWL Ltd; Ex parte PWL Ltd (formerly Palandri Wines Ltd) (No 2)* [2008] WASC 232 cited  
*Re Rubicon Asset Management Ltd* (2009) 74 ACSR 346; [2009] NSWSC 1068 discussed  
*Re Stacks Managed Investments Ltd* (2005) 219 ALR 532; [2005] NSWSC 753 discussed  
*Westfield Management Ltd v AMP Capital Nominees Ltd* [2011] NSWSC 1015 cited  
*Yunghanns v Candoora No. 19 Pty Ltd (No 2)* (2000) 35 ACSR 34; [2000] VSC 300 cited

COUNSEL: P L O'Shea SC and J W Peden for the applicant  
 A S Martin SC and G M Drew for certain members  
 D R W Tucker (solicitor) for a member, Tucker SF Pty Ltd  
 T P Sullivan SC and S R R Cooper for the Australian Securities and Investments Commission intervening  
 D D Keane instructed directly by Lion Advantage Ltd, an applicant for appointment as a temporary responsible entity (21 November 2011)  
 J W Peden for the applicant and Mr Mark McIvor (23 November 2011)

SOLICITORS: Nyst Lawyers for the applicant  
 Piper Alderman for certain members  
 Tucker & Cowen for Tucker SF Pty Ltd  
 Australian Securities and Investments Commission for the intervener  
 Nyst Lawyers for Mr Mark McIvor (23 November 2011)

- [1] On Monday, 21 November 2011 I made certain orders following a hearing which was held on short notice and in circumstances of urgency. These are my reasons for making those orders. The circumstances of urgency included the fact that two insurance policies covering officers of Equititrust Ltd (the company) were due to expire at 3.00 pm that day. They were unlikely to be renewed and alternative insurance could not be sourced. In those circumstances, the recently-appointed directors of the company were not prepared to remain on the board and proposed to resign shortly before 3.00 pm.

- [2] By an originating application filed on 15 November 2011 the company sought the following two orders:

- “1. The Equititrust Income Fund be wound up pursuant to section 601ND of the *Corporations Act* (Cth) 2001;
2. The Equititrust Priority Class Income Fund be wound up pursuant to section 601ND of the *Corporations Act* (Cth) 2001.”

It also sought an order pursuant to s 601FN of the *Corporations Act* (Cth) 2001 (“the Act”) that:

“Equititrust Limited be replaced as the Responsible Entity of the Equititrust Income Fund and the Equititrust Priority Class Income Fund (‘Funds’) by a temporary Responsible Entity, with that entity to wind-up the Funds and take steps to call a meeting of members to ratify its appointment”.

The company also sought an order pursuant to s 601NF that a committee consisting of Mr Jeff McDermid, Mr Paul Vincent and Mr Nick Combis be appointed to take responsibility for ensuring that the funds are wound up in accordance with their constitutions and that appropriate directions be made to effect that winding up.

- [3] Upon the hearing of the application the company initially sought only an order pursuant to s 601FN of the Act that it be replaced as the responsible entity of the two funds. However, it submitted that if I did not appoint a temporary responsible entity to replace it, I should order that the funds be wound up.
- [4] The Australian Securities and Investments Commission (ASIC) intervened in the proceeding and made an oral application for the appointment of a receiver to the funds pursuant to s 1101B of the Act.

#### **The application for the appointment of a temporary responsible entity**

- [5] There was a jurisdictional impediment to the making of an order under s 601FN for the appointment of a temporary responsible entity. That section entitles ASIC or a member of a registered scheme to apply to the Court for the appointment of a temporary responsible entity of a scheme under s 601FP if the scheme “does not have a responsible entity that meets the requirements of s 601FA”. Section 601FA requires the responsible entity of a registered scheme to be a public company that holds an Australian financial services licence authorising it to operate a managed investment scheme. At the time of the company’s application and at the time of the hearing it met both of these requirements. The fact that it was in breach of the terms of its financial services licence and faced the prospect of having that licence terminated or suspended did not alter the fact that it still held its licence.
- [6] This jurisdictional impediment was, in part, the result of the company seeking from ASIC and obtaining an adjournment until 22 November 2011 of a hearing to show cause why its licence should not be terminated.
- [7] Counsel for ASIC helpfully drew my attention to Regulation 5C.2.02 of the *Corporations Regulations* 2001 (Cth), although the company did not make any

application under that regulation. For the reasons given by ASIC, it is questionable whether that regulation provides a source of power for the Court to appoint a temporary responsible entity other than in the circumstances provided for in s 601FL or s 601FN.

- [8] In the result, the Court's power to appoint a temporary responsible entity upon an application under s 601FN was not invoked.
- [9] This makes it unnecessary to address the question of whether the appointment of a temporary responsible entity was in the interests of the members, and a contentious issue as to whether the replacement of the company by such an entity would result in a reconversion of subordinated units held by the company in its own right, and a decrease in the value of units held by other members.

#### **The application under s 601ND to wind up the funds**

- [10] The company submitted that if I did not appoint a temporary responsible entity to replace it as the responsible entity for each fund, then I should make the orders sought in paragraphs 1 and 2 of its originating application for each of the funds to be wound up pursuant to s 601ND. ASIC supported this application. So did a member of the Equititrust Income Fund, Tucker SF Pty Ltd. The only opposition to making orders under s 601ND came from seven members for whom Mr Martin SC and Mr Drew of counsel appeared. The basis for that opposition was to enable members to call a meeting and to vote upon a proposal to wind up the Income Fund pursuant to s 601NB of the Act.
- [11] It is necessary to outline certain factual matters by way of background to explain why I reached the conclusion that it was just and equitable to make an order directing the responsible entity to wind up each fund, and why I considered that such an order should be made promptly rather than delayed for some uncertain period to allow the members to vote on a resolution to wind up the Income Fund.
- [12] The company is the responsible entity of three managed schemes, two of which are registered. The third, being the Equititrust Premium Fund ("EPF"), is not registered and is not required to be registered under the Act. The two registered managed investment schemes are known as the Equititrust Income Fund ("EIF") and the Equititrust Priority Class Income Fund ("EPCIF"). The EIF has some 1,400 members and net assets in excess of \$100,000,000. The EPCIF has only five members, all apparently associated with the company's sole shareholder, Mr McIvor. EPCIF holds 13,636,478 units in the EPF.
- [13] As its name suggests, the EIF was intended to be an "income fund" which provided monthly interest payments on most investments and the redemption of capital. Where a member invests for a period of 12 months the entitlement to redemption arises on the anniversary of the allotment of units after a request is made to redeem. The fund no longer achieves its purposes. The fund has been frozen since October 2008 in that no redemptions of units have been permitted since then. Since April 2011 the fund has ceased paying interest to members.
- [14] The company was beset by discord between directors and the company's sole shareholder, Mr McIvor, during 2011. It is unnecessary to describe fully the nature of the discord. An application was brought by the superannuation fund of a former director, Mr Tucker, seeking an order for the winding up of the EIF. The

application was adjourned on the basis of certain undertakings, given by Mr McIvor to the Court, not to seek to appoint any new director or remove any existing director from the board of the company without giving notice to the existing board and to ASIC, and seeking leave of the Court. These undertakings were given on 27 October 2011 in circumstances in which the company had been placed in the hands of a newly appointed board of directors. The newly appointed board comprised Mr Paul Vincent, Mr Jeff McDermid, Mr Troy Bingham and Mr Warwick Powell. Mr Vincent is a Fellow of the Institute of Chartered Accountants, and has 30 years experience as a Chartered Accountant. He and his fellow directors familiarised themselves with the operations of the company and considered how the funds might best be wound up. The new board considered the best realisation strategies.

[15] On 12 October 2011 a differently constituted board had unanimously resolved:

- (a) that Equititrust Limited as the responsible entity of the Equititrust Income Fund considers that the purpose of the Equititrust Income Fund cannot be accomplished (within the meaning of s 601NC(1) of the *Corporations Act*).
- (b) that Equititrust Limited as responsible entity of the Equititrust Income Fund take steps to wind up the Equititrust Income Fund within the meaning of s 601NC(1) and in accordance with its constitution.
- (c) that the chief executive officer prepare notices to give to members of the scheme and to ASIC in accordance with s 601NC(2) of the *Corporations Act*.

A similar resolution was passed the same day in respect of the EPCIF, namely that its purpose cannot be accomplished and that it should be wound up.

[16] The new board would have preferred to continue with the process of winding up that had been instigated, being a process provided for under s 601NC of the Act. However, the expiry and non-renewal of insurance policies on 21 November 2011 prompted them to have the company apply for winding up orders pursuant to s 601ND.

[17] Mr Vincent, in an affidavit sworn on 18 November 2011, assessed the approximate financial position of the company as at 31 October 2011 as follows:

- a. ETL [Equititrust Ltd] has assets in its own right worth approximately \$26,498,000;
- b. ETL has liabilities in its own right in the approximate sum of \$26,470,000;
- c. ETL has assets that it holds for the EIF in the approximate sum of \$120 million;
- d. ETL has liabilities in its capacity as responsible entity for the EIF in the approximate sum of \$9 million;
- e. ETL has therefore net assets in the EIF in the approximate sum of \$111 million;