

36



Form 17
Rule 8.05(1)(a)

Amended Statement of Claim

No. VID 790 of 2014

Federal Court of Australia
District Registry: Victoria

Innes Creighton

Applicant

**Australian Executor Trustees Limited
(ACN 007 869 794)**

Respondent

A. REPRESENTATIVE PROCEEDING

1. The applicant brings this proceeding as a representative party in a representative proceeding pursuant to Pt IVA of the *Federal Court of Australia Act 1976*.
2. On or about 16 November 2011, the applicant was issued \$100,000 in debentures by Provident Capital Limited (**Provident**), pursuant to an application made on a form contained in Debenture Prospectus 2011 issued by Provident.

PARTICULARS

- a) *Debenture Prospectus 2011 was issued by Provident and was lodged with ASIC on 24 December 2010.*
 - b) *The application to invest \$100,000 in debentures was in writing and was made by the applicant completing an application form attached to Debenture Prospectus 2011 and posting the application and a cheque for \$100,000 to Provident. The application form is no longer in the possession of the applicant.*
 - c) *The applicant received an 'Investment Certificate' from Provident in respect of the debentures issued by Provident in the sum of \$100,000.*
3. The respondent (**AETL**) was at all relevant times the trustee for debenture holders of debentures issued by Provident under the provisions of Chapter 2L of the *Corporations Act 2001* (the Act) and under a Trust Deed made between Provident and AETL.

PARTICULARS

The Trust Deed is in writing and was made on 11 December 1998.

Filed on behalf of
Prepared by
Law firm
Tel
Email
Address for service

Mr Innes Creighton, Applicant
Odette McDonald
Slater & Gordon Limited
(03) 9602 6866 Fax (03) 9600 0290
odette.mcdonald@slatergordon.com.au
Slater and Gordon Limited, 485 La Trobe Street, Melbourne VIC 3001

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 26/06/2015 4:44:27 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number: VID790/2014
File Title: Innes Creighton v Australian Executor Trustees Limited
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 29/06/2015 10:24:47 AM AEST

A handwritten signature in black ink, appearing to read 'Warwick Soden'.

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

4. The group members to whom the proceeding relates are all persons who:
- 4.1. ~~were issued debentures by Provident on or after 22 December 2010, but not including any debentures that were funded by a "rollover" or reinvestment of any debenture issued before 22 December 2010; and~~
 - 4.2. ~~4.1. were holders of those same debentures on 18 September 2012 when Provident entered voluntary administration, holders of debentures issued by Provident; and~~
 - 4.3. ~~4.2. suffered loss or damage as a result of AETL's contraventions of s 283DA of the Act as alleged in this Statement of Claim prior to 22 December 2010.~~

B. PROVIDENT AND ITS DUTIES

5. At all material times, Provident had the following duties imposed on it by Ch 2L of the Act:
- 5.1. to carry on and conduct its business in a proper and efficient manner (s 283BB(a)); and
 - 5.2. to provide, within a month after the end of each quarter, a quarterly report to AETL including information about any matters that may materially prejudice the interests of the debenture holders (s 283BF(4)(g)).

C. AETL, ITS DUTIES AND POWERS

6. AETL is and was at all relevant times:
- 6.1. a company incorporated pursuant to the laws of Australia;
 - 6.2. a financial services organisation providing, amongst other services, corporate trustee services; and
 - 6.3. a company holding itself out as having particular knowledge, skill and experience in the provision of corporate trustee services.
7. At all relevant times, AETL had the duty to exercise reasonable diligence to ascertain whether the property of Provident that was or should have been available (whether by way of security or otherwise) would be sufficient to repay the amounts deposited or lent as and when they became due (s 283DA(a)).
8. At all relevant times, AETL had rights and powers:
- 8.1. to require Provident to make all of its financial and other records available for inspection by it, or an officer, employee or auditor appointed by it to carry out an inspection (the Act, s 283BB(c)); and
 - 8.2. to require Provident to give any information, explanation or other assistance required by it, or by an officer, employee or auditor appointed by it, about matters pertaining to its financial and other records (the Act, s 283BB(c)); and

- 8.3. to apply to the court for directions in relation to the performance of its functions or to determine any question in relation to the interests of debenture holders (the Act, s 283HA); and
 - 8.4. to apply to the court for any orders that the court considers appropriate to protect the interests of existing or prospective debenture holders (the Act, s 283HB).
9. AETL received payments from Provident for its services as trustee.

PARTICULARS

The applicant will give particulars of the payments received by AETL after discovery.

D. **PROVIDENT'S BUSINESS AND AETL'S GENERAL KNOWLEDGE ~~THE VALUE OF ITS ASSETS~~**

- 10. At all relevant times, Provident's business activities involved, as AETL knew, borrowing money from investors by issuing debentures and loaning the funds raised to third-party borrowers, primarily for property investment, on a first-mortgage basis (the **FTI Portfolio**).
- 11. Further, at all relevant times from about August 2007, Provident's business activities involved, as AETL knew, making loans or refinancing loans previously funded by a facility from Bendigo and Adelaide Bank Limited (**BEN**), primarily for property investment (the **BEN Portfolio**), on terms:
 - 11.1. that the loan and related mortgages were transferred to BEN;
 - 11.2. that repayments of principal and interest on the loans were made direct to BEN;
 - 11.3. that BEN had first recourse to the security assets of loans in the BEN Portfolio;
 - 11.4. that Provident was required to refinance loans in the BEN Portfolio more than 270 days past due; and
 - 11.5. that Provident was required to make a cash deposit with BEN, which from 30 September 2010 was \$10m, as security for the BEN facility (the **BEN wholesale facility**).

PARTICULARS

The "wholesale funding" provided for the BEN Portfolio was described in Debenture Prospectus 11 at p. 10.

- 12. Further, at all relevant times, typical third-party borrowers to whom Provident made loans were, as AETL knew, outside of the lending criteria of Australia's traditional financial institutions and included business owners, the self-employed, property investors raising funds to purchase property, the credit impaired and borrowers wishing to consolidate debt.

PARTICULARS

Provident's business activities were described in Debenture Prospectus 11 at pp. 3 and 16.

13. At all relevant times, AETL knew that Provident's primary assets were loans receivable and that the value of those loans depended on the financial position and performance of each borrower as well as the value of the security property.

PARTICULARS

Provident's assets and investments risks were set out in Debenture Prospectus 11 at pp. 20-24 and 27.

14. Further, at all relevant times, AETL knew, or ought to have known, that the substantial asset of Provident that was or would be available to repay the amounts loaned by investors in debentures was the loans receivable in the FTI Portfolio.

~~**E. INFORMATION AVAILABLE TO AETL IN THE PERIOD TO DECEMBER 2010 ABOUT THE FINANCIAL POSITION AND PERFORMANCE OF PROVIDENT**~~

~~**A) GENERAL MATTERS**~~

~~**(a) AETL on notice of risks**~~

15. At all relevant times, the main risks to investors in debentures issued by Provident were, as AETL knew, the risk of credit losses in the FTI Portfolio and the BEN Portfolio to which Provident was exposed as a result of the terms of the BEN wholesale facility.

PARTICULARS

The risk of credit losses was identified in Debenture Prospectus 11 at p. 20 and in Provident Capital Prospectus 2011 at pp. 18-19.

16. At all relevant times, AETL knew, or ought to have known, that where loans are non-performing or the lender has entered into possession of the security property, there is frequently a shortfall to the lender upon realisation of the underlying security property.

PARTICULARS

McGrath + Nicol, Report to Creditors (17 October 2012) at p. 24.

17. At all relevant times, AETL knew, or ought to have known, that it required from time-to-time current information about each of the following matters in order to ascertain the value of the loans in the FTI Portfolio:
- 17.1. the number and value of loans in the FTI Portfolio;
 - 17.2. the purpose for which the loan was made;
 - 17.3. the number, value and period for which loans in the FTI Portfolio were in default;
 - 17.4. the number, value and period for which Provident was mortgagee in possession of loans in the FTI Portfolio;
 - 17.5. the current "as is" value of the security property for each loan in the FTI Portfolio that was in default;
 - 17.6. the loan to valuation ratio of each loan in the FTI Portfolio that was in default.
- 17A. At all relevant times, AETL in exercising its powers and discretions as trustee for debenture holders:

- (a) kept records of communications passing between it and Provident relating to the financial position of Provident and relevant to the interests of debenture holders (the File), including regular reports of *inter alia* the performance of loans recorded in the FTI Portfolio or the BEN Portfolio;
 - (b) knew or ought reasonably to have known the matters recorded in the File, including historical matters since 2000, when exercising the said powers and discretions; and
 - (c) without limiting (a) or (b), by not later than about 1 December 2008 knew or ought reasonably to have known:
 - (i) the arrears histories of each of the loans referred to in Section E below; and
 - (ii) a current valuation, and any matters likely to have a material impact on the current valuation, of the security for each loan referred to in Section E below.
18. At all relevant times, AETL knew, or ought to have known, that Provident did not disclose in any prospectus or financial statements or quarterly reports to AETL, current information about all of the matters referred to in the preceding paragraphs.
19. At all relevant times from at least 24 December 2008, AETL knew that Provident did not satisfy the benchmarks stated by ASIC in Regulatory Guide 69 as to equity ratio (benchmark 1) and credit rating (benchmark 4).

~~B) THE FINANCIAL POSITION AND PERFORMANCE OF PROVIDENT AS AT 30 JUNE 2008~~

E. INFORMATION TO DECEMBER 2008

20. By no later than 5 November 2008, AETL knew, or ought to have known, that as at 30 June 2008, Provident reported total assets of \$239,834,246, of which \$192,822,594 were loans receivable.

PARTICULARS

Provident Capital Ltd financial report for the year ended 30 June 2008 at pp. 8, 24.

21. By no later than 5 November 2008, AETL knew, or ought to have known, that as at 30 June 2008, Provident reported liabilities in the amount of \$225,358,236, of which \$161,094,049 were current liabilities and \$64,264,187 were non-current liabilities.

PARTICULARS

Provident Capital Ltd financial report for the year ended 30 June 2008 at pp. 8, 25-26.

22. By no later than 5 November 2008, AETL knew, or ought to have known, that as at 30 June 2008, Provident reported total debentures on issue in the amount of \$154,822,573, of which \$30,017,474 were due to be repaid within 3 months, \$67,987,141 were due to be repaid between 3 months and 1 year and \$56,817,958 were due to be repaid between 1 year and 5 years.

PARTICULARS

Provident Capital Ltd financial report for the year ended 30 June 2008 at p. 26.

22A. By no later than 5 November 2008, AETL knew, or ought to have known, that as at 30 June 2008, Provident had reported \$1,256,943, being tax assets, that would be non-realizable in the event of insolvency or administration.

PARTICULARS

Provident Capital Ltd financial report for the year ended 30 June 2008 at p. 8.

23. By no later than 5 November 2008, AETL knew, or ought to have known, that as at 30 June 2008, and across both the FTI Portfolio and the BEN Portfolio:
- 23.1. Provident reported \$7.9m of loan interest receivable on its balance sheet;
 - 23.2. Provident had 44 past due loans (greater than 30 days), with an aggregate principal balance of \$70.8m, being 36.7% by value and 28% by number of the total loan portfolio;
 - 23.3. Provident had 36 past due loans (greater than 90 days), with an aggregate principal balance of \$52.8m, being 27.4% by value and 22.9% by number of its total loan portfolio; and
 - 23.4. of the past due loans greater than 90 days, Provident was mortgagee in possession of \$28.3m of those past due loans, being 53.6% by value of those past due loans.

PARTICULARS

Provident Capital Ltd financial report for the year ended 30 June 2008 at pp. 16-18, 24.

24. By no later than 24 December 2008, AETL knew, or ought to have known, that Provident's largest borrowing was in the amount of \$13.5m and was for construction funding purposes.

PARTICULARS

Provident Capital Ltd financial report for the year ended 30 June 2008 at pp. 17-18.

(a) FTI Portfolio

24A. By no later than about 1 December 2008, AETL knew, or ought to have known, that as at about December 2008 there were approximately 30 past due loans (greater than 90 days) in the FTI Portfolio, with a principal balance of approximately \$54.6m.

PARTICULARS

The status of the loans was reported on a rolling basis in the arrears reports provided by Provident to AETL during at least 2007 and 2008.

The calculation methodology reflected in the December 2008 arrears report (received by AETL on about 2 February 2009), if applied to the pre-December 2008 reports, would have shown that by not later than November 2008 the status of the FTI portfolio would have been materially identical to the December 2008 report (subject to allowances for additional accruals of interest) and to the effect alleged herein.

24B. By no later than about 1 December 2008, AETL knew, or ought to have known, that of the past due loans (greater than 90 days) that appeared in the December 2008 Arrears Report:

24B.1 21 of the 31 loans had a loan to valuation ratio, as disclosed by Provident, of at least 85% (the 21 Excessive-LVR loans);

24B.2 11 of the loans, as disclosed by Provident, had a loan to valuation ratio of at least 100%; and

24B.3 by reason of the 21 Excessive-LVR loans, Provident was in breach of the Trust Deed.

PARTICULARS

The 21 Excessive-LVR loans were disclosed on the Arrears Report for December 2008.

Under clauses 5.2 of the Trust Deed any financial accommodation provided by Provident was required to be not greater than a certain proportion of the accommodation security, the highest proportion being 85% for residential land.

24C. By reason of the matters alleged in paragraphs 20 to 24B above, AETL should have formed the opinion, by no later than 1 December 2008, that it could only be satisfied that the assets of Provident would be sufficient to repay the debentures when they became due by making further inquiries of Provident about the financial position and performance of the FTI Portfolio and the value of the security property.

24D. By reason of the matters alleged in the preceding paragraph, and in order to discharge the duty imposed by s 283DA of the Act, AETL was obliged, from time-to-time, and by no later than 15 December 2008, to make inquiries about and to satisfy itself about the value of the loans and any actual or reasonably anticipated credit losses in the FTI Portfolio and about the provisions made for credit losses, including about each of the matters identified in paragraphs 24E to 24AN inclusive below.

(b) Burleigh Views Loan

24E. By no later than about 1 December 2008, AETL knew, or ought to have known, that a loan recorded in the FTI Portfolio and relating to a development property at Burleigh Heads, Queensland (the Burleigh Views loan):

24E.1 was originally written in 2000, for a 12 month period, with a facility limit of \$4 million;

24E.2 related to a site:

(a) for which development approval had lapsed in about March 2002;

(b) which in about 2003 had been valued, with or assuming development approval, at no more than \$5.9m;

(c) on which there had been little or no construction activity since 2005;

24E.3 as at 30 June 2008, had a carrying value of \$13,500,429;

24E.4 was to a borrower who on 21 August 2008 had entered liquidation;

24E.5 had caused Provident on 5 September 2008 to enter as mortgagee in possession;

24E.6 had appeared on Arrears Reports that AETL received for months prior to March 2007;

24E.7 by January 2007 and February 2007 was recorded in the Arrears Reports as having been in arrears for 27 to 28 months;

24E.8 ceased to appear on Arrears Reports after March 2007.

PARTICULARS

The Burleigh Views loan appeared on the Arrears Reports dated 31 January 2007 and 28 February 2007.

24F. Had AETL, within a reasonable time after March 2007, alternatively 30 June 2008, made further enquiries about the value of the security property for the Burleigh Views loan, AETL would have discovered:

24F.1 each of the matters set out in the preceding paragraph;

24F.2 that as at December 2008, the loan had a carrying value of about \$13.5m.

PARTICULARS

Provident Capital Ltd report to the trustee for the quarter ended 30 September 2008.

24G. Having obtained the further information referred to in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that provisions for credit losses of approximately \$7.895m (including 5% realisation costs) should be made for the Burleigh Views loan.

(c) Ovchinnikov loan

24H. Had AETL at any time prior to December 2008 made further inquiries, as it was obliged to do, about the value of the security property for the loan to Mihail Ovchinnikov (the Ovchinnikov loan), it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

24H.1 that the loan had a principal balance as at December 2008 of about \$3.9m and net arrears of about \$1.25m and had been in arrears for about 1400 days; and

24H.2 that the loan to valuation ratio disclosed on the arrears report was 166%, implying a valuation of the security property of \$3.12m.

24I. Having obtained the further information alleged in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that provisions for credit losses of approximately \$2.224m (including 5% realisation costs) should be made for the Ovchinnikov loan.

(d) Unique Castle Loan

24J. Had AETL at any time prior to December 2008 made further inquiries, as it was obliged to do, about the value of the security properties for the loan to Unique Castle Development Pty Ltd (the Unique Castle loan), it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

24J.1 that as at December 2008, the loan had a principal balance of about \$3.8m and net arrears of about \$935,000 and had been in arrears for about 700 days; and

24J.2 that the most recent valuation of the security property at 161 Castle Hill Road, Castle Hill was \$4,050,000 and was dated 26 June 2006.

24K. Having obtained the further information alleged in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that provisions for credit losses of approximately \$939,219 (including 5% realisation costs) should be made for the Unique Castle loan.

(e) Ozer loan

24L. Had AETL at any time prior to December 2008 made further inquiries, as it was obliged to do, about the value of the security property for the loan to Hasan Ozer (the Ozer loan), it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

24L.1 that as at December 2008, the loan had a principal balance of about \$1.87m and net arrears of \$189,868; and

24L.2 that the most recent valuation of the property was \$1.3m and was dated 13 December 2006.

24M. Having obtained the further information alleged in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that provisions for credit losses of approximately \$832,724 (including 5% realisation costs) should be made for the Ozer loan.

(f) Tembelli loan

24N. Had AETL at any time prior to December 2008 made further inquiries, as it was obliged to do, about the value of the security property for the loan to Tembelli Pty Ltd (the Tembelli loan), it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

24N.1 that the loan had a principal balance as at December 2008 of about \$3.898m and net arrears of \$1.02m; and

24N.2 that the loan to valuation ratio disclosed on the arrears report was 120%, implying a valuation of the security property of \$4.1m.

24O. Having obtained the further information alleged in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that provisions for credit losses of approximately \$1,014m (including 5% realisation costs) should be made for the Tembelli loan.

(g) Chrysalis loan

24P. Had AETL made further inquiries, as it was obliged to do, about the value of the development property at Newcastle, New South Wales (the Chrysalis loan), it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

24P.1 the Chrysalis loan was in default from at least 13 October 2005; and

24P.2 as at 30 June 2008, the Chrysalis loan had a carrying value of \$6.9 million

24Q. Had AETL, within a reasonable time after 30 June 2008, made further enquiries about the value of the security property for the Chrysalis loan, AETL would have discovered:

24Q.1 that as at December 2008, the loan had a principal balance of about \$5.664m and net arrears of \$663,421 and had been in arrears for about 818 days; and

24Q.2 that the most recent valuation of the security property was \$6m and was dated 20 May 2008.

24R. Having obtained the further information alleged in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that provisions for credit losses of approximately \$628,242 (including 5% realisation costs) should be made for the Chrysalis loan.

(h) Kooindah loan

24S. Had AETL at any time prior to December 2008 made further inquiries, as it was obliged to do, about the value of the security property for the loan to Kooindah Lifestyle Pty Ltd (the Kooindah loan), it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

24S.1 that the loan had a principal balance as at December 2008 of about \$1.053m and net arrears of \$210,745 and had been in arrears for about 395 days; and

24S.2 that the most recent valuation of the security property was \$900,000 and was dated 29 March 2007.

24T. Having obtained the further information alleged in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that provisions for credit losses of approximately \$409,007 (including 5% realisation costs) should be made for the Kooindah loan.

(i) Gardiner loan

24U. Had AETL at any time prior to December 2008 made further inquiries, as it was obliged to do, about the value of the security property for the loan to Victor and Verna Gardiner (the Gardiner loan), it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

24U.1 that the loan had a principal balance as at December 2008 of about \$1.136m and net arrears of \$181,905; and

24U.2 that the most recent valuation of the security property was \$650,000 and was dated 23 September 2005.

24V. Having obtained the further information alleged in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that provisions for credit losses of approximately \$700,639 (including 5% realisation costs) should be made for the Gardiner loan.

(i) Leach loan

24W. Had AETL at any time prior to December 2008 made further inquiries, as it was obliged to do, about the value of the security property for the loan to Phillip Leslie Leach (the Leach loan), it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

24W.1 that the loan had a principal balance as at December 2008 of about \$1.973m and net arrears of \$536,767; and

24W.2 that the most recent valuation of the security property was \$2.3m and was dated 9 February 2007.

24X. Having obtained the further information alleged in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that provisions for credit losses of approximately \$325,733 (including 5% realisation costs) should be made for the Leach loan.

(k) Morrell loan

24Y. Had AETL at any time prior to December 2008 made further inquiries, as it was obliged to do, about the value of the security property for the loan to Maureen Kaye Morrell (the Morrell loan), it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

24Y.1 that the loan had a principal balance as at December 2008 of about \$1.049m and net arrears of \$186,162; and

24Y.2 that the loan to valuation ratio disclosed on the arrears report was 107%, implying a valuation of the security property of \$1,153,377.

24Z. Having obtained the further information alleged in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that provisions for credit losses of approximately \$140,020 (including 5% realisation costs) should be made for the Morrell loan.

(l) Naumovska loan

24AA. Had AETL at any time prior to December 2008 made further inquiries, as it was obliged to do, about the value of the security property for the loan to Dimitar Naumovski and Milica Naumovska (the Naumovska loan), it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

24AA.1 that the loan had a principal balance as at December 2008 of about \$494,408 and net arrears of \$71,907 and had been in arrears for about 441 days; and

24AA.2 that the most recent valuation of the security property was \$500,000 and was dated 21 June 2007.

24AB. Having obtained the further information alleged in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that provisions for credit losses of approximately \$91,315 (including 5% realisation costs) should be made for the Naumovska loan.

(m) Hanna loan

24AC. Had AETL at any time prior to December 2008 made further inquiries, as it was obliged to do, about the value of the security property for the loan to Paul Vincent Hanna (the Hanna loan), it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

24AC.1 that the loan had a principal balance as at December 2008 of about \$5.046m and net arrears of \$758,110 and had been in arrears for about 303 days; and

24AC.2 that the most recent valuation of the security property was \$6m and was dated 14 September 2007.

24AD. Having obtained the further information alleged in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that provisions for credit losses of approximately \$104,258 (including 5% realisation costs) should be made for the Hanna loan.

(n) Carlsund loan

24AE. Had AETL at any time prior to December 2008 made further inquiries, as it was obliged to do, about the value of the security property for the loan to Carl Andrew and Elizabeth Gai Carlson (the Carlsund loan), it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

24AE.1 that the loan had a principal balance as at December 2008 of about \$846,102 and net arrears of \$257,212; and

24AE.2 that the most recent valuation of the security property was \$1.1m and was dated 11 September 2006.

24AF. Having obtained the further information alleged in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that provisions for credit losses of approximately \$76,314 (including 5% realisation costs) should be made for the Carlsund loan.

(o) Smith & Arnott loan

24AG. Had AETL at any time prior to December 2008 made further inquiries, as it was obliged to do, about the value of the security property for the Smith & Arnott loan, it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

24AG.1 that the loan had a principal balance as at December 2008 of about \$247,879 and net arrears of \$64,244; and

24AG.2 that the loan to valuation ratio disclosed on the arrears report was 108%, implying a valuation of the security of \$289,997.

24AH. Having obtained the further information alleged in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that provisions for credit losses of approximately \$36,627 (including 5% realisation costs) should be made for the Smith & Arnott loan.

(p) DS loan

24AI. Had AETL at any time prior to December 2008 made further inquiries, as it was obliged to do, about the value of the security property for the loan to DS Investments Pty Ltd (the DS loan), it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

24AI.1 that the loan had a principal balance as at December 2008 of about \$292,686 and net arrears of \$56,991 and had been in arrears for about 423 days; and

24AI.2 that the most recent valuation of the security property was \$350,000 and was dated 24 October 2006.

24AJ. Having obtained the further information alleged in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that provisions for credit losses of approximately \$17,177 (including 5% realisation costs) should be made for the DS loan.

(g) Good Life loan

24AK. Had AETL at any time prior to December 2008 made further inquiries, as it was obliged to do, about the value of the security property for the loan to Good Life Retirement Systems Pty Ltd (the Good Life loan), it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

24AK.1 that the loan had a principal balance as at December 2008 of about \$1.212m and net arrears of \$215,419 and had been in arrears for about 553 days; and

24AK.2 that the loan to valuation ratio disclosed on the arrears report was 86%, implying a valuation of the security of \$1.667m.

24AL. Having obtained the further information alleged in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that provisions for credit losses of approximately \$2,533 (including 5% realisation costs) should be made for the Good Life loan.

(r) Residual loans

24AM. Had AETL at any time prior to December 2008 made further inquiries, as it was obliged to do, about the value of the FTI Portfolio, it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

24AM.1 that after realisation of the security on the Clucor loan, there remained a receivable to Provident of \$730,531 in June 2008; and

24AM.2 that after realisation of the security on the Agara/MMT loan, there remained a receivable to Provident of \$775,363 in June 2008.

PARTICULARS

Walter Turnbull "Financial Assets – Loans and Advances – Directors Impairment Assessment" dated June 2008.

24AN. Having obtained the further information alleged in the preceding paragraph, AETL by not later than early December 2008 would, or should, have formed the opinion that impairments of at least \$1.5m should be made on account of the residuals for the Clucor and Agara/MMT loans.

F. OBLIGATIONS AND CONTRAVENTION – DECEMBER 2008

(a) Proper conclusions and response

24AO. Having formed the opinions alleged in paragraphs 24G, 24I, 24K, 24M, 24O, 24R, 24T, 24V, 24X, 24Z, 24AB, 24AD, 24AF, 24AH, 24AJ, 24AL and 24AN above, AETL by not later than early December 2008 would, or should have reached the following conclusions:

24AO.1 the loan to valuation ratios on the 21 Excessive-LVR loans placed Provident in breach of the Trust Deed;

24AO.2 that provisions for credit losses of approximately \$15.437m in the FTI Portfolio should have been made by Provident;

24AO.3 that impairments of at least \$1.5m should be made by Provident on account of the residual loans;

24AO.4 that the provisions for credit losses in the FTI Portfolio, and impairments that should have been made and recognised, materially prejudiced the interests of existing and prospective note holders; and

24AO.5 that the property available to Provident in the FTI Portfolio was insufficient to repay the debentures when they became due.

24AP. Had AETL reached the conclusions alleged in the preceding paragraph, as it ought to have done, AETL would, or should have, immediately, and by no later than 23 December 2008, made an application to the court for orders that Provident be restricted from advertising for additional deposits or loans and that Provident be restricted from further borrowing from members of the public.

24AQ. Had AETL applied for the orders alleged in the preceding paragraph, the court would have made the orders in those terms.

24AR. Further, or alternatively, had AETL reached the conclusions alleged in paragraph 24AO above, as it ought to have done, AETL would, or should have, immediately, and by no later than 23 December 2008, have notified ASIC of those conclusions.

24AS. Had AETL notified ASIC as alleged in the preceding paragraph, ASIC would have placed a stop order on Provident Debenture Prospectus 11 and prevented further borrowing by Provident by way of debentures.

(b) Contraventions and causation

24AT. In contravention of its duties under s 283DA of the Act, AETL:

24AT.1 did not form the opinion alleged in paragraph 24C above; and

24AT.2 did not make the further inquiries alleged in paragraph 24D above; and

24AT.3 did not reach the conclusions alleged in paragraph 24N above; and

24AT.4 did not take the steps alleged in paragraphs 24AP or 24AR above.

24AU. If AETL, exercising reasonable diligence, had done each of the things alleged in the preceding paragraph, then:

24AU.1 debentures would not have been issued on or after 23 December 2008;

- 24AU.2 AETL would have appointed an investigating accountant to provide a report on Provident's financial position;
- 24AU.3 Following the report of the investigating accountant, by not later than 23 December 2008 receivers would have been appointed to the property of Provident secured by the fixed and floating charge dated 11 December 1998;
- 24AU.4 Alternatively, an investigating accountant would not have been appointed and by not later than 23 December 2008 receivers would have been appointed to the property of Provident secured by the fixed and floating charge dated 11 December 1998;
- 24AU.5 the applicant and the group members who were first issued debentures after 23 December 2008 would not have suffered any loss or damage; and
- 24AU.6 those group members who already held debentures as at 23 December 2008 would have suffered less loss and damage.
- 24AV. By reason of AETL's contraventions of s 283DA of the Act, the applicant and each group member has suffered loss and damage.

PARTICULARS

- a) On 18 September 2012, Provident entered voluntary administration. The security available for repayment of the debenture holders was at that time inadequate and the suffering of loss by the debenture holders became ascertainable and inevitable.
- b) If AETL took the steps alleged in paragraph 24AT, then the property available to repay debenture-holders would have been realised at about that time. So far as the applicant is able to say before the receipt of expert reports, debenture holders would have received a return of about \$0.66 cents in the dollar ('2009 recovery rate'). Further particulars of the return that debenture holders would have received will be provided after the receipt of expert reports and prior to trial.
- c) In fact, Provident continued to trade and the value of the property available to repay debenture-holders deteriorated, with the result that
- i. on 30 September 2013, the receivers and managers of Provident estimated that debenture holders would receive a return of between 17 and 19 cents in the dollar and
- i. on 31 December 2014, the receivers and managers of Provident estimated that debenture holders would receive a return of 12 cents in the dollar on their principal ('value left in hand').
- d) Group members who held debentures as at 23 December 2008 suffered loss of at least the difference between the 2009 recovery rate in paragraph b) of these particulars and the value left in hand in paragraph c) of these particulars.
- e) Group members who were issued debentures after 23 December 2008 suffered loss of at least the issue price for the debentures less the value left in hand.

f) Further, the applicant and the group members suffered distress and anxiety and seek damages on the basis of the decision in Newman v Financial Wisdom (2004) 183 FLR 164.

g) Further particulars of loss and damage will be provided prior to trial.

G) THE G. FINANCIAL POSITION AND PERFORMANCE OF PROVIDENT AS AT 30 JUNE 2009

25. By no later than 30 October 2009, AETL knew, or ought to have known, that as at 30 June 2009, Provident reported total debentures on issue of \$116,542,499, of which \$20,262,417 were due to be repaid within 3 months, \$52,075,529 were due to be repaid between 3 months and 1 year and \$44,204,553 were due to be repaid between 1 year and 5 years.

PARTICULARS

Provident Capital Ltd report to the trustee for the quarter ended 30 September 2009 at p. 4.

26. By no later than 30 October 2009, AETL knew, or ought to have known, that as at 30 June 2009, and across both the FTI Portfolio and the BEN Portfolio:
- 26.1. Provident reported \$10.4m of loan interest receivable on its balance sheet;
 - 26.2. Provident reported \$31.3m of interest income and \$26.6m of interest received, leaving an amount of unpaid interest of \$4.7m;
 - 26.3. Provident had impairment provisions of \$3.4m;
 - 26.4. Provident had 60 past due loans, with an aggregate principal balance of \$88.9m, of which \$44.3m had been assessed as not impaired, leaving \$44.5m assessed as impaired or potentially impaired;
 - 26.5. Provident had 41 past due loans (greater than 90 days), with an aggregate principal balance of \$62.8m, being 32.6% by value and 23.2% by number of its total loan portfolio; and
 - 26.6. of the past due loans greater than 90 days, Provident was mortgagee in possession of \$28.7m of those past due loans, being 45.7% of those past due loans.

PARTICULARS

- a) Provident Capital Ltd Financial Statements for the year ended 30 June 2010 at pp. 10, 18, 22, 24-25*
- b) Provident Capital Ltd report to the trustee for the quarter ended 30 September 2009 at pp. 5-6.*

27. By no later than 30 October 2009, AETL knew, or ought to have known:
- 27.1. that as at 30 June 2009, Provident's largest loan was in the amount of \$15.1m and was a "construction loan";
 - 27.2. that as at 30 June 2009, the value of "construction loans" accounted for about 13% of the debentures on issue; and

27.3. that from that time, Provident should have measured its performance against benchmark 1 in ASIC's Regulatory Guide 69 on the basis that it should maintain a minimum equity ratio of 20%; and

27.4. that as at 30 June 2009, Provident reported an equity ratio of 6.43%.

PARTICULARS

Provident Capital Ltd report to the trustee for the quarter ended 30 September 2009 at pp. 3, 4-5.

D. THE H. FINANCIAL POSITION AND PERFORMANCE OF PROVIDENT _AS-AT 30 JUNE 2010

(a) General security

28. By no later than 28 September 2010, AETL knew, or ought to have known, that as at 30 June 2010, Provident reported total assets of \$222,011,825, of which \$178,306,246 were loans receivable.

PARTICULARS

Provident Capital Ltd Financial Statements for the year ended 30 June 2010 at pp. 8, 24.

29. By no later than 28 September 2010, AETL knew, or ought to have known, that as at 30 June 2010, Provident reported liabilities in the amount of \$207,991,130, of which \$159,973,320 were current liabilities and \$48,017,810 were non-current liabilities.

PARTICULARS

Provident Capital Ltd Financial Statements for the year ended 30 June 2010 at p. 8.

30. By no later than 28 September 2010, AETL knew, or ought to have known, that as at 30 June 2010, Provident reported total debentures on issue in the amount of \$116,977,143, of which \$20,028,181 were due to be repaid within 3 months, \$60,476,907 were due to be repaid between 3 months and 1 year and \$36,472,055 were due to be repaid between 1 year and 5 years.

PARTICULARS

Provident Capital Ltd Financial Statements for the year ended 30 June 2010 at p. 27.

31. By no later than 28 September 2010, AETL knew, or ought to have known, that as at 30 June 2010, Provident reported non-realizable assets in the amount of \$1,500,157, being tax assets.

PARTICULARS

Provident Capital Ltd Financial Statements for the year ended 30 June 2010 at p. 8.

32. By no later than 28 September 2010, AETL knew, or ought to have known, that as at 30 June 2010, and across both the FTI Portfolio and the BEN Portfolio, Provident had 158 loans by number and \$178,306,246 of loans by value, of which:

32.1. 114 loans by number and \$105.7m of loans by value were for "residential loans";

32.2. 23 loans by number and \$16.8m of loans by value were for "commercial loans"; and

32.3. 1 loan in the amount of \$17.5m was for "construction".

PARTICULARS

Provident Capital Ltd financial statements for the year ended 30 June 2010 at pp. 17, 19.

33. By no later than 22 October 2010, AETL knew, or ought to have known:
- 33.1. that as at 30 June 2010, the value of "construction loans" accounted for about 15% of the debentures on issue; and
 - 33.2. that from that time, Provident should have measured its performance against benchmark 1 in ASIC's Regulatory Guide 69 on the basis that it should maintain a minimum equity ratio of 20%; and
 - 33.3. that as at 30 June 2010, Provident reported an equity ratio of 6.32%.

PARTICULARS

Provident Capital Ltd report to the trustee for the quarter ended 30 September 2010 at pp. 3, 5.

34. By no later than 22 October 2010, AETL knew, or ought to have known, that as at 30 June 2010, and across both the FTI Portfolio and the BEN Portfolio:
- 34.1. Provident reported \$13m of loan interest receivable on its balance sheet;
 - 34.2. Provident reported \$26.6m of interest income and \$24.7m of interest received, leaving an amount of unpaid interest of \$1.8m;
 - 34.3. Provident had impairment provisions of \$1.4m;
 - 34.4. Provident had 44 past due loans (greater than 30 days), with an aggregate principal balance of \$88.7m, being 49.7% by value and 27.8% by number of the total loan portfolio;
 - 34.5. Of the past due loans, Provident had assessed \$54.89m as not impaired, leaving \$33.8m assessed as impaired or potentially impaired;
 - 34.6. Provident had 25 past due loans (greater than 90 days), with an aggregate principal balance of \$57.2m, being 32.1% by value and 15.8% by number of its total loan portfolio;
 - 34.7. Provident was taking legal proceedings in respect of 6 loans which had an aggregate principal balance of \$15,019,535.

PARTICULARS

- a) *Provident Capital Ltd report to the trustee for the quarter ended 30 September 2010 at p. 6.*
- b) *Provident Capital Ltd financial statements for the year ended 30 June 2010 at pp. 18-19, 10, 22, 24.*

35. By no later than 28 September 2010, AETL knew, or ought to have known, that in the financial year ended 30 June 2010, Provident received \$20,419,532 from issuing debentures and repaid \$19,984,888 to investors.

PARTICULARS

Provident Capital Ltd financial statements for the year ended 30 June 2010 at p. 10.

36. By reason of the matters alleged in paragraphs 10 to 35 above, AETL should have formed the opinion, by no later than 30 October 2010, that it could only be satisfied that the assets of Provident would be sufficient to repay the debentures when they became due by making further inquiries of Provident about the financial position and performance of the FTI Portfolio and the value of the security property.

~~F. FURTHER INQUIRIES THAT AETL WAS OBLIGED TO MAKE~~

(b) AETL obligations of enquiry – general security

37. By reason of the matters alleged in the preceding paragraph, and in order to discharge the duty imposed by s 283DA of the Act, AETL was obliged, from time-to-time, and by no later than 30 October 2010, to make inquiries about and to satisfy itself about the value of the loans and any actual or reasonably anticipated credit losses in the FTI Portfolio and about the provisions made for credit losses, including about:
- 37.1. the total value of debentures on issue and the dates on which those debentures were due to be repaid;
 - 37.2. the value of the assets available to Provident to repay the debentures, which necessarily included the details of loans in the FTI Portfolio;
 - 37.3. Provident's policies for managing loans in default and for realising securities and the steps it was taking to implement those policies; and
 - 37.4. the financial position and performance of borrowers in the FTI Portfolio;
 - 37.5. the number and value of loans in the FTI Portfolio;
 - 37.6. the number, value and period for which loans in the FTI Portfolio were in default;
 - 37.7. the number, value and period for which Provident was mortgagee in possession of loans in the FTI Portfolio;
 - 37.8. the progress of development and sales activity for each of the loans made for "construction purposes";
 - 37.9. the current "as is" or realisable value of the security property for each loan in default;
 - 37.10. the loan to valuation ratio of loans in the FTI Portfolio in default.

~~A) INQUIRIES ABOUT DEVELOPMENT AT BURLEIGH HEADS, QUEENSLAND~~

(c) Inquiries about Burleigh Views Loan

38. Had AETL made further inquiries, as it was obliged to do, about the value of the development property at Burleigh Heads, Queensland (the **Burleigh Views loan**), it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

- 38.1. each of the matters set out in paragraphs 24E and 24F above;

- ~~38.1.~~ the loan was originally written in 2000, for a 12 month period, with a facility limit of \$4 million;
- ~~38.2.~~ there was little or no construction activity on the site between 2005 and 2010;
- ~~38.3.~~ as at 30 June 2008, the loan had a carrying value of \$13,500,429;
- ~~38.4.~~ on 21 August 2008, the borrower had entered liquidation, and by 5 September 2008 Provident had entered as mortgagee in possession;
- ~~38.5.~~38.2. that on 13 August 2009, Provident was told that the development approval for the site had lapsed;
- ~~38.6.~~ from that point in time, the value of the land (with a development approval) was no more than \$5.0 million, being the most recently obtained valuation of the land obtained in 2003; and
- ~~38.7.~~38.3. that as at 30 June 2010, the loan had a carrying value of \$17,518,058.

PARTICULARS

- a) *Transcripts of examination of Mr O'Sullivan in NSD808 of 2012 on 19 April 2013 (pp 74, 77, 132, 159), 24 June 2013 (pp. 23-24, 27).*
- b) *Provident Debenture Prospectus 11 at p. 11.*
- c) *Provident Capital Prospectus 2011 at p. 10.*
39. Having obtained the further information alleged in the preceding paragraph, AETL would, or should, have formed each of the following opinions about the Burleigh Views loan:
- 39.1. that despite being mortgagee in possession since September 2008, Provident had not been taking steps to realise its security;
- 39.2. that Provident had not been maintaining current valuations for the security;
- 39.3. that provisions for credit losses of at least \$11.6m should be made for this loan.

~~B) INQUIRIES ABOUT DEVELOPMENT AT NEWCASTLE, NEW SOUTH WALES~~

(d) Inquiries about Chrysalis loan, Newcastle NSW

40. Had AETL made further inquiries, as it was obliged to do, about the value of the development property at Newcastle, New South Wales (the **Chrysalis loan**), it would have discovered, within a reasonable time after making those inquiries, each of the following matters:
- 40.1. each of the matters set out in paragraphs 24P and 24Q above;
- ~~40.1.~~40.2. the Chrysalis loan was in default from at least 13 October 2005;
- ~~40.2.~~40.3. as at 30 June 2008, the Chrysalis loan had a carrying value of \$6.9 million;
- ~~40.3.~~40.4. on 11 March 2010, Provident received a valuation for the land that gave a land value of \$5.9 million;

~~40.4.40.5.~~ as at 30 June 2010, the Chrysalis loan had a carrying value of \$7,826,009.

PARTICULARS

- a) *PPB Advisory, Annual Report to Debentureholders for the 2013 Financial Year, at p. 7.*
- b) *Provident Capital Limited, Financial Report for the year ended 30 June 2008, at p. 17.*
- c) *Transcripts of examination of Mr O'Sullivan in NSD808 of 2012 on 25 June 2013 (pp. 48-49, 56-57), 26 June 2013 (p. 3).*
- d) *Provident Capital Limited, Financial Report for the year ended 30 June 2011 at p. 20.*

41. Having obtained the further information alleged in the preceding paragraph, AETL would, or should, have formed each of the following opinions:

- 41.1. that Provident had not been taking steps to realise its security;
- 41.2. that provisions for credit losses of at least \$1.9m should be made for this loan.

(e) ~~C) THE BALANCE OF THE~~ Inquiries about FTI Portfolio PORTFOLIO

42. Had AETL made further inquiries, as it was obliged to do, about the FTI Portfolio, it would have discovered, within a reasonable time after making those inquiries, each of the following matters:

- 42.1. that Provident had been, since at least 2009, mortgagee in possession of loans with a value of about \$44.9m;
- 42.2. that Provident had not been obtaining regular valuations of its securities for loans in default;
- 42.3. that Provident had not been taking steps to realise its securities; and
- 42.4. AETL would have formed the opinion that in December 2010 provisions for credit losses in the balance of the FTI Portfolio (excluding the Burleigh Views loan and the Chrysalis loan) of at least 10% of the value of the loans, being about \$6.717m, should be made

PARTICULARS

- a) *Advisory, Information Session for Debentureholders (13 August 2012) at p. 19.*
- b) *PPB Advisory, Notice to Debentureholders (3 December 2012).*
- c) *That provisions for credit losses in the balance of the FTI Portfolio of at least 10% as at December 2010 should have been made may be inferred from (i) the size of the credit losses sustained when the FTI Portfolio was realised; (ii) statistical data from the Australian mortgage insurance industry about losses-given-defaults for residential loans; and (iii) the opinion expressed by PPB Advisory that Provident is likely to have under provisioned its bad debt impairments for a number of years.*
- d) *As to (i): as at 3 July 2012, the FTI Portfolio had a carrying value of \$103,825,156 over 39 loans (PPB Advisory, Annual Report to Debentureholders for the 2013 Financial Year at p. 6). As at 31 December 2013, PPB Advisory had realised 31 loans with a carrying*

value of about \$57.2 million for the sum of about \$30.5 million. This means that credit losses of 47% were suffered in realised loans. Further, as at 31 December 2013, Provident carried 8 loans at \$49,115,158 for which PPB Advisory anticipated realising \$15,573,238. This means that PPB Advisory anticipated credit losses of 68% in the unrealised portfolio. Across the whole portfolio (realised and unrealised) and excluding the Burleigh View loan and the Chrysalis loan, that yields credit losses of about 51%. (See PPB Advisory's Annual Report to Debentureholders for the 2013 Financial Year (30 September 2013) and Update to Debentureholders as at 31 December 2013 (26 February 2014).

- e) As to (ii): see Australian Prudential Regulation Authority, *Stress Testing Housing Loan Portfolios: A Regulatory Case Study* (September 2005) at p. 13.
- f) As to (iii): see McGrath + Nicol, *Report to Creditors* (17 October 2012) at p. 14.
- g) The amount of \$6.717m is calculated by first deducting the amount of Provident's liabilities in the BEN Portfolio (\$85,791,281) from the total loan portfolio, then deducting the carrying value of the Burleigh Views loan and the Chrysalis loan and then applying 10% provisioning for credit losses to the balance. Further particulars of the amount of the provisions for credit losses in the balance of the FTI Portfolio will be provided before trial.

~~G. CONCLUSIONS REACHED AS A RESULT OF FURTHER INVESTIGATIONS~~

I. OBLIGATIONS AND CONTRAVENTIONS

(a) Proper conclusions and response

- 43. Having formed the opinions alleged in paragraphs 39, 41 and 42 above, AETL would, or should, have reached the following conclusions:
 - 43.1. that Provident's practice of not realising securities meant that the accounts did not give a true picture of the value of the assets held as loan receivables;
 - 43.2. that provisions for credit losses of at least \$20.217m in the FTI Portfolio should have been made by Provident;
 - 43.3. that the provisions for credit losses in the FTI Portfolio that should have been made materially prejudiced the interests of existing and prospective note holders; and
 - 43.4. that the property available to Provident in the FTI Portfolio was insufficient to repay the debentures when they became due.

PARTICULARS

The provisions for credit losses alleged in sub-paragraph 43.2 are the sum of the provisions for credit losses alleged in sub-paragraphs 39.3, 41.2 and 42.4.

~~H. . . . CESSATION OF FUND-RAISING~~

- 44. Had AETL reached the conclusions alleged in paragraph 43 above, as it ought to have done, AETL would, or should have, immediately, and by no later than 1

December 2010, have made an application to the court for orders that Provident be restricted from advertising for additional deposits or loans and that Provident be restricted from further borrowing from members of the public.

45. Had AETL applied for the orders alleged in the preceding paragraph, the court would have made orders in those terms.

PARTICULARS

The application made by AETL would have included evidence on affidavit of the matters it had ascertained and the conclusions it had reached and a court, acting on that evidence and on application by the trustee for the debenture holders would have made the orders sought.

46. Further, or alternatively, had AETL reached the conclusions alleged in paragraph 43 above, as it ought to have done, AETL would, or should have, immediately, and by no later than 1 December 2010, have notified ASIC of those conclusions.
47. Had AETL notified ASIC as alleged in the preceding paragraph, ASIC would have placed a stop order on Provident Capital Debenture Prospectus 2011 and prevented further borrowing by Provident by way of debentures.

~~I. CONTRAVENTION BY AETL OF SECTION 283DA~~

(b) Contraventions and causation

48. In contravention of its duties under s 283DA of the Act, AETL:
- 48.1. did not form the opinion alleged in paragraph 36 above; and
 - 48.2. did not make the further inquiries alleged in paragraphs 37, 38, 40 and 42 above; and
 - 48.3. did not reach the conclusions alleged in paragraph 43 above;
 - 48.4. did not take the steps alleged in paragraphs 44 and 46 above.
49. If AETL, exercising reasonable diligence, had done each of the things alleged in the preceding paragraph, then:
- 49.1 debentures would not have been issued on or after 22 December 2010;
and
 - 49.2 by not later than 22 December 2010 receivers would have been appointed to the property of Provident secured by the fixed and floating charge dated 11 December 1998;
 - 49.3 the applicant and the group members who were first issued debentures after 22 December 2010 would not have suffered any loss or damage;
and
 - 49.4 those group members who already held debentures as at 22 December 2010 would have suffered less loss and damage.
50. By reason of AETL's contraventions of s 283DA of the Act, the applicant and each group member has suffered loss and damage.

PARTICULARS

- a) ~~The applicant and each group member were issued debentures by Provident on or after 22 December 2010.~~
- a) On 18 September 2012, Provident entered voluntary administration.
- b) If AETL took the steps alleged in paragraph 24AT, then the property available to repay debenture-holders would have been realised and, so far as the applicant is able to say before the receipt of expert reports, debenture holders would have received a higher return than that identified in paragraph c) below. Further particulars of the return that debenture holders would have received will be provided after the receipt of expert reports and prior to trial.
- In fact, Provident continued to trade and the value of the property available to repay debenture-holders deteriorated, with the result that
- e)-i. On 30 September 2013, the receivers and managers of Provident estimated that debenture holders would receive a return of between 17 and 19 cents in the dollar and
- ii. on 31 December 2014, the receivers and managers of Provident estimated that debenture holders would receive a return of 12 cents in the dollar on their principal.
- c) Group members who held debentures as at 22 December 2010 suffered loss of at least the difference between the "but for" return in paragraph b) of these particulars and the actual return in paragraph c) of these particulars.
- d) Group members who were issued debentures after 22 December 2010 suffered loss of at least the issue price for the debentures less the actual return in paragraph c) of these particulars.
- e) Further, the applicant and the group members suffered distress and anxiety and seek damages on the basis of the decision in Newman v Financial Wisdom (2004) 183 FLR 164.
- f) Further particulars of loss and damage will be provided prior to trial.

49-51 In the premises, the applicant and each group member are entitled to recover the loss and damage they have suffered, as a result of the AETL's failure to comply with s 283DA of the Act, from AETL pursuant to s 283F of the Act.

50-52 The applicant and each group member seek the relief set out in the Amended Application.

Date: 26 June 2015 ~~23 December 2014~~



Signed by Slater and Gordon Lawyers
Lawyers for the Applicant

This pleading was prepared by David Collins QC and Chris Young of counsel and amended by Lachlan Armstrong QC and Chris Young of counsel.

Certificate of lawyer

I Odette McDonald certify to the Court that, in relation to the amended statement of claim filed on behalf of the applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 26 June 2015



Signed by Odette McDonald
Lawyer for the applicant