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No: VID798/2014

Federal Court of Australia
District Registry: Victoria
Division: General

INNES CREIGHTON
Applicant

AUSTRALIAN EXECUTOR TRUSTEES LIMITED ACN 007 869 794
Respondent

ORDER

JUDGE: JUSTICE MIDDLETON

DATE OF ORDER: 26 June 2015

WHERE MADE: Melbourne

THE COURT ORDERS THAT:

Cross-claim application

1. The interlocutory application filed by the respondent on 6 May 2015 for leave to file cross-claims (the Application) is discontinued.
2. No order as to costs of the Application as between the parties.

Amendment

3. The Applicant has leave to amend the Originating Application and the Statement of Claim substantially in the form set out in the proposed Amended Originating Application and the proposed Amended Statement of Claim exhibited to the Affidavit of Odette Nigela Alaina McDonald affirmed on 17 June 2015, without prejudice to the right of the Respondent to take any limitations point arising in respect of the amendments.
4. The Applicant to file and serve an Amended Originating Application and an Amended Statement of Claim by 26 June 2015.
5. The Respondent to file and serve a Defence to the Amended Statement of Claim by 31 July 2015.
6. The Applicant to pay the Respondent's costs occasioned by, and thrown away as a consequence of, the amendments to the Originating Application and the Statement of Claim.



Notice of commencement

7. Pursuant to section 33X(1)(a), alternatively section 33X(5), alternatively section 33ZF of the Federal Court of Australia Act 1976 (Cth) (the Act), the form and content of the notice set out in Annexure A to these orders be approved as a notice to advise group members of the commencement of the proceeding and costs arrangements made for the proceeding (Notice of Commencement).
8. The Notice of Commencement be given to potential group members in the following way:
 - (a) By 7 July 2015, the Applicant shall cause the Notice of Commencement to be sent by pre-paid ordinary post and/or by email to the last known mailing or email addresses held by the Applicant's solicitors in respect of each potential group member;
 - (b) By 7 July 2015, the Applicant's solicitor cause a copy of the Notice of Commencement, the Amended Statement of Claim and the Defence to the Statement of Claim to be displayed on its website.
9. Pursuant to section 37AF of the Act, and on the ground that the order is necessary to prevent prejudice to the proper administration of justice, paragraphs 21, 22, 25(b), 25(c), 30, 32, 43-46, the redacted section of paragraph 42(a) and annexure BJYP-1 to the affidavit of Benjamin James Yang Phi affirmed 25 June 2015:
 - (a) not be required to be served on the Respondent; and
 - (b) remain confidential on the Court file and not be disclosed to any other parties or persons without the express prior consent of the applicant or prior order of this Court.

Opt out

10. Order 7 of the Orders of Justice Gordon dated 30 January 2015 be vacated.
11. By 30 July 2015, the parties endeavour to agree:
 - (a) the time and date before which a group member may opt-out of this proceeding pursuant to section 33J of the Act;
 - (b) the form and content of the opt-out notice for the purposes of section 33Y of the Act; and
 - (c) the proposed method by which the opt-out notice is to be published and/or distributed.



12. By 6 August 2015 the applicant:

- (a) if the matters referred to in Order 11 have been agreed – deliver to the Associate to his Honour Justice Middleton the parties' proposed orders in respect of the said matters; or
 - (b) if the matters referred to in Order 11 have not been agreed – file and serve any application in respect of the said matters;
- and the matter be listed for mention, or for hearing of any application pursuant to (b) (as the case may be) on 14 August 2015.

Mediation

13. Order 8 of the Orders of Justice Gordon dated 30 January 2015, and the mediation listed for 11 August 2015, be vacated.
14. Pursuant to Rule 28.02 of the Federal Court Rules 2011 (Cth):
- (a) the proceeding be referred to mediation by a Registrar of the Court;
 - (b) the mediation shall be completed by 30 November 2015 or such later date as the Registrar may direct;
15. In the event that the matter does not settle at the conclusion of the mediation, the Registrar is directed to conduct a case management conference immediately following the mediation to consider the most economic and efficient means of bringing the proceedings to trial and of conducting the trial, at which conference the Registrar may give further directions.
16. The Registrar is to report the result of the mediation/case management conference to the Court by 3 December 2015.

Other matters

17. The proceeding be listed for directions on 14 August 2015 at 10.15am.
18. Costs otherwise reserved.
19. Liberty to apply.

Date that entry is stamped: 29 June 2015



Registrar



Annexure A

Federal Court of Australia

NOTICE OF A CLASS ACTION

Debentureholders in PROVIDENT CAPITAL LIMITED

1. Why is this notice important?

A class action has been commenced in the Federal Court of Australia on behalf of all persons who were issued debentures by Provident Capital Limited (**Provident**), and who have not been repaid in full.

The Federal Court has ordered that this notice be published for the information of persons whose rights might be affected by the class action (**group members**).

You have been identified as a potential group member based on Provident's register of debenture holders.

You should read this notice carefully. If you have questions about matters contained in this notice you should seek advice from a solicitor. You should not contact the Court.

2. What is a class action?

A class action is a legal claim brought by the **Applicant** on his or her own behalf and on behalf of group members with similar claims against the **Respondent**.

Under Part IVA of the *Federal Court of Australia Act 1976* (Cth), group members do not need to give their consent to be included within a class action.

Rather, persons falling within the 'group definition' will be bound by (and potentially benefit from) any judgment or settlement in the class action unless they have "opted out" of the proceeding.

The "opt out" procedure is explained below.

3. What is the Provident class action?

The Applicant in this class action is Mr Innes Creighton. The claim alleges that:

1. Australian Executor Trustees (**AET**) breached its obligations as a trustee for the debentureholders of Provident under the *Corporations Act 2001* (Cth); and
2. if AET had not breached its obligations, then Provident would have been prevented from issuing further debentures from 23 December 2008. Further, receivers would have been appointed to Provident by that date.

The detailed allegations are set out in the Applicant's **Amended Statement of Claim**.

Mr Creighton claims damages for the financial losses that he suffered, and also claims damages for losses suffered by group members. He claims interest on that amount, and seeks payment of the



legal costs incurred on his behalf and on behalf of the group.

AET denies the allegations, and has filed a **Defence**.

A copy of the Amended Statement of Claim and the Defence are available to be viewed on the website referred to below.

4. Are you a group member in the class action?

You have been sent this notice because you have been identified as someone who is likely to be a group member in this class action.

You are a group member if the following apply:

- a) you held a Provident debenture on 18 September 2012 (when Provident entered voluntary administration); and
- b) you suffered financial loss or damage.

If you meet those criteria, then the class action will seek to establish that your loss was caused by AET and to obtain compensation from AET on your behalf.

If you are unsure whether or not you are a group member, you should contact Slater and Gordon on 1800 071 827 or by email to provident@slatergordon.com.au or seek your own legal advice.

5. What does it mean to be a group member?

If you are a group member then you will be bound by the outcome of the class action.

If the class action is successful, you will be entitled to share in the benefit of any order, judgment or settlement.

If the class action is unsuccessful, or is not as successful as you might have wished, you may be prevented from bringing the same claim in any other proceedings.

If you do not wish to be a group member, you will have an opportunity to "opt out" of the proceeding.

The Court will make orders relating to the procedure for opting out of the class action later in 2015.

6. Will group members be liable for legal costs?

Applicant's Costs

The Applicant has engaged Slater and Gordon pursuant to a Conditional Legal Costs Agreement (the **CLCA**). It is not necessary for you or other group members to enter into a CLCA in order to participate in the class action.

Slater and Gordon is acting on a 'No Win – No Fee' basis. If the class action is successful then:

1. Slater and Gordon will be entitled to be paid legal costs and reimbursed for out of pocket expenses (**disbursements**) in accordance with the CLCA. The firm will be entitled to charge a 25% premium or "uplift" on the professional fees incurred under that agreement. The uplift



is not a percentage of compensation obtained;

2. the Applicant will seek an order that those legal costs and disbursements be paid out of the *total* amount recovered for *all* group members (a **reimbursement order**); and
3. the Federal Court will assess the reasonableness of those legal costs and disbursements and only make a reimbursement order for such an amount as is determined to be reasonable.

Aside from this limited procedure, Slater and Gordon has no right or entitlement to seek any payment from group members.

Respondent's Costs

In litigation, the Court will typically order the losing party to pay a proportion of the legal costs of the successful party (an **adverse costs order**).

In a class action, it is the Applicant that faces the risk of an adverse costs order if the action fails. As a group member, an adverse costs order will not be made against you.

Accordingly, Mr Creighton is assuming a substantial personal risk as the Applicant in this litigation.

In many class actions, this risk prompts an Applicant to enter into a 'litigation funding agreement' under which the litigation funder will indemnify the Applicant in exchange for a percentage of the total amount of any compensation that may be recovered.

In the Provident class action, there is no litigation funder. Rather:

1. Mr Creighton has obtained an indemnity against adverse costs from Slater and Gordon;
2. Slater and Gordon has obtained adverse costs (**AC**) insurance in respect of that indemnity; and
3. the cost of the AC insurance will form part of the legal costs incurred under Mr Creighton's CLCA for which reimbursement will be sought, as part of the reimbursement order, in the event that the claim is successful.

The terms of the AC insurance have been put before the Federal Court on a confidential basis as they are commercially-sensitive and cannot be publically disclosed.

Slater and Gordon believes that the funding arrangements outlined above will produce a substantially better outcome for group members than if commission-based litigation funding had been preferred.

Retaining Slater and Gordon

If this class action is successful, then it is *possible* that group members will need to take further steps to prove their individual entitlement to compensation.

You might want lawyers to assist you in those steps and, if so, you will need to enter a costs agreement with the lawyers. You will be able to engage your own lawyers, or Slater and Gordon.

A copy of Slater and Gordon's costs agreement can be obtained by contacting the firm. Any 'individual' costs incurred in this way will be additional to the 'reimbursement' costs referred to above.



8. Do I have to take any steps?

You do not have to take any steps. The purpose of this notice is simply to inform you of the commencement of the class action, the fact that you might be a group member, and the costs arrangements in the action.

Later this year, the Court will be asked to approve the distribution of an 'opt-out notice', which provides group members with an opportunity to opt out of the proceeding.

In making that decision, group members should consider the costs arrangements described above. If you object to those costs arrangements then you should opt out of the proceeding. If you do not opt out, you will be treated as having accepted the costs arrangements.

9. Where can you obtain copies of relevant documents?

Copies of relevant documents, including the Application, the Amended Statement of Claim, and the Defence, may be obtained by:

- a) downloading them from <https://www.slatergordon.com.au/class-actions/currentclass-actions/provident-capital-ltd>;
- b) requesting them by email to provident@slatergordon.com.au; or
- c) inspecting them on the Federal Court website: www.fedcourt.gov.au or by visiting a District Registry of the Federal Court in Sydney, Canberra, Melbourne, Brisbane, Adelaide, Perth, Hobart or Darwin: the addresses for these registries are available at www.fedcourt.gov.au or by calling the Victoria District Registry on (03) 8600 3333.

Please consider the above matters carefully.

If there is anything of which you are unsure, you should contact Slater and Gordon by email to provident@slatergordon.com.au or by telephone on 1800 071 827, or seek your own legal advice.