

**THIRD CROSS-CLAIM
AMENDED STATEMENT OF CROSS-CLAIM**

Filed pursuant to leave granted by Justice Ball on 5 March 2018.

COURT DETAILS

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|-------------|----------------------------------|
| Court | Supreme Court of New South Wales |
| Division | Equity |
| Registry | Sydney |
| Case number | 2015 / 306222 |

TITLE OF PROCEEDINGS

| | |
|-----------|---|
| Plaintiff | Innes John Creighton |
| Defendant | Australian Executor Trustees Limited |

TITLE OF THIS CROSS-CLAIM

| | |
|------------------|---|
| Cross-claimant | Australian Executor Trustees Limited |
| Cross-defendants | Philip Bruce Meade and the others listed in Schedule 1 |

FILING DETAILS

| | |
|--------------------------------|--|
| Filed for | Australia Executor Trustees Limited, Cross-Claimant |
| Filed in relation to | Cross-claim |
| Legal representative | Brad Woodhouse, Corrs Chambers Westgarth |
| Legal representative reference | 9116109 |
| Contact name and telephone | Brad Woodhouse, (02) 9210 6859 |
| Contact email | brad.woodhouse@corrs.com.au |

RELIEF CLAIMED

- 1 Damages.
- 2 Damages pursuant to:
 - (a) s. 82 of the former *Trade Practices Act* 1974 and s. 236 of the Australian Consumer Law;
 - (b) s. 1041I of the *Corporations Act* 2001;
 - (c) s. 12GM of the *Australian Securities and Investments Commission Act* 2001 (**ASIC Act**); or
 - (d) former s. 68 of the *Fair Trading Act* 1987 (NSW) and s. 236 of the Australian Consumer Law.
- 3 Contribution pursuant to s. 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) or s. 23B of the *Wrongs Act* 1958 (Vic.).
- 4 Interest.
- 5 Costs.

PLEADINGS AND PARTICULARS

The Cross-claimant is the Defendant to the Second Further Amended Statement of Claim filed by the Plaintiff on 31 January 2017 (**Statement of Claim**). If, which is denied, the Cross-claimant is liable to the Plaintiff or Group Members in the manner pleaded in the Statement of Claim, then, solely for the purpose of this Cross-claim, the Cross-claimant pleads as follows:

Parties

- 1 The Cross-claimant, Australian Executor Trustees Limited (**AET**), is and was at all material times:
 - (a) a corporation duly incorporated in accordance with the laws of Australia; and
 - (b) entitled to sue and be sued in its corporate name and style.
- 2 From 7 December 2004 onwards, AET was the trustee for holders of debentures issued by Provident Capital Limited (**Provident**).

- 3 HLB Mann Judd (NSW Partnership) (**HLB**) was, at all material times, a partnership who carried on business as a professional services firm that provided, amongst other things, audit services.
- 4 HLB were the auditors of Provident in the period from 26 July 2010 to at least 29 June 2012.
- 5 The cross-defendants were partners of HLB in the period from 26 July 2010 to 29 June 2012.
- 6 HLB audited the financial report of Provident for each of the financial years ended 30 June 2010 (**FY10**) and 30 June 2011 (**FY11**).
- 7 HLB reviewed the financial report of Provident for each of the half-years ended 31 December 2010 (**1H11**) and 31 December 2011 (**1H12**).
- 8 Throughout the period from 26 July 2010 to 29 June 2012:
- (a) Provident had on issue debentures that were ED securities pursuant to s. 111AI of the Corporations Act;
 - (b) Provident was a disclosing entity pursuant to s. 111AC of the Corporations Act;
 - (c) Provident was required by s. 292 of the Corporations Act to prepare a financial report for each financial year;
 - (d) Provident was required by s. 301 of the Corporations Act to have its financial report for each financial year audited and to obtain an auditor's report;
 - (e) HLB, as the auditor who audited Provident's financial report for each of FY10 and FY11, was required by s. 307 of the Corporations Act to form an opinion about whether:
 - (i) Provident's financial report was in accordance with the Corporations Act, including whether it complied with the accounting standards and whether it gave a true and fair view of Provident's financial position and performance;
 - (ii) It had been given all information, explanation and assistance necessary for the conduct of the audit; and
 - (iii) Provident had kept financial records sufficient to enable to Provident's financial report to be prepared and audited;

- (f) HLB, as the auditor who audited Provident's financial report for each of FY10 and FY11, was required by s. 307A(1) of the Corporations Act to conduct its audits in accordance with the auditing standards;
- (g) HLB, as the auditor who audited Provident's financial report for each of FY10 and FY11, was required by s. 308(1) of the Corporations Act to report to Provident's members on whether HLB was of the opinion that Provident's financial report was in accordance with the Corporations Act, including whether it complied with the accounting standards and whether it gave a true and fair view of Provident's financial position and performance;
- (h) pursuant to s. 313(1) of the Corporations Act, HLB was required to provide a copy of its audit report for each of FY10 and FY11 to the trustee for the holders of debentures issued by Provident;
- (i) pursuant to s. 318(1) of the Corporations Act, Provident was required to provide a copy of HLB's audit report for each of FY10 and FY11 to the trustee for the holders of debentures issued by Provident;
- (j) pursuant to s. 318(2) of the Corporations Act, the holder of a debenture issued by Provident was entitled to require Provident to provide the holder with a copy of HLB's audit report for the last financial year;
- (k) Provident was required by s. 302(a) of the Corporations Act to prepare a financial report for each half-year;
- (l) Provident was required by s. 302(b) of the Corporations Act to have its financial report for each half-year either audited or reviewed and (in either case) to obtain an auditor's report;
- (m) HLB, as the auditor who reviewed Provident's financial report for each of 1H11 and 1H12, was required by s. 307A(1) of the Corporations Act to conduct its audits in accordance with the auditing standards;
- (n) HLB, as the auditor who reviewed Provident's financial report for each of 1H11 and 1H12, was required by s. 309(4) of the Corporations Act to report to Provident's members on whether HLB became aware of any matter in the course of the review that made HLB believe that the financial report did not comply with the accounting standards or did not

give a true and fair view of Provident's financial position and performance;

- (o) pursuant to s. 313(1) of the Corporations Act, HLB was required to provide a copy of its review report for each of 1H11 and 1H12 to the trustee for the holders of debentures issued by Provident;
- (p) pursuant to s. 318(4) of the Corporations Act, Provident was required to provide a copy of HLB's review report for each of 1H11 and 1H12 to the trustee for the holders of debentures issued by Provident;
- (q) pursuant to s. 313(2) of the Corporations Act, throughout the period from 26 July 2010 to 29 June 2012, HLB was required to give the trustee for debenture holders a written report about any matter that:
 - (A) HLB became aware of in conducting an audit or review of Provident's financial report for a financial year or half-year;
 - (B) in HLB's opinion was or was likely to be prejudicial to the interests of holders of debentures issued by Provident; and
 - (C) in HLB's opinion was relevant to the exercise of the powers of the trustee for holders of debentures issued by Provident, or the performance of the trustee's duties, under the Corporations Act or under the debenture trust deed; and
- (r) pursuant to s. 313(2) of the Corporations Act, HLB was required to give the trustee for holders of debentures issued by Provident a copy of any report referred to in sub-paragraph (q) above.

FY10 audit

Damages in negligence at common law

- 9 On 22 September 2010, Provident issued its financial report for FY10.
- 10 Provident's financial report for FY10 stated:
 - (a) that Provident's current assets, as at 30 June 2010, included loans and advances with a recoverable value of \$165,354,556;

- (b) that Provident's non-current assets, as at 30 June 2010, included loans and advances with a recoverable value of \$12,951,690;
 - (c) that the recoverable value of loans and advances took into account an impairment provision of \$1,466,932;
 - (d) that, as at 30 June 2010, the total outstanding balance of past due loans (**2010 Past Due Loans**) was \$88,710,332;
 - (e) that of the 2010 Past Due Loans, \$54,890,105 had been assessed as not impaired;
 - (f) that Provident's total assets as at 30 June 2010 were \$222,011,825;
 - (g) that, as at 30 June 2010, Provident had on issue debentures with a principal of \$116,977,143;
 - (h) that Provident's net assets as at 30 June 2010 were \$14,020,695; and
 - (i) that Provident had incurred \$2,612,904 in expenses relating to the impairment of loans and receivables (comprised of \$1,962,904 in recognised losses and \$650,000 in individually assessed impairment).
- 11 After auditing Provident's financial report for FY10, HLB issued an audit report (**FY10 Audit Report**) in which HLB expressed the opinion that Provident's financial report for FY10:
- (a) gave a true and fair view of the financial position of Provident as at 30 June 2010 and of its performance for the year ended on that date; and
 - (b) was presented in accordance with, amongst other things, the Corporations Act and Australian Accounting Standards.
- 12 It was a term of the contract (between Provident and HLB) under which HLB was retained to audit Provident's financial report for FY10 that HLB would exercise reasonable care and skill in auditing the financial report and issuing its audit report.

Particulars

- (1) The contract is partly in writing and partly implied.
- (2) To the extent the contract is in writing, it is dated 4 August 2010 (HLB.001.001.5188).
- (3) The pleaded term is implied.

- 13 At the time HLB audited Provident's financial report for FY10 and issued the FY10 Audit Report, HLB knew or ought reasonably to have known:
- (a) that Provident had on issue debentures the subject of Chapter 2L of the Corporations Act;
 - (b) that AET was the trustee for the holders of those debentures and owed the duties set out in s. 283DA of the Corporations Act.
- 14 At the time HLB audited Provident's financial report for FY10 and issued the FY10 Audit Report, it was reasonably foreseeable by HLB:
- (a) that AET would rely upon HLB having conducted its audit, and prepared its audit report, with reasonable care and skill;
 - (b) that AET would consider, and rely upon, any audit report provided by HLB in respect of Provident's financial report for FY10;

Particulars

Clause 7.4.2 of the Trust Deed

- (c) that AET would rely upon HLB's audit report in discharging the trustee's duties under s. 283DA of the Corporations Act, the Trust Deed (as that term is defined in the Statement of Claim) and at law;
- (d) that AET would rely upon any report issued by HLB pursuant to s. 313(2) of the Corporations Act in the event that HLB, in the course of conducting its audit, became aware of any matters that were in its opinion:
 - (i) likely to be prejudicial to the interests of debenture holders; and
 - (ii) relevant to the exercise of the powers of the trustee for debenture holders, or the performance of the trustee's duties under the Corporations Act or the Trust Deed;
- (e) that a failure by HLB to exercise reasonable care and skill in the conduct of its audit might result in HLB not becoming aware of matters that it would otherwise have been required to report to the debenture trustee pursuant to s. 313(2) of the Corporations Act;
- (f) that AET, being uninformed or unaware of matters that ought to have been reported to it under s. 313(2) of the Corporations Act would affect

its assessment of what powers it ought exercise, or what steps it ought take, in discharging its role as trustee;

- (g) that a failure by HLB properly to conduct its audit, or to prepare its audit report, might result in AET being uninformed or unaware of matters that, if known, would affect its assessment of the matters it was required to ascertain and do in accordance with ss. 283DA(a), 283DA(b) and 283DA(c) of the Corporations Act;
- (h) that a failure by HLB to exercise reasonable care and skill in opining whether or not Provident's financial report for FY10 presented a true and fair view of Provident's financial position and performance, might result in AET being uninformed or unaware of matters that, if known, would affect its assessment of the matters it was required to ascertain and do in accordance with ss. 283DA(a), 283DA(b) and 283DA(c) of the Corporations Act;
- (i) that the failures pleaded above might cause AET to fail to exercise the powers available to it, to discharge its duties under s. 283DA, and result in its being liable to debenture holders under s. 283F of the Corporations Act; and
- (j) that, were that to occur, AET would suffer harm in the form of economic loss.

15 The risk of harm pleaded in paragraph 14 was not insignificant.

16 At the time HLB audited Provident's financial report for FY10 and issued the FY10 Audit Report (and at all material times up to the issue of HLB's audit report for FY11):

- (a) it was not the general practice of trustees for debenture holders to routinely conduct or commission an audit (or an investigation in the nature of an audit) of debenture issuers on an annual basis;
- (b) for a trustee for debenture holders to conduct or commission an audit (or an investigation in the nature of an audit) of debenture issuers in circumstances where HLB was already performing an audit would involve unreasonable duplication of effort and unjustifiable expense;
- (c) by reason of the matters in subparagraphs (a)-(b), absent some special circumstances known to the trustee justifying departure from ordinary

practice, it was not reasonably practicable for a trustee for debenture holders to conduct or commission an audit (or an investigation in the nature of an audit) of debenture issuers;

- (d) AET had no practical ability to protect itself from the risk of harm pleaded in paragraph 14;
- (e) AET could not direct, control or influence the manner in which HLB performed its audit or prepared its audit report;
- (f) AET was dependent upon HLB taking reasonable care to avoid the risk of harm pleaded in paragraph 14; and
- (g) AET was vulnerable to harm resulting from a failure by HLB to exercise reasonable care and skill in performing its audit and preparing its audit report.

17 By reason of the matters pleaded in paragraphs 8 and 12 to 16 above, in auditing Provident's financial report for FY10 and in issuing the FY10 Audit Report, HLB owed a duty to AET to take reasonable care:

- (a) in the conduct of its audit; and
- (b) in the preparation of its audit report,

to avoid the risk of harm pleaded in paragraph 14 above.

17A A reasonably competent auditor in the position of HLB exercising reasonable care and skill in the conduct of its audit of Provident's financial report for FY10 and in the preparation of its audit report would have:

- (a) conducted investigations to obtain an understanding of Provident's business and used this understanding to:
 - (i) identify areas of audit focus, being the material risks to the financial health and performance of Provident; and
 - (ii) appropriately design and perform audit procedures to test those areas of audit focus to ensure those risks are reduced to an acceptably low level;

Particulars

Auditing Standard ASA 330 [6] and [18]

- (b) as a result of the investigations in subparagraph (a), become aware that:
- (i) all of the issued shares in Provident were owned and controlled by its Managing Director, Michael O'Sullivan, or entities in which Mr O'Sullivan had an interest;
 - (ii) Mr O'Sullivan had authority over Provident's decision making process in respect of loans including the extension of loans, the identification of impaired loans and the making of provisions in respect of impaired loans;
 - (iii) the reported net assets of Provident as at 30 June 2010 were \$14,020,695;
 - (iv) the reported total amount of loans made by Provident as at 30 June 2010 was \$178,306,246, of which \$88,710,332 were reported as past due;
 - (v) Provident's net interest income in FY10 was approximately \$12,312,000, when compared with approximately \$13,629,000 in FY09;
 - (vi) Provident's current financial liabilities as at 30 June 2010 were approximately \$154,751,000 (or 76% of total financial liabilities), when compared with approximately \$142,510,000 (or 69% of total liabilities) as at 30 June 2009;
 - (vii) the making of provision for impaired loans could have a significant effect on the net assets of Provident; and
 - (viii) Mr O'Sullivan's position as Managing Director of Provident and his ownership interest gave rise to a conflict of interest, including in relation to the making of provisions for impaired loans;
- (c) upon becoming aware of the matters in subparagraph (b), exercised a heightened degree of scepticism including by not relying upon, or alternatively not solely relying upon, systems and process for the identification of impaired loans, and the making of provision against impaired loans, which depended upon the decisions of Mr O'Sullivan;

- (d) investigated and tested all material loans, and a selection of other loans, made by Provident to determine:
 - (i) whether a substantial proportion of Provident's loan book was collectable; and
 - (ii) whether the provision (if any) made against each loan was adequate;

Particulars

As to the issue of selection or sampling of loans, see Auditing Standard ASA 530 [6] to [8].

- (e) determined that loans of \$3,000,000 or greater, or alternatively approximately \$3,000,000 or greater, were material for the purpose of the investigation and testing referred to in subparagraph (d);
- (f) when investigating and testing each material and other selected loan:
 - (i) reviewed the books and records of Provident relevant to each loan;
 - (ii) determined whether Provident's processes for the granting or renewing of the loan had been followed;
 - (iii) analysed Provident's ledger accounts to determine whether the principal and interest payment obligations in respect of the loan were being met;
 - (iv) in the case of loans obtained for the purpose of development, determined whether the borrower was undertaking the works for which the loan was granted and whether loan advances to the borrower were being made in accordance with the loan agreement and were supported by evidence of work done;
 - (v) obtained the latest valuation of the property securing the loan, noting the valuation date and any terms or caveats of the valuation relevant to the recoverability of the loan and whether the valuation was prepared on an "as is" or on an "as if complete" basis; and
 - (vi) identified circumstances where Provident's Loan Policies and Procedures Manual had not been followed;

- (g) where investigation and testing of a particular loan disclosed that principal and interest repayments were not being made in accordance with the terms of the loan:
 - (i) determined the reasons for the delays;
 - (ii) except in the case of minor delays, assessed what steps Provident had taken to either achieve future timely repayments or otherwise achieve recovery of principal and interest;
 - (iii) where repayment was to be achieved by foreclosure and sale of a property securing the loan, obtained documents to support a confirmed sale, or if a sale was not underway, appropriate written evidence to substantiate the amount that might be recovered from the proposed sale;
 - (iv) where repayment was to be achieved by refinancing, obtained all correspondence setting out the offer or offers to refinance, supported by a recent independent valuation of the property to be used as security for the refinancing; and
 - (v) where a proposal other than foreclosure and sale or refinancing was proposed, analysed any assumptions or calculations involved in the proposal and, if necessary, obtained expert advice in relation to the proposal;
- (h) increased the number of loans selected for investigation and testing if the investigation and testing of the initial sample of loans demonstrated inaccuracies with Provident's determination of impairment or material departures from Provident's Loan Policy and Procedures Manual;
- (i) requested Provident to provide cash flow projections for FY11 and evidence to support such projections in order to determine whether the assessment by Provident's management that Provident was a going concern was appropriate;

Particulars

Audit Standard ASA 570 at [3.1], [6], [16] and [13.2].

- (j) determined whether it had been given all information, explanation and assistance necessary for the conduct of the audit; and

Particulars

s. 307(b), Corporations Act

- (k) determined whether Provident had kept financial records sufficient to enable a financial report to be prepared and audited.

Particulars

s. 307(c), Corporations Act

17B In performing the tasks pleaded in the previous paragraph, a reasonably competent auditor in the position of HLB exercising reasonable care and skill would have, in the course of conducting the audit of Provident's financial report for FY10 and in preparing its audit report:

- (a) in relation to the loan to Burleigh Views Pty Ltd (**Burleigh Views loan**) become aware that:

- (i) the loan was initially established in 2000, with loan advances occurring regularly since that time;

Particulars

Account ledger (SMI.202.001.0001)

- (ii) the loan was due for repayment in about May 2008, but repayment had not been made by that date;

Particulars

Deed of variation (SMI.202.001.0096)

Account ledger (SMI.202.001.0001)

- (iii) Provident had, in correspondence with the borrower dated 4 November 2003, threatened to appoint a receiver;

Particulars

Facsimile (SMI.202.001.0277)

- (iv) the borrower went into liquidation in September 2008, and at about that time Provident became mortgagee in possession of the property securing the loan;

Particulars

Letter (SMI.202.001.0959)

Letter (SMI.202.001.0960)

- (v) the Burleigh Views loan continued after September 2008, with interest and fees continuing to be capitalised;

Particulars

Account ledger (SMI.202.001.0001)

- (vi) the loan balance as at 30 June 2010 was approximately \$17,518,000;

Particulars

Loan receivables (HLB working paper E07-001)

- (vii) the most recent "as is" valuation of the property securing the Burleigh Views loan was dated September 2007 and expressed a value of \$13,500,000;

Particulars

Valuation report (SMI.202.001.0334)

- (b) by reason of the matters in subparagraph (a), determined that:
- (i) the Burleigh Views loan was impaired, or alternatively showed signs of impairment;

Particulars

AASB 139 at [59]

- (ii) there was insufficient evidence to support the recoverability of the Burleigh Views loan;
- (c) in relation to the loan to Chrysalis Holdings Pty Ltd (**Chrysalis loan**), become aware that:
- (i) there had been no repayments of this loan since 2006;

Particulars

Account ledger (SMI.203.001.0001)

- (ii) the net amount outstanding on the Chrysalis loan as at 30 June 2010 was approximately \$6,963,784;

Particulars

90+ day loan impairment (HLB working papers E07-022)

- (iii) solicitors acting on behalf of Provident had, on or around 4 March 2008, issued demands upon a guarantor of the loan alleging that the borrower was in default;

Particulars

Letter (PCL.501.007.0001)

- (iv) the books and records of Provident relating to the Chrysalis loan contained a valuation report for the property securing the loan, dated 9 December 2009, which expressed an "as is with DA" value of \$3,320,000, and a separate valuation as at 9 December 2009 by the same valuer which expressed an "as is with DA" valuation of \$7,300,000;

Particulars

Valuation report (PPB.001.016.2987)

Valuation report (HLB.005.006.0054)

- (d) by reason of the matters in subparagraph (c), determined that:
- (i) the Chrysalis loan was impaired, or alternatively showed signs of impairment;
- Particulars**
- AASB 139 at [59]
- (ii) there was insufficient evidence as to the recoverability of the Chrysalis loan;
- (e) in relation to the loan to George Tahatos Holdings Pty Ltd (**Tahatos loan**), become aware that:
- (i) in June 2007, Provident offered to roll the loan over, such that the loan was due for repayment in December 2007

Particulars

Letter (PRV.501.008.5287 at .5292)

- (ii) in the period from June 2007, interest payments were less than the amount of interest accruing;

Particulars

Account ledger (SMI.214.001.0001)

- (iii) the net amount outstanding on the Tahatos loan as at 30 June 2010 was approximately \$4,926,605;

Particulars

90+ day loan impairment (HLB working papers E07-022)

- (iv) the most recent "as is" valuation of the property securing the Tahatos loan was dated December 2005 and expressed a value of \$6,815,000;

Particulars

Valuation report (PRV.502.005.7942)

- (f) by reason of the matters in subparagraph (e), determined that:
- (i) the Tahatos loan was impaired, or alternatively showed signs of impairment;

Particulars

AASB 139 at [59]

- (ii) there was not sufficient evidence to as to the recoverability of the Tahatos loan;
- (g) Not used
- (h) Not used
- (i) Not used
- (j) Not used
- (k) in relation to the loan to Owston Nominess No 2 Pty Ltd as trustee for the Warren Anderson Trust (**Owston loan**), become aware that:

- (i) the loan was more than 90 days in arrears, and was due for repayment on 1 July 2010;

Particulars

90+ day loan impairment (HLB working papers E07-022)

- (ii) the net amount outstanding as at 30 June 2010 was approximately \$5,710,182;

Particulars

90+ day loan impairment (HLB working papers E07-022)

- (iii) the most recent valuation for the property securing the loan was dated June 2009 and expressed a value of \$5,700,000;

Particulars

90+ day loan impairment (HLB working papers E07-022)

- (l) by reason of the matters in subparagraph (k), determined that:
 - (i) the Owston loan was impaired, or alternatively showed signs of impairment;

Particulars

AASB 139 at [59]
 - (ii) there was not sufficient evidence to support the recoverability of the Owston loan;
- (m) in relation to the loan to Unique Castle Development Pty Ltd (**Unique Castle loan**), become aware that:
 - (i) the loan was advanced in July 2005, and was due for repayment in July 2007;

Particulars

Account ledger (SMI.217.001.0125)
 - (ii) the loan was more than 90 days in arrears, and the net amount outstanding as at 30 June 2010 was approximately \$4,922,499;

Particulars

90+ day loan impairment (HLB working papers E07-022)

- (iii) regular interest payments ceased to be made in 2008 and subsequent irregular payments were less than the amount of interest accruing;

Particulars

Account ledger (SMI.217.001.0125)

- (iv) Provident had commenced proceedings against the borrower alleging default and seeking possession of the properties securing the loan;

Particulars

Memo (SMI.217.001.0221)

- (v) the most recent "as is" valuation of the property located at 161 Castle Hill Road, Castle Hill, New South Wales, and which secured the Unique Castle loan, was dated January 2009 and expressed a value of \$4,750,000;

Particulars

Valuation report (PRV.501.008.8856)

- (n) by reason of the matters in subparagraph (m), determined that:
- (i) the Unique Castle loan was impaired, or alternatively showed signs of impairment;

Particulars

AASB 139 at [59]

- (ii) there was not sufficient evidence to support the recoverability of the Unique Castle loan;
- (o) Not used
- (p) Not used
- (q) Not used
- (r) Not used

- (s) Not used
- (t) Not used
- (u) in relation to the loan to Paul Vincent Hanna (**Hanna loan**), become aware that:

- (i) the loan was more than 90 days in arrears, and the net amount outstanding as at 30 June 2010 was approximately \$5,888,406;

Particulars

90+ day loan impairment (HLB working papers E07-022)

- (ii) the most recent "as is" valuation of the property securing the Hanna loan was dated September 2009 and expressed a value of \$6,000,000;

Particulars

90+ day loan impairment (HLB working papers E07-022)

- (v) by reason of the matters in subparagraph (u), determined that:
 - (i) the Hanna loan was impaired, or alternatively showed signs of impairment;

Particulars

AASB 139 at [59]

- (ii) there was not sufficient evidence to support the recoverability of the Hanna loan;

(w) Not used

(x) Not used

17C Upon becoming aware of the matters and reaching the determinations pleaded in paragraph 17B, a reasonably competent auditor in the position of HLB exercising reasonable care and skill would have, in the course of conducting the audit of Provident's financial report for FY10 and in preparing its audit report:

- (a) requested Provident to explain why, in relation to the Burleigh Views, Chrysalis, Tahatos, Owston, Unique Castle, and Hanna loans, foreclosure and sale had not taken place consistent with the prudent

and responsive loan recovery procedures as prescribed in Provident's Credit Policy Manual;

- (b) requested Provident to provide information about, or otherwise sought expert assistance to determine, the value of the properties securing the Burleigh Views, Chrysalis and Tahatos, loans calculated on an "as is" basis as at 30 June 2010; and

Particulars

AASB 139 at [63]

Auditing Standard ASA 620 at [10] and [11]

- (c) requested Provident to explain why its management had concluded that renewing the facilities or allowing the facilities to continue was going to achieve full repayment of the Burleigh Views, Chrysalis, Tahatos, Owston, Unique Castle and Hanna loans.

17D Upon taking the steps in paragraph 17C, unless Provident provided sufficient appropriate audit evidence as to the recoverability of the Burleigh Views, Chrysalis, Tahatos, Owston, Unique Castle, and Hanna loans a reasonably competent auditor in the position of HLB exercising reasonable care and skill, in the course of conducting the audit of Provident's financial report for FY10 and in preparing its audit report, would have:

Particulars of sufficient appropriate audit evidence

Auditing Standard ASA 500 at [10] – [13]

As to the recoverability of loans, such evidence is a current written valuation by an independent qualified valuer estimating the value of the property securing each loan on an "as is" basis.

- (a) formed an opinion that he or she had not been given all information, explanation and assistance necessary for the conduct of the audit;

Particulars

s. 307(b), Corporations Act

- (b) formed an opinion that Provident had not kept financial records sufficient to enable a financial report to be prepared and audited;

Particulars

s. 307(c), Corporations Act

- (c) concluded that he or she had insufficient evidence to determine whether or not a provision was required against those loans;
- (d) formed an opinion that Provident's financial statements did not give a true and fair view of Provident's financial position and performance;

Particulars

ss. 297 and 308, Corporations Act

- (e) modified its audit report of Provident's financial statements stating that the financial statements did not accord with Accounting Standard AASB 139;

Particulars

Auditing Standard ASA 705 at [6], [7], [9], [11-13]

s. 308(3), Corporations Act

- (f) provided a report to Provident's management that the lack of evidence as to the recoverability of the Burleigh Views, Chrysalis, Tahatos, Owston, Unique Castle and Hanna loans resulted in:
 - (i) circumstances where the auditor concluded that there were risks that an item in the financial report might not be accurate;
 - (ii) accounting estimates based on management's judgment incorporating assumptions as to future events;
 - (iii) depending on the outcome of discussions between the auditor and management, disagreement between the auditor and management; and
 - (iv) concerns about Provident's ability to continue as a going concern and to meet its debts as and when they fell due;
- (g) provided to AET a:
 - (i) copy of the audit report of Provident's financial statements and the report to Provident's management referred to in the previous subparagraph;

Particulars

ss.307A and 313(1) Corporations Act

Auditing Standard ASA 260

- (ii) report pursuant to s. 313(2) of the Corporations Act recording that:
- (A) the records of Provident did not contain sufficient information to determine the amount that might be recovered in respect of loans in arrears including the Burleigh Views, Chrysalis, Tahatos, Unique Castle and Hanna loans;
 - (B) the auditor could not determine whether or to what extent a provision was required against the Burleigh Views, Chrysalis, Tahatos, , Unique Castle, and Hanna loans;
 - (C) Provident had renewed or extended loans to borrowers who had defaulted on the repayment of principal or interest without requiring up to date valuations or adequate evidence of the borrower's capacity to repay; and
 - (D) the auditor either intended to or had modified his or her audit report accordingly.

- 18 In breach of the duty pleaded in the paragraph 17, HLB failed to exercise reasonable care and skill in the course of conducting the audit of Provident's financial report for FY10 and in preparing the FY10 audit Report because it:
- (a) relied upon systems and processes for the monitoring of loans arrears, identification of impaired loans, and the making of provisions against impaired loans, which depended upon the decisions of Mr O'Sullivan;
 - (b) relied upon statements made by Mr O'Sullivan regarding the sale of properties securing certain loans made by Provident;

Particulars

90+ day loan impairment (HLB working papers E07-022) in relation to the Chrysalis, Unique Castle, Hanna, Owston, and Tahatos loans.

- (c) failed to conduct a review of events occurring after 30 June 2010 to determine if the foreshadowed sales of properties securing certain loans had progressed;
- (d) failed to review all material loans and did not identify that the Burleigh Views loan was impaired or at risk of impairment;

Particulars of material loans

AET repeats paragraph 17A(e), and refers to the loans referred to in paragraph 17B and the loans to Yarraman Estate Pty Ltd, Delta Dawn Pty Ltd, MJ Server Pty Ltd, Cleveland Corporation Pty Ltd as trustee for the Cleveland Family Trust, Ian Maxwell Anderson and Brett John Gunderson.

- (e) failed to conduct any review, or alternatively any adequate review, of Provident's systems and processes for the monitoring of loan arrears;
- (f) Not used
- (g) failed to investigate and test in the manner pleaded in subparagraphs 17A(d)-(h) above for all material loans to determine whether:
 - (i) each material loan was impaired or demonstrated indicators of impairment;
 - (ii) each material loan was recoverable;
 - (iii) the provision (if any) made against each loan was adequate; and
 - (iv) a substantial proportion of Provident's loan book was recoverable;
- (h) failed to become aware of the matters and failed to make the determinations pleaded in subparagraphs 17B(a)(i), (a)(iv), (a)(v), (b), (c)(iv), (d)(ii), (f)(ii), (l)(ii), (n)(ii) and (v)(ii);

- (i) relied upon valuations performed on an “as if complete basis” or informal estimates provided by real estate agents with the effect that HLB was not aware of the current value of properties securing certain loans made by Provident;
 - (j) failed to take the steps pleaded in paragraph 17C;
 - (k) failed to take the steps pleaded in paragraph 17D in circumstances where Provident:
 - (i) Not used
 - (ii) would have been unable to provide sufficient appropriate audit evidence as to the recoverability of Burleigh Views, Chrysalis, Tahatos, Owston, Unique Castle, and Hanna loans.
- 18AA In performing its duties under the trust deed and under s. 283DA of the Corporations Act, AET relied on the audit of Provident’s financial report for FY10 and the FY10 Audit Report.
- 18A If HLB had not breached its duty in the manner pleaded in paragraph 18:
- (a) HLB would have taken the steps pleaded in paragraph 17D, including the provision of information to AET as pleaded in paragraph 17D(g);
 - (b) updated valuations of the properties securing the loans referred to in paragraph 18(k)(ii) would have been obtained by Provident or HLB which would have disclosed that:
 - (i) the “as is” value of the property securing the Burleigh Views loan as at 1 February 2009 was approximately \$6,240,000;
 - (ii) in circumstances where the total amount owing under the Burleigh Views loan as at 30 June 2010 was approximately \$17,518,000, Provident’s financial statements should have but did not account for a loss of approximately \$11,278,000;
 - (iii) the “as is” value of the property securing the Chrysalis loan as at 1 February 2009 was approximately \$3,000,000;
 - (iv) in circumstances where the total amount owing under the Chrysalis loan as at 30 June 2010 was approximately \$6,940,000, Provident’s financial statements should have but did not account for a loss of approximately \$3,964,000;

- (v) the "as is" value of the property securing the Tahatos loan as at about 30 June 2010 was approximately \$3,950,000;
 - (vi) in circumstances where the total amount owing under the Tahatos loan as at 30 June 2010 was approximately \$4,926,000, Provident's financial statements should have but did not account for a loss of approximately \$976,000;
 - (vii) the "as is" value of the property securing the Owston loan as at about 30 June 2010 was approximately \$5,700,000;
 - (viii) in circumstances where the total amount owing under the Owston loan as at 30 June 2010 was approximately \$5,710,000, Provident's financial statements should have but did not account for a loss of approximately \$10,000;
 - (ix) by reason of the matters in subparagraphs (i)-(viii):
 - (A) Provident had a net asset deficiency of approximately \$6,380,000 rather than a net asset surplus of approximately \$14,021,000 as disclosed in Provident's financial statements; and
 - (B) Provident made a loss before tax for FY10 of approximately \$18,436,000 rather than a profit before tax of approximately \$1,953,000 as disclosed in Provident's financial statements;
- (c) informed of the matters in subparagraphs (a) and (b) above, AET would have:
- (i) undertaken inquiries and investigations with each of HLB and Provident to determine whether:
 - (A) Provident was complying with the terms of the debentures, the Trust Deed and the Corporations Act; and
 - (B) Provident was able to repay all debentures on issue as and when they fell due;
 - (ii) in the event that Provident was in breach of the terms of the debentures, the Trust Deed or the Corporations Act, taken all

- available steps to cause Provident to remedy any such breach;
- (iii) appointed an investigating account to further investigate the matters above if it was not satisfied, based on its inquiries and investigations, that Provident:
 - (A) was not, or did not remain, in breach of the terms of the debentures, the Trust Deed and the Corporations Act; and
 - (B) was able to repay all debentures on issue as and when they fell due;
 - (iv) taken legal advice and advice from the appointed investigating accountant as to the appropriate steps to address any matters identified by that investigating accountant;
 - (v) sought orders appointing a receiver to the assets of Provident and/or otherwise exercised its powers under Chapter 2L of the Corporations Act or the Trust Deed so as to require Provident to repay debenture holders and prevent it from borrowing further monies from the public;
 - (vi) further and in the alternative to subparagraph (v), AET would not have consented to being named in any further debenture prospectus issued by Provident and, as a result, either:
 - (A) Provident would not have issued further debentures; or
 - (B) AET would have been replaced as trustee for debenture holders;
- (d) if the steps pleaded in subparagraph (c) had been taken, AET would not be liable to the Plaintiff or Group Members (or would be liable in a lesser amount).
- 19 By reason of the matters pleaded in paragraph 18A:
- (a) HLB's breach of duty pleaded in paragraph 18 was a necessary condition of AET's loss;
 - (b) it is appropriate that HLB's liability extend to AET's loss; and

- (c) by reason of subparagraphs (a) and (b), the breach of duty pleaded in paragraph 18 caused AET's loss.

Statutory damages for misleading and deceptive conduct

- 20 HLB's conduct in issuing the FY10 Audit Report above was:
- (a) conduct in trade or commerce;
- (b) conduct in relation to financial products, namely, the debentures issued by Provident.
- 21 HLB issued the FY10 Audit Report by use of postal or telegraphic services.

Particulars

Email (HLB.001.001.6353)

- 22 By issuing the FY10 Audit Report, HLB impliedly represented that:
- (a) it had conducted its audit in respect of Provident's financial report for FY10 with reasonable care and skill (**2010 Care and Skill Representation**);
- (b) HLB had reasonable grounds for its opinion that:
- (i) it had been given all information, explanation and assistance necessary for the conduct of the audit (**2010 307(b) Representation**);
- (ii) Provident had kept records sufficient to enable a financial report to be prepared and audited (**2010 307(c) Representation**); and
- (iii) Provident's financial report for FY10 gave a true and fair view of the financial position of Provident as at 30 June 2010 and of its performance for the year ended on that date (**2010 TAFV Representation**).

Particulars

The 2010 Care and Skill Representation, the 2010 307(b) Representation, the 2010 307(c) Representation and the 2010 TAFV Representation were made to Provident, its members and AET.

23 Contrary to the:

- (a) 2010 Care and Skill Representation, HLB had not conducted its audit in respect of Provident's financial report for FY10 with reasonable care and skill;

Particulars

AET relies on the matters pleaded in paragraph 18 above.

- (b) 2010 307(b) Representation, HLB did not have reasonable grounds for its opinion that it had been given all information, explanation and assistance necessary for the conduct of the audit;

Particulars

AET relies on the matters pleaded in subparagraphs 17B(b), (d)(ii), (f)(ii), (l)(ii), (n)(ii) and (v)(ii) and paragraph 17C above

- (c) 2010 307(c) Representation, did not have reasonable grounds for its opinion that Provident had kept sufficient records to enable a financial report to be prepared and audited;

Particulars

AET relies on the matters pleaded in subparagraphs 17B(b), (d)(ii), (f)(ii), (l)(ii), (n)(ii) and (v)(ii) and paragraph 17C above

- (d) 2010 TAFV Representation, HLB did not have reasonable grounds for its opinion that Provident's financial report for FY10 gave a true and fair view of the financial position of Provident as at 30 June 2010 and of its performance for the year ended on that date.

Particulars

AET relies on the matters pleaded in paragraphs 18 and 18A(b) above.

24 By virtue of the matters pleaded in paragraphs 20 to 23 above, by issuing the FY10 Audit Report, HLB engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of:

- (a) former s. 52 of the former *Trade Practices Act 1974*;
- (b) s. 1041H of the Corporations Act;
- (c) s. 12DA of the ASIC Act; and
- (d) former s. 42 of the *Fair Trading Act 1987* (NSW).

25 If HLB had not made each of the 2010 Care and Skill Representation, the 2010 307(b) Representation, the 2010 307(c) Representation and the 2010 TAFV Representation:

- (a) AET would have become aware that:
 - (i) Provident's financial reports for the period ending 30 June 2010 as they were presented did not present a true and fair view of Provident's actual financial position and actual financial performance for the year ending 30 June 2010; or
 - (ii) alternatively, HLB was not of the opinion that Provident's financial reports for the period ending 30 June 2010 presented a true and fair view of Provident's actual financial position and financial performance for the year ending 30 June 2010; or
 - (iii) alternatively, HLB was unable to form the opinion that Provident's financial reports for the period ending 30 June 2010 presented a true and fair view of Provident's actual financial position and financial performance for the year ended 30 June 2010;
- (b) informed of the matters in subparagraph (a) above, AET would have:
 - (i) undertaken inquiries and investigations with each of HLB and Provident to determine whether:
 - (A) Provident was complying with the terms of the debentures, the Trust Deed and the Corporations Act; and
 - (B) Provident was able to repay all debentures on issue as and when they fell due;

- (ii) in the event that Provident was in breach of the terms of the debentures, the Trust Deed or the Corporations Act, taken all available steps to cause Provident to remedy any such breach;
- (iii) appointed an investigating account to further investigate the matters above if it was not satisfied, based on its inquiries and investigations, that Provident:
 - (A) was not, or did not remain, in breach of the terms of the debentures, the Trust Deed and the Corporations Act; and
 - (B) was able to repay all debentures on issue as and when they fell due;
- (iv) taken legal advice and advice from the appointed investigating accountant as to the appropriate steps to address any matters identified by that investigating accountant;
- (v) sought orders appointing a receiver to the assets of Provident and/or otherwise exercised its powers under Chapter 2L of the Corporations Act or the Trust Deed so as to require Provident to repay debenture holders and prevent it from borrowing further monies from the public;
- (vi) further and in the alternative to subparagraph (v), AET would not have consented to being named in any further debenture prospectus issued by Provident and, as a result, either:
 - (A) Provident would not have issued further debentures; or
 - (B) AET would have been replaced as trustee for debenture holders;
- (c) if the steps pleaded in subparagraph (b) had been taken, AET would not be liable to the Plaintiff or Group Members (or would be liable in a lesser amount).

- 26 By reason of the matters pleaded in paragraph 25 above, AET has suffered loss by the acts of HLB giving rise to the contraventions pleaded in paragraph 24 above.
- 27 AET is entitled to recover that loss from HLB as damages under:
- (a) s. 82 of the former *Trade Practices Act*;
 - (b) s. 1041I of the Corporations Act;
 - (c) s. 12GM of the ASIC Act;
 - (d) former s. 68 of the *Fair Trading Act 1987* (NSW).
- 28 In the FY10 Audit Report, HLB represented that its audit services were of a particular standard, namely, that they accorded with the Australian Auditing Standards (**2010 Audit Standard Representation**).

Particulars

The 2010 Audit Standard Representation was made on about 23 September 2010, in writing in the FY10 Audit Report

- 29 The 2010 Audit Standard Representation was made in:
- (a) in trade or commerce; and
 - (b) in connexion with the supply of HLB's audit services.
- 30 At the time HLB issued the FY10 Audit Report, the Australian Auditing Standards required that an audit be conducted so as to provide reasonable assurance that the financial report, taken as a whole, was free from material misstatement.

Particulars

ASA 200, [24]

- 31 By reason of the matters pleaded at paragraphs 18 and 18A(a) and (b) above, the FY10 Audit Report:
- (a) had not been conducted with professional competence and due care; and

- (b) had not been conducted so as to provide reasonable assurance that the financial report, taken as a whole, was free from material misstatement.

32 By virtue of the matters pleaded in the previous paragraph:

- (a) the 2010 Audit Standard Representation was false;
- (b) the making of the 2010 Audit Representation was conduct engaged in by HLB that was misleading or deceptive or likely to mislead or deceive; and
- (c) by issuing its audit report for Provident's FY10 financial report, HLB contravened:
 - (i) former s. 53(aa) of the former *Trade Practices Act* 1974; and
 - (ii) former s. 44(b) of the *Fair Trading Act* 1987 (NSW).

32A If HLB had not made the 2010 Audit Standard Representation, AET would have become aware of the matters and taken the steps detailed in paragraph 25 above.

33 By reason of the matters pleaded in the previous paragraph, AET has suffered loss by the acts of HLB giving rise to the contraventions pleaded in paragraph 32 above.

34 AET is entitled to recover that loss from HLB as damages under:

- (a) s. 82 of the former *Trade Practices Act*; and
- (b) former s. 68 of the *Fair Trading Act* 1987 (NSW).

Contribution

35 At the time HLB audited Provident's financial report for FY10 and issued the FY10 Audit Report, it was reasonably foreseeable by HLB:

- (a) that holders of debentures issued by Provident would rely on HLB to conduct its audit and prepare its audit report with reasonable care and skill;
- (b) that holders of debentures issued by Provident would rely on the trustee for debenture holders performing its duties under the trust deed and under s. 283DA of the Corporations Act;

- (c) that AET would rely on HLB to conduct its audit and prepare its audit report with reasonable care and skill for the reasons pleaded at paragraph 14 above;
- (d) that, if HLB failed to conduct its audit and prepare its audit report with reasonable care and skill, then AET might, in reliance on HLB's audit report, fail to take steps (such as appointing a receiver) to protect the interests of debenture holders;
- (e) that, were that to occur, debenture holders might suffer harm in the form of economic loss, including loss incurred by those debenture holders as a result of rolling over their debentures.

36 The risk of harm pleaded in paragraph 35 was not insignificant.

37 At the time HLB audited Provident's financial report for FY10 and issued HLB's audit report:

- (a) debenture holders had no practical ability to protect themselves from the risk of harm pleaded in paragraph 35;
- (b) debenture holders could not direct, control or influence the manner in which HLB performed its audit or prepared its audit report;
- (c) debenture holders were dependent upon HLB taking reasonable care to avoid the risk of harm pleaded in paragraph 35; and
- (d) debenture holders were vulnerable to harm resulting from a failure by HLB to exercise reasonable care and skill in performing its audit and preparing its audit report.

38 By reason of the matters pleaded in paragraphs 8, 12, 13, 14 and 35 to 37 above, in auditing Provident's financial report for FY10 and in issuing the FY10 Audit Report, HLB owed a duty to holders of debentures issued by Provident to take reasonable care:

- (a) in the conduct of its audit; and
- (b) in the preparation of its audit report,

to avoid the risk of harm pleaded in paragraph 35 above.

38A AET repeats paragraphs 17A-18 above.

- 39 By reason of the matters pleaded in the previous paragraph, and in breach of the duty pleaded in paragraph 38 above, HLB failed to take reasonable care in the conduct of its audit of Provident's financial report for FY10 and in the preparation of HLB's audit report.
- 39A AET repeats paragraphs 18AA and 18A.
- 39B If AET had taken the steps pleaded in paragraph 18A(c) above, those Group Members who:
- (a) as at 29 June 2012, held debentures that had been issued before 22 September 2010 (when HLB issued the FY10 Audit Report), would have been repaid in full or in an amount greater than that actually recovered by Group Members; and
 - (b) held debentures as at 22 September 2010, and were debenture holders as at 29 June 2012 as a result of having rolled over those debentures, would not have rolled over their debentures and their debentures would instead have been repaid either in full or in an amount greater than that actually recovered by those Group Members.
- 40 By reason of the matters pleaded in paragraphs 39A and 39B:
- (a) HLB's breach of duty pleaded in paragraph 39 above was a necessary condition of the loss suffered by the subclass of Group Members pleaded in paragraph 39B;
 - (b) it is appropriate that HLB's liability extend to those Group Members' loss; and
 - (c) by reason of subparagraphs (a) and (b), the breach of duty pleaded in 18 caused those Group Members' loss.
- 40A The loss suffered by the Group Members pleaded in paragraph 40 above is the same loss in respect of which those Group Members seek to recover damages in this proceeding from AET.
- 40B AET repeats paragraphs 20-26 and paragraphs 29-33 above.
- 41 If AET had taken the steps pleaded in paragraph 25 above then:
- (a) the Plaintiff and Group Members would not have acquired the debentures they held as at 29 June 2012 and would not have suffered the loss claimed by them in this proceeding; and

- (b) further and in the alternative, those Group Members who were debenture holders as at 29 June 2012 as a result of having rolled over those debentures, would not have rolled over their debentures and their debentures would have instead been repaid either in full or in an amount greater than that actually received by those Group Members;
 - (c) further and in the alternative, those Group Members who held debentures as at 22 September 2010 and continued to hold them until 29 June 2012 would have either been repaid in full or would have received a greater amount than that actually recovered by them.
- 41A By reason of the matters pleaded in paragraphs 40B and 41 above, the Plaintiff and Group Members have suffered loss by the acts of HLB giving rise to the contraventions pleaded in paragraphs 24 and 32 above.
- 42 The Plaintiff and Group Members are entitled to recover that loss from HLB as damages under:
 - (a) s. 82 of the former *Trade Practices Act*;
 - (b) s. 1041I of the Corporations Act;
 - (c) s. 12GM of the ASIC Act; and
 - (d) former s. 68 of the *Fair Trading Act 1987* (NSW).
- 42A The Plaintiff and some Group Members:
 - (a) were resident in Victoria as at 22 September 2010;
 - (b) have become residents of Victoria since 22 September 2010; and/or
 - (c) suffered the loss pleaded in paragraph 41A above in Victoria.
- 42B By reason of the matters pleaded in the previous paragraph the contraventions pleaded in paragraphs 26 and 33 above also constitute a contravention of the former s. 9 of the *Fair Trading Act 1999* (Vic).
- 42C By reason of the matters pleaded in the previous paragraph, any Group Member falling within one or more of subparagraphs 42A(a)-(c) above, in addition to the relief pleaded in paragraph 42 above, are entitled to recover the loss pleaded in paragraph 42 above from HLB as damages under s. 159 of the *Fair Trading Act 1999* (Vic).

43 If, which is denied, AET is liable to the Plaintiff or Group Members as alleged in the Statement of Claim, then:

- (a) AET owed debenture holders a duty to exercise reasonable care and skill to:
 - (i) 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 debenture holders when the debentures fell due; and
 - (ii) ascertain whether the borrower or any guarantor has committed any breach of the terms of the debentures, the provisions of the Trust Deed or Chapter 2L of the Corporations Act;
- (b) for the reasons pleaded in the Statement of Claim alleging that AET breached its statutory duties under s. 283DA of the Corporations Act, AET also breached its duty of care pleaded in the previous subparagraph;
- (c) for the reasons pleaded in the Statement of Claim alleging that the Plaintiff and Group Members suffered loss and damage because AET contravened s. 283DA of the Corporations Act, the Plaintiff and Group Members suffered loss by reason of the breach of duty pleaded in the previous subparagraph;
- (d) in the premises, AET's liability to the Plaintiff and Group Members could have been established in tort.

44 By reason of the matters pleaded in paragraphs 35 to 43 above, if, which is denied, AET is liable to the Plaintiff and group members as alleged in the Statement of Claim, then AET is entitled to recover contribution from HLB pursuant to:

- (a) s. 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW); and
- (b) s. 23B of the *Wrongs Act 1958* (Vic.).

- 45 Further or alternatively, if, which is denied, AET is liable to the Plaintiff or Group Members as alleged in the Statement of Claim, then its liabilities are coordinate with those of HLB pleaded above.
- 46 By reason of the matters pleaded in paragraphs 35 to 43 and 45 above, if, which is denied, AET is liable to the Plaintiff and Group Members as alleged in the Statement of Claim, then AET is entitled to recover contribution from HLB pursuant to the doctrine of equitable contribution.

FY11 audit

Damages in negligence at common law

- 47 On 30 September 2011, Provident issued its financial report for FY11.
- 48 Provident's financial report for FY11 stated:
- (a) that Provident's current assets, as at 30 June 2011, included loans and advances with a recoverable value of \$171,591,159;
 - (b) that Provident's non-current assets, as at 30 June 2011, included loans and advances with a recoverable value of \$16,713,249;
 - (c) that the recoverable value of loans and advances took into account an impairment provision of \$1,695,932;
 - (d) that, as at 30 June 2011, the total outstanding balance of past due loans (**2011 Past Due Loans**) was \$96,898,577;
 - (e) that of the 2011 Past Due Loans, \$68,833,759 had been assessed as not impaired;
 - (f) that Provident's total assets as at 30 June 2011 were \$236,649,318;
 - (g) that, as at 30 June 2011, Provident had on issue debentures with a principal of \$125,250,399;
 - (h) that Provident's net assets as at 30 June 2011 were \$15,170,855;
 - (i) that Provident had incurred \$1,337,756 in expenses relating to the impairment of loans and receivables (comprised of \$251,756 in recognised losses and \$1,086,000 in individually assessed impairment).

- 49 After auditing Provident's financial report for FY11, HLB issued an audit report (**FY11 Audit Report**) in which HLB expressed the opinion that Provident's financial report for FY11:
- (a) gave a true and fair view of the financial position of Provident as at 30 June 2011 and of its performance for the year ended on that date; and
 - (b) was presented in accordance with, amongst other things, the Corporations Act and Australian Accounting Standards.
- 50 It was a term of the contract (between Provident and HLB) under which HLB was retained to audit Provident's financial report for FY11 that HLB would exercise reasonable care and skill in auditing the financial report and issuing its audit report.

Particulars

AET repeats the particulars to paragraph 12 above.

- 51 At the time HLB audited Provident's financial report for FY11 and issued the FY11 Audit Report, HLB knew or ought reasonably to have known:
- (a) that Provident had on issue debentures the subject of Chapter 2L of the Corporations Act;
 - (b) that AET was the trustee for the holders of those debentures and owed the duties set out in s. 283DA of the Corporations Act.
- 52 At the time HLB audited Provident's financial report for FY11 and issued the FY11 Audit Report, it was reasonably foreseeable by HLB:
- (a) that AET would rely upon HLB having conducted its audit, and prepared its audit report, with reasonable care and skill;
 - (b) that AET would consider, and rely upon, any audit report provided by HLB in respect of Provident's financial report for FY11;

Particulars

Clause 7.4.2 of the Trust Deed

- (c) that AET would rely upon HLB's audit report in discharging its duties under s. 283DA of the Corporations Act, the Trust Deed and at law;
- (d) that AET would rely upon any report issued by HLB pursuant to s. 313(2) of the Corporations Act in the event that HLB, in the course of

conducting its audit, became aware of any matters that were in its opinion:

- (i) likely to be prejudicial to the interests of debenture holders;
and
 - (ii) relevant to the exercise of the powers of the trustee for debenture holders, or the performance of the trustee's duties under the Corporations Act or the Trust Deed;
- (e) that a failure by HLB to exercise reasonable care and skill in the conduct of its audit might result in HLB not becoming aware of matters that it would otherwise have been required to report to the debenture trustee pursuant to s. 313(2) of the Corporations Act;
- (f) that AET, being uninformed or unaware of matters that ought to have been reported to it under s. 313(2) of the Corporations Act would affect its assessment of what powers it ought exercise, or what steps it ought take, in discharging its role as trustee;
- (g) that a failure by HLB to exercise reasonable care and skill in conducting its audit, or preparing its audit report, might result in AET being uninformed or unaware of matters that, if known, would affect its assessment of the matters it was required to ascertain and do in accordance with ss. 283DA(a), 283DA(b) and 283DA(c) of the Corporations Act;
- (h) that a failure by HLB to exercise reasonable care and skill in opining whether or not Provident's financial report for FY11 presented a true and fair view of Provident's financial position and performance, might result in AET being uninformed or unaware of matters that, if known, would affect its assessment of the matters it was required to ascertain and do in accordance with ss. 283DA(a), 283DA(b) and 283DA(c) of the Corporations Act;
- (i) that the failures pleaded above might cause AET to fail to exercise the powers available to it, to discharge its duties under s. 283DA and result in its being liable to debenture holders under s. 283F of the Corporations Act; and

- (j) that, were that to occur, AET would suffer harm in the form of economic loss.
- 53 The risk of harm pleaded in paragraph 52 was not insignificant.
- 54 At the time HLB audited Provident's financial report for FY11 and issued the FY11 Audit Report:
- (a) it was not the general practice of trustees for debenture holders to routinely conduct or commission an audit (or an investigation in the nature of an audit) of debenture issuers on an annual basis;
 - (b) for a trustee for debenture holders to conduct or commission an audit (or an investigation in the nature of an audit) in circumstances where HLB was already performing an audit would involve unreasonable duplication of effort and unjustifiable expense;
 - (c) by reason of the matters in subparagraphs (a)-(b), absent some special circumstances known to the trustee justifying departure from ordinary practice, it was not reasonably practicable for a trustee for debenture holders to conduct or commission an audit (or an investigation in the nature of an audit);
 - (d) AET had no practical ability to protect itself from the risk of harm pleaded in paragraph 52;
 - (e) AET could not direct, control or influence the manner in which HLB performed its audit or prepared its audit report;
 - (f) AET was dependent upon HLB taking reasonable care to avoid the risk of harm pleaded in paragraph 52; and
 - (g) AET was vulnerable to harm resulting from a failure by HLB to exercise reasonable care in performing its audit and preparing its audit report.
- 55 By reason of the matters pleaded in paragraphs 8 and 50 to 54 above, in auditing Provident's financial report for FY11 and in issuing the FY11 Audit Report, HLB owed a duty to AET to take reasonable care:
- (a) in the conduct of its audit; and
 - (b) in the preparation of its audit report,
- to avoid the risk of harm pleaded in paragraph 52 above.

- 56 AET repeats paragraph 17A above, save that:
- (a) the reference in the chapeau to FY10 should be read as a reference to FY11;
 - (b) subparagraph 17A(b)(iii) should be read as if it pleaded that the reported net assets of Provident as at 30 June 2011 were \$15,170,855;
 - (c) subparagraph 17A(b)(iv) should be read as if it pleaded that the total amount of loans made by Provident as at 30 June 2011 was \$188,304,408, of which \$96,898,577 were reported as past due;
 - (d) subparagraph 17A(b)(v) should be read as if it pleaded that Provident's net interest income in FY11 was approximately \$9,700,000, when compared with approximately \$13,629,000 in FY09 and approximately \$12,312,000 in FY10;
 - (e) subparagraph 17A(b)(vi) should be read as if it pleaded that Provident's current financial liabilities as at 30 June 2011 were approximately \$159,269,000 (or 74% of total financial liabilities), when compared with approximately \$142,510,000 (or 69% of total liabilities) as at 30 June 2009 and approximately \$154,751,000 (or 76% of total financial liabilities) as at 30 June 2010; and
 - (f) the reference to FY11 in subparagraph 17A(i) should be read as a reference to FY12.

56A In performing the tasks pleaded in the previous paragraph, a reasonably competent auditor in the position of HLB exercising reasonable care and skill would have, in the course of conducting the audit of Provident's financial report for FY11 and in preparing its audit report:

- (a) in relation to the Burleigh Views loan, become aware that:
 - (i) the loan was initially established in 2000, with loan advances occurring regularly since that time;

Particulars

Account ledger (SMI.202.001.0001)

- (ii) the loan was due for repayment in about May 2008, but repayment had not been made by that date;

Particulars

Deed of variation (SMI.202.001.0096)

Account ledger (SMI.202.001.0001)

- (iii) Provident had, in correspondence with the borrower dated 4 November 2003, threatened to appoint a receiver;

Particulars

Facsimile (SMI.202.001.0277)

- (iv) the borrower went into liquidation in September 2008, and at about that time Provident became mortgagee in possession of the property securing the loan;

Particulars

Letter (SMI.202.001.0959)

Letter (SMI.202.001.0960)

- (v) the Burleigh Views loan continued after September 2008, with interest and fees continuing to be capitalised;

Particulars

Account ledger (SMI.202.001.0001)

- (vi) the loan balance as at 30 June 2011 was approximately \$20,086,000;

Particulars

Loan receivables book (HLB working paper E07-001)

- (vii) it had been reported to Provident that the development at the property securing the loan had been vandalised, that the property had been damaged by flooding and a landslide, and that the development consent for one aspect of the development had lapsed;

Particulars

Condition report (SMI.202.001.0301)

Letter (SMI.202.001.0303)

- (viii) the most recent "as is" valuation of the property securing the Burleigh Views loan was dated September 2007 and expressed a value of \$13,500,000;

Particulars

Valuation report (SMI.202.001.0334)

- (b) by reason of the matters in subparagraph (a), determined that:
- (i) the Burleigh Views loan was impaired, or alternatively showed signs of impairment;

Particulars

AASB 139 at [59]

- (ii) there was insufficient evidence to support the recoverability of the Burleigh Views loan;
- (c) in relation to the Chrysalis loan, become aware that:

- (i) there had been no repayments of this loan since 2006;

Particulars

Account ledger (SMI.203.001.0001)

- (ii) the net amount outstanding on the Chrysalis loan as at 30 June 2011 was approximately \$7,027,859;

Particulars

90+ day loan impairment (HLB working papers E07-021)

- (iii) solicitors acting on behalf of Provident had, on or around 4 March 2008, issued demands upon a guarantor of the loan alleging that the borrower was in default;

Particulars

Letter (PCL.501.007.0001)

- (iv) the books and records of Provident relating to the Chrysalis loan contained a valuation report for the property securing the loan, dated December 2009, which expressed an "as is with DA" value of \$3,320,000 and a separate valuation as at 9

December 2009 prepared by the same valuer which expressed an "as is with DA" valuation of \$7,300,000;

Particulars

Valuation report (PPB.001.016.2987)

Valuation report (HLB.005.006.0054)

- (d) by reason of the matters in subparagraph (c), determined that:
- (i) the Chrysalis loan was impaired, or alternatively showed signs of impairment;

Particulars

AASB 139 at [59]

- (ii) there was insufficient evidence to support the recoverability of the Chrysalis loan;
- (e) in relation to the Tahatos loan, become aware that:
- (i) in June 2007, Provident offered to roll the loan over, such that the loan was due for repayment in December 2007;

Particulars

Letter (PRV.501.008.5287 at .5292)

- (ii) in the period from June 2007, interest payments were less than the amount of interest accruing;
- (iii) the net amount outstanding on the Tahatos loan as at 30 June 2011 was approximately \$4,926,605;

Particulars

90+ day loan impairment (HLB working papers E07-021)

- (iv) the most recent "as is" valuation of the property securing the Tahatos loan was dated December 2005 and expressed a value of \$6,815,000;

Particulars

Valuation report (SMI.202.001.0334)

- (f) by reason of the matters in subparagraph (e), determined that:
- (i) the Tahatos loan was impaired, or alternatively showed signs of impairment;

Particulars

AASB 139 at [59]

- (ii) there was insufficient evidence to support the recoverability of the Tahatos loan;
- (g) Not used
- (h) Not used
- (i) Not used
- (j) Not used
- (k) in relation to the Owston loan, become aware that:
- (i) the loan was more than 90 days in arrears, and was due for repayment on 1 September 2011;

Particulars

90+ day loan impairment (HLB working papers E07-021)

- (ii) the net amount outstanding as at 30 June 2011 was approximately \$8,056,682;

Particulars

90+ day loan impairment (HLB working papers E07-021)

- (iii) the most recent valuation for the property securing the loan was dated June 2009 and expressed a value of \$5,700,000;

Particulars

90+ day loan impairment (HLB working papers E07-021)

- (l) by reason of the matters in subparagraph (k), determined that:

- (i) the Owston loan was impaired, or alternatively showed signs of impairment;

Particulars

AASB 139 at [59]

- (ii) there was insufficient evidence to support the recoverability of the Owston loan;

(m) in relation to the Unique Castle loan, become aware that:

- (i) the loan was advanced in July 2005, and was due for repayment in July 2007;

Particulars

Account ledger (SMI.217.001.0125)

- (ii) regular interest payments ceased to be made in 2008 and subsequent irregular payments, were less than the amount of interest accruing;

Particulars

Account ledger (SMI.217.001.0125)

- (iii) Provident had commenced proceedings against the borrower alleging default and seeking possession of the properties securing the loan;

Particulars

Memo (SMI.217.001.0221)

- (iv) the loan was more than 90 days in arrears, and the net amount outstanding as at 30 June 2011 was approximately \$5,015,970;

Particulars

90+ day loan impairment (HLB working papers E07-021)

- (v) the most recent "as is" valuation of the property located at 161 Castle Hill Road, Castle Hill, New South Wales, and which secured the Unique Castle loan, was dated January 2009 and expressed a value of \$4,750,000;

Particulars

Valuation report (PRV.501.008.8856)

- (n) by reason of the matters in subparagraph (m), determined that:
- (i) the Unique Castle loan was impaired, or alternatively showed signs of impairment;

Particulars

AASB 139 at [59]

- (ii) there was insufficient evidence to support the recoverability of the Unique Castle loan;
-
- (o) Not used
- (p) Not used
- (q) Not used
- (r) Not used
- (s) Not used
- (t) Not used
- (u) in relation to the Hanna loan, become aware that:

- (i) the loan was more than 90 days in arrears, and the net amount outstanding as at 30 June 2011 was approximately \$5,909,934;

Particulars

90+ day loan impairment (HLB working papers E07-021)

- (ii) the most recent "as is" valuation of the property securing the Hanna loan was dated September 2009 and expressed a value of \$6,000,000;

Particulars

90+ day loan impairment (HLB working papers E07-021)

- (v) by reason of the matters in subparagraph (u), determined that:
- (i) the Hanna loan was impaired, or alternatively showed signs of impairment;

Particulars

AASB 139 at [59]

- (ii) there was insufficient evidence to support the recoverability of the Hanna loan;
 - (w) Not used
 - (x) Not used
- 56B Upon becoming aware of the matters and reaching the determinations pleaded in paragraph 56A, a reasonably competent auditor in the position of HLB exercising reasonable care and skill would have, in the course of conducting the audit of Provident's financial report for FY11 and in preparing its audit report:
- (a) requested Provident to explain why, in relation to the Burleigh Views, Chrysalis, Tahatos, Owston, Unique Castle and Hanna loans, foreclosure and sale had not taken place consistently with the prudent and responsive loan recovery procedures as prescribed in Provident's Credit Policy Manual;
 - (b) requested Provident to provide information about, or otherwise sought expert assistance to determine, the value of the properties securing the Burleigh Views, Chrysalis, Tahatos, Owston, Unique Castle and Hanna loans an "as is" basis as at 30 June 2011; and

Particulars

AASB 139 at [63]

Auditing Standard ASA 620 at and [7], [8] and [A1]

- (c) requested Provident to explain why its management had concluded that renewing the facilities or allowing the facilities to continue was going to achieve full repayment of the Burleigh Views, Chrysalis, Tahatos, Owston, Unique Castle and Hanna loans.
- 56C Upon taking the steps in 56B, unless Provident provided sufficient appropriate audit evidence as to the recoverability of the Burleigh Views, Chrysalis, Tahatos, Owston, Unique Castle, and Hanna loans, a reasonably competent auditor in the position of HLB exercising reasonable care and skill, in the course of conducting the audit of Provident's financial report for FY11 and in preparing its audit report, would have:

Particulars of sufficient appropriate audit evidence

Auditing Standard ASA 500 at [A1] – [A25]

As to the recoverability of loans, such evidence is a current written valuation by an independent valuer estimating the value of the property securing each loan on an “as is” basis.

- (a) formed an opinion that he or she had not been given all information, explanation and assistance necessary for the conduct of the audit;

Particulars

s. 307(b), Corporations Act

- (b) formed an opinion that Provident had not kept financial records sufficient to enable a financial report to be prepared and audited;

Particulars

s. 307(c), Corporations Act

- (c) concluded that he or she had insufficient evidence to determine whether or not a provision was required against those loans;
- (d) formed an opinion that Provident’s financial statements did not give a true and fair view of Provident’s financial position and performance;

Particulars

ss. 297 and 308, Corporations Act

- (e) modified its audit report of Provident’s financial statements stating that the financial statements did not accord with Accounting Standard AASB 139;

Particulars

Auditing Standard ASA 705 at [6], [7], [9], [11-13]

s. 308(3), Corporations Act

- (f) provided a report to Provident’s management that the lack of evidence as to the recoverability of the Burleigh Views, Chrysalis, Tahatos, Owston, Unique Castle and Hanna loans resulted in:
- (i) circumstances where the auditor concluded that there were risks that an item in the financial report might not be accurate;

- (ii) accounting estimates based on management's judgment incorporating assumptions as to future events;
- (iii) depending on the outcome of discussions between the auditor and management, disagreement between the auditor and management; and
- (iv) concerns about Provident's ability to continue as a going concern and to meet its debts as and when they fell due.

Particulars

Auditing Standard ASA 260 at [15]

- (g) provided to AET a:
 - (i) copy of the audit report of Provident's financial statements and the report to Provident's management referred to in the previous subparagraph;

Particulars

ss.307A and 313(1) Corporations Act

Auditing Standard ASA 260

- (ii) report pursuant to s. 313(2) of the Corporations Act recording that:
 - (A) the records of Provident did not contain sufficient information to determine the amount that might be recovered in respect of loans in arrears including the Burleigh Views, Chrysalis, Tahatos, Owston, Unique Castle and Hanna loans;
 - (B) the auditor could not determine whether or to what extent a provision was required against the Burleigh Views, Chrysalis, Tahatos, Owston, Unique Castle and Hanna loans;
 - (C) Provident had renewed or extended loans to borrowers who had defaulted on the repayment of principal or interest without requiring up to date valuations or adequate evidence of the borrower's capacity to repay;

- (D) the auditor either intended to or had modified his or her audit report accordingly.

57 In breach of the duty pleaded in paragraph 55 above, HLB failed to exercise reasonable care and skill in the course of conducting its audit of Provident's financial report for FY11 and in the preparation of the FY11 Audit Report because it:

- (a) relied upon systems and processes for the monitoring of loans arrears, identification of impaired loans, and the making of provisions against impaired loans, which depended upon the decisions of Mr O'Sullivan;
- (b) relied upon statements made by Mr O'Sullivan regarding the sale of properties securing certain loans made by Provident;

Particulars

90+ day loan impairment (HLB working papers E07-021) in relation to the Unique Castle, Hanna, and Tahatos loans.

- (c) failed to conduct a review of events occurring after 30 June 2011 to determine if the forshadowed sales of properties securing certain loans had progressed;
- (d) failed to review all material loans and did not identify that the Burleigh Views loan was impaired or at risk of impairment;

Particulars of material loans

AET repeats paragraph 17A(e), and refers to the loans referred to in paragraph 56A and the loans to Yarraman Estate Pty Ltd, Delta Dawn Pty Ltd, MJ Server Pty Ltd, Cleveland Corporation Pty Ltd as trustee for the Cleveland Family Trust, Ian Maxwell Anderson, Brett John Gunderson and Edward Studdy

- (e) failed to conduct any review, or alternatively any adequate review, of Provident's systems and processes for the monitoring of loan arrears;
- (f) Not used
- (g) failed to investigate and test in the manner pleaded in subparagraphs 17A(d)-(h) above for all material loans to determine whether:

- (i) each material loan was impaired or demonstrated indicators of impairment;
 - (ii) each material loan was recoverable;
 - (iii) the provision (if any) made against each loan was adequate;
and
 - (iv) a substantial proportion of Provident's loan book was recoverable;
- (h) failed to become aware of the matters pleaded in subparagraphs 56A(a)(ii), (a)(iv), (a)(v), (b), (c)(iv), (d)(ii), (f)(ii), (l)(ii), (n)(ii) and (v)(ii);
- (i) relied upon valuations performed on an "as if complete basis" or informal estimates provided by real estate agents with the effect that HLB was not aware of the current value of properties securing certain loans made by Provident;
- (j) failed to take the steps pleaded in paragraph 56B;
- (k) failed to take the steps pleaded in paragraph 56C in circumstances where Provident:
- (i) Not used
 - (ii) would have been unable to provide sufficient appropriate audit evidence as to the recoverability of the Burleigh Views, Chrysalis, Tahatos, Owston, Unique Castle and Hanna loans.

57AA In performing its duties under the trust deed and under s. 283DA of the Corporations Act; AET relied on the audit of Provident's financial report for FY11 and the FY11 Audit Report.

57A If HLB had not breached its duty in the manner pleaded in paragraph 57:

- (a) HLB would have taken the steps pleaded in paragraph 56C, including the provision of information to AET as pleaded in paragraph 56C(g);
- (b) updated valuations of the properties securing the loans referred to in paragraphs 57(k)(ii) would have been obtained by Provident or HLB which would have disclosed that:
 - (i) the "as is" value of the property securing the Burleigh Views loan as at 1 December 2010 was approximately \$5,500,000;

- (ii) in circumstances where the total amount owing under the Burleigh Views loan as at 30 June 2011 was approximately \$20,086, Provident's financial statements should have but did not account for a loss of approximately \$14,586,000;
- (iii) the "as is" value of the property securing the Chrysalis loan as at 1 December 2010 was approximately \$3,150,000;
- (iv) in circumstances where the total amount owing under the Chrysalis loan as at 30 June 2011 was approximately \$7,027,000, Provident's financial statements should have but did not account for a loss of approximately \$3,877,000;
- (v) the "as is" value of the property securing the Tahatos loan as at 1 December 2010 was approximately \$3,950,000;
- (vi) in circumstances where the total amount owing under the Tahatos loan as at 30 June 2011 was approximately \$5,524,000, Provident's financial statements should have but did not account for a loss of approximately \$1,574,000;
- (vii) in circumstances where the total amount owing under the Owston loan as at 30 June 2011 was approximately \$8,057,000, Provident's financial statements should have but did not account for a loss of approximately \$2,357,0000;
- (viii) the "as is" value of the property securing the Unique Castle loan as at 1 December 2010 was approximately \$2,150,000;
- (ix) in circumstances where the total amount owing under the Unique Castle loan as at 30 June 2011 was approximately \$5,016,000, Provident's financial statements should have but did not account for a loss of approximately \$2,866,000;
- (x) the "as is" value of the property securing the Hanna loan as at 1 December 2010 was approximately \$3,800,000;
- (xi) in circumstances where the total amount owing under the Hanna loan as at 30 June 2011 was approximately \$5,910,000, Provident's financial statements should have but did not account for a loss of approximately \$2,110,000

- (xii) by reason of the matters in subparagraphs (i) to (xi):
 - (A) Provident had a net asset deficiency of approximately \$12,199,000 rather than a net asset surplus of approximately \$15,171,000 as disclosed in Provident's financial statements;
 - (B) Provident made a loss before tax for FY11 of approximately \$26,220,000, rather than a profit before tax of approximately \$1,150,000 as disclosed in Provident's financial statements;
- (c) informed of the matters in subparagraphs (a) and (b) above, AET would have:
 - (i) undertaken inquiries and investigations with each of HLB and Provident to determine whether:
 - (A) Provident was complying with the terms of the debentures, the Trust Deed and the Corporations Act; and
 - (B) Provident was able to repay all debentures on issue as and when they fell due;
 - (ii) in the event that Provident was in breach of the terms of the debentures, the Trust Deed or the Corporations Act, taken all available steps to cause Provident to remedy any such breach;
 - (iii) appointed an investigating accountant to further investigate the matters above if it was not satisfied, based on its inquiries and investigations, that Provident:
 - (A) was not, or did not remain, in breach of the terms of the debentures, the Trust Deed and the Corporations Act; and
 - (B) was able to repay all debentures on issue as and when they fell due;

- (iv) taken legal advice and advice from the appointed investigating accountant as to the appropriate steps to address any matters identified by that investigating accountant;
- (v) sought orders appointing a receiver to the assets of Provident and/or otherwise exercised its powers under Chapter 2L of the Corporations Act or the Trust Deed so as to require Provident to repay debenture holders and prevent it from borrowing further monies from the public; and
- (vi) further and in the alternative to subparagraph (v), AET would not have consented to being named in any further debenture prospectus issued by Provident and, as a result, either:
 - (A) Provident would not have issued further debentures; or
 - (B) AET would have been replaced as trustee for debenture holders; and
- (d) if the steps pleaded in subparagraph (c) had been taken, AET would not be liable to the Plaintiff or Group Members (or would be liable in a lesser amount).

57B By reason of the matters pleaded in paragraph 57A:

- (a) HLB's breach of duty pleaded in paragraph 57 was a necessary condition of AET loss;
- (b) it is appropriate that HLB's liability extend to AET's loss; and
- (c) by reason of (a) and (b), the breach of duty pleaded in 57 caused AET's loss.

Statutory damages for misleading and deceptive conduct

58 HLB's conduct in issuing the FY11 Audit Report:

- (a) conduct in trade or commerce;
- (b) conduct in relation to financial products, namely, the debentures issued by Provident.

59 HLB issued the FY11 Audit Report by use of postal or telegraphic services.

- 60 By issuing the FY11 Audit Report, HLB impliedly represented that:
- (a) it had conducted its audit in respect of Provident's financial report for FY11 with reasonable care and skill (**2011 Care and Skill Representation**);
 - (b) it had reasonable grounds for its opinion that:
 - (i) it had been given all information, explanation and assistance necessary for the conduct of the audit (**2011 307(b) Representation**);
 - (ii) Provident had kept records sufficient to enable a financial report to be prepared and audited (**2011 307(c) Representation**); and
 - (iii) Provident's financial report for FY11 gave a true and fair view of the financial position of Provident as at 30 June 2011 and of its performance for the year ended on that date (**2011 TAFV Representation**).

Particulars

The 2011 Care and Skill Representation, the 2011 307(b) Representation, the 2011 307(c) Representation and the 2011 TAFV Representation were made to Provident, its members and AET.

- 61 Contrary to the:
- (a) 2011 Care and Skill Representation, HLB had not conducted its audit in respect of Provident's financial report for FY11 with reasonable care and skill;

Particulars

AET relies on the matters in pleaded in paragraph 57 above.
 - (b) 2011 307(b) Representation, HLB did not have reasonable grounds for its opinion that it had not been given all information, explanation and assistance necessary for the conduct of the audit;

Particulars

AET relies on the matters pleaded in subparagraphs subparagraphs 56A(b), (d)(ii), (f)(ii), (l)(ii), (n)(ii) and (v)(ii) and paragraph 56B above.

- (c) 2011 307(c) Representation, HLB did not have reasonable grounds for its opinion that it Provident had kept sufficient records to enable a financial report to be prepared and audited; and

Particulars

AET relies on the matters pleaded in subparagraphs subparagraphs 56A(b), (d)(ii), (f)(ii), (l)(ii), (n)(ii) and (v)(ii) and paragraph 56B above.

- (d) 2011 TAFV Representation, HLB did not have reasonable grounds for its opinion that Provident's financial report for FY11 gave a true and fair view of the financial position of Provident as at 30 June 2011 and of its performance for the year ended on that date.

Particulars

AET relies on the matters pleaded in paragraphs 57 and 57A(b) above

62 Not used.

63 By virtue of the matters pleaded in paragraphs 58 to 61 above, by issuing the FY11 Audit Report, HLB engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of:

- (a) s. 18 of the Australian Consumer Law;
- (b) s. 1041H of the Corporations Act; and
- (c) s. 12DA of the ASIC Act.

63A If HLB had not made each of the 2011 Care and Skill Representation, the 2011 307(b) Representation, the 2011 307(c) Representation and the 2011 TAFV Representation, AET would have:

- (a) become aware that:
 - (i) Provident's financial reports for the period ending 30 June 2011, as they were presented, did not present a true and fair

- view of Provident's actual financial position and actual financial performance for the year ending 30 June 2011;
- (ii) alternatively, HLB was not of the opinion that Provident's financial reports for the period ending 30 June 2011 presented a true and fair view of Provident's actual financial position and financial performance for the year ending 30 June 2011;
 - (iii) alternatively, HLB was unable to form the opinion that Provident's financial reports for the period ending 30 June 2011 presented a true and fair view of Provident's actual financial position and financial performance for the year ended 30 June 2011;
- (b) informed of the matters in subparagraph (a) above, AET would have:
- (i) undertaken inquiries and investigations with each of HLB and Provident to determine whether:
 - (A) Provident was complying with the terms of the debentures, the Trust Deed and the Corporations Act; and
 - (B) Provident was able to repay all debentures on issue as and when they fell due;
 - (ii) in the event that Provident was in breach of the terms of the debentures, the Trust Deed or the Corporations Act, taken all available steps to cause Provident to remedy any such breach;
 - (iii) appointed an investigating accountant to further investigate the matters above if it was not satisfied, based on its inquiries and investigations, that Provident:
 - (A) was not, or did not remain, in breach of the terms of the debentures, the Trust Deed and the Corporations Act; and
 - (B) was able to repay all debentures on issue as and when they fell due;

- (iv) taken legal advice and advice from the appointed investigating accountant as to the appropriate steps to address any matters identified by that investigating accountant;
- (v) sought orders appointing a receiver to the assets of Provident and/or otherwise exercised its powers under Chapter 2L of the Corporations Act or the Trust Deed so as to require Provident to repay debenture holders and prevent it from borrowing further monies from the public; and
- (vi) further and in the alternative to subparagraph (v), AET would not have consented to being named in any further debenture prospectus issued by Provident and, as a result, either:
 - (A) Provident would not have issued further debentures; or
 - (B) AET would have been replaced as trustee for debenture holders; and
- (c) if the steps pleaded in subparagraph (b) had been taken, AET would not be liable to the Plaintiff or Group Members (or would be liable in a lesser amount).

64 By reason of the matters pleaded in 63A above, AET has suffered loss by the acts of HLB giving rise to the contraventions pleaded in paragraph 62 above.

65 AET is entitled to recover that loss from HLB as damages under:

- (a) s. 236 of the Australian Consumer Law;
- (b) s. 1041I of the Corporations Act; and
- (c) s. 12GM of the ASIC Act.

66 In the FY11 Audit Report, HLB represented that its audit services were of a particular standard, namely, that they accorded with the Australian Auditing Standards (**2011 Audit Standard Representation**).

Particulars

The 2011 Audit Standard Representation was made on about 30 September 2011, in writing in the FY11 Audit Report

- 67 The representation pleaded in paragraph 66 was made in:
- (a) in trade or commerce; and
 - (b) in connexion with the supply of HLB's audit services.
- 68 At the time HLB issued the FY11 Audit Report, the Australian Auditing Standards required that an audit be conducted so as to provide reasonable assurance about whether the financial report as a whole was free from material misstatement.

Particulars

ASA 200, [24]

- 69 By reason of the matters pleaded in paragraphs 57 and 57A above, the FY11 Audit Report:
- (a) had not been conducted with professional competence and due care; and
 - (b) had not been conducted so as to provide reasonable assurance that the financial report, taken as a whole, was free from material misstatement.
- 70 By virtue of the matters pleaded in the previous paragraph:
- (a) the 2011 Audit Standard Representation was false;
 - (b) the making of the 2011 Audit Standard Representation was conduct engaged in by HLB that was misleading or deceptive or likely to mislead or deceive; and
 - (c) by issuing the FY11 Audit Report, HLB contravened s. 29(1)(b) of the Australian Consumer Law.
- 71 By reason of the matters pleaded in the previous paragraph, AET has suffered loss by the acts of HLB giving rise to the contraventions pleaded in paragraph 70 above.
- 72 AET is entitled to recover that loss from HLB as damages under s. 236 of the Australian Consumer Law.

Contribution

- 73 At the time HLB audited Provident's financial report for FY11 and issued the FY11 Audit Report, it was reasonably foreseeable by HLB:
- (a) that holders of debentures issued by Provident would rely on HLB to conduct its audit and prepare its audit report with reasonable care and skill;
 - (b) that holders of debentures issued by Provident would rely on AET performing its duties under the Trust Deed and under s. 283DA of the Corporations Act;
 - (c) that AET would rely on HLB to conduct its audit and prepare its audit report with reasonable care and skill in the manner pleaded at paragraph 52 above;
 - (d) that, if HLB failed to conduct its audit and prepare its audit report with reasonable care and skill, then the trustee for debenture holders might, in reliance on HLB's audit report, fail to take steps (such as appointing a receiver) to protect the interests of debenture holders; and
 - (e) that, were that to occur, debenture holders might suffer harm in the form of economic loss.
- 74 The risk of harm pleaded in paragraph 73 was not insignificant.
- 75 At the time HLB audited Provident's financial report for FY11 and issued the FY11 Audit Report:
- (a) debenture holders had no practical ability to protect themselves from the risk of harm pleaded in paragraph 73;
 - (b) debenture holders could not direct, control or influence the manner in which HLB performed its audit or prepared its audit report;
 - (c) debenture holders were dependent upon HLB taking reasonable care to avoid the risk of harm pleaded in paragraph 73; and
 - (d) debenture holders were vulnerable to harm resulting from a failure by HLB to exercise reasonable care in the performing its audit and preparing its audit report.
- 76 By reason of the matters pleaded in paragraphs 8, 50, 51 and 73 to 75 above, in auditing Provident's financial report for FY11 and in issuing the FY11 audit

Report, HLB owed a duty to holders of debentures issued by Provident to take reasonable care:

- (a) in the conduct of its audit; and
- (b) in the preparation of its audit report,

to avoid the risk of harm pleaded in paragraph 73 above.

76A AET repeats paragraphs 56-57 above.

77 By reason of the matters pleaded in the previous paragraph, and in breach of the duty pleaded in paragraph 76 above, HLB failed to take reasonable care in the conduct of its audit of Provident's financial report for FY11 and in the preparation of HLB's audit report.

Particulars

AET repeats the particulars to paragraph 56 above.

77A AET repeats paragraphs 57AA and 57A.

77B If AET had taken the steps pleaded in paragraph 57A(c) above those Group Members who:

- (a) as at 29 June 2012, held debentures that had been issued before 30 September 2011 (when HLB issued the FY11 Audit Report), would have been repaid in full or in an amount greater than that actually recovered by Group Members; and
- (b) held debentures as at 30 September 2011, and were debenture holders as at 29 June 2012 as a result of having rolled over those debentures, would not have rolled over their debentures and their debentures would instead have been repaid either in full or in an amount greater than that actually recovered by those Group Members.

78 By reason of the matters pleaded in paragraphs 77A and 77B above:

- (a) HLB's breach of duty pleaded in paragraph 77 above was a necessary condition of the loss suffered by the subclass of Group Members pleaded in paragraph 77B;
- (b) it is appropriate that HLB's liability extend to those Group Members' loss; and

- (c) by reason of paragraphs (a) and (b), the breach of duty pleaded in 57 caused those Group Members' loss.
- 78A The loss suffered by the Group Members pleaded in paragraph 78 above is the same loss in respect of which those Group Members seek to recover damages in this proceeding from AET.
- 78B AET repeats paragraphs 58 to 64 and 66 to 70 above.
- 79 If AET had taken the steps pleaded in paragraph 63A(b) above then:
- (a) the Plaintiff and Group Members would not have acquired the debentures they held as at 29 June 2012 and would not have suffered the loss claimed by them in this proceeding;
- (b) further and in the alternative, those Group Members who were debenture holders as at 29 June 2012 as a result of having rolled over those debentures, would not have rolled over their debentures and their debentures would have instead been repaid either in full or in an amount greater than that actually received by those Group Members;
- (c) further and in the alternative, those Group Members who held debentures as at 30 September 2011 and continued to hold them until 29 June 2012 would have either been repaid in full or would have received a greater amount than that actually recovered by them.
- 79A By reason of the matters pleaded in paragraphs 78B and 79 above, the Plaintiff and Group Members have suffered loss by the acts of HLB giving rise to the contraventions pleaded in paragraphs 63 and 70 above.
- 80 The Plaintiff and group members are entitled to recover that loss from HLB as damages under:
- (a) s. 236 of the Australian Consumer Law;
- (b) s. 1041I of the Corporations Act;
- (c) s. 12GM of the ASIC Act.
- 80A The Plaintiff and some Group Members:
- (a) were resident in Victoria as at 30 September 2011;
- (b) have become residents of Victoria since 30 September 2011; and/or
- (c) suffered the loss pleaded in paragraph 79A above in Victoria.

- 81 AET repeats paragraph 43.
- 82 By reason of the matters pleaded in paragraphs 73 to 80 above, if, which is denied, AET is liable to the Plaintiff and group members as alleged in the Statement of Claim, then AET is entitled to recover contribution from HLB pursuant to:
- (a) s. 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW); and
 - (b) s. 23B of the *Wrongs Act 1958* (Vic.).
- 83 Further or alternatively, if, which is denied, AET is liable to the Plaintiff or Group Members as alleged in the Statement of Claim, then its liabilities are coordinate with those of HLB pleaded above.
- 84 By reason of the matters pleaded in paragraphs 73 to 81 and 83 above, if, which is denied, AET is liable to the Plaintiff and group members as alleged in the Statement of Claim, then AET is entitled to recover contribution from HLB pursuant to the doctrine of equitable contribution.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in this statement of cross-claim has reasonable prospects of success.

I have advised the cross-claimant that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

Bradley Woodhouse

Date of signature

22 FEBRUARY 2018

NOTICE TO CROSS-DEFENDANT

If you do not file a defence you will be bound by any judgment or order in the proceedings so far as it is relevant to this cross-claim.

HOW TO RESPOND

Please read this statement of cross-claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the cross-claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 **If you intend to dispute the cross-claim or part of the cross-claim**, by filing a defence and/or making a cross-claim.
- 2 **If money is claimed, and you believe you owe the money claimed**, by:
 - Paying the cross-claimant all of the money and interest claimed.
 - Filing an acknowledgement of the claim.
 - Applying to the court for further time to pay the claim.

3 If money is claimed, and you believe you owe part of the money claimed,
by:

- Paying the cross-claimant that part of the money that is claimed.
- Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at
<http://www.ucprforms.justice.nsw.gov.au/> or at any NSW court registry.

REGISTRY ADDRESS

| | |
|----------------|---|
| Street address | 184 Phillip Street, Sydney |
| Postal address | Supreme Court of NSW, GPO Box 3, Sydney, 2001 |
| Telephone | (02) 9230 8628 |

[on separate page]

AFFIDAVIT VERIFYING

Name Yvonne Maree Kelaher
 Address Level 3, 30 Hickson Road, Millers Point, NSW
 Occupation Senior Manager
 Date 22 FEBRUARY 2018

I say on oath :

- 1 I am the Senior Manager – Relationship and Transaction Management for the Cross Claimant and am authorised to make this affidavit on their behalf.
- 2 I believe that the allegations of fact in the statement of cross-claim are true.

SWORN at Sydney

Signature of deponent



Name of witness

Address of witness

8 Chifley, 8-12 Chifley Square, Sydney, NSW

Capacity of witness

Solicitor

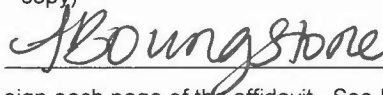
And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have confirmed the deponent's identity using the following identification document:

DRIVERS LICENCE 12107062

Identification document relied on (may be original or certified copy)†

Signature of witness



Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

[* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

PARTY DETAILS

A list of parties must be filed and served with this statement of cross-claim.

PARTIES TO THIS CROSS-CLAIM**Cross-claimant**

Australian Executor Trustees Limited,
Cross-claimant

Cross-defendants

Philip Bruce Meade and the others listed in
Schedule 1, Cross-defendant

DETAILS ABOUT CROSS-DEFENDANTS THAT ARE NEW PARTIES**First cross-defendant**

Name

Philip Bruce Meade and the others listed in Schedule 1

Address

Level 9, 207 Kent Street
Sydney NSW 2000

SCHEDULE ONE

The partners of HLB, who so far as known to the Cross-claimant were:

MEADE, Philip Bruce
BEMBRICK, Peter Ross
TAYLOR, Barry Anthony
HUTTON, Michael Geoffrey
NEEDHAM, Andrew Fletcher
SWINDELLS, Darryl Kevin
SMITH, Aidan Gerard
PREEN, Stephan Keith
FITTLER, Sven Anthony
JAMES, Simon Powell
MULLER, Mark Douglas
VON-LUCKEN, Mariana Ines
WICKENDEN, Neil
GARDINER, Matthew Robert
ROSE, Victor Bruce
BIDDLE, John Russell
MATTISKE, Dennis Jeffrey
McGRANE, David