

DEFENCE TO AMENDED STATEMENT OF THIRD CROSS-CLAIM

COURT DETAILS

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

TITLE OF PROCEEDINGS

First plaintiff	Innes John Creighton
Defendant	Australian Executor Trustees Limited

TITLE OF THIS CROSS-CLAIM

First Cross-Claimant	Australian Executor Trustees Limited
First Cross-Defendant	Philip Bruce Meade and the others listed in Schedule 1

FILING DETAILS

Filed for	Philip Bruce Meade and the others listed in Schedule 1, Cross-Defendants
Filed in relation to	Amended Statement of Third Cross-Claim
Legal representative	Tricia Hobson, Norton Rose Fulbright Australia
Legal representative reference	2846067
Contact name and telephone	Susannah Mitton, Norton Rose Fulbright Australia (02) 9330 8718
Contact email	tricia.hobson@nortonrosefulbright.com susannah.mitton@nortonrosefulbright.com

HEARING DETAILS

The proceeding is listed for directions before Justice Ball on 3 April 2018.

PLEADINGS AND PARTICULARS

In answer to the Pleadings and Particulars contained in the Amended Statement of Third Cross-Claim filed on 5 March 2018 (**Amended Third Cross-Claim**) the Cross-Defendants (Philip Bruce Meade and the others listed in Schedule 1) rely on the following facts and assertions:

Parties

1 The Cross-Defendants admit paragraph 1 of the Third Cross-Claim.



- 2 In answer to paragraph 2 of the Amended Third Cross-Claim, the Cross-Defendants say that:
- (a) They do not know the circumstances in which Australian Executor Trustee Limited (**AET**) was trustee for holders of debentures issued by Provident Capital Limited (**Provident**);
 - (b) From the date of their appointment as auditors of Provident, they were aware that AET was the trustee for holders of debentures issued by Provident; and
 - (c) Otherwise do not admit the paragraph.
- 3 In answer to paragraph 3 of the Amended Third Cross-Claim, the Cross-Defendants say that:
- (a) They admit that the professional practice is conducted in Sydney under the name HLB Mann Judd ("the NSW Partnership") and by HLB Mann Judd (NSW) Pty Ltd (**HLB**), a practice company approved by Chartered Accountants Australia and New Zealand;
 - (b) HLB, at all material times, carried on business as a professional services firm that provided, amongst other things, audit services; and
 - (c) HLB, at all material times, was a partnership with the rights and the obligations of the partnership governed by the HLB Mann Judd Partnership Agreement dated 1 July 2010.
- 4 In answer to paragraph 4 of the Amended Third Cross-Claim, the Cross-Defendants
- (a) Admit that there was a written agreement between the Directors of Provident and HLB for HLB to audit the financial statements of Provident for the financial year ended 30 June 2010, comprising the balance sheet, statement of comprehensive income, statement of changes in equity, statement of cashflows for the year then ended, a summary of significant accounting policies and other explanatory information;

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- (i) The terms of the agreement are set out in the letter from HLB to the Directors of Provident dated 4 August 2010 and signed on behalf of Provident by John Fulker COO on 5 August 2010.
- (b) Admit that there was a written agreement between the Directors of Provident and HLB for HLB to audit the financial statements of Provident for the financial year ended 30 June 2011, comprising the statement of financial position as at 30 June 2011, statement of comprehensive income, statement of changes in equity, statement of cashflows for the year then ended, a summary of significant accounting policies and other explanatory information;

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- (i) The terms of the agreement are set out in the letter from HLB to the Directors of Provident dated 6 July 2011 and signed on behalf of Provident by Michael O'Sullivan Managing Director on 20 July 2011.
 - (c) Otherwise do not admit the allegations in paragraph 4 of the Amended Third Cross-Claim.
- 5 In answer to paragraph 5 of the Amended Third Cross-Claim, the Cross-Defendants say that:
- a) Victor Bruce Rose and Dennis Jeffery Mattiske retired from HLB prior to 1 July 2010; and
 - b) The partners of HLB in the period from 26 July 2010 to 29 June 2012 are listed in Schedule One, subject to the following:
 - (i) David McGrane retired from HLB on 30 June 2011;
 - (ii) John Biddle retired from HLB on 30 September 2011; and
 - (iii) Philip Meade retired from HLB on 31 December 2011.
- 6 In answer to paragraph 6 of the Amended Third Cross-Claim, the Cross-Defendants:



- (a) Admit that HLB audited the financial statements of Provident for the financial year ending 30 June 2010, which was comprised of the balance sheet as at 30 June 2010, the balance sheet, statement of changes in equity and statement of cash flows for the year then ended, a summary of significant accounting policies and other explanatory information.

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- (i) The Objective and Scope of the Audit of the Financial Statements is set out in the letter from HLB to the Directors of Provident dated 4 August 2010 (**August 2010 Agreement**).
- (b) Say that under the terms of the August 2010 Agreement, the directors, management and, where appropriate, others charged with governance acknowledged and understood that they had responsibility:
- (i) For the preparation and fair representation of the financial statements in accordance with Australian Accounting Standards;
- (ii) For such internal control as directors, management and others charged with governance determined was necessary to enable the preparation of financial statements that were free from material misstatement, whether due to fraud or error; and
- (iii) To provide HLB with:
- (A) Access to all information of which directors, management and others charged with governance were aware that was relevant to the preparation of the financial statements such as records, documentation and other matters;
- (B) Additional information that HLB may request from directors, management and others charged with governance for the purpose of the audit; and
- (C) Unrestricted access to persons within the entity from whom HLB determined it necessary to obtain audit evidence.
- (c) Admit that HLB audited the financial statements of Provident for the year ending 30 June 2011, which was comprised of the statement of financial

position as at 30 June 2011, statement of comprehensive income, statement of changes in equity and statement of cash flows for the year then ended, a summary of significant accounting policies and other explanatory information, and the director's declaration.

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- (i) The Objective and Scope of the Audit of the Financial Statements is set out in the letter from HLB to the Directors of Provident dated 6 July 2011 (**July 2011 Agreement**).

- (d) Say that under the terms of the July 2011 Agreement, the directors, management and, where appropriate, others charged with governance acknowledged and understood that they had responsibility:
 - (i) For the preparation and fair representation of the financial statements in accordance with Australian Accounting Standards;
 - (ii) For such internal control as directors, management and others charged with governance determined was necessary to enable the preparation of financial statements that were free from material misstatement, whether due to fraud or error; and
 - (iii) To provide HLB with:
 - (A) Access to all information of which directors, management and others charged with governance were aware that was relevant to the preparation of the financial statements such as records, documentation and other matters;
 - (B) Additional information that HLB may request from directors, management and others charged with governance for the purpose of the audit; and
 - (C) Unrestricted access to persons within the entity from whom HLB determined it necessary to obtain audit evidence.

- (e) Otherwise they do not admit the allegations in paragraph 6 of the Amended Third Cross-Claim.



7 In answer to paragraph 7 of the Amended Third Cross-Claim, the Cross-Defendants:

- (a) Admit that there was a written agreement between the Directors of Provident and HLB for HLB to review the 31 December 2010 half-year financial report of Provident;

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- (i) The terms of the agreement are set out in the letter from HLB to the Directors of Provident dated 4 August 2010 on p. 8 under the heading "*Scope of the review of the Provident Capital Limited half-year financial report*" (**August 2010 Agreement**).
- (b) Say that under the terms of the August 2010 Agreement, they admit that HLB reviewed the 31 December 2010 half-year financial report of Provident, which comprised of the condensed balance sheet as at 31 December 2010, and the related condensed statements of comprehensive income, changes in equity and cash flows for the sixth-month period ended on that date, a summary of significant accounting policies and other explanatory notes.
- (c) Say that under the terms of the August 2010 Agreement, the responsibility for the half-year financial report, including adequate disclosure, was that of the directors.
- (d) Admit that there was a written agreement between the Directors of Provident and HLB for HLB to review the 31 December 2011 half-year financial report of Provident;

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- (i) The terms of the agreement are set out in the letter from HLB to the Directors of Provident dated 6 July 2011 on pp. 8-9 under the heading "*Scope of the review of the Provident Capital Limited half-year financial report*" (**July 2011 Agreement**).
- (e) Say that under the terms of the July 2011 Agreement, they admit that HLB reviewed the 31 December 2011 half-year financial report of Provident,



which comprised the condensed statement of financial position as at 31 December 2011, and the related condensed statements of comprehensive income, changes in equity and cash flows for the sixth-month period ended on that date, a summary of significant accounting policies and other explanatory notes.

- (f) Say that under the terms of the July 2011 Agreement, the responsibility for the half-year financial reports, including adequate disclosure, was that of the directors.
- (g) Otherwise they do not admit the allegations in paragraph 7 of the Amended Third Cross-Claim.

8 In answer to paragraph 8 of the Amended Third Cross-Claim, the Cross-Defendants:

- (a) Admit that HLB was aware that Provident had on issue debentures that were ED securities pursuant to s.111A1 of the *Corporations Act*.
- (b) Admit that HLB was aware that Provident was a disclosing entity pursuant to s.111AC of the *Corporations Act*.
- (c) Admit that HLB was aware that Provident was required by s. 292 of the *Corporations Act* to prepare a financial report for each financial year.
- (d) Admit that HLB was aware that 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) Admit that, as the auditor of the financial statements of Provident as pleaded at paragraph 6 and as the reviewer of the financial reports of Provident as pleaded at 7 of this amended defence, HLB was required by s. 307 of the *Corporations Act* to form an opinion on whether HLB was of the opinion that:
 - (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 value of Provident's financial position and performance;

- (ii) It had been given all the information, explanation and assistance necessary for the conduct of the audit; and
 - (iii) Provident had kept financial records sufficient to enable a financial report to be prepared and audited.
- (f) Admit that, as the auditor of the financial statements of Provident as pleaded at paragraph 6 and as the reviewer of the financial reports of Provident as pleaded at paragraph 7 of this amended defence, HLB was required by s. 307A(1) of the *Corporations Act* to conduct its audits and reviews in accordance with the auditing standards.
- (g) Admit that, as the auditor of the financial statements of Provident as pleaded at paragraph 6 of this amended defence, HLB was required by s. 308(1) of the *Corporations Act* to report to the members of Provident 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) Admit that 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 the debentures issued by Provident.
- (i) Admit that HLB was aware that Provident was required by s. 318(1) of the *Corporations Act* 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) Admit that HLB was aware that, pursuant to s.318(2) of the *Corporations Act*, the holder of a debenture issued by Provident was entitled to ask Provident to provide the holder with a copy of HLB's audit report for the last financial year.
- (k) Admit that HLB was aware that Provident was required by s. 302(a) of the *Corporations Act* to prepare a financial report for each half-year.
- (l) Admit that HLB was aware that Provident was required by s. 302(b) of the *Corporations Act* to have its financial report for each half-year either

audited or reviewed in accordance with Division 3 and (in either case) to obtain an auditor's report.

- (m) Admit that, as the reviewer of the financial reports of Provident as pleaded at paragraph 7 of this amended defence, HLB was required by s. 307A(1) of the *Corporations Act* to conduct its reviews in accordance with the auditing standards.
- (n) Admit that:
 - (i) HLB reviewed the 31 December 2010 half-year financial report of Provident as pleaded at paragraph 7 of this defence and they were aware that HLB was required by s.309(4) of the *Corporations Act* to report to members of Provident on whether it became aware of any matter in the course of the review that made it believe that the financial report did not comply with Division 2; and
 - (ii) HLB reviewed the 31 December 2011 half-year financial report of Provident as pleaded at paragraph 7 of this defence and they were aware that HLB was required by s.309(4) of the *Corporations Act* to report to members of Provident on whether it became aware of any matter in the course of the review that made it believe that the financial report did not comply with Division 2.
- (o) Admit that pursuant to s.313(1) of the *Corporations Act*, HLB was required to provide a copy of its 31 December 2010 half-year financial report of Provident and 31 December 2011 half-year financial report of Provident as pleaded at paragraph 7 of this defence to the trustee for the holders of the debentures issued by Provident.
- (p) Admit that HLB was aware that Provident was required by s. 318(4) of the *Corporations Act* to provide a copy of HLB's 31 December 2010 half-year financial report of Provident and 31 December 2011 half-year financial report of Provident as pleaded at paragraph 7 of this defence to the trustee for the holders of debentures issued by Provident.
- (q) Admit that 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 Provident a written report about any matter that:



- (i) HLB became aware of in conducting an audit or review of Provident's financial report for a financial year or half-year;
 - (ii) In HLB's opinion was or was likely to be prejudicial to the interests of holders of debentures issued by Provident; and
 - (iii) In HLB's opinion was 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.
- (r) Admit that 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 report referred to in sub-paragraph (q) above.
- (s) Otherwise do not admit the allegations in paragraph 8 of the Amended Third Cross-Claim.

FY10 audit

9 The Cross-Defendants admit paragraph 9 of the Amended Third Cross-Claim.

10 The Cross-Defendants admit paragraph 10 of the Amended Third Cross-Claim.

11 In answer to paragraph 11 of the Amended Third Cross-Claim, the Cross-Defendants :

- (a) Admit that after auditing the financial statements of Provident as pleaded at paragraph 6(a) above, HLB issued an Audit report in which it expressed the opinion that:
 - (i) *"the financial report of Provident Capital Limited is in accordance with the Corporations Act 2001, including:*
 - (A) *giving a true and fair view of the company's financial position as at 30 June 2010 and of its performance for the year ended on that date; and*
 - (B) *complying with Australian Accounting Standards (including the Australian Accounting Interpretations) and the Corporations Regulations 2001; and*

- (ii) *the financial statements also comply with International Financial Reporting Standards as disclosed in Note 1(a)*".
 - (b) Otherwise do not admit the allegations in paragraph 11 of the Amended Third Cross-Claim.
- 12 In answer to paragraph 12 of the Amended Third Cross-Claim, the Cross-Defendants say that:
- (a) They admit that HLB audited the financial statements of Provident as pleaded in paragraph 6(a) above;
 - (b) They say that the agreement was in writing and set out set out in the letter from HLB to the Directors of Provident dated 4 August 2010;
 - (c) They say that it was a term of HLB's contract with the Directors of Provident that HLB would exercise reasonable care and skill in auditing the financial report and issuing its audit report; and
 - (d) Otherwise do not admit the allegations in paragraph 12 of the Amended Third Cross-Claim.
- 13 The Cross-Defendants admit paragraph 13 of the Amended Third Cross-Claim.
- 14 The Cross-Defendants deny the allegations in paragraph 14 of the Amended Third Cross-Claim.
- 15 The Cross-Defendants deny the allegations in paragraph 15 of the Amended Third Cross-Claim.
- 16 In answer to paragraph 16 of the Amended Third Cross-Claim, the Cross-Defendants:
- (a) Deny the allegations in the paragraph;
 - (b) Say that as trustee for the holders of debentures issued by Provident from time to time, AET enjoyed, amongst others, the powers pursuant to the Debenture Trust Deed and the Deed of Amendment to compel Provident to:
 - (i) Make available for inspection by AET or its auditor, the whole of the financial or other record of Provident: Clause 6.0.2;



- (ii) Give AET or its auditor such information as AET or its auditor required with respect to all matters relating to the financial or other records of Provident: Clause 6.0.3; and
- (iii) Provide AET, at AET's request under Clause 6.08, a schedule relevantly setting out:
 - (A) Details of the amounts of the debenture funds invested in each form of authorised investment at the end of the month: Clause 6.0.8.2;
 - (B) The amount of the debenture funds at the beginning and at the end of the month: Clause 6.0.8.3;
 - (C) For each form of authorised investment, the income received during the month and the projected income for the next month: Clause 6.0.8.4;
 - (D) The amount of interest paid on debentures for the month and the projected amount of the interest payable on debentures for the next month: Clause 6.0.8.5; and
 - (E) Particulars of mortgage arrears at the end of the month and the action taken by Provident to recover those arrears: Clause 6.0.8.6

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- (aa) Debenture Trust Deed dated 11 December 1998
 - (bb) Deed of Amendment dated 23 December 1999
 - (cc) Consolidated Trust Deed dated 25 November 2005
- (c) AET as trustee for the holders of debentures issued by Provident from time to time, enjoyed the power pursuant to the *Corporations Act* to compel Provident to comply with its obligations to:
- (i) Make all of its financial and other records available for inspection by:
 - (A) AET; or

- (B) A registered company auditor appointed by AET to carry out the inspection: s. 283BB *Corporations Act*;
 - (ii) Give AET or AET's auditor appointed any information, explanations or other assistance that they require about matters relating to those records: s.283BB of the *Corporations Act*;
 - (iii) If Provident created a security interest, to give AET written details of the security interest within 21 days after it was created, and, if the total amount to be advanced on the security of the security interest was indeterminate and the advances are not merged in an account with bankers, trade creditors or anyone else – to give AET written details of the amount of each advance within 7 days after it was made: s.283BE of the *Corporations Act*; and
 - (iv) Within one month after the end of each quarter, to give AET a quarterly report that set out the information required by ss. 283BF(4, (5) and (6) of the *Corporations Act*; and
- (d) AET as trustee for the holders of debentures issued by Provident from time to time enjoyed an indemnity from Provident for all costs, charges and expenses properly incurred, including without limitation costs, charges and expenses:
- (i) In carrying out or exercise or the attempted carrying out or exercise by AET of any duty or power express or implied by law;
 - (ii) In connection with any breach by Provident of this deed;
 - (iii) In connection with the convening and holding of any meeting of debenture and the carrying out of any directions under such meeting; and
 - (iv) Charged to AET by AET's auditor in connection with any function performed by its auditor concerning this deed: Trust Deed Clause 8.2
- (e) By reasons of the matters pleaded in paragraph 16(b) of this Amended Defence above, AET had an obligation and/or legal and/or practical ability

and duty to satisfy itself of the accuracy of Provident's financial report for FY10 and any other aspect of Provident's financial affairs including through the appointment by AET of a registered company auditor to inspect the records of Provident at AET's request;

- (f) HLB audited the financial statements of Provident as pleaded in paragraph 6(a) above and issued the 2010 Audit Report:
- (i) In accordance with the Auditing Standard including ethical requirements, which includes an independence requirement;
 - (ii) Including the independence declaration that HLB had complied with the independence requirement of the *Corporations Act*; and
 - (iii) In accordance with those requirements, HLB could not allow AET (as trustee for debenture holders) to direct, control or influence the conduct of HLB's audit or the contents of the 2010 Audit Report.

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- (A) Auditing and Assurance Standards AUS2020 (Objectives and General Principles Governing an Audit of a Financial Report ((February 2004) at .04;
 - (B) 2010 Audit Report at p. 35
- (g) Further, if the risk of harm pleaded in paragraph 16 in the Amended Third Cross-Claim existed (which is denied), AET or debenture holders had an obligation and/or a legal and/or practical ability to protect itself from the risk of harm.
- (h) Further, at no time did AET inform the Cross-Defendants that it was unable to protect itself from the pleaded risk of harm.
- 17 In answer to paragraph 17 of the Amended Third Cross-Claim, the Cross-Defendants say that:
- (a) They repeat their answers to paragraphs 8 and 12 to 16 above;
 - (b) Deny the allegations in paragraph 17.

17A In answer to paragraph 17A of the Amended Third Cross-Claim, the Cross-Defendants:

(a) Deny the allegations in paragraph 17A(a) and say that a reasonably competent auditor in the position of HLB exercising reasonable care and skill in the conduct of (**A Competent Auditor**) its audit of Provident's financial report for FY10 and in the preparation of its audit report would:

- (i) Determine overall responses to assessed risks at the financial report level; and
- (ii) Irrespective of the approach selected, design and perform substantive procedures for each material class of transactions, account balance, and disclosure.

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(A) Auditing Standard ASA 330 [6] and [15]

(b) In answer to sub-paragraph 17A(b):

- (i) Deny that A Competent Auditor would have undertaken the investigations pleaded in sub-paragraph 17A(a) in auditing Provident's financial report for FY10.
- (ii) Admit that A Competent Auditor of Provident's financial report for FY10 would have become aware of the facts contained in sub-paragraphs 17A(b)(i), (iii), (iv), (v) and (vii);
- (iii) Say in respect of sub-paragraph 17A(b)(vi) that A Competent Auditor of Provident's financial report for FY10 would have become aware that 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 **financial** liabilities) as at 30 June 2009; and
- (iv) Otherwise do not admit the sub-paragraph.

(c) In answer to sub-paragraph 17A(c), the Cross-Defendants:

- (i) Refer to and repeat sub-paragraphs (a) and (b) above;
- (ii) Say that A Competent Auditor of Provident's financial report for FY10 would have planned and performed the audit with professional scepticism, recognising that circumstances may exist that may cause the financial report to be materially misstated.

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- (A) Auditing Standard ASA 200 [21] and [23]; and
- (iii) Otherwise do not admit the paragraph.
- (d) Deny the allegations in sub-paragraph 17A(d) and say that:
 - (i) A Competent Auditor of Provident's financial report for FY10 would have (relevantly) undertaken a combination of Audit sampling, and review of specific loans to determine whether the overall provision against the loan book was materially overstated or understated.

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- Auditing Standards ASA 530 [6], [24], [25], [26](b), [26](c), [27] and [31].
- (e) Do not admit the allegations in paragraph 17A(e).
- (f) In answer to paragraph 17A(f):
 - (i) Refer to and repeat sub-paragraph (d) above.
 - (ii) Deny that A Competent Auditor of Provident's financial report for FY10 was required to investigate and test "*all material and other selected loans*"; and
 - (iii) Say that a Competent Auditor of Provident's financial report for FY10 was required to design specific tests that addressed the actual and perceived risks in the organisation.
- (g) In answer to the paragraph 17A(g):
 - (i) Deny the allegations in the paragraph; and

- (ii) Say that A Competent Auditor of Provident's financial report for FY10 would recognise which loans were not being serviced in accordance with the terms of their loan and would investigate, inter alia:
 - (A) Why the loan was in default;
 - (B) What was Provident's recovery strategy;
 - (C) What documents or independent data supported the reasonableness of Provident's recovery strategy.

- (h) In answer to the paragraph 17A(h):
 - (i) Deny the allegations in the paragraph; and
 - (ii) Say that A Competent Auditor of Provident's financial report for FY10 would review all loans which had been outside their loan terms for 90 days or more, to consider whether the loan book ought to be impaired.

- (i) In answer to paragraph 17A(i) of the Amended Third Cross-Claim, the Cross-Defendants:
 - (i) Admit the allegations in paragraph 17A(i) of the Amended Third Cross-Claim but deny the particulars; and
 - (ii) Say that the Auditing Standard ASA 570 (**ASA 570**) in force on or about 1 July 2009 (the commencement of FY 2010) relevantly states:
 - (A) At paragraph 6 of ASA570: "Going Concern basis" means the accounting basis whereby in the preparation of the financial report the reporting entity [Provident] is viewed as a going concern, that is, it is expected to:
 - (a) be able to pay its debts as and when they fall due;
 - and

- (b) Continue in operation without any intention or necessity to liquidate or otherwise wind up its operations.
- (B) At paragraph 7 of ASA 570: "Relevant period" means the period of approximately 12 months from the date of the auditor's [HLB's] current report to the expected date of the auditor's [HLB's] report for:
 - (a) The next annual reporting period in the case of an annual financial report; or
 - (b) The corresponding period for the following year in the case of an interim reporting period.
- (C) At paragraph 16 of ASA 570: In obtaining an understanding of the entity [Provident], the auditor [HLB] shall consider whether there are events or conditions or related business risks which may cast significant doubt on Provident's ability to continue as a going concern.
- (j) The Cross-Defendants admit paragraph 17A(j) of the Amended Third Cross-Claim.
- (k) The Cross-Defendants admit paragraph 17A(k) of the Amended Third Cross-Claim.

17B In answer to 17B the Cross-Defendants:

- (a) Deny that A Competent Auditor of Provident's financial report for FY10 was required to or would have performed all of the tasks pleaded in paragraph 17A in the course of conducting the audit of Provident's financial report for FY10 and in preparing its audit report.
- (b) In answer to sub-paragraph 17B(a), say that A Competent Auditor of Provident's financial report for FY10 would have:
 - (i) learnt, amongst other things, the facts pleaded in (i), (ii), (iv), (v), (vi) about the Burleigh Views Loan;



- (ii) learnt that the most recent valuation of Burleigh Views was dated 20 September 2010 and valued the property at \$26.6m on completion;
 - (iii) learnt that Provident intended to (and was) waiting for DA approval to decide whether or not Provident completed the project itself, or partnered with a developer;
 - (iv) learnt that Provident did not intend to sell the site undeveloped; and
 - (v) Otherwise do not admit the sub-paragraph.
- (c) In answer to sub-paragraph 17B(b), say that A Competent Auditor of Provident's financial report for FY10, having learnt the information in sub-paragraph (c) above:
- (i) Would have determined that there was a potential indicator for the impairment of the Burleigh Views Loan; and
 - (ii) Otherwise deny the paragraph.
- (d) In answer to sub-paragraph 17B(c), say that A Competent Auditor of Provident's financial report for FY10 would have:
- (i) learnt, amongst other things, the facts pleaded in (i) and (ii) about the Chrysalis Loan;
 - (ii) learnt that the most recent valuation of the property securing the Chrysalis Loan was dated 9 December 2009 and valued the property at \$29.285m on completion and \$7.3m as is with DA approval; and
 - (iii) Otherwise do not admit the sub-paragraph.
- (e) In answer to sub-paragraph 17B(d), say that A Competent Auditor of Provident's financial report for FY10, having learnt the information in sub-paragraph (d) above:
- (i) Would have determined that there was a potential indicator for the impairment of the Chrysalis Loan; and
 - (ii) Otherwise deny the paragraph.

- (f) In answer to sub-paragraph 17B(e), say that A Competent Auditor of Provident's financial report for FY10 would have:
- (i) learnt, amongst other things, the facts pleaded in (i), (ii) and (iii) about the Tahatos Loan;
 - (ii) learnt that the most recent valuation or appraisal of the property secured against the Tahatos Loan was a real estate agent's estimate of \$6m obtained in July 2010;
 - (iii) learnt that negotiations over the terms of a sale contract for the property secured against the Tahatos Loan had commenced with settlement expected in September 2010;and
 - (iv) Otherwise do not admit the sub-paragraph.
- (g) In answer to sub-paragraph 17B(f), say that A Competent Auditor of Provident's financial report for FY10, having learnt the information in sub-paragraph (f) above:
- (i) Would have determined that there was a potential indicator for the impairment of the Tahatos Loan; and
 - (ii) Otherwise deny the paragraph.
- (h) In answer to sub-paragraph 17B(k), say that A Competent Auditor of Provident's financial report for FY10 would have:
- (i) learnt, amongst other things, the facts pleaded in (i) and (ii) and (iii) about the Owston Loan;
 - (ii) learnt that the most recent valuation or appraisal of the property secured against the Owston Loan was a real estate agent's estimate of \$6.5m obtained in August 2010;and
 - (iii) Otherwise do not admit the sub-paragraph.
- (i) In answer to sub-paragraph 17B(l), say that A Competent Auditor of Provident's financial report for FY10, having learnt the information in sub-paragraph (h) above:

- (i) Would have determined that there was a potential indicator for the impairment of the Owston Loan; and
 - (ii) Otherwise deny the paragraph.
- (j) In answer to sub-paragraph 17B(m), say that A Competent Auditor of Provident's financial report for FY10 would have:
 - (i) learnt, amongst other things, the facts pleaded in (i) and (ii) about the Unique Castle Loan;
 - (ii) learnt that the most recent valuations or appraisals of the property secured against the Unique Castle Loan were:
 - (A) a real estate agent's estimate (which assumed the grant of a DA) of between \$5 and \$5.5m obtained in August 2010; and
 - (B) a valuation of \$4.750m dated 30 June 2010;
 - (iii) Otherwise do not admit the sub-paragraph.
- (k) In answer to sub-paragraph 17B(n), say that A Competent Auditor of Provident's financial report for FY10, having learnt the information in sub-paragraph (j) above:
 - (i) Would have determined that there was a potential indicator for the impairment of the Unique Castle Loan; and
 - (ii) Otherwise deny the paragraph.
- (l) In answer to sub-paragraph 17B(u), say that A Competent Auditor of Provident's financial report for FY10 would have:
 - (i) learnt, amongst other things, the facts pleaded in (i) and (ii) about the Hanna Loan;
 - (ii) learnt that marketing of the property which was secured against the Hanna Loan was commencing in September 2010; and
 - (iii) Otherwise do not admit the sub-paragraph.



(m) In answer to sub-paragraph 17B(v), say that A Competent Auditor of Provident's financial report for FY10, having learnt the information in sub-paragraph (l) above:

- (i) Would have determined that there was a potential indicator for the impairment of the Hanna Loan; and
- (ii) Otherwise deny the paragraph.

17C In answer to 17C, the Cross-Defendants:

- (a) Deny that A Competent Auditor of Provident's financial report for FY10 would have reached the determinations in 17B above;
- (b) Deny that A Competent Auditor of Provident's financial report for FY10 would have reached the determinations in 17B above prior to engaging in the discussions referred to in 17C(c); and
- (c) Otherwise deny the paragraph.

17D In answer to paragraph 17D of the Amended Third Cross-Claim, the Cross-Defendants:

- (a) Deny that A Competent Auditor of Provident's financial report for FY10 would have made the determinations in 17B above and taken the steps in 17C above;
- (b) Deny that Auditing Standard ASA 705 was in force in relation to the FY10 audit of Provident;
- (c) Say that A Competent Auditor of Provident's financial report for FY10 would have complied with the Auditing Standard ASA 500 in force on or about 1 July 2009;
- (d) Say that, if A Competent Auditor of Provident's financial report for FY10 had not been able to obtain reasonable satisfaction about the recoverability of the loans identified in 17D, then the Competent Auditor would first report that information to the Board. If, no such reasonable satisfaction had been able to be achieved by the time that the Competent Auditor was to sign the audit report, then the Competent Auditor:



- (i) would form the opinions referred to in sub-paragraphs 17D (a), (b), (c) and (d);
 - (ii) may modify its audit report or disclaim the audit opinion;
 - (iii) would report its opinions and conclusions to each of Provident management, Provident's board, AET and ASIC
 - (iv) Otherwise do not admit the paragraph.
- 18 The Cross-Defendants deny the allegations in paragraph 18 of the Amended Third Cross-Claim.
- 18AA The Cross-Defendants do not admit the allegations in paragraph 18AA of the Amended Third Cross-Claim and repeat their answers to paragraphs 14 and 16 of this Amended Defence.
- 18A The Cross-Defendants deny the allegations in paragraph 18A of the Amended Third Cross-Claim.
- 19 The Cross-Defendants deny the allegations in paragraph 19 of the Amended Third Cross-Claim and say further:
- (a) A reasonable competent trustee in the position of AET was obliged to act on behalf of debenture holders, and for their benefit, in the manner provided for by s.283DA of the *Corporations Act* and by the Trust Deed and the Deed of Amendments;
 - (i) As trustee, AET from time to time for the holders of debentures issued by Provident enjoyed, amongst others, the powers pursuant to the Debenture Trust Deed and the Deed of Amendments to compel Provident to:
 - (A) Make available for inspection by AET or its Auditor, the whole of the financial or other records of Provident: Trust Deed Clause 6.0.2, which includes but is not limited to:
 - (a) The books and records of Provident relevant to each loan, including:



- (i) Any and/or all Loan and Security documentation as well as loan Extensions and/or Rollover material to determine whether Provident's processes for the granting or renewing of loans had been followed: Provident Credit Policy Manual Clauses 3.13 on p. 9, 3.19 on pp. 10 and 11 and Appendix 3 on pp. 17 and 18; and
 - (ii) Loans for property development: Provident Credit Policy Manual Clause 3.28 on p. 12 and Appendix 1 on p. 13; and
 - (iii) Valuation Reports: Provident Credit Policy Manual Clause 3.15 on pp. 9 and 10.
- (B) Give AET or its auditor such information as AET or its auditor requires with respect to all matters relating to the financial or other records of Provident: Trust Deed Clause 6.0.3, which includes but is not limited to:
- (a) The books and records of Provident relevant to each loan, including:
 - (i) Any and/or all Loan and Security documentation as well as loan Extensions and/or Rollover material to determine whether Provident's processes for the granting or renewing of loans had been followed: Provident Credit Policy Manual Clauses 3.13 on p. 9, 3.19 on pp. 10 and 11 and Appendix 3 on pp. 17 and 18 ; and
 - (ii) Loans for property development: Provident Credit Policy Manual Clause 3.28 on p. 12 and Appendix 1 on p. 13; and
 - (iii) Valuation Reports: Provident Credit Policy Manual Clause 3.15 on pp. 9 and 10.



- (C) Provide AET, at AET's request under Clause 6.0.8, a schedule relevantly setting out:
- (a) Details of the amounts of the debenture funds invested in each form of authorised investment at the end of the month: Clause 6.0.8.2;
 - (b) The amount of the debenture funds at the beginning and at the end of the month: Clause 6.0.8.3;
 - (c) For each form of authorised investment, the income received during the month and the projected income for the next month: Clause 6.0.8.4;
 - (d) The amount of interest paid on debentures for the month and the projected amount of the interest payable on debentures for the next month: Clause 6.0.8.5; and
 - (e) Particulars of mortgage arrears at the end of the month and the action taken by Provident to recover those arrears: Clause 6.0.8.6, which includes but is not limited to:
 - (i) An analysis of Provident's ledger accounts to determine whether the principal and interest payment obligations in respect of the loans were being met.

PARTICULARS

- (aa) Debenture Trust Deed dated 11 December 1998
- (bb) Deed of Amendment dated 23 December 1999
- (cc) Consolidated Trust Deed dated 25 November 2005
- (dd) Provident Credit Policy Manual Credit and Lending Department Accepted and Approved on 22 February 2007



(ee) Procedure Manual Credit Policy Manual Credit and Lending Department Accepted and Approved on 9 September 2009

- (b) AET as trustee for the holders of debentures issued by Provident from time to time enjoyed the power pursuant to the *Corporations Act* to compel Provident to comply with its obligations to:
- (A) Make all of its financial and other records available for inspection by:
 - (a) AET; or
 - (b) A registered company auditor appointed by AET to carry out the inspection: s. 283BB *Corporations Act*;
 - (B) Give AET or AET's auditor appointed any information, explanations or other assistance that they require about matters relating to those records: s.283BB of the *Corporations Act*;
 - (C) If Provident created a security interest, to give AET written details of the security interest within 21 days after it is created, and, if the total amount to be advanced on the security of the security interest is indeterminate and the advances are not merged in an account with bankers, trade creditors or anyone else – to give the trustee written details of the amount of each advance within 7 days after it was made: s.283BE of the *Corporations Act*; and
 - (D) Within one month after the end of each quarter, to give AET a quarterly report that set out the information required by ss. 283BF(4, (5) and (6) of the *Corporations Act*; and
 - (E) AET from time to time for the holders of debentures issued by Provident enjoyed an indemnity from Provident for all costs, charges and expenses properly incurred, including without limitation costs, charges and expenses:



- (a) In carrying out or exercise or the attempted carrying out or exercise by AET of any duty or power express or implied by law;
- (b) In connection with any breach by Provident of this deed;
- (c) In connection with the convening and holding of any meeting of debenture and the carrying out of any directions under such meeting; and
- (d) Charged to AET by AET's auditor in connection with any function performed by its auditor concerning this deed: Trust Deed Clause 8.2

(c) By reasons of the matters pleaded in paragraph 17A(f) of this Amended Defence above, AET had an obligation and/or legal and/or practical ability and duty to investigate and test any and/or all of Provident's loans, loan records including but not limited to loans obtained for the purpose of property development and valuations to satisfy itself of the accuracy of Provident's loans, loan records and/or valuations and any other aspect of Provident's financial affairs, including its adherence to Provident's Loan Policies and Procedures Manual including through the appointment by AET of a registered company auditor to inspect any and/or all loan records and/or Provident's Manuals at AET's request.

20 In answer to paragraph 20 of the Amended Third Cross-Claim, the Cross-Defendants admit that HLB's conduct in issuing its audit report in which it expressed the opinion pleaded in paragraph 11 of this Amended Defence was:

- (a) Conduct in trade or commerce;
- (b) Conduct in relation to financial products;
- (c) Otherwise does not admit the paragraph.

21 The Cross-Defendants admit paragraph 21 of the Amended Third Cross-Claim.

22 In answer to paragraph 22 of the Amended Third Cross-Claim, the Cross-Defendants:

- (a) admit that they made the representations pleaded in paragraph 22(a) and 22(b) to Provident; and
 - (b) otherwise do not admit the paragraph.
- 23 The Cross-Defendants deny the allegations in paragraph 23 of the Amended Third Cross-Claim.
- 24 The Cross-Defendants deny the allegations in paragraph 24 of the Amended Third Cross-Claim.
- 25 The Cross-Defendants deny the allegations in paragraph 25 of the Amended Third Cross-Claim.
- 26 The Cross-Defendants deny the allegations in paragraph 26 of the Amended Third Cross-Claim.
- 27 The Cross-Defendants deny the allegations in paragraph 27 of the Amended Third Cross-Claim.
- 28 In answer to paragraph 28 of the Amended Third Cross-Claim, the Cross-Defendants:
- (a) Admit the allegations in paragraph 28 of the Amended Third Cross-Claims; and
 - (b) Say that at that time HLB issued an Audit report in which it expressed the opinion that:
 - (i) *“the financial report of Provident Capital Limited is in accordance with the Corporations Act 2001, including:*
 - (A) *giving a true and fair view of the company's financial position as at 30 June 2010 and of its performance for the year ended on that date; and*
 - (B) *complying with Australian Accounting Standards (including the Australian Accounting Interpretations) and the Corporations Regulations 2001; and*



- (ii) *the financial statements also comply with International Financial Reporting Standards as disclosed in Note 1(a)*".

29 In answer to paragraph 29 of the Amended Third Cross-Claim, the Cross-Defendants say that:

- (a) They repeat their answers to paragraph 28 above; and
- (b) The representation pleaded in answer to paragraph 28 of this Amended Defence was made in:
 - (i) trade or commerce; and
 - (ii) in connection with the supply of HLB's audit services.

30 In answer to paragraph 30 of the Amended Third Cross-Claim, the Cross-Defendants say that:

- (a) They admit that at the time HLB issued its Audit report as pleaded in paragraph 28 of this defence, the Australian Auditing Standards required that:
 - (i) HLB comply with relevant ethical requirements relating to audit engagements and plan and perform the audit to obtain reasonable assurance whether the financial report taken as a whole is free from material misstatement; and
 - (ii) Reasonable assurance is a concept relating to the accumulation of the audit evidence necessary for the auditor to conclude that there are no material misstatements in the financial report taken as a whole. Reasonable assurance relates to the whole audit process.

PARTICULARS

- (A) ASA200, [24] and [25]

31 The Cross-Defendants deny the allegations in paragraph 31 of the Amended Third Cross-Claim.

32 The Cross-Defendants deny the allegations in paragraph 32 of the Amended Third Cross-Claim.

- 32A The Cross-Defendants do not admit the allegations in paragraph 32A of the Amended Third Cross-Claim.
- 33 The Cross-Defendants deny the allegations in paragraph 33 of the Amended Third Cross-Claim.
- 34 The Cross-Defendants deny the allegations in paragraph 34 of the Amended Third Cross-Claim.
- 35 The Cross-Defendants deny the allegations in paragraph 35 of the Amended Third Cross-Claim.
- 36 The Cross-Defendants deny the allegations in paragraph 36 of the Amended Third Cross-Claim.
- 37 In answer to paragraph 37 of the Amended Third Cross-Claim, the Cross-Defendants deny the paragraph and say that:
- (a) The debenture holders enjoyed the benefit of a trustee who was obliged to act on their behalf, and for their benefit, in the manner provided for by s. 283DA of the *Corporations Act* and by the Trust Deed and the Deed of Amendments;
 - (b) Say that AET, as trustee for the holders of debentures issued by Provident from time to time enjoyed, amongst others, the powers pursuant to the Debenture Trust Deed and the Deed of Amendment to compel Provident to:
 - (i) Make available for inspection by AET or its auditor, the whole of the financial or other record of Provident: Clause 6.0.2;
 - (ii) Give AET or its auditor such information as AET or its auditor requires with respect to all matters relating to the financial or other records of Provident: Clause 6.0.3; and
 - (iii) Provide AET, at AET's request under Clause 6.0.8, a schedule relevantly setting out:
 - (A) Details of the amounts of the debenture funds invested in each form of authorised investment at the end of the month: Clause 6.0.8.2;



- (B) The amount of the debenture funds at the beginning and at the end of the month: Clause 6.0.8.3;
- (C) For each form of authorised investment, the income received during the month and the projected income for the next month: Clause 6.0.8.4;
- (D) The amount of interest paid on debentures for the month and the projected amount of the interest payable on debentures for the next month: Clause 6.0.8.5; and
- (E) Particulars of mortgage arrears at the end of the month and the action taken by Provident to recover those arrears: Clause 6.0.8.6

PARTICULARS

- (aa) Debenture Trust Deed dated 11 December 1998
 - (bb) Deed of Amendment dated 23 December 1999
 - (cc) Consolidated Trust Deed dated 25 November 2005
- (c) AET, as trustee for the holders of debentures issued by Provident from time to time, enjoyed the power pursuant to the *Corporations Act* to compel Provident to comply with its obligations to:
- (i) Make all of its financial and other records available for inspection by:
 - (A) AET; or
 - (B) A registered company auditor appointed by AET to carry out the inspection: s. 283BB *Corporations Act*;
 - (ii) Give AET or AET's auditor appointed any information, explanations or other assistance that they require about matters relating to those records: s.283BB of the *Corporations Act*;
 - (iii) If Provident created a security interest, to give AET written details of the security interest within 21 days after it is created, and, if the total amount to be advanced on the security of the security interest



is indeterminate and the advances are not merged in an account with bankers, trade creditors or anyone else – to give the trustee written details of the amount of each advance within 7 days after it was made: s.283BE of the *Corporations Act*; and

- (iv) Within one month after the end of each quarter, to give AET a quarterly report that set out the information required by ss. 283BF(4, (5) and (6) of the *Corporations Act*; and
- (d) AET, as trustee for the holders of debentures issued by Provident from time to time enjoyed an indemnity from Provident for all costs, charges and expenses properly incurred, including without limitation costs, charges and expenses:
- (i) In carrying out or exercise or the attempted carrying out or exercise by AET of any duty or power express or implied by law;
 - (ii) In connection with any breach by Provident of this deed;
 - (iii) In connection with the convening and holding of any meeting of debenture and the carrying out of any directions under such meeting; and
 - (iv) Charged to AET by AET's auditor in connection with any function performed by its auditor concerning this deed: Trust Deed Clause 8.2
- (e) By reasons of the matters pleaded in paragraph 37(b) of this Amended Defence above, AET had an obligation and/or legal and/or practical ability and duty to satisfy itself of the accuracy of Provident's financial report for FY10 and any other aspect of Provident's financial affairs including through the appointment by AET of a registered company auditor to inspect the records of Provident at AET's request;
- (f) HLB audited the financial statements of Provident as pleaded in paragraph 6(a) above and issued the 2010 Audit Report:
- (i) In accordance with the Auditing Standard including ethical requirements, which includes an independence requirement;



- (ii) Including the independence declaration that HLB had complied with the independence requirement of the *Corporations Act*; and
- (iii) In accordance with those requirements, HLB could not allow the trustee (AET) or any other person including but not limited to debenture holders to direct, control or influence the conduct of HLB's audit or the contents of the 2010 Audit Report.

PARTICULARS

- (A) Auditing and Assurance Standards AUS2020 (Objectives and General Principles Governing an Audit of a Financial Report) (February 2004) at .04;
- (B) 2010 Audit Report at p. 35

(g) They otherwise deny the allegations in paragraph 37.

38 In answer to paragraph 38 of the Amended Third Cross-Claim, the Cross-Defendants:

- (a) Repeat their answers to paragraphs 8, 12, 13, 14, 35 to 37; and
- (b) Otherwise deny the allegations.

38A In answer to paragraph 38A of the Amended Third Cross-Claim, the Cross-Defendants repeat their answers to paragraphs 17A to 18 in this Amended Defence above.

39 The Cross-Defendants deny the allegations in paragraph 39 of the Amended Third Cross-Claim.

39A In answer to paragraph 39A of the Amended Third Cross-Claim, the Cross-Defendants repeat their answers to paragraphs 18AA and 18A in the Amended Defence.

39B The Cross-Defendants deny the allegations in paragraph 39B of the Amended Third Cross-Claim.

40 The Cross-Defendants deny the allegations in paragraph 40 of the Amended Third Cross-Claim.



- 40A The Cross-Defendants deny the allegations in paragraph 40A of the Amended Third Cross-Claim.
- 40B In answer to paragraph 40B of the Amended Third Cross-Claim, the Cross-Defendants repeat their answers to paragraphs 20 to 26 and paragraphs 29 to 33 of this Amended Defence.
- 41 The Cross-Defendants do not admit the allegations in paragraph 41 of the Amended Third Cross-Claim.
- 41A The Cross-Defendants deny the allegations in paragraph 41A of the Amended Third Cross-Claim.
- 42 The Cross-Defendants deny the allegations in paragraph 42 of the Amended Third Cross-Claim.
- 42A The Cross-Defendants do not admit the allegations in paragraph 42A of the Amended Third Cross-Claim.
- 42B The Cross-Defendants deny the allegations in paragraph 42B of the Amended Third Cross-Claim.
- 42C The Cross-Defendants deny the allegations in paragraph 42C of the Amended Third Cross-Claim.
- 43 The Cross-Defendants deny the allegations in paragraph 43 of the Amended Third Cross-Claim.
- 44 The Cross-Defendants deny the allegations in paragraph 44 of the Amended Third Cross-Claim.
- 45 The Cross-Defendants deny the allegations in paragraph 45 of the Amended Third Cross-Claim.
- 46 The Cross-Defendants deny the allegations in paragraph 46 of the Amended Third Cross-Claim.

FY11 audit

- 47 The Cross-Defendants admit paragraph 47 of the Amended Third Cross-Claim.



48 The Cross-Defendants admit paragraph 48 of the Amended Third Cross-Claim.

49 In answer to paragraph 49 of the Amended Third Cross-Claim, the Cross-Defendants say:

(a) They admit that after auditing the financial statements of Provident as pleaded at paragraph 6(c) above, HLB issued an Audit report in which it expressed the opinion that:

(i) *“the financial report of Provident Capital Limited is in accordance with the Corporations Act 2001, including:*

(A) *giving a true and fair view of the company's financial position as at 30 June 2011 and of its performance for the year ended on that date; and*

(B) *complying with Australian Accounting Standards (including the Australian Accounting Interpretations) and the Corporations Regulations 2001; and*

(ii) *the financial statements also comply with International Financial Reporting Standards as disclosed in Note 1(a)”.*

(b) Otherwise does not admit the allegations in paragraph 49 of the Third Cross-Claim.

50 In answer to paragraph 50 of the Amended Third Cross-Claim, the Cross-Defendants:

(a) Admit that HLB audited the financial statements of Provident as pleaded in paragraph 6(c) above;

(b) Say that the agreement was in writing and set out in the letter from HLB to the Directors of Provident dated 6 July 2011; and

(c) Say that it was a term of HLB's contract with the Directors of Provident that HLB would exercise reasonable care and skill in auditing the financial report and issuing its audit report;

- (d) Otherwise do not admit the allegations in paragraph 50 of the Third Cross-Claim.
- 51 The Cross-Defendants admit paragraph 51 of the Amended Third Cross-Claim.
- 52 The Cross-Defendants deny the allegations in paragraph 52 of the Amended Third Cross-Claim.
- 53 The Cross-Defendants deny the allegations in paragraph 53 of the Amended Third Cross-Claim.
- 54 In answer to paragraph 54 of the Amended Third Cross-Claim, the Cross-Defendants:
- (a) Deny the allegations in the paragraph;
- (b) Say that AET, as trustee for the holders of debentures issued by Provident from time to time enjoyed, amongst others, the powers pursuant to the Debenture Trust Deed and the Deed of Amendment to compel Provident to:
- (i) Make available for inspection by AET or its auditor, the whole of the financial or other record of Provident: Clause 6.0.2;
- (ii) Give AET or its auditor such information as AET or its auditor requires with respect to all matters relating to the financial or other records of Provident: Clause 6.0.3; and
- (iii) Provide AET, at AET's request under Clause 6.08, a schedule relevantly setting out:
- (A) Details of the amounts of the debenture funds invested in each form of authorised investment at the end of the month: Clause 6.0.8.2;
- (B) The amount of the debenture funds at the beginning and at the end of the month: Clause 6.0.8.3;
- (C) For each form of authorised investment, the income received during the month and the projected income for the next month: Clause 6.0.8.4;



- (D) The amount of interest paid on debentures for the month and the projected amount of the interest payable on debentures for the next month: Clause 6.0.8.5; and
- (E) Particulars of mortgage arrears at the end of the month and the action taken by Provident to recover those arrears: Clause 6.0.8.6

PARTICULARS

- (aa) Debenture Trust Deed dated 11 December 1998
 - (bb) Deed of Amendment dated 23 December 1999
 - (cc) Consolidated Trust Deed dated 25 November 2005
 - (dd) Deed of Amendment dated 31 January 2011
- (c) AET, as trustee for the holders of debentures issued by Provident from time to time enjoyed the power pursuant to the *Corporations Act* to compel Provident to comply with its obligations to:
- (i) Make all of its financial and other records available for inspection by:
 - (A) AET; or
 - (B) A registered company auditor appointed by AET to carry out the inspection: s. 283BB of the *Corporations Act*;
 - (ii) Give AET or AET's auditor appointed any information, explanations or other assistance that they require about matters relating to those records: s.283BB of the *Corporations Act*;
 - (iii) If Provident created a security interest, to give AET written details of the security interest within 21 days after it is created, and, if the total amount to be advanced on the security of the security interest is indeterminate and the advances are not merged in an account with bankers, trade creditors or anyone else – to give the trustee written details of the amount of each advance within 7 days after it was made: s.283BE of the *Corporations Act*; and

- (iv) Within one month after the end of each quarter, to give AET a quarterly report that set out the information required by ss. 283BF(4), (5) and (6) of the *Corporations Act*; and
- (d) AET, as trustee for the holders of debentures issued by Provident from time to time enjoyed an indemnity from Provident for all costs, charges and expenses properly incurred, including without limitation costs, charges and expenses:
- (i) In carrying out or exercise or the attempted carrying out or exercise by AET of any duty or power express or implied by law;
 - (ii) In connection with any breach by Provident of this deed;
 - (iii) In connection with the convening and holding of any meeting of debenture and the carrying out of any directions under such meeting; and
 - (iv) Charged to AET by AET's auditor in connection with any function performed by the its auditor concerning this deed: Trust Deed Clause 8.2
- (e) By reasons of the matters pleaded in paragraph 54(b) of this Amended Defence above, AET had an obligation and/or legal and/or practical ability and duty to satisfy itself of the accuracy of Provident's financial report for FY10 and any other aspect of Provident's financial affairs including through the appointment by AET of a registered company auditor to inspect the records of Provident at AET's request;
- (f) HLB audited the financial statements of Provident as pleaded in paragraph 6(c) above and issued the 2011 Audit Report:
- (i) In accordance with the Auditing Standard including ethical requirements, which includes an independence requirement;
 - (ii) Including the independence declaration that HLB had complied with the independence requirement of the *Corporations Act*; and

- (iii) In accordance with those requirements, HLB could not allow AET (as trustee for debenture holders) to direct, control or influence the conduct of HLB's audit or the contents of the 2010 Audit Report.

PARTICULARS

(A) Auditing and Assurance Standards AUS2020 (Objectives and General Principles Governing an Audit of a Financial Report) (February 2004) at .04;

(B) 2011 Audit Report at p. 34

- (g) Further, if the risk of harm pleaded in paragraph 54 in the Amended Third Cross-Claim existed (which is denied), or debenture holders had an obligation and/or a legal and/or practical ability to protect itself from the risk of harm: paragraph 54(b) of this Amended Defence.

55 In answer to paragraph 55 of the Amended Third Cross-Claim, the Cross-Defendants say that:

- (a) They repeat their answers to paragraphs 8 and 50 to 54 above; and
 (b) Deny the allegations the paragraph 54.

56 In answer to paragraph 56 of the Amended Third Cross-Claim, the Cross-Defendants refer to and repeat their response to paragraph 17A, whilst making the same amendments as pleaded in paragraph 56 of the Amended Third Cross-Claim, to allow for the fact that paragraph 17A refers to the 2010 audit and paragraph 56 refers to the 2011 audit.

56A In answer to 56A the Cross-Defendants:

- (a) Deny that A Competent Auditor of Provident's financial report for FY11 was required to or would have performed all of the tasks pleaded in paragraph 56 in the course of conducting the audit of Provident's financial report for FY11 and in preparing its audit report.
 (b) In answer to sub-paragraph 56A(a), say that A Competent Auditor of Provident's financial report for FY11 would have:

- (i) learnt, amongst other things, the facts pleaded in (i), (ii), (iv), (v), (vi) about the Burleigh Views Loan;
 - (ii) learnt that the most recent valuation of Burleigh Views was a letter dated 30 August 2011 from Landsbury's which re-confirmed their opinion that the property's value was \$26.6m on completion;
 - (iii) learnt that Provident intended to (and was) waiting for DA approval to decide whether or not Provident completed the project itself, or partnered with a developer;
 - (iv) learnt that Provident did not intend to sell the site undeveloped;
 - (v) learnt that Trevor Seymour, a non-executive director of Provident had visited the Burleigh Heads site during the 2011 year and noted that the majority of the stage 1 works were complete;
 - (vi) learnt that the development consent for one aspect of the project had lapsed; and
 - (vii) Otherwise do not admit the sub-paragraph.
- (c) In answer to sub-paragraph 56A(b), say that A Competent Auditor of Provident's financial report for FY11, having learnt the information in sub-paragraph (b) above:
- (i) Would have determined that there was a potential indicator for the impairment of the Burleigh Views Loan; and
 - (ii) Otherwise deny the paragraph.
- (d) In answer to sub-paragraph 56A(c), say that A Competent Auditor of Provident's financial report for FY11 would have:
- (i) learnt, amongst other things, the facts pleaded in (i) and (ii) about the Chyrsalis Loan;
 - (ii) learnt that the most recent valuation of the property securing the Chyrsalis Loan was dated 9 December 2009 and valued the



property at \$29.285m on completion and \$7.3m as is with DA approval;

- (iii) learnt that DA approval had been obtained;
 - (iv) learnt that the Local Environmental Plan for the area had changed and would permit an additional floor which was expected to increase the value of the properties;
 - (v) received confirmation that the architect considered that the changes to the LEP allowed for a 21% increase in units on the property from 46 to 56 units; and
 - (vi) Otherwise do not admit the sub-paragraph.
- (e) In answer to sub-paragraph 56A(d), say that A Competent Auditor of Provident's financial report for FY11, having learnt the information in sub-paragraph (d) above:
- (i) Would have determined that there was a potential indicator for the impairment of the Chrysalis Loan; and
 - (ii) Otherwise deny the paragraph.
- (f) In answer to sub-paragraph 56A(e), say that A Competent Auditor of Provident's financial report for FY11 would have:
- (i) learnt, amongst other things, the facts pleaded in (i), (ii) and (iii) about the Tahatos Loan;
 - (ii) learnt that the most recent valuation or appraisal of the property secured against the Tahatos Loan was a real estate agent's estimate of \$6m obtained in July 2010;
 - (iii) learnt that negotiations over the terms of a sale contract for the property secured against the Tahatos Loan had commenced with settlement expected in September 2010;

- (iv) learnt that the previous sale contract had fallen over, but that the vendor was in discussions with Australian Executive Apartments with a price range of between \$5.5m and \$6m; and
 - (v) Otherwise do not admit the sub-paragraph.
- (g) In answer to sub-paragraph 56A(f), say that A Competent Auditor of Provident's financial report for FY11, having learnt the information in sub-paragraph (f) above:
- (i) Would have determined that there was a potential indicator for the impairment of the Tahatos Loan; and
 - (ii) Otherwise deny the paragraph.
- (h) In answer to sub-paragraph 17B(k), say that A Competent Auditor of Provident's financial report for FY11 would have:
- (i) learnt, amongst other things, the facts pleaded in (i) and (ii) and (iii) about the Owston Loan;
 - (ii) learnt that the most recent valuation or appraisal of the property secured against the Owston Loan was a real estate agent's estimate of \$6.5m obtained in August 2010;
 - (iii) learnt that the borrower had accepted an offer to sell a property (Fern Hill) for \$50m. Whilst Provident did not have a mortgage over Fern Hill, it anticipated accessing \$5m of the funds from the sale of Fern Hill under a general caveat clause to reduce the amount of the loan; and
 - (iv) Otherwise do not admit the sub-paragraph.
- (i) In answer to sub-paragraph 56A(l), say that A Competent Auditor of Provident's financial report for FY11, having learnt the information in sub-paragraph (h) above:
- (i) Would have determined that there was a potential indicator for the impairment of the Owston Loan; and

- (ii) Otherwise deny the paragraph.
- (j) In answer to sub-paragraph 56A(m), say that A Competent Auditor of Provident's financial report for FY10 would have:
 - (i) learnt, amongst other things, the facts pleaded in (i) and (ii) about the Unique Castle Loan;
 - (ii) learnt that the most recent valuations or appraisals of the property secured against the Unique Castle Loan were:
 - (A) A real estate agent's estimate (which assumed the grant of a DA) of between \$5 and \$5.5m obtained in August 2010; and
 - (B) A valuation of \$4.750m dated 30 June 2010.
 - (C) A real estate agent's estimate (which assumed the grant of a DA) of between \$5 and \$5.5m obtained in August 2011;
 - (D) A contract had been issued by Provident at \$5.5m, however it did not settle; and
 - (iii) Otherwise do not admit the sub-paragraph.
- (k) In answer to sub-paragraph 56A(n), say that A Competent Auditor of Provident's financial report for FY11, having learnt the information in sub-paragraph (j) above:
 - (i) Would have determined that there was a potential indicator for the impairment of the Unique Castle Loan; and
 - (ii) Otherwise deny the paragraph.
- (l) In answer to sub-paragraph 56A(u), say that A Competent Auditor of Provident's financial report for FY11 would have:
 - (i) learnt, amongst other things, the facts pleaded in (i) and (ii) about the Hanna Loan;
 - (ii) learnt that marketing of the property which was secured against the Hanna Loan was commenced in September 2010, but that the sale

process had been delayed because of the floods and then current economic climate; and

- (iii) Otherwise do not admit the sub-paragraph.
- (m) In answer to sub-paragraph 56A(v), say that A Competent Auditor of Provident's financial report for FY11, having learnt the information in sub-paragraph (l) above:
- (i) Would have determined that there was a potential indicator for the impairment of the Hanna Loan;
 - (ii) Determined that a provision of \$100,000 ought be applied by reason of the Hanna Loan; and
 - (iii) Otherwise deny the paragraph.

56B In answer to 56BC, the Cross-Defendants:

- (a) Deny that A Competent Auditor of Provident's financial report for FY11 would have reached the determinations in 56A above;
- (b) Deny that A Competent Auditor of Provident's financial report for FY10 would have reached the determinations in 56A above prior to engaging in the discussions referred to in 56B; and
- (c) Otherwise deny the paragraph.

56C In answer to paragraph 56C of the Amended Third Cross-Claim, the Cross-Defendants:

- (a) Deny that A Competent Auditor of Provident's financial report for FY10 would have made the determinations in 56A above and taken the steps in 56B above;
- (b) Say that A Competent Auditor of Provident's financial report for FY10 would have complied with the Auditing Standard ASA 500 in force on or about 1 July 2009;

- (c) Say that, if A Competent Auditor of Provident's financial report for FY10 had not been able to obtain reasonable satisfaction about the recoverability of the loans identified in 56A, then the Competent Auditor would first report that information to the Board. If, no such reasonable satisfaction had been able to be achieved by the time that the Competent Auditor was to sign the audit report, then the Competent Auditor:
- (i) would form the opinions referred to in sub-paragraphs 156C (a), (b), (c) and (d);
 - (ii) may modify its audit report or disclaim the audit opinion;
 - (iii) would report its opinions and conclusions to each of Provident management, Provident's board, AET and ASIC
 - (iv) Otherwise do not admit the paragraph.

57 The Cross-Defendants deny the allegations in paragraph 57 of the Amended Third Cross-Claim.

57AA The Cross-Defendants do not admit the allegations in paragraph 57AA of the Amended Third Cross-Claim and repeat their answers to paragraphs 52 and 54 of this Amended Defence.

57A The Cross-Defendants deny the allegations in paragraph 57A of the Amended Third Cross-Claim.

57B The Cross-Defendants deny the allegations in paragraph 57B of the Amended Third Cross-Claim and refer to and repeat paragraph 19 above

58 In answer to paragraph 58 of the Amended Third Cross-Claim, the Cross-Defendants admit that HLB's conduct in issuing its audit report in which it expressed the opinion pleaded in paragraph 49 of this Amended Defence was:

- (a) Conduct in trade or commerce;
- (b) Conduct in relation to financial products; and
- (c) Otherwise does not admit the paragraph.



- 59 The Cross-Defendants admit paragraph 59 of the Amended Third Cross-Claim.
- 60 In answer to paragraph 60 of the Amended Third Cross-Claim, the Cross-Defendants:
- (a) Admit that they made the representation pleaded in paragraph 60(a) and 60(b) to Provident; and
 - (b) Otherwise does not admit the paragraph.
- 61 The Cross-Defendants deny the allegations in paragraph 61 of the Amended Third Cross-Claim.
- 62 Not used.
- 63 The Cross-Defendants deny the allegations in paragraph 63 of the Amended Third Cross-Claim.
- 63A The Cross-Defendants deny the allegations in paragraph 63A of the Amended Third Cross-Claim.
- 64 The Cross-Defendants deny the allegations in paragraph 64 of the Amended Third Cross-Claim.
- 65 The Cross-Defendants deny the allegations in paragraph 65 of the Amended Third Cross-Claim.
- 66 In answer to paragraph 66 of the Amended Third Cross-Claim, the Cross-Defendants:
- (a) Admit the allegations in paragraph 66 of the Amended Third Cross-Claims; and
 - (b) Say that at that time HLB issued an Audit report in which it expressed the opinion that:
 - (i) *“the financial report of Provident Capital Limited is in accordance with the Corporations Act 2001, including:*

- (A) *giving a true and fair view of the company's financial position as at 30 June 2011 and of its performance for the year ended on that date; and*
 - (B) *complying with Australian Accounting Standards (including the Australian Accounting Interpretations) and the Corporations Regulations 2001; and*
 - (ii) *the financial statements also comply with International Financial Reporting Standards as disclosed in Note 1(a)".*
- 67 In answer to paragraph 67 of the Amended Third Cross-Claim, the Cross-Defendants say that:
- (a) They repeat their answers to paragraph 66 above; and
 - (b) The representation pleaded in answer to paragraph 66 of this Amended Defence was made in:
 - (i) trade or commerce; and
 - (ii) in connection with the supply of HLB's audit services.
- 68 In answer to paragraph 68 of the Amended Third Cross-Claim, the Cross-Defendants:
- (a) Admit the allegations in paragraph 68 of the Amended Third Cross-Claim but deny the particulars to paragraph 68 of the Amended Third Cross Claim; and
 - (b) Say that at the time HLB issued its Audit report as pleaded in paragraph 66 of this Amended defence, the relevant Australian Auditing Standards in force at that time required that, in conducting an audit of a financial report, the overall objectives of the auditors [HLB] are:
 - (i) To obtain reasonable assurance about whether the financial report as a whole is free from material misstatement, whether due to fraud or error, thereby enabling the auditor to express an opinion on whether the financial report is prepared, in all material respects, in accordance with an applicable financial reporting framework; and



- (ii) To report on the financial report, and communicate as required by the Australian Auditing Standards, in accordance with the auditor's findings.

PARTICULARS

Auditing Standard ASA 200 [11]

- 69 The Cross-Defendants deny the allegations in paragraph 69 of the Amended Third Cross-Claim.
- 70 The Cross-Defendants deny the allegations in paragraph 70 of the Amended Third Cross-Claim.
- 71 The Cross-Defendants deny the allegations in paragraph 71 of the Amended Third Cross-Claim.
- 72 The Cross-Defendants deny the allegations in paragraph 72 of the Amended Third Cross-Claim.
- 73 The Cross-Defendants deny the allegations in paragraph 73 of the Amended Third Cross-Claim.
- 74 The Cross-Defendants deny the allegations in paragraph 74 of the Amended Third Cross-Claim.
- 75 In answer to paragraph 75 of the Amended Third Cross-Claim, the Cross-Defendants deny the paragraph and say further that:
 - (a) The debenture holders enjoyed the benefit of a trustee who was obliged to act on their behalf, and for their benefit, in the manner provided for by s. 283DA of the *Corporations Act* and by the Trust Deed and the Deed of Amendments;

PARTICULARS

- (i) Paragraphs 16 and 54 of this Amended Defence
- (b) HLB audited the financial statements of Provident as pleaded in paragraph 6(c) above and issued the 2011 Audit Report:

- (i) In accordance with the Auditing Standard including ethical requirements, which includes an independence requirement;
- (ii) Including the independence declaration that HLB had complied with the independence requirement of the *Corporations Act*; and
- (iii) In accordance with those requirements, HLB could not allow AET (as trustee for debenture holders) to direct, control or influence the conduct of HLB's audit or the contents of the 2011 Audit Report.

PARTICULARS

- (A) Auditing and Assurance Standards AUS2020 (Objectives and General Principles Governing an Audit of a Financial Report) (February 2004) at .04;
- (B) 2011 Audit Report at p. 34

(c) They otherwise deny the allegations in paragraph 75.

76 In answer to paragraph 76 of the Amended Third Cross-Claim, the Cross-Defendants:

- (a) Repeat their answers to paragraphs 8, 50, 51, 73 to 75; and
- (b) Otherwise deny the allegations.

76A In answer to paragraph 76A of the Amended Third Cross-Claim, the Cross-Defendants repeat their answers to paragraphs 56 to 57 in this Amended Defence above.

77 The Cross-Defendants deny the allegations in paragraph 77 of the Amended Third Cross-Claim.

77A In answer to paragraph 77A of the Amended Third Cross-Claim, the Cross-Defendants repeat their answers to paragraphs 57AA and 57A.

77B The Cross-Defendants deny the allegations in paragraph 77B of the Amended Third Cross-Claim.

- 78 The Cross-Defendants deny the allegations in paragraph 78 of the Amended Third Cross-Claim.
- 78A The Cross-Defendants deny the allegations in paragraph 78A of the Amended Third Cross-Claim.
- 78B In answer to paragraph 78B of the Amended Third Cross-Claim, the Cross-Defendants repeat their answers to paragraphs 58 to 60 and paragraphs 66 to 70 of this Amended Defence.
- 79 The Cross-Defendants deny the allegations in paragraph 79 of the Amended Third Cross-Claim.
- 79A The Cross-Defendants deny the allegations in paragraph 79A of the Amended Third Cross-Claim.
- 80 The Cross-Defendants deny the allegations in paragraph 80 of the Amended Third Cross-Claim.
- 80A The Cross-Defendants do not admit the allegations in paragraph 80A of the Amended Third Cross-Claim.
- 81 In answer to paragraph 80 of the Amended Third Cross-claim, the Cross-Defendants repeat their answer to paragraph 43 of this Amended Defence.
- 82 The Cross-Defendants deny the allegations in paragraph 82 of the Amended Third Cross-Claim.
- 83 The Cross-Defendants deny the allegations in paragraph 83 of the Amended Third Cross-Claim.
- 84 The Cross-Defendants deny the allegations in paragraph 84 of the Amended Third Cross-Claim.
- 85 Further, in answer to the whole Amended Third Cross-Claim, the Cross-Defendants say:
- (a) They deny that the Plaintiff and Group Members are entitled to the relief sought in the Second Further Amended Statement of Claim; and



- (b) HLB denies that AET are entitled to the relief sought in the Amended Third Cross-Claim; and
- (c) Pursuant to s.50 of the *Civil Liability Act 2002*, that HLB, in carrying out its professional audit services as set out at paragraphs 6 and 7 above, acted in a professional manner at the time the services were provided; and/or
- (d) If, which is denied, the Plaintiff or Group Members as alleged in the Second Further Amended Statement of Claim are entitled to recover that loss and damage, the cause of that loss and damage, being the same loss and damage in respect of which AET seeks to recover in this proceeding from HLB, are the actions and omissions of Provident and not any contravention by HLB; and/or
- (e) If, which is denied, the Plaintiff and Group Members as alleged in the Second Further Amended Statement of Claim are entitled to recover that loss and damage, the cause of that loss and damage, being the same loss and damage in respect of which AET seeks to recover in this proceeding from HLB, are the actions and omissions of AET and not any contravention by HLB; and/or
- (f) If, which is denied, HLB is liable to the Plaintiff or Group Members as alleged in the Second Further Amended Statement of Claim, and that the Plaintiff and Group Members are entitled to recover compensation from HLB, then that compensation must be reduced to account for any amounts recovered or to be recovered by the Plaintiff and Group Members:
 - (i) pursuant to the Receivership of Provident, including the proceedings commenced by the Receivers of Provident against the directors of Provident in the Supreme Court of New South Wales (proceeding No. 2014/63700); and
 - (ii) pursuant to the Supreme Court of New South Wales primary proceedings against AET (proceeding No. 2015/306222); and
 - (iii) pursuant to the Supreme Court of New South Wales Second Cross-Claim against Pricewaterhouse Coopers (**PwC**) (proceeding No. 2015/306222).



- 86 In further answer to the whole Amended Third Cross-Claim, the Cross Defendants say that if, which is denied, the Plaintiff and Group Members as alleged in the Second Further Amended Statement of Claim are entitled to recover that loss and damage, being the same loss and damage in respect of which AET seeks to recover in this proceeding from HLB, and if that loss arose in connection with HLB carrying out its professional audit services as set out at paragraphs 6 and 7 above (which is not admitted);
- (a) To the extent if any, that the provision of those services resulted in the losses alleged, HLB acted at all times in the provision of those services in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice;
 - (b) By reason of s.50 of the *Civil Liability Act 2002 (NSW)*(**CLA**), HLB did not incur any liability in connection with the provision of those services;
 - (c) The Cross-Defendants say that the Plaintiff and Group Member claims are apportionable claims within s. 34 of the CLA and Part VIA of the Trade Practices Act 1974 (**TPA**);
 - (d) The Cross-Defendants say that AET and Michael O'Sullivan are concurrent wrongdoers in connection with any such loss within the meaning of s.34 of the CLA and s. 87CB of the TPA. By reason of s.35 of the CLA and s. 87CD of the TPA, HLB's liability is limited to an amount that is just having regard to the extent of its responsibility for any such loss.
- 87 Michael Roger O'Sullivan (**Mr O'Sullivan**) was:
- (a) An executive director of Provident since its incorporation on 25 May 1998;
 - (b) Was the Managing Director of Provident from 25 May 1998,
 - (c) Was a member of the board of directors of Provident at all material times;
 - (d) Was responsible for:
 - (i) Preparing and/or settling all reports to the trustee (AET);
 - (ii) Preparing and/or settling all disclosure documents issued by Provident;



- (iii) Supervising the credit control and approval process;
 - (iv) Advising the board of directors of Provident (**Board**) in relation to the status of the loans advanced to borrowers;
 - (v) Settling and/or approving all Board pack documentation, including but not limited to all loan arrears reports;
 - (vi) Making provisioning recommendations to the Board in relation to impaired loans;
 - (vii) Managing enforcement action in respect of defaulting loans;
- (e) As a member of the Board, approving all reports to AET and all financial reports and prospectuses issued by Provident.

88 Pursuant to s.180(1) of the *Corporations Act* and under general law, Mr O'Sullivan was required to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise if they:

- (a) Were a director or officer of a corporation in the circumstances of Provident; and
- (b) Occupied the office held by, and had the same responsibilities within the corporation as, the director or officer (**Director's Duties**).

89 At all material times, pursuant to s.283BF of the *Corporations Act* Provident was required to produce a quarterly report to AET containing notifications of (amongst other things):

- (a) Any failure by Provident to comply with the terms of the debentures or provisions of the Trust Deed;
- (b) Any event happening during the quarter that caused or could cause:
 - (i) Any amount deposited or lent under the debentures to become immediately payable;
 - (ii) The debentures to become immediately enforceable;



- (iii) Any other right or remedy under the terms of the debenture or provisions of the Trust Deed to become immediately enforceable;
 - (c) Any circumstances that occurred during the quarter that immediately prejudiced:
 - (i) Provident, any of its subsidiaries, or any guarantor(s);
 - (ii) Any security interest included in or created by the debentures or the Trust Deed;
 - (d) Any substantial change in the nature of the business of the borrower, any of its subsidiaries, or any of the guarantors;
 - (e) Any other matters that may materially prejudice any other interests of the debenture holders (**s.283BF Reports**).
- 90 Provident maintained written credit and procedure manuals which employees were required to abide by (**Policy Requirements**), which relevantly include:
- (a) Provident Credit Policy Manual Credit and Lending Department Accepted and Approved on 22 February 2007; and
 - (b) Procedure Manual Credit Policy Manual Credit and Lending Department Accepted and Approved on 9 September 2009 (**Procedure Manuals**).
- 91 The Policy Requirements included that, in relation to any extension of a loan beyond the loan term, the granting of the extension was to be viewed as making a new advance and the Policy requirements in relation to a new advance were to apply.

PARTICULARS

- (i) Clause 3.19 of the Procedure Manuals
- 92 The Policy Requirements included that, where any roll over of a loan occurs within the period of the roll over the borrower must make arrangements to either repay the loan or otherwise obtain Provident's agreement to extend the loan.

PARTICULARS

- (i) Clause 3.19 of the Procedure Manuals

93 At all material times Mr O'Sullivan knew or ought to have known of:

- (a) The financial position of Provident as reported in the Financial Reports and Management Accounts;
- (b) The content of the Policy Requirements and the Procedure Manuals;
- (c) The matters and content of Debenture Prospectus 10 and 11;
- (d) The matters and content of Provident's s.283 Reports and RG 69 reports to AET and ASIC; and
- (e) The matters pleaded in paragraphs 10 to 10.3, 11 to 15, 17 -19, 29.1, 29.2, 30-34 of the Second Further Amended Statement of Claim (**SFASOC**).

94 In 2009 and 2010, upon resolutions of the Board, the following dividends were declared by Provident:

- (a) 5 April 2009 a dividend of \$1.45 million (**April 2009 dividend**);
- (b) On 23 June 2010 a dividend of \$2.5 million (**June 2010 Dividend**).

PARTICULARS

- (i) Provident Board Minutes 15 April 2009; and
- (ii) Provident Board Minutes 23 June 2010.

95 In the circumstances pleaded above, if the plaintiffs succeed in their case against AET as pleaded in the SFASOC, then Mr O'Sullivan knew or ought to have known the matters set out in paragraphs 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, 73 and 75 of the SFASOC and, with that knowledge, Mr O'Sullivan should have formed the views set out in paragraphs 44, 46, 48, 50, 52, 54, 56, 58, 60, 62, 64, 66, 68, 70, 72, 74 and 76 of the SFASOC.

96 By reason of the matters pleaded in paragraph 95 above, in or around late January 2009 Mr O'Sullivan should have formed the opinion set out in paragraphs 77 and 78 of the SFASOC and reported those conclusions to:

- (a) The Board of Provident; and

(b) AET, as trustee for the debenture holders.

97 In the circumstances pleaded above, if the plaintiffs succeed in their case against AET as pleaded in the SFASOC, then Mr O'Sullivan knew or ought to have known the matters set out in paragraphs 105, 107, 109, 111, 113, 115, 117, 119, 121, 122, 124, 126, 128 and 132 of the SFASOC, and with that knowledge, Mr O'Sullivan should have formed the views set out in paragraphs 106, 108, 110, 112, 114, 116, 118, 120, 123, 125, 127, 129, 131 and 133 of the SFASOC.

98 By reason of the matters pleaded in paragraph 97 above, by November or December 2010, Mr O'Sullivan should have formed the opinion set out in paragraphs 134 and 135 of the SFASOC and reported those conclusions to:

(a) The Board of Provident; and

(b) AET, as trustee for the debenture holders.

99 Mr O'Sullivan's failure to take the steps set out in 96 and 98 above amounted to a breach of the Director Duties as set out paragraph 88 of this Amended Defence above. Mr O'Sullivan's breaches were continuing breaches from 1 March 2008 until the appointment of Receivers.

100 Mr O'Sullivan's breaches caused, or in the alternative, were a dominant factor in causing Provident to continue trading on and following 1 March 2008 by:

(a) Accepting new debenture funds;

(b) Paying interest on funds already borrowed;

(c) Incurring operational costs;

(d) Paying the April 2009 and August 2010 Dividend in circumstances where Provident's operations could not support such payments.

101 Had Mr O'Sullivan's breaches not occurred, Provident:

(a) Would have allocated a substantial provision in its books and records and financial statements and reports in respect of the NPL's;

(b) Would have reported to AET the Trust Deed Breaches, System Failings and Provisioning Failings;



- (c) Should have made the report(s) discussed above in paragraph 101(b) and caused AET to take steps pursuant to Clause 11.2 of the Trust Deed;
 - (d) Withdrawn Debenture Prospectus 10;
 - (e) Would not have issued Debenture Prospectus 11;
 - (f) Would have ceased operating on or following 1 March 2008;
 - (g) Would not have paid interest on debentures after 1 March 2008;
 - (h) Would not have paid the April 2009 Dividend or the August 2010 Dividend;
 - (i) Would not have delayed in realising securities and enforcing NPL's following 1 March 2008;
 - (j) Would not have paid interest on recoverable proceeds of the NPL's following 1 March 2008;
 - (k) Would not have incurred further operational costs following 1 March 2008;
 - (l) Would not have accepted new debenture funds after 1 March 2008;
 - (m) Would not, after 1 March 2008, have paid interest on funds already borrowed.
- 102 By reason of the matters pleaded at paragraphs 99 to 101 inclusive above of this Amended Defence and Mr O'Sullivan's breaches of the Director's Duties, Mr O'Sullivan caused loss and damage to the Plaintiff and Group Members and hence to AET.
- 103 The loss and damage that the Plaintiffs and Group Members allege in the SFASOC to have suffered and that they seek to prove through their expert evidence is the same loss and damage as caused by Mr O'Sullivan.
- 104 If, which is denied, the Plaintiff and Group Members as alleged in the Second Further Amended Statement of Claim are entitled to recover that loss and damage, being the same loss and damage in respect of which AET seeks to recover in this proceeding from HLB, HLB's liability is limited by Professional Standards Scheme approved under the Professional Standards Legislation;



PARTICULARS

- (i) Professional Standards Act 1994 (NSW), The Institute of Chartered Accountants In Australia (NSW) Scheme for Category 1 Services; and
- (ii) The Limitation of Liability is set out at p. 9 in the letter from HLB to the Directors of Provident dated 4 August 2010; and
- (iii) The Limitation of Liability is set out at p. 10 in the letter from HLB to the Directors of Provident dated 6 July 2011.

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 defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature

David B. Goldman
Solicitor on record *by the partner D. B. Goldman*

Capacity

Date of signature

12 March 2013

AFFIDAVIT VERIFYING

Name Michael Thurgood
 Address Level 19, 207 Kent St, Sydney NSW 2000
 Occupation Chief Operating Officer - Shared Services
 Date 12th March 2018

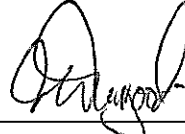
I say on oath/affirm:

- 1 I am the Chief Operating Officer, Shared Services of HLB.
- 2 I believe that the allegations of fact contained in the defence are true.
- 3 I believe that the allegations of fact that are denied in the defence are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

SWORN / AFFIRMED at

Sydney, NSW

Signature of deponent



Name of witness

Garry Willis Weis JP 118555

Address of witness

58 Browns Rd Korrang NSW 2158

Capacity of witness

Justice of the peace / ~~Solicitor / Barrister / Commissioner for affidavits / Notary public~~

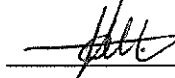
And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.
I have confirmed the deponent's identity using the following identification document:

Drivers License 8295DW

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.

Garry Willis Weis
 A Justice of the Peace in and for
 The State of New South Wales
 Regn. No: 118555

FURTHER DETAILS ABOUT FILING PARTY**Filing party**

Name Philip Bruce Meade and the others listed in Schedule One
Address Level 19, 207 Kent St
Sydney NSW 2000

Legal representative for filing party

Name Tricia Hobson
Practising certificate number
Firm Norton Rose Fulbright Australia
Contact solicitor Susannah Mitton
Address Grosvenor Place
225 George Street
Sydney NSW 2000

DX address 368 Sydney
Telephone 02 9330 8000
Fax 02 9330 8111
Email tricia.hobson@nortonrosefulbright.com
susannah.mitton@nortonrosefulbright.com
Electronic service address tricia.hobson@nortonrosefulbright.com
susannah.mitton@nortonrosefulbright.com



SCHEDULE ONE

The partners of HLB in the period from 26 July 2010 to 29 June 2012 were:

MEADE, Philip Bruce
BEMBRICK, Peter Ross
TAYLOR, Barry Anthony
HUTTON, Michael Geoffrey
NEEDHAM, Andrew Fletcher
SWINDELLS, Darryl Kevin
SMITH, Aidan Gerard
PREEN, Stephen Keith
FITTLER, Sven Anthony
JAMES, Simon Powell
MULLER, Mark Douglas
VON-LUCKEN, Mariana Ines
WICKENDEN, Neil
GARDINER, Matthew Robert
BIDDLE, John Russell
McGRANE, David
GRIVAS, Steve
KABROVSKI, Tony
PHILPOT, Jonathan

