

## FURTHER AMENDED STATEMENT OF CLAIM

### COURT DETAILS

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

### TITLE OF PROCEEDINGS

Plaintiff	<b>Innes John Creighton</b>
Defendant	<b>Australian Executor Trustees Limited</b> <b>ACN 007 869 794</b>

### FILING DETAILS

Filed for	<b>Innes John Creighton</b> plaintiff
Legal representative	Tim Finney, Slater and Gordon Lawyers
Legal representative reference	BP:OM:M345970
Contact name and telephone	Tim Finney, (03) 9602 6969
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### TYPE OF CLAIM

Other (Corporations List Judge)

## RELIEF CLAIMED

1. An order pursuant to s 283F of the *Corporations Act 2001* (**Corporations Act**) that the defendant pay compensation to the plaintiff and each of the Group Members, for the loss or damage suffered by each of them by reason of the defendant's contraventions of:
  - a. s 283DA(a) of the Corporations Act;
  - b. s 283DA(b)(ii) of the Corporations Act;
  - c. s 283DA(c)(ii) of the Corporations Act; and/or
  - d. s 283DA(e)(i) of the Corporations Act.
2. In the alternative, an order that the defendant pay equitable compensation to the plaintiff and each Group Member by reason of the defendant's breach or breaches of its fiduciary duty or duties as trustee.
3. Interest pursuant to s 100 of the *Civil Procedure Act 2005* (NSW) (**CPA**).
4. Costs.
5. Such further or other order as the Court determines is appropriate.

## QUESTIONS COMMON TO CLAIMS OF GROUP MEMBERS

The questions of law or fact common to the claims of the group members are:

1. What was the nature and scope of the defendant's obligations under ss 283DA(a), (b)(ii), (c)(ii) and (e)(i) of the Corporations Act?
2. Did the defendant, in and from January 2009, or alternatively, in and from late October, early November 2010, exercise reasonable diligence to ascertain whether the property of Provident Capital Limited (**Provident**), that was or should have been available (whether by security or otherwise), would have been sufficient to repay the debenture-holders, when their debentures became due, consistent with its obligation under s 283DA(a) of the Corporations Act?
3. Did Provident, in and from January 2009, or alternatively, in and from late October or early November 2010, breach:
  - a. the LVR Criteria Requirement in the Trust Deed, (as that expression is defined below);
  - b. the Business Conduct Requirement (as that expression is defined below) and/or s 283BB(a) of the Corporations Act; and/or

- c. the Solicitor's Certificate of Title Requirement in the Trust Deed (as that expression is defined below)?
4. Did AETL, in and from January 2009, or alternatively, in and from late October or early November 2010, have a proper basis to be satisfied that Provident was not in breach of the Use of Debenture Funds Requirement (as that expression is defined below)?
  5. Did AETL know of, or ought reasonably to have known of, any breaches of the Trust Deed, or potential breaches, and/or exercise reasonable diligence to ascertain whether Provident had committed any such breaches?
  6. If the answer to the question in paragraph 5 is yes, did the defendant do everything in its power to ensure that Provident remedied any such breaches, consistent with its obligation under s 283DA(c)(ii) of the Corporations Act and/or in equity?
  7. Did Provident, in and from January 2009, or alternatively late October, early November 2010, comply with its obligations under s 283BF, and in particular did the content of any quarterly reports provided by Provident to AETL, purportedly pursuant to s 283BF, comply with the requirements of s 283BF(4)?
  8. If the answer to the question in paragraph 7 is no, did the defendant breach s 283DA(e)(i) by failing to notify ASIC as soon as was practicable that Provident had not complied with s 283BF?
  9. In light of what the defendant knew, or should have known, about the financial position, performance and assets of Provident, what steps was the defendant obliged to take, and/or what steps would a trustee in the defendant's position have likely taken, in or around January 2009, or alternatively in or around November 2010?
  10. Had the defendant taken those steps:
    - (a) would Provident have been precluded from issuing further debentures whether because of orders made by a court or stop orders made by the Australian Securities and Investments Commission (**ASIC**); and/or
    - (b) would receivers have been appointed to the property of Provident secured by the fixed and floating charge, earlier than they ultimately were and if so, what would have been the likely return to debenture-holders?
  11. If the defendant breached ss 283DA(a), (b)(ii), (c)(ii) and/or (e)(i) of the Corporations Act and/or fiduciary obligations it owed to the debenture-holders, is compensation recoverable from the defendant by the plaintiff and the group members and if so, what is the correct measure of that compensation?

## REPRESENTATIVE ACTION

The plaintiff brings this application as a representative party under Part 10 of the CPA.

The group members to whom this proceeding relates are all persons who were holders of debentures issued by Provident as at 29 June 2012.

## PLEADINGS AND PARTICULARS

### A. REPRESENTATIVE PROCEEDING

1. The plaintiff brings this proceeding as a representative party in a representative proceeding pursuant to Pt 10 of the CPA.
2. On or about 16 November 2011, the plaintiff was issued \$100,000 in debentures by Provident Capital Limited (**Provident**), pursuant to an application made on a form contained in Provident Capital Prospectus 2011 (**Debenture Prospectus 2011**) issued by Provident.

#### PARTICULARS

- a) *Debenture Prospectus 2011 was issued by Provident and was lodged with ASIC on 24 December 2010.*
  - b) *The application to invest \$100,000 in debentures was in writing and was made by the plaintiff completing an application form attached to Debenture Prospectus 2011 and posting the application and a cheque for \$100,000 to Provident. The application form is no longer in the possession of the plaintiff.*
  - c) *The plaintiff received an 'Investment Certificate' from Provident in respect of the debentures issued by Provident in the sum of \$100,000 being Investment Certificate number D112165501 dated 16 November 2011.*
3. The defendant (**AETL**) was, from on or about 7 December 2004, the trustee for debenture holders of debentures issued by Provident under the provisions of Chapter 2L of the Corporations Act and under a Trust Deed between Provident and AETL (**Trust Deed**).

#### PARTICULARS

- a) *The Trust Deed is in writing and was made on 11 December 1998 between Provident and IOOF Australia Trustees (NSW) Ltd (ACN 000 329 706) (**IOOF**).*
- b) *On or about 7 December 2004 IOOF (then called Tower Trust (NSW) Ltd) retired and AET was appointed as the new trustee under the Trust Deed.*
- c) *The Trust Deed was amended by a Deed of Amendment dated 23 December 1999, a Deed of Amendment dated 24 November 2005, a Deed of Amendment dated 31 January 2011, a Deed of Amendment of Debenture Trust Deed dated on or about 10 December 2012 and a Deed of Amended of Debenture Trust Deed dated on or about 10 January 2013.*

4. The group members to whom the proceeding relates are all persons who were holders of debentures issued by Provident as at 29 June 2012.

**B. PROVIDENT AND ITS DUTIES**

5. Provident:

- 5.1. at all material times, carried on the business of fixed rate mortgage lending and the issuing of debentures pursuant to Chapter 2L of the Corporations Act;
- 5.2. at all material times, had the following duties imposed on it by Chapter 2L of the Corporations Act and/or the Trust Deed:
- 5.2.1. to carry on and conduct its business in a proper and efficient manner (s 283BB(a) and Trust Deed, clause 6.0.1);
- 5.2.2. make all of its financial and other records available for inspection by the trustee; or an officer or employee of the trustee authorised by the trustee to carry out the inspection; or a registered company auditor appointed by the trustee to carry out the inspection and give them any information, explanations or other assistance that they may require about matters relating to those records (s 283BB(c) and Trust Deed, clauses 6.0.2 and 6.0.3);
- 5.2.3. if it created a security interest it had to:
- 5.2.3.1. give AETL written details of the security interest within 21 days after it was created (s 283BE(a)); and
- 5.2.3.2. if the total amount to be advanced on the security of the security interest was indeterminate and the advances were not merged in a current account with bankers, trade creditors or anyone else – give AETL written details of the amount of each advance with 7 days after it was made (s 283BE(b));
- 5.2.4. to provide, within a month after the end of each quarter, a quarterly report to AETL including information required by ss 283BF(4), (5) and (6) including about any matters that may materially prejudice the interests of the debenture holders (s 283BF(1) and s 283BF(4)(g));
- 5.3. as beneficial owner, charged in favour of AETL for debenture-holders all of Provident's present and future right, title and interest in Provident's assets to secure the due and punctual payment of the secured money (**Charge**) (Trust Deed, clause 4.1);
- 5.4. was placed into receivership on 29 June 2012 by order of the Federal Court of Australia;
- 5.5. entered into voluntary administration on 18 September 2012; and
- 5.6. entered into liquidation pursuant to a creditors' voluntary winding-up on 24 October 2012.

**C. AETL, ITS DUTIES AND POWERS**

6. AETL is and was at all relevant times:

- 6.1. a company incorporated pursuant to the laws of Australia;
- 6.2. a financial services organisation providing, amongst other services, corporate trustee services; and
- 6.3. a company holding itself out as having particular knowledge, skill and experience in the provision of corporate trustee services.

7. At all relevant times, AETL had the duty to:

- 7.1. exercise reasonable diligence to ascertain whether the property of Provident that was or should have been available (whether by way of security or otherwise) would be sufficient to repay the amounts deposited or lent as and when they became due;

**PARTICULARS**

*The duty arose pursuant to s 283DA(a) of the Corporations Act.*

- 7.2. exercise reasonable diligence to ascertain whether Provident had committed any breach of the provisions of the Trust Deed or Chapter 2L of Corporations Act;

**PARTICULARS**

*The duty arose pursuant to s 283DA(b)(ii) of the Corporations Act.*

- 7.3. do everything in its power to ensure that Provident remedied any breach known to AETL (or which it ought to have known by reason of its obligation under s 283DA(b)(ii)) of any provision of the Trust Deed or Chapter 2L of the Corporations Act unless AETL was satisfied that the breach would not materially prejudice the debenture holders' interests or any security for the debentures;

**PARTICULARS**

*The duty arose pursuant to s 283DA(c)(ii) of the Corporations Act and/or in equity.*

- 7.4. in the event Provident failed to remedy any breach of the provisions of the Trust Deed or Chapter 2L of the Corporations Act, when required by AETL and/or AETL ascertained that the property of Provident that was or should be available was not sufficient to repay debenture-holders as and when their debentures became due:

- 7.4.1. call a meeting of debenture-holders; and
- 7.4.2. inform the debenture-holders of the failure at the meeting; and
- 7.4.3. submit proposals for protection of the debenture-holders' interests to the meeting; and
- 7.4.4. ask for directions from the debenture-holders in relation to the matter; and/or

**PARTICULARS**

*The duty arose in equity and consistent with the power given to AETL by s 283EB(1) of the Corporations Act.*

- 7.4.5. apply to the Court for directions or orders to protect the interests of debenture-holders;

**PARTICULARS**

*The duty arose in equity and consistent with the power given to AETL by ss 283HA and 283 HB of the Corporations Act.*

- 7.5. notify ASIC as soon as practicable if Provident had not complied with s 283BF of the Corporations Act (s 283DA(c)(i));

**PARTICULARS**

*The duty arose pursuant to s 283DA(e)(i) of the Corporations Act.*

- 7.6. in the event of an "event of default" as defined in clause 11.1 of the Trust Deed, which included if Provident defaulted in the performance of any obligation under the Trust Deed and, where reasonably capable of remedy, that default was not remedied within 21 days after Provident had received notice of or otherwise became aware of such default (clause 11.1.2):

- 7.6.1. declare that all money owing (actually or contingently) on any current debentures was immediately due and payable; or
- 7.6.2. take action to enforce the Charge either itself or by the appointment of a receiver; or
- 7.6.3. apply to wind up Provident; or
- 7.6.4. take proceedings for a judgment against Provident for the payment of money or damages; or
- 7.6.5. any one of those things (pursuant to equity and consistent with the power given to AETL in the Trust Deed, clause 11.2).

**PARTICULARS**

*The duties arose in equity and consistent with the powers given to AETL in clauses 11.1.2 and 11.2 of the Trust Deed.*

8. At all relevant times, AETL had rights and powers:
- 8.1. to require Provident to make all of its financial and other records available for inspection by it, or an officer, employee or auditor appointed by it to carry out an inspection (the Corporations Act, s 283BB(c) and the Trust Deed, clause 6.0.2); and
- 8.2. to require Provident to give any information, explanation or other assistance required by it, or by an officer, employee or auditor appointed by it, about matters pertaining to its financial and other records (the Corporations Act, s 283BB(c) and the Trust Deed, clause 6.0.3); and
- 8.3. to prevent the issue of any prospectus or supplementary or replacement prospectus in respect of debentures to be issued or already issued (Trust Deed, clause 6.0.10); and

- 8.4. to apply to the court for directions in relation to the performance of its functions or to determine any question in relation to the interests of debenture holders (the Corporations Act, s 283HA); and
  - 8.5. to apply to the court for any orders that the court considers appropriate to protect the interests of existing or prospective debenture holders (the Corporations Act, s 283HB); and
  - 8.6. to enforce Provident's duty to repay the debenture funds (Trust Deed, clause 1A.2.1); and
  - 8.7. to enforce the Charge created by the Trust Deed for the benefit of the debenture-holders (Trust Deed, clause 1A.2.2); and
  - 8.8. to enforce any other duties of Provident under the terms of the debentures, the Trust Deed and/or the Corporations Act (Trust Deed, clause 1A.2.3).
9. AETL received payments from Provident for its services as trustee.

#### **D. TRUST DEED**

10. At all material times Trust Deed provided that:
- 10.1. each finance facility (as defined in clause 1.1) must satisfy the following criteria:
- 10.1.1. the maximum amount to be made available by Provident under the finance facility must not be greater than the following proportions of the certified value of the primary facility security (**LVR Criteria**) at the time Provident offered to grant the finance facility:

<b>Primary Facility Security</b>	<b>Maximum LVR (LVR Limit)</b>
<i>(A) Land for use for residential purposes</i>	85%
<i>(B) Land for use for commercial purposes</i>	75%
<i>(C) Land for use for industrial purposes</i>	75%
<i>(D) Land for use for rural purposes</i>	70%
<i>(E) Land for construction or development where the finance facility is to fund that construction or development</i>	70% of projected end value of development

#### **(LVR Criteria Requirement),**

where "certified value" in respect of any property means the market value of the property certified by a duly qualified real estate valuer appointed or approved by Provident to certify the value of the property (clause 5.2.1);



- 10.1.2. before permitting the first draw down on a finance facility, Provident must obtain a certificate from its solicitor (**Solicitor's Certificate on Title Requirement**):
  - 10.1.2.1. to the effect that Provident would receive a good title as first registered mortgagee of the particular facility security following registration of the relevant documents then held or to be received at the time of the draw down (clause 5.5.1);
  - 10.1.2.2. setting out the information required by Provident (clause 5.5.2)
- 10.2. Provident could only deal with debenture funds (**Use of Debenture Funds Requirement**):
  - 10.2.1. by holding the application amount in trust for the applicant until the debenture certificate was issued for the application amount or the application amount was returned to the applicant at the request of the applicant (clause 2.9);
  - 10.2.2. by using debenture funds principally to provide finance facilities to other people, including any related corporation, on the security and terms permitted under the Trust Deed (clause 5.1);
  - 10.2.3. pending draw down in finance facility transactions, by investing debenture funds in any one or more or a combination of authorised investments as it determined appropriate, such investments being:
    - 10.2.3.1. any debenture bonds, stock or securities issued by or guaranteed by the government of Australia or any of the States or Territories of Australia;
    - 10.2.3.2. interest-bearing deposits at call or for a term with any bank authorised to carry on the business of banking anywhere in Australia;
    - 10.2.3.3. investment with any dealer in the short-term money market, approved by the Reserve Bank of Australia as an authorised dealer, that has established lines of credit with that bank as a lender of last resort;
    - 10.2.3.4. commercial bills of exchange issued by any corporation, including any related corporation;
    - 10.2.3.5. debentures and promissory notes of any corporation, including any related corporation;
    - 10.2.3.6. negotiable or convertible certificates of deposit issued by an Australian trading bank;
    - 10.2.3.7. land and buildings acquired by way of foreclosure under any security,

(clauses 5.7 and 1.1.3 – 1.1.12)
  - 10.2.4. by using debenture funds (as from 24 November 2005) to pay expenses in connection with the exercise of any of Provident's rights under any of the facility securities or for the protection of any of these

facility securities and the money secured by them, including work of a capital nature to property the subject of the facility security, or fees for services in managing the property the subject of the facility security (clause 5.8); and

- 10.3. Provident would strive to carry on and conduct its business in a proper and efficient manner (**Business Conduct Obligation**) (clause 6.0.1).

#### **E. PROVIDENT'S BUSINESS AND AETL'S KNOWLEDGE**

11. At all relevant times, Provident's business activities involved, as AETL knew, borrowing money from investors by issuing debentures and loaning the funds raised to third-party borrowers, primarily for property investment, on a first-mortgage basis (**FTI Portfolio**).
12. In or about August 2007, as AETL knew, Provident entered into a Wholesale Funding Facility with Adelaide Bank Limited (**ABL and ABL Facility**) which involved the following features:
- 12.1. Provident would make or refinance loans which had already been made by Provident (**ABL Portfolio**), using funds provided by ABL or a trust controlled by ABL (**ABL Trust**);
- 12.2. the loan and its security interest would be assigned to ABL or to the ABL Trust and as such ABL had first recourse to the security;
- 12.3. ABL also had a charge over certain of Provident's residual rights associated with the ABL Portfolio loans and mortgages;
- 12.4. interest on the loans would be received by Provident and then transferred to ABL or the ABL Trust;
- 12.5. Provident would manage the loan for ABL;
- 12.6. Provident was required to refinance loans more than 270 days past due up to a maximum aggregate value of 5% of all loans in the ABL Portfolio and when refinanced those loans and the related mortgages would be transferred back to Provident and form part of the FTI Portfolio; and
- 12.7. Provident was required to pay a cash deposit (of \$7.5 million as at 30 June 2008 and \$10 million as at 30 September 2008 and thereafter), which was available to be used to repay any losses or operating fees resulting in non-payment of the ABL Portfolio loans.
13. Further, at all relevant times, typical third-party borrowers to whom Provident made loans were, as AETL knew, outside of the lending criteria of Australia's traditional financial institutions and included business owners, the self-employed, property investors raising funds to purchase property, the credit impaired and borrowers wishing to consolidate debt.

#### **PARTICULARS**

*Provident's business activities were described in Debenture Prospectus 11 issued by Provident and lodged with ASIC on or about 24 December 2008 (**Debenture Prospectus 11**) at pp. 3 and 16.*

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

**PARTICULARS**

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

15. Further, at all relevant times, AETL knew, or ought to have known, that the principal assets of Provident that were or would be available to repay the amounts payable under debentures issued pursuant to the Trust Deed were the loans and advances made by Provident in the FTI Portfolio and the accompanying security for those loans and advances.
16. At all relevant times, the main risks to investors in debentures issued by Provident were, as AETL knew, the risk of credit losses in the FTI Portfolio and the ABL Portfolio to which Provident was exposed as a result of the terms of the ABL Facility.

**PARTICULARS**

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

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

**PARTICULARS**

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

18. At all relevant times, AETL knew, or ought to have known, that it required from time-to-time current information about each of the following matters in order to ascertain the value of the loans in the FTI Portfolio:
- 18.1. the number and value of loans in the FTI Portfolio;
  - 18.2. the purpose for which the loan was made;
  - 18.3. the number, value and period for which loans in the FTI Portfolio were in default;
  - 18.4. the number, value and period for which Provident was mortgagee in possession of loans in the FTI Portfolio;
  - 18.5. the current "as is" value of the security property for each loan in the FTI Portfolio that was in default;
  - 18.6. the loan to valuation ratio of each loan in the FTI Portfolio that was in default.
19. At all relevant times, AETL in exercising its powers and discretions as trustee for debenture holders:
- 19.1. kept records of communications passing between it and Provident relating to the financial position of Provident and relevant to the interests of debenture holders (**File**), including regular reports of inter alia the performance of loans recorded in the FTI Portfolio or the ABL Portfolio;

- 19.2. knew or ought reasonably to have known the matters recorded in the File, including historical matters since 2000, when exercising the said powers and discretions; and
- 19.3. without limiting 19.1 or 19.2, knew or ought reasonably to have known:
- (i) the arrears histories of each of the loans referred to in Section F below; and
  - (ii) details of the security interest held for each loan, including any valuations, for each loan referred to in Section F below.
20. At all relevant times, AETL knew, or ought to have known, that Provident did not disclose in any prospectus or financial statements or quarterly reports to AETL, current information about all of the matters referred to in paragraph 18.
21. At all relevant times from at least 24 December 2008, AETL knew that Provident did not satisfy the benchmarks stated by ASIC in Regulatory Guide 69 as to equity ratio (benchmark 1) and credit rating (benchmark 4).
22. At all relevant times from 7 December 2004, AETL knew or ought to have known that the existence of the Use of the Debenture Funds Requirement obliged it to:
- 22.1. obtain from Provident, on a regular basis, sufficient information to enable AETL to satisfy itself that the Use of the Debenture Funds Requirement had been met; and
  - 22.2. ensure that systems were in place to ensure that debenture funds were kept separate from Provident's other funds.

#### **PARTICULARS**

*AETL may have requested Provident to:*

- a) *keep separate bank accounts for debenture funds;*
  - b) *provide a monthly reconciliation of the sources and uses of debenture funds, showing opening balances, rollovers, maturities, funds lent, funds returned from matured loans and closing balance of debenture funds; and/or*
  - c) *maintain a database of debenture funds and the disposition of those funds.*
23. By on or about 5 November 2008, AETL knew, or ought to have known, that as at 30 June 2008, Provident reported total assets of \$239,834,246, of which \$192,822,594 were loans receivable.

#### **PARTICULARS**

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

24. By on or about 5 November 2008, AETL knew, or ought to have known, that as at 30 June 2008, Provident reported liabilities in the amount of \$225,358,236, of which \$161,094,049 were current liabilities and \$64,264,187 were non-current liabilities.

#### **PARTICULARS**

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

25. By on or about 5 November 2008, AETL knew, or ought to have known, that as at 30 June 2008, Provident reported total debentures on issue in the amount of \$154,822,573, of which \$30,017,474 were due to be repaid within 3 months, \$67,987,141 were due to be repaid between 3 months and 1 year and \$56,817,958 were due to be repaid between 1 year and 5 years.

**PARTICULARS**

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

26. By on or about 5 November 2008, AETL knew, or ought to have known, that as at 30 June 2008, Provident had reported \$1,256,943, being tax assets, that would be non-realizable in the event of insolvency or administration.

**PARTICULARS**

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

27. By on or about 5 November 2008, AETL knew, or ought to have known, that as at 30 June 2008, and across both the FTI Portfolio and the ABL Portfolio:

- 27.1. Provident reported \$7.9m of loan interest receivable on its balance sheet;
- 27.2. Provident had 44 past due loans (greater than 30 days), with an aggregate principal balance of \$70.8m, being 36.7% by value and 28% by number of the total loan portfolio;
- 27.3. Provident had 36 past due loans (greater than 90 days), with an aggregate principal balance of \$52.8m, being 27.4% by value and 22.9% by number of its total loan portfolio;
- 27.4. of the past due loans greater than 90 days, Provident was mortgagee in possession of \$28.3m of those past due loans, being 53.6% by value of those past due loans; and
- 27.5. Provident reported impairments expenses of loans receivables of \$1,531,383 for the year ended 30 June 2008, compared with \$302,373 for the previous financial year.

**PARTICULARS**

*Provident Capital Ltd financial report for the year ended 30 June 2008 at pp. 7, 16-18, and 24.*

28. By on or about 5 November 2008, AETL knew, or ought to have known, that:
- 28.1. Provident's largest borrowing was in the amount of \$13,500,429 which equated to 7% by value of the total loans, and was for construction funding purposes;
- 28.2. the ten largest borrowers had 16 loans aggregating to \$59,294,623 equating to 30.8% by value and 9.6% by number of the total loans.

**PARTICULARS**

*Provident Capital Ltd Quarterly Report dated 30 October 2008.*

29. By no later than 5 November 2008, AETL knew, or ought to have known, that, from March 2008:

- 29.1. Provident held all debenture funds in a general account, which account was also used to make payments for purposes other than those permitted by the Trust Deed, including payments in respect of loan advances, Provident's operating expenses, and any declared dividends;
- 29.2. Provident did not have adequate controls in place to ensure that debenture funds were not used to make payments for purposes other than those permitted by the Trust Deed; and
- 29.3. having regard to the matters pleaded at 29.1 and 29.2 above, AETL was unable properly to satisfy itself that Provident was meeting the Use of Debenture Funds Requirement.

#### **PARTICULARS**

*In March 2008, Provident commenced using financial operating software which could only operate using a single banking account, hence requiring all funds to be held in, and all transactions to be made in and out of, a general account, including the receipt and holding of debenture funds. Provident disclosed in the Provident Capital Ltd financial report for the year ended 30 June 2008 at p. 21 that it had adopted the externally supplied operating software.*

*Provident also identified in that financial report at p. 21 the primary controls that it applied to mitigate the risk of fraud, none of which included any of the following or equivalent controls:*

- 1) *keeping separate bank accounts for debenture funds;*
  - 2) *providing a monthly reconciliation of the sources and uses of debenture funds, showing opening balances, rollovers, maturities, funds lent, funds returned from matured loans and closing balance of debenture funds; or*
  - 3) *maintaining a database of debenture funds and the disposition of those funds.*
30. By no later than 5 November 2008, AETL knew, or ought to have known, that the global financial crisis:
    - 30.1. was having a significant and negative impact upon the property market, the employment market and the availability of credit;
    - 30.2. increased the risk of credit loss because of changes to borrowers' circumstances increasing the risk of loan defaults, changes to property values and reduced availability of credit generally;
    - 30.3. could have a negative impact on the value of the property available to repay the debenture-holders.

#### **PARTICULARS**

*These matters were common knowledge within the financial industry at or around this time and specific reference was made to these matters by Provident in Debenture Prospectus 11 at page 23.*

31. By on or about 5 December 2008, AETL knew that Provident was proposing to issue Debenture Prospectus 11 in or about late December 2008.

**PARTICULARS**

*Email from Malcolm Bersten to Philip Joseph and Stuart Howard of AET on 5 December 2008 [AET.500.001.2703].*

32. By 1 December 2008 or shortly thereafter, AETL knew:
- 32.1. that on or about 31 October 2008 there were approximately 28 past due loans (greater than 90 days) in the FTI Portfolio, with a principal balance of approximately \$51.8m equating to 24.8% of total loans made by Provident; and
  - 32.2. the identity of the loans that were, as at 31 October 2008, in arrears.

**PARTICULARS**

*October 2008 Arrears Report provided to AET on or about 1 December 2008 (October 08 Arrears Report).*

33. Sometime in or around the first week of January 2009, AETL received a report from Provident showing the loans made by Provident which were in excess of 90 days past due as at 30 November 2008 (**November 08 Arrears Report**).
34. The November 08 Arrears Report showed:
- 34.1. that as at about 30 November 2008 there were approximately 30 past due loans (greater than 90 days) in the FTI Portfolio, with a principal balance of approximately \$51.3m equating to 23.13% of total loans made by Provident;
  - 34.2. an increase of arrears across the entire FTI Portfolio of \$5.1m and an increase in the average LVR of the entire FTI Portfolio from 74% in October to 87% in November;
  - 34.3. that as at about 30 November 2008, 16 of the 30 loans had a loan to valuation ratio, as disclosed by Provident, of at least 85%;
  - 34.4. that as at about 30 November 2008, 10 of the loans had a loan to valuation ratio, as disclosed by Provident, of at least 100%;
  - 34.5. a marked deterioration in arrears and the loan to value ratio (**LVR**) in relation to a number of loans, in particular the Ovchinnikov Loan, Unique Castle Loan, Ozer Loan, Tembelli Loan, Chrysalis Loan, Kooindah Loan, Gardiner Loan, Leach Loan, Morrell Loan, Naumovska Loan, Hanna Loan, Carlisund Loan, Smith and Arnott Loan, DS Loan and Good Life Loan (as these expressions are defined in Section F, below) (**Loans of Concern**), in the one month since 31 October 2008; and
  - 34.6. for the Loans of Concern, an average LVR of 106%.

**PARTICULARS**

*November 08 Arrears Report provided to AET on or about 9 January 2009.*

*The amounts owing for the Loans of Concern were shown in the October 08 Arrears Report and November 08 Arrears Report as follows:*

Loan	October 2008			November 2008		
	Principal Balance	Net Arrears	LVR	Principal Balance	Net Arrears	LVR
Ovchinnikov	3,918,942	1,251,967	71%	3,935,760	1,832,282	105%
Unique Castle	3,844,688	1,150,272	95%	3,844,68	1,202,413	125%
Ozer	1,877,856	188,942	81%	1,877,855	743,651	147%
Tembelli	3,874,080	1,020,101	81%	3,898,288	1,760,523	119%
Chrysalis Holdings	5,664,596	660,937	67%	5,664,820	1,987,255	91%
Koлиндah Lifestyle	1,047,895	180,958	116%	1,053,262	196,072	139%
Gardiner	1,127,945	182,023	71%	1,136,183	497,333	109%
Leach	1,951,805	481,176	84%	1,952,481	508,381	107%
Morrell	1,043,343	185,698	75%	1,045,737	650,140	106%
Naumovska	465,972	71,493	93%	488,716	97,682	117%
Hanna	5,004,150	614,736	86%	5,043,650	685,460	98%
Carlsund	834,458	222,700	32%	847,206	244,762	41%
Smith and Arnott	245,374	57,217	85%	247,879	60,675	106%
DS Investments	288,995	54,046	83%	292,202	55,448	99%
Good Life	1,210,727	293,811	67%	1,210,727	311,226	85%
<b>Total</b>	<b>32,400,826</b>	<b>6,616,077</b>	<b>79%</b>	<b>32,539,454</b>	<b>10,833,303</b>	<b>106%</b>

35. On or about 27 January 2009 AET wrote to Provident inquiring why the arrears had increased from \$9m to \$14m within the space of one month.

#### PARTICULARS

*Email from Stewart Howard of AET to Butch Hornby of Provident on or about 27 January 2009 [AET.500.001.2446].*

36. On or about 28 January 2009 Provident wrote to AET advising that the November 08 Arrears Report had incorrectly shown the "gross arrears" rather than the "net arrears" and enclosed an amended report (**Amended November 08 Arrears Report**).

#### PARTICULARS

*Email from Butch Hornby of Provident to Stewart Howard of AET on or about 28 January 2009 [AET.500.001.2635].*

37. The Amended November 08 Arrears Report:
- 37.1. did not alter the LVR figures from the November 08 Arrears Report;
  - 37.2. disclosed 'net arrears' of \$9.3m;
  - 37.3. contained the net arrears figures which excluded amounts which Provident regarded as unrecoverable, described as a "non-accrual of interest provision"; and



- 37.4. confirmed that in addition to the approximately \$5m of interest that was not being received, or even accrued, on the Loans of Concern, there were 10 loans with a LVR greater than 100%.

#### **PARTICULARS**

*Amended November 08 Arrears Report provided to AETL on or about 28 January 2009.*

38. By reason of the matter pleaded in paragraphs 36 and 37, AETL should have formed the opinion, in or around late January 2009, that:
- 38.1. Provident had only been reporting net arrears;
  - 38.2. \$5m of interest had not accrued on the loans listed in the Amended November 08 Arrears Report, which interest amount Provident regarded as unrecoverable, described as a "non-accrual of interest provision";
  - 38.3. the reason for the non-accrual of interest provision is that Provident considered the likelihood of recovering the \$5m of interest as low;
  - 38.4. the arrears reports received by AETL from Provident to that point in time did not provide an accurate record of the total amount overdue for payment by borrowers, taking into account interest; and
  - 38.5. Provident was unlikely to recoup all of the principal and net arrears on those loans with an LVR greater than 100%.

#### **F. THE EXERCISE OF REASONABLE DILIGENCE PURSUANT TO S 283DA(a) & (b)(ii)**

39. By reason of:
- 39.1. the matters pleaded in paragraphs 11 to 34, in or around early January 2009; or
  - 39.2. alternatively, the matters pleaded in those paragraphs and in paragraph 36 to 38, in or around late January 2009;

AETL should have formed the opinion that it needed to conduct its own review as to whether:

- 39.3. the assets of Provident would be sufficient to repay the debentures when they became due; and
- 39.4. Provident had committed any breach of the provisions of the Trust Deed or Chapter 2L of the Corporations Act;

by requiring Provident (pursuant to s 283BB(c) and clauses 6.0.2 and 6.0.3 of the Trust Deed) to provide to AETL, within a reasonable time:

- 39.5. access to or copies of the complete loan transaction files including a complete statement of account;
- 39.6. and all valuations obtained in relation to the security property;

for all of the loans shown on the November 08 Arrears Report and the Amended November 08 Arrears Report and of the ten largest borrowers, together with:

- 39.7. full details of the \$2,045,122 amount of "Other loan related receivables" identified as comprising part of Provident's "Other Financial Assets" at Note 10 to the Provident Capital Ltd Financial Statements for the year ended 30 June 2008, including:
- 39.7.1. the full details of the loans to which the "Other loan related receivables" amount related;
  - 39.7.2. whether the property securing each of those loans had been sold; and
  - 39.7.3. after any realisation of the security the subject of those loans, the residual receivable amount owing to Provident in respect of each loan.
40. Had AETL, in or around early January 2009, or alternatively in or around late January 2009, formed the opinion referred to in paragraph 39, and required Provident to provide the information referred to in that paragraph within a reasonable period, it would have obtained, by in or around mid to late January 2009, or alternatively early February 2009:
- 40.1. the complete loan transaction file, including a statement of account, for a loan relating to a development property at Burleigh Heads, Queensland (**Burleigh Views loan**), being the largest loan made by Provident;
  - 40.2. the complete loan transaction files including the valuations then held by Provident of the security for all loans in default, including those for the Loans of Concern; and
  - 40.3. the complete loan transaction files, including details of any residual amounts owing to Provident, for the loan to Clucor Pty Ltd (**Clucor loan**) and the loan to MMT Investments Pty Ltd (**Agara/MMT loan**) identified in the Walter Turnbull "Financial Assets – Loans and Advances – Directors Impairment Assessment" report dated 11 June 2008.
41. On or about 2 February 2009, AETL received a report from Provident showing the loans made by Provident which were in excess of 90 days past due as at December 2008 (**December 08 Arrears Report**).
42. By reason of the matters alleged in paragraph 40 above, AETL should have formed the opinion, in or around mid to late January 2009, or alternatively, by reason of the matters alleged in paragraphs 40 and 41, early February 2009, that it could only be satisfied that the assets of Provident would be sufficient to repay the debentures when they became due by making appropriate provisions for credit losses and impairments, including the provisions described in sections F.1 to F.16 below, in order to ascertain the value of the loans.

#### **F.1 Burleigh Views loan**

43. By mid to late January 2009 or early February 2009 AETL knew, or by reason of the matters pleaded in paragraph 40, ought to have known, in relation to the loan to Burleigh Views Pty Ltd (**Burleigh Views loan**):
- 43.1. that Provident had agreed to enter into a facility agreement dated 21 March 2000 which did not satisfy the LVR Criteria Requirement, as no certified value of the primary facility security had been obtained at the time;
  - 43.2. that Provident had not obtained from its solicitors, certification to the effect that Provident would receive a good title as first registered mortgagee of the

mortgaged property and had thereby breached the Solicitors' Certificate on Title Requirement;

- 43.3. that an officer of Provident had not completed a "valuation certification" as referred to in Provident's internal procedures;
- 43.4. that Provident had not obtained a written loan application form for the loan;
- 43.5. that Provident had failed to obtain adequate supporting documents to confirm income levels, expenditure and the financial position of the borrower;
- 43.6. that Provident had failed to ensure that mortgage property insurance was held for the mortgage property and/or obtain evidence of renewal/current insurance cover annually for the mortgaged property;
- 43.7. that Provident permitted or offered to permit rollovers of the loan on 17 January 2002, 20 June 2002, 24 April 2004, 19 October 2006 and 4 May 2007 where:
  - 43.7.1. (in respect of rollovers after 20 June 2002) the borrower had been in default since at least October 2004;
  - 43.7.2. (in respect of the rollover of 17 January 2002) the facility limit under the rolled-over facility was in excess of the LVR Criteria and so in breach of the LVR Criteria Requirement;
  - 43.7.3. (in respect of the rollovers on 20 January 2002, 24 April 2004, 19 October 2006 and 4 May 2007) Provident had not obtained an updated certified valuation of the mortgaged property at the times of the rollovers, in breach of the LVR Criteria Requirement;
  - 43.7.4. Provident had failed to obtain a new application form from the borrower;
- 43.8. that Provident had failed to commence recovery/legal action once the loan had remained in arrears for one month;
- 43.9. that Provident had permitted interest to capitalise whilst the borrower was in default;
- 43.10. that the loan related to a site:
  - 43.10.1. for which development approval had lapsed in about March 2002;
  - 43.10.2. which in about 2003 had been valued, with or assuming development approval, at no more than \$5.9m;
  - 43.10.3. on which there had been little or no construction activity since 2005;
- 43.11. that the loan as at 30 June 2008 had a carrying value of \$13,500,429;
- 43.12. that the loan was to a borrower who, on 21 August 2008, had entered liquidation;
- 43.13. that the loan had caused Provident, on 5 September 2008, to enter as mortgagee in possession;
- 43.14. that the loan had appeared on arrears reports that AETL received for months prior to March 2007;
- 43.15. that the loan by January 2007 and February 2007 was recorded in the arrears reports as having been in arrears for 27 to 28 months;

43.16. that the loan ceased to appear on arrears reports after March 2007.

### PARTICULARS

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

*Provident Capital Ltd Quarterly Report dated 30 October 2008.*

*The Burleigh Views loan file maintained by Provident.*

44. Having obtained the further information referred to in the preceding paragraph, AETL, by mid to late January 2009 or early February 2009, would, or should, have formed the opinion that provisions for credit losses of approximately \$7.895m (including 5% realisation costs) should be made for the Burleigh Views loan.

### F.2 Ovchinnikov loan

45. By mid to late January 2009 or early February 2009, AETL knew or by reason of the matters pleaded in paragraphs 40 and 41, ought to have known, in relation to the loan to Mihail Ovchinnikov (**Ovchinnikov loan**):

- 45.1. that Provident had not obtained from its solicitors, certification to the effect that Provident would receive a good title as first registered mortgagee of the mortgaged property and had thereby breached the Solicitors' Certificate on Title Requirement;
- 45.2. that an officer of Provident had not completed a "valuation certification" as referred to in Provident's internal procedures;
- 45.3. that Provident had not obtained a written loan application form for the loan;
- 45.4. that Provident had failed to obtain adequate supporting documents to confirm income levels, expenditure and the financial position of the borrower;
- 45.5. that Provident had failed to obtain evidence of renewal/current insurance cover annually for the mortgaged property;
- 45.6. that Provident had permitted the term of the loan, which was for construction purposes, to exceed two years;
- 45.7. that Provident had permitted the borrower to draw down on the facility on 30 June 2003 in the amount of \$3,161,464.25 (where the maximum amount that could be drawn down under the facility was \$3,258,000), where such funds were to be used for construction or development purposes, without being satisfied that the security property had sufficient value, at the time of the draw down, to adequately secure the amount drawn down;
- 45.8. that Provident had failed to obtain any quantity surveyor reports for the loan or in respect of any progress claims;
- 45.9. that Provident permitted partial or progressive loan drawdowns without evidence of work completed;
- 45.10. that Provident permitted or offered to permit rollovers of the loan by offer of a loan facility dated 8 July 2004, deed of loan dated 11 November 2004 and letter of offer dated 20 December 2004 in circumstances where:
  - 45.10.1. the borrower had been in default since at least 13 October 2003;

- 45.10.2. Provident had not obtained an updated certified valuation of the mortgaged property at the times of the rollovers, in breach of the LVR Criteria Requirement;
  - 45.10.3. Provident had not obtained new application forms from the borrower;
  - 45.11. that Provident had failed to commence recovery/legal action once the loan had remained in arrears for one month;
  - 45.12. that the loan had a principal balance as at December 2008 of about \$3.9m, net arrears of about \$1.25m and had been in arrears for about 1,422 days; and
  - 45.13. that the loan to valuation ratio was reported to be 166%, implying a valuation of the security property of \$3.13m.
46. By reason of the matters alleged in the preceding paragraph, AETL, by mid to late January 2009 or early February 2009, would, or should, have formed the opinion that provisions for credit losses of approximately \$2.224m (including 5% realisation costs) should be made for the Ovchinnikov loan.

### **F.3 Unique Castle Loan**

47. By mid to late January 2009 or early February 2009 AETL, knew or by reason of the matters pleaded in paragraphs 40 and 41, ought to have known, in relation to the loan to Unique Castle Development Pty Ltd (**Unique Castle loan**):
- 47.1. that Provident had not obtained from its solicitors, certification to the effect that Provident would receive a good title as first registered mortgagee of the properties mortgaged in respect of the loan and had thereby breached the Solicitors' Certificate on Title Requirement;
  - 47.2. that Provident had not obtained a written loan application form for the loan;
  - 47.3. that Provident had failed to obtain adequate supporting documents to confirm income levels, expenditure and the financial position of the borrower;
  - 47.4. that Provident had permitted the borrower to draw down on the facility on 8 July 2005 in the amount of \$3,315,000 (which was the maximum amount that could be drawn down under the facility), where such funds were to be used for construction or development purposes, without being satisfied that the security property had sufficient value, at the time of the draw down, to adequately secure the amount drawn down;
  - 47.5. that Provident had permitted a rollover of the loan for twelve months by deed of loan dated 15 September 2006, in circumstances where Provident had not obtained an updated certified valuation of one of the mortgaged properties, at 9 Hoop Pine Place, West Pennant Hills, at the time, in breach of the LVR Criteria Requirement;
  - 47.6. that as at December 2008, the loan had a principal balance of about \$3.9m, net arrears of about \$935,566 and had been in arrears for about 708 days;
  - 47.7. the loan to value ratio was reported to be 64%; and
  - 47.8. that the most recent valuation of the security property at 161 Castle Hill Road, Castle Hill was \$4.5m and was dated 20 January 2009.

48. By reason of the matters alleged in the preceding paragraph, AETL, by mid to late January 2009 or early February 2009, would, or should, have formed the opinion that provisions for credit losses of approximately \$511,719 (including 5% realisation costs) should be made for the Unique Castle loan.

#### **F.4 Ozer loan**

49. By mid to late January 2009 or early February 2009, AETL knew or by reason of the matters pleaded in paragraphs 40 and 41, ought to have known, in relation to the loan to Hasan Ozer (**Ozer loan**):

- 49.1. that Provident had not obtained from its solicitors, certification to the effect that Provident would receive a good title as first registered mortgagee of properties mortgaged in respect of this loan and had thereby breached the Solicitors' Certificate on Title Requirement;
- 49.2. that an officer of Provident had not completed a "valuation certification" as referred to in Provident's internal procedures;
- 49.3. that Provident had not obtained a written loan application form for the loan;
- 49.4. that Provident had failed to obtain adequate supporting documents to confirm income levels, expenditure and the financial position of the borrower;
- 49.5. that Provident had failed to obtain evidence of renewal/current insurance cover annually for the mortgaged properties;
- 49.6. that Provident permitted or offered to permit rollover of the loan by deed of variation dated 30 June 2005 in circumstances where :
- 49.6.1. Provident had not obtained an updated certified valuation of the mortgaged properties at the times of the rollovers, in breach of the LVR Criteria Requirement;
- 49.6.2. Provident had not obtained new application forms from the borrower;
- 49.7. that Provident had failed to commence recovery/legal action once the loan had remained in arrears for one month;
- 49.8. that as at December 2008, the loan had a principal balance of about \$1.88m, net arrears of about \$189,868 and the loan to value ratio was reported to be 149%; and
- 49.9. that the most recent valuation of the property was \$1.4m on an 'as is' basis and was dated 13 January 2009.

50. By reason of the matters alleged in the preceding paragraph, AETL, by mid to late January 2009 or early February 2009, would, or should, have formed the opinion that provisions for credit losses of approximately \$737,724 (including 5% realisation costs) should be made for the Ozer loan.

#### **F.5 Tembelli loan**

51. By mid to late January 2009 or early February 2009, AETL knew or by reason of the matters pleaded in paragraphs 40 and 41, ought to have known, in relation to the loan to Tembelli Pty Ltd (**Tembelli loan**):

- 51.1. that Provident had not obtained from its solicitors, certification to the effect that Provident would receive a good title as first registered mortgagee of the

mortgaged property and had thereby breached the Solicitors' Certificate on Title Requirement;

- 51.2. that an officer of Provident had not completed a "valuation certification" as referred to in Provident's internal procedures;
  - 51.3. that Provident had not obtained a written loan application form for the loan;
  - 51.4. that Provident had failed to obtain adequate supporting documents to confirm income levels, expenditure and the financial position of the borrower;
  - 51.5. that Provident failed to ensure that mortgage property insurance was held for the mortgaged property and/or obtain evidence of renewal/current insurance cover annually for the mortgaged property;
  - 51.6. that the loan had a principal balance as at December 2008 of about \$3.898m, net arrears of about \$1.02m and the loan to valuation ratio was reported to be 120%; and
  - 51.7. that the most recent valuation of the property was \$4.0m and was dated 12 August 2008.
52. By reason of the matters alleged in the preceding paragraph, AETL, by mid to late January 2009 or early February 2009, would, or should, have formed the opinion that provisions for credit losses of approximately \$1.120m (including 5% realisation costs) should be made for the Tembelli loan.

#### **F.6 Chrysalis loan**

53. By mid to late January 2009 or early February 2009, AETL knew or by reason of the matters pleaded in paragraphs 40 and 41, ought to have known in relation to the loan to Chrysalis Holdings Pty Ltd for a development property at Newcastle, New South Wales (**Chrysalis loan**):
- 53.1. that the Chrysalis loan was in default from at least 13 October 2005;
  - 53.2. that as at 30 June 2008, the Chrysalis loan had a carrying value of \$6.9 million;
  - 53.3. that Provident had not obtained from its solicitors, certification to the effect that Provident would receive a good title as first registered mortgagee of the mortgaged property and had thereby breached the Solicitors' Certificate on Title Requirement;
  - 53.4. that an officer of Provident had not completed a "valuation certification" as referred to in Provident's internal procedures;
  - 53.5. that Provident had not obtained a written loan application form for the loan;
  - 53.6. that Provident had failed to obtain adequate supporting documents to confirm income levels, expenditure and the financial position of the borrower;
  - 53.7. that Provident had failed to obtain evidence of renewal/current insurance cover annually for the mortgaged property;
  - 53.8. that Provident had permitted the borrower to draw down on the facility on 30 June 2003 in the amount of \$4,650,000 (which was the maximum amount that could be drawn down under the facility), where such funds were to be used for construction or development purposes, without being satisfied that the security

property had sufficient value, at the time of the draw down, to adequately secure the amount drawn down;

- 53.9. that Provident failed to monitor at all times the loan to ascertain that adequate funds were available to meet the cost of the completion of the project/building;
- 53.10. that Provident permitted or offered to permit a rollover of the loan by deed of loan dated 15 June 2006 where:
  - 53.10.1. the borrower had been in default;
  - 53.10.2. Provident had not obtained an updated certified valuation of the mortgaged property at the time of the rollover, in breach of the LVR Criteria Requirement;
  - 53.10.3. Provident had failed to obtain a new application form from the borrower;
- 53.11. that Provident had failed to commence recovery/legal action once the loan had remained in arrears for one month;
- 53.12. that Provident had permitted interest to capitalise whilst the borrower was in default;
- 53.13. that as at December 2008, the loan had a principal balance of about \$5.664m, net arrears of about \$663,421 and had been in arrears for about 818 days;
- 53.14. that the loan to valuation ratio disclosed on the arrears report was reported to be 92%, implying a valuation of the security property of \$6.9m; and
- 53.15. that the best evidence of the value of the security property was a conditional offer of \$6.0m made to Provident on 20 May 2008 [PRV.501.030.6226].
- 54. By reason of the matters alleged in the preceding paragraph, AETL, by mid to late January 2009 or early February 2009, would, or should, have formed the opinion that provisions for credit losses of approximately \$628,242 (including 5% realisation costs) should be made for the Chrysalis loan.

#### **F.7 Kooindah loan**

- 55. By mid to late January 2009 or early February 2009, knew or by reason of the matters pleaded in paragraphs 40 and 41, ought to have known in relation to the loan to Kooindah Lifestyle Pty Ltd (**Kooindah loan**):
  - 55.1. that Provident had agreed to enter into a facility agreement in or around June 2005 which exceeded the LVR Criteria, in breach of the LVR Criteria Requirement;
  - 55.2. that Provident had not obtained from its solicitors, certification to the effect that Provident would receive a good title as first registered mortgagee of the mortgaged property and had thereby breached the Solicitors' Certificate on Title Requirement;
  - 55.3. that an officer of Provident had not completed a "valuation certification" as referred to in Provident's internal procedures;
  - 55.4. that Provident had not obtained a written loan application form for the loan;



- 55.5. that Provident had failed to obtain adequate supporting documents to confirm income levels, expenditure and the financial position of the borrower;
  - 55.6. that Provident failed to ensure that mortgage property insurance was held for the mortgage property and/or obtain evidence of renewal/current insurance cover annually for the mortgaged property;
  - 55.7. that Provident had failed to obtain any quantity surveyor reports for the loan or in respect of any progress claims;
  - 55.8. that Provident permitted partial or progressive loan drawdowns without evidence of work completed;
  - 55.9. that Provident failed to monitor at all times the loan to ascertain that adequate funds were available to meet the cost of the completion of the project/building;
  - 55.10. that Provident permitted or offered to permit rollovers of the loan on 7 December 2006 (to 7 March 2007) and on 7 March 2007 (to 5 June 2007) where:
    - 55.10.1. Provident had not obtained an updated certified valuation of the mortgaged property at the times of the rollovers, in breach of the LVR Criteria Requirement;
    - 55.10.2. the facility limit under the rolled-over facility was in excess of the LVR Criteria and so in breach of the LVR Criteria Requirement;
    - 55.10.3. Provident had failed to obtain a new application form from the borrower;
  - 55.11. that the loan had a principal balance as at December 2008 of about \$1.053m, net arrears of about \$210,745 and had been in arrears for about 395 days; and
  - 55.12. that the loan to valuation ratio disclosed on the arrears report was reported to be 140%, implying a valuation of the security property of \$899,969.
56. By reason of the matters alleged in the preceding paragraph, AETL, by mid to late January 2009 or early February 2009, would, or should, have formed the opinion that provisions for credit losses of approximately \$409,036 (including 5% realisation costs) should be made for the Kooindah loan.

#### **F.8 Gardiner loan**

- 57. By mid to late January 2009 or early February 2009, AETL knew or by reason of the matters pleaded in paragraphs 40 and 41, ought to have known, in relation to the loan to Victor and Verna Gardiner (**Gardiner loan**):
  - 57.1. that Provident had not obtained a written loan application form for the loan;
  - 57.2. that Provident permitted partial or progressive loan drawdowns without evidence of work completed;
  - 57.3. that the loan had a principal balance as at December 2008 of about \$1.136m and net arrears of about \$181,905; and
  - 57.4. that the loan to valuation ratio disclosed on the arrears report was reported to be 110%, implying a valuation of the security property of \$1.2m.
- 58. By reason of the matters alleged in the preceding paragraph, AETL, by mid to late January 2009 or early February 2009, would, or should, have formed the opinion that

provisions for credit losses of approximately \$174,548 (including 5% realisation costs) should be made for the Gardiner loan.

#### **F.9 Leach loan**

59. By mid to late January 2009 or early February 2009, AETL knew or by reason of the matters pleaded in paragraphs 40 and 41, ought to have known, in relation to the loan to Phillip Leslie Leach (**Leach loan**):
- 59.1. that Provident had not obtained from its solicitors, certification to the effect that Provident would receive a good title as first registered mortgagee of the mortgaged property and had thereby breached the Solicitors' Certificate on Title Requirement;
  - 59.2. that an officer of Provident had not completed a "valuation certification" as referred to in Provident's internal procedures;
  - 59.3. that the loan had a principal balance as at December 2008 of about \$1.974m and net arrears of about \$536,767; and
  - 59.4. that the loan to valuation ratio disclosed on the arrears report was reported to be 109%, implying a valuation of the security property of \$2.3m.
60. By reason of the matters alleged in the preceding paragraph, AETL, by mid to late January 2009 or early February 2009, would, or should, have formed the opinion that provisions for credit losses of approximately \$325,687 (including 5% realisation costs) should be made for the Leach loan.

#### **F.10 Morrell loan**

61. By mid to late January 2009 or early February 2009, AETL knew or by reason of the matters pleaded in paragraphs 40 and 41, ought to have known, in relation to the loan to Maureen Kaye Morrell (**Morrell loan**):
- 61.1. that Provident had not obtained from its solicitors, certification to the effect that Provident would receive a good title as first registered mortgagee of the mortgaged property and had thereby breached the Solicitors' Certificate on Title Requirement;
  - 61.2. that Provident had not obtained a written loan application form for the loan;
  - 61.3. that Provident had failed to obtain adequate supporting documents to confirm income levels, expenditure and the financial position of the borrower;
  - 61.4. that Provident failed to ensure that mortgage property insurance was held for the mortgage property and/or obtain evidence of renewal/current insurance cover annually for the mortgaged property;
  - 61.5. that the loan had a principal balance as at December 2008 of about \$1.049m and net arrears of about \$186,162; and
  - 61.6. that the loan to valuation ratio disclosed on the arrears report was 107%, implying a valuation of the security property of \$1.153m.
62. By reason of the matters alleged in the preceding paragraph, AETL, by mid to late January 2009 or early February 2009, would, or should, have formed the opinion that provisions for credit losses of approximately \$140,020 (including 5% realisation costs) should be made for the Morrell loan.

### F.11 Naumovska loan

63. By mid to late January 2009 or early February 2009, AETL knew or by reason of the matters pleaded in paragraphs 40 and 41, ought to have known, in relation to the loan to Dimitar Naumovski and Milica Naumovska (**Naumovska loan**):
- 63.1. that Provident had failed to obtain evidence of renewal/current insurance cover annually for the mortgaged property;
  - 63.2. that the loan had a principal balance as at December 2008 of about \$494,408 and net arrears of about \$71,907 and had been in arrears for about 441 days;
  - 63.3. that the loan to valuation ratio was reported to be 120%; and
  - 63.4. that the most recent valuation of the security property was \$480,000 and was dated 27 November 2008.
64. By reason of the matters alleged in the preceding paragraph, AETL, by mid to late January 2009 or early February 2009, would, or should, have formed the opinion that provisions for credit losses of approximately \$110,315 (including 5% realisation costs) should be made for the Naumovska loan.

### F.12 Hanna loan

65. By mid to late January 2009 or early February 2009, AETL knew or by reason of the matters pleaded in paragraphs 40 and 41, ought to have known, in relation to the loan to Paul Vincent Hanna (**Hanna loan**):
- 65.1. that Provident had agreed to enter into a facility agreement dated 22 December 2006 which exceeded the LVR Criteria, in breach of the LVR Criteria Requirement;
  - 65.2. that Provident had not obtained from its solicitors, certification to the effect that Provident would receive a good title as first registered mortgagee of the mortgaged property and had thereby breached the Solicitors' Certificate on Title Requirement;
  - 65.3. that Provident had not obtained a written loan application form for the loan;
  - 65.4. that Provident had failed to obtain adequate supporting documents to confirm income levels, expenditure and the financial position of the borrower;
  - 65.5. that Provident had failed to obtain evidence of renewal/current insurance cover annually for the mortgaged property;
  - 65.6. that Provident had permitted the borrower to draw down on the facility on 21 December 2006 in the amount of \$4,636,476 (where the maximum amount that could be drawn down under the facility was \$4,680,000), where such funds were to be used for construction or development purposes, without being satisfied that the security property had sufficient value, at the time of the draw down, to adequately secure the amount drawn down;
  - 65.7. that Provident failed to monitor at all times the loan to ascertain that adequate funds were available to meet the cost of the completion of the project/building;
  - 65.8. that the loan had a principal balance as at December 2008 of about \$5.046m, net arrears of about \$758,110 and had been in arrears for about 303 days; and

- 65.9. that the loan to valuation ratio disclosed on the arrears report was 97%, implying a valuation of the security property of \$6.0m.
66. By reason of the matters alleged in the preceding paragraph, AETL, by mid to late January 2009 or early February 2009, would, or should, have formed the opinion that provisions for credit losses of approximately \$104,397 (including 5% realisation costs) should be made for the Hanna loan.

#### **F.13 Carlsund loan**

67. By mid to late January 2009 or early February 2009, AETL knew or by reason of the matters pleaded in paragraphs 40 and 41, ought to have known, in relation to the loan to Carl Andrew and Elizabeth Gai Carlsund (**Carlsund loan**):
- 67.1. that Provident had not obtained from its solicitors, certification to the effect that Provident would receive a good title as first registered mortgagee of the mortgaged property and had thereby breached the Solicitors' Certificate on Title Requirement;
- 67.2. that an officer of Provident had not completed a "valuation certification" as referred to in Provident's internal procedures;
- 67.3. that Provident had not obtained a written loan application form for the loan;
- 67.4. that Provident had failed to obtain adequate supporting documents to confirm income levels, expenditure and the financial position of the borrower;
- 67.5. that Provident failed to ensure that mortgage property insurance was held for the mortgage property and/or obtain evidence of renewal/current insurance cover annually for the mortgaged property;
- 67.6. that Provident had failed to commence recovery/legal action once the loan had remained in arrears for one month;
- 67.7. that the loan had a principal balance as at December 2008 of about \$864,102 and net arrears of about \$257,212; and
- 67.8. that the loan to valuation ratio was reported to be 70% implying a valuation of the security property of \$1.6m.
68. By reason of the matters alleged in the preceding paragraph, AETL, by mid to late January 2009 or early February 2009, would, or should, have formed the opinion that provisions for credit losses were not required for the Carlsund loan.

#### **F.14 Smith & Arnott loan**

69. By mid to late January 2009 or early February 2009, AETL knew or by reason of the matters pleaded in paragraphs 40 and 41, ought to have known, in relation to the loan to Lorraine Mary Smith & Lynelle Maree Arnott (**Smith & Arnott Loan**):
- 69.1. that Provident had not obtained from its solicitors, certification to the effect that Provident would receive a good title as first registered mortgagee of the mortgaged property and had thereby breached the Solicitors' Certificate on Title Requirement;
- 69.2. that Provident had not obtained a written loan application form for the loan;
- 69.3. that Provident had failed to obtain adequate supporting documents to confirm income levels, expenditure and the financial position of the borrower;

- 69.4. that Provident had failed to commence recovery/legal action once the loan had remained in arrears for one month;
  - 69.5. that the loan had a principal balance as at December 2008 of about \$247,879 and net arrears of about \$64,244; and
  - 69.6. that the loan to valuation ratio disclosed on the arrears report was 108%, implying a valuation of the security of \$289,997.
70. By reason of the matters alleged in the preceding paragraph, AETL, by mid to late January 2009 or early February 2009, would, or should, have formed the opinion that provisions for credit losses of approximately \$36,627 (including 5% realisation costs) should be made for the Smith & Arnott loan.

#### **F.15 DS loan**

71. By mid to late January 2009 or early February 2009, AETL knew or by reason of the matters pleaded in paragraphs 40 and 41, ought to have known in relation to the loan to DS Investments Pty Ltd (**DS loan**):
- 71.1. that Provident had not obtained from its solicitors, certification to the effect that Provident would receive a good title as first registered mortgagee of the mortgaged property and had thereby breached the Solicitors' Certificate on Title Requirement;
  - 71.2. that Provident had not obtained a written loan application form for the loan;
  - 71.3. that Provident had failed to obtain adequate supporting documents to confirm income levels, expenditure and the financial position of the borrower;
  - 71.4. that Provident had failed to obtain evidence of renewal/current insurance cover annually for the mortgaged property;
  - 71.5. that Provident permitted or offered to permit rollovers of the loan on 15 September 2004, 15 September 2005 and 10 November 2006, when at the time of each rollover:
    - 71.5.1. the facility limit under the rolled-over facility was in excess of LVR Criteria and so in breach of the LVR Criteria Requirement; and
    - 71.5.2. Provident had failed to obtain a new application form from the borrower;
  - 71.6. that the loan had a principal balance as at December 2008 of about \$292,686 and net arrears of about \$56,991 and had been in arrears for about 423 days;
  - 71.7. that the loan to valuation ratio was reported to be 100%, implying a valuation of the security of \$350,027; and
  - 71.8. that the best evidence of the value of the security property was the average market appraisal ascribed by real estate agents in March and April 2008 of \$250,000.
72. By reason of the matters alleged in the preceding paragraph, AETL, by mid to late January 2009 or early February 2009, would, or should, have formed the opinion that provisions for credit losses of approximately \$112,177 (including 5% realisation costs) should be made for the DS loan.

### F.16 Good Life loan

73. By mid to late January 2009 or early February 2009, AETL knew or by reason of the matters pleaded in paragraphs 40 and 41, ought to have known, in relation to the loan to Good Life Retirement Systems Pty Ltd (**Good Life loan**):
- 73.1. that Provident had not obtained from its solicitors, certification to the effect that Provident would receive a good title as first registered mortgagee of the mortgaged property and had thereby breached the Solicitors' Certificate on Title Requirement;
  - 73.2. that Provident had not obtained a written loan application form for the loan;
  - 73.3. that Provident had permitted the borrower to draw down on the facility on 2 June 2006 in the amount of \$1,180,000 (which was the maximum amount that could be drawn down under the facility), where such funds were to be used for construction or development purposes, without being satisfied that the security property had sufficient value, at the time of the draw down, to adequately secure the amount drawn down;
  - 73.4. that Provident failed to monitor at all times the loan to ascertain that adequate funds were available to meet the cost of the completion of the project/building;
  - 73.5. that Provident had failed to commence recovery/legal action once the loan had remained in arrears for one month;
  - 73.6. that the loan had a principal balance as at December 2008 of about \$1.212m and net arrears of about \$215,419 and had been in arrears for about 553 days; and
  - 73.7. that the loan to valuation ratio disclosed on the arrears report was 86%, implying a valuation of the security of \$1.667m.
74. By reason of the matters alleged in the preceding paragraph, AETL, by mid to late January 2009 or early February 2009, would, or should, have formed the opinion that provisions for credit losses were not required for the Good Life loan.

### F.17 Residual loans

75. By mid to late January 2009 or early February 2009, AETL knew or by reason of the matters pleaded in paragraphs 40 and 41, ought to have known, in relation to the Clucor loan and the Agara/MMT loan (**residual loans**):
- 75.1. that after realisation of the security on the Clucor loan, there remained a receivable to Provident of \$730,531 in June 2008; and
  - 75.2. that after realisation of the security on the Agara/MMT loan, there remained a receivable to Provident of \$775,363 in June 2008.

### PARTICULARS

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

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

**F.18 Systems and Processes**

77. By reason of the matters alleged in paragraph 40 and Sections F.1 to F.17 above, AETL should have formed the opinion, in or around mid to late January 2009 that Provident, in breach of the Business Conduct Requirement:
- 77.1. did not have an adequate system or management control process to ensure that quantity surveyor reports were obtained for each construction loan and each progress claim during the term of the construction loan;
  - 77.2. did not have an adequate system or management control process to ensure that progressive loan drawdowns would only be effected against evidence of work completed;
  - 77.3. did not have an adequate system or management control process to ensure the monitoring of construction loans to ensure that adequate funds were available to meet the cost of the completion of the construction;
  - 77.4. did not have an adequate system or management control process to identify and monitor borrowers in default of their loan agreements;
  - 77.5. did not have an adequate system or management control process to ensure that recovery/legal action would be commenced once a loan account remained in arrears for one month;
  - 77.6. did not have an adequate system or management control process to ensure that appropriate provisions for bad debts were made on a monthly basis;
  - 77.7. did not have an adequate reporting system to facilitate compliance monitoring by internal management, the board of Provident and AETL;
  - 77.8. did not implement or did not follow a system or procedure of reviewing valuations:
    - 77.8.1. to ensure that the assumptions therein were appropriately made and/or accurate;
    - 77.8.2. to determine the currency of the valuations;
    - 77.8.3. to determination whether the valuations were carried out on a consistent basis;
    - 77.8.4. to determine whether the valuation methodology was appropriate;
    - 77.8.5. to determine whether the valuer had any conflict of interest in providing valuations to Provident (for instance by reason of having valued the property for the borrower);
  - 77.9. did not have an adequate system or procedure for determining the holding costs, realisation costs and other costs associated with holding or selling security property with regard to nonperforming loans, so as to ensure appropriate provision for non-performing loans;
  - 77.10. did not have an adequate system or management control process to ensure that sufficient supporting documents confirming income levels, expenditure and financial position had been obtained from the borrower;

- 77.11. did not have an adequate system or management control process to ensure that mortgage property insurance for all security properties had been obtained and that such insurance has been renewed annually; and
- 77.12. did not have an adequate system or management control process to ensure that the Solicitor's Certificate on Title Requirement had been met.

## **G. OBLIGATIONS AND CONTRAVENTIONS – DECEMBER 2008**

### **G.1 Proper conclusions and response**

78. Having obtained the information and having formed the opinions alleged in the paragraphs in Section F above, AETL, by mid to late January 2009 or early February 2009, would, or should have reached the following conclusions:
- 78.1. that Provident had breached the Trust Deed, specifically:
- 78.1.1. the LVR Criteria Requirement;
  - 78.1.2. the Business Conduct Requirement; and
  - 78.1.3. the Solicitor's Certificate on Title Requirement, as alleged in the paragraphs in Sections F.1 to F.18;
- 78.2. that provisions for credit losses of approximately \$14.530m in the FTI Portfolio should have been made by Provident;
- 78.3. that impairments of at least \$1.5m should be made by Provident on account of the residual loans;
- 78.4. that the provisions for credit losses in the FTI Portfolio, and impairments that should have been made and recognised on the residual loans, materially prejudiced the interests of existing and prospective debenture holders;
- 78.5. that the property available to Provident in the FTI Portfolio was insufficient to repay the debentures when they became due; and
- 78.6. that the Provident Capital Ltd Quarterly Report dated 30 October 2008 had not complied with s 283BF(4) of the Corporations Act.
79. Further, or alternatively, had AETL required Provident to provide it on a regular basis with sufficient information to enable AETL to satisfy itself that the Use of the Debenture Funds Requirement had been met, as it ought to have done, and/or by reason of the matters pleaded in paragraph 29, by mid to late January or early February 2009 AETL would, or should, have reached the conclusion that Provident did not have adequate financial controls in place to ensure that the Use of Debenture Funds Requirement had been met, and consequently that Provident was potentially in breach of the Trust Deed.
80. Had AETL reached the conclusions alleged in the preceding two paragraphs, as it ought to have done by mid to late January 2009 or early February 2009, AETL would, or should, have immediately made an application to the court for orders that Provident be restricted from advertising for additional deposits or loans and that Provident be restricted from further borrowing from members of the public and be made to refund any monies received pursuant to Debenture Prospectus 11.
81. Had AETL applied for the orders alleged in the preceding paragraph, the court would have made the orders in those terms.



82. Further, or alternatively, had AETL reached the conclusions alleged in paragraphs 78 and 79 above, as it ought to have done by mid to late January 2009 or early February 2009, AETL would, or should, have immediately notified ASIC of those conclusions.
83. Had AETL notified ASIC as alleged in the preceding paragraph, ASIC would have placed a stop order on Debenture Prospectus 11 and prevented further borrowing by Provident by way of debentures.
84. Further, or alternatively, had AETL reached the conclusions alleged in paragraphs 78 and 79 above, as it ought to have done by mid to late January 2009 or early February 2009, AETL would, or should, have immediately served a notice of an "event of default" on Provident requiring Provident to remedy the various breaches of the Trust Deed within 21 days and otherwise done everything in its power to ensure that Provident remedied the breaches of the Trust Deed and s 283BF(4), failing which it would have:
- 84.1. declared that all money owing (actually or contingently) on any current debentures was immediately due and payable; and/or
- 84.2. taken action to enforce the Charge by the appointment of a receiver; and/or
- 84.3. applied to wind up Provident.

## **G.2 Contraventions and causation**

85. In contravention of its duties under s 283DA(a) and (b)(ii) of the Corporations Act, AETL:
- 85.1. did not obtain the information and form the opinions alleged in Section F above; and
- 85.2. consequently did not reach the conclusions alleged in paragraphs 78 and 79 above.
86. Further, in contravention of its duties under s 283DA(a) and/or s 283DA(b)(ii) and/or s 283DA(c)(ii) and/or in equity, AETL did not take the steps alleged in paragraphs 80, 82 and 84 above.
87. Further, in contravention of its duties under s 283DA(e)(i) AETL did not notify ASIC as soon as practicable that Provident had not properly complied with s 283BF.
88. If AETL had not contravened ss 283DA(a), (b)(ii), (c)(ii) or (e)(i) or either one of those provisions and/or its fiduciary duties, then:
- 88.1. debentures would not have been issued in or from late January 2009 or from sometime in February 2009;
- 88.2. Provident would have been required to return any monies received pursuant to Debenture Prospectus 11 by virtue of ss724, 737 or 738 of the Corporations Act;
- 88.3. Provident would have remedied all breaches of the Trust Deed;
- 88.4. alternatively, receivers would have been appointed to the property of Provident secured by the Charge in or around February 2009 or early March 2009;
- 88.5. the group members who were first issued debentures after 23 December 2008 pursuant to Debenture Prospectus 11, but prior to the time when the steps pleaded in paragraphs 80, 82 and/or 84 could or would have been taken, would not have suffered any loss or damage or alternatively, would have suffered less loss and damage;

- 88.6. the plaintiff and the group members who were first issued debentures after the time when the steps pleaded in paragraphs 80, 82 and/or 84 would or could have been taken, would not have suffered any loss or damage; and
- 88.7. those group members who already held debentures as at 23 December 2008 would have suffered less loss or damage.
89. By reason of AETL's contraventions of s 283DA of the Act, the plaintiff and each group member has suffered loss and damage, or alternatively, by reason of AETL's breach of its fiduciary duties the plaintiff and each group member has suffered loss.

#### PARTICULARS

- a) *Provident was placed into receivership on 29 June 2012 by order of the Federal Court of Australia.*
- b) *On 18 September 2012, Provident entered voluntary administration.*
- c) *The security available for repayment of the debenture holders as at 29 June 2012 and 18 September 2012 was at that time inadequate and the suffering of loss by the debenture holders became ascertainable and inevitable.*
- d) *If AETL took the steps alleged in paragraphs 80, 82, and 84 then the property available to repay debenture-holders would have been realised at about that time. So far as the plaintiff is able to say before the receipt of expert reports, debenture holders would have received a return of about \$0.66 cents in the dollar ("**2009 recovery rate**"). Further particulars of the return that debenture holders would have received will be provided after the receipt of expert reports and prior to trial.*
- e) *In fact, Provident continued to trade and the value of the property available to repay debenture-holders deteriorated, with the result that:*
  - i. *on 30 September 2013, the receivers and managers of Provident estimated that debenture holders would receive a return of between 17 and 19 cents in the dollar; and*
  - ii. *on 31 December 2014, the receivers and managers of Provident estimated that debenture holders would receive a return of 12 cents in the dollar on their principal ("**value left in hand**").*
- f) *Group members who held debentures as at 23 December 2008, or as at the date when the steps alleged in paragraphs 80, 82, and 84 could or should have been taken, suffered loss of at least the difference between the 2009 recovery rate in paragraph (d) of these particulars and the value left in hand in paragraph (e) of these particulars.*
- g) *Group members who were issued debentures after 23 December 2008, or alternatively after the time when the steps alleged in paragraphs 80, 82, and 84 could or should have been taken, suffered loss of at least the issue price for the debentures less the value left in hand.*
- h) *Further particulars of loss and damage will be provided prior to trial.*

**THE FOLLOWING SECTIONS H TO K ARE PLEADED IN THE ALTERNATIVE TO THE CLAIM IN SECTION G**

**H. FINANCIAL POSITION AND PERFORMANCE OF PROVIDENT– AT 30 JUNE 2009**

90. By on or about 30 October 2009, AETL knew, or ought to have known, that as at 30 June 2009, Provident reported total debentures on issue of \$116,542,499, of which \$20,262,417 were due to be repaid within 3 months, \$52,075,529 were due to be repaid between 3 months and 1 year and \$44,204,553 were due to be repaid between 1 year and 5 years.

**PARTICULARS**

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

91. By on or about 30 October 2009, AETL knew, or ought to have known, that as at 30 June 2009, and across both the FTI Portfolio and the ABL Portfolio:
- 91.1. Provident reported \$10.4m of loan interest receivable on its balance sheet;
  - 91.2. Provident reported \$31.3m of interest income and \$26.6m of interest received, leaving an amount of unpaid interest of \$4.7m;
  - 91.3. Provident had impairment provisions of \$3.4m;
  - 91.4. Provident had 60 past due loans, with an aggregate principal balance of \$88.9m, of which \$44.3m had been assessed as not impaired, leaving \$44.5m assessed as impaired or potentially impaired;
  - 91.5. Provident had 41 past due loans (greater than 90 days), with an aggregate principal balance of \$62.8m, being 32.6% by value and 23.2% by number of its total loan portfolio; and
  - 91.6. of the past due loans greater than 90 days, Provident was mortgagee in possession of \$28.7m of those past due loans, being 45.7% of those past due loans.

**PARTICULARS**

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

92. By on or about 30 October 2009, AETL knew, or ought to have known:
- 92.1. that as at 30 June 2009, Provident's largest loan was in the amount of \$15.1m and was a "construction loan";
  - 92.2. that as at 30 June 2009, the value of "construction loans" accounted for about 13% of the debentures on issue; and
  - 92.3. that from that time, Provident should have measured its performance against benchmark 1 in ASIC's Regulatory Guide 69 on the basis that it should maintain a minimum equity ratio of 20%; and
  - 92.4. that as at 30 June 2009, Provident reported an equity ratio of 6.43%.

**PARTICULARS**

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

**I. FINANCIAL POSITION AND PERFORMANCE OF PROVIDENT – AT 30 JUNE 2010**

93. By on or about 28 September 2010, AETL knew, or ought to have known, that as at 30 June 2010, Provident reported total assets of \$222,011,825, of which \$178,306,246 were loans receivable.

**PARTICULARS**

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

94. By on or about 28 September 2010, AETL knew, or ought to have known, that as at 30 June 2010, Provident reported liabilities in the amount of \$207,991,130, of which \$159,973,320 were current liabilities and \$48,017,810 were non-current liabilities.

**PARTICULARS**

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

95. By on or about 28 September 2010, AETL knew, or ought to have known, that as at 30 June 2010, Provident reported total debentures on issue in the amount of \$116,977,143, of which \$20,028,181 were due to be repaid within 3 months, \$60,476,907 were due to be repaid between 3 months and 1 year and \$36,472,055 were due to be repaid between 1 year and 5 years.

**PARTICULARS**

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

96. By on or about 28 September 2010, AETL knew, or ought to have known, that as at 30 June 2010, Provident reported non-realizable assets in the amount of \$1,500,157, being tax assets.

**PARTICULARS**

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

97. By on or about 28 September 2010, AETL knew, or ought to have known, that as at 30 June 2010, and across both the FTI Portfolio and the ABL Portfolio, Provident had 158 loans by number and \$178,306,246 of loans by value, of which:
- 97.1. 114 loans by number and \$105.7m of loans by value were for "residential loans";
- 97.2. 23 loans by number and \$16.8m of loans by value were for "commercial loans"; and
- 97.3. 1 loan in the amount of \$17.5m was for "construction".

**PARTICULARS**

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

98. By on or about 22 October 2010, AETL knew, or ought to have known:

- 98.1. that as at 30 June 2010, the value of "construction loans" accounted for about 15% of the debentures on issue; and
- 98.2. that from that time, Provident should have measured its performance against benchmark 1 in ASIC's Regulatory Guide 69 on the basis that it should maintain a minimum equity ratio of 20%; and
- 98.3. that as at 30 June 2010, Provident reported an equity ratio of 6.32%.

**PARTICULARS**

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

- 99. By on or about 22 October 2010, AETL knew, or ought to have known, that as at 30 June 2010, and across both the FTI Portfolio and the ABL Portfolio:
  - 99.1. Provident reported \$13m of loan interest receivable on its balance sheet;
  - 99.2. Provident reported \$26.6m of interest income and \$24.7m of interest received, leaving an amount of unpaid interest of \$1.8m;
  - 99.3. Provident had impairment provisions of \$1.4m;
  - 99.4. Provident had 44 past due loans (greater than 30 days), with an aggregate principal balance of \$88.7m, being 49.7% by value and 27.8% by number of the total loan portfolio;
  - 99.5. of the past due loans, Provident had assessed \$54.89m as not impaired, leaving \$33.8m assessed as impaired or potentially impaired;
  - 99.6. Provident had 25 past due loans (greater than 90 days), with an aggregate principal balance of \$57.2m, being 32.1% by value and 15.8% by number of its total loan portfolio; and
  - 99.7. Provident was taking legal proceedings in respect of 6 loans which had an aggregate principal balance of \$15,019,535.

**PARTICULARS**

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

- 100. By on or about 28 September 2010, AETL knew, or ought to have known, that in the financial year ended 30 June 2010, Provident received \$20,419,532 from issuing debentures and repaid \$19,984,888 to investors.

**PARTICULARS**

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

**J. THE EXERCISE OF REASONABLE DILIGENCE PURSUANT TO S 283DA(a) & (b)(ii)**

- 101. By reason of the matters alleged in paragraphs 11 to 38 and 90 to 100 above, AETL should have formed the opinion, on or around 30 October 2010, that it needed to conduct its own review as to whether:

- 101.1. the assets of Provident would be sufficient to repay the debentures when they became due; and
- 101.2. Provident had committed any breach of the provisions of the Trust Deed or Chapter 2L of the Corporations Act;
- by requiring Provident (pursuant to s 283BB(c) and clauses 6.0.2 and 6.0.3 of the Trust Deed) to provide to AETL, within a reasonable time:
- 101.3. access to or copies of the complete loan transaction files, including a complete statement of account, for all loans in default and for all loans with LVR's in excess of the ratios required by the LVR Criteria Requirement; and
- 101.4. access to or copies of the complete loan transaction files, including a complete statement of account, for the ten largest borrowers.
102. Had AETL, on or around 30 October 2010, formed the opinion referred to in paragraph 101, and required Provident to provide the information referred to in that paragraph within a reasonable time, it would have obtained by in or around November 2010:
- 102.1. the complete loan transaction file, including a complete statement of account, for the Burleigh Views Loan, being the largest loan made by Provident; and
- 102.2. the complete loan transaction files, including a complete statement of account, for all loans in default and for all loans with LVR's in excess of the ratios required by the LVR Criteria Requirement.
103. In or about the first week of December 2010, AETL received a report from Provident showing the loans made by Provident which were in excess of 90 days past due as at October 2010 (**October 10 Arrears Report**).
104. By reason of the matters alleged in paragraph 102 above, AETL should have formed the opinion, in or around November 2010 or alternatively, by reason of the matters alleged in paragraphs 102 and 103, early December 2010, that it could only be satisfied that the assets of Provident would be sufficient to repay the debentures when they became due by making appropriate provisions for credit losses and impairments, including the provisions described in sections J.1 to J.16 below, in order to ascertain the value of the loans

#### **J.1 Burleigh Views Loan**

105. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraph 102, ought to have known, in relation to the Burleigh Views loan:
- 105.1. each of the matters set out in paragraph 43 above;
- 105.2. that on 13 August 2009, Provident was told that the development approval for the site had lapsed;
- 105.3. that as at 30 June 2010, the loan had a carrying value of \$17,518,058;
- 105.4. that despite being mortgagee in possession since September 2008, Provident had not been taking steps to realise its security;
- 105.5. that Provident had not been maintaining current valuations for the security.

### PARTICULARS

- a) *Transcripts of examination of Mr O'Sullivan in NSD808 of 2012 on 19 April 2013 (pp 74, 77, 132, 159), 24 June 2013 (pp. 23-24, 27).*
- b) *Provident Debenture Prospectus 11 at p. 11.*
- c) *Provident Capital Prospectus 2011 at p. 10.*

106. Having obtained the further information alleged in the preceding paragraph, AETL, by around November or December 2010, would, or should, have formed the opinion that provisions for credit losses of at least \$11.9m (including 5% realisation costs) should be made for the Burleigh Views loan.

### J.2 Chrysalis loan

107. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 102 and 103, ought to have known, in relation to the Chrysalis loan:

107.1. each of the matters set out in paragraph 53 above;

107.2. that on 11 March 2010, Provident received a valuation for the land that gave a land value of \$5.9 million;

107.3. that as at 31 October 2010, the Chrysalis loan had a carrying value of \$7.022m.

107.4. that Provident had not taken steps to realise its security.

### PARTICULARS

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

108. By reason of the matters alleged in the preceding paragraph, AETL, by around November or December 2010 would, or should, have formed the opinion that provisions for credit losses of at least \$1.4m (including 5% realisation costs) should be made for this loan.

### J.3 FTI Portfolio

109. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 102 and 103, ought to have known:

109.1. each of the matters pleaded at paragraphs 47, 53, 55, 61, 63, 65, 71 and 73 above in relation to the Unique Castle loan, Chrysalis loan, Kooindah loan, Morrell loan, Naumovska loan, Hanna loan, DS loan and Good Life loan;

109.2. that Provident had been, since at least 2009, mortgagee in possession of loans with a value of about \$44.9m;

109.3. that Provident had not been obtaining regular valuations of its securities for loans in default; and

109.4. that Provident had not been taking steps to realise its securities.

#### **PARTICULARS**

- a) *Advisory, Information Session for Debentureholders (13 August 2012) at p. 19.*
- b) *PPB Advisory, Notice to Debentureholders (3 December 2012).*

#### **J.4 Unique Castle loan**

110. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 102 and 103 ought to have known, in relation to the Unique Castle loan:

- 110.1. each of the matters set out in paragraph 47 above;
- 110.2. that the loan had a principal balance as at October 2010 of about \$3.969m, net arrears of about \$960,877 and had been in arrears for about 1,345 days;
- 110.3. that the loan to valuation ratio was reported to be 104%, implying a valuation of the security property of \$4.75m; and
- 110.4. that the most recent valuation of the security property at 161 Castle Hill Road, Castle Hill was \$4.75m and was dated 30 June 2010.

111. By reason of the matters alleged in the preceding paragraph, AETL, by around November or December 2010 would, or should, have formed the opinion that provisions for credit losses of at least \$417,880 (including 5% realisation costs) should be made for this loan.

#### **J.5 Kooindah loan**

112. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 102 and 103 ought to have known, in relation to the Kooindah loan:

- 112.1. each of the matters set out in paragraph 55 above;
- 112.2. that the loan had a principal balance as at October 2010 of about \$472,665, net arrears of about \$210,538 and had been in arrears for about 1,053 days;
- 112.3. that the loan to valuation ratio was reported to be 67%, implying a valuation of the security property of \$1.025m; and
- 112.4. that the most recent valuation of the security property was \$900,000 and was dated 27 March 2007.

#### **J.6 Morrell loan**

113. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 102 and 103, ought to have known, in relation to the Morrell loan:

- 113.1. each of the matters set out in paragraph 61 above;
- 113.2. that the loan had a principal balance as at October 2010 of about \$665,953, net arrears of about \$186,468 and had been in arrears for about 1,989 days;
- 113.3. that the loan to valuation ratio was reported to be 53%, implying a valuation of the security property of \$1.60m; and



113.4. that the most recent valuation of the security property was \$870,000 and was dated 30 March 2010.

114. By reason of the matters alleged in the preceding paragraph, AETL, by around November or December 2010 would, or should, have formed the opinion that provisions for credit losses of at least \$25,921 (including 5% realisation costs) should be made for this loan.

#### **J.7 Naumovska loan**

115. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 102 and 103 ought to have known, in relation to the Naumovska loan:

115.1. each of the matters set out in paragraph 63 above;

115.2. that the loan had a principal balance as at October 2010 of about \$630,388, net arrears of about \$73,445 and had been in arrears for about 840 days;

115.3. that the loan to valuation ratio was reported to be 141%, implying a valuation of the security property of \$500,023; and

115.4. that the most recent valuation of the security property was \$480,000 and was dated 3 February 2010.

116. By reason of the matters alleged in the preceding paragraph, AETL, by around November or December 2010 would, or should, have formed the opinion that in addition to a provision of \$75,000 already recognised by Provident in respect of the Naumovska loan, provisions for credit losses of at least \$247,833 (including 5% realisation costs) should be made for this loan.

#### **J.8 Hanna loan**

117. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 102 and 103, ought to have known, in relation to the Hanna loan:

117.1. each of the matters set out in paragraph 65 above;

117.2. that the loan had a principal balance as at October 2010 of about \$5.063m, net arrears of about \$831,379 and had been in arrears for about 962 days;

117.3. that the loan to valuation ratio was reported to be 98%, implying a valuation of the security property of \$6.0m; and

117.4. that the most recent valuation of the security property was \$6.0m and was dated 18 September 2009.

118. By reason of the matters alleged in the preceding paragraph, AETL, by around November or December 2010 would, or should, have formed the opinion that in addition to a provision of \$50,000 already recognised by Provident in respect of the Hanna loan, provisions for credit losses of at least \$194,910 (including 5% realisation costs) should be made for this loan.

#### **J.9 DS loan**

119. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 102 and 103 ought to have known, in relation to the DS loan:

119.1. each of the matters set out in paragraph 71 above;

- 119.2. that Provident permitted or offered to permit a rollover of the loan by Deed of Loan and Guarantee dated 30 January 2009, when at the time of that rollover:
- 119.2.1. the borrower had been in default since at least 4 November 2007;
  - 119.2.2. the facility limit under the rolled-over facility was in excess of LVR Criteria and so in breach of the LVR Criteria Requirement; and
  - 119.2.3. Provident had failed to obtain a new application form from the borrower;
- 119.3. that the loan had a principal balance as at October 2010 of about \$345,660, net arrears of about \$21,323 and had been in arrears for about 205 days;
- 119.4. that the loan to valuation ratio was reported to be 104%, implying a valuation of the security property of \$352,022; and
- 119.5. that the best evidence of the value of the security property was the mid-point of a market appraisal of \$160,000 made to Provident on 25 October 2010 [PRV.501.033.0595].

120. By reason of the matters alleged in the preceding paragraph, AETL, by around November or December 2010 would, or should, have formed the opinion that in addition to a provision of \$25,000 already recognised by Provident in respect of the DS loan, provisions for credit losses of at least \$214,983 (including 5% realisation costs) should be made for this loan.

#### **J.10 Good Life loan**

121. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 102 and 103 ought to have known, in relation to the loan to the Good Life loan:
- 121.1. each of the matters set out in paragraph 73 above;
  - 121.2. that the loan had a principal balance as at October 2010 of about \$1.123m, net arrears of about \$216,925 and had been in arrears for about 1,212 days; and
  - 121.3. that the loan to valuation ratio was reported to be 74%, implying a valuation of the security property of \$1.80m.

#### **J.11 Sinclair loans**

122. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 102 and 103 ought to have known, in relation to the loans to Angus William Sinclair (**Sinclair loans**):
- 122.1. that Provident had not obtained from its solicitors certification to the effect that Provident would receive a good title as first registered mortgagee of the mortgaged property and had thereby breached the Solicitors' Certificate on Title Requirement;
  - 122.2. that the loans had an aggregate principal balance as at October 2010 of about \$1.566m, aggregate net arrears of about \$468,252 and had been in arrears for about 835 and 706 days; and
  - 122.3. that the loan to valuation ratios were reported to be 121% and 132%, implying an aggregate valuation of the security properties of \$1.60m.

123. By reason of the matters alleged in the preceding paragraph, AETL, by around November or December 2010 would, or should, have formed the opinion that in addition to the total provisions of \$394,000 already recognised by Provident in respect of the Sinclair loans, provisions for credit losses of at least \$513,738 (including 5% realisation costs) should be made for these loans.

#### **J.12 Jarule loan**

124. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 102 and 103 ought to have known, in relation to the loan to Jarule Pty Ltd (**Jarule loan**):

124.1. that the loan had a principal balance as at October 2010 of about \$2.733m, net arrears of about \$503,543 and had been in arrears for about 365 days; and

124.2. that the loan to valuation ratio was reported to be 120%, implying a valuation of the security property of \$2.70m.

125. By reason of the matters alleged in the preceding paragraph, AETL, by around November or December 2010 would, or should, have formed the opinion that provisions for credit losses of at least \$671,260 (including 5% realisation costs) should be made for this loan.

#### **J.13 Owston loan**

126. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 102 and 103 ought to have known, in relation to the loan to Owston Nominees No 2 Pty Ltd as trustee for the Warren Anderson Trust (**Owston loan**):

126.1. that the loan had a principal balance as at October 2010 of about \$5.186m, net arrears of about \$1.215m and had been in arrears for about 489 days; and

126.2. that the loan to valuation ratio was reported to be 112%, implying a valuation of the security property of \$5.70m.

127. By reason of the matters alleged in the preceding paragraph, AETL, by around November or December 2010 would, or should, have formed the opinion that provisions for credit losses of at least \$986,133 (including 5% realisation costs) should be made for this loan.

#### **J.14 Eastridge Investments loan**

128. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 102 and 103 ought to have known, in relation to the loan to Eastridge Investments Pty Ltd (**Eastridge Investments loan**):

128.1. that Provident had not obtained from its solicitors certification to the effect that Provident would receive a good title as first registered mortgagee of the mortgaged property and had thereby breached the Solicitors' Certificate on Title Requirement;

128.2. that the loan had a principal balance as at October 2010 of about \$2.513m, net arrears of about \$618,676 and had been in arrears for about 516 days;

128.3. that the loan to valuation ratio was reported to be 115%, implying a valuation of the security property of \$2.719m; and

128.4. a valuation dated 27 August 2008 provided a value of the security property of \$2.75m.

129. By reason of the matters alleged in the preceding paragraph, AETL, by around November or December 2010 would, or should, have formed the opinion that in addition to a provision of \$100,000 already recognised by Provident in respect of the Eastridge Investments loan, provisions for credit losses of at least \$519,591 (including 5% realisation costs) should be made for this loan.

#### **J.15 Bortolin-Papa loan**

130. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 102 and 103 ought to have known, in relation to the loan to Gina Giovanna Bortolin-Papa (**Bortolin-Papa loan**):

130.1. that Provident had not obtained from its solicitors certification to the effect that Provident would receive a good title as first registered mortgagee of the mortgaged property and had thereby breached the Solicitors' Certificate on Title Requirement;

130.2. that the loan had a principal balance as at October 2010 of about \$882,531, net arrears of about \$209,474 and had been in arrears for about 742 days; and

130.3. that the loan to valuation ratio was reported to be 99%, implying a valuation of the security property of \$1.10m;

130.4. that the most recent valuation of the security property was \$950,000 and was dated 20 January 2010.

131. By reason of the matters alleged in the preceding paragraph, AETL, by around November or December 2010 would, or should, have formed the opinion that in addition to a provision of \$50,000 already recognised by Provident in respect of the Bortolin-Papa loan, provisions for credit losses of at least \$189,505 (including 5% realisation costs) should be made for this loan.

#### **J.16 Tahatos loan**

132. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 102 and 103 ought to have known, in relation to the loan to George Tahatos Holdings Pty Ltd (**Tahatos loan**):

132.1. that the loan had a principal balance as at October 2010 of about \$4.486m, net arrears of about \$687,624 and had been in arrears for about 310 days; and

132.2. that the loan to valuation ratio was reported to be 96%, implying a valuation of the security property of \$5.410m.

133. By reason of the matters alleged in the preceding paragraph, AETL, by November or December 2010 would, or should, have formed the opinion that provisions for credit losses of at least \$34,625 (including 5% realisation costs) should be made for this loan.

#### **J.17 Systems and Processes**

134. By reason of the matters alleged in paragraphs 102 and Sections J.1 to J.16 above, AETL should have formed the opinion, in or around November or December 2010 that Provident, in breach of the Business Conduct Requirement:

- 134.1. did not have an adequate system or management control process to ensure that quantity surveyor reports were obtained for each construction loan and each progress claim during the term of the construction loan;
- 134.2. did not have an adequate system or management control process to ensure that progressive loan drawdowns would only be effected against evidence of work completed;
- 134.3. did not have an adequate system or management control process to ensure the monitoring of construction loans to ensure that adequate funds were available to meet the cost of the completion of the construction;
- 134.4. did not have an adequate system or management control process to identify and monitor borrowers in default of their loan agreements;
- 134.5. did not have an adequate system or management control process to ensure that recovery/legal action would be commenced once a loan account remained in arrears for one month;
- 134.6. did not have an adequate system or management control process to ensure that appropriate provisions for bad debts were made on a monthly basis;
- 134.7. did not have an adequate reporting system to facilitate compliance monitoring by internal management, the board of Provident and AETL;
- 134.8. did not implement or did not follow a system or procedure of reviewing valuations:
  - 134.8.1. to ensure that the assumptions therein were appropriately made and/or accurate;
  - 134.8.2. to determine the currency of the valuations;
  - 134.8.3. to determination whether the valuations were carried out on a consistent basis;
  - 134.8.4. to determine whether the valuation methodology was appropriate;
  - 134.8.5. to determine whether the valuer had any conflict of interest in providing valuations to Provident (for instance by reason of having valued the property for the borrower);
- 134.9. did not have an adequate system or procedure for determining the holding costs, realisation costs and other costs associated with holding or selling security property with regard to nonperforming loans, so as to ensure appropriate provision for non-performing loans;
- 134.10. did not have an adequate system or management control process to ensure that sufficient supporting documents confirming income levels, expenditure and financial position had been obtained from the borrower;
- 134.11. did not have an adequate system or management control process to ensure that mortgage property insurance for all security properties had been obtained and that such insurance has been renewed annually; and
- 134.12. did not have an adequate system or management control process to ensure that the Solicitor's Certificate on Title Requirement had been met.

## K. OBLIGATIONS AND CONTRAVENTIONS – DECEMBER 2010

### K.1 Proper conclusions and response

135. Having obtained the information and having formed the opinions alleged in the paragraphs in Section J above, AETL by November or December 2010, would, or should, have reached the following conclusions:
- 135.1. that Provident had breached the Trust Deed, specifically:
- 135.1.1. the LVR Criteria Requirement;
  - 135.1.2. the Business Conduct Requirement;
  - 135.1.3. the Solicitor's Certificate on Title Requirement,
- as alleged in the paragraphs in Sections J.1 to J.17,
- 135.2. that Provident's practice of not realising securities meant that the accounts did not give a true picture of the value of the assets held as loan receivables;
- 135.3. that provisions for credit losses of at least \$17.346m in the FTI Portfolio should have been made by Provident;
- 135.4. that the provisions for credit losses in the FTI Portfolio that should have been made materially prejudiced the interests of existing and prospective debenture holders;
- 135.5. that the property available to Provident in the FTI Portfolio was insufficient to repay the debentures when they became due; and
- 135.6. that the Provident Capital Quarterly Report dated 30 October 2010 had not complied with s 283BF(4) of the Corporations Act.

### PARTICULARS

*The provisions for credit losses alleged in sub-paragraph 135.3 are the sum of the provisions for credit losses alleged in paragraphs 106, 108, 111, 114, 116, 118, 120, 123, 125, 127, 129, 131 and 133.*

136. Further, or alternatively, had AETL required Provident to provide it on a regular basis with sufficient information to enable AETL to satisfy itself that the Use of the Debenture Funds Requirement had been met, as it ought to have done, and/or by reason of the matters pleaded in paragraph 29, by November or December 2010 AETL would, or should, have reached the conclusion that Provident did not have adequate financial controls in place to ensure that the Use of Debenture Funds Requirement had been met, and consequently that Provident was potentially in breach of the Trust Deed.
137. Had AETL reached the conclusions alleged in the preceding two paragraphs above, as it ought to have done by November or December 2010, AETL would, or should, have immediately made an application to the court for orders that Provident be restricted from advertising for additional deposits or loans and that Provident be restricted from further borrowing from members of the public.
138. Had AETL applied for the orders alleged in the preceding paragraph, the court would have made orders in those terms.

## PARTICULARS

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

139. Further, or alternatively, had AETL reached the conclusions alleged in paragraphs 135 and 136 above, as it ought to have done by November or December 2010, AETL would, or should, have immediately notified ASIC of those conclusions.
140. Had AETL notified ASIC as alleged in the preceding paragraph, ASIC would have placed a stop order on Debenture Prospectus 2011 and prevented further borrowing by Provident by way of debentures.
141. Further, or alternatively, had AETL reached the conclusions alleged in paragraphs 135 and 136 above, as it ought to have done by November or December 2010, AETL would, or should have, immediately, served a notice of an "event of default" on Provident requiring Provident to remedy the various breaches of the Trust Deed within 21 days and otherwise done everything in its power to ensure that Provident remedied the breaches of the Trust Deed and s 283BF(4), failing which it would have:
- 141.1.1. declared that all money owing (actually or contingently) on any current debentures was immediately due and payable; and/or
  - 141.1.2. taken action to enforce the Charge by the appointment of a receiver; and/or
  - 141.1.3. applied to wind up Provident.

### **K.2 Contraventions and causation**

142. In contravention of its duties under s 283DA(a) and (b)(ii) of the Corporations Act, AETL:
- 142.1. did not obtain the information and form the opinions alleged in Section J above; and
  - 142.2. consequently did not reach the conclusions alleged in paragraphs 135 and 136 above.
143. Further, in contravention of its duties under s 283DA(a) and/or s 283DA(b)(ii) and/or s 283DA(c)(ii) and/or in equity, AETL did not take the steps alleged in paragraphs 137, 139 and 141 above.
144. Further, in contravention of its duties under s 283DA(e)(i) AETL did not notify to ASIC as soon as practicable that Provident had not properly complied with s 283BF.
145. If AETL had not contravened ss 283DA(a), (b)(ii), (c)(ii) or (e)(i) or any one of those provisions and/or its fiduciary duties, then:
- 145.1. debentures would not have been issued on or after 22 December 2010;
  - 145.2. Provident would have remedied all breaches of the Trust Deed;
  - 145.3. alternatively, by in or around December 2010 receivers would have been appointed to the property of Provident secured by the Charge;
  - 145.4. the plaintiff and the group members who were first issued debentures after 22 December 2010 would not have suffered any loss or damage; and

145.5. those group members who already held debentures as at 22 December 2010 would have suffered less loss or damage.

146. By reason of AETL's contraventions of s 283DA of the Act the plaintiff and each group member has suffered loss and damage, or alternatively, by reason of AETL's breach of its fiduciary duties, the plaintiff and each group member has suffered loss.

#### **PARTICULARS**

- a) *Provident was placed into receivership on 29 June 2012 by order of the Federal Court of Australia.*
- b) *On 18 September 2012, Provident entered voluntary administration.*
- c) *The security available for repayment of the debenture holders as at 29 June 2012 and 18 September 2012 was at that time inadequate and the suffering of loss by the debenture holders became ascertainable and inevitable.*
- d) *If AETL took the steps alleged in paragraphs 137, 139 and 141, then the property available to repay debenture-holders would have been realised at about that time and, so far as the plaintiff is able to say before the receipt of expert reports, debenture holders would have received a higher return than that identified in paragraph (e) below. Further particulars of the return that debenture holders would have received will be provided after the receipt of expert reports and prior to trial.*
- e) *In fact, Provident continued to trade and the value of the property available to repay debenture-holders deteriorated, with the result that*
  - i. *on 30 September 2013, the receivers and managers of Provident estimated that debenture holders would receive a return of between 17 and 19 cents in the dollar and*
  - ii. *on 31 December 2014, the receivers and managers of Provident estimated that debenture holders would receive a return of 12 cents in the dollar on their principal.*
- f) *Group members who held debentures as at 22 December 2010 suffered loss of at least the difference between the "but for" return in paragraph (d) of these particulars and the actual return in paragraph (e) of these particulars.*
- d) *Group members who were issued debentures after 22 December 2010 suffered loss of at least the issue price for the debentures less the actual return in paragraph (e) of these particulars.*
- f) *Further particulars of loss and damage will be provided prior to trial.*

#### **L. RELIEF CLAIMED**

147. In the premises, the plaintiff and each group member are entitled to the relief claimed on page 2 of this document.



**SIGNATURE OF LEGAL REPRESENTATIVE**

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

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

Signature



Capacity

Tim Finney, solicitor on record

Date of signature

24 June 2016

## NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this statement of claim:

- You will be in default in these proceedings.
- The court may enter judgment against you without any further notice to you.

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

## HOW TO RESPOND

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

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

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au).
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 **If you intend to dispute the claim or part of the claim**, by filing a defence and/or making a cross-claim.
- 2 **If money is claimed, and you believe you owe the money claimed**, by:
  - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
  - Filing an acknowledgement of the claim.
  - Applying to the court for further time to pay the claim.
- 3 **If money is claimed, and you believe you owe part of the money claimed**, by:
  - Paying the plaintiff that part of the money that is claimed.
  - Filing a defence in relation to the part that you do not believe is owed.

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

**REGISTRY ADDRESS**

Street address	Law Courts Building, 184 Phillip St, Sydney NSW 2000
Postal address	GPO Box 3, Sydney NSW 2001
Telephone	1300 679 272

**FURTHER DETAILS ABOUT PLAINTIFF****Plaintiff**

Name Innes Creighton  
Address 30 Lakeland Drive  
Doreen, Victoria, 3754

**Legal representative for plaintiff**

Name Tim Finney  
Practising certificate number P0030716 (issued by the Legal Services Board of Victoria)  
Firm Slater and Gordon  
Contact solicitor Tim Finney  
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**DETAILS ABOUT DEFENDANT****Defendant**

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