

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

FILED

21 DEC 2016

**COURT DETAILS**

Court	Supreme Court of New South Wales
Division	Equity
Registry	Sydney
Case number	2015 / 171592 -012

**TITLE OF PROCEEDINGS**

First Plaintiffs	<b>John Smith and Rosemary Smith</b>
Defendant	<b>Australian Executor Trustees Limited</b>

**TITLE OF THIS CROSS-CLAIM**

Cross-claimant	<b>Australian Executor Trustees Limited</b>
Cross-defendants	<b>Philip Bruce Meade and the others listed in Schedule 1</b>

**FILING DETAILS**

Filed for	<b>Australia Executor Trustees Limited, Cross-Claimant</b>
Filed in relation to	Cross-claim
Legal representative	Brad Woodhouse, Corrs Chambers Westgarth
Legal representative reference	9116109
Contact name and telephone	Brad Woodhouse, (02) 9210 6859
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**RELIEF CLAIMED**

- 1 Damages.
- 2 Damages pursuant to:
  - (a) s. 82 of the former *Trade Practices Act 1974*;
  - (b) s. 1041I of the *Corporations Act 2001*;
  - (c) s. 12GM of the *Australian Securities and Investments Commission Act 2001*;
  - (d) former s. 68 of the *Fair Trading Act 1987 (NSW)*; or
  - (e) the corresponding provisions of the fair trading legislation of the other States and Territories.
- 3 Contribution pursuant to s. 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)* or s. 23B of the *Wrongs Act 1958 (Vic.)* or the corresponding provisions of the contribution legislation of the other States and Territories, or in equity.
- 4 Interest.
- 5 Costs.

**PLEADINGS AND PARTICULARS**

The Cross-claimant is the Defendant to the Further Amended Statement of Claim filed by the Plaintiffs on 3 June 2016 (**Statement of Claim**), which is served with this Statement of Cross-claim. If, which is denied, the Cross-claimant is liable to the Plaintiffs or Group Members in the manner pleaded in the Statement of Claim, then, solely for the purpose of this Cross-claim, the Cross-claimant pleads as follows:

**Parties**

- 1 The cross-claimant, Australian Executor Trustees Limited (**AET**), is and was at all material times:
  - (a) a corporation duly incorporated in accordance with the laws of Australia; and
  - (b) entitled to sue and be sued in its corporate name and style.

- 2 From 24 November 2005 (alternatively, 7 December 2004) onwards, AET was the trustee for holders of debentures issued by Provident Capital Limited (**Provident**).
- 3 HLB Mann Judd (NSW Partnership) (**HLB**) was, at all material times, a partnership who carried on business as a professional services firm that provided, amongst other things, audit services.
- 4 HLB were the auditors of Provident in the period from 26 July 2010 to at least 29 June 2012.
- 5 The cross-defendants were partners of HLB in the period from 26 July 2010 to 29 June 2012.
- 6 HLB audited the financial report of Provident for each of the financial years ended 30 June 2010 (**FY10**) and 30 June 2011 (**FY11**).
- 7 HLB reviewed the financial report of Provident for each of the half-years ended 31 December 2010 (**1H11**) and 31 December 2011 (**1H12**).
- 8 Throughout the period from 26 July 2010 to 29 June 2012:
- (a) Provident had on issue debentures that were ED securities pursuant to s. 111AI of the Corporations Act.
  - (b) Provident was a disclosing entity pursuant to s. 111AC of the Corporations Act.
  - (c) Provident was required by s. 292 of the Corporations Act to prepare a financial report for each financial year.
  - (d) Provident was required by s. 301 of the Corporations Act to have its financial report for each financial year audited and to obtain an auditor's report.
  - (e) HLB, as the auditor who audited Provident's financial report for each of FY10 and FY11, was required by s. 308(1) of the Corporations Act to report to Provident's members on whether HLB was of the opinion that Provident's financial report was in accordance with the Corporations Act, including whether it complied with the accounting standards and whether it gave a true and fair view of Provident's financial position and performance.

- (f) Pursuant to s. 313(1) of the Corporations Act, HLB was required to provide a copy of its audit report for each of FY10 and FY11 to the trustee for the holders of debentures issued by Provident.
- (g) Pursuant to s. 318(1) of the Corporations Act, Provident was required to provide a copy of HLB's audit report for each of FY10 and FY11 to the trustee for the holders of debentures issued by Provident.
- (h) Pursuant to s. 318(2) of the Corporations Act, the holder of a debenture issued by Provident was entitled to require Provident to provide the holder with a copy of HLB's audit report for the last financial year.
- (i) Provident was required by s. 302(a) of the Corporations Act to prepare a financial report for each half-year.
- (j) Provident was required by s. 302(b) of the Corporations Act to have its financial report for each half-year either audited or reviewed and (in either case) to obtain an auditor's report.
- (k) HLB, as the auditor who reviewed Provident's financial report for each of 1H11 and 1H12, was required by s. 309(4) of the Corporations Act to report to Provident's members on whether HLB became aware of any matter in the course of the review that made HLB believe that the financial report did not comply with the accounting standards or did not give a true and fair view of Provident's financial position and performance.
- (l) Pursuant to s. 313(1) of the Corporations Act, HLB was required to provide a copy of its review report for each of 1H11 and 1H12 to the trustee for the holders of debentures issued by Provident.
- (m) Pursuant to s. 318(4) of the Corporations Act, Provident was required to provide a copy of HLB's review report for each of 1H11 and 1H12 to the trustee for the holders of debentures issued by Provident.
- (n) Pursuant to s. 313(2) of the Corporations Act, throughout the period from 26 July 2010 to 29 June 2012, HLB was required to give Provident a written report about any matter that:
  - (A) HLB became aware of in conducting an audit or review of Provident's financial report for a financial year or half-year;

- (B) in HLB's opinion was or was likely to be prejudicial to the interests of holders of debentures issued by Provident; and
  - (C) in HLB's opinion was relevant to the exercise of the powers of the trustee for holders of debentures issued by Provident, or the performance of the trustee's duties, under the Corporations Act or under the debenture trust deed.
- (o) Pursuant to s. 313(2) of the Corporations Act, HLB was required to give the trustee for holders of debentures issued by Provident a copy of any report referred to in sub-paragraph (n) above.

### **FY10 audit**

#### Damages in negligence at common law

- 9 On 22 September 2010, Provident issued its financial report for FY10.
- 10 Provident's financial report for FY10 stated:
- (a) that Provident's current assets, as at 30 June 2010, included loans and advances with a recoverable value of \$165,354,556;
  - (b) that Provident's non-current assets, as at 30 June 2010, included loans and advances with a recoverable value of \$12,951,690;
  - (c) that the recoverable value of loans and advances took into account an impairment provision of \$1,466,932;
  - (d) that, as at 30 June 2010, the total outstanding balance of past due loans (**Past Due Loans**) was \$88,710,332;
  - (e) that of the Past Due Loans, \$54,890,105 had been assessed as not impaired;
  - (f) that Provident's total assets as at 30 June 2010 were \$222,011,825;
  - (g) that, as at 30 June 2010, Provident had on issue debentures with a principal of \$116,977,143;
  - (h) that Provident's net assets as at 30 June 2010 were \$14,020,695;
  - (i) that Provident had incurred \$2,612,904 in expenses relating to the impairment of loans and receivables (comprised of \$1,962,904 in recognised losses and \$650,000 in individually assessed impairment).

- 11 After auditing Provident's financial report for FY10, HLB issued an audit report in which HLB expressed the opinion that Provident's financial report for FY10:
- (a) gave a true and fair view of the financial position of Provident as at 30 June 2010 and of its performance for the year ended on that date; and
  - (b) was presented in accordance with, amongst other things, the *Corporations Act 2001* and Australian Accounting Standards.
- 12 It was a term of the contract (between Provident and HLB) under which HLB was retained to audit Provident's financial report for FY10 that HLB would exercise reasonable care and skill in auditing the financial report and issuing its audit report.
- Particulars**
- (1) The contract is partly in writing and partly implied.
  - (2) To the extent the contract is in writing, it is dated 4 August 2010 [HLB.001.001.5188].
  - (3) The pleaded term is implied.
- 13 At the time HLB audited Provident's financial report for FY10 and issued HLB's audit report, HLB knew or ought reasonably to have known:
- (a) that Provident had on issue debentures the subject of Chapter 2L of the *Corporations Act*;
  - (b) that AET was the trustee for the holders of those debentures and owed the duties set out in s. 283DA of the *Corporations Act*.
- 14 At the time HLB audited Provident's financial report for FY10 and issued HLB's audit report, it was reasonably foreseeable by HLB:
- (a) that AET would rely upon HLB having conducted its audit, and prepared its audit report, with reasonable skill and care;
  - (b) that AET would consider, and rely upon, any audit report provided by HLB in respect of Provident's financial report for FY10;
  - (c) that AET would rely upon HLB's audit report in discharging the trustee's duties under section 283DA of the *Corporations Act*;
  - (d) that a failure by HLB properly to conduct its audit, or to prepare its audit report, might result in AET being uninformed or unaware of

matters that, if known, would affect its assessment of the matters it was required to ascertain and do in accordance with ss. 283DA(a), 283DA(b) and 283DA(c) of the Corporations Act;

- (e) that a failure by HLB properly to ensure that Provident's financial report for FY10 presented a true and fair view of Provident's financial position and performance, might result in AET being uninformed or unaware of matters that, if known, would affect its assessment of the matters it was required to ascertain and do in accordance with ss. 283DA(a), 283DA(b) and 283DA(c) of the Corporations Act;
- (f) that the failures pleaded above might cause AET to fail to discharge its duties under section 283DA, and result in its being liable to debenture holders under section 283F of the Corporations Act; and
- (g) that, were that to occur, AET would suffer harm in the form of economic loss.

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

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

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

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

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

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

- 18 In breach of the duty pleaded in the previous paragraph, HLB failed to take reasonable care in the conduct of its audit of Provident's financial report for FY10 and in the preparation of HLB's audit report.

### Particulars

The best particulars that AET can currently provide are as follows:

- (1) A competent auditor exercising reasonable care would have reviewed Provident's files for a sample of loans (sufficiently large to provide the auditor with comfort that the results were representative) in order to check:
  - (A) that a complete file was kept in respect of the loan;
  - (B) that the loan was being serviced in accordance with its terms or whether it was in arrears;
  - (C) that the amount advanced to the borrower did not exceed the agreed loan amount;
  - (D) that the loan satisfied the LVR Criteria Requirement pleaded at paragraph 8(d)(i) of the Statement of Claim;
  - (E) that Provident held a current valuation for the property securing the loan;
  - (F) whether any matter on the file indicated that there was reasonable doubt as to whether Provident would recover all principal and interest in accordance with the terms of the loan;
  - (G) whether any provision or impairment was warranted in respect of the loan;
  - (H) that any refinance of the loan was not disguising the fact that the loan was, in substance, a Past Due Loan.
- (2) A competent auditor exercising reasonable care would have reviewed Provident's files for a sample of Past Due Loans (sufficiently large to provide the auditor with comfort that the results were representative) in order to check the matters in (1)(A) and (1)(C)-(H) above.



- (3) A competent auditor exercising reasonable care would have checked that Provident had a written policy for assessing whether it was necessary to make a provision or impairment in respect of a loan written by Provident, and would have checked that that policy provided objective criteria by which such provision or impairment was to be assessed, such that provisions and impairments were not apt to be understated by virtue of management bias.
- (4) A competent auditor exercising reasonable care would have reviewed Provident's loan arrears reports in order to ascertain the identity, frequency and amounts of loan arrears.
- (5) According to the report of Andrew Malarkey dated 20 October 2016 and served by the Plaintiffs in proceeding 2015/306222 (**Malarkey Report**):
- (A) As at 9 March 2009, Provident only held assets sufficient to provide a return to debenture holders of between 44.9 and 48.7 cents in the dollar (allowing for receivership costs) or between 70.8 and 73.2 cents in the dollar (assuming no receivership costs) ([571]).
- (B) As at 30 January 2011, Provident only held assets sufficient to provide a return to debenture holders of between 33.1 and 35.7 cents in the dollar (allowing for receivership costs) or between 61.5 and 63.4 cents in the dollar (assuming no receivership costs) ([571]).
- (C) A qualified accountant would have formed the view that, in order to ascertain whether the property of Provident was sufficient to repay debenture holders, it would have been necessary to undertake a file review of all loans in arrears greater than 90 days and any other large loans ([51]).
- (D) A qualified accountant would have concluded that additional provisions for credit losses and impairments recorded by Provident were required, in the amount of \$27.3 million to \$34.4 million in around November and December 2010 ([55]).

- (E) A qualified accountant would have concluded that it was highly unlikely there would be sufficient property of Provident available to meet the claims of debenture holders in November and December 2010 ([57]).
  - (F) A qualified accountant would have formed the view, in November or December 2010, that, in the absence of a credible proposal to recapitalise PCL in the short term, serious consideration should be given to what steps could be taken to require that PCL be restricted from advertising for additional deposits or loans and that PCL be restricted from further borrowing from members of the public and / or declare that all money owing (actually or contingently) on any current debentures be immediately due and payable ([64]).
  - (G) A qualified accountant, would have concluded in about November or December 2010, that the trustee for debenture holders should consider and, if deemed necessary, seek legal advice as to what further actions should be implemented, including: appointing a receiver under the charge contained in the debenture trust deed; and, applying to wind up Provident ([65]).
- (6) If the conclusions in the Malarkey Report are accepted, then, having regard to:
- (A) what was stated in Provident's financial report for FY10, as pleaded at paragraph 10 above;
  - (B) the matters in (5)(A)-(G) above;
  - (C) the magnitude of the shortfalls in (5)(A) and (5)(B) above;
  - (D) in the case of the matters in (5)(D) to (5)(G) above – the proximity in time between September 2010 (when the FY10 audit report was issued) and November or December 2010;
  - (E) in the case of the matters in (5)(C) to (5)(G) above – the similarity between (1) to (4) above and the approach of the

putative qualified accountant described in the Malarkey Report; and

- (F) the opinion actually expressed by HLB in its audit report in respect of Provident's financial report for FY10, as pleaded at paragraph 11 above,

it may be inferred that HLB did not take the steps identified at (1) to (4) above.

- (7) A competent auditor exercising reasonable care would have considered whether a collective impairment of Provident's financial assets (such as its loans and advances) was required, and assessed that a collective provision of at least \$5,800,000 was necessary as at 30 June 2010.
- (8) A competent auditor exercising reasonable care would have considered whether loans in respect of which Provident had taken possession of the properties securing the loans could continue to be recognised as a financial asset, and concluded that:
- (A) such loans could not be recognised as financial assets, and derecognised about \$26,900,000 in loans and advances as at 30 June 2010; and
- (B) the properties securing the relevant loans should instead have been recognised as assets at their fair value less costs to sell, resulting in about \$13,000,000 in assets being recognised as at 30 June 2010.
- (9) A competent auditor exercising reasonable care would have considered whether loan balances remaining after the properties securing the loans had been sold could continue to be recognised as a contingent asset in circumstances where Provident was taking legal action against the relevant borrower or guarantor for the remaining loan balance owing, and concluded that:
- (A) to continue to be recognised as an asset, Provident had to be virtually certain that the relevant loans would be realised;
- (B) the outcome of the legal action against the relevant borrowers or guarantors was not virtually certain; and

- (C) the loan balances could not continue to be recognised as an asset, and derecognised about \$3,700,000 in such assets as at 30 June 2010.

Further particulars will be provided following disclosure of documents and issuance of subpoenas.

19 HLB's breach of duty pleaded in the previous paragraph has caused AET loss.

**Particulars**

If, which is denied, AET is liable to the Plaintiffs and group members as alleged in the Statement of Claim, then, but for HLB's breach of duty, HLB would have:

- (1) not provided an audit report expressing the opinion that Provident's FY10 financial report gave a true and fair view of the financial position of Provident as at 30 June 2010 and of its performance for the year ended on that date;
- (2) informed Provident, Provident's members and AET that:
  - (A) Provident only held assets sufficient to provide a return to debenture holders of between 33.1 and 48.7 cents in the dollar (alternatively, between 61.5 and 73.2 cents in the dollar);
  - (B) debenture holders would not receive payment in full where recoveries were made from the realisation of the secured properties;
  - (C) AET should consider and, if deemed necessary, seek legal advice as to what further actions should be implemented as a matter of urgency, including: restricting Provident from advertising for additional deposits or loans; declaring all money owing on any current debentures be immediately due and payable; appointing a receiver under the charge contained in the debenture trust deed; and, applying to wind up Provident.
- (3) AET would have enforced the charge under the debenture trust deed by appointing a receiver to the assets of Provident and/or

otherwise exercised its powers under Chapter 2L of the Corporations Act or the debenture trust deed so as to require Provident to repay debenture holders and prevent it from borrowing further monies from the public. In those circumstances, AET would not have consented to being named in any further debenture prospectus issued by Provident and, as a result, would not be liable to the Plaintiffs or group members (or would be liable in a lesser amount).

Statutory damages for misleading and deceptive conduct

- 20 HLB's conduct in issuing its audit report pleaded in paragraph 11 above was:
- (a) conduct in trade or commerce;
  - (b) conduct in relation to financial products, namely, the debentures issued by Provident.
- 21 HLB issued its audit report pleaded in paragraph 11 above by use of postal or telegraphic services.
- 22 By issuing its audit report pleaded in paragraph 11 above, HLB impliedly represented that:
- (a) it had conducted its audit in respect of Provident's financial report for FY10 with reasonable care;
  - (b) HLB had reasonable grounds for its opinion that Provident's financial report for FY10 gave a true and fair view of the financial position of Provident as at 30 June 2010 and of its performance for the year ended on that date.
- 23 Contrary to the representation pleaded in paragraph 22(a), HLB had not conducted its audit in respect of Provident's financial report for FY10 with reasonable care.

**Particulars**

AET repeats the particulars to paragraph 18 above.

- 24 Contrary to the representation pleaded in paragraph 22(b), HLB did not have reasonable grounds for its opinion that Provident's financial report for FY10 gave a true and fair view of the financial position of Provident as at 30 June 2010 and of its performance for the year ended on that date.

### Particulars

AET repeats the particulars to paragraph 18 above.

- 25 By virtue of the matters pleaded in paragraphs 20 to 24 above, by issuing its audit report pleaded in paragraph 11 above, HLB engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of:
- (a) former s. 52 of the former *Trade Practices Act 1974*;
  - (b) s. 1041H of the Corporations Act;
  - (c) s. 12DA of the *Australian Securities and Investments Commission Act 2001*;
  - (d) former s. 42 of the *Fair Trading Act 1987 (NSW)*;
  - (e) the corresponding prohibitions on misleading and deceptive conduct under the statutes of the other States and Territories.

- 26 HLB's conduct in issuing its audit report pleaded in paragraph 11 above has caused AET loss.

### Particulars

If HLB had not issued its audit report, or had not made the representations in paragraph 22(a) and paragraph 22(b) above, then it would have been necessary for Provident to obtain another audit report. That other audit report would have identified the matters in (2) of the particulars to paragraph 19 above. AET otherwise repeats the remainder of the particulars to paragraph 19 above.

- 27 AET is entitled to recover that loss from HLB as damages under:
- (a) s. 82 of the former Trade Practices Act;
  - (b) s. 1041I of the Corporations Act;
  - (c) s. 12GM of the ASIC Act;
  - (d) former s. 68 of the *Fair Trading Act 1987 (NSW)*;
  - (e) the corresponding provisions of the fair trading legislation of the other States and Territories.

28 In its audit report for Provident's FY10 financial report, HLB represented that its audit services were of a particular standard, namely, that they accorded with the Australian Auditing Standards.

29 The representation pleaded in paragraph 28 was made in:

- (a) in trade or commerce; and
- (b) in connexion with the supply of HLB's audit services.

30 At the time HLB issued its audit report for Provident's FY10 financial report, the Australian Auditing Standards required that an audit be conducted so as to provide reasonable assurance that the financial report, taken as a whole, was free from material misstatement.

**Particulars**

ASA 200, [24]

31 HLB's audit of Provident's FY10 financial report had not been conducted so as to provide reasonable assurance that the financial report, taken as a whole, was free from material misstatement.

**Particulars**

AET repeats the particulars to paragraph 18 above.

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

- (a) the representation pleaded in paragraph 28 was false.
- (b) by issuing its audit report for Provident's FY10 financial report, HLB contravened:
  - (A) former s. 53(aa) of the former *Trade Practices Act* 1974;
  - (B) former s. 44(b) of the *Fair Trading Act* 1987 (NSW);
  - (C) the corresponding prohibitions on misleading and deceptive conduct under the statutes of the other States and Territories.

33 HLB's conduct in issuing its audit report for Provident's FY10 financial report has caused AET loss.

**Particulars**

AET repeats the particulars to paragraph 26 above.

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

- (a) s. 82 of the former Trade Practices Act;
- (b) former s. 68 of the *Fair Trading Act 1987* (NSW);
- (c) the corresponding provisions of the fair trading legislation of the other States and Territories.

Contribution

- 35 At the time HLB audited Provident's financial report for FY10 and issued HLB's audit report, it was reasonably foreseeable by HLB:
- (a) that holders of debentures issued by Provident would rely on the trustee for debenture holders performing its duties under the trust deed and under s. 283DA of the Corporations Act;
  - (b) that AET would rely on HLB to conduct its audit and prepare its audit report with reasonable skill and care in the manner pleaded at paragraph 14 above;
  - (c) that, if HLB failed to conduct its audit and prepare its audit report with reasonable skill and care, then AET might, in reliance on HLB's audit report, fail to take steps (such as appointing a receiver) to protect the interests of debenture holders;
  - (d) that, were that to occur, debenture holders might suffer harm in the form of economic loss.
- 36 The risk of harm pleaded in paragraph 35 was not insignificant.
- 37 At the time HLB audited Provident's financial report for FY10 and issued HLB's audit report:
- (a) Debenture holders had no practical ability to protect themselves from the risk of harm pleaded in paragraph 35.
  - (b) Debenture holders could not direct, control or influence the manner in which HLB performed its audit or prepared its audit report.
  - (c) Debenture holders were dependent upon HLB taking reasonable care to avoid the risk of harm pleaded in paragraph 35.
  - (d) Debenture holders were vulnerable to harm resulting from a failure by HLB to exercise reasonable care in performing its audit and preparing its audit report.



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

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

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

39 In breach of the duty pleaded in the previous paragraph, HLB failed to take reasonable care in the conduct of its audit of Provident's financial report for FY10 and in the preparation of HLB's audit report.

#### **Particulars**

AET repeats the particulars to paragraph 18 above.

40 The breach of duty pleaded in the previous paragraph has caused the Plaintiffs and group members loss, being the same loss in respect of which the Plaintiffs and group members seek to recover damages in this proceeding from AET.

41 HLB's conduct in issuing its audit report pleaded in paragraph 11 above, in contravention of the statutory prohibitions on misleading conduct pleaded in paragraphs 25 and 32 above, has caused the Plaintiffs and group members loss, being the same loss in respect of which the Plaintiffs and group members seek to recover damages in this proceeding from AET.

#### **Particulars**

If HLB had not issued its audit report, or had not made the representations in paragraph 22(a), paragraph 22(b) or 28 above, then it would have been necessary for Provident to obtain another audit report. That other audit report would have identified the matters in (2) of the particulars to paragraph 19 above. AET otherwise repeats the remainder of the particulars to paragraph 19 above. If AET had taken the actions identified in the particulars to paragraph 19 above, then the Plaintiffs and group members would not have suffered the loss claimed by them in this proceeding.

- 42 The Plaintiffs and group members are entitled to recover that loss from HLB as damages under:
- (a) s. 82 of the former Trade Practices Act;
  - (b) s. 1041I of the Corporations Act;
  - (c) s. 12GM of the ASIC Act;
  - (d) former s. 68 of the *Fair Trading Act* 1987 (NSW);
  - (e) the corresponding provisions of the fair trading legislation of the other States and Territories.
- 43 If, which is denied, AET is liable to the Plaintiffs or Group Members as alleged in the Statement of Claim, then that liability could have been established in tort.
- 44 By reason of the matters pleaded in paragraphs 35 to 42 above, if, which is denied, AET is liable to the Plaintiffs and group members as alleged in the Statement of Claim, then AET is entitled to recover contribution from HLB pursuant to:
- (a) s. 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW);
  - (b) s. 23B of the *Wrongs Act* 1958 (Vic.);
  - (c) such other corresponding provision of the contribution legislation of the other States and Territories as may be applicable to each group member's claim against AET.
- 45 Further or alternatively, if, which is denied, AET is liable to the Plaintiffs or Group Members as alleged in the Statement of Claim, then its liabilities are coordinate with those of HLB pleaded above.
- 46 By reason of the matters pleaded in paragraphs 35 to 43 and 45 above, if, which is denied, AET is liable to the Plaintiffs and group members as alleged in the Statement of Claim, then AET is entitled to recover contribution from HLB pursuant to the doctrine of equitable contribution.

### **FY11 audit**

#### Damages in negligence at common law

- 47 On 30 September 2011, Provident issued its financial report for FY11.

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

- 49 After auditing Provident's financial report for FY11, HLB issued an audit report in which HLB expressed the opinion that Provident's financial report for FY11:
- (a) gave a true and fair view of the financial position of Provident as at 30 June 2011 and of its performance for the year ended on that date; and
  - (b) was presented in accordance with, amongst other things, the *Corporations Act 2001* and Australian Accounting Standards.

50 It was a term of the contract (between Provident and HLB) under which HLB was retained to audit Provident's financial report for FY11 that HLB would exercise reasonable care and skill in auditing the financial report and issuing its audit report.

#### **Particulars**

- (1) AET repeats the particulars to paragraph 12 above.

- 51 At the time HLB audited Provident's financial report for FY11 and issued HLB's audit report, HLB knew or ought reasonably to have known:
- (a) that Provident had on issue debentures the subject of Chapter 2L of the Corporations Act;
  - (b) that AET was the trustee for the holders of those debentures and owed the duties set out in s. 283DA of the Corporations Act.
- 52 At the time HLB audited Provident's financial report for FY11 and issued HLB's audit report, it was reasonably foreseeable by HLB:
- (a) that AET would rely upon HLB having conducted its audit, and prepared its audit report, with reasonable skill and care;
  - (b) that AET would consider, and rely upon, any audit report provided by HLB in respect of Provident's financial report for FY11;
  - (c) that AET would rely upon HLB's audit report in discharging its duties under section 283DA of the Corporations Act;
  - (d) that a failure by HLB properly to conduct its audit, or to prepare its audit report, might result in AET being uninformed or unaware of matters that, if known, would affect its assessment of the matters it was required to ascertain and do in accordance with ss. 283DA(a), 283DA(b) and 283DA(c) of the Corporations Act;
  - (e) that a failure by HLB properly to ensure that Provident's financial report for FY11 presented a true and fair view of Provident's financial position and performance, might result in AET being uninformed or unaware of matters that, if known, would affect its assessment of the matters it was required to ascertain and do in accordance with ss. 283DA(a), 283DA(b) and 283DA(c) of the Corporations Act;
  - (f) that the failures pleaded above might cause AET to fail to discharge its duties under section 283DA and result in its being liable to debenture holders under section 283F of the Corporations Act; and
  - (g) that, were that to occur, AET would suffer harm in the form of economic loss.
- 53 The risk of harm pleaded in paragraph 52 was not insignificant.

54 At the time HLB audited Provident's financial report for FY11 and issued HLB's audit report:

- (a) AET had no practical ability to protect itself from the risk of harm pleaded in paragraph 52.
- (b) AET could not direct, control or influence the manner in which HLB performed its audit or prepared its audit report.
- (c) AET was dependent upon HLB taking reasonable care to avoid the risk of harm pleaded in paragraph 52.
- (d) AET was vulnerable to harm resulting from a failure by HLB to exercise reasonable care in performing its audit and preparing its audit report.

55 By reason of the matters pleaded in paragraphs 8 and 50 to 54 above, in auditing Provident's financial report for FY11 and in issuing HLB's audit report, HLB owed a duty to AET to take reasonable care:

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

to avoid the risk of harm pleaded in paragraph 52 above.

56 In breach of the duty pleaded in the previous paragraph, HLB failed to take reasonable care in the conduct of its audit of Provident's financial report for FY11 and in the preparation of HLB's audit report.

#### **Particulars**

The best particulars that AET can currently provide are as follows:

- (1) A competent auditor exercising reasonable care would have taken the steps identified in (1)-(4) of the particulars to paragraph 18 above.
- (2) If the conclusions in the Malarkey Report are accepted, then, having regard to:
  - (A) what was stated in Provident's financial report for FY11, as pleaded at paragraph 48 above;
  - (B) the matters in (5) of the particulars to paragraph 18 above;

- (C) the magnitude of the shortfall in (5)(A) and (B) of the particulars to paragraph 18 above;
- (D) the similarity between the steps referred to in (1) above and the approach of the putative qualified accountant described in the Malarkey Report; and
- (F) the opinion actually expressed by HLB in its audit report in respect of Provident's financial report for FY11, as pleaded at paragraph 49(a) above,

it may be inferred that HLB did not take the steps referred at (1) above when auditing Provident's financial report for FY11.

Further particulars will be provided following disclosure of documents and issuance of subpoenas.

57 HLB's breach of duty pleaded in the previous paragraph has caused AET loss.

**Particulars**

AET repeats the particulars to paragraph 19 above, *mutatis mutandis*.

Statutory damages for misleading and deceptive conduct

58 HLB's conduct in issuing its audit report pleaded in paragraph 49 above was:

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

59 HLB issued its audit report pleaded in paragraph 49 above by use of postal or telegraphic services.

60 By issuing its audit report pleaded in paragraph 49 above, HLB impliedly represented that:

- (a) it had conducted its audit in respect of Provident's financial report for FY11 with reasonable care;
- (b) HLB had reasonable grounds for its opinion that Provident's financial report for FY11 gave a true and fair view of the financial position of Provident as at 30 June 2011 and of its performance for the year ended on that date.

61 Contrary to the representation pleaded in paragraph 60(a), HLB had not conducted its audit in respect of Provident's financial report for FY11 with reasonable care.

**Particulars**

AET repeats the particulars to paragraph 56 above.

62 Contrary to the representation pleaded in paragraph 60(b), HLB did not have reasonable grounds for HLB's opinion that Provident's financial report for FY11 gave a true and fair view of the financial position of Provident as at 30 June 2011 and of its performance for the year ended on that date.

**Particulars**

AET repeats the particulars to paragraph 56 above.

63 By virtue of the matters pleaded in paragraphs 58 to 62 above, by issuing its audit report pleaded in paragraph 49 above, HLB engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of:

- (a) former s. 52 of the former *Trade Practices Act* 1974;
- (b) s. 1041H of the Corporations Act;
- (c) s. 12DA of the *Australian Securities and Investments Commission Act* 2001;
- (d) former s. 42 of the *Fair Trading Act* 1987 (NSW);
- (e) the corresponding prohibitions on misleading and deceptive conduct under the statutes of the other States and Territories.

64 HLB's conduct in issuing its audit report pleaded in paragraph 49 above has caused AET loss.

**Particulars**

AET repeats the particulars to paragraph 26 above, *mutatis mutandis*.

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

- (a) s. 82 of the former Trade Practices Act;
- (b) s. 1041I of the Corporations Act;
- (c) s. 12GM of the ASIC Act;

- (d) former s. 68 of the *Fair Trading Act 1987* (NSW);
- (e) the corresponding provisions of the fair trading legislation of the other States and Territories.

66 In its audit report for Provident's FY11 financial report, HLB represented that its audit services were of a particular standard, namely, that they accorded with the Australian Auditing Standards.

67 The representation pleaded in paragraph 66 was made in:

- (a) in trade or commerce; and
- (b) in connexion with the supply of HLB's audit services.

68 At the time HLB issued its audit report for Provident's FY11 financial report, the Australian Auditing Standards required that an audit be conducted so as to provide reasonable assurance about whether the financial report as a whole was free from material misstatement.

**Particulars**

ASA 200, [5] and [11]

69 HLB's audit of Provident's FY11 financial report had not been conducted so as to provide reasonable assurance that the financial report, taken as a whole, was free from material misstatement.

**Particulars**

AET repeats the particulars to paragraph 56 above.

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

- (a) the representation pleaded in paragraph 66 was false.
- (b) by issuing its audit report for Provident's FY11 financial report, HLB contravened:
  - (A) former s. 53(aa) of the former *Trade Practices Act 1974*;
  - (B) former s. 44(b) of the *Fair Trading Act 1987* (NSW);
  - (C) the corresponding prohibitions on misleading and deceptive conduct under the statutes of the other States and Territories.



- 71 HLB's conduct in issuing its audit report for Provident's FY11 financial report has caused AET loss.

**Particulars**

AET repeats the particulars to paragraph 26 above, *mutatis mutandis*.

- 72 AET is entitled to recover that loss from HLB as damages under:
- (a) s. 82 of the former Trade Practices Act;
  - (b) former s. 68 of the *Fair Trading Act 1987* (NSW);
  - (c) the corresponding provisions of the fair trading legislation of the other States and Territories.

Contribution

- 73 At the time HLB audited Provident's financial report for FY11 and issued HLB's audit report, it was reasonably foreseeable by HLB:
- (a) that holders of debentures issued by Provident would rely on AET performing its duties under the trust deed and under s. 283DA of the Corporations Act;
  - (b) that AET would rely on HLB to conduct its audit and prepare its audit report with reasonable skill and care in the manner pleaded at paragraph 52 above;
  - (c) that, if HLB failed to conduct its audit and prepare its audit report with reasonable skill and care, then the trustee for debenture holders might, in reliance on HLB's audit report, fail to take steps (such as appointing a receiver) to protect the interests of debenture holders;
  - (d) that, were that to occur, debenture holders might suffer harm in the form of economic loss.
- 74 The risk of harm pleaded in paragraph 73 was not insignificant.
- 75 At the time HLB audited Provident's financial report for FY11 and issued HLB's audit report:
- (a) Debenture holders had no practical ability to protect themselves from the risk of harm pleaded in paragraph 73.

- (b) Debenture holders could not direct, control or influence the manner in which HLB performed its audit or prepared its audit report.
- (c) Debenture holders were dependent upon HLB taking reasonable care to avoid the risk of harm pleaded in paragraph 73.
- (d) Debenture holders were vulnerable to harm resulting from a failure by HLB to exercise reasonable care in the performing its audit and preparing its audit report.

76 By reason of the matters pleaded in paragraphs 8, 50, 51 and 73 to 75 above, in auditing Provident's financial report for FY11 and in issuing HLB's audit report, HLB owed a duty to holders and future holders of debentures issued by Provident to take reasonable care:

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

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

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

#### **Particulars**

AET repeats the particulars to paragraph 56 above.

78 The breach of duty pleaded in the previous paragraph has caused the Plaintiffs and group members loss, being the same loss in respect of which the Plaintiffs and group members seek to recover damages in this proceeding from AET.

79 HLB's conduct in issuing its audit report pleaded in paragraph 49 above, in contravention of the statutory prohibitions on misleading conduct pleaded in paragraphs 63 and 70 above, has caused the Plaintiffs and group members loss, being the same loss in respect of which the Plaintiffs and group members seek to recover damages in this proceeding from AET.

#### **Particulars**

AET repeats the particulars to paragraph 41 above, *mutatis mutandis*.

- 80 The Plaintiffs and group members are entitled to recover that loss from HLB as damages under:
- (a) s. 82 of the former Trade Practices Act;
  - (b) s. 1041I of the Corporations Act;
  - (c) s. 12GM of the ASIC Act;
  - (d) former s. 68 of the *Fair Trading Act 1987* (NSW);
  - (e) former s. 159 of the former *Fair Trading Act 1999* (Vic.);
  - (f) the corresponding provisions of the fair trading legislation of the other States and Territories.
- 81 If, which is denied, AET is liable to the Plaintiffs or Group Members as alleged in the Statement of Claim, then that liability could have been established in tort.
- 82 By reason of the matters pleaded in paragraphs 73 to 80 above, if, which is denied, AET is liable to the Plaintiffs and group members as alleged in the Statement of Claim, then AET is entitled to recover contribution from HLB pursuant to:
- (a) s. 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW);
  - (b) s. 23B of the *Wrongs Act 1958* (Vic.);
  - (c) such other corresponding provision of the contribution legislation of the other States and Territories as may be applicable to each group member's claim against AET.
- 83 Further or alternatively, if, which is denied, AET is liable to the Plaintiffs or Group Members as alleged in the Statement of Claim, then its liabilities are coordinate with those of HLB pleaded above.
- 84 By reason of the matters pleaded in paragraphs 73 to 81 and 83 above, if, which is denied, AET is liable to the Plaintiffs and group members as alleged in the Statement of Claim, then AET is entitled to recover contribution from HLB pursuant to the doctrine of equitable contribution.

### SIGNATURE OF LEGAL REPRESENTATIVE

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

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

Signature



Capacity

Bradley Woodhouse

Date of signature

20 December 2016

### NOTICE TO CROSS-DEFENDANT

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

### HOW TO RESPOND

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

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

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at [www.lawaccess.nsw.gov.au](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 cross-claim or part of the cross-claim**, by filing a defence and/or making a cross-claim.
- 2 **If money is claimed, and you believe you owe the money claimed**, by:
  - Paying the cross-claimant all of the money and interest claimed.
  - Filing an acknowledgement of the claim.
  - Applying to the court for further time to pay the claim.

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

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

Court forms are available on the UCPR website at

<http://www.ucprforms.justice.nsw.gov.au/> or at any NSW court registry.

**REGISTRY ADDRESS**

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

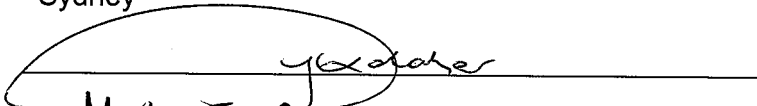
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### AFFIDAVIT VERIFYING

Name Yvonne Maree Kelaher  
 Address Level 22, 207 Kent Street, Sydney, NSW  
 Occupation Senior Manager  
 Date 20 December 2016

I say on oath :

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

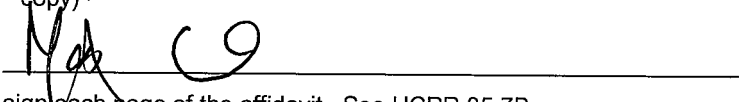
SWORN at Sydney  
 Signature of deponent   
 Name of witness Mark J Cassano  
 Address of witness 8 Chifley, 8-12 Chifley Square, Sydney, NSW  
 Capacity of witness Solicitor

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

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

NSW DL # 12107062

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

Signature of witness 

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

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

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

**PARTY DETAILS**

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

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

**Australian Executor Trustees Limited,**  
Cross-claimant

**Cross-defendants**

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

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

Name

**Philip Bruce Meade** and the others listed in Schedule 1

Address

Level 9, 207 Kent Street  
Sydney NSW 2000

**SCHEDULE ONE**

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

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