

SECOND THIRD FURTHER AMENDED STATEMENT OF CLAIM

Filed pursuant to leave granted by Justice Ball on 3 May 2018

COURT DETAILS

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

TITLE OF PROCEEDINGS

Plaintiff	Innes John Creighton
Defendant	Australian Executor Trustees Limited ACN 007 869 794

FILING DETAILS

Filed for	Innes John Creighton, plaintiff
Legal representative	Ben Hardwick, Slater and Gordon Lawyers
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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); and/or
 - 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)?~~~~[deleted]~~
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 the Australian Securities and Investments Commission (**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 ceased or otherwise been precluded from issuing further debentures whether through the defendant's own actions, because of orders made by a court or stop orders made by ASIC; and/or
 - (b) would receivers have been appointed to the property of Provident secured by the fixed and floating charge, and/or other external administrators been appointed to Provident 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 AETL 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;
 - 5.6. entered into liquidation pursuant to a creditors' voluntary winding-up on 24 October 2012;

- 5.7. at all material times, was required, in prospectuses and other disclosures, including quarterly reports issued to AETL, to disclose whether it met:
- 5.7.1. benchmark 1 of ASIC's Regulatory Guide 69 (**RG 69**), which stipulated that issuers of unlisted debentures should maintain a minimum equity ratio (as defined in Benchmark 1) of 8%, or (if more than a minor part of its activities was property development or lending funds directly or indirectly for property development) a minimum equity ratio of 20%; and
 - 5.7.2. benchmark 4 of RG 69, which stipulated that issuers of debentures should:
 - 5.7.2.1. have their debentures rated for credit risk (i.e. the risk that the principal and interest will not be repaid at the end of a relevant period);
 - 5.7.2.2. use a recognised credit rating agency for this purpose;
 - 5.7.2.3. state the current rating in their prospectus, who it is from and briefly explain the rating (i.e. what it says about the risk of the investor not getting their money back); and
 - 5.7.2.4. take reasonable steps to ensure the rating remains current.
- 5.8. at all material times:
- 5.8.1. was a person carrying on a financial services business within the meaning of Chapter 7 of the Corporations Act;
 - 5.8.2. was required, pursuant to section 911A of the Corporations Act, to hold an Australian financial services licence (**AFSL**);
 - 5.8.3. was obliged, pursuant to section 912A of the Corporations Act, to:
 - 5.8.3.1. do all things necessary to ensure that the financial services covered by the AFSL were provided efficiently, honestly and fairly;
 - 5.8.3.2. comply with the conditions of the AFSL;
 - 5.8.4. held an AFSL issued by ASIC;

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At all material times, Provident held licence no 225172. The licence was re-issued on 12 December 2008 on restated terms;

- 5.8.5. was required, pursuant to conditions of the AFSL, to:
 - 5.8.5.1. be able to pay all its debts as and when they become due and payable;
 - 5.8.5.2. prior to 12 December 2008, have:
 - 5.8.5.2.1. total assets that exceed total liabilities, or total adjusted assets (as defined in the

AFSL) that exceed total adjusted liabilities (as defined in the AFSL), as shown in its most recent balance sheet lodged with ASIC;

5.8.5.2.2. no reason to suspect that its total assets would not exceed its total liabilities or, no reason to suspect that its total adjusted assets would not exceed its total adjusted liabilities on a current balance sheet;

5.8.5.3. from 12 December 2008, either:

5.8.5.3.1. have total assets that exceed total liabilities as shown in its most recent balance sheet lodged with ASIC and have no reason to suspect that its total assets would currently exceed its total liabilities; or

5.8.5.3.2. have adjusted assets (as defined in the AFSL) that exceed adjusted liabilities (as defined in the AFSL) calculated at the balance date shown in its most recent balance sheet lodged with ASIC and have no reason to suspect that its adjusted assets would currently not exceed its adjusted liabilities.

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;

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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:

Primary Facility Security	Maximum LVR (LVR Limit)
<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**):~~[deleted]

~~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 Requirement**) (clause 6.0.1).

E. PROVIDENT'S BUSINESS AND AETL'S KNOWLEDGE

11. At all relevant times, Provident's business activities:

- 11.1. 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**); and
 - 11.2. required, as AETL knew, Provident to hold an AFSL and at all relevant times AETL was aware of the conditions attached to the AFSL held by Provident.
12. In or about August 2007, as AETL knew, Provident entered into a Wholesale Funding Facility (**ABL Facility**) with Adelaide Bank Limited and/or ABL Nominees Pty Ltd (together, **ABL**) 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.

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*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;
 - 18.7. any impairment provision recorded against the individual loans by Provident.
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 RG 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 \$192,820,594 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:

26.1. \$1,256,983, 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.

26.2. \$3,607,301, being a loan to a related body corporate, Provident Cashflow Limited (**PCF Loan**), the recovery of which could be doubtful.

PARTICULARS

Provident Capital Ltd quarterly report for the three months ended June 2008 at p. 2.

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.

- 28A. By on or about 5 November 2008, AETL knew, or ought to have known, in respect of a loan made by Provident relating to a development property at Burleigh Heads, Queensland made to Burleigh Views Pty Ltd (**Burleigh Views loan**), that:
- 28A.1. the Burleigh Views loan was Provident's largest loan;
- 28A.2. the loan had been on foot since at least 2003;
- 28A.3. by January 2007 and February 2007, the loan had been recorded in arrears reports provided to AETL by Provident as having been in arrears for 27 to 28 months;
- 28A.4. by March 2007, the loan had been recorded in arrears reports provided to AETL by Provident, as having been in arrears for 29 months;
- 28A.5. that as at March 2007, the principal balance of the loan had been \$9,771,995.24 with 'Arrears' of \$2,446,421.30;
- 28A.6. the loan ceased to appear on arrears reports for periods after March 2007;
- 28A.7. the loan ceased to appear on arrears reports apparently due to a 'refinance' of the loan by Provident;
- 28A.8. the effect of the purported refinance was to remove the Burleigh Views loan from arrears reports, in circumstances where in substance the loan remained unpaid;
- 28A.9. Provident had made the loan based on "as if complete" valuations of the development property;
- 28A.10. lending based on "as if complete" valuations was inherently more risky than lending based on "as is" valuations;
- 28A.11. in disclosures made in various publications in 2008, Provident made reference to, and apparently relied upon:
- 28A.11.1 a valuation for the development property dated 23 December 2003; and
- 28A.11.2 a valuation for the development property supplied by the borrower dated September 2007;
- 28A.12. that the valuation dated September 2007 referred to in the preceding paragraph likely:
- 28A.12.1 had been prepared by a valuer who had not been appointed or approved by Provident to certify the value of the property; and
- 28A.12.2 therefore would not provide a "certified value" of the development property for the purposes of the LVR Criteria Requirement (clause 5.2.1 of the Trust Deed);
- 28A.13. that the independence and competence of the valuer of the property was important in ensuring it could appropriately be relied upon by Provident;

- 28A.14. that as at 30 September 2008, the amount lent by Provident exceeded 70% of the projected end value of the development based on the valuation dated 23 December 2003;
- 28A.15. on or around 28 February 2008, ASIC had noted that the loan was "very old" and queried whether there was a default issue;
- 28A.16. since February 2008, Provident had disclosed that construction at the development property was "nearing completion".

PARTICULARS

In or around April 2007, Provident provided AETL with a loan arrears report as at 28 February 2007 which commented, in respect of the Burleigh Views loan, that a refinance was under way.

In or around May 2007, Provident provided AETL with a loan arrears report as at 31 March 2007 which commented, in respect of the Burleigh Views loan, that a refinance offer had been issued by Provident.

The Burleigh Views loan did not feature in the next loan arrears report as at 30 April 2007.

On or around 29 February 2008, Provident published a supplementary disclosure prospectus 10 which disclosed that:

- a. Provident's largest loan was for an amount of \$12,026,966;*
- b. the loan amount was based on an initial valuation made as at 23 December 2003 for construction funding purposes and which assessed the "as if complete" value at \$17,222,000;*
- c. the work at the development property was nearing completion;*
- d. the borrower had supplied a valuation report dated September 2007 assessing the "as if complete" value at \$26,000,000 (exclusive of GST);*
- e. the security property was located on the Gold Coast in Queensland.*

Save that the reported amount of the loan increased, Provident made similar disclosures on or around 31 October 2008 in its ASIC Regulatory Guide Benchmark Disclosure Report for the quarter ended 30 September 2008.

On or around 31 October 2007, ASIC published RG 69, which stated, inter alia, that when a debenture issuer is involved in or lends money for property related activities, they should take an approach to valuations which includes:

- a. establishing a panel of valuers and ensuring that no one valuer conducts more than 1/3 of the issuer's valuation work; and*
- b. appointing valuers with the trustee's consent.*

Sometime after the introduction of RG 69, AETL sent a letter to Provident dated 22 January 2008 requesting that Provident provide details of its valuers for AETL's approval [AET.500.001.0351]. Provident then provided lists of its valuers for consent by AETL from time to time from around 30 April 2008 onwards [AET.500.001.2368].

On or around 28 February 2008, Stuart Howard of AETL had received an email from Malcolm Bersten of Provident attaching a draft supplementary prospectus which was described as having been marked up to show ASIC's comments on the document, which included the comments referred to at paragraph 28A.15 above [AET.500.001.0489; AET.500.001.0497].

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.

- 30.4. substantially increased the risk that property valuations relied upon by AETL (particularly those obtained prior to the global financial crisis) were unreliable.

PARTICULARS

These matters were common knowledge within the financial industry at or around this time and specific reference was made to these matters (except for the final matter) 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 AETL 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 AETL on or about 1 December 2008 (**October 08 Arrears Report**).*

33. AETL received:

- 33.1. in the twelve months prior to December 2008, monthly reports from Provident disclosing details about loans in arrears:
- 33.1.1. with differing formats;
- 33.1.2. with differing levels of disclosure of information;
- 33.1.3. which did not disclose (save for the Initial November 08 Arrears Report (as defined below)) details of impairment provisions recorded in respect of loans listed in the relevant report;

PARTICULARS

Arrears Reports dated November 2007 – November 2008

Report of Andrew Malarkey dated 9 March 2018 at [39]-[40]

- 33.1-33.2. on or about 16 December 2008, a report from Provident showing the loans made by Provident which were in excess of 90 days past due as at 30 November 2008 (**Initial November 08 Arrears Report**); and-
- 33.2-33.3. on or about 9 January 2009, a further 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**).

33A. By 22 December 2008 or shortly thereafter, AETL knew, or ought to have known, that the average loan to valuation ratio (LVR) for loans for construction funding purposes was 74% as at 30 November 2008.

PARTICULARS

Draft Prospectus 11 provided to AETL on 22 December 2008
[AET.500.001.1591; AET.500.001.1592].

34. The Initial November 08 Arrears Report and the November 08 Arrears Report showed and/or evidenced:

- 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 an ~~loan-to-valuation-ratio~~LVR, as disclosed by Provident, of at least 85%;
- 34.4. that as at about 30 November 2008, 10 of the loans had an ~~loan-to-valuation-ratio~~LVR, 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, Carlsund Loan, Smith and Arnott Loan, DS Loan and Good Life Loan (as these expressions are defined in Section F, below) (**2008 Loans of Concern**), in the one month since 31 October 2008; and
- 34.6. for the 2008 Loans of Concern, an average LVR of 106%.
- 34.7. in the case of the Initial November 08 Arrears Report:
 - 34.7.1. of the 10 loans with a reported 'TVLR' in excess of 100%, 6 did not have a loan impairment provision;
 - 34.7.2. eight loans had loan impairment provisions (**Recorded Individual Provisions**) totalling \$800,000;
- 34.8. 18 of the loans in arrears had been in arrears for more than one year;
- 34.9. eight of the loans in arrears had been in arrears for more than two years;
- 34.10. four of the loans in arrears had been arrears for more than 3.5 years;
- 34.11. potential losses on the reported loans, which:
 - 34.11.1. totalled more than \$3.4 million;
 - 34.11.2. were inconsistent with Recorded Individual Provisions, including by reason of the fact that in respect of at least six 2008 Loans of Concern with LVRs greater than 100%, there were substantial

potential losses evidenced by each of the arrears reports, but no loan impairment provisions recorded against the loans.

PARTICULARS

Initial November 08 Arrears Report emailed to AETL on or around 16 December 2008.

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

The amounts owing for the 2008 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	TLVR
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%
Koindah 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%
Total	32,400,826	6,616,077	79%	32,539,454	10,833,303	106%

In the Initial November 08 Arrears Report, the Ovchinnikov Loan, Unique Castle Loan, Leach Loan, Smith and Arnott Loan, Koindah Loan and Ozer Loan (as these expressions are defined in Section F, below) were all reported to have a TLVR in excess of 100%, but with no provision reported. Individual Recorded Provisions were recorded against the Good Life loan, Morrell loan, Gardiner loan, Naumovska loan, Tembelli loan and DS loan (as these expressions are defined in Section F, below), the loan to Hans Peter Mollinger and Jillian May Mollinger, and the loan to Hastings Craftsman Built Homes Pty Ltd.

As to the calculation of potential losses, the plaintiff refers to the report of Andrew Malarkey dated 20 October 2016 at [108]-[112] where he calculates potential losses to be \$3,425,334. There were ten loans in respect of which potential losses were evidenced.

35. On or about 27 January 2009 AETL 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 AETL 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 AETL 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 AETL 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 2008 Loans of Concern, there were 10 loans with a LVR greater than 100%; and
 - 37.5. evidenced potential losses on the reported loans, which:
 - 37.5.1. totalled more than \$3 million; and
 - 37.5.2. were inconsistent with Recorded Individual Provisions, including by reason of the fact that in respect of at least six 2008 Loans of Concern with reported LVRs greater than 100%, there were substantial potential losses evidenced by the arrears report, but no loan impairment provisions recorded against the loans.

PARTICULARS

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

As to the calculation of potential losses, the plaintiff refers to the report of Andrew Malarkey dated 20 October 2016 at [189] where he calculates potential losses to be \$3,075,401. There were ten loans in respect of which potential losses were evidenced.

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%.

38A. 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).

38B. The December 08 Arrears Report showed and/or evidenced:

- 38B.1. that almost one quarter (24.7%) of loans (by principal balance) were in arrears of 90 days or more;
- 38B.2. that as at about 31 December 2009, 20 of the 30 loans in arrears of 90 days or more had an LVR, as disclosed by Provident, of at least 85%;
- 38B.3. that as at about 31 December 2009, 9 of the loans had a LVR, as disclosed by Provident, of at least 100%;
- 38B.4. potential losses on the reported loans, which:
 - 38B.4.1 totalled more than \$4 million;
 - 38B.4.2 were inconsistent with Recorded Individual Provisions, including by reason of the fact that in respect of at least five 2008 Loans of Concern with reported LVRs greater than 100%, there were substantial potential losses evidenced by the arrears report, but no loan impairment provisions recorded against the loans.

PARTICULARS

December 08 Arrears Report emailed to AETL on or around 2 February 2009.

As to the calculation of potential losses, the plaintiff refers to the report of Andrew Malarkey dated 20 October 2016 at [211] where he calculates potential losses to be \$4,053,597. There were nine loans in respect of which potential losses were evidenced.

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 paragraphs 36 to 3838B, sometime in February 2009 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;~~

~~B~~by:

~~39.4A. taking the steps referred to in section F.1 below;~~

~~39.4B. further or alternatively, taking the steps referred to in section F.2 below.~~

~~requiring Provident (pursuant to s 283BB(c) and clauses 6.0.2 and 6.0.3 of the Trust Deed) to provide to AETL (or an investigative accountant reporting to AETL), within a reasonable time:~~

~~39.5. access to or copies of the complete loan transaction files including a complete statement of account;~~[deleted]~~~~

~~39.6. and all valuations obtained in relation to the security property(s);~~[deleted]~~~~

~~for all of the loans shown on the Initial November 08 Arrears Report, 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;~~[deleted]~~~~

~~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. ~~[deleted]~~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, AETL (or an investigative accountant reporting to AETL) 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**)-[deleted]
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.[deleted]

F.1 Initial enquiries

- 42A. By reason of the matters pleaded in paragraph 39, AETL should have, in relation to each of the loans reported in either the Initial November 08 Arrears Report, November 08 Arrears Report, Amended November 08 Arrears Report, and/or December 08 Arrears Report as having been in arrears for more than 90 days and having LVRs greater than 100%:
- 42A.1. required Provident (pursuant to s 283BB(c) of the Corporations Act and clauses 6.0.2 and 6.0.3 of the Trust Deed) to provide to AETL:
- 42A.1.1. an explanation as to how TLVR had been calculated in the arrears reports;
- 42A.1.2. valuation reports, marketing appraisals, and/or agreements or offers relating to the value of property in respect of which Provident held a security interest for the loan;
- 42A.1.3. loans statements for the loan;
- 42A.1.4. information about whether interest continuing to accrue on the loan was being brought to account by Provident;
- 42A.1.5. (in respect of the December 08 Arrears Report) details of any impairment provisions recorded against loans reported in the arrears report;
- 42A.2. determined the net balance outstanding (principal plus arrears);
- 42A.3. deducted the value of any then current impairment provision from the net balance outstanding to determine the net amount outstanding;
- 42A.4. determined an appropriate valuation, or appropriate range of valuations, for the property in respect of which Provident held a security interest, having regard to the age and basis of valuation of any relevant valuation reports and marketing appraisals;

- 42A.5. estimated recovery and holding costs associated with each security property, with recovery costs assumed to be around 5% of the appropriate valuation of the gross realisable value;
- 42A.6. deducted the estimated recovery and holding costs from the most appropriate valuation in order to estimate a net realisable value for each property;
- 42A.7. where the net amount outstanding was greater than the estimated net realisable value, calculated a notional provision (**Initial Enquiry Additional Provision**) by deducting the estimated net realisable value from the net amount outstanding; and
- 42A.8. compared the Initial Enquiry Additional Provision with the potential loss evidenced by the relevant arrears report.
- 42B. Had AETL requested the information and material pleaded in paragraph 42A.1, it would have received shortly thereafter the information and materials referred to in respect of each of the loans discussed in sections F.1.1 –F.1.10 below.
- 42C. By January 2009, alternatively February 2009, having received the information and materials referred to in paragraph 42B above, AETL should have undertaken the analysis referred to in paragraphs 42A.2 – 42A.8 and reached the conclusions as pleaded in sections F.1.1–F.1.10 below.

F.1.1 Morrell Loan

- 42D. In relation to the loan to Maureen Kaye Morrell (**Morrell loan**), AETL knew or by reason of the matters pleaded in paragraph 42C ought to have known or concluded that:
- 42D.1. the net amount outstanding for the loan, before provisioning, was \$1,231,923 (as at 30 November 2008) and \$1,235,728 (as at 31 December 2008);
- 42D.2. the valuation of the property securing the loan implied by the Initial November 08 Arrears Report and the November 08 Arrears Report was \$1,600,035;
- 42D.3. the implied valuation was based on an 'as is' valuation of the security property for the loan from a valuation report dated 30 November 2005, which estimated the value of the property to be \$1,600,000;
- 42D.4. the age of the valuation being relied upon for arrears reporting purposes (some 36 months old) was of concern;
- 42D.5. the security property had been the subject of a contract for sale for \$1,200,000 in or around February 2008;
- 42D.6. the loan had been in arrears for 45 months (as at 30 November 2008) and 46 months (as at 31 December 2008);
- 42D.7. interest was not accruing on the loan;
- 42D.8. an individual impairment provision of \$50,000 had been recorded against the loan;

42D.9. the net amount outstanding (after taking into account provisioning) was \$1,181,923 (as at 30 November 2008) and \$1,185,728 (as at 31 December 2008);

42D.10. an appropriate range to assume for the gross realisable value of the property, for the purpose of initial enquiries, was \$1,600,000 (as an upper limit) and \$1,200,000 (as a lower limit); and

42D.11. the loan had an Initial Enquiry Additional Provision of around \$41,923 (as at 30 November 2008) and around \$45,728 (as at 31 December 2008), assuming the lower valuation, calculated as follows:

	<u>30 November 2008</u>		<u>31 December 2008</u>	
	<u>High</u>	<u>Low</u>	<u>High</u>	<u>Low</u>
<u>Gross realisable value</u>	<u>\$1,600,000</u>	<u>\$1,200,000</u>	<u>\$1,600,000</u>	<u>\$1,200,000</u>
<u>Recovery costs</u>	<u>(\$80,000)</u>	<u>(\$60,000)</u>	<u>(\$80,000)</u>	<u>(\$60,000)</u>
<u>Holding costs</u>	<u>Nil</u>	<u>Nil</u>	<u>Nil</u>	<u>Nil</u>
<u>Net realisable value</u>	<u>\$1,520,000</u>	<u>\$1,140,000</u>	<u>\$1,520,000</u>	<u>\$1,140,000</u>
<u>Net outstanding</u>	<u>\$1,181,923</u>	<u>\$1,181,923</u>	<u>\$1,185,728</u>	<u>\$1,185,728</u>
<u>Required additional provision</u>	<u>Nil</u>	<u>\$41,923</u>	<u>Nil</u>	<u>\$45,728</u>

F.1.2 Ovchinnikov loan

42E. In relation to the loan to Mihail Ovchinnikov (**Ovchinnikov loan**), AETL knew or by reason of the matters pleaded in paragraph 42C ought to have known or concluded that:

42E.1. the net amount outstanding for the loan, before provisioning, was \$5,190,292 (as at 30 November 2008) and \$5,195,760 (as at 31 December 2008);

42E.2. the valuation of property securing the loan implied by the Initial November 08 Arrears Report and the November 08 Arrears Report was \$5,500,182;

42E.3. the implied valuation was based on an 'as if complete' valuation of the security property for the loan from a valuation report dated June 2002, which estimated the value of the property to be \$5,500,000;

42E.4. the most recent valuation of the security property for the loan was a 'going concern' valuation as at 16 November 2004 from a valuation report dated 18 April 2005 for \$5,300,000;

42E.5. the age of the valuation being relied upon for arrears reporting purposes (some 77 months old) was of concern, as was the age of the most recent valuation (around 49 months);

42E.6. the loan had been in arrears for 46 months (as at 30 November 2008) and 47 months (as at 31 December 2008);

- 42E.7. interest was not accruing on the loan;
- 42E.8. no individual impairment provision of had been recorded against the loan;
- 42E.9. the net amount outstanding (after taking into account provisioning) was \$5,190,292 (as at 30 November 2008) and \$5,195,760 (as at 31 December 2008);
- 42E.10. an appropriate amount to assume for the gross realisable value of the property, for the purpose of initial enquiries, was \$5,300,000; and
- 42E.11. the loan had an Initial Enquiry Additional Provision of around \$155,292 (as at 30 November 2008) and around \$160,760 (as at 31 December 2008), calculated as follows:

	<u>30 November 2008</u>		<u>31 December 2008</u>	
	<u>High</u>	<u>Low</u>	<u>High</u>	<u>Low</u>
<u>Gross realisable value</u>	<u>\$5,300,000</u>	<u>\$5,300,000</u>	<u>\$5,300,000</u>	<u>\$5,300,000</u>
<u>Recovery costs</u>	<u>(\$265,000)</u>	<u>(\$265,000)</u>	<u>(\$265,000)</u>	<u>(\$265,000)</u>
<u>Holding costs</u>	<u>Nil</u>	<u>Nil</u>	<u>Nil</u>	<u>Nil</u>
<u>Net realisable value</u>	<u>\$5,035,000</u>	<u>\$5,035,000</u>	<u>\$5,035,000</u>	<u>\$5,035,000</u>
<u>Net outstanding</u>	<u>\$5,190,292</u>	<u>\$5,190,292</u>	<u>\$5,195,760</u>	<u>\$5,195,760</u>
<u>Required additional provision</u>	<u>\$155,292</u>	<u>\$155,292</u>	<u>\$160,760</u>	<u>\$160,760</u>

F.1.3 Gardiner loan

- 42F. In relation to the loan to Victor and Verna Gardiner (**Gardiner loan**), AETL knew or by reason of the matters pleaded in paragraph 42C ought to have known or concluded that:
- 42F.1. the net amount outstanding for the loan, before provisioning, was \$1,318,710 (as at 30 November 2008) and \$1,318,139 (as at 31 December 2008);
- 42F.2. the valuation of the property securing the loan implied by the Initial November 08 Arrears Report and the November 08 Arrears Report, was \$1,505,130;
- 42F.3. it was unclear what the implied valuation was based upon;
- 42F.4. the loan had originally been secured by security properties at 20 Haslemere Crescent, Buttaba and 15 Sunlight Parade, Fishing Point in the State of New South Wales;

PARTICULARS

Deed of Loan dated 13 September 2004 [CRE.004.001.0020].

- 42F.5. the property at 20 Haslemere Crescent, Buttaba had been realised by Provident as mortgagee in possession on or around 27 January 2006;

PARTICULARS*Transfer under power of sale AC69152L [CRE.004.001.0020].*

- 42F.6. the most recent valuation of the security property at 15 Sunlight Parade, Fishing Point was an 'as is' valuation from a valuation report dated 23 September 2005, which estimated the value of the property to be \$325,000;
- 42F.7. that the security property located at 15 Sunlight Parade, Fishing Point was the subject of two market appraisals which valued it at between approximately \$900,000 and \$950,000 and were dated 10 April 2008;
- 42F.8. the age of the most recent valuation (some 38 months old) was of concern;
- 42F.9. the loan had been in arrears for 30 months (as at 30 November 2008) and 31 months (as at 31 December 2008);
- 42F.10. interest was not accruing on the loan;
- 42F.11. an individual impairment provision of \$250,000 had been recorded against the loan;
- 42F.12. the net amount outstanding (after taking into account provisioning) was \$1,068,710 (as at 30 November 2008) and \$1,068,139 (as at 31 December 2008);
- 42F.13. an appropriate range to assume for the gross realisable value of the remaining property, for the purpose of initial enquiries, was \$950,000 (as an upper limit) and \$900,000 (as a lower limit); and
- 42F.14. the loan had an Initial Enquiry Additional Provision of around \$166,210 to \$213,710 (as at 30 November 2008) and around \$165,639 to \$213,139 (as at 31 December 2008), calculated as follows:

	<u>30 November 2008</u>		<u>31 December 2008</u>	
	<u>High</u>	<u>Low</u>	<u>High</u>	<u>Low</u>
<u>Gross realisable value</u>	<u>\$950,000</u>	<u>\$900,000</u>	<u>\$950,000</u>	<u>\$900,000</u>
<u>Recovery costs</u>	<u>(\$47,500)</u>	<u>(\$45,000)</u>	<u>(\$47,500)</u>	<u>(\$45,000)</u>
<u>Holding costs</u>	<u>Nil</u>	<u>Nil</u>	<u>Nil</u>	<u>Nil</u>
<u>Net realisable value</u>	<u>\$902,500</u>	<u>\$855,000</u>	<u>\$902,500</u>	<u>\$855,000</u>
<u>Net outstanding</u>	<u>\$1,068,710</u>	<u>\$1,068,710</u>	<u>\$1,068,139</u>	<u>\$1,068,139</u>
<u>Required additional provision</u>	<u>\$166,210</u>	<u>\$213,710</u>	<u>\$165,639</u>	<u>\$213,139</u>

F.1.4 Unique Castle loan

42G. In relation to the loan to Unique Castle Development Pty Ltd (**Unique Castle loan**), AETL knew or by reason of the matters pleaded in paragraph 42C ought to have known or concluded that:

42G.1. the net amount outstanding for the loan, before provisioning, was \$5,047,102 (as at 30 November 2008) and \$4,786,719 (as at 31 December 2008);

42G.2. the valuation of property securing the loan implied by the Initial November 08 Arrears Report and the November 08 Arrears Report was \$4,050,318;

42G.3. the implied valuation was based on an 'as is' valuation of the security property for the loan from a valuation report dated 15 June 2006, which estimated the value of the property to be \$4,050,000;

42G.4. the age of the valuation being relied upon for arrears reporting purposes (some 30 months old) was of concern;

42G.5. the most recent valuation of the security property at 161 Castle Hill Road, Castle Hill was a valuation report dated 20 January 2009, which estimated the 'as is' value of the property to be \$4,500,000;

42G.6. the loan had been in arrears for 22 months (as at 30 November 2008) and 23 months (as at 31 December 2008);

42G.7. interest was accruing on the loan;

42G.8. no individual impairment provision of had been recorded against the loan;

42G.9. the net amount outstanding (after taking into account provisioning) was \$5,047,102 (as at 30 November 2008) and \$4,786,719 (as at 31 December 2008);

42G.10. an appropriate amount to assume for the gross realisable value of the property, for the purpose of initial enquiries, was \$4,500,000; and

42G.11. the loan had an Initial Enquiry Additional Provision of around \$994,299 to \$1,216,496 (as at 30 November 2008) and around \$739,380 to \$967,040 (as at 31 December 2008), calculated as follows:

	<u>30 November 2008</u>		<u>31 December 2008</u>	
	<u>High</u>	<u>Low</u>	<u>High</u>	<u>Low</u>
Gross realisable value	<u>\$4,500,000</u>	<u>\$4,500,000</u>	<u>\$4,500,000</u>	<u>\$4,500,000</u>
Recovery costs	<u>(\$225,000)</u>	<u>(\$225,000)</u>	<u>(\$225,000)</u>	<u>(\$225,000)</u>
Holding costs	<u>(\$222,197)</u>	<u>(\$444,394)</u>	<u>(\$227,661)</u>	<u>(\$455,321)</u>
<u>Net realisable value</u>	<u>\$4,052,803</u>	<u>\$3,830,606</u>	<u>\$4,047,339</u>	<u>\$3,819,679</u>
Net outstanding	<u>\$5,047,102</u>	<u>\$5,047,102</u>	<u>\$4,786,719</u>	<u>\$4,786,719</u>
<u>Required additional provision</u>	<u>\$994,299</u>	<u>\$1,216,496</u>	<u>\$739,380</u>	<u>\$967,040</u>

F.1.5 Leach loan

42H. In relation to the loan to Phillip Leslie Leach (**Leach loan**), AETL knew or by reason of the matters pleaded in paragraph 42C ought to have known or concluded that:

42H.1. the net amount outstanding for the loan, before any provisioning, was \$2,460,863 (as at 30 November 2008) and \$2,510,733 (as at 31 December 2008);

42H.2. the valuation of property securing the loan implied by the Initial November 08 Arrears Report and the November 08 Arrears Report was \$2,300,086;

42H.3. the implied valuation was based on an 'as is' valuation of the security property for the loan from a valuation report dated 9 February 2007, which estimated the value of the property to be \$2,300,000;

42H.4. marketing appraisals dated 17 August 2007 and 16 January 2008 had provided respective values of:

42H.4.1. \$2,100,000 to \$2,700,000; and

42H.4.2. \$2,500,000 to \$2,700,000;

42H.5. the loan had been in arrears for 18 months (as at 30 November 2008) and 19 months (as at 31 December 2008);

42H.6. that interest was accruing on the loan;

42H.7. no individual impairment provision had been recorded against the loan;

42H.8. an appropriate amount to assume for the gross realisable value of the property, for the purpose of initial enquiries, was \$2,300,000; and

42H.9. the loan had an Initial Enquiry Additional Provision of around \$380,142 to \$484,421 (as at 30 November 2008) and around \$432,126 to \$538,518 (as at 31 December 2008), calculated as follows:

	<u>30 November 2008</u>		<u>31 December 2008</u>	
	<u>High</u>	<u>Low</u>	<u>High</u>	<u>Low</u>
<u>Gross realisable value</u>	<u>\$2,300,000</u>	<u>\$2,300,000</u>	<u>\$2,300,000</u>	<u>\$2,300,000</u>
<u>Recovery costs</u>	<u>(\$115,000)</u>	<u>(\$115,000)</u>	<u>(\$115,000)</u>	<u>(\$115,000)</u>
<u>Holding costs</u>	<u>(\$104,279)</u>	<u>(\$208,558)</u>	<u>(\$106,392)</u>	<u>(\$212,785)</u>
<u>Net realisable value</u>	<u>\$2,080,721</u>	<u>\$1,976,442</u>	<u>\$2,078,608</u>	<u>\$1,972,215</u>
<u>Net outstanding</u>	<u>\$2,460,863</u>	<u>\$2,460,863</u>	<u>\$2,510,733</u>	<u>\$2,510,733</u>
<u>Required additional provision</u>	<u>\$380,142</u>	<u>\$484,421</u>	<u>\$432,126</u>	<u>\$538,518</u>

F.1.6 Ozer loan

42l. In relation to the loan to Hasan Ozer (Ozer loan), AETL knew or by reason of the matters pleaded in paragraph 42C ought to have known or concluded that:

- 42l.1. the net amount outstanding for the loan, before provisioning, was \$2,067,724 (as at 30 November 2008) and \$2,067,724 (as at 31 December 2008);
- 42l.2. the valuation of property securing the loan implied by the Initial November 08 Arrears Report and the November 08 Arrears Report was \$1,780,069;
- 42l.3. it was unclear what the implied valuation was based upon;
- 42l.4. the loan had formerly been secured by security properties at 4 Louisa Street, Auburn and 3/18 Carlisle Street, Tamarama;

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Deed of Loan dated 17 September 2004 [PRV.502.002.2285].

Deed of Variation of Loan dated 30 June 2005 [PRV.502.002.2297].

- 42l.5. Provident's mortgage over the property at 4 Louisa Street, Auburn had been released on or around 9 February 2007;

PARTICULARS

Discharge of mortgage dated 9 February 2007 [CRE.004.001.0021].

- 42l.6. the most recent valuation of the security property at 3/18 Carlisle Street, Tamarama was a valuation report dated 13 January 2009, which estimated the 'as is' value of the property to be \$1,400,000, and the 'forced sale' value of the property to be \$1,300,000;
- 42l.7. the loan had been in arrears for 26 months (as at 30 November 2008) and 27 months (as at 31 December 2008);
- 42l.8. interest was not accruing on the loan;
- 42l.9. no individual impairment provision had been recorded against the loan;
- 42l.10. an appropriate range to assume for the gross realisable value of the property, for the purpose of initial enquiries, was \$1,400,000 (as an upper limit) and \$1,300,000 (as a lower limit); and
- 42l.11. the loan had an Initial Enquiry Additional Provision of around \$737,724 to \$832,724 (as at both 30 November 2008 and 31 December 2008), calculated as follows:

	<u>30 November 2008</u>		<u>31 December 2008</u>	
	<u>High</u>	<u>Low</u>	<u>High</u>	<u>Low</u>
<u>Gross realisable value</u>	<u>\$1,400,000</u>	<u>\$1,300,000</u>	<u>\$1,400,000</u>	<u>\$1,300,000</u>
<u>Recovery costs</u>	<u>(\$70,000)</u>	<u>(\$65,000)</u>	<u>(\$70,000)</u>	<u>(\$65,000)</u>
<u>Holding costs</u>	<u>Nil</u>	<u>Nil</u>	<u>Nil</u>	<u>Nil</u>

<u>Net realisable value</u>	<u>\$1,330,000</u>	<u>\$1,235,000</u>	<u>\$1,330,000</u>	<u>\$1,235,000</u>
Net outstanding	<u>\$2,067,724</u>	<u>\$2,067,724</u>	<u>\$2,067,724</u>	<u>\$2,067,724</u>
<u>Required additional provision</u>	<u>\$737,724</u>	<u>\$832,724</u>	<u>\$737,724</u>	<u>\$832,724</u>

F.1.7 Naumovska loan

42J. In relation to the loan to Dimitar Naumovski and Milica Naumovska (**Naumovska loan**), AETL knew or by reason of the matters pleaded in paragraph 42C ought to have known or concluded that:

42J.1. the net amount outstanding for the loan, before provisioning, was \$560,328 (as at 30 November 2008) and \$566,315 (as at 31 December 2008);

42J.2. the valuation of property securing the loan implied by the Initial November 08 Arrears Report and the November 08 Arrears Report was \$500,042;

42J.3. the implied valuation was based on an 'as is' valuation of the security property for the loan from a valuation report dated 21 June 2007, which estimated the value of the property to be \$500,000;

42J.4. that the most recent valuation of the security property was a valuation report dated 27 November 2008, which estimated the 'as is' value of the property to be \$480,000;

42J.5. the loan had been in arrears for 14 months (as at 30 November 2008) and 15 months (as at 31 December 2008);

42J.6. that interest was not accruing on the loan;

42J.7. an individual impairment provision of \$25,000 had been recorded against the loan;

42J.8. the net amount outstanding (after taking into account provisioning) was \$535,328 (as at 30 November 2008) and \$541,315 (as at 31 December 2008);

42J.9. an appropriate amount to assume for the gross realisable value of the property, for the purpose of initial enquiries, was \$480,000; and

42J.10. the loan had an Initial Enquiry Additional Provision of around \$79,328 (as at 30 November 2008) and around \$85,315 (as at 31 December 2008), calculated as follows:

	<u>30 November 2008</u>		<u>31 December 2008</u>	
	<u>High</u>	<u>Low</u>	<u>High</u>	<u>Low</u>
<u>Gross realisable value</u>	<u>\$480,000</u>	<u>\$480,000</u>	<u>\$480,000</u>	<u>\$480,000</u>
<u>Recovery costs</u>	<u>(\$24,000)</u>	<u>(\$24,000)</u>	<u>(\$24,000)</u>	<u>(\$24,000)</u>
<u>Holding costs</u>	<u>Nil</u>	<u>Nil</u>	<u>Nil</u>	<u>Nil</u>

<u>Net realisable value</u>	<u>\$456,000</u>	<u>\$456,000</u>	<u>\$456,000</u>	<u>\$456,000</u>
<u>Net outstanding</u>	<u>\$535,328</u>	<u>\$535,328</u>	<u>\$541,315</u>	<u>\$541,315</u>
<u>Required additional provision</u>	<u>\$79,328</u>	<u>\$79,328</u>	<u>\$85,318</u>	<u>\$85,318</u>

F.1.8 Tembelli loan

42K. In relation to the loan to Tembelli Pty Ltd (**Tembelli loan**), AETL knew or by reason of the matters pleaded in paragraph 42C ought to have known or concluded that:

42K.1. the net amount outstanding for the loan, before provisioning, was \$4,920,312 (as at 30 November 2008) and \$4,920,338 (as at 31 December 2008);

42K.2. the valuation of the property securing the loan implied by the Initial November 08 Arrears Report and the November 08 Arrears Report, was \$4,775,370;

42K.3. the implied valuation was based on an 'as is' valuation of the security property for the loan on a 'gross realisation' approach from a valuation report dated 14 January 2005, which estimated the value of the property to be \$4,775,000;

42K.4. the age of the valuation being relied upon for arrears reporting purposes (some 46 months old) was of concern;

42K.5. that the most recent valuation of the security property was a valuation report dated 28 August 2008 prepared for National Australia Bank, which estimated the 'as is' value of the property on a gross realisation basis to be \$4,630,000;

42K.6. that the most recent valuation of the security property for Provident was a valuation report dated 12 August 2008, which estimated the value of the property to be \$3,100,000 on an "in one line" basis, \$3,600,000 on a "gross realisation" basis, and \$4,000,000 on a "whole complex" basis;

42K.7. the reason Provident had relied on the valuation report dated 14 January 2005 rather than the valuation report dated 12 August 2008 was unclear;

42K.8. the fact that Provident was not relying on the most recent appropriate valuation report held by it was also of concern;

42K.9. the loan had been in arrears for 32 months (as at 30 November 2008) and 33 months (as at 31 December 2008);

42K.10. that interest was not accruing on the loan;

42K.11. an individual impairment provision of \$200,000 had been recorded against the loan;

42K.12. the net amount outstanding (after taking into account provisioning) was \$4,720,312 (as at 30 November 2008) and \$4,720,338 (as at 31 December 2008);

42K.13. an appropriate range to assume for the gross realisable value of the property, for the purpose of initial enquiries, was \$4,630,000 (as an upper limit) and \$3,100,000 (as a lower limit); and

42K.14. the loan had an Initial Enquiry Additional Provision of around \$321,812 to \$1,775,312 (as at 30 November 2008) and around \$321,838 to \$1,775,338 (as at 31 December 2008), calculated as follows:

	30 November 2008		31 December 2008	
	High	Low	High	Low
<u>Gross realisable value</u>	<u>\$4,630,000</u>	<u>\$3,100,000</u>	<u>\$4,630,000</u>	<u>\$3,100,000</u>
<u>Recovery costs</u>	<u>(\$231,500)</u>	<u>(\$155,000)</u>	<u>(\$231,500)</u>	<u>(\$155,000)</u>
<u>Holding costs</u>	<u>Nil</u>	<u>Nil</u>	<u>Nil</u>	<u>Nil</u>
<u>Net realisable value</u>	<u>\$4,398,500</u>	<u>\$2,945,000</u>	<u>\$4,398,500</u>	<u>\$2,945,000</u>
<u>Net outstanding</u>	<u>\$4,720,312</u>	<u>\$4,720,312</u>	<u>\$4,720,338</u>	<u>\$4,720,338</u>
<u>Required additional provision</u>	<u>\$321,812</u>	<u>\$1,775,312</u>	<u>\$321,838</u>	<u>\$1,775,338</u>

F.1.9 Kooindah loan

42L. In relation to the loan to Kooindah Lifestyle Pty Ltd (**Kooindah loan**), AETL knew or by reason of the matters pleaded in paragraph 42C ought to have known or concluded that:

42L.1. the net amount outstanding for the loan, before provisioning, was \$1,249,334 (as at 30 November 2008) and \$1,264,007 (as at 31 December 2008);

42L.2. the valuation of property securing the loan implied by the Initial November 08 Arrears Report and the November 08 Arrears Report was \$900,031;

42L.3. it was unclear what the implied valuation was based upon;

42L.4. that the most recent valuation of the security property was a 'hypothetical development' valuation from a valuation report dated 1 September 2006, which estimated the value of the property to be \$1,025,000;

42L.5. that on 29 March 2007, a valuer had provided a letter to Provident stating that an offer in relation to the property at \$900,000 plus GST was considered to be fair and reasonable in the circumstances;

42L.6. that the security property had been the subject of a market appraisal dated 15 October 2008, which estimated the value of the property to be \$700,000;

42L.7. the age of the last valuation (some 27 months old) was of concern;

42L.8. the loan had been in arrears for 12 months (as at 30 November 2008) and 13 months (as at 31 December 2008);

42L.9. that interest was accruing on the loan;

- 42L.10. no individual impairment provision had been recorded against the loan;
- 42L.11. the net amount outstanding (after taking into account provisioning) was \$1,249,334 (as at 30 November 2008) and \$1,264,007 (as at 31 December 2008);
- 42L.12. an appropriate range to assume for the gross realisable value of the property, for the purpose of initial enquiries, was \$1,025,000 (as an upper limit) and \$700,000 (as a lower limit); and
- 42L.13. the loan had an Initial Enquiry Additional Provision of around \$328,555 to \$690,277 (as at 30 November 2008) and around \$343,851 to \$706,195 (as at 31 December 2008), calculated as follows:

	<u>30 November 2008</u>		<u>31 December 2008</u>	
	<u>High</u>	<u>Low</u>	<u>High</u>	<u>Low</u>
<u>Gross realisable value</u>	<u>\$1,025,000</u>	<u>\$700,000</u>	<u>\$1,025,000</u>	<u>\$700,000</u>
<u>Recovery costs</u>	<u>(\$51,250)</u>	<u>(\$35,000)</u>	<u>(\$51,250)</u>	<u>(\$35,000)</u>
<u>Holding costs</u>	<u>(\$52,972)</u>	<u>(\$105,943)</u>	<u>(\$53,594)</u>	<u>(\$107,188)</u>
<u>Net realisable value</u>	<u>\$920,778</u>	<u>\$559,057</u>	<u>\$920,156</u>	<u>\$557,812</u>
<u>Net outstanding</u>	<u>\$1,249,334</u>	<u>\$1,249,334</u>	<u>\$1,264,007</u>	<u>\$1,264,007</u>
<u>Required additional provision</u>	<u>\$328,555</u>	<u>\$690,277</u>	<u>\$343,851</u>	<u>\$706,195</u>

F.1.10 Smith & Arnott loan

- 42M. In relation to the loan to Lorraine Mary Smith and Lynelle Maree Arnott (**Smith & Arnott loan**), AETL knew or by reason of the matters pleaded in paragraph 42C ought to have known or concluded that:
- 42M.1. the net amount outstanding for the loan, before provisioning, was \$308,555 (as at 30 November 2008) and \$310,123 (as at 31 December 2008);
- 42M.2. the valuation of property securing the loan implied by the Initial November 08 Arrears Report and the November 08 Arrears Report was \$290,022;
- 42M.3. the implied valuation was based on an 'as is' valuation of the security property for the loan from a valuation report dated 24 July 2006, which estimated the value of the property to be \$290,000;
- 42M.4. the security property had been the subject of a market appraisal dated 15 October 2008, which estimated the value of the security property to be \$180,000;
- 42M.5. the age of the valuation being relied upon for arrears reporting purposes (some 28 months old) was of concern;
- 42M.6. the loan had been in arrears for 17 months (as at 30 November 2008) and 18 months (as at 31 December 2008);

42M.7. that interest was accruing on the loan;

42M.8. no individual impairment provision had been recorded against the loan;

42M.9. an appropriate range to assume for the gross realisable value of the property, for the purpose of initial enquiries, was \$290,000 (as an upper limit) and \$180,000 (as a lower limit); and

42M.10. the loan had an Initial Enquiry Additional Provision of around \$46,130 to \$163,705 (as at 30 November 2008) and around \$47,765 to \$165,406 (as at 31 December 2008), calculated as follows:

	<u>30 November 2008</u>		<u>31 December 2008</u>	
	<u>High</u>	<u>Low</u>	<u>High</u>	<u>Low</u>
<u>Gross realisable value</u>	<u>\$290,000</u>	<u>\$180,000</u>	<u>\$290,000</u>	<u>\$180,000</u>
<u>Recovery costs</u>	<u>(\$14,500)</u>	<u>(\$9,000)</u>	<u>(\$14,500)</u>	<u>(\$9,000)</u>
<u>Holding costs</u>	<u>(\$13,075)</u>	<u>(\$26,150)</u>	<u>(\$13,141)</u>	<u>(\$26,893)</u>
<u>Net realisable value</u>	<u>\$262,425</u>	<u>\$144,850</u>	<u>\$262,359</u>	<u>\$144,717</u>
<u>Net outstanding</u>	<u>\$308,555</u>	<u>\$308,555</u>	<u>\$310,123</u>	<u>\$310,123</u>
<u>Required additional provision</u>	<u>\$46,130</u>	<u>\$163,705</u>	<u>\$47,765</u>	<u>\$165,406</u>

F.1.11 Conclusions based upon initial enquiries

42N. By reason of the matters pleaded in sections F.1.1-F.1.10, AETL should have concluded that:

42N.1. in respect of the loans referred to in section F.1.1-F.1.10 above, the total Initial Enquiry Additional Provisions ranged from:

42N.1.1. around \$3,209,492 to around \$5,653,188 (based on the Initial November 08 Arrears Report, November 08 Arrears Report and/or Amended November 08 Arrears Report);

42N.1.2. around \$2,295,018 to around \$4,523,123 (based on the December 08 Arrears Report); and

42N.2. subject to further review, Provident's loan impairment provisions were very likely materially understated.

F.2 Expanded review

42O. By reason of the matters pleaded in paragraph 39 above, alternatively those matters and the matters pleaded in section F.1 above, AETL should have, in January or February 2009:

42O.1. required Provident (pursuant to s 283BB(c) of the Corporations Act and clauses 6.0.2 and 6.0.3 of the Trust Deed) to provide to AETL (or an investigative accountant reporting to AETL), within a reasonable time:

42O.1.1. access to or copies of the complete loan transaction files including a complete statement of account; and

42O.1.2. all valuations obtained in relation to the security property(s);

for all of the loans shown on the Initial November 08 Arrears Report, the November 08 Arrears Report, and/or the Amended November 08 Arrears Report and/or the December 08 Arrears Report and for the ten largest borrowers (**2008 Loans of Interest**), together with:

42O.1.3. 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:

42O.1.3.1. the full details of the loans to which the "Other loan related receivables" amount related;

42O.1.3.2. whether the property securing each of those loans had been sold; and

42O.1.3.3. after any realisation of the security the subject of those loans, the residual receivable amount owing to Provident in respect of each loan;

42O.2. obtained updated valuations for any property securing a Loan of Interest which, as disclosed by Provident pursuant to paragraph 42O.1:

42O.2.1. had not been the subject of a suitable valuation within the previous 12 months, alternatively 4 months;

42O.2.2. had not been valued on an "as is" basis.

42P. Had AETL required Provident to provide the information referred to in paragraph 42O, AETL (or an investigative accountant reporting to AETL) would have obtained, within a reasonable period thereafter:

42P.1. the complete loan transaction file, including a statement of account, for the Burleigh Views loan;

42P.2. the complete loan transaction files including the valuations then held by Provident of the security for all 2008 Loans of Interest, including those for the 2008 Loans of Concern; and

42P.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.

42Q. By in or around January, or alternatively in or around February 2009, having obtained the material pleaded in paragraph 42P, AETL should have undertaken the analysis and reached the conclusions as pleaded in sections F.2.1 –F.2.11 below.

F.2.1 Burleigh Views loan

43. ~~By mid to late~~in or around January 2009, ~~alternatively or early in or around~~ February 2009, AETL knew, or by reason of the matters pleaded in paragraphs 42O and 42P40, ought to have known, in relation to the loan to Burleigh Views Pty Ltd (~~**Burleigh Views loan**~~)Burleigh Views loan:

43.1A. the matters pleaded in paragraph 28A;

- 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;~~~~[deleted]~~
- 43.3. that an officer of Provident had not completed a "valuation certification" as referred to in Provident's internal procedures;
- 43.4. [deleted]
- 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;
- 43.10.4. the most recent valuation of which was a report dated 4 September 2007 which valued it at \$13.5m on an "as is" basis and was prepared for a party other than Provident;
- 43.11. that the loan as at 31 December 2008 had a carrying value of \$14,320,559;
- 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;
- 43.13A that Provident had not obtained an updated valuation report regarding the site as it ought to have done; and
- 43.13B that the valuation report referred to in the preceding sub-paragraph, had it been obtained by Provident or alternatively AETL, would have valued the site at or around \$6.24m (assuming development approval) or \$5m (assuming no development approval);;
- 43.14. ~~that the loan had appeared on arrears reports that AETL received for months prior to March 2007; [deleted]~~
- 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; and [deleted]~~
- 43.16. ~~that the loan ceased to appear on arrears reports after March 2007. [deleted]~~

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 in or around~~ in or around January 2009 or ~~early in or around~~ in or around February 2009, would, or should, have formed the opinion that provisions for credit losses of between approximately:

- 44.1. ~~\$8,252,1598,124,062;~~ \$8,252,1598,124,062; and

- 44.2. \$8,314,559;

should be made for the Burleigh Views loan.

F.2.2 Ovchinnikov loan

- 45. ~~By mid to late in or around~~ in or around January 2009, ~~alternatively or early in or around~~ in or around February 2009, AETL knew or by reason of the matters pleaded in paragraphs 42O and 42P40 and 41, ought to have known, in relation to the loan to Mihail Ovchinnikov (Ovchinnikov loan):

- 45.1A. the matters pleaded in paragraph 42E (except subparagraph 42E.11);
- 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;~~~~[deleted]~~
- 45.2. that an officer of Provident had not completed a "valuation certification" as referred to in Provident's internal procedures;
- 45.3. ~~[deleted]~~
- 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;~~
~~[deleted]~~
- 45.13. ~~[deleted]~~
- 45.14. ~~that the most recent valuation of the security property was \$5.3m and was dated 18 April 2005;~~~~[deleted]~~

45.15. that Provident had not obtained an updated valuation report regarding the security property as it ought to have done; and

45.16. that the valuation report referred to in the preceding sub-paragraph, had it been obtained by Provident or alternatively AETL, would have valued the security property at or around \$2.45m on an "as is" basis and \$1.75m on a "forced sale" basis, plus between \$324,000 to \$463,000 for an associated water licence.

46. By reason of the matters alleged in the preceding paragraph, AETL, ~~by mid to late in or around~~ in or around January 2009 or ~~early in or around~~ in or around February 2009, would, or should, have formed the opinion that provisions for credit losses of between approximately:

46.1. ~~\$2,623,7472,357,399;~~ and

46.2. ~~\$3,721,2943,199,535;~~

should be made for the Ovchinnikov loan.

F.2.3 Unique Castle Loan

47. ~~By mid to late in or around~~ in or around January 2009, ~~alternatively or early in or around~~ in or around February 2009, AETL, knew or by reason of the matters pleaded in paragraphs 42O and 42P40 and 41, ought to have known, in relation to the loan to Unique Castle Development Pty Ltd (Unique Castle loan):

47.1A. the matters pleaded in paragraph 42G (except subparagraph 42G.11);

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;~~[deleted]

47.2. ~~[deleted]~~

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;~~[deleted]

47.7. ~~[deleted]~~the loan to value ratio was reported to be 64%; and

- 47.8. ~~[deleted]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;~~
- 47.9. ~~In the alternative to the preceding sub-paragraph and in the event that the valuation in that subparagraph was not available to AETL by mid to late January 2009 or early February 2009, that:[deleted]~~
- 47.9.1. ~~Provident had not obtained an updated valuation report regarding the security property as it ought to have done; and~~
- 47.9.2. ~~that the valuation report referred to in the preceding sub-paragraph, had it been obtained by Provident or alternatively AETL, would have valued the security property at or around \$2.05m on an "as-is" basis, and \$1.85m on a "forced sale" basis.~~
48. ~~By reason of the matters alleged in the preceding paragraph, AETL, by mid to late in or around January 2009 or early in or around February 2009, would, or should, have formed the opinion that provisions for credit losses of between approximately:~~
- 48.1. ~~\$638,130; and~~
- 48.2. ~~\$3,461,415,3,710,871;~~
- ~~should be made for the Unique Castle loan.~~

F.2.4 Ozer loan

49. ~~By mid to late In or around January 2009, or early alternatively in or around February 2009, AETL knew or by reason of the matters pleaded in paragraphs 42O and 42P40 and 44, ought to have known, in relation to the loan to Hasan Ozer (Ozer loan):~~
- ~~49.1A. the matters pleaded at paragraph 42I (except subparagraph 42I.11);~~
- 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;[deleted]~~
- 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; and~~

- 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 [deleted]
- 49.9. that the most recent valuation of the property was \$1.4m on an 'as is' basis, \$1.3m on a "forced sale" basis, and was dated 13 January 2009. [deleted]
50. By reason of the matters alleged in the preceding paragraph, AETL, ~~by mid to late in or around~~ January 2009 or ~~early in or around~~ February 2009, would, or should, have formed the opinion that provisions for credit losses of between approximately:
- 50.1. \$799,272,706,224; and
- 50.2. \$1,002,569,816,474;
- should be made for the Ozer loan.

F.2.5 Tembelli loan

51. ~~By mid to late in or around~~ January 2009, ~~or early alternatively in or around~~ February 2009, AETL knew or by reason of the matters pleaded in paragraphs 42O and 42P40 and 41, ought to have known, in relation to the loan to Tembelli Pty Ltd (Tembelli loan):
- 51.1A. the matters pleaded in paragraph 42K (except subparagraph 42K.14);
- 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; [deleted]
- 51.2. that an officer of Provident had not completed a "valuation certification" as referred to in Provident's internal procedures;
- 51.3. [deleted]
- 51.4. that Provident had failed to obtain adequate supporting documents to confirm income levels, expenditure and the financial position of the borrower; and
- 51.5. 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;
- 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%; [deleted]
- 51.7. that the most recent valuation of the security property was \$4.63m and was dated 28 August 2008; and [deleted]
- 51.8. that a prior valuation of the security property was \$3.1m on an "in one line" basis and was dated 12 August 2008. [deleted]
52. By reason of the matters alleged in the preceding paragraph, AETL, ~~by mid to late in or around~~ January 2009 or ~~early in or around~~ February 2009, would, or should, have formed the opinion that provisions for credit losses of between approximately:

52.1. \$~~459,834~~217,637; and

52.2. \$~~2,220,934~~1,736,562;

should be made for the Tembelli loan.

F.2.6 Chrysalis loan

53. ~~By mid to late~~ In or around January 2009, ~~alternatively or early in or around~~ February 2009, AETL knew or by reason of the matters pleaded in paragraphs ~~42O and 42P~~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;~~[deleted]

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. [deleted]
- 53.15. [deleted]
- 53.16. that the most recent valuation of the security property was \$6.85m and was dated 17 August 2005;
- 53.17. that Provident had not obtained an updated valuation report regarding the security property as it ought to have done; and
- 53.18. that the valuation report referred to in the preceding sub-paragraph, had it been obtained by Provident or alternatively AETL, would have valued the security property at or around \$3m on an "as is" basis, and \$2.4m on a "forced sale" basis;
- 53.19. the net amount outstanding for the loan, before provisioning, was \$6,328,242 (as at both 30 November 2008 and 31 December 2008);
- 53.20. interest was not accruing on the loan; and
- 53.21. no individual impairment provision had been recorded against the loan.
54. By reason of the matters alleged in the preceding paragraph, AETL, ~~by mid to late in or around~~ January 2009 or ~~early in or around~~ February 2009, would, or should, have formed the opinion that provisions for credit losses of between approximately:
- 54.1. \$~~3,719,709~~3,410,742; and
- 54.2. \$~~4,636,176~~4,018,242;
- should be made for the Chrysalis loan.

F.2.7 Kooindah loan

55. ~~By mid to late~~In or around January 2009, ~~or early~~ alternatively in or around February 2009, AETL knew or by reason of the matters pleaded in paragraphs 42O and 42P~~40 and 41~~, ought to have known in relation to the loan to Kooindah Lifestyle Pty Ltd (Kooindah loan):
- 55.1A. the matters pleaded in paragraph 42L (except subparagraph 42L.13);
- 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;~~[deleted]
- 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; and
- 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; [deleted]~~
- 55.12. [deleted]
- 55.13. ~~[deleted] that the most recent valuation of the security property was \$1.025m and was dated 1 September 2006;~~
- 55.14. that Provident had not obtained an updated valuation report regarding the security property as it ought to have done; and
- 55.15. ~~[deleted] that the security property was the subject of a market appraisal which valued it at \$700,000 and was dated 15 October 2008.~~
56. By reason of the matters alleged in the preceding paragraph, AETL, ~~by mid to late in or around~~ January 2009 or early in or around February 2009, would, or should, have formed the opinion that provisions for credit losses of between approximately
- 56.1. \$320,789,305,493; and
- 56.2. \$697,445,697,445;
- should be made for the Kooindah loan.

F.2.8 Gardiner loan

57. ~~By mid to late~~ In or around January 2009, ~~or early~~ alternatively in or around February 2009, AETL knew or by reason of the matters pleaded in paragraphs 42O and 42P~~40 and 41~~, ought to have known, in relation to the loan to ~~Victor and Verna Gardiner~~ (Gardiner loan):

57.1A. the matters pleaded at paragraph 42F (except subparagraph 42F.14);

57.1. that Provident had not obtained a written loan application form for the loan; and

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~~[deleted]

57.4. [deleted]

57.5. [deleted]~~that the security property located at 15 Sunlight Parade, Fishing Point in the State of New South Wales was the subject of two market appraisals which valued it at between approximately \$900,000 and \$950,000 and were dated 10 April 2008.~~

58. By reason of the matters alleged in the preceding paragraph, AETL, ~~by mid to late~~ in or around January 2009 or ~~early~~ in or around February 2009, would, or should, have formed the opinion that provisions for credit losses of between approximately:

58.1. ~~\$200,124~~144,264; and

58.2. ~~\$313,602~~202,460;

should be made for the Gardiner loan.

F.2.9 Leach loan

59. ~~By mid to late~~ In or around January 2009, ~~or early~~ alternatively in or around February 2009, AETL knew or by reason of the matters pleaded in paragraphs 42O and 42P~~40 and 41~~, ought to have known, in relation to the loan to Phillip Leslie Leach (Leach loan):

59.1A. the matters pleaded at paragraph 42H (except subparagraph 42H.9);

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;~~[deleted]

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;~~ [deleted]

59.4. [deleted]

59.5. ~~that the most recent valuation of the security property was \$2.3m and was dated 9 February 2007;~~ [deleted]

59.6. that Provident had not obtained an updated valuation report regarding the security property as it ought to have done; and

59.7. that the valuation report referred to in the preceding sub-paragraph, had it been obtained by Provident or alternatively AETL, would have valued the security property at or around \$1.95m on an "as is" basis, and between \$1.7m and \$1.8m on a "forced sale" basis.

60. By reason of the matters alleged in the preceding paragraph, AETL, ~~by mid to late in or around~~ January 2009 or ~~early in or around~~ February 2009, would, or should, have formed the opinion that provisions for credit losses of between approximately:

60.1. ~~\$720,751~~688,767; and

60.2. ~~\$1,039,143~~1,039,143;

should be made for the Leach loan.

F.2.10 Morrell loan

61. ~~By mid to late~~ In our around January 2009, ~~or early alternatively in or around~~ February 2009, AETL knew or by reason of the matters pleaded in paragraphs 42O and 42P40 and 44, ought to have known, in relation to the loan to ~~Maureen Kaye Morrell (Morrell loan)~~:

61.1A. the matters pleaded at paragraph 42D (except subparagraph 42D.11):

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; [deleted]~~

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; and

61.5. ~~that the loan had a principal balance as at December 2008 of about \$1.049m and net arrears of about \$186,162; [deleted]~~

61.6. [deleted]

61.7. ~~[deleted] that the most recent valuation of the security property was \$1.6m and was dated 30 November 2005;~~

61.8. that Provident had not obtained an updated valuation report regarding the security property as it ought to have done; ~~and,~~

61.9. ~~that the security property had been the subject of a contract for sale for \$1.2m in or about February 2008. [deleted]~~

62. By reason of the matters alleged in the preceding paragraph, AETL, ~~by mid to late in or around~~ January 2009 or ~~early in or around~~ February 2009, would, or should, have formed the opinion that provisions for credit losses of between approximately:

- 62.1. nil; and
 62.2. \$172,16330,728;

should be made for the Morrell loan.

F.2.11 Naumovska loan

63. ~~By mid to late~~ In or around January 2009, ~~or early~~ alternatively in or around February 2009, AETL knew or by reason of the matters pleaded in paragraphs 42O and 42P40 and 41, ought to have known, in relation to the loan to ~~Dimitar Naumovski and Milica Naumovska~~ (Naumovska loan):

63.1A. the matters pleaded at paragraph 42J (except subparagraph 42J.10); and

- 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;~~ [deleted]
 63.3. ~~that the loan to valuation ratio was reported to be 120%; and~~ [deleted]
 63.4. ~~that the most recent valuation of the security property was \$480,000 and was dated 27 November 2008.~~ [deleted]

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 between approximately:

- 64.1. \$100,97568,528; and
 64.2. \$132,23479,315;

should be made for the Naumovska loan.

F.2.12 Hanna loan

65. ~~By mid to late~~ In or around January 2009, ~~or early~~ alternatively in or around February 2009, AETL knew or by reason of the matters pleaded in paragraphs 42O and 42P40 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;~~ [deleted]
 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. [deleted]
- 65.7. [deleted]
- 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. [deleted]
- 65.10. that the most recent valuation of the security property was \$6m and was dated 14 September 2007;
- 65.11. that Provident had not obtained an updated valuation report regarding the security property as it ought to have done; and
- 65.12. that the valuation report referred to in the preceding sub-paragraph, had it been obtained by Provident or alternatively AETL, would have valued the security property at or around \$4.5m on an "as is" basis, and \$3.15m on a "forced sale" basis;:-
- 65.13. the net amount outstanding for the loan, before provisioning, was \$5,729,110 (as at 30 November 2008) and \$5,804,258 (as at 31 December 2008);
- 65.14. that interest was not accruing on the loan; and
- 65.15. no individual impairment provision had been recorded against the loan.
66. By reason of the matters alleged in the preceding paragraph, AETL, ~~by mid to late in or around~~ around January 2009 or ~~early in or around~~ around February 2009, would, or should, have formed the opinion that provisions for credit losses of between approximately:
- 66.1. ~~\$1,673,963~~1,352,860; and
- 66.2. ~~\$3,264,293~~2,772,383;
- should be made for the Hanna loan.

F.2.13 Carlsund loan

67. ~~By mid to late in or around~~ around January 2009, ~~or early alternatively in or around~~ around February 2009, AETL knew or by reason of the matters pleaded in paragraphs ~~42O and 42P40 and 44~~, 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;~~[deleted]
- 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. [deleted]
- 67.9. that the most recent valuation of the security property was \$1.1m on an "as is" basis, \$825,000 on a "forced sale" basis, and was dated 1 August 2003;
- 67.10. that Provident had not obtained an updated valuation report regarding the security property as it ought to have done; ~~and~~
- 67.11. the security property was the subject of a market appraisal which valued it at \$1,296,000 and was dated 15 March 2008;
- 67.12. that interest was accruing on the loan; and
- 67.13. no individual impairment provision had been recorded against the loan.
68. By reason of the matters alleged in the preceding paragraph, AETL, ~~by mid to late in or around~~ around January 2009 or ~~early in or around~~ around February 2009, would, or should, have formed the opinion that provisions for credit losses of between approximately:
- 68.1. nil; and
- 68.2. \$472,544;
- should be made for the Carlsund loan.

F.2.14 Smith & Arnott loan

69. ~~By mid to late in or around~~ around January 2009, ~~or early alternatively in or around~~ around February 2009, AETL knew or by reason of the matters pleaded in paragraphs 42O and 42P40 and 41, ought to have known, in relation to the ~~loan to Lorraine Mary Smith & Lynelle Maree Arnott (Smith & Arnott Loan):~~
- 69.1A. the matters pleaded at paragraph 42M (except subparagraph 42M.10):
- 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; [deleted]~~
- 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; and
- 69.5. ~~that the loan had a principal balance as at December 2008 of about \$247,879 and net arrears of about \$64,244; [deleted]~~

- 69.6. [deleted]
- 69.7. ~~that the most recent valuation of the security property was \$290,000 and was dated 24 July 2006; [deleted]~~
- 69.8. that Provident had not obtained an updated valuation report regarding the security property as it ought to have done; ~~and,~~
- 69.9. ~~the security property was the subject of a market appraisal which valued it at \$180,000 and was dated 15 October 2008. [deleted]~~
70. By reason of the matters alleged in the preceding paragraph, AETL, ~~by mid to late in or around~~ January 2009 or ~~early in or around~~ February 2009, would, or should, have formed the opinion that provisions for credit losses of between approximately:
- 70.1. \$41,24039,605; and
- 70.2. \$163,156;
- should be made for the Smith & Amott loan.

F.2.15 DS loan

71. ~~By mid to late in or around~~ January 2009, ~~or early alternatively in or around~~ February 2009, AETL knew or by reason of the matters pleaded in paragraphs 42O and 42P40 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; [deleted]~~
- 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. [deleted]
- 71.7A that the most recent valuation of the security property was \$400,000 and was dated 6 May 2008; and

- 71.8. that the security property was the subject of market appraisals which valued it at \$220,000, and from \$250,000 to \$275,000, and which were dated March and April 2008 respectively;
- 71.9. the net amount outstanding for the loan, before provisioning, was \$397,651 (as at 30 November 2008) and \$349,677 (as at 31 December 2008);
- 71.10. that interest was accruing on the loan;
- 71.11. an individual impairment provision of \$25,000 had been recorded against the loan; and
- 71.12. the net amount outstanding for the loan (after taking into account provisioning) was \$374,651 (as at 30 November 2008) and \$324,677 (as at 31 December 2008).
72. By reason of the matters alleged in the preceding paragraph, AETL, ~~by mid to late in or around~~ around January 2009 or ~~early in or around~~ around February 2009, would, or should, have formed the opinion that provisions for credit losses of between approximately:
- 72.1. nil; and
- 72.2. \$112,463;
- should be made for the DS loan.

F.2.16 Good Life loan

73. ~~By mid to late in or around~~ in or around January 2009, ~~or early alternatively in or around~~ or February 2009, AETL knew or by reason of the matters pleaded in paragraphs ~~42O and 42P40 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; [deleted]~~
- 73.2. that Provident had not obtained a written loan application form for the loan;
- 73.3. [deleted]
- 73.4. [deleted]
- 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 \$215,490 and had been in arrears for about 553 days;
- 73.7. [deleted]
- 73.8. that the most recent valuation of the security property was \$1.8m and was dated 17 March 2006; and
- 73.9. that Provident had not obtained an updated valuation report regarding the security property as it ought to have done.

74. By reason of the matters alleged in the preceding paragraph, AETL, by in or around mid to late January 2009 or in or around early February 2009, would, or should, have formed the opinion that provisions for credit losses were not required for the Good Life loan.

F.2.17 Residual loans

75. By ~~mid to late~~ in or around January 2009, ~~or early~~ alternatively in or around February 2009, AETL knew or by reason of the matters pleaded in paragraphs 42O and 42P40 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 in or around January 2009, alternatively in or around February 2009, ~~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.483 Systems and Processes

77. By reason of the matters alleged in paragraph ~~42P40~~ and Sections F.2.1 to F.2.17 above, AETL should have formed the opinion, in or around ~~mid to late January 2009~~, alternatively in or around February 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 by 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; and
- 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.~~ [deleted]

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.2 and F.3 above, AETL, by in or around mid to late January 2009, alternatively in or around ~~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. [deleted]the Solicitor's Certificate on Title Requirement, as alleged in the paragraphs in Sections F.2.4 to and F.4.83;
 - 78.2. that provisions for credit losses in respect of the loans referred to in section F.2 of between approximately \$18,427,688 ~~18,289,200~~ and \$29,723,988 ~~26,990,364~~ (as at 30 November 2008) and between

- approximately \$18,317,351 and \$27,115,879 (as at 31 December 2008) 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 respect of loans referred in section F.2, the 2008 Loans of Concern 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 that was or should have been available to Provident was, or was highly likely to be, ~~would be~~ insufficient to repay the debentures when they became due;
- 78.6. that the Provident Capital Ltd Quarterly Report dated 30 October 2008 had not complied with s 283BF(4) of the Corporations Act.
- 78.7. that Provident was in breach of conditions under its AFSL, and consequently in breach of s 912A of the Corporations Act as Provident had reason to suspect:
- 78.7.1. that its total assets would currently not exceed its total liabilities; and/or
- 78.7.2. that its adjusted assets would currently not exceed its adjusted liabilities; and
- 78.8. that:
- 78.8.1. for the purposes of RG 69, more than a minor part of Provident's activities was property development or lending funds directly or indirectly for property development;
- 78.8.2. by reason of paragraphs 5.7 and 78.8.1, the benchmark minimum equity ratio applicable to Provident, for the purposes of reporting by Provident against benchmark 1 of RG 69, was 20%;
- 78.8.3. in Debenture Prospectus 11 and in its Quarterly Report dated 30 October 2008 Provident had incorrectly identified the applicable benchmark minimum equity ratio as 8%.

PARTICULARS

- (a) *The provisions for credit losses alleged in sub-paragraph 78.2 are the sum of the provisions for credit losses alleged in paragraphs 44, 46, 48, 50, 52, 54, 56, 58, 60, 62, 64, 66, 68, 70 and 72.*
- (b) *The lower end of the range in sub-paragraph 78.2 is the sum of the lower end of the range of provisions specified in the paragraphs referenced in (a) less \$1.123m reflecting provisions that may have been made by Provident in December 2008.*
- (c) *The higher end of the range in sub-paragraph 78.2 is the sum of the higher end of the range of provisions specified in the paragraphs referenced in (a).*

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~~ in or around January or ~~early~~ in or around February 2009 AETL would, or should, have reached the conclusion that it could not be satisfied that Provident had 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~~ in or around January 2009 or ~~early~~ alternatively in or around February 2009, AETL would, or should, have:
- 80.1. informed ASIC and Provident of the above conclusions; and
 - 80.2. 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).
- 80A. In or around February 2009, Provident would have:
- 80A.1. ceased further borrowing from members of the public;
 - 80A.2. ceased rolling over debentures;
 - 80A.3. refunded any monies received pursuant to Debenture Prospectus 11, by reason of:
 - 80A.4. Provident volunteering to do so;
 - 80A.5. Provident complying with its obligation under s 724 of the Corporations Act to repay money received from applicants for debentures pursuant to Debenture Prospectus 11;
 - 80A.6. ASIC placing a stop order on Debenture Prospectus 11 and preventing further borrowing by Provident by way of the issue and/or rollover, of debentures, though administrative action or by obtaining court orders; and/or
 - 80A.7. AETL applying for, and obtaining, court 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 (including by way of rollover) and be made to refund any monies received pursuant to Debenture Prospectus 11.
81. [deleted]
82. [deleted]
83. In the events described in paragraph 80A Provident:
- 83.1. would have been unable to remedy, within 21 days of being served with the notice referred to in paragraph 80.2, the various breaches of the Trust Deed; and/or
 - 83.2. would have been unable to ensure that the property that was or should have been available to Provident would be sufficient to repay the debentures when they became due.

84. In the premises, in or around March 2009, AETL would, or should, 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. obtained court orders to have receivers appointed to the property of Provident and/or to have Provident wound up.
- 84A. Further, or in the alternative to the steps described in paragraph 84:
- 84A.1. Provident would have:
 - 84A.1.1. instigated a voluntary administration of the company; or
 - 84A.1.2. instigated a voluntary liquidation of the company; or
 - 84A.2. ASIC would have obtained court orders to have receivers appointed to the property of Provident and/or to have Provident wound up.

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 any of the steps alleged in paragraphs 80, 80A.7 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 or around 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. [deleted]
 - 88.4. external administrators/liquidators would have been appointed to Provident and/or the property of Provident secured by the Charge in or around February 2009 or early in or around 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 to 84A 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 to 84A 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 to 84 then the property available to repay debenture-holders would have been realised at about that time. Debenture holders would have received a return of between approximately ~~53.646.4~~ and 57.42 cents in the dollar ('**2009 recovery rate**').*
- e) *In fact, Provident continued to trade and the value of the property available to repay debenture-holders deteriorated, with the result that on ~~30 September 2015~~ 23 October 2017, the receivers and managers of Provident estimated that debenture holders would receive a return of ~~16~~ 21.2 cents in the dollar.*
- f) *Group members who held debentures as at 23 December 2008, or as at the date when the steps alleged in paragraphs 80 to 84A 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 to 84A 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 \$26.4m of interest received, leaving an amount of unpaid interest of \$4.98m;
 - 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 at least from that time, Provident should have measured its performance against benchmark 1 in RG 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:

- 96.1. 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.

- 96.2. that the total amount owing in respect of the PCF Loan was \$3,509,385 the recovery of which could be doubtful.

PARTICULARS

Provident Capital Ltd quarterly report dated 21 July 2010 at p. 2

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.

- 97A. By on or around 1 October 2010 or shortly thereafter, AETL knew, or ought to have known that, as at August 2010:
- 97A.1 there were 22 past due loans (greater than 90 days) in the FTI Portfolio, with a principal balance of approximately \$57.3m equating to 30.71% of total loans made by Provident;
- 97A.2 thirteen of the 22 loans had a 'TLVR', as disclosed by Provident, of at least 85%;
- 97A.3 seven of the 22 loans had a 'TLVR', as disclosed by Provident, of at least 100%;
- 97A.4 of the seven loans with a reported 'TVLR' in excess of 100%, three did not have a loan impairment provision;
- 97A.5 eleven loans had Recorded Individual Provisions totalling \$1,939,482;
- 97A.6 potential losses on the reported loans:
- 97A.6.1. totalled more than \$1.7 million;
- 97A.6.2. were inconsistent with the Recorded Individual Provisions, including by reason of the fact that in respect of three loans with reported LVRs greater than 100%, there were substantial potential losses evidenced by the arrears report, but no loan impairment provisions recorded against the loans.
- 97A.7 loans more than 90 days in arrears included the Chrysalis loan, the Unique Castle loan, the Kooindah loan, the Morrell loan, the Naumovska loan, the Hanna loan, the Good Life loan, the Sinclair loans, the Jarule loan, the Owston loan, the Eastridge Investments loan, the Bortolin-Papa loan, and the Tahatos loan (as those terms are defined in sections F and J).

PARTICULARS

*August 2010 Arrears Report provided to AETL on or about 1 October 2010 (**August 10 Arrears Report**) [AET.500.001.8461; AET.500.001.8464].*

As to the calculation of potential losses, the plaintiff refers to the report of Andrew Malarkey dated 20 October 2016 at [233] where he calculates potential losses to be \$1,778,916. There were seven loans in respect of which potential losses were evidenced.

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.

100A. In or about the first week of November 2010, AETL received a report from Provident showing the loans made by Provident which were in excess of 90 days past due as at 31 September 2010 (**September 10 Arrears Report**).

100B. The September 10 Arrears Report showed and/or evidenced:

- 100B.1 that more than 30% (30.5%) of loans (by principal balance) were in arrears of 90 days or more;
- 100B.2 that as at about 31 September 2010, 14 of the 23 loans in arrears of 90 days or more had a 'TLVR', as disclosed by Provident, of at least 85%;
- 100B.3 that as at about 31 October 2010, eight of the loans had a TLVR in excess of 100%; and

100B.4 loans more than 90 days in arrears including the loans identified in paragraph 97A.7 above, and the DS loan (together, the **2010 Loans of Concern**).

PARTICULARS

September 10 Arrears Report emailed to AETL on or around 1 November 2010 [AET.500.001.8448; AET.500.001.8451].

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:

101.2A. taking the steps referred to in section J.1 below;

101.2B further or alternatively, taking the steps referred to in section J.2 below.

~~requiring Provident (pursuant to s 283BB(c) and clauses 6.0.2 and 6.0.3 of the Trust Deed) to provide to AETL (or an investigative accountant reporting 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 [deleted]~~

~~101.4. access to or copies of the complete loan transaction files, including a complete statement of account, for the ten largest borrowers. [deleted]~~

~~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, AETL (or an investigative accountant reporting to AETL) would have obtained by in or around November 2010: [deleted]~~

~~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**). [deleted]~~

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 [deleted]~~

J.1 Initial enquiries

104A. By reason of the matters pleaded in paragraph 101, AETL should have, in relation to each of the loans reported in the August 10 Arrears Report as having been in arrears for more than 90 days and having LVRs greater than 100%:

104A.1. required Provident (pursuant to s 283BB(c) of the Corporations Act and clauses 6.0.2 and 6.0.3 of the Trust Deed) to provide to AETL:

104A.1.1. an explanation as to how TLVR had been calculated in the arrears reports;

104A.1.2. valuation reports, marketing appraisals, and/or agreements or offers relating to the value of property in respect of which Provident held a security interest for the loan;

104A.1.3. loans statements for the loan;

104A.1.4. information about whether interest continuing to accrue on the loan was being brought to account by Provident;

104A.2. determined the net balance outstanding (principal plus arrears);

104A.3. deducted the value of any then current impairment provision from the net balance outstanding to determine the net amount outstanding;

104A.4. determined an appropriate valuation, or appropriate range of valuations, for the property in respect of which Provident held a security interest, having regard to the age and basis of valuation of any relevant valuation reports and marketing appraisals;

104A.5. estimated recovery and holding costs associated with each security property, with recovery costs assumed to be around 5% of the appropriate valuation of the gross realisable value;

104A.6. deducted the estimated recovery and holding costs from the most appropriate valuation in order to estimate a net realisable value for each property;

104A.7. where the net amount outstanding was greater than the estimated net realisable value, calculated an Initial Enquiry Additional Provision by deducting the estimated net realisable value from the net amount outstanding; and

104A.8. compared the Initial Enquiry Additional Provision with the potential loss evidenced by the relevant arrears report.

104B. Had AETL requested the information and material pleaded in paragraph 104A.1, it would have received shortly thereafter the information and materials referred to in respect of each of the loans discussed in sections J.1.1 –J.1.6 below.

104C. By about November 2010, having received the information and materials referred to in paragraph 104B above, AETL should have undertaken the analysis referred to in paragraphs 104A.2 – 104A.8 above and reached the conclusions as pleaded in sections J.1.1 – J.1.6 below.

J.1.1 Unique Castle loan

104D. In relation to the Unique Castle loan, AETL knew or by reason of the matters pleaded in paragraph 104C ought to have known or concluded that:

104D.1. the net amount outstanding for the loan, before provisioning, was \$4,930,380 (as at 31 October 2010);

104D.2. the valuation of property securing the loan as set out in the August 10 Arrears Report (and also in the September 10 Arrears Report) was \$4,750,000;

104D.3. the valuation provided in the August 10 Arrears Report (and also in the September 10 Arrears Report) was based upon an “as is” valuation dated 30 June 2010, which estimated the value of the property to be \$4,750,000, and did not include a valuation of the property on an “as is” basis;

104D.4. the loan had been in arrears for 44 months (as at 31 October 2010);

104D.5. interest was not accruing on the loan;

104D.6. no individual impairment provision had been recorded against the loan;

104D.7. an appropriate amount to assume for the gross realisable value of the property, for the purpose of initial enquiries, was \$4,750,000; and

104D.8. the loan had an Initial Enquiry Additional Provision of around \$417,880 as at 31 October 2010, calculated as follows:

	<u>31 October 2010</u>	
	<u>High</u>	<u>Low</u>
<u>Gross realisable value</u>	<u>\$4,750,000</u>	<u>\$4,750,000</u>
<u>Recovery costs</u>	<u>(\$237,500)</u>	<u>(\$237,500)</u>
<u>Holding costs</u>	<u>Nil</u>	<u>Nil</u>
<u>Net realisable value</u>	<u>\$4,512,500</u>	<u>\$4,512,500</u>
<u>Net outstanding</u>	<u>\$4,930,380</u>	<u>\$4,930,380</u>
<u>Required additional provision</u>	<u>\$417,880</u>	<u>\$417,880</u>

J.1.2 Naumovska loan

104E. In relation to the Naumovska Loan, AETL knew or by reason of the matters pleaded in paragraph 104C ought to have known or concluded that:

104E.1. the net amount outstanding for the loan, before provisioning, was \$703,833 (as at 31 October 2010);

- 104E.2. the valuation of the property securing the loan, as set out in the August 10 Arrears Report (and also in the September 10 Arrears Report), was \$500,000;
- 104E.3. the valuation provided in the August 10 Arrears Report (and also in the September 10 Arrears Report) was based upon the upper value in a "restricted valuation" of the security property dated 3 February 2010, which estimated the value of the property to be from \$460,000 to \$500,000.
- 104E.4. that the most recent valuation of the security property was \$480,000 and was dated 27 November 2008;
- 104E.5. the loan had been in arrears for 28 months (as at 31 October 2010);
- 104E.6. interest was not accruing on the loan
- 104E.7. an individual impairment provision of \$75,000 had been recorded against the loan;
- 104E.8. the net amount outstanding (after taking into account provisioning) was \$628,833 (as at 31 October 2010);
- 104E.9. an appropriate range to assume for the gross realisable value of the property, for the purpose of initial enquiries, was \$480,000 (as an upper limit) and \$460,000 (as a lower limit); and
- 104E.10. the loan had an Initial Enquiry Additional Provision of around \$172,833 to \$191,833 as at 31 October 2010, calculated as follows:

	31 October 2010	
	High	Low
<u>Gross realisable value</u>	<u>\$480,000</u>	<u>\$480,000</u>
<u>Recovery costs</u>	<u>(\$24,000)</u>	<u>(\$23,000)</u>
<u>Holding costs</u>	<u>Nil</u>	<u>Nil</u>
<u>Net realisable value</u>	<u>\$456,000</u>	<u>\$437,000</u>
<u>Net outstanding</u>	<u>\$628,833</u>	<u>\$628,833</u>
<u>Required additional provision</u>	<u>\$172,833</u>	<u>\$191,833</u>

J.1.3 Sinclair loans

- 104F. In relation to the loans to Angus William Sinclair (**Sinclair Loans**), AETL knew or by reason of the matters pleaded in paragraph 104C ought to have known or concluded that:
- 104F.1. the loans were cross-collateralised;
- 104F.2. the net amount outstanding for the loans, before provisioning, was \$2,034,282 (as at 31 October 2010);

- 104F.3. the total valuations of the properties securing the loans, as set out in the August 10 Arrears Report (and also in the September 10 Arrears Report), was \$1,600,000;
- 104F.4. the total valuation provided in the August 10 Arrears Report (and also in the September 10 Arrears Report) was based upon:
- 104F.4.1. an 'as is' valuation of the security property at 3 Pacific Street, Fishermans Bay in the New South Wales (**Pacific St security**) in a valuation report dated 18 December 2008, which estimated the value of the property to be \$875,000 on an 'as is' basis, and \$700,000 on a 'forced sale' basis; and
- 104F.4.2. an 'as is' valuation of the security property at 2 Ocean Street, Fishermans Bay in the New South Wales (**Ocean St security**) in a valuation report dated 18 December 2008, which estimated the value of the property to be \$725,000 on an 'as is' basis, and \$580,000 on a 'forced sale' basis;
- 104F.5. the most recent valuation of the Pacific St security was a valuation report dated 6 February 2009, which estimated the 'as is' value of the property to be \$950,000;
- 104F.6. the most recent valuation of the Ocean St security was a valuation report dated 3 July 2009, which estimated the 'as is' value of the property to be \$435,000;
- 104F.7. the fact that Provident was not relying on the most recent appropriate valuation reports held by it was of concern;
- 104F.8. the loans had been in arrears for 59 months and 70 months respectively (as at 31 October 2010);
- 104F.9. interest was not accruing on the loans.
- 104F.10. combined total individual impairment provisions of \$394,000 had been recorded against the loans;
- 104F.11. the net amount outstanding (after taking into account provisioning) was \$1,640,282 (as at 31 October 2010);
- 104F.12. an appropriate range to assume for the gross realisable value of the property, for the purpose of initial enquiries, was \$1,385,000 (as an upper limit) and \$1,280,000 (as a lower limit); and
- 104F.13. the loan had an Initial Enquiry Additional Provision of around \$324,532 to \$424,282 as at 31 October 2010, calculated as follows:

	31 October 2010	
	High	Low
<u>Gross realisable value</u>	<u>\$1,385,000</u>	<u>\$1,280,000</u>
<u>Recovery costs</u>	<u>(\$69,250)</u>	<u>(\$64,000)</u>
<u>Holding costs</u>	<u>Nil</u>	<u>Nil</u>
<u>Net realisable value</u>	<u>\$1,315,750</u>	<u>\$1,216,000</u>
<u>Net outstanding</u>	<u>\$1,640,282</u>	<u>\$1,640,282</u>
<u>Required additional provision</u>	<u>\$324,532</u>	<u>\$424,282</u>

J.1.4 Jarule loan

104G. In relation to the loan to Jarule Pty Ltd (the **Jarule loan**), AETL knew or by reason of the matters pleaded in paragraph 104C ought to have known or concluded that:

104G.1. the net amount outstanding for the loan, before provisioning, was \$3,236,414 (as at 31 October 2010);

104G.2. the total valuation of property securing the loan, as set out in the August 10 Arrears Report (and also in the September 10 Arrears Report), was \$2,700,000;

104G.3. the total valuation provided in the August 10 Arrears Report (and also in the September 10 Arrears Report) was based upon an 'as is' valuation dated 22 September 2008, which estimated the value of the property to be \$2,700,000;

104G.4. that the security property had been the subject of a market appraisal which valued it at \$2.5m and was dated 27 July 2010;

104G.5. the age of the valuation being relied upon for arrears reporting purposes (some 25 months old) was of concern;

104G.6. the loan had been in arrears for 12 months (as at 31 October 2010);

104G.7. interest was accruing on the loan;

104G.8. no individual impairment provision had been recorded against the loan;

104G.9. an appropriate range to assume for the gross realisable value of the property, for the purpose of initial enquiries, was \$2,700,000 (as an upper limit) and \$2,500,000 (as a lower limit); and

104G.10. the loan had an Initial Enquiry Additional Provision of around \$808,679 to \$1,135,943 as at 31 October 2010, calculated as follows:

	31 October 2010	
	High	Low
<u>Gross realisable value</u>	<u>\$2,700,000</u>	<u>\$2,500,000</u>
<u>Recovery costs</u>	<u>(\$135,000)</u>	<u>(\$125,000)</u>
<u>Holding costs</u>	<u>(\$137,265)</u>	<u>(\$274,529)</u>
<u>Net realisable value</u>	<u>\$2,427,735</u>	<u>\$2,100,471</u>
<u>Net outstanding</u>	<u>\$3,236,414</u>	<u>\$3,236,414</u>
<u>Required additional provision</u>	<u>\$808,679</u>	<u>\$1,135,943</u>

J.1.5 Owston loan

104H. In relation to the loan to Owston Nominees No 2 Pty Ltd as trustee for the Warren Anderson Trust (**Owston loan**), AETL knew or by reason of the matters pleaded in paragraph 104C ought to have known or concluded that:

- 104H.1. the net amount outstanding for the loan, before provisioning, was \$6,401,313 (as at 31 October 2010);
- 104H.2. the total valuation of property securing the loan, as set out in the August 10 Arrears Report (and also in the September 10 Arrears Report), was \$5,700,000;
- 104H.3. the total valuation provided in the August 10 Arrears Report (and also in the September 10 Arrears Report) was based upon an 'as is' valuation dated 23 June 2009, which estimated the value of the property to be \$5,700,000;
- 104H.4. the loan had been in arrears for 16 months (as at 31 October 2010);
- 104H.5. interest was accruing on the loan;
- 104H.6. no individual impairment provision had been recorded against the loan;
- 104H.7. an appropriate amount to assume for the gross realisable value of the property, for the purpose of initial enquiries, was \$5,700,000; and
- 104H.8. the loan had an Initial Enquiry Additional Provision of around \$1,291,588 to \$1,596,864 as at 31 October 2010, calculated as follows:

	31 October 2010	
	High	Low
<u>Gross realisable value</u>	<u>\$5,700,000</u>	<u>\$5,700,000</u>
<u>Recovery costs</u>	<u>(\$285,000)</u>	<u>(\$285,000)</u>
<u>Holding costs</u>	<u>(\$305,275)</u>	<u>(\$601,551)</u>
<u>Net realisable value</u>	<u>\$5,109,725</u>	<u>\$4,804,449</u>
<u>Net outstanding</u>	<u>\$6,401,313</u>	<u>\$6,401,313</u>
<u>Required additional provision</u>	<u>\$1,291,588</u>	<u>\$1,596,864</u>

J.1.6 Eastridge Investments loan

104I. In relation to the loan to Eastridge Investments Pty Ltd (**Eastridge Investments loan**), AETL knew or by reason of the matters pleaded in paragraph 104C ought to have known or concluded that:

- 104I.1. the net amount outstanding for the loan, before provisioning, was \$3,132,091 (as at 31 October 2010);
- 104I.2. the valuation of property securing the loan, as set out in the August 10 Arrears Report (and also in the September 10 Arrears Report), was \$2,750,000;
- 104I.3. the valuation provided in the August 10 Arrears Report (and also in the September 10 Arrears Report) was based upon an 'as is' valuation dated 27 August 2008, which estimated the value of the property to be \$2,750,000;
- 104I.4. the most recent valuation of the security property was an 'as is' valuation from a valuation report dated 7 October 2009, which estimated the 'as is' value of the property to be \$2,000,000;
- 104I.5. the fact that Provident was not relying on the most recent appropriate valuation reports held by it was of concern;
- 104I.6. the security property was the subject of a market appraisal which valued it at from \$1.95m to \$2.1m and was dated 1 February 2010.
- 104I.7. the loan had been in arrears for 17 months (as at 31 October 2010);
- 104I.8. interest was accruing on the loan;
- 104I.9. an individual impairment provision of \$100,000 had been recorded against the loan;
- 104I.10. the net amount outstanding (after taking into account provisioning) was \$3,032,091 (as at 31 October 2010);
- 104I.11. an appropriate range to assume for the gross realisable value of the property, for the purpose of initial enquiries, was \$2,000,000 (as an upper limit) and \$1,950,000 (as a lower limit); and

104I.12. the loan had an Initial Enquiry Additional Provision of around \$1,280,903 to \$1,477,215 as at 31 October 2010, calculated as follows:

	31 October 2010	
	High	Low
<u>Gross realisable value</u>	<u>\$2,000,000</u>	<u>\$1,950,000</u>
<u>Recovery costs</u>	<u>(\$100,000)</u>	<u>(\$97,500)</u>
<u>Holding costs</u>	<u>(\$148,812)</u>	<u>(\$297,624)</u>
<u>Net realisable value</u>	<u>\$1,751,188</u>	<u>\$1,554,876</u>
<u>Net outstanding</u>	<u>\$3,032,091</u>	<u>\$3,032,091</u>
<u>Required additional provision</u>	<u>\$1,280,903</u>	<u>\$1,477,215</u>

J.1.7 Conclusions based upon initial enquiries

104J. By reason of the matters pleaded in sections J.1.1-J.1.6, AETL should have concluded that:

104J.1. in respect of the loans referred to in section J.1.1-J.1.6 above, the total Initial Enquiry Additional Provisions ranged from around \$4,296,415 to around \$5,244,017; and

104J.2. subject to further review, Provident's loan impairment provisions were very likely materially understated.

J.2. Expanded review

104K. By reason of the matters pleaded in paragraph 101 above, alternatively those matters and the matters pleaded in section J.1 above, AETL should have, in or around November 2010:

104K.1. required Provident (pursuant to s 283BB(c) of the Corporations Act and clauses 6.0.2 and 6.0.3 of the Trust Deed) to provide to AETL (or an investigative accountant reporting to AETL), within a reasonable time:

104.1.1. access to or copies of the complete loan transaction files, including a complete statement of account; and

104.1.2. all valuations obtained in relation to the security property(s);

for all loans shown on the August 10 Arrears Report or the September 10 Arrears Report (including the 2010 Loans of Concern) and for the ten largest borrowers (2010 Loans of Interest);

104K.2. obtained updated valuations for any property securing a 2010 Loan of Interest which, as disclosed by Provident pursuant to paragraph 104K.1:

104K.2.1. had not been the subject of a suitable valuation within the previous 12 months;

104K.2.2. had not been valued on an "as is" basis.

104L. Had AETL required Provident to provide the information referred to in paragraph 104K, AETL (or an investigative accountant reporting to AETL) would have obtained, within a reasonable period thereafter:

104L.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

104L.2. the complete loan transaction files including the valuations then held by Provident of the security for all 2010 Loans of Interest.

104M. 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**).

104N. The October 10 Arrears Report showed and/or evidenced:

104N.1. that more than 30% (30.6%) of loans (by principal balance) were in arrears of 90 days or more;

104N.2. that as at about 31 October 2010, 14 of the 24 loans in arrears of 90 days or more had a 'TLVR', as disclosed by Provident, of at least 85%;

104N.3. that as at about 31 October 2010, eight of the loans had a TLVR in excess of 100%;

104N.4. potential losses on the reported loans, which:

104N.4.1. totalled more than \$1.9 million;

104N.4.2. were inconsistent with Recorded Individual Provisions, including by reason of the fact that in respect of three loans with reported LVRs greater than 100%, there were substantial potential losses evidenced by the arrears report, but no loan impairment provisions recorded against the loans;

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October 10 Arrears Report emailed to AETL on or around 1 December 2010 [AET.500.001.7916].

As to the calculation of potential losses, the plaintiff refers to the report of Andrew Malarkey dated 20 October 2016 at [278] where he calculates potential losses to be \$1,921,557. There were eight loans in respect of which potential losses were evidenced.

104O. By in or around November or December 2010, having obtained the material pleaded in paragraph 104L (and after early December 2010 (as applicable) having obtained the material pleaded in paragraph 104M), AETL should have undertaken the analysis and reached the conclusions as pleaded in sections J.2.1 –J.2.15 below.

J.2.1 Burleigh Views Loan

105. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 104K and 104L, 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 31 October 2010, the loan had a carrying value of \$18,527,079;
 - 105.4. that despite being mortgagee in possession since September 2008, Provident had not been taking adequate steps to realise its security;
 - 105.5. that Provident had not been maintaining current valuations for the security;
 - 105.6. that Provident had not obtained an updated valuation report regarding the security as it ought to have done; and
 - 105.7. that the valuation report referred to in the preceding sub-paragraph, had it been obtained by Provident or alternatively AETL, would have valued the security property at or around \$5.5m.
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 between approximately:
- 106.1. \$13,178,329; and
 - 106.2. \$13,233,329;
- should be made for the Burleigh Views loan.

J.2.2 *Chrysalis loan*

107. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 104K and 104L~~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;
 - 107.2A that Provident had not obtained an updated valuation report regarding the security property as it ought to have done;
 - 107.2B that the valuation report referred to in the preceding sub-paragraph, had it been obtained by Provident or alternatively AETL, would have valued the security property at or around \$3.15m on an "as is" basis and \$2.67m on a "forced sale" basis;
 - 107.3. that as at 31 October 2010, the Chrysalis loan had a carrying value of \$7.022m; and
 - 107.4. that Provident had not taken adequate steps to realise its security.
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 between approximately:
- 108.1. ~~\$4,428,177~~3,958,796; and
 - 108.2. ~~\$5,391,059~~4,452,296;
- 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:~~[deleted]~~
- 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 adequate steps to realise its securities.~~

J.2.34 Unique Castle loan

110. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 104K and 104L~~102 and 103~~ ought to have known, in relation to the Unique Castle loan:
- 110.1. each of the matters set out in paragraphs 47 and 104D (except subparagraph 104D.8) 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; [deleted]~~
- 110.3. ~~[deleted]~~
- 110.4. ~~that the most recent valuation of the security property at 161 Castle Hill Road, Castle Hill was \$4.75m, was dated 30 June 2010, and did not include a valuation of the property on an "as is" basis; [deleted]~~
- 110.5. that Provident had not otherwise obtained an updated valuation report regarding the "as is" value of the security property as it ought to have done; and
- 110.6. that the valuation report referred to in the preceding sub-paragraph, had it been obtained by Provident or alternatively AETL, would have valued the security property at or around \$2.15m on an "as is" basis, \$1.935m on a "forced sale" basis.
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 between approximately:
- 111.1. \$3,127,9442,839,505; and
- 111.2. \$3,644,7603,067,943;
- should be made for this loan.

J.2.45 Kooindah loan

112. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 104K and 104L~~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; and
 - 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. [deleted]
 - 112.4. [deleted]
- 112A. 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 between approximately:
- 112A.1. nil; and
 - 112A.2. \$145,7789,453;
- should be made for this loan.

J.2.56 Morrell loan

113. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 104K and 104L~~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. [deleted]
 - 113.4. that the most recent valuation of the security property was \$1.6m and was dated 30 November 2005
 - 113.5. that Provident had not obtained an updated valuation report regarding the security property as it ought to have done; and
 - 113.6. that the security property was the subject of a market appraisal which valued it at between \$1m and \$1.2m and was dated 4 March 2009.
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 were not required for the Morrell loan. ~~provisions for credit losses of between approximately:~~
- 114.1. nil; and ~~[deleted]~~
 - 114.2. \$11,492; ~~[deleted]~~
- ~~should be made for this loan.~~

J.2.67 Naumovska loan

115. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 104K and 104L~~102 and 103~~ ought to have known, in relation to the Naumovska loan:
- 115.1. each of the matters set out in paragraphs 63 and 104E (except subparagraph 104E.10) 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. [deleted]
- 115.4. that the most recent valuation of the security property was \$480,000 and was dated 27 November 2008; and
- 115.5. that a "restricted valuation" of the security property valued it at from \$460,000 to \$500,000 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 between approximately:

116.1. ~~\$244,834~~162,033; and

116.2. ~~\$285,679~~186,083;

should be made for this loan.

J.2.78 Hanna loan

117. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 104K and 104L~~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. [deleted]
- 117.4. that the most recent valuation of the security property was \$6.0m and was dated 18 September 2009;
- 117.5. that Provident had not obtained an updated valuation report regarding the security property as it ought to have done; and
- 117.6. that the valuation report referred to in the preceding sub-paragraph, had it been obtained by Provident or alternatively AETL, would have valued the security property at or around \$3.8m on an "as is" basis, and \$2.65m on a "forced sale" basis.
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 between approximately:
- 118.1. ~~\$2,467,574~~2,149,410; and
- 118.2. ~~\$3,930,612~~3,294,285;
- should be made for this loan.

J.2.89 DS loan

119. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 104K and 104L~~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. [deleted]
 - 119.4A. that the most recent valuation of the security property was \$400,000 and was dated 6 May 2008;
 - 119.4B. that Provident had not obtained an updated valuation report regarding the security property as it ought to have done; and
 - 119.5. that the security property was the subject of a market appraisal which valued it at from \$155,000 to \$160,000 and was dated 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 between approximately:
- 120.1. nil; and
 - 120.2. ~~\$222,643~~192,796;
- should be made for this loan.

J.2.940 Good Life loan

121. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 104K and 104L~~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;
 - 121.3. [deleted]
 - 121.4. that the most recent valuation of the security property was \$1.8m and was dated 17 March 2006;

121.5. that Provident had not obtained an updated valuation report regarding the security property as it ought to have done; and

121.6. that the security property had been the subject of a contract for sale for \$1.35m in or about September 2010.

121A. 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 between approximately:

112A.1. nil; and

112A.2. \$207,35740,475;

should be made for this loan.

J.2.104 Sinclair loans

122. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 104K and 104L~~102 and 103~~ ought to have known, in relation to the loans to Angus William Sinclair (Sinclair loans):

122.1A. the matters pleaded in paragraph 104F (except subparagraph 104F.13):

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; [deleted]~~

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; [deleted]~~

122.3. [deleted]

122.4. ~~that the most recent valuation of the security property at 3 Pacific Street, Fishermans Bay in the New South Wales (Pacific St security) was \$950,000 and was dated 6 February 2009; [deleted]~~

122.5. ~~that the most recent valuation of the security property at 2 Ocean Street, Fishermans Bay in the New South Wales (Ocean St security) was \$435,000 and was dated 3 July 2009; [deleted]~~

122.6. ~~that a prior valuation of the Pacific St security was \$700,000 on a "forced sale" basis and was dated 18 December 2008 [deleted]~~

122.7. ~~that a prior valuation of the Ocean St security was \$580,000 on a "forced sale" basis and was dated 18 December 2008; [deleted]~~

122.8. that Provident had not obtained an updated valuation report regarding the security properties as it ought to have done.

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 between approximately:

123.1. \$418,959293,370; and

123.2. \$659,462408,282;

should be made for the Sinclair loans.

J.2.4211 Jarule loan

124. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 104K and 104L~~102 and 103~~ ought to have known, in relation to the loan to Jarule Pty Ltd (Jarule loan):

124.1A. the matters pleaded in paragraph 104G (except subparagraph 104G.10); and

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; [deleted]~~

124.2. [deleted]

124.3. ~~that the most recent valuation of the security property was \$2.7m and was dated 22 September 2008 [deleted]~~

124.4. that Provident had not obtained an updated valuation report regarding the security property as it ought to have done; and

124.5. ~~that the security property was the subject of a market appraisal which valued it at \$2.5m and was dated 27 July 2010. [deleted]~~

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 between approximately:

125.1. \$747,929; and

125.2. \$1,104,693;

should be made for this loan.

J.2.4312 Owston loan

126. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 104K and 104L~~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):

126.1A. the matters pleaded in paragraph 104H (except subparagraph 104H.8); and

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; [deleted]~~

126.2. [deleted]

126.3. ~~that the most recent valuation of the security property was \$5.7m and was dated 23 June 2009; [deleted]~~

126.4. that Provident had not obtained an updated valuation report regarding the security property as it ought to have done.

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 between approximately:

127.1. \$1,163,338; and

127.2. \$1,525,614;

should be made for this loan.

J.2.1413 *Eastridge Investments loan*

128. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 104K and 104L~~102 and 103~~ ought to have known, in relation to the loan to ~~Eastridge Investments Pty Ltd~~ (**Eastridge Investments loan**):
- 128.1A. the matters pleaded in paragraph 104I (except subparagraph 104I.12); and
- 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; [deleted]~~
- 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; [deleted]~~
- 128.3. [deleted]
- 128.4. ~~that the most recent valuation of the security property was \$2m and was dated 7 October 2009; [deleted]~~
- 128.5. ~~that Provident had not obtained an updated valuation report regarding the security property as it ought to have done; and,~~
- 128.6. ~~that the security property was the subject of a market appraisal which valued it at from \$1.95m to \$2.1m and was dated 1 February 2010. [deleted]~~
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 between approximately:
- 129.1. \$1,235,903; and
- 129.2. \$1,452,840;
- should be made for this loan.

J.2.1514 *Bortolin-Papa loan*

130. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 104K and 104L~~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; [deleted]~~
- 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;
- 130.3. that the loan to valuation ratio was reported to be 99%, implying a valuation of the security property of \$1.10m; and

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 between approximately:

131.1. \$~~172,675~~118,130; and

131.2. \$~~236,749~~127,630;

should be made for this loan.

J.2.1615 Tahatos loan

132. By in or around November or December 2010, AETL knew, or, by reason of the matters pleaded in paragraphs 104K and 104L~~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. [deleted]

132.3. that the most recent valuation of the security property was \$6.815m and was dated 22 December 2005;

132.4. that Provident had not obtained an updated valuation report regarding the security property as it ought to have done; and

132.5. that the valuation report referred to in the preceding sub-paragraph, had it been obtained by Provident or alternatively AETL, would have valued the security property at or around \$3.95m on an "as is" basis, and \$3.35m on a "forced sale" basis.

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 between approximately:

133.1. \$1,546,312; and

133.2. \$2,376,750;

should be made for this loan.

J.173 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 by 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; and
- 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.~~ [deleted]

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.2 and J.3 above, AETL by in or around 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; and
 - 135.1.2. the Business Conduct Requirement; ;
 - 135.1.3. ~~[deleted]the Solicitor's Certificate on Title Requirement,~~
as alleged in the paragraphs in Sections J.2 ~~4~~ and J.3 ~~4~~ 7,
- 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 in respect of the loans referred to in section J.2 of between approximately \$28,698,940 27,393,054 and \$34,428,755 31,472,467 in the FTI Portfolio should have been made by Provident;
- 135.4. that the provisions for credit losses in respect of the 2010 Loans of Concern the FTI Portfolio that should have been made materially prejudiced the interests of existing and prospective debenture holders;
- 135.5. that the property that was or should have been available to Provident was, or was highly likely to be, ~~would be~~ 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.
- 135.7. that Provident was in breach of conditions under its AFSL, and consequently in breach of s 912A of the Corporations Act as Provident had reason to suspect:
- 135.7.1. that its total assets would currently not exceed its total liabilities and/or
 - 135.7.2. that its adjusted assets would currently not exceed its adjusted liabilities;
- 135.8. that:
- 135.8.1. for the purposes of RG 69, more than a minor part of Provident's activities was property development or lending funds directly or indirectly for property development;
 - 135.8.2. by reason of paragraphs 5.7 and 135.8.1, the benchmark minimum equity ratio applicable to Provident, for the purposes of reporting by Provident against benchmark 1 of RG 69, was 20%;

- 135.8.3. in at least its Quarterly Reports for the quarters ended 30 September 2009 and September 2010, Provident had incorrectly identified the applicable benchmark minimum equity ratio as 8%.

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- (a) *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, 112A, 114, 116, 118, 120, 121A, 123, 125, 127, 129, 131 and 133.*
- (b) *The lower end of the range in sub-paragraph 135.3 is the sum of the lower end of the range of provisions specified in the paragraphs referenced in (a).*
- (c) *The higher end of the range in sub-paragraph 135.3 is the sum of the higher end of the range of provisions specified in the paragraphs referenced in (a).*
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 in or around November or December 2010 AETL would, or should, have reached the conclusion that it could not be satisfied that Provident had 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 in or around November or December 2010, AETL would, or should, have:
- 137.1. informed ASIC and Provident of the above conclusions; and
- 137.2. 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).
- 137A In or around December 2010, Provident would have:
- 137A.1. ceased further borrowing from members of the public;
- 137A.2. ceased rolling over debentures;
- 137A.3. refunded any monies received pursuant to Debenture Prospectus 2011, by reason of:
- 137A.4. Provident volunteering to do so;
- 137A.5. Provident complying with its obligation under s 724 of the Corporations Act to repay money received from applicants for debentures pursuant to Debenture Prospectus 2011;
- 137A.6. ASIC placing a stop order on Debenture Prospectus 2011 and preventing further borrowing by Provident by way of the issue and/or rollover, of debentures though administrative action or by obtaining court orders; and/or

- 137A.7. AETL applying for, and obtaining, court 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 (including by way of rollover) and be made to refund any monies received pursuant to Debenture Prospectus 2011.
138. [deleted]
139. [deleted]
140. In the events described in paragraph 137A Provident:
- 140.1. would have been unable to remedy, within 21 days of being served with the notice referred to in paragraph 137.2, the various breaches of the Trust Deed; and/or
- 140.2. would have been unable to ensure that the property that was or should have been available to Provident would be sufficient to repay the debentures when they became due.
141. In the premises, in or around December 2010, AETL would, or should 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. obtained court orders to have receivers appointed to the property of Provident and/or to have Provident wound up.
- 141A Further, or in the alternative to the steps described in paragraph 141:
- 141A.1. Provident would have:
- 141A.1.1. instigated a voluntary administration of the company; or
- 141A.1.2. instigated a voluntary liquidation of the company; or
- 141A.2. ASIC would have obtained court orders to have receivers appointed to the property of Provident and/or to have Provident wound up.

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 any of the steps alleged in paragraphs 137, 137A.7 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 been required to return any monies received pursuant to Debenture Prospectus 2011 by virtue of ss 724, 737 or 738 of the Corporations Act;
 - 145.3. external administrators/liquidators would have been appointed to Provident and/or the property of Provident secured by the Charge in or around December 2010;
 - 145.3A. the group members who were first issued debentures after 22 December 2010 pursuant to Debenture Prospectus 2011, but prior to the time when the steps pleaded in paragraphs 137 to 141A could or would have been taken, would not have suffered any loss or damage or alternatively, would have suffered less loss and damage;
 - 145.4. the plaintiff and the group members who were first issued debentures after the time when the steps pleaded in paragraphs 137 to 141A could or would have been taken, 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 to 141 at the time when those steps could or would have been taken, then the property available to repay debenture-holders would have been realised at about that time. Debenture holders would have received a return of between approximately 43.836.5 and 46.3 cents in the dollar (**2010 recovery rate**).*
- e) *In fact, Provident continued to trade and the value of the property available to repay debenture-holders deteriorated, with the result that on ~~30 September 2015~~ 23 October 2017, the receivers and managers of Provident estimated that debenture holders would receive a return of ~~46~~ 21.2 cents in the dollar.*
- f) *Group members who held debentures as at 22 December 2010, or as at the date when the steps alleged in paragraphs 137 to 141A could or would have been taken, suffered loss of at least the difference between the 2010 recovery rate in*

paragraph (d) of these particulars and the actual return in paragraph (e) of these particulars.

- g) *Group members who were issued debentures after 22 December 2010, or alternatively after the time when the steps alleged in paragraphs 137 to 141A could or would have been taken suffered loss of at least the issue price for the debentures less the actual return in paragraph (e) of these particulars.*
- h) *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

Ben Hardwick, solicitor on record

Date of signature

17/5/18

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.
- 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 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 Benedict Tobin Hardwick
Practising certificate number P0020370
Firm Slater and Gordon
Contact solicitor Tristan Moseby
Address 485 La Trobe Street
Melbourne, Victoria, 3001
DX address DX 229 Melbourne
Telephone (03) 9602 6969
Fax (03) 9600 0290
Email tristan.moseby@slatertgordon.com.au
Electronic service address tristan.moseby@slatertgordon.com.au

DETAILS ABOUT DEFENDANT**Defendant**

Name Australian Executor Trustees Limited
Address C/- Corrs Chambers Westgarth
8-12 Chifley Square
Sydney NSW 2000

#AFFIDAVIT VERIFYING

Name Innes Creighton
 Address 30 Lakeland Drive, Doreen, Victoria, 3754
 Occupation Retired
 Date 17 May 2018

I say on oath:

- 1 I am the plaintiff.
- 2 I believe that the allegations of fact in the Third Further Amended Statement of Claim are true.

SWORN at Doreen, Victoria
 Signature of deponent *I. Creighton*
 Name of witness Sam Bytheway
 Address of witness 485 La Trobe Street, Melbourne, Victoria, 3000
 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. [OR, delete whichever option is inapplicable]
~~#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.*~~
- 2 ~~#I have known the deponent for at least 12 months.~~ [OR, delete whichever option is inapplicable]
 #I have confirmed the deponent's identity using the following identification document:

Drivers license

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

Signature of witness *Sam*

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.]