

Ball 16/8/16

DEFENCE TO THE FURTHER AMENDED STATEMENT OF CLAIM

COURT DETAILS

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

FILED

1-2 AUG 2016



TITLE OF PROCEEDINGS

Plaintiffs **John Smith and Rosemary Smith** (TL)
Defendant **Australian Executor Trustees Limited (ACN 007 869 794)**

FILING DETAILS

Filed for **Australian Executor Trustees Limited, defendant**
Filed in relation to The Plaintiffs' claim
Legal representative Brad Woodhouse, Corrs Chambers Westgarth
Legal representative reference 9116109/02
Contact name and telephone Brad Woodhouse (02) 9210 6859
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HEARING DETAILS

The proceedings are listed for directions before Justice Ball on 16 August 2016.

PLEADINGS AND PARTICULARS

The Defendant, Australian Executor Trustees Limited (**AET**), pleads the following in relation to the allegations contained in the Further Amended Statement of Claim (**SOC**):

- 1 In answer to paragraph 1 of the SOC, AET:
 - (a) says that it does not know the identities of the Group Members; and
 - (b) otherwise admits the matters alleged therein.
- 2 In answer to paragraph 2 of the SOC, AET:
 - (a) admits that the Plaintiffs were issued debentures by Provident Capital Limited (receivers and managers appointed) (in liquidation) ACN 082 735 573 (**Provident**) on or about 13 September 2010; and
 - (b) otherwise does not admit the matters alleged therein.

- 3 In answer to paragraph 3 of the SOC, AET:
- (a) except to the extent pleaded in paragraph 3(b) below, does not admit the matters alleged in paragraphs 3(c), 3(d) and 3(e) of the SOC; and
 - (b) says that at all material times prior to 29 June 2012, Provident's principal business activities involved fixed rate mortgage lending and the issuing of fixed rate debentures pursuant to Chapter 2L of the *Corporations Act 2001* (Cth); and
 - (c) otherwise admits the matters alleged therein.
- 4 In answer to paragraph 4 of the SOC, AET:
- (a) says that it does not know the identities and circumstances of the Group Members; and
 - (b) otherwise does not admit the matters alleged therein.
- 5 In answer to paragraph 5 of the SOC, AET:
- (a) admits the matters alleged in paragraphs 5(a) and 5(b);
 - (b) says that at all material times it held itself out as having knowledge, skill and experience in the provision of trustee services to companies which had issued debentures under Chapter 2L of the *Corporations Act*; and
 - (c) otherwise denies the matters alleged therein.
- 6 In answer to paragraph 6 of the SOC AET:
- (a) pleads to paragraph 6(f)(iii) on the basis that the term "*Business Conduct Requirement*" is a reference to the covenant given by Provident in clause 6.0.1 of the Trust Deed (as defined in paragraph 7 below), which covenant is otherwise purportedly defined as the "*Business Conduct Obligation*" in paragraph 8(k)(i) of the SOC;
 - (b) repeats the matters pleaded in paragraph 4 above; and
 - (c) otherwise does not admit the matters alleged therein.

7 In answer to paragraph 7 of the SOC, AET:

- (a) says that the document styled "*Debenture Trust Deed*" dated 11 December 1998 (the Trust Deed) constituted an agreement between IOOF Australia Trustees (NSW) Limited (**IOOF**) and Provident under which IOOF was referred to as "*Trustee*" and had certain powers and discretions in relation to debentures issued by Provident;
- (b) says further that the Trust Deed has been amended from time-to-time;

Particulars

- A. Deed of Amendment dated 23 December 1999
 - B. Deed of Amendment made on or about 24 November 2005
 - C. Deed of Amendment dated 31 January 2011
 - D. Deed of Amendment of Debenture Trust Deed dated on or about 10 December 2012
 - E. Deed of Amendment of Debenture Trust Deed dated on or about 10 January 2013
- (c) says further that:
- (i) on or about 7 December 2004, IOOF retired from the office styled "*Trustee*" under the Trust Deed and AET accepted appointment to that office;

Particulars

- Deed of Retirement and Appointment and Release, dated on or about 7 December 2004, clauses 3(a) and 7.
- (ii) on or about 24 November 2005, the Trust Deed was amended to appoint AET as trustee for debenture holders who held debentures issued by Provident under any disclosure document lodged with the Australian Securities and Investments Commission (**ASIC**) after 24 November 2005; and

Particulars

Deed of Amendment made on or about 24 November 2005, clause 2.1 and item 3 of the schedule

(iii) AET has been the trustee for debenture holders of debentures issued by Provident under Chapter 2L of the Corporations Act and under the Trust Deed from on or about 24 November 2005 or, alternatively, 7 December 2005; and

(d) otherwise denies the matters alleged therein.

8 In answer to paragraph 8 of the SOC, AET:

(a) repeats the matters pleaded in paragraph 7 above and otherwise denies the matters alleged in paragraph 8(a) of the SOC;

(b) admits, save for the matters pleaded in paragraph 8(c) below, the matters alleged in paragraph 8(b) of the SOC in respect of the period commencing on or about 24 November 2005 to date;

(c) denies the matters alleged in paragraph 8(b) of the SOC in so far as those matters relate to AET's obligations in respect of debenture holders who held debentures issued by Provident under any disclosure document lodged with ASIC prior to 24 November 2005;

(d) admits the matters alleged in paragraphs 8(c), 8(g), 8(i) and 8(m) of the SOC;

(e) relies on the terms of the Trust Deed (as amended from time-to-time) for their full force and effect; and

(f) otherwise denies the matters alleged therein.

9 In answer to paragraph 9 of the SOC, AET:

(a) does not admit the matters alleged therein; and

(b) says further that it had no obligation to be aware of the terms of the Procedure Manual (as defined and particularised in paragraph 9 of the SOC).

10 In answer to paragraph 10 of the SOC, AET:

(a) repeats matters pleaded in paragraph 9 above;

(b) relies on the terms of the Procedure Manual (as varied from time-to-time) for their full force and effect; and

(c) otherwise does not admit the matters alleged therein.

11 In answer to paragraph 11 of the SOC, AET:

(a) repeats the matters pleaded in paragraph 10 above;

(b) relies on the terms of the Procedure Manual for their full force and effect; and

(c) otherwise does not admit the matters alleged therein.

12 In answer to paragraph 12 of the SOC, AET:

(a) admits:

(i) the matters alleged in paragraphs 12(a), 12(b) and 12(d) of the SOC; and

(ii) that Provident had the obligation pleaded in paragraph 12(c) of the SOC from 30 January 2012; and

Particulars

Personal Property Securities (Corporations and Other Amendments) Act 2010 (Cth), section 3 and items 49 and 56 of Schedule 1

(b) otherwise denies the matters alleged therein.

13 In answer to paragraph 13 of the SOC, AET:

(a) admits the matters alleged therein; and

(b) says further that in discharging its duties under the *Corporations Act* it was entitled to rely on the accuracy of:

(i) any information or reports issued by Provident to AET pursuant to Chapter 2L of the *Corporations Act*, the Trust Deed or otherwise; and

(ii) any report, certificate or other document and accompanying document provided to AET by Provident's auditor pursuant to section 313 of the *Corporations Act*.

Particulars

The documents on which AET was entitled to rely included:

- A. audited annual financial reports issued by Provident;
- B. audited interim annual financial reports issued by Provident;
- C. from October 2008, bi-annual reports titled "*ASIC Regulatory Guide 69 Benchmark Disclosure Report*" issued by Provident;
- D. Quarterly Reports supplied by Provident to AET addressing the matters in section 283BF of the *Corporations Act*;
- E. Monthly reports supplied by Provident to AET; and
- F. Prospectuses issued from time-to-time by Provident.

14 In answer to paragraph 14 of the SOC, AET:

- (a) admits it had the power to apply to the Court for the orders pleaded in paragraphs 14(a) and 14(b);
- (b) says that it could not or ought not exercise such powers unless there was a proper basis for making an application to the Court;
- (c) says further that, in forming any view as to whether there was a proper basis to exercise its powers under sections 283HB(1)(c) and 283HB(1)(d) of the *Corporations Act*, it was entitled to rely on the accuracy of the information and documents pleaded in paragraph 13 above; and
- (d) otherwise denies the matters alleged therein.

15 In answer to paragraph 15 of the SOC, AET:

- (a) admits that Provident used debenture funds to provide finance facilities to the following borrowers:
 - (i) Burleigh Views Pty Ltd;
 - (ii) George Tahatos Holdings Pty Ltd;
 - (iii) Chrysalis Holdings Pty Ltd;

- (iv) Delta Dawn Pty Ltd;
- (v) Yarraman Estate Pty Ltd;
- (vi) The Empress Development Pty Ltd;
- (vii) MJ Server Pty Ltd;
- (viii) Neo East No 1 Pty Ltd;
- (ix) Cleveland Corporations Pty Ltd;
- (x) Neo Lido Pty Ltd;
- (xi) Mihail Ovchinnikov;
- (xii) MMT Investment Services Pty Ltd;
- (xiii) Silvera Pty Ltd;
- (xiv) AJV Constructions Pty Ltd;
- (xv) Tembelli Pty Ltd;
- (xvi) Alex G Grivas Pty Ltd;
- (xvii) Unique Castle Development Pty Ltd; and

(b) otherwise does not admit the matters alleged therein.

16 In answer to paragraph 16 of the SOC, AET:

- (a) admits that Provident provided it with copies of the reports listed in particulars (a) to (m) to paragraph 16 of the SOC (the quarterly reports) on or about the dates particularised;
- (b) says further that AET was entitled to rely on the accuracy of the quarterly reports; and
- (c) otherwise does not admit the matters alleged therein.

17 In answer to paragraph 17 of the SOC, AET:

- (a) says that it was not provided with a copy of the Loan Arrears Report Dec 04 (as defined in the SOC) in or around February 2005, or at all; and

(b) otherwise does not admit the matters alleged therein.

18 In answer to paragraph 18 of the SOC, AET:

(a) admits that Provident provided it with copies of the reports listed in particulars (a) to (k) to paragraph 18 of the SOC (the arrears reports) on or about the dates particularised;

(b) says further that it was entitled to rely on the accuracy of the arrears reports; and

(c) otherwise does not admit the matters alleged therein.

19 In answer to paragraph 19 of the SOC, AET:

(a) repeats the matter pleaded in paragraph 17 above;

(b) says it was aware of the information contained in each arrears report within a reasonable time of receiving each report (apart from the report pleaded in paragraph 17 of the SOC, which was not provided to AET);

(c) says further that AET was entitled to rely on the accuracy of the arrears reports;

(d) says further that a proportion of loans being in arrears did not, of itself, indicate that the debenture holders' interests were materially prejudiced; and

(e) otherwise denies the matters alleged therein.

20 In answer to paragraph 20 of the SOC, AET:

(a) repeats the matters pleaded in paragraphs 7, 8 and 13(b) above;

(b) denies that AET can have any liability in respect of any contravention of the *Corporations Act* or breach of the Trust Deed by Provident that occurred prior to on or about 24 November 2005 or, alternatively, 7 December 2004; and

(c) otherwise does not admit the matters alleged therein.

21 In answer to paragraph 21 of the SOC, AET:

(a) repeats the matters pleaded in paragraphs 7 and 8 above;

(b) denies that AET can have any liability in respect of any contravention of the

Corporations Act or breach of the Trust Deed by Provident that occurred prior to on or about 24 November 2005 or, alternatively, 7 December 2004; and

(c) otherwise does not admit the matters alleged therein.

22 In answer to paragraph 22 of the SOC, AET:

(a) repeats the matters pleaded in paragraphs 7 to 11 above;

(b) pleads to paragraph 22 on the basis that the term "*Business Conduct Requirement*" is a reference to the covenant given by Provident in clause 6.0.1 of the Trust Deed, which covenant is otherwise purportedly defined as the "*Business Conduct Obligation*" in paragraph 8(k)(i) of the SOC;

(c) says that paragraph 22 is embarrassing and liable to be struck out to the extent that it alleges that conduct engaged in by Provident prior to June 2002 was not consistent with the requirements of the Procedure Manual in circumstances where it is not pleaded that the Procedure Manual was in existence prior to June 2002;

(d) denies that AET can have any liability in respect of any contravention of the *Corporations Act* or breach of the Trust Deed by Provident that occurred prior to on or about 24 November 2005 or, alternatively, 7 December 2004; and

(e) otherwise does not admit the matters alleged therein.

23 In answer to paragraph 23 of the SOC, AET:

(a) repeats the matters pleaded in paragraphs 7 and 8 above;

(b) denies that AET can have any liability in respect of any contravention of the *Corporations Act* or breach of the Trust Deed by Provident that occurred prior to on or about 24 November 2005 or, alternatively, 7 December 2004; and

(c) otherwise does not admit the matters alleged therein.

24 In answer to of paragraph 24 of the SOC, AET:

(a) repeats the matters pleaded in paragraphs 7, 8, 13(b) and 17 above;

(b) admits the matters alleged in paragraph 24(a)(i) of the SOC; and

(c) otherwise denies the matters alleged therein.

- 25 In answer to paragraph 25 of the SOC, AET:
- (a) repeats paragraph 24 above; and
 - (b) otherwise denies the matters alleged therein.
- 26 In answer to paragraph 26 of the SOC, AET:
- (a) repeats paragraphs 7, 13, 24 and 25 above;
 - (b) denies that AET can have any liability in respect of any failure by it to be aware of, or take action in relation to, any event or circumstance that occurred prior to on or about 24 November 2005 or, alternatively, 7 December 2004;
 - (c) says that, in discharging its obligations as trustee, AET relied on the information and documents pleaded in paragraph 13 above; and
 - (d) otherwise denies the matters alleged therein.
- 27 AET denies paragraph 27 of the SOC.
- 28 AET denies paragraph 28 of the SOC.
- 29 AET denies paragraph 29 of the SOC.
- 30 AET denies paragraph 30 of the SOC.
- 31 AET denies paragraph 31 of the SOC.
- 32 AET denies paragraph 32 of the SOC.
- 33 In answer to paragraph 33 of the SOC, AET:
- (a) admits that it did not do any of the matters alleged in paragraph 32 of the SOC prior to 8 June 2012;
 - (b) denies it was under any obligation to do any of the matters alleged in paragraph 32 of the SOC prior to 8 June 2012;
 - (c) says that:
 - (i) it commissioned an independent report into the solvency of Provident on or about 20 February 2012;

- (ii) it received and considered the independent report into the solvency of Provident on or about 27 March 2012; and
 - (iii) as at 8 June 2012, Provident was not in default of its obligations in respect of any debenture issued by it; and
 - (d) otherwise denies the matters alleged therein.
- 34 AET admits paragraph 34 of the SOC.
- 35 In answer to paragraph 35 of the SOC, AET:
- (a) admits that on 8 June 2012, it commenced proceedings in the Federal Court of Australia seeking orders under section 283HB(1) of the Corporations Act to make the Charge (as defined in the SOC) immediately enforceable and to appoint receivers to Provident; and
 - (b) otherwise denies the matters alleged therein.
- 36 In answer to paragraph 36 of the SOC, AET:
- (a) admits the matters alleged therein; and
 - (b) says further that the pleaded order was the subject of a stay until 3 July 2012.
- 37 AET admits paragraph 37 of the SOC.
- 38 AET admits paragraph 38 of the SOC.
- 39 AET denies paragraph 39 of the SOC.
- 40 In answer to paragraph 40 of the SOC, AET denies that the Plaintiffs or any Group Member are entitled to the relief claimed, or any relief.
- 41 Further, and in answer to the whole of the SOC, AET:
- (a) says that it reasonably considered the auditors involved in the preparation of reports and other financial documents provided to it were relevantly skilled to perform the task and were doing so in accordance with section 313 of the *Corporations Act*;
 - (b) says further that if it contravened section 283DA(b)(ii) of the Corporations Act, which is denied, and if the Plaintiffs and Group Members suffered loss and

damage, which is also denied:

- (i) the cause of the loss and damage are the actions and omissions of Provident and not any contravention by AET; and
 - (ii) no compensation is recoverable from it by the Plaintiffs and Group Members, pursuant to section 283F(1)(a) of the *Corporations Act* or otherwise; and
- (c) says further that if it contravened section 283DA(b)(ii) of the *Corporations Act*, which is denied, and the Plaintiffs and the Group Members are entitled to recover compensation from AET pursuant to section 283F(1)(a) of the *Corporations Act* or otherwise, which is denied, that compensation must be reduced to account for any amounts recovered or to be recovered by the Plaintiffs and Group Members pursuant to the receivership of Provident, including any amounts recovered in proceedings commenced by the Receivers of Provident against the former directors of Provident.

42 Further, and in answer to the whole of the SOC, AET:

- (a) relies on the date of the filing of the Statement of Claim in these proceedings as 10 June 2015;
- (b) says that an action under section 283F(1) of the *Corporations Act* must be commenced within 6 years of the day on which the cause of action arises;

Particulars

Section 283F(2) of the *Corporations Act*

- (c) says further that a cause of action under section 283F(1) of the *Corporations Act* arises when a person suffers loss or damage because another person contravenes a provision of Chapter 2L of the *Corporations Act*;
- (d) says further that if, which is denied, AET contravened section 283DA(b)(ii) of the *Corporations Act* and such contravention caused any Group Member loss or damage prior to 10 June 2009, then the cause of action of the Group Member or Group Members under section 283F of the *Corporations Act* is statute-barred and ought be dismissed.

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.

Signature

A handwritten signature in black ink, appearing to be 'John J. O'Connell', written over a horizontal line.

Capacity

Solicitor

Date of signature

12 August 2016

[on separate page]

[Do not include the affidavit verifying in Local Court proceedings. See Guide for preparing documents for other circumstances where Affidavit not required.]

AFFIDAVIT VERIFYING

Name Yvonne Maree Kelaher
 Address Level 22, 207 Kent Street, Sydney, NSW
 Occupation Senior Manager
 Date 12 August 2016

I say on oath:

- 1 I am the Senior Manager - Relationship and Transaction Management for the Defendant.
- 2 I have checked the accuracy of the statements contained within this Defence.
- 3 I believe that the allegations of fact contained in the defence are true.
- 4 I believe that the allegations of fact that are denied in the defence are untrue.
- 5 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

SWORN at Sydney

Signature of deponent

Name of witness

Address of witness

Capacity of witness

Sydney


 Mark Joseph Cessario

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

Solicitor

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

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

NSW DL# 12107062

Identification document relied on

Signature of witness

