Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: TAXATION AND COMMERCIAL

File Number(s): 2015 / 0837 & 0838

Re: Michael O'Sullivan

APPLICANT

And Australian Securities & Investments Commission

RESPONDENT

DECISION

Tribunal: **Mr P W Taylor SC, Senior Member**

Date: **27 January 2022**

Place: **Sydney**

ASIC's 16 February 2015 Ban decision under Corp Act s 920A is affirmed

ASIC's 16 February 2015 Disqualification decision under Corp Act s 206F(1)(a) is set aside. In substitution for that decision, the Tribunal is satisfied that Mr O'Sullivan's disqualification is justified, and decides that Mr O'Sullivan is disqualified from managing any corporation for a period (approximating two years and nine months) ending on 20 September 2024..

.....SGD.....

Mr P W Taylor SC, Senior Member

Catchwords

CORPORATIONS – misleading financial product disclosure - banning order under s 920A – lack of care and diligence as a director - disqualification decision under s 206F — ban order decision affirmed – disqualification period reduced

Legislation

Administrative Appeals Tribunal Act 1975

Corporations Act 2001

Cases

ASIC v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed) (No 3) [2013] FCA 1342

ASIC v Cassimatis (No. 8) [2016] FCA 1023

ASIC v Drake (No. 2) [2016] FCA 1552

ASIC v Healey [2011] FCA 717

ASIC v Rich (2009) 75 ACSR 1

ASIC v Adler [2002] NSWSC 483

ASIC v Vizard [2005] FCA 1037

ASC v Kippe (1996) 137 ALR 423

Australian Securities and Investments Commission v Forge [2007] NSWSC 1489

Australian Securities and Investments Commission (ASIC) v Mariner Corp [2015] FCA 589

Australian Securities and Investments Commission v McCormack [2017] FCA 672

Australian Executor Trustees Ltd v Provident Capital Ltd [2012] FCA 728

Boucher v ASC (1996) 71 FCR 122

Culley v ASIC [2010] FCAFC 43

Donald v ASIC [2000] FCA 1142

Doyle v ASIC [2005] HCA 78

Guss v ASIC [2006] AATA 401

Murdaca v ASIC (2009) FCAFC 92

Musumeci v ASIC [2009] AATA 524

Oreb v ASIC (No 2) [2017] FCAFC 49

O'Sullivan v ASIC [2017] AATA 644

O'Sullivan v ASIC [2018] FCA 228

R v Byrnes [1995] HCA 1

Re Hayes v ASIC [2006] AATA 1506

Re HIH Insurance Ltd (in prov liq); ASIC v Adler (2002) 42 ACSR 80

Seymour and Australian Securities and Investments Commission [2017] AATA 2581

Sweeney and Australian Securities and Investments Commission [2017] AATA 2182

Quinlivan v ASIC [2010] AATA 113

Vines v ASIC (2007) 73 NSWLR 451

Visnic v ASIC (2007) 231 CLR 381

Secondary Materials

Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020

REASONS FOR DECISION

Mr P W Taylor SC, Senior Member

1. Mr O'Sullivan was the driving force in the establishment, of Provident Capital Limited ("PCL"). He was PCL's managing director throughout the period from its May 1998 incorporation to its 24 October 2012 liquidation. He was the "key person" identified in the Australian Financial Services licence granted to PCL on 14 February 2003.[1] In April 2005, when a related company Cashflow Finance Solutions Pty Ltd ("Cashflow")[2] was incorporated, he became a director of that company, and was still a director at the time of Cashflow's 28 May 2013 liquidation.

2. PCL's main business was that of a money lender, primarily on the security of first mortgage loans. Until about July 2007, PCL's funding for that aspect of its business came exclusively from the issue of public debentures. The debenture funding provided what PCL called its "Fixed Term Investment" ("FTI") portfolio.) After August 2007 PCL also had bank financed funding:- *see paragraph 62 below*. In about August 2009, PCL launched a managed investment scheme that also operated a first mortgage fund.[3]

3. Until mid September 2007 Cashflow's name and status had been Provident Inventory Finance Limited ("'PIFL"). Both of its names, particularly its incorporation name, indicated the nature of its business - as a provider of short term inventory finance for small and medium sized enterprises. Cashflow funded its lending operations partly under loan arrangements with PCL and partly under a "receivables" agreement with third parties:- *see paragraph 332 below*.

4. ASIC's views of aspects of Mr O'Sullivan's conduct in relation to PCL, and the circumstances of his involvement in the 2010 release of a guarantee he had given to support Cashflow, ultimately resulted in the two 16 February 2015 decisions that are the subject of

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1 PCL was a wholly owned subsidiary of Provident Asset Management Pty Ltd (PCL Asset Management). PCL Asset Management held its PCL shares in trust for the O'Sullivan Trust and the Provident Trust. Mr O'Sullivan and members of his family were the trust beneficiaries.

2 PCL and Cashflow were related corporations because PCL Asset Management held all of the shares in PCL, and 51% of the shares in Cashflow:- see Corp Act ss 9, 46 & 50.

3 Between February and April 2012, Mr O'Sullivan (with PCL's other directors) incorporated Provident Funds Management Australia Ltd, another wholly owned subsidiary of PCL Asset Management, lodged an Australian Financial Services licence application for the new company, and sought to implement an arrangement under which Provident Funds Management Australia Ltd would act as the "responsible entity" for the managed investment schemes, and contract to have PCL carry out the actual management activities of the schemes. As a result of a voluntary de-registration application, the company was deregistered in March 2013.

these review proceedings. The two decisions, which originally took effect at the time of their 17 February 2015 service, were:-

(a) ***the (financial services) Ban decision***:- an order, under the Corporations Act 2001 ("Corp Act") ss 920A & 920B, banning Mr O'Sullivan from providing financial services, for a period of seven years. The order was based on findings that the contents of PCL's various required reports and disclosure documents related to a "financial product", had been misleading, contravened a financial services law and enlivened the banning power:- *see Corp Act ss 728, 761A, 764A(1)(a), 920A(1)(e), 1041H(1)*. (An outline of the findings underlying the Ban decision is set out later in these reasons:- *see paragraph 11 below*.)

(b) ***the (company management) Disqualification decision***:- an order, under Corp Act s 206F(1)(a), disqualifying Mr O'Sullivan from managing corporations, for a period of five years. The threshold basis for this order was the combination of (i) the liquidation of PCL and Cashflow, (ii) Mr O'Sullivan's status as a director of each company, and (iii) the considerable asset deficiency reported by the respective liquidators.[4] That threshold having been crossed, ASIC considered Mr O'Sullivan had contravened his Corp Act s 180 obligation of reasonable care and diligenceas to the Cashflow guarantee release, and over a sustained period in his management of PCL's largest loan. (An expanded outline of the reasons for the decision appears later in these reasons:- *see paragraph 25 below*.)

5. On 23 February 2015 Mr O'Sullivan lodged applications for review of both ASIC decisions. On 30 March 2015 the Tribunal made an order under s41(2) of the Administrative Appeals Tribunal Act 1975 staying the further operation of the Disqualification decision. That stay order has remained in force and has an unexpired term only marginally less than the full five year disqualification period. On the other hand, at the time of the review hearing in March 2020, the unexpired term of the seven year Ban decision was just under two years.

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[4] PCL's liquidator's 18 December 2012 report under Corp Act s 533, disclosed an estimated zero return to unsecured creditors. A subsequent report in October 2013 estimated a $77.7m net asset deficiency. Cashflow's liquidator's 14 March 2014 supplementary report included a "book value" net asset deficiency of about $5.6m. ASIC's decision proceeded on the basis that Cashflow had a net asset deficiency of $2.46m.

THE HISTORY OF THE REVIEW PROCEEDINGS

6. The more than five year period between Mr O'Sullivan's 23 February 2015 review application and the March 2020 hearing is not directly relevant to the matters to be determined. It merits a brief explanation nevertheless. That explanation provides background to the way the parties approached the review hearing.

7. Mr O'Sullivan's review applications were the subject of Tribunal hearings in July, August and November 2015. There was a further procedural hearing in July 2016. Subsequently, the Tribunal's 2 May 2017 decision affirmed ASIC's Ban decision, but varied the Disqualification decision. The varied Disqualification decision conditionally permitted Mr O'Sullivan to manage three family companies:- see *O'Sullivan v ASIC* [2017] AATA 644.

8. Mr O'Sullivan successfully appealed to the Federal Court of Australia. In early March 2018 the Federal Court judgment set aside the Tribunal's orders and remitted his review applications to the Tribunal:- see *O'Sullivan v ASIC* [2018] FCA 228 at [3]-[4], [39].

9. Three of Mr O'Sullivan's PCL co-directors[5] had also been the subject of adverse ASIC decisions, and had made their own review applications to the Tribunal. One of those co-directors (Mr Bersten) had been the subject of the subject of 5 year Ban and Disqualification decisions by ASIC. A second co-director had been the subject of a two year Ban decision. The Tribunal's November 2017 decision affirmed that ban:- *see Sweeney and Australian Securities Investment Commission* [2017] AATA 2182. A third co-director, who had also been a director of Cashflow, had been the subject of a three year Ban decision, and a three year Disqualification decision. In another November 2017 decision, the Tribunal affirmed the ban decision relating to that director, but set aside the Disqualification decision:- *see Seymour and Australian Securities Investments Commission* [2017] AATA 2581.

10. In the preparation and conduct of the remitted review proceedings, the parties made strenuous efforts to agree upon an efficient way of presenting the enormous volume of relevant material in a manageable and comprehensible manner. Those efforts relevantly culminated in agreement (i) to tender the transcript of Mr O'Sullivan's evidence at the earlier

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[5] Details of PCL's directors are outlined in the section of these reasons dealing with PCL's directors, officers and auditors:- *see paragraphs 58 & 59 below*.

2015 review hearing, ((ii) to limit the subject matter of any further cross examination of Mr O'Sullivan and, (iii) to rely on the contents of various, substantially agreed, summarising documents, whose contents I describe later in these reasons:- *see paragraph 34 below*.

BASIS FOR THE BAN DECISION

11. ASIC's 16 February 2015 banning order was based on findings that Mr O'Sullivan's conduct, as a director of PCL and, more particularly, in relation to the company's disclosures about a loan it had made to a project specific development corporation named Burleigh Views Pty Ltd ("Burleigh Views"), constituted both a personal failure to comply with a financial services law and involvement with PCL's corresponding failure. Those failures provided the threshold authority for ASIC's ban decision:- *see Corp Act s 920A(1)(e)&(g)*.

12. PCL had first advanced funds to Burleigh Views pursuant to a March 2000, $4m 12 month mortgage loan agreement, for the purpose of funding the $1m purchase, and the $3m, two stage, 36 residential unit development, of a property at Burleigh Heads. Material to the present matter, by May 2008 (following various earlier defaults and renewal or variation of the original loan agreement) Burleigh Views had not completed the first stage of the development and had failed to repay the loan in accordance with the terms of the most recently negotiated (May 2007) conditional renewal terms. As a result of that default, in about July 2008 PCL took possession of the property as mortgagee. Burleigh Views went into liquidation in August 2008. At that time the outstanding loan debt approximated $13.5m and not even the Stage 1 construction of the development had been completed. In August 2009 the Gold Coast Council informed PCL that the still incomplete development no longer had a relevant approval. Subsequently, the development remained uncompleted but, as at March 2020, there was a prospect of development approval being obtained.

13. For a substantial part of the period from 2000 to 2008 the Burleigh Views loan had been PCL's largest. It accounted for about 7% of PCL's total loans, and a significantly larger proportion of its FTI portfolio loans. By the time of Burleigh Views August 2008 liquidation the loan balance had increased to about $13.81m. By about December 2009 it made up about 10% of the value of PCL's total loan portfolio, and by no later than June 2011, it made up about 20% of PCL's FTI loan portfolio:- *see Schedule 4A to these Reasons - "PCL Loan Portfolio – Benchmark 5 Disclosures etc"*. At both of those times interest accrued on the

loan accounted for a very substantial proportion of PCL's reported net profit before tax:- *see Schedule 1-3A - Burleigh Views Loan - accrued interest & reported NPBT.*

14. When PCL itself went into liquidation on 24 October 2012 the Burleigh Views loan balance had increased (as a result of fees, expenses and unpaid interest) to about $22m. (Material events detailing the history of the Burleigh Views loan, and events involved in PCL's management of it, are summarised later in these reasons:- *see paragraphs 67 to 124 below*.)

15. Between October 2008 and March 2012 PCL published fifteen Quarterly Reports (*see paragraph 163 below*) and seven complementary half yearly Benchmark Reports (*see paragraph 167 below*). The Quarterly Reports were (typically) two page documents containing the compliance disclosures required by Corp Act s 283BF. Mr O'Sullivan signed each of the Quarterly reports. The Benchmark Reports were seven or eight page documents (required by ASIC's "Regulatory Guide 69 – Debentures and notes: Improving disclosure for retail investors") ("Reg 69") that accompanied the corresponding Quarterly Report for March and September. They addressed the extent of PCL's compliance with eight "benchmarks" set out in Reg 69 Section C. The PCL directors formally approved all of the Quarterly and Benchmark Reports - either at a PCL Board meeting, in a circular resolution, or in an email acknowledgment.

16. In its February 2015 decision reasons ASIC considered the Quarterly Reports PCL had provided to ASIC and AETL (*see paragraph 60 below*) were misleading or deceptive. This was because they did not disclose the following matters relating to the Burleigh Views loan:-
    (a) that it had been in default since August 2008
    (b) that PCL had taken possession of the property as mortgagee, and that Burleigh Views was itself in liquidation
    (c) that the loan default had the capacity to materially prejudice the interests of PCL's debenture holders
    (d) that all of the valuations PCL commissioned of the Burleigh Views property (from 2004 until May 2012) addressed its value "as if" the development was complete, whereas the development was incomplete and no longer had a current development approval for its completion. (The nature and effect of the various valuations and appraisals of the Burleigh Views property are described later in these reasons:- *see paragraphs 130 to 136 below.)*

17. ASIC considered the Benchmark Reports were misleading or deceptive, because they did not disclose the fact that Burleigh Views had gone into liquidation in August 2008, and failed to comply with the specific requirements of the Reg 69 Benchmark 7. That benchmark particularly related to the valuation basis of development and construction loans, and loans where the security property accounted for more than 5% of the reporting entity's assets. (The required Benchmark contents are summarised later in these reasons:- *see paragraph 140 below*.)

18. Overall ASIC considered Mr O'Sullivan knew (i) from May 2008 onwards, that the Burleigh Views loan was in arrears, (ii) that PCL had taken possession of the property by about July 2008, (iii) that Burleigh Views had gone into liquidation and, (iv) by April 2010, that the Burleigh Heads property did not then have the valid consents necessary to complete the development, and whose existence had been assumed in the property valuations. On that basis ASIC found that Mr O'Sullivan had engaged in misleading and deceptive conduct (within the scope of Corp Act s 1041H) in relation to his approval of:-
    (a) PCL's 15 Quarterly Reports from October 2008 to March 2012
    (b) the seven Benchmark Reports PCL published between October 2008 and September 2011.

19. ASIC also considered that Mr O'Suillivan had approved each of 36 monthly "Trust Arrears Reports" that PCL provided to AETL between about October 2008 and December 2011. None of those reports had disclosed either Burleigh Views August 2008 liquidation or the default status of the Burleigh Views loans, and ASIC considered that Mr O'Sullivan had not otherwise informed AETL of those matters. ASIC considered those combined circumstances established that Mr O'Sullivan's conduct towards AETL had been misleading and deceptive, and also constituted a contravention of Corp Act s 1041H.

20. Next the ASIC decision reasons addressed the Information Booklets PCL had published in January and March 2012:- *see paragraphs 187 & 191 below*. Although each of those Information Booklets included a table of loan arrears (specifically of the FTI loan portfolio) those tables had not included the Burleigh Views loan arrears. That omission ASIC characterised as misleading or deceptive and, because Mr O'Sullivan had approved the issue of both Information Booklets, ASIC considered he had, in these two respects, again contravened a financial services law.

21. Finally, ASIC's decision reasons addressed the PCL 22 December 2010 Prospectus ("Prospectus No 13"):- *see paragraph 154 below*. It had been approved by the PCL directors and issued under Mr O'Sullivan's hand. Prospectus No 13 contained a statement that PCL was not engaged in property development, reported a September 2010 "as if complete" valuation ($26,680,000 exc GST) of the Burleigh Views property and indicated a corresponding 65.7% LVR. Prospectus No 13 did not, however contain information about Burleigh Views loan default, PCL's 2008 entry into possession as mortgagee, or the August 2008 liquidation. Neither did it disclose the (pre 2010) lapse of the development consent for the property. ASIC found that, as a combined result of its positive contents and omissions, Prospectus No 13 both contained misleading statements and did not contain sufficient accurate information to permit an informed decision about PCL's financial position (specifically the risk that the Burleigh Views loan would not be repaid). Consequently in offering debentures under the Prospectus, PCL had contravened a "financial services law" (specifically Corp Act s 728) and Mr O'Sullivan, because of his role in PCL and responsibility for the Prospectus contents, and been knowingly involved in PCL's contravention.

MR O'SULLIVAN'S CONCESSIONS RELATING TO THE BAN DECISION

22. In his previous affidavit evidence Mr O'Sullivan had detailed the processes involved in the preparation of PCL's various disclosure documents. (I discuss the process later in these reasons:- *see paragraphs 197 to 202 below*.) Relying on that information he had asserted having made all reasonable enquiries, and having held a reasonably based belief that none of the documents was misleading, either by statement or omission. However, in the present proceedings Mr O'Sullivan explicitly conceded a responsibility for the preponderance of the impugned disclosures, and the consequent availability of a Ban decision. Part of that concession derived from the contents of a September 2019 affidavit where Mr O'Sullivan set out concessions he regarded himself as having made during the course of his cross examination in the 2015 Tribunal proceedings. For the purposes of the present proceedings they can be sufficiently interpreted and summarised as having been to the following effect:-

(a) Burleigh Views itself never paid interest on its loan from PCL. Its interest payment default was typically accounted for in loan variations, or accruals, including "capitalised" unpaid interest, that were treated as additions to the loan principal

(b) from September or October 2008, until at least the end of 2011, the Burleigh Views loan should have been (but was not) included in the various loan arrears and loan default information in PCL's Benchmark Reports, and its 2010 Prospectus No 13.

Neither was it included in the loan arrears information in PCL's January and March 2012 Information Booklets

(c) PCL's financial controller generated the monthly loan arrears reports for AETL from PCL's "NTBS" loan management system, and Mr O'Sullivan checked them before they were provided to the PCL Board

(d) as PCL's managing director and chief executive officer, Mr O'Sullivan had a responsibility to correct anything in a PCL Prospectus that he knew dealt inaccurately with the status and circumstances of the Burleigh Views loan

(e) (throughout the principally relevant period, from 2007 to 2012) Mr O'Sullivan had known the contemporaneous status of the various valuations of the Burleigh Views property, including whether or not they were exclusive of GST, and had a "broad awareness" of the loan to valuation ratio ("LVR") of the Burleigh Views loan

(f) (at least after the legal advice it received in April 2010) PCL should have disclosed the lapse of the development authority for the Burleigh Views property in Provident's disclosure documents.

23. In the same affidavit, and in outline submissions lodged on 2 October 2019, Mr O'Sullivan accepted that PCL's September 2008 to March 2012 loan disclosures, in the various monthly Trustee Arrears Reports, the Quarterly Reports, Benchmark Reports, Prospectus No 13 and PCL's 2012 Information Booklets, had been inadequate. The concession addressed 28 matters ASIC had highlighted in its "Issues 2, 3 and 4" (*see paragraph 47(b) below*) and acknowledged the following matters

(a) the failure to disclose the fact of the Burleigh Views loan default status, the loan arrears, the capitalisation of interest, PCL's entry into possession, and control of the property, and the fact of Burleigh Views liquidation

(b) the failure to include the Burleigh Views loan in the disclosed loan arrears totals

(c) the failure to disclose (from April 2010 onwards) the lapsing of the (previous) development approval, and the risk that no renewed development approval would be obtained

(d) the failure to disclose that the Burleigh Views loan's LVR (loan to valuation ratio) did not take into account either the absence of a current development approval or the required completion costs of the proposed development

(e) the failure to disclose that the Burleigh Views property valuations were inclusive of GST

(f) the erroneous claim (in the October 2008, April and October 2009 Benchmark Reports) that the development was nearing completion

(g) the failure to disclose in PCL's (December 2010) Prospectus No 13 the risk of a significant shortfall on the Burleigh Views loan

(h) the mis-statement (in PCL's April and October 2011 Benchmark Reports) that the recovery of the Burleigh Views loan capital and interest was "reasonably certain"

(i) the erroneous claim, in the Information Booklets, that PCL anticipated completion of the development construction in 2012, when no Development Approval had been obtained.

24. In the light of these concessions, Mr O'Sullivan's submissions accepted that the Quarterly Reports did not comply with the disclosure requirements (relating to debenture compliance and material prejudice to security interests) in Corp Act s 283BF(4). Mr O'Sullivan also accepted that had he had contravened the misleading and deceptive conduct prohibition in Corp Act s 1041H(1) in relation to the inadequate disclosures in monthly loan arrears reports to AETL, the Quarterly Reports, the Benchmark Reports, Prospectus No 13 and the Information Booklets. That acceptance carried with it an acknowledgement of the appropriateness of a Ban decision being made under Corp Act ss 920A &, 920B. Mr O'Sullivan nevertheless disputed the seven year length of the ban period imposed. In that dispute he specifically challenged the appropriate response to ASIC's "Issues 2(c) & 4(e)" - that (i) after May 2007, PCL had failed to disclose that it had not obtained its own "as is" valuations, and (ii) PCL had inaccurately represented (in Prospectus No 13) that it was not engaged in property development.[6]

BASIS FOR THE DISQUALIFICATION DECISION

25. The circumstances of Mr O'Sullivan's status as a director of both PCL and Cashflow, where those companies had gone into liquidation with asset deficiencies reported by their liquidators, conditionally enlivened ASIC's statutory discretion in Corp Act s 206F(1) to disqualify Mr O'Sullivan from managing any corporation, for a period of up to five years. The exercise of that discretionary power is contingent on satisfaction that the particular director's disqualification is "justified". That satisfaction must be arrived at after regard to any relationship between the liquidated corporations, and may take into account the

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6 I address those disputes later in these reasons:- *see paragraphs 278 to 283 below*.

director's conduct in relation to the management or property of any corporation:- *Corp Act s 206F(2)(a)&(b)*. The nature and extent of any relationship between the asset deficient corporations may inform, and does not preclude, a determination that disqualification is appropriate: - *Guss v ASIC* [2006] AATA 401. (In its 16 February 2015 reasons ASIC accepted that PCL and Cashflow were related corporations, found that they operated separate enterprises, and considered that their corporate relationship did not inhibit satisfaction that disqualification was "justified".)

26. Although PCL and Cashflow operated separate businesses, between 2005 and 2007 Cashflow had entered into various transactions under which it obtained funding from PCL:- *see paragraph 332 below*. It also obtained funding under a 30 June 2006 factoring agreement ("RASA") the terms of which included an indemnity from Cashflow, and a limited guarantee by each of PCL, Mr O'Sullivan and Mr Nolan (another Cashflow director):- *see also paragraph 332(b)below*.

27. In February 2010 the RASA creditor (then an entity called "BBSFF") had demanded a $700,000 payment from Cashflow. On 29 April 2010 BBSF made similar demands on PCL, Mr O'Sullivan and Mr Nolan, as guarantors. Five months later, pursuant to three separate Deeds entered into on 3 September 2010, PCL paid BBSFF $0.775m. One Deed operated to novate the RASA to PCL, and release PCL from its RASA obligations, in consideration of the $775,000 payment. In the two other Deeds, BBSF separately released each of Mr O'Sullivan and Mr Nolan from their respective RASA guarantee obligations, without their having provided any consideration for the release. The 16 February 2015 ASIC reasons concluded that PCL had required, and Mr O'Sullivan had personally caused, BBSF's execution of the Deeds of Release. The reasons further concluded that Mr O'Sullivan had participated in this transaction and neither obtained independent advice that his guarantee had no value, nor provided any consideration to PCL for the release of his guarantee. The reasons concluded that Mr O'Sullivan's conduct involved a failure to exercise reasonable care and diligence as a director, and contravened Corp Act s 180.

28. Apart from the circumstances surrounding Mr O'Sullivan's 3 September 2010 release from the Cashflow guarantee, the 16 February 2015 reasons contained no specific findings about, and no criticism of, Mr O'Sullivan's conduct in relation to Cashflow. In fact, the majority of the matters addressed in those reasons concerned Mr O'Sullivan's conduct in relation to PCL. In that respect they focussed on essentially the same factual background

as that canvassed in the Ban decision reasons. But, in two respects, they extended beyond the specific misleading and deceptive conduct findings that founded the Ban decision.

29. The first of those extended misleading conduct findings related to PCL's December 2010 Prospectus No 13, and its disclosure inadequacies relating to the management of the Burleigh Views loan. ASIC characterised Mr O'Sullivan's conduct relating to those inadequacies (and implicitly the similar inadequacies in each of the Quarterly Reports, Benchmark Reports, and Arrears Reports to AETL) as a failure to act with the due care and diligence required by Corp Act 180(1).

30. The second of the extended misleading conduct findings related to the contents of PCL's disclosure of its status as a creditor of Cashflow, in the post June 2010 Quarterly Reports and Benchmark Reports. Up to October 2010 all of the Quarterly Reports had disclosed the fact and extent of PCL's own direct funding assistance to Cashflow:- *see paragraph 332(a) below*. In addition, the Benchmark Reports had also disclosed PCL's guarantee of Cashflow's RASA liability:- *see paragraph 332(b) below*. But under a 3 September 2010 Novation Deed, PCL had acquired all of Cashflow's RASA debt:- *see paragraphs 335(l) & 335(m) below*. Thereafter, PCL's Quarterly Reports had adhered to their previous format and content in relation to Cashflow's indebtedness, and made no reference to the fact or consequences of the September 2010 Novation. The Benchmark Report of October 2010, reported the fact that PCL's guarantee had been released. The Benchmark Report of April 2011 reported (without any specific detail) the fact of PCL's acquisition of Cashflow's RASA debt. Against this factual background, the 16 February 2015 reasons found that Mr O'Sullivan had engaged in misleading conduct, in relation to each of the, post September 2010, Reports, and had contravened Corp Act s 1041H. The findings were variously expressed, but their substance was that non-disclosure of the combined facts of (i) the 3 September 2010 Novation and, (ii) the voluntary release of PCL's co-guarantors (one of whom was Mr O'Sullivan) had the capacity to mislead AETL to believe that PCL had acted in an entirely rational way, and had not assumed any additional risk "as a result of the release of the guarantee".

31. In addition to those disclosure related findings, and despite Mr O'Sullivan's apparent subjective confidence in the recoverability of the loan (and the apparent approval of that strategy by his PCL co-directors) ASIC considered that he had failed to act with the due

care and diligence required by Corp Act 180(1) in relation to the management of the Burleigh Views loan. That failure was considered to have occurred in the following respects:-

(a) authorising the May 2007 refinancing of the Burleigh Views loan without (i) formal documentation having been prepared, (ii) obtaining an updated valuation or, (iii) conducting any proper assessment of PCL's best interests;

(b) after Burleigh Views August 2008 liquidation, failing to obtain appropriate legal and external advice, or conduct a mortgagee sale of the Burleigh Views property, pursue the loan guarantors or "otherwise follow the procedures" in PCL's Manual / Credit Policy.

(c) instructing the ongoing capitalisation of the Burleigh Views loan in February 2009.

32. A further matter addressed in the 16 February 2015 reasons concerned the third variation of the Burleigh Views loan agreement, pursuant to a 24 April 2004 Deed. Clause 1 of the Schedule to the Deed identified the $8.89m loan principal, and listed its 19 separate components. One of them was a $3m amount described as "construction costs to be advanced by progressive payments as specified in clause 3(e) of the 21 March 2000 loan agreement. (That clause permitted progressive monthly drawdowns supported by the certification of completed work by an approved quantity surveyor.) Eight days before the 24 April Deed, Mr O'Sullivan had written to Mr P Zarro (then Burleigh Views sole director and a co-guarantor of the Burleigh Views loan) and Mr Sukic (a former director of City Pacific Developments Pty Ltd "City Pacific") conveying "agreement in principle" to assist Burleigh Views in providing $900,000 to City Pacific to pay $4.5m payment to PCL to discharge its mortgage over lots in the "Gold Coast Financial Centre" and permit the sale of those lots to Mr Sukic (for $3.6m). An amount of $900,000 was drawn down on the Burleigh Views loan on 24 June 2004, and on the same day City Pacific paid $4.33m to PCL and obtained a discharge of its mortgage. The ASIC reasons concluded that this $900,000 drawdown transaction had no commercial rationale for PCL, but clearly operated to the benefit of City Pacific Pty Ltd. Mr O'Sullivan had been a director and shareholder of City Pacific, as had Mr Sukic. Mr Sukic had also been a PCL director, and was a personal acquaintance of Mr O'Sullivan. The ASIC reasons considered that this transaction operated only for the benefit of City Pacific and had involved Mr O'Sullivan improperly using his position as a PCL director to benefit City Pacific. Conduct of that kind was a contravention of Corp Act s 182(1):- *see further paragraphs 303 to 330 below*.

33. The reasons accepted that Mr O'Sullivan was a director of various other companies, and that no criticism had been made of his conduct in relation to any of them. Nevertheless, the ASIC decision concluded that disqualification was justified, essentially because Mr O'Sullivan's conduct was considered to have been amongst "the worst cases". The ASIC decision also considered Mr O'Sullivan lacked insight in the seriousness of his conduct, specifically in relation to the June 2004 City Pacific drawdown, and the September 2010 release of the Cashflow guarantee.

MATTERS AGREED BETWEEN THE PARTIES

34. I referred earlier to the history of the review application and the parties agreement about the conduct of the remitted view proceedings:- *see paragraph 10 above*. In the following paragraphs I detail the various documents on which the parties substantially agreed, and proffered for the purpose of facilitating the determination of the review proceedings.

35. ***The First Statement of Agreed Facts ("SOAF:1")***:- This document was one of two "agreed" documents tendered at the previous review hearing. It contains a 109 paragraph statement of facts concerning matters requiring consideration in the review. Those matters include:-

(a) ***PCL***:- PCL's material corporate details and history:- *SOAF:1 ¶1 to 12.* Those matters are summarised later in these reasons:- *see paragraphs 50 to 57 below.*

(b) ***Burleigh Views***:- The history of the Burleigh Views loan from 2000 to 2008 – including the 21 March 2000 $4m loan agreement, its variation in 2002, 2004 and 2007, Burleigh Views 21 August 2008 liquidation, and PCL's possession and control of the property after 5 September 2008:- *SOAF:1 ¶13 to 38.* The history of the Burleigh Views loan is outlined later in these reasons:- *see paragraph 67 below.*

(c) ***Development Approval***:- The history of the Burleigh Views loan from August 2009 to June 2012 – including the lapse of the Development Approval for the property, steps taken to attempt to obtain a new Development Approval, PCL's first $2m loss provision for the loan in December 2011, and valuations of the property in 2011 and 2012:- *SOAF:1 ¶39 to 58.*

(d) ***PCL's public Disclosure documents***:- Details of PCL's October 2008 to March 2012 Quarterly Reports, Benchmark Reports and Loan Arrears reports to AETL, and

its December 2010 Prospectus and 2012 Information Booklets, and particularly the fact that the loan was typically not identified as a loan that was in arrears:- *SOAF:1 ¶59 to 68*

(e) ***PCL's management reports***:- Details of the typical content of the regular monthly reports to the PCL Board throughout the period from November 2008 to April 2012, including details of the format and content of "Top Ten Loans Reports" and "Loan Arrears Reports", characterisation of the Burleigh Views loan as PCL's largest, and the fact that it was never included in the "Loan Arrears Reports":- *SOAF:1 ¶69 to 72*

(f) ***City Pacific Drawdown***:- Details of PCL's 4 September 2001 $4.070m loan to City Pacific, a June 2004 $0.9m drawdown on the PCL Burleigh Views loan and the circumstances in which Burleigh Views used the loan drawdown to assist City Pacific discharge its then (approximately) $4.5m loan balance debt to PCL:- *SOAF:1 ¶74 to 79.*

(g) ***Cashflow's structure and background***:- Details of Cashflow's business (as a short term "inventory" financier), its corporate structure and method of funding, including a 21 September 2005 "Working Capital Facilty" and a March 2012 promissory note agreement, both provided by PCL, and a June 2006 Receivables Acquisition and Servicing Agreement: ("RASA") that had been guaranteed by PCL and Mr O'Sullivan (the "Cashflow Guarantee"), was held by BBSF Securitisation Limited ("BBSFF") as at February 2009, and was novated to PCL in September 2010:- *SOAF:1 ¶80 to 90*

(h) ***PCL's novation of Cashflow's RASA and release of the Cashflow guarantee***:- Details of Cashflow's November 2007 business loss insurance policy with Coface, the "breach of policy" proceedings Cashflow commenced against Coface in November 2009, BBSFF's February and April 2010 demands on the Cashflow Guarantee, and the release of the Cashflow Guarantee (including the release of Mr O'Sullivan) in connection with PCL's $0.775m payment to "BBSFF":- *SOAF:1 ¶91 to 107.*

36. ***The Second Statement of Agreed Facts ("SOAF:2")***:- This was the second of the two "agreed" documents tendered at the previous review hearing. In its opening paragraphs it records facts to the effect that

(a) PCL engaged its respective auditors, Walter Turnbull (in the period from 2008 to 2009) and HLB Mann Judd (in the period from 2010-2012) to conduct "audits or reviews" relating to its various

(i) Benchmark Reports – namely the October 2010 and October 2011 Benchmark Reports

(ii) Prospectus – namely Prospectus No 10 (2007), No 11 (2008), No 12 (2009) and No 13 (2010) (particularly in relation to the Benchmark Reports they contained)

(iii) Half year reports – 2008, 2009, 2010, 2011

(iv) Annual Reports – 2009, 2010, 2011

(b) the contents of PCL's various Benchmark disclosures (in PCL's Benchmark Reports, Prospectus and Information Booklets) had been derived from information in PCL's audited annual and half year reports:- *SOAF:2:- paragraphs 3 to 9*.

37. The remaining 126 paragraphs of SOAF:2 set out more detailed statements outlined the communications between the auditors and PCL personnel, relating to those audit tasks, particularly where the communications or conduct related to the Burleigh Views loan. Those agreed matters had been derived from the contents of many hundreds of audit related documents that were exchanged between the parties in the months following a directions hearing in July 2016. Mr O'Sullivan sought to derive from the SOAF:2 contents the inference that PCL's auditors were aware of all the material circumstances relating to the Burleigh Views loan, but nevertheless relevantly approved (or at least did not demur from) the contents of PCL's disclosure documents. Mr O'Sullivan's contentions are addressed later in these reasons:- *see paragraph 218 below*.

38. ***Propositions about the other PCL Director's knowledge of the Burleigh View loan default***:- Another submission Mr O'Sullivan made was that, at all material times the other PCL directors were well aware of the state of affairs relating to the Burleigh Views Loan. Mr O'Sullivan contended that the knowing acquiescence of the other directors in PCL's management of, and disclosure conduct relating to, the loan was a relevant consideration in evaluating the significance of any adverse findings made in in relation to his personal conduct. In order to simplify the process of addressing Mr O'Sullivan's submission the parties reached agreement on some 13 factual propositions relating to the knowledge of the

other PCL directors. Those propositions are summarised later in these reasons:- *see paragraph 215 below*.

39. ***Consolidated Statement of the Parties Positions*** ("**ConSTAT**"):- This table was prepared for the purposes of the present review hearing and was lodged with the Tribunal on 16 December 2019. The first two ConSTAT columns set out the contents of ASIC's 21 December 2018, 192 paragraph statement of the factual findings appropriate for the resolution of the proceedings. A third column in the table recorded Mr O'Sullivan's responses to each ConSTAT item. The fourth column set out ASIC's reply to those responses. (I have used the ConSTAT items and comments to point to the assertedly relevant information, identify material factual disputes, and guide the factual findings I have made.)

40. ***The PCL financial statement schedules***:- These three schedules summarise PCL's balance sheet and profit and loss statements, including aspects of its liabilities and cashflow in the financial years from 2007 to 2011, and in the half year to December 2011. ConSTAT item 17 indicated the parties agreement about the accuracy of the three schedules, which bear the following titles:-

    (a) Schedule 1 –- PCL / Provident Profit & Loss / Balance Sheet - Summary
    (b) Schedule 2 – PCL / Provident Financial Liabilities - Summary
    (c) Schedule 3 – PCL / Provident Cashflow – Summary.

41. I have supplemented Schedules 1-3 with Schedule 1-3A – "Burleigh Views Loan - accrued interest & reported NPBT". This Schedule tabulates the interest PCL accrued, in the Burleigh Views loan statement, from July 2006 to December 2011. The Schedule then compares the accrued interest with the total "Net Profit Before Tax" recorded in PCL's financial statements, for each of the financial years from 2007 to 2011. The comparison shows that accrued interest on the Burleigh Views loan amounted to a substantial, and increasing proportion (from about 20% to over 100%) of PCL's reported "NPBT".

42. ***PCL's reporting and disclosure documents ("Schedule 4")***:- This schedule lists the date, and material content, of all of the monthly reports to the PCL Board, the PCL Quarterly and Benchmark Reports, and the various PCL Prospectus – from December 2006 to June 2012. ConSTAT item 109 indicated the parties agreement about the accuracy of the disclosure documents schedule.

43. I have supplemented Schedule 4 with Schedule 4A – "PCL Loan Portfolio – Benchmark 5 Disclosures – Loan numbers, values and arrears". This tabulates PCL's Benchmark 5 disclosures (*see paragraph 171 below*) relating to the value of its total loans, and loan arrears, from 30 June 2008 to 31 December 2011. The Schedule show that the Burleigh View loan was consistently more than 10% of PCL's "FTI" loan portfolio, and more than 33% of the value of its total loan arrears.

44. ***Board approval of the PCL disclosure documents (Schedule 5")***:- This Schedule outlines the fact, dates and manner of the PCL Board's approval of all the contentious disclosure documents. ConSTAT item 109 again indicated the parties agreement about the accuracy of the contents of Schedule 5.

45. ***Burleigh Views property valuations ("Schedule 6")***:- This schedule details the date and type of the various valuations and assessments of the value of the Burley Views property, together with relevant details of each assessment:- *see paragraph 130 below*. Whilst the parties agreed on the contents of Schedule 6, Mr O'Sullivan did not concede that the valuation documents it listed reflected the totality of the valuations that PCL did in fact obtain. I address, and reject, that proposition later in these reasons:- *see paragraph 133 below*.

46. ***The PCL Audit Committee attendances ("Schedule 7")***:- This schedule details the dates of, and the attendances at, meetings of the PCL audit committee. In the course of the review hearing the parties indicated their agreement to the accuracy of this schedule.

47. ***The annotated Statement of Issues***:- In December 2018 ASIC produced a statement of issues. By the time of the March 2020 the parties had provided a version of that document annotated with Mr O'Sullivan's responses. Those responses substantially agreed with the formulated question, sometimes indicated agreement with underlying factual assertions or questions it contained, whilst disputing that any adverse conclusion could be drawn from them, and sometimes disputed or qualified the underlying factual assertions. Leaving aside those matters that were directly concerned with the content and terms of any ban or disqualification order, It is sufficient for present purposes to summarise the stated issues as requiring determination of the following matters:-

    (a) ***Issues 1 & 5:- Contravention of Corp Act s 180(1)***. These two "issues" raised 10 aspects of PCL's management of the Burleigh Views loan, including the content of

the reporting to the PCL Board, and sought to characterise them as involving breaches of the statutory duty of due care and diligence.

(b) ***Issues 2, 3 & 4:- Contravention of Corp Act ss 283BF, 728 & 1041H***. These three "issues" addressed the content of the various PCL disclosure documents. They identified 28 respects (broadly those summarised in *paragraphs 15 & 19 to 21 above)* in which the various documents were said to have involved contraventions of these Corp Act provisions.

(c) ***Issue 6:- The knowledge and conduct of other PCL personnel and PCL's auditors***. This "issue" posited that both PCL's auditors and Mr O'Sullivan's co-directors were aware of the material aspects of the Burleigh Views loan, and at least acquiesced in the impugned management and disclosure conduct relating to the loan. It posed the question of the extent to which that acquiescence operated to mitigate any adverse characterisation of Mr O'Sullivan's personal conduct:- *see paragraphs 203 to 267 below*.

(d) **Issue 7:- the circumstances of the September 2001 City Pacific drawdown**. This "issue" enquired whether the June 2004 drawdown of $0.9m against the Burleigh Views loan principal involved Mr O'Sullivan improperly using his position, or failing to act with the requisite care and diligence:- *see paragraphs 32 above & 303 to 330 below*.

(e) ***Issues 8 & 9:- the circumstances of the release of the Mr O'Sullivan's guarantee of Cashflow's RASA obligations***. Issue 9 raised a question whether Mr O'Sullivan should have considered that the guarantee had value. Issue 8 raised various related questions about the quality of Mr O'Sullivan's conduct in participating in the September 2010 release of the guarantee, and in approving the contents of the disclosure documents relating to it:- *see paragraphs 331 to 359 below*.

(f) ***Issues 10 to 12:- determination of the Disqualification decision review***. Issue 10 enquired about the accuracy and significance of regarding PCL and Cashflow as having carried on the same enterprise. Issues 11 and 12, posed questions about the appropriate length and extent of any disqualification decision.

(g) ***Issues 13 & 14:- determination of the Ban decision review***. These Issues posed questions about the appropriate length of any ban decision.

48. Mr O'Sullivan's various concessions about the inadequacy of aspects of the various PCL disclosure documents (*see paragraphs 23 & 24 above*) were accompanied (in his September 2019 affidavit) by cross references to the various matters particularised under "Issues 2, 3 and 4" of the Annotated Statement of Issues. As a result of that specificity, Mr O'Sullivan's concession left in contest only two of the asserted disclosure deficiencies. They involved "Issue 2(c)" (PCL's disavowal of involvement in property development) and "issue 4(e)" (non-disclosure of the absence of any "as is" valuation of the Burleigh Views property). (I later resolve the former of those issues in Mr O'Sullivan's favour:- *see paragraphs 278 to 283 below*.)

PCL'S MATERIAL CORPORATE HISTORY

49. Although Mr O'Sullivan's concessions acknowledged the accuracy of most of the factual matters underlying ASIC's criticisms of PCL's disclosures relating to the Burleigh Views loan, evaluating the significance of his personal conduct (particularly having regard to Issues 1 & 6) requires an understanding of PCL's operations and of Mr O'Sullivan's role.

50. Apart from matters directly relating to the Burleigh Views loan (*see paragraphs 67 to 124 below*) and those relating to Cashflow (*see paragraph 335 below*) the dates and events in PCL's corporate history principally material to the present proceedings are briefly summarised in the following paragraphs:-

(a) **December 2007, 2008, 2009 & 2010**:- PCL issued a further five Prospectus "No's 10 to 13, and a Supplementary Prospectus). The most presently material prospectus was Prospectus No 13. It was approved by the PCL Board on 17 December 2010, and released on 22 December 2010. The material contents of PCL's Prospectus documents are outlined later in these reasons:- *see further paragraph 143 to 162 below*.

(b) **22 December 2011**:- ASIC wrote to PCL raising concerns about the adequacy of its financial disclosures, particularly in the light of the draft prospectus PCL had submitted to ASIC earlier that month. ASIC requested PCL to (i) undertake not to issue (or roll over) any further securities, and (ii) engage an independent expert to report on the company's solvency. The particular matters ASIC cited as the reasons for its concern included (i) PCL's uncertain prospects of recovering the Burleigh Views loan, having regard to projected development costs of $4m, (ii) the level of

loan arrears and the adequacy of PCL's provisioning and, (iii) the absence of current "as is" valuations for "distressed properties".

(c) **23 December 2011**:- PCL responded to ASIC and indicated that it (i) had ceased accepting investments from new investors, (ii) had withdrawn its current (2010) Prospectus No 13, (iii) would not proceed to issue (the then draft) Prospectus No 14 and, (iv) would consult with ASIC about an information booklet to be issued to existing investors.

(d) **January, March and April 2012**:- PCL sequentially published three "Information Booklets" providing additional disclosure about its lending performance and financial circumstances. PCL had foreshadowed the 20 January 2012 Information Booklet in its 23 December 2011 response to ASIC. The third Information Booklet appears to have been prompted by AETL's concerns about PCL's (i) longstanding failure to include the Burleigh Views loan balance in its loan arrears reports and, (ii) inadequate response to an explanation request AETL had made after the publication of the March 2012 Information Booklet:- *see paragraphs 125 & 126 below*. The material contents of the three Information Booklets are outlined later in these reasons:- *see paragraphs 186 to 196 below*.

51. **27 March 2012**:- PPB Advisory provided both ASIC and AETL with the "Solvency review" AETL had commissioned in late February 2012. The review concluded that PCL was currently cash flow solvent, but faced the significant risk of an underlying asset deficiency. It estimated PCL had a potential $5.9m asset deficiency, and that 90% of all loans in PCL's FTI Portfolio were non-performing.. The report recommended AETL commission a current "as is" valuation of the Burleigh Views property.

52. **8 June 2012**:- PPB Advisory provided an addendum to their 27 March 2012 Solvency Review. This addendum took into account valuation reports on three of PCL's security properties, including the 8 May 2012 Savill's Burleigh Views valuation (*see paragraph 128 below*). The report concluded that, once the new valuations were taken into account, PCL's $6.08m net asset value as at 31 December 2011 was overstated. PCL would have to make provisions of $22.16m, resulting in a net asset deficiency approximating $16.08m. That deficiency could increase to $28.37m, if certain other loans were regarded as irrecoverable. The anticipated size of PCL's asset deficiency meant that the claims of all debenture holders would not be met.

53. **8 June 2012**:- AETL commenced proceedings in the Federal Court of Australia to enforce the debenture holders' securities. (AETL acted in reliance on Corp Act s 283HB(1), and contended that 90% of PCL's loans were non-performing.)

54. **3 July 2012**:- Following the 29 June 2012 publication of its reasons for judgment, the Federal Court appointed receivers to PCL. (In those reasons Rares J found that PCL (i) was likely to have a net asset deficiency, including losses on the Burleigh Views loan and two other properties, and (ii) had no realistic prospect of raising funds to finance any asset shortfall. Rares J also found that the loan arrears disclosure in the 2012 Information Booklets had been confusing and incomplete:- *Australian Executor Trustees Ltd v Provident Capital Ltd* [2012] FCA 728 at [45]-[[57], [58], [62]-[64].) At that date PCL's $256m total loans included approximately $150m in the FTI portfolio.

55. **18 September 2012**:- AETL appointed administrators to PCL.

56. **24 October 2012**:- PCL was put into liquidation. In their 30 October 2013 "Final Supplementary Report" PCL's liquidators opined that PCL's net asset deficiency approximated $77.746m. They identified five factors as contributors to PCL's failure:- (i) default by a significant number of mortgage borrowers, (ii) poor loan recovery action by PCL, (iii) inadequate provisioning for credit losses, (iv) failure to obtain current valuations and, (v) (obviously implicit in the previous criticisms) poor management, and misconduct by PCL's directors in relation to the Burleigh Views loan.

57. **19 November 2019**:- PCL's receiver reported that the Burleigh Views loan was PCL's only remaining loan asset. The Gold Coast City Council had recently issued draft development approval conditions, the effect of which was to permit the marketing and realisation of the property. The receiver anticipated the sale of the property would be completed in the first half of 2020. The total anticipated return to PCL's debenture holders was 21 cents in the $.

PCL'S BOARD, EXECUTIVE OFFICERS & AUDITORS

58. At the times relevant to the present proceedings, PCL directors, material senior executive personnel, and its auditors were as indicated in the following table.

Entity	Status / Function	Start	End
Directors			
O'Sullivan	Chairman & Managing Director	29-May-98	28-Jan-14
Seymour	non-Executive Director	29-May-98	17-Dec-13
Bersten	Legal Counsel & Director	1-Jul-00	28-Jan-14
Sweeney	non-Executive DIrector	20-Jul-08	7-Mar-14
Executives			
Fulker	Chief operating officer	pre Aug 08	28-Aug-12
Haq	Company Secretary	25-Jul-07	3-Jul-12
Hornby	Chief financial officer	Oct-08	28-Aug-12
Kennedy	Financial controller	pre Oct 08	2012
Auditors			
Walter Turnbull	auditors	Jan-08	Jul-10
HLB Mann Judd	auditors	Jul-10	3-Jul-12

59. Until 1 July 2007, Mr O'Sullivan was PCL's only executive director. Mr Bersten was a solicitor whose firm was a legal adviser to PCL. He first joined the PCL Board as a non-Executive director, and was a member of PCL's Audit Compliance Committee. After 1 July 2007 Mr Bersten became a full time legal adviser to PCL and changed his status to that of an executive director. Mr Seymour was a chartered accountant with over 30 years experience in banking and finance. He was the Chairman of both PCL's Audit Compliance Committee and its Remuneration committee. Mr Sweeney was the former Managing Director of a public company and also had many decades of experience in banking and finance. He was first engaged as a consultant adviser to PCL (in about mid 2008) and joined the PCL Board shortly afterwards. Towards the end of November 2008 he also became a member of PCL's Audit committee, and replaced Mr Bersten on that committee. Mr Haq was both a Chartered Accountant and Chartered Secretary. He also had many decades of experience in those capacities.

PCL'S DEBENTURE TRUST DEED & FUNDING

60. PCL issued its Debentures under an 11 December 1998 Trust Deed (the "Fixed Term Investment" or "FTI" portfolio), and its various amendments (from 1999 to January 2011). I.O.O.F Australia Trustees (NSW) Ltd was the trustee under the Debenture Trust Deed.

After 1998 the company underwent a number of name changes. During the period relevant to these proceedings it was named Australian Executors Trustees Limited ("AETL").

61. The 1998 Trust Deed granted the trustee a first ranking floating charge over PCL's assets. The charge crystallised in the event of any of eight specific contingencies. One of them was PCL's unremedied failure to comply with its deed obligations. Relevant to the present matter, those obligations included:-

(a) *clauses 2.3 & 2.17*:- timely payment of interest to debenture holders

(b) *clauses 5.1 & 5.2*:- using the debenture funds principally for the purpose of providing finance facilities secured by registered first mortgage, on terms that otherwise complied with the Deed

(c) *clause 5.2.1*:- limiting mortgages to a maximum 10 year term and the loan amounts to specific proportions of the value of the mortgaged property (in the case of loans for construction or development purposes the maximum loan to value ratio ("LVR") was 70% of the, appropriately certified, projected end value of the development

(d) *clauses 6.0.3 to 6.0.9*:- keeping proper accounts, and providing the trustee with both monthly reports (with various particulars, including interest paid, mortgage arrears and action taken to recover arrears) and also copies of any accounts and reports PCL lodged with ASIC

(e) *clause 6.0.12*:- giving the trustee prompt notice of (i) any default, or potential default, under the trust deed and (ii) any material adverse change in PCL's financial circumstances, including its ability to comply with the trust deed obligations.

62. From early August 2007 PCL also had a $100m wholesale funding facility with Bendigo and Adelaide Bank ("ABB"). (As part of the arrangements with ABB, AETL released its security in relation to mortgages that were allocated to the ABB facility.) Thereafter PCL's debenture funding declined from the June 2007 total (of about $208m) to $125m in June 2011, but its overall funding liabilities remained relatively stable (in the order of $210m). Over that period debenture funding typically provided about 60% to 70% of PCL's total funding. (By the end of the 2011 financial year PCL's wholesale funding liabilities approximated $90m, and thus about 40% of PCL's total mortgage loans:- *see Schedule 4A – PCL Loan portfolio etc*.) .About 40% of PCL's debenture funding was repayable within 12 months and was recognised as a current liability in PCL's financial statements.

PCL'S CREDIT AND PROCEDURE POLICIES

63. From at least June 2002 PCL had various, Board approved, policy and procedure documents ("CPP manuals") setting out its lending and loan management practices. All the versions of the CPP manuals after March 2008 declared that they were "the only source of credit authority" within PCL, and that any departure from them required Board approval. The title and contents of the various CPP manuals indicate that they were primarily authored or amended by people other than Mr O'Sullivan, and were addressed to PCL's management personnel. However, Mr O'Sullivan acknowledged (in his April 2015 affidavit) that the manuals were developed in consultation with him, and that he had a responsibility for monitoring compliance with their contents. The manuals themselves recorded that Mr O'Sullivan had the function of carrying out an annual review of the credit policy. Consistent with that function, the Board minutes periodically record Mr O'Sullivan tabling the reviewed CPP manual version at Board meetings.

64. There is therefore no reason to doubt that Mr O'Sullivan was very familiar with the substance of PCL's obligations and practices in relation to the principal matters covered in the various CPP manuals – namely, loan valuation and valuation ratio ("LVR") requirements, arrears reporting procedures and loan recovery practices. However, Mr O'Sullivan appears to have doubted the extent to which they were intended to apply to him. In his May 2015 affidavit he described the CPP manuals as merely non binding guidelines, and cited various parts (mainly from pre-March 2008 versions) of the manuals as giving him a personal authorisation to depart from them. However, after March 2008 none of those provisions really extended beyond an implicit discretion to depart from standard conditions and to waive charging the higher interest rate that would otherwise apply to default loans. There was certainly nothing in any of the post March 2008 versions of the CPP manuals to support Mr O'Sullivan's claim (in his May 2017 affidavit) that he had a discretion to make "ad hoc exceptions" for particular transactions.

65. The relevant CPP manuals, and the period to which each applied, were as follows:-

    (a) **February 2007 to 30 March 2008**:- Credit Policy and Procedure Manual Credit and Lending Department. This document imposed a maximum 70% LVR (based on a GST exclusive gross realisation valuation) for construction loans. It required valuations (based on an approved form of written instructions) by valuers included on an approved panel. A valuation for a construction loan was required to address

both “as is” and “gross realisation” values. In addition, regard was to be had to a quantity surveyor’s report in assessing any construction loan. Construction loans were subject to limits of $15m (previously $9m) and 2 year terms, but interest capitalisation (within the LVR limit) was permissible. Apart from short (maximum three month) maturity date extensions that PCL could unilaterally grant (at the higher interest rate applicable to late payments), any extension after the original loan term was to be treated as a new loan, to which all the ordinary loan approval procedures were to be applied. Section 10 of the Manual addressed the management of loan arrears. It required the generation of a weekly report for all loans that had fallen into arrears, a monthly report of all loans that were at least one month in arrears, and a “non-accrual report” for all loans that were more than 4 months in arrears.

(b) **31 March 2008 to 8 September 2009**:- Credit Policy and Procedure Manual Credit and Lending Department. This 65 page manual was similar to the previous CPP manual, and contained essentially the same provisions relating to construction loans, valuations, loan extension procedures, and the management, reporting and non-accrual of loan arrears. However, some of the more specific provisions (relating to loan limits and terms) appear to have been removed from the manual and included in a complementary “product guide”.

(c) **9 September 2009 to 29 November 2009**:- This version of the CPP manual had a different format, and was somewhat shorter, and less detailed, than its predecessors. This was partly because some provisions, and specifically those dealing with loan arrears and their reporting, had been moved to an associated document. Section 3 of the manual contained essentially the same provisions about valuation requirements, and loan extensions, as those contained in the previous versions of the manual, except that where a loan was being extended (pursuant to a provision in the original loan agreement) there was a potential requirement to obtain a new valuation, if the “current” valuation was more than 12 months old. Appendix 5 set out PCL’s standard valuation instructions, and stipulated the required valuation contents – photographs, comparable sales, land only value, and details of any development approval (dates of issue and expiry, substantial commencement and apparent compliance). Appendix 2 set out the relevant LVR and loan limits for various categories of loan. Complementing that requirement, clause 3.27 of the manual itself provided that the LVR for a construction loan was to be calculated based on the “gross realisable value” of the property, but construction loan

valuations were also required to address the “as is” value of the property. Interest for the anticipated term of the loan was to be included in the approved loan principal, and accord with the LVR limit.

(d) Appendix 2 to the CPP manual did not impose any term or monetary limits for construction and development purpose loans. However. Appendix 1 listed a number of PCL product guides, including one for construction and development loans. The 15 September 2009 version of that guide restricted such loans to a maximum 65% LVR, $5m loan amount and an 18 month term. The specific additional requirements included “as is” and “on-completion” valuations, “cost to complete” determination by a quantity surveyor, confirmation of saleability within six months of construction completion, and provision of supporting documentation (including relevant approvals).

(e) **30 November 2009 to July 2010**:- This version of the CPP manual was similar to its immediate predecessor. Section 3 of the manual contained essentially the same provisions about valuation requirements, and loan extensions. One difference (in clause 3.19) was that where a loan was being extended (pursuant to a provision in the original loan agreement) there was an explicit requirement to obtain a new valuation, if the “current” valuation was more than two years old. Clause 3.27 (dealing with construction loans) contained substantially the same provisions about construction loan valuation, and the inclusion of interest for the loan term as part of the loan principal, as its predecessor provision. Appendix 2 of the manual again set out the relevant LVR and loan limits for various categories of loan (the latter limits did not include construction loans). Appendix 2 again stated a 65% LVR limit on construction loans. Appendix 5 set out PCL’s standard valuation instructions. They were substantially the same as those in previous versions.

(f) **August 2010 to 31 January 2011**:- The August 2010 manual followed the same format as its immediate predecessors. Section 3 contained essentially the same provisions about valuation requirements, and loan extensions, as those contained in the previous versions of the manual. One change was a limited discretion to waive the two year valuation currency limit for loan extensions. Another change was that the provisions previously contained in clause 3.27 (dealing with valuations and interest in relation to construction loans) were no longer contained in the manual itself. The manual continued (in Appendix 2) to adopt a 65% LVR criterion for

construction loans, which was less than the permissible 70% LVR limit in the debenture trust deed. The manual imposed general limits of $1.5m per loan and $3m per borrower, but no specific limits for construction and development loans. However Appendix 1 indicated the existence of a separate "product guide" for construction and development loans. The August 2010 version of that guide continued with the 65% LVR, $5m loan amount and 18 month term, limits for such loans (as well as continuing the valuation and other requirements in the previous version of the "product guide").

(g) **1 February 2011 to January 2012**:- This version of the manual retained substantially the same provisions as its predecessor in relation to loan extensions and valuation practices. However, the previous two year limit on the currency of valuations where a loan extension was being sought, was waivable – if the extension did not exceed 12 months, the loan had been satisfactorily conducted, and the LVR was considered sufficiently low to justify dispensing with the requirement for a new valuation. (This CPP manual, its predecessor, or the "product guide" appears to have picked up the conditional requirement for annual valuation of construction and development properties loans, that was introduced by the June 2010 changes to Regulatory Guide 69:- *see paragraphs 140(d) to 140(g) below*.)

66. The more important aspects of the CPP manual requirements are summarised (very broadly, and without specific regard to the precise periods of the currency of each requirement) in the following subparagraphs.

(a) **Extensions**:- Extensions after a loan's initial term were treated as the making of a new advance. As such they were (until September 2009) subject to the current loan policy requirements - including current valuation. After September 2009 there were incrementally increased, but conditional, permissive discretions to accept valuations that were more than two years old, where the loan had been conducted satisfactorily.

(b) **Interest capitalisation**:- From at least February 2007 interest capitalisation (within the required LVR) was permissible for construction and development loans. Following the introduction of the "product guide" in September 2009, interest for the term of construction loans was required to be treated as part of the loan principal. Once the loan term had expired, any unpaid interest should necessarily have been regarded as in arrears. The PCL Prospectus and Benchmark Report documents, in

addressing loan arrears, appear to have included interest, where PCL considered that its recovery was "reasonably certain":- *see paragraph 174 below*.

(c) **Loan to value ratios**:- Loans were subject to specific "LVR" restrictions, which varied according to the asset class and location. Loans made for construction and development purposes were (until September 2009) subject to a 70% LVR, relating to the projected gross realisation value of the development. That LVR was required to take into account any interest during the loan term. After September 2009 (and perhaps until Prospectus No 13 in December 2010:- *see paragraph 160 below*) the LVR for construction and development loans appears to have been 65%.

(d) **Loan limits**:- As at February 2007 individual loan limits varied from $5m to $15m depending on the type of loan. Loans for development and construction purposes were limited to a maximum $15m and two year term. From about September 2009 the CPP "product guide" for construction loans indicated a $5m monetary limit and an 18 month term limit.

(e) **Loan arrears reporting**:- Up until the September 2009 version the CPP manual required each default loan (ie., any loan where a timely payment was outstanding) to be included in weekly and monthly management arrears reports. Where the loan default was more than 90 days, the loan was to be included in a monthly "Past Due" report, and included in the Board papers. (After September 2009 the loan arrears category appears to have been extended to include loans that were less than 90 days in arrears.) Where loan interest was more than four months in arrears, or the recovery of interest was "unlikely or reasonably unlikely", interest was not to be accrued, unless the managing director considered doing so was appropriate. The Board papers were required to include a specific report on default loans that had been placed on a "non-accrual" basis.

(f) **Valuations**:- Any new loan was subject to prior current independent valuation by an approved valuer. As at February 2007 any loan for development or construction purposes was required to have both "as is" and "on completion" values. PCL's relevant lending manager (or Mr O'Sullivan) was required to review any valuation and certify its compliance with a "checklist" of requirements - including the LVR and other aspects of the property details. The requirement for both "as is" and "on completion" valuations for construction or development loans was evident in the

valuation "checklists" and was carried through to the August 2010 CPP manual. The "product guide" for construction loans required both "as is" and "on completion" valuations. In addition, all of the PCL prospectus from February 2008 to December 2010, and the 2012 Information Booklets, in their comments on Benchmark 7, indicated that PCL required both "as is" and "as if complete" valuations for construction or development loans.

BURLEIGH VIEWS LOAN HISTORY

67. The Burleigh Views development was the subject of an 11 March 1998 "Town Planning Consent Permit" for the two stage construction of 36 townhouses. Under the terms of the relevant Queensland legislation the planning permit would automatically lapse within four years (ie., by March 2002) unless either the dwellings had begun to be used, or the permit period had been extended.

68. Following the initial $4m loan agreement of March 2000 (*see paragraph 12 above*) and various later variations which increased the agreed loan principal to $5.165m, the extended loan term expired (without repayment) at the end of March 2003. By the latter part of 2003 Burleigh Views had done some earthworks, but had otherwise made little progress towards completion of the development. Mr O'Sullivan said he accepted December 2003 advice from building surveyors that, because of the earthworks, work on the approved development would be taken to have substantially commenced, and the actual construction work could continue under the previously granted approval. In December 2003, after having served formal default notices with a view to exercising its mortgagee power of sale, PCL had obtained a further valuation of the property. That valuation, which explicitly assumed the existence of a valid approval (despite attaching a copy of the 1998 Council approval that set out the four year "use commencement" validity limit) gave a (GST inclusive) gross realisation amount of $17.2m "on completion" of the proposed development. (There was an unexplained construction cost estimate of $5.126m, and an "as is" value of $5.9m.) Relying on that valuation, in April 2004 PCL entered into a deed of variation with Burleigh Views (and related arrangements involving City Pacific:- *see paragraphs 303 to 330 below*). The 2004 loan variation Deed (i) recognised the $4.05m outstanding Burleigh Views loan balance, (ii) indicated a civil works cost of $0.79m, (iii) contemplated a $3m construction cost and, (iv) provided for further advances of $4.8m (resulting in a loan principal of about $8.89m). The loan agreement provided for interest payable monthly in arrears, gave a

conditional permission for interest to be capitalised (up to a maximum of $0.375m), and required repayment by 30 November 2004.

69. **August 2004 to April 2007**:- Construction work started on the first of the townhouses in August 2004. The 30 November 2004 date passed without repayment, and the loan balance increased partly as a of further advances and partly as a result of the capitalisation of accrued interest. By August 2005 the interest bearing balance of the loan had increased (from $4.375m to $9.655m), and the total loan balance approximated $10.3m. In November 2005 PCL demanded repayment and served formal notice of its intention to exercise its mortgagee's power of sale. But Burleigh Views responded to this with a proposal to complete Stage 1 of the development, and remained in possession. In early 2006 there was a period of disruption attributable to landslip remediation work undertaken by the local Council. In April 2006, at a time when Burleigh Views sale of the property was being canvassed (and encouraged by PCL), PCL began to include the loan in its monthly arrears report, and recorded the expected imminent sale of the property. Mr O'Sullivan said, in his April 2015 affidavit that PCL also then stopped accruing interest on the Burleigh View loan. The accuracy of this statement is however, questionable. On the one hand, in the material submitted to the PCL Board, the loan continued to be recorded in the arrears reports, and in an additional list of loans it was described as having interest "accrual stopped", until the May 2007 refinancing. However, the Burleigh Views loan statement continued to list monthly "Interest Accrual" items, and add them to the loan balance (although not to the interest bearing balance of the loan):- *see the Table in paragraph 394 below*). In August 2006, after months of unsuccessful attempts by Burleigh Views to achieve a sale of the property, PCL entered into possession, and notified Burleigh Views of its intention to sell the property. In December 2006, Burleigh Views' accountants advised ASIC that the company had ceased trading, and was, with PCL's assistance, attempting to sell the property for $11.35m. The accountant's letter indicated that the sale was anticipated to satisfy PCL's mortgage debt, but not amounts due to unsecured creditors, and thus effectively acknowledged that Burleigh Views was insolvent. The letter also attributed to Mr O'Sullivan PCL's commitment, if the proposed sale could not be achieved, to fund Burleigh Views completion of the development.

70. The proposition in the accountant's letter that the proposed $11.35m sale would have satisfied PCL's debt is one of questionable accuracy. (The PCL Loan Statement records had disclosed an outstanding balance of $11.43m as at 31 July 2006. By 31 October 2006

the PCL Loan Statement the recorded loan balance approximated $11.7m. That was also the amount included in the Loan Arrears reports to the PCL Board:- *see the Table in paragraph 394 below*.) However, the other proposition in the accountant's letter, that Mr O'Sullivan had indicated PCL would fund the completion of the development was accurate. In his April 2015 affidavit Mr O'Sullivan set out his view that, because Burleigh Views had not been able to achieve a sale of the property, the next best option was for PCL to finance the completion of the development. Although no decision to that effect was formally recorded in the PCL Board minutes, Mr O'Sullivan asserted, in general terms, that he had discussed the status of the loan, and the proposed construction completion financing, with the other PCL directors.

71. In the following months, Mr O'Sullivan received independent advice confirming the likely completion of the balance of the Stage 1 works by mid May 2007. Burleigh Views provided an estimate that the construction of Stage 2 of the development could be completed within 10 months. PCL also received an apparently relevant Council certification of inspection of aspects of the existing works, and their corresponding compliance with approved plans.

72. **May to September 2007**:- PCL's Board Report as at 31 April 2007 continued to record the Burleigh Views loan as being in arrears. The Loan Arrears report stated a $9.7m loan principal, and accrued interest of $2.754m, with a projected completion valuation of $17.2m and an "LVR" of 57%. (Properly interpreted, the Loan Arrears report actually indicated a total outstanding loan debt approximating $12.5m, and a corresponding LVR of 72.74%:- *see paragraph 394 below*.)

73. In May 2007, apparently in the anticipation that all the Stage 1 works would be completed by the end of May 2007, PCL submitted a written offer, which Burleigh Views accepted on 4 May 2007, to refinance the loan for an additional 12 month term. PCL's 2 May 2007 offer letter, signed by Mr O'Sullivan wrote, contained the following elements:- (i) an asserted current debt of $11.5m (ie., $0.8m less than the balance indicated in the Loan Arrears report), (ii) additional Stage 1 & 2 construction costs totalling $4.75m, (iii) an overall loan limit (the lesser of $13.5m and 70% of the "on completion", GST exclusive, property valuation), contingent upon sales of Stage 1 units (totalling $10.8m) during the Stage 2 construction, and subject to a further limit of $13.15m during Stage 1, (iv) a Quantity Surveyor's certification, satisfactory to PCL, of the cost for the completion of the development, and subsequent management of all construction costs drawdowns and, (vii)

initial payment of a $100,000 loan application fee, as well as, (viii) interest (at a rate of 16.5%, reducible to 10.5% for prompt payment), to be paid monthly in arrears, or capitalised (up to the $13.5m loan limit) if Burleigh Views otherwise complied with the loan terms, and PCL was satisfied with the progress of the development.

74. Both the valuation and quantity surveyor's report contemplated by the refinancing agreement were to be arranged by PCL. The quantity surveyor's estimate / report was a pre-condition to any funding of both Stage 1 and Stage 2 development works. The valuation was a requirement that related only to funding of the Stage 2 works. The valuation was to be on both an "as is" and "on completion" basis, and was required to confirm that the property would be readily saleable within six months after construction had been completed.

75. Mr O'Sullivan acknowledged (in his April 2015 affidavit) that on 15 May 2007 he authorised the PCL's effective recognition of the refinancing arrangement as having been implemented from 15 May 2007. Mr O'Sullivan gave that authorisation without (i) any discussion or approval recorded in the PCL Board minutes, (ii) payment of the $100,000 loan application fee (the amount was added to the loan balance), (iii) the Quantity Surveyor's certification contemplated by the loan offer, (iv) obtaining any further valuation of the property and, (v) formal documentation of the terms of the refinancing agreement. (No formal documentation existed at that date and, despite an interchange of document drafts between PCL and Burleigh Views solicitors over several months between June and September 2007, no executed contractual documentation was put into evidence.) The authorisation / instruction record Mr O'Sullivan attached to his April 2015 affidavit, stated the loan principal was $13.5m, and referred to the $17.222m December 2003 valuation as the relevant supporting valuation. Obviously based on that valuation, Mr O'Sullivan's instruction document noted that the LVR was 78.4%.[7] These details in the instruction record contrasted with the 70% LVR condition stipulated in PCL's 2 May 2007 offer letter. (Compliance with that condition would have limited the total loan debt to $12.055m, an amount that was already less than the $12.5m debt stated in the Loan Arrears report as at 30 April 2007:- *see paragraph 394 below*.)

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[7] It is appropriate to note that the actual loan balance recorded in PCL's statement records as at 15 May 1007 was $12.314m. With the projected building costs of $4.75m, unless substantial Stage 1 unit sales occurred during the completion of construction, the projected debt was likely to approximate PCL's then most recent valuation.

76. In July 2007 Burleigh Views received a marketing proposal, which contemplated an advertising campaign and an auction sale of the property in mid September 2007. In August 2007, Burleigh Views seems to have negotiated with a Mr Duncan / D K R Developments Pty Ltd for a profit sharing arrangement to complete the development. Those negotiations appear to have prompted the interests associated with Mr Duncan obtaining a 4 September 2007 valuation from Colliers International Consultancy and Valuation Pty Ltd ("Colliers").

77. At the end of October 2007 PCL's solicitors reported to Mr O'Sullivan that Burleigh Views had not returned the formal refinancing agreement that had been circulated, apparently in September 2007. As a consequence of the absence of formal documentation, PCL had not provided the funding necessary to progress the project, and it had "ground to a halt".

78. **December 2007 to May 2008**:- It is not clear whether the contemplated marketing activities went ahead, but Burleigh Views certainly did not sell the property in December 2007. By early 2008 PCL was itself contemplating the sale of the property. That is evident from a brief 19 February 2008 email Mr O'Sullivan received from a mortgage originator. The email sought to elicit PCL's interest in pursuing a $13.2m sale of the site. The proposed sale was conditional on completion of the Stage 1 construction.

79. By some time in early 2008 PCL (and Mr O'Sullivan in particular) had received, or was at least aware of the contents of, the 4 September 2007 Colliers valuation. That is apparent from the content of the 29 February 2008 Supplementary Prospectus (which Mr O'Sullivan signed) that PCL had issued in response to ASIC's issue of Regulatory Guide 69 (and following ASIC's dissatisfaction with the contents of PCL's Prospectus No 10):- *see paragraphs 145 & 199 below*. In the section of the prospectus dealing with the Benchmark 7 valuation criterion, PCL addressed the Burleigh Views loan (although without referring to it by name) in the following terms.

> *The Company has made only one loan where the loan accounts for more than 5% of the total value of the Company's loan portfolio. The loan amount is $12,026,966 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; the work is nearing completion, and the borrower has supplied a valuation report dated September 2007 assessing the "as if complete" value at $26,000,000 (exclusive of GST). The security property is located on the Gold Coast in Queensland.*

80. Objectively construed, that Supplementary Prospectus statement suggested that PCL had not obtained the updated valuation contemplated by the May 2007 refinancing agreement

(and required by the then current CPP manual:- *see paragraph 65(a) above*). It also indicated that PCL had not obtained its own valuation since December 2003, but implicitly considered the 2007 Colliers valuation as supporting some continued reliance on the $17.2m 2003 valuation. However, Mr O'Sullivan would have readily appreciated that the $12.026m amount had been the recorded loan balance as at 30 June 2007, and reflected an LVR of 69.8% based on the 2003 (GST inclusive) valuation. He would also have appreciated that the corresponding LVR (based on the $15.656 GST inclusive "feasibility study" sales proceeds contemplated in the 2003 valuation) was 76.8%. Finally he would have undoubtedly known that the actual loan balance at the end of February 2008 approximated $13.058m. That reflected a 75% LVR against the $17.2m (GST inclusive) valuation and an LVR of 83.4% against the $15.656 (GST exclusive) projected gross sales proceeds.

81. The September 2007 Colliers valuation had assumed the existence of a valid development approval, completion of Stage 1 construction between November 2007 and January 2008, commencement of Stage 2 construction in January 2008, Stage 1 sales during the Stage 2 construction process, and completion of Stage 2 by April 2009. Based on that timing, and the prevailing market outlook, it gave four valuation amounts. They were:- "as if complete" Gross Realisations on both GST inclusive ($27.35m) and GST exclusive ($26.09m) bases, and "as is", GST exclusive "market" ($13.5m) and "investment" ($14.2m) values. Those formally stated valuation conclusions did not specifically differentiate between Stage 1 and Stage 2 of the development, but the valuation gave a $125,710 market value for the Stage 2 unit sites. From that value one could arithmetically divide the $13.5m "as is" market value into separate components of $11.237m for Stage 1 and $2.262m for Stage 2. Apart from those ultimate valuation opinions, the report details included some important additional parameters. Feasibility details set out in the report, particularly in relation to the derivation of the "as is" valuation opinions, indicated (i) selling costs of $1.103m, (ii) construction costs of $6.116m and, (iii) other fees and holding costs approximating $0.66m.

82. Knowledge of the Colliers $13.5m "as is" valuation opinion (and of the then current loan balance) likely accounts for PCL's apparent decision not to follow up either the February 2008 enquiry or a subsequent $12m expression of interest that Mr O'Sullivan received in April 2008. The 17 April 2008 email letter attributed to Mr O'Sullivan a desire to achieve a sale price of $13.5m, consistent with the Colliers valuation amount. That desire may also have been contributed to by other information Mr O'Sullivan received at about the same

time. That consisted of a 2008 marketing proposal he had from Brisbane based commercial real estate agents (Ray White). The proposal contemplated the advertising of the property from 16 May 2008 (apparently the day after the loan fell due for repayment under the May 2007 re-financing agreement) and a mid June 2008 closing date for offers to purchase the property. The Ray White marketing proposal gave an indicative sale price range of $11.88m to $13.98m for the property as a whole, and separate ranges for Stage 1 ($9.9m to $11.7m) and Stage 2 ($1.98m to $2.25m). Those indications were qualified by the disclaimer of being a statement of preliminary opinion (that explicitly assumed the currency of development approval), and a strong recommendation that PCL obtain a formal valuation. Together with an (undoubted) understanding that the loan balance was likely to approximate the $13.5m loan limit by the projected June sale date, this marketing proposal appears to have encouraged Mr O'Sullivan to the view that PCL's best option was to continue to fund the development to the point where the units in the first stage of the development could be sold. In any event, although the $12m 17 April 2008 expression of interest was consistent with the lower end of the marketing range suggested by Ray White, Mr O'Sullivan said (and there was no evidence to the contrary) that the 17 April 2008 enquiry, despite his attemptsl to follow it up, never developed to the stage of being a firm interest in purchasing the property.

83. **May to September 2008**:- After Burleigh Views failed to make the May 2008 repayment PCL, on Mr O'Sullivan's instruction, continued to accrue and capitalise interest (although only at the lower 10.5% rate). Whilst this continuing accrual and extension appears to have been contrary to the provisions in the then current CPP manual (*see paragraphs 65(a) & 65(b) above)* Mr O'Sullivan said was PCL's practice to continuing to accrue interest where the realisable value of the security was considered sufficient to cover the total debt outstanding. The decision to capitalise interest certainly resulted, by mid June 2008, in the capitalised loan balance exceeding the $13.5m loan limit. In July 2008, PCL took control of the property, as mortgagee in possession.

84. On 13 August 2008 the maturity date of the BV loan was changed, from the 15 May 2008 expiry of the May 2007 renewal term to 11 November 2008. On 18 August 2008, having been informed by Mr Fulker (PCL's chief operating officer) that the Burleigh Views loan was a month in arrears, Mr O'Sullivan instructed the continued accrual of interest, and foreshadowed a final August 2008 decision about whether to place the loan on "non-accrual". Three days after that email exchange, Burleigh Views went into liquidation. (At

that time the loan balance had accumulated to $13.8m.) Late on 28 August 2008 PCL's after having been told about the liquidator's appointment, Mr O'Sullivan spoke to the liquidator. At the end of August 2008, consistent with Mr O'Sullivan's instruction, the Burleigh Views loan was certainly not included in PCL's loan arrears report.

85. On 5 September 2008, Mr O'Sullivan instructed PCL's external solicitors to give ASIC formal notice that PCL had gone into possession of the property. He signed the formal notice on 9 September 2008. He also wrote to the liquidator (and again on 16 September 2008) informing him that PCL had taken possession of the property.

86. Late in the afternoon of 16 September 2008 Mr O'Sullivan received a $9.725m offer (from interests associated with Mr Duncan (*see paragraph 76 above*) to purchase (by put and call options to be settled 21 days after the issue of title certificates) the 18 townhouses in the first stage of the Burleigh Views development. In ConSTAT ¶70 ASIC and Mr O'Sullivan took different views about the significance of this offer correspondence. Mr O'Sullivan's likely disinterest in such an offer would have been consistent with his view that PCL's best option was to continue to fund the development. But his contention was that the offer email was merely an expression of interest that never progressed to the stage of being capable of being progressed to an actual sale. That proposition was foreshadowed as a matter that would be supported by the contents of a further affidavit from Mr O'Sullivan. However, Mr O'Sullivan's 27 September 2019 affidavit addressed the topic only in two paragraphs at the end of the affidavit. Those paragraphs were, in substance, a verbatim re-statement of the annotation in ConSTAT,¶70, including a footnote heralding another affidavit, that was never provided.

87. On the other hand, events in November 2008 are at least consistent with the prospective purchaser having maintained a significant degree of interest in the property:- *see paragraphs 91 & 92 below*. Consequently, in the absence of further specific information, ASIC's disagreement with the proposition that the September 2008 "put and call" enquiry was not a genuine purchase enquiry, seems to be justified.

88. **October 2008 to December 2008**:- In early October 2008, on the same day as PCL had signed its June 2008 financial statements, Mr O'Sullivan wrote a general email to PCL's staff. He noted the impact of the global financial crisis, its likely effect in limiting the availability of bank finance, and announced that PCL would be immediately re-assessing

PCL's loan eligibility criteria. That re-assessment would include a reduction of "loan to valuation" ratios. (The re-assessment was reflected two months later, in PCL's Prospectus 11, with its announcement of reduced LVR's and the cessation of offers for construction loans:- *see paragraph 146 below*.)

89. Two days later, on 3 October 2008, PCL's auditors provided Mr Fulker with a management report, relating to their audit of PCL's 2008 Annual Report. That report expressed concern that many default loans did not have current valuations, and announced that the auditors would require current "as is" valuations for all June 2008 loan arrears properties, if they were still in arrears as at 31 December 2008:- *see further paragraph 221 below.*

90. Almost a fortnight later, in about mid October, no doubt as a follow up to the August 2008 email exchange between himself and Mr Fulker, Mr O'Sullivan instructed the continued capitalisation of the Burleigh Views loan interest. He did so in the full appreciation that the capitalisation decision would result in the Burleigh Views loan not being included in the PCL September 2008 loan arrears report. On 14 October 2008, in an email he copied to Mr O'Sullivan, Mr Fulker relayed Mr O'Sullivan's instruction to other PCL staff. He added the instruction to remove the Burleigh Views loan from the monthly loan arrears report. (These respective instructions were contrary to the loan arrears management practices set out in the then current CPP manual:- *see paragraphs 65(a) & 65(b) above*.)

91. In early November 2008 there was a degree of interest from prospective purchasers of the Burleigh Views property. On 4 November 2008 Mr O'Sullivan engaged in email exchanges with a prospective purchaser who expressed interest in acquiring Stage 2 of the development for $2.6m, an amount the purchaser suggested Mr O'Sullivan had raised as a possibility. When Mr O'Sullivan responded that PCL saw completion of the development as its best option, and had already rejected an offer around the $2.6m amount, the prospective purchaser asked whether PCL had a recent valuation and what price would make PCL reconsider its attitude. Mr O'Sullivan rejected that invitation, and responded that PCL would prefer to control construction on Stage 2 whilst Stage 1 units were being sold, and was prepared to undertake the necessary development works.

92. In his 27 April 2015 affidavit, and in ConSTAT ¶72, Mr O'Sullivan said that in early November 2008 he was given a copy of the 4 September 2007 "Colliers" Burleigh Views valuation. An alternative, and likely more accurate, explanation is that Mr O'Sullivan had

either seen, or at least become aware of the content of, the Collier's valuation many months earlier. (That is more likely because in PCL's February 2008 Supplementary Prospectus Mr O'Sullivan had referred to the September 2007 valuation date, and the $26m (GST exclusive) valuation:- *see paragraphs 76 & 79 above*.) In any event, the Collier's valuation likely had additional significance for Mr O'Sullivan in early November 2008. This was because, as the report indicated, it had been commissioned by Mr Andrew Duncan. (Mr Duncan's activities had also prompted the 16 September 2008 $9.725m offer for Stage 1 (*see paragraph 86 above*) .) The cover page of the Collier's report stated that it had been prepared for "an intending mortgagee "subject to readdressing of the report". On 6 November 2008, in further discussions with Mr Duncan, Mr O'Sullivan did duly request that the report be re-addressed to PCL. Mr Duncan responded by relaying Colliers' view that, in November 2008, the report was no longer current and could not simply be re-addressed. Mr O'Sullivan's response to Mr Duncan about the suggestion of engaging Colliers to provide a new valuation was that he saw no value in PCL paying Colliers' $10,000 valuation fee, and would prefer to appoint PCL's own valuers.[8]

93. Mr O'Sullivan said he had been encouraged by the 4 November 2008 $2.6m offer for Stage 2 – because it was higher than both the Colliers Stage 2 valuation (which he put at $1.97m to $2.25m) and the Ray White marketing appraisal of May 2008 ($1.98m to $2.25m). However, Collier's implicit "as is" valuation of Stage 2 was $2.262m (rather than the range suggested by Mr O'Sullivan:- *see paragraph 81 above*) and both it and the upper end of the Ray White appraisal were significantly less than the offer amount. Those considerations make it difficult to understand how the lesser valuations operated to encourage Mr O'Sullivan to disavow any interest in pursuing the prospect of selling (at least Stage 2 of) the property. The difficulties are compounded by (i) the reality of Colllier's November 2008 disavowal of the continued currency of the September 2007 valuation and (ii) Mr O'Sullivan's own concerns about the impact of the Global Financial Crisis:- *see paragraph 87 above*.

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[8] Consistent with the preference, and perhaps also with the contemporaneous concern of PCL's auditors about current valuations for loans that were in default:- *see paragraph 221 below*; on 23 December 2008, contacted Mr Robertson with a view to obtaining an updated report. Despite the fact of that communication with Mr Robertson, and the auditors concern, Mr O'Sullivan said in his 27 April 2015 affidavit (at paragraph [135]) that he considered a further valuation report was unnecessary. There is no evidence that Mr Robertson did provide a further / updated valuation and throughout the period from October 2008 to October 2009 PCL's Benchmark Reports continued to refer to the September 2007 ("Colliers") report.

94. Nevertheless, it is clear that Mr O'Sullivan's apparent disinterest in pursuing the sale of the Burleigh Views property at that stage was consistent with the view he had apparently held from the time PCL took possession of the property. In his April 2015 affidavit, and in evidence in the 2015 Tribunal review hearing, Mr O'Sullivan said that after PCL went into possession as mortgagee, and certainly by December 2008, he had come to embrace, and had thereafter discussed with the other Board members, a recovery strategy that involved completion of the second stage of the Burleigh Views development before attempting to sell any of the residential units. The reasons for adopting this strategy included (i) avoiding the risk of "Stage 1" buyers being discouraged by ongoing construction on "Stage 2", and (ii) avoiding the risk of being required to provide a significant discount for any "one line" sale of the entire development in its "as is" incomplete state.

95. **February to August 2009**:- In February 2009, in response to an enquiry from Mr Fulker, Mr O'Sullivan repeated his previous instruction to continue to capitalise the Burleigh Views loan interest. That instruction was repeated again in July 2009, and authorised the capitalisation of the loan interest through to 30 June 2010. Within the PCL loan management software application, the loan maturity date was changed (first in July, and then again in August 2009) to 31 December 2010. Those instructions and changes likely account for the fact that the Burleigh Views loan was typically not included in the loan arrears reports provided to the directors for the monthly Board meetings. Nevertheless, as the details summarised in Schedule 4 indicate, from February 2009 until May 2010 the monthly loan reports included in the Board papers continued to record 11 November 2008 as the maturity date for the Burleigh Views loan (thus implicitly recognising the default and arrears status of the loan).

96. **August to October 2009**:- On 13 August 2009 PCL received a letter from the Gold Coast City Council advising that the 1998 planning permit for the Burleigh Views property had lapsed in 2002 - because the development had not been completed and used by that date. Mr O'Sullivan promptly responded, pointing out that the buildings in Stage 1 of the project were "virtually complete" and that substantial work had already been undertaken on Stage 2 of the development. He asserted that PCL was in the process of engaging contractors, and that the completion work was anticipated to start in late September. In a further letter of 28 September 2009, the Council acknowledged the Stage 1 construction but said (perhaps erroneously given the delayed construction start, and the troubles that had affected the site in 2006:- *see paragraphs 69 & 72 above*) that the work had been

constructed in around 2000/2001. The Council also said (correctly) that Stage 1 had never been occupied. The Council informed PCL that (i) no further development of the site could occur under the 1998 permit, (ii) a new Gold Coast planning scheme had come into effect in 2003, and (iii) any new planning permit application would be subject to assessment under the 2003 planning scheme.

97. The Council's DA lapse assertion was obviously a significant development, its accuracy was apparently a matter of some initial controversy. On 30 October 2009 Mr O'Sullivan received a letter from planning consultants who had been approached about the DA lapse by one of PCL's former directors (Mr Sukic – *see paragraph 32 above*). The consultant's letter was diffident about the accuracy of the Council's position. It suggested that although the Council might have been incorrect in its view about whether the approved work had commenced, it was potentially correct in asserting that the approval had lapsed because the work had never been completed and the Stage 1 buildings had never been occupied. The letter suggested that PCL obtain legal advice about the validity of the Burleigh Views development approval. If the advice confirmed the approval lapse, the letter predicted that, given the open space zoning of the property under the new (2003) planning scheme, it was logical to expect that the Council would refuse to approve the construction of the further 18 units contemplated for Stage 2 of the proposed development.

98. ***December 2009***:- On 10 December 2009, in a further email to Mr O'Sullivan, the planning consultants reported the substance of the initial legal advice they had suggested PCL obtain. It was to the effect that the Council was likely (but not certain) to be correct about the lapse of the 1998 approval – essentially because the Stage 1 buildings had never progressed to completion and actual occupation. The legal advice suggested that rather than taking proceedings to challenge the Council's position, PCL might be better advised to lodge a "change of use" application under the new planning regime. However, the planning consultants pointed out that such an application would have its own difficulties. They opined that the Council was (i) unlikely to refuse a further permit for the 18 townhouses that had already been substantially constructed, (ii) likely to make any such approval conditional on an open space restriction that would effectively preclude further residential development of the site, and (iii) unlikely to approve the construction of the additional 18 townhouses contemplated by the 1998 development proposal and planning permit.

99. On 23 December 2009 PCL lodged its debenture Prospectus 12. It included a new statement about the valuation of the Burleigh Views property. It said that the latest valuation of the property had been undertaken in December 2009 and had assessed the "as if complete" value at $26.8m, exclusive of GST:- *see paragraph 152 below*. The background to this statement involves the artificial $19.285m valuation amount that had been shown in the December 2008 Board Report and which appears to have been the valuation amount recorded in PCL's internal management accounting system throughout most of 2009. In September 2009 Mr Hornby, who was then in the course of preparing information for PCL's next Prospectus, had noted that the $19.285m amount did not correspond with any formal valuation, and sought an explanation from Mr O'Sullivan. Mr O'Sullivan responded to Mr Hornby that, whilst he could "run through this with you", he had commissioned a new valuation, which he expected would arrive in the following week. A month later, Mr Bersten followed the valuation up with a further enquiry, that elicited the same response from Mr O'Sullivan. There is in fact no evidence of any such formal valuation report having been obtained. The Prospectus 12 information appears to have been derived from an exchange of emails on 15 December 2009 between Mr O'Sullivan and Mr John Robertson (a valuer on PCL's valuation panel). In that exchange Mr Robertson, anticipating a "final report" (that Mr O'Sullivan noted in July 2010 was not on file) set out a "gross realisation" spreadsheet. The spreadsheet listed some basic parameters of the units in the two Stages of the proposed development, and gave a total (GST inclusive) value of $26.68m. That total value reflected assessments of $12.37m for the first 18 townhouses, and $14.31m for the additional 18 townhouses contemplated for the completed Stage 2.

100. **April to June 2010**:- On 1 April 2010 PCL received formal legal advice from Minter Ellison confirming that the development permit for the Burleigh Views Property had indeed lapsed. The essential reason for the lapse was that, despite the substantial work carried out on Stage 1, the units had never actually been used for the originally approved purpose. Minter Ellison recommended PCL lodge a "change of use" development application to permit completion of the proposed development. They noted that the development would conflict with the current environmental open space precinct, and opined that the conflict would require PCL to provide "sufficient grounds" to justify the approval being granted. They did not express any view about the likely success of such an application.[9]

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[9] Mr O'Sullivan said, in his April 2015 affidavit that his optimism that the Council was "very likely" to approve a new DA" was based on Minter Ellison's advice. However, Minter Ellison's April 2020 advice

101. Later in April Mr Hornby circulated the Board papers to the PCL directors. His email stated that the loan arrears report was now being automatically generated by the accounting system. He also drew attention to the Top 10 Loans schedule, and informed the directors, without explanation, that the Burleigh Views loan maturity date should read 31 December 2010 (instead of the printed 11 November 2008, which had been shown in all the monthly reports to the Board since December 2008:- *see Schedule 4*). This communication was a clear indication that although the Burleigh View loan had been in default for a considerable period, it would not appear on the automatically generated loan arrears report. Nevertheless the fact of the loan's irregular status would have been readily apparent from the details that did appear in the "Top 10 Loans" section of the Board report. Those details (in the April 2010 report) included (i) the outstanding loan balance of $16.934m, (ii) the 31 December 2010 "maturity date" (which Mr O'Sullivan must have known was quite artificial) and, (iii) a total loan to valuation ratio of 87.8%. (Despite the valuation information contained in PCL's December 2009 Prospectus, that 87.8% "TLVR" percentage was based on the arbitrary $19.28m "valuation" that Mr Hornby had queried in September 2009:- *see paragraph 99 above*).

102. On 2 June 2010 Mr O'Sullivan commissioned planning consultants to pursue the (Minter Ellison recommended) change of use development application for the Burleigh Views property. The consultants' 31 May 2010 fee proposal (i) recommended significant changes to the originally proposed Stage 2 layout, (ii) warned that the application would have to be supported by a range of geotechnical, hydraulic, landscape and architectural plans, (iii) indicated that the application would be subject to significant fees and infrastructure charges and, (iv) predicted the application would likely take at least 20 weeks to be assessed. Read with the earlier Minter Ellison advice the May 2010 fee proposal letter conveys the impression that obtaining the requisite further approval would involve considerable effort and expense, and was far from a foregone conclusion. That impression is only confirmed by two matters. The first is Mr O'Sullivan's 18 June 2010 letter to the building surveyors who had provided contrary advice in December 2003. That letter, sought details of the matters they had relied on, particularly any Council correspondence. The second matter is the August 2010 architectural redesign proposal, which contemplated the need for a lesser

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letter was less specific than the advice PCL had received in December 2009, and its limited contents do not provide a discernible objective basis for the optimism Mr O'Sullivan asserted.

development density, and of which Mr O'Sullivan was aware.[10] Nevertheless, Mr O'Sullivan said in his April 2015 affidavit that after receiving Minter Ellison's advice, he had confidently expected the Council's likely approval of a further development application for the completion of the development.

103. **July to September 2010**:- On 27 July 2010, possibly after recognition of the apparent inconsistency between PCL's internal records and the information contained in the Prospectus and Benchmark Reports, Mr O'Sullivan instructed that the $26.68m amount should be "entered" as the Burleigh Views property valuation as at 19 December 2009. The effect of that instruction is readily apparent from the Board Report summary contained in Schedule 4. For the whole period from mid February 2009 to the end of June 2010, the Burleigh Views loan had featured as the largest single loan in the monthly "Top 10 Loan" report to the PCL Board. In that period the LVR reported for the loan had steadily increased from about 73% to 89.3% - a percentage that was obviously based on the artificial $19.285m "valuation". However, in the Board Report for the period ended 31 July 2010, the reported LVR dropped to 66.9%. This was obviously the result of Mr O'Sullivan's instruction to use the December 2009, $26.68m amount.

104. For reasons not presently material, between May and August 2010 PCL transitioned to a new audit firm. On 11 August 2010, in a series of emails, the new auditors ("HLBMJ") delivered a request listing some of the debentures and loans intended to be examined. The twenty loans listed included the Burleigh Views loan. Mr Fulker conveyed that request to other PCL personnel, including Mr O'Sullivan, and enquired whether there was anything that "should be in / out" of the (loan) file(s) that is not necessary for the auditors". He also emailed another PCL officer informing her that all the loans listed by the auditors "other than Burleigh Views" were in arrears. He charged her with the responsibility of updating the loan strategy (with the latest development information to be provided by Mr O'Sullivan) and clearly explaining the background to each loan file. In the last of the three emails, Mr Fulker suggested to Mr O'Sullivan it would be desirable to provide an "up front" summary of the Burleigh views loan, in order to "save a lot of time". (Communications later in August show

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[10] The problematic prospects of timely attainment of an appropriate development approval continued to be evident in the following months. In December 2010, PCL's planning consultant reported that the "pre-lodgement" meeting with the Council had been "reasonably positive" but there were many planning conflicts that the Council required to be addressed. The DA was not lodged until late May 2011, and prompted the Council's request for further information and supporting reports. PCL did not respond to the Council until late January 2012.

that Mr Kennedy, PCL's financial controller, told PCL's new auditors that Burleigh Views was a loan with interest arrears. There was a follow up meeting with the auditors scheduled for 1 September 2010:- *see paragraphs 237 & 238 below*.)

105. The auditors provided their report on 14 September 2010. It was considered at the 15 September 2010 PCL Audit Committee meeting where, according to the meeting minutes, there was detailed discussion of various matters, specifically including loan arrears reporting and the Burleigh Views loan:- *see paragraph 238 below.* Shortly after that meeting, and likely prompted by awareness of the auditors' enquiries, Mr O'Sullivan obtained an "update" of the Burleigh Views valuation:- *see Schedule 7*. That update involved another exchange of emails, on 21 September 2010. In that exchange the valuer provided a letter, that alluded to an "almost complete" (but again, apparently never produced) formal valuation report, set out a spreadsheet containing brief details of the basic property and valuation parameters. The spreadsheet indicated a total "as if complete" (GST inclusive) value of $23.08m for the development. (Separate valuations – of $10.89m for Stage 1 &. $12.19m for stage 2 – could be derived from its contents). This reflected a significant reduction (attributable to the use of lower $/sqm valuation rates) from the previous (December 2019) spreadsheet. Several hours later, after Mr O'Sullivan had queried the reason for the reduction, Mr Robertson provided a further letter. It contained an identically worded narrative, but an altered spreadsheet that reverted (without explanation) to the $/sqm rates, and the consequential $26.68m total, in the December 2009 spreadsheet:- *see paragraph 99* above. Mr O'Sullivan immediately provided the second letter to Mr Hornby, who provided it to PCL's auditors later the same day.

106. At the end of the month, the "Top 10 Loans" table, which was a regular feature of Mr 'O'Sullivan's monthly reports to the PCL Board, identified the $18.298m balance of the Burleigh Views loan (which had been repeatedly reported as more than twice the size of PCL's next largest loan) and continued to indicate an LVR (of 68.6%) based on the Robertson letter / spreadsheet values). The loan had a stated maturity date of 31 December 2010, and no loan arrears. However, it was certainly known to Mr O'Sullivan, and it must have been obvious to the PCL Board (at least in the light of the information contained in previous Board Reports) that the loan was non-performing, had a loan balance more than three times the CPP "product guide" limit, and was well outside the maximum permissible 18 month loan term for construction loans:- *see paragraphs 65(d) & 65(f) above*.

107. ***October to December 2010***:- In early October 2010 Mr Seymour visited the Burleigh Views property. He reported to the Board at the 14 October 2010 meeting. The meeting minutes record, although with unfortunately brief ambiguity, his note of the "progress" of the works and the position of the project. Despite the ambiguous brevity of the note, it is abundantly clear that, from at least this time onwards, all of the PCL directors, and certainly Mr O'Sullivan, well understood the magnitude of the loan, and the fact of Burleigh Views default. They all likely understood, and Mr O'Sullivan certainly understood, that recovery of the Burleigh Views loan depended on the ability of PCL to achieve completion of "Stage 2" of the development.

108. On 15 December 2010, PCL's planning consultants reported to Mr O'Sullivan about the result of discussions at a "pre-lodgement" meeting arranged to elicit the Council's likely re-action to the proposed renewed Development Application for the completion of the project. The consultants advised that, whilst the meeting had been "reasonably positive" the Council wanted PCL to address various respects in which the proposal conflicted with the local planning scheme. A significant consideration was the location of the site within an environmental corridor, and the Council requirement for PCL to submit a further environmental report. An additional issue, which the consultants had anticipated, was that the Council would likely require a geotechnical analysis of the site. This requirement was a predictable consequence of the landslip problem that had interrupted construction activities on the site in 2006.

109. **May to August 2011:-** Following on from PCL's planning consultant's December 2010 advice, on 27 May 2011 Mr O'Sullivan and Mr Bersten wrote to the Gold Coast City Council providing PCL's formal consent to the lodgement of a new development application for the Burleigh Views property. In mid July 2011 the Council issued a lengthy letter raising some 30 matters where PCL was required to provide additional information. Amongst those matters were the Council's concerns about slope instability, geotechnical certification for buildings, pedestrian and vehicular access, visual amenity, and landscaping to meet ecological and fire hazard concerns. Despite the length, and apparent complexity, of those matters of concern, PCL's planning consultant reported that the Council had not raised any general objection to the application. However, it was not until 20 January 2012 that PCL responded to the Council's information request:- *see paragraph 123 below*.

110. On 22 August 2011 PCL's auditors again requested information for the purpose of their review of PCL's loan arrears. The information requested a wide range of information but the first item on the list was for an update on the valuation of Burleigh Views as at 30 June 2011. The auditors followed up that request on 2 September 2011. They noted that the valuation had not been provided, and requested information about the extent to which the development had been completed, and the estimated completion date. Mr O'Sullivan promptly responded to that request, indicating that the Stage 1 work was "95% complete" and that "heavy works" had been carried out on Stage 2. His response did not, however, refer to the unresolved approval status of the development.

111. Prior to his 2 September 2011 response, and no doubt prompted by the auditor's enquiry, on 27 August 2011 Mr O'Sullivan had approached Mr Robertson for a further valuation update of the Burleigh Views property. He told the valuer that the first 18 units in "Stage 1" were 95% complete, "Stage 2" was ready to commence, and PCL was "simply waiting on confirmation from Council and some minor items".[11] He said PCL anticipated construction commencement around October / November 2011. When Mr Robertson had not responded, Mr O'Sullivan sent another email saying he wanted the "valuation issue" resolved that day and, until receiving a formal report, he would be happy with a letter along the lines of the 20 September 2010 letter, perhaps with the removal its reference to any continued impact of the global financial crisis. The following day (ie., 31 August 2011), the valuer provided a copy of the 20 September letter (slightly altered as Mr O'Sullivan had suggested) and with the date changed to 30 August 2011. That valuation letter was apparently provided to the auditors, who met with PCL personnel on 5 September 2011 to discuss the progress of the loan arrears and loan provisioning – a topic which would likely have involved consideration of valuations for the properties known to be in arrears.

112. In the meantime, on 29 August 2011 a prospective investor, having read PCL's 22 December 2010 Prospectus No 13 (*see paragraph 154 below*) sent an enquiry that focussed on the disproportionate size of the ($17.518m) Burleigh Views loan. The question the investor raised, the internal consideration it provoked within PCL, and PCL's response to the investor, were as follows:-

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[11] Mr O'Sullivan's statement that PCL was simply waiting on confirmation from Council was perhaps literally true, but it is a considerable over-simplification of the underlying reality – that PCL had received, and had not yet responded to, a detailed information request from the Council:- *see the footnote to paragraph 102 above*.

(a) Investor email:-

> *In your Prospectus 2011 pg.9 you mentioned that the maximum limits for each loan is $2.5 million, and the maximum limits for each borrower is $4 million. However, in page 7, there are details of one loan that is valued at $17,518,058, which significantly exceeds both the $2.5 million/loan limit and the $4 million/borrower limit. Is there any particular reason why the loan is concentrated in this one loan & borrower?*

(b) Hornby (PCL Chief Financial Officer) email to Bersten:-

> *This is Burleigh Views - Malcolm I am sure you would be best able to eloquently summarise this one*

(c) Bersten email response:-

> *The maximum loan and borrower limits on page 9 are our current policy limits, as is noted in the same phrase. The largest loan of $17,518,058 is a construction facility made originally in 2004.*

(d) PCL email response to investor:-

> *Regarding question 2: The maximum loan and borrower limits on page 9 are our current policy limits, as is noted in the same phrase.*
>
> *The largest loan of $17,518,058 is a construction facility made originally in 2004. Also please refer to p10 point 6 regarding the latest valuation as at September 2010.*

113. This last response was literally accurate, because the 2004 Burleigh Views loan agreement involved a principal amount of $8.89m (*see paragraph 68 above)*, and that was less than both the pre 2007 and the 2007 to September 2009 8 loan limits (respectively $9m and $15m: *see paragraph 65(a)& 65(c) above*. However, the response to the investor obscured the underlying reality, that the current loan balance reflected the capitalisation of long standing payment default by Burleigh Views.

114. **October to December 2011:**- From about mid October 2011, perhaps prompted by increasing enquiry by PCL's auditors, or awareness of the program reflected in Mr O'Sullivan's instructions to Mr Robertson in August 2011, various PCL officers Including Mr Hornby) began feasibility assessments for the proposed completion, and sale, of the Burleigh Views development. The first of these assessments adjusted the August 2011 valuation to a GST exclusive amount of $24.254m, and contemplated a loan balance of $23.59m as at October 2012. Certainly, the auditors' interest in the details of PCL's plans for embarking on the Stage 2 development work became evident in communications in early November 2011. Following that, on 15 November 2011 Mr Hornby reported to Mr O'Sullivan

that the auditors were looking for specific information, including a selection of work invoices, a planned schedule of work, and details of the procedures for controlling the construction expenditure. After discussion with Mr O'Sullivan, Mr Hornby provided three invoices relating to work that had been done, and information to the effect that PCL relied on approvals from its planning consultants, project managers and Mr O'Sullivan's own ultimate personal oversight and approval. Several days later Mr Hornby provided further information, responding to the auditors' enquiry whether PCL's "project managers", who the previously supplied invoices indicated had charged for work and materials in the year ended June 2011, were also both "the builder and project manager".

115. Following that, on 22 November 2011, the auditors provided PCL with their management report letter, relating to the 2011 financial year audit,. The report was generally approving of PCL's accounts. However, the apparently condign contents of the auditors' management report letter, were not the end of the matter. On the same day as the 22 November 2011 management report letter Mr Hornby met with HLBMJ and followed up that meeting with an email he sent early the same afternoon. In the email he undertook to provide a "high level review" to support the director's view of the recoverability of the Burleigh Views loan, and details of the loan interest since 1 July 2009. Later on the same afternoon, HLBMJ pointed out to Mr Hornby that the Burleigh Views LVR in the October 2011 Benchmark Report had been overstated, because PCL had misdescribed the August 2011 Roberson valuation as GST exclusive. After that, but still on the same day, Mr Hornby emailed Mr Sullivan and Mr Bersten. He referred to his meeting with the auditors and noted that the audit of PCL's Benchmark Reports had been focussed on by the auditors as a result (he suspected) of concern expressed by AETL. He informed them that the auditors were pressing for a feasibility study for the proposed completion of the development. More specifically he relayed the auditors' concerns about the contents of the Benchmark Report. Those concerns were to the following effect

    (a) the directors subjective opinion that the loan would be recovered in full should be supported by reliance on an appropriate feasibility study

    (b) the apparent irregularity in characterising the Robertson valuation as exclusive of GST (and the consequential understatement of the Burleigh Views LVR in the October 2011 Benchmark Report)

    (c) the likely inaccuracy (given the apparent absence of any specific assessment) of the Benchmark 8 claim (consistently made since the December 2008 Prospectus:- *see*

paragraph 149 below) that the Burleigh Views LVR had been calculated on a "cost to complete" basis

(d) the desirability of including in the Benchmark Report certification for completed work

(e) The desirability of independent support for the approval and certification of payments for completion of the construction work.

116. Mr Hornby responded further to HLBMJ on 24 November 2011. In relation to the treatment of GST in the sale of units in the proposed development he gave PCL's view that it might have a $0.9m GST liability. He also provided a 14 October 2011 "high level feasibility" that he attributed to Mr O'Sullivan. The feasibility study contemplated a final loan balance (after a $3m construction cost and interest) of $25.764m, net sales proceeds of $25.78m, resulting in a marginal surplus of about $15k as at December 2012. Mr Hornby informed the auditors that PCL would provide a more detailed review for the half year audit process at the end of December. The auditors' response pointed out that the proposed detailed review would have to take into account the GST inclusive basis of the August 2011 valuation, and that doing so would increase the LVR above the 75% reported in the October 2011 Benchmark Report.

117. In the light of Mr Hornby's anticipation of a more detailed feasibility, it is relevant to note that Schedule 6 includes details of a 1 December 2011 feasibility study. Based on sales proceeds reflecting the $26.68m valuation (after making a net adjustment for GST), and after allowing for construction and selling costs totalling $3.261m, the feasibility anticipated that the completed development would result in a small surplus (of about $121,000) after repaying the projected loan balance. However, it is relevant to register a considerable degree of scepticism about the reliability of the construction cost estimate underlying this feasibility study, and the marginally optimistic result it projected. As I have previously described, the Collier's September 2007 valuation had included specific allowances (which exceeded $7.2m) for the costs involved in the completion and realisation of the development:- *see paragraph 81 above*. Colliers' estimate of those matters appears to have been the only, apparently informed independent, costs assessment available to PCL up to the end of 2011[12]. Clearly, if it had been used in undertaking the December 2011 feasibility exercise, it would have resulted in the projection of a very significant loan shortfall.

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[12] In his May 2017 affidavit Mr Bersten said that, sometime after Mr Seymour's visit to the Burleigh Views site in September 2010 and his October 2010 report to the Board, Mr O'Sullivan had estimated the

118. In the middle of December 2011 PCL provided ASIC with a draft of its proposed new Debenture Prospectus. ASIC's responded to it by first issuing a statutory production notice, meeting with PCL representatives, and then sending a concerns letter to PCL on 22 December 2011. ASIC's specific concerns about PCL's disclosures seem to have been principally triggered by PCL's proposal to transition to funding its activities "solely through wholesale funding", but they extended to detailed comments about each of the Benchmark disclosures in the draft prospectus. In particular, ASIC expressed concern about (i) the prospects of recovering the loans to Burleigh Views and Cashflow, (ii) the level of loan arrears, and (iii) the absence of "as is" valuations for "distressed" security properties. As a consequence of its concerns ASIC requested PCL to (i) issue an "updated disclosure document", (ii) not issue any new securities under its current Prospectus, (iii) withdraw all its advertising and, (v) engage an independent expert to report on the company's activities and solvency.

119. Mr Bersten's prompt (23 December 2011) response to ASIC's concerns letter asserted PCL's solvency, its "full compliance with all applicable … requirements" and an understanding that ASIC was not suggesting the contrary. Nevertheless, Mr Bersten indicated that PCL

(a) had withdrawn its current Prospectus, and would not proceed to issue any new Prospectus

(b) had discontinued advertising

(c) would prepare an "Information Booklet" to all existing investors, and consult with ASIC about its contents

(d) would allow a period (up to a month after publication of the Information Booklet) in which existing investors could withdraw their funds.

120. ***January to May 2012***:- Mr Robertson provided PCL with a 30 page valuation report on 2 January 2012. This referred to inspections in July and October 2011 - perhaps indicating that it had been commissioned before Mr O'Sullivan's 27 August 2011 email, and long delayed. The report noted the Council's position that the 1998 development consent had lapsed, PCL's mid-2011 application for a new consent, and the fact that the Council was waiting for PCL to provide further requested information to support that application. Based

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construction costs would approximate $4m. This further obscures the justification for the use of the $3m estimate in the feasibility.

on assumptions that the Council would approve the application, and about the specifications for the Stage 2 construction, the report adhered to the parameters and amount of the August 2011 $26.68m (GST inclusive) “assessed market value”, but described it as the amount of the “gross realisation potential” of the proposed units. The significance of this label was that the report did not address either the timing of, or the cost involved in, completion of the development, and did not assess PCL’s “net” potential realisation from the sale of the completed development.

121. In mid January 2012 PCL (specifically, Mr Bersten) provided ASIC with a draft of the first Information Booklet. This drew an immediate response, in which ASIC voiced numerous concerns, including that (i) the draft was misleading, because it failed to convey to investors “how serious is the level of arrears” in PCL’s loan portfolio, (ii) the quoted LVR for the Burleigh Views property was misleading (because there was no formal valuation and no allowance for realisation costs) and, (iii) there was no discussion of the consequences of the March 2012 expiry of PCL’s wholesale funding arrangements. Mr Bersten made some (not readily discernible as extensive) changes, consulted with PCL’s solicitors about the revised drafts, and then sent ASIC an altered version of the Information Booklet on 18 January 2012. That missive received a brief, somewhat obscure and perhaps surprising response (in view of the minimal changes that appear to have been made) that the amended draft addressed “a substantial number” (though not all) of ASIC’s previously articulated concerns. A few days later, Mr Bersten circulated the amended Information Booklet to the other PCL directors, and then published the first of the Information Booklets. In that document PCL disclosed that the Burleigh Views LVR already exceeded 75%, before construction and selling costs. After allowing $4m for construction costs alone, PCL acknowledged the risk of a loan recovery shortfall.:- *see further paragraphs 187 to 190 below*.

122. Further details of the contemplated (GST exclusive) construction costing, totalling approximately $4.25m (well in excess of the construction cost allowance in both the 1 December 2011 feasibility and the January 2012 Information Booklet) were provided to Mr O’Sullivan in a 20 February 2012 report from Herriotz International. Following that estimate Mr Hornby revised the earlier feasibility assessment to include those costs, and provided that document to Mr O’Sullivan on 26 February 2012. That revision, which assumed construction commencement in June 2012, completion in early 2013, total construction and

sales costs approximating $5m, and sales proceeds being received from mid January 2013 onwards, reduced the previously estimated surplus to a $94,000 loss.

123. Consistent with the contemplation in the January 2012 Information Booklet, and the results of the feasibility studies, between 2 and 5 March 2012, Mr Hornby circulated to the PCL directors a list of proposed loan provisions. They included a $$1m provision against the Burleigh Views loan "as a contingency against future costs". On 6 March 2012 in a narrative loan arrears report he circulated to the directors, Mr Hornby recorded that on 20 January 2012 PCL had provided the Council with a response to the July 2011 additional information request. The report anticipated that Council would approve the application in late March or April 2012, and that construction of the remainder of the development would take six to eight months. But in view of the delay, the report stated that a provision had been made against the loan "as a contingency against future costs". That $2m provision was included in the Top 10 Loans report in the papers for the PCL Board meeting on 15 March 2012. At that meeting the PCL Board approved the publication of PCL's second Information Booklet:- *see paragraph 191 below*. In the 16 March 2012 Information Booklet PCL reported that, after the $2m provision, the (potentially recoverable) loan balance was approximately $19.24m, and there was still a shortfall risk.

124. Shortly after the March 2012 Board meeting, and the publication of the 16 March 2012 Information Booklet, on 22 March 2012 PCL received further cost estimates for the completion of the Burleigh Views development. They ranged from $4.77m to $7.25m (both GST exclusive). PCL's architects expressed concern about the wide variation in the costs estimates, and suggested that PCL operate on a $5m budget. However, both that budget and the estimate range obviously highlighted the shortfall potential acknowledged in the Information Booklet.

125. On 23 March 2012 AETL wrote to PCL requiring it to provide information about a range of matters. These included (i) the progress of valuations for the Burleigh Views property (and two of the other Top 10 Loans), (ii) the actions PCL was taking to recapitalise its balance sheet following loan provisioning it had made in its December 2011 financial statement, (iii) immediate correction of the past non-disclosure of loan arrears, particularly relating to the Burleigh Views loan and, (iv) a detailed written explanation of the reasons why that non-disclosure had occurred. Pending clarification of the valuation issues, AETL asked PCL not to accept any new debenture investments, to deposit any loan recoveries in a "locked box"

(and not disburse them without AETL's consent). Mr O'Sullivan promptly despatched PCL's response to AETL. His response either noted, or expressly agreed with, some of AETL's concerns. However, he rejected AETL's request that PCL should cease accepting any new investments in its FTI portfolio, he pointed to the contents of the 16 March 2012 Information Booklet and strongly rejected the proposition that, in either its past or current disclosures, PCL had not fully complied with its obligations. He also rejected the "locked box" request – on the basis that it would deprive PCL of its cash flow, and reduce its future profitability.

126. Unsurprisingly, Mr O'Sullivan's response did not satisfy AETL. It wrote again on 27 March 2012, and repeated its view that PCL should cease accepting investments, pending receipt of current valuations for various properties, including Burleigh Views. AETL rejected Mr O'Sullivan's assertion about the adequacy of PCL's disclosures, regarded PCL's apparently long standing non-disclosure of the Burleigh Views loan arrears as "deeply concerning", and again demanded an explanation. This complaint from AETL appears to have prompted PCL to publish the third version of the Information Booklet:- *see paragraph 193 below.* In a further response to AETL on 5 April 2012, implicitly still defending PCL's past disclosures, Mr O'Sullivan asserted that in the Information Booklet, and "to remove any doubt", PCL had adopted an "expanded interpretation of what constitutes "arrears" loans". (This was a disingenuous statement and evaded AETL's request for an explanation of the reason for PCL's past non-disclosures:- *see paragraph 193 below*.)

127. Also on 27 March 2012, PPB Advisory provided both ASIC and AETL with the "Solvency review" AETL had commissioned in late February 2012. The review concluded that PCL was currently cash flow solvent, but faced the significant risk of an underlying asset deficiency. It estimated PCL had a potential $5.9m asset deficiency. Consistent with that apprehension, the report recommended AETL commission a current "as is" valuation of the Burleigh Views property.

128. AETL and PCL received that valuation in early May 2012. The 8 May 2012 Savill's valuation reported that the Council had still not decided the new development application, and was waiting for further geotechnical and hydrological reports to be submitted by PCL. The report gave two (GST inclusive) "as if complete" valuation estimates for a "one line" sale of the property:- (i) $3.83m (taking into account various adverse features of the site, including its protracted history and past use and, (ii) $4.45m (conditional on the issue of unencumbered title for the Stage 1 units. The report also gave two (GST inclusive) "Gross Realisation"

estimates for the "as if complete" sale of the individual units. Based on the same contingencies. The valuation estimates were $14.29m and $16.2m. The report indicated that, because of various uncertainties (including the absence of development approval and an informed feasibility assessment), it was not possible to provide an "as is" valuation of the property. Unsurprisingly, the report ultimately concluded that the property was not a suitable first mortgage security.

129. **June 2012**:- In the course of the 29 June 2012 reasons for judgment (*see paragraph 52 above*) Rares J noted the differing views expressed in the January and May 2012 valuations. Rares J opined that (i) the sensible practical course was for PCL to complete the development, and (ii) the gross realisable value of the completed development was somewhere within the $16.2m to $26.68m range, and likely at or below the middle of that range.

BURLEIGH VIEWS PROPERTY VALUATIONS

130. The PCL CCP manuals required all construction loan valuations to be commissioned on the basis of an approved form of written instructions. Prior to September 2009, its existence (and location within PCL's computer system) was listed in an Appendix to the CCP manual. On 28 August 2009, after PCL established its first managed investment scheme, Mr O'Sullivan approved a standard from of written instructions. Following that approval, Mr Bersten instructed that the standard form be issued to all of PCL's panel valuers, and sent a copy of his instruction email to Mr O'Sullivan. (The standard instructions required specific reference to the status of any development approval for the security property.) Subsequently those instructions were set out in full in an Appendix to the new (September 2009) version of the CPP manual:- *see paragraph 65(c) above*. Nevertheless, the evidence tends to contradict the likelihood that Mr O'Sullivan used it, or any similar comprehensive form of instructions, when he commissioned the "gross realisation" estimates from Mr Roberson in December 2009, September 2010 or August 2001.

131. The valuations, sales estimates and feasibilities for the Burleigh Views property, principally relevant to PCL's decision making in relation to the Burleigh Views loan after PCL took possession of the property, have been described in the previous section of these reasons (as part of the Burleigh View loan history). Schedule 6 to these reasons – "Burleigh Views property valuations / estimates / feasibilities"- complements those descriptions with outline

details summarising the effect of all the identified valuation type documents. Subject to two qualifications, the parties agreed on the content of the information in Schedule 6. One qualification related to the January 2003, Raine & Horne $4.3m - $4.5m "as is" market appraisal. That appears to have been accompanied by an "as if complete" gross realisation "recommendation" of $9.3m for Stage 1 and $7.7m for Stage 2 (resulting in a total of $17.05m). Secondly, the October 2006 Dalton Real Estate appraisal is rather obscure in its details, and does not appear to reconcile precisely with the number and categorisation of the units reflected in either the Colliers (2007) or the Roberson (August 2011) valuations. But, if one assumes that the discordance in the unit categorisation is minor, the number of units in the Dalton appraisal can be interpreted as implying a total sales projection of $22.8m – comprising $10.7m (for Stage 1), $12.1m (for Stage 2).

132. Apart from those qualifications, it is also appropriate to note a degree of oversimplification in some of the Schedule 6 details. For example, the $6.77m May 2001 Gradmont valuation total comprised a "gross realisation" of $5.62m for the completed Stage 1, and a $1.15m "residual" value for the Stage 2 land. Furthermore, although Schedule 6 indicates that valuation included a construction cost estimate of $2.195m, full regard to the valuation report reveals that amount was a quantity surveyors estimate of the construction cost for Stage 1 alone. The projected construction cost for the whole development was double that estimate ($4.39m). Another example is the $6.116m construction cost estimate in the September 2007 Colliers valuation. That estimate specially addressed the scope of the uncompleted work in Stage 1 ($0.705m) and the whole of the Stage 2 construction costs ($5.12m plus $0.3m contingency). Despite being higher than the Gradmont 2001 estimate (for a larger scope of work) It was based on price indexed adjustments to a June 2004 external project manager's estimate that specifically addressed the uncompleted work)

133. It was suggested on Mr O'Sullivan's behalf, that the details summarised in Schedule 6 may not be a complete record of all the valuations or appraisals that PCL obtained. Mr O'Sullivan did not accept, for example, that PCL had not obtained the valuation contemplated in the May 2007 refinancing agreement. In his April 2015 affidavit Mr O'Sullivan alluded generally to "other valuations and real estate appraisals" PCL had obtained around the time of the November 2008 discussions:- *see paragraphs 91 & 92 above*. In his 2015 cross examination Mr O'Sullivan also alluded to the possibility of a "missing" valuation. It was also submitted that there was some evidence PCL had paid a valuation fee in January 2006. A further submission was that Mr Hornby's September 2009 valuation query to Mr

O'Sullivan (*see paragraph 99 above*), pointed to the existence of a 15 August 2007 $17.222 valuation by PRP (whereas the only known valuation in that amount was actually dated 23 December 2003). The actuality for which these various suggestions contended, whatever its forensic plausibility, is improbable. There is certainly no reliable evidence of either the content of, or PCL's substantial reliance on, any such possible additional valuation information. The explicitly asserted valuation information on which PCL publicly relied in its Prospectus and Benchmark Reports is summarised both in Schedule 4 and, in more detail, in later parts of these reasons. That reliance relevantly begins with the inclusion of reference to the Colliers valuation in the February 2008 Supplementary Prospectus. That was only included on the basis of Mr O'Sullivan's specific suggestion, and his acknowledgement to Mr Bersten that PCL had not revalued the property since 2003:- *see paragraph 145 below*. Properly considered, the evidence is bereft of a credible basis for concluding that there was any material omission from the valuation material summarised in Schedule 6. Accordingly, the suggestion does not materially detract from the significance that can properly be attributed to the known valuation information.

134. Schedule 6 indicates the general nature of the valuation, the author / source of the valuation, the valuation or appraisal range, and the approval and completion assumptions on which it was based. The entries in the "Valuation (As Is)" column reflect the position that (until it obtained the May 2012 Savill's valuation:- *see paragraph 128 above*) PCL had not obtained any "as is" valuation after September 2007. The column entry treats the April 2008 marketing submission as if it could be interpreted as providing an "as is" estimate – although it may be more realistic to treat that appraisal as having anticipated the actual completion of the Stage 1 units, and their immediate saleability.

135. The various estimates and valuations were commonly expressed as GST inclusive, and usually did not quantify the impact of any GST liability on the realisation of the completed development. To allow for a consistent adjustment for GST, and comparison between the various appraisals and valuations, the Schedule includes an adjustment allowance for GST. Typically, except in the case of the feasibility assessments from late 2011 onwards, they did not articulate specific assumptions about the projected development timing and costs. In the case of the feasibility assessments, the projected loan value at the completion of the development has also been included. The final column in Schedule 6 displays a calculated a TLVR value. That final column shows that at all times after September 2010, even without making an allowance for completion costs of the development (and certainly without making

an allowance of the magnitude contemplated in the September 2007 Colliers valuation:- *see paragraph 81 above*) the "TLVR" substantially exceeded PCL's 70% LVR policy for construction loans – as indicated in the pre-September 2009 versions of its CPP manual.

136. The valuation information summarised in Schedule 6, is consistent with the valuation information discussed earlier in these reasons. At the time of the May 2007 refinancing agreement Mr O'Sullivan knew that PCL's most recent valuation was the December 2003 "gross realisation" estimate, and that his recognition of a $13.5m loan principal (*see paragraph 75 above*) substantially exceeded PCL's 70% LVR for construction loans. The Collier's September 2007 valuation, if it could properly have been regarded as a reliable current valuation, could have justified a view that the more accurate LVR approximated the 47% shown in Schedule 6. But it is not clear either when, or in what circumstances, this document was provided to PCL. What is clear is that by November 2008, Mr O'Sullivan knew it could not be regarded as a reliable current valuation.

137. The following propositions are consistent with the information in Schedule 6:-

(a) Despite the contemplation in the May 2007 refinancing agreement (*see paragraph 72 above*), and its own CPP manual lending policy, PCL did not commission an "as is" valuation for the Burleigh Views property until May 2012.

(b) The April 2008 marketing submission, even assuming it could be treated as an informative "as is" estimate, suggested a real risk PCL would not recover the loan balance from an "as is" sale of the property.

(c) Until the feasibility assessments carried out between November 2011 and February 2012, PCL seems not to have obtained any meaningful assessment of the costs likely to be involved in completion of the development, and appears to have disregarded both the $4.75m estimate expressed in the May 2007 refinancing agreement and the $6.116m estimate contained in the September 2007 Colliers valuation.

(d) After at least October 2010, and even without taking into account construction costs and timing, the available valuation information indicated that the Burleigh Views TLVR (based on the "as complete" valuation amounts) well exceeded (i) the 65% ratio suggested in the August 2010 CPP Manual (*see paragraph 65(d) above*), and (ii) the 70% ratio contemplated in the 1998 Trust Deed:- *see paragraph 61 above*.

REGULATORY GUIDE 69 - "BENCHMARK" & PROSPECTUS DISCLOSURE GUIDANCE

138. In October 2007 ASIC published the first version of Regulatory Guide 69 ("Reg 69") to provide disclosure guidance to entities involved in unlisted debenture fundraising from retail investors. The express purpose of the disclosure guidance was to encourage the provision of information to assist retail investors in making informed decisions. This guidance was based on an understanding that Corp Act provisions placed special emphasis on the needs of retail investors, and required disclosure of "all they need to know" to (i) make prudent investment decisions and, (ii) monitor the performance of their debenture investments.

139. Four Reg 69 versions were published in the period prior to PCL's 2012 liquidation. The October 2007 version directly applied to any prospectus issued after 1 December 2007, and required existing debenture issuers to provide complying disclosure by 1 March 2008. It prompted PCL to release its supplementary Prospectus in February 2008, and specifically address the Reg 69 Benchmark guidance criteria:- *see paragraph 145 below*. The second Reg 69 version was an August 2008 re-issue that remained current until May 2010. It was superseded by the third version ('Reg 69B') in June 2010. That version remained current until the issue of Reg 69C in February 2012. The prefatory sections of the Regulatory Guide described unlisted debentures as posing particular challenges to retail investors because of the absence of "price discovery mechanisms and market forces" to assist investment decisions and monitor a debenture issuer's ongoing performance.

140. Each version of Regulatory Guide 69 contained eight "benchmarks". ASIC expected unlisted debenture issuers to either comply with each benchmark, or explain the reasons for their non-compliance. The "benchmarks" principally relevant to the present matter, were as follows:-

(a) ***Benchmark 1: Equity capital (all versions)***:- this imposed a minimum 8% "equity ratio", and required a 20% ratio where "more than a minor part" of a debenture issuer's activities were property developments, or involved lending for property development purposes. The 2010 and 2012 Reg 69 versions required issuers to disclose their equity ratio for the previous year.

(b) ***Benchmark 4: Credit ratings (2007, 2008) // Debt maturity (2010, 2012)***:- Originally this "guidance" required issuers to have their debentures rated by a

recognised credit rating agency, publish the rating in any prospectus, and take reasonable steps to maintain the currency of their credit rating. (PCL never sought a rating:- *see paragraph 170 below*.) The third (June 2010) Reg 69 version changed this benchmark to "debt maturity" and required issuers to disclose the maturity profile of their interest bearing liabilities, and details of the applicable interest rates.

(c) ***Benchmark 5:- Loan portfolio (2007, 2008)***:- this initially required a debenture issuer to disclose:-

(i) the number and value of its loans

(ii) the loan purposes and the geographic regions (again by number and nature)

(iii) by number and value, the proportion of loans "in default or arrears"

(iv) the proportion (both number and value) of secured loans

(v) the proportion (both number and value) of the issuer's total loan portfolio involved in their largest loan, and their ten largest loans.

(d) ***Benchmark 5: Loan portfolio (2010, 2012)***:- Paragraph RG 69.67 had previously provided an exegesis to the specifically required disclosures, and described debenture holders as having a "strong interest" in knowing what proportion of loans were in default, what proportion were in arrears and "what the issuer is doing" to address those loans. That interest was re-stated in the (renumbered RG 69.61) but it was more specifically reflected in the amended version of this benchmark (and complemented by amendments to Benchmark 7, which conditionally required annual valuations). The additional requirements in Benchmark 5 itself were:-

(i) an analysis of the maturity profile, and interest rates, of the issuer's loan assets

(ii) an analysis of loans that were more than 30 days in arrears, or had been renegotiated within the preceding six months

(iii) the number, value and percentage of loans where the issuer had taken action to enforce the security (either by taking possession or initiating legal proceedings)

(e) ***Benchmark 7: Valuations (2007 to 2012)***:- this required (amongst other things):-

(i) a clear statement of valuation policies - in relation to valuation frequency and recency when making a loan

(ii) valuation of development properties on both "as is" and "as if complete" bases

(iii) all valuations being based on comprehensive instructions and reasonable assumptions

(f) specific information about the "cost" and valuation of particular properties where the property or loan accounted for more than 5% of the issuer's assets or loans (The "cost" information was expected to be provided "for comparison purposes". The valuation information was to include the valuer's identity, valuation method and key assumptions, and be sufficient to help a retail investor assess the quality and reliability of the valuation.)

(g) ***Benchmark 7: Valuations (June 2010, February 2012)***:- these amended Reg 69 versions additionally required annual revaluation of development properties, except where funds had been retained by the issuer and only released in stages to fund completion costs

(h) ***Benchmark 8***:- ***(2007 to 2012)***:- this benchmark required the debenture issuer to:-

(i) maintain a 70% loan to valuation ratio for property development loans, based on the latest "as if complete" valuation

(ii) provide loan funds in stages supported by external evidence of the progress of the development

(iii) disclose their policies and practices in relation to the progressive funding of a borrower's development activities

(i) ***Benchmark 8: Lending principles (June 2010)***:- the amended version altered the description of the required 70% valuation ratio, and required it to be retained on the basis of the latest "complying valuation" - a term that was defined as a valuation that either (i) complied with the "as is" and "as if complete" (conditionally annual) valuation requirements of Benchmark 7 or, (ii) was the "capital improved value" in a(n) (annual) municipal rates valuation.

141. The requirements of Benchmark 5 reflected the reality that a debenture issuer's loan portfolio was likely to be its primary asset. The quality of that portfolio was the key to assessment of the issuer's financial performance and stability. Consequently, information about the default proportion of the loan portfolio was said to be particularly important for investors. They were entitled to know what proportion of the loan portfolio was in default, and what the debenture issuer was doing in relation to the default loans. That entitlement was stated in all the RG 69 versions, and made very explicit with the June 2010 changes to

Benchmark 5. The requirements of Benchmarks 7 and 8, particularly after the June 2010 introduction of the (conditional) requirement of annual valuations, reflected the concern, evident in the Benchmark 1 "equity ratio" criteria, that property development activities presented particular credit risks - because of the uncertainties, and deferred cash flow, inherent in the activity.

142. Section F of Reg 69 dealt with debenture issuers half year and annual reports, and imposed audit requirements relating to them. An issuer had to have their annual reports audited, and their half year reports subject to an audit "review". (At least from August 2008 onwards Reg 69 explicitly required auditors to have regard to, amongst other things, the issuer's quarterly reports, prospectus and any additional disclosures.) All the Reg 69 versions specifically noted the obligation imposed on an issuer's auditor to disclose to the debenture holder's trustee anything they considered "likely to be prejudicial to the interests" of the debenture holders, and relevant to the trustee's duties and powers:- *see Corp Act s 313(2).*

PCL PROSPECTUS NO'S 10 TO 13 (DECEMBER 2007 TO DECEMBER 2010)

143. PCL issued all five of these debenture prospectus documents after the May 2007 refinancing agreement for the Burleigh Views loan, and after the introduction of Reg 69 in October 2007. In that period it raised at total of approximately $84m of debenture funding, the majority (at least $63m) of which was raised in response to the three prospectus documents issued after Burleigh Views August 2008 liquidation:- *see Schedule 3*. In his covering letter to Prospectus No's 10 (2007), 11 (2008) and 12 (2009) Mr O'Sullivan assured potential investors (with implicit regard to Reg 69.15) that they would find all they needed to know in the information in the Prospectus.[13] The four PCL Prospectus issued after January 2008 specifically addressed the benchmark disclosure requirements in Reg 69. The contents of the five prospectus documents are summarised in the following paragraphs.

144. **18 December 2007**:- Mr Bersten reported the lodgement of the 2007 Prospectus at the 19 December 2007 PCL Board meeting. The Prospectus had three sections (1: product features; 2: financial and other information; 3: how to invest) and included an investment application form. Section 1 provided an overview of the key features of the debenture

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[13] Mr O"Sullivan's covering letter to Prospectus No 13 contained the less emphatic (but not materially different) statement, that the Prospectus set out information to assist an investor "to make a considered investment decision".

investment. It then outlined the nature of PCL's business, and set out narrative explanations about (i) the investment risks, (ii) reliance on first mortgage security, (iii) a breakdown of the components of the loan portfolio (6% were described as construction loans), (iv) PCL's construction loan practices in relation to LVR (70% of the completion value), valuation (within 3 months of the loan agreement, and based on both "as is" and "as if completed" assessments) and progress claim payment (expert assessment against cost to complete). The last part of this section of the Prospectus referred to AETL's role as trustee, and its responsibility to exercise reasonable diligence in monitoring PCL's financial position and performance. Section 2 of the Prospectus set out details of PCL's financial position as at 30 June 2007, including details of loans (totalling $41.6m) that were more than 90 days in arrears, and a statement of the directors' satisfaction about their recoverability. The Prospectus contained no specific information about the status of any of its construction loans and, in particular, no acknowledgement that the development had "ground to a halt" (*see paragraph 77 above*) and nothing about the valuation status of the Burleigh Views loan.

145. **29 February 2008**:- Although the Board ratified the lodgement of the 2007 Prospectus at its 19 December 2007 meeting, Mr Bersten had also reported that, following the recent publication of Reg 69, ASIC was unhappy with the Prospectus contents and required PCL to provide a supplementary document. There is no record of that six page supplementary document having been formally approved by the PCL Board. However, in his May 2017 affidavit Mr Bersten gave a detailed account of the process involved in its preparation:- *see paragraph 199 below*; and it was published on 29 February 2008, under Mr O'Sullivan's signature. The document specifically addressed the eight benchmark categories described in ASIC's Reg 69:- *see paragraph 140 above*. In so doing it stated that PCL only used valuers approved by AETL, repeated the statements in Prospectus No 10 about PCL's 70% LVR and progress payment practices in relation to construction loans. In addition, without specifically identifying the borrower, it acknowledged that the Burleigh Views loan was (as at 30 June 2007) a $12.026m construction loan, and PCL's largest loan, accounting for more than 5% of the total loan portfolio. The specific statement in the Supplementary Prospectus about the property valuation (required by the "guidance" in Reg 69 Benchmark 7:- *see paragraph 140(e) above*) was as set out earlier in these reasons:- *see paragraph 79 above.* That statement implicitly (but inaccurately) suggested the original (and the current) loan principal had been advanced in about 2003. It also erroneously asserted that the development was "nearing completion". Significantly, in his May 2017 affidavit, Mr

Bersten attributed that "completion" information, and the inclusion of the reference to the 2007 Colliers' valuation, to Mr O'Sullivan. The reason Mr O'Sullivan gave for the reference to that valuation was "because we haven't revalued the property".

146. **24 December 2008**:- A draft of Prospectus 11 was tabled by Mr Bersten at the 17 December 2008 PCL Board meeting. The Prospectus had the same three sections as its predecessor (ie., 1: product features; 2: financial and other information; 3: how to invest). Section 1 of the Prospectus addressed the Regulatory Guide benchmarks in relation to PCL's financial statements for the year ended June 2008 - and included a number of additional general comments. One of those addressed "risks to your investment" and (following on from Mr O'Sullivan's October 2008 internal memorandum:- *see paragraph 88 above*) noted the "general market economic slowdown", with its consequentially increased risk of loan default and credit loss. In the light of its perception of those increased risks, PCL reduced its acceptable LVR's for some loans, and announced that it was no longer offering construction loans. In relation to Benchmark 5, the Prospectus reported that PCL considered loans as being in arrears where they had "not operated within key terms for at least 90 days". It stated that the 90+ arrear day loan balances (principal and interest) totalled $52.817m, and involved 36 loans, as at 30 June 2008. Implicitly acknowledging (although failing to comply with) the guidance underlying Benchmark 5 (*see paragraph 140(d) above)* the report provided a partial breakdown of the status of those loans as at 30 September 2008. That breakdown, whilst not identifying individual loans, provided the total amount of loans that had been repaid or were in the process of being sold (about $14.1m) and the amount (approximately $31m) of the loans where PCL had either entered into possession of the security property, or had begun the process of taking possession. The Prospectus recorded the directors' opinion that (i) the recovery of the loan principal amounts (less any provisions that had been made) was "reasonably certain", and (ii) that the security PCL held for the loans was adequate to cover the loans. But the contents of the disclosure represented a basic failure to comply with the Benchmark 5 guidance, because the underlying reality was that the Burleigh Views loan was in default and in arrears, and PCL had entered into possession. PCL's Prospectus disclosed none of those facts, even though the essential point of the guidance in Benchmark 5 was that retail investors had a "strong interest" in knowing what PCL was doing to recover such a loan.

147. In relation to Benchmark 7 and the Burleigh Views loan, and in a substantial "cut and paste" from the February 2008 Supplementary Prospectus, the following passage appeared on page 11 of the December 2008 Prospectus:-

> *4 The Company has made only one loan where the loan accounts for more than 5% of the total value of the Company's loan portfolio. The loan amount at 30 June 2008 was $13,500,429 based on an initial valuation made as at 23 December 2003 tor construction funding purposes and which assessed the "as if complete" value at $17,222,000; the work is nearing completion, and the borrower has supplied a valuation report dated September 2007 assessing the "as if complete" value at $26,000,000 (exclusive of GST). The security property is located on the Gold Coast in Queensland.*

148. The statement that "the work is nearing completion" repeated the error in the Supplementary Prospectus. It also conveyed the impression that the borrower remained in control of the property and that the loan was operating according to its terms. Neither that particular statement, nor anything else in the Prospectus, conveyed the reality that PCL had taken possession of the property, and contemplated undertaking construction of Stage 2 of the development. Moreover, although the stated valuation details would have permitted a discerning reader to conclude that the loan LVR was 78% (based on the 2003 valuation) or 52% (based on the 2007 valuation) the brevity of the valuation details, in no sense complied with the guidance requirement underlying Benchmark 7 (*see paragraph 140(e) above*) – having regard to (i) Mr O'Sullivan's then recently expressed concern about the impact of the Global Financial crisis (*see paragraph 88 above*) and, (ii) his knowledge that Colliers had recently characterised the September 2007 valuation as out of date (*see paragraph 92 above*). These inadequacies in the valuation statement compounded the inadequacy of the information in the Benchmark 5 disclosure about arrears loans and PCL's recovery actions relating to them:- *see paragraph 146 above*.

149. The inaccuracy in those aspects of the December 2008 Prospectus 11 was made more significant by the contents of two new sentences added to the Benchmark 8 notes. In the February 2008 Supplementary Prospectus the notes had been merely a condign summary of the LVR ratios PCL applied to its various loan categories, without reference to any particular loan. The first of the new sentences stated that PCL was not offering any new loans for construction purposes. The second new sentence followed an explanation that PCL's policy with construction loans was only to advance development funds subject to the maximum 70% LVR, progressively, and on the basis of expert assessment against the projected cost to complete. The new sentence then specifically referred to PCL's only

construction loan (ie., the Burleigh Views loan) and stated that its LVR "on a cost to complete basis", having regard to the loan balance at 30 November 2008, was 54.6%.

150. The stated 54.6% LVR would have conveyed to a discerning reader (one who referred back to and understood the Benchmark 7 information) that PCL had based it on the unparticularised valuation that had been provided by the borrower. Such a reader would also have understood, given the differences in the loan balance date and the LVR, that after 30 June 2008 the loan balance had increased by about $700,000. What the discerning reader would not have been able to determine was what PCL meant to convey by the assertion that the 54.6% LVR had been calculated "on a cost to complete basis". The use of that expression may have been prompted by the expectation (stated in Reg 69) that an issuer would include the "cost" of such a property "for comparison purposes":- *see paragraph 140(f) above*.[14] But the Prospectus explained neither the statement nor the integers of the calculation. Furthermore, the 54.6% LVR stated in the Prospectus was much less than both the 70% LVR reported to the PCL Board (as the largest of the Top 10 Loans) in the 12 December 2008 Board papers, and the 75% LVR reported in the February 2009 Board papers:- *see Schedule 4*. These considerations compel the conclusion that the "on a cost to complete basis" statement was inaccurate and misleading – in so far as it conveyed the impression that the completion costs had been taken into account in the 54.6% LVR assessment, and that that assessment actually informed PCL's current management of the loan.

151. **23 December 2009**:- Prospectus 12 had two sections (1: product features & financial information; 2: how to invest) and also included an investment application form. Section 1 again addressed the Regulatory Guide benchmarks, but in relation to PCL's financial statements for the year ended June 2009. The 90+ arrear day loan balance was stated to be $62.758m, relating to 41 loans, as at 30 June 2009. The Prospectus provided a breakdown of the recovery status of those loans, as September 2009. The total value of the loans that had been repaid or were in the process of being sold was about $21m, and about $35.7m was the value of the properties where PCL had either entered into possession as mortgagee, or had begun the process of taking possession. As to those loans, the

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[14] The claim that the Burleigh Views LVR had been calculated "on a cost to complete basis" was repeated in all the subsequent Prospectus and Benchmark Reports (other than the April 2009 Benchmark Report).

Prospectus stated that the PCL directors considered that there was adequate security and that the recovery of the principal amounts (less provisions of $3.45m) was "reasonably certain".

152. The Burleigh Views loan was not included in the Benchmark 5 arrears total, and the comments in relation to it (as PCL's largest, and its only construction loan) certainly did not disclose either Burleigh Views payment default in May 2008 itself or PCL's possession of the property as mortgagee. (PCL's first implicit such disclosure appears to have been in the April 2011 Benchmark Report:- *see paragraph 180 below*. The first explicit disclosure of PCL's possession of the property appears to have been in the January 2012 Information Booklet:- *see paragraph 189 below*.) The Prospectus 12 comments on Benchmark 7 removed any reference to the 2003 and 2007 valuations and, in what was likely an implicit recognition of the error it contained, also removed the claim that the development was "nearing completion". The short passage in paragraph 7.4 of the Prospectus was as follows:-

> *4. The Company has made only one loan where the loan accounts for more than 5% of the total value of the Company's loan portfolio. The loan is for property development. The loan amount at 30 June 2009 was $15,101,887. The latest valuation of the development in December 2009 assessed the "as if complete" value at $26,680,000 (exclusive of GST). The security property is located in south east Queensland.*

153. The Benchmark 8 comments in the Prospectus indicated that PCL's current policy in relation to construction and development loans was to impose an LVR limit of 65%. The statement about expert assessment of progressive funding of development costs was modified to state that the estimated cost to complete would not exceed the undrawn balance of the loan. (A statement necessarily implying that the loan was operating within its approval limits.) The Benchmark 8 comments then stated that the LVR for the Burleigh Views loan (as at 30 June 2009) was 56.6% "on a cost to complete basis". Again that was in fact merely the arithmetical ratio of the 30 June 2009 loan balance to the December 2009 valuation. The only "cost to complete" information that PCL appears to have had at the time was (i) the $4.75m allowance in the May 2007 re-financing agreement (*see paragraph 72 above*) and (ii) the $6.116 estimate in the 2007 Colliers valuation:- *see paragraph 81 above*. If those construction costs amount had in fact been included, the reported LVR would have been 74.4% or 79.5% - the latter being the approximate LVR assessment that had consistently been attributed to the loan in the PCL Board papers since July 2009. (A similar LVR

percentage continued to be included in the Board papers until August 2010:- *see Schedule 4*.)

154. **22 December 2010**:- On 16 December 2010, three months after the discussion at the September 2010 audit committee meeting (*see paragraphs 105 above & 215(f) and 238 below*) and a few days before the publication of Prospectus No 13, Mr Bersten sent a memo to the other PCL directors about the accuracy of the debenture prospectus information and disclosures. He said:-

> *It is an essential part of our compliance procedures that we verify that the statements in the prospectus are correct and not likely to mislead. This is to protect the company and each director from possible liability or prosecution in relation to the prospectus, and to minimise the risk of investor complaints.*

155. Mr Bersten attached to his memo a 14 page itemised checklist. The checklist contained various items that needed to be taken into account in assessing the accuracy and adequacy of the Prospectus. A preliminary enquiry was whether "in the opinion of both Provident's personnel and professional advisers (both internal and external)" the Prospectus contained "all the information that investors and their professional advisers would reasonably expect to find … for the purpose of making an informed assessment" of PCL's financial performance. Thereafter responsibility for each individual enquiry item was allocated to one or more of PCL and its legal advisers. Each item in the checklist appears to have been responded to, and the response initialled, several days prior to the release of the Prospectus. As a process, the completed checklist indicated that considerable effort had gone into the compilation and scrutiny of the Prospectus.

156. Despite the effort indicated by the completed Bersten memo checklist, Prospectus No 13 followed essentially the same format as Prospectus No 12, and still contained some significant deficiencies. Not the least of them were the failures to candidly disclose (i) the default status of the Burleigh Views loan, (ii) the likelihood of a substantial recovery shortfall unless the development was completed and, (iii) the uncertain prospect of approval for the completion of the development (as to which, *see paragraph 108 above*).

157. Each of Prospectus No's 11 and 12, had mirrored the standard contents of the previous Benchmark Reports in relation to the "equity capital" ratio in Benchmark 1. Those contents included the assertion that PCL was not engaged in property development:- *see paragraph*

169 below. Prospectus No 13 repeated that statement. (It was not qualified until the January 2012 Information Booklet:- *see paragraph 188 below*.)

158. The Prospectus addressed the topic of loan arrears in Benchmark 5, by reference to PCL's financial statements for the year ended June 2010. The total arrears amount of $100.7m involved 30+ arrear day loans, and included principal of $88.7m and interest of $12.015m. Unlike its predecessor, Prospectus No 13 did not differentiate between arrear loans where it had entered into possession, or taken steps to achieve sale of the security properties. But it continued to express the directors' satisfaction about loan recoverability. That opinion was followed by comments on loan security practices and, in particular, "diversification" as a practice "integral to effective risk management". Similar general statements had appeared in previous Prospectus. However, they were complemented in Prospectus No 13 by the inclusion (from the October 2010 Benchmark Report) of specific statements of the ($2m & $4m) loan limits:- *see paragraph 175 below*.

159. In relation to Benchmark 7 the Prospectus added some information about the nature of the standard instructions PCL gave when commissioning property valuations. The information about PCL's largest loan was in substantially the same wording as the previous paragraph 7.4, but disclosed the $17.518m loan balance as at 30 June 2010. It complemented that disclosure with the additional comments relating to Benchmark 8.

160. Prospectus No 13, in addressing Benchmark 8, indicated that PCL's current policy for construction and development loans involved a return to an LVR limit of 70%. It contained even more specific statements about the content of the expert assessment involved in progressive funding of development costs for construction loans. In relation to the Burleigh Views loan, the Prospectus updated the wording in the 2009 Prospectus, to include an "as if complete" value of $26.68m derived from the September 2010 Robertson letter spreadsheet valuation (*see paragraph 105 above*). However, it repeated the erroneous claim that the valuation was exclusive of GST. That error was carried forward into the calculation of the Burleigh Views LVR, which the Prospectus asserted (based on the 30 June 2010 loan balance) was 65.7% "on a cost to complete basis". In fact that percentage did not include either a GST allowance or any construction or realisation costs. It was simply the ratio of the 30 June 2009 loan balance to the September 2010 valuation amount. (By this time PCL may have had a further construction cost estimate of $3m to $3.5m:- *see paragraph 238 below*. If either that amount, the $4.75m May 2007 cost estimate, or the

$6.116 Colliers construction cost estimate had been taken into account the resultant LVR would have been either 78%, 83% or 88.5%.)

OVERVIEW OF THE PROSPECTUS DISCLOSURES

161. Each of the four Prospectus documents issued after December 2007 identified PCL's largest loan, and described it as the only loan involving more than 5% of the value of the company's total loan portfolio. The three Prospectus documents issued after Burleigh Views August 2008 liquidation raised debenture funding of at least $63m, but none of them revealed that PCL's stated arrears loan value did not include the Burleigh Views loan debt. Neither did those Prospectus documents disclose any of the following matters:-

(a) the mortgagor's default

(b) PCL's own control as mortgagee in possession

(c) PCL's intention to complete the development

162. In addition, some of the statements made in the Prospectus were clearly inaccurate. This particularly applied to the claim (in the February 2008 and December 2008 Prospectus documents) that the Burleigh Views development was "nearing completion". It also applied to the claims (in Prospectus No's 11, 12 & 13) about "a cost to complete basis" of the loan to valuation ratio. It applied to those claims because (i) the published LVRs did not take any construction costs into account, (ii) PCL appears not to have made any specific allowance for completion costs until the 25 November 2011 feasibility and, (iii) PCL did not obtain its own expert construction cost estimate until February 2012:- *see paragraph 122 above*.

QUARTERLY REPORTS

163. Corp Act s 283BF required PCL, as the issuer of debentures under the 1998 Trust Deed, to provide AETL and ASIC with complying "quarterly" reports. The reports were required to address, amongst other things:-

(a) any failure to comply with the terms of the debentures, the trust deed or the various provisions in Corp Act ss 283AA-283EA

(b) any circumstance that materially prejudiced PCL or any security under the debentures or trust deed

(c) any matters that might materially prejudice any security or the interests of the debenture holders

(d) details of any loans made to a related body corporate during the quarter, and the total of any such entity's related debt.

164. Between October 2008 and April 2012 PCL provided the 15 Quarterly Reports listed in Schedules 4 & 5. Mr O'Sullivan signed each report, typically with Mr Bersten as a co-signatory. The reports all followed a standard format, and included a statement that the report had been made in accordance with a Board resolution:- *see Corp Act s 283BF(8)*. Thereafter, in relation to the particular quarter, there were statements to the following effect:-

(a) PCL had not failed to comply with any relevant obligation under Corp Law Chapter 2L, any Debenture or the trust deed:- *see Corp Act s 283BF(4)(a)*

(b) no circumstances had occurred during the quarter that materially prejudiced PCL, or any securities "included in or created by" the debentures or the trust deed:- *see Corp Act s 283BF(4)(c)*

(c) there were no other matters that might materially prejudice any security or interests of the debenture holders:- *see Corp Act s 283BF(4)(c) & (g)*.

165. The agreed Schedule 5 document (see ConSTAT Item 109) records the date and circumstances of the relevant approvals of each report. The information indicates that most of the Quarterly Reports were the subject of approvals recorded in the Board minutes. In one instance (relating to the December 2008 Quarterly report) the Board approval was retrospective. In some other instances, the approval was recorded in email exchanges. Irrespective of those variations, the totality of the information establishes that all the PCL directors (in addition to Mr O'Sullivan) did indeed formally approve the contents of each of the Quarterly Reports.

166. None of the reports included any cautionary reference to the Burleigh Views loan. In particular, there was no reference to the Burleigh Views loan default, PCL's September 2008 formal assumption of control of the property, nor to PCL's decision to defer completion and sale of the property.

PCL'S BENCHMARK REPORTS - OCTOBER 2008 TO OCTOBER 2011

167. Between October 2008 and October 2011 a Benchmark Report accompanied each of the (seven) April and October Quarterly Reports PCL published to AETL and ASIC. None of the Benchmark Reports was signed, but each of them was attached to the corresponding

Quarterly Report, and there described as updating the disclosures in PCL's most recent Prospectus or Financial Statements, "against the ASIC benchmarks under Regulatory Guide 69". Each Benchmark Report was approved by all the individual PCL directors:- *see Schedule 5 - Reports and Prospectus documents - relevant dates*.

168. The typical contents of PCL's Benchmark Report, to the extent they are presently material matters, are summarised in the following paragraphs.

169. **Benchmark 1 - equity capital**:- The report identified ASIC's alternative 8% equity capital / total debt ratio as the relevant benchmark target, for the stated reasons that (i) PCL was not engaged in property development and, (ii) property development lending was "only a minor part" of its activities. Notwithstanding that lower ratio target, the report noted that PCL's (usually about 6%) equity ratio did not satisfy the target. The report expressed PCL's satisfaction with its capital, citing (amongst other things) (i) its low level of credit losses, (ii) its valuation ratio restrictions, (iii) its limited liability under its wholesale funding facility, and (from the April 2010 report onwards) (iv) its loan management practices.

170. **Benchmark 4 – credit rating / loan maturity**:- PCL did not obtain a credit rating for its debentures. The Benchmark reports (until October 2010) explained that it did not consider the potential benefit of obtaining a rating could justify the associated costs. After the benchmark guidance changed to "debt maturity" (in the June 2010 Reg 69 version) PCL relied on a table of loan and debenture maturities (contained in its "liquidity" disclosure relating to Benchmark 2) as satisfactory compliance with Benchmark 4.

171. ***Benchmark 5 - loan portfolio***:- The report alluded to PCL's $100m wholesale funding facility with Bendigo Adelaide Bank, and the $7.5m to $10m security deposit that facility required. The report included tables categorising PCL's loans, by number and value, and identifying (without specifically naming any of the borrowers) (i) the value of the largest individual loan, (ii) the total indebtedness of the ten largest borrowers and, (iii) their corresponding proportions of the total loan portfolio. (Those respective proportions increased over time from 7% to 10% and from about 30% to 40%.)

172. A further table provided the total value of loans in arrears. Until the October 2010 report, that table dealt with loans in default for more than 90 days. It provided the total number and amount of the arrears loans, and categorised them according to the stage of any security

realisation action being undertaken - either by the borrower, by PCL as mortgagee in possession, or by PCL as a party to legal proceedings seeking possession. Following the changes to Reg 69 in June 2010, from October 2010 onwards the report table addressed loans that had been in default for more than 30 days, but it no longer detailed the total number or amount of those loans. Neither did it detail the (differing) various realisation status of those loans. Instead, in what was either a misinterpretation, or a disregard, of the revised Benchmark 5 requirements (*see paragraph 140(d) above*), the report only detailed a single category of default loans that were the subject of actual "legal proceedings". Those six loans totalled $15.019m, were only about 15% of the $102m arrears total that had been reported to the 14 October 2010 PCL Board meeting, and necessarily did not include the (then) $17.5m Burleigh Views loan balance.

173. Schedule 4A to these reasons summarises the relevant content of the Benchmark Reports in relation to the Benchmark 5 Loan Arrears disclosures. The Schedule includes details of the adjustments that ought to have been made to indicate the effect of including the Burleigh Views loan within the Loan Arrears report information. Those adjustments show that the proportion of PCL's loans that were in arrears increased from 34% to 61% between June 2008 and December 2011.

174. Each Benchmark Report from October 2008 to April 2010 included, at the end of the table summarising the loans in arrears, a statement that the PCL directors considered the recovery of the loan principal amounts was "reasonably certain" and that the security PCL held was adequate. In the April 2010 Benchmark Report the "reasonably certain" opinion was repeated, but re-expressed to apply "subject to the provisions" made in PCL's financial reports. In the April and October 2011 Benchmark reports, PCL merely recorded the directors' opinion that the stated total of the loan arrears was recoverable.

175. Prior to October 2010 the Benchmark Reports had not included any specific statement about loan limits (even though they were stipulated in both the CPP manual and in PCL "product guides":- *see paragraph 65 above*). However, from October 2010 onwards each of the Benchmark reports stated that PCL had maximum loan limits of $2.5m (per loan) and $4m (per borrower).

176. ***Benchmark 7 - valuations***:- Three of the four paragraphs in this part of each report were typically identical, and formulaic. They asserted that PCL's valuation practices had the

following elements:- (i) reliance on “professional”, and “as is”, valuation reports made no more than three months before the mortgage loan, (ii) inclusion of an “as if completed” valuation of properties that were the subject of construction and development finance loans, and (iii) the appointment of a panel of valuers approved by the trustee for the debenture holders.

177. A fourth paragraph of this section of the reports asserted that only PCL’s largest loan (ie., the Burleigh Views loan - as the “Top 10 Loans” reports to the PCL Board consistently disclosed:- *see paragraph 211 below*) accounted for more than 5% of its total loan portfolio. Prior to the changed content of “Benchmark 7” from June 2010 onwards *(see paragraphs 140(e) & 140(f) above*) the statements about that loan differed only to the extent that the April 2010 report took into account the 15 December 2009 Robertson valuation spreadsheet letter:- *see paragraph 99 above*. The relevant content of these reports was as follows:-

(a) **October 2008, April 2009, October 2009 reports - paragraph 7.4**:- The wording in each report reproduced the terms of the disclosure in the February 2008 Supplementary Prospectus (*see paragraph 79 above*) but modified details to reflect the period to which each report related. It stated the outstanding loan amount as at the end of the financial period to which it related. (The amounts were $13.5m, $14.3m and $15.1m.) Then each report stated that the loan amount was based on the 23 December 2003 “as if complete” valuation of $17.2m. (It follows, though not stated in any of the Reports, that the corresponding LVRs were 78.4%, 83.1% & 87.7%.) The paragraph of the Report then also stated:-

> *… the work is nearing completion, and the borrower has supplied a valuation report dated September 2007 assessing the “as if complete” value at $26,000,000 (exclusive of GST). The security property is located on the Gold Coast in Queensland.*

(b) ***April 2010 report - paragraph 7.4***:- This report was written three weeks after Mr O’Sullivan received legal advice confirming lapse of the development consent for the property:- *see paragraph 100 above.* The Report acknowledged the $15.98m loan balance as at 31 December 2009 but, like the corresponding contents of the Benchmark 7 disclosure in the 22 December 2009 Prospectus No 12 (*see paragraph 152 above*) it made no claim about the development work “nearing completion”. It then continued with the statement that the

> *… latest valuation of the development in December 2009 assessed the "as if complete" value at $26,680,000 (exclusive of GST). The security property is located in south east Queensland.*

178. ***October 2010, April and October 2011 reports - paragraphs 7.3 and 7.6***:- After the June 2010 change to the Reg 69, Benchmark 7 required annual valuations of development property loans, except where funds had only been advanced in stages to fund completion costs. The Benchmark Reports from October 2010 onwards contained additional information about PCL's practice in issuing valuers with written instructions that detailed "a comprehensive list of matters to be addressed", and the fact of "additional information" being required for properties that had development approval. After setting out the relevant current loan balance, the individual reports stated that the latest "as if complete" valuation of the development was "$26,680,000 (exclusive of GST)" - as at each of the September 2010 and August 2011 valuation dates. Again the reports made no claim about the state of completion of the project.

179. ***Benchmark 8 - lending principles - loan to valuation ratios***:- The six paragraphs of this part of the reports were again formulaic and, until April 2010, largely identical. They described a loan approval requirement of a 70% LVR for property development loans. The loan amount was required to take into account any capitalised or prepaid interest and the valuation was on an "as if complete" valuation. Construction cost funding was to be advanced only against expert assessment of progress claims. The October 2009 report was the first to disclose that PCL then had only one construction loan, with a 78.3% LVR "on a cost to complete basis". (That LVR % was clearly not derived from the valuation amounts disclosed in paragraph 7.4 of the Report, and was based on the arbitrary $19.28m "valuation" that Mr Hornby had queried in September 2009:- *see paragraph 99 above.*) The April and October 2010 reports (no doubt reflecting Prospectus No 12:- *see paragraph 153 above*) contained a table suggesting the PCL's required LVR for construction loans had been reduced to 65% of the "as if complete" valuation. Likely prompted by that reduction, awareness of the artificiality of the $19.28m "valuation" and the contents of Prospectus No 12, the April 2010 report noted that PCL's only current property development loan had an "LVR on a cost to complete basis using the December 2009 valuation" of 59.9%. The October 2010 report indicated that the "LVR on a cost to complete basis using the September 2010 valuation was 65.7%".

180. The April 2011 Benchmark Report was the first such report in which PCL disclosed (in Benchmark 8, but not Benchmark 5) that the Burleigh Views loan was "past due". It stated that PCL was "completing the development to maximise its recovery". That change appears to have been initiated by Mr Bersten. On 21 April 2011, following the PCL Board meeting the previous day, he circulated a copy of the March 2011 Quarterly and Benchmark Reports and, in relation to their content he said:-

> *The letter is in the usual form and the Benchmark Update is based on the wording used in the current prospectus. Butch has updated numerical data as necessary to reflect the relevant balance dates and periods. The last paragraph of the Benchmark Update dealing with the Burleigh Views development has been modified to reflect the current position.*

181. That "last paragraph" modification included the assertion that the LVR (including unpaid interest and costs) on a "cost to complete basis" was 71%, based on the September 2010 Robertson letter spreadsheet. The paragraph ended with the additional statement that "the Company is of the opinion that the loan will be recovered in full". (The concerns expressed by PCL's auditors later in the year, awareness of the inadequate valuations of the Burleigh Views property, and the absence of a realistic feasibility assessment, combine to reveal that this opinion was not demonstrably based on any informed, and properly considered assessment:- *see paragraphs 114 to 117 above*. Almost two years earlier, at least the majority of PCL's directors knew there was a risk of a recovery shortfall, and were concerned that it would have a material adverse effect on PCL: *see paragraphs 215(a) & 215(d) below*. Eight months later, in the first of the Information Booklets, PCL expressly acknowledged, somewhat less than candidly, the risk of a recovery shortfall on the Burleigh Views loan:- *see paragraph 189 below*.)

182. The October 2011 Benchmark Report (PCL's last, before the January 2012 Information Booklet - *see paragraph 186 below*) deleted the specific statement that the loan was "past due", but otherwise contained much the same information, and the same statement of PCL's satisfaction about the likely recoverability of the full loan amount. The report claimed that the loan to valuation ratio, again on "a cost to complete basis" (given the $20.086m 30 June 2011 loan balance, and including unpaid interest and costs) was 75.3% of the August 2011 Robertson letter spreadsheet. (I have previously noted both HLBMJ's reservations about this claim, and its inherently misleading nature:- *see paragraphs 115(c) & 150 above*.)

Overview of the Benchmark Report disclosures

183. Each of the Benchmark Reports identified PCL's largest loan, and described it as the only loan involving more than 5% of the value of the company's total loan portfolio. The "nearing completion" statements in the first three Benchmark reports (and for which Mr O'Sullivan was directly responsible:- *see paragraph 145 above*) were quite wrong, misleading and unjustified. Not until April 2011 did the contents of the reports reveal, even obliquely, the facts of either (i) the mortgagor's default, (ii) PCL's own control as mortgagee in possession, (iii) PCL's intention to complete the development and, (iv) PCL's view that the loan recoverability depended on that completion.

184. Four specific observations may be made about the contents of the Benchmark Reports in relation to Benchmark 7. The first is that, despite the terms of the May 2007 refinancing (*see paragraph 72 above*) at no time before the April 2010 Benchmark Report (with its reference to the December 2009 valuation) did PCL have an assessment that could even arguably be described as a current "as if complete" valuation of the Burleigh Views property. The second is that, given both the paucity of the December 2009 "valuation" content, and the appearance of very limited loan drawdowns after May 2007, in contrast to the significant increases in the loan balance as a result of the capitalisation of interest, PCL could not fairly and credibly have regarded the absence of a current valuation as nevertheless compliant with the Benchmark 7 guidance relating to construction loans (either before or after June 2010):- *see paragraphs 140(e) to 140(g) above*. The third observation is that, notwithstanding the valuation, loan limit and rollover / extension policies in its CPP manual (*see paragraphs 65 & 66 above*) PCL had not in fact commissioned (at least in the manner consistent with its asserted valuation policies) either an "as is" or an "as if complete) valuation of the property. The fourth observation is that although the September 2007 Colliers valuation gave a $13.5m "as is" valuation (*see paragraph 81 above*), that value was not disclosed in the Benchmark Reports and (from about June 2008 onwards) was in fact less than the stated loan balance:- *see paragraphs 83 & 84 above*.

185. Two further observations can be made about the content of the Reports in relation to Benchmark 8. The first observation is that the LVR percentages in the April and October 2011 Benchmark Reports in fact ignored any construction costs PCL would incur in completing the development. PCL did not make any specific allowance for completion costs until the 25 November 2011 feasibility, and did not obtain an informed construction cost

estimate until February 2012. However, the terms of the May 2007 loan refinancing contemplated that the total projected construction costs to complete the development were $4.75m, and the Colliers September 2007 feasibility had projected construction costs approximating $6.116m. If only the lower construction costs figure had been taken into account at the time of those Benchmark Reports the assessed LVR would have increased to about 88% and 93% in the two Reports. The second observation is that at the time PCL released each of the April and October 2011 Benchmark Reports Mr O'Sullivan certainly knew, and the other PCL directors likely also knew (*see paragraph 215 below*) that there was no current approval for the completion of the development. However, that was not a matter PCL disclosed, despite the oblique reference to a pending "final construction approval" in the January 2012 Information Booklet:- *see paragraph 189 below*.

INFORMATION BOOKLETS – JANUARY TO APRIL 2012

186. At the end of December 2011 PCL had undertaken not to accept any new investments under, and to withdraw, its (December 2010) Prospectus No 13:- *see paragraphs 50(b), 50(c) & 119 above*. At the same time, in response to concerns expressed initially by ASIC, and later by AETL, PCL had foreshadowed the publication of an Information Booklet to existing investors. It eventually published three Information Booklets. They all followed, with some format and content modifications, the style of Section 1 of PCL's prospectus documents but (consistent with the contents of Mr Bersten's 23 December 2011 letter:- *see paragraph 119*) they were only provided to existing investors, and did not contain either a "how to invest" section, or an application form The booklets set out additional information and disclosures about PCL's lending performance. All of the PCL directors approved each of the Information Booklets:- *see Schedule 5*.

187. **20 January 2012**:- The first Information Booklet addressed PCL's financial position as at 30 June 2011. It began with the explanation that it was an interim disclosure, pending the completion of an independent accounting review of PCL's fixed term investment program, its loan carrying values and its cash flow projections. In a subsection headed "Challenges" PCL explained that (i) 51.5% of the value of its total loan portfolio (and 73% of its FTI loan portfolio) was in arrears (mostly for periods greater than 180 days), and (ii) some loan limits and LVRs that applied when loans had been made were no longer "reflected" (ie., had been exceeded) in PCL's current loan portfolio.

188. Later parts of the Information Booklet addressed the various benchmarks in Reg 69. In relation to ASIC's Benchmark 1 the Booklet said PCL, whilst not "engaged in property development" "is funding the construction costs" of one loan whose balance was more than 10% of PCL's loan portfolio. As a result, PCL had acquiesced in ASIC's view (per its 22 December 2011 letter:- *see paragraph 118 above*) that more than a minor part of its activities was "property development related", and recognised that the applicable ASIC benchmark capital ratio was 20%. It noted that PCL's actual 6.42% equity capital as at 30 June 2011 did not meet that 20% benchmark. In relation to Benchmark 5, the Information Booklet identified PCL's largest ($20.086m) loan as reflecting 21% of the value of its fixed term investment lending portfolio. It also disclosed that $74.577m of its total loan portfolio was more than 90 days in arrears, as at 30 June 2011. That total was then broken down to reflect the state of affairs, in relation to the recovery status of those loans, as at 30 December 2011. The breakdown (which returned to the pre-October 2010 content of the Benchmark Reports:- *see paragraph 172 above*) included a total (approximating $48.4m) relating to properties where PCL had either entered into possession as mortgagee, or begun the process of taking possession.

189. The Information Booklet disclosures relating to Benchmarks 1 and 5 did not explicitly disclose that the $20.086m loan (ie., the Burleigh Views loan as at 30 June 2011) had not been included in either of the $74.577m or $48.4m totals. However, later comments in the Benchmark 5 section did disclose that (i) the borrower was in liquidation, (ii) as mortgagee in possession, PCL was proposing to complete Stage 2 of the development, (iii) Stage 1 of the development was complete, (iv) PCL was waiting for "final construction approval from the Council for Stage 2", (iv) PCL anticipated construction commencement in 2012 and, (v) PCL had decided to defer the sale of the Stage 1 townhouses, pending the completion of construction. The Booklet went on to report that PCL (i) was relying on the $26.68m GST inclusive valuation of August 2011, (ii) did not have any current "as is" valuation, (iii) had estimated construction costs of $4m and, (iv) had not taken those costs (or any potential GST credits) into account in its LVR estimate of 75.3%. The Booklet did contain an equivocal statement that there was a risk PCL would not recover the "entire amount outlaid for this loan". But that risk was explained by reference to the "investment risk" statement that had been a consistent feature of PCL's Prospectus documents, and did not indicate any risks relating specifically to the Burleigh Views property. In addressing Benchmark 8, and despite its earlier acknowledgement that the calculation did not take construction costs into account, the Information Booklet retained the 75.3% LVR claim. It went on to

acknowledge that this exceeded the benchmark LVR, but attributed that excess to the borrower's liquidation and the time that would be involved in PCL's completion of the development.

190. The disclosures in the January 2012 Information Booklet were significantly more extensive than those contained in PCL's December 2010 Prospectus No 13. The Information Book disclosures went some way towards appropriate disclosure in relation to the following topics that ASIC had identified in "Issue 2":-

(a) ***Issues 2(a), 2(b) & 2(e)***:- although the Information Booklet did not make clear that the loan arrears total did not include the Burleigh Views loan, it did substantially indicate (by reference to the borrower's liquidation and its own possession of the property) that the loan was in default

(b) ***Issue 2(g)***:- the Information Booklet disclosure that PCL was awaiting "final construction approval" disclosed the fact of the absence of current requisite approvals (without disclosing the uncertainty of the underlying prospects of ultimately obtaining those approvals)

(c) ***Issue 2(i)***:- the Information Booklet did acknowledge the risk of an ultimate loan shortfall (but did not attribute that risk to any specific details of the prospects of the proposed development).

191. **16 March 2012**:- The second Information Booklet addressed PCL's financial position as at 31 December 2011, and attributed its reported $12.98m loss to increased provisions (from $1.3m to $14.9m) against the carrying value of its loans:- *see Schedule 1 - Provident Profit & Loss // Balance Sheet - Summary of Financial Statements*. In the "Challenges" subsection of the booklet PCL explained that (i) its equity capital as at 31 December 2011 was 2.73% (and did not meet ASIC's current 20% benchmark), (ii) 46.8% of the value of its total loan portfolio (and 70.3% of its fixed term investment funded loans) was in arrears (mostly for periods greater than 180 days), and (iii) the profile of its loan portfolio did not meet the maximum loan limits and LVRs permitted by the Trust Deed.

192. The March booklet otherwise contained much the same information as that in the January booklet. The notable differences were that (i) PCL's largest loan balance was stated at $19.237m (after a $2m impairment reduction:- *see paragraph 123 above*), (ii) the total loan portfolio more than 90 days in arrears was said to have declined to $66.77m, (iii) the value of properties where PCL had either entered into possession as mortgagee, or began the

process of taking possession, had reduced to $41.6m (without disclosing that this amount did not include the $19.237m Burleigh Views loan balance), (iv) the Burleigh Views loan valuation had been confirmed in January 2012, (v) the construction costs estimate had increased to $4.25m and, (vi) the Burleigh Views LVR had reduced to 72.1% (relying on the impairment provision, but without disclosing that the construction costs had not been included in the LVR calculation). In relation to the Burleigh Views loan recovery risk, this version of the booklet repeated the diffident statement contained in the January booklet.

193. **4 April 2012**:- The third Information Booklet also addressed PCL's financial position as at 31 December 2011. It contained substantially the same details as the March 2012 booklet. Three notable differences were that each of (i) the loan arrears total, (ii) the amount of the loans in arrears for more than 90 days and, (iii) the value of properties where PCL had either entered into possession as mortgagee, or began the process of taking possession, had increased. In each case the increase was principally as a result of including the $19.237m Burleigh Views loan balance. This altered treatment (which had been made in response to AETL's expression of "deep concern" - *see paragraphs 124 to 126 above*) was obliquely (and disingenuously) explained as involving "an expanded interpretation of what constitutes 'arrears' loans" and a step PCL had taken to "avoid any doubts".[15] In relation to the Burleigh Views loan the Booklet retained the misleading LVR of 72.1% and continued to explain the loan recovery risk by reference to the same general, and essentially evasive, statement as that contained in the previous Booklets.

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[15] The explanation was disingenuous for a number of reasons. First of all, PCL's April 2011 Benchmark Report (despite omitting it from the 'loan arrears" total) had unambiguously stated that the Burleigh Views loan was "past due":- *see paragraph 180 above*. Secondly, the preceding page of the Information Booklet expressly treated the terms "loan arrears" and "loans past due" as synonymous. The consistent feature of PCL's credit and procedure manuals was the requirement to treat all loans as in arrears, where they were more than 90 days past their due payment dates:- *see paragraphs 65(a) & 66(e) above*. Thirdly, statements to the same effect had been contained in PCL's Prospectus No's 11 & 12:- *see paragraphs 146 & 151* above. Fourthly, after the June 2010 changes to RG 69B relating to Benchmark 5 (*see paragraphs 140(d) & 172 above*) PCL's Benchmark Reports had dealt with loans that were more than 30 days in arrears. Consistent with that change, in PCL's Prospectus No 13, loans were treated as in default / past due where mortgagors were more than 30 days behind in their payments:- *see paragraph 158 above*. Finally, the inescapable fact is that the only reason for Burleigh Views absence from PCL loan arrears reporting was Mr O'Sullivan's personal and idiosyncratic decisions in August and October 2008, and February 2009:- *see paragraphs 84, 90 & 95 above*.

Overview of the disclosures in the Information Booklets

194. Schedule 4A to these reasons, which summarises the relevant content of the Benchmark Report Loan Arrears statements, also includes the similar disclosures in the Information Booklets. In the case of the January and March 2012 Information Booklets, Schedule 4A also includes an adjustment to indicate the effect of including the Burleigh Views loan. The Schedule readily demonstrates that the Burleigh Views loan was a substantial proportion of PCL's FTI portfolio. If the default status of the loan had been accurately disclosed, that would have resulted in a substantial increase in the default proportion of PCL's total loan portfolio.

195. The Information Booklets did ultimately correct some of the contentious deficiencies in PCL's previous disclosures (specifically (i) Burleigh Views liquidation, (ii) PCL's entry into possession, and (iii) its intention to complete the development). But the Information Booklets' statements recognising a shortfall risk on the Burleigh Views loan were laconically formulaic, and essentially evasive. The disclosures that underlay them (in relation to the absence of "as is" valuations and the absence of a current development approval) were grudging and themselves misleading. In relation to the belated, and tendentiously explained, inclusion of the Burleigh Views loan balance in the "arrears" total, they were disingenuous.

196. The PCL directors' asserted confidence in recovery of the Burleigh Views loan was utterly dependent on the completion of the second stage of the development. Whilst the Information Booklets glibly asserted that PCL was awaiting "final construction approval", the assertion was misleading and the reality was quite different. Neither stage of the development had a current development consent and, despite the optimism in Mr Hornby's 6 March 2012 loan arrears report (*see paragraph 123 above*), there was no demonstrable objective basis for regarding such a consent as imminent. Mr O'Sullivan PCL had known about the absence of approval, and the difficulties confronting the grant of a new approval, since about August 2009, and most certainly since April 2010:- *see paragraphs 96 & 100 above.*

PRACTICES IN RELATION TO THE PREPARATION OF THE PCL PROSPECTUS, BENCHMARK AND OTHER REPORTS

197. What the parties described as "Issue 6" (*see paragraph 47(c) above*) partly enquired whether the conduct of other PCL personnel, perhaps particularly the other PCL directors, significantly informed the characterisation of Mr O'Sullivan's conduct, for the purpose of either the Ban or Disqualification decisions. (I have set out particulars of the other directors, and of the principally involved senior PCL personnel, earlier in these reasons:- *see the Table at paragraph 58 above*.)

198. A first step in addressing that issue involves understanding the processes involved in the preparation of PCL's various disclosure documents, and although most of them were typically formally approved by the Board (as indicated in Schedule 5) they were in fact the end result of contributions from various PCL officers.

199. After Mr Bersten took up a full time executive director's role (in July 2007) and particularly after the publication of Reg 69 he had an overall responsibility (with a range of other responsibilities he had) for co-ordinating the preparation of PCL's periodic Prospectus and benchmark disclosures. The appropriate starting point in what that co-ordination involved is the February 2008 Supplementary Prospectus. Mr Bersten prepared the first draft of that Prospectus, with input from Mr Fulker, PCL's legal advisers, and from Mr O'Sullivan:- *see paragraph 145 above*.. (According to Mr Bersten's May 2017 affidavit he incorporated into the drafts two of Mr O'Sullivan's comments about the Burleigh Views loan.) He circulated various drafts to Mr O'Sullivan, AETL and ASIC.

200. Mr Bersten said (in his May 2017 affidavit) that he created a "checklist" to verify the source of the Prospectus information, and that the Prospectus and Checklist became the template for the later Prospectus and Benchmark Reports. The usual process for the preparation of those later documents was similar (to the extent of soliciting information from various PCL personnel, circulating drafts, and completing a "checklist" verification process). An exception to that generality was that, from January 2009 onwards, Mr Hornby typically prepared the first draft of each document. Mr Hornby was also typically the person who prepared the detailed financial / accounting information for the each of the various disclosure documents.

201. In his 25 May 2015 affidavit Mr O'Sullivan outlined a similar understanding of the process involved in the preparation of PCL's various disclosure documents, and highlighted the primary role of Messrs Bersten and Hornby. He particularly emphasised the practice of circulating drafts to PCL's legal advisers and AETL and the "checklist" process. He suggested the "checklist" indicated that his personal contributions and responsibilities were limited to the Chairman's covering letter accompanying each Prospectus, and to particular parts of the Prospectus relating to the description of PCL's business and the company's prospects. In relation to the PCL Benchmark Reports, Mr O'Sullivan said that they were prepared in substantially the same manner, and subjected to a similar "due diligence" process. However, in relation to the specific information in the disclosure documents about the Burleigh Views loan and development, the agreed propositions acknowledged that "in broad terms" Mr O'Sullivan was the relevant source.

202. The loan arrears reports (consisting of a spreadsheet table with details of the relevant loans) were typically generated from PCL's accounting system, under Mr Fulker's immediate supervision / instruction. Mr Fulker himself was responsible for generating the content of any additional narrative reports:- *see paragraph 213 below*. The arrears reports that PCL sent to AETL, were originally compiled by Mr Kennedy (at least from October 2008) and sent to Mr O'Sullivan for comment, including the addition of details in relation to particular loans. (It was agreed that Mr O'Sullivan was responsible for reviewing and approving each of the monthly reports.) In late November 2008 Mr O'Sullivan actually suggested to Mr Kennedy that the arrears report to AETL should include the kind of detailed categorisation detailed in the pre October 2010 Benchmark Reports:- *see paragraph 172 above*. Later communications between Mr Kennedy and Mr O'Sullivan (eg., in May 2010) indicate that if AETL requested additional information about particular arrears loans, Mr Kennedy referred the request to Mr O'Sullivan. From May 2010 onwards the form of the report was expanded to provide the additional information AETL had requested (about the timing of proposed recovery action in relation to individual loans). In August 2011, AETL requested that the arrears report should include details of the date of the last valuation for arrears properties, and Mr Kennedy provided a revised version of the report including that information.

OTHER PCL PERSONNEL - KNOWLEDGE AND ACTIVITIES CONCERNING BURLEIGH VIEWS

203. As the entries in Schedule 5 suggest, the PCL Board met almost monthly. The regular, indeed almost invariable, attendees were the four PCL directors and the company

secretary, Mr Haq. Messrs Fulker and Hornby were very occasionally present for limited parts of some Board meetings.

204. The PCL directors comprising its Audit Committee also met regularly, though at less regular intervals than the Board meetings. Messrs Haq and Fulker were typically additional attendees, Mr Fulker was a frequent attendee (up until September 2010):- *see Schedule 7*.

205. Prior to each Board meeting a pack of material was circulated to the Board members ((often as an attachment to a short email from Mr Hornby). The content of that material varied over time, but settled into a well established format around the end of 2008 and early 2009. The dates of the various Board reports, and the period to which they relate, are set out in Schedule 4. The entries in the Schedule provide a broad summary of the loan information typically provided to the Board. They include details about (i) the total loan arrears, (ii) the Burleigh Views loan balance, maturity, and LVR, and (iii) whether or not the Burleigh Views loan was included in the loan arrears report table provided to the directors.

206. The Board papers typically included a set of monthly management accounts. They contained detailed balance sheet and profit and loss statements, with comparisons to budget and past periods. They also included (i) a list of loans where interest had not been brought to account ("non-accruing" loans), (ii) a "loan arrears report" (with details of current balances, monthly interest, number of months in arrears, and LVR), (iii) a cashflow projection and, (iv) a short overview summary of PCL's performance.

207. Between November 2007 and about May 2008 the appearance of the Board papers appears to have changed, and settled into a general format that continued thereafter, subject to some further changes described below. In that new format the papers continued to contain the previous monthly management account format, but included a multi-page set of "power point" screen printouts. In about November 2007 Mr O'Sullivan, who invariably chaired the Board meetings, had begun to make such a presentation at the Board meetings, and by May 2008 the "power point" file was usually emailed to the directors shortly before the meeting. The power point printouts provided an abbreviated summary of the current trading results, with a short commentary on material changes, a budget comparison, and comments on other current matters. They also contained a short commentary on loan arrears. The commentary typically (i) quantified the total of loans in arrears, (ii) noted the

change from the previous month, (iii) identified some of the particular loans that had been added to (or removed from) the list and, (iv) referred the directors to an accompanying loan arrears report spreadsheet. An explanatory chart plotted the loan arrears totals for the last 12 months. It showed the loan totals in separate categories according to (i) the length of the arrears period, and (ii) their respective proportions of the total PCL loan portfolio.

208. The PCL Board minutes for most of 2007 and 2008 are merely abbreviated outlines of the matters dealt with at each meeting. Until the 15 October 2008 meeting the minutes do not record anything indicative of Board level consideration of the Burleigh Views loan, notwithstanding the May 2007 refinancing, Mr O'Sullivan's anticipation of loan default and potential sale of the property, Burleigh Views actual default, and PCL's entry into possession. However, the 15 October 2008 meeting occurred shortly after the auditors' 3 October 2008 management letter (*see paragraph 221 below*) and the minutes suggest that Mr O'Sullivan reported orally to the meeting and made some comments about arrears loans, apparently in addition to the content of the previously circulated Board report. The minutes do not detail the substance of Mr O'Sullivan's report, but the objective facts then known to him included the following matters – all of which were relevant to an informed understanding of the true position in relation to PCL's loan arrears:- (i) PCL had already taken control of the Burleigh Heads property in about June 2008, (ii) Mr O'Sullivan had been informed of Burleigh Views' liquidation, (iii) he had been in contact with the liquidator, (iv) PCL had lodged with ASIC formal notice of its assumption of control as mortgagee in possession, (v) PCL had received the 3 October 2008 audit management report, and (vi) Mr O'Sullivan had made a decision (on 14 October 2008) to remove the Burleigh Views loan from the loan arrears report:- *see paragraphs 84 to 90 above*.

209. **November 2008 onwards**:- The 3 October 2008 audit management report had raised various concerns about PCL's financial statements for the year ended 30 June 2008. One of those concerns was the absence of "as is" independent valuations for loans more than 90 days in arrears, and a request that current valuations be provided by 31 January 2009:- *see further paragraph 221 below*. Following that report, the loan arrears chart in the Board papers for the November 2008 Board meeting was supplemented by an additional table that listed the individual arrears loans (but not the Burleigh Views loan). A separate spreadsheet version of the arrears loans was also sent to the individual directors.

210. Following the 19 November 2008 Board meeting, and in further response to the matters raised in the October 2008 audit management report, the contents of the Board report changed again for the 17 December 2008 Board meeting. The changes involved the inclusion of a list of "Top 10 Loans" and modifications to the additional table of loan arrears. The significant arrears table changes were (i) a new column indicating any provision made against the loan, (ii) the loan to valuation ratio expressed as a "total" ("TLVR") value (resulting in some loans showing a TLVR substantially exceeding 100%) and, (iii) grouping of the loans according to their recoverability status (as reflected in the 24 December 2008 Prospectus, a draft of which was tabled at the December 2008 Board meeting:- *see paragraph 146 above)*.

211. The "Top 10 Loans" report thereafter continued to appear in substantially that form and

(a) consistently listed the Burleigh Views loan as the largest loan

(b) disclosed the Burleigh Views loan as having no interest arrears

(c) regularly disclosed that the Burleigh Views loan LVR exceeded the 70% limit in the trust Deed and CPP manual, and was

  (i) 74.92% to 89.3% (from December 2008 to June 2010)

  (ii) 70.20% to 80.40% (from December 2010 to April 2012)

(d) gave incrementally altered maturity dates for the loan - specifically:-

  (i) 11 November 2008 (reports between November 2008 and April 2010)

  (ii) 31 December 2010 (reports between May 2010 and February 2011

  (iii) 30 April 2011 (reports between March 2011 and July 2011)

  (iv) 30 June 2012 (reports between August 2011 and February 2012)

  (v) Jan 13+ (after March 2012 the reports substituted an "estimated discharge date" for the "maturity date" in the table).

212. Towards the end of October 2009, following some months of discussions, Messrs Sweeney, Seymour and Bersten reached agreement about the desirable form and content of the loan arrears reports to be provided to the Board. Their view (according to Mr Bersten's May 2017 affidavit) was that the Board needed "meaningful commentary about what was being done about each loan". He sent a detailed memo to that effect to Mr O'Sullivan on 30 October 2009. The substance of what he said was that (i) any loan in default for 90 days should be included in the list of loan arrears, (ii) there should be a report on particular loans that had "a potential impact on PCL's balance sheet" and, (iii) the standing Board agenda should be amended to include a "loan arrears" item to deal with the matters to which he had

specifically referred. Mr Bersten included reference to the Burleigh Views loan as one of two specific examples of loans that could adversely affect PCL. (In his May 2017 affidavit he acknowledged awareness of two matters, obviously additional to the size of the loan, that were likely to have informed his view. They were (i) Mr O'Sullivan's "August or September 2009" disclosure of the Council's view that the original development approval (at least for Stage 2) of the Burleigh Views development had lapsed and, (ii) the absence of a current valuation for the property.)

213. As originally drafted, Mr Bersten's memo contemplated that the "loan arrears" report should be presented by someone other than Mr O'Sullivan. That proposal apparently reflected the initial joint preference of Messrs Sweeney, Bersten and Seymour. However, an exchange of views between them resulted in that requirement being deleted from the final form of the memo. The deletion reflected (i) a degree of deference to Mr O'Sullivan and, (ii) a recognition (expressed by Mr Bersten) that, as a practical matter, Mr O'Sullivan was the only "appropriate person to report". Subsequently Mr Fulker provided the directors with a revised form of arrears report, with a two page narrative on each loan. But, in an exchange of emails in June 2010, Messrs Bersten, Sweeney and Seymour responded that the abbreviated information on the first page of the altered format, with some additional specific information (about materiality and provisioning) would suffice if it was provided in a quarterly report. Following this, the usual agenda circulated with the Board papers did include a "loan arrears" item, but neither the Board papers, nor the loan arrears schedule circulated to the Board, appears to have included (at least not on a regular basis) the revised form of explanatory narrative. The Board papers themselves certainly did not usually include any specific information relating to the status of the Burleigh Views loan. The loan continued to be included in the "Top 10 Loans" report, but was never part of the list of loans in arrears.

Overview - PCL Board knowledge of the Burleigh Views Loan

214. Despite the content of the various Prospectus and Benchmark Reports, and their typical approval by the Board, discussion of the Burleigh Views loan was rarely recorded in the PCL Board minutes. The absence of records of specific regular discussion, the approximate five year period from early 2007 to mid 2012, and the changes in the format of the information provided to the PCL Board over that time, make it difficult to obtain from the minutes alone a demonstrably clear hindsight view of the quality and timing of the information known to the other PCL directors relating to the Burleigh Views loan. However,

the minutes need to be understood in the context of their brevity, and the likely extent of the discussions to which they (and other communications) allude. As to that, it is material to note that Mr O'Sullivan said (in his April 2015 affidavit) it was his practice to provide regular updates at the Board meetings. That recollection, which is broadly consistent with some of the general acknowledgements contained in Mr Bersten's May 2017 affidavit, and which I accept, is not probative of the content of the information that was disclosed at any particular time. But it gains significance when read with the contents of the various versions of the PCL Prospectus and the Benchmark Reports that were demonstrably known to and approved by all the PCL directors:- *see Schedule 5*.

215. I referred earlier to the parties agreement on 13 propositions relating to the extent of the other PCL directors knowledge of the status of the Burleigh Views loan:- *see paragraph 38 above*. The agreed propositions did not address the knowledge of PCL's other personnel (eg., Messrs Haq, Fulker and Hornby) – perhaps on the basis of a (reasonable) assumption that their respective functions and activities, including their interaction with the Board members, were likely to have resulted in their knowledge being immaterially different from that of (at least the other) PCL directors. In dealing with the knowledge of the other directors the agreed propositions primarily addressed Messrs Sweeney and Seymour, but Mr Bersten's knowledge may reasonably be assumed to be similar – given the contents of his May 2017 affidavit, his almost invariable attendance at Board meetings, his role as a co-signatory to PCL's Quarterly Reports and his activities relating to the content of the arrears reports and Prospectus:- *see paragraphs 109, 112, 115, 154, 155, 180 & 212 above*. The agreed propositions partly overlapped. To that extent they were somewhat repetitive. Their material substance, together with the inferences that can be drawn from the Board reports, minutes and public disclosure documents, can be reduced to the matters summarised in the following sub-paragraphs:-

(a) **November / December 2008**:- By the time of the 19 November 2008 Board meeting (*see paragraphs 209 above and 223 below*) all three of the other PCL directors (Messrs Bersten, Sweeney and Seymour) were well aware of the substantial BV loan balance and its default status. They were also aware that the loan was not included in PCL's loan arrears report. At least Messrs Seymour and Sweeney were aware that Burleigh Views had gone into liquidation, and that PCL had taken control of the property. They were also aware there was a risk, because of the incomplete

state of the development, that PCL would not be able to recover the full amount of the loan.

(b) ***Early 2009***:- By this time, all the directors knew that the BV loan was not being included in PCL's loan arrears report. Furthermore, Messrs Seymour and Sweeney (at least) knew that there was no realistic prospect of PCL recovering its loan debt unless and until the property was fully developed and sold. They were also aware that the then current tight liquidity situation precluded any practical prospect of PCL itself undertaking work to complete the development.

(c) ***September 2009***:- Mr Seymour (at least) knew that there was no current Development Approval for the Burleigh Views property. The accuracy of the Council's DA lapse assertion was obviously significant, and apparently a matter of some initial controversy. Given the size of the Burleigh Views loan, the Council's August 2009 notification was likely a matter of discussion within PCL. Consistent with that probability Mr O'Sullivan also said (in his April 2015 affidavit) that, after learning of the Council's attitude he discussed the approval lapse with the other PCL directors. Mr Bersten (in his May 2017 affidavit) conceded awareness (by about September 2009) of the absence of a current approval for (what he understood was) Stage 2 of the development.

(d) ***October 2009***:- Messrs Sweeney, Seymour and Bersten were all of the view, which they conveyed to Mr O'Sullivan, that the Burleigh Views loan had the potential to have a material adverse impact on PCL. At that time Mr Bersten knew there was no current valuation for the Burleigh Views property:- *see paragraphs 99 & 212 above*.

(e) ***April to June 2010***:- Mr O'Sullivan (as he asserted in his April 2015 affidavit) likely advised the other PCL directors about the general tenor of Minter Ellison's April 2010 formal advice relating to the lapse of the development approval for the Burleigh Views property. Until May 2010, the Top 10 Loans reports that were included in the Board papers consistently recorded 11 November 2008 as the loan maturity date. That consistently reported loan maturity date patently indicated, and the PCL directors knew, that the loan was in fact in arrears. In June 2010, having expressed concern about the quality of the loan arrears report information being provided to the Board, the PCL directors expressed their preference about the desirable format and

frequency of more informative reports, but apparently failed to ensure their regular subsequent provision.

(f) ***September // October 2010***:- The Burleigh Views loan was discussed at a PCL audit committee meeting on 15 September 2010:- *see paragraph 238 below*. It is likely that the lapsed development consent was discussed at the meeting and that all the PCL Director attendees (Messrs Bersten, Seymour and Sweeney) were by then aware that PCL did not have a current development approval that would permit the lawful completion of the development. Mr Bersten acknowledged (in his May 2017 affidavit) an imprecise recollection, which he attributed to this period, of awareness of a lack of approval for Stage 2 of the development. Certainly, by 14 October 2010 all the PCL directors understood that recovery of the BV Loan depended on the completion of Stage 2 of the development.

(g) ***After October 2010***:- The Burleigh Views loan was discussed at many PCL Board meetings after 14 October 2010. In particular, the PCL directors knew that the reason for the continuing inactivity in carrying out any development work was the unresolved status of the development approval required for the property.

216. There was additional agreement between the parties about the other PCL directors' knowledge of the valuation status of the Burleigh View property. That agreement (which is complemented by the content of the email exchanges between Mr Bersten and Mr O'Sullivan in October 2009, and is consistent with inferences otherwise to be drawn from the Supplementary Prospectus and the Benchmark Reports) involved the propositions that:-

(a) ***November 2008 to December 2009***:- by this time Mr Seymour, at the least, knew that PCL had not commissioned any valuation of the property since 2003.

(b) ***December 2009***:- Prior to the 15 December 2009 Robertson "gross realisation" spreadsheet, Mr Sweeney (and likely all the other directors) knew PCL did not even claim to have a current valuation of the property. They also likely knew that, despite its stated valuation policy, PCL did not (after September 2007) have an "as is" valuation of the property.

217. ***In relation to the various PCL disclosure documents***:- The parties agreed that Mr Seymour and Mr Sweeney (at least) were aware of various disclosure deficiencies. This followed the uncontentious fact that each of the other directors had reviewed and approved

the Prospectus documents. Benchmark Reports, Quarterly Reports and Information Booklets.

SOAF:2 – THE PCL AUDIT MATERIAL – MR O'SULLIVAN'S CONTENTION

218. Another aspect of "Issue 6" enquired about the significance of PCL's auditors involvement and activities in evaluating Mr O'Sullivan's conduct. To aid in that enquiry, the 57 page, 136 paragraph SOAF:2 document (*see paragraph 36 above*) set out agreed aspects of the activities of PCL's auditors in the period from about late 2007 (ie., after the May 2007 refinancing agreement for the Burleigh Views loan) until April 2012 (ie., the publication of the third PCL Information Booklet). Mr O'Sullivan relied on the information in SOAF:2 to demonstrate the extent of his and PCL's conduct in involving the auditors in the reporting and disclosure conduct impugned by ASIC. That involvement was said to evidence no audit criticism, and the auditors' essential approval, of PCL's management, reporting and disclosure activities, relating to the Burleigh Views loan. The submission was that the auditors' approval or acquiescence should influence, favourably to Mr O'Sullivan, the appropriate assessment of his conduct. Evaluation of that submission requires regard to the detail of the activities of each of the audit firms that PCL engaged.

SOAF:2 – WALTER TURNBULL'S AUDIT AND REVIEW ENGAGEMENTS 2007 TO 2010

219. PCL approved the appointment of Walter Turnbull ("WT") as its new auditors, at the 19 December 2007 Board meeting, the day after it had lodged Prospectus No 10. WT's first audit task related to PCL's December 2007 half year financial statements. That was the subject of their (essentially unremarkable) 14 February 2008 management report. Thereafter, PCL engaged WT to provide monthly internal audit reports, which involved agreed procedures relating to small samples of settled and discharged loans.

220. In April 2008 PCL engaged WT for the 2008 financial year report audit. As part of that audit function, in July 2008 WT alerted PCL to the importance of loan impairment assessment, and provided a discussion paper that identified, amongst other things, the importance of current valuations where loans were in default or their LVR exceeded PCL's lending policies. The matters raised in the WT paper, and the general topic of loan impairment assessment, appears to have been discussed, at least at PCL Audit Committee meetings, in the following months.

221. After providing their September 2008 (again unremarkable) audit report for PCL's annual financial statements, WT provided its 3 October 2008 management report. That report highlighted the necessity to have current valuations for loans that continued to be in significant default at the end of the financial reporting period:- *see paragraph 89 above*. Mr O'Sullivan's October 2008 instruction to continue to capitalise the Burleigh Views loan interest (*see paragraph 90 above*) meant that the Burleigh Views loan was not treated as being default, and thus not automatically caught by the current valuation requirement in the WT 3 October 2008 Management Report. Nevertheless, the loan became the subject of the auditors' attention in November 2008. That was a consequence of WT's further retainer to provide reviews of PCL's Benchmark Reviews, and the February 2008 Supplementary Prospectus. That retainer led to WT requesting (amongst other things) (i) a list of all loans, with their corresponding product categories and LVRs and, (ii) access to PCL's loan files for both the Burleigh Views loan, and four other loans. The nature of the Benchmark Report criteria in Reg 69, and the contents of both the Supplementary Prospectus and the 30 October 2008 Benchmark Report (*see paragraphs 79 & 177(a) above*), necessarily focussed attention on the Burleigh Views loan amount, given that the contents of the latter two documents tended to indicate that PCL did not have a supporting valuation that accorded with PCL's then current loan policies:- *see paragraphs 65(a), 65(b) & 65(d) above*.

222. One of WT's audit staff attended PCL's office on 12 November 2008 and (presumably) inspected the requested loan files. Mr O'Sullivan contended, and ASIC disputed, that the auditors probably then saw the Burleigh View loan statements, were aware of the interest capitalisation, valuations and "correspondence with the Gold Coast Council". For its part ASIC contended that an annotated response by Mr Fulker to WT on 12 November 2008 actually tended to indicate that the file was incomplete. ASIC's contention, at least as articulated in its comments and documentary references in ConSTAT paragraph 80, involved a doubtful interpretation of the 12 November 2008 document, a misunderstanding of the actual sequence of the communications to which it referred, and was consequently unpersuasive. The more likely situation is that WT were given access to the Burleigh View loan file, established the loan amount and understood (from the loan account statement, which they are likely to have seen) that interest was being capitalised. It is likely also (given the content of their subsequent report about the Supplementary Prospectus and Benchmark Report disclosures) that they either saw, or accepted the assertions about, the valuations referred to in the Benchmark 7 disclosures in those documents. However, there is nothing

to suggest (as Mr O'Sullivan's submissions implicitly contended) that the Burleigh Views loan file would then have contained any material communications between PCL and the Council. (Indeed, it is clear that the Council did not communicate its view about the development approval lapse until much later - August 2009:- *see paragraph 96 above*.)

223. The 13 November 2008 PCL Audit Committee meeting was attended by all the PCL directors (other than Mr O'Sullivan) and by all three of Messrs Haq, Hornby and Fulker. (At that time Messrs Bersten, Seymour and Sweeney, as well as Mr Fulker, would have been well aware of the amount, and the default status, of the Burleigh Views loan.) The meeting discussed three events that focussed attention on PCL's loan management and reporting practices. Those matters were (i) the 3 October 2008 Management Report (ii) WT's 5 November retainer to provide half yearly reviews of (principally) PCL's Benchmark Reports and, (iii) 11 November 2008 correspondence between Mr Fulker and the auditors, directed at clarifying the auditors' intended approach, and the loan files (including the Burleigh Views loan) to which they requested access. The minutes of the PCL audit committee meeting record that there was to be a clarification of WT's requirements in their management report. There was also to be a standard reporting template for every defaulting loan, and a monthly loan arrears report, which included details of the latest property valuation. .Shortly after the meeting, on 17 November 2008 Mr Fulker copied Mr O'Sullivan in on an email to other PCL personnel. The email summarised what the auditors had described as their "general rule" requiring current valuations for any 30 June 2008 loan arrears that had not been remedied at the end of the half year (ie., December 2008).

224. Almost a fortnight later WT provided PCL with its review report about the Benchmark Report disclosures. The audit report stated (subject to apparently standard qualifications indicating reliance on company personnel and documented policies) that nothing had come to the auditor's attention to indicate to them that the benchmark disclosures "were not presented in accordance with RG 69.45, 69.58-60 & 69.68". (Those provisions dealt with "rollover" of debenture holders investments, Benchmark 5 disclosures relating to loan profiles and arrears:- *see paragraph 140(c) above)*; and "related party" transaction disclosures.)

225. The next formal report from WT was about the content of PCL's December 2008 half year financial statements. This was preceded by an 18 November 2008 engagement letter, and a 30 January 2009 draft, in which WT again addressed the topic of loan impairment, particularly emphasising the importance of the adequacy of information about default loans

and supporting valuations. That particular topic, and WT's requirements, appear to have been discussed at PCL Board meetings on 17 December 2008 and 24 February 2009, as well as at the intervening PCL audit committee meeting on 4 February 2009. In the outcome, notwithstanding the objective facts that PCL had already taken possession of the property, and that the monthly Board reports contained irregularities concerning the loan maturity date and valuation, WT's half year audit report stated that the auditors had not become aware of anything that led them to believe PCL's half year financial statements did not disclosure a "true and fair" view.

226. In April and May 2009 Messrs Hornby and Fulker communicated with WT about the latter's requirements for the 2009 PCL annual audit, particularly in relation to loan arrears and impairment assessments. Those requirements included a copy of PCL's loan policy, the provision of a list of all loans in default, and current valuations for material loans and loans for property development. WT conducted that review in June 2009 to assess the "accuracy and completeness" of PCL's reporting of loan arrears, including LVR assessments and valuation amounts. The review report of July 2009 stated that it had been based on a random sample of loans reported on from July 2008 to April 2009. It contained an overall conclusion that the loan arrears reporting framework was effective and well maintained, and that the auditors had not detected any significant errors or irregularities. The report highlighted the, objectively obvious, high risk associated with calculating LVRs on the basis of out-of-date valuations. However it did so after indicating that in all but one of the 27 loans examined the LVRs had been correctly calculated and reported.[16] The July 2009 WT report was tabled, though without recorded comment, at the PCL Board meeting on 18 August 2009, where it was characterised as part of the auditor's continuing quarterly audit function.

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[16] The ConSTAT item 80 relating to the July 2009 report contained a vigorous disagreement as to whether the auditors had seen the Burleigh Views loan file, and whether, as a consequence, should or could be taken to have endorsed PCL's approach to the management and reporting of the loan. On Mr O'Sullivan's behalf it was contended that (i) the auditors had previously requested the Burleigh Views loan file, (ii) the auditors had in fact been given the loan file and, (iii) the Burleigh Views loan was known to be in default (even though not formally included in the loan arrears reports. However, as ASIC contended, given that the purpose of the July 2009 Report was to address the accuracy of information contained in the loan arrears reports, and the undisputed fact that the Burleigh Views loan was not classified by PCL as a loan in arrears, even if WT examined the Burleigh View loan file, there is no clear evidentiary basis for concluding that the state of the loan was material to the principal focus of the July 2009 report. Indeed, since the overall implication of the July 2009 report is that the auditors were affirmatively satisfied of the currency of the valuations for the loans they considered, it seems an unlikely proposition.

227. The topic of loan impairment assessment, particularly in relation to loans in default, continued to be raised in communications between WT and PCL in and after April 2009. In late April, and in mid May 2009, WT identified their concerns about not only the impairment assessment of those loans but also their classification as current or non-current assets. In raising those concerns WT identified the categories of documents that would be required for the annual financial report audit. They included a current valuation for loans whose default was more than 6 months as at 30 June 2009.

228. WT's July 2009 "final report" on PCL's loan arrears reporting (which was tabled at the 18 August 2009 PCL Board meeting) asserted that its principal objective had been to ensure the accuracy and completeness of the information in PCL's "arrears loans reports", particularly in relation to matters such as recorded property valuations and LVR calculations. The overall conclusion was that PCL's loan arrears report control practices were effective and the reporting system well maintained. Whilst testing had revealed some "small discrepancies" it had not revealed any significant errors or irregularities. The "small discrepancies" were exemplified in section 3 of the report. They included an example of miscalculation of an LVR, an error which it classified as having a "high risk" (ie., with potential to have an extensive adverse impact) if PCL did not carefully adhere to reliance on up to date valuations.

229. Condign as the auditors' July 2009 loan arrears report was, information PCL provided to WT a few days later in August 2009 (in relation to the auditors' interest in the "current" / "non-current" classification of outstanding loans) clearly revealed PCL's internal attribution of a 11 November 2008 maturity date to the Burleigh Views (then $15.1m) loan balance, and its characterisation as "non-current" in the June 2009 PCL Annual Report financial statements. In the background to this balance sheet categorisation of loan assets was ongoing consideration of impairment assessment for default loans. More specifically, an increased impairment assessment was first formally recognised in a September 2009 draft of the PCL annual report for the June 2009 financial year, and then obliquely canvassed in late October 2009 in a draft of WT's management report to PCL. That report specifically noted both a significant increase in the value of default loans, and that requested audit evidence, particularly relating to evidence of current valuations, had not been provided. Although WT had, in the meantime, issued an unqualified audit report for the June 2009 financial year, the contents of the draft management letter strongly suggested that their

willingness to do so occurred despite the absence of relevant current valuation evidence, and only because of additional (but unspecified) audit procedures having been undertaken.

230. A few days before Mr Bersten's 30 October 2009 memo about arrears loan reporting *(see paragraph 212 above*) PCL's auditors had written a management letter addressing the "going concern" risk of PCL. On 6 November 2009 Mr Hornby sent Mr Seymour a copy of the auditors' 26 October 2009 letter. The letter stated that the auditors were able to issue an unqualified audit report, but recorded a number of matters of concern. The first of these involved an increased audit risk as a result of the number of default loans and current economic conditions. (The number and value of reported default loans had increased from 36 to 41, and from $52.8m to $62.7m:- *see paragraphs 146 & 151 above*.) The other matters involved (i) PCL's failure to provide current valuations for default loans, and (ii) a going concern analysis, as a result of PCL's reduced liquidity. The letter also noted audit adjustments of three "material mis-statements" in the accounts (varying in amount between $0.12m and $1.55m). The letter cautioned that the audit had not been "designed to identify all matters that may be relevant to those charged with governance".

231. In early November 2009 PCL engaged WT to review the disclosures in the 24 December 2008 Prospectus No 11 and also (apparently) the Benchmark Reports of 30 April and 30 October 2009. Each of those documents contained essentially similar statements about the Burleigh Views loan. Repeating the substance of the disclosure in the February 2008 Supplementary Prospectus, each document referred to the Burleigh Views loan as a construction loan that (i) related to a property development that was "nearing completion", (ii) had been based on a 2003 $17.2m valuation and, (iii) was supported by a, borrower provided, September 2007 $26m (GST exclusive) "as if complete" valuation:- *see paragraphs 146 and 177(a) above*. In undertaking that Benchmark disclosure review WT personnel again requested access to the Burleigh Views loan file, so they could "agree the draw down of the loan (if any) to the expert's report". In response, PCL provided WT with copies of the two (2003 and 2007) valuations referred to in the disclosure documents.

232. WT's request, for the stated purpose of agreeing draw downs to an expert report, appears to have been prompted by the contents of the Benchmark 8 comments in the December 2008 Prospectus No 11. They specifically asserted that PCL only advanced development funds against an "expert" assessment of the cost to complete. The fact that WT made such a request tends to suggest their ignorance of both Burleigh Views liquidation and PCL's

possession of the property. Nevertheless, it is reasonable to assume that WT did secure the requested access to the Burleigh Views loan file. It is also reasonable to assume (having regard to the information they had already obtained about the "non-current" classification of the loan, and its internally reported November 2008 maturity date) that WT were at least aware of the non-performing nature of the Burleigh Views loan. Despite that awareness, WT's disclosure report of 10 December 2009 (which stated that it was addressing only the disclosure documents for the period ending 24 December 2008 (ie. the date of Prospectus No 11) again opined that nothing had come to attention to cause them to believe that the contents of PCL's disclosures had not been presented in accordance with the applicable guidance requirements in RG 69.45, 69.58-60 & 69.68". .

233. WT must be taken (because of their repeated concern about valuations for default loans) to have been familiar with the contents of PCL's monthly loan arrears reports, and of the fact that they did not include the Burleigh Views loan. Consequently, the contents of WT's 10 December 2009 disclosure report seem objectively surprising – having regard to the unambiguous requirements of Reg 69.58-60 in relation to Benchmark 5. Furthermore, unless WT should be understood as having confined their consideration to those specific Reg 69 provisions, the essentially approving contents of the report are not readily reconcilable with the proposition that WT was then aware of either the Council's recent (13 August & 28 September 2009) letters advising PCL that there was no continuing development approval for the property:- *see paragraph 96 above*; or the gloomy planning and legal advice PCL had received on 30 October and 10 December 2009:- *see paragraphs 97 & 98 above*.

234. In its half year report to 31 December 2009, PCL appears to have reclassified loans totalling approximately $29m as current loans, and correspondingly reduced the total reported value of its "non-current" loans. That change likely included a reclassification of the (then approximately $15.1m) Burleigh Views debt as a current loan – notwithstanding the development approval lapse that had been communicated by the Council in August 2009, and the absence of any construction activity. Nevertheless, in March 2010 WT's (non-audit) review of the half year PCL report stated that the auditors had not become aware of anything that led them to believe the PCL accounts did not give a true and fair view, and did not comply with the relevant financial reporting standards and corporations regulations. That condign assessment seems only consistent with either ignorance of, or an obvious failure

to appreciate, the lapse of the original development approval and the adverse advice PCL had received about the prospect of obtaining a new approval of equivalent scope.

235. A little later in March 2010 WT provided their management letter relating to the December 2009 half year review, and noted that in the course of the review exercise they had not identified any matters they "considered to be of governance interest". Also in March 2010 WT were again engaged to provide a report on PCL's Benchmark disclosures. There is some imprecision in the SOAF:2 description of the details of the intended scope of the engagement. However it appears that the overall practical effect of the engagement, and the contents of WT's disclosure review reports, was that they collectively covered the period up to 23 December 2009 (ie., the lodgement of PCL's Prospectus No 12) and had the cumulative effect of expressing WT's view that they had not encountered anything to indicate that the benchmark disclosures in that period were not in accordance with the guidance in RG 69.45, 69.58-60 & 69.68 (The relevant content of those disclosures has been noted earlier in these reasons:- *see paragraphs 151 to 153 and 177(a) above*.)

236. It is highly likely WT knew PCL was treating the Burleigh Views loan as being outside the normal category of default or arrears loans. At the same time, WT must also have been aware that the loan was not performing (in the sense that it was well past any contractual term) and that interest was being accrued and capitalised. They must also have been aware (because of their own complaint about the absence of current valuations (*see paragraph 229 above*) and because it was an obvious inference from the content of the various pre December Benchmark 7 disclosures) that up until December 2009, PCL had not commissioned its own valuation since 2003. Moreover, because that 15 December 2009 "valuation" was only evidenced in the brief letter spreadsheet, the auditors could not reasonably have been affirmatively satisfied that it had been commissioned in accordance with PCL's CPP manual policies. Consequently, given the unambiguous requirements of Benchmark 5 in relation to the disclosure of loan arrears, the largely acquiescent content of WT's various disclosure review reports to PCL seems surprising. The similarly unambiguous requirements of Benchmark 7 (*see paragraph 140(f) above*) also lead to surprise at the the failure of WT to highlight the unsatisfactory state of the valuations for the Burleigh Views property, unless those reports are to be interpreted as confined to consideration of the specific RG 69 clauses to WT's review report referred. WT's approval of the "true and fair" opinion about PCL's financial statements, suggests they were prepared to accept the limited content of the December 2009 letter spreadsheet as a sufficient

"current valuation", notwithstanding the absence of an objective basis on which they could have been satisfied about its "quality and reliability" as a valuation. That acceptance suggests WT were unaware of the Council's August and September 2009 communications. Those communications, against the background where the proposed development was certainly incomplete, had certainly never been "used", and there had been a significant change in the planning scheme, had obvious substance, and made the valuation of the property an inherently problematic exercise. The fact that the development consent lapse assertion was not even alluded to in the various reports WT provided in 2010, points to the probability that it was either a matter of which they were unaware, or (and less probably) whose significant adverse potential impact they had failed to appreciate.

SOAF:2 – HLB MANN JUDD'S AUDIT AND REVIEW ENGAGEMENTS 2010 TO 2012

237. HLB Mann Judd ("HLBMJ") replaced WT in August 2010. Their first report (dated 1 December 2010) was confined to a qualified scrutiny of limited aspects of PCL's accounting practices. In the meantime, PCL had engaged HLBMJ to audit its June 2010 annual report. The 4 August 2010 engagement letter indicated that the retainer would extend to a review of PCL's half year report in December 2010. As part of the audit work HLBMJ identified a selection of loans to be examined. The selection included the Burleigh Views loan, and Mr Fulker conveyed to Mr O'Sullivan HLBMJ's suggestion that "a brief summary up front may save a lot of time":- *see paragraph 104 above*. A few days later, after a review of PCL's interest receivables at a meeting between Mr Kennedy and a HLBMJ staff member, and in the context of a materiality assessment, HLBMJ requested an explanation for the calculation of the Burleigh Views loan deferred interest balance. Mr Kennedy responded that, whilst the loan was actually in arrears, PCL was treating Burleigh Views as having received an "interest in advance" loan. He provided HLBMJ with a spreadsheet file showing that PCL had been accruing interest on the loan since early March 2008, and periodically adding the accrued / deferred interest to the loan principal. Later in August 2010, as part of its audit assessment of PCL's loan provisioning, and discussion at a meeting with PCL on 1 September 2010, the auditors requested (amongst other things) that PCL provide it with a background explanation about the loan, and a copy of a valuation supporting its recoverability at the 30 June 2010 balance date.

238. The details of what was discussed at the 1 September 2010 meeting were not the subject of specific evidence but the contents of an audit file note suggest that HLBMJ were aware

of the incomplete state of the development, and some uncertainty whether PCL would attempt to sell the Stage 1 units before completing the development. However, HLBMJ's 14 September 2010 letter to PCL indicated that it had requested, and was still awaiting a valuation to support the recoverability of the Burleigh Views loan. (That indication suggested HLBMJ did not regard the 15 December 2009 "valuation" as providing the required support, notwithstanding Mr O'Sullivan's July 2010 instruction:- *see paragraph 103 above*.) The following day, three of HLBMJ's audit staff were present for part of the PCL audit Committee meeting (with Messrs Sweeney, Seymour, Bersten, Fulker, Horny and Kennedy) during which there was an hour long discussion of HLBMJ's 14 September 2010 report. The discussion topics noted in the meeting minutes included (amongst other things) loan arrears reporting, loan provisioning, related party transactions, the Burleigh Views loan and one other) loan. The parties agreed (somewhat ambiguously given the auditor representatives presence for only about half of the audit committee meeting) there was likely some discussion of the development approval lapse:- *see paragraph 215(f) above*. But there is nothing to that effect noted in the minutes. Information in the HLBMJ audit file indicates the auditors' contemporary awareness of (i) the loan balance ($17.5m as at 30 June 2010), (ii) PCL's possession of the property as mortgagee, (iii) the status of the loan as PCL's only construction loan, (iv) the apparent reclassification as the loan from non-current to current and, (v) a construction cost estimate of $3m to $3.5m for completing the development.[17] Five days after the audit committee meeting, Mr Hornby provided HLBMJ with the 20 September 2010 $26.68m Robertson letter valuation:- *see paragraph 105 above*. Three days later, the HLBMJ 23 September 2010 audit report was unqualified in its opinion that PCL's 30 June 2010 financial report gave a true and fair view of the company's financial position.

239. By the time HLBMJ provided their 23 September 2010 audit opinion five months had elapsed since Mr O'Sullivan's receipt of the Minter Ellison advice confirming the lapse of the development approval for the Burleigh Views development. More than nine months had passed since Mr O'Sullivan had received the gloomy advice from PCL's planning consultants about the prospect of obtaining a new approval that would allow completion of

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[17] The origin, basis and nature of the construction cost estimate are all unclear. If it was an existing estimate PCL had provided to HLBMJ, it is considerably less than the $4m estimate Mr Bersten recollected having been given by Mr O'Sullivan:- see his 30 May 2017 affidavit at paragraph 128(f). Neither amount was included in the first version of the feasibility study that PCL undertook in October 2011. There is no clear evidence that PCL devoted any attention to obtaining a realistic assessment of construction costs, until very late in 2011.

the originally intended development:- *see paragraphs 98 & 100 above*. However, the audit file notes summarised in SOAF:2 contain nothing to suggest that the auditors were aware of any such information and had considered its potential impact. In the absence of any such evidence, it is difficult to accept that HLBMJ's unqualified opinion reflected full awareness and consideration of those matters.

240. On 31 January 2011 HLBMJ provided PCL with a review report relating to the contents of PCL's October 2010 Benchmark Report and the 22 December 2010 Prospectus No 13. (The content of the Benchmark Report and Prospectus, have been outlined earlier in these reasons:- *see paragraphs 140(e), 154 and 178 above*.) The October 2010 Benchmark Report was the first after the June 2010 changes to the content of the Reg 69 Benchmark 7 guidance:- *see paragraph 140(e) above*. A few days before the Board formally approved the 22 October 2010 Benchmark Report Mr Bersten had asked HLBMJ to check that the "policy descriptions" in the draft report relating to Benchmarks 5, 7 and 8 matched those in PCL's CPP manual. Although HLBMJ had been given a copy of the September 2010 Robertson valuation, were aware that the Burleigh Views loan was in fact in arrears, and had not been included in PCL's reported loan arrears, their review report opined, as WT had previously done, that nothing had come to attention to cause them to believe the disclosure documents did not satisfy the relevant guidance. They referred specifically to RG 69.45, 69.58-60 & 69.68. (In the June 2010 version of Reg 69 the first and the last of those provisions again dealt with "rollover" of investors' funds, and "related party" transactions. However, RG 69.58-60 were less specific than in the previous version and required details of the "diversification" of the loan portfolio, rather than specific information about loan arrears.)

241. For the purpose of its review report on PCL's December 2010 half year report, HLBMJ received a copy of PCL's loan arrears report in February 2011, addressed the adequacy of PCL's loan provisions and apparently attended a meeting with Mr Hornby at which they asked to be updated about the Burleigh Views loan. Although the evidence did not disclose details of what information was provided at that meeting, it occurred after PCL's planning adviser had attended a "pre-lodgement" meeting with the Council, and several months before PCL's May 2011 lodgement of its own development application:- *see paragraphs 107 and 109 above*. It is also the case that HLBMJ were aware of the fact that PCL was treating the then $18.9m Burleigh Views debt as a fully recoverable "current" loan. The latter awareness again suggests that when HLBMJ provided its 15 March 2011 half year

report, acquiescing in the view that PCL's report gave a "true and fair view", it was either unaware of (or, less likely, had disregarded without comment) the uncertain prospects of obtaining development approval for the completion of the development.

242. By the time of the start of the audit processes for its 30 June 2011 Annual Report PCL was internally canvassing the appropriateness of provisions to be made in relation to some loans. Although those contemplated provisions did not include the Burleigh Views loan, and it was not included in the loans PCL characterised as being in arrears, HLBMJ again requested an update on the status of that loan, including its stage of construction, expected completion date and current valuation. (The fact that the request related to these matters, and not to the status of the development approval, adds to the unlikelihood HLBMJ then appreciated, and had taken into account, the absence of a development approval for the completion of the project.) The information that request elicited, and the meeting which followed it, were referred to earlier in these reasons, and included the auditors being provided with the Robertson letter spreadsheet information of 30 August 2011:- *see paragraph 111 above*. The information appears also to have included knowledge of Mr Seymour's visit to the Burleigh Views, and his comments on the current state of the development, they being matters he had reported to the 14 October 2010 PCL Board meeting. The auditors' file indicates their knowledge of (i) the capitalisation of loan interest, (ii) the $20m loan balance, (iii) its characterisation as a "current" loan, (iv) an anticipated construction period (from February to December 2012), (v) a "not unreasonable" $3m development cost estimate, (vi) a net balance of $36k (assuming $26.68m in sales proceeds) and, (vii) a comment to the effect that a $1m construction cost contingency would give rise to a material impairment of the loan. The auditors' file notes suggest the possible "non-accrual" of some part of the loan interest. That suggestion led on to a recorded speculation (which seems quite incongruent with reality) that PCL's potential "headroom" in relation to the loan might be greater than the otherwise anticipated small net balance.

243. HLBMJ, provided PCL (specifically Mr Hornby) with their draft June 2011 Audit Management letter on 7 September 2011. In it they anticipated providing an unqualified audit opinion, subject to confirmation by the PCL audit committee of various matters, including the recoverability of loans in arrears, and the absence of any significant issues requiring consideration. In relation to the review of loan arrears, the auditors reported that during the audit, HLBMJ reviewed all 90 days in arrears loans and (where available) obtained source documents, including recent independent property valuations, agents

"valuation" or sales contracts, to support management's estimate of recoverable amounts. The draft letter indicated that (in some, unspecified) instances HLBMJ had not been able to obtain substantiating third party evidence and had relied on representations provided by management, in particular from Mr O'Sullivan. It may be inferred that the PCL audit committee provided the requested assurance (at a 9 September 2011 meeting that was attended by some of the HLBMJ audit staff) because the unqualified audit opinion formed part of the PCL annual report the Board approved at its 30 September 2011 meeting. That unqualified opinion is again suggestive of HLBMJ's contemporary ignorance of the actual status of the approval for the development. (It may also be observed that their acceptance of a $3m construction cost estimate as "not unreasonable" seems uncritically optimistic – having regard to (i) its uncertain origin and content, (ii) PCL's asserted policy of "expert" assessment of "costs to complete", (iii) the $4.75m allowance in the May 2007 refinancing agreement and, (iv) the total construction realisation cost estimate (totalling about $7.2m) in the 2007 Colliers valuation:- *see paragraphs 65(d), 152 & 160 above (in relation to the policy) and paragraphs 72 & 81 above (in relation to the costs estimates)*.

244. Following that, on 22 November 2011, the auditors provided PCL with their management report letter, relating to the 2011 financial year audit,. The report was generally approving of PCL's accounts. That approval was expressed notwithstanding the auditors' knowledge (evident from the contents of their files) that (i) the Burleigh Views loan was in arrears (even though it was not included on the monthly loan arrears report), (ii) since at least 16 July 2009, PCL had been capitalising interest on a monthly basis, (iii) PCL was relying on the $26.68m Robertson "valuation" of August 2011 and, (iv) the $3m construction costs estimate to complete the development. The auditors had a general understanding that construction would take about 10 months, commencing in February 2012, and considered that period reasonable, on the basis that "foundations and ground work" had already been completed. (A basis that again tends to suggest HLBMJ's ignorance of the actual approval status of the project.)

245. Earlier in November 2011 HLBMJ had commenced work on a review of the disclosures in PCL's December 2010 Prospectus No 13 and its October 2011 Benchmark Report. In the course of that review they appear to have devoted more attention to the completion cost of the development, and accurate assessment of the likely realisation proceeds. In relation to the former, on 10 November 2011 HLBMJ sought information from PCL about the program for the construction work for the 2011 year, a selection of invoices for the work, and details

about the process for control and approval of the expenditure involved. (The context of the enquiry was against the background of HLBMJ's understanding that PCL did not require expert assessment of construction progress before payments were made – an understanding that is difficult to reconcile with (i) the CPP manual / "product guide", (ii) the contents of the December 2010 Prospectus No 13 relating to Benchmark 8 and (iii) the similar benchmark contents in the October 2011 Benchmark Report:- *see paragraphs 65(d), 152 & 179 above*.) Those enquiries elicited the responses from Mr Hornby, including the information relayed from Mr O'Sullivan, alluded to earlier in these reasons:- *see paragraphs 114 to 116 above*. (That information dealt with ongoing work on the site. Its provision tends to re-inforce the likelihood of HLBMJ's ignorance of the uncertain state of the approval for the development.) After receiving that information, on 22 November 2011, HLBMJ pushed to obtain PCL's feasibility assessment for the completion of the work. It also alerted Mr Hornby to the mischaracterisation of the August 2011 Robertson letter spreadsheet as a GST exclusive valuation, and the consequential understatement of the Burleigh Views LVR in the October 2011 Benchmark Report. (Those matters, the interaction they provoked between Mr Hornby and Mr O'Sullivan, and the feasibility assessment Mr Hornby provided to HLBMJ on 24 November 2011, have been referred to earlier in these reasons:- *see paragraphs 115 & 116 above.)*

246. Subsequently, on 7 December 2011, HLBMJ provided PCL with their review report, which stated they were unaware of anything to cause them to believe the Benchmark Report disclosures did not comply with the guidance in RG 69.45, 69.52 to 69.54 and 69.62 to 69.63. The auditors clearly appreciated that the recoverability opinion expressed in the Benchmark Report relied on the completion of the development, and hence on the costs allowed for in the feasibility. As to that, it is plain, from annotations in the audit file, that the auditors had not undertaken a detailed review of construction costs. (Consequently the observations made earlier about the September 2011 management letter also apply to this review report:- *see paragraph 243 above*.)

247. Between December 2011 and early March 2012 PCL undertook not to accept any new investments under the December 2010 Prospectus, obtained the January 2012 valuation report (that both acknowledged the absence, and assumed the grant, of a development approval:- *see paragraph 120 above*) published the first of its Information Booklets and, in early March 2012, proposed a $2m provision against the Burleigh Views loan:- *see paragraphs, 120 to 123 & 186 to 192 above*. On 6 March 2012 Mr Kennedy provided

HLBMJ with a spreadsheet of PCL's loans. It disclosed the Burleigh Views loan's characterisation as a non-current loan and a $2m provision against its full recoverability. At about the same time (and in any event, in connection with their December 2011 half year audit / review task) HLBMJ apparently received copies of the 2 January 2012 Robertson valuation, an amended version of PCL's 26 February 2012 feasibility assessment, and the 6 March 2012 PCL narrative loan arrears report:- *see paragraphs 120, 122 & 123 above*. Both the January 2012 valuation and the loan arrears report acknowledged the Council's attitude that the original development approval had lapsed, and revealed that PCL did not have a current approval necessary to complete the development. The March 2012 loan arrears report anticipated a new approval being granted by April 2012, but noted the provision that had been raised against the 31 December 2011 loan balance. The amended feasibility assessment appears to have contemplated a $58,000 realisation shortfall, even after allowing for the $2m provision against the December 2011 loan balance.

248. It seems likely (although it is not entirely clear) that after the/a discussion with HLBMJ in early March 2012, PCL reclassified the Burleigh Views loan (with its $2m provision) as a non-current asset in its December 2011 half year financial statements. The PCL Board approved the December 2011 half year report, and noted the auditors' related report, at its 15 March 2012 meeting. The auditors report, which must be regarded as having been informed by the matters summarised in the immediately preceding paragraph, nevertheless contained a statement of agnosticism about any matters that would detract from satisfaction that PCL's half year accounts gave a true and fair view.

CONCLUSIONS ABOUT THE AUDIT MATERIALS

249. The preceding review of the SOAF:2 information (and matters otherwise evident from the available documents) demonstrates that both WT and HLBMJ had been sequentially engaged, essentially as required by the Reg 69 guidance:- *see paragraph 142 above*. In undertaking their various audit or review tasks they had interacted extensively with senior executive PCL personnel. They even attended some of PCL's audit committee meetings, (typically) with Messrs Sweeney and Seymour. Each of the auditors had been aware of the nature and size of the Burleigh Views loan, the accrual and capitalisation of the loan interest, and that it was in fact, but not characterised by PCL as, a loan in default or arrears (until the explicit acknowledgement in the April 2012 Information Booklet:- *see paragraph 193*

above). Both audit firms likely knew, at least implicitly, that PCL had gone into possession as mortgagee, and intended to complete the development.

250. That awareness came from the contents of documents demonstrably provided to (or created by) the auditors, or the contents of communications between the auditors and PCL personnel. At least WT had requested, and apparently been granted, access to PCL's BV Loan file on at least two occasions - in November 2008 and November 2009 – *see paragraphs 222 and 231 above*).

251. Each of the audit firms had been provided with such of the valuations (those dated 2003, 2007, December 2009, September 2010 and August 2011) as were apparently relevant to their particular tasks. WT, for example, were provided with the valuation reports of 2003, 2007 and December 2009. HLBMJ were provided with the Robertson spreadsheet realisation reports of September 2010 and August 2011 (as well as the January 2012 valuation). However, and contrary to Mr O'Sullivan's submissions, there is no reliable evidence that WT was aware, at the time of their various reports, of the absence of a current approval for the Burleigh Views development. Such a proposition seems unlikely:- *see paragraphs 222, 234 & 236 above*. There is similarly scant evidence that (until March 2012) HLBMJ appreciated the problematic development approval status of the Burleigh Views property, and it is unlikely that they did:- *see paragraphs 238, 241, 242, 244, & 245 above*. Even if there is reason to entertain the possibility the auditors knew about the problematic development approval status of the property, both auditors certainly knew that PCL had neither commissioned an "as is" valuation, nor even obtained a detailed current valuation report that permitted the kind of disclosure (required by the Reg 69 Benchmark 7 guidance) that would have allowed retail investors to assess the "quality and reliability" of the "valuations" of the Burleigh Views property.

252. Against this background, the respective auditors' generally favourable reporting on PCL's financial statements and disclosure documents, and in particular, the absence of criticism of PCL's practice of not recognising the Burleigh Views loan as being in arrears, is difficult to understand. Similarly difficult to understand is their apparent respective acquiescence (implicit at least in their "true and fair view" opinions on PCL's financial statements) in the deficient quality of the available valuations relating to the Burleigh Views loan.

253. The submission put was that, despite his status and responsibilities as PCL's managing director, Mr O'Sullivan nevertheless relied on the PCL auditors "to identify issues regarding the management, accounting disclosure and reporting of the Burleigh Views loan. This submission perhaps drew on the complaint Mr O'Sullivan made in his April 2015 affidavit, that PCL's auditors never drew his attention to the potential relevance of the lapse of development approval to his reliance on PCL's valuations of the Burleigh Views property. However, it stands in contrast with a number of matters. First of all Mr O'Sullivan acknowledged (in his April 2015 affidavit) that, within PCL's management practices, once a loan was significantly in arrears, he was closely involved in the loan management decisions relating to assessment of the property value, provisions against non-recovery and enforcement of the mortgage security. Secondly, the agreed ConSTAT propositions indicate that Mr O'Sullivan was in fact the PCL executive primarily responsible for the management of the Burleigh Views loan. More specifically, he was familiar with the site, with the work that had been carried out, and the details of the valuations. He was the principal decision maker in relation to the extension or refinancing of the loan in 2007. He was also the person who authorised the subsequent "advances" and the interest accrual that increased the loan balance, and was reflected in PCL's reported income and profit. Consistent with those roles and actual decision making, as between himself and the other PCL directors. Mr O'Sullivan was the principal source of information relating to the loan. Indeed the tenor of the many communications Messrs Fulker and Hornby had with Mr O'Sullivan, particularly in relation to information sought by the auditors (and specifically in relation to obtaining "current" valuations) demonstrates that within the PCL organisation, apart from the merely administrative accounting functions (and the overall compilation exercise involved in assembling PCL's financial statements) Mr O'Sullivan was the principal decision maker for, and the principal source of information about, the Burleigh Views loan. He was personally responsible, in the sense that he was the actual determinative decision maker, for unilaterally determining (i) the maturity dates of the Burleigh Views loan after May 2008, (ii) that the loan interest should be capitalised, (iii) that the loan should not be treated as in default or arrears, for the purposes of PCL's standard monthly reporting. It was he who decided not to obtain an updated valuation, after being informed in November 2008 that the Colliers valuation was out of date. He was also the person within PCL who was responsible for commissioning and accepting the Robertson "valuations" of 2009, 2010 and 2011. He did so notwithstanding that (so far as appears) neither the circumstances in which the valuer was instructed, nor the form of the valuation, conformed to the substantive requirements of PCL's CPP manual and construction loan product guide.

254. Against this background, the objectively surprising apparent acquiescence of the two audit firms does not establish that in any of the decisions he made, including his authorisation of the various disclosure documents, Mr O'Sullivan either actually relied on information provided by any of the auditors or, alternatively (if there were any basis for inferring the fact of reliance, that he did so after making his own independent and informed assessment. (Here I am alluding to Corp Act s 189.) Consequently, the auditors' surprising acquiescence does not detract significantly from the adverse view that should properly be taken of Mr O'Sullivan's conduct. That is particularly the case in relation to his responsibility for the disclosure irregularities that he ultimately conceded:- *see paragraph 23 above*. I do not accept (because it is inherently improbable) the implication in Mr O'Sullivan's April 2015 affidavit (at paragraph 158) that he was unaware of the potential relevance of the development approval lapse to the value of the Burleigh Views property, and relied on the auditors to detect such a matter. It is in fact artificial to contend that Mr O'Sullivan relied, in any sense material to the present matter, on the PCL auditors. Reality points more accurately and persuasively in precisely the opposite direction. The decisions to capitalise the loan interest, and treat the Burleigh Views loan as not being in arrears or default, were in no meaningful sense made in reliance on the assessments of PCL's auditors. They were decisions made prior to any relevant audit involvement and, in all probability, they were influenced by a desire to avoid having to make the kind of candid disclosure that the Trust Deed and the Reg 69 guidance required. (That desire[18] must have been elevated by the later awareness of the DA difficulties with the Burleigh Views property, and the concerns expressed by the other PCL directors of the loan's potentially material adverse impact on PCL:- *see paragraph 215(d) above*.) If there were any substance in the audit reliance submission made on Mr O'Sullivan's behalf, one would have expected to have seen in his evidence, and in the contemporary documents, a genuine enquiry of the auditors about the propriety of excluding the Burleigh Views loan from the loan arrears report. One would also have expected to see both obviously conscientious adherence to PCL's asserted valuation policies, the commissioning of compliant reports, and explicit disclosure to the valuers, and the auditors, of the actual status of the development approval for the project. But those matters are conspicuously absent from the available material. For those reasons, the

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[18] ASIC did not contend, and I do not intend to convey, that Mr O'Sullivan dishonestly avoided disclosure. It is rather that (consistent with his opposition to AETL's March 2012 requests:- *see paragraphs 125 & 126 above*) he regarded full disclosure as undesirable, and unnecessary, given the difficulties with the property, and his view that PCL's ultimate prospects of maximum (though not necessarily complete) recovery dependent on completion of the development.

proposition that Mr O'Sullivan relevantly relied on the auditors to draw his attention to any disclosure irregularities is not a conclusion to which the available evidence points, and should be rejected.

255. The same conclusion is appropriate in rejecting the significance Mr O'Sullivan's submissions sought to attach to the knowledge and acquiescence of the other PCL directors. The conduct of those other directors was materially deficient (as indeed the Tribunal decisions relating to Messrs Sweeney and Seymour found) but those deficiencies typically related to conduct that occurred after, and was likely significantly contributed to by Mr O'Sullivan's own anterior decisions, and by his personal status, both as the PCL managing director and as the PCL executive most directly involved in managing the loan. The acquiescent shortcomings of the other PCL directors do not materially detract from Mr O'Sullivan's own personal responsibility for what was an intentional and sustained course of conduct – in refusing to treat the Burleigh Views loan as in arrears, in accruing and capitalising the loan interest, and in refraining from commissioning property valuations that accorded with PCL's credit policy.

256. The principal difficulties with the pre-December 2009 benchmark disclosures were the non-disclosure of the Burleigh Views loan default, the inclusion of reference to the Colliers September 2007 valuation, the statement that the development was "nearing completion", and the statement (first made in the December 2008 Prospectus) that the Burleigh Views LVR had been calculated "on a cost to complete basis". The non-disclosure of the exclusion of the Burleigh Views loan from the arrears report, and its internal characterisation, as an "interest in advance" loan was attributable to Mr O'Sullivan's unilateral decision:- *see paragraphs 84, 90 & 237 above*). Mr O'Sullivan was personally responsible for the inclusion of the disclosure reference to the Colliers valuation, despite knowing it was no longer current (perhaps not the least because of the intervening global financial crisis)- *see paragraph 145 above*. He was also the source of the "nearing completion" statement that first been made in the February 2008 Supplementary Prospectus. He provided it in response to a specific enquiry from Mr Bersten:- *see paragraph 145 above*. It was something Mr O'Sullivan personally, and certainly, knew to be incorrect. The claim that the LVR had been calculated "on a cost to complete basis" was indefensible and wrong:- *see paragraph 150 above*.

257. The refusal to treat the Burleigh Views loan as being in default, in the disclosure documents, appears to be completely inconsistent with the repeated statement in the PCL Prospectus that loan "default" was exemplified by a borrower not meeting a "fundamental obligation under the loan arrangement, such as … failing to discharge the loan on or before its due date". The reasons for the decision not to treat the Burleigh Views loan as in arrears and in default were not adequately explained. It can be inferred that the decision was influenced partly by what Mr O'Sullivan described (in his April 2015 affidavit) as PCL's discretionary practice of allowing interest on construction loans to be capitalised, and partly by his subsequently asserted subjective optimism that the "on completion" value or realisation of the development was likely to exceed the ultimate loan liability. But there is an incongruity involved in regarding either of those considerations as providing a genuinely instructive insight into Mr O'Sullivan's decision-making. One aspect of that incongruity is that the same considerations applied prior to the May 2007 refinancing, and yet the Burleigh Views loan was treated by PCL as an arrears loan for the whole period from March 2006 to April 2007. Secondly, neither of those considerations actually justified treating the loan is not being in arrears for the purposes of the disclosure benchmarks. The different integers of the Benchmark 5 guidance have been set out earlier in these reasons:- *see paragraphs 140(c) & 140(d) above*. Even before the June 2010 amendments they required disclosure of the number and value of loans "in default or arrears", and the exegesis to the specific requirements pointed out the potential interest of investors in knowing what the debenture issuer was doing about those loans. After the June 2010 amendments to Reg 69, the explicit additional requirements related to loans that had been "renegotiated" and those where the debenture issuer had taken possession of properties. Moreover, those matters were required to be addressed in a context where loan should have been subject to a limited term, and a complying LVR, consistent with PCL's disclosed policies. Consequently, it was never an adequate response to the benchmark disclosure guidance in Reg 69 to refuse to characterise a loan as being in default or arrears merely because of a subjective optimism about the adequacy of the loan security. It was certainly not an adequate response where that expected adequacy was not based on a current complying valuation.

258. Furthermore, the proposition that Mr O'Sullivan was affirmatively satisfied about the adequacy of security for the Burleigh Views loan at any time after authorising the implementation of the May 2007 refinancing is problematic, and not one I am satisfied I should accept. As I have described earlier, the loan limits stipulated in the May 2007 refinancing were a 12 month term and a monetary limit of $13.5 million or such lesser

amount as reflected 70% of the required current valuation. The fact that this alternative monetary limit stipulation appeared in the 2007 refinancing, against the background of his knowledge of the failed $11.35m sale proposal in the latter part of 2006 (*see paragraph 69 above*) suggests Mr O'Sullivan's likely contemporary diffidence about the realisable value of the property. Certainly by the early part of 2008, the prospect of realising the property for an amount that would fully recover the debt appears to have been unlikely. Mr O'Sullivan's attitude to the sales enquiries in early 2008, and later his abortive negotiations with Mr Duncan in the latter part of the same year, all tend to re-inforce the probability that his actual contemporary view doubted the likelihood of full recovery of the loan debt.

259. That assessment of Mr O'Sullivan's asserted confidence in the value of the property as problematic, is broadly consistent with the inferences than can be drawn from his April 2015 affidavit. There, after describing the many months in which Burleigh Views attempted to sell the property in 2006, he said that once it became clear (in late December 2006 / early 2007) that his efforts to achieve a sale of the property had not succeeded "the next best option" was for PCL to fund the completion of the development. After Burleigh Views liquidation, he remained of the same view. That view, which had also influenced his reaction to the April 2008 $12m sale proposal, was that PCL "was likely to achieve a far higher level of recovery" by completing the development. In other words, from early in 2007, and certainly by mid 2008, Mr O'Sullivan appreciated that there was a real risk PCL could have a shortfall on the recovery of the loan. Furthermore, the shortfall risk was of sufficient magnitude to justify a commercial assessment that it was likely to be in PCL's interest to fund completion of the development rather than to renew attempts to sell the property in its current state. In acting on that view Mr O'Sullivan must be taken to have reasonably anticipated that the required level of funding would be in the range between $4.75 million, as contemplated by the May 2007 refinancing, and (following PCL's February 2008 receipt of the Colliers 2007 valuation) the $6.116 million contemplated in that valuation.

260. The principal difficulties with the disclosures in the December 2009 Prospectus, the subsequent Benchmark Reports, and the December 2010 Prospectus continued to be (i) the non-disclosure of the Burleigh Views loan default / arrears and, (ii) the repetition of the claim that the Burleigh Views LVR had been calculated "on a cost to complete basis". The additional difficulty with the disclosures was their reliance on the various Robertson valuations, and their characterisation as being GST exclusive. As to the first of those matters, the non-disclosure of the default and arrears status of the Burleigh Views loan, the

comments I have already made (*in paragraph 257 above*) apply, with added force in relation to the non-disclosure after the June 2010 Reg 69 amendments to Benchmark 5:- *see paragraph 140(d) above*.

261. In relation to the reliance on the various Robertson valuations in the December 2009 Prospectus and subsequent documents, the difficulty confronting the submission of reliance on the auditors is that Mr O'Sullivan personally commissioned those valuations. That is certainly true of the December 2009 "valuation", which Mr O'Sullivan commissioned after prompting from the auditors, Mr Hornby and Mr Bersten. There is nothing to suggest that Mr O'Sullivan commissioned the valuation in a manner consistent with the CPP policy, and he certainly did not obtain a full narrative valuation report. Substantially similar considerations apply to the September 2010 and August 2011 Robertson "valuations". Mr O'Sullivan likely commissioned them to satisfy HLBMJ's audit enquiries, did not provide written instructions compliant with PCL policy and did not obtain a narrative report. Those were repeated and significant deficiencies having regard to the disclosure guidance contained in Reg 69:- *see paragraph 140(e) above*. They were deficiencies for which Mr O'Sullivan was personally and primarily responsible.

LEGAL ADVICE IN RELATION TO THE CONTENTIOUS DISCLOSURES

262. Although this was not a matter specifically raised as part of "Issue 6" (*see paragraph 47(c) above*) Mr O'Sullivan's written submissions alluded to the involvement of PCL's solicitors, principally in advising about the content of the Information Booklets, as a consideration potentially contributing to a less censorious view of his responsibility for the conceded non-disclosures.

263. The nature and extent of PCL's solicitor's advice about the appropriate content of the Information Booklets was, however, the subject of scant evidence. Mr Bersten exchanged emails with the solicitors during the process of drafting and revising the first of the Information Booklets in January 2012:- *see paragraph 121 above*. However, the available communications suggest that Mr Bersten had substantially drafted the content of that Information Booklet before he submitted it to the solicitors, and made no substantive changes to it, after that submission. Whilst that consultation process perhaps justified an inference that the solicitors acquiesced in the final content of the document, it does not warrant detracting from Mr O'Sullivan's ultimate responsibility for the contentious /

misleading information it contained. It certainly does not detract from his responsibility for the, arguably more egregious, non-disclosures in the documents that preceded the January 2012 Information Booklet. (The arguable "corrections" contained in that Booklet are noted earlier in these reasons:- *see paragraphs 189 & 190 above*.)

264. There is even less apparent significance in PCL solicitor's involvement in relation to the March and April 2012 versions of the Information Booklet, although it is the case that Mr Bersten sent marked up copies of the Booklet changes to the solicitors, and apparently consulted with them prior to their respective publication.

265. The most relevant substantial disclosure change made in the March information Booklet was the introduction of the $2m provision against the Burleigh Views loan. The Booklet otherwise retained the errors in relation to the disclosed total of arrears loans, and the misleading assessment of the Burleigh Views loan. Whilst it may again be assumed that the solicitors acquiesced in those continuing shortcomings, there is no firm foundation for concluding either that they appreciated either shortcoming or that their acquiescence made any significant causal contribution to the content of the Booklet. (On the other hand, Mr O'Sullivan actually knew both matters, and expressly approved the publication of the March booklet.)

266. The substantial (disclosure relevant) change made in the April 2012 Information Booklet was the inclusion of the Burleigh Views loan in the reported "arrears loans" total. The explanation for that adjustment was the disingenuous statement noted earlier in these reasons:- *see paragraphs 126 & 193 above*. There is no evidentiary basis to attribute any causal significance to the solicitor's advice in relation to either that statement or to PCL's preceding failure to include the Burleigh Views loan in the "arrears" disclosures.

267. Accordingly, although there is some material evidencing the fact that PCL sought and obtained advice from its solicitors in relation to the content of the Information Booklets, the limited information provided by that material is of no real significance in the present matter.

CORPORATIONS ACT - PROVISIONS RELATING TO FINANCIAL SERVICES

268. Corp Act Chapter 7, and more particularly Parts 7.1 (ss 760A to 769C) & 7.6 to 7.10 (ss 910A to 1045A), contain the principal statutory scheme governing the provision of financial

services.[19] Corp Act s 760A sets out the general objectives of the statutory scheme, and does so in the following terms:-

> ***760A*** *Object of Chapter*
>
> *The main object of this Chapter is to promote:*
>
> *(a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and*
>
> *(b) fairness, honesty and professionalism by those who provide financial services; and*
>
> *(c) fair, orderly and transparent markets for financial products; and*
>
> *(d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities.*

269. The presently relevant Corp Act financial services provisions are[20]:-

(a) the prohibition of (and the "civil penalty provision" relating to) materially adverse misleading statements in, or omissions from, disclosure documents under which a person offers to issue securities:- *see Corp Act ss 728(1) & (3)*

(b) the limited defences available where the impugned contents of a disclosure document either follow reasonable enquiry, or reliance on information provided by others:- *see Corp Act ss 731-733*

(c) the definitional characterisation of persons (such as PCL) whose business involves the issue of debentures, as carrying on a "financial services business" (of dealing in financial products):- *see Corp Act ss 761A(1), 764A(1)(a), 766A(1)(b) & 766C*

(d) the general (but qualified) requirement for a person who carries on a financial services business to hold an Australian financial services licence ("AFS"):- *see Corp Act ss 911A & 911D*

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19 Additional provisions specifically relating to debenture issuers, such as PCL, are contained in Corp Act Chapter 2L. The relevant nature of those provisions is indicated earlier in these reasons:- *see paragraphs 163 & 164 above*. Mr O'Sullivan conceded contravention of Corp Act s 283BF (in relation to the content of the Quarterly Reports):- *see paragraph 24 above*. Intentional or reckless contravention of Corp Act s 283F is an offence, potentially punishable by six month's imprisonment:- *see Corp Act ss 283BI, 1311E & Schedule 3*.

20 Various provisions, particularly relating to the grounds on which ASIC could make a banning order, and the considerations relevant to assessment of person's "fit and proper" status were made by the Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020 – No 3 of 2020, which commenced on 18 February 2020. Although the legislative outline contained in the following paragraphs reflects those amendments (and later amendments made by the Financial Sector Reform (Hayne Royal Commission Response) Act 2020 – No 135 of 2020), none of those amendments is material to the reasons for my decision.

(e) the requirement that a person who provides financial services is either a director or an employee, or an authorised representative (or an employee of an authorised representative), of an AFS licensee:- *see Corp Act ss 911B, 766A, 766D*

(f) the prohibition on false claims of lawful entitlement to provide financial services:- *see Corp Act s 911C*

(g) the requirements that an AFS licensee must (amongst other things) (i) "do all things necessary to ensure" the efficient, honest and fair provision of their financial services, (ii) have in place "adequate arrangements" to manage conflicts of interest, (iii) comply with "financial services laws"[21], (iv) take reasonable steps to ensure that representatives comply with financial services laws, (v) comply with their licence conditions (conditions that typically include ensuring the competence, training and individual assessment, of anyone who provides "financial product advice" on the licensee's behalf) and, (vi) have in place adequate arrangement to compensate retail clients for any obligation breach:- *see Corp Act ss 912A(1)(a), (b), (ca), (f), 912B & 961L.*

(h) the potential suspension or cancellation of an AFS licence where

(vi) the licensee has not complied with (or ASIC has reason to believe the licensee will not comply with) their general obligations), or

(vii) the licensee, or one of its authorised representatives, is subject to a banning order (or a judicially imposed disqualification):- *see Corp Act s 915C*

(i) the requirement that where an AFS licensee appoints an "authorised representative"

(viii) the representative must satisfy the statutory education and training requirements:- *see Corp Act ss 916A(1)-(3A), 921C*

(ix) the licensee must provide the representative with a written authority that specifies the authorised financial services:- *see Corp Act s 916A(1)&(2)*

(x) the validity of the representative's authority is limited to consistency with the terms of any banning order (or disqualification) to which they may be subject:- see *Corp Act s 916A(3)(b)*

(xi) the licensee must formally notify ASIC of any representative's appointment, and the revocation or alteration of their appointment:- *see eg Corp Act s 916F*

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21 The term "financial services laws" is defined. It includes the Corp Act provisions relating to (i) "fundraising" (ie., Chapter 6D – ss 700 to 742) and, (ii) "financial services and markets (ie., Chapter 7 ss 761A to 1101J).

(xii) the licensee must ensure that its representatives are competent, and adequately trained, to provide their authorised financial services:- *see Corp Act s 912A(1)(f), 921C*

(xiii) the licensee must take reasonable steps to ensure that its representatives comply with financial services laws:- *see Corp Act ss 912A(1)(ca), 961L*

(j) the (qualified) restriction on the use of certain terms (eg. claims of independence, impartiality or lack of bias) in relation to a financial services business:- *see Corp Act ss 923A & 923B*

(k) the general joint and several liability of licensees and representatives, and the potential joint and several liability of licensees for the conduct of their common "representatives":- *see Corp Act s 917A-917F*

(l) ASIC's obligation to maintain a publicly accessible register of AFS licensees, authorised representatives, and persons subject to banning and disqualification orders:- *see Corp Act s 922A & 922B.*

270. In relation to the actual delivery of financial services, a person who provides "personal" financial product advice is obliged to (i) act in the client's best interests (including making "reasonable enquiries" and conducting "reasonable investigations"), (ii) provide appropriate advice to the client, and, (iii) give priority to the client's interests, whenever they conflict with those of the advice provider:- *see Corp Act ss 961-961E, 961G & 961J.* In addition, Corp Act Part 7.10 (ss 1041A to 1041K) contains a range of prohibitions relating to financial products and financial services. Those of principal present relevance are

(a) the prohibition on "dishonest" conduct in relation to financial products or services:- *see Corp Act s 1041G*

(b) the prohibition on false or materially misleading information relating to financial products:- *see Corp Act ss 1041E, 1041F*

(c) the prohibition on conduct that is actually or potentially misleading in relation to financial products or services:- *see Corp Act s 1041H.*

271. Consistent with both the basic objectives of the statutory scheme, and its detailed prescriptions and prohibitions, the Corp Act provisions conditionally authorise ASIC to make a banning order in a wide range of circumstances. They relevantly include circumstances where

(a) the person has become insolvent, or has incurred a conviction for fraud:- *see Corp Act s 920A(1(bb)&(c)*,

(b) ASIC has reason to believe the person (or an officer of a corporate licensee) is not "fit and proper"[22] either to provide financial services or to control a financial services business entity:- *see Corp Act s 913BA(1)(b), (d), (e), 913BB, 920A(1)*(d)

(c) ASIC has reason to believe the person is not adequately trained and competent, or is likely to fail to comply with (or likely to be involved in a failure comply with) financial services laws:- *see Corp Act s 920A(1)(da), (f)&(h)*

(d) the person has failed to comply with a financial services law, or has been involved in another person's failure to comply:- *see Corp Act s 920A(1)(e)&(g)*

(e) ASIC has reason to believe in the likelihood of the person's future financial services law contravention, or involvement in another person's contravention:- see *Corp Act s 920A(1)(g)&(h)*.

272. A "banning order" order may be limited to particular capacities or circumstances, and qualified by limited permissions:- *see Corp Act s 920B(1)(a)&(b).* Subject to those possibilities, a ban order made under the pre 2020 Corp Act amendments was limited to prohibiting a person from providing financial services. However, amendments made in 2020 (after the review hearing) extend the permissible scope of a banning order to address (i) the control of a financial services business and, (ii) the performance of any functions involved in the conduct of a financial services business:- *see Corp Act s 920B(1)(c)-(e)*.

273. Whatever the precise parameters of a particular banning order, it precludes

(a) the grant of any inconsistent AFS licence:- *Corp Act s 920C(1)*

(b) an appointment, of an "authorised representative", under terms inconsistent with the banning order:-- *Corp Act s 916A(3)(b).*

274. The prohibition period involved in any banning order cannot exceed 5 years, if it has been made solely on the ground of the person's officer status within a financial services business corporation that went into liquidation and had an asset deficiency:- *see Corp Act s*

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[22] At the time of both ASIC's 16 February 2015 decision and the March 2019 review hearing, the corresponding criterion was the person's "good fame and character". The "fit and proper" criterion was introduced, with effect from 18 February 2020, by the Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020 (No 3 of 2020). The differently worded criterion, whilst complemented by other prescriptions about its application, has no material impact on the assessment of the review application.

920B(2)(a). In all other circumstances the ban period may be either permanent or time limited:- *see Corp Act s 920B(2)-(3)*. (Prior to the 2020 amendments, a permanent ban period was mandatory where ASIC had reason to believe the person was not "of good fame or character":- *see Corp Act s 920B(2)(b)*.) However, despite the expressed period or content of any banning order, ASIC has a statutory power of variation or cancellation, whose exercise is not subject to any time restriction for its exercise:- *see Corp Act s 920D*. In the case of orders made after February 2020, the discretion is subject to the threshold contingency of ASIC's satisfaction about the appropriateness of the variation or cancellation "because of a change in any circumstances" on which the banning order was made:- *see Corp Act s 920D(1)&(2)*. (The "change in … circumstances" limitation appears not to restrict the variation or cancellation of banning orders made before February 2020:- *see Corp Act s 1667.)*

275. In the present case, ASIC's 16 February 2015 banning order prohibited Mr O'Sullivan from providing (any) "financial services":- *see paragraph 4(a) above*. Its effect was to preclude him, until 2022, from (i) holding any "financial services" licence and, (ii) being granted "authorised representative" status by any AFS licensee:- *Corp Act s 920C & 1311(1)* (the offence provision) The order did not explicitly preclude Mr O'Sullivan from being a director or employee of such a licensee, but his status in either of those capacities might influence an adverse ASIC banning order decision. It would do so if ASIC considered his involvement provided reason to believe the licensee was likely to fail to comply with their general "financial services" obligations:- *see Corp Act ss 920A(1)(ba) & 912A*.

THE APPROPRIATE BANNING ORDER PERIOD

276. The permissive generality of the Corp Act ss 920A(1) & 920B(2) confers the widest possible discretion, consistent with the objectives of the statutory scheme and the particular circumstances, about the operative period, and the extent, of a banning order. Exercise of the banning order power is not limited to persons who held an AFS licence or authorised representative status, nor to those whose impugned conduct occurred in the course of activities for which an AFS licence is required:- *ASC v Kippe* (1996) 137 ALR 42320 ACSR 679; *Boucher v ASC* (1996 71 FCR 122; 20 ACSE 503.

277. In the present case, having ultimately made the concessions summarised earlier in these reasons (*see paragraphs 22 to 24 above*) Mr O'Sullivan did not dispute the potential

availability of a banning order, but contested its appropriate length. Part of that dispute involved his (previously noted) disagreement with ASIC's contentions that (i) in Prospectus No 13, PCL had inaccurately disavowed engagement in property development and, (ii) after May 2007, PCL had not disclosed the absence of its own valuations for the Burleigh Views property (particularly the absence of "as is" valuations).

278. ***Issue 2(c) – the "is not engaged in property development" statement***:- PCL's various Prospectus and Benchmark reports, in addressing Benchmark 1, had consistently stated that PCL "is not engaged in property development":- *see paragraphs 157 and 169 above*. This statement was literally, and in practical reality, correct. There is nothing to establish that PCL's business was ever anything other than that of a mortgage lender. Its business income was principally "net interest income" from its mortgage loans:- *see Schedule 1*. A necessarily incidental part of its business as a mortgage lender could involve taking possession of, and realising, the security properties of defaulting mortgagors. The happening of such an incidental contingency does not justify characterisation of PCL as "engaged in" property development.

279. An additional consideration is that the Benchmark Reports (and the Prospectus) have to be read as a whole, and understood from the perspective of their intended and likely readers, principally AETL and PCL's debenture holders. The context for the "not engaged in property development" statement was ASIC's guidance (in Reg 69.35) about the appropriate "equity ratio" for issuers of unlisted debentures:- *see paragraph 140(a) above*. The statement itself was part of PCL's explanation for adopting an 8% equity ratio as appropriate for its activities:- *see paragraph 169 above*. The statement was made in the context of disclosures that PCL did advance funds for property development, and indicated that the Burleigh Views loan (though not specifically named) was for construction purposes and accounted for more than 5% of PCL's loan portfolio. Those disclosures might have been regarded (earlier than the January 2012 Information Booklet:- *see paragraph 187 above*) as revealing that "more than a minor part" of PCL's activities were related to property development, and might have called into question the justification for PCL's assertion that its adopted 8% capital ratio benchmark conformed with the Reg 69 Guidance. However, ASIC neither addressed that question nor urged that it be answered adversely, so as to provide an additional reason for criticism of Mr O'Sullivan's conduct.

280. A further factual matter is the objective reality that although PCL took possession of the Burleigh Views property in 2008, it did not then hold a valid development approval for the property, and never undertook any actual development work.[23] It held the property, and took steps aimed at obtaining a new development approval, but that possession and (fruitless) endeavour, against the background of its essential business as a mortgage lender, and the specific disclosure that part of its business involved lending for property development purposes, does not justify characterisation of PCL as being "engaged in" property development.

281. Neither do PCL's impotent activities directed towards regularising the development approval status of the Burleigh Views property characterise the "is not engaged in property development" statement as misleading to the intended readers of its disclosure documents. Criticism of the "is not engaged in property development" involves a myopic focus on an assertion which, though in one respect of problematical accuracy, had a particular contextual significance and meaning, in relation to the Reg 69 benchmark guidance. The larger, and much more significant issue, which Mr O'Sullivan does not dispute, is that PCL did fail to disclose the factual matters that gave rise to real questions about (i) the realisable value of the Burleigh Views loan security, (ii) the prudence of PCL's accounting treatment of the property and, (iii) the prudence of its management of the property, in its capacity as mortgagee in possession. In relation to those aspects, Mr O'Sullivan's belated concessions are far more significant than the questionable (but, as I have held, the literal) accuracy of the statement that PCL "is not engaged in property development".

282. ***Issue 4(e) - the absence of PCL's own valuations***:- PCL's first specific disclosure of valuation information relating to the Burleigh Views loan was in the February 2008 Supplementary Prospectus. The contents of that disclosure, which were essentially repeated in the December 2008 Prospectus, have been set out earlier in these reasons:- *see paragraphs 79 & 147 above.* The principal significance of the disclosure was to suggest PCL's reliance on the $17.2m "as if complete" September 2007 Colliers valuation:- *see paragraphs 76 to 81 above*. That suggestion also implied that PCL had not in fact obtained any other valuation since the earlier December 2003 valuation. That implication provides some support for Mr O'Sullivan's resistance to ASIC's valuation non-disclosure criticism.

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[23] The scant evidence of minor costs incurred in the year to 30 June 2011 (*see paragraph 114 above*) does not relevantly contradict this proposition.

But his resistance was also somewhat meretricious. This was because there was no disclosure of the Colliers $13.5m "as is valuation". Nor was there an acknowledgement of the facts that PCL's apparent reliance on the Colliers valuation did not satisfy the May 2007 refinancing conditions, and did not accord with PCL's credit and procedure policies. A further significant non-disclosure was the fact that Colliers had, in November 2008, disavowed the valuation, as being no longer current:- *see paragraph 92 above*.

283. Furthermore, any inference of substantive valuation disclosure that could arguably have been drawn from the contents of the 2008 Prospectus documents loses its significance when regard is had to the subsequent disclosure statements in each of PCL's December 2009 and December 2020 Prospectus. Although those statements used the term "latest valuation" they in fact merely reported the $26.68m, "as if complete" figure from the Robertson "final report" of December 2009, and from his later (September 2010) letter and spreadsheet:- *see paragraphs 99 & 105 above.* Neither of those reports was either demonstrably a fully considered valuation, nor one that addressed the "as is" value of the Burleigh Views property. Those basic shortcomings in the available "valuation" information exacerbate the deficiencies in the Benchmark 8 disclosures:- *see paragraphs 153 & 160.* A consideration that compounds the inadequacy of the disclosures is provided by Mr O'Sullivan's ultimately conceded contemporaneous awareness of the general nature of the valuation deficiencies:- *see paragraph 22(e).* Evaluation of those combined considerations leads to the conclusion that there is neither merit nor significant relevance, in Mr O'Sullivan's opposition to this aspect of ASIC's non-disclosure contentions.

284. ***Considerations informing assessment of the ban period***:- ASIC's Regulatory Guide 98 proffers a discussion intended to provide insight into the appropriate approach to the exercise of the banning order power, particularly in the assessment whether an order should be made and, if so, the period to which it should relate. That approach, whilst not binding in any sense, provides some principled, and illustrative, guidance for the exercise of the banning power.

285. A good deal of the discussion in Reg 98 is devoted to the objectives of the "financial services regime" and to ASIC's responsibilities as the financial services regulator, together with its asserted commitment to promoting "investor and consumer confidence in the financial services industry":- *see Reg 98.6 to 98.9, 98.51*. Part of that commitment recognises the use of the banning power as a means of publicly demonstrating the unacceptable nature of

impugned conduct, and regards that kind of demonstration as having an important deterrent potential:- *Reg 98.10*.

286. In an exegetical complement to the permissive generality of the Corp Act s 920A(1) threshold criteria, Reg 98 (non-exhaustively) suggests (and I accept) that relevant considerations include the following:-

(a) the nature and seriousness of the impugned conduct (particularly its character as either aberrant or sustained) the quality of the impugned actor's state of mind (in the range between dishonest self interest and incompetent lack of care) and the consequences of the conduct

(b) the comparative utility of other available sanctions

(c) the desirability of affording protection to investors / consumers

(d) the capacity of the ban decision to promote confidence in informed decision making by investors and consumers

(e) the capacity of the ban decision to promote honesty and professionalism in, and to deter misconduct by, financial product and service providers

(f) the impugned actor's personal circumstances, including both their performance / compliance history, and the apprehended consequences of the contemplated ban order.

287. Some of these considerations are aspirational, and their comparative significance essentially a matter of impression rather than assessment amenable to empirical evaluation and demonstrably predictable projection. In particular, the capacity of a particular sanction to have either a specific protective effect, or one of either positive re-inforcement of appropriate standards, or general deterrence, must be regarded as one that depends on many variables and, as a matter of practical reality, largely unverifiable assumptions about the extent of informed public awareness, and proper understanding, of the underlying circumstances. Nevertheless, the desideratum of promoting the objectives of the statutory scheme, is the primary purpose of the banning order power. Inherent confidence in the capacity of appropriate sanctions to contribute to that promotion, leads to the view that deterrence of improper conduct can properly be regarded as a matter of fundamental importance, even in the absence of apprehensions about repeated or future misconduct by the particular person concerned:- *Australian Securities and Investments Commission v McCormack* [2017] FCA 672 at [47]; *Donald v ASIC* [2000] FCA 1142, *Re Hayes v ASIC*

[2006] AATA 1506 at [58]-[59] (2000) 104 FCR 126; *Musumeci v ASIC* [2009] AATA 524 at [78]; (2009) 109ALD 677.

288. Despite emphasising the (statutorily obliged) generality that each case must depend on its own particular circumstances, RG 98.62 proffers the view that an informative distinction can be made between three broad ban order periods. Those three ban period ranges are

(a) *less than three years*:- potentially appropriate to merely careless conduct that caused minimal loss, where the impugned actor has remedied the conduct and / or appropriately addressed the assessment of that conduct.

(b) *between three and ten years*:- potentially appropriate to conduct that was reckless (or highly careless), objectively misleading, sustained and likely to have had a significant adverse impact

(c) *greater than 10 years*:- potentially appropriate to conduct that was significantly inconsistent with financial services laws, particular where it was dishonest, or indicated either intentional disregard of financial services laws or "serious incompetence and irresponsibility".

289. In the present case ASIC contends that the seven year ban period is appropriate. It does so for essentially five reasons. They are (i) Mr O'Sullivan's personal status as PCL's chief executive officer and, more specifically, as the principal influencer of PCL's conduct in relation to the Burleigh views loan, (ii) ASIC's assessment of Mr O'Sullivan's impugned disclosure misconduct as intentional (though not dishonest) sustained, seriously misleading and consequently significantly improper, (iii) Mr O'Sullivan's personal / familial financial interest in PCL (*see the footnote to paragraph 1 above*), (iv) the significant losses to PCL's debenture holder investors and, (v) ASIC's dissatisfaction that Mr O'Sullivan's belatedly made concessions were really probative of genuine insight into the nature and extent of his misconduct (in relation to both disclosure and actual management of the Burleigh Views loan) and thus conduce to confidence in the propriety of his future behaviour in any financial service provider role. In the review proceedings, ASIC contended that its dissatisfaction was not only warranted, but provided additional bases for the exercise of the banning power:- see *Corp Act s 920A(1)(g)&(h)* (ie., reason to believe in the likelihood of future financial services laws contraventions).

290. ASIC had originally articulated its dissatisfaction with Mr O'Sullivan's insight into the seriousness of the criticisms of his conduct relating to the Burleigh Views loan, and the likelihood of his future compliance with financial services laws, in its December 2018 written submissions. The criticisms in those submissions drew heavily on aspects of the evidence Mr O'Sullivan had given in the course of the 2015 hearing, notwithstanding the concessions he had then made:- *see paragraph 22 above*. They therefore preceded his September 2019 affidavit, with the concessions summarised earlier in these reasons (*see paragraph 23 above*) and his oral evidence about them.

291. Those latter concessions were specifically aimed at the reporting and disclosure complaints ASIC had identified within "Issues 2, 3 & 4" in its December 2018 statement of issues, and acknowledged 26 of the 28 particularised matters. Nevertheless, ASIC adhered to its essential submission that Mr O'Sullivan displayed insufficient insight to justify confidence in his likely future financial services law compliance, or to warrant any lesser ban period. The substance of ASIC's submissions involved the following propositions:-

(a) The comparative recency of Mr O'Sullivan's concessions, despite his previous opposition to some of ASIC's disclosure criticisms

(b) Mr O'Sullivan's unjustified adherence to the accuracy of a statement that Burleigh Views loan interest had been "paid", as a result of the capitalisation of the loan principal

(c) The imprecision of the circumstances, and reasoning process, that had led to the ultimate concessions being made

(d) The explanations Mr O'Sullivan offered for his belated concessions gave the impression that they were less the product of his own realisation and judgment than acquiescence in advice he had received, in the course of the drawn out process involved in his challenge to ASIC's ban decision.

(e) More significant than the questionable significance of the acknowledgement of the material disclosure deficiencies, at various times in the course of his evidence Mr O'Sullivan had either defended, or appeared to have defended, his substantive management of the Burleigh Views loan, despite not having obtained appropriate valuations (ie., valuations that complied with PCL's CPP policies:- *see paragraph 66(f) above*) and not having made a careful and truly informed assessment of the realistic prospect of PCL recovering its loan debt.

292. The converse submission, advanced on Mr O'Sullivan's behalf, is that the ban period he has already served is an ample, and sufficient exercise of the ban order power. The submission articulated grounds relied on in opposing both the length of ASIC's ban period decision, and the disqualification decision. The grounds of principal relevance to the Ban decision were as follows:-

(a) Mr O'Sullivan was not the exclusive PCL decision maker in relation to its management of the Burleigh Views loan

(b) The disclosure documents containing the misleading statements were typically largely formulated by Mr Bersten and they were uniformly approved by the entirety of the PCL Board

(c) At least by the time of the later disclosure documents, all of the PCL Board members, knew the general circumstances of the Burleigh Views loan, its default status, the borrower's liquidation and the absence of a current development approval, yet no-one dissented from, or expressed concern about the adequacy and sufficiency of, PCL's disclosures

(d) Similarly, all of the impugned disclosure documents were known to PCL's auditors and solicitors, and never attracted any materially adverse criticism or comment

(e) Mr O'Sullivan made significant concessions in the course of the 2015 Tribunal proceedings, and his ultimate more comprehensive concessions, though belated, are the result of an educated introspection, reflect a significant alteration in his strongly held and expressed previous views, and are probative of a genuine insight that conduces to comfortable satisfaction in the likely propriety of his conduct in any future financial services role.

(f) The period of any Disqualification decision should favourably influence the decision on any Ban period, because essentially the same conduct enlivened both decisions, and should attract only one sanction

293. It will be apparent from Mr O'Sullivan's concessions, and the factual findings I have made, that ASIC's overall forensic characterisation of PCL and Mr O'Sullivan's disclosure misconduct (as significant and repeated) is amply justified. The inadequate disclosures about the true state of affairs of the Burleigh View loan, and PCL's sustained failure to disclose, candidly and fully, its real status as a loan significantly in default, and whose carrying value was not supported by any current valuation that was both soundly based and consistent with PCL's credit policies, were egregious departures from the standards of conduct demanded by the statutory scheme.

294. It will also be apparent from my factual findings, including my adoption of the factual agreements proffered by the parties) that Mr O'Sullivan was only one of those whose conduct made a causal contribution to PCL's disclosure shortcomings. That generality is certainly true in the case of the other PCL directors, whose material knowledge (at least by about the end of October 2010) was relevantly commensurate with that of Mr O'Sullivan, save perhaps in relation to awareness of the inherent deficiencies in the Robertson letter valuations:- *see paragraph 215 above. (*It is also appropriate to note that Mr Bersten, in particular, seems to have had a significant role in the drafting of PCL's various disclosure documents:- *see paragraph 199 above.)* That generality is also apt, though to a lesser extent, in the case of PCL's auditors. They were certainly aware of the actual default by Burleigh Views, the absence of the loan from PCL's arrears reporting, and the scant valuation support for the recoverability of the loan. They were probably not ware of the irregular development approval status of the Burleigh Views property:- *see paragraphs 249 to 254 above*.

295. Minds can reasonably differ about the significance that ought properly be attached to Mr O'Sullivan's role where, although he was the principal influencer of PCL's management and treatment of the Burleigh Views loan, he was not the only person responsible for the sustained financial services law contraventions involved in PCL's misleading and inadequate disclosures. However, for the reasons I expressed earlier, Mr O'Sullivan's role as PCL's principal influencer, his status as Managing Director, the egregious shortcomings in PCL's disclosures, and his role as the primary author / publisher of the various disclosure documents (notwithstanding Mr Bersten's role in their preparation), are the determinative considerations:- *see paragraphs 253 to 257 above*.[24] Those shortcomings should never have occurred. They were the product of a hopeful, but problematic and essentially defensive, optimism about the ultimate prospect of avoiding a material shortfall on the Burleigh Views loan:- *see paragraphs 258 & 259 above*. PCL's adherence to that optimism was driven by Mr O'Sullivan. It resulted in PCL internalising material information about the

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[24] The magnitude of PCL's ultimate asset deficiency is also a relevant consideration, even though the Burleigh Heads loan was only a part of PCL's overall deficiency, and the disclosure deficiencies were not the direct cause of that deficiency. On the other hand, I have not attached any significance to Mr O'Sullivan's personal / familial financial interest in PCL. Those interests likely contributed to Mr O'Sullivan's decision making authority within PCL, but they were also interrelated with PCL's overall repute and with the returns PCL provided to its debenture holders. Consistent with ASIC's disavowal of a dishonesty contention, none of the material I have reviewed warrants a conclusion that Mr O'Sullivan was at any stage motivated by his personal / familial interests, independently of his desire to secure PCL's financial future and have it discharge its obligations to its debenture holders.

loan itself, and about PCL's true financial circumstances. The repeated nature of the disclosure irregularities, to which Mr O'Sullivan's management decisions directly and indirectly contributed, and for which (as the individual signatory or publisher) he bore personal responsibility would, in my view justifiably lead to a ban period longer than that imposed by ASIC's 15 February 2015 decision. It would do so partly because of the appearances that (i) PCL obtained debenture funding of at least $63m as a result of the three Prospectus it issued after Burleigh Views August 2008 liquidation, (ii) the Burleigh Views accrued loan interest was a very significant part of PCL's reported "NPBT", especially in the 2009 to 2011 financial years and, (iii) in that same period, PCL Asset Management Pty Ltd apparently derived dividend income approximating $4m:- *see Schedule 1-3A*. It would also do so because of regard to the statutory objectives and the guidance proffered in RG 98:- *see paragraph 288 above*. Such a longer ban period would provide an appropriately unambiguous statement of intolerance of deliberate obscurity and misinformation in prospectus and other public disclosure documents, particularly where the misinformation had been associated with the appearance of financial benefit.

296. The prospect of a longer ban period was not something for which ASIC contended, and it was not addressed in the review proceedings. Accordingly, my view of the potential availability of a longer Ban period is presently relevant only as an indicator of the seriousness of the PCL's disclosure deficiencies, and of Mr O'Sullivan's direct personal responsibility for them.

297. In the light of my view of the seriousness of PCL's misconduct, and Mr O'Sullivan's personal responsibility for it, I do not consider that his belated concessions provide a sufficient reason either to withhold exercise of the banning power or to reduce the appropriate ban period. ASIC urged that view because Mr O'Sullivan had defended his original resistance to ASIC's criticisms until shortly before the present hearing:- *see paragraph 291 above*. Nevertheless,a his ultimate concessions were considerable. They extended to explicit recognitions (in his oral evidence) that the inadequate disclosures were potentially misleading to debenture investors, and that he had failed to act with reasonable care and diligence, in relation to the Burleigh Views loan (and specifically in relying on valuations that assumed the existence of a valid development approval).

298. Whilst the lateness of the concessions does warrant care in evaluating their real significance, my assessment is that ASIC's criticisms of them were overstated. Mr

O'Sullivan's affidavit statement that the Burleigh views loan interest had been "paid" from loan funds was a pointless qualification that attracted attention for its infelicity of expression. But ASIC's criticism, based on that infelicity, took Mr O'Sullivan's statement out of its context, which was that of a candid (though unavoidable) and repeated admission that Burleigh Views had not paid interest and was in default. Similarly, ASIC's criticism that Mr O'Sullivan had not offered a clear explanation for the change of mind that led to his ultimate concessions, whilst a tenable point of view, sought an unachievable precision, whose absence does not detract from a favourable assessment of the significance of Mr O'Sullivan's concessions. As I understood Mr O'Sullivan's evidence, two primary matters were the essential influences on the concessions he made. The first was a changed realisation that the critical point to address was the objective inadequacy of the disclosures, rather than his contemporaneous subjective appreciation of that inadequacy when each of the disclosure documents had been published. The second was the full appreciation, after examining the Tribunal's reasons for decision in the Sweeney and Seymour matters (*see paragraph 9 above*) of not only just how simple it would have been, but also that it was his responsibility, to have made full disclosure of the true state of affairs in relation to the Burleigh View loan. Whilst those elements of Mr O'Sullivan's evidence do not provide a compelling explanation for the timing of his ultimate concessions, I do not regard that deficiency as a sufficient reason to question the reality of his overall concessions, or to detract from a conclusion that Mr O'Sullivan does now fully appreciate that the disclosure required extends to any matters potentially material to an investor, and that, in any situations where the appropriate disclosure extent was doubtful, he would likely seek, and follow, expert advice.

299. The facts that Mr O'Sullivan ever thought PCL's disclosures were adequate, and indeed stoutly defended them in his March 2012 response to AETL (*see paragraphs 125 & 126 above*) are concerning. So too is the fact that he attributes his ultimate acceptance of their inadequacy to an understanding that developed during an "incredible learning curve" over a long period of time. The realities are that the disclosure requirements, particularly those relating to the loan arrears criteria in Benchmark 5, were completely unambiguous, and Mr O'Sullivan's March 2012 "explanation" to AETL was disingenuous:- *see paragraphs 140(c) & 140(d) and also paragraphs 126 & 193 above*. But I derive from Mr O'Sullivan's evidence the impression that his past adherence to his management of the Burleigh Views loan as an "exception" to PCL's ordinary policies, and the sufficiency of PCL's disclosures, was related to, and indeed justified by, his self perception that he had a "good grip" on the

Burleigh Views loan situation. That led to his subjective confidence in obtaining a development approval (*see paragraph 102 above*) and completing the development. The background to that confidence seems most likely to have been his view that pursuit of the ultimate completion of the development offered PCL the best chance of maximising the amount of the loan debt it would ultimately recover. (That was certainly the view of all of the PCL directors by October 2010 – *see paragraph 215(f) above* – and it is consistent with the "next best option" view that Mr O'Sullivan formed after the fruitless discussions bout the sale of the property:- *see paragraph 259 above*.

300. ASIC submitted that Mr O'Sullivan's willingness to have acted on that subjective optimism, despite the obvious valuation deficiencies, called into question his latterly professed managerial insight, and provided an additional reason to adhere to the seven year ban period. I take a different view, and regard as relevantly exceptional, the circumstances of the Burleigh Views loan, including the respects in which Mr O'Sullivan acknowledged a lack of reasonable care and diligence in relation to the management of the loan:- *see paragraph 297 above*. When the particular circumstances and difficulties of the loan (from late 2007 onwards) are taken into account, and evaluated with the concessions Mr O'Sullivan made, as well as the significantly adverse outcome that led not only to PCL's liquidation and asset deficiency, but also to the significant criticism of all of PCL's directors, I do not think that there is any persuasive objective reason to apprehend the likelihood of future financial services law contraventions by Mr O'Sullivan.

301. Nevertheless, the facts remain that the disclosure failures were significant, sustained, objectively indefensible and directly attributable to Mr O'Sullivan's decisions about the management of the loan. Consequently, having regard to the criteria suggested in Reg 98 (*see paragraph 286 above*), a banning order is appropriate. It is appropriate as a way of seeking to dispel any similar thought (about the acceptability of withholding material information and making tendentious partial disclosures) being entertained by either Mr O'Sullivan or other financial service providers. Furthermore, the length of the banning order should reflect the objective seriousness of the repeated disclosure deficiencies. It should also reflect Mr O'Sullivan's primary responsibility for those deficiencies, as the PCL director who was in fact the primary manager of the Burleigh Views loan, and the person who primarily influenced PCL's decisions not only about the management of the loan, but also the disclosures related to it.

302. For these reasons[25], the seven year ban period is the preferable sanction decision. Accordingly, the 16 February 2015 decision to that effect is affirmed.

THE 2004 CITY PACIFIC DRAWDOWN ON THE BURLEIGH VIEWS LOAN

303. The circumstances of a June 2004 drawdown of $900,000 against PCL's loan to Burleigh Views, and PCL's discharge of securities it held for City Pacific Developments Pty Ltd's ("City Pacific's") debt, formed part of the basis for ASIC's disqualification decision. The view taken in that decision was that the arrangement had no commercial value to PCL, solely benefitted City Pacific, and involved Mr O'Sullivan misusing his position as a director of PCL:- *see paragraph 32 above*. In the review proceedings, ASIC further contended that, in relation to City Pacific, Mr O'Sullivan had failed to act with due care and diligence as a director of PCL.

304. City Pacific had been incorporated (as Provident Holdings Pty Ltd) in June 1996. It underwent its name change in November 1997, was the subject of a creditors winding up in April 2005, and was de-registered in August 2006. Between June 1998 and March 2000 Mr O'Sullivan had been a 50% shareholder in City Pacific with Mr Sukic. Thereafter Mr Sukic was City Pacific's sole shareholder. The following table sets out the company's directorship history:-

Name	Director status	Start	End
Sukic, RS	co - with MOS	28-Jun-96	30-Jan-97
Panter, RM	co - with MOS	30-Jan-97	13-Jul-99
O'Sullivan, MR	co - with RSS / RMP	28-Jun-96	13-Jul-99
Sukic, RS	co - with MOS / sole	19-Feb-98	24-Aug-00
Panter, RM	sole	24-Aug-00	20-Aug-06

305. The following chronology is relevant to a proper understanding of the circumstances involved in the $900,000 City Pacific drawdown.

306. ***1998 to 2001***:- In February 1998 had advanced funds to City Pacific on the security of a property known as the "Gold Coast Financial Centre" at Bundall in Queensland. City Pacific's repayment obligations under the loan agreement were guaranteed by Beachlink

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[25] I address Mr O'Sullivan's "duplicated sanction" submission (*see paragraph 292(f) above*) later in these reasons, when dealing with the disqualification decision:- *see paragraphs 460, 471 & 472 below*.

Properties Pty Ltd. It seems that in September 2001 the $4.07m loan balance had been refinanced or renewed by PCL. At that time City Pacific appears to have paid six months interest in advance, but it paid no further interest until early 2004.

307. ***February 2004***:- PCL recorded City Pacific as having made a $180,630 payment on 25 February 2004. That amount approximated 5% of the $3.6m sale price of the Bundall property:- *see paragraphs 312 to 314 below*.

308. ***2 - 12 March 2004***:- PCL wrote to the Burleigh views directors offering (in effect) to refinance the existing loan (as well as an additional borrowing Burleigh Views had obtained from Coastline Project Pty Ltd over the security of another property at Southport in Queensland). (It seems likely that there were several versions of this letter. One version, nominally dated 12 March 2004 in fact bears facsimile header dates of 2 and 8 March 2004. In addition, the final page of the 12 March 2004 letter contains Mr P Zarro's 8 March 2004 handwritten acknowledgement and acceptance, on behalf on Burleigh Views. Finally, the agreed changes in the subsequent 24 April 2004 Deed of Variation stipulated that the relevant loan offer letter was dated 9 March 2004.)

309. Whatever its actual date, the 12 March 2004 offer letter required the refinanced Burleigh Views loan to be repaid by 30 November 2004. A special condition of the offer was that the loan to Burleigh Views was to be cross collateralised with the loan to City Pacific in relation to the Bundall property. That property was to be placed on the market within 45 days of settlement of the refinanced Burleigh Views loan. There was permission for early repayment, and in that event, the repayment was to be applied firstly in discharge of the loan itself, and secondly in discharge of PCL's loan to City Pacific over the Bundall property. PCL indicated that it would accept $4.5 million to discharge the City Pacific loan.

310. ***1 April 2004***:- By this time City Pacific's debt to PCL approximated an amount slightly in excess of $4.624m and included $0.555m of unpaid interest.

311. ***8 April 2004***:- In circumstances not apparent from the available material, solicitors acting for Mr Sukic contacted Mr P Zarro (the then sole Burleigh Views director and one of two co-guarantors of the Burleigh Views loan). According to the handwritten note of the telephone conversation, the solicitors offered Mr Zarro a "deal" relating to a $900,000 "shortfall" on the sale of City Pacific's Bundall Road property. The deal involved (i) Mr Zarro agreeing to fund

the shortfall from the Burleigh Views sale proceeds, (ii) Rapview Pty Ltd agreeing to purchase one of the Burleigh Views units (at a $100,000 discount from its list price) and, (iii) Mr Zarro agreeing to make an additional $75,000 payment to Rapview. (It may reasonably be inferred from these details that Mr Zarro and / or Burleigh Views had some existing indebtedness to Rapview.)

312. ***16 April 2004***:- On 16 April 2004 Mr O'Sullivan wrote to Mr Sukic and to Mr Zarro. This letter was obviously the result of earlier discussions and confirmed an "agreement in principal" to release City Pacific from its debt to PCL, in exchange for a $4.5m payment. That offer was conditional upon Burleigh Views (i) providing $900,000 to assist Mr Sukic in the $3.6m purchase of the Bundall property, (ii) paying $75,000 to a company controlled by Mr Sukic, and (iii) allowing that company to purchase one of the units in Stage 1 of the Burleigh Views development at a $100,000 price discount. Mr O'Sullivan's letter requested confirmation that this proposal was "generally the agreement", so that it could be properly documented.

313. ***22 April 2004***:- Mr Sukic's solicitors sent him a letter enclosing draft copies of (i) a deed of agreement between City Pacific and Burleigh Views and, (ii) an acknowledgement by Mr Zarro and Burleigh Views of their existing $150,000 debt to Rapview Pty Ltd. (Mr Sukic sent copies of these documents to Mr O'Sullivan later the same day.)

314. The draft deed of agreement recited that PCL had advanced $4.5 million to City Pacific over the security of the Bundall Road property, that CPD had sold the property for $3.6m, and that Burleigh Views and Mr Zarro had agreed to provide $900,000 to City Pacific to enable the release of PCL's mortgage security, so as to facilitate completion of the sale. There were specific provisions of the agreement that (i) the sale of the property was to be completed by no later than 20 June 2004 and (ii) City Pacific was to pay the 5% contract deposit amount to PCL in reduction of its existing indebtedness. Clause 2 of the draft document contained Burleigh Views specific authorisation for PCL to pay $900,000 to City Pacific from an advance to be made by PCL to Burleigh Views.

315. ***24 April 2004***:- On 24 April 2004 PCL entered into a number of Deeds. One was a variation of PCL's 1998 loan agreement with City Pacific. (It required City Pacific to put the Bundall property on the market if it had not been sold by 30 June 2004, and fully repay the loan by 24 April 2005.) A second Deed was a new guarantee for the Burleigh Views loan. The

guarantors were Mr P Zarro (who was one of the existing guarantors) and City Pacific (apparently in substitution for Mr Anthony Zarro). (Mr Anthony Zarro had been one of the two previous guarantors, but was no longer a director of Burleigh Views). Another Deed effected the third variation of PCL's Burleigh Views loan agreement. It described City Pacific as a guarantor of the Burleigh Views loan, and included it (in that capacity) as a new party to the varied loan agreement. (I summarised the effect of the variation Deed earlier in these reasons:- *see paragraph 68 above*.) Relevant to the present context, although the loan principal and draw down components did not specifically include the $900,000 advance to City Pacific, the variations to the loan agreement made lengthy additions stipulating the conditions under which the loan was provided and any construction cost draw downs would be available. They included the provision of a detailed feasibility, construction program and satisfactory cash flow program. All progress claims were to be supported by detailed breakdowns of the work done, and funds would only be made available following independent authorisation of the completed works (by a quantity surveyor or valuer appointed by PCL). Finally a new clause 17 specifically provided that the cost to complete the development would at all times be retained in the undrawn balance of the loan facility.

316. ***27 April 2004*** - The solicitors acting for City Pacific and Beachlink Pty Ltd wrote to PCL's solicitors providing copies of some 13 documents (mostly comprising various deeds and acknowledgements relating to the variation of the Burleigh views loan). The letter asserted a representation from PCL that all City Pacific's obligations under the security documents would be discharged following the $3.6m sale of the Bundall properties, and an additional payment of $900,000 "being from part of the proceeds of a loan from PCL to Burleigh Views".

317. One of the attachments was an acknowledgement by City Pacific, and Mr Zarro, endorsed with certificates of advice by (apparently) two different solicitors. The acknowledgements indicated that each of the guarantors been advised about the content of the guarantee and fully understood its purport. However, a handwritten addition, which was expressed to relate only to City Pacific, was in the following terms

> *"City Pacific developments Pty Ltd is executing this guarantee on the clear understanding and representation the lender that it will expire and be of no effect on CPD discharging its loan to the lender in the sum of $3.5 million in relation to lots 6, 7, 8 & 9 on SP 11756 (43.6M on the sale of the lots and $900,000 from the lender's advance to Burleigh views Pty Ltd)."*

318. One of the documents that formed part of the 24 April 2004 arrangement was a mortgage granted by City Pacific in favour of PCL over the Bundall Street property. A notation in the mortgage stated that the consideration for the mortgage was PCL's agreement to advance funds to Burleigh Views Pty Ltd at City Pacific's request.

319. ***7 June 2004***:- City Pacific granted PCL a charge over all its property to secure all its indebtedness to PCL.

320. ***24 June 2004***:- PCL released its mortgages (there was apparently a second mortgage) and the charge. The statements of mortgage release indicated that the amount then secured by PCL was $3.6 m.

321. ***30 June 2004***:- By 30 June 2004 City Pacific's debt to PCL totalled $4.562m, and included $0.467m in unpaid interest. On 30 June 2004, City Pacific paid PCL $4.331m. The settlement letter from PCL solicitors to City Pacific's lawyers indicated that the actual amount of City Pacific's principal debt to PCL was $4.5 million. That debt had been discharged partly by the 180,000 deposit that had been paid on 28 April, partly by the $900,000 advance to Burleigh Views, and partly by bank cheque from the proceeds of sale. There was a corresponding confirmation letter from PCL to PCL solicitors.

322. PCL then forewent payment of the balance of the City Pacific debt, and released its security over the Bundall property. The $4.331m payment was partly funded by the $900,000 drawdown on the Burleigh Views loan. No such payment was provided for in the 24 April 2004 variation of the Burleigh Views loan agreement. Indeed, the only drawdowns expressly contemplated by the varied agreement were for construction costs, duties, professional fees and marketing costs relating to the development.

323. The circumstances in which, and the reasons why, Burleigh Views agreed to this $900,000 drawdown against its loan from PCL, and the terms of the arrangement under which it provided that money to City Pacific (in circumstances where that company would seem to have been unlikely to be able to pay its debts) were not readily apparent. However, it is clear that Mr P Zarro was aware of, and agreed to, the proposal. On the same day as he signed both the loan variation and the guarantee Deeds, he also signed an acknowledgement of debt in which, on Burleigh Views behalf he undertook to make a partial repayment to Rapview, and indicated that the payment was intended to secure the

withdrawal of Rapview's caveat over a property that was to be offered to PCL as (apparently) additional security. The inescapable conclusion from these various documents is that Mr Zarro, the then principal director of Burleigh Views was fully aware of the proposed $900,000 additional advance from PCL and its provision to City Pacific to discharge part of its existing indebtedness to PCL.

324. The overall practical effect of the City Pacific transaction therefore seems to have been that, faced with the reality of a sale contract for substantially less than the amount of City Pacific's secured debt, PCL agreed to a proposal under which Burleigh Views agreed to accept a corresponding obligation and to acknowledge (at least implicitly) that it would be secured by its existing mortgage to PCL over the Burleigh Views property.

325. The available material does not readily explain the arrangements and relationships between Burleigh Views, City Pacific, Mr Zarro and M Sukic or their motivations for entering into the arrangements evidenced in the documents. However, their motivations are beside the point in assessing the complaints about Mr O'Sullivan's conduct. ASIC's initial criticism, that the arrangement involving the $900,000 advance was of no commercial benefit to PCL, and served only to benefit City Pacific, is untenable. The reality is that PCL was faced with a $4.5m loan to City Pacific that had been non-performing, for a considerable period. It was the subject of a $3.6m contract for sale. That amount was substantially less than City Pacific's outstanding debt to PCL.

326. One aspect of ASIC's complaint was that there was no evidence of City Pacific's inability to discharge its liability to PCL. But this complaint reverses the evidentiary onus involved in making out a complaint of impropriety about Mr O'Sullivan's conduct. Moreover, the suggestion, implicit in the complaint, that there was a basis for inferring City Pacific had sufficient means to discharge the debt, is improbable. It is improbable because of (i) the history of the debt, (ii) the $3.6m contract for sale, (iii) the arrangements that were in fact made with Burleigh Views and, (iv) City Pacific's ultimate fate.

327. No less insubstantial was ASIC's complaint that Mr O'Sullivan failed to act with due care and diligence as a director of PCL. This complaint seems to have involved two criticisms. The first was that City Pacific's guarantee was inadequate, because it was not intended to survive the sale of the Bundall Street property. The second criticism was that the $900,000 loan drawdown disadvantaged Burleigh Views, because it was not provided for in the loan

drawdown schedule in the April 2004 loan agreement, and could result in Burleigh Views being deprived of funds to complete the development.

328. The first criticism must necessarily be based on the propositions that (i) there was a prospect City Pacific had some commercial substance, other than the Bundall properties, and, (ii) that the underlying commercial intention of its participation in the guarantee arrangement with PCL was that it should be a continuing guarantor. The first proposition is unlikely. The second proposition is inconsistent with the flavour of the documents executed in April 2004. The overwhelming inference to be drawn from those documents is that City Pacific's guarantee liability for the Burleigh View loan was only intended to operate in the period between April 2004, and the required June 2004 completion of the sale of the Bundall property.

329. The second criticism, has some greater degree of plausibility, to the extent that the $900,000 draw down was not explicitly provided for in the schedule to the April 2004 variation of the Burleigh Views loan agreement. But it is tolerably clear that the drawdown had been conceived from the outset as a component of the loan variation. It is also clear that PCL had received the December 2003 PRP valuation of the Burleigh Views property:- *see paragraph 68 above*. In the light of that valuation, the approved loan limit of $8.89m reflected a 51% LVR. Even with the $900,000 advance (assuming that it could properly be treated as additional to the $8.89m loan limit), a loan balance of $9.79m would still only have involved a 57% LVR. Furthermore, under the terms of the 2004 variation agreement PCL was not required to advance any of the construction draw down funds to Burleigh Views, unless it was satisfied, on the basis of independent expert assessment, that the funds being provided were within the agreed "costs to complete" scenario, and within the agreed LVR limit.

330. When the totality of the apparent circumstances of the City Pacific draw down are objectively and reasonably evaluated, they provide no basis for ASIC's complaint about Mr O'Sullivan's conduct.

CASHFLOW FINANCE SOLUTIONS PTY LTD - BUSINESS AND BOARD

331. Messrs O'Sullivan, Bersten and Seymour had been directors of Cashflow since its April 2005 incorporation. After July 2010 they were its only directors. Provident Asset Management Pty Ltd, PCL's holding company and the trustee of trusts benefitting Mr

O'Sullivan's family, held 51% of Cashflow's issued shares. Corporate entities associated with Mr Bersten and Mr Seymour each held separate 24.5% shareholdings in Cashflow.

332. Cashflow funded its inventory finance activities under:-

(a) ***Agreements with PCL***:- specifically (i) a 21 September 2005, $5m facility agreement, (ii) after 8 October 2007, a $3.6m secured (second ranking) loan under a Deed of Loan and Guarantee, that was renewed annually in the following years and, (iii) a 31 March 2012 promissory note agreement.

(b) ***Agreements with factors***:- specifically (i) a $25m, 30 June 2006 Receivables Acquisition and Servicing Agreement ("RASA") with Ancora Securitisation (SF) Asset Pty Ltd and secured by a first ranking charge, (ii) RASA amendments in June and November 2008 and, (iii) a 25 February 2009 novation of that agreement (to BBSFF Securitisation Ltd). Under the RASA terms, Cashflow provided a general indemnity against related losses. That indemnity was itself supported by a 30 June 2006 deed of guarantee and indemnity between the factor company, PCL, Mr O'Sullivan and a Mr Nolan. (Until July 2009 Mr Nolan had been Cashflow's managing director.) Mr O'Sullivan and Mr Nolan were guarantors "in their personal capacity". The guarantees were joint and several, and expressed to continue despite the discharge of any co-guarantor. The guarantee liability (i) primarily applied to Cashflow's obligation to repay Ancora for receivables in relation to which Coface had not paid a policy claim and, (ii) was limited to 10% of the RASA's "aggregate available commitment".

333. PCL had obtained AETL's approval of the 21 September 2005 agreement on the basis that Cashflow held insurance covering 90% of its inventory finance receivables. On 6 November 2007 Cashflow entered into such a policy of insurance, with Coface Services (Australia) Pty Ltd.

334. In the years after June 2006, the RASA "aggregate available commitment" was periodically reduced. The first reduction was to $17m, in the June 2008 amendment. The second reduction, to $9m, was part of a series of graduated reductions, provided for in the November 2008 amendments. That $9m limit was expressed to apply from 7 November 2008 until 14 December 2009. Thereafter the limit was to reduce to $7m, until 14 June 2010. From 15 June 2010 the limit was to reduce to $0m. The effect of these agreed

reductions was reflected in the potential guarantee liability disclosures in PCL's Benchmark Reports in October 2009, April 2010. (The October 2010 Benchmark Report recorded the release of the guarantee:- *see paragraph 335(l) below*.)

CASHFLOW - OVERVIEW OF MATERIAL EVENTS

335. Additional material dates and events relating to Cashflow, until early September 2010 were as follows:-

(a) ***2008***:- Cashflow's peak trading activity was in the 2008 financial year. It had provided finance totalling about $19m, and had about 34 full time staff. But in the latter part of 2008 Coface refused to renew Cashflow's policy of insurance, and also refused to pay policy claims. Following that refusal Cashflow ceased its financing activities and terminated the employment of its sales staff.

(b) ***February 2009***:- The RASA was novated – to substitute BBSFF Securitisation Ltd as the financier:- *see paragraph 332(b) above*. The 30 June 2006 deed of guarantee was assigned to BBSFF (as to Mr O'Sullivan's contrary submission - *see paragraphs 388 & 389 below*.)

(c) ***July to November 2009***:- Mr Nolan resigned as Cashflow's managing director, and wrote to Ancora attempting to end his future liability under the guarantee. Cashflow commenced Federal Court proceedings against Coface in relation to the rejected policy claims. (Subsequently, Cashflow's subjective assessment of the value of the claim was progressively reduced, from a $30m-$50m range, to between $1.75m and $2.3m.)

(d) ***23 February to 23 April 2010***:- As a result of Coface's claim refusals, and its December 2009 policy cancellation, BBSFF wrote to Cashflow (i) "redesignating" rejected claims (totalling $1.118m) as "ineligible receivables" under the RASA and, (ii) specifically asserting the February 2009 assignment of the June 2006 guarantee, requested payment of $700,000 (ie., the liability limit for such "redesignated" claims) within 60 days. BBSFF also foreshadowed calling on the guarantee. The letter prompted discussion between Mr Bersten and Mr O'Sullivan. On 2 March 2010 Mr Bersten emailed Mr O'Sullivan a draft memo for the Cashflow board. In the memo he referred to BBSFF's 23 February 2010 letter, noted the $700,000 payment request and opined that it was a precursor to subsequent demands on the

guarantors. He surmised that BBSFF had determined to act "to avoid losing the benefit of the guarantees" when the "aggregate available commitment" reduced to nil on 15 June 2010. He also noted that BBSFF's recently published accounts had written off the value of the RASA receivables, apart from the $700,000 request and potential guarantee liability.

(e) On 3 March 2010 Mr Bersten sent Mr O'Sullivan a second email, apparently after the discussion he had suggested in his previous email. The memorandum accompanying this second email set out Mr Bersten's view (influenced by a recent Federal Court decision) that the assignment of RASA debts was ineffective. Mr Bersten opined that the receivables BBSFF had purportedly "redesignated" in its 23 February 2010 letter, were not "eligible" receivables under the RASA terms. He concluded his memorandum with the observation that "if my analysis is correct" any liability relating to the "re-designated" receivables fell outside the scope of the 30 June 2006 deed of guarantee.

(f) ***23 April 2010***:- Cashflow (specifically Mr O'Sullivan and Mr Bersten) received legal advice about the enforceability of BBSFF's $700,000 February 2010 payment request under the novated receivables agreement. The thrust of the advice from counsel was to the following effect:- (i) without expressing any final opinion, it was "well arguable" that the debt assignments contemplated by the RASA novation were ineffective, (ii) consequently the receivables that were the subject of BBSFF's 23 February 2010 letter were not "eligible receivables" and were not amenable to the "redesignation" BBSFF had asserted, (iii) although the guarantee liability primarily related only to "eligible" receivables, the guarantee wording was capable of extending to Cashflow's restitutionary liability for amounts BBSFF had advanced for receivables that were not "eligible" under the June 2006 RASA terms. In response to a specific question whether that characterisation would result in there being no liability under the guarantee, counsel answered "no", and adverted to the potential for a restitutionary claim. They did not however, express any view about the extent of the guarantee liability that might arise on this alternative basis.

(g) Apprised of this advice, Cashflow's solicitor (mistakenly) apprehended that the restitutionary guarantee liability could be so great that the existing $700,000 demand "would look like a bargain". In his covering email to Mr O'Sullivan, he suggested that one of the entities related to PCL should attempt to purchase the contentious

debt from BBSFF (for $700,000 or less), before BBSFF became apprised of the argument about the inefficacy of the debt assignments, and the potential restitutionary liability.

(h) ***28 to 30 April 2010***:- Mr O'Sullivan, as the Chairman of Cashflow, wrote to BBSFF on 28 April 2010. He highlighted the uncertainty of any recovery from the Coface policy litigation and bluntly asserted that the June 2006 guarantee was worthless. Perhaps taking up the suggestion that had been made by Cashflow's solicitor, Mr O'Sullivan proposed that PCL would purchase BBSFF's interest in the receivables agreement, as a means of providing BBSFF with the "certainty of a recovery". On 29 April 2010 BBSFF responded with a formal demand, under the assigned 30 June 2006 guarantee, for a $700,000 payment by the three guarantors (PCL, O'Sullivan and Nolan) in relation to the redesignated loans that had been referred to in the 23 February 2010 letter. Mr O'Sullivan's 30 April 2010 riposte asserted (without explanation) that the guarantee demands (but not the guarantee itself) were defective. He nevertheless proposed a commercial resolution, along the lines of his 28 April 2010 letter.

(i) ***10 May 2010***:- After receipt of the 29 April 2010 guarantee demand Mr O'Sullivan received further legal advice about BBSFF's payment request. This advice acknowledged awareness of the demand, and described itself as a more detailed document that replaced the 23 April 2010 advice. The May 2010 advice (i) was significantly more diffident (and explicitly refrained from any final opinion) about the invalidity of the $700,000 the payment request relating to the "redesignated" receivables (ie., the "Secured Obligation" under clauses 1.1 and 8.2(b) of the June 2006 deed of guarantee), (ii) (in elaboration of the view briefly expressed in the April 2010 advice) considered that the guarantee (and corresponding indemnity) liability for any non-payment by Cashflow "under or in connection with any Secured Obligation" could extend to include Cashflow's "breach of warranty" or "restitutionary" liability in relation to "ineligible" loans and, (iii) noted the "overriding" provision in the guarantee that restricted any liability to the 10% limit, and thus to the $700,000 amount asserted in the 29 April 2010 demand.

(j) ***27 May to August 2010***:- Cashflow (typically through Mr O'Sullivan) and BBSFF exchanged letters debating BBSFF's entitlement to call on the guarantee, and a compromise involving PCL's purchase of BBSFF's interest in the outstanding loans.

Cashflow (in a letter apparently from Mr Bersten) initially proposed its acquisition of BBSFF's RASA interests, involving an assignment, a $650,000 payment to BBSFF, and mutual releases. Mr O'Sullivan followed that up with a detailed (1 June 2010) letter in which he (i) opined that there was a high risk of loss on uninsured loans, (ii) asserted that Cashflow would not have the means to pursue loan recoveries if BBSFF persisted with its payment demands and, (iii) offered a commercial novation / assignment arrangement under which PCL would take "the risk of non-recovery of the loan portfolio balances". BBSFF's response (in a 21 June 2010 letter) was that it would transfer the contentious receivables to PCL for $3m. (That amount was imprecisely explained to have been arrived at after taking into account (i) repaid loans totalling $1.75m (deposited to a "Sellers Account"), (ii) the $700,000 guarantee demand and, (iii) 50% of the principal of (unspecified) loans that would mature by 30 June 2010.) Mr O'Sullivan responded promptly, and renewed PCL's $650,000 offer. In his 22 June 2010 letter he explained the derivation of that amount[26] and repeated PCL's previous assertion that there was no guarantee liability. He asserted a willingness to discuss the guarantor's position with BBSFF's legal advisers, but asserted confidence that PCL's view reflected the "correct legal position". On 7 July 2010, Mr O'Sullivan wrote again to BBSFF urging acceptance of PCL's previous offer. He supported that urging with the following propositions:- (i) all the outstanding RASA funded loans were in default, (ii) there was unlikely to be any net benefit in pursuing recovery action against the borrowers, (iii) Coface's denial of policy liability meant that the insurance policy was of questionable benefit and, (iv) PCL's offer was the only way BBSFF could achieve the certainty of any RASA recovery.

(k) In a 16 July 2010 letter (apparently addressed to Mr O'Sullivan in his personal capacity as guarantor, BBSFF asked for an explanation of the basis for PCL's assertion that the guarantees were ineffective. Perhaps understandably (given the contents of PCL's formal legal advice) Mr O'Sullivan appears not to have responded to that request. On 19 July 2010 BBSFF, relying on non-payment of its $700,000 payment request, formally notified Cashflow of default under the RASA terms and the crystallisation of its floating charge security. BBSFF threatened the issue of a

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[26] The three components were (i) the actual "Sellers Account" balance (< $200,000), (ii) 50% of the loan repayments due by June 2010 ($450,000) and, (iii) the guarantee liability ($0) = $650,000.

statutory demand if Cashflow continued its payment default. Despite the absence of a response to either of BBSFF's July 2010 letters, in a short letter of 5 August 2010 Mr Bersten renewed PCL's 22 June 2010 $650,000 payment proposal, again conditional on mutual releases.

(l) ***3 September 2010***:- Cashflow's liability to PCL was in the order of $2.2m. PCL, Cashflow and BBSFF entered into a novation deed. The recited threefold purpose of the deed was (i) to substitute PCL for BBSFF under all of the RASA related agreements, (ii) to release BBSFF from all related obligations and, (iii) to similarly release PCL and Cashflow. Under the operative provisions of the novation deed PCL (i) became substituted for BBSFF as the "purchaser" under the 20 June RASA and acquired all of BBSFF's RASA interests, including a first ranking charge over Cashflow's assets, (ii) agreed with BBSFF to provide mutual releases in relation to RASA rights and obligations (other than rights it had transferred to PCL) and, (iii) paid BBSFF $775,000.00 "in consideration of the provisions in this Deed".

(m) The novation deed resulted in PCL (i) becoming Cashflow's RASA creditor (to the extent of approximately $4.2m), (ii) acquiring all of BBSFF's interests as the RASA creditor (and thus its interests under the 30 June 2006 guarantee) and (iii) being released from its own obligations as a limited guarantor of Cashflow's RASA liabilities. That extinction of PCL's guarantee obligation had no effect on the position of Messrs O'Sullivan and Nolan, because the 30 June 2006 guarantee provided for their independent continuing liability, irrespective of the discharge of any co-guarantor.

(n) The Deed of Novation's provisions contemplated the transfer of the guarantee rights, and the exclusion of the transferred rights from the mutual releases for which the Deed otherwise provided. Notwithstanding those provisions, on 3 September 2010 BBSFF, Mr O'Sullivan and Mr Nolan entered into deeds of release that were obviously complementary to, and part of the overall transaction relating to, the novation agreement. Each of the deeds of release noted BBSFF's $700,000 guarantee demand, provided for mutual releases (without acknowledging or requiring any other consideration), and declared that the releases would be effective on the date the novation deed was made.

336. The September 2010 novation transaction was apparently a matter of significance to PCL, given the size of PCL's funding to Cashflow, the latter's status as a related party, and the protracted negotiations with BBSFF. Nevertheless, neither the BBSFF guarantee demand, the negotiations preceding the novation, nor the actual decision to proceed with the novation agreement was the subject or any minuted discussion at any of the seven PCL board meetings between March and 22 September 2010. This was despite the following circumstances:-

(a) the Prospectus and Benchmark report disclosures of PCL's loan to Cashflow (from October 2008 through to October 2011), acknowledged that it gave rise to a potential conflict of interest "which may influence the action taken to enforce the transaction";

(b) at its 21 July 2010 meeting the PCL Board foreshadowed the preparation of a "Conflicts of Interests" policy by Mr Bersten, its circulation to the other PCL directors before, and its tabling at, the 18 August 2010 meeting;

(c) on 16 August 2010 Mr O'Sullivan submitted a formal declaration of interest, relating to transactions between PCL and PCL Holdings Pty Ltd,

(d) by 17 August 2010 Mr Bersten had prepared a "Conflicts of Interest Register", which recorded the 30 June 2006 Guarantee, and Mr O'Sullivan's status as a co-guarantor;

(e) at the 18 August 2010 Board meeting Mr Bersten tabled, and the Board noted, both the Conflicts of Interests" policy and the Conflicts of Interest Register. (The policy specifically noted the conflict risk involved in related party transactions.)

(f) Mr Bersten, as a result of a specific invitation, attended the PCL Audit Committee meeting on 1 September 2010 and provided Messrs Seymour and Sweeney with an "update" on matters relating to Cashflow.

337. Notwithstanding the absence of any minuted detailed discussion, the minutes of the PCL Board meeting on 22 September 2010 do record the fact that Mr O'Sullivan and Mr Bersten provided Messrs Seymour and Sweeney with "an update on recent developments … including litigation against Coface" in relation to the PCL loan to Cashflow.

338. Material events concerning Cashflow, in the period after September 2010 are summarised in the following sub-paragraphs:-

(a) ***October 2010***:- In its 22 October 2010 Benchmark Report PCL reported (i) (broadly consistent with disclosures in PCL's February 2008 supplementary Prospectus, and the intervening Benchmark Reports) the personal ownership of Cashflow by Messrs

Bersten, O'Sullivan and Seymour, (ii) PCL's outstanding $2.2m loan to Cashflow, (iii) accrued loan interest of $0.209m as at 30 June 2010 and, (iv) the potential conflict of interest apparent from the circumstances of the loan. The Benchmark Report again disclosed the fact that PCL had given a $700,000 guarantee. Without exegesis (and with perhaps questionable accuracy – *see paragraph 357 below*) it described PCL's guarantee as having been "released".

(b) ***21 November 2011***:- Cashflow's position paper in the mediation of its dispute with Coface, asserted that its compensable losses lay in a range from approximately $32.8m to $43.8m.

(c) ***13 February 2012***:- Mr O'Sullivan received a short letter of advice from the firm of solicitors acting for Cashflow in its Federal Court proceedings against Coface. The letter reported Senior Counsel's opinion that Cashflow had reasonable prospects of succeeding in the proceedings, and of recovering damages in a range between $4m & $5m.

(d) ***31 March 2012***:- The PCL Deed of Loan and Guarantee was replaced by three Cashflow promissory notes – for $2.62m, $0.31m and $0.775m, respectively. The promissory notes were payable on 1 December 2012. At that time approximately $4.2m was outstanding under the RASA funding arrangement.

(e) ***16 & 18 April 2012***:- Mr Bersten recommended to the PCL Board a $500,000 advance to Cashflow to pursue its proceedings against Coface. This amount was required to permit Cashflow to provide "security for costs" that had been ordered by the Federal Court, because of Cashflow's apparent impecuniosity. PCL approved the advance at the 18 March 2012 board meeting. With that additional advance (and apparently misunderstanding the precise nature and effect of the September 2010 novation), Mr Bersten assessed Cashflow's total indebtedness to PCL as approximating $3.24m.

(f) ***July 2012***:- Following the 3 July 2012 appointment of PCL's receivers (*see paragraph 54 above*) Cashflow's total indebtedness to PCL actually approximated $8.4m. PCL's Receivers then took action to take control of Cashflow's proceedings against Coface. On 19 July 2012 Mr O'Sullivan wrote to the PCL Receivers, providing background information about Cashflow's affairs, including details of the Coface litigation. The material parts of his comments were to the following effect:-

(i) PCL had a charge over any Cashflow recovery in the Coface proceedings, (ii) Cashflow was dependent on PCL's financial assistance in being able to pursue the Coface proceedings, (iii) the Receivers should endeavour to achieve a settlement of the Coface proceedings, (iv) Cashflow had already paid about $473,000 into court, as security for costs, (v) Cashflow would likely incur costs approximating $700,000 in conducting the case to judgment and, (vi) a proposal that, in consideration of obtaining the benefit of Cashflow's recovery from Coface, PCL would release Cashflow, and its directors, from all outstanding liability to PCL. The PCL Receivers responded on 20 July 2012, agreeing to continue to fund the litigation, with a view to negotiating a commercial settlement, but rejecting any proposal to provide any release to Cashflow or its directors.

(g) ***21 August 2012***:- In a letter to Mr O'Sullivan PCL's Receivers encouraged attempts to settle the Coface litigation, acquiesced in a proposed settlement offer of $1.25m, but indicated that they were not prepared to fund the costs of a contested hearing.

(h) ***27 August 2012***:- PCL's receivers were appointed receivers of Cashflow.

(i) ***18 December 2012***:- Cashflow's receivers settled the Federal Court litigation against Coface for a sum approximating $934,000 (presumably in addition to recovery of the money that had been paid into court as security for costs).

(j) ***28 May 2013***:- Cashflow was wound up. The liquidator's first report, dated 24 September 2013 opined that Cashflow had total creditors of between $5m and $10m, unsecured creditors of between $0.5m and $1m, and total realisable assets of less than $1m.

(k) ***7 March 2014***:- PCL's liquidator provided ASIC with a supplementary report. It noted that Cashflow's liquidators, in an earlier report of November 2013, had assessed Cashflow's total liabilities at $9.8m, including an approximate $8.85m debt to PCL. PCL's liquidators noted that

(i) PCL's loan to Cashflow was not consistent with PCL's 2008 (and subsequent) Credit Policy Manual, because it was a loan to a related party secured only by a second ranking charge;

(ii) as at September 2010 Cashflow had about $4.2m in loans that had been funded by BBSFF;

(iii) PCL's release of the O'Sullivan and Nolan guarantees was the result of negotiations that had been pursued by Mr O'Sullivan and Mr Bersten;

(iv) There was no evidence of any minuted PCL Board discussion or approval of the decision to provide the Cashflow loan, or the later decision to release the guarantees provided by Messrs O'Sullivan and Nolan;

(v) There was no evidence of PCL having obtained legal advice in relation to the release of the O'Sullivan and Nolan guarantees;

(vi) the guarantee releases, involved Mr O'Sullivan in an inherent conflict of interest.

(l) ***14 March 2014***:- Cashflow's liquidator provided ASIC with a supplementary report. The report opined that Cashflow had total creditors of $9.8m, unsecured creditors of $0.933m, and a $5.68m net asset deficiency. The unsecured creditors were (i) Coface ($559,541), and (ii) lawyers (barristers: $113,630 & solicitors: $147,805) Cashflow had retained in relation to the proceedings against Coface. The liquidator considered that Cashflow's failure was attributable to poor management of its loan portfolio and its inadequate cashflow (as a result of loan defaults by its borrowers and the Coface's refusal of indemnity). In partial elaboration of the loan management criticism, the liquidator opined that Cashflow had never been in a position to repay fully either its RASA funding or its liability to PCL. Consistent with those observations, the liquidator considered that Cashflow had been insolvent since about April 2010, as evidenced by its inability to comply with BBSFF's demand.

(m) Despite the contents of the liquidator's supplementary report, Mr O'Sullivan (i) disputed that Cashflow had any unsecured creditors at the time of its winding up, (ii) asserted that PCL was Cashflow's only creditor and, (iii) in so far as his 7 July 2010 letter (*see paragraph 335(j) above*) could be construed as tending to corroborate the liquidator's opinion about Cashflow's insolvency, sought to characterise it as a (non-probative) assertion he had made to advance PCL's interests in negotiation with BBSFF. (Mr O'Sullivan's opinion about the level of Cashflow's unsecured liabilities appears to be substantially corroborated by January 2015 information from the liquidators, that the only unsecured creditor's proof of debt was for an amount of approximately $27,000.)

MR O'SULLIVAN'S KNOWLEDGE AND CONDUCT RELATING TO THE GUARANTEE RELEASE

339. ASIC's 16 February 2015 reasons complained that PCL (principally through Mr O'Sullivan) had required the guarantee releases as a condition of its RASA purchase / novation, but had neither sought, nor obtained, any contribution from Mr O'Sullivan (or Mr Nolan) for the release. The reasons regarded the proposition that PCL had requested the release of the guarantees as having been effectively acknowledged by Mr O'Sullivan, as a result of an email submission in February 2015, which indicated (amongst other things) that BBSFF had "agreed to release the Guarantees".

340. ASIC's reasons rejected the contention, made in the February 2015 submissions, that Mr O'Sullivan had believed the guarantee was worthless, and that, in agreeing to the $775,000 payment for the novation and release transactions, BBSFF had accepted that proposition. It was ASIC's view that the $775,000 consideration tended to demonstrate that BBSFF in fact regarded the guarantee as enforceable. Consequently ASIC concluded that the guarantee was enforceable and had some value, despite Mr O'Sullivan's contrary assertion in his 28 April 2010 letter to BBSFF and in the contents of his 2 December 2014 statutory declaration.

341. In his 2 December 2014 declaration Mr O'Sullivan, acknowledged that the guarantee release was part of the overall "novation" transaction. However, he also
    (a) characterised the release as one by BBSFF, rather than PCL
    (b) asserted that the "novation" was extremely beneficial to PCL, because it had the practical effect of allowing PCL to control the Coface litigation (with a potential recovery of both PCL's loan and the $775,000 novation agreement price)
    (c) asserted that an additional benefit to PCL was that it acquired, in practical reality, a first ranking security over Cashflow
    (d) asserted that Mr Bersten had advised him that the guarantee was worthless
    (e) asserted that BBSFF had reduced the guarantee liability cap to $0m, after Coface's refusal to insure Cashflow
    (f) asserted that, as a matter of law, once PCL's guarantee was released (as a result of the "novation" arrangements) all the other guarantors had be to released
    (g) asserted that BBSFF had obtained independent advice about the guarantee, and had ultimately accepted PCL's position

(h) said that the formal guarantee release was certainly not the purpose of the "novation" transaction and was (merely) a matter of prudence "even though the guarantee was worthless".

342. It is tolerably clear that various aspects of what Mr O'Sullivan said in his December 2014 statutory declaration were incorrect and incomplete. The more material of those deficiencies were as follows:-

(a) The assertion that BBSFF had released the guarantees was literally correct but, in reality, disingenuous. It was disingenuous because (i) the course of the negotiations indicated that PCL had sought the release of the guarantees, (ii) the structure of the "novation" agreement, contemplated the transfer of the guarantee entitlement to PCL and, (iii) given that structure, the status of the guarantee was a matter of commercial indifference to BBSFF.

(b) It was inaccurate (given the terms of the November 2008 amendments – *see paragraph 334 above*) to say (in relation to the April 2020 demand) that BBSFF had reduced the guarantee amount to $0m

(c) Mr Bersten's initial (March 2010) advice about the likely unenforceability of the guarantee had been contradicted by the independent legal advice of April and May 2010, and Mr O'Sullivan was well aware of the receipt of that advice:- *see paragraphs 335(f) to 335(i) above*.

(d) The assertion that BBSFF had received independent advice, and accepted PCL's contention about the unenforceability of the guarantee, was just an argumentative surmise. Submissions provided to ASIC on Mr O'Sullivan's behalf in February 2015 disclosed that he had not seen any such advice, and had interpreted BBSFF's "acceptance" of the guarantee contention merely from their agreement to the novation transaction.

(e) Given the terms of both the novation agreement and the guarantee, there was no basis for asserting that the guarantee liability could not survive PCL's acquisition of the RASA debt, as a result of the novation agreement.

343. Mr O'Sullivan repeated his assertion about the worthless nature of the 30 June 2006 guarantee in his 27 April 2015 affidavit. In that affidavit he largely repeated the substance of what he had said in his December 2014 statutory declaration. He also said

(a) The assertion, in his 28 April 2010 letter, that the guarantee was defective and non-recoverable, was based on Mr Bersten's advice.

(b) He had regarded the "worthlessness" of the guarantees as one of the strongest points available to PCL, in its attempt to achieve a novation price "as close to $700,000 as possible, because he knew that BBSFF's internal valuation of its RASA rights relied entirely on the guarantee, and assumed that the loans would otherwise be irrecoverable.

(c) He understood that by 15 June 2010, the aggregate available commitment under the RASA terms had reduced to zero, and the guarantee limit was consequently then nil.

344. Those statements by Mr O'Sullivan provide some insight into his perception of the commerciality of the September 2010 novation agreement. But the logic of his second statement tends to reinforce the idea of a contemporary appreciation of the guarantee liability arising from the April 2010 demand, and to contradict the proposition that he had then regarded the guarantee as worthless. That tendency makes it difficult to accept either of the propositions that in 2010 Mr O'Sullivan contemporaneously believed (i) there was unlikely to be any guarantee liability as a result of the 29 April 2010 demand or, (ii) BBSFF had come to accept that the guarantee was not enforceable and was worthless. In relation to the first point, the legal advice of April and May 2010 specifically opined that the guarantee was likely to be enforceable. In relation to the second point, there is a considerable inconsistency between the propositions that BBSFF were relying entirely on the prospect of recovery from the guarantee, and yet regarded the guarantee as worthless. There is an even greater inconsistency involved in the assertion that Mr O'Sullivan (and Mr Bersten) regarded the guarantees as unenforceable and worthless, when they required (as I am satisfied they did) the release of the guarantees by BBSFF.

345. Mr O'Sullivan addressed the first of those difficulties in his 25 May 2015 affidavit. There he acknowledged his contemporaneous awareness of the April and May 2010 advice from counsel, but asserted he had not read the advice. His position was that he relied on Mr Bersten. He asserted Mr Bersten had never conveyed to him a changed opinion about the guarantee liability. Nor had Mr Bersten indicated that the, subsequently obtained, independent legal advice was inconsistent with the views he had expressed in his 2 March 2010 draft memorandum):- *see paragraphs 335(d) & 335(e) above*.

346. In the course of his cross examination in 2015, Mr O'Sullivan had been taken to PCL's solicitor's overview of the April 2010 advice, and to the principally relevant paragraph of the

May 2010 opinion. Those parts of the respective advices unarguably recorded views that the guarantee was potentially enforceable. Yet Mr O'Sullivan essentially disavowed a contemporaneous understanding to that effect. He initially described the advice from counsel as complicated and claimed not to have understood it. Later he said he had "flicked" it to Mr Bersten, and had received a negative response to his enquiry whether the advice "changed our position".

347. In other parts of his evidence in August 2015 Mr O'Sullivan accepted that he drove the commercial side of the negotiations with BBSFF about the novation agreement, but denied that he had requested release from his personal guarantee. He asserted, in effect, that his guarantee release, and that of Mr Nolan was something for which Mr Bersten had stipulated, essentially as a concomitant of achieving PCL's release. Whilst he acknowledged that he had not contributed financially to the release of his guarantee, he adhered to the positions that (i) PCL benefitted significantly from the novation agreement, (ii) he and PCL considered the guarantee worthless, (iii) BBSFF, rather than PCL had released the guarantee, and (iv) the circumstances had not involved him in any conflict (of interest and duty).

348. In his most recent (27 September 2019) affidavit Mr O'Sullivan took a somewhat difficult to follow position. On the one hand he asserted adherence to the contents of his April 2015 affidavit. On the other hand, he referred in detail to PCL's solicitor's 23 April 2010 interpretation of counsel's summary advice of the same date, and said he had been guided by that summary in his understanding of the advice from counsel. He then summarised his understanding of the solicitor's advice - that there was a risk not only that the guarantee would be enforceable, but that that the liability might not be limited to the "10% aggregation" underlying the $700,000 payment request. The obvious difficulty of reconciling those elements of Mr O'Sullivan's proffered explanation perhaps unsurprisingly led onto a concession, in his September 2019 affidavit, that he ought to have spent more time familiarising himself with the legal advice of April and May 2010. He asserted a contemporaneous belief (which he claimed to have derived from Mr Bersten) that after 15 June 2010, the "aggregate available commitment" limit had reduced to zero, even for the purposes of the 29 April 2010 demand. He denied that, in relation to the novation arrangements, and the guarantee release, he had consciously acted in his own interest in achieving the release of his guarantee.

349. In his further cross examination in the review proceedings Mr O'Sullivan accepted that he should have realised in 2010 that there was no demonstrable objective basis for the view that he had no potential liability under the June 2006 guarantee. He nevertheless continued to assert the contrary, both as to the advice he had received, and as to his own view, in 2010. However, he also conceded that the plain meaning of the 23 April 2010 legal advice, which he acknowledged he had received and read, was that there was a real risk of liability under the guarantee. Nevertheless, he resisted the notion that he had a conflict of interest "in the context of what actually occurred". He even claimed, obviously inaccurately, that the guarantee "was not even mentioned". (This was inaccurate because he also said he thought the guarantee release had been raised by Mr Bersten at a PCL board meeting, although without any emphasis.) Finally, perhaps with some degree of exasperation, Mr O'Sullivan asserted that if he had thought the guarantee was an issue then "Cashflow could have just discharged the debt itself, and then the guarantee wouldn't have come into play".

350. I do not accept the basic thrust of Mr O'Sullivan's explanations about the circumstances of the release of his guarantee – that in 2010 he regarded the guarantee as unenforceable and worthless. The reasons for that non-acceptance are set out in the following paragraphs.

351. Mr O'Sullivan's belatedly conceded knowledge of the contents of PCL's solicitor's advice of 23 April 2010 indicates a contemporaneous awareness of the risk that the guarantee was effective. The risk was readily apparent from any reasonable reading of counsel's two formal advices. Perhaps more significantly, the risk was unambiguously expressed in the reference to a "bargain" in the covering note that PCL's solicitor sent to Mr O'Sullivan. Against that background, Mr O'Sullivan's repeated assertions of a contemporary understanding of the unenforceability and worthlessness of the guarantee, are not credible. They reflect adversely on the reliability of his evidence.

352. Mr O'Sullivan's post 15 June 2010 communications (*see paragraph 335(j) above*) reveal that both he and Mr Bersten were insisting upon the guarantee releases. Given that the essence of Cashflow's proposal was BBSFF's assignment of the entirety of its RASA interests, there was no objective reason to insist on any guarantee release. That is particularly the case if, Mr O'Sullivan had the unambiguous contemporary understanding (of the worthlessness of the guarantee) that he professed.

353. I accept that Mr O'Sullivan's June and July 2010 letters to BBSFF, where he offered to participate in discussion of the legal analysis underlying PCL's assertion about the guarantee giving rise to no liability, could be regarded as consistent with a contemporaneous belief in the valueless nature of the guarantee. But it is not possible to reconcile such a belief with the actual content of the considered legal advice that PCL / Cashflow and Mr O'Sullivan had received. It is rather more likely, and I find, that the assertions in the letters about the guarantee were part of a negotiation strategy, in which Mr O'Sullivan was seeking to persuade BBSFF that the commercial risks they faced were of the magnitude he was asserting. Those assertions did not, however, reflect his actual contemporaneous belief and awareness. Indeed, given the advice Mr O'Sullivan had received, it is most unlikely that his offer, of a dispassionate discussion of a legal analysis supporting the likely unenforceability of the guarantee, was anything more than an insincere negotiating stance.

354. I am fortified in that view by three considerations. The first is the inconsistency in Mr O'Sullivan's various accounts of his understanding, and his imprecise (and in my view inaccurate) assertion that the guarantee release had not been discussed. The second is the implausibility of his assertion that the guarantee problem / issue could have been resolved simply by Cashflow making the required payment. The third is the structure of the transaction documents.

355. Mr O'Sullivan's assertion about a problem resolving payment by Cashflow is implausible because of Cashflow's apparently dire financial position. That position was evident from (i) BBSFF's payment request, (ii) Cashflow's apparent dependence on PCL for financial support and, (iii) the narrative that drove Mr O'Sullivan's commercial negotiation with BBSFF – that it was unlikely to recover anything directly from Cashflow.

356. The structure of the novation transaction documents is important to understand. Mr O'Sullivan concededly drove the commercial negotiations with BBSFF. He pursued those negotiations with a contention that BBSFF were unlikely to recover anything by pursuing its RASA security rights against Cashflow. Conversely, he perceived that PCL / Cashflow were in a more advantageous position than BBSFF in being able to progress the Coface litigation, and that there was a realistic prospect of a favourable outcome of those proceedings. That latter view perhaps suggested, notwithstanding Cashflow's apparently parlous state, that there was some justification for PCL not actively pursuing the guarantee demand that

BBSFF had made, pending the outcome of the Coface proceedings. But it was not in PCL's interest that the personal guarantees be merely released.

357. Consistent with that view the novation deed itself provided for PCL to acquire (by novation and transfer) all of BBSFF's rights under the RASA and under the guarantee. The novation deed also provided for BBSFF's release of both Cashflow and PCL. Those releases specifically did not extend to anything that was the subject of the novation and transfer. It follows that although the novation deed merged PCL's contingent obligation as a co-guarantor with its status as the primary creditor, it explicitly did not involve any release of the guarantee. Furthermore, neither Mr O'Sullivan nor Mr Nolan was a party to the novation deed. Nor was the novation deed expressed to be in any way contingent upon the release of their respective guarantee obligations. On the contrary, the novation deed itself inherently contemplated the survival of their guarantee obligations, and the effective transfer to PCL of the benefit of those obligations.

358. Given those features of the novation agreement, the separate deeds of release relating to the personal guarantees of Mr O'Sullivan and Mr Nolan, appear to have been structured as something of a contrivance. The contrivance was that, under the terms of the novation deed BBSFF assigned / novated all its RASA rights, including its rights as guarantor, to PCL. On the other hand, under the terms of the Deed of Release to which Mr O'Sullivan was a party, it purported to release him from all liability under the guarantees. BBSFF had no readily discernible commercial reason to release guarantees that it had had agreed to assign to PCL. Furthermore, there is a basis to question BBSFF's actual capacity to effectuate a release that was expressed to take effect when (ie., necessarily after) the novation deed had been made. The fact that BBSFF participated in this apparently contrived structure for the release of the O'Sullivan and Nolan guarantees is most likely (and I find that it was) attributable to PCL's request or insistence. PCL's request betokens a contemporary apprehension of the likely enforceability of the guarantee, and the apparent conflict of interest involved in its release, and especially its release without consideration. The most likely reason for PCL to have required BBSFF to release the O'Sullivan and Nolan guarantees was to remove the possible future personal liability of those two guarantors.

359. That analysis of the circumstances of the novation transaction was likely to have been readily apparent to Bersten and to have reflected his contemporaneous understanding. Given Mr O'Sullivan's acknowledged role as the driving force behind the commercial

aspects of the novation negotiations, the apparent closeness of the relationship between Mr Bersten and Mr O'Sullivan, and the latter's acknowledged reliance on the former in relation to the legal aspects of the novation transaction, it is likely to have been an understanding and strategy that Mr O'Sullivan fully understood and shared. Because of that likelihood, and the view I previously expressed about the unreliability of his evidence to the contrary (*see paragraph 351 above*) it is the appropriate finding to make.

CORPORATIONS ACT - PROVISIONS RELATING TO CORPORATE MANAGEMENT

360. Company directors are required to exercise reasonable care and diligence, and not use their position (or information they obtain because of their position), to obtain a personal advantage:- *Corp Act ss 180(1), 181-183*. The content of a director's care and diligence obligation will depend on the nature of the corporation and its activities, the director's position and responsibilities, and the particular circumstances involved:- *Australian Securities and Investments Commission (ASIC) v Mariner Corp* [2015] FCA 589 at [440]-[442]; (2015) 241 FCR 502; (2015) 327 ALR 95. Subject to that generality, a director will ordinarily be regarded as having satisfied their care and diligence requirement where, in making a decision relating to the corporation's operations, they have informed themselves "to the extent they reasonably believe appropriate", have no conflicting personal interests, act in good faith, and rationally believe their decision is in the interests of the company:- *Corp Act s 180(2) {ie., the "business judgment rule")*. For the purposes of the "business judgment rule" a director's "best interests" belief is relevantly "rational" unless it is one that no reasonable person (in their position) could hold:- *see Corp Act s 1802(d)*; *ASIC v Mariner* [2015] FCA 589 at [493]-[494] per Beach J citing .*ASIC v Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229 at [7290] per Austin J;

361. Where the contentious conduct of a director involves the potential derivation of a personal advantage, the general requirement is one of disclosure of interest:- *Doyle v ASIC* [2005] HCA 78; (2005) 227 CLR 18. But disclosure is not necessarily conclusive of the propriety of a director's conduct. The required propriety posits an objective standard of conduct, namely the course of action that would be taken by a reasonable person (aware of the duties, powers and circumstances of the director) in the particular circumstances:- *R v Byrnes* [1995] HCA 1; (1995) 183 CLR 501 at 514, 515.

362. A person becomes automatically disqualified, from eligibility for status as a company director, in certain circumstances. One such circumstance is where they are an undischarged bankrupt:- *Corp Act s 206B(3)*. Another is where they have been convicted of (i) any dishonesty offence punishable by imprisonment for more than 3 months or, (ii) any Corp Act contravention punishable by imprisonment for more than 12 months:- *Corp Act s 206B(1)*. Apart from such instances of automatic disqualification, a person may be the subject of a court, or ASIC, disqualification decision. The grounds for a disqualification decision include (i) personal contravention of a civil penalty provision:- *Corp Act ss 206C (court decision)*; (ii) officer status in a corporation that has contravened the Corp Act at least twice:- *Corp Act s* 206E(1)(a) (*court decision*) or, (iii) .management related multiple company insolvency administration (amongst other things) within the preceding 7 years:- *Corp Act s 206D(1) (court decision), 206F(1) (ASIC decision)*.

363. A disqualified person ceases to be a director, and cannot be appointed as a director, unless they are the subject of a permission granted by a court or ASIC:- *Corp Act ss 201B(2); 203B; 206A(2), 206GAB & 206G*. A disqualified person commits an offence if (without a relevant permission) they participate in, or give instructions to compliant directors about, making decisions affecting a company's business:- *see Corp Act s 206A(1)*.

364. Automatically imposed periods of disqualification, unless extended by a court order, are for a period of five years:- *Corp Act ss 206B(2), 206BA.* The permissible periods for judicially imposed disqualification periods vary according to the disqualification grounds. Depending on the particular grounds the disqualification may be for "any appropriate period", or for a maximum of 20 years:- *see Corp Act ss 206C(1), 206D(1), 206E, 206EAB.* Disqualification periods arising from an ASIC decision, are subject to a maximum of five years:- *Corp Act ss 206B(2) & 206BA, 206F(1), 206GAA(1).*

365. Where the threshold ground for disqualification is the person's status as a director of multiple companies that have been wound up in insolvency, exercise of ASIC's disqualification discretion is not contingent on findings of specific Corp Act contraventions by the director:- *Scott v ASIC* [2010] FCA 424; (2010) 78 ACSR 399 at [12]. It is contingent however, on satisfaction that the disqualification is "justified":- *see Corp Act s 206D(1)(b); (court) 206F(1) (ASIC).* In assessing whether a disqualification is "justified", both a court and ASIC "may have regard" (a) to the person's conduct in relation to the management of "any corporation", and (b) to "any other matters" considered appropriate:- *see Corp Act s*

206D(3); 206F(2)(b)(i) & (iii). Where ASIC is the disqualification period decision maker it "must" have regard to whether the companies that have been wound up in insolvency were "related":- *see Corp Act s 206F(2)(a).* However, the fact of relationship between the failed companies is not expressed as a circumstance precluding satisfaction that disqualification is justified. In addition, ASIC "may" have regard to, (i) the public interest and, (ii) any other matter it considers "appropriate".

366. The characterisation of "public interest" as a merely permissibly relevant consideration likely understates its likely relevance, and potential materiality, to the exercise of the disqualification discretion. This public interest purpose of the statutory discretion was expressly endorsed in the plurality reasons in *Visnic v ASIC* (2007) 231 CLR 381 at [11]. It was more expansively articulated in the judgment reasons in *Murdaca v ASIC* (2009) FCAFC 92; 178 FCR 119. There, the Full Court of the Federal Court of Australia, in the course of noting the amplitude of the Corp Act s 206F(1) threshold conditions enlivening ASIC's disqualification power, said this

> *[101] … ASIC's power to disqualify a person from the management of corporations must be exercised for the purposes for which it was granted. Those purposes are the protection of all those persons who deal with corporations from the consequences of the actions of those corporate officeholders who, either through incompetence or dishonesty or a combination of the two, bring about the failure of corporations and thus cause loss to others (Rich v ASIC (2004) 220 CLR 129 at [47]-[50]) and the maintenance of professional management standards in the public interest (Visnic v ASIC (2007) 231 CLR 381 at [11] & [26]).*

367. That passage highlights the inherently protective purpose of the disqualification power, and relates to both the personal conduct of the particular person, and also to the maintenance of appropriate corporate standards in general:- see *Culley v ASIC* [2010] FCAFC 43; (2010) 183 FCR 279 at [32]; *Oreb v ASIC (No 2)* [2017] FCAFC 49; (2017) 247 FCR 323 at [29]. In *Australian Securities and Investments Commission v Forge* [2007] NSWSC 1489 White J addressed the permissible relevance of the latter. Recognising the relevance of general deterrence in the exercise of the disqualification discretion, White J said:-

> *[103] … A disqualification order is protective of the public for the period of disqualification against misconduct by the person disqualified. However, that is not its only purpose. The object of general deterrence is also of great importance. That object is served by the public disapproval of the impugned conduct being marked not only by a declaration that the conduct has contravened the Act, but by an order for disqualification of the contravener from managing a corporation either for a fixed period or for life. The shame or embarrassment which accompanies such an order is not designed as punishment, although it might have that effect, but serves as a*

general deterrent to others who might be tempted to breach their duties as directors or officers of a company.

368. The essentially protective purpose of the disqualification power, and the generality of the permissions to have regard to conduct in relation to "any corporation" and "any other matters" considered appropriate, contemplate a wide range of relevant considerations. They include the nature and extent of the person's past conduct. That consideration likely permits regard to circumstances where ASIC is satisfied the person engaged in conduct that, if it had been prosecuted, would have led to conviction and given rise to an automatic disqualification under Corp Act s 206B. Similarly permissibly relevant circumstances would be where ASIC was satisfied the person's conduct involved other kinds of Corp Act contraventions, and would enliven the judicial disqualification power conferred by Corp Act ss 206C & 206E:- *see paragraph 362 above*. In addition, contravention of other Corp Act provisions is also permissibly relevant consideration in determining whether, having regard to a director's conduct, and the underlying statutory purposes of the protection of the public, and the related concepts of specific and general deterrence, a period of disqualification is the correct or preferable decision:- *ASIC v Adler* [2002] NSWSC 483; (2002) 168 FLR 253 at [55]-[56]; *ASIC v Vizard* [2005] FCA 1037; (2005) 145 FCR 57, at [35].

369. However, the statutory conditions enlivening ASIC's disqualification power under Corp Act s 206F(1) do not expressly require either express findings of, or underlying satisfaction about, Corp Act contraventions by the director. That textual width of the threshold criteria raises a nice question as to whether, in the absence of satisfaction that the director has been involved in relevant contraventions, the explicit requirement of satisfaction that disqualification is "justified" is capable of being satisfied

370. The answer to that question is not certainly dictated by the observation in *Scott v ASIC* [2010] FCA 424 at [12] (and the Tribunal decisions on which it relied[27]) that specific contravention findings are not required. This is because, in each of those cases, ASIC had made factual findings that were indicative of contravention. Those findings included (i) insolvent trading by the corporation (*Scott* at [13]; *Guss* at [42] & [44]), *Quinlivan* at [72]) and, (ii) failure to keep proper financial records (*Scott* at [14], *Guss* at [40] & [46]), *Quinlivan* at [72]). However, the permissible, and likely necessary, regard to "the public interest"

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27 *Guss v ASIC* [2006] AATA 401; *Quinlivan v ASIC* [2010] AATA 113; (2010) 113 ALD 599.

suggests that appropriate exercise of the disqualification discretion does not depend on satisfaction of a director's actual past Corp Act contraventions. In this Tribunal's reasoning in *Quinlivan v ASIC* [2010] AATA 113; (2010) 113 ALD 599 at [76] DP McPherson and Senior Member McCabe contemplated that a person's "inability or unwillingness" to comply with their lawful obligations may justify their disqualification, as a matter of public interest.[28] Consistent with that view, the statutory disqualification discretion in Corp Act s 206F may be informed not only by dissatisfaction with the standard of a director's past conduct (even in the absence of findings of actual contraventions), but also by a lack of confidence in the director's future compliance with the required standards of conduct.[29] For that reason, it is certainly relevant to consider whether Mr O'Sullivan's conduct contravened the statutory care skill and diligence obligation in Corp Act s 180, but it is not necessary to reach a definite conclusion to that effect. Evidence of contravention is relevant as part of the "public interest", but that interest is not directly dependent on proof of actual past contravention.

EXEGESIS ON A DIRECTORS "CARE AND DILIGENCE" OBLIGATIONS - CORP ACT S 180

371. At a general level, directors are required to take reasonable steps to become familiar with, and keep informed about, the fundamentals of the corporation's business, its activities, policies and financial position:- *ASIC v Healey* [2011] FCA 717 at [166]. Reasonable steps to keep a director appropriately informed include permissible reliance on apparently reliable information, and competent, informed advice, provided by others:- *Maxwell* at [101]; *Healey* at [167]; *see Corp Act s 189*. Beyond those generalities, the care and diligence duty in Corp Act s 180(1) has both subjective and objective elements. The subjective elements of the duty require regard to the director's position and responsibilities within the company *Re HIH Insurance Ltd (in prov liq); ASIC v Adler* (2002) 42 ACSR 80 at [372]; *ASIC v Maxwell* [2006] NSWSC 1052 at [100]; (2006) 59 ACSR 373; *ASIC v Healey* [2011] FCA 717 at [165]; (2011) 196 FCR 291 at [165]; *ASIC v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed) (No 3)* [2013] FCA 1342 at [533(b)]; (2013) 31 ACLC 13-073 at [533(b)] (APCH). That regard may justify

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28 The remarks of Edelman J in *ASIC v Cassimatis (No. 8)* [2016] FCA 1023 at [488]-[495]; (2016) 336 ALR 209 at [5] & [679], though made in a different context (not involving Corp Act s 206F), are arguably consistent with this proposition.

29 Consistent with that wider principle, in *Holden v ASIC* [2016] AATA 605 at [106], in affirming an ASIC disqualification decision, the Tribunal (DP Forgie) placed primary reliance on the director's lack of understanding of the nature of their obligations as a director (rather than on the specific past Corp Act contraventions).

the expectation of a high standard of care and diligence where a director is the dominant actor, and the controlling influence, in the corporation's activities:- *ASIC v Cassimatis (No. 8)* [2016] FCA 1023 at [492]-[495].

372. The objective elements of the duty require regard to the company's circumstances, and to the hypothesised conduct, in the same circumstances, of an ordinary person who possessed the director's knowledge and experience:- *ASIC v Cassimatis (No. 8)* [2016] FCA 1023 at [488]-[495]; (2016) 336 ALR 209. Subject to the potential application of the "business judgment rule" (*see paragraph 360 above*), the "reasonable person" hypothesis may involve regard to the significance of information that the director ought to have sought to obtain:- *ASIC v Mariner* [2015] FCA 589 at [459]; (2015) 241 FCR 502 at [459].

373. Contravention of the care and skill obligation in Corp Act s 180 requires conduct that either causes actual damage to the corporation, or gives rise to a reasonably foreseeable risk of harm to the interests of the corporation:- *ASIC v Cassimatis (No. 8)* [2016] FCA 1023 at [465]-[467]. Those interests are not limited to the corporation's proprietary rights. They permissibly extend to the corporation's financial and management repute, including the foreseeable risk of Corp Act contraventions by the corporation:- *ASIC v Mariner* [2015] FCA 589 at [448], [449] & [469]. (2015) 241 FCR 502; *ASIC v Cassimatis (No. 8)* [2016] FCA 1023 at [5], [480]-[484] (risk of reputational harm), [679], [680], [696]-[698] (contravention involving the corporation giving inappropriate financial advice); *ASIC v Drake (No. 2)* [2016] FCA 1552; (2016) 340 ALR 75 at [394]-[406], [452] (risk of breach of trust claims against a corporate trustee).

374. However, neither the occurrence of financial damage, nor the foreseeability of its occurrence, nor the foreseeability of other kinds of harm, dictates a conclusion that the director's conduct involved a contravention of the Corp Act care and diligence obligation. Such a conclusion can only be reached after due regard to any potential benefits of the director's conduct, the nature of the foreseeable harm, the likelihood of its occurrence, and the objective reasonableness of the director's conduct, in the totality of the prevailing circumstances:- *Vines v ASIC* (2007) 73 NSWLR 451 at [814] per Ipp JA; *ASIC v Mariner* [2015] FCA 589 at [450]-[452], [482]; (2015) 241 FCR 502; *ASIC v Cassimatis (No. 8)* [2016] FCA 1023 at [465]-[466] & more especially [485]-[487], (2016) 336 ALR 209. This framing of the statutory care and diligence duty, requiring consistency with the conduct of "a reasonable person" in corresponding circumstances, inherently presupposes (and thus

requires) the availability of an alternative course of action, (that would not have involved substantially the same risk of foreseeable harm) before the impugned conduct can be characterised as a contravention of the Corp Act s 180 duty of care and diligence:- *ASIC v Drake* [2016] FCA 1552 at [450]-[456], [468], [495] per Edelman J).

375. The submissions by ASIC and Mr O'Sullivan's on the Corp Act s 180 principles, despite substantial agreement, differed in two respects, one perhaps minor, and one rather more substantial. The former difference was that, in positing the conduct of the hypothetical "reasonable person, regard should be had to the many prescriptive provisions relevant to the conduct of PCL's business. ASIC contended that relevant prescriptions were contained in RG 69, PCL's credit policies, PCL's publicly disclosed procedures, and in the Debenture Trust Deed requirements. ASIC further contended that they would have informed the conduct of the "reasonable person". Mr O'Sullivan's submissions cavilled, somewhat imprecisely, with that contention. On the one hand, the submissions appeared to dispute the proposition that any regard should be had to the prescriptions contained in those documents. On the other hand, and in an implicit acknowledgment of their potential relevance, the submissions objected that those prescriptions could not be determinative. It is sufficient to dispose of this disagreement by recording my views that ASIC's contention was correct, but established no more than that the various documentary prescriptions potentially informed, rather than necessarily determined, the conduct of the "reasonable person".

376. The second submission difference related to the requirement for actual or reasonably foreseeable harm as a necessary precondition to any finding of contravention of the Corp Act s 180 care and diligence obligation:- *see paragraph 373 above*. ASIC's Outline written submissions appeared to treat the foreseeability of harm as both a necessary, and a sufficient, basis for a contravention finding. That appearance emerged, perhaps most clearly, from ASIC's submission it was "not to the point" that the hypothetical reasonable person might "ultimately" have come to the same decision as Mr O'Sullivan / PCL – that funding completion of the Burleigh Views development was in PCL's best interest, because it carried the chance of the greatest recovery of the loan debt. (Perhaps implicit in ASIC's submissions, despite its urging of Corp Act s 180 contraventions, was the contention that they were not ultimately necessary either to enliven, or to warrant exercise of, the disqualification discretion. Such a contention is consistent with the potential width of the public interest discussed in paragraph 370 above.)

377. On the other hand, Mr O'Sullivan's outline submissions characterised ASIC's criticisms of his conduct as going to matters of "process" in his decision making.[30] According to that characterisation, ASIC's criticisms fell short of establishing availability of a different decision that would have averted any relevantly foreseeable harm to PCl. In this respect, the submissions directly challenged ASIC's "not to the point" contention. The additional submission was that, in any event, Mr O'Sullivan's decision making was within the scope of the "business judgment rule" in Corp Act s 180(2):- *see paragraph 360 above*. The submission emphasised that the "business judgment rule" relevantly required only that Mr O'Sullivan (i) had informed himself to the extent that he reasonably believed to be appropriate and, (ii) had a "rational belief" his decision was in PCL's "best interests". In relation to the former point, the reasonableness of Mr O'Sullivan's belief depended on the particular circumstances, and required regard to (i) the nature of the relevant decision, (ii) the extent of his personal knowledge and responsibility and, (iii) the exigencies of prioritisation, practicality, time and cost in obtaining any additional information:- *ASIC v Mariner* [2015] FCA 589 at [490], citing *ASIC v Rich* [2009] NSWSC 1229 at [7283]-[7284]; (2009) 75 ACSR 1. In relation to the "rational belief" point, it required only that Mr O'Sullivan's belief about PCL's best interests was one that was not unreasonable, rather than one that was demonstrably correct or even persuasive:- *see paragraph 360 above*.

378. ASIC's submissions did not dissent from that ultimate proposition. However, they emphasised two points. The first was that the "rational belief" element of the "business judgment rule" was contingent on a director's ability to satisfy the threshold contingencies in Corp Act s 180(2), particularly the condition requiring that Mr O'Sullivan should have informed himself "to the extent they reasonably believe to be appropriate". (Implicitly, the submission relied on the "process" criticisms, to support the view that Mr O'Sullivan had acted unreasonably in acting on his own assessment.) The second point was that the contentious conduct only attracts the operation of the "business judgment rule" if it in fact involves a conduct decision. It cannot operate to exonerate a director for a failure to comply with their basic obligations of oversight of, and familiarity with, the corporation's activities, practices and policies.

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30 The distinction between lack of care in the "process" of decision making, and relevant deficiency in the actual decision, had been made by Edelman J, and was central to the decision in *ASIC v Drake* [2016] FCA 1552:- *see paragraph 374 above*.

THE CORP ACT BREACH CONTENTION ISSUES

379. ASIC's 16 February 2015 disqualification decision was influenced by findings that Mr O'Sullivan's conduct had involved Corp Act contraventions, principally contraventions of his statutory care and diligence obligations as a director, in relation to

(a) the June 2004 City Pacific drawdown on the Burleigh Views loan

(b) the May 2007 refinancing of the Burleigh Views loan

(c) management of the Burleigh Views loan following the borrower's August 2008 liquidation

(d) capitalisation of Burleigh Views loan interest after February 2009

(e) misleading disclosures relating to the Burleigh Views loans, and

(f) the September 2010 release of his guarantee of Cashflow's RASA debt:- *see paragraphs 27 to 32 above*.

380. The parties annotated Statement of Issues, with some additions, changes of wording and emphasis, substantially reflected these matters. It articulated the Issues I summarised earlier in these reasons (*at paragraph 47 above*), and thus presented them as matters requiring determination. Of those matters, Issues 1, 5 & 7 to 9 raised the principal questions posed about Mr O'Sullivan's compliance with the management obligations in Corp Act ss 180 & 182.[31] I address those Issues in the following sections of these reasons. However, it is relevant to remember that the threshold disqualification criteria in Corp Act s 206F(1) do not require specific Corp Act contravention findings:- *see paragraph 369 above*. That was a proposition ASIC emphasised, and ultimately submitted that disqualification was justified because of what it characterised as Mr O'Sullivan's serious and persistent failure to exercise reasonable care.

ISSUE 5 - THE BURLEIGH VIEWS DISCLOSURE DEFICIENCIES – THE CARE AND DILIGENCE CONTRAVENTION ISSUE

381. The 16 February 2015 disqualification decision reasons contained a finding that Mr O'Sullivan had contravened Corp Act s 180 in relation to the contents of the inadequate

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[31] Issues 2, 3 & 4 raised questions of Corp Act contravention in relation to the contents of PCL's public disclosure documents. Mr O'Sullivan's concessions in relation to the contents of those documents involved an acknowledgment of related Corp Act contraventions:- *see paragraphs 22 to 24, and 277 to 283 above*.

disclosures in the December 2010 Prospectus No 13:- *see paragraph 29 above*. The context in which the reasons addressed that matter, and the similarly impugned disclosures in the Quarterly Reports, Benchmark Reports and the Arrears Reports to AETL, suggest that ASIC had the same view in relation to those latter documents. However, the reasons express a specific disclosure related Corp Act s 180 contravention only in relation to the December 2010 Prospectus.

382. The annotated version of the Statement of Issues identified a more narrow Issue in relation to inadequate disclosure as a Corp Act s 180 contravention. This was posed, in "Issue 5", as a question whether Mr O'Sullivan failed in his care and diligence obligations by not ensuring the accuracy and completeness of "the written information" disclosed to the PCL Board. about the Burleigh Views loan (including the loan arrears reports). Having regard to the parties co-operative / consensus approach to the way the review proceedings should be conducted and, in particular, to their considered and agreed formulation of the "Issues", it is appropriate to address "Issue 5" exactly as it was framed, rather than to consider the obviously different, and arguably wider, non-disclosure related "care and diligence" contravention finding in the February 2015 decision reasons.

383. Earlier in these reasons I have outlined the content of the Board reports:- *see paragraph above*. That information is also relevantly summarised in Schedule 4:- *see paragraphs 42, and 205 to 213 above*. I also noted that the neither the Board reports nor the formal Board minutes likely were the exclusively probative of the information about the Burleigh Views loan that had been provided to the other Board members:- *see paragraph 214 above*. Ultimately, having had regard to the parties "agreed propositions", I made specific findings about the awareness of the other PCL directors about the state of the Burleigh Views loan:- *see paragraphs 38 & 215 above*. The combined effect of those findings is to indicate that in all likelihood the PCL Board was at all times well aware of the default status of the Burleigh Views loan, and of its omission from the loan arrears report that was provided to the Board. It follows that the deficient content of the Board Papers, and the related arrears reports, was a matter of form rather than substance, and no relevant "harm" followed from that inadequate disclosure in "the written information" provided to the PCL Board. The PCL Board members knew the underlying reality of the borrower's default, and the uncertain prospect of ultimate recovery of the loan debt. They nevertheless acquiesced in the management decisions that underlay the disclosure deficiencies in "the written information" provided to the Board. Because of the actual state of the knowledge of all the other PCL

directors, it is not appropriate to regard Mr O'Sullivan as having contravened Corp Act s 180 in relation to the contents of the "written information".

ISSUE 7 – THE CITY PACIFIC DRAWDOWN

384. The Statement of Issues formulated this Issue as raising both the Corp Act s 182 "misuse of position" finding expressed in the 16 February 2015 decision reasons, and a related contravention (perhaps a finding implicit in the decision reasons) of the care and diligence obligation in Corp Act s 180(1):- *see paragraph 32 above*. I have rejected ASIC's criticisms of Mr O'Sullivan's conduct in relation to the 2004 City Pacific advance:- *see paragraphs 303 to 330* above. Consequently Issue 7 is to be resolved in Mr O'Sullivan's favour.

ISSUES 8 & 9 - THE CASHFLOW GUARANTEE CONTRAVENTION ISSUES

385. The annotated Statement of Issues identified the circumstances of the September 2010 Cashflow guarantee release as raising Issues 8 & 9. The latter issue raised two factual questions:- (i) whether any value attached to the guarantee and, (ii) whether Mr O'Sullivan considered, or should have considered, that the guarantee had value. Issue 8 then required determination of four questions. Two of them enquired as to whether Mr O'Sullivan (i) had appropriately disclosed his conflict of interest in relation to the guarantee and, (ii) had engaged in misleading and deceptive conduct, and contravened Corp Act s 1041H, because the PCL disclosure documents published after September 2010, did not disclose the release of his guarantee. The remaining two questions enquired as to whether the circumstances of the release involved Mr O'Sullivan having contravened Corp Act s 180 or s 182.

386. The first two of those questions raised by Issue 8 only indirectly involve the circumstances of the guarantee release, and should be resolved in Mr O'Sullivan's favour. In relation to the disclosure of interest question (ie., "Issue 8d"), it is relevant to note that it was not posed as the basis for any specific Corp Act contravention finding. Nor was it adverted to in the February 2015 decision reasons. Furthermore, although there is no explicit record of any detailed discussion or approval, at PCL Board meetings, of the details of the release of the Cashflow Guarantee, the available information does include specific disclosure of Mr O'Sullivan's interest as a co-guarantor, pre Board meeting briefings by Mr Bersten, and discussion at Board meetings of "recent developments" relating to Cashflow's circumstances:- *see paragraph 336 above*. From those circumstances it is abundantly

clear that Mr Bersten was aware (and Messrs Seymour and Sweeney were probably also aware) of the thrust of the commercial negotiations with BBSFF relating to the RASA novation, including the release of the guarantee. Against that background, there is no adequate evidentiary basis for significant additional criticism of Mr O'Sullivan in relation to the disclosure of his liability under the guarantee, or his interest in his personal release.

387. Nor is there justification for criticism of Mr O'Sullivan in relation to the contents of the Quarterly and Benchmark Reports in their non-disclosure / limited disclosure of the facts of the cessation of PCL's obligations, and the release of Mr O'Sullivan's guarantee of Cashflow's RASA obligations. Earlier in these reasons I identified the relevant Quarterly and Benchmark Reports, and summarised the related adverse findings that ASIC had made in the 16 February 2015 decision:- *see paragraph 30 above*. In the annotated Statement of Issues the question (ie., "Issue 8c") was posed in more limited (and perhaps diffident) terms as to whether Mr O'Sullivan's non-disclosure of the release of his guarantee liability "if any" was relevantly misleading. Framed in this way, and unlike the February 2015 reasons, Issue 8c did not explicitly complain about the absence of any reference to the "release" of PCL's guarantee in the Quarterly Reports. Neither did it complain about the October 2010 Benchmark Report's description of the PCL guarantee as having been "released". (I have already observed that it was perhaps not entirely accurate to describe PCL's guarantee liability as having been "released":- *see paragraph 338(a) above*.) But even if those complaints should be regarded as included in the Issue 8c question, neither of them has substance, and the question should be answered favourably to Mr O'Sullivan. The Quarterly Reports to AETL have to be understood against the background of their required content:- *see paragraph 163 above*. Those contents did not require disclosure of guarantee obligations relating to the external liabilities of a related party entity. None of the pre-September 2010 Quarterly Reports had referred to either Cashflow's RASA obligations or PCL's guarantee of them – and no complaint has been made about the absence of that information from those Quarterly Reports. The same observation, about the absence of complaint, is true of the pre October 2010 Benchmark Reports, although they did, of course, disclose the fact of PCL's RASA guarantee obligation. In relation to the October 2010 Benchmark Report, it did (inaccurately) describe the PCL guarantee obligation has having been "released", but there was nothing relevantly misleading in either that infelicity of expression, or in the absence of any reference to the release of Mr O'Sullivan's personal obligations as a guarantor. The disclosure (in the October 2010 Benchmark Report) recording the fact of the "release" of PCL's guarantee also said nothing about the terms on

which the release had been obtained. And the fact is that none of PCL's disclosures relating to the Cashflow guarantee had ever particularised the details of PCL's status as guarantor, or indicated that its status was as a co-surety, with potential rights of contribution from others. Whilst there are circumstances in which the contents of a statement can render the absence of additional explanatory information misleading, those circumstances must have the effect of qualifying the literal accuracy or significance of the information that has been conveyed or called into question. No such circumstances applied to the contents of PCL post September 2010 disclosures relating to the Cashflow guarantee. In relation to the Quarterly Reports, in particular, a substantial guarantee liability for the debts of a related party could conceivably come within the scope of the statutory obligation to report to the debenture trustee on matters that "may materially prejudice … interests of debenture holders". But the 3 September 2010 transactions did not involve PCL undertaking any guarantee obligation. On the contrary, PCL had negotiated its acquisition of BBSFF's RASA entitlements, at an apparently modest price, and had done so for the purpose, and with apparently realistic prospects, of significantly improving PCL's prospects of recovering a substantial part Cashflow's indebtedness. In the overall commercial reality of the September 2010 Novation transactions, which should be taken as a whole, it is difficult to see an objective basis on which the release of the (limited) O'Sullivan guarantee should be regarded as inconsistent with a genuine contemporaneous opinion that there had been no occurrence with the capacity to cause material prejudice to the interests of PCL's debenture holders.

388. Turning then to Issue 9, relating to the value of the guarantee, one contention Mr O'Sullivan's submissions advanced was that Mr O'Sullivan had no liability under BBSFF's April 2010 demand. This contention asserted the 30 June 2006 Deed of Guarantee with Ancora had not been assigned to BBSFF. However that assertion is unlikely to correspond with reality. This is because:-

(a) Both before and, more significantly, after the February 2009 RASA Novation, in its Prospectus and Benchmark Report disclosure documents PCL had consistently disclosed its Cashflow guarantee liability:- *see paragraph 336 above*

(b) BBSFF's 23 February 2010 letter had explicitly asserted that the guarantee (along with a Deed of Charge of Cashflow's assets) had been assigned to it in February 2009:- *see paragraph 335(d) above*.

(c) Neither in his draft memo of 2 March 2010, nor his email advice on the following day, had Mr Bersten asserted the absence of any assignment of the guarantee. Instead

his proffered view, that the guarantee was worthless, was articulated solely on the basis of the inefficacy of Ancora's assignment of receivables under the February 2009 RASA novation agreement:- *see paragraph 335(e) above*;

(d) BBSFF's 23 March 2010 letter proceeded on the basis of a clear understanding that its rights arose under both the RASA "and the related transaction documents" – an expression capable of being construed as an allusion to its previous assertion of assignment of the guarantee;

(e) The instructions to counsel, which are set out in the April 2010 advice, did not contest BBSFF's assertion about the assignment of the guarantee, and explicitly disavowed the proposition that the guarantee was ineffective;

(f) PCL's solicitor's email advice of 23 April 2010, by virtue of its (erroneous) reference to the potentially unlimited extent of the guarantee liability, necessarily accepted the actuality of the assignment of the guarantee:- *see paragraph 335(g) above*;

(g) The 29 April 2010 BBSFF demand, and accompanying liability certificate, repeated the asserted assignment of the guarantee;

(h) The further legal advice of May 2010 had explicitly assumed the guarantee was a binding agreement that operated in favour of BBSFF, and extensively addressed the scope of the guarantee liability, rather than its ongoing existence after the February 2009 RASA novation;

(i) The assertions, in Mr O'Sullivan's April to August 2010 letters to BBSFF, that the guarantee was "worthless" tend to be inconsistent with, and certainly do not contain an express, contradiction of the asserted assignment of the guarantee:- *see paragraphs 335(h) & 335(j) above*;

(j) BBSFF's 16 July 2010 letter (with its unresponded to request for Mr O'Sullivan to explain his repeated assertions about the inefficacy of the guarantee demands) contained a further explicit assertion of the novation / assignment of the guarantee:- *see paragraph 335(k) above*;

(k) Consistent with the preceding events, the 3 September 2010 Novation Deed recited the fact of Ancora's February 2009 assignment of the guarantee to BBSFF;

(l) Equally consistent with those events, the 3 September 2010 Deed of release between BBSFF and Mr O'Sullivan also recited the fact of the assignment of the guarantee to BBSFF.

389. If there had been any factual basis to dispute the reality of Ancora's assignment of the Cashflow guarantee to BBSFF, it would have been raised in the months of negotiations that

preceded the 3 September 2010 Deed of Release. Throughout that period Mr O'Sullivan's communications, and those of Mr Bersten, evidence an enthusiasm to advance any assertion that would serve to drive down BBSFF's price / recovery expectations relating to its RASA related entitlements. Their respective patent enthusiasm, nevertheless never extended to an assertion that BBSFF did not have the status of assignee / promisee in relation to the June 2006 Deed of Guarantee. Nor did it prevent Mr O'Sullivan causing himself and PCL to be parties to September 2010 Deeds that expressly recited, as uncontroversial matters providing the mutually accepted objective background, the assignment of the guarantee. The totality of those considerations point to an underlying reality, and one mutually accepted by the parties to the Deeds, that Ancora had assigned the June 2006 guarantee to BBSFF.

390. Another aspect of Mr O'Sullivan's submissions picked up the views that had been diffidently expressed between March and May 2010 about the arguable inefficacy of the February 2009 RASA novation / assignment from Ancora to BBSFF:- *see paragraphs 335(e), 335(f) & 335(i)*. But that submission did not attempt to resolve that diffidence. Without a definitive basis for its resolution, there is no sound evidentiary basis for a conclusion that the guarantee was of no value. Nevertheless, the O'Sullivan submissions also contested that point, and suggested that the $775,000 price BBSFF accepted was an evidentiary pointer to the valueless nature of Mr O'Sullivan's guarantee. In making that suggestion the submissions drew on an observation in the Tribunal's Seymour decision (*see [2017] AATA 2182 & paragraph 9 above*) - that the arguably greater amount potentially recoverable from the outstanding RASA receivables pointed to a likelihood that BBSFF had in fact shared Mr O'Sullivan's asserted view of the valueless nature of the guarantee. The suggestion, creative as it was, is not sufficiently persuasive to be accepted. The motivations that led BBSFF to accept the $775,000 amount are imponderable. But there is no objective evidence to indicate that it ever abandoned its claim on the guarantee. In fact, the $775,000 amount it agreed to accept as consideration for the 3 September 2010 Novation Deed is objectively consistent with the guarantee having a value of $700,000. That consistency could only be undermined by objective persuasive evidence that the actual amount of the outstanding receivables ($902,528 – according to Mr O'Sullivan's 22 June 2010 letter) had in fact been recovered by Cashflow, and not also paid to BBSFF (notwithstanding the statutory demand threat contained in BBSFF's 19 July 2010 letter:- *see paragraph 335(k) above*.) between 22 June and 3 September 2010. Neither party pointed to any such evidence.

391. The remaining aspects of Issues 8 and 9 are partly resolved, adversely to Mr O'Sullivan by my earlier findings that (i) he understood that guarantee did have value[32] and, (ii) had required the release of the guarantee:- *see paragraphs 350 to 359 above*. However, in relation to the question of Corp Act s 180 contravention, the O'Sullivan submission was essentially to the effect that, the September 2010 novation agreement between BBSFF and PCL was clearly a transaction beneficial to PCL and, consequently the incidental release of the O'Sullivan personal guarantee was not a matter that involved relevant "harm" to PCL sufficient to warrant a finding of contravention of Corp Act s 180. The difficulty with this submission, and one which precludes its acceptance, lies in the apparently contrived structure of the 3 September 2010 Deeds. As I have pointed out, whilst the RASA Novation, was uncontentiously of potential benefit to Cashflow (and thus indirectly to PCL) there is no objectively sound reason for PCL to have either required or encouraged the release of Messrs O'Sullivan and Nolan. And although the structure of the 3 September 2010 documents yields an impression that BBSFF voluntarily released the individual co-guarantors, that impression cannot survive careful regard to the actual terms of the 3 September 2010 Novation Deed. The foreseeable "harm" to which the release of the O'Sullivan guarantee gave rise, is the loss of a right of contribution from a co-surety. In the absence of evidence to substantiate that a right of contribution from Mr O'Sullivan (in particular) would have been valueless, that was relevant harm for the purposes of Corp Act s 180. Consequently, given the findings I have made, the lack of objective justification for the release of the O'Sullivan guarantee (or the Nolan guarantee) involved Mr O'Sullivan in a contravention of Corp Act 180, given his solicitation of, and active participation in the documentation of, that release.

392. The findings in the preceding paragraph substantially warrant the further finding that the release of the guarantee involved a personal advantage to Mr O'Sullivan, and consequently his conduct in soliciting and effectuating the release of his guarantee also constituted a contravention of Corp Act s 182(1). The O'Sullivan submissions relied on several grounds to resist such a conclusion. One ground was, in effect, that PCL would itself have met any liability under the guarantee. Another was that, given the asserted uncertainty about the efficacy of the guarantee, the "extent of any tangible benefit" to Mr O'Sullivan was "speculative". Both of these grounds have critical difficulties, and should be rejected. The

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[32] It would perhaps be more accurate to say that Mr O'Sullivan understood there was a real risk that the guarantee demand would be enforceable against him.

difficulty with the first ground is that had PCL met the guarantee demand and, as seems likely (*see paragraph 355 above*), been unable to recover from Cashflow, it would have been entitled to seek contribution from both Messrs Nolan and O'Sullivan. Whether or not PCL would ultimately have done so, is a question that the PCL directors (other than Mr O'Sullivan) would have had to decide in due course. That "due course" would, no doubt have required regard to the unresolved status of the Federal Court proceedings against Coface, to the total extent of Cashflow's indebtedness to PCL and, perhaps also, to Mr O'Sullivan's personal position as one of the beneficiaries of the Trusts administered by PCL and Cashflow's shareholders:- *see paragraphs 1 & 338 above.* But unless and until PCL fully recovered its Cashflow debt, it is difficult to be satisfied (and I am not) that the best interests of PCL would have been served by foregoing the prospect of contributions from its co-guarantors. That dissatisfaction leads on to consideration of the second basis advanced in the O'Sullivan submissions, the assertedly "speculative" nature of any advantage he gained from the release of his personal guarantee. This submission seeks to derive a "no advantage" conclusion from (i) the diffident opinion about the ultimate efficacy of the February 2009 RASA novation / assignment and, (ii) the possibility that Mr O'Sullivan may not ultimately have been required either to satisfy, or to contribute to the satisfaction of, the guarantee demand. But the submission tends actually to highlight the advantage that Mr O'Sullivan did gain from the release. It was that he entirely avoided the risk of being required to do either of those things. That risk may not have been at the level of certainty, having regard to the contents of the May 2010 legal advice, but it was by no means unsubstantial. In this context it is relevant, though not itself determinative, to note that in his oral evidence in the review proceedings Mr O'Sullivan himself conceded that he did benefit from the release of his personal guarantee.

ISSUE 1 - BURLEIGH VIEWS LOAN MANAGEMENT – THE CARE AND DILIGENCE CONTRAVENTION ISSUES - OVERVIEW

393. Issue 1 in the Statement of Issues addressed the management of the Burleigh Views loan. It set out nine principal matters, relating to Mr O'Sullivan's conduct as a PCL director, and contentiously proposed they involved contravention of the Corp Act s 180(1) care and diligence obligation. Those matters were, in some respects somewhat vague, and in other respects, partly repetitive. Perhaps related to that element of repetition, they included more specific events (and times) than those that had been the subject of specific findings in ASIC's February 2015 decision reasons. Nevertheless, they raised essentially the same matters as had the decision reasons. In their respective written submissions ASIC and Mr

O'Sullivan recognised that some matters were closely related, and could be grouped together, but differed somewhat about the most appropriate groupings. Taking the parties approach into consideration, I consider that the particularised matters can conveniently be summarised as raising the question of care and diligence contraventions by Mr O'Sullivan in his conduct relating to the following five broad subject matter groupings:-

(a) ***Issue 1_2007***:- the May 2007 refinancing of the Burleigh Views loan:- *Issues 1(a)(i); 1(c)(i)&(ii); 1(e) & 1(g)*

(b) ***Issue 1_2008***:- the 2008 Burleigh Views loan default and the management of the loan after the August 2008 liquidation of Burleigh Views:- *Issues 1(a)(ii)–(v)*

(c) ***Issue 1_intcap***:- the capitalisation of interest on the Burleigh Views loan (as at May 2007, May 2008, February 2009 and August 2009[33]), and the absence of any provision (prior to December 2011) for non-recovery of the full loan amount:- *Issues 1(a), 1(f), 1(h) & 1(i)*

(d) ***Issue 1_feasblty***:- The absence of any proper post liquidation assessment of the feasibility of completing the Burleigh Views development:- *Issue 1(b)*

(e) ***Issue 1_val'n***:- The absence (after May 2007, November 2008, July 2009[34] and August 2009) of any valuation that complied with PCL's credit policies, and reliance on non-complying valuation opinions:- *Issues 1(c), 1(d)* & 1(g).

ISSUE 1_2007:- THE MAY 2007 BURLEIGH VIEWS LOAN REFINANCING

394. The amount of the Burleigh Views loan balance in the months preceding, and at the time of, the May 2007 refinancing is difficult to determine with absolute certainty. This is partly because of the limited legibility of some of the available records, some variations between them, and the distinctions made in the records between the loan principal, accrued interest, interest arrears and non-accrued interest. Nevertheless, the following Table provides an informative indication of the loan debt components, and the progression of the total debt between July 2006 and 14 May 2007.

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33 In August 2009 the Council had informed PCL of the lapse of planning approval for the Burleigh Views development:- *see paragraph 96 above*.

34 In July 2009 PCL's auditors had provided PCL with their final report on Loan Arrears:- *see paragraphs 228 & 229 above*.

Burleigh Views Loan
- Loan Arrears Reports Jul 2006 to April 2007
- Loan Statement - May 2007

Date	Principal		Interest			Total Debt	LVR %	
	Limit	*Actual*	*Paid*	*Unpaid*	*Arrears*	*(P & I)*	*P only*	*(P & I)*
				{accrued}	months		as rep	calculated
Loan Arrears Reports								
31-Jul-06	8,890,000	9,646,332	227,632	1,718,172	21	11,364,504	51.62	65.99
31-Aug-06	8,890,000	9,647,624	227,632	1,600,099	22	11,247,723	51.62	65.31
31-Oct-06	8,890,000	9,648,332	227,632	2,043,282	25	11,691,613	51.62	67.89
30-Nov-06	8,890,000	9,648,332	227,632	2,122,586	26	11,770,918	51.62	68.35
31-Dec-06	8,890,000	9,768,991	227,632	2,205,638	28	11,974,629	51.62	69.53
31-Jan-07	8,890,000	9,767,299	Refinance underw ay				51.62	
28-Feb-07	8,890,000	9,768,058	Refinance underw ay				51.62	
31-Mar-07	na	9,771,995		2,674,052	29	12,446,047	57	72.27
30-Apr-07	na	9,772,303		2,754,373	31	12,526,676	57	72.74
Loan statement								
31-Jul-06		9,646,332				11,443,760		66.45
31-Oct-06		9,648,317				11,688,928		67.87
31-Dec-06		9,646,332				11,969,858		69.50
14-May-07		9,870,661				12,314,534		71.50

395. The circumstances relevant to, and the details of, the May 2007 Burleigh Views loan refinancing agreement have been outlined earlier in these reasons:- *see paragraphs 69 to 75 above*. Material aspects of those details were:-

(a) From April 2006 until May 2007 PCL characterised the Burleigh Views loan as being in arrears. In reports to the PCL Board and, in accordance with PCL's credit policy (*see paragraph 65(a) above*) the loan was included in a list of loans described as being in default with interest accrual stopped:- *see paragraph 69 above. (*However, as the preceding Table suggests, the statement that interest accrual had been stopped appears to be contradicted by both the loan arrears report details and the PCL loan statement entries.)

(b) For a substantial period prior to PCL's entry into possession in August 2006, Burleigh Views had unsuccessfully attempted to achieve a sale of the property.

(c) In December 2006 Burleigh Views accountant's acknowledged that the company had ceased trading, and was unable to pay its unsecured creditors;

(d) At the same time as announcing that Burleigh Views had ceased trading, the company's accountants raised the prospect of renewed attempts to sell the property. They simultaneously raised the prospect, if a sale could not be achieved, of having PCL fund the completion of construction.

(e) The then contemplated Burleigh Views sale price of $11.35m was, by December 2006, less than the recorded total loan debt, which then approximated $12m;

(f) The $11.5m total loan debt stated in PCL's May 2007 refinancing offer understated (by $0.8m) the previously recorded $12.315m loan debt, and appears not to have included all of the interest liability that had fallen due;

(g) The Burleigh Views LVR approximated 73% as at 14 May 2007 and, based on the refinanced loan limit of $13.5m, was recorded at 78.4% in Mr O'Sullivan's 15 May 2007 refinancing approval instruction;

(h) The May 2007 refinancing agreement contemplated total additional construction costs of $4.75m and, arguably consistent with a preceding estimate of 10 months to complete the development, provided for a 12 month loan term.

(i) The projected total loan debt at the completion of Stage 2 of the development (ie. $12.314m total loan + $4.75m construction costs + construction period interest) would, in the absence of concurrent sales of Stage 1 units, approximate the 2003 $17.222m valuation, and reflect an LVR approximating 100%.

(j) The May 2007 refinancing agreement was subject to formal documentation, quantity surveyor's certification, and further valuation (in relation to the Stage 2 construction cost funding). None of those conditions / requirements had been satisfied when Mr O'Sullivan instructed PCL's accounting recognition of the $13.5m loan limit in the May 2007 agreement.

396. After 15 May 2007, PCL commissioned neither the valuation, nor the construction cost certification process, contemplated by the refinancing agreement terms. PCL did prepare formal documentation for the refinancing proposal, but Burleigh Views never executed the proffered formal agreement, and indeed seems to have abandoned the refinancing proposal:- *see paragraph 77 above*.

397. Although Mr O'Sullivan's 15 May 2007 instruction recognised the proposed $13.5m loan limit, there was in fact no additional drawdown of any of the proposed construction cost funding. PCL's accounting statement for the loan records the actual opening loan balance at the $11.5m contemplated by the refinancing proposal. It then records as "advances" two further amounts, but they are noted as having been by way of "transfer from previous loan". The loan statement also records a further $100,000 "advance", but that is noted as the "Establishment fee" recorded in the refinancing agreement letter. These entries result in a recorded loan balance of $11.86m as at 15 May 2007.

398. After 15 May 2007, the PCL loan statement does record some further "advances", but it provides no description of the individual amounts, and there is no evidentiary basis to characterise any of them as involving either any provision of funds to Burleigh Views, or construction expenses related to the development of the property. As a consequence of those further "advances", and Burleigh Views continuing loan default, the loan principal, and the total outstanding loan debt progressively increased as indicated in the following Table:-

Burleigh Views loan advances & balance

-15 May 2007 to 15 May 2008

Date	Advances	Note	Balance
	(ex interest cap'tlsn)		*(inc interest)*
15-May-07	118,058.22		11,618,058.22
15-May-07	98,050.00		11,716,108.22
15-May-07	100,000.00		11,816,108.22
15-Jun-07	2,600.00		11,918,082.85
20-Aug-07	308.00	1	12,239,248.18
25-Sep-07	74.80		12,350,014.13
5-Oct-07	20,000.00		12,370,088.93
15-Oct-07	308.00	1	12,477,227.29
22-Oct-07	74.80		12,477,227.29
24-Oct-07	39,315.86		12,516,543.15
12-Nov-07	308.00		12,516,851.15
26-Nov-07	74.80		12,628,226.48
4-Dec-07	616.00	1	12,628,842.48
18-Dec-07	308.00	1	12,739,079.71
24-Dec-07	50,000.00	1	12,789,079.71
18-Jan-08	74.80		12,903,196.68
22-Jan-08	32,857.97		12,936,054.65
30-Jan-08	74.80		12,936,129.45
1-Feb-08	308.00	1	12,936,437.45
14-Feb-08	6,458.55		12,942,896.00
Total (15 May 2008)	**469,870.60**		**13,450,196.04**
Sub-total			
(post 15 May 2007)	153,762.38		
Note 1			
After 14 February 2008 identical amounts were debited to the loan account and described as either "Maintenance Cost" or "Service Fee".			

399. The essence of the submission advanced on Mr O'Sullivan's behalf in relation to this aspect of Issue 1 was that PCL's 2007 agreement for the refinancing of the loan was the result of a reasonably informed, and rationally held, belief that the conditional extension of the loan to May 2008 was in PCL's best interests. This submission invoked the "business judgment rule" in Corp Act s 180(2). The additional submission was that there was no reasonably foreseeable prospect that the proposed refinancing would cause any harm to PCL - given (i) the magnitude of the existing debt, (ii) the history of unsuccessful attempts to achieve a

sale of the property, (iii) the conditional nature of the refinancing obligation, (iv) the contemplation that the proposed construction could be completed within 10 months and, (v) the inherent likelihood that completion of construction would significantly increase the value of the property.

400. ASIC's criticism of the May 2007 refinancing agreement, and its characterisation of it as involving Mr O'Sullivan in contravention of his Corp Act obligation of care and diligence, were variously expressed. Allowing for some synthesis of the matters ASIC canvassed, they can be regarded as including the following elements:-

(a) Whether or not the refinanced loan principal should be regarded as (i) the actual $12.5m debt as at 14 May 2017 or (ii) the $13.5m loan limit in the offer, it apparently exceeded the 70% LVR limit indicated by the 2003 PRP valuation, and did not otherwise comply with the maximum permissible 70% LVR limitation in PCL's credit policies and the Debenture Trust Deed – because PCL did not have a current complying valuation

(b) In addition to not having a current complying valuation, Mr O'Sullivan had made no informed assessment of the lawfulness, timing or cost of completion of the development

(c) There was little prospect of full loan repayment within the (12 month) refinanced loan period.

401. The actual loan balance (whether the $12.3m total reflected in the loan statement as at 14 May 2007, or the $11.8m reflected in the statement as at 15 May 2007), and the $4.75m construction cost contemplated in the May 2007 refinancing agreement suggest that the proposal was distinctly problematic – if the 2003 valuation of the completed development at $17.22m valuation reflected a realistic valuation at May 2007. Nevertheless, there are a number of difficulties with ASIC's submissions. The first difficulty is that, contrary to ASIC's submission, PCL did not effect "a $13.5m drawdown" as a result of the May 2007 agreement. The details of PCL's loan statement set out earlier show the actual position. The loan statement did recognise a $13.5m loan limit, but the "refinanced" loan principal as at 15 May 2007 was only $11.5m. In practical terms, that amount merely recognised (though it appears to have somewhat discounted) the existing loan debt.

402. The second difficulty is that, as expressed, the May 2007 refinancing agreement did not unconditionally oblige PCL to provide any construction cost funding to Burleigh Views. The

funding obligations under the refinancing agreement were expressly and entirely dependent on PCL's satisfaction with (i) formal documentation, (ii) independent certification of the projected completion costs, (iii) a complying valuation (in relation to Stage 2) and, (iv) a loan limit dictated by compliance with the 70% LVR indicated by a proposed complying valuation. For these reasons, ASIC's characterisation of the proposed refinancing strategy as "unfeasible", based on the limitations suggested by the 2003 PRP valuation, misconceives the terms of the refinancing agreement and the substance of the strategy that it embodied.

403. The explicitly conditional nature of the "refinancing" agreement meant that it had a limited immediate practical effect. It did not involve the actual provision of further funding to Burleigh Views. It did not unconditionally oblige PCL to fund the development completion costs. It in fact gave PCL considerable subjective discretion to refuse to provide any such financing. It implicitly contemplated that PCL would exercise that discretion informed by the "as is" and "on completion" valuation assessments, and the completion cost estimate, whose provision were conditions of the agreement.

404. Given the apparently prolonged, but unsuccessful, attempts to sell the Burleigh Views property that had been made since April 2006, the completion cost funding conditionally contemplated by the May 2007 refinancing agreement was a reasonable and rationally based decision. It was reasonable and rational because, in addition to the sale difficulties that had been encountered, (i) the agreement was conditioned upon appropriate independent costs assessment and valuation, (ii) the agreement would not preclude any intervening sale, should one be able to be achieved, (iii) delaying any final decision about realising the loan security, pending independent assessment of value and construction cost, was a prudent decision - given the existing loan balance, and the existing, but dated, $17.22m valuation assessment, (iv) given both the passage of time, and the substantial construction that had been carried out on the Stage 1 section of the development since the 2003 valuation, there was a reasonable basis to anticipate that the "on completion" value of PCL's security would have substantially increased, and by an amount likely to generate a greater loan recovery by PCL than any immediate mortgagee sale of the property.

405. In these circumstances, the proper view to take of the May 2007 refinancing agreement is that it was merely an appropriately conditional funding agreement. Moreover, it was never, in reality, implemented. Leaving aside the inconsistent statements of the loan debt amount as at 15 May 2007, the practical effects of the refinancing agreement were merely (i) to

recognise Burleigh Views existing indebtedness and, (ii) to allow PCL to defer any operative decision about either realisation of the security, or the provision of further funding, until it was informed by competent valuation and construction cost assessments.

406. For those reasons, the May 2007 refinancing agreement did not involve Mr O'Sullivan in any contravention of the Corp Act s 180 care and diligence obligation.

ISSUE 1_2008 & ISSUE 1_INTCAP:- CAPITALISATION OF THE BURLEIGH VIEWS LOAN INTEREST

407. Material aspects of events that occurred between the May 2007 refinancing agreement and February 2009 have been outlined earlier in these reasons:- *see paragraphs 76 to 95 above*. They included the following:-

(a) The interest expressed by DKR Developments Pty Ltd (between August 2007 and early 2008) initially in assisting with the development and by February 2008, in purchasing the property for $13.2m (conditional upon completion of the Stage 1 construction);

(b) PCL's receipt, also in about February 2008, of the Colliers September 2007 valuation of the Burleigh Views property (with its (i) $13.5m "as is" valuation, (ii) $.8m construction and sale cost estimate, (iii) 16 month Stage 2 construction period estimate and, (iv) $26.09m, GST exclusive, "on completion" valuation:- *see paragraph 81 above*);

(c) An April 2008 expression of interest in purchasing the property for $12m;

(d) An April / May 2008 May 2008 proposal to market the property, apparently "as is", with an estimated sale price range between $11.88m and $13.98m;

(e) PCL's July to September 2008 possession of the property, at a time when the total loan debt approximated $13.8m, and apparently exceeded any available "as is" valuation of the property;

(f) After Burleigh Views August 2008 liquidation, a September 2008 conditional $9.725m offer to purchase the Stage 1 component of the development

(g) Mr O'Sullivan's October 2008 awareness of, and concern about, the impact of the global financial crisis, his instruction to continue capitalisation of the Burleigh Views loan interest, and its consequential removal from PCL's loan arrears report;

(h) A November 2008 expression of interest to acquire the Stage 2 section of the development for $2.6m

(i) Mr O'Sullivan's November 2008 awareness that Colliers had refused to endorse their September 2007 valuation as having continuing currency

(j) By December 2008 Mr O'Sullivan formed the view that there were significant practical impediments (and consequential risks of significant price discounts) to both any progressive sale of completed Stage 1 units, and to any "as is" sale of the development;

(k) In February 2009 Mr O'Sullivan confirmed his instructions about ongoing capitalisation of the Burleigh Views loan interest, and the removal of the loan from PCL's Loan Arrears report.

408. It is apparent from the matters outlined in the preceding paragraph that from about the middle of 2007 PCL and Burleigh Views has been giving active consideration to the sale of the property. It is also apparent that, based on the then available valuation opinions, marketing proposals and expressions of interest, there were uncertain prospects of PCL being able to achieve an "as is" sale price that would avoid a substantial shortfall on the outstanding loan balance. (At the time of Burleigh Views' August 2008 liquidation the recorded loan balance was $13.8m. By February 2009 the loan balance was about $14.6m.)

409. In assessing the contention that Mr O'Sullivan contravened his Corp Act s 180 care and diligence obligation in relation to the management of the Burleigh Views loan in this period (ie., from the October 2007 apparent lapse of the refinancing proposal to the February 2009 continuation of interest capitalisation) it is important to determine the proper character of his relevant decision. It apparently involved a cessation of any attempt to achieve an "as is" sale of the property. It less clearly involved a total rejection of the prospect of such a sale. It also stopped short of actual commitment to funding the completion of the development. Given that Mr O'Sullivan had previously recognised the potential relevance of both informed valuation and construction cost assessment, it is appropriate to contemplate that he would ultimately have been informed by such assessments. Consequently the most appropriate characterisation of his and PCL's decision in this period was that it was to defer any activity in relation to either the sale, or the development, of the property.

410. Such a deferral decision can be readily criticised, on the grounds ASIC advanced. Even before PCL's receipt of the Colliers valuation, there was a basis for anticipating that sale of the completed development might not result in full recovery of the loan amount:- *see*

paragraph 401 above. Those grounds were hardly alleviated by the contents of the Colliers valuation, given (i) its assumptions about the staging of the development, (ii) its realisation cost estimate and, (iii) its doubtful currency, in November 2008, as reliable valuation information. Consistent with that view of the problematic basis for optimism about the ultimate prospect of recovery for the loan, Mr O'Sullivan contemporary statements suggest that, in November 2008, he at least contemplated PCL obtaining its own current valuation. Furthermore, the imposition of both the valuation and construction costs assessment in the terms of the May 2007 refinancing agreement tend strongly to indicate that any reasonable acquisition of information extended to actually obtaining those kinds of assessments.

411. The problematic prospects of PCL's ultimate recovery of the loan amount, together with the conditions Mr O'Sullivan had imposed in the May 2007 refinancing agreement, lead me to the view that Mr O'Sullivan should not be regarded as having reasonably considered that he had adequately informed himself about those recovery prospects, in the period from about October 2007 to February 2009. The decision was one of considerable significance. There was no apparent exigency suggesting the impracticability or unreasonableness of obtaining informed and detailed advice. The suggestion that Mr O'Sullivan's own knowledge of the development could be regarded as reasonably sufficient information was contradicted by the conditions that he had caused to be imposed as part of the May 2007 refinancing terms. For those reasons, the "business judgment rule" does not apply to preclude a finding of Corp Act s 180 contravention:- *see paragraph 377 above*.

412. It is still necessary however to consider whether his decision (bearing the "deferral" character I have indicated:- *see paragraph 409 above*) either involved relevantly foreseeable harm, or fell outside the scope of a reasonable balancing of the relevant considerations:- *see paragraph 374 above*.

413. In addressing that question, it is not possible to ignore the objective fact of the uncertain status of the development approval for the development, in this October 2007 to February 2009 period. As a matter of objective fact, confirmed by the April 2010 legal advice, the approval had lapsed by 2002:- *see paragraphs 96 & 100 above*. If Mr O'Sullivan had, consistent with reasonable care and diligence, commissioned the current valuation he apparently contemplated in November 2008, it is unclear whether the valuation process would have resulted in awareness of the approval lapse. That lack of clarity emerges from several considerations. First of all, Mr O'Sullivan had previously (in 2003) received advice

that work on the site had substantially commenced, and would suffice to establish the ongoing currency of the approval:- *see paragraph 68 above*. Second the question of approval lapse appears not to have come to light in 2006, despite the then obviously incomplete state of the development, and the Council's conduct in carrying out remediation work on the site:- *see paragraph 69 above*. Third, PCL's standard valuation instructions would not have required the valuer to verify specifically the currency of development approval (as distinct from confirming that "substantial commencement" had occurred with the period of the development approval):- *see paragraph 65(c) above*. Fourth, it was not in fact until August 2009 that the Council appears to have first formed, and communicated to Burleigh Views / PCL, its view that the development approval had lapsed:- *see paragraph 96 above*.

414. Nevertheless, the objective reality is that the development approval had lapsed. That fact raised a fundamental problem with reliance, at any time between October 2007 and February 2009, on any of the then known valuations. This was because they had all proceeded on the assumption of a valid development approval that would permit completion of the existing development. Without such an approval, the value of the property was at least uncertain and, in practical reality, very unlikely to be in the order of any of the "on completion" valuation assessments.

415. In this situation, a clearly reasonable decision available to the hypothetical "reasonable person" with Mr O'Sullivan's status and responsibilities, would have been to defer any action to realise the security, and to investigate the prospects of either renewing the previous development approval, or obtaining an alternative approval.

416. Consequently, whilst Mr O'Sullivan's deferral decision was not in fact educated by information that he reasonably regarded as sufficient, it did in fact accord with the permissible, and indeed the likely decision, of the hypothesised reasonable person with Mr O'Sullivan's responsibilities, in PCL's circumstances as they actually existed. The situation was in fact one that fell within the example that Edelman J had used in *ASIC v Drake* [2016] FCA 1552 to highlight the critical difference between criticism of a director's decision making "process" and evidentiary satisfaction that the actual decision either fell outside the permissible range of "reasonable care" outcomes, or gave rise to reasonably foreseeable harm. (Edelman J's example was that of a director whose idiosyncratic (and completely uninformed) choice of an appropriate investment in fact corresponded with the choice that

would have been made by an informed expert:- *see [2016] FCA 1552 at [11]*.) For that reason, no Corp Act s 180 contravention finding is appropriate in relation to Mr O'Sullivan's deferral decision during the period from October 2007 to February 2009. Furthermore, the same reasoning applies to the period after about December 2008.[35] It certainly applies to the period after August 2009. That was when Mr O'Sullivan did become aware of the Council's view that the development approval had lapsed. Thereafter he did cause PCL to investigate, and ultimately to pursue, the prospect of obtaining a development approval that would permit the lawful further development of the property:- *see paragraphs 97, 98, 100 & 102 above*.

417. The further aspect of the Issues presently under consideration is the February 2009 decision to capitalise the Burleigh Views loan interest, and to not include the loan in PCL's Loan Arrears report. In addressing this aspect it is necessary to distinguish between the concepts of loan default, interest accrual and interest capitalisation. Loan default is principally relevant in enlivening a mortgagee's rights in relation to the realisation of the property, and to any reporting obligations the mortgagee may have. Where the loan default involves a failure to pay interest on the loan, a mortgagee will have to quantify the contractual interest entitlement and also decide whether to recognise the interest as likely to be recoverable. That decision may involve treating the unpaid interest as a "receivable", and accruing in as earned income. It may also involve not only accruing the unpaid interest as income, but also capitalising the unpaid amount, by adding it to the interest bearing loan balance, and reporting it as part of the mortgagee's assets.

418. Under the 2004 loan variation Deed, the Burleigh Views loan limit was $8.89m. That limit included a permission, conditional on PCL's satisfaction, to capitalise unpaid interest, up to a maximum amount of $0.375m (ie., about 5 month's interest at the ordinary 10% interest rate):- *see paragraph 68 above*. In the 12 months preceding the May 2006 refinancing

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[35] Even if the question of reasonable care and diligence in the period between December 2008 and August 2009 should be assessed on the counter factual basis that the development approval was still current, or on the basis of an uncontroversial belief in its currency, the deferral of action to realise the property would still be a decision result that would not have been unreasonable. It would not have been unreasonable because of (i) the unsuccessful past attempts to secure a sale of the property, (ii) concern about the impact of the global financial crisis, (iii) the apparent likelihood that any "as is" sale of the property would have resulted in a significant loan recovery shortfall and, (iv) a basis to apprehend that, whilst the cost / benefit of completing the development was unclear, the limited valuation evidence available, provided some reason to expect that such a proposal might materially enhance the prospect of PCL increasing the extent of its loan recovery.

agreement Mr O'Sullivan said that PCL had not accrued all of the Burleigh View loan interest. That view, which may be taken to reflect Mr O'Sullivan's subjective opinion about the irregularity of ongoing accrual of loan interest on a substantially defaulting loan, was consistent with one aspect of the default loans reports to the PCL Board: *see paragraph 69 above*. However, the non-accrual proposition seems to be contradicted by the "Interest Accrual" entries that are recorded in both the Loan Arrears reports and in the Burleigh Views loan statement:- *see paragraph 394 above*.

419. The conditional refinancing agreement of May 2007 specified a "peak debt" of only $13.15m, although it nominally contemplated a loan limit of $13.5m. The peak debt amount conditionally included capitalised interest, up to maximum limit of $0.6m (again, about 5 months interest at the ordinary 10% rate). Consequently, even if the May 2007 refinancing agreement should be regarded as having become operative (despite the absence of executed formal documentation) the reality is that any interest capitalisation it contemplated was both limited (effectively as to both time and amount) and conditional on PCL's satisfaction.

420. The circumstances in which Mr O'Sullivan came to authorise the capitalisation of interest on the Burleigh Views loan after taking possession of the property in 2008, and its omission from the PCL monthly Loan Arrears report, are outlined earlier in these reasons:- *see paragraphs 83, 84, 90, 95 101 & 106 above.* ASIC contended that both those elements of Mr O'Sullivan's authorisation contravened his care and diligence obligations. That was because they were contrary to PCL's credit policy and not informed by any proper contemporary assessment of the prospects of PCL recovering the loan debt. ASIC's specific assertions were that Mr O'Sullivan had not properly informed himself about either (i) the projected costs of completing the development or, (ii) the realisable value of the property.

421. In addressing ASIC's submission it is necessary to distinguish between (i) the exclusion of the Burleigh Views loan from the Loan Arrears reports, (ii) the capitalisation of interest, and (iii) the accrual of interest, notwithstanding the default status of the loan.

422. The exclusion of the Burleigh Views loan from PCL's Loan Arrears reports (from October 2008 onwards) was, practically speaking, an inevitable consequence of Mr O'Sullivan's decision and instruction to capitalise the unpaid loan interest. That instruction, given his

presumably intimate knowledge of PCL's practices and credit policies, bespoke his subjective intention to ensure that the Burleigh Views loan did not appear in PCL's Loan Arrears reports. The fact that, after October 2008 Mr O'Sullivan, despite being certainly aware of both Burleigh Views' default status and its absence from the Loan Arrears reports, confirmed (in February 2009) his capitalisation instruction, and took no steps to have the Burleigh Views loan included in the Arrears Reports, only tends to confirm the deliberate intention behind his instruction. That instruction was indefensible:- *see paragraph 257 above*. Irrespective of any view that Mr O'Sullivan entertained about the ultimate recoverability of the loan, it was unarguably a loan in default. No amount of motivated perception or rationalisation detracts from that reality.

423. Mr O'Sullivan's decision to have the Burleigh Views loan not included in the Loan Arrears report was subsequently acquiesced in by both the other PCL directors and by PCL's auditors:- *see paragraphs 215(a) & 249 above*. But that acquiescence was equally indefensible. Moreover the capitalisation decision was one that Mr O'Sullivan alone initially made, and nothing in the subsequent acquiescence of the other directors and the auditors (objectively surprising as it is) detracts from the wholly unjustified nature of his decision. It was a decision that related to compliance with PCL's ordinary practices and to the performance of its reporting obligations to AETL. As such it is very doubtful that it is a decision to which the "business judgment rule" could apply:-- *see paragraph 378 above*. Even if the decision were to be characterised as one to which the "business judgment rule" potentially applied, the intentional and sustained exclusion of the Burleigh Views loan from PCL's Loan Arrears report was a decision that no reasonable person could have rationally believed was in PCL's best interests. Neither could any reasonable person, in Mr O'Sullivan's position, have regarded such a course of conduct as consistent with the exercise of appropriate care and diligence.

424. Furthermore, the exclusion of the Burleigh Views loan from the Loan Arrears report had the foreseeable potential to significantly harm PCL, at least in relation to its corporate repute with AETL and its debenture holders. The mere fact of this indefensible characterisation of such a major loan as not being in default, raised serious questions about the quality of PCL's management of its FTI loan portfolio. Those questions did not admit of any persuasive answer, given the essentially impressionistic basis on which Mr O'Sullivan had acted in making his decision, essentially to postpone specific action directed at the realisation of the security, and his underlying pessimism about the likely realisable "as is" valuation of the

property:- *see paragraphs 94 & 259*. Those questions about the quality of PCL's management underlay the debenture investor's enquiry about the December 2010 Prospectus No 13:- *see paragraph 112 above*. They pointedly emerged in late 2011 and early 2012, when AETL persistently demanded explanation from PCL about its treatment of the Burleigh Views loan:- *see paragraphs 125 & 126 above*.

425. Apart from the intended impact of Mr O'Sullivan's instruction to capitalise the Burleigh Views loan interest on the content of PCL's Loan Arrears report, the mere capitalisation of interest was not itself conduct that involved a lack of care or diligence that warrants a finding of contravention of Corp Act s 180. As a matter of simple contractual right, PCL was entitled to add the unpaid interest to the outstanding loan balance. It is less clear that capitalisation of the interest, so as to add it to the interest bearing component of the loan, was consistent with PCL's contractual entitlements. But that treatment of the unpaid interest involved no further application of PCL's funds, and consequently no reasonably foreseeable harm or loss.

426. However, the mere accounting recognition of the outstanding loan balance (so as to include either capitalised or merely accrued interest) is one thing, and the characterisation and reporting of that interest as recoverable income / a realisable asset, is another. In that context, the views I have expressed earlier about the problematic recoverability of the loan balance are important to bear in mind. Even before PCL was informed about the lapse of the Burleigh Views development approval, the ultimate recoverability of the full amount of the loan balance was questionable:- *see paragraphs 94, 259 & 395(i) above*. Certainly after PCL knew of that lapse, and the uncertain prospect of obtaining a further approval for a development corresponding with the original development proposal, no reasonable director could have condignly continued to accept the proposition that it was appropriate to continue to accrue the loan interest as fully recoverable earned interest. It was unarguably imprudent and unreasonable to so do, based merely on an impressionistic view of "on completion" value of a development that no longer had a development approval, and lacked the reasonably predictable prospect of obtaining the requisite approval.[36] Again, the

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[36] The progression of views and advice about the prospects of obtaining a further development approval is outlined in earlier parts of these reasons. There I (i) opined that the prospect of obtaining a further approval was uncertain, (ii) noted that PCL did not submit a new application until May 2011, (iii) noted that PCL did not respond to the Council's information request until January 2012 and, (iv) in March 2012 made a $2m provision against the loan:- *see paragraphs 98, 99, 102, 109 & 123 above*.

acquiescence of the other PCL directors, and PCL's auditors, in that conduct is objectively surprising. But the reality is that Mr O'Sullivan, as the PCL executive with direct responsibility for, and apparently the greatest knowledge of the situation with the development, should properly be regarded as the person who dominated the perspectives from which the other PCL personnel and auditors viewed the circumstances of the loan. In no real sense could it properly be said that Mr O'Sullivan's opinions and assessments about the recoverability of the loan interest were attributable to the advice, input or opinions of either his co-directors or PCL's auditors:- *see paragraphs 253 to 255 above*.

427. Having regard to (a) PCL's pre May 2007 history of refusing to accrue unpaid interest and, (b) the valuation and quantity surveyor conditions set out in the May 2007 refinance agreement, ASIC's criticism of Mr O'Sullivan's conduct in relation to the continued accrual of the unpaid interest on the Burleigh Views loan is unanswerable. No reasonably careful PCL director could properly have continued to accrue the Burleigh Views loan interest after PCL's entry into possession, in the absence of the additional information and advice contended for by ASIC. They most certainly could not reasonably have done so after the August 2009 awareness that the original development approval had lapsed, and that there were uncertain prospects of obtaining a further approval for the previously proposed development.

428. Furthermore, the unjustified, and prolonged accrual of interest on the Burleigh Views loan had the reasonably foreseeable risk of harming PCL's repute with AETL and the debenture holders. This was foreseeable harm for substantially the same reasons as the exclusion of the Burleigh Views loan from the Loan Arrears reports:- *see paragraph 424 above*. In addition, the details of PCL's of the value of PCL's FTI portfolio, and its accrued income, between 2008 and 2011, are outlined in Schedule 1-3A and Schedule 4A to these reasons. Those details readily indicate that the Burleigh Views loan was not only a major component of the FTI portfolio, but accounted for a very material proportion of PCL's reported interest income. The combination of those considerations warrants the finding that Mr O'Sullivan's conduct in causing PCL to accrue the Burleigh View loan interest involved a contravention of his Corp Act s 180 care and diligence obligation.

ISSUE 1_VAL'N & ISSUE 1_2008 - RELIANCE ON INADEQUATE VALUATION OPINIONS

429. The history and details of the various valuation and opinion documents available to PCL in the period between May 2007 and May 2012 are indicated in Schedule 6, and have been discussed earlier in these reasons:- *see paragraphs 79 to 81, 92, 99, 105, 111 & 130 to 137 above*. The presently relevant essential point is that, at no relevant stage in that period did PCL / Mr O'Sullivan obtain a properly commissioned valuation that complied with its construction loan policy.

430. ASIC's criticism of Mr O'Sullivan was essentially that, in the absence of a current, and properly informed (GST exclusive) valuation, he had not complied with PCL's loan policies and could not have formed a requisitely careful assessment of the extent of the recoverability of the Burleigh Views loan. (That criticism may be regarded as subsuming the further point that Mr O'Sullivan had not obtained or carried out any informed assessment of the costs likely to be incurred in the completion of the development.) This criticism was necessarily directed at Mr O'Sullivan's August 2008 and February 2009 decisions relating to the continuing accrual of loan interest, and the exclusion of the Burleigh View loan from the Loan Arrears report. It received added emphasis in relation to the state of affairs after August 2009, when Mr O'Sullivan became apprised of the lapse of development approval for the property:- *see paragraphs 96 to 100 above*.

431. ASIC's criticism of Mr O'Sullivan's failure to commission and obtain any properly informed current valuation, specifically after taking control of the property in the latter part of 2008 is unanswerable. That conclusion is suggested by the valuation and quantity survey certification conditions in the May 2007 refinancing agreement. It is reinforced by the shortfall apprehensions that influenced Mr O'Sullivan's "deferral" decision in late 2008:- *see paragraph 409 above*. The prudent concerns that had prompted the valuation and costs assessment pre-conditions in the May 2007 refinancing applied, with perhaps even greater force, to PCL's possession of the property, and its contemplated course of action in completing the development. No reasonably careful and diligent director would have shrunk from acquiring that information. The critical items of information that a careful and diligent director would have been concerned to obtain, were the real current realisable value of the property, the apparent magnitude of the likely loan shortfall, based on that valuation, and the realistic prospect of, and the risks associated with, undertaking the completion of the proposed development of the property.

432. One of the submissions made on Mr O'Sullivan's behalf was that commissioning any contemporaneous valuation of the property would have been an unnecessary and empty exercise. It would have been an unnecessary exercise because of Mr O'Sullivan's subjective knowledge of the development and (perhaps) his opinion about PCL's "next best option". It would have been an empty exercise because no contemporary valuation would have provided (a) an "as is" value that provided any prospect of full recovery of the loan nor, (b) certainly after August 2009, any "as if complete" value that would have indicated the likely recovery of the loan balance.

433. Those submissions bear upon both the potential application of the "business judgment rule" and on the proposition that no harm, actual or reasonably foreseeable, flowed from Mr O'Sullivan's failure to obtain a complying valuation. In relation to the first of those points I doubt its force. The fact that Mr O'Sullivan reasonably anticipated a current valuation would have pointed to the risk of a significant shortfall, given the objectively prevailing circumstances in either August 2008, February 2009 or August 2009, does not detract from the importance of being fully informed about the actual contemporaneous values and circumstances. Furthermore, the contrast between the conditions imposed in the May 2007 refinancing agreement (under which PCL assumed the responsibility of obtaining such a valuation) are quite inconsistent with the proposition that in either August 2008, February 2009 or August 2009, Mr O'Sullivan actually and genuinely considered that he had appropriately informed himself to a sufficient extent to be able to make a decision that he genuinely believed to be in the best interests of PCL:- *see paragraph 411 above*. Thirdly, the neglect to follow the valuation requirements and processes mandated in PCL's CPP policies, particularly compliance with the valuation instructions he had himself specifically approved (ie, in August 2009:- *see paragraph 130 above*) was not a "decision" for the purposes of the "business judgment rule":- *see paragraphs 378 & 423 above*. Finally, Mr O'Sullivan's own conduct in resorting to obtaining the Robertson opinions bespeaks an acknowledgement that a reasonably careful and diligent director would have obtained relevant valuations. Given that objective, and implicitly acknowledged, requirement, Mr O'Sullivan's patently non complying conduct, in the manner in which he commissioned the Robertson opinions was not defensible as consistent with reasonable care and diligence.

434. However, the second proposition advanced on Mr O'Sullivan's behalf, that no actual or reasonably foreseeable harm flowed from the absence of a complying valuation is sound, if it is confined to that narrow circumstance. It suffices to detract from satisfaction that this

aspect of his conduct itself involved a Corp Act s 180 contravention. The narrow proposition is sound because such a valuation would only have been a tool informing his and PCL's decisions about (i) deferral of action to realise the mortgaged property, (ii) the accrual of interest and, (iii) the contents of PCL's disclosure documents. As to the first of those, I have already concluded that Mr O'Sullivan's "deferral" decision, despite the lack of care in the process in which he made the decision, did not involve a Corp Act s 180 contravention:- *see paragraphs 413 to 416 above*. As to the second and third matters, it was the unjustified accrual of interest, and the misleading disclosures, rather than the absence of a complying valuation, that was the real cause of harm to PCL.[37] It was Mr O'Sullivan's conduct in relation to those matters that involved contravention of the Corp Act s 180 obligations.

ISSUE 1_FEASBLTY & ISSUE 1_2008:- ABSENCE OF FEASIBILITY ASSESSMENTS FOR COMPLETION OF THE BURLEIGH VIEWS LOAN

435. The history of the feasibility assessments available to PCL in relation to the Burleigh Views loans have been detailed in the earlier sections of these reasons dealing with the Burleigh Views loan history *(see particularly paragraphs 114 to 117, 122, 123 above*) and the Burleigh Views property valuations:- *see paragraphs 135 and 137 above*.

436. ASIC contended that, at least after being informed (in August 2009) of the lapse of the development approval, Mr O'Sullivan should have undertaken an appropriate feasibility assessment, and "given serious consideration" to the comparative benefits and uncertainties of the "available options" (ie. (i) sale, (ii) pursuit of renewed approval for the originally proposed, or substantially similar, development, (iii) pursuit of approval for a modified development and, (iv) funding the construction of whatever development approval could be obtained.

437. The hypothetically dutiful PCL director would likely have ultimately come to the conclusion that pursuit of approval and construction of the originally proposed development was an

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[37] Although I do not consider that Mr O'Sullivan's valuation related conduct fell within the scope of the "business judgment rule", I am inclined to the view (arguably consistent with that expressed by Rares J in the 2012 Federal Court proceedings) that if Mr O'Sullivan / PCL had made full disclosure of the absence of a current / complying valuation, disclosed his reasoning for refraining from obtaining such a valuation, not accrued interest, and acknowledged the uncertainty of the ultimate development outcome, no significant harm would have foreseeably accrued from the mere absence of the valuation. Complete and candid disclosure of all the circumstances would, more likely, have resulted in resigned acceptance that the circumstances pointing to a problematic loan outcome had not been of PCL's making.

appropriate decision. However, the mere coincidence between such a conclusion, and the course of action that Mr O'Sullivan contemplated for PCL, does not preclude a finding that Mr O'Sullivan's failure to solicit appropriate valuation and feasibility assessments involved a failure to comply with his care and diligence obligations. By failing to obtain an informed assessment of the feasibility of completing the construction of the Burleigh Views development, Mr O'Sullivan failed to act with the care and diligence statutorily required of him as the principal executive director of PCL.

438. However, Mr O'Sullivan's failure to commission or obtain any considered assessment of the feasibility of the proposed completion of the construction of the Burleigh Views development raises essentially the same question as his failure to obtain appropriate valuations of the property, at least after August 2008. It raises essentially the same question, because the feasibility assessment was but one element involved in the assessment of the ultimately realisable value of the completely development, and the ultimately achievable net proceeds to eb derived from the realisation of the property. Since it raises substantially the same question, it is to be answered in substantially the same way. Mr O'Sullivan's lack of care in failing to commission or conduct an appropriate feasibility assessment did not, of itself, occasion actual or reasonably foreseeable harm to PCL, and did not constitute contravention of Corp Act s 180.

CONCLUSION – CORP ACT CONTRAVENTION ISSUES

439. The effect of the findings I have made on the Corp Act contravention Issues identified in the parties Statement of Issues is as follows

(a) ***Issue 1_2007*** (*ie., Statement of Issues 1(a)(i); 1(c)(i)&(ii); 1(e) & 1(g))* - the May 2007 of the Burleigh Views loan refinancing in May 2007:- Mr O'Sullivan's conduct in authorising the conditional refinancing agreement did not involve contravention of Corp Act s 180:- *paragraphs 401 to 406 above*;

(b) ***Issue 1_2008*** – (ie., *Issues 1(a)(ii)–(v))* - management of the Burleigh Views loan after PCL took possession as mortgagee:- Mr O'Sullivan's conduct in deciding to defer action by PCL in realising the mortgaged property did not involve contravention of Corp Act s 180:- *paragraphs 411 to 415 above;*

(c) ***Issue 1_intcap (ie.,*** *Issues 1(a), 1(f), 1(h) & 1(i))* - capitalisation of interest when the Burleigh Views loan was in default:- Mr O'Sullivan's conduct in deciding that PCL would accrue the Burleigh Views loan interest as earned and recoverable income,

and to not characterise the loan as being in arrears, did involve contravention of Corp Act s 180:- *paragraphs 422 to 428 above;*

(d) ***Issue 1_val'n*** *– (ie., Issues 1(c), 1(d)* & 1(g)) - The absence (after May 2007, November 2008, July 2009[38] and August 2009) of any valuation that complied with PCL's credit policies, and reliance on non-complying valuation opinions:- Mr O'Sullivan's conduct in deciding not to obtain compliant valuations of the Burleigh Views property, to inform his decision to defer action by PCL in realising the mortgaged property did not itself involve contravention of Corp Act s 180 did not, of itself, involve contravention of Corp Act s 180:- *paragraphs 429 to 434 above*;

(e) ***Issue 1_feasblty*** *(ie, Issue 1(b))* - absence of any proper post liquidation feasibility assessment for completing the Burleigh Views development:- Mr O'Sullivan's conduct in deciding not to undertake a feasibility assessment to inform his decision to defer action by PCL in realising the mortgaged property did not, of itself, involve contravention of Corp Act s 180:- *paragraphs 435 to 438 above*;

(f) ***Issue 2***:- misleading statements in PCL's December 2010 Debenture Prospectus No 13 & the 2012 Information Booklets:- Mr O'Sullivan made the inadequate disclosures / misleading statements in these disclosure documents. His conduct involved contraventions of Corp Act ss 728 & 1041H:- *paragraphs 23, 24 & 277 to 283 above*;

(g) ***Issue 3***:- misleading statements in PCL's Loan Arrears reports to AETL, PCL's Quarterly and Benchmark Reports:- Mr O'Sullivan made the inadequate disclosures / misleading statements in these disclosure documents. His conduct involved contraventions of Corp Act s 1041H:- *paragraphs 23 & 24 above*;

(h) ***Issue 4***:- inadequate disclosure of material matters to AETL:- Mr O'Sullivan was involved in the inadequate disclosures / misleading statements to AETL about the status of the Burleigh View loan, the status of the development approval, the valuation information about the property, and the risk of a debt shortfall on any realisation of the property. His conduct involved contravention of Corp Act s 283BF:- *paragraphs 23 & 24 above*;

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[38] In July 2009 PCL's auditors had provided PCL with their final report on Loan Arrears:- *see paragraphs 228 & 229 above*.

(i) ***Issue 5***:- written disclosure of complete and accurate information about the Burleigh Views loan to the PCL Board:- The PCL Board was relevantly aware of the material information relating to the loan. The deficiencies in the written information Mr O'Sullivan provided to the PCL Board, typically in the Board meeting "packs", did not involve a Corp Act s 180 contravention:- *paragraphs 381 to 383 above*;

(j) ***Issue 6***:- the knowledge and acquiescence of PCL's auditors and its other directors:- The knowledge and acquiescence of PCL's auditors, and Mr O'Sullivan's co-directors of PCL does not materially detract from his personal responsibility for the "deferral", interest accrual and valuation decisions he made in relation to PCL's management of the Burleigh Views loan:- *paragraphs 253 to 261 above*;

(k) ***Issue 7***:- The 2004 drawdown against the Burleigh Views loan relating to the discharge of the City Pacific loan debt:- Mr O'Sullivan's conduct in relation to this transaction did not involve any contravention of Corp Act s 180:- *paragraph 384 above*;

(l) ***Issues 8 & 9***:- The 2010 release of Mr O'Sullivan's personal guarantee of Cashflow's liability to BBSFF:- Mr O'Sullivan's pursuit of, and active acquiescence in this transaction, and the subsequent reporting of the release of PCL's guarantee, involved contraventions of Corp Act ss 180 & 182, but not contravention of Corp Act s 1041H:- *paragraphs 387 & 388 to 392 above*.

O'SULLIVAN'S PERSONAL CIRCUMSTANCES

440. There was little consideration of Mr O'Sullivan's personal circumstances, in either the evidence or the parties submissions, other than reference to the material contained in Mr O'Sullivan's March 2015 and September 2019 affidavits. In the following paragraphs I summarise that material, and complement it with information derived from related corporate register details.

441. Mr O'Sullivan has a long history of company directorship and management. Details of his corporate directorships (including his status as a director of PCL and Cashflow) are set out in "Schedule 8 - History and status of O'Sullivan directorships". The Schedule reveals the following information:-

(a) In the seventeen years before the May 2007 refinancing agreement relating to the Burleigh Views loan, Mr O'Sullivan had been appointed as a director of approximately 18 companies;

(b) In 8 instances Mr O'Sullivan's directorship status ended before the May 2007 refinancing agreement relating to the Burleigh Views loan;

(c) As at May 2007, Mr O'Sullivan was a director of 10 companies, eight of which were apparently associated (at least in name) to either PCL or Cashflow;

(d) Between May 2007 and May 2010, Mr O'Sullivan became a director of three further companies (two in 2008 and the third, a company apparently related to PCL, in May 2010);

(e) Consequently, at the time of PCL's October 2012 liquidation Mr O'Sullivan held directorships in 13 companies (nine of them apparently related to either PCL or Cashflow)

(f) Between the date of PCL's October 2012 liquidation, and the February 2015 Disqualification decision, Mr O'Sullivan

(vii) ceased to be a director of nine companies

(viii) continued to hold directorships in four companies

(ix) acquired no new directorships in any company

(g) Since the February 2015 Disqualification decision Mr O'Sullivan

(x) has continued to hold directorships in four companies

(xi) acquired no new directorships in any company.

442. Perhaps using a high level generalisation that tended to overlook the nature of both PCL and Cashflow's respective businesses, Mr O'Sullivan said the activities of the various companies of which he had been a director, and thus his own experience, involved financial planning, insurance broking, mortgage broking and property development services. He provided some more expansive information about the four companies of which he has remained as a director. That information, complemented by the available company registration records, is broadly to the effect set out in the following paragraphs.

443. ***PCL Asset Management Pty Ltd***:- This company was PCL's holding company, and Cashflow's majority shareholder. Mr O'Sullivan has been a director, and the company secretary, since 1992. At the time of the May 2007 Burleigh Views refinancing agreement, he was the company's sole director. After early March 2008, he was a co-director with Messrs Bersten & Seymour and "MR" (Mr O'Sullivan's wife). Messrs Bersten & Seymour

ceased their directorships in early 2014. In early March 2015, "BMO'S" (another, Queensland resident, O'Sullivan family member, and one of the four directors of BSHpl:- *see paragraph 446 below*) replaced MR as a director of the company.

444. PCL Asset Management is the corporate trustee of two O'Sullivan family trusts. In the four financial years from 1 July 2006 to 30 June 2010, the company received total dividend income of $8.45m from PCL:- *see Schedule 3 "Provident cash flow summary"*. In his March 2015 affidavit Mr O'Sullivan asserted that his disqualification has the potential to cause "disruption" to the affairs of the company, and consequential financial detriment to its trust estates, and their beneficiaries. But this was a rather unpersuasive generality. There was no evidence of the real nature and extent of the company's activities, and no suggestion that BMO'S lacked relevant management capacities. Nor was there anything to suggest that Mr O'Sullivan's advice and assistance would not continue to be available to the company, albeit in the capacity of an employee or adviser, rather than as a director with direct decision making responsibility in relation to the management of the company.

445. ***PCL Holdings Pty Ltd***:- This a wholly owned subsidiary of PCL Asset Management Pty Ltd. Mr O'Sullivan has been the company secretary since the company's 2002 incorporation. He was also the company's sole director until early March 2015. Since that time the company has been joined on the board by BMO'S. In his March 2015 affidavit, Mr O'Sullivan described PCL Holdings as a "private investment company" whose principal activity, though winding down, was as the manager of a number of unregulated loans made to other (unspecified) corporations. He said the company had no significant liabilities, typically had trade creditors totalling less than $2,500, and was the source of a significant proportion of his family's income. In his March 2015 affidavit Mr O'Sullivan made a similar general assertion that his inability to "continue to direct the activities and business of the company" was likely to cause disruption, particularly to the management of the company's assets. That general apprehension lacked persuasive force. It was not repeated in Mr O'Sullivan's September 2019 affidavit. There was no demonstrated basis to conclude that the disqualification decision had hindered, or that its implementation would be likely to hinder, the company's capacity to utilise Mr O'Sullivan's services, as an adviser or employee, in the management of the company's assets.

446. ***Bernard Sean Holdings Pty Ltd ("BSHpl")***:- Mr O'Sullivan, along with MR, BMO'S and another family member (perhaps BMO'S's wife) have been the only directors and

shareholders of this company since December 2003. Mr O'Sullivan is the company secretary. The company is the corporate trustee of a self managed superannuation fund, whose beneficiaries are O'Sullivan family members. The company held both PCL debentures and units in the two managed investment schemes PCL operated. In his March 2015 affidavit Mr O'Sullivan said that all the company directors and fund beneficiaries contributed to the company's management, but he opined that his disqualification would be likely to cause "disruption" to the management of the fund's affairs. As in the case of PCL Holdings Pty Ltd, this generally expressed apprehension lacks force, and was not repeated in Mr O'Sullivan's September 2019 affidavit. Mr O'Sullivan's advice, and services, would continue to be available to the company directors. They would, presumably, be no less conscientious / careful / diligent in relation to the management of the fund's affairs than if Mr O'Sullivan retained his status as a director of the company.

447. ***Portcullis Capital Pty Ltd***:- Mr O'Sullivan has been the sole director and secretary of this company since its incorporation in September 2012 (ie., just before PCL's 24 October 2012 liquidation). It is a wholly owned subsidiary of Amira Holdings Pty Ltd. Amira Holdings Pty Ltd has two shareholders (Mr O'Sullivan and MR) and is the corporate trustee of another O'Sullivan family trust. Until January 2014 Messrs Bersten, O'Sullivan & Seymour, and "MR" were the directors of Amira Holdings. Thereafter, Mr O'Sullivan continued on, as a co-director with MR, until February 2015. Since that time MR has been the sole director of Amira Holdings Pty Ltd. (She has been the company secretary since the company's March 2008 incorporation.)

448. In his March 2015 affidavit Mr O'Sullivan described Portcullis as a finance intermediary between lenders and corporate and business real estate mortgagee borrowers. He asserted his role as the principal person involved in the operations of the company. However, he also asserted that the company had a number of contractors and consultants. He then apprehended that their income could be significantly adversely affected by any disqualification that might be visited upon him.

449. That apprehension was not inherently persuasive, because disqualification would not itself have necessarily precluded Mr O'Sullivan's employment by the company, and a continuing involvement in its day to day business activities in that capacity. Neither would it necessarily impede the company's ability to engage contractor's and consultants. (That observation appears to be underscored by the circumstances relating to Mr O'Sullivan's status as a

director of Amira Holdings Pty Ltd. In March 2015 Mr O'Sullivan had sought leave to retain his directorship of that company, and apprehended that his inability (as a result of disqualification) to "continue to direct the activities and business" of the company had the potential to cause financial detriment to his family. However, Mr O'Sullivan actually relinquished his directorship of Amira Holdings Pty Ltd in February 2015. Consistent with that change of status, in the 2020 review proceedings he did not pursue any application for leave in relation to that company.)

450. In his September 2019 affidavit Mr O'Sullivan said that when he incorporated Portcullis Capital Pty Ltd he contemplated its Portcullis' business activities would be his primary business activity and income source. He said that intention had been thwarted, resulting in the company's business activities being "predominantly on hold", by the practical difficulties, and stigma, arising from ASIC's decisions, and the unresolved status of the review applications. He went on to say that, despite the, post March 2015 retention of his directorship of the four companies, he had suffered from an impaired earning capacity throughout that period.

451. Despite the fact that Mr O'Sullivan's September 2019 assertions of impaired earning capacity, and resultant family stress, were generalised and not supported by information demonstrating real financial hardship, they were not the subject of any specific contradiction. Consequently, they should be accepted as substantiating the fact, as distinct from the quantitative impact, of significant adverse personal consequences of the fate of PCL, and to some extent, of the adverse assessment of him evident in ASIC's February 2015 decisions.

452. Again without contradiction, Mr O'Sullivan also said that, apart from the matters addressed in ASIC's 15 February 2015 decisions, his conduct as company director had not been the subject of adverse allegation, complaint or regulatory attention.

453. Two broad propositions were advanced on Mr O'Sullivan's behalf in reliance on the preceding details of Mr O'Sullivan's personal background and circumstances. The first proposition was that the conduct which ASIC had impugned indicated, at its highest, relevant misconduct as a director only in relation to the management and affairs of PCL. It should be viewed as a significant aberration in a history of otherwise appropriate corporate management conduct. Consequently it should not be visited with a disqualification sanction

of the magnitude ASIC had imposed in its February 2015 decision. (I address this proposition in the next section of these reasons:- *see especially paragraph 461 below*.)

454. The second proposition, was that Mr O'Sullivan would likely suffer significant financial detriment from any disqualification decision. This submission sought, unpersuasively, to derive force from an observation by the Tribunal (apparently in the reasons for the 30 March 2015 stay order:- *see paragraph 5 above*) that there was apparently little doubt that the February 2015 disqualification decision had caused, and would continue to cause significant hardship to Mr O'Sullivan.

455. The attempted reliance on an essentially preliminary observation made by the Tribunal in March 2015 is unpersuasive because it was made (i) less than two months after the February 2015 decisions, and (ii) in all likelihood, without a fully considered evaluation of the proffered material (because such an evaluation was not required for determination of the stay application). In any event, I have to address the matter on the basis of my own assessment of the now available material.

456. At a general level I accept (as I have already indicated) that the ASIC disqualification decision has contributed to some diminution of Mr O'Sullivan's repute. But I do not regard the general, though uncontradicted, assertions of "disruption", and correspondingly general apprehensions of financial detriment, as materially persuasive. He is the sole director of only 1 of the companies (Portcullis Capital). There is no evidentiary basis to question the capacity of the other (and potentially continuing) director. Nor is there an evidentiary basis to conclude that Mr O'Sullivan's knowledge, experience and connections would not continue to be available to the company, even if he were precluded from management responsibility and authority in relation to each of the corporations. Consequently, if other factors point to a conclusion that Mr O'Sullivan's disqualification is otherwise "justified", the limited evidence and submissions relating to the circumstance of these other corporations, and his role in relation to them, would not detract from that conclusion. Nor would it warrant a grant of leave to exclude his continued status as a director of these companies from the scope of any disqualification decision.

THE JUSTIFICATION FOR DISQUALIFICATION

457. The undemanding Corp Act s 206F(1) criteria enlivening ASIC's disqualification power were uncontentiously satisfied by the reports of PCL and Cashflow's liquidators:- *see paragraph 4(b) above*. The exercise of that power must have regard to the status of PCL and Cashflow as related corporations:- *see Corp Act s 206F(2)(a)*. No doubt that obligation reflects a legislative awareness of the undemanding nature of the threshold criteria, and indicates that the ultimate asset deficiency of corporate entities whose financial circumstances were substantially interdependent, ought not, of itself, be regarded as sufficient justification for disqualification of the directors of either corporation. However, the mandated obligation to have regard to the relationship between the failed corporations patently stops short of precluding disqualification where such a relationship exists. This indeterminate nature of the "regard to" obligation is, at least arguably, consistent with recognition of other statutory criteria authorising disqualification, and permissive regard to them, in connection with "the public interest". Consistent with that view, positive satisfaction about a director's Corp Act contraventions, in relation to any corporation, may inform, but is not a precondition to, the making of a disqualification decision under Corp Act s 206F(1).

458. In the present case PCL and Cashflow were related corporations, in the strict sense, because of the relationship between their shareholders:- *see paragraph 1 above*. They were also related, in a factual sense, because they had several common directors and because of the funding assistance, both direct and indirect (ie., the RASA guarantee), that PCL provided to Cashflow:- *see paragraphs 331 & 332 above*. However, there is no reason to conclude that the relationship between the two companies contributed, to any material extent, to Cashflow's financial fate. That seems to have been determined principally by the breakdown of Cashflow's relationship with Coface and, more specifically, the inability to obtain indemnity under its insurance arrangements with Coface:- *see paragraphs 335(a), 335(d) & 338(f) above*.[39] Conversely, although the amount of PCL's ultimate asset deficiency was, as a matter of objective fact, likely to have been contributed to by Cashflow's net asset deficiency, and the consequential irrecoverability of the financial assistance PCL

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[39] In the March 2014 supplementary report Cashflow's liquidator had partly attributed Cashflow's failure to a general management deficiency in relation to both the management of its loan portfolio, and the company's overall "strategic management":- *see paragraph 338(l) above*. However, the parties Statement of Issues in the review proceedings raised no such criticism. Consistent with that position, ASIC confined its Cashflow related submissions to Issues 8 & 9, relating to the September 2010 release of Mr O'Sullivan's personal guarantee.

had provided to Cashflow, that irrecoverability was, with one exception, not demonstrably associated with any impugned conduct of Mr O'Sullivan. That exception relates, of course, to the release of Mr O'Sullivan's potential $700,000 personal liability under the 30 June 2006 deed of guarantee. However, that involved conduct quite distinguishable from the ordinary management of PCL, and from ASIC's criticisms of Mr O'Sullivan in relation to PCL. For these reasons, none of the aspects of the relationship between PCL and Cashflow is material to assessment of justification for any disqualification decision.

459. In contending that no disqualification was justified, one of the principal matters advanced on Mr O'Sullivan's behalf was that he had not breached his Corp Act s 180 duty of care and diligence. A concomitant of that submission was that, in the absence of a relevant Corp Act contravention, no disqualification ought be considered justified. The first aspect of that contention is contradicted by the contravention findings I have made:- *see paragraph 439 above*. The second aspect of that contention is not consistent with the undemanding criteria in Corp Act s 206F(1):- *see paragraphs 365, 369 & 370 above*.

460. The other matters relied on to support Mr O'Sullivan's opposition to the appropriateness (ie., the justification) for his disqualification were to the following effect:-

(a) ASIC has made no complaint about Mr O'Sullivan's management conduct in relation to the general (ie., non Burleigh Views) aspects of PCL business, nor about the discharge of his responsibilities as a director of Cashflow;

(b) The management decisions Mr O'Sullivan made in relation to the Burleigh Views loan were part of a sensible commercial strategy, and did not warrant an adverse view of Mr O'Sullivan's general corporate management capacity and probity, especially having regard to the fact that they were endorsed by the other PCL directors;

(c) Neither Mr O'Sullivan's involvement in PCL's disclosure deficiencies, nor his approach to the management and realisation of the Burleigh Views loan, had been shown to have contributed materially to PCL's failure and asset deficiency

(d) Mr O'Sullivan's personal / familial financial interest in PCL is not, in the absence of an allegation of dishonesty, an informative consideration in the making of any disqualification decision

(e) Mr O'Sullivan's conduct in relation to the release of the Cashflow guarantee, was not asserted to have been dishonest, occurred in the context of a uniquely complex set of circumstances of commercial exigency, did not contribute to Cashflow's failure, and had no material relevance to an overall assessment of Mr O'Sullivan's management competence and probity

(f) The Ban decision (especially given the length of its practical operation) was a sufficient sanction, particularly because the principal basis for criticism of his conduct was the inadequate disclosure in relation to financial products;

(g) Even if a period of disqualification was warranted, it should be proportionate to the permissible 5 year maximum, that maximum should be regarded as appropriate only to the "worst" case, and Mr O'Sullivan's conduct (which ASIC conceded did not involve dishonesty) ought not be regarded as proximate to any such case

461. ***The limited scope of ASIC's conduct complaints***:- I indicated earlier the apparently extensive history of Mr O'Sullivan's involvement as a company director. I have acknowledged, and ASIC did not dispute the accuracy of, his assertion of absence of complaint about his abilities and conduct as a director, other than in relation to the matters concerning PCL and the Cashflow guarantee. Complementing the inference of competence, care and diligence to which that history gives rise is the impression generated by the procedures and practices involved in the ordinary conduct of PCL's activities. They included (i) the involvement of other, apparently competent directors, (ii) apparently appropriately documented credit policies and practices, (iii) regular reporting practices, including apparently regular and detailed written reports to the PCL Board, (iv) apparently timely compliance with audit obligations and, (v) evidence of engagement of apparently competent staff and external advisers. All of these matters, though basic desiderata, and matters of obvious self interest (particularly given Mr O'Sullivan's personal / familial interest in PCL's commercial success and good repute) are also consistent with the public interest. That public interest involves having competent, diligent and appropriately experienced people managing the functions of trading corporations. In that context, the absence of justified criticism of Mr O'Sullivan's conduct in relation to any corporation other than PCL (and the Cashflow guarantee) is a significant consideration.[40] Taken on its own, it tends to

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[40] I note that the PCL liquidator's October 2012 report opined that there were material deficiencies in a range of PCL's loan management practices. However, that opinion was not developed into specific

point against satisfaction that his disqualification is justified. That is the case because the protective purpose of the Corp Act Chapter 2D provisions may also be served by encouraging the appointment of competent and diligent persons as directors.

462. But that public interest also points to the importance of both confidence in the future conduct of a particular director, and confidence in the operation of a regulatory scheme that will appropriately sanction, and contribute to corresponding deterrence, of transgressing conduct. It is in these two considerations on which ASIC principally relies in urging affirmation of the five year disqualification decision.

463. ***The Burleigh Views management decisions***:- The sequence of events I described in the earlier sections of these reasons - particularly under the heading "Burleigh Views loan history" (*see paragraphs 67 to 129 above*) - shows that PCL had an extremely difficult recovery situation thrust upon it. That difficulty manifested itself, with different nuances of complexity, on three relevant occasions. The first occasion was in May 2007, when Mr O'Sullivan was required to consider a development completion proposal proffered after Burleigh Views drawn out and unsuccessful attempts to sell the property. The second occasion was in June 2008 when PCL took control of the property after the collapse of the development completion proposal embodied in the conditional refinancing agreement of May 2007. The third occasion was in August 2009 when PCL was alerted to the, ultimately uncontentious, fact of the lapse of development approval for the completion of the originally proposed development. The difficulties caused by the last of those developments was never resolved during Mr O'Sullivan's period as an active director of PCL.

464. In dealing with Mr O'Sullivan's general management of the Burleigh Views loan, and most specifically, what I have characterised as his "deferral" decision (*see paragraph 409 above*) I have concluded that his conduct did not constitute a Corp Act contravention. That was because his deferral decision ultimately accorded with the reasonable decision of an appropriately informed and careful director. However, his decision making process was not that of an appropriately informed director, and the decision to which he came was merely co-incidentally one that accorded with an objective assessment of PCL's best interests.

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criticism of Mr O'Sullivan's conduct, other than in relation to the Burleigh Views loan. It does not, therefore, detract from the general relevance of Mr O'Sullivan's background experience.

465. In this context ASIC was correct, in my view, to maintain its criticism of Mr O'Sullivan's lack of genuine insight into, and acceptance of responsibility for, the deficient aspects of his decision making process in relation to his "deferral" decision. That decision making process was significantly deficient, at least in the period prior to the August 2009 discovery of the development approval lapse.

466. If the "deferral" decision(s) – and specifically the post June 2008 (and pre August 2009) deferral decision – had been the only impugned aspect of Mr O'Sullivan's conduct, I would have been inclined to regard it as an aberrant decision making process, overwhelmingly contributed to by the exigency of the situation, and especially the recent experience of problematic attempts to achieve a sale of the property. However, as I have found, Mr O'Sullivan was responsible for other significant Corp Act contraventions. Those contraventions likely had a significant corrosive influence on the overall integrity of PCL's management and practices, and most specifically, likely affected the content of its public disclosure documents.

467. ***No dishonesty in relation to PCL's management or material contribution to PCL's ultimate failure***:- ASIC expressly disavowed any suggestion of dishonesty on Mr O'Sullivan's part. My own consideration of the contemporaneous records satisfies me that it is appropriate to accept that disavowal. I am also satisfied that although the reasons for PCL's ultimate failure, at least as identified by PCL's liquidator (*see paragraph 56 above*) included the management of, and disclosures relating to, the Burleigh Views loan, they were also significantly more extensive. In that context I note, consistent with both the April 2012 Information Booklet, and the liquidator's October 2012 report, that more than 90% of the value of PCL's FTI loans had defaulted. (According to the April 2012 Information Booklet, that involved loans approximating $87.4m.)

468. However, I also note that PCL's actual advances under the Burleigh Views loan (as distinct from accrued and capitalised interest) appear to have occurred by August 2005 and (after allowing for interest capitalised on the original loan amount) likely totalled something less than $9.6m:- *see paragraph 69 above*. It is not readily apparent, and it is objectively unlikely, that PCL subsequently advanced any significant additional loan funds after August 2005:- *see paragraphs 394 & 398 above*. Consequently, although it is readily apparent that the irrecoverability of the Burleigh Views loan made up a significant proportion of the total loan defaults relating to PCL's FTI portfolio, it also appears that the overwhelming

proportion of the actual loan advances had been advanced by PCL before the events that were the subject of ASIC's criticisms of Mr O'Sullivan's conduct in the present proceedings. It follows that although PCL's disclosure deficiencies likely were the principal events that triggered the supervisory attention that resulted in PCL's receivership, and subsequent liquidation, it is less readily apparent that Mr O'Sullivan's impugned conduct materially contributed to the actual total recoverability shortfall apprehended by the PCL's liquidator.

469. ***No dishonesty in relation to Cashflow or material contribution to Cashflow's ultimate failure***:- Although I have found that Mr O'Sullivan contravened Corp Act s 182 in the circumstances in which he was released from his personal guarantee, I do not regard this matter as materially contributing to satisfaction that Mr O'Sullivan's future disqualification is justified. The reasons for that disinclination are as follows. First, I am satisfied that Mr Bersten, who had substantial legal experience, was aware of the conflict of interest involved in the guarantee release proposal. He appears to have had the direct personal responsibility for the content of the various September 2010 transaction Deeds. Notwithstanding what I have said earlier about contemporary awareness of a conflict or interest (*see paragraph 358 above*) there is no evidence that Mr Bersten alerted Mr O'Sullivan to any impropriety involved in the release and it is correspondingly likely that Mr Bersten's active involvement at least implicitly provided Mr O'Sullivan with a degree of comfort about the propriety of the guarantee release transaction. Second, Mr O'Sullivan was a co-guarantor with PCL and, in a situation where PCL would necessarily achieve a release from its guarantee obligations, there is some degree of underlying consistency with the original concept of equal responsibility amongst the three co-guarantors, for all of them to be simultaneously released. Third, it seems highly likely that all the PCL directors regarded the September 2010 Novation agreement as highly advantageous to PCL, and one that had realistic prospect of recovering a much greater proportion of the RASA debt than the amount PCL had paid to BBSFF for the Novation. In this context, involving a comparison of PCL's overall position before and after the Novation transaction, there was a tenable basis for a contemporaneous view that the release of Mr O'Sullivan's guarantee was not a substantial consideration detracting from PCL's best interests. Finally, and consistent with the preceding proposition, it seems highly likely that all of the PCL directors were in fact aware of both Mr O'Sullivan's conflict of interest, and the release proposal, and did not articulate either opposition to, or concern about, the manner in which Mr O'Sullivan's release was effected:- *see paragraph 386 above.*

470. ***Mr O'Sullivan's personal and familial financial interests in PCL***:- Consistent with the view that Mr O'Sullivan did not act dishonestly in relation to either the management of the Burleigh Views loan, or the disclosures relating to it, it is not appropriate to conclude that Mr O'Sullivan's conduct was to any extent motivated by his own personal and family interests. This is the case notwithstanding the view I have expressed that his asserted confidence in the ultimate recoverability of the Burleigh Views loan was problematic (*see paragraph 258 above*), and that his involvement in the irregular treatment of the Burleigh Views loan was sustained and intentional:- *see paragraphs 255 & 423 above*. However, PCL's reported financial statements suggest that Mr O'Sullivan's family interests did substantially benefit from his impugned interest accrual decisions:- *see paragraph 476 below*. That appearance is a relevant consideration in the determination of an appropriate disqualification period.

471. ***The sufficiency of the Ban decision***:- It was ultimately substantially uncontentious that Mr O'Sullivan's conduct in relation to PCL's disclosures concerning the Burleigh Views loan, and the consequential disclosures relating to PCL's loan arrears and reported income, were seriously deficient, and involved various Corp Act contraventions:- *see paragraphs 23, 24 & 277 to 283 above.* Those deficiencies have resulted in the 7 year Ban decision, a decision which I have upheld:- *see paragraphs 284 to 302 above*.

472. That Ban decision, despite its length is not, however, a sufficient sanction for the care and diligence Corp Act contraventions in which Mr O'Sullivan engaged. It is not a sufficient sanction because those contraventions, principally his decisions relating to the capitalisation of interest on the Burleigh Views loan, and the exclusion of the loan from PCL Loan Arrears reports, were anterior to, and likely materially contributed to, the serious disclosure deficiencies manifested in PCL's public disclosure documents. They contributed to those deficiencies because, together with Mr O'Sullivan's status and authority within PCL, they had the practical result of overcoming the safeguards that should have been provided by (i) PCL's documented policies and practices, (ii) informed assessments, and critical evaluations, by Mr O'Sullivan's co-directors and, (iii) the fully informed and objective assessments by PCL's auditors. Reading through the primary documents on which I have relied in compiling the events summarised in the sections of these reasons dealing with (i) the history of the Burleigh Views loan (*see paragraphs 67 to 129 above*) and, (ii) the audit materials (*see paragraphs 218 to 261 above*) left me with the impression that both the PCL directors and its auditors ultimately deferred to Mr O'Sullivan's decision making about the

Burleigh Views loan, its management and related disclosures, and did so without a full appreciation of all the actual circumstances, and without a clear eyed discharge of their own personal responsibilities. In essence, Mr O'Sullivan's authority, both in terms of his formal status and his superior knowledge of, and personal responsibility for, the Burleigh Views loan corroded the effective operation of the management systems that did exist within PCL, and which should have prevented the repeated and egregious deficiencies in PCL's public disclosures:- *see paragraphs 253 to 255 & 295 above*. It is scarcely possible to comprehend what in fact occurred, except on the basis of that corrosive influence of Mr O'Sullivan's management decision making, and the lack of care, including the Corp Act contraventions I have found, that it involved.

473. ***Proportionality and consistency***:- There is no contextual justification for the proposition that the five year maximum period of disqualification authorised by Corp Act s 206F(1), applies only to a "worst case" and requires the selection of any disqualification period to be determined by an impressionistic calibration of the particular circumstances against such a comparative scale. The idea of a "worst case" is fundamentally ephemeral, and the notion of a legislative intention to proclaim a five year period of disqualification as inflexibly appropriate to such a case tends to be inconsistent with both (a) the undemanding criteria in Corp Act s 206F(1)(a) and, (ii) the contemplation of a court ordered disqualification period of up to 20 years, contingent upon satisfaction that management deficiencies contributed to corporate failure:- see Corp Act s 206D(1).

474. Where the justification for disqualification derives principally from an adverse view of a person's capacity or resolve to comply with their Corp Act obligations, the public interest would tend to favour a substantial, and likely the maximum, period of disqualification. Where the justification for disqualification derives substantially from the view that a period of disqualification is necessary to provide an element of personal deterrence, in view of the person's diffident compliance resolve, regard must necessarily be had both to the nature and consequences of their past conduct, including both any personal benefits, and any adverse personal consequences, it may have involved. Where the justification for a disqualification period derives principally from an assessment of the public interest in maintaining appropriate standards of conduct, and demonstrating a regulatory determination to enforce those standards, regard to the public interest is likely to require regard to, and to permit emphasis of, the extent to which the person's past conduct departed

from proper standards and the extent to which it apparently impacted adversely upon the conduct and interests of others involved in the corporation's management or dealings.

475. In the exercise of the necessarily impressionistic assessment of "justification" for any disqualification period, and despite the disavowal of any scale calibrated by reference to some "worst case", some measure of proportionality and consistency is desirable. Those desiderata draw attention to the outcome of ASIC's concerns about Mr O'Sullivan's co-directors of PCL, one of whom (Mr Seymour) ultimately escaped any period of disqualification, and another of whom (Mr Bersten) apparently incurred a five year disqualification period:- *see paragraph 9 above*. However, the difference in those two outcomes, given the findings I have made, that all the PCL directors had a general awareness of the circumstances and reporting of the Burleigh Views loan, tends to demonstrate the difficulty involved in the concept of consistency in the exercise of the disqualification power. The difficulty arises from the permissible width of the relevant considerations, and the necessity to address the circumstances, abilities and the apparent resolve of the particular person. The unavoidable singularity of at least some aspects of each individual's personal circumstances and qualities, suggests that "consistency" lies more in the process of assessment, by taking all relevant considerations into account, than in mere comparison of the actual disqualification periods that have been determined.

476. In the present matter the egregious default involved in Mr O'Sullivan's interest accrual and loan arrears report decisions relating to the Burleigh View loan compel the imposition of a period of disqualification. They were completely unjustified decisions, and they appear to have had the corrosive effect to which I have referred:- *see paragraphs 255 & 472 above*. In my view the public interest requires an unambiguous sanction, essentially as an element of general deterrence. Such a sanction is required for essentially four reasons (i) Mr O'Sullivan's role as the ultimate executive authority within PCL, and his personal responsibility for the impugned decisions, (ii) the egregious default the decisions involved, (iii) their likely causal contribution to the inadequate / misleading public disclosures that PCL made and, (iv) the appearance that, Mr O'Sullivan's personal / family interests significantly benefited from the interest accrual decision.[41]

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[41] I refer here to the objective appearance that PCL Asset Management received a total of $8.45m in dividends in the financial years from 2007 to June 2010. In the same period, PCL accrued $7.362m in interest on the Burleigh Views loan. In each of the 2009 and 2010 financial years, the Burleigh Views loan interest accrual appears to have made up more than half of PCL's reported net profit before tax:-

477. On the other hand, and despite ASIC's criticisms of Mr O'Sullivan's lack of insight into the full extent of the deficiencies his conduct involved (principally in relation to the matters that reasonable care indicated should have influenced what I have called his "deferral" decision) I am not satisfied that any additional element of personal deterrence is required. Mr O'Sullivan's conduct, particularly in relation to the interest accrual decisions and loan arrears reporting involved egregious errors. However, I am inclined to think that the ultimate adverse impact of those errors flowed most directly from the disclosure deficiencies. In relation to those deficiencies, although I have accepted the reality of Mr O'Sullivan's tardily proffered acknowledgements (*see paragraphs 297 to 300 above*) I have affirmed ASIC's 7 year Ban decision. That is a significant public censure of Mr O'Sullivan's conduct. Furthermore, although the Ban decision is not specifically directed at Mr O'Sullivan's underlying management decisions, it is in reality influenced by those decisions – given my rejection of the contention that Mr O'Sullivan's personal responsibility for the disclosure inadequacies was mitigated by the acquiescence of PCL's other directors and its auditors:- *see paragraphs 253 to 257 above*. And insofar as Mr O'Sullivan's management conduct and decisions justify an additional sanction (which I am satisfied they do) I am also inclined to think that the long drawn out process involved in the determination of Mr O'Sullivan's review application, with the cost, stress and delay it has involved, has already provided a significant sanction, by laying bare the nature of his errors, and their consequences, particularly their personal consequences for Mr O'Sullivan since ASIC's 2015 Disqualification decision. Finally, the underlying reality is that Mr O'Sullivan's management errors occurred in the context of a very unusual set of circumstances, were conspicuously aberrant against the background of his corporate management history, and were in no sense motivated by personal dishonesty.

478. It is now almost a decade since PCL's liquidation, and seven years since ASIC's Disqualification decision. Mr O'Sullivan will serve a 7 year Ban decision period. A Disqualification decision is warranted by the unambiguous adverse findings I have made. No significant disqualification period has in fact operated, but the fact of the decision, and its unresolved status over a period of years, is likely to have had a meaningful (though

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see Schedule 1-3A. Although, PCL Asset Management held PCL (an unquantified amount of) debentures, and may be regarded as having suffered a significant loss as a result of PCL's collapse, that circumstance should be regarded simply as an aspect of the risk inherent in the investment. It does not operate to offset the apparent significance of the benefits suggested by the dividend payments, particularly in each of the 2009 and 2010 financial years.

unquantified) adverse impact on Mr O'Sullivan and his family. That impact will be reinforced by my findings, and by my view (on the basis of the currently available information) that no disqualification exemption should apply to Mr O'Sullivan's current directorships. The combination of the considerations I have outlined (in this paragraph, and the immediately preceding paragraphs) leads to my view that a disqualification period of less than five years is both justified and appropriate. The ban period should broadly reflect the during which Mr O'Sullivan's conduct adversely affected PCL's disclosures. It should also recognise both the significant sanction of the Ban decision, take into account my view that the objective of personal deterrence is sufficiently served by that decision, by the time cost and stress involved in the resolution of the present proceedings, by the reality that the disqualification period will operate for a substantial period after the impugned conduct and after expiry of the Ban period, and by the absence of leave in relation to Mr O'Sullivan's current directorships. The period in which Mr O'Sullivan's management conduct adversely affected PCL's disclosures can be viewed in several different ways – namely (i) the whole period after the conditional May 2007 refinancing agreement, (ii) the October 2008 to March 2012 period covered by the impugned Quarterly Reports, (iii) the period from December 2008 to December 2011 during which PCL's Prospectus were open and, (iv) the period from August 2009 to December 2011 during which, despite awareness of the lapse of the Burleigh Views development approval, PCL continued to solicit debenture funding on the basis of its various Prospectus documents. The views I have expressed about the May 2007 refinancing agreement disincline me to regard that date as the appropriate starting point. The other alternative dates result in periods ranging from about 3.5 years to 2 years, and each of those periods has an element of justification, depending upon the view one takes of (i) the objective fact (and hence the discoverablilty) of the lapse of the Burleigh Views DA and, (ii) when PCL was in fact first aware of that lapse. Taking that potential range of views into account, together with the other matters I have outlined, the appropriate disqualification period is at the approximate mid point ie., two years and nine months. Such a period of disqualification, which will take effect towards the end of the Ban period, and years after the impugned conduct, suffices to serve the underlying protective and deterrent purposes of the disqualification period power in Corp Act s 206F(1).

CONCLUSION ON THE DISQUALIFICATION PERIOD

479. In the light of the considerations I have addressed, the preferable decision is that a disqualification period is justified, but should now be limited to a prospective period

approximating two years and nine months. That period should operate from the date of service of the notice required by Corp Act s 206F(3)&(4) and end on Friday 20 September 2024.

I certify that the preceding four hundred and seventy-nine (479) paragraphs are a true copy of the reasons for the decision herein of Senior Member Peter Taylor

.....SGD.....

Associate

Dated: 27 January 2022

Date(s) of hearing:	**9 March 2020 - 13 March 2020**
Counsel for the Applicant:	**Ms Vanessa Whittaker and Mr Matthew Sherman**
Solicitors for the Applicant:	**Quinn Emanual Urquhart & Sullivan**
Counsel for the Respondent:	**Ms Kristina Stern SC**
Solicitors for the Respondent:	**Australian Government Solicitor**

LIST OF SCHEDULES

SCHEDULES

SCHEDULE 1 - PROVIDENT PROFIT & LOSS / BALANCE SHEET - SUMMARY

Year	30 June 2007	30 June 2008	30 June 2009	30 June 2010	30 June 2011	31 December 2011
						Half-year
PROFIT AND LOSS						
Income						
Interest income	$28,149,131	$29,008,581	$31,346,411	$26,652,106	$25,905,546	$13,144,592
Interest expense	$17,817,227	$17,628,585	$17,717,369	$14,340,023	$16,205,208	$8,647,766
Net interest income	**$10,331,904**	**$11,379,996**	**$13,629,042**	**$12,312,083**	**$9,700,338**	**$4,496,826**
Non interest income	A $1,035,735	$1,708,068	$995,302	$823,568	$1,391,724	$1,308,152
Net operating income	**$11,367,639**	**$13,088,064**	**$14,624,344**	**$13,135,651**	**$11,092,062**	**$5,804,978**
Expenses from ordinary activities						
Employee benfefits expense	$3,804,487	$3,769,850	$3,805,832	$4,020,622	$4,264,152	$1,990,252
Marketing expenses	$1,876,941	$990,400	$977,084	$998,587	$876,432	$369,209
Professional fees	$530,432	$670,190	$437,743	$671,662	$674,670	$346,134
Occupancy expenses	$454,880	$694,212	$716,888	$773,759	$788,077	$396,839
Impairment of loans and receivables	B $302,373	$1,531,383	$4,877,308	$2,612,904	$1,337,756	$14,902,482
Depreciation expense	$118,821	$228,084	$372,806	$349,714	$143,170	$81,283
Commission and brokerage expense		$253,661	$383,868	$133,882	$410,940	$195,617
Telephone expense	$87,992	$85,126	$83,470	$84,793	$97,085	$46,705
Other expenses	$392,855	$583,840	$622,694	$680,773	$841,124	$457,417
Office relocation expense			$132,867			
Doubful debts recovery/(expense)	A $1,000,000					
Total expenses from ordinary activities	**$6,567,881**	**$8,806,746**	**$12,410,560**	**$10,326,696**	**$9,433,406**	**$18,785,938**
Profit/(loss) from ordinary activities before income tax	**$4,799,758**	**$4,281,318**	**$2,213,784**	**$2,808,955**	**$1,658,656**	**$12,980,960**
Income tax expense	$1,445,291	$1,295,568	$672,426	$855,628	$508,496	$3,889,500
Net profit after providing for income tax	**$3,354,467**	**$2,985,750**	**$1,541,358**	**$1,953,327**	**$1,150,160**	**$9,091,460**
BALANCE SHEET						
Assets						
Current assets	C					
Cash and cash equivalents	$4,305,675	$24,328,109	$8,000,641	$17,249,024	$19,249,760	$11,016,317
Interest receivable	$7,245,878	$8,065,360	$10,482,177	$13,105,946	$15,809,326	$17,669,261
Loans and advances	$196,716,353	J $177,505,337	$148,853,663	$165,354,556	$171,591,159	$139,188,432
Commercial bills	$1,633,173	$2,124,764	$945,417	$1,065,016	$1,287,476	$1,360,512
Current tax asset	$110,162	G $179,828		$346,169	$178,615	$231,984
Other financial assets	$127,811	J $2,194,843				
Other assets	$288,375	J $555,100	$260,715	$197,147	$80,772	$87,026
Security deposits		$314,314				
Deferred tax asset						$626,996
Total current assets	**$210,427,427**	**$215,267,655**	**$168,542,613**	**$197,317,858**	**$208,197,108**	**$170,180,528**
Non-current assets						
Loans and advances	$19,534,263	$15,315,257	$43,745,683	$12,951,690	$16,713,249	$37,446,784
Property, plant and equipment	$248,910	$639,094	$501,807	$221,109	$223,656	$282,899
Deferred tax assets	$1,082,835	$1,077,115	$1,503,234	$1,153,988	$944,093	$4,284,998
Security deposits	$51,660	$7,535,125	$12,332,872	$10,367,180	$10,458,033	$10,428,510
Other assets					$113,179	$119,908
Total non-current assets	**$21,217,668**	**$24,566,591**	**$58,083,596**	**$24,693,967**	**$28,452,210**	**$52,563,099**
Total assets	**$231,645,095**	**$239,834,246**	**$226,626,209**	**$222,011,825**	**$236,649,318**	**$222,743,627**
Liabilities						
Current liabilities						
Trade and other payables	$8,774,948	$8,236,928	$5,454,199	$4,596,085	$5,278,136	$4,674,656
Provisions (non-loan) H	$204,767	$282,831	$357,500	$626,621	$699,329	$639,914
Financial liabilities	$137,619,490	$152,574,290	$142,510,220	$154,750,614	$159,269,470	$159,125,277
Current tax liability			$25,785			
Total current liabilities	**$146,599,205**	**$161,094,049**	**$148,347,704**	**$159,973,320**	**$165,246,935**	**$164,439,847**
Non-current liabilities						
Financial liabilities	$71,305,630	$64,264,187	$63,711,137	$48,017,810	$56,231,528	$52,224,385
Total non-current liabilities	**$71,305,630**	**$64,264,187**	**$63,711,137**	**$48,017,810**	**$56,231,528**	**$52,224,385**
Total liabilities	**$217,904,833**	**$225,358,236**	**$212,058,841**	**$207,991,130**	**$221,478,463**	**$216,664,232**
Net assets/total equity	**$13,740,260**	**$14,476,010**	**$14,567,368**	**$14,020,695**	**$15,170,855**	**$6,079,395**
Contributed equity	$100,000	$100,000	$100,000	$100,000	$100,000	$100,000
Retained earnings/profit	$13,640,260	$14,376,010	$14,467,368	$13,920,695	$15,070,855	$5,979,395
T documents references (Financial Statements)	Vol 11, Tab A3 pg 6530-6561	Vol 11, Tab A3 pg 6562-6600	Vol 11, Tab A3 pg 6601-6635	Vol 11, Tab A3 pg 6636-6670	Vol 11, Tab A3 pg 6671-6704	Vol 19 Tab 20 pg 11982-11995
	pg 6562-6600	pg 6601-6635	pg 6636-6670	pg 6671-6704		

A. In the 2008 financial statements, the non-interest income was reported $1,000,000 less and there was no $1,000,000 doubful debt expense. The profit figure was the same.

B. In the 2007 financial statements, the item was called bad debts written off.

C. The 2007 balance sheet above is taken from the 2008 financial statements.The 2007 version did not differentiate between current and non-current, but the 2008 did. In 2007 there was an

D. This loan information is taken from the 2008 financial statements.

E. The Burleigh Views Loan is the largest loan in the largest loans table.

F. In the 2008 financial statements, this was recorded as one figure of $54,515,903. The separate items and figures are taken from the 2009 financial statements.

G. In the 2009 financial statements, this was recorded as a negative liability viz an asset. It changed the asset and liability totals, but the net asset figure was the same.

H. These are not loan provisions, but provisions for such things as employee entitlements, auditor fees, trustee fees and lease make-good.

J. In the 2009 financial statements, on the 2008 balance sheet these items were reported as $170,494,890 loans and advances and $760,390 other assets. In the 2009 notes, the 2008 total loans and advances were reported as $194,810,147.

SCHEDULE 2 - PROVIDENT FINANCIAL LIABILITIES - SUMMARY

Year	30 June 2007	30 June 2008	30 June 2009	30 June 2010	30 June 2011	31 December 2011
						Half-year
LOANS						
Total loans and advances	C $216,250,616	J $192,820,594	$192,599,346	$178,306,246	$188,304,408	$176,635,216
Burleigh Views total (ie., as largest loan) E	D $12,026,966	$13,500,429	$15,101,887	$17,518,058	$20,086,212	$21,327,806
Burleigh Views % of total loans and advances E	D 5.7%	7.1%	7.8%	10.0%	11.0%	$0
Loan arrears - as reported						
Total past due loans (>90 days)	$41,636,821	$52,817,247	$62,758,593	$57,295,183	$74,577,260	$79,700,700
Total past due loans (>30 days, including >90 days)	D $85,133,337	$70,832,895	$88,951,683	$88,710,332	$96,898,577	
T-Doc reference (Financial Statements)	Vol 11, Tab A3 pg 6530-6561 pg 6562-6600	Vol 11, Tab A3 pg 6562-6600 pg 6601-6635	Vol 11, Tab A3 pg 6601-6635 pg 6636-6670	Vol 11, Tab A3 pg 6636-6670 pg 6671-6704	Vol 11, Tab A3 pg 6671-6704	Vol 19 Tab 20 pg 11982-11995

A. In the 2008 financial statements, the non-interest income was reported $1,000,000 less and there was no $1,000,000 doubful debt expense. The profit figure was the same.

B. In the 2007 financial statements, the item was called bad debts written off.

C. The 2007 balance sheet above is taken from the 2008 financial statements.The 2007 version did not differentiate between current and non-current, but the 2008 did. In 2007 there was an asset item of a $4,000,000 Cashflow promissory note, and in 2008 this was included in the loans and advances. In 2007 there was a negative current tax liability viz an asset, and in 2008 it was an asset. The assets and liabilities reported in 2007 were different from the above, but the net asset figure was the same.

D. This loan information is taken from the 2008 financial statements.

E. The Burleigh Views Loan is the largest loan in the largest loans table.

F. In the 2008 financial statements, this was recorded as one figure of $54,515,903. The separate items and figures are taken from the 2009 financial statements.

G. In the 2009 financial statements, this was recorded as a negative liability viz an asset. It changed the asset and liability totals, but the net asset figure was the same.

H. These are not loan provisions, but provisions for such things as employee entitlements, auditor fees, trustee fees and lease make-good.

J. In the 2009 financial statements, on the 2008 balance sheet these items were reported as $170,494,890 loans and advances and $760,390 other assets. In the 2009 notes, the 2008 total loans and advances were reported as $194,810,147.

SCHEDULE 3 - PROVIDENT CASHFLOW - SUMMARY

Year	30 June 2007	30 June 2008	30 June 2009	30 June 2010	30 June 2011	31 December 2011
						Half-year
CASH FLOWS						
Cash flows from operating activities						
Interest received	$29,548,633	$26,736,244	$26,369,171	$24,767,422	$23,494,819	$11,036,709
Other fees received	$1,035,735	$1,245,212	$696,658	$1,456,187	$1,256,735	$1,222,494
Borrowing costs	$17,542,020	$18,940,668	$19,118,271	$14,543,445	$15,747,196	$8,905,661
Payments to suppliers and employees	$6,950,569	$6,499,088	$6,975,242	$8,008,200	$8,037,987	$4,140,801
Income taxes paid	$2,733,476	$1,511,811	$892,933	$878,337	$139,931	$131,770
Net cash provided by operating actitivies	**$3,358,303**	**$1,029,889**	**$79,383**	**$2,793,627**	**$826,440**	**$919,029**
Cash flows from investing activities						
Payments for property, plant and equipment	$137,836	$618,267	$115,519	$69,339	$145,717	$140,526
Payment for loan advances	$126,253,627	$149,985,124	$108,932,456	$44,606,127	$52,022,910	$36,087,177
Repayment of loan advances	$100,689,892	$167,415,034	$106,905,000	$56,263,647	$40,799,285	$33,091,758
Issue of promissory notes	$46,263,282	$14,100,000				
Repayment of promissory notes	$49,563,282	$18,100,000	$1,210,391			
Proceeds from disposal of equipment				$500	$700	
Investment in Monthly Income Fund					$110,000	
Net cash provided by/(used in) investing activities	**$22,401,571**	**$20,811,643**	**$932,584**	**$11,588,681**	**$11,487,642**	**$3,135,945**
Cash flows from financing activities						
Dividends paid	$2,250,000	$2,250,000	$1,450,000	$2,500,000		
Funds held in trust	$33,507	$17,546	$80,863	$7,276	$11,221	$56,652
Proceeds from issues of debentures/FTIs	$37,289,501	$12,709,032	$8,363,380	$20,419,532	$24,015,850	$19,130,836
Proceeds from wholesale funding facility		F $76,576,883	$59,088,864	$34,469,865	$33,680,806	$12,064,468
Repayment of debentures/FTIs redeemed	$50,865,258	$66,811,579	$46,643,454	$19,984,888	$15,742,594	$11,155,258
Repayment of wholesale funding facility		F $22,060,980	$34,752,194	$37,531,158	$29,312,345	$24,161,863
Net cash inflow provided by/(used in) financing activities	**$15,859,264**	**$1,819,098**	**$15,474,267**	**$5,133,925**	**$12,652,938**	**$4,178,469**
Net increase/(decrease) in cash held	**$34,902,532**	**$20,022,434**	**$16,327,486**	**$9,248,383**	**$2,000,736**	**$8,233,443**
Cash at the beginning of the reporting period	$39,208,207	$4,305,675	$24,328,109	$8,000,641	$17,249,024	$19,249,760
Cash at the end of the reporting period	**$4,305,675**	**$24,328,109**	**$8,000,641**	**$17,249,024**	**$19,249,760**	**$11,016,317**
T Documents reference (Financial Statements	Vol 11, Tab A3 pg 6530-6561	Vol 11, Tab A3 pg 6562-6600	Vol 11, Tab A3 pg 6601-6635	Vol 11, Tab A3 pg 6636-6670	Vol 11, Tab A3 pg 6671-6704	Vol 19 Tab 20 pg 11982-11995
	pg 6562-6600	pg 6601-6635	pg 6636-6670	pg 6671-6704		
Burleigh views loan - Proportions						
Interest from Schedule 1	$28,149,131	$29,008,581	$31,346,411	$26,652,106	$25,905,546	$13,144,592
Net interest income from Schedule 1	**$10,331,904**	**$11,379,996**	**$13,629,042**	**$12,312,083**	**$9,700,338**	**$4,496,826**
Interest income received - from Schedule 3	$29,548,633	$26,736,244	$26,369,171	$24,767,422	$23,494,819	$11,036,709
Net profit - before tax - from Schedule 1	**$4,799,758**	**$4,281,318**	**$2,213,784**	**$2,808,955**	**$1,658,656**	**$12,980,960**

Schedule 1-3A:- Burleigh Views Loan - accrued interest & reported NPBT

Reasons:- paragraphs 13, 41 & 428

	2007	2008	2009	2010	2011	2012
interest accrual	81,928	103,794	116,516	130,333	152,131	173,344
"	81,839	108,180	120,415	135,850	159,120	180,698
"	79,399	109,159	123,166	137,066	161,738	182,417
"	81,945	106,756	120,288	133,843	158,348	178,188
"	79,304	111,301	125,426	139,510	165,221	185,946
"	82,953	109,929	122,530	136,233	161,867	181,619
"	82,955	114,042	127,708	142,481	168,948	
"	74,933	115,422	128,864	143,753	170,502	
"	82,995	108,939	117,458	132,135	155,537	
"	37,860	117,426	131,091	149,077	173,793	
"	106,283	115,084	128,010	146,720	169,821	
"		119,950	133,483	154,152	177,360	
Totals (per year)	**872,393**	**1,339,981**	**1,494,955**	**1,681,153**	**1,974,386**	**1,082,211**
Total (2007 to 2011)			***7,362,867***			
Net Proft Before Tax						
Total	4,799,758	4,281,318	2,213,784	2,808,955	1,658,656	
BV interest %	18.18%	31.30%	67.53%	59.85%	119.04%	

Dividends paid (pa)	2,250,000	2,250,000	1,450,000	2,500,000	0	
Total Dividends			***8,450,000***			

Note:- In the half year to 31 December 2011 PCL's financial statements recorded a $14.9m provision for impaired loans, and an operating loss of $12.98m - see Schedule 1

SCHEDULE 4 - PCL REPORTS - HOW THE BURLEIGH VIEWS LOAN WAS REPORTED TO THE BOARD AND DISCLOSED INVESTORS - 2007 TO 2012

No.	Document Type	Date of Document	Effective Date of Financial Data	T-Doc Ref [Vol/Tab/Page]	Reported Maturity Date	Included in Arrears Total?	Reported as Largest Loan?	Balance ($)	Net Outstanding ($)	LVR (%)	Provision ($)	Interest Balance ($)	Interest Non Accural ($)	Valuation* (as if complete) ($) * see Annexure 1	Valuation Date
1	Board Report	**31/12/2006**	31/12/2006	17/2/10556-10557		Yes		9,766,991.36		51.62		2,205,538.09			
2	Board Report	**31/01/2007**	31/01/2007	17/2/10570-10571		Yes		9,767,299.36		51.62					
3	Board Report	**28/02/2007**	28/02/2007	17/2/10584-10585		Yes		9,768,057.64		51.62					
4	Board Report	**31/03/2007**	31/03/2007	17/2/10559		Yes		9,711,995.24		57				17,222,000	
5	Board Report	**30/04/2007**	30/04/2007	17/2/10614		Yes		9,772,303.24		57				17,222,000	
6	Board Report	**31/05/2007**	31/05/2007	17/2/10640		No									
7	Prospectus 10	**18/12/2007**	30/06/2007	11/A10/6915		No	Yes	12,026,966.00						17,222,000	23/12/2003
8	Prospectus 10 Supp	**29/02/2008**	30/06/2007	11/A10/6909											
9	Quarterly Report	**not available**	**31/12/2007**	Not available											
10	Board Report	**16/04/2008 30/4/2018**	30/04/2008	BR: 20/1/12322-3		No									
11	Board Report	**31/05/2008**	31/05/2008	BR: 20/2/12344		No									
12	Quarterly Report	**not available**	**30/06/2008**	Not available											
13	Benchmark Report	**30/10/2008**	**30/06/2008**	17/1/10328											
14	Board Report	**30/06/2008**	30/06/2008	BR: 20/3/12354		No									
15	Board Report	**31/07/2008**	31/07/2008	BR: 20/4/12383		No									
16	Board Report	**31/08/2008**	31/08/2008	BR: 20/5/12393		No	Yes	13,810,695.91							
17	Board Report	**31/08/2008**	31/08/2008	ASIC will seek leave to tender.		No									
18	Board Report	**14/10/2008**	30/09/2008	BR:20/13/12405		No									
19	Quarterly Report	**30/10/2008**	30/09/2008	17/1/10326-10327											
20	Benchmark Report	**30/10/2008**	30/06/2008	17/1/10326		No	Yes	13,500,429.00						26,000,000 (ex. GST)	1/09/2007
21	Board Report	**14/11/2008**	31/10/2008	BR:20/7/12414		No									
22	Board Report	**12/12/2008**	30/11/2008	BR: 17/2/10672	**11/11/2008**	No	Yes	14,192,461.89		70		0.00		19,285,714.29	
23	Prospectus 11	**24/12/2008**	30/06/2008	11/A10/6950		No	Yes	13,500,429.00		54.6 "on a cost to complete basis"				26,000,000 (ex. GST)	1/09/2007
24	Quarterly Report	**28/01/2009**	31/12/2008	17/1/10335											
25	Board Report	**29/01/2009**	31/12/2008	BR: 17/2/10672 LAR: 2A/17/539-546 LAR: 2A/18/547-551		No									
26	Board Report	**16/02/2009**	31/01/2009	BR: 17/2/10702 LAR: 2A/19/556		No	Yes	14,449,762.88	14,449,762.88	74.92	0.00	0.00	-		
27	Board Report	**10/03/2009**	28/02/2009	BR: 17/2/10710 LAR: 2A/23/563	**11/11/2008**	No	Yes	14,579,056.47	14,579,056.47	75.6	0.00	0.00	-		
28	Board Report	**9/04/2009**	31/03/2009	BR: 17/2/10741 LAR: 2A/23/572	**11/11/2008**	No	Yes	14,832,621.84	14,832,621.84	76.9	0.00	0.00	-		
29	Quarterly Report	**29/04/2009**	31/03/2009	17/1/10337-10339											

No.	Document Type	Date of Document	Effective Date of Financial Data	T-Doc Ref [Vol/Tab/Page]	Reported Maturity Date	Included in Arrears Total?	Reported as Largest Loan?	Balance ($)	Net Outstanding ($)	LVR (%)	Provision ($)	Interest Balance ($)	Interest Non Accural ($)	Valuation* (as if complete) ($) * see Annexure 1	Valuation Date
30	Benchmark Report	**29/04/2009**	31/12/2008	17/1/10340-10346		No	Yes	14,320,559.00						26,000,000 (ex. GST)	1/09/2007
31	Board Report	**11/05/2009**	30/04/2009	BR: 17/2/10761 LAR: 2A/28/604	**11/11/2008**	No	Yes	14,832,621.84	14,832,621.84	76.9	0.00	0.00	-		
32	Board Report	**11/06/2009**	31/05/2009	BR: 17/2/10780 LAR: 2A/29/610	**11/11/2008**	No	Yes	14,961,089.00	14,961,089.00	77.6	0.00	0.00	-		
33	Board Report	**9/07/2009**	30/06/2009	BR: 17/2/10801	**11/11/2008**	No	Yes	15,101,887.00	15,101,887.00	78.3	0.00	0.00	-		
34	Quarterly Report	**15/07/2009**	30/06/2009	17/1/10347-10348											
35	Board Report	**14/08/2009**	31/07/2009	BR: 17/2/10822 LAR: 2A/33/636	**11/11/2008**	No	Yes	15,233,277.92	15,233,277.92	79	0.00	0.00	-		
36	Board Report	**10/09/2009**	31/08/2009	BR: 17/2/10843 LAR: 2A/34/640	**11/11/2008**	No	Yes	15,369,586.00	15,369,586.00	79.7	0.00	0.00	-		
37	Board Report	**12/10/2009**	30/09/2009	BR: 17/2/10850 LAR: 17/2/10871	**11/11/2008**	No	Yes	15,508,754.00	15,508,754.00	**79.7**	0.00	0.00	-		
38	Quarterly Report	**30/10/2009**	30/09/2009	17/1/10349-10351											
39	Benchmark Report	**30/10/2009**	30/06/2009	17/1/10352		No	Yes	15,101,887.00		78.3 "on a cost to complete basis"				26,000,000 (ex. GST)	1/09/2007
40	Board Report	**12/11/2009**	31/10/2009	BR: 17/2/10885 LAR: 17/2/10892	**11/11/2008**	No	Yes	15,643,204.00	15,643,204.00	81.1	0.00	0.00	-		
41	Board Report	**9/12/2009**	30/11/2009	BR: 17/2/10908 LAR: 2A/41/679	**11/11/2008**	No	Yes	15,784,973.00	15,784,973.00	81.8	0.00	0.00	-		
42	Prospectus 12	**23/12/2009**	30/06/2009	11/A10/6990		No	Yes	15,101,887.00		56.6 "on a cost to complete basis"				26,680,000	1/12/2009
43	Quarterly Report	**29/01/2010**	21/12/2009	17/1/10359											
44	Board Report	**11/02/2010**	31/12/2009	BR: 17/2/10933 LAR: 2A/43/684	**11/11/2008**	No	Yes	15,977,139.00	15,977,139.00	82.8	0.00	0.00	-		
45	Board Report	**12/02/2010**	31/01/2010	BR: 17/2/10958 LAR: 2A/44/689	**11/11/2008**	No	Yes	16,119,620.00	16,119,620.00	**82.8**	0.00	0.00	-		
46	Board Report	**11/03/2010**	28/02/2010	BR: 17/2/10980 LAR: 2A/45/694	**11/11/2008**	No	Yes	16,350,960.00	16,350,960.00	**82.8**	0.00	0.00	-		
47	Board Report	**15/04/2010**	31/03/2010	BR: 17/2/11008 LAR: 2A/46/700	**11/11/2008**	No	Yes	16,590,090.00	16,590,090.00	86	0.00	0.00	-		
48	Benchmark Report	**21/04/2010**	31/12/2009	17/1/10363		No	Yes	15,977,139.00		59.9 "on a cost to complete basis"				26,680,000 (ex. GST)	1/12/2009
49	Quarterly Report	**21/04/2010**	31/03/2010	17/1/10361											
50	Board Report	**25/05/2010**	30/04/2010	BR: 18/1/11038 LAR: 18/1/11080	**31/12/2010**	No	Yes	16,934,788.00	16,934,788.00	87.8	0.00	0.00	-		
51	Board Report	**11/06/2010**	31/05/2010	BR: 18/1/11067 LAR: 2A/49/772	**31/12/2010**	No	Yes	17,212,740.00	17,212,740.00	89.3	0.00	0.00	-		
52	Quarterly Report	**21/07/2010**	30/06/2010	17/1/10370											
53	Board Report	**16/06/2010**	30/06/2010	BR: 18/1/11095 LAR: 2A/49/772	**31/12/2010**	No	Yes	17,518,058.00	17,518,058.00	**89.3**	0.00	0.00	-		
54	Board Report	**13/08/2010**	31/07/2010	BR: 18/1/11133 LAR: 18/1/11150	**31/12/2010**	No	Yes	17,842,906.00	17,842,906.00	**66.9**	0.00	0.00	-		
55	Board Report	**17/09/2010**	31/08/2010	BR: 18/1/11165 LAR: 18/1/11183	**31/12/2010**	No	Yes	18,102,191.00	18,102,191.00	67.8	0.00	0.00	-		

No.	Document Type	Date of Document	Effective Date of Financial Data	T-Doc Ref [Vol/Tab/Page]	Reported Maturity Date	Included in Arrears Total?	Reported as Largest Loan?	Balance ($)	Net Outstanding ($)	LVR (%)	Provision ($)	Interest Balance ($)	Interest Non Accural ($)	Valuation* (as if complete) ($) * see Annexure 1	Valuation Date
56	Board Report	12/10/2010	30/09/2010	BR: 18/1/11198 LAR: 18/1/11217	31/12/2010	No	Yes	18,298,468.00	18,298,468.00	68.6	0.00	0.00	-		
57	Quarterly Report	22/10/2010	30/09/2010	17/1/10372											
58	Benchmark Report	22/10/2010	30/06/2010	17/1/10374		No	Yes	17,518,058.00		65.7 "on a cost to complete basis"				26,680,000 (ex. GST)	1/09/2010
59	Board Report	11/11/2010	31/10/2010	BR: 18/1/11233 LAR: 18/1/11250	31/12/2010	No	Yes	18,527,079.00	18,527,079.00	69.4	0.00	0.00	-		
60	Board Report	10/12/2010	30/11/2010	BR: 18/1/11265 LAR: 18/1/11285	31/12/2010	No	Yes	18,719,590.00	18,719,590.00	70.2	0.00	0.00	-		
61	Prospectus 13	22/12/2010	30/06/2010	11/A10/7031		No	Yes	17,518,058.00		65.7 "on a cost to complete basis"				26,680,000	1/09/2010
62	Quarterly Report	24/01/2011	31/12/2010	17/1/10381											
63	Board Report	31/01/2011	31/12/2010	BR: 18/1/11302 LAR: 3A/64/948	31/12/2010	No	Yes	18,945,007.00	18,945,007.00	71	0.00	0.00	-		
64	Board Report	14/02/2011	31/01/2011	BR: 18/1/11341 LAR: 18/1/11350	31/12/2010	No	Yes	19,119,259.00	19,119,259.00	71.7	0.00	0.00	-		
65	Board Report	11/03/2011	28/02/2011	BR: 18/1/11380 LAR: 18/1/11402	30/04/2011	No	Yes	19,309,678.00	19,309,678.00	72.4	0.00	0.00	-		
66	Board Report	18/04/2011	31/03/2011	BR: 18/1/11417 LAR: 18/1/11443	30/04/2011	No	Yes	19,481,172.00	19,481,172.00	72.4	0.00	0.00	-		
67	Quarterly Report	27/04/2011	31/03/2011	17/1/10384											
68	Benchmark Report	27/04/2011	31/12/2010	17/1/10386		Disclosed as "past due" but not included in reported arrears total	Yes	18,945,007.00		71 "on a cost to complete basis"				26,680,000 (ex. GST)	1/09/2010
69	Board Report	16/05/2011	30/04/2011	BR: 18/1/11460 LAR: 18/1/11445	30/04/2011	No	Yes	19,677,543.00	19,677,543.00	73.8	0.00	0.00	-		
70	Board Report	21/06/2011	31/05/2011	BR: 18/1/11496 LAR: 3A/65/953	30/04/2011	No	Yes	19,870,919.00	19,870,919.00	74.5	0.00	0.00	-		
71	Board Report	18/07/2011	30/06/2011	BR: 18/1/11535 LAR: 3A/66/959	30/04/2011	No	Yes	20,086,212.00	20,086,212.00	75.3	0.00	0.00	-		
72	Quarterly Report	20/07/2011	30/06/2011	17/1/10395											
73	Board Report	16/08/2011	31/07/2011	BR: 18/1/11571 LAR: 3A/69/979	30/06/2012	No	Yes	20,259,229.00	20,259,229.00	75.9	0.00	0.00	-		
74	Board Report	17/08/2011	31/08/2011	BR: 18/1/11597	30/06/2012	No	Yes	20,449,689.00	20,449,689.00	76.6	0.00	0.00	-		
75	Board Report	17/10/2011	30/09/2011	BR: 18/1/11624 LAR: 18/1/11638	30/06/2012	No	Yes	20,637,743.00	20,637,743.00	77.4	0.00	0.00	-		
76	Quarterly Report	25/10/2011	30/09/2011	17/1/10398											
77	Benchmark Report	25/10/2011	30/06/2011	17/1/10401		No	Yes	20,086,212.00		75.3 "on a cost to complete basis"				26,680,000 (ex. GST)	1/08/2011
78	Board Report	14/11/2011	31/10/2011	BR: 18/1/11654	30/06/2012	No	Yes	20,829,491.00	20,829,491.00	78.1	0.00	0.00	-		
79	Board Report	13/12/2011	30/11/2011	BR: 18/1/11681	30/06/2012	No	Yes	21,038,711.00	21,038,711.00	78.9	0.00	0.00	-		
80	Information Booklet	20/01/2012	30/06/2011	15/27/9894		No	Yes	20,086,212.00		75.3				26,680,000 (inc. GST)	1/01/2012
81	Quarterly Report	31/01/2012	31/12/2011	17/1/10409											

No.	Document Type	Date of Document	Effective Date of Financial Data	T-Doc Ref [Vol/Tab/Page]	Reported Maturity Date	Included in Arrears Total?	Reported as Largest Loan?	Balance ($)	Net Outstanding ($)	LVR (%)	Provision ($)	Interest Balance ($)	Interest Non Accural ($)	Valuation* (as if complete) ($) * see Annexure 1	Valuation Date
82	Board Report	30/01/2012	31/12/2011	BR: 18/1/11707 LAR: 3A/75/996	30/06/2012	No	Yes	21,237,806.00	21,237,806.00	79.6	0.00	0.00	-		
83	Board Report	13/02/2012	31/01/2012	BR: 18/1/11733	30/06/2012	No	Yes	21,442,845.00	21,442,845.00	80.4	0.00	0.00	-		
84	Board Report	16/02/2012	28/02/2012	BR: 18/1/11759	"Jan 13+" "Note: Maturity date replaced with estimate discharge date from cash flow projection"	No	Yes	21,642,269.00	19,542,269.00	80.4	2,000,000.00	-	100,000.00		
85	Board Report	15/03/2012	31/03/2012	BR: 18/1/11785 LAR: 3A/82/1067	"Jan 13+" "Note: Maturity date replaced with estimate discharge date from cash flow projection"	No	Yes	21,839,794.00	19,689,794.00	80.4	2,000,000.00	-	150,000.00		
86	Information Booklet	16/03/2012	31/12/2011	15/28/9920		No	Yes	19,237,806.00		72.1				26,680,000 (inc. GST)	1/01/2012
87	Information Booklet	4/04/2012	31/12/2011	15/29/9946		No	Yes	19,237,806.00		72.1				26,680,000 (inc. GST)	1/01/2012
88	Quarterly Report	18/04/2012	31/03/2012	17/1/10412											
89	Board Report	10/05/2012	30/04/2012	BR: 18/1/11810 LAR: 3A/84/1150	"Jan 13+" "Note: Maturity date replaced with estimate discharge date from cash flow projection"	Yes BV mentioned outside of Loan Arrears Table at 10/2/1152	Yes	22,037,771.00	19,887,771.00	80.4	2,000,000.00	-	200,000.00		
90	Board Report	19/06/2012	31/05/2012	BR: 8/24/5397	"Jan 13+" "Note: Maturity date replaced with estimate discharge date from cash flow projection"	No	Yes	22,232,205.00	19,982,205.00	83.3	2,000,000.00	-	250,000.00		

Schedule 4A:- PCL Loan Portfolio - Benchmark 5 Disclosures - Loan numbers, values and arrears

Note 1:- The loan value stated is the loan principal

Note 2:- Shaded entries are calculated values derived from information in the relevant report

Reasons:- paragraphs 13, 173, 194 & 428

Report Period	Total Loans			Arrears Loans (as rep'td - (exc BV Loan)				Burleigh Views Loan				Arrears Loans (inc BV Loan) - as calculated	
		FTI		No	Value	% of loans			% of loans		%		
	$m	$m	% (value)		(principal)	No's	Value	$m	No's	Value	FTI	$m	% (value)
30-Jun-08	192.82	130.80	67.84	36	52.82	21.7	27.4	13.50	0.6	7	10.32%	66.32	34.39%
31-Dec-08	219.28	119.14	54.33	36	65.02	18.0	29.6	14.32	0.5	6.5	12.02%	79.34	36.18%
30-Jun-09	206.22	116.54	56.51	41	62.76	23.2	32.6	15.10	0.6	7.8	12.96%	77.86	37.76%
31-Dec-09	172.90			37	64.91	24	37.5	15.98	0.6	9.2	not stated	80.89	46.78%
30-Jun-10	178.30			44	88.71	27.85	49.75	17.52	0.6	9.8	not stated	106.23	59.58%
31-Dec-10	189.30			49	111.29	29.70	58.79	18.95	0.6	10	not stated	130.23	68.80%
30-Jun-11	188.30			55	96.90	36.18	51.46	20.09	0.7	11	not stated	116.98	62.13%
30 Jun 2011 {Inf Bk v1}	188.30	95.90	50.93	55	96.90	36.2	51.5	20.09	0.66	10.67	20.94%	116.98	62.13%
30 Dec 2011 {Inf Bk v2}	176.60	96.90	54.87	48	85.76	34.77	48.55	19.24	1.82	10.89	19.85%	105.00	59.45%
Burleigh Views loan added to Arrears Loans													
30 Dec 2011 {Inf Bk v3}	176.60	96.90	54.87	49	108.00	35.51	59.44	19.24	1.82	10.89	19.85%	108.00	61.15%

Schedule 5 - PCL Quarterly & Benchmark Reports, Prospectus & Information Booklets

Report type	Dates		Circulated	Board Approval		T documents reference
	Period End	Document		Minutes	Other	
Prospectus 10	18-Dec-07	30-Jun-07		19-Dec-07		11/A10/6915
Prospectus 10 Supp	29-Feb-08	30-Jun-07		no record		11/A10/6909
Benchmark	30-Jun-08	30-Oct-08	28-Oct-08	31-Oct-08	28-Oct-08	17/1/10328
Quarterly Report	30-Sep-08	30-Oct-08	28-Oct-08	31-Oct-08	28-Oct-08	17/1/10326
Prospectus 11	24-Dec-08	30-Jun-08	17-Dec-08	no record		11/A10/6950
Quarterly Report	31-Dec-08	28-Jan-09		04-Feb-09		17/1/10335
Benchmark	31-Dec-08	29-Apr-09	24-Apr-09	20-May-09	16-Apr-09	17/1/10340
Quarterly Report	31-Mar-09	29-Apr-09	24-Apr-09	20-May-09	16-Apr-09	17/1/10337
Quarterly Report	30-Jun-09	15-Jul-09		15-Jun-09		17/1/10347
Benchmark	30-Jun-09	30-Oct-09		21-Oct-09		17/1/10352
Quarterly Report	30-Sep-09	30-Oct-09		21-Oct-09		17/1/10349
Prospectus 12	23-Dec-09	30-Jun-09		no record		11/A10/6990
Quarterly Report	31-Dec-09	29-Jan-10		29-Jan-10		17/1/10359
Benchmark	31-Dec-09	21-Apr-10		21-Apr-10		17/1/10363
Quarterly Report	31-Mar-10	21-Apr-10		21-Apr-10		17/1/10361
Quarterly Report	30-Jun-10	21-Jul-10	16-Jul-10	21-Jul-10		17/1/10370
Benchmark	30-Jun-10	22-Oct-10	21-Oct-10		22-Oct-10	17/1/10374
Quarterly Report	30-Sep-10	22-Oct-10	21-Oct-10		22-Oct-10	17/1/10372
Prospectus 13 2011	22-Dec-10	30-Jun-10	17-Dec-10	15-Dec-10	17-Dec-10	11/A10/7031
Benchmark	30-Dec-10	27-Apr-11	21-Apr-11		22-Apr-11	17/1/10386
Quarterly Report	31-Dec-10	24-Jan-11	20-Jan-11		20-Jan-11	17/1/10381
Quarterly Report	31-Mar-11	27-Apr-11	21-Apr-11	18-May-11	22-Apr-11	17/1/10384
Quarterly Report	30-Jun-11	20-Jul-11		20-Jul-11		17/1/10395
Benchmark	30-Jun-11	25-Oct-11		19-Oct-11		17/1/10401
Quarterly Report	30-Sep-11	25-Oct-11		19-Oct-11		17/1/10398
Quarterly Report	31-Dec-11	31-Jan-12	30-Jan-12	31-Jan-12		17/1/10409
Information Booklet	20-Jan-12	30-Jun-11	06-Jan-12	20-Jan-12		15/27/9894
Information Booklet	16-Mar-12	31-Dec-11	16-Mar-12	15-Mar-12	16-Mar-12	15/28/9920
Quarterly Report	31-Mar-12	18-Apr-12		18-Apr-12		17/1/10412
Information Booklet	04-Apr-12	31-Dec-11	03-Apr-12	04-Apr-12	04-Apr-12	15/29/9946

Schedule 6 - Burleigh Views property valuations / estimates / feasibilities

No.	Date	Type	Prepared for	Source	Evidence Reference	Valuation					BV Loan Balance ($m)*	Projected total costs on Completion ($m)**	TLVR (disregarding projected construction costs)***
						Valuation (As Is) ($m)	Valuation (As Complete, incl any GST) ($m)	Estimated Construction Costs ($m)	Assumed Status of Completed Development	*(Assumed)* GST liability on as complete sales (net) ($m)	Assumed max as complete realisation value excl GST ($m)			
1	02-Mar-01	Report	Provident Capital Limited	Gradmont	T16/1/9982	6.77	6.77	2.195	Stg 1 Complete, Stg 2 has DA Approval					
2	17-Jan-03	Market Appraisal	Patrick Zarro	Raine & Horne	MOS-1, Vol 2, p 633	4.3 - 4.5	n/a	n/a	n/a					
3	03-Feb-03	Market Appraisal	Patrick Zarro	Raine & Horne	MOS-1, Vol 2, p 634-635	n/a	17.05	n/a	Stg 1 & Stg 2 complete					
4	23-Dec-03	Report	Provident Capital Limited	PRP Valuers	T3/A21/1699	5.9	17.222	5.126	Stg 1 & Stg 2 complete					
5	17-Oct-06	Appraisal	Patrick Zarro	Bernard F Dalton Real Estate	MOS-1, Vol 2, p 791 (p 634)	n/a	13.8	n/a	Stg 1			11.61		
6	04-Sep-07	Report	DKR Developments Pty Ltd	Colliers	T1/A22/1767	13.5	27.35	6.12	Stg 1 & Stg 2 complete	1.259	26.09	12.24		46.91%
7	01-Apr-08	Appraisal	Provident Capital Limited	Ray White	T10/24/12006	11.88-13.95	11.88-13.95	n/a	Stg 1 Complete, Stg 2 DA			13.167		
8	30-Nov-08	Board Report	Provident Capital Limited	Provident Capital Limited	T17/2/10663	n/a	19.29	n/a	unexplained			14.192		
9	15-Dec-09	Spreadsheet	Provident Capital Limited	Landburys	T2A/42/683 T10/A5/5918	n/a	26.68	n/a	Stg 1 & Stg 2 complete	*1.259*	25.421	15.922		62.63%
10	20-09-2010 (email sent at 21/09/10 at 2:35pm)	Spreadsheet	Provident Capital Limited	Landburys	T10/A6/5919	n/a	23.08	n/a	Stg 1 & Stg 2 complete	*1.259*	21.821	18.298		83.86%
11	20-09-2010 (email sent at 21/09/10 at 5:00pm)	Spreadsheet	Provident Capital Limited	Landburys	T19/4/11836-11837	n/a	26.68	n/a	Stg 1 & Stg 2 complete	*1.259*	25.421	18.298		71.98%
12	30-Aug-11	Spreadsheet	Provident Capital Limited	Landburys	T3A/71/988	n/a	26.68	n/a	Stg 1 & Stg 2 complete	*1.259*	25.421	20.449		80.44%
13	13-Oct-11	Feasibility	Provident Capital Limited	Provident Capital Limited	T3A/70/985	n/a	26.68	n/a	Stg 1 & Stg 2 complete	2.43	24.25	20.65	23.59	97.28%
14	25-Nov-11	Feasibility	Provident Capital Limited	Provident Capital Limited	T3A/72/991	n/a	26.68	3.00	Stg 1 & Stg 2 complete	0.9	25.78	21.039	25.763	99.93%
15	01-Dec-11	Feasibility	Provident Capital Limited	Provident Capital Limited	T3A/73/993	n/a	26.68	3.00	Stg 1 & Stg 2 complete	0.5	26.18	21.039	26.059	99.54%
16	02-Jan-12	Report	Provident Capital Limited	Landburys	T10/A9/5927	n/a	26.68	n/a	Stg 1 & Stg 2 complete	*1.259*	25.421	21.238		83.55%
17	26-Feb-12	Feasibility	Provident Capital Limited	Provident Capital Limited	MOS-1, pp 1380-1381	n/a	26.68	4.73	Stg 1 & Stg 2 complete	0.78	25.9	21.642	25.994	100.36%
18	08-May-12	Report	Provident Capital Limited and Australian Executor Trustees Limited	Savills	T10/A15/6043	3.83	16.2	n/a	Stg 1 & Stg 2 complete	?	16.2	22.038		136.04%

Notes

[*] Tribunal documents, Volume 10, Tab A28, pg 6263-6291; Vol 15, Tab 10, pg 9458-9468

[**] Tribunal Documents, Volume 3A, tab 70, p 985 (for Oct 2011); Volume 3A, tab 72, p 991 (for Nov 2011); Volume 3A tab 73, p 993 (for Dec 2011); MOS-1, p 1381 (for Feb 2012)

[***] TVLR calculated on projected total costs at completion, where available

Schedule 7 - **PCL - Audit and Compliance Committee Meetings, duration, minutes, and attendances**

Reasons - *paragraph 46, 105, 204, 215, 220, 223, 238, 243, 336(f).*

Date	Start	Finish	Duration	Pages	Attendances								Description
			hrs.min	*n*									
25-Jun-08	12.14	13.1		3		Bersten	Seymour		Haq		Fulker	other		review of NTBS - external audit
6-Aug-08	9.03	10.15	1.12	2		Bersten	Seymour	Sweeney	Haq		Fulker		audit rep	AASB7 compliance - FY 2008 audit update
27-Aug-08	9.25	11.00	1.35	2		Bersten	Seymour	Sweeney	Haq		Fulker	other		AASB7 compliance
3-Sep-08	14.36	17.12	2.36	2		Bersten	Seymour	Sweeney	Haq		Fulker	other		FY 2008 financial report
13-Nov-08	9.05	10.30	1.25	3		Bersten	Seymour	Sweeney	Haq	Hornby	Fulker			3 Oct 2008 audit management letter - loan arrears list being prepared
17-Dec-08	9.40	10.37	0.57	3			Seymour	Sweeney	Haq	Hornby	Fulker			loan arrears report - reviewed and proposed additional info
4-Feb-09	11.09	12.48	1.39	2			Seymour	Sweeney	Haq	Hornby				Dec 2008 arrears - concerns about val'n amounts - 1/2 year report
1-Apr-09	9.30	11.05	1.35	3			Seymour	Sweeney	Haq	Hornby	Fulker			March 2009 audit management letter - review default loan currency
23-Jun-09	12.01	13.02	1.01	3			Seymour	Sweeney	Haq	Hornby	Fulker			Formal response to October management letter
9-Sep-09	14.06	16.12	2.06	3		Bersten	Seymour	Sweeney	Haq	Hornby	Fulker			FY 2009 report - auditors final report on loan arrears reporting
28-Sep-09	8.10	8.31	0.21	2			Seymour	Sweeney	Haq	Hornby				FY 2009 financial report
10-Nov-09	3.05	4.33	1.28	3			Seymour	Sweeney	Haq	Hornby		other		Review of arrears loan reporting - audit report
29-Nov-09						*minutes not located*								
04-Mar-10	10.00	11.45	1.45				Seymour	Sweeney		Hornby	Fulker	Kennedy		December 2009 1/2 year financial report - approval
11-Mar-10	12.48	12.53	0.05	1	O'Sullivan	Bersten	Seymour	Sweeney	Haq					December 2009 1/2 year financial report - approval
16-Jun-10	9.06	10.22	1.16	4		Bersten	Seymour	Sweeney	Haq	Hornby		Gerber et al		Auditors half-year report
01-Sep-10	11.04	1.05	2.01	3		Bersten	Seymour	Sweeney	Haq	Hornby	Fulker	Gerber et al		Draft FY 2010 report - update on Cashflow
15-Sep-10	9.32	11.35	2.03	4		Bersten	Seymour	Sweeney	Haq	Hornby	Fulker	others	audit rep	Rev'd FY 2010 report - B Views loan discussed in detail - reporting improvements
24-Nov-10	9.30	10.30	1.00	3			Seymour	Sweeney		Hornby		other		first monthly internal audit - $25,000 materiality
16-Feb-11	11.33	1.04	1.31	3			Seymour	Sweeney	Haq	Hornby		Gerber et al		Draft FY 2010 1/2 year report
07-Mar-11	10.05	11.45	1.40	3			Seymour	Sweeney	Haq	Hornby		others	audit rep	Draft FY 2010 1/2 year report - proposed in depth loan file compliance review
22-Jun-11	11.55	12.46	0.51	2			Seymour	Sweeney	Haq	Hornby		others		Audit reports - no significant issues
3-Aug-11	9.51	11.03	1.14	2			Seymour	Sweeney	Haq	Hornby				Draft FY 2011 financial reports
9-Sep-11	9.10	11.13	2.03	2			Seymour	Sweeney	Haq	Hornby			audit rep	FY 2011 financial reports
14-Dec-11	9.12	10.40	1.28	2			Seymour	Sweeney	Haq	Hornby		Gerber et al		Compliance report
12-Mar-12	14.04	15.55	1.51	3			Seymour	Sweeney	Haq	Hornby			audit rep	Draft December 2011 1/2 year report - provisions detailed
16-May-12	12.08	14.10	2.02	2			Seymour	Sweeney	Haq	Hornby		Gerber		Internal audit report

Schedule 8 - History and status of O'Sullivan directorships

Reasons:- paragraph 441

Count			MOS directorships - dates and status			Comment
Total	Category		Start	End		*Director / Corp'n status*
		Current Directorships				
1	1	Provident Asset Management Pty Ltd	29-Oct-92		Current	1 of 2
2	2	PCL Holdings Pty Ltd	9-Feb-02		Current	1 of 2
3	3	Bernard Sean Holdings Pty Ltd	18-Dec-03		Current	1 of 4
4	4	Portcullis Capital Pty Ltd	7-Sep-12		Current	sole
		PCL related corporate entities - ceased directorships				
5	1	Provident Capital Pty Ltd	16-May-94	26-Feb-97	Ceased	Deregistered
6	2	Provident Access Pty Ltd	24-May-05	19-Dec-12	Ceased	Deregistered
7	3	Provident Lending Services Pty Ltd	12-May-10	19-Dec-12	Ceased	Deregistered
8	4	Provident Mortgage Solutions Pty Ltd	10-Feb-95	19-Dec-12	Ceased	Deregistered
9	5	Provident Wealth Management Pty Ltd	26-May-05	19-Dec-12	Ceased	Deregistered
10	6	Provident Funds Management Australia Ltd	3-Feb-12	18-Mar-13	Ceased	Deregistered
11	7	Cashflow Finance Solutions Pty Ltd	20-Apr-05	28-Jan-14	Ceased	Deregistered
12	8	Provident Capital Pty Ltd	25-May-98	28-Jan-14	Ceased	External Adm'n
		Other ceased directorships - deregistered corporations				
13	1	The Dunbars Financial Management Group Pty Ltd	15-Jun-91	17-Jun-91	Ceased	Deregistered
14	2	City Pacific Developments Pty Ltd	28-Jun-96	13-Jul-99	Ceased	Deregistered
15	3	Hinterland Architectural Services Pty Ltd	21-May-96	1-Nov-01	Ceased	Deregistered
16	4	Ozbiz Capital Pty Ltd	18-Dec-02	30-Dec-04	Ceased	Deregistered
17	5	11 003 981 780 Pty Ltd	20-Jun-90	9-Oct-05	Ceased	Deregistered
18	6	Connecticut Financial Services Group Pty Ltd	30-Nov-06	19-Aug-09	Ceased	Deregistered
19	7	MG Capital Partners Pty Ltd	8-May-08	9-Jul-14	Ceased	Deregistered
		Former directorships - currently registered corporations				
20	1	Dale Virtue Pty Ltd	18-Mar-94	10-Feb-97	Former	Registered
21	2	Postjet Pty Ltd	26-Oct-92	10-Feb-97	Former	Registered
22	3	Corporate Capital Group Pty Ltd	30-Nov-06	26-May-08	Former	Registered
23	4	Amira Holdings Pty Ltd	3-Mar-08	16-Feb-15	Former	Registered