

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 7/09/2015 4:00:46 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: QUD591/2015
File Title: Graeme Clarke and Marion Clarke in their capacity as trustees of the G&M Clarke Superannuation Fund v Sandhurst Trustees Limited ACN 004 030 737
Registry: QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA



Warrick Soden

Dated: 7/09/2015 4:00:49 PM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



DEFENCE

No. QUD 591 of 2015

Federal Court of Australia
District Registry: Queensland
Division: General

GRAEME CLARKE AND MARION CLARKE

In their capacity as Trustees of the G&M CLARKE SUPERANNUATION FUND

Plaintiffs

SANDHURST TRUSTEES LIMITED ACN 004 030 737

Defendant

The Plaintiffs

1. The Defendant admits paragraph 1 of the Statement of Claim.
2. The Defendant does not know and therefore cannot admit paragraph 2 of the Statement of Claim.
3. The Defendant admits that the G & M Clarke Superannuation Fund have since 4 September 2008 been the holders of unsecured deposit notes (**Notes**) issued by Wickham Securities Limited (in liquidation) ACN 111 421 811 (**Wickham**) but does not know and cannot admit they were in the amounts and for the terms set out in the particulars.

Wickham

4. In respect of paragraph 4 of the Statement of Claim the Defendant:
 - 4.1. admits paragraph 4(a);
 - 4.2. admits paragraph 4(b);
 - 4.3. in relation to paragraph 4(c):

Filed on behalf of	Sandhurst Trustees Limited, Defendant
Prepared by	John Kirk Hunter Edmond, lawyer, and settled by Mark Hoffmann QC
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- 4.3.1. says that at all material times Wickham carried on business as a financier providing funds to borrowers to assist in the financing of property investments and related property transactions;
- 4.3.2. from time to time Wickham borrowed money from the public by issuing notes under Chapter 2L of the *Corporations Act*, 2001 (**the Act**);
- 4.3.3. the Defendant otherwise denies paragraph 4(c).
- 4.4. in relation to paragraph 4(d):
 - 4.4.1. says at all material times Wickham used the moneys borrowed from the public by way of the issue of notes to advance funds by way of loans secured by, among other things, first and second ranking mortgages;
 - 4.4.2. otherwise denies paragraph 4(d).
- 4.5. admits the matters alleged in paragraph 4(e) of the Statement of Claim;
- 4.6. admits the matters alleged in paragraph 4(f) of the Statement of Claim.

The Group Members

5. In respect of paragraph 5 of the Statement of Claim the Defendant:
 - 5.1. does not know and therefore cannot admit the matters alleged in paragraph 5(a) of the Statement of Claim;
 - 5.2. as to paragraph 5(b), denies that any Group Members have suffered loss and damage by reason of any conduct of the Defendant;
 - 5.3. does not know and therefore cannot admit the matters alleged in paragraph 5(c).

The Defendant

6. In respect of paragraph 6 of the Statement of Claim the Defendant:
 - 6.1. admits paragraph 6(a);
 - 6.2. admits paragraph 6(b);
 - 6.3. admits that it had skill and experience in the provision of trustee services but otherwise denies the matters alleged in paragraph 6(c).

Trust Deed for Notes

7. In respect of paragraph 7 of the Statement of Claim the Defendant:

- 7.1. says that it acted as the trustee of a Trust Deed for notes issued by Wickham under Chapter 2L of the *Corporations Act* from 7 June 2005;
 - 7.2. otherwise denies paragraph 7.
8. In respect of paragraph 8 of the Statement of Claim the Defendant:
- 8.1. admits paragraph 8(a);
 - 8.2. admits paragraph 8(b);
 - 8.3. admits paragraph 8(c);
 - 8.4. admits paragraph 8(d);
 - 8.5. admits paragraph 8(e);
 - 8.6. denies paragraph 8(f) and says that the lending and security criteria were and are defined to mean the matters set out in Schedule 4 to the Deed;
 - 8.7. admits paragraph 8(g);
 - 8.8. admits paragraph 8(h);
 - 8.9. admits paragraph 8(i);
 - 8.10. admits paragraph 8(j);
 - 8.11. admits paragraph 8(k) and says further that this included the provision to the Defendant by Wickham of its audited annual financial statements and half year financial statements and auditor's review report;
 - 8.12. admits paragraph 8(l);
 - 8.13. admits paragraph 8(m);
 - 8.14. admits paragraph 8(n);
 - 8.15. admits paragraph 8(o);
 - 8.16. denies paragraph 8(p) and says that "*notes outstanding*" is defined in Schedule 1 to the Trust Deed;
 - 8.17. admits paragraph 8(q);
 - 8.18. admits paragraph 8(r);
 - 8.19. admits paragraph 8(s);
 - 8.20. admits paragraph 8(t);

- 8.21. admits paragraph 8(u);
- 8.22. admits paragraph 8(v);
- 8.23. admits paragraph 8(w);
- 8.24. admits paragraph 8(x);
- 8.25. admits paragraph 8(y);
- 8.26. admits paragraph 8(z);
- 8.27. says further that the Trust Deed also provided:
 - 8.27.1. that within 75 days after the end of the first six months of each financial year and within 90 days after the close of each financial year, Wickham must provide to the Trustee a copy of a certificate from the auditor which provides details of Wickham's Net Tangible Assets (as defined) as at the date specified in the certificate being a date not more than three months or such longer period as the Defendant may allow before the date of that certificate;

Particulars

- (a) Clause 6.4(d) of the Trust Deed.
- 8.27.2. that in respect of the issue of notes by Wickham, a report from the auditor was to be provided in accordance with Clause 11.1(c) of the Trust Deed;
- 8.27.3. placed limits on the liability of the Defendant as set out in Clause 13;
- 8.27.4. the Defendant was at liberty to accept a certificate given or statement made by any auditor or officer of Wickham and was not bound to call for further evidence or be responsible for any loss occasioned by failure to do so;

Particulars

- (a) Clause 18(b) of the Trust Deed.

8.27.5. provided that the Defendant was at liberty to accept a certificate signed on behalf of all the directors by any two directors to the effect that any particular dealing or thing was in the opinion of the certifying directors in conformity with the provisions of the Trust Deed as sufficient evidence of conformance with the terms of the Trust Deed and that the Defendant was in no way bound to call for further evidence or be responsible for any loss that may be occasioned as a result.

Particulars

(a) Clause 24 of the Trust Deed.

9. The Defendant denies paragraph 9 of the Statement of Claim.

Prospectus

10. In respect of paragraph 10 of the Statement of Claim the Defendant says:

10.1. that prospectuses for the offer of notes by Wickham were lodged with ASIC on or about the dates stated in the particulars to paragraph 10;

10.2. the prospectuses (as supplemented by supplementary prospectuses) stated that applications for notes issued by Wickham may only be accepted by way of an application form attached to the respective prospectuses;

10.3. otherwise denies the matters alleged.

11. In respect of paragraph 11 of the Statement of Claim:

11.1. admits that the prospectuses particularised contains statements to the effect pleaded in paragraph 11(a) of the Statement of Claim but otherwise denies the matters alleged therein;

11.2. admits that the prospectuses particularised contains statements to the effect pleaded in paragraph 11(b) of the Statement of Claim but otherwise denies the matters alleged therein;

- 11.3. admits that the prospectuses particularised contains statements to the effect pleaded in paragraph 11(c) of the Statement of Claim but otherwise denies the matters alleged therein;
- 11.4. admits that the prospectuses particularised contains statements to the effect pleaded in paragraph 11(d) of the Statement of Claim but otherwise denies the matters alleged therein;
- 11.5. admits that the prospectuses particularised contains statements to the effect pleaded in paragraph 11(e) of the Statement of Claim but otherwise denies the matters alleged therein;
- 11.6. admits that the prospectuses particularised contains statements to the effect pleaded in paragraph 11(f) of the Statement of Claim but otherwise denies the matters alleged therein;
- 11.7. admits that the prospectuses particularised contains statements to the effect pleaded in paragraph 11(g) of the Statement of Claim but otherwise denies the matters alleged therein;
- 11.8. admits that the prospectuses particularised contains statements to the effect pleaded in paragraph 11(h) of the Statement of Claim but otherwise denies the matters alleged therein;
- 11.9. admits that the prospectuses particularised contains statements to the effect pleaded in paragraph 11(i) of the Statement of Claim but otherwise denies the matters alleged therein;
- 11.10. admits that the prospectuses particularised contains statements to the effect pleaded in paragraph 11(j) of the Statement of Claim but otherwise denies the matters alleged therein;
- 11.11. admits that the prospectuses particularised contains statements to the effect pleaded in paragraph 11(k) of the Statement of Claim but otherwise denies the matters alleged therein;

11.12. admits that the prospectuses particularised contains statements to the effect pleaded in paragraph 11(l) of the Statement of Claim but otherwise denies the matters alleged therein;

11.13. admits that the prospectuses particularised contains statements to the effect pleaded in paragraph 11(m) of the Statement of Claim but otherwise denies the matters alleged therein.

12. In relation to paragraph 12 the Defendant:

12.1. admits that Wickham owed a statutory duty to carry on and conduct its business in a proper and efficient manner pursuant to Section 283BB(a) of the *Corporations Act*;

12.2. otherwise does not know and cannot admit the matters alleged.

Duties of Wickham under the Corporations Act

13. In respect of paragraph 13 of the Statement of Claim the Defendant:

13.1. admits paragraph 13(a);

13.2. admits paragraph 13(b);

13.3. admits paragraph 13(c).

Duties of Sandhurst under the Corporations Act

14. In respect of paragraph 14 of the Statement of Claim the Defendant:

14.1. admits paragraph 14(a);

14.2. admits paragraph 14(b);

14.3. admits paragraph 14(c);

14.4. in response to paragraph 14(d), admits that among other things pursuant to Section 283DA(e) it had an obligation to notify ASIC as soon as practicable if Wickham had not complied with Section 283BF of the *Corporations Act*.

Loan Transactions

15. In respect of paragraph 15 of the Statement of Claim the Defendant:

15.1. says that subsequent to 8 June 2005 Wickham used moneys raised by way of the issue of notes to fund loans to borrowers;

- 15.2. otherwise does not know and cannot admit the particularised loans.

Breaches of Lending and Security Criteria

16. In respect of paragraph 16 of the Statement of Claim the Defendant:

- 16.1. does not know and cannot admit the matters alleged in paragraph 16(a);
- 16.2. does not know and cannot admit the matters alleged in paragraph 16(b);
- 16.3. does not know and cannot admit the matters alleged in paragraph 16(c);
- 16.4. does not know and cannot admit the matters alleged in paragraph 16(d);
- 16.5. does not know and cannot admit the matters alleged in paragraph 16(e);
- 16.6. does not know and cannot admit the matters alleged in paragraph 16(f);
- 16.7. does not know and cannot admit the matters alleged in paragraph 16(g);
- 16.8. does not know and cannot admit the matters alleged in paragraph 16(h);
- 16.9. does not know and cannot admit the matters alleged in paragraph 16(i);
- 16.10. does not know and cannot admit the matters alleged in paragraph 16(j);
- 16.11. does not know and cannot admit the matters alleged in paragraph 16(k);
- 16.12. does not know and cannot admit the matters alleged in paragraph 16(l);
- 16.13. does not know and cannot admit the matters alleged in paragraph 16(m);
- 16.14. does not know and cannot admit the matters alleged in paragraph 16(n);
- 16.15. does not know and cannot admit the matters alleged in paragraph 16(o);
- 16.16. says further that none of the alleged breaches of lending and security criteria were disclosed to it by way of the director's quarterly certificates pursuant to Section 283BF of the *Corporations Act* provided in the period 8 June 2005 to 21 December 2012;
- 16.17. says it was not informed of any of the alleged breaches by the auditor in any reports provided by the auditor to the Defendant in the period 8 June 2005 to 21 December 2012.

Breaches of the Business Conduct Obligation

17. In respect of paragraph 17 of the Statement of Claim the Defendant:

- 17.1. does not know and cannot admit the matters alleged in paragraphs 17(a);

17.2. does not know and cannot admit the matters alleged in paragraphs 17(b);

17.3. does not know and cannot admit the matters alleged in paragraph 17(c).

Trustee's obligations to ensure compliance with Trust Deed and Corporations Act

18. In respect of paragraph 18 of the Statement of Claim the Defendant:

18.1. admits that it owed a duty of reasonable diligence pursuant to Clause 12.1 and Section 283DA(a) to ascertain whether the property of Wickham (that is, or should be available, whether by way of security or otherwise) will be sufficient to repay the amount deposited or lent when it becomes due;

18.2. admits that it had a duty to exercise reasonable diligence pursuant to Clause 12.1(b) of the Trust Deed and Section 283DA(b) of the Act to ascertain whether Wickham had committed any breach of the terms of the notes, the Deed or Chapter 2L of the Act;

18.3. as to paragraph 18(a) admits the matters alleged in paragraph 18(a)(i), (ii) and (iii) but otherwise denies the matters alleged therein;

18.4. denies the matters alleged in paragraph 18(b);

18.5. denies the matters alleged in paragraph 18(c);

18.6. admits the matters alleged in paragraph 18(d).

Sandhurst's failure to exercise reasonable diligence

19. In respect of paragraph 19 of the Statement of Claim the Defendant:

19.1. says that a trustee exercising reasonable diligence in the position of Sandhurst would have ascertained the matters referred to in paragraph 18(a)(i), (ii) and (iii);

19.2. denies that a trustee exercising reasonable diligence in the position of the Defendant in light of the reports it had received concerning Wickham would have ascertained the matters alleged in paragraph 18(a)(iv), (a)(v) and (b), (c) and (d) as alleged or at all;

19.3. denies the matters alleged in paragraph 19(c).

20. In respect of paragraph 20 of the Statement of Claim, the Defendant:

20.1. repeats the matters set out in paragraphs 18 and 19 above and 31 to 34 below;

- 20.2. in or about October 2012, following the collapse of Banksia Securities Limited, so as to ascertain its potential impact on the liquidity of other debenture and note issuers by email dated 31 October 2012 from the Defendant to Wickham the Defendant requested the provision of a report as to the liquidity of the loan portfolio of Wickham Securities by no later than Wednesday 7 November 2012;
- 20.3. in or about November 2012, the Defendant arranged for an officer of Bendigo and Adelaide Bank Limited to conduct an inspection of loan files at the offices of Wickham;
- 20.4. on or about 27 November 2012, Mr Mike Griffiths of Bendigo and Adelaide Bank Limited attended at the offices of Wickham and met with the Chief Executive Officer of Wickham Mr Garth Robertson for the purpose of obtaining information as to the financial position and affairs of Wickham and the state of its loan book. Mr Griffiths provided a report to Sandhurst by email dated 27 November 2012;
- 20.5. following receipt of Mr Griffiths' report the Defendant notified Wickham that it had appointed Messrs PPB as investigating accountants which it did on 7 December 2012;
- 20.6. otherwise denies the matters alleged in paragraph 20.

Sandhurst's breaches of the Reasonable Diligence Covenant and contraventions of s283DA(b)(ii) of the Corporations Act

21. In respect of paragraph 21 of the Statement of Claim, the Defendant:

- 21.1. denies paragraph 21(a);
- 21.2. denies paragraph 21(b).

Loss or Damage

22. The Defendant denies paragraph 22.
23. The Defendant does not know and cannot admit the matters alleged in paragraph 23.
24. The Defendant does not know and cannot admit the matters alleged in paragraph 24.
25. The Defendant does not know and cannot admit the matters alleged in paragraph 25.
26. The Defendant does not know and cannot admit the matters alleged in paragraph 26.
27. The Defendant does not know and cannot admit the matters alleged in paragraph 27.

28. The Defendant denies the matters alleged in paragraph 28.
29. The Defendant denies paragraph 29.
30. The Defendant denies paragraph 30.

Further Answers

31. In further answer to the Plaintiff's claim the Defendant says that in the discharge of its duties under the Act and the Trust Deed it was entitled to rely upon and did rely upon:

31.1. audited financial statements;

Particulars

- (a) Financial Statements for the year ended 30 June 2006 and auditor's report of his statutory audit opinion dated 27 October 2006;
 - (b) Financial Statements for the year ended 30 June 2007 and auditor's report of his statutory audit opinion dated 28 September 2007;
 - (c) Financial Statements for the year ended 30 June 2008 and auditor's report of his statutory audit opinion dated 19 September 2008;
 - (d) Financial Statements for the year ended 30 June 2009 and auditor's report of his statutory audit opinion dated 20 August 2009;
 - (e) Financial Statements for the year ended 30 June 2010 and auditor's report of his statutory audit opinion dated 28 September 2010;
 - (f) Financial Statements for the year ended 30 June 2011 and auditor's report of his statutory audit opinion dated 30 September 2011;
 - (g) Financial Statements for the year ended 30 June 2012 and auditor's report of his statutory audit opinion dated 27 September 2012
- 31.2. half year financial statements subject of review by the auditor;
- 31.3. certificates in respect of the net tangible assets of Wickham as certified by the auditor pursuant to Clause 6.4(d) of the Trust Deed;

Particulars

- (a) Certificate of auditor dated 26 September 2007;
- (b) Certificate of auditor dated 1 October 2008;

- (c) Certificate of auditor dated 13 March 2009;
- (d) Certificate of auditor dated 29 September 2009;
- (e) Certificate of auditor dated 28 September 2010;
- (f) Certificate of auditor dated 30 September 2011;
- (g) Certificate of auditor dated 26 September 2012.

31.4. quarterly reports provided by Wickham pursuant to Section 283BF of the Act;

Particulars

- (a) Quarterly Report pursuant to s 283BF to the Defendant dated 31.12.2006
- (b) Quarterly Report pursuant to s 283BF to the Defendant dated 31.03.2007
- (c) Quarterly Report pursuant to s 283BF to the Defendant dated 30.09.2007
- (d) Quarterly Report pursuant to s 283BF to the Defendant dated 31.12.2007
- (e) Quarterly Report pursuant to s 283BF to the Defendant dated 31.03.2008
- (f) Quarterly Report pursuant to s 283BF to the Defendant Lodged 31 July 2008 dated 30.06.2008
- (g) Quarterly Report pursuant to s 283BF to the Defendant Lodged 5 August 2008 dated 30.6.2008
- (h) Quarterly Report pursuant to s 283BF to the Defendant dated 30.09.2008
- (i) Quarterly Report pursuant to s 283BF to the Defendant dated 31.12.2008
- (j) Quarterly Report pursuant to s 283BF to the Defendant dated 31.03.2009
- (k) Quarterly Report pursuant to s 283BF to the Defendant dated 30.06.2009
- (l) Quarterly Report pursuant to s 283BF to the Defendant dated 30.09.2009
- (m) Quarterly Report pursuant to s 283BF to the Defendant dated 31.12.2009
- (n) Quarterly Report pursuant to s 283BF to the Defendant dated 31.03.2010

- (o) Quarterly Report pursuant to s 283BF to the Defendant dated 30.06.2010
- (p) Quarterly Report pursuant to s 283BF to the Defendant dated 30.09.2010
- (q) Quarterly Report pursuant to s 283BF to the Defendant dated 31.12.2010
- (r) Quarterly Report pursuant to s 283BF to the Defendant dated 31.03.2011
- (s) Quarterly Report pursuant to s 283BF to the Defendant dated 30.06.2011
- (t) Quarterly Report pursuant to s 283BF to the Defendant dated 30.09.2011
- (u) Quarterly Report pursuant to s 283BF to the Defendant dated 31.12.2011
- (v) Quarterly Report pursuant to s 283BF to the Defendant dated 31.03.2012
- (x) Quarterly Report pursuant to s 283BF to the Defendant dated 30.06.2012
- (y) Quarterly Report pursuant to s 283BF to the Defendant dated 30.09.2012

32. The Defendant says that:

- 32.1. the auditor provided unqualified statutory audit opinions in respect of the financial statements of Wickham as particularised in paragraph 31 above;
- 32.2. the auditor certified Wickham's compliance with Clause 6.4(d) of the Trust Deed namely in that it had satisfied the Minimum Net Tangible asset covenant in the Trust Deed on each occasion subject of the certificates;
- 32.3. Wickham certified by way of the quarterly reports pursuant to s 283BF its compliance with the Trust Deed and the requirements of Chapter 2L of the Act stating also that:
 - 32.3.1. the Borrower confirms that there has been no failure by the Borrower or any guarantor to comply with the terms of the debentures or the provisions of the trust Deed or Chapter 2L of the Corporations Act during the quarter;

32.3.2. no circumstances had occurred during the quarter that materially prejudice:

32.3.2.1. Wickham, any of its subsidiaries, or any of the guarantors; or

32.3.2.2. any security or charge included in or created by the debentures or the Trust Deed.

32.3.3. it confirmed that it had complied with the financial covenants of the Trust Deed.

32.3.4. it confirmed that it had not exceeded the LVR of any loan as published in the current prospectus, or the Trust Deed.

32.3.5. confirmed that it had lent all monies within the permitted Lending and Security Criteria.

33. The Defendant says that in the premises it exercised the reasonable diligence that a Trustee in the position of Defendant as trustee of Wickham would have exercised.

34. Further, and in answer to the whole of the Statement of Claim, and if (which is denied) the Plaintiffs and Group Members sustained loss or damage because the Defendant contravened a provision of Chapter 2L of the *Corporations Act*, the Defendant says the following:

34.1. the Plaintiffs and each Group Members sustained loss or damage on or before 14 July 2009;

34.2. by reason of the facts and matters pleaded in paragraph 34.1 above, any cause of action under s 283F(1) of the *Corporations Act* of the Plaintiffs and Group Members arose on or before 14 July 2009 in respect of losses allegedly suffered prior to that date;

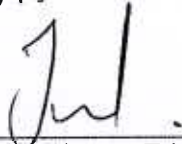
34.3. by reason of the facts and matters pleaded in paragraphs 34.1 and 34.2 above the action brought by the Plaintiffs and Group Members does not satisfy s 283F(2) of the *Corporations Act*;

34.4. by reason of the facts and matters pleaded in paragraphs 34.1 to 34.3 above,

s 283F(2) of the *Corporations Act* operates as a bar to the claim brought by the Plaintiffs and each Group Member in respect of losses allegedly suffered prior to 14 July 2009.

Date:

7/09/15



Signed by John Kirk Hunter Edmond
Lawyer for the Defendant

This pleading was prepared by John Kirk Hunter Edmond, lawyer and settled by Mark Hoffmann QC.

Certificate of lawyer

I, John Kirk Hunter Edmond, certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date:

07/09/15



Signed by John Kirk Hunter Edmond
Lawyer for the Respondent