FEDERAL COURT OF AUSTRALIA

Clarke v Sandhurst Trustees Limited [2014] FCA 580

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| Citation: | Clarke v Sandhurst Trustees Limited [2014] FCA 580 |
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| Parties: | **GRAEME CLARKE and MARION CLARKE v SANDHURST TRUSTEES LIMITED (ABN 16 004 030 737)** |
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| File number(s): | QUD 804 of 2013 |
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| Judge(s): | **GREENWOOD J** |
|  |  |
| Date of judgment: | 5 June 2014 |
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| Catchwords: | **CORPORATIONS** – consideration of an application for an order that a trustee for debenture holders described as unsecured deposit notes for the purposes of Ch 2L of the *Corporations Act 2001* (Cth) give discovery, for the purposes of r 7.23 of the *Federal Court Rules 2011*, of particular documents to a prospective applicant in contemplated principal proceedings for relief in the Federal Court against the trustee – consideration of the statutory regime within which the trustee acted – consideration of contended breaches of duty on the part of the trustee  |
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| Legislation: | *Corporations Act 2001* (Cth), Chapters 2L, 2M, s 283DA*Federal Court Rules 2011*, r 7.23  |
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| Cases cited: | *Higgins* *v Hancock* (2011) 199 FCR 393*Reeve v Aqualast Pty Ltd* [2012] FCA 679*St George Bank Ltd v Rabo Australia Ltd* [2004] FCA 1360  |
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| Date of hearing: | 19 March 2013 |
|  |  |
| Place: | Brisbane |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 169 |
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| Solicitor for the Prospective Applicants: | Shine Lawyers |
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| Counsel for the Prospective Respondent: | Mr M Hoffman QC with Mr M Trim |
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| Solicitor for the Prospective Respondent: | Group Legal Bendigo and Adelaide Bank Limited |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 804 of 2013 |

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| BETWEEN: | GRAEME CLARKEFirst Prospective ApplicantMARION CLARKESecond Prospective Applicant |
| AND: | SANDHURST TRUSTEES LIMITED (ABN 16 004 030 737)Prospective Respondent |

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| JUDGE: | GREENWOOD J |
| DATE OF ORDER: | 5 JUNE 2014 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. Within 21 days of the date of this order the prospective respondent, Sandhurst Trustees Limited (“Sandhurst”), give discovery to the prospective applicants in their capacity as trustees of the G & M Clarke Superannuation Fund (the “Superannuation Fund”) of:

(a) the hard copy documents contained in approximately 11 lever‑arch folders referred to in para 15(a) of the affidavit of Mark James Miller filed 27 February 2014;

(b) the documents contained in an electronic folder of documents being approximately 561MB of data in size and called “Wickham” referred to in para 15(b)(v) of the affidavit of Mark James Miller filed 27 February 2014;

such discovery being limited to documents that fall within the category of documents listed in Schedule 1 to these orders and which came into the possession of Sandhurst between 1 June 2005 and 6 February 2013 but excluding the documents listed in Schedule 2 to these orders.

1. The discovery required of Sandhurst by Order 1 is satisfied by either providing electronic copies of the discovered documents to the solicitors for Mr and Mrs Clarke or by making the discovered documents available to their solicitor for inspection.
2. Within 14 days of the date of this order, Mr and Mrs Clarke and Sandhurst file any further submissions they may wish to make in relation to any orders as to the disposition of the costs of the application and as to the question of whether any particular orders ought to be made in relation to the costs of providing discovery the subject of Orders 1 and 2.

**Schedule 1**

1. Any document by which Sandhurst purports to have complied with its duty as a trustee under s 283DA of the *Corporations Act 2001* (Cth).
2. Documents concerning loans made by Wickham Securities Ltd (“Wickham”).
3. Loan statements concerning loans made by Wickham.
4. Any guarantees provided to Wickham in respect of obligations owed to Wickham in connection with documents referred to in numbers 2 and 3 of this Schedule.
5. Any security documents provided to Wickham by borrowers from Wickham or by guarantors of obligations as referred to in number 4 of this Schedule.
6. Documents showing the property that was provided by way of security, charge or otherwise, for money advanced by Wickham to borrowers from Wickham in respect of funds provided or lent to Wickham by Mr and Mrs Clarke as trustees of the Superannuation Fund, as noteholders.
7. Property valuations in relation to any property which was charged or otherwise offered or given as security to Wickham for money lent by Wickham to borrowers from Wickham in respect of money provided or lent to Wickham by noteholders.
8. Any request or other action undertaken by Sandhurst to ascertain whether the property of Wickham (whether by way of security or otherwise) was likely to be sufficient to repay the amount deposited or lent by the noteholders when it became due, including any documents provided as a result of such request or action;
9. Any company or other searches undertaken to investigate any borrower who was lent money by Wickham.
10. Any company and other searches undertaken to investigate any guarantor of any borrower who was lent money by Wickham.
11. Any searches undertaken to investigate any security provided to Wickham.
12. Any property or other searches made with regard to security provided to Wickham.
13. Any mortgages or other documents relevant to the security provided to Wickham;
14. Copies of the Noteholders’ register.
15. The financial records of Wickham including any bank statements provided.
16. Any request made by Sandhurst to Wickham for documents relating to the manner in which its business was carried on and/or the conduct of its business, and any documents so provided.
17. Any request made by Sandhurst to Wickham for documents relating to its financial and other records, and any documents so provided.
18. Any notes or documents relating to any inspection undertaken by Sandhurst of the financial and other records of Wickham.
19. Any document provided to Sandhurst by Wickham pursuant to cl 6.1(d) of the Unsecured Note Trust Deed dated 7 June 2005 (the “Trust Deed”).
20. Any notice of Event of Default (such term being defined in the Trust Deed) and any documents in relation to the action proposed to be taken by Wickham to remedy it.
21. Any notice of any material default which was provided by Wickham to Sandhurst under any security interest to which Wickham or any of its assets was subject.
22. Any notice from Wickham to Sandhurst indicating that the Trust Deed cannot be fulfilled.
23. Copies of all reports by which Wickham reported to Sandhurst as to whether interest due under the Notes had been paid and the principal amount of the Notes outstanding at the date of the report.
24. Any document by which Sandhurst sought to establish whether the financial covenants referred to in cl 6.4 of the Trust Deed had been met by Wickham, and any documents provided by Wickham in response to such request.
25. Any document which indicated that there was a substantial likelihood that Wickham had breached the financial covenants contained in cl 6.4 of the Trust Deed.
26. Copies of any financial records obtained by Sandhurst in order to determine whether Wickham had complied with its obligations under cl 9.1 of the Trust Deed.
27. Any request made by Sandhurst pursuant to cl 9.2 of the Trust Deed, and any documents provided by Wickham in response to that request.
28. Any notice given to Sandhurst by Wickham notifying Sandhurst of the amount of Notes Wickham proposes to issue under the prospectus.
29. Any draft prospectus given to Sandhurst.
30. Any report from the auditor given to Sandhurst in accordance with cl 11.1(c) of the Trust Deed.
31. Any requirement of Sandhurst for Wickham to obtain a further report from an accountant pursuant to cl 11.2(a)(i) of the Trust Deed.
32. Any confirmation by Sandhurst that Wickham may issue Notes in accordance with cl 11.2(a)(ii) of the Trust Deed.
33. Any further report provided to Sandhurst by Wickham pursuant to cl 11.2(b) of the Trust Deed.
34. Any cancellation of approval to issue notes made by Sandhurst pursuant to cl 11.4 of the Trust Deed.
35. A copy of any Note certificate or notice issued by Wickham to a noteholder pursuant to cl 11.8 of the Trust Deed.
36. Any certificate or statement made by any barrister, solicitor, attorney, auditor or officer of Wickham accepted by Sandhurst.
37. Any document or documents concerning a meeting of noteholders called by either Wickham or Sandhurst.
38. Any communications with (including all documents provided to) any accountant appointed by Sandhurst to investigate Wickham.
39. Any feasibility report prepared by or for a borrower which evidences the viability and profitability of a development project the subject of any loans made by Wickham.

In this Schedule, the term “document” includes any documents in whatever form including:

(a) electronic form or hard copy form;

(b) letter;

(c) email;

(d) facsimile;

(e) handwritten notes;

(f) electronic notes;

(g) hard copy notes;

(h) file notes;

(i) USB;

(j) CD‑ROM;

(k) financial statements;

(l) accounts;

(m) plans;

(n) diagrams;

(o) photographs;

(p) reports;

(q) valuations;

(r) contracts;

(s) portfolios; and

(t) draft documents.

**Schedule 2**

1. Instrument of appointment of administrator dated 21 December 2013.
2. Letter from PPB Advisory (“PPB”) dated 24 December 2012.
3. Letter from PPB to Noteholders dated 4 January 2013.
4. Report of PPB to creditors dated 29 January 2013.
5. Update of PPB to creditors and Noteholders dated 28 March 2013.
6. Report to Noteholders by PPB dated 29 April 2013.
7. Report to Noteholders by PPB dated 5 September 2013.
8. Originating Application No. 8632 of 2013 in the Supreme Court of Queensland dated 6 September 2013.
9. Sandhurst’s letter to Noteholders dated 11 January 2013.
10. Sandhurst’s letter to Noteholders dated 30 January 2013.
11. Unsecured Note Trust Deed dated 7 June 2005.
12. Supplemental Unsecured Note Trust Deed No. 1 dated 7 July 2006.
13. Supplemental Unsecured Note Trust Deed No. 2 dated 23 April 2009.
14. Prospectus for equities – unquoted, dated 7 June 2005.
15. Notice of appointment of trustees for debenture holders dated 6 June 2005.
16. Supplementary prospectus dated 28 June 2006.
17. Prospectus for equities – unquoted dated 7 July 2006.
18. Prospectus for equities – unquoted dated 7 August 2006.
19. Supplementary prospectus dated 29 February 2008.
20. Notice of resignation or removal of auditors – resignation of auditor dated 13 March 2008.
21. Prospectus of equities – unquoted dated 22 September 2008.
22. Supplementary prospectus dated 23 April 2009.
23. Supplementary prospectus dated 17 June 2010.
24. Disclosure notice for unlisted disclosing entity dated 8 July 2010.
25. Supplementary prospectus dated 22 December 2012.
26. Financial statements and reports for the period 1 July 2006 to 30 June 2007.
27. Half yearly reports for the period 1 July 2007 to 31 December 2007.
28. Financial statements and reports for the period 1 July 2009 to 31 December 2009.
29. Half yearly reports for the period 1 July 2009 to 31 December 2009.
30. Financial statements and reports for the period 1 July 2009 to 30 June 2010.
31. Half yearly reports for the period 1 July 2010 to 31 December 2010.
32. Financial statements and reports for the period 1 July 2010 to 30 June 2011.
33. Half yearly reports for the period 1 July 2011 to 31 December 2013.
34. Financial statements and reports for the period 1 July 2011 to 30 June 2012.
35. Quarterly certificate pursuant to Directors’ Resolution for quarter ending 31 December 2005.
36. Quarterly certificate pursuant to Directors’ Resolution for quarter ending 31 March 2006.
37. Quarterly certificate pursuant to Directors’ Resolution for quarter ending 30 September 2006.
38. Report to the Trustee for the quarter ending 31 December 2006.
39. Report to the Trustee for the quarter ending 31 March 2007.
40. Report to the Trustee for the quarter ending 30 September 2007.
41. Report to the Trustee for the period ending 31 December 2007.
42. Report to the Trustee for the period ending 31 March 2008.
43. Report to the Trustee for the quarter ending 30 June 2008.
44. Report to the Trustee for the quarter ending 30 September 2008.
45. Report to the Trustee for the quarter ending 31 December 2008.
46. Report to the Trustee for the quarter ending 31 March 2009.
47. Report to the Trustee for the quarter ending 30 June 2009.
48. Report to the Trustee for the quarter ending 30 September 2009.
49. Report to the Trustee for the quarter ending 31 December 2009.
50. Report to the Trustee for the quarter ending 31 March 2010.
51. Report to the Trustee for the quarter ending 30 June 2010.
52. Report to the Trustee for the quarter ending 30 September 2010.
53. Report to the Trustee for the quarter ending 31 December 2010.
54. Report to the Trustee for the quarter ending 31 March 2011.
55. Report to the Trustee for the quarter ending 30 June 2011.
56. Report to the Trustee for the quarter ending 30 September 2011.
57. Report to the Trustee for the quarter ending 31 December 2011.
58. Report to the Trustee for the quarter ending 31 March 2012.
59. Report to the Trustee for the quarter ending 30 June 2012.
60. Report to the Trustee for the quarter ending 30 September 2012.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 804 of 2013 |

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| BETWEEN: | GRAEME CLARKEFirst Prospective ApplicantMARION CLARKESecond Prospective Applicant |
| AND: | SANDHURST TRUSTEES LIMITED (ABN 16 004 030 737)Prospective Respondent |

|  |  |
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| JUDGE: | GREENWOOD J |
| DATE: | 5 JUNE 2014 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

## Background

1. These proceedings concern an application by Mr and Mrs Clarke under r 7.23 of the *Federal Court Rules 2011*, as prospective applicants for the purposes of that rule, for an order that Sandhurst Trustees Limited (“Sandhurst”), as prospective respondent, give discovery to them of particular documents initially identified in the application but later revised in the course of the hearing.
2. The application arises in the following context.
3. Wickham Securities Limited (“Wickham”) is a corporation which was registered on 18 October 2004. From 2005 until, in effect, 21 December 2012, the date upon which it entered administration under the provisions of the *Corporations Act 2001* (Cth) (the “Act”), Wickham carried on the business of raising funds through the issue of debenture notes described as “unsecured deposit notes” for the purposes of s 283BH of the Act, to investors subscribing pursuant to one or more prospectuses issued by Wickham. According to a prospectus issued by Wickham on or about 8 June 2005, Wickham described itself as a company which would invest funds so raised in a “portfolio of high yielding secured loans within a pre‑determined risk profile”.
4. Section 283AA of the Act provides that before a corporation such as Wickham makes an offer of debentures to investors, the corporation must enter into a trust deed that complies with s 283AB of the Act and appoint a trustee contemplated by s 283AC. Section 283AB provides, put simply, that particular classes of rights and interests must be held in trust by the trustee for the benefit of the debenture holders. Section 283AC provides that the trustee for the debenture holders must be a body falling within s 283AC(1) which includes, relevantly, a licensed trustee company (within the meaning of Ch 5D).
5. Sandhurst is a licensed trustee company.
6. On 7 June 2005, Wickham entered into the “Unsecured Note Trust Deed” (the “Trust Deed”) with Sandhurst. Under the Trust Deed, the trustee holds on trust for the benefit of the noteholders the right to enforce Wickham’s duty to pay any money owing to the noteholders under the Trust Deed; any charge or security for the payment of any money owing to the noteholders; the right to enforce any duties of Wickham under Ch 2L of the Act, the Trust Deed or the Conditions (being the terms and conditions applicable to the notes as set out in Sch 3 to the Trust Deed and any prospectus issued in accordance with the Trust Deed); and, all other property acquired by the trustee and intended to be held for the benefit of the noteholders.

## Rule 7.23

1. Before examining the terms of the Trust Deed and the relevant provisions of the Act in any detail, it is necessary to identify the principles governing the operation of r 7.23 of the *Federal Court Rules 2011*. It is not necessary to say too much about r 7.23. The principles and the relevant authorities have been addressed in *Higgins* *v Hancock* (2011) 199 FCR 393 by Jacobson J at [55] to [59] and in *Reeve v Aqualast Pty Ltd* [2012] FCA 679 by Yates J at [63] to [66]. I adopt the observations on the approach to r 7.23 of their Honours in each case.
2. Rule 7.23 is in these terms:

(1) A *prospective applicant* may apply to the Court for an order under subrule (2) if the prospective applicant:

(a) *reasonably believes* that the prospective applicant *may* have the *right* to obtain *relief* in the Court from a prospective respondent whose description has been ascertained; and

(b) after making *reasonable* inquiries, does not have sufficient information to decide whether to start a proceeding in the Court to obtain that relief; and

(c) *reasonably* believes that:

(i) the prospective respondent has or is likely to have or has had or is likely to have had in the prospective respondent’s control documents directly relevant to the question whether the prospective applicant has a right to obtain the relief; and

(ii) inspection of the documents by the prospective applicant would assist in making the decision.

(2) If the Court is satisfied about matters mentioned in subrule (1), the Court may order the prospective respondent to give discovery to the prospective applicant of the documents of the kind mentioned in subparagraph (1)(c)(i).

 [emphasis added]

1. The terms “prospective applicant” and “prospective respondent” are defined in r 7.21 in the following way:

***prospective applicant*** means a person who *reasonably believes* that there *may* be a *right* for the person to obtain relief against another person who is not presently a party to a proceeding in the Court.

***prospective respondent*** means a person, not presently a party to a proceeding in the Court, against whom a prospective applicant reasonably believes the prospective applicant may have a right to obtain relief.

 [italic emphasis added]

1. It follows that an applicant must show, apart from any other considerations, that he or she believes that he or she may have a right against the proposed respondent to relief (deriving from an identified and contended cause of action) and the belief is, objectively, reasonably held rather than a “mere” belief or mere assertion or matter of speculation, notwithstanding that r 7.23 is to be construed beneficially so as to give the fullest scope reasonably allowed of the language of the rule (*St George Bank Ltd v Rabo Australia Ltd* [2004] FCA 1360 at [26]) and also recognising that the notion of a “reasonable belief” reflects a threshold to be satisfied by the applicant set at “quite a low level”. The evidence must demonstrate that there is some tangible support for the belief that takes the existence of the alleged right beyond mere belief, assertion or speculation (*Reeve v Aqualast Pty Ltd* at [65]).

## The terms of the Trust Deed

1. As to the terms of the Trust Deed which are said to give rise to obligations on the part of Sandhurst which it failed to discharge, the following clauses should be noted.
2. Clauses 2.1 and 2.2 address the notes Wickham may issue.
3. Clause 2.11 provides that money raised by Wickham through the issue of the notes may be applied by it to: provide finance in accordance with the “Lending and Security Criteria” (the content of which is set out in Sch 4 to the Trust Deed) for the acquisition and/or development of real property and/or related working capital purposes; pay any commission, procuration fee or brokerage payable by Wickham in accordance with the Trust Deed and the terms of any prospectus; invest in any “Authorised Investments” (see the definition of that term in Sch 1 – Dictionary); pay the Principal Amount of any note on maturity or earlier repayment; working capital of Wickham; and for any other purposes disclosed in a prospectus.
4. Clause 6.1 sets out 14 general covenants made by Wickham with Sandhurst and for the benefit of the noteholders. By those covenants, Wickham agrees (among other things), put simply, to: comply with the Act and the provisions of the Trust Deed; conduct the business in a proper and efficient manner; promptly, and to the extent practicable within five business days, give the trustee any information it may reasonably require for the purposes of the Trust Deed or to discharge its obligations under the Act; promptly, and in any event within five business days of becoming aware of the happening of an event of default, provide the trustee with written notice of the event and the action proposed to remedy it; notify the trustee, while the notes remain outstanding, immediately upon becoming aware that any provision of the Trust Deed cannot be fulfilled.
5. Clause 6.3 casts an obligation on Wickham to provide a report to the trustee (at the same time as the report required under s 283BF) signed by two directors stating whether or not interest due on the notes has been paid in the relevant period and the principal amount of the notes outstanding at the date of the report.
6. Clause 6.4 contains a series of financial covenants. Wickham must at all times maintain Net Tangible Assets (see Sch 1) with a value at least equal to the Minimum Capital (see Sch 1). Clauses 6.4(a) and (b) contain particular prohibitions upon the issue of notes by Wickham. Clause 6.4(d) provides 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 give the trustee a copy of a certificate from Wickham’s auditor which provides details of Wickham’s net tangible assets (as at a date specified in the certificate, being a date not earlier than three months before the date of the certificate (or such other times the trustee may approve)). Clause 6.4(e) provides that within 21 days after the receipt of that certificate, the trustee may require Wickham to obtain a further report from an accountant approved by the trustee in respect of the cl 6.4(d) matters. By cl 9.2, Wickham agrees to provide the trustee with such information as the trustee reasonably requests (about it and any of its subsidiaries) to enable the trustee to discharge its duties under the Trust Deed and the Act, and where the information concerns financial information, the trustee may request Wickham to provide an auditor’s certificate stating that the auditor has reviewed the financial information and acknowledges that based on the auditor’s reasonable enquiries nothing has come to the attention of the auditor which causes him or her to believe that the information provided to the trustee is incorrect or incomplete.
7. Clause 11.1 provides that if Wickham proposes to issue a prospectus offering notes it must: notify the trustee in writing of the amount of the notes intended to be issued; provide the trustee with a copy of the draft prospectus; and give the trustee a copy of a report from an auditor which states the amount of the notes which, in the auditor’s opinion, could be issued by Wickham without breaching the financial covenants and states that the auditor has not become aware of any material circumstances (at relevant dates) which would, if taken into account at the date of the report, affect the amount of notes which may be issued by Wickham without breaching the financial covenants.
8. Clause 12 sets out the duties of the trustee. Clause 12, relevantly, is in these terms:

**12. Duties of the Trustee**

**12.1 General obligations**

The Trustee covenants to do the following:

* + - 1. Exercise reasonable diligence 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.
			2. Exercise reasonable diligence to ascertain whether [Wickham] has committed any breach of the terms of the Notes, this Deed or Chapter 2L of the [Act].
			3. Do everything in its power to ensure [Wickham] remedies any breach known to the Trustee of the terms of the Notes, this Deed or Chapter 2L of the [Act] unless the Trustee is satisfied any such breach does not materially prejudice the Noteholders’ interests or any security for the Notes.
			4. Ensure [Wickham] complies with Part 2K of the [Act] to the extent that it applies to the Notes.
			5. Notify ASIC as soon as practicable if [Wickham] has not complied with sections 283BE, 283BF, 318(1) or 318(4) of the [Act].

…

1. Notwithstanding the two principal general obligations on the part of Sandhurst to exercise *reasonable diligence* to ascertain whether the property of Wickham (including receivables payable by borrowers from Wickham) that is or should be available to it, will be sufficient to repay the amount deposited or lent when it becomes due, and the obligation to exercise *reasonable diligence* to ascertain whether Wickham has committed any breach of the terms of the notes, the Trust Deed or a provision of Ch 2L of the Act, cl 13 of the Trust Deed sets out a series of *limitations* upon the liability of the trustee. Sandhurst particularly draws attention to cl 13.1(a)(iii) which is in these terms:
2. *Subject to clause 13.5*, it is irrevocably and unconditionally acknowledged and agreed that:

…

(iii) The Trustee is **not**, and its directors, officers, employees, agents and attorneys are **not**, *liable* to any party for –

1. any absence of, or defect in title or for the Trustee’s inability to exercise any of its Powers under any Transaction Document
2. any failure by [Wickham] to perform its obligations under any Transaction Document
3. the financial condition or solvency of [Wickham]
4. any statement, representation or warranty of [Wickham] being incorrect or misleading in any respect
5. acting in accordance with the instructions of a Special Resolution in accordance with this Deed or any other Transaction Document
6. the adequacy or enforceability of the Notes or this Deed or the Prospectus, and
7. any recitals, statements, representations or warranties contained in any Transaction Document or in any certificate or other document referred to in or provided for in, or received by it under, any Transaction Document.

[emphasis added]

1. That limitation of liability is expressed to be subject to cl 13.5. Subject to a qualification not presently relevant, cl 13.5 provides that nothing in cl 13 or elsewhere in the Trust Deed has the effect of exempting Sandhurst from liability for a breach of s 283DA of the Act for “failure to show the degree of care and diligence required of it as Trustee”, or has the effect of indemnifying Sandhurst in respect of any liability arising under s 283DA.
2. However, Sandhurst contends that cl 13 does have the effect of limiting any liability on its part for any contravention of any of the duties recited in cl 12 of the Trust Deed (recognising that any such contended contravention is denied).
3. Clause 13.3 provides that Sandhurst has “absolute discretion” in relation to the exercise of its duties and powers and, subject to cl 13.5, Sandhurst is “in no way responsible for any loss, costs, damages, expenses, or inconvenience which may result from the exercise or non‑exercise of its duties and Powers under this Deed or in relation to the Transaction Documents”. The term “Transaction Documents” means “this Deed, the Conditions, the Prospectus, each Note and any other document or agreement which [Wickham] and the Trustee from time to time agree and designate in writing to be a Transaction Document for the purposes of this Deed” (Sch 1 – Dictionary).
4. Clause 15.2 provides that except as required under s 283DA of the Act, Sandhurst is not required to keep itself informed as to the performance or observance by Wickham of Wickham’s obligations under any Transaction Document or any other document or agreement to which it is a party; nor investigate whether or not any failure by Wickham to pay a noteholder any part of any amount due and payable under a note has occurred or is continuing; nor inspect the properties or books of Wickham or to assess or keep under review the business, operations, financial condition, creditworthiness or “status of affairs” of Wickham.
5. Clause 18(b) provides that the trustee is at liberty to accept a certificate given or a statement made by any barrister, solicitor, attorney, auditor or officer of Wickham and is not bound to call for further evidence or “be responsible for any loss occasioned by failure to do [so]”.
6. As earlier mentioned, cl 2.11 provides (and, in particular, cl 2.11(a)(i)) that the money raised by Wickham through the issue of the notes may be applied by it to provide finance in accordance with the lending and security criteria set out in Sch 4 to the Trust Deed. Sch 4 provides that all loans are to be fully documented and made on an arms‑length commercial basis as to interest, terms and security. Loans may be made for terms of no more than 12 months. The Sch 4 criteria provide that Wickham:

… will not advance loan funds until obtaining from the borrower (and any applicable guarantors) security which is sufficient to satisfy all of the obligations owed to [Wickham] under the applicable loan and, where applicable, any prior‑ranking security interests. In particular, [Wickham] will not advance loan funds unless a registrable first or second mortgage over real property security is held to secure the principal and interest under the applicable loan.

Collateral security may be required by [Wickham] in addition to real property security. If [Wickham] requires collateral security, then it will not advance loan funds unless it has first obtained the required collateral security. Collateral security may include, but is not limited to the following:

* A first or second ranking charge over all or part of the assets and/or undertakings of a corporate borrower or a third party.
* A chattel mortgage, a bill of sale and/or personal guarantees from third parties, such as one or more of the directors of a borrowing company.
1. The criteria include a provision that the maximum amount that may be advanced by Wickham in respect of any loan is 85% of the independent valuation of the real property held to secure the loan (the “facility limit”), and the amount of a proposed loan must be aggregated within any amounts secured by prior or equal ranking security interests when calculating the facility limit.
2. Further, Wickham shall not advance funds until obtaining from the borrower security which is, in the aggregate, sufficient and is reasonably likely to be sufficient, to satisfy the liability of the borrower for the repayment of all money and other liabilities owed to Wickham or which may be incurred under the applicable loan.
3. Wickham remained entitled to advance additional funds to an existing borrower on the basis of the existing security (complying with the criteria) provided Wickham was satisfied the existing security was sufficient to satisfy the borrower’s liability for the repayment of all monies owed to Wickham or which might be incurred under the applicable loan.
4. As to independent valuations, the criteria provide that the value of real property offered as security for a loan must be determined “at market value for mortgage lending purposes by a registered valuer approved by, but independent of, [Wickham]”. Valuations were required to be less than six months old at the time of loan approval.
5. As to development projects concerning real property, Wickham was required to only advance funds for such a project after reviewing and being satisfied with a “detailed feasibility report prepared by or for the borrower which evidences the viability and profitability of the development project”.
6. As to credit assessment of borrowers, the criteria provide that prior to agreeing to any proposed loan, Wickham was required to assess the ability of the borrower to meet payments of interest and principal when due under the proposed loan. The assessment process was to include obtaining a credit bureau reference check in respect of each borrower or third party security provider which was required to be less than six months old at the time of any loan approval.
7. So far as the Trust Deed is concerned, Sandhurst contends that neither Mr Clarke nor Mrs Clarke could hold a *reasonable* belief that he or she may have a right to relief against it based upon a contended failure by Sandhurst to discharge any duties cast upon it by the Trust Deed or a failure by Sandhurst to exercise any powers conferred upon it under the Trust Deed because a proper reductionist construction of the terms of the Trust Deed make it plain that no such liability can arise in Sandhurst by operation of cl 13.1(a)(iii), cl 13.3, cl 15.2 and cl 18(b). Sandhurst contends, in effect, so far as the Trust Deed is concerned, that by reason of these clauses, the scope of its engagement gives rise to no legal liability or responsibility notwithstanding any of the covenants casting duties upon the trustee. That follows, it is said, because an assessment of whether Sandhurst has discharged a duty of reasonable diligence under the Trust Deed, to ascertain, for example, whether the receivables available to Wickham will be sufficient to repay the noteholders, or whether Wickham has complied with the Sch 4 lending criteria, is entirely a function of the *regime* established by the Trust Deed (and as to quarterly reports, certificates and an audit certificate, also the Act) within which Sandhurst acted in taking steps or not taking steps or in electing to rely upon particular certificates or instruments signed by the directors or other officers of Wickham.
8. As to these clauses, cl 13.1(a)(iii) purports to limit (that is, exclude) Sandhurst’s liability to any party for failures *by* Wickham or conduct *of* Wickham but not failures by the trustee itself to perform duties cast upon it by the Trust Deed. Clause 13.3 purports to confer an *absolute discretion* upon the trustee as to whether or not it will exercise any of its duties (and powers) cast upon it under the Trust Deed.
9. Clause 13.3 is unlikely to be construed in a way which confers an absolute discretionary *power* upon the trustee to render the performance of its express duties and powers under the Trust Deed as nugatory, should it choose to so act in purported exercise of such a power. What point would there be in the Trust Deed conferring any duties upon the trustee if it can, as a matter of proper construction, simply elect not to perform any of those duties as a matter of absolute and unconstrained discretion? Clause 13.3 would, at least arguably, be likely to be read‑down in the context of the document overall.
10. Clause 15.2 would, at least arguably, be unlikely to be construed in a way which excludes enquiry if, in all the *circumstances*, enquiry is called for in the proper discharge of its obligations under cl 12.1.
11. Clause 18(b) entitles the trustee to accept a certificate as to particular matters given by a person in a capacity identified in the clause. A question might well arise, at least arguably, as to the relationship between reliance upon a certificate under cl 18(b) and the discharge of a duty under cl 12.
12. All of these matters would no doubt be highly contentious questions to be resolved in prospective litigation. Subject to the content of the admissible evidence on the present application identified in the affidavit material as to the foundation of the contended cause of action, to which I will turn later in these reasons, a prospective applicant might objectively form a reasonable belief that the provisions of the Trust Deed identified by Sandhurst are not necessarily a *complete answer* to a contended right to relief based upon a contended contravention of, for example, cl 12.1.

## The *Corporations Act*, Chapter 2L - Debentures

1. As to the *Corporations Act*, these matters, apart from the matters mentioned at [4] to [6] of these reasons, are relevant.
2. A “borrower” such as Wickham required to enter into a trust deed under s 283AA has the duties imposed by Pt 2L.2 within Ch 2L of the Act (s 283BA). Wickham’s general duties are set out at s 283BB.
3. Section 283BF requires Wickham to give the trustee a quarterly report within one month after the end of each quarter (and lodge a copy with Australian Securities and Investments Commission (“ASIC”)) that sets out the information required by s 283BF(4). By s 283BF(4), each quarterly report must include details of any failure by Wickham (and each guarantor) to comply with the terms of the debentures or the provisions of the Trust Deed or Ch 2L during the quarter; any event that has occurred during the quarter that has caused, or could cause, any amount *deposited* with Wickham or *lent* to Wickham to become immediately payable, or the debentures to become immediately enforceable, or any *other right* or remedy under the terms of the debenture or provisions of the Trust Deed to become immediately enforceable (s 283BF(4)(a) and (b)).
4. The report must also include information about any circumstances that have occurred during the quarter that *materially prejudice* Wickham, any of its subsidiaries or any of the guarantors, or any security interest included in or created by the debenture or the trust deed (s 283BF(4)(c)).
5. The report must also include information concerning any substantial change in the nature of Wickham’s business or that of its subsidiaries or any guarantor that has occurred during the quarter (s 283BF(4)(d)) and whether any of the stipulated s 283BF(4)(e) events have occurred relevant to a guarantor.
6. The report must also set out the s 283BF(4)(f) stipulated information concerning the net amount outstanding on any advances in relation to any security interest (s 51A effective 30 January 2012) at the end of the quarter.
7. Each quarterly report must also identify *any other matter* that may *materially prejudice* any security interest or other interests of the debenture holders (s 283BF(4)(g)).
8. Section 283BI provides that Wickham commits an offence if it intentionally or recklessly contravenes identified provisions of Pt 2L.2 including s 283BB setting out its general duties and s 283BF in relation to the provision and content of the quarterly reports.
9. Part 2L.4 addresses the topic of the duties of the trustee and the extent to which the terms of a debenture, a trust deed or a contract with the holders of debentures secured by a trust deed might be rendered void.
10. Section 283DA is, relevantly for present purposes, in these terms:

**283DA Trustee’s Duties**

The trustee of a trust deed entered into under s 283AA **must**:

1. exercise *reasonable diligence* to ascertain whether the *property* [which means any legal or equitable estate or interest in real or personal property of any description and includes a chose in action, see s 9, Dictionary, “property”] of the borrower [Wickham – see s 9, “borrower”] and of each guarantor 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; and
2. exercise *reasonable diligence* to ascertain whether [Wickham] or any guarantor has committed any breach of:

(i) the terms of the debentures; or

(ii) the provisions of the trust deed or this Chapter; and

1. do *everything* in its *power* to *ensure* that [Wickham] or a guarantor *remedies* any breach *known* to the trustee of:

(i) any term of the debentures; or

(ii) any provision of the trust deed or this Chapter;

*unless* the trustee is satisfied that the breach will not materially prejudice the debenture holders’ interests or any security for the debentures;

(e) notify ASIC as soon as practicable if:

(i) [Wickham] has not complied with section 283BF or [the reporting requirements under s 318(1) or s 318(4)]; or

(ii) a guarantor has not complied with s 283CC; and

...

 [emphasis added]

1. Section 283DB provides that a term of a debenture, a provision of a trust deed or a term of a contract with the holders of debentures secured by a trust deed, is **void** in so far as the relevant term or provision would have the *effect* of exempting a trustee from liability for breach of s 283DA for failure to show the *degree* of care and diligence required of it as trustee, or would have the effect of indemnifying the trustee against that liability, *unless* the relevant term or provision releases the trustee from liability for something done or omitted to be done before the release is given, or unless the relevant term or provision enables a meeting of debenture holders to approve the release of a trustee from liability for something done or omitted to be done before the release is given.
2. Section 283DB(2) and s 283DC deal with matters related to meetings of debenture holders and releases approved by such a meeting.
3. Thus, s 283DB has the effect of rendering void the terms or provisions of a debenture, trust deed or the relevant class of contract identified in that section, which seek to exempt a trustee from liability for a contravention of *s 283DA* arising out of a failure on the part of the trustee to show the degree of care and diligence required of it as a trustee under s 283DA and rendering void any indemnification of the trustee against that liability. Although it is said that the *Trust Deed* operates in a way which exempts the trustee from any contended failure to discharge its duties arising under, or exercise its powers conferred by, the Trust Deed (and extinguishes any contended liability on the part of the trustee under the deed), s 283DB prevents, according to its terms, any exemption of the trustee in respect of contraventions of s 283DA.
4. Section 283F(1) provides, relevantly, that a person who suffers loss or damage because a trustee (among others) has contravened a provision of Ch 2L (and, relevantly, Pt 2L.4 of Ch 2L), may recover the amount of the loss or damage from the trustee or a person involved in the contravention. An action commenced in reliance upon s 283F(1) must be commenced at any time within six years after the day on which the cause of action arose.

## Wickham – the prospectuses

1. Wickham’s first prospectus recites that it was lodged with ASIC on **8 June 2005** (Prospectus 1).
2. The key features are recited as these. The issuer is Wickham. The notes are unsecured deposit notes ranking equally at an issue price of $1.00 per note with Wickham expecting to raise $30 million during the term of the prospectus with a right to accept over‑subscriptions of $5 million. The minimum subscription was $1 million. Sandhurst was appointed pursuant to the Trust Deed previously described to act as trustee “for the benefit of investors”. The interest rate offered on the notes might change “from time to time” at the discretion of Wickham. The investment term would be either 6 months, 12 months, 24 months or 60 months. The maturity date for the notes would be the last day of the relevant term. The prospectus recites that Wickham will invest the majority of the proceeds of the issue in secured loans to borrowers to assist in financing property investments and property‑related transactions, financing the acquisition of new property investments and re‑financing existing property investments. The funds raised by the issue of the notes would only be made available by way of loans for business or investment purposes. Wickham’s target asset allocation was described as being for 90% to 95% of its assets to be invested in secured loans in compliance with the “Lending Criteria” and 5% to 10% of its assets to be invested in authorised investments to satisfy Wickham’s liquidity requirements. However, the prospectus recites that Wickham may invest up to 100% of its assets in authorised investments pending investment in secured loans and depending upon Wickham’s liquidity requirements.
3. The Board of Wickham was said to be constituted by Mr Bradley Sherwin, Mr Nigel Rae and Mr William Redmond. Mr Sherwin was said to have extensive experience in the financial planning industry. Mr Rae was said to have extensive experience in financial planning and investment analysis. Mr Sherwin and Mr Rae were to be “responsible for implementing the business strategy and managing the daily operations of [Wickham]”. Mr Redmond was described as a solicitor admitted in 1986 and a person who “brings significant legal experience to the Board”. The investment committee was made up of Mr Sherwin, Mr Redmond, Mr Stephen Turner and Mr Russell Maxwell. Mr Turner was said to have been involved in the banking and finance industry since 1983 and was described as a person with extensive experience in property and commercial lending. Mr Maxwell was said to have been involved in the banking and finance industry since 1984 having held a senior position in three identified banks.
4. On **28 June 2006**, Wickham lodged a supplementary prospectus with ASIC which supplemented the prospectus of 8 June 2005.
5. By that prospectus, Wickham said that it had determined from 9 July 2006 that its lending activities would be expanded to “include the financing of property development projects subject to certain limitations”. The document recites that the Board was conscious that some investors might prefer not to invest in a company with exposure to property development projects. Investors (noteholders) were to be given an opportunity to redeem their notes prior to maturity if they were of such a view.
6. On **7 July 2006**, Wickham lodged a further prospectus with ASIC (Prospectus 2).
7. Under Prospectus 2, Wickham proposed to raise $40 million by issuing unsecured deposit notes, ranking equally, of $1.00 with a right to accept over‑subscriptions of up to $5 million. The notes were to be issued for terms of 12 months, 24 months, 36 months, 48 months and 60 months. No minimum subscription applied. Sandhurst continued to act as trustee for the benefit of investors. At 30 June 2006, Wickham had raised $15,051,971.00 through the issue of unsecured notes under its first prospectus. The previous directors continued to be directors and the investment committee was made up of the same individuals.
8. On **8 August 2007**, Wickham lodged a further prospectus with ASIC (Prospectus 3).
9. By this prospectus, Wickham proposed to issue $1.00 unsecured deposit notes, ranking equally, so as to raise $32 million. The term of the notes would be a 12, 24, 36, 48 or 60 month term. Interest payments would be paid quarterly in arrears by direct credit to an investor’s bank account no more than 14 days after the end of each relevant quarter. The prospectus recites that at 30 June 2007, Wickham had raised $22,847,971.00 through the issue of notes under its first and second prospectuses and the aggregate principal amount of notes outstanding was $18,437,170.00. The notes would be issued so as to lend funds to “borrowers to assist in financing property investments and property‑related transactions, as well as financing property development projects”. The prospectus recites that Wickham applies strict lending criteria to approving loans including the requirement for either a first or second registered mortgage over real property. The prospectus recites that funds advanced by Wickham to a borrower in financing new property investments, re‑financing existing property investments and in financing property development projects would be subject to a limitation that “no more than 40% of the total assets of [Wickham] may be applied in the financing of property development projects”. The directors of Wickham are recited as Mr Sherwin, Mr Rae and Mr Simon Walmsley. Mr Walmsley was said to have been involved in the finance industry since 1996 and his experience was said to include financial planning and working within the banking sector. The investment committee was to comprise Mr Sherwin, Mr Turner, Mr Maxwell and Mr David Henry. Mr Henry was said to have been involved in the banking and finance sector since 1992 with “vast experience in all aspects of property finance”.
10. On **29 February 2008**, Wickham lodged a supplementary prospectus which supplemented the prospectus issued on 8 August 2007.
11. The supplementary prospectus recites that by operation of ASIC’s Regulatory Guide 69, Wickham was required to identify eight benchmarks developed by ASIC to help investors understand and assess an investment in unlisted debentures. The supplementary prospectus identifies those eight benchmarks and sets out information in relation to each one describing whether it meets the benchmarks and “if not, why not?” The benchmarks are: equity capital, liquidity, rollovers, credit rating, loan portfolio, related party transactions, valuations and lending principles. As to the loan portfolio, Wickham recites that it has 23 loans with a total value of $13,604,452.00. It identifies the regions, the number of loans in each region, the book value of the loan and the class of activity of the investment undertaken by the borrower from Wickham. The prospectus recites that Wickham “generally lends on the basis that interest on a loan is capitalised, which means the borrower is not required to make regular interest payments but must pay the principal amount of the loan and all accrued but unpaid interest at the end of the term of the loan”. At the date of the supplementary prospectus, all of Wickham’s loans are recited as having been made on that basis. One loan was said to be in arrears with a balance outstanding of $394,500.00 representing 2.9% of the company’s loan book. As to the lending principles benchmark, Wickham recited that it did not meet ASIC’s benchmark for “loan to valuation ratios”. It recited that it complied with the Trust Deed which limited the amount that could be advanced in respect of any loan to 85% of an independent valuation of the real property where the valuation was determined in accordance with the principles in the Trust Deed relating to valuations.
12. On **22 September 2008**, Wickham lodged a further prospectus with ASIC (Prospectus 4) by which it proposed to issue unsecured notes, ranking equally, of $1.00 each with an aim of raising $32 million.
13. The investment terms would be the same as the previous prospectus. At 30 June 2008, Wickham recites that it had raised $29,704,971.00 through the issue of notes under its first three prospectuses and the aggregate principal outstanding was $18,578,170.00. The prospectus addresses the eight benchmarks for the purposes of Regulatory Guide 69. The total value of loans was $16,589,563.00. As to the lending principles benchmark, Wickham again said that it did not meet ASIC’s “loan to valuation ratios” but that it would ensure the loan to valuation ratio would not exceed 80% of the latest “as if complete” valuation for every property development loan made by Wickham from the date of the prospectus; would not exceed 80% of the “latest market valuation” for loans to acquire vacant land; and would not exceed 85% of the “latest market valuation” for loans made to assist with the acquisition of completed property developments or buildings. Wickham recited that it complied with the requirement of the Trust Deed that the maximum amount advanced in respect of any loan would be 85% of the independent valuation of the real property determined in accordance with the Trust Deed. There was no change to the composition of the Board or the investment committee.
14. For the purposes of this prospectus and the prospectus of 8 August 2007, no notes would be issued under the prospectus later than 13 months after the date of the prospectus.
15. On **23 April 2009**, Wickham lodged a supplementary prospectus which supplemented the prospectus of 22 September 2008.
16. The supplementary prospectus recites that Mr Rae had resigned as a director of Wickham and that Mr Peter Siemons had been appointed in his place. Mr Siemons is recited as having been involved in financial management for over 25 years with extensive experience in analysing financial statements and preparing management accounts.
17. On **6 November 2009**, Wickham lodged a further prospectus with ASIC (Prospectus 5) by which it proposed to issue unsecured unlisted fixed interest rate deposit notes of $1.00 per note with the aim of raising $32 million.
18. Again, the term would be a 12, 24, 36, 48 or 60 month investment term. The prospectus recites that at 30 June 2009, Wickham had raised $32,486,971.00 and the aggregate principal amount of notes outstanding was $19,494,170.00. The prospectus addresses the eight benchmarks. The loan portfolio (Benchmark 5) is discussed. The lending principles are set out in the same terms as described for the earlier prospectus. The Board of Wickham is made up of Mr Sherwin, Mr Siemons and Mr Walmsley. The investment committee is constituted by Mr Sherwin, Mr Henry, Mr Turner and Mr Maxwell.
19. On **17 June 2010**, Wickham lodged a supplementary prospectus to supplement the prospectus issued on 6 November 2009.
20. Mr Walmsley had resigned as a director and Mr Ian Montgomery was appointed in his place. Mr Montgomery is recited as having been involved in the banking industry since 1982. He held a lending position with National Australia Bank and left the Bank in 2000 to establish a company specialising in residential and commercial property and equipment leasing. The supplementary prospectus updated information about loans. A dividend payment was made to Sherwin Financial Planners Pty Ltd (“SFP”) and Reacroft Pty Ltd in the six months ended 31 December 2009 which exceeded the funds available to be paid as a dividend by an amount of $1,089,883.00. This dividend payment was then “re‑categorized by [Wickham] as an unsecured loan to SFP (Loan)”. The supplementary prospectus recites that the loan “has now been repaid and [Wickham] received interest payments of 6% per annum during the term of the loan”. The loan is described as a “payment error”. The loan is also described as not having been approved by the investment committee before it was made. It was made on an unsecured basis.
21. On **15 December 2010**, Wickham lodged a further prospectus with ASIC (Prospectus 6) by which it proposed to issue unsecured unlisted fixed interest rate deposit notes of $1.00 per note with the aim of raising $30 million.
22. The notes would be issued for the same terms as previously indicated. At 30 June 2010, Wickham had raised $38,848,471.00 through the issue of notes under its first five prospectuses and the aggregate principal amount of notes outstanding was $22,096,891.00. At 30 September 2010, the aggregate principal amount of notes outstanding was $23,673,891.00. The prospectus recites, like the prospectus lodged on 6 November 2009, that no securities would be issued under the prospectus later than 13 months after the date of the prospectus. The prospectus addresses each of the benchmarks. The loan portfolio is described by location, number of loans, the percentage of the loan book that each loan represents and the value of each loan. At the date of the prospectus, two loans were said to be more than 30 days past due with a balance outstanding in the aggregate of $745,000.00. The lending principles set out at cl 2.8 in respect of Benchmark 8 are in the same terms as earlier described. The directors are recited as Mr Sherwin, Mr Siemons and Mr Montgomery. The investment committee is recited as being constituted by Mr Sherwin, Mr Montgomery, Mr Turner and Mr Garth Robertson. Mr Robertson is described as a person who has been involved in the banking and finance industry since 1984 with a 24 year career with the National Australia Bank.
23. On **22 December 2010**, Wickham lodged a supplementary prospectus to supplement the prospectus of 15 December 2010.
24. The supplementary prospectus introduced a new s 5.3 into the prospectus of 15 December 2010. Section 5 deals with financial information. Section 5.1 sets out the audited balance sheet for Wickham as at 30 June 2009 and 30 June 2010. Section 5.2 sets out notes to the balance sheet. The new s 5.3 sets out Wickham’s “audited income statement for the years ended 30 June 2010 and 30 June 2009” together with notes to the income statement. The profit for the year ending 30 June 2010 was recited as $3,245.00. The 30 June 2009 profit was $157,711.00.

## Wickham – its administration

1. On 21 December 2012, Mr Grant Sparks and Mr David Leigh of PPB Advisory were appointed joint and several administrators of Wickham by a resolution of the directors under s 436A of the Act.
2. On 7 January 2013, the first meeting of creditors of Wickham was held. Sandhurst, representing the noteholders, attended the first meeting of creditors.
3. On 29 January 2013, the administrators issued a preliminary report to creditors arising out of a review of the financial accounts; a review of the available books and records of Wickham; an investigation of Wickham’s loan portfolio and the security held for loans made by it; and an investigation of loans and transactions with related entities.
4. The preliminary report contains the following information.
5. The administrators conducted interviews with Mr Sherwin and Mr Siemons regarding the business activities of Wickham including details of Wickham’s loan book. The administrators note the **remarkable** observation by Mr Sherwin and Mr Siemons in the course of interviews that those directors “knew nothing about the business operations” (s 2.3) and that Wickham’s operations were “handled by Garth Robertson”. Mr Robertson resigned as an employee and director of Wickham on or about 19 December 2012. The administrators requested him to make his laptop computer available so that they could image company data. Mr Montgomery resigned as a director on 11 April 2012.
6. The preliminary investigations by the administrators identified a number of “significant issues”.
7. *First*, the directors had “not accurately [reported] the *position* and *quality* of [Wickham’s] loan portfolio” [emphasis added] to Sandhurst since at least August 2010 when receivers and managers were appointed to a borrower called WLP Pty Ltd.
8. *Second*, Wickham provided Sandhurst with an “Account Balance Confirmation letter” advising that the balance of Wickham’s “Application Account” was $10,779,835.00 as at 30 November 2012 when the actual balance at that date was $264,892.00. In other words, the balance of the Application Account was overstated by $10,514,943.00. The administrators expressed this view: “It is our view that this confirmation letter has been *fabricated*” [emphasis added]. The administrators also say that their investigations indicate that an account balance of $10,779,835.00 did not exist at any time in the 12 month period prior to Wickham’s letter to Sandhurst confirming that account balance.
9. *Third*, although the prospectus issued by Wickham dated 15 December 2010 was open for 13 months, Wickham’s records indicate that it continued to accept amounts from noteholders after the closing date of 14 January 2012. The contributions beyond the closing date amount to $1,962,500.00.
10. At section 2.4 of their report, the administrators observe that their investigations revealed that Wickham provided Sandhurst with a schedule disclosing 21 loans totalling $28,181,010.00 as at 30 June 2012. The administrators say that they have identified another loan file where the debt was not reported to Sandhurst as at 30 June 2012. The administrators estimated in their preliminary report a range of “gross realisations” that might occur from the loan portfolio as $1,738,000.00 as the low estimate and $6,265,500.00 as the upper estimate with the book value of the loan portfolio recorded as $28,180,010.00 in respect of 22 loans.
11. In the Executive Summary in section 2 under section 2.4, the administrators set out a schedule which says that of those loans, three were supported by first mortgage security; five by second mortgage security; three loans were not supported by any available loan file; seven of the loans were made to entities in respect of which receivers and managers had been appointed to the borrower, and in respect of four loans, the borrower was in liquidation or had become a deregistered company. Wickham recorded total noteholder liabilities of $27,671,014.00. The estimated gross return on the loan portfolio was 6c to 22c in each dollar before taking account of the costs of recovering the loans, legal fees and the costs and expenses of the administrators (and/or liquidators).
12. The report notes that Sandhurst had taken steps to convene a meeting of noteholders for 5 February 2013 and that ASIC had commenced action in the Federal Court against Mr Sherwin and entities related to him for freezing orders.
13. A second meeting of creditors was proposed for 6 February 2013.
14. In the report the administrators also note aspects of the loan criteria. They note that loan terms for loans made prior to 9 July 2006 were to be no more than 12 months and loan terms after that date no more than 24 months. The maximum loan to valuation ratio was to be 85% with valuations less than six months old at the time of a loan approval.
15. As to Sandhurst, the administrators observe that if Wickham is placed into liquidation, the liquidators would investigate whether “Sandhurst has complied with its obligations pursuant to the Trust Deed”. The administrators also observe that they had written to Sandhurst “seeking further information, and will continue investigations to ascertain if these obligations have been complied with”. The administrators also note that “Sandhurst did have concerns about the Company’s loan portfolio and cash flow” and that this concern resulted in the administrators (before appointment as administrators) being “engaged on 6 December 2012 to commence an Independent Review of the loan portfolio”.
16. Section 5 of the preliminary report provides further information concerning the investigations conducted by the administrators. In that section, the administrators make these comments. They express the opinion that the books and records of Wickham have not been maintained in accordance with s 286 of the Act. The company records do not include any management accounting records or loan balance records. At the date of the report, Mr Robertson had not provided his laptop to the administrators which was said to contain company data. Investigations by the administrators had not identified any *records* either electronic or paper detailing how Wickham had calculated *interest* payable on loans or detailing individual loan *transactions* with particular borrowers.
17. The directors made files available for review although only 13 files were made available notwithstanding that there were 22 loan transactions. During the course of investigations by the administrators, two different versions of a list of loans made by the company emerged. One report identified 18 loans with an outstanding balance of $27,094,010.00 and the second report detailed 21 loans with balances of $28,180,010.00. Three additional loans were identified totalling $1,086,000.00.
18. In section 5, the administrators summarise their investigation of the loan portfolio. Three loans are supported by first ranking mortgages. One loan is current. One borrower claimed that the loan had been repaid. As to the third loan, Wickham was in the course of realising the security. Of the other loans, two properties, subject to second‑ranking mortgages, were subject to sale contracts. Receivers and managers had been appointed to six borrowers representing seven loans. Liquidators had been appointed to three borrowers. Six borrowers had current loans although there were no details in the company files about the currency of the loans. Only two borrowers had been identified as regularly paying interest on their loan account during the 2012 calendar year.
19. The review of the loan portfolio revealed that current valuation reports were not held; valuation reports were not addressed to Wickham; not all loan files held a copy of a loan approval by Wickham’s Board or its investment committee; no current correspondence was evident on the files; and there were no approvals of loan extensions beyond the initial approved term in the majority of the files.
20. The administrators were unable to locate files for the additional loans made in 2012.
21. The administrators say that no recovery is expected from those borrowers that have receivers and managers appointed or where liquidators have been appointed.
22. In terms of reporting to Sandhurst, Wickham provided reports for the periods ended 30 September 2009 to 30 September 2012. The administrators note that Sandhurst advised them that it had concerns about Wickham’s cashflow position and requested Wickham to provide Sandhurst with a cashflow forecast. An email from Wickham to Sandhurst dated 30 November 2012 enclosed a cashflow forecast for three months to February 2013 together with a “Bank Confirmation Statement” apparently issued by the Bank of Queensland and its funds manager, DDH Graham Limited, disclosing a balance in Wickham’s “application account” on 30 November 2012 of $10,779,835.00. Upon investigation, DDH Graham Limited advised the administrators that the Confirmation Statement as at 30 November 2012 “[had] not been generated by [it]”. The account transaction listing received by the administrators from the Bank of Queensland shows that the actual bank account balance at 30 November 2012 was $264,892.00 thus leaving the administrators to conclude that the earlier confirmation letter was fabricated.
23. At section 5.6, the administrators note that Wickham’s annual accounts disclose that Wickham’s auditor, Mr Brian Kingston, had provided an unqualified audit opinion dated 12 September 2012 that Wickham’s accounts at 30 June 2012 represented a “true and fair view” of Wickham’s position at that date. The administrators say that they propose to review that audit opinion in the light of information arising out of their investigations. The administrators set out information in relation to the financial years ending 2010, 2011 and 2012 and conclude that they do not consider that the information disclosed in the accounts to 30 June 2012 is accurate.
24. At section 5.11, the administrators consider, based on their preliminary investigations, that Wickham’s failure is attributable to defaults on loans, insufficient income to pay interest to its unsecured noteholders, insufficient working capital and the deficiencies of management. The administrators observe that Wickham did not maintain records that correctly record and explain its transactions, financial position and performance thus preventing true and fair financial statements to be prepared and audited. Further, Wickham continued to accept funds from noteholders after 14 January 2012 receiving an additional $1,962,500.00.
25. At the meeting of creditors on 6 February 2013, the administrators were appointed *liquidators* of Wickham.
26. On 29 April 2013, the liquidators provided a report to Wickham’s noteholders. In that report, the liquidators say that investigations subsequent to the report of the administrators on 29 January 2013 had identified two further loans amounting to $5,130,000.00. One loan was for $400,000.00. A receiver and manager had been appointed to the borrower in June 2012. Investigations suggested that there was no value in the second mortgage security held by Wickham. The second loan was for $4,730,000.00 and investigations were continuing into that loan. A revised estimate of the gross realisations that might occur from the loan portfolio was summarised in this way. The revised lower estimate of recoveries was $1,738,000.00 and the revised upper estimate was $9,699,500.00 in respect of 24 loans having a book value of $33,310,010.00. Realisations to the date of the report, 29 April 2013, amounted to $993,323.00.
27. Of the 24 identified loans, three were supported by first mortgage security; five by second mortgage security; four had no loan file; eight were loans made to borrowers where receivers and managers had been subsequently appointed; and in respect of four loans, the borrower was in liquidation or the company had been deregistered.
28. At para 3.1 of the report, the liquidators observe that investigations were continuing into the question of whether Mr Kingston had conducted an audit of Wickham’s accounts in accordance with the required accounting standards required to be applied under Part 2M.5 of the Act.
29. As to Sandhurst, at para 3.2 the liquidators observe: “Investigations have continued into compliance by Sandhurst with its obligations pursuant to the Trust Deed. Our review includes the information provided by the Company to Sandhurst, and Sandhurst’s obligation to analyse and investigate the information provided to them”.
30. At para 3.3, the liquidators observe that their investigations into Wickham’s loan portfolio have identified “numerous irregularities”.
31. On 5 September 2013, the liquidators provided a further report to Wickham’s noteholders.
32. In that report, the liquidators observe that their investigations have revealed 24 loans at a book value of $33,310,010.00 and the revised lower estimate of recoveries amounts to $1,758,431.00 with a revised upper estimate of $9,719,931.00. Realisations to 5 September 2013 had increased from $993,323.00 to $1,038,754.00. The estimated gross loan recoveries would be in the range 6c to 35c in the dollar before deducting the costs likely to be incurred in achieving an increased estimated realisation. In the Executive Summary, the liquidators say that they have identified transfers amounting to $494,454.00 from Wickham’s account to an account held by Mr Robertson and a payment of $95,113.00 from Wickham’s account to builders completing renovations to Mr Sherwin’s residence in Wooloowin. The revised schedule at para 2.1 identifies three loans subject to first mortgage security; five loans subject to second mortgage security; four loans where no loan file was identified; eight transactions in respect of which receivers and managers had been appointed to the borrower as at the date of the report (5 September 2013); and four transactions where the borrower had been placed in liquidation or the company had been deregistered.
33. At para 4.1, the liquidators note that ASIC has cancelled the registration of Wickham’s auditor, Mr Brian Kingston, on the footing that ASIC considered that he had failed to carry out or adequately perform the duties of an auditor in relation to Wickham’s accounts. ASIC took the position that Wickham’s audit was not conducted in accordance with AASB applicable standards because Mr Kingston had failed to obtain sufficient appropriate audit evidence to support material financial balances in the 2012 financial report; an unqualified audit opinion was given without sufficient or appropriate audit evidence to support the adoption of a “going concern” basis for the accounts for the 2012 financial year; an adequate level of professional enquiry was not exercised in auditing the “recoverable value” of the loan portfolio assets; and key audit planning, execution and completion procedures were not performed or documented by Mr Kingston. The auditors note that Mr Kingston signed an enforceable undertaking given to ASIC “that he would never reapply for registration or perform any duties or functions of an auditor” (para 4.1).
34. As to Sandhurst, at para 4.2 the liquidators note that “[i]nvestigations are continuing into compliance by Sandhurst with its obligations pursuant to the Trust Deed”.
35. On 1 May 2013, Mr Sherwin became bankrupt upon his presentation of a debtor’s petition.

## Mr and Mrs Clarke

1. It is now necessary to say something about the evidence of Mr and Mrs Clarke before returning to aspects of the audit regime and the statutory provisions dealing with reporting and the particular certificates issued by the directors and Mr Brian Kingston.
2. In his affidavit sworn 18 February 2014, Mr Graeme Clarke says that he and his wife are the trustees of the G & M Clarke Superannuation Fund (the “Fund”). Mr Clarke says that the Fund made the following investments with Wickham:

| **Date** | **Notes Issued** | **Amount invested** |
| --- | --- | --- |
| 4 September 2008 (Prospectus 3) | 60 months @ 10% maturing 3 September 2013 | $45,000.00 |
| 4 September 2008(Prospectus 3) | 12 months @ 9% maturing 4 September 200912 months @ 9% maturing 4 September 201012 months @ 9% maturing 4 September 201112 months @ 9% maturing 4 September 201212 months @ 9% maturing 4 September 2013 | $45,000.00(in all) |
| 9 August 2010(Prospectus 5) | 60 months @ 10% maturing 9 August 2015 | $50,000.00 |
| 3 September 2012(Prospectus 6) | 12 months @ 8% maturing 3 September 2013 | $100,000.00 |

1. Of the $240,000.00 invested by the Fund, three investments of $20,000.00 in all were either withdrawn or paid out on maturity leaving a total amount invested with Wickham at the date of appointment of administrators of $220,000.00. The Fund received distributions from Wickham by way of interest on the notes in an amount of $42,021.00.
2. Mr Clarke says that he (together with his wife) has in his possession a number of documents relating to these investments. Five documents are identified: an interest statement (dated 15/10/2012) from Wickham for the period 1/7/2012 to 30/9/2012 for 30,000 $1.00 notes for a term of 12 months; an interest statement (dated 15/10/2012) from Wickham for the period 1/7/2012 to 30/9/2012 for notes for a term of 60 months; an interest statement (dated 15/10/2012) from Wickham for the period 1/7/2012 to 30/9/2012 for 100,000 notes for a 12 month term; an investment table for the Fund (dated 4/2/2013); a Deed of Trust for the Fund (dated 2/5/2002). Mr Clarke observes in his affidavit that his solicitor, Ms Janice Saddler, has in her possession a copy of Wickham’s annual report for the financial year ending 30 June 2008 and Wickham’s half‑yearly report for the period 31 December 2008. Mr Clarke says that Ms Saddler also has in her possession copies of the quarterly reports prepared pursuant to s 283BF of the Act.
3. Throughout Mr Clarke’s affidavit, he describes things by reference to the phrase “we note”, and no doubt Mr Clarke is seeking to swear to those matters on his own behalf and that of his wife. For present purposes, I propose to treat these references as a statement of Mr Clarke’s knowledge (where appropriate) or his analysis of matters or observations made by him. Challenges are made to the admissibility of much of Mr Clarke’s evidence and I will return to that matter shortly.
4. Mr Clarke refers to a letter from Sandhurst to his solicitors, Shine Lawyers, dated 5 February 2014 (being an exhibit to an affidavit of Mr Miller filed on behalf of Sandhurst and dated 12 February 2014). Mr Clarke says that, in that letter, Sandhurst says it received quarterly, half‑yearly and yearly reports and annual accounts from Wickham from in or around 2005 to late 2012. Mr Clarke says that although Sandhurst’s letter “does not purport to be definitive [of the documents it received from Wickham]” the letter “does not indicate that Sandhurst received any other documents from Wickham, or that Sandhurst requested information from Wickham to clarify matters, or that Sandhurst raised with Wickham any queries about the information provided in these documents”. Mr Clarke then makes observations to the following effect about the quarterly reports Sandhurst acknowledges it received:
5. The investment portfolio annexed to the report for the quarter ending 31 March 2010 sets out Wickham’s portfolio position for the quarter ending 31 December 2009.
6. The investment portfolio annexed to the report for the quarter ending 30 September 2010 is undated.
7. The investment portfolio annexed to the report for the quarter ending 31 December 2010 sets out Wickham’s investment portfolio position for the quarter ending 31 December 2009.
8. The investment portfolio annexed to the report for the quarter ending 31 March 2011 sets out Wickham’s investment portfolio position for the quarter ending 31 December 2009.
9. The investment portfolio annexed to the report for the quarter ending 30 June 2011 sets out Wickham’s investment portfolio position for the quarter ending 31 December 2009.
10. The investment portfolio annexed to the report for the quarter ending 31 December 2011 sets out Wickham’s investment portfolio position for the quarter ending 31 December 2009.
11. The investment portfolio annexed to the report for the quarter ending 31 March 2012 sets out Wickham’s investment portfolio position for the quarter ending 31 December 2009.
12. The investment portfolio annexed to the report for the quarter ending 30 September 2012 sets out Wickham’s investment portfolio position for the quarter ending 30 June 2012.
13. Mr Clarke further comments that in most of the quarterly reports provided by Wickham to the trustee, Wickham disclosed that Benchmarks 1, 4, 7 and 8 the subject of Regulatory Guide 69 had not been met and on one occasion a report disclosed that Benchmarks 5 and 6 had also not been met. From 30 September 2011, Benchmark 7 and 8 had been met. Mr Clarke also observes that in some of the prospectuses, explanations are given by Wickham as to why these benchmarks were not met. Mr Clarke says that he does not have copies of any documents which address how Sandhurst might have investigated Wickham’s failure to meet the benchmarks set out in Regulatory Guide 69 or how the material contained in the prospectuses issued by Wickham which dealt with the failure to comply with the relevant benchmarks was “checked or verified”.
14. Mr Clarke says that he has copies of the reports of PPB Advisory dated 4 January 2013, 29 January 2013, 29 April 2013 and 5 September 2013.
15. Mr Clarke says, in respect of the report dated 5 September 2013, that he notes that the liquidator observes that of the identified 24 loans made by Wickham, no loan files could be located for four of the loans; receivers and managers had been appointed to the borrower in respect of eight loans; and four borrowers were either in liquidation or had been deregistered.
16. At para 23, Mr Clarke says that he has been advised by Ms Saddler that there would *normally* be in existence particular identified documents dealing with the actions of a trustee discharging duties and exercising powers in the position of Sandhurst. Again, a challenge is made to the admissibility of these observations on the footing that Mr Clarke is simply reflecting views expressed to him by Ms Saddler with the result that Mr Clarke’s views can rise no higher than the views of Ms Saddler. As to that, Sandhurst says that Ms Saddler does not qualify her views by identifying, based on any expert advice, what would be the normal records kept by a trustee in the position of Sandhurst, and Ms Saddler does not depose to expertise which would entitle her to swear to the likely range of documentation which would form part of the engagement between a trustee in the position of Sandhurst and an entity such as Wickham.
17. Nevertheless, I propose to admit para 23 into evidence on the footing that it identifies the basis upon which Mr Clarke has formed his belief about matters relating to particular documents.
18. At para 23, Mr Clarke says that he has been told that the following documents would normally be in existence:
19. *notices* by Wickham to Sandhurst that it proposes to issue notes under each prospectus and supplementary prospectus (where relevant);
20. *copies* of each prospectus in draft provided by Wickham to Sandhurst;
21. any *amendments* suggested by Sandhurst to those documents;
22. *reports* from an auditor stating the amount of the notes to be issued under each prospectus and commenting that the auditor has not become aware of any material circumstance which might affect the amount of notes to be issued;
23. *investigations* undertaken by Sandhurst to determine whether the property of a borrower was sufficient to repay the amount deposited or lent by Wickham when the loan became due for payment;
24. *investigations* undertaken by Sandhurst to ascertain whether the terms of the Trust Deed had been complied with by Wickham and particularly whether finance had been provided to borrowers from Wickham in accordance with the Sch 4 “Lending and Security Criteria”;
25. *investigations* as to whether loans made by Wickham to a borrower were fully documented; made on a commercial basis as to interest, terms and security; made for no more than 12 months; included security sufficient to satisfy obligations owed under the loan agreement; included security by way of a registrable first or second mortgage; exhibited a maximum loan to valuation ratio of 85% of an independent valuation of the real property; were supported by an independent valuation meeting the relevant requirements of Sch 4 of the Trust Deed; and in the case of a development of real property, whether a detailed feasibility report prepared by or for the borrower was available to Wickham evidencing the viability and profitability of the development project before the loan was made;
26. *certificates* from an auditor in accordance with cl 6.4(d) of the Trust Deed;
27. *requests* for information required by Sandhurst from borrowers in order to obtain any further report from an accountant;
28. *requests* for information sought under cl 9.2 of the Trust Deed.
29. At para 24, Mr Clarke says that he and his wife propose to commence proceedings against Sandhurst for damages for breach of fiduciary duties owed by Sandhurst as trustee to them as noteholders (recognising that they subscribed for notes in their capacity as trustees of the Fund); damages for breach of the Trust Deed; and damages for contravention of s 283DA of the Act.
30. At para 25, Mr Clarke says that he (at least) is of the view that the documents which he has in his possession (and again he purports to speak on behalf of his wife) are not sufficient to enable him to determine whether to commence the proposed proceedings in the Federal Court of Australia against Sandhurst. He says that, in particular, he is unable to determine whether Sandhurst discharged its duty of “reasonable diligence” or whether Sandhurst breached fiduciary duties owed to him [them] as a noteholder, in four respects, namely, (a) in ascertaining whether the property of a borrower was sufficient to repay the amount lent by Wickham; (b) in ascertaining whether Wickham had complied with the terms of the Trust Deed in making a loan to a borrower; (c) by failing to follow the procedure set out in the Trust Deed when considering information contained in the prospectuses and supplementary prospectuses; and, (d) by failing to check and consider the quarterly reports issued by Wickham.
31. Mr Clarke says that on 15 October 2013 his solicitors wrote to Sandhurst suggesting that it was likely to have in its control documents directly relevant to the question of whether Mr and Mrs Clarke might have a right to obtain damages in a potential action against Sandhurst under Ch 2L of the Act and that inspection of the identified documents would assist them in making a decision whether to commence any legal proceedings. Sandhurst was requested to provide copies of the identified documents. In that context Sandhurst was told of the documents Mr and Mrs Clarke already held. A list of the categories of documents sought from Sandhurst was given to it. Sandhurst declined to provide the documents on the footing that the documents in the schedule were either not in its possession, custody or control or were confidential or were more appropriately obtained by making a request of Wickham. Sandhurst denied any failure of reasonable diligence or breach of duty on any footing.
32. Mr Clarke says that against the background of all these considerations, he seeks the identified documents from Sandhurst (if they exist) prior to commencing an action, in order to assist in determining whether a cause of action arises in him and Mrs Clarke as trustees of the Fund.
33. One of the things that Mr Clarke does not say in his principal affidavit of 18 February 2014 is that he believes that he may have the right to obtain relief in the Federal Court from Sandhurst in respect of the matters he identifies. He says, of course, that he proposes to take action against Sandhurst in respect of three potential causes of action and as a matter of inference it would be unlikely that he would hold such a view unless he believed that he may have the right to obtain relief in the Court against Sandhurst on one or more of those grounds. At para 2 of his affidavit, he says that he refers to the affidavit of Ms Saddler sworn 5 December 2013 and he deposes that the “contents of Ms Saddler’s affidavit are true and correct to the best of my knowledge and belief” and that the contents of Ms Saddler’s affidavit “accords with my instructions”. At para 48 of Ms Saddler’s affidavit, she says that “Mr and Mrs Clarke believe that they may have a right to obtain damages from Sandhurst for a breach of section 283DA of the Act or due to a failure on the part of Sandhurst to act in accordance with its duties as trustee”. At para 48, Ms Saddler says that, in particular, Mr and Mrs Clarke believe that they may have a right to obtain damages from Sandhurst in respect of the two identified causes of action because they believe that Sandhurst:

(a) failed to exercise reasonable diligence to ascertain whether the property of Wickham (whether by way of security or otherwise) was sufficient to repay the amount lent;

1. failed to exercise reasonable diligence to ascertain whether Wickham committed any breach of the terms of the Notes, the trust deed, or Chapter 2L of the Act, particularly with regard to:

(i) the conduct of Wickham’s business;

(ii) the way and manner in which Wickham’s financial and other records were kept;

(iii) the way in which the money raised through the issue of Notes was applied by Wickham;

(iv) Wickham’s compliance with the general covenants set out in Clause 6.1 of the trust deed;

(v) reports provided by Wickham pursuant to s 283DF of the Act and Clause 6.3 of the trust deed;

(vi) Wickham’s compliance with the financial covenants set out in Clause 6.4 of the trust deed; and

(vii) Wickham’s compliance with the terms of any issued prospectus.

1. failed to ensure that Wickham complied with Chapter 2K of the Act, to the extent that it applied to the Notes.
2. Although it would have been more helpful had Mr Clarke directly deposed to the matters Ms Saddler identifies at para 48 of her affidavit, I am willing to treat Mr Clarke’s affidavit, by operation of para 2 of his affidavit, as adopting by incorporation an assertion of the proposition that he believes that he may have the right to obtain relief in the Federal Court of Australia from Sandhurst on the identified basis.
3. The next question is whether that belief is, objectively, a reasonably held belief.

## Further aspects of the *Corporations Act*

1. Sandhurst says (as it contends in relation to the duties owed under the Trust Deed), that Mr Clarke could not *reasonably* believe that he may have a right to obtain relief in the Court in respect of Sandhurst’s contended failures to exercise reasonable diligence for the purposes of Ch 2L, because the *statutory regime* within which Sandhurst was required to discharge duties under s 283DA makes it plain that Sandhurst was entitled to rely on the certificates of the directors, the auditor and the quarterly reports submitted to it by Wickham. Sandhurst puts it this way: nothing elevated any duty cast upon it under the Act (or the Trust Deed) to a duty to enquire into or investigate the matters recited at (a), (b) and (c) of [127] of these reasons, to the standard of a “blood hound”.
2. As to the statutory regime, s 295 of the Act sets out the statutory requirements for the annual financial report and financial statements required of Wickham as a “disclosing entity” (see s 292(1)(a)) (as to “disclosing entity” see s 111AC and s 111AI of the Act). Section 295(3) sets out the requirements with respect to the notes to the financial statements. Sections 295(4) and 295(5) provide for the “directors’ declaration”. Section 296 provides that the financial report for a financial year must comply with the “accounting standards”. Part 2M.5 of Ch 2M addresses the topic of “Accounting and Auditing Standards” and s 334 within that Part provides that the Australian Accounting Standards Board (“AASB”) may make accounting standards for the purposes of the Act. The Auditing and Assurance Standards Board (“AUASB”) may make auditing standards for the purposes of the Act (s 336(1)).
3. Section 297 provides that the financial statements and notes to the statements for the financial year must give a “true and fair view” of the financial position and performance of Wickham.
4. Section 301 provides that a disclosing entity must have its financial report for a financial year audited in accordance with Div 3 of Pt 2M.3.
5. Section 302 provides for the preparation and auditing of a half‑yearly report for a disclosing entity. It also provides for a directors’ report. Section 303 sets out the statutory requirements for the half‑yearly report and financial statements and makes provision for a directors’ declaration (s 303(4) and s 303(5)). The half‑yearly report must also give a true and fair view of the financial position and performance of Wickham (s 305).
6. Section 307 (Div 3 of Pt 2M.3) requires an auditor who conducts an audit of a financial report for a financial year or half‑year to form an opinion about whether the financial report and financial statements are in accordance with the Act; whether they comply with applicable accounting standards; and whether they reflect a true and fair view of the financial position and performance of Wickham.
7. The auditor must also form an opinion about whether he or she has been given all information, given an explanation sought in relation to any matter and given assistance necessary for the conduct of the audit; whether the disclosing entity has kept financial records sufficient to enable a financial report complying with the Act (and thus reflecting a true and fair view) to be prepared and audited; and whether the disclosing entity has kept other records and registers required by the Act.
8. Section 307A provides that the audit must be conducted in accordance with the applicable auditing standards.
9. As to the Accounting and Auditing Standards, AASB 139 entitled “Financial Instruments: Recognition and Measurement” sets out Standards directed to, among other things, the assessment at the end of each reporting period of whether there is any objective evidence that a financial asset or group of assets (including receivables) is impaired. The Standard also addresses the principles to be applied in recognising and measuring financial assets and their carrying value in the compilation of the financial statements (including the relevant recoverable value of particular assets). Receivables must be recorded at their “recoverable amount”.
10. ASA 500 (formerly AUS 502) prepared by the AUSB explains what constitutes audit evidence in conducting an audit of a financial report and explains the auditor’s responsibility to design and perform audit procedures to obtain sufficient appropriate audit evidence so as to be able to draw reasonable conclusions on which to base the auditor’s opinion.
11. ASA 540 (formerly AUS 526) addresses the auditor’s responsibilities relating to accounting estimates including fair value accounting estimates and related disclosures in an audit of a financial report. The Standard also includes requirements and guidance on “misstatements of individual accounting estimates, and indicators of possible management bias”.
12. Section 308 of the Act requires the auditor to report to members on whether the financial report complies with the Accounting Standards and whether the financial report reflects a true and fair view. If the auditor is not of that opinion, the auditor must say why he or she holds that view (s 308(1)). A similar position applies to half‑yearly financial reports (s 309). The auditor has a right of access at all reasonable times to the books of a disclosing entity and may require an officer of the entity to provide information, give an explanation of a particular matter or provide assistance in the conduct of the audit (s 310 and s 312).
13. Section 313(1) provides that the auditor of a borrower (relevantly, Wickham), in relation to the issue of debentures concerning those borrowings, must give the trustee for the noteholders a copy of any report, certificate or other document that the auditor is required to give to Wickham or Wickham’s members under the Act or as required by the debenture instrument or the Trust Deed, and also provide a copy of any document that accompanies the report.
14. Section 313(2) provides that Wickham’s auditor must give Wickham (and also provide a copy to Sandhurst) a written report about *any matter* that the auditor becomes aware of in conducting the audit which, in the auditor’s *opinion*, is or is likely to be, *prejudicial* to the interests of debenture holders and which, in the auditor’s *opinion*, is *relevant* to the *exercise* of the powers of the trustee or the *performance* of the trustee’s duties under the Act or the Trust Deed.
15. An offence based upon a failure to comply with s 313(1) or s 313(2) is an offence of strict liability for the purposes of the Commonwealth Criminal Code.
16. The ultimate point Sandhurst makes in relation to this regime is that on each occasion that an annual report or half‑yearly report concerning Wickham was provided to Sandhurst, an *unqualified* audit report was also provided to it expressing the statutory audit opinion. Sandhurst says that no opinion was ever expressed to Sandhurst by way of a report or otherwise disclosing any qualification to the audit opinion or on any matter which would fall within the scope of s 313(2). Moreover, Sandhurst says that it relies upon cl 18(b) of the Trust Deed which provides, as mentioned earlier, that Sandhurst is at liberty to accept (and Sandhurst says, rely upon) a certificate given by an auditor appointed by Wickham.
17. Sandhurst observes that the notes to the financial statements for the year ending 30 June 2011 recite that the financial report has been prepared in accordance with the applicable accounting standards and the Act. Note 1, “Statement of Significant Accounting Policies” at para (e) says this as to “Receivables”:

All loan receivables are recognised at the face value of the loans made and recognised in accordance with the terms of the loans. The collectability of loans is reviewed on an ongoing basis. Loans which are known to be uncollectable are written off. A provision for doubtful debts is raised when some doubt as to collection exists.

1. Note 6 to the financial statements records the recoverable value of secured loans advanced to borrowers from Wickham at $24,528,280.00 with a provision for doubtful debts of $625,000.00. The financial statements for the year ending 30 June 2010 adopt a recoverable value of such secured loans at $18,248,751.00. On 30 September 2011, Mr Montgomery signed a declaration on behalf of the directors of Wickham in relation to the financial statements for the year ending 30 June 2011 in which he said that the financial statements “comply with Accounting Standards and the Corporations Regulations 2001; and give a true and fair view of the financial position as at 30 June 2011 and of the performance for the year ended on that date of [Wickham]”.
2. On 30 September 2011, Mr Brian Kingston provided an independent audit report in relation to the financial report for the year ending 30 June 2011 in which he says that he has conducted an independent audit in accordance with Australian Auditing Standards in order to provide reasonable assurance as to whether the financial report is free of material misstatement. He also says this:

I performed procedures to assess whether in all material respects the financial report presents fairly, in accordance with the Corporations Act 2001, including compliance with Accounting Standards and other mandatory financial reporting requirements in Australia, a view which is consistent with my understanding of the company’s financial position, and of its performance as represented by the results of its operations and cash flows.

…

Audit opinion

In my opinion, the financial report of [Wickham] is in accordance with the Corporations Act 2001, including:

1. giving a true and fair view of the company’s financial position as at the 30th June, 2011 and of its performance for the period ended on that date; and
2. complying with Accounting Standards in Australia and the Corporations Regulations 2001; and

other mandatory financial reporting requirements in Australia.

1. Apart from these matters, Mr Kingston provided a letter dated 30 September 2011 to Wickham’s directors in these terms:

I refer to the [Trust Deed] dated the 7th June, 2005, entered into by [Wickham] (The Borrower) and [Sandhurst] (The Trustee).

I have completed my audit of the Company for the year ended 30th June, 2011. My examination of the financial statements did not disclose any circumstances that would prevent me from making the following statement.

In accordance with clause 6.4(d) of the financial covenants I state that in my opinion, the borrower has maintained Net Tangible Assets with a value of at least equal to the Minimum Capital as defined on page 65 of the Trust Deed.

A copy of this letter may be provided to the Trustee for the purposes of clause 6.4(d) of the Trust Deed.

1. As to the position at 31 December 2011, Mr Sherwin signed a declaration on behalf of the directors dated 15 March 2012 that the financial statements and notes to those statements for the half‑year ending 31 December 2011 complied with Accounting Standards and the *Corporations Regulations 2001* (Cth) and gave a true and fair view of the financial position of Wickham as at 31 December 2011 and of the performance of the company for the half‑year ended 31 December 2011.
2. Sandhurst also says that it was provided with quarterly reports by Wickham as required by s 283BF(4) of the Act and as required by the Trust Deed. Many of those quarterly reports are in evidence as Annexure JMS25 to the affidavit of Ms Saddler. Sandhurst says that nothing was reported to it in any of those quarterly reports which caused it to be put on any particular enquiry. An example of the content of each report is the report for the quarter ending 31 December 2011 at p 837 of Ms Saddler’s affidavit. In that report, for example, Wickham confirms that no circumstances have occurred during the quarter which materially prejudiced Wickham, any of its subsidiaries or any of the guarantors or any security or charge included in or created by the debentures or the Trust Deed. Wickham confirms that neither it nor its subsidiaries have had any substantial change in the nature of their business during the quarter. Wickham confirms that the Trust Deed covenants, representations, warranties, obligations and conditions expressly or impliedly contained in the document are in full force and effect and have been complied with. Wickham confirms that it has complied with the financial covenants of the Trust Deed and that all monies lent by it were lent within the permitted lending and security criteria prescribed by Sch 4. It is true to say that each of the quarterly reports reflects the responses reflected for the report ending 31 December 2011. Mr Clarke criticises the quarterly reports on the footing that very many of them contain an attachment marked Annexure “A” entitled “Investment Portfolio of [Wickham]” bearing the description “Quarter End 31 December 2009” even though the report is for an entirely different quarter. There are seven examples of this occurring. The report for the quarter ending 30 September 2010 contains an Annexure “B” but marked “Quarter End # [insert date]”. Plainly, the attachment of an Investment Portfolio Statement to a quarterly report which bears a date unrelated to the period of the actual report is sloppy and, one imagines, the trustee would have noticed the inaccuracy and would have sought information about it from Wickham. In each case, however, the annexed statement is not simply a copy of the statement relevant to the quarter ending 31 December 2009. The statistical information in the annexed statement changes in each case and the likely explanation is that somebody has selected a pro forma template in the form of the statement for the period ending 31 December 2009 and then incorporated the statistical information appropriate to the actual quarter under discussion. The author has probably simply failed to change the date in the heading to Annexure “A”. Nevertheless, there is an anomaly and sloppiness which might well put a professional trustee on notice as to enquiry.
3. Sandhurst says that it adopted the policies and practices reflected at para 11 of the affidavit of Mr Hayden Williams sworn 26 February 2014 and that Mr Williams took the steps identified at paras 12 and 13 on particular occasions. Mr Williams is the Manager “Corporate Trusts” for Sandhurst. Mr Williams also refers at para 15 of his affidavit to particular information that Sandhurst received from Wickham in relation to the annual financial reports. At paras 20 to 26, Mr Williams identifies steps that he took once becoming aware of the appointment of receivers and managers to an entity called Banksia Securities Limited.
4. I have had regard to all of these factual matters.
5. In the end result, Sandhurst contends that the conjunction of the declarations and certificates made by the directors and provided to the trustee; the unqualified audit reports; no reference by the auditor to any matter, fact or circumstance falling within s 313(2) of the Act; and the sequence of quarterly reports which raised no relevant matter for enquiry, gives rise to the conclusion that Mr Clarke could not reasonably believe that he may have a right to obtain relief in the Court in respect of the contended failures on the part of Sandhurst to exercise reasonable diligence for the purposes of Ch 2L of the Act and in respect of the matters recited at (a), (b) and (c) of [127] of these reasons.
6. It seems to me, however, that Mr Clarke could, objectively, reasonably hold the view that he may be entitled to a right to relief in the Court in respect of the contended breaches of duty. It may be that many of the matters contended for by Sandhurst have merits in the context of a trial of questions of fact and law should a claim be commenced. However, at the very *threshold*, Mr Clarke in forming a belief about whether he *may* have a right to obtain relief in the Court in respect of contended breaches on the part of Sandhurst does so against the background of a range of factors conditioning that view and they are these:
7. Sandhurst, a professional trustee, agreed to act as trustee “for the benefit of the Noteholders” subscribing for unsecured deposit note debentures pursuant to prospectuses issued in accordance with the Trust Deed and the Act. The Trust Deed and the Act cast duties upon the trustee the purpose of which is to provide some measure of protection for the noteholders.
8. The analysis conducted by the administrators and then those individuals in their capacity as liquidators of Wickham reveals by reference to the reports dated 29 January 2013, 29 April 2013 and 5 September 2013 a total failure in the underlying position of Wickham and the performance of the business undertaking of raising money by investments made by noteholders and the lending of those funds to borrowers.
9. The content of the reports, available to Mr Clarke for his consideration, have been described in detail in these reasons. The final report dated 5 September 2013 says that of 24 loans made by Wickham only three of those loans were made on the basis of first mortgage security. Five further loans were made on the basis of second mortgage security. No files have been able to be located in respect of four loan transactions. In respect of eight borrowers, the position emerges that the borrowing entity has now had receivers and managers appointed. In respect of four further loan transactions, the borrowing entity is either in liquidation or is deregistered or in the process of being deregistered as a company.
10. Although the noteholders’ funds were to be lent by Wickham in accordance with the criteria prescribed by Sch 4 of the Trust Deed, the reports of the administrators and liquidators suggest that the criteria were not properly applied.
11. Moreover, Mr Sherwin has been a director of the company from the outset. He is described in the prospectus documents as a man having extensive experience in the financial planning industry and other relevant experience. Mr Siemons was a director of Wickham from about April 2009. He was described in the supplementary prospectus as having been involved in financial management for over 25 years with extensive experience in analysing financial statements and preparing management accounts. Yet, when interviewed by the administrators in the course of their investigations and asked about Wickham’s “business activities including details of the loan book”, Mr Sherwin and Mr Siemons apparently said to the administrators that they “knew nothing about the business operations and that they were handled by Garth Robertson”.
12. Not only was there a major failing in the financial position of Wickham, there was, apparently, a major failure on the part of two directors to properly engage with the business activities, operations and undertaking of Wickham.
13. An investor lending money to Wickham within a statutory structure which necessitated the presence of a trustee acting for the benefit of the noteholders, might well form a view that a professional trustee experienced in engaging with individuals purporting to act as directors of a borrower from noteholders might well have developed a professional and sophisticated “nose” (although not necessarily that of a “blood hound”) attracting the attention of the trustee to the notion that neither Mr Sherwin nor Mr Siemons apparently knew anything about the business operations of Wickham and, in particular, the matters about which the administrators inquired, namely, the business activities of Wickham and the loan book. The loan book was the asset, the interest returns upon which would provide the security for the redemption of the investments by the noteholders. A noteholder might well ask “what was the trustee doing?”. The answer might be a great deal but, for present purposes, the question simply is whether a note‑holding lender to Wickham might reasonably form, objectively, a view that he or she may have a right to relief in the Court in respect of a contended breach of the identified duty, by the trustee.
14. The reports reveal a gross exaggeration in the value of the identified loans by Wickham.
15. The reports reveal, as early as 29 January 2013, a substantial failure on the part of Wickham to maintain proper files, records of loan transactions, correspondence, valuations and other documentation in relation to loan transactions.
16. The final report of the liquidators on 5 September 2013 suggests that loan recoveries might be as low as 6c in the dollar or might rise to an upper estimate of 35c in the dollar before the costs and expenses of the liquidation and realisation of the debts are taken into account.
17. Mr Sherwin and Mr Siemons told the liquidators that Mr Garth Robertson was the man who knew all about the business activities of Wickham, its business operations and matters related to the loan book. The liquidators have identified a particular concern about the contended conduct of Mr Robertson as already discussed. Mr Robertson resigned as an employee and director of Wickham on 19 December 2012, two days before the appointment of administrators.
18. Again, an investor lending money to Wickham within a statutory structure requiring the presence of a trustee acting for the benefit of the noteholders might well ask whether a professional trustee standing in the shoes of Sandhurst might have taken steps to investigate the degree of Mr Roberson’s engagement with the business undertaking of Wickham. Perhaps officers of Sandhurst did precisely that and were satisfied with their enquiries.
19. Whilst Sandhurst might well rely upon the audit reports, the unqualified nature of those reports and the absence of any matter drawn to the attention of the trustee falling within s 313(2) of the Act, the uncontradicted position seems to be that Mr Kingston **so** totally failed to discharge his duties that he has given an undertaking to ASIC never to act as an auditor again.
20. An investor lending money to Wickham within a statutory structure requiring the presence of a trustee acting for the benefit of the noteholders might well ask whether an experienced, sophisticated, professional trustee, experienced in dealing with auditors, ought to have become astute to, by reason of enquiry or otherwise, at least some circumstance which suggested a basis for concern about apparently profound inadequacies in the skills and performance of the person *purporting* to properly act as an auditor of financial statements of a disclosing entity *dealing with the money of investors*. So total and complete was Mr Kingston’s failures in the conduct of the audit that he voluntarily gave the undertaking to ASIC described in the report of the administrators.
21. An investor lending money to Wickham within a statutory structure requiring the presence of a trustee acting for the benefit of the noteholders might, objectively, reasonably form the view that relying upon the statements of directors (and particularly a declaration signed by Mr Sherwin who says that he had no knowledge of the business activities of the company) and the certificates of an auditor so profoundly failing in the discharge of audit responsibilities as to give an undertaking not to act as an auditor again, was not sufficient to properly discharge the duties of the trustee to a noteholder under the Trust Deed or s 283DA of the Act, (that is to say, Mr Clarke as a person who contends he suffered loss or damage by reason of the trustee’s contravention of s 283DA of the Act).
22. In addition, the administrators, as professional insolvency investigators in relation to these matters, took the view that if Wickham was placed in liquidation there was a proper basis for at least conducting investigations into whether Sandhurst had complied with its obligations under the Trust Deed (see [90] of these reasons). Moreover, the liquidators later took the view that there was a proper basis for continuing to investigate Sandhurst’s compliance with obligations under the Trust Deed (see [104] of these reasons) and in the further report of 5 September 2013 the liquidators continue to note that they are conducting investigations into compliance by Sandhurst with its obligations under the Trust Deed (see [109] of these reasons). If the administrators and then the liquidators are expressing these views as experienced administrators, Mr Clarke might reasonably believe, in the context of these other matters, that there is a proper basis for concern about the discharge of duties on the part of the trustee and that he *may* have a right to relief in the Court in respect of a contended breach of duty on the part of the trustee.
23. It follows that Mr Clarke’s belief is not mere speculation. There is a basis upon which he could form an objectively reasonable belief that he may be entitled to relief in the Court in proceedings based upon a contended breach of duty on the part of the trustee. Of course, all of the relevant questions of fact and law would need to be determined in the relevant proceedings.
24. Mr Clarke has available to him a very limited number of documents. Having regard to paras 50 to 57 of Ms Saddler’s affidavit and the content of the correspondence referred to in those paragraphs, I am satisfied about these matters.
25. *First*, Mr Clarke and his advisers have made reasonable enquiries to try and obtain information sufficient to enable Mr Clarke to decide, with legal advice, whether to start a proceeding in the Court against Sandhurst on the grounds identified. *Second*, I am satisfied that after making those reasonable enquiries, Mr Clarke does not have sufficient information available to him to decide whether to commence a proceeding in the Court to obtain the relief sought. *Third*, I am satisfied that Mr Clarke reasonably believes that Sandhurst has or is likely to have or has had or is likely to have had in its control documents directly relevant to the question of whether Mr Clarke has a right to obtain relief in the proposed proceedings and that inspection of the documents by Mr Clarke and his advisers would assist him in making the decision.
26. In the application, Mr Clarke identifies a range of documentation at Sch 2 which he seeks from Sandhurst. In Mr Miller’s affidavit sworn 26 February 2014, Mr Miller describes the onerous burden that would be cast upon Sandhurst in seeking to isolate each of the documents described in Sch 2 to the application. At para 15 of his affidavit, Mr Miller says that Sandhurst has approximately 11 lever‑arch folders of hard copy documents which relate to Wickham which would need to be reviewed to determine whether they ought to be produced as documents falling within the description of documents within Sch 2. Mr Miller says that potentially Sandhurst may hold some other hard copies of invoices in its archives.
27. Mr Miller estimates that it would take up to five days for a solicitor to review the 11 lever‑arch folders to determine which documents, if any, would need to be produced as falling within Sch 2.
28. Apart from these 11 lever‑arch folders, Mr Miller says that documents have been stored electronically by Sandhurst on five shared network drives.
29. At para 15(b), Mr Miller says that these network drives contain 173 gigabytes of data and the stored documents include documents in Word format, PDF documents, Excel spreadsheets, PowerPoint slides and similar documents. Mr Miller sets out information given to him which he verily believes which suggests that 173 gigabytes of data would amount to approximately 2.1 million documents. Mr Miller says that based upon information provided to him, only a very small proportion of the electronically stored information would be likely to be relevant to the Sch 2 categories. Many of the electronic documents would be irrelevant. Some documents would also be confidential.
30. Mr Miller says that there is a specific electronic folder for Wickham related documents on one of the shared network drives. The volume of such data is said to be 561 megabytes. In order to avoid subjecting Sandhurst to an expansive and onerous examination of all of its stored electronic data and physical documents, the applicant proposes that the 11 lever‑arch folders identified by Mr Miller be examined by Sandhurst to isolate documents falling within the Sch 2 categories and that the documents stored electronically in the specific folder for Wickham related documents on one of the shared network drives as described by Mr Miller also be examined by Sandhurst to isolate documents falling within the Sch 2 categories.
31. I am satisfied that undertaking that task would not place an onerous burden upon Sandhurst.
32. I am satisfied that the discretion ought to be exercised so as to order Sandhurst to give discovery to Mr Clarke of the documents within the 11 lever‑arch folders identified by Mr Miller, and the documents stored electronically in the specific electronic folder for Wickham related documents identified by Mr Miller, to the extent, in each case, that such documents fall within any of the categories of documents identified in Sch 2 to the application.
33. Discovery of the documents is to be provided within 21 days. In the event that Sandhurst contends that any document identified for discovery in the course of reviewing the physical and electronic documents is said to be confidential, Sandhurst may seek to contend that disclosure ought to be restricted to certain persons subject to appropriate undertakings.
34. In order to address that position should it emerge and should the parties not be able to reach agreement about the proper treatment of the document, the application may be re‑listed on three days’ notice for the determination of any issue in relation to the confidentiality of any particular document.
35. The orders will incorporate leave to apply on three days’ notice.
36. I propose to make further directions that the parties file within 14 days further submissions in relation to the question of costs of the application and any question concerning the costs associated with providing discovery the subject of the primary orders.

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| I certify that the preceding one hundred and sixty‑nine (169) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood. |

Associate:

Dated: 5 June 2014