

**IN THE FEDERAL COURT OF AUSTRALIA  
VICTORIA DISTRICT REGISTRY**

No. VID 616 of 2009

**IN THE MATTER OF FINCORP INVESTMENTS LTD  
(IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)  
(ACN 098 838 549)**

and

**IN THE MATTER OF SANDHURST TRUSTEES LTD  
(ACN 040 030 737)**

**BETWEEN:**

**MARK HARRISON and RHONDA HARRISON**  
Applicants

**AND**

**SANDHURST TRUSTEES LTD**  
(ACN 040 030 737)  
Respondent

**AMENDED STATEMENT OF CLAIM**

**Introductory**

1. The applicants bring this proceeding as representative parties in a group proceeding pursuant to Pt IVA of the *Federal Court of Australia Act 1976*.
2. The applicants sue on their own behalf and on behalf of all other persons ("Group Members") who:

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- 2(a) on 23 March 2007 were investors in or otherwise held Debentures<sup>1</sup> and/or Unsecured Notes<sup>2</sup> issued by Fincorp;<sup>3</sup>
- 2(b) acquired such Debentures and Unsecured Notes on or after 7 December 2004; and
- 2(c) suffered loss and damage as a result of Sandhurst's<sup>4</sup> contraventions of s 283DA of the *Corporations Act 2001* (the "**Corporations Act**") during the period 7 December 2004 to 1 July 2006.

#### Particulars

- i) *As to the requirement that a Group Member must have "otherwise held" a Debenture and/or Unsecured Note, there were general conditions of issue of Debentures under the Debenture Trust Deed and of Unsecured Notes under the Unsecured Note Trust Deed (cll 6 and 8 of the first schedule to each deed, respectively) that allowed for the transfer and transmission on death of Debentures and Unsecured Notes such that a person other than the original investor may have "otherwise held" a Debenture or Unsecured Note on 23 March 2007.*
3. At all material times, Fincorp Investments Ltd, previously known as Fincorp Finance Ltd ("**Fincorp**"), was a member of a group of companies known as the Fincorp Group.

#### Particulars

- i) *The Fincorp Group included Fincorp, which raised money from investors by issuing Debentures and Unsecured Notes, Guardian Mortgages Pty Ltd (described below at paragraph 20(c)(i)), the prime borrower from Fincorp of money raised by the issue of Debentures and Unsecured Note, and Capital First Investments Pty Ltd and the Related Development Companies (described below at paragraph 20(c)(ii)), which borrowed money from Guardian Mortgages Pty Ltd for the purpose of purchasing land.*

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<sup>1</sup> "Debentures" are defined in paragraph 4 below.

<sup>2</sup> "Unsecured Notes" are defined in paragraph 5 below.

<sup>3</sup> "Fincorp" is defined in paragraph 3 below.

<sup>4</sup> "Sandhurst" is defined in paragraph 14 below.

### The trust deeds

4. On or about 5 August 2002, Fincorp entered into a Debenture Trust Deed with National Australia Trustees Ltd (“the **Debenture Trust Deed**”) pursuant to which Fincorp would raise money from investors by issuing debentures (“**Debentures**”) and National Australia Trustees agreed to act as trustee for the Debenture holders.

#### Particulars

- i) *The Debenture Trust Deed is in writing.*
  - ii) *The Debenture Trust Deed is available for inspection by arrangement at the offices of the applicants’ solicitors.*
  
5. On or about 5 August 2002, Fincorp entered into an Unsecured Note Trust Deed (“the **Unsecured Note Trust Deed**”) with National Australia Trustees Ltd pursuant to which Fincorp would raise money from investors by issuing unsecured notes (“**Unsecured Notes**”) and National Australia Trustees agreed to act as trustee for the Debenture holders.

#### Particulars

- i) *The Unsecured Note Trust Deed is in writing.*
  - ii) *The Unsecured Note Trust Deed is available for inspection by arrangement at the offices of the applicants’ solicitors.*
  
6. In accordance with s 283AB of the Corporations Act, the Debenture Trust Deed provided that the trustee held:
  - 6(a) the right to enforce Fincorp’s obligation to pay;
  - 6(b) a charge granted by Fincorp to secure Fincorp’s obligation to pay; and
  - 6(c) the right to enforce any other obligations that Fincorp had under the terms of the Debentures, the provisions of the Debenture Trust Deed or the provisions of Chapter 2L of the Corporations Act;

on trust for the benefit of Debenture holders.

**Particulars**

- i) *The applicants refer to clauses 1.1 and 5.3 of the Debenture Trust Deed.*
  - ii) *On or about 5 August 2002, Fincorp granted a first-ranking fixed and floating charge (“ the **Charge**”) over its assets in favour of National Australia Trustees.*
7. In accordance with s 283AB of the Corporations Act, the Unsecured Note Trust Deed provided that the trustee held:
- 7(a) the right to enforce Fincorp’s obligation to pay; and
  - 7(b) the right to enforce any other obligations that Fincorp had under the terms of the Unsecured Notes, the provisions of the Unsecured Note Trust Deed or the provisions of Chapter 2L of the Corporations Act;
- on trust for the benefit of Unsecured Note holders.

**Particulars**

- i) *The applicants refer to clauses 1.1 and 4.3 of the Unsecured Note Trust Deed.*

**The prospectuses**

- 8. The offers of Debentures and Unsecured Notes made by Fincorp to investors pursuant to the Debenture Trust Deed and the Unsecured Note Trust Deed were offers of securities that needed disclosure to investors under Chapter 6D of the Corporations Act.
- 9. From on or about 30 September 2002 to on or about 23 March 2007, Fincorp offered Debentures and Unsecured Notes to investors and purported to make disclosures about those offers in four prospectuses, being:
  - 9(a) a prospectus dated 30 September 2002, replaced by a replacement prospectus dated 1 November 2002, and supplemented by a supplementary prospectus dated 6 August 2003 (“the **First Prospectus**”); and

- 9(b) a prospectus dated 14 October 2003, supplemented by a supplementary prospectus dated 6 January 2004, replaced by a replacement prospectus dated 17 February 2004 and supplemented by a supplementary prospectus dated 8 June 2004 (“the **Second Prospectus**”); and
- 9(c) a prospectus dated 7 December 2004, supplemented by a supplementary prospectus dated 14 February 2005, substituted by a substituted supplementary prospectus dated 17 February 2005, replaced by a replacement supplementary prospectus dated 26 May 2005 and further replaced by a second replacement supplementary prospectus dated 28 October 2005 (“the **Third Prospectus**”);
- 9(d) a prospectus dated 9 January 2006 (“the **Fourth Prospectus**”), replaced by a replacement prospectus dated 30 May 2006 (“the **Replacement Fourth Prospectus**”).

#### **Particulars**

- i) *Copies of the documents comprising the First Prospectus are available for inspection by arrangement at the offices of the applicants’ solicitors.*
- ii) *Copies of the documents comprising the Second Prospectus are available for inspection by arrangement at the offices of the applicants’ solicitors.*
- iii) *Copies of the documents comprising the Third Prospectus are available for inspection by arrangement at the offices of the applicants’ solicitors.*
- iv) *The Fourth Prospectus and the Replacement Fourth Prospectus are available for inspection by arrangement at the offices of the applicants’ solicitors.*

#### **Debentures held by the applicants**

10. On or about 31 July 2006, the applicants, having earlier applied to Fincorp to invest \$285,000.00 in Debentures, were issued Debentures for that sum by Fincorp.

#### **Particulars**

- i) *The application to invest \$285,000 in Debentures was in writing and was made by the applicants completing an application form attached to the Replacement Fourth*

*Prospectus and posting the application and a cheque for \$285,000 to Fincorp.*

- ii) The application form is no longer in the possession of the applicants.*
- iii) The applicants received a "Note Certificate" from Fincorp in respect of the Debentures issued by Fincorp in the sum of \$285,000.*
- iv) The Note Certificate issued by Fincorp is available for inspection by arrangement at the offices of the applicants' solicitors.*
- v) The Debentures were issued to the applicants on 31 July 2006.*

11. Further, on or about 2 February 2007, the applicants, having earlier applied to Fincorp to invest a further \$45,000.00 in Debentures, were issued Debentures for that sum by Fincorp.

#### **Particulars**

- i) The application to invest \$45,000 in Debentures was in writing and was made by the applicants completing an application form attached to the Replacement Fourth Prospectus and posting the application and a cheque for \$45,000 to Fincorp.*
- ii) The application form is no longer in the possession of the applicants.*
- iii) The applicants received a "Note Certificate" from Fincorp in respect of the Debentures issued by Fincorp in the sum of \$45,000.*
- iv) The Note Certificate issued by Fincorp is available for inspection by arrangement at the offices of the applicants' solicitors.*
- v) The Debentures were issued to the applicants on 2 February 2007.*

#### **Fincorp's obligations as a borrower**

12. At all material times, Fincorp had the following duties imposed upon it by Chapter 2L of the Corporations Act:

12(a) to carry on and conduct its business in a proper and efficient manner;<sup>5</sup>

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<sup>5</sup> Corporations Act, s 283BB(a).

- 12(b) to make all of its financial and other records available for inspection by the trustee or an officer, employee or auditor appointed by the trustee to carry out an inspection;<sup>6</sup>
- 12(c) to give any information, explanations or other assistance required by the trustee or an officer, employee or auditor appointed by the trustee about matters relating to its financial and other records;<sup>7</sup>
- 12(d) to provide, within a month after the end of each quarter, a quarterly report about prescribed matters, including about:
- 12(d)(i) any failures by the borrower to comply with the terms of the debentures, the trust deed or Chapter 2L of the Corporations Act;<sup>8</sup>
- 12(d)(ii) any event that occurred during the quarter that caused or could cause any amount deposited or lent under the debentures to become immediately payable or the debenture to become immediately enforceable;<sup>9</sup>
- 12(d)(iii) any other matters that may materially prejudice any security or the interests of the debenture holders.<sup>10</sup>
13. Further, at all material times, Fincorp had the following duties imposed upon it by the Debenture Trust Deed and the Unsecured Note Trust Deed:
- 13(a) to comply with the Corporations Act and the terms of the Debenture Trust Deed and the Unsecured Note Trust Deed;
- 13(b) to maintain net tangible assets of at least \$500,000;
- 13(c) not to issue a Debenture unless the value of its net tangible assets would be at least \$500,000 following the issue of the Debenture;

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<sup>6</sup> Corporations Act, s 283BB(c).

<sup>7</sup> Corporations Act, s 283BB(c).

<sup>8</sup> Corporations Act, s 283BF(4)(a).

<sup>9</sup> Corporations Act, s 283BF(4)(b).

<sup>10</sup> Corporations Act, s 283BF(4)(g).

- 13(d) not to issue an Unsecured Note unless the value of its net tangible assets would be at least \$500,000 following the issue of the Unsecured Note.

**Particulars**

- i) The applicants refer to clauses 1.1, 6, 9 and 12.1 of the Debenture Trust Deed.*
- ii) The applicants refer to clauses 1.1, 5, 8 and 11.1 of the Unsecured Note Trust Deed.*

**Sandhurst's appointment and its obligations and duties**

14. On or about 4 March 2004, the respondent ("Sandhurst"):
- 14(a) replaced National Australia Trustees Ltd as trustee for the Debenture holders under the Debenture Trust Deed; and
  - 14(b) replaced National Australia Trustees Ltd as trustee for the Unsecured Note holders under the Unsecured Note Trust Deed.

**Particulars**

- i) Sandhurst was appointed trustee pursuant to the Debenture Trust Deed under the Deed of Appointment and Retirement of Trustee made on 4 March 2004.*
  - ii) Sandhurst was appointed trustee pursuant to the Unsecured Note Trust Deed under the Deed of Appointment and Retirement of Trustee made on 4 March 2004.*
  - iii) Copies of each deed are available for inspection by arrangement at the offices of the applicant's solicitors.*
15. Sandhurst is and was at all material times:
- 15(a) a company incorporated pursuant to the laws of Australia;
  - 15(b) a financial services organisation providing *inter alia* corporate trustee services; and
  - 15(c) a company holding itself out as having particular knowledge, skill and experience in the provision of corporate trustee services.

16. There were terms of the Debenture Trust Deed and the Unsecured Note Trust Deed that Sandhurst was to be remunerated for its services as trustee.

**Particulars**

- i) The applicants refer to clause 17 of the Debenture Trust Deed and to clause 15 of the Unsecured Note Trust Deed.*

17. Sandhurst received payments from Fincorp for its services as trustee.

**Particulars**

- i) The applicants are unable to provide particulars of the payments Sandhurst received from Fincorp for its services until discovery is completed.*

18. At all material times, Sandhurst had the following duties, imposed by s 283DA of the Corporations Act:

18(a) to exercise reasonable diligence to ascertain whether the property of Fincorp that was or should have been available (whether by way of security of otherwise) would be sufficient to repay the amount deposited or lent when it became due; and

18(b) to exercise reasonable diligence to ascertain whether Fincorp had committed any breach of the terms of the debentures or any provision of the Debenture Trust Deed, the Unsecured Note Trust Deed or Chapter 2L of the Corporations Act.

19. For the purpose of discharging its duties as described in paragraph 18, Sandhurst had the following rights and powers:

19(a) the right to enforce Fincorp's duty to repay the Debentures and the Unsecured Notes, as described in paragraphs 6(a) and 7(a) above;

19(b) the right to enforce any other duties that Fincorp may have, as described in paragraphs 6(c) and 7(b) above;

19(c) the right to inspect all of Fincorp's financial and other records, as described in paragraph 12(b) above;

19(d) the right to obtain any information, explanations or other assistance that it required about matters relating to Fincorp's financial and other records, as described in paragraph 12(c) above;

19(e) the power to institute proceedings to enforce the payment of the amounts owing in relation to each Debenture and Unsecured Note if such amounts became due and payable as a consequence of an Event of Default under the Debenture Trust Deed or the Unsecured Note Trust Deed;

#### Particulars

*i) An "Event of Default" was defined in the Debenture Trust Deed and in the Unsecured Note Trust Deed to mean, amongst other events, the following: (a) a breach by Fincorp of the Debenture Trust Deed or Unsecured Note Trust Deed which is not remedied within 21 days after the trustee gives notice of the breach to Fincorp; and (b) Fincorp being or being deemed to be unable to pay its debts within the meaning of the Corporations Act.*

19(f) the power to require Fincorp to call a meeting of Debenture holders and Unsecured Note holders;

19(g) the power to call a meeting of Debenture holders and Unsecured Note holders if Fincorp failed to remedy any breach of the terms of the Debentures or Unsecured Notes, or of the Debenture Trust Deed or the Unsecured Note Trust Deed, or of Chapter 2L of the Corporations Act;<sup>11</sup>

19(h) the power to apply to the court for an order for the calling of a meeting of Debenture holders and Unsecured Note holders;<sup>12</sup>

19(i) the power to apply to the court for directions in relation to the performance of its functions or to determine any question in relation to the interests of the debenture holders;<sup>13</sup>

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<sup>11</sup> Corporations Act, s 283EB.

<sup>12</sup> Corporations Act, s 283EC.

- 19(j) the power to apply to the court for any orders that the court considers appropriate to protect the interests of existing or prospective debenture holders;<sup>14</sup> and
- 19(k) the power to apply to a court for an opinion, advice or direction on any question respecting the management or administration of the “Trust Assets”, being the assets described in paragraphs 6 and 7 above.

#### Particulars

- i) In respect of the power referred to in paragraph 19(e), the applicants refer to clause 10 of the Debenture Trust Deed and to clause 9 of the Unsecured Note Trust Deed.*
- ii) In respect of the power referred to in paragraph 19(f), the applicants refer to clause 14.1 of the Debenture Trust Deed and to clause 13.1 of the Unsecured Note Trust Deed.*
- iii) In respect of the power referred to in paragraph 19(k), the applicants refer to clause 18.6(b) of the Debenture Trust Deed and to clause 16.6(b) of the Unsecured Note Trust Deed.*

#### Fincorp’s position at 6 December 2004

20. By no later than 6 December 2004, Sandhurst knew the following about Fincorp’s business:

- 20(a) that Fincorp’s business involved raising funds from the public by issuing Debentures and Unsecured Notes and it on-lent funds to Guardian Mortgages, another company within the Fincorp Group, which company in turn on-loaned most of the funds to other companies within the Fincorp Group, the Related Development Companies, to finance the purchase of land by those other companies;

#### Particulars

- i) The applicants refer to the disclosures made in the Third Prospectus at pp 9-10.*
- ii) Sandhurst knew about these matters because it reviewed the Third Prospectus before it was lodged with ASIC and the*

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<sup>13</sup> Corporations Act, s 283HA.

<sup>14</sup> Corporations Act, s 283HB.

*applicants refer to the "Important Notice" on page 2 of the Third Prospectus and to page 72 of that prospectus.*

- 20(b) that on or about 30 September 2004, Fincorp had on issue \$91,866,000 of Debentures, of which \$45,821,000 was to be repaid within 12 months and \$13,040,000 of Unsecured Notes, of which \$4,640,000 was to be repaid within 12 months;

#### **Particulars**

- i) The applicants refer to the quarterly trustee report for the quarter ending 30 September 2004.*
- ii) Sandhurst knew about these matters because it received and reviewed the quarterly trustee report.*

- 20(c) that by about 30 September 2004:

20(c)(i) Fincorp had made loans totalling about \$104,138,222 to a related company within the Fincorp Group, Guardian Mortgages Pty Ltd (later known as Fincorp Mortgages Pty Ltd) ("**Guardian Mortgages**");

20(c)(ii) Guardian Mortgages had on-lent about \$88,080,716 to other companies within the Fincorp Group that were:

20(c)(ii)(A) wholly-owned subsidiaries of Capital First Investments Pty Ltd ("**Capital First**") which is now known as Fincorp Group Holdings Pty Ltd; and

20(c)(ii)(B) related parties of Eric Krecichwost, the chairman and managing director of Fincorp; and

20(c)(ii)(C) carrying on the business of purchasing land, purportedly for development,

(collectively, the "**Related Development Companies**").

**Particulars**

- i) *The applicants refer to the disclosures made in the Third Prospectus at pp 9-10.*
- ii) *Sandhurst knew about these matters because it reviewed the Third Prospectus before it was lodged with ASIC and the applicants refer to the "Important Notice" on page 2 of the Third Prospectus and to page 72 of that prospectus.*
- iii) *Particulars of the Related Development Companies are contained in Annexure A.*

20(d) that all of the loans made by Guardian Mortgages to the Related Development Companies were on terms that interest payments were capitalised until maturity;

**Particulars**

- i) *The applicants refer to the disclosures made in the Third Prospectus at pp 9-10.*
- ii) *Sandhurst knew about these matters because it reviewed the Third Prospectus before it was lodged with ASIC and the applicants refer to the "Important Notice" on page 2 of the Third Prospectus and to page 72 of that prospectus.*

20(e) that the Related Development Companies used the funds borrowed from Guardian Mortgages to finance the purchase of land and purportedly for the cost of developing the land;

**Particulars**

- i) *The applicants refer to the disclosures made in the Third Prospectus at pp 9-14.*
- ii) *Sandhurst knew about these matters because it reviewed the Third Prospectus before it was lodged with ASIC and the applicants refer to the "Important Notice" on page 2 of the Third Prospectus and to page 72 of that prospectus.*
- iii) *The funds borrowed were only used "purportedly" for the purpose of developing the land in that, as alleged at paragraph 20(j) below, little or no development work had been carried out on any of the land owned by the Related Development Companies. The applicants do not allege that the Related Development Companies misused or misapplied the funds borrowed.*

- 20(f) that the value of the land owned by the Related Development Companies, and the progress of development of that land, was crucial to the value of Fincorp's assets;

**Particulars**

- i) The applicants refer to the disclosures made in the Third Prospectus at pp 18-22.*
- ii) Sandhurst knew about these matters because it reviewed the Third Prospectus before it was lodged with ASIC and the applicants refer to the "Important Notice" on page 2 of the Third Prospectus and to page 72 of that prospectus.*

- 20(g) that the total cost to the Related Development Companies of acquiring the land owned by them was about \$106,880,000;

**Particulars**

- i) The applicants refer to the disclosures made in the Third Prospectus at pp 11-14.*
- ii) Sandhurst knew about these matters because it reviewed the Third Prospectus before it was lodged with ASIC and the applicants refer to the "Important Notice" on page 2 of the Third Prospectus and to page 72 of that prospectus.*
- iii) Particulars of the costs of acquisition are given in Annexure A.*

- 20(h) that the then current financial statements of the Related Development Companies stated that the total cost of the land, including acquisition costs, development and borrowing costs and holding costs, was about \$120,834,798;

**Particulars**

- i) The applicants refer to the disclosures made in the Third Prospectus at pp 57, 59 and 61.*
- ii) Sandhurst knew about these matters because it reviewed the Third Prospectus before it was lodged with ASIC and the applicants refer to the "Important Notice" on page 2 of the Third Prospectus and to page 72 of that prospectus.*

- 20(i) that Fincorp represented to prospective investors that the total "value" of the land owned by the Related Development Companies was about

\$170,515,000, based on valuations referred to in the financial statements of the Related Development Companies;

**Particulars**

- i) The applicants refer to the disclosures made in the Third Prospectus at pp 11-14 and at pp 57 and 59.*
- ii) Particulars of the valuations are included at Annexure A.*
- iii) The valuations were based on either or both of a "hypothetical development model" and a "direct comparison basic".*
- iv) Sandhurst knew about these matters because it reviewed the Third Prospectus before it was lodged with ASIC and the applicants refer to the "Important Notice" on page 2 of the Third Prospectus and to page 72 of that prospectus.*

20(j) that little or no development work had been carried out on any of the land owned by the Related Development Companies;

**Particulars**

- i) The applicants refer to the disclosures made in the Third Prospectus at pp 11-14.*
- ii) Sandhurst knew about these matters because it reviewed the Third Prospectus before it was lodged with ASIC and the applicants refer to the "Important Notice" on page 2 of the Third Prospectus and to page 72 of that prospectus.*

20(k) that Fincorp derived all or most of its cashflows by issuing Debentures and Unsecured Notes, and most of the money raised thereby was advanced as loans to Guardian Mortgages, the interest receipts on which constituted all or most of its revenues;

**Particulars**

- i) The applicants refer to the disclosures made in the Third Prospectus at pp 29-30.*
- ii) Sandhurst knew about these matters because it reviewed the Third Prospectus before it was lodged with ASIC and the applicants refer to the "Important Notice" on page 2 of the Third Prospectus and to page 72 of that prospectus.*

- 20(l) that Fincorp intended to lodge the Third Prospectus with ASIC on 7 December 2004 for the purpose of raising up to \$200,000,000 by issuing Debentures and Unsecured Notes.

**Particulars**

- i) The applicants refer to the disclosures made in the Third Prospectus at p 5.*
  - ii) Sandhurst knew about these matters because it reviewed the Third Prospectus before it was lodged with ASIC and the applicants refer to the "Important Notice" on page 2 of the Third Prospectus and to page 72 of that prospectus.*
21. Further, by no later than 6 December 2004, Sandhurst knew the following about the financial position and performance as at 30 June 2004 of Fincorp, Guardian Mortgages, Capital First and the Related Development Companies:
- 21(a) that Fincorp had a working capital deficiency of \$2,871,041;
  - 21(b) that Fincorp had total equity of \$3,580,124;
  - 21(c) that, despite Fincorp's working capital deficiency, the directors had stated they believed that Fincorp would be able to meet all of its debts as and when they fell due by reason of (a) the repayment of surplus funds from related parties, (b) the issuing of more Debentures and Unsecured Notes by Fincorp and (c) the "rolling-over" into new investments of existing Debentures and Unsecured Notes due to be repaid;
  - 21(d) that Capital First and its controlled entities had a loss after tax of \$1,349,666;
  - 21(e) that Capital First and its controlled entities had a working capital deficiency of \$54,391,261;
  - 21(f) that Capital First and its controlled entities had a net asset deficiency of \$1,349,566, when the land owned by the Related Development Companies was valued on the basis set out in paragraph 20(h) above;

- 21(g) that Capital First and its controlled entities had a net asset deficiency of about \$15,304,364 when the land owned by the Related Development Companies was valued on the basis set out in paragraph 20(g) above;
- 21(h) that Capital First and its controlled entities would have had surplus net assets of about \$48,330,636 if the land owned by the Related Development Companies was valued on the basis set out in paragraph 20(i) above;
- 21(i) that the shareholders of Capital First and its controlled entities had not contributed any significant equity to the companies and those companies relied wholly or substantially on debt funding to carry out their activities;
- 21(j) that, despite Capital First's net asset deficiency and working capital deficiency, the financial statements were prepared and signed by the directors on a "going concern" basis, because of the matters set out in paragraph 21(h) above and because the loans from Guardian Mortgages could be rolled-over.

#### **Particulars**

- i) The applicants refer to the financial reports of Fincorp Investments Ltd for the year ending 30 June 2004, Fincorp Holdings Pty Ltd and Controlled Entities for the year ending 30 June 2004 and Capital First Investments and Controlled Entities for the year ending 30 June 2004, each of which was included in the Third Prospectus at pp 28-72.*
- ii) Sandhurst knew about these matters because it reviewed the Third Prospectus before it was lodged with ASIC and the applicants refer to the "Important Notice" on page 2 of the Third Prospectus and to page 72 of that prospectus.*
22. By reason of Sandhurst's knowledge of the matters set out in paragraphs 20 and 21 above, it should have formed the view, by no later than 6 December 2004, that the assets of Fincorp may not be sufficient to repay the Debentures and Unsecured Notes when they became due.

#### **Particulars**

- i) A prudent trustee, having particular knowledge, skill and experience in the provision of corporate trustee services, would not have accepted as satisfactory the current financial position of Fincorp, Guardian Mortgages and Capital First and the Related Development Companies when considering Fincorp's short-term obligation to repay maturing Debentures and Unsecured Notes against the long-term basis of the developments Fincorp represented were being undertaken on the land owned by the Related Development Companies.*
- ii) Further, a prudent trustee would not have been satisfied about the sufficiency of Fincorp's assets based on assumptions made by the directors about the rolling-over of Debentures and Unsecured Notes and the issuing of new debentures to finance repayment obligations to existing noteholders.*
- iii) Such prudent trustee would, with such knowledge, make further inquiries and investigations.*

23. To enable it to discharge its duties as trustee (as described in paragraph 18 above), it was necessary for Sandhurst promptly to exercise its rights and powers (as described in paragraph 19 above) to make appropriate enquiries and to satisfy itself accurately:

23(a) on an ongoing basis and at least quarterly and annually, from March 2004; and

23(b) further, by reason of Sandhurst's knowledge of the matters set out in paragraphs 20 and 21 above;

about the following matters:

23(c) the amount of Debentures and Unsecured Notes on issue;

23(d) the dates on or by which those Debentures and Unsecured Notes were due to be repaid;

23(e) the uses to which the funds raised by the issue of Debentures and Unsecured Notes were put, including the amount and terms of any loans made by Fincorp and any security provided for those loans, as well as whether the borrower was a related party of Fincorp or a member of the Fincorp Group;

- 23(f) the uses to which the funds raised were put by the entities that borrowed the funds from Fincorp, including the purpose of any loans made, the amount, terms and security provided for any loans and whether the borrower was a related party of Fincorp and/or the entity that borrowed the funds from Fincorp or a member of the Fincorp Group;
- 23(g) where the funds raised by Fincorp were ultimately loaned to companies for the purpose of purchasing land, the current value of the land on an “as is” and “as if complete” basis, the owner’s proposals and intentions for the development and resale of the land (including feasibility studies and quantity surveyor’s reports), the current and projected status of any development proposed and projections and monthly costs reports about the development of the land;
- 23(h) whether Fincorp’s fund-raising abilities had been impaired in any way including by the making of stop orders by ASIC and, if so, the reasons for, duration and terms of any stop orders made;
- 23(i) Fincorp’s ability to repay the amounts loaned by way of Debentures and Unsecured Notes, including information about its cashflows and sources of funding;
- 23(j) Fincorp’s intentions about its future fund-raising;
- 23(k) systems, processes and procedures used by Fincorp for determining the recoverability and impairment of loans and for determining bad and doubtful debts;
- 23(l) systems, processes and procedures used by Fincorp for ensuring that it at all times had at least \$500,000 in net tangible assets;
- 23(m) systems, processes and procedures used by Fincorp for ensuring that its property was at all times sufficient to repay the amounts deposited and lent when they became due;
- 23(n) the financial position and performance of Fincorp;

- 23(o) the financial position and performance of Guardian Mortgages;
- 23(p) the financial position and performance of Capital First and the Related Development Companies; and
- 23(q) the basis for significant line items in financial statements, reports and accounts.
24. Had Sandhurst, exercising reasonable diligence, made the enquiries described in paragraph 23 above, it would have become aware, within a reasonable time after making those inquiries, of the following matters:
- 24(a) that on or about 21 October 2004, ASIC had made a stop order in relation to the Second Prospectus pursuant to Ch 6D of the Corporations Act in relation to Fincorp's failure to disclose all the risks associated with lending to related entities, its failure to disclose all the risks associated with lending to borrowers involved in real estate developments, Fincorp's failure to disclose fees paid to director-related entities and misleading statements made in the Second Prospectus in relation to security obtained for loans provided;

**Particulars**

- i) The applicants refer to document no 018702803 recorded in the publicly available OFFERlist database on the ASIC website.*
- 24(b) that the Related Development Companies were primarily carrying on the business of "land banking", that is, acquiring land for the purpose of on-selling that land either before or after development applications had been approved;

**Particulars**

- i) The applicants refer to the statement on page 1 of the Third Prospectus that "the borrowers from the Group Lending Companies are ... companies that are associated with the directors of Fincorp Holdings of the Group, being primarily land purchase and/or development companies";*

- ii) Further, the applicants refer to the definition of "Related Development Company" on page 2 of the Third Prospectus;
- iii) Further, the applicants refer to page 10 of the Third Prospectus which disclosed that the terms of the loans was for 1 year;
- iv) Further, the applicants refer to page 22 of the Third Prospectus under the heading "Sale of Undeveloped Land" which disclosed that "not all of the properties held by development company borrowers are to be developed by the borrower, but may have been acquired with the purpose of on-selling, either before or after development applications have been approved".
- v) Further, the applicants refer to Fincorp's report to Sandhurst for the quarter ending 30 September 2006 at page 12 which stated that Fincorp intended to cease land banking.
- vi) Finally, the applicants refer to pp 12 and 27 of the Report by Administrators dated 18 July 2007 in which both the administrators and the directors refer to the "land banking" activities of Fincorp.

24(c) that the valuations obtained by Fincorp and/or the Related Development Companies to support the values referred to in paragraph 20(i) above:

24(c)(i) were based on numerous hypothetical assumptions; and

24(c)(ii) were based on key assumptions that were not supported by background research or expert advice;

which assumptions, if not valid, may have impugned the accuracy of the valuations for the purpose of assessing the realisable value of Fincorp's receivables.

#### **Particulars**

- i) The hypothetical assumptions included the development yield, lead-in period to construction start, consultants costs, management costs, holding costs, contingency, cost escalation, revenues, revenue escalation, selling costs, GST and the sales rate.
- ii) The assumptions that were not supported by background research or expert advice included civil construction costs, building construction costs, sales rate and lot sales prices.
- iii) The applicants will provide full particulars of each of the valuations, together with the hypothetical assumptions in each

*valuation and the key assumptions that were not supported by background research or expert advice after discovery and before trial.*

- 24(d) the valuations referred to in paragraph 24(c) adopted a basis of valuation which did not provide a realistic value of Fincorp's receivables in the context of a short-term sale or disposal of the land.

#### **Particulars**

- i) The valuations were based on either or both of a "hypothetical development model" and a "direct comparison basic".*
  - ii) The valuations were based on hypothetical assumptions about the development yield, lead-in period to construction start, consultants costs, management costs, holding costs, contingency, cost escalation, revenues, revenue escalation, selling costs, GST and the sales rate.*
25. Had Sandhurst become aware of the matters set out in paragraph 24 above, Sandhurst, exercising reasonable diligence, within a reasonable time thereafter:
- 25(a) would have formed the view that Fincorp's ability to repay Debentures and Unsecured Notes when they became due was substantially reliant upon its ability to raise new funds from the further issue of Debentures and Unsecured Notes and its reliance on existing investors rolling over their investments;
  - 25(b) would have formed the view that it, as trustee, could not rely upon the valuations obtained by Fincorp and/or the Related Development Companies described in paragraph 20(i) above when determining the value of Fincorp's assets for the purpose of discharging its duties;
  - 25(c) would have formed the view that the proper assessment of the value of the land for the purpose of discharging its duties was that described at paragraph 20(g) above, alternatively, that described at paragraph 20(h) above;
  - 25(d) would have formed the view, based on the matters set out in paragraphs 24(b), 25(b) and 25(c) above, that the total liabilities of Capital First and the Related Development Companies exceeded their total assets

when the value of the land was prudently assessed by between \$15,304,364 and \$1,349,566;

- 25(e) would have formed the view, based on the matters set out in paragraph 25(d) above, that it, as trustee, should treat the value of Fincorp's property as being reduced by a sum of between \$15,304,364 and \$1,349,566 for the purpose of discharging its duties;
  - 25(f) would have formed the view, based on the matters set out in paragraph 25(e) above, that Fincorp may not be complying with its obligations to maintain net tangible assets of at least \$500,000, as described in paragraph 13(b) above;
  - 25(g) would have formed the view that Fincorp may not be complying with its obligations under the trust deeds and may not be able to pay its debts as and when they fell due;
  - 25(h) would have formed the view, based on the matters described in paragraphs 25(a) and 25(e) above, that Fincorp may not be complying with its obligation to conduct its business in a proper and efficient manner, as described in paragraph 12(a) above;
  - 25(i) would have formed the view that the matters described in paragraphs 25(a) and 25(d) above materially prejudiced the interests of existing and prospective Debenture holders and Unsecured Note holders;
  - 25(j) would have formed the view that the property available to Fincorp was insufficient to repay the Debentures and Unsecured Notes when they became due.
26. Had Sandhurst formed the views described in paragraph 25 above, as it ought to have done, Sandhurst would immediately, and by no later than about 6 December 2004, have exercised its powers as described in paragraphs 19(i) and 19(j) and made an application to the court for orders that the Charge be enforceable immediately, that Fincorp be restricted from advertising for

additional deposits or loans and that Fincorp be restricted from further borrowing from members of the public.

27. Had Sandhurst applied for the orders described in paragraph 26 above, the court would have made orders in those terms.

**Particulars**

*i) The application made by Sandhurst would have included evidence on affidavit of the matters it has ascertained, as described in paragraphs 24 and 25 above and a court, acting on that evidence and on application by the trustee for the debenture-holders, would have made the orders sought.*

28. Further, or alternatively, had Sandhurst formed the views described in paragraph 25 above, as it ought to have done, Sandhurst would immediately, and by no later than about 6 December 2004, have notified ASIC of those matters.

**Particulars**

*i) The applicants refers to s 283DA(e) of the Corporations Act and to the matters alleged at paragraph 25 above.*

29. Had Sandhurst notified ASIC in accordance with paragraph 28 above, ASIC would have placed a stop order on the Third Prospectus preventing further borrowing by way of Debentures and Unsecured Notes.

**Particulars**

*i) ASIC, having made earlier stop orders in relation to Fincorp's fund-raising, and having been notified, by the trustee for the debenture-holders, of the matters described in paragraph 25, would have made stop orders pursuant to Ch 6D of the Corporations Act.*

30. In breach of its duties as described in paragraph 18 above and in contravention of s 283DA of the Corporations Act, Sandhurst:

30(a) failed to form the view described in paragraph 22 above;

30(b) did not know, and did not make any or any adequate enquiries of Fincorp, or its auditors or conduct any inspection of Fincorp's financial and other records, or seek any information about those records so as to inform itself accurately or at all, about the matters described in paragraph 23 above;

and thus, Sandhurst:

30(c) did not become aware of the matters described in paragraph 24 above;  
and

30(d) failed to ascertain the matters described in paragraph 25 above.

#### **Particulars**

*i) In December 2009, the applicants' solicitors requested the respondent provide all correspondence between Sandhurst and Fincorp in the period 7 December 2004 to 1 July 2006.*

*ii) The documents provided by Sandhurst disclose that Sandhurst's only relevant inquiry took place on or about 6 December 2004, when Sandhurst wrote to Fincorp and offered a number of mostly typographical corrections in relation to the Third Prospectus.*

31. Sandhurst did not take the steps described in paragraph 26 above.
32. Sandhurst did not take the steps described in paragraph 28 above.
33. If Sandhurst, exercising reasonable diligence, had formed the view described in paragraph 22 above and made enquiries as described in paragraph 23 above, it would have become aware of the matters described in paragraph 24, and it would have formed the views described in paragraph 25 above and taken the steps described in paragraph 26 and/or 28 above, then Debentures and Unsecured Notes would have not have been issued from about 6 December 2004 and the applicants and the Group Members would not have suffered any loss or damage.
34. By reason of Sandhurst's contraventions of s 283DA of the Corporations Act, the applicants and each Group Member have suffered loss and damage.

**Particulars**

- i) The applicants and each Group Member invested in Debentures and/or Unsecured Notes.*
- ii) Fincorp was placed in voluntary administration on or about 23 March 2007.*
- iii) As a result of Fincorp being placed in voluntary administration, the applicants and the Group Members will not receive a full return on their investments.*
- iv) Further particulars of loss and damage will be provided prior to trial.*

35. In the premises, the applicants and the Group Members are entitled to recover the loss and damage they have suffered, as a result of Sandhurst's failure to comply with s 283DA, from Sandhurst pursuant to s 283F of the Corporations Act.

**Fincorp's position at 31 July 2005**

36. Alternatively, in addition to the matters set out at paragraph 20 above that Sandhurst knew about Fincorp's business and in addition to the matters set out at paragraph 21 above that Sandhurst knew about the financial position and performance of Fincorp, Guardian Mortgages, Capital First and the Related Development Companies, by no later than 31 July 2005, Sandhurst knew:

36(a) that on or about 30 June 2005, Fincorp had on issue \$122,481,000 of Debentures, of which \$60,295,000 was to be repaid within 12 months and \$15,320,000 of Unsecured Notes, of which \$5,018,000 was to be repaid within 12 months.

**Particulars**

- i) The applicants refer to the quarterly trustee report for the quarter ending 30 June 2005.*
- ii) Sandhurst knew about these matters because it received and reviewed the quarterly trustee report.*

37. By reason of Sandhurst's knowledge of the matters set out in paragraphs 20, 21 and 36 above, it should have formed the view, by no later than 31 July 2005, that the assets of Fincorp may not be sufficient to repay the Debentures and Unsecured Notes when they became due.

**Particulars**

*i) The applicants refer to and repeat the particulars to paragraph 22 above.*

38. To enable it to discharge its duties as trustee (as described in paragraph 18 above), it was necessary for Sandhurst promptly to exercise its rights and powers (as described in paragraph 19 above) to make appropriate enquiries and to satisfy itself accurately:

38(a) on an ongoing basis and at least quarterly and annually from March 2004; and

38(b) further, by reason of Sandhurst's knowledge of the matters set out in paragraphs 20, 21 and 36 above;

about each of the matters set out at paragraphs 23(c) to 23(q) above.

39. Had Sandhurst, exercising reasonable diligence, made the enquiries described in paragraph 38 above, it would have become aware, within a reasonable time after making those inquiries, of each of the matters set out at paragraphs 24 above and, in addition, would have become aware:

39(a) that as at 31 July 2005, the valuations described at paragraph 20(i) above were between about 9 months and 23 months out of date;

**Particulars**

*i) The applicants refer to and repeat the particulars to paragraph 20(i) above.*

39(b) that, according to the financial statements of Capital First and the Related Development Companies as at 30 June 2005, the most recent valuations of the land prepared according to the same or similar method as those described at paragraph 20(i) above stated the total value of the land to be \$160,114,000, a decline of about \$10,000,000 from the values stated as at 30 June 2004;

**Particulars**

*i) The applicants refer to note 1 to the financial statements for Fincorp Group Holdings Pty Ltd as at 30 June 2005, included in the Fourth Prospectus at p 79.*

39(c) that on or about 1 July 2005, Fincorp Breezes Howard Pty Ltd (later known as Breezes Howard Pty Ltd), a Related Development Company, had purchased land at Howard for about \$1,650,000;

**Particulars**

*i) The applicants refer to p 14 of the Fourth Prospectus.*

39(d) that Fincorp and/or the Related Development Companies had obtained valuations in about June 2005 for the land at Howard and for the land at Kiama, which valuations:

39(d)(i) in respect of the land at Howard, stated the value to be \$1,660,000 based on a “direct comparison” approach and further stated that the development proposed by the relevant Related Development Company was “high risk” and there was no development approval for the project;

39(d)(ii) in respect of the land at Kiama, stated the value to be about \$1,800,000, which was a decline of about \$1,700,000 from the previous valuation of that land;

**Particulars**

*i) In respect of the valuation of the land at Howard, the applicants refer to the letter from Ernst & Young to Fincorp and Sandhurst Trustees of 23 May 2006 and particularly to annexure C of that letter.*

*ii) In respect of the valuation of the land at Kiama, the applicants refer to pp 14 of the Fourth Prospectus.*

39(e) that little or no development work had been carried out on the land owned by the Related Development Companies since its appointment as trustee;

**Particulars**

*i) The applicants refer to pp 13-14 of the Fourth Prospectus.*

39(f) that on or about 30 June 2005:

39(f)(i) Fincorp had total equity of \$2,953,000;

39(f)(ii) Fincorp had made loans of \$128,582,000 to Guardian Mortgages and other borrowers, the majority of which was loaned to Guardian Mortgages;

39(f)(iii) Guardian Mortgages had on-lent \$101,401,000 to the Related Development Companies;

39(f)(iv) Capital First and its controlled entities had an operating loss of \$12,432,000 for the year ended 30 June 2005;

39(f)(v) Capital First and its controlled entities had a working capital deficiency of \$123,419,000;

39(f)(vi) that Capital First and its controlled entities had a net asset deficiency of about \$14,962,000, when the land owned by the Related Development Companies was valued on the basis set out in paragraph 20(h) above (that is, the stated value of the land was about \$130,757,000 including acquisition costs, development and borrowing costs and holding costs);

39(f)(vii) that Capital First and its controlled entities had a net asset deficiency of about \$37,139,000 when the land owned by the Related Development Companies was valued on the basis set out in paragraph 20(g) above (that is, the value of the land was about \$108,530,000 by reference only to acquisition costs);

39(f)(viii) that Capital First and its controlled entities would have had surplus net assets of about \$4,467,102 if the land owned by the Related Development Companies was valued on the

basis set out in paragraph 20(i) above (that is, according to a hypothetical development model and/or direct comparison basis);

39(f)(ix) that the shareholders of Capital First and its controlled entities had not contributed any significant equity to the companies and those companies relied wholly or substantially on debt funding to carry out their activities;

39(f)(x) that, despite Capital First's net asset deficiency and working capital deficiency, the financial statements were prepared and signed by the directors on a "going concern" basis, because of the matters set out in paragraph 39(f)(viii) above and because the loans from Guardian Mortgages could be rolled-over.

#### **Particulars**

*i) The applicants refer to the financial reports of Fincorp Investments Ltd for the year ending 30 June 2005 and Fincorp Holdings Pty Ltd and Controlled Entities for the year ending 30 June 2005, each of which was included in the Fourth Prospectus at pp 30-96.*

40. Had Sandhurst become aware of the matters set out in paragraph 39 above, Sandhurst, exercising reasonable diligence, within a reasonable time thereafter:

40(a) would have formed the view that Fincorp's ability to repay Debentures and Unsecured Notes when they became due was substantially reliant upon its ability to raise new funds from the further issue of Debentures and Unsecured Notes and its reliance on existing investors rolling over their investments;

40(b) would have formed the view that it, as trustee, could not rely upon the valuations then being used by Fincorp and/or the Related Development Companies described in paragraph 20(i) and 39(b) above when determining the value of Fincorp's assets for the purpose of discharging its duties;

- 40(c) would have formed the view that the proper assessment of the value of the land was a value assessed by reference to the method described at paragraph 20(g) above (which value is stated at paragraph 39(f)(vii) above) alternatively, the method described at paragraph 20(h) above (which value is stated at paragraph 39(f)(vi) above);
- 40(d) would have formed the view, based on the matters set out in paragraphs 24(b), 40(b) and 40(c) above, that the total liabilities of Capital First and the Related Development Companies exceeded their total assets when the value of the land was prudently assessed by between \$37,139,000 and \$14,962,000;
- 40(e) would have formed the view, based on the matters set out in paragraph 40(d) above, that it, as trustee, should treat the value of Fincorp's property as being reduced by a sum of between \$37,139,000 and \$14,962,000 for the purpose of discharging its duties;
- 40(f) would have formed the view, based on the matters set out in paragraph 40(e) above, that Fincorp may not be complying with its obligations to maintain net tangible assets of at least \$500,000, as described in paragraph 13(b) above;
- 40(g) would have formed the view that Fincorp may not be complying with its obligations under the trust deeds and may not be able to pay its debts as and when they fell due;
- 40(h) would have formed the view, based on the matters described in paragraphs 40(a) and 40(e) above, that Fincorp may not be complying with its obligation to conduct its business in a proper and efficient manner, as described in paragraph 12(a) above;
- 40(i) would have formed the view that the matters described in paragraphs 40(a) and 40(d) above materially prejudiced the interests of existing and prospective Debenture holders and Unsecured Note holders;

40(j) would have formed the view that the property available to Fincorp was insufficient to repay the Debentures and Unsecured Notes when they became due.

41. Had Sandhurst formed the views described in paragraph 40 above, as it ought to have done, Sandhurst would immediately, and by no later than about 31 July 2005 have exercised its powers as described in paragraphs 19(i) and 19(j) and made an application to the court for orders that the Charge be enforceable immediately, that Fincorp be restricted from advertising for additional deposits or loans and that Fincorp be restricted from further borrowing from members of the public.
42. Had Sandhurst applied for the orders described in paragraph 41 above, the court would have made orders in those terms.

#### **Particulars**

*i) The application made by Sandhurst would have included evidence on affidavit of the matters it has ascertained, as described in paragraphs 39 and 40 above and a court, acting on that evidence and on application by the trustee for the debenture-holders, would have made the orders sought.*

43. Further, or alternatively, had Sandhurst formed the views described in paragraph 40 above, as it ought to have done, Sandhurst would immediately, and by no later than about 31 July 2005, have notified ASIC of those matters.

#### **Particulars**

*i) The applicants refers to s 283DA(e) of the Corporations Act and to the matters alleged at paragraph 40 above.*

44. Had Sandhurst notified ASIC in accordance with paragraph 43 above, ASIC would have placed a stop order on the Third Prospectus preventing further borrowing by way of Debentures and Unsecured Notes.

#### **Particulars**

*i) ASIC, having made earlier stop orders in relation to Fincorp's fund-raising, and having been notified, by the trustee for the debenture-holders, of the matters described in paragraph 40,*

*would have made stop orders pursuant to Ch 6D of the Corporations Act.*

45. In breach of its duties as described in paragraph 18 above and in contravention of s 283DA of the Corporations Act, Sandhurst:

45(a) failed to form the view described in paragraph 37 above;

45(b) did not know, and did not make any or any adequate enquiries of Fincorp, or its auditors or conduct any inspection of Fincorp's financial and other records, or seek any information about those records so as to inform itself accurately or at all, about the matters described in paragraph 38 above;

and thus, Sandhurst

45(c) did not become aware of the matters described in paragraph 39 above;  
and

45(d) failed to ascertain the matters described in paragraph 40 above.

#### **Particulars**

*i) The applicants refer to and repeat the particulars to paragraph 27 above.*

*ii) The documents provided by Sandhurst disclose that Sandhurst's only relevant actions between 7 December 2004 and 31 July 2005 were (a) to attend a meeting with Fincorp on or about 10 December 2004, (b) to remind Fincorp, on or about 24 January 2005, that the quarterly trustee report was almost due, (c) to attend a meeting on or about 3 March 2005, (d) to seek an explanation from Fincorp, on or about 9 March 2005, about a media article published on or about 8 March 2005 and, (e) on or about 10 March 2005, to seek further information about proceedings brought against Fincorp in the New South Wales Supreme Court.*

46. Sandhurst did not take the steps described in paragraph 41 above.

47. Sandhurst did not take the steps described in paragraph 43 above.

48. If Sandhurst, exercising reasonable diligence, had formed the view described in paragraph 37 above and made enquiries as described in paragraph 38 above it would have become aware of the matters described in paragraph 39, and it would have formed the views described in paragraph 40 above and taken the steps described in paragraph 41 and/or 28 above, then Debentures and Unsecured Notes would have not have been issued from about 31 July 2005 and the applicants and the Group Members would not have suffered any loss or damage.
49. By reason of Sandhurst's contraventions of s 283DA of the Corporations Act, the applicants and each Group Member have suffered loss and damage.

#### **Particulars**

- i) The applicants and each Group Member invested in Debentures and/or Unsecured Notes.*
  - ii) Fincorp was placed in voluntary administration on or about 23 March 2007.*
  - iii) As a result of Fincorp being placed in voluntary administration, the applicants and the Group Members will not receive a full return on their investments.*
  - iv) Further particulars of loss and damage will be provided prior to trial.*
50. In the premises, the applicants and the Group Members are entitled to recover the loss and damage they have suffered, as a result of Sandhurst's failure to comply with s 283DA, from Sandhurst pursuant to s 283F of the Corporations Act.

#### **Fincorp's position at 31 October 2005**

51. Alternatively, in addition to the matters set out at paragraphs 20, 21 and 36 above that Sandhurst knew about Fincorp's business and about the financial position and performance of Fincorp, Guardian Mortgages, Capital First and the Related Development Companies, by no later than 31 October 2005, Sandhurst knew:
- 51(a) that on or about 30 September 2005, Fincorp had on issue \$139,011,000 of Debentures, of which \$77,572,000 was to be repaid

within 12 months and \$17,609,000 of Unsecured Notes, of which \$7,065,000 was to be repaid within 12 months.

**Particulars**

- i) The applicants refer to the quarterly trustee report for the quarter ending 30 September 2005.*
- ii) Sandhurst knew about these matters because it received and reviewed the quarterly trustee report.*

52. By reason of Sandhurst's knowledge of the matters set out in paragraphs 20, 21, 36 and 51 above, it should have formed the view, by no later than 31 October 2005, that the assets of Fincorp may not be sufficient to repay the Debentures and Unsecured Notes when they became due.

**Particulars**

- i) The applicants refer to and repeat the particulars to paragraph 22 above.*

53. To enable it to discharge its duties as trustee (as described in paragraph 18 above), it was necessary for Sandhurst promptly to exercise its rights and powers (as described in paragraph 19 above) to make appropriate enquiries and to satisfy itself accurately:

53(a) on an ongoing basis and at least quarterly and annually from March 2004; and

53(b) further, by reason of Sandhurst's knowledge of the matters set out in paragraphs 20, 21, 36 and 51 above;

about each of the matters set out at paragraphs 23(c) to 23(q) above.

54. Had Sandhurst, exercising reasonable diligence, made the enquiries described in paragraph 53 above, it would have become aware, within a reasonable time after making those inquiries, of each of the matters set out at paragraphs 24 and 39 above and, in addition, would have become aware:

54(a) that Fincorp and/or the Related Development Companies had obtained valuations in about July 2005 for the land at Corinna Waters, Mernda

Business Park, Mernda Mayfield Farm and Mernda Town Centre, which valuations:

- 54(a)(i) in respect of the land at Corinna Waters, stated the value to be about \$47,500,000, which was a decline of about \$1,500,000 from the previous valuation of that land, and which valuation was based on key assumptions about lot sales prices, sales rates and development costs that were not supported by background research or expert advice, adopted aggressive sales prices, did not allow for a lead-in period and underestimated stamp duty and holding costs;
- 54(a)(ii) in respect of the land at Mernda Business Park, was based on key assumptions about super lot sale values, development period and sales rates and development costs that were not supported by background research or expert advice, adopted aggressive sales prices, did not allow for a lead-in period, underestimated stamp duty and holding costs and did not contain an update of sales evidence since the previous valuation;
- 54(a)(iii) in respect of the land at Mernda Mayfield Farm, was based on key assumptions about residential lot values, development period and sales rates and development costs that were not supported by background research or expert advice, underestimated stamp duty, incorrectly calculated profit and risk factors and did not contain an update of sales evidence since the previous valuation;
- 54(a)(iv) in respect of the land at Mernda Town Centre, was based on key assumptions about super lot sale values, development period and sales rate and development costs that were not supported by background research or expert advice, adopted aggressive sales prices, did not allow for a lead-in period, underestimated stamp duty and holding costs and did not

contain an update of sales evidence since the previous valuation.

**Particulars**

*i) In respect of the valuation of each block of land, the applicants refer to the letter from Ernst & Young to Fincorp and Sandhurst Trustees of 23 May 2006 and particularly to annexure C of that letter.*

54(b) that on or about 7 October 2005, Fincorp Breezes Mackay Pty Ltd, a Related Development Company, had purchased land at Mackay for about \$6,850,000;

**Particulars**

*i) The applicants refer to p 14 of the Fourth Prospectus.*

54(c) that little or no development work had been carried out on the land owned by the Related Development Companies since its appointment as trustee.

**Particulars**

*i) The applicants refer to pp 13-14 of the Fourth Prospectus.*

55. Had Sandhurst become aware of the matters set out in paragraph 54 above, Sandhurst, exercising reasonable diligence, within a reasonable time thereafter:

55(a) would have formed the view that Fincorp's ability to repay Debentures and Unsecured Notes when they became due was substantially reliant upon its ability to raise new funds from the further issue of Debentures and Unsecured Notes and its reliance on existing investors rolling over their investments;

55(b) would have formed the view that it, as trustee, could not rely upon the valuations obtained by Fincorp and/or the Related Development Companies described in paragraph 20(i) and 39(b) above when determining the value of Fincorp's assets for the purpose of discharging its duties;

- 55(c) would have formed the view that the proper assessment of the value of the land was a value assessed by reference to the method described at paragraph 20(g) above (which value was about \$115,380,000) alternatively, the method described at paragraph 20(h) above (which value was about \$137,607,000);
- 55(d) would have formed the view, based on the matters set out in paragraphs 24(b), 55(b) and 55(c) above, that the total liabilities of Capital First and the Related Development Companies exceeded their total assets when the value of the land was prudently assessed by between \$37,139,000 and \$14,962,000;
- 55(e) would have formed the view, based on the matters set out in paragraph 55(d) above, that it, as trustee, should treat the value of Fincorp's property as being reduced by a sum of between \$37,139,000 and \$14,962,000 for the purpose of discharging its duties;
- 55(f) would have formed the view, based on the matters set out in paragraph 55(e) above, that Fincorp may not be complying with its obligations to maintain net tangible assets of at least \$500,000, as described in paragraph 13(b) above;
- 55(g) would have formed the view that Fincorp may not be complying with its obligations under the trust deeds and may not be able to pay its debts as and when they fell due;
- 55(h) would have formed the view, based on the matters described in paragraphs 55(a) and 55(e) above, that Fincorp may not be complying with its obligation to conduct its business in a proper and efficient manner, as described in paragraph 12(a) above;
- 55(i) would have formed the view that the matters described in paragraphs 55(a) and 55(e) above materially prejudiced the interests of existing and prospective Debenture holders and Unsecured Note holders;

- 55(j) would have formed the view that the property available to Fincorp was insufficient to repay the Debentures and Unsecured Notes when they became due.
56. Had Sandhurst formed the views described in paragraph 55 above, as it ought to have done, Sandhurst would immediately, and by no later than about 31 October 2005, have exercised its powers as described in paragraphs 19(i) and 19(j) and made an application to the court for orders that the Charge be enforceable immediately, that Fincorp be restricted from advertising for additional deposits or loans and that Fincorp be restricted from further borrowing from members of the public.
57. Had Sandhurst applied for the orders described in paragraph 56 above, the court would have made orders in those terms.

**Particulars**

- i) The application made by Sandhurst would have included evidence on affidavit of the matters it has ascertained, as described in paragraphs 54 and 55 above and a court, acting on that evidence and on application by the trustee for the debenture-holders, would have made the orders sought.*
58. Further, or alternatively, had Sandhurst formed the views described in paragraph 55 above, as it ought to have done, Sandhurst would immediately, and by no later than about 31 October 2005, have notified ASIC of those matters.

**Particulars**

- i) The applicants refers to s 283DA(e) of the Corporations Act and to the matters alleged at paragraph 55 above.*
59. Had Sandhurst notified ASIC in accordance with paragraph 58 above, ASIC would have placed a stop order on the Third Prospectus preventing further borrowing by way of Debentures and Unsecured Notes.

**Particulars**

- i) ASIC, having made earlier stop orders in relation to Fincorp's fund-raising, and having been notified, by the trustee for the*

*debenture-holders, of the matters described in paragraph 55, would have made stop orders pursuant to Ch 6D of the Corporations Act.*

60. In breach of its duties as described in paragraph 18 above and in contravention of s 283DA of the Corporations Act, Sandhurst:

60(a) failed to form the view described in paragraph 52 above;

60(b) did not know, and did not make any or any adequate enquiries of Fincorp, or its auditors or conduct any inspection of Fincorp's financial and other records, or seek any information about those records so as to inform itself accurately or at all, about the matters described in paragraph 53 above;

and thus, Sandhurst:

60(c) did not become aware of the matters described in paragraph 54 above;  
and

60(d) failed to ascertain the matters described in paragraph 55 above.

#### **Particulars**

*i) The applicants refer to and repeat the particulars to paragraph 60 above.*

*ii) The documents provided by Sandhurst disclose that Sandhurst's only relevant actions between 1 August 2005 and 31 October 2005 were (a) on or about 22 September 2005, to inquire of Fincorp whether the effect of orders made in the New South Wales Supreme Court would lead to an Event of Default; (b) on or about 30 September 2005, to inquire of Fincorp whether it was complying with enforceable undertakings it entered with ASIC; (c) on or about 20 October 2005, to remind Fincorp to provide the quarterly trustee report for September 2005, the 2005 audited accounts and an update on the investor response to the enforceable undertaking; (d) on or about 27 October 2005, to provide a pro forma report format for the quarterly reports to trustee.*

61. Sandhurst did not take the steps described in paragraph 56 above.

62. Sandhurst did not take the steps described in paragraph 58 above.

63. If Sandhurst, exercising reasonable diligence, had formed the view described in paragraph 52 above and made enquiries as described in paragraph 53 above, it would have become aware of the matters described in paragraph 54 and it would have formed the views described in paragraph 55 above and taken the steps described in paragraph 56 and/or 58 above, then Debentures and Unsecured Notes would have not have been issued from about 31 October 2005 and the applicants and the Group Members would not have suffered any loss or damage.
64. By reason of Sandhurst's contraventions of s 283DA of the Corporations Act, the applicants and each Group Member have suffered loss and damage.

#### **Particulars**

- i) The applicants and each Group Member invested in Debentures and/or Unsecured Notes.*
  - ii) Fincorp was placed in voluntary administration on or about 23 March 2007.*
  - iii) As a result of Fincorp being placed in voluntary administration, the applicants and the Group Members will not receive a full return on their investments.*
  - iv) Further particulars of loss and damage will be provided prior to trial.*
65. In the premises, the applicants and the Group Members are entitled to recover the loss and damage they have suffered, as a result of Sandhurst's failure to comply with s 283DA, from Sandhurst pursuant to s 283F of the Corporations Act.

#### **Fincorp's position at 8 January 2006**

66. Alternatively, in addition to the matters set out at paragraphs 20, 21, 36 and 51 above that Sandhurst knew about Fincorp's business and about the financial position and performance of Fincorp, Guardian Mortgages, Capital First and the Related Development Companies, by no later than 8 January 2006, Sandhurst knew:
- 66(a) that on or about 31 December 2005, Fincorp had on issue \$152,938,000 of Debentures, of which \$86,931,000 was to be repaid

within 12 months and \$18,081,114 of Unsecured Notes, of which \$7,559,114 was to be repaid within 12 months.

**Particulars**

- i) The applicants refer to the quarterly trustee report for the quarter ending 31 December 2005.*
- ii) Sandhurst knew about these matters because it received and reviewed the quarterly trustee report.*

66(b) that Fincorp proposed to lodge the Fourth Prospectus with ASIC on 9 January 2006 by which it sought to raise up to \$500,000,000 from the issue of Debentures and Unsecured Notes;

**Particulars**

- i) Sandhurst had reviewed the Fourth Prospectus before it was lodged with ASIC.*
- ii) The applicants refer to the "Important Notice" on the second page of the Fourth Prospectus which stated Sandhurst's role in the preparation of the prospectus (limited to reviewing its contents) and to page 99 of that prospectus which stated that Sandhurst had given its consent to its name appearing in the context in which it was named.*

66(c) that the total "value" of the land owned by the Related Development Companies when determined on the same basis as the valuations described at paragraph 20(i) above had declined by about \$11.64m from the values stated by Fincorp in the Third Prospectus and described at paragraph 20(i) above;

**Particulars**

- i) Particulars of the valuations are given in Annexure A.*
- ii) Sandhurst knew about these matters because they were stated in the Fourth Prospectus at p 74, which prospectus Sandhurst had reviewed before it was lodged with ASIC.*
- iii) The applicants refer to the "Important Notice" on the second page of the Fourth Prospectus which stated Sandhurst's role in the preparation of the prospectus (limited to reviewing its contents) and to page 99 of that prospectus which stated that Sandhurst had given its consent to its name appearing in the context in which it was named.*

66(d) that Fincorp and/or the Related Development Companies had obtained valuations in about October 2005 of the land at Bribie Island and South Morang, which valuations:

66(d)(i) in respect of the land at Bribie Island, stated the value to be about \$12,800,000, a decline of about \$6,700,000 on the previous valuation;

66(d)(ii) in respect of the land at South Morang, stated the value to be about \$3,800,000, a decline of about \$1,040,000 on the previous valuation;

#### **Particulars**

*i) Sandhurst knew about these matters because they were stated in the Fourth Prospectus at pp 13-14, which prospectus Sandhurst had reviewed before it was lodged with ASIC.*

*ii) The applicants refer to the "Important Notice" on the second page of the Fourth Prospectus which stated Sandhurst's role in the preparation of the prospectus (limited to reviewing its contents) and to page 99 of that prospectus which stated that Sandhurst had given its consent to its name appearing in the context in which it was named.*

66(e) that Fincorp was proposing to restructure its operational activities from about 9 January 2006 so that Fincorp's loans would be made directly to the Related Development Companies;

#### **Particulars**

*i) The applicants refer to the quarterly trustee report for the quarter ending 31 December 2005.*

*ii) Sandhurst knew about these matters because it received and reviewed the quarterly trustee report.*

66(f) each of the matters set out in paragraphs 39(b), 39(c), 39(e), 39(f) and 54(b) above.

67. By reason of Sandhurst's knowledge of the matters set out in paragraphs 20, 21, 36, 51 and 66 above, it should have formed the view, by no later than 31

January 2006, that the assets of Fincorp may not be sufficient to repay the Debentures and Unsecured Notes when they became due.

**Particulars**

- i) *A prudent trustee, having particular knowledge, skill and experience in the provision of corporate trustee services, would not have accepted as satisfactory the current financial position of Fincorp, Guardian Mortgages and Capital First and the Related Development Companies when considering Fincorp's short-term obligation to repay maturing Debentures and Unsecured Notes against the long-term basis of the developments Fincorp represented were being undertaken on the land owned by the Related Development Companies.*
- ii) *Further, a prudent trustee, knowing that the recoverability of Fincorp's receivables was crucially based on the value of the land owned by the Related Development Companies and knowing about the decline in value of the land at Corinna Waters, Kiama, Bribie Island and South Morang would not have been satisfied about the sufficiency of Fincorp's assets when Capital First and the Related Development Companies had a net asset deficiency even on the highest valuations available.*
- iii) *Such prudent trustee would, with such knowledge, make further inquiries and investigations.*

68. To enable it to discharge its duties as trustee (as described in paragraph 18 above), it was necessary for Sandhurst promptly to exercise its rights and powers (as described in paragraph 19 above) to make appropriate enquiries and to satisfy itself accurately:

68(a) on an ongoing basis and at least quarterly and annually from March 2004; and

68(b) further, by reason of Sandhurst's knowledge of the matters set out in paragraphs 20, 21, 36, 51 and 66 above;

about each of the matters set out at paragraphs 23(c) to 23(q) above.

69. Had Sandhurst, exercising reasonable diligence, made the enquiries described in paragraph 68 above, it would have become aware, within a reasonable time after making those inquiries, of each of the matters set out at paragraphs 24, 39(a), 39(d) and 54(a) above and, in addition, would have become aware:

69(a) that Fincorp and/or the Related Development Companies had obtained valuations in about October and December 2005 for the land at Mackay and The Ridge, which valuations:

69(a)(i) in respect of the land at Mackay, stated the value to be about \$5,550,000, which represented a loss of about \$1,350,000 on the price paid by the relevant Related Development Company for the land, and which valuation was not based on independent estimates of construction costs;

69(a)(ii) in respect of the land at The Ridge, stated the value to be about \$32,554,000;

**Particulars**

*i) In respect of the valuation of the land at Mackay and The Ridge, the applicants refer to the letter from Ernst & Young to Fincorp and Sandhurst Trustees of 23 May 2006 and particularly to annexure C of that letter.*

69(b) that little or no development work had been carried out on the land owned by the Related Development Companies since its appointment as trustee.

**Particulars**

*i) The applicants refer to pp 13-14 of the Fourth Prospectus*

70. Had Sandhurst become aware of the matters set out in paragraph 69 above, Sandhurst, exercising reasonable diligence, within a reasonable time thereafter:

70(a) would have formed the view that Fincorp's ability to repay Debentures and Unsecured Notes when they became due was substantially reliant upon its ability to raise new funds from the further issue of Debentures and Unsecured Notes and its reliance on existing investors rolling over their investments;

70(b) would have formed the view that it, as trustee, could not rely upon the valuations obtained by Fincorp and/or the Related Development

Companies described in paragraph 20(i), 39(b) and/or 66(c) above when determining the value of Fincorp's assets for the purpose of discharging its duties;

- 70(c) would have formed the view that the proper assessment of the value of the land was a value assessed by reference to the method described at paragraph 20(g) above (which value was about \$115,380,000) alternatively, the method described at paragraph 20(h) above (which value was about \$137,607,000);
- 70(d) would have formed the view that even if it was appropriate to value the land owned by the Related Development Companies in accordance with the method described at paragraph 20(i) above, then by reason of the declines in value referred to at paragraphs 54(a)(i), 66(c), 66(d)(i), 66(d)(ii) and 69(a)(i) above, it was unlikely there remained any surplus net assets in Capital First and the Related Development Companies, contrary to the statements described at paragraph 39(f)(x) above;

#### **Particulars**

- i) The applicants refer to paragraph 39(f)(viii) above and to the surplus net assets of \$4,467,102 that were said to exist in Capital First and the Related Development Companies as at 30 June 2005.*
- ii) The effect of the declines in the value of the land at Corinna Waters, Kiama, Bribie Island, South Morang and Mackay was to deplete that pool of surplus net assets, leaving a net asset deficiency (assessed as at 30 June 2005) of about \$5.87 million.*
- 70(e) would have formed the view, based on the matters set out in paragraphs 24(b), 70(b), 70(d) above, that however the values of the land owned by the Related Development Companies were assessed, Capital First and the Related Development Companies had a net asset deficiency;
- 70(f) would have formed the view, based on the matters set out in paragraph 70(e) above, that it, as trustee, should treat the value of Fincorp's property as being reduced by a sum to reflect that net asset deficiency for the purpose of discharging its duties;

- 70(g) would have formed the view, based on the matters set out in paragraph 70(f) above, that Fincorp may not be complying with its obligations to maintain net tangible assets of at least \$500,000, as described in paragraph 13(b) above;
- 70(h) would have formed the view that Fincorp may not be complying with its obligations under the trust deeds and may not be able to pay its debts as and when they fell due;
- 70(i) would have formed the view, based on the matters described in paragraphs 70(a) and 70(f) above, that Fincorp may not be complying with its obligation to conduct its business in a proper and efficient manner, as described in paragraph 12(a) above;
- 70(j) would have formed the view that the matters described in paragraphs 70(a) and 70(e) above materially prejudiced the interests of existing and prospective Debenture holders and Unsecured Note holders;
- 70(k) would have formed the view that the property available to Fincorp was insufficient to repay the Debentures and Unsecured Notes when they became due.
71. Had Sandhurst formed the views described in paragraph 70 above, as it ought to have done, Sandhurst would immediately, and by no later than about 8 January 2006 have exercised its powers as described in paragraphs 19(i) and 19(j) and made an application to the court for orders that the Charge be enforceable immediately, that Fincorp be restricted from advertising for additional deposits or loans and that Fincorp be restricted from further borrowing from members of the public.
72. Had Sandhurst applied for the orders described in paragraph 71 above, the court would have made orders in those terms.

#### **Particulars**

- i) The application made by Sandhurst would have included evidence on affidavit of the matters it has ascertained, as described in paragraphs 69 and 70 above and a court, acting*

*on that evidence and on application by the trustee for the debenture-holders, would have made the orders sought.*

73. Further, or alternatively, had Sandhurst formed the views described in paragraph 70 above, as it ought to have done, Sandhurst would immediately, and by no later than about 8 January 2006, have notified ASIC of those matters.

**Particulars**

- i) The applicants refers to s 283DA(e) of the Corporations Act and to the matters alleged at paragraph 70 above.*

74. Had Sandhurst notified ASIC in accordance with paragraph 73 above, ASIC would have placed a stop order on the Fourth Prospectus preventing further borrowing by way of Debentures and Unsecured Notes.

**Particulars**

- i) ASIC, having made earlier stop orders in relation to Fincorp's fund-raising, and having been notified, by the trustee for the debenture-holders, of the matters described in paragraph 70, would have made stop orders pursuant to Ch 6D of the Corporations Act.*

75. In breach of its duties as described in paragraph 18 above and in contravention of s 283DA of the Corporations Act, Sandhurst:

75(a) failed to form the view described in paragraph 67 above;

75(b) did not know, and did not make any or any adequate enquiries of Fincorp, or its auditors or conduct any inspection of Fincorp's financial and other records, or seek any information about those records so as to inform itself accurately or at all, about the matters described in paragraph 68 above;

and thus, Sandhurst:

75(c) did not become aware of the matters described in paragraph 69 above;  
and

75(d) failed to ascertain the matters described in paragraph 70 above.

**Particulars**

- i) *The applicants refer to and repeat the particulars to paragraph 60.*
  - ii) *The documents provided by Sandhurst disclose that Sandhurst's only relevant actions between 1 November 2005 and 8 January 2006 were (a) on or about 1 December 2005 to provide a copy of Sandhurst's annual report to Fincorp; (b) on or about 5 January 2006, providing copies of the deeds of appointment and retirement of trustees for the Debenture Trust Deed and the Unsecured Note Trust Deed to Fincorp.*
76. Sandhurst did not take the steps described in paragraph 71 above.
77. Sandhurst did not take the steps described in paragraph 73 above.
78. If Sandhurst, exercising reasonable diligence, had formed the view described in paragraph 67 above and made enquiries as described in paragraph 68 above, it would have become aware of the matters described in paragraph 69 and it would have formed the views described in paragraph 70 above and taken the steps described in paragraph 71 and/or 73 above, then Debentures and Unsecured Notes would have not have been issued from 8 January 2006 and the applicants and the Group Members would not have suffered any loss or damage.
79. By reason of Sandhurst's contraventions of s 283DA of the Corporations Act, the applicants and each Group Member have suffered loss and damage.

**Particulars**

- i) *The applicants and each Group Member invested in Debentures and/or Unsecured Notes.*
  - ii) *Fincorp was placed in voluntary administration on or about 23 March 2007.*
  - iii) *As a result of Fincorp being placed in voluntary administration, the applicants and the Group Members will not receive a full return on their investments.*
  - iv) *Further particulars of loss and damage will be provided prior to trial.*
80. In the premises, the applicants and the Group Members are entitled to recover the loss and damage they have suffered, as a result of Sandhurst's failure to

comply with s 283DA, from Sandhurst pursuant to s 283F of the Corporations Act.

**Fincorp's position at 30 April 2006**

81. Alternatively, in addition to the matters set out at paragraphs 20, 21, 36, 51 and 66 above that Sandhurst knew about Fincorp's business and about the financial position and performance of Fincorp, Guardian Mortgages, Capital First and the Related Development Companies, by no later than 30 April 2006, Sandhurst knew:

81(a) that on or about 31 March 2006, Fincorp had on issue \$158,094,230 of Debentures, of which \$91,533,038 was to be repaid within 12 months and \$18,704,640 of Unsecured Notes, of which \$8,189,452 was to be repaid within 12 months.

81(b) that on or about 21 February 2006, Fincorp had been served by ASIC with a notice under s 30 of the *Australian Securities and Investments Commission Act 2001*;

81(c) that on or about 29 March 2006, ASIC made an interim stop order pursuant to Ch 6D of the Corporations Act in relation to the Fourth Prospectus because of inadequate disclosure by Fincorp in the Fourth Prospectus;

81(d) that on or about 18 April 2006, ASIC made a new interim stop order pursuant to Ch 6D of the Corporations Act in relation to the Fourth Prospectus;

81(e) that on or about 27 April 2006, Fincorp had engaged Ernst & Young to conduct a review of the recoverability and impairment of its loan receivables ("the **EY Report**").

**Particulars**

- i) *For of the matter referred to in paragraphs (b)-(e) above, the applicants refer to the quarterly trustee report for the quarter ending 31 March 2006.*

*ii) Sandhurst knew about these matters because it received and reviewed the quarterly trustee report.*

82. By reason of Sandhurst's knowledge of the matters set out in paragraphs 20, 21, 36, 51, 66 and 81 above, it should have formed the view, by no later than 30 April 2006, that the assets of Fincorp may not be sufficient to repay the Debentures and Unsecured Notes when they became due.

#### **Particulars**

- i) The applicants refer to and repeat the particulars to paragraph 67 above.*
- ii) Further, a prudent trustee, with knowledge of the matters set out in paragraph 81 above, possessed additional grounds to not accept as satisfactory Fincorp's belief in its capacity to repay Debentures and Unsecured Notes because the stop orders had the effect of preventing Fincorp raising new funds to repay existing noteholders.*

83. To enable it to discharge its duties as trustee (as described in paragraph 18 above), it was necessary for Sandhurst promptly to exercise its rights and powers (as described in paragraph 19 above) to make appropriate enquiries and to satisfy itself accurately:

83(a) on an ongoing basis and at least quarterly and annually from March 2004; and

83(b) further, by reason of Sandhurst's knowledge of the matters set out in paragraphs 20, 21, 36, 51, 66 and 81 above;

about each of the matters set out at paragraphs 23(c) to 23(q) above.

84. Had Sandhurst, exercising reasonable diligence, made the enquiries described in paragraph 83 above, it would have become aware, within a reasonable time after making those inquiries, of each of the matters set out at paragraphs 24, 39(a), 39(d), 54(a), 69(a) and 69(b) above.
85. Had Sandhurst become aware of the matters set out in paragraph 84 above, Sandhurst, exercising reasonable diligence, within a reasonable time thereafter would have formed each of the views set out at paragraphs 70(a) to 70(k) above.

86. Had Sandhurst formed the views described in paragraph 85 above, as it ought to have done, Sandhurst would immediately, and by no later than about 30 April 2006 have exercised its powers as described in paragraphs 19(i) and 19(j) and made an application to the court for orders that the Charge be enforceable immediately, that Fincorp be restricted from advertising for additional deposits or loans and that Fincorp be restricted from further borrowing from members of the public.
87. Had Sandhurst applied for the orders described in paragraph 86 above, the court would have made orders in those terms.

**Particulars**

- i) The application made by Sandhurst would have included evidence on affidavit of the matters it has ascertained, as described in paragraphs 84 and 85 above and a court, acting on that evidence and on application by the trustee for the debenture-holders, would have made the orders sought.*
88. Further, or alternatively, had Sandhurst formed the views described in paragraph 85 above, as it ought to have done, Sandhurst would immediately, and by no later than about 30 April 2006, have notified ASIC of those matters.

**Particulars**

- i) The applicants refers to s 283DA(e) of the Corporations Act and to the matters alleged at paragraph 85 above.*
89. Had Sandhurst notified ASIC in accordance with paragraph 88 above, ASIC would have placed a stop order on the Fourth Prospectus preventing further borrowing by way of Debentures and Unsecured Notes.

**Particulars**

- i) ASIC, having made earlier stop orders in relation to Fincorp's fund-raising, and having been notified, by the trustee for the debenture-holders, of the matters described in paragraph 85, would have made stop orders pursuant to Ch 6D of the Corporations Act.*
90. In breach of its duties as described in paragraph 18 above and in contravention of s 283DA of the Corporations Act, Sandhurst:

- 90(a) failed to form the view described in paragraph 82 above;
- 90(b) did not know, and did not make any or any adequate enquiries of Fincorp, or its auditors or conduct any inspection of Fincorp's financial and other records, or seek any information about those records so as to inform itself accurately or at all, about the matters described in paragraph 83 above;

and thus, Sandhurst:

- 90(c) did not become aware of the matters described in paragraph 84 above;  
and
- 90(d) failed to ascertain the matters described in paragraph 85 above.

#### **Particulars**

- ii) The applicants refer to and repeat the particulars to paragraph 75 above.*
- iii) The documents provided by Sandhurst disclose that Sandhurst's only relevant actions between 9 January 2006 and 30 April 2006 were (a) on or about 9 January 2006 to give it consent to being named in the Fourth Prospectus; (b) on or about 22 March 2006 to provide Fincorp with its 2005 tax invoice; (c) on or about 7 April 2006, to request Fincorp's cash flow analysis to 30 June 2007; (d) on or about 10 April 2006, to arrange times to meet with ASIC and Fincorp; (e) on or about 12 April 2006, to provide a letter to Fincorp outlining its method of calculating fees.*

91. Sandhurst did not take the steps described in paragraph 86 above.
92. Sandhurst did not take the steps described in paragraph 88 above.
93. If Sandhurst, exercising reasonable diligence, had formed the view described in paragraph 82 above and made enquiries as described in paragraph 83 above, it would have become aware of the matters described in paragraph 84 and it would have formed the views described in paragraph 85 above and taken the steps described in paragraph 86 and/or 88 above, then Debentures and Unsecured Notes would have not have been issued from about 30 April 2006 and the applicants and the Group Members would not have suffered any loss or damage.

94. By reason of Sandhurst's contraventions of s 283DA of the Corporations Act, the applicants and each Group Member have suffered loss and damage.

**Particulars**

- i) The applicants and each Group Member invested in Debentures and/or Unsecured Notes.*
  - ii) Fincorp was placed in voluntary administration on or about 23 March 2007.*
  - iii) As a result of Fincorp being placed in voluntary administration, the applicants and the Group Members will not receive a full return on their investments.*
  - iv) Further particulars of loss and damage will be provided prior to trial.*
95. In the premises, the applicants and the Group Members are entitled to recover the loss and damage they have suffered, as a result of Sandhurst's failure to comply with s 283DA, from Sandhurst pursuant to s 283F of the Corporations Act.

**Fincorp's position at 31 May 2006**

96. Alternatively, in addition to the matters set out at paragraphs 20, 21, 36, 51, 66 and 81 above that Sandhurst knew about Fincorp's business and about the financial position and performance of Fincorp, Guardian Mortgages, Capital First and the Related Development Companies, by no later than 31 May 2006, Sandhurst knew:
- 96(a) each of the matters set out in paragraphs 39(d), 54(a), 69(a) and 69(b) above;
  - 96(b) that the valuations of the land owned by the Related Development Companies that were provided to Ernst & Young for the purposes of preparing the EY Report were not current valuations;
  - 96(c) that in respect of the valuation of the land at Corinna Waters, Ernst & Young said the valuation was "not considered a reliable reflection of the value of the property";

- 96(d) that in respect of the valuation of the land at Mernda Business Park, Ernst & Young said the valuation was “not considered a reliable reflection of the value of the property” and that they “had major concerns about the accuracy of the valuation”;
- 96(e) that in respect of the valuation of the land at Mernda Mayfield Farm, Ernst & Young said the valuation was “not considered a reliable reflection of the value of the property” and that they had “concerns about the accuracy of the valuation”;
- 96(f) that in respect of the valuation of the land at Mernda Town Centre, Ernst & Young said the valuation was “not considered a reliable reflection of the value of the property” and that they had “concerns about the accuracy of the valuation and in our opinion the valuer has overstated the value of the property at \$33 million (we understand the property was purchased in 2003 for \$15.5 million)”;

**Particulars**

- i) *For each allegation in paragraphs 96(b) to 96(f), the applicants refer to the letter from Ernst & Young to Fincorp and Sandhurst Trustees of 23 May 2006 and particularly to annexure C of that letter.*
- ii) *Sandhurst knew about those matters because it received and reviewed the letter from Ernst & Young.*
- 96(g) that on or about 30 May 2006, Fincorp had lodged the Replacement Fourth Prospectus with ASIC, which prospectus Sandhurst had reviewed prior to that date;
- 96(h) that on or about 31 May 2006, ASIC had revoked the interim stop order made on 18 April 2006.

**Particulars**

- i) *For each allegation in paragraphs 96(g) to 96(h), the applicants refer to the Replacement Fourth Prospectus.*
- ii) *Sandhurst knew about those matters because it received and reviewed the Replacement Fourth Prospectus before it was lodged with ASIC.*

*iii) The applications refer to the "Important Notice" on p 2 of the Replacement Fourth Prospectus which stated Sandhurst's role in the preparation of that prospectus and to p 50 under the heading "Sandhurst Trustees" which stated that Sandhurst had given its consent to its name appearing in the context in which it was named.*

97. By reason of Sandhurst's knowledge of the matters set out in paragraphs 20, 21, 36, 51, 66, 81 and 96 above, it should have formed the view, by no later than 31 May 2006, that the assets of Fincorp may not be sufficient to repay the Debentures and Unsecured Notes when they became due.

#### **Particulars**

- i) The applicants refer to and repeat the particulars to paragraph 82 above.*
- ii) Further, a prudent trustee, knowing about the deficiencies in the valuations identified by Ernst & Young and described in paragraph 96 above would not have been satisfied about the sufficiency of Fincorp's assets when the solvency of the Related Development Companies was said to depend, in large part, on those valuations.*

98. To enable it to discharge its duties as trustee (as described in paragraph 18 above), it was necessary for Sandhurst promptly to exercise its rights and powers (as described in paragraph 19 above) to make appropriate enquiries and to satisfy itself accurately:

98(a) on an ongoing basis and at least quarterly and annually from March 2004; and

98(b) further, by reason of Sandhurst's knowledge of the matters set out in paragraphs 20, 21, 36, 51, 66, 81 and 96 above;

about each of the matters set out at paragraphs 23(c) to 23(q) above.

99. Had Sandhurst, exercising reasonable diligence, made the enquiries described in paragraph 98 above, it would have become aware, within a reasonable time after making those inquiries, of each of the matters set out at paragraphs 24(a) to 24(c) above.

100. Had Sandhurst become aware of the matters set out in paragraph 99 above, Sandhurst, exercising reasonable diligence, within a reasonable time thereafter would have formed each of the views set out at paragraphs 70(a) to 70(k) above.
101. Had Sandhurst formed the views described in paragraph 100 above, as it ought to have done, Sandhurst would immediately, and by no later than about 31 May 2006 have exercised its powers as described in paragraphs 19(i) and 19(j) and made an application to the court for orders that the Charge be enforceable immediately, that Fincorp be restricted from advertising for additional deposits or loans and that Fincorp be restricted from further borrowing from members of the public.
102. Had Sandhurst applied for the orders described in paragraph 101 above, the court would have made orders in those terms.

#### **Particulars**

- i) The application made by Sandhurst would have included evidence on affidavit of the matters it had ascertained, as described in paragraphs 99 and 100 above and a court, acting on that evidence and on application by the trustee for the debenture-holders, would have made the orders sought.*
103. Further, or alternatively, had Sandhurst formed the views described in paragraph 100 above, as it ought to have done, Sandhurst would immediately, and by no later than about 31 May 2006, have notified ASIC of those matters.

#### **Particulars**

- i) The applicants refers to s 283DA(e) of the Corporations Act and to the matters alleged at paragraph 100 above.*
104. Had Sandhurst notified ASIC in accordance with paragraph 103 above, ASIC would have placed a stop order on the Replacement Fourth Prospectus preventing further borrowing by way of Debentures and Unsecured Notes.

#### **Particulars**

- i) ASIC, having made earlier stop orders in relation to Fincorp's fund-raising, and having been notified, by the trustee for the debenture-holders, of the matters described in paragraph 100,*

*would have made stop orders pursuant to Ch 6D of the Corporations Act.*

105. In breach of its duties as described in paragraph 18 above and in contravention of s 283DA of the Corporations Act, Sandhurst:

105(a) failed to form the view described in paragraph 97 above;

105(b) did not know, and did not make any or any adequate enquiries of Fincorp, or its auditors or conduct any inspection of Fincorp's financial and other records, or seek any information about those records so as to inform itself accurately or at all, about the matters described in paragraph 98 above;

and thus, Sandhurst:

105(c) did not become aware of the matters described in paragraph 99 above;  
and

105(d) failed to ascertain the matters described in paragraph 100 above.

#### **Particulars**

*i) The applicants refer to and repeat the particulars to paragraph 90 above.*

*ii) The documents provided by Sandhurst disclose that Sandhurst's only relevant actions between 1 May 2006 and 31 May 2006 were (a) on or about 24 May 2006 to send the EY Report to ASIC; (b) on or about 29 May 2006, to give its consent to being named in the Replacement Fourth Prospectus.*

106. Sandhurst did not take the steps described in paragraph 101 above.

107. Sandhurst did not take the steps described in paragraph 103 above.

108. If Sandhurst, exercising reasonable diligence, had formed the view described in paragraph 97 above and made enquiries as described in paragraph 98 above, it would have become aware of the matters described in paragraph 99 and it would have formed the views described in paragraph 100 above and taken the steps described in paragraph 101 and/or 103 above, then Debentures and Unsecured

Notes would have not have been issued from about 31 May 2006 and the applicants and the Group Members would not have suffered any loss or damage.

109. By reason of Sandhurst's contraventions of s 283DA of the Corporations Act, the applicants and each Group Member have suffered loss and damage.

**Particulars**

- i) The applicants and each Group Member invested in Debentures and/or Unsecured Notes.*
- ii) Fincorp was placed in voluntary administration on or about 23 March 2007.*
- iii) As a result of Fincorp being placed in voluntary administration, the applicants and the Group Members will not receive a full return on their investments.*
- iv) Further particulars of loss and damage will be provided prior to trial.*

110. In the premises, the applicants and the Group Members are entitled to recover the loss and damage they have suffered, as a result of Sandhurst's failure to comply with s 283DA, from Sandhurst pursuant to s 283F of the Corporations Act.

**Fincorp's position at 31 July 2006**

111. Alternatively, in addition to the matters set out at paragraphs 20, 21, 36, 51, 66, 81 and 96 above that Sandhurst knew about Fincorp's business and about the financial position and performance of Fincorp, Guardian Mortgages, Capital First and the Related Development Companies, by no later than 31 July 2006, Sandhurst knew:

- 111(a) that on or about 30 June 2006, Fincorp had on issue \$157,908,303 of Debentures, of which \$92,818,251 was to be repaid within 12 months and \$18,428,766 of Unsecured Notes, of which \$7,811,347 was to be repaid within 12 months.

**Particulars**

- i) The applicants refer to the quarterly trustee report for the quarter ending 30 June 2006.*

*ii) Sandhurst knew about these matters because it received and reviewed the quarterly trustee report.*

112. By reason of Sandhurst's knowledge of the matters set out in paragraphs 20, 21, 36, 51, 66, 81, 96 and 111 above, it should have formed the view, by no later than 31 July 2006, that the assets of Fincorp may not be sufficient to repay the Debentures and Unsecured Notes when they became due.

#### **Particulars**

*i) The applicants refer to and repeat the particulars to paragraph 97 above.*

113. To enable it to discharge its duties as trustee (as described in paragraph 18 above), it was necessary for Sandhurst promptly to exercise its rights and powers (as described in paragraph 19 above) to make appropriate enquiries and to satisfy itself accurately:

113(a) on an ongoing basis and at least quarterly and annually from March 2004; and

113(b) further, by reason of Sandhurst's knowledge of the matters set out in paragraphs 20, 21, 36, 51, 66, 81, 96 and 111 above;

about each of the matters set out at paragraphs 23(c) to 23(q) above.

114. Had Sandhurst, exercising reasonable diligence, made the enquiries described in paragraph 113 above, it would have become aware, within a reasonable time after making those inquiries, of each of the following matters:

114(a) that on or about 16 June 2006, valuations of the land owned by the Related Development Companies assessed in accordance with the method described at paragraph 20(i) above disclosed that the total "value" of that land had decreased by about \$51.65 million from the "values" stated in the Replacement Fourth Prospectus;

#### **Particulars**

*i) The applicants refer to the Supplementary Prospectus to the Replacement Fourth Prospectus.*

*ii) Particulars of the valuations are contained in Annexure A.*

114(b) that on or about 30 June 2006:

114(b)(i) Fincorp Property Pty Ltd (“**Fincorp Property**”) which had on 1 July 2005 acquired all subsidiary entities of Capital First, being the Related Development Companies, had an operating loss of \$4,785,000;

114(b)(ii) Fincorp Property and its controlled entities had a net asset deficiency of \$19,747,000;

114(b)(iii) that, despite Fincorp Property’s net asset deficiency, the financial statements were prepared and signed by the directors on a “going concern” basis, because the directors believed Fincorp Property would continue to receive funding from Fincorp;

114(b)(iv) that the directors of Fincorp Property did not claim, in contrast to the financial statements for the year ended 30 June 2005, that Fincorp Property was a “going concern” on the basis that if land owned by the Related Development Companies was held at “market value” then there was a pool of surplus net assets.

#### **Particulars**

*i) The applicants refer to the financial statements for Fincorp Property for the year ending 30 June 2006.*

115. Had Sandhurst become aware of the matters set out in paragraph 114 above, Sandhurst, exercising reasonable diligence, within a reasonable time thereafter would have formed each of the views set out at paragraphs 70(a) to 70(k) above.
116. Had Sandhurst formed the views described in paragraph 115 above, as it ought to have done, Sandhurst would immediately, and by no later than about 31 July 2006 have exercised its powers as described in paragraphs 19(i) and 19(j) and made an application to the court for orders that the Charge be enforceable

immediately, that Fincorp be restricted from advertising for additional deposits or loans and that Fincorp be restricted from further borrowing from members of the public.

117. Had Sandhurst applied for the orders described in paragraph 116 above, the court would have made orders in those terms.

**Particulars**

- i) The application made by Sandhurst would have included evidence on affidavit of the matters it has ascertained, as described in paragraphs 114 and 115 above and a court, acting on that evidence and on application by the trustee for the debenture-holders, would have made the orders sought.*

118. Further, or alternatively, had Sandhurst formed the views described in paragraph 115 above, as it ought to have done, Sandhurst would immediately, and by no later than about 31 July 2006, have notified ASIC of those matters.

**Particulars**

- i) The applicants refers to s 283DA(e) of the Corporations Act and to the matters alleged at paragraph 115 above.*

119. Had Sandhurst notified ASIC in accordance with paragraph 118 above, ASIC would have placed a stop order on the Replacement Fourth Prospectus preventing further borrowing by way of Debentures and Unsecured Notes.

**Particulars**

- i) ASIC, having made earlier stop orders in relation to Fincorp's fund-raising, and having been notified, by the trustee for the debenture-holders, of the matters described in paragraph 115, would have made stop orders pursuant to Ch 6D of the Corporations Act.*

120. In breach of its duties as described in paragraph 18 above and in contravention of s 283DA of the Corporations Act, Sandhurst:

120(a) failed to form the view described in paragraph 112 above;

120(b) did not know, and did not make any or any adequate enquiries of Fincorp, or its auditors or conduct any inspection of Fincorp's financial and other records, or seek any information about those records so as to inform itself accurately or at all, about the matters described in paragraph 113 above;

and thus, Sandhurst:

120(c) did not become aware of the matters described in paragraph 114 above;  
and

120(d) failed to ascertain the matters described in paragraph 115 above.

#### **Particulars**

- i) The applicants refer to and repeat the particulars to paragraph 105 above.*
- ii) The documents provided by Sandhurst disclose that Sandhurst's only relevant actions between 1 June 2006 and 31 July 2006 were (a) on or about 23 June 2006, to confirm with Fincorp the agenda for a meeting with ASIC to take place on 29 June 2006.*

121. Sandhurst did not take the steps described in paragraph 116 above.
122. Sandhurst did not take the steps described in paragraph 118 above.
123. If Sandhurst, exercising reasonable diligence, had formed the view described in paragraph 112 above and made enquiries as described in paragraph 113 above, it would have become aware of the matters described in paragraph 114 and it would have formed the views described in paragraph 115 above and taken the steps described in paragraph 116 and/or 118 above, then Debentures and Unsecured Notes would have not have been issued from about 31 July 2006 and the applicants and the Group Members would not have suffered any loss or damage.
124. By reason of Sandhurst's contraventions of s 283DA of the Corporations Act, the applicants and each Group Member have suffered loss and damage.

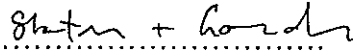
**Particulars**

- i) The applicants and each Group Member invested in Debentures and/or Unsecured Notes.*
- ii) Fincorp was placed in voluntary administration on or about 23 March 2007.*
- iii) As a result of Fincorp being placed in voluntary administration, the applicants and the Group Members will not receive a full return on their investments.*
- iv) Further particulars of loss and damage will be provided prior to trial.*

125. In the premises, the applicants and the Group Members are entitled to recover the loss and damage they have suffered, as a result of Sandhurst's failure to comply with s 283DA, from Sandhurst pursuant to s 283F of the Corporations Act.

126. The applicants and the Group Members seek the relief set out in the Application.

**Dated:** 5 March, 2010

  
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SLATER AND GORDON  
Solicitors for the applicants

This pleading was prepared by John Dixon and Chris Young of counsel.

ANNEXURE A

Related Development Company	Land	Date of Purchase	Date of Loan	Cost	Third Prospectus Value & Particulars of Valuation	Subsequent Valuations in June – October 2005	Subsequent Valuations in June 2006
Custodian Investments Australia Pty Ltd	Kiama	May 2003	May 2003	\$2.65m	\$3.5m 27 August 2003	\$1.8 m (-\$1.7m) Directors' valuation 30 June 2005	Land compulsorily acquired by RTA for about \$1.8m
Southern Cross Investments Pty Ltd (later known as Fincorp Corinna Waters Epping Pty Ltd)	Corinna Waters	July 2003 (contracts exchanged)	July 2003	\$28.25m	\$49m John McEntee 21 October 2004	\$47.5m (-\$1.5) John McEntee 29 July 2005	\$25.5m (-\$23.5m) June 2006
Summit Investment Group Pty Ltd (later known as Fincorp Mernda Town Centre Pty Ltd and Mernda Town Centre Pty Ltd)	Mernda Town Centre	December 2003	December 2003	\$15.5m	\$33m John McEntee 21 October 2004	\$33m John McEntee 28 July 2005	\$18.0m Charter Keck Cramer 13 June 2006
Alliance Properties Pty Ltd (later known as Fincorp The Ridge Doreen Pty Ltd and The Ridge, Doreen Pty Ltd)	The Ridge, Doreen	February 2004	February 2004	\$22.5m	\$32m John McEntee 21 October 2004	\$32,554,000 (+\$554m) Knight Frank 6 October 2005	na

Related Development Company	Land	Date of Purchase	Date of Loan	Cost	Third Prospectus Value & Particulars of Valuation	Subsequent Valuations in June - October 2005	Subsequent Valuations in June 2006
Harrington Investment Group Pty Ltd (later known as Fincorp Breezes Bribie Island Pty Ltd and Breezes Bribie Island Pty Ltd)	Bribie Island	April 2004	April 2004	\$18.75m	\$19.5m Knight Frank 1 February 2004	\$12.8m (-\$6.7m) DTZ Australia (Gold Coast) 4 October 2005	na
Berkshire Investment Group Pty Ltd (later known as Fincorp South Morang Commercial Pty Ltd)	South Morang	October 2004	October 2004	\$3.888m	\$4.84m Stockdale & Leggo July 2004	\$3.8m (-\$1.04m) Charter Keck Cramer 8 October 2005	\$3.22m Particulars of sale with Pacific Equity dated 31 March 2006
Focus Properties Pty Ltd (later known as Fincorp Mernda Business Park Pty Ltd and Mernda Mayfield Business Park Pty Ltd)	Mernda Business Park	September 2004	September 2004	\$9.8m	\$16m John McEntee 21 October 2004	\$16m John McEntee 28 July 2005	\$10.85m (-\$5.15m) Charter Keck Cramer 13 June 2006

<i>Related Development Company</i>	<i>Land</i>	<i>Date of Purchase</i>	<i>Date of Loan</i>	<i>Cost</i>	<i>Third Prospectus Value &amp; Particulars of Valuation</i>	<i>Subsequent Valuations in June – October 2005</i>	<i>Subsequent Valuations in June 2006</i>
Clearview Investments Pty Ltd (later known as Fincorp Mernda Mayfield Farm Pty Ltd and Mernda Mayfield Farm Pty Ltd)	Mernda Mayfield Farm	October 2004	September 2004	\$5.55m	\$11m John McEntee 21 October 2004	\$11m John McEntee 29 July 2005	\$13.1m (+\$2.1m) Charter Keck Cramer 13 June 2006
Fincorp Breezes Howard Pty Ltd (later known as Breezes Howard Pty Ltd)	Howard	1 July 2005	July 2005	\$1,650,000	na	\$1,660,000 Herron Todd White 3 June 2005	na
Fincorp Breezes Mackay Pty Ltd	Mackay	7 October 2005	October 2005	\$6.9m	na	\$5,550,000 (-\$1.3m) Knight Frank December 2005	na