

STATEMENT OF CLAIM

COURT DETAILS

Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	GENERAL
Registry	SYDNEY
Case number	

TITLE OF PROCEEDINGS

Plaintiff	DANNY MARIELLE MOUSSA
First defendant	CAMDEN COUNCIL
Second defendant	CORNISH GROUP SPRING FARM PTY LTD ACN 120 837 381
Third defendant	SMEC TESTING SERVICES PTY LTD (In Liquidation) ACN 101 164 792
Fourth defendant	SMECTS HOLDINGS PTY LTD ACN 063 746 823

FILING DETAILS

Filed for	DANNY MARIELLE MOUSSA , plaintiff
Legal representative	André Joseph Adams, Mayweathers
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TYPE OF CLAIM

Torts - negligence - property damage.

RELIEF CLAIMED

The Plaintiff claims on his own behalf and on behalf of each of the Group Members:

- A Damages at common law;
- B Damages under s 236 of the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*;
- C Costs;
- D Interest on damages and costs pursuant to s100 of the *Civil Procedure Act 2005 (NSW)*; and
- E Such further orders as the Court deems fit.

PLEADINGS AND PARTICULARS

The Parties

- 1 The Plaintiff:
 - (a) is the registered owner of Lot 4127 in DP 1195599 known as 37 Wagner Road, Spring Farm in New South Wales 2570 (**the Property**);
 - (b) has suffered loss and damage in the nature of property damage and economic loss due to the Property being unfit for residential buildings due to the unsound condition of soil on the Property;
 - (c) commences these proceedings as a representative proceeding pursuant to s 157 of the *Civil Procedure Act 2005 (NSW)* (**the CPA**) on behalf of all persons (**Group Members**), who or which:
 - (i) claim to have suffered loss or damage to property, or economic loss, as a result of the properties currently or formerly owned by them being, or potentially being, or perceived to be, or potentially perceived by prospective purchasers of land to be, unfit for residential buildings, due to the conduct of the Defendants pleaded in this Statement of Claim, such properties being within the area delineated on the corresponding maps **attached** to this Statement of Claim and marked **Annexure A, (the Spring Farm area)**;
 - (ii) are the legal personal representatives of the estates of any person who would be a Group Member but for their death after the date of their suffering damage to property or economic loss in the form described in the previous sub-paragraph;

(iii) are not any of the following:

- A a related party (as defined by s 228 of the *Corporations Act* 2001 (Cth) (**Corporations Act**) of the Second, Third or Fourth Defendants;
- B a related body corporate (as defined by s 50 of the *Corporations Act*) of the Second, Third or Fourth Defendants;
- C an associated entity (as defined by s 50AAA of the *Corporations Act*) of the Second, Third or Fourth Defendants;
- D an officer or a close associate (as defined by s 9 of the *Corporations Act*) of the Second, Third or Fourth Defendants; or
- E the Commonwealth or a State or a body corporate, minister or officer acting in the capacity of an officer of the Commonwealth or a State.

2 Immediately prior to the commencement of these proceedings, seven or more persons have claims against the Defendants on the bases set out in paragraph (1)(c)(i) above, within the meaning of s 157 of the CPA.

3 The Plaintiff and Group Members have the same interest in these proceedings, by reason of the fact that the Plaintiff and each Group Member claim the same type of relief against the Defendants in negligence and for misleading or deceptive conduct and require a resolution of at least the common issues of law or fact identified under separate heading in this Statement of Claim.

4 The First Defendant (**Camden Council**) is and was at all relevant times:

- (a) a Local Government Council constituted pursuant to Chapter 9, Part 2, Division 1 of the *Local Government Act* 1993 (NSW), liable to be sued in its own name;
- (b) formerly the owner of some or all of the land comprising the Spring Farm area; and
- (c) an authority vested with statutory powers under the *Environmental Planning and Assessment Act* 1979 (NSW) (**EPAA**) relating to the certification and approval of subdivision of and development on the land comprising the Spring Farm area.

- 5 The Second Defendant (**CGSF**) is and was at all relevant times:
- (a) a body corporate incorporated pursuant to the Corporations Act entitled to be sued in its corporate name;
 - (b) formerly the owner of some or all of the land comprising the Spring Farm area until subdivided lots thereon began to be sold; and
 - (c) conducting a business involving the purchase, subdivision, development and sale of land, including land in the Spring Farm area.
- 6 The Third Defendant (**SMEC TS**) is and was at all material times:
- (a) a body corporate incorporated pursuant to the Corporations Act entitled to be sued in its corporate name;
 - (b) conducting a business providing professional services in the nature of geotechnical investigation and related services;
 - (c) wholly owned by the Fourth Defendant; and
 - (d) a company with all the same directors as the directors of the Fourth Defendant.
- 7 The Fourth Defendant (**SMECTS Holdings**) is and was at all material times:
- (a) a body corporate incorporated pursuant to the Corporations Act entitled to be sued in its corporate name;
 - (b) conducting a business providing professional services in the nature of geotechnical investigation and related services;
 - (c) the owner of all issued share capital in SMEC TS; and
 - (d) a company with all the same directors as the directors of SMEC TS.

Factual Circumstances

- 8 As at May 2007, Camden Council was the owner of parcels of real property formerly entitled Lots 1/58953, 2/158953, 3/158953, 4/620435, 5/620435 and Y/162529 within the Spring Farm area, which was itself wholly within the Camden Council area, (such parcels together being **the Council Land**).
- 9 Prior to May 2007, the Council Land had been subject to substantial cutting and filling earthwork whilst owned by Camden Council.

- 10 As at May 2007, the Council Land was the subject of a Development Control Plan and a Local Government Environmental Plan, each of which expressly contemplated future residential building development for that land.
- 11 As at May 2007, the Council Land was, in many places and generally, not fit for residential building development or construction due to the unsound condition of the soil, (a state hereafter referred to as **unsound for building**), in particular due to the widespread presence at significant depths of inadequately compacted or uncompacted fill, or fill otherwise unsuitable due its type, density and/or moisture content, (**uncontrolled fill**).
- 12 On or about 3 May 2007, Camden Council and CGSF entered into a Deed of Reciprocal Land Transfer, (**the Deed**), which embodied an agreement to swap the Council Land for other land then owned by CGSF.
- 13 It was expressly contemplated in the Deed that CGSF would subdivide and develop the Council Land for residential occupation upon acquisition.
- 14 CGSF took possession of the Council Land on or about 1 November 2010 for the purpose of carrying out remedial bulk earthworks.
- 15 As at 1 November 2010, the Council Land was still unsound for building.
- 16 As at 1 November 2010, Camden Council was aware, or ought to have been aware, that the Council Land was unsound for building.

Particulars

- (a) Camden Council was aware of the prior history of cutting and filling earthworks and the use of uncontrolled fill on the Council Land.
- (b) Camden Council was aware of the contents of at least one geotechnical investigation report which indicated that the Council Land was then currently unsound for building, namely the Site Fill Investigation Report prepared by GeoEnviro Consultancy dated 20 October 2010 (**the GeoEnviro report**).
- 17 As at 1 November 2010, CGSF was aware, or ought to have been aware, that the Council Land was unsound for building.

Particulars

- (a) CGSF was aware of the prior history of cutting and filling earthworks and the use of uncontrolled fill on the Council Land.

- (b) CGSF was aware of the contents of the GeoEnviro report.
- 18 The Council Land was transferred to CGSF pursuant to the Deed on or about 20 April 2012 (**the Council Land transfer**).
- 19 On about 21 December 2012, Camden Council issued a series of Planning Certificates under s 149 of the EPAA with respect to the Council Land, each certificate stating that the land encompassed by the certificate was zoned General Residential, permitting development for home occupations.
- 20 Subsequent to 21 December 2012, CGSF caused to be created a Plan of subdivision which proposed a subdivision of the Council Land into newly identified lots (**the new lots**).
- 21 At some time between December 2012 and January 2015, SMEC TS and/or SMECTS Holdings were engaged by CGSF to and did perform:
- (a) geotechnical investigation services; and
- (b) remedial bulk earthworks support services,
- on or with respect to the Council Land, and each of the new lots, one of the primary purposes of the services being to ensure the new lots would not be unsound for building.
- 22 In about 2014, CGSF commenced a process of selling the new lots, although no Plan of subdivision creating the new lots had yet been registered.
- 23 As at the time CGSF commenced the process of selling the new lots, Camden Council was aware, or ought to have been aware, that the new lots were unsound for building.

Particulars

- (a) Camden Council had not satisfied itself adequately or at all that the Council Land had been made suitable for residential building development since 1 November 2010;
- (b) the terms and circumstances of the engagement of SMEC TS and/or SMECTS Holdings were ostensibly not such as to adequately achieve the purpose of ensuring the new lots would not be unsound for building.

24 As at the time CGSF commenced selling the new lots, CGSF was aware, or ought to have been aware, that the new lots were unsound for building.

Particulars

- (a) CGSF had not satisfied itself adequately or at all that the Council Land had been made suitable for residential building development since 1 November 2010;
 - (b) the terms and circumstances of the engagement of SMEC TS and/or SMECTS Holdings were ostensibly not such as to adequately achieve the purpose of ensuring the new lots would not be unsound for building.
- 25 In about January 2015, SMEC TS and/or SMECTS Holdings created and issued individual Site Classification Reports (**SCR**) with respect to each of the new lots, classifying each lot as either Class M, Class S or Class H1, in accordance with clause 2.5.3 of Australian Standard 2870-2011 – *Residential slabs and footings*, representing in effect that each new lot was not unsound for building.
- 26 The Plaintiff and some of the Group Members purchased some of the new lots, either from CGSF or from an intermediate owner, subject to settlement of the Contracts for Sale of Land not completing unless and until the Plan of subdivision creating the new lots was registered.
- 27 The Plaintiff and some of the Group Members each caused to be constructed residential buildings on their respective lots.
- 28 In purchasing their respective lots, and in causing residential buildings to be constructed on their respective lots, the Plaintiff and the relevant Group Members each proceeded on the assumption that their respective lots were not unsound for building.
- 29 The assumption of each of the Plaintiff and the relevant Group Members was made in reliance on the conduct and involvement of each of the Defendants as set out above.
- 30 At various times after construction, a number of the houses constructed by the Plaintiff and the relevant Group Members suffered structural defects and damage in the form of, but not limited to, visible cracking, lifting, sinking, and other separations (**the structural damage**).
- 31 The structural damage was in all cases caused directly by the fact that the new lots were unsound for building.

- 32 Each of the new lots is still unsound for building, and consequently is vulnerable to and prone to new or further structural damage.
- 33 Each of the new lots has been injuriously affected in value as a result of the fact that it is unsound for building becoming manifest.
- 34 Some Group Members own, or have since the structural damage became manifest owned, properties in the Spring Farm area other than the new lots.
- 35 As a consequence of it becoming public knowledge that the new lots are unsound for building, all properties in the Spring Farm area have become and are likely to remain, injuriously affected in value.

Particulars

- (a) the structural damage has become public knowledge since about 2018;
- (b) in the case of some of the properties, the structural damage has not been repaired and remains obvious to the public;
- (c) all properties in the Spring Farm area have become stigmatised as a result of public knowledge that many properties in that area are unsound for building, as evidenced by the common use by sections of the public of the term “Sink Farm” for the Spring Farm area;
- (d) the quantum of the adverse affectation on the value of the property will be particularised following service of the Plaintiff’s opinion evidence; and
- (e) the quantum of the adverse affectation on the value of the land of Group Members will be given following opt out, the determination of the Plaintiff’s claim and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Group Members.

Camden Council

- 36 At all relevant times prior to the Council Land transfer, Camden Council knew or ought to have known that the Council Land was likely to be used for residential building development.

- 37 As at the date of the Council Land transfer, Camden Council knew or ought to have known that if the land was not adequately compacted for the purposes of residential building development at that time there was a risk of damage to property and economic loss being suffered by subsequent purchasers of any lots comprising part of the Council Land, and within the Spring Farm area, including the Plaintiff and Group Members, **(Risk of Harm)**.
- 38 At all material times, the Plaintiff and Group Members:
- (a) had no or no practicable ability to prevent, avoid or minimise suffering damage to property or economic loss as a result of undue settlement of the Council Land, or of consequent stigmatisation of land in the Spring Farm area;
 - (b) were particularly vulnerable to any undue settlement of the Council Land and consequent stigmatisation of land in the Spring Farm area; and consequently
 - (c) were dependent for the protection of their property and economic interests upon Camden Council taking precautions against the Risk of Harm.
- 39 As a result of the matters pleaded in paragraphs 36 to 38 above, Camden Council at all relevant times owed a duty to the Plaintiff and Group Members to exercise reasonable care and to take reasonable precautions against the possibility of the materialisation of the Risk of Harm.
- 40 At all relevant times the Risk of Harm was:
- (a) foreseeable to Camden Council; and
 - (b) not insignificant.

Particulars

- (i) Camden Council was aware as at and for some time prior to 26 October 2010 that the compaction and characteristics of the soil of the Council Land was at such times not suitable for residential building development;
- (ii) substantial earthworks were necessary as at 26 October 2010 for the Council Land to be made suitable for residential building development;
- (iii) if such work was not done or was not adequately done there was a high risk that residential buildings constructed on lots on the Council Land would suffer damage, such as the structural damage; and

- (iv) if a number residential buildings constructed on lots on the Council Land suffered damage, such as the structural damage, due to being unsound for building, property values in the area would likely be injuriously affected.

41 As a result of the matters pleaded and particularised in paragraphs 36 to 40 above:

- (a) there was a significant risk of harm if reasonable precautions were not taken against the Risk of Harm;
- (b) the harm that could occur in the event that the Risk of Harm eventuated was serious in that it could involve significant damage to property and significant economic loss;
- (c) the burden of taking reasonable precautions against the Risk of Harm was low or moderate or, in the alternative, was not unreasonable having regard to the probability that the Risk of Harm would eventuate and the potential seriousness of the harm if that occurred; and
- (d) the social utility of Camden Council's relevant activities was not so great as to have impeded it from taking reasonable precautions against the Risk of Harm.

42 As a result of the matters pleaded and particularised in paragraphs 36 to 41 above, a reasonable person in the position of Camden Council at the material times would have taken the following precautions against the materialisation of the Risk of Harm:

- (a) properly conducting the works necessary to make the Council Land suitable for residential building development;
- (b) properly supervising and inspecting the works necessary to make the Council Land suitable for residential building development;
- (c) taking reasonable steps to ensure that any material used for the works necessary to make the Council Land suitable for residential building development would itself be suitable;
- (d) arranging proper and adequate geotechnical investigation of the Council Land before transfer of the Council Land, and before approving subdivision of the Council Land, and before any approval of residential building development on the Council Land or individual lots comprising the Council Land;
- (e) requiring CGSF to satisfy Camden Council that the Council Land was no longer unsound for building;

- (f) observing and complying with Camden Council's own Engineering Construction Specification dated 10 February 2009, and any applicable subsequent versions of this document, (**the Engineering Specification**), with respect to the Council Land;
- (g) requiring CGSF to satisfy Camden Council that works had been done to the Council Land in compliance with the Engineering Specification;
- (h) requiring CGSF to satisfy Camden Council that works had been done to the Council Land in compliance with Australian Standard 3798-2007 – *Guidelines on earthworks for commercial and residential developments* – in particular sections 4 and 5;
- (i) requiring CGSF to satisfy Camden Council that works had been done to the Council Land in compliance with Camden Council's Development Control Plan 2011, in particular Part B, section 19; and
- (j) instructing and advising any subsequent owners of the Council Land or individual new lots on the Council Land, including but not limited to CGSF, the Plaintiff and the relevant Group Members, of the condition of the Council Land, and of the danger of undue settlement of the Council Land.

(together and separately, **the Council Reasonable Precautions**).

43 Camden Council failed to take any of the Council Reasonable Precautions.

44 In the circumstances, Camden Council breached its duty of care to the Plaintiff and the Group Members.

Causation and loss

45 Had Camden Council not breached its duty of care:

- (a) the Council Land would not have unduly settled;
- (b) the new lots would not have been unsound for building at the time of purchase by the Plaintiff and Group Members;
- (c) properties owned by the Plaintiff and Group Members would not have sustained structural damage due to the undue settlement;
- (d) the Plaintiff and the Group Members would not have sustained economic loss;
- (e) property values in the Spring Farm area would not have been injuriously affected by stigmatisation; and

(f) in the alternative, the Plaintiff and the Group Members would not have purchased their respective properties at all.

46 In the circumstances, the Plaintiff and the Group Members have suffered loss and damage as a result of Camden Council's breach of duty of care.

Particulars

- (a) the structural damage to their properties;
- (b) cost of repairs of the structural damage to their properties;
- (c) costs associated with investigating or otherwise ameliorating the structural damage to their properties;
- (d) adverse affectation on the value of their properties; and
- (e) in the alternative, on the basis that the Plaintiff or Group Members would not have purchased their respective properties, the cost of purchasing the properties, including the transaction costs in purchasing the properties and attempting to sell or selling the properties, including but not limited to stamp duty and conveyancing costs.

CGSF

Negligence

47 As at the date of the Council Land transfer, CGSF knew or ought to have known that if the Council Land was not adequately compacted for the purposes of residential building development at that time the Risk of Harm existed.

48 At all material times, the Plaintiff and Group Members:

- (a) had no or no practicable ability to prevent, avoid or minimise suffering damage to property or pure economic loss as a result of undue settlement of the Council Land, or of consequent stigmatisation of land in the Spring Farm area;
- (b) were particularly vulnerable to any undue settlement of the Council Land and consequent stigmatisation of land in the Spring Farm area; and consequently;
- (c) were dependent for the protection of their property and economic interests upon CGSF taking precautions against the Risk of Harm.

49 As a result of the matters pleaded in paragraphs 47 to 48 above, CGSF at all relevant times owed a duty of care to the Plaintiff and Group Members to exercise reasonable care and to take reasonable precautions against the possibility of the materialisation of the Risk of Harm.

50 At all relevant times the Risk of Harm was:

- (a) foreseeable to CGSF; and
- (b) not insignificant.

Particulars

- (i) CGSF was aware as at and for some time prior to 26 October 2010 that the compaction and characteristics of the soil of the Council Land was at such times not suitable for residential building development;
- (ii) substantial works were necessary as at 26 October 2010 for the Council Land to be made suitable for residential building development;
- (iii) if such work was not done or was not adequately done there was a high risk that residential buildings constructed on lots on the Council Land would suffer damage, such as the structural damage; and
- (iv) if a number residential buildings constructed on lots on the Council Land suffered damage, such as the structural damage, due to being unsound for building, property values in the area would likely be injuriously affected.

51 As a result of the matters pleaded and particularised in paragraphs 47 to 50 above:

- (a) there was a significant risk of harm if reasonable precautions were not taken against the Risk of Harm;
- (b) the harm that could occur in the event that the Risk of Harm eventuated was serious in that it could involve significant damage to property and significant economic loss;
- (c) the burden of taking reasonable precautions against the Risk of Harm was low or moderate or, in the alternative, was not unreasonable having regard to the probability that the Risk of Harm would eventuate and the potential seriousness of the harm if that occurred; and
- (d) the social utility of CGSF's relevant activities was not so great as to have impeded it from taking reasonable precautions against the Risk of Harm.

52 As a result of the matters pleaded and particularised in paragraphs 47 to 51 above, a reasonable person in the position of CGSF at the material times would have taken the following precautions against the materialisation of the Risk of Harm:

- (a) properly conducting the works necessary to make the Council Land suitable for residential building development;

- (b) properly supervising and inspecting the works necessary to make the Council Land suitable for residential building development;
- (c) taking reasonable steps to ensure that any material used for the works necessary to make the Council Land suitable for residential building development would itself be suitable;
- (d) arranging proper and adequate geotechnical investigation of the Council Land before conducting any sales process of the new lots;
- (e) satisfying itself that the Council Land was no longer unsound for building;
- (f) observing and complying with the Engineering Specification, with respect to the Council Land and the new lots;
- (g) satisfying itself that works had been done to the Council Land in compliance with Australian Standard 3798-2007 – *Guidelines on earthworks for commercial and residential developments* – in particular sections 4 and 5;
- (i) satisfying itself that works had been done to the Council Land in compliance with Camden Council's Development Control Plan 2011, in particular Part B, section 19; and
- (j) instructing and advising any subsequent owners of the Council Land or individual lots on the Council Land, including but not limited to the Plaintiff and relevant Group Members, of the condition of the Council Land, and of the danger of undue settlement of the Council Land.

(together and separately, **the CGSF Reasonable Precautions**).

53 CGSF failed to take any of the CGSF Reasonable Precautions.

54 In the circumstances CGSF breached its duty of care to the Plaintiff and Group Members.

Australian Consumer Law

55 Further, in the factual circumstances pleaded above, at all material times CGSF was engaging in conduct in trade or commerce for the purposes of the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**ACL**).

56 In the factual circumstances pleaded above, CGSF engaged in conduct that was misleading and deceptive in breach of s 18 of the ACL.

Particulars

- (a) Advertising, marketing and/or promoting the sale of the new lots without having taken the CGSF Reasonable Precautions.
- (b) conducting a sales process of the new lots without having taken the CGSF Reasonable Precautions.
- (c) expressly and/or implicitly representing to prospective purchasers of the new lots that they were not unsound for building when that was not the case.

57 Further, in the factual circumstances pleaded above, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land, CGSF:

- (a) made false or misleading representations concerning the characteristics of land; and
- (b) made false or misleading representations concerning the use to which the land is capable of being put or may lawfully be put;

in breach of s 30 of the ACL.

Particulars

- (a) expressly and/or implicitly representing to prospective purchasers of the new lots that they were not unsound for building when that was not the case.

Causation and loss

58 Had CGSF not breached its duty of care and ss 18 and 30 of the ACL:

- (a) the Council Land would not have unduly settled;
- (b) the new lots would not have been unsound for building at the time of purchase by the Plaintiff and Group Members;
- (c) properties owned by the Plaintiff and Group Members would not have sustained structural damage due to the undue settlement;
- (d) the Plaintiff and the Group Members would not have sustained economic loss;
- (e) property values in the Spring Farm area would not have been injuriously affected by stigmatisation; and

- (f) in the alternative, the Plaintiff and the Group Members would not have purchased their respective properties at all.

59 In the circumstances the Plaintiff and the Group Members have suffered loss and damage as a result of CGSF's breach of duty of care and breach of ss 18 and 30 of the ACL.

Particulars

- (a) the structural damage to their properties;
- (b) cost of repairs of the structural damage to their properties;
- (c) costs associated with investigating or otherwise ameliorating the structural damage to their properties;
- (d) adverse affectation on the value of their properties; and
- (e) in the alternative, on the basis that the Plaintiff or Group Members would not have purchased their respective properties, the cost of purchasing the properties, including the transaction costs in purchasing the properties and attempting to sell or selling the properties, including but not limited to stamp duty and conveyancing costs.

SMEC TS and SMECTS Holdings

Negligence

60 At all relevant times prior to issuing the SCRs, SMEC TS and SMEC TS Holdings knew or ought to have known that the Council Land was likely to be used for residential building development.

61 As at the time of their geotechnical investigation works on the Council Land and/or the new lots, SMEC TS and SMEC TS Holdings knew or ought to have known that if the land was not adequately compacted for the purposes of residential building development the Risk of Harm existed.

62 At all material times the Plaintiff and Group Members:

- (a) had no or no practicable ability to prevent, avoid or minimise suffering damage to property or pure economic loss as a result of undue settlement of the Council Land, or consequent stigmatisation of land in the Spring Farm area;
- (b) were particularly vulnerable to any undue settlement of the Council Land and consequent stigmatisation of land in the Spring Farm area; and consequently,

(c) were dependent for the protection of their property and economic interests upon SMEC TS and SMEC TS Holdings taking precautions against the Risk of Harm.

63 As a result of the matters pleaded in paragraphs 60 to 62 above, SMEC TS and SMECTS Holdings at all relevant times owed a duty of care to the Plaintiff and Group Members to exercise reasonable care and to take reasonable precautions against the possibility of the materialisation of the Risk of Harm.

64 Further, at all relevant times due to the relationship between SMEC TS and SMECTS Holdings, SMECTS Holdings owed an independent duty of care to the Plaintiff and Group Members, arising from and analogous to that owed by SMEC TS set out above.

Particulars

- (a) SMECTS Holdings owned all the issued share capital in SMEC TS;
- (b) SMEC TS and SMECTS Holdings had entirely common directorships;
- (c) SMECTS Holdings was at all times aware of all of the activities of SMEC TS relevant to the matters pleaded in this Statement of Claim; and
- (d) in the circumstances, in all of the activities of SMEC TS relevant to the matters pleaded in this Statement of Claim SMEC TS acted as a conduit of SMECTS Holdings.

65 At all relevant times the Risk of Harm was:

- (a) foreseeable to SMEC TS and SMEC TS Holdings; and
- (b) not insignificant.

Particulars

- (a) SMEC TS and SMEC TS Holdings, in conducting businesses providing professional services in the nature of geotechnical investigation, were or ought to have been aware of:
 - (i) the significant risks of damage to buildings constructed on land that was unsound for building; and
 - (ii) the potential adverse effect on residential property value where the land was or might be perceived to be unsound for building.

- 66 As a result of the matters pleaded and particularised in paragraphs 60 to 65 above:
- (a) there was a significant risk of harm if reasonable precautions were not taken against the Risk of Harm;
 - (b) the harm that could occur in the event that the Risk of Harm eventuated was serious in that it could involve significant damage to property and significant economic loss;
 - (c) the burden of taking reasonable precautions against the Risk of Harm was low or moderate or, in the alternative, was not unreasonable having regard to the probability that the Risk of Harm would eventuate and the potential seriousness of the harm if that occurred; and
 - (d) the social utility of SMEC TS and SMEC TS Holdings' relevant activities was not so great as to have impeded them from taking reasonable precautions against the Risk of Harm.
- 67 As a result of the matters pleaded and particularised in paragraphs 60 to 66 above, a reasonable person in the position of SMEC TS and SMEC TS Holdings at the material times would have taken the following precautions against the materialisation of the Risk of Harm:
- (a) properly conducting the works necessary to make the Council Land suitable for residential building development;
 - (b) properly supervising and inspecting the works necessary to make the Council Land suitable for residential building development;
 - (c) taking reasonable steps to ensure that any material used for the works necessary to make the Council Land suitable for residential building development would itself be suitable;
 - (d) conducting proper and competent geotechnical investigation of the Council Land with due care and skill;
 - (e) drilling to an appropriate depth for soil sampling when conducting geotechnical investigation of the Council Land;
 - (f) providing proper and competent remedial bulk earthworks support services on the Council Land with due care and skill; and
 - (g) exercising due care and skill in the preparation and issuance of the SCRs.
- (together and separately, **the SMEC Reasonable Precautions**).
- 68 SMEC TS and SMEC TS Holdings failed to take any of the Reasonable Precautions.

69 In the circumstances, SMEC TS and SMEC TS Holdings breached their duty of care to the Plaintiff and Group Members.

Australian Consumer Law

70 Further, in the factual circumstances pleaded above, at all material times SMEC TS and SMEC TS Holdings were engaging in conduct in trade or commerce for the purposes of the ACL.

71 In the factual circumstances pleaded above, SMEC TS and SMEC TS Holdings engaged in conduct that was misleading and deceptive in breach of s 18 of the ACL.

Particulars

- (a) preparing and issuing the SCRs without having taken the SMEC Reasonable Precautions.
- (b) failing to advise CGSF, Camden Council, the Plaintiff or the Group Members that the new lots were unsound for building.
- (c) implicitly or expressly representing that the new lots were not unsound for building when that was not the case.

72 Further, in the factual circumstances pleaded above, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land, SMEC TS and SMEC TS Holdings:

- (a) made false or misleading representations concerning the characteristics of land; and
- (b) made false or misleading representations concerning the use to which the land is capable of being put or may lawfully be put;

in breach of s 30 of the ACL.

Particulars

- (a) representing in each of the SCRs that the respective new lot was not unsound for building when that was not the case.

Causation and loss

- 73 Had SMEC TS and SMEC TS Holdings not breached their duty of care and s 18 and s 30 of the ACL:
- (a) the Council Land would not have unduly settled;
 - (b) the new lots would not have been unsound for building at the time of purchase by the Plaintiff and Group Members;
 - (c) properties owned by the Plaintiff and Group Members would not have sustained structural damage due to the undue settlement;
 - (d) the Plaintiff and the Group Members would not have sustained economic loss;
 - (e) property values in the Spring Farm area would not have been injuriously affected by stigmatisation; and
 - (f) in the alternative, the Plaintiff and the Group Members would not have purchased their respective properties at all.
- 74 In the circumstances, the Plaintiff and the Group Members have suffered loss and damage as a result of SMEC TS and SMEC TS Holdings' breaches of duty of care and breaches of s 18 and s 30 of the ACL.

Particulars

- (a) the structural damage to their properties;
- (b) cost of repairs of the structural damage to their properties;
- (c) costs associated with investigating or otherwise ameliorating the structural damage to their properties;
- (d) adverse affectation on the value of their properties; and
- (e) in the alternative, on the basis that the Plaintiff or Group Members would not have purchased their respective properties, the cost of purchasing the properties, including the transaction costs in purchasing the properties and attempting to sell or selling the properties, including but not limited to stamp duty and conveyancing costs.

Common Questions of Law or Fact

- 75 The questions of law or fact common to the claims of the Plaintiff and each Group member are:
- (a) whether the Risk of Harm existed;

- (b) whether the Defendants owed a duty of care to the Plaintiff and Group Members;
- (c) the nature, scope and content of any duty of care;
- (d) whether the Risk of Harm was foreseeable;
- (e) whether a reasonable person in the position of the respective Defendants would have taken the Council Reasonable Precautions, the CGSF Reasonable Precautions or the SMEC Reasonable Precautions;
- (f) whether the Defendants breached their duty of care in the manner alleged or at all;
- (g) whether the alleged breaches of duty of care caused or contributed to undue settlement of the land and consequent damage to the properties;
- (h) whether CGSF, SMEC TS or SMECTS Holdings engaged in misleading or deceptive conduct in trade or commerce in breach of s 18 of the ACL;
- (i) whether CGSF made false or misleading representations in breach of s 30 of the ACL;
- (j) whether any breach of s 18 of the ACL by CGSF, SMEC TS or SMECTS Holdings, or of s 30 of the ACL by CGSF, caused loss or damage;
- (k) whether there has been stigmatisation of properties in the Spring Farm area as a result undue settlement of the land and consequent damage to some properties;
- (l) whether there has been adverse affectation on the value of properties in the Spring Farm area as a result undue settlement of the land and consequent damage to some properties;
- (m) the extent of any adverse affectation on the value of properties in the Spring Farm area; and
- (n) the principles for identifying and measuring compensable loss suffered by the Plaintiff and Group Members resulting from the alleged breaches of duty of care and misleading and deceptive conduct.

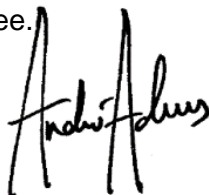
Initial Case Conference – Practice Note SC Gen17 clause 4.2(e)

76 These proceedings are listed for an initial case conference at 9.00 a.m. on the Wednesday after the expiration of 42 days following the filing of the originating process, being

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.



Signature

Capacity

Date of signature

Solicitor on record

18 December 2020

NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this statement of claim:

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.

- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim,** by filing a defence and/or making a cross-claim.
- 2 If money is claimed, and you believe you owe the money claimed,** by:
 - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
 - Filing an acknowledgement of the claim.
 - Applying to the court for further time to pay the claim.
- 3 If money is claimed, and you believe you owe part of the money claimed,** by:
 - Paying the plaintiff that part of the money that is claimed.
 - Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.ucprforms.justice.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS


Street address	Supreme Court of New South Wales Law Courts Building 184 Philip Street SYDNEY NSW 2000
Postal address	GPO Box 3 SYDNEY NSW 2000
Telephone	1300 679 272

AFFIDAVIT VERIFYING

Name Danny Marielle Moussa
 Address 37 Wagner Road, Spring Farm NSW 2570
 Occupation Electrician
 Date 18 December 2020

I say on oath:

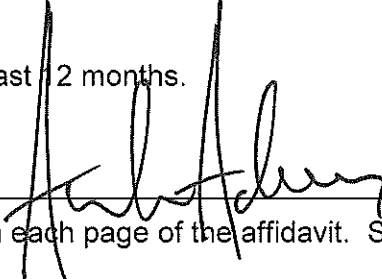
- 1 I am the plaintiff.
- 2 I believe that the allegations of fact in the statement of claim are true.

SWORN at Sydney, NSW
 Signature of deponent 
 Name of witness André Joseph Adams
 Address of witness Level 31, 201 Elizabeth Street Sydney NSW 2000
 Capacity of witness Australian Legal Practitioner

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

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

Signature of witness



Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

PARTY DETAILS**PARTIES TO THE PROCEEDINGS****Plaintiff**

Danny Marielle Moussa

Defendants

Camden Counsel, First Defendant

Cornish Group Spring Farm Pty Ltd
ACN 120 837 381, Second Defendant

SMEC Testing Services Pty Ltd (In Liq)
ACN 101 164 792, Third Defendant

SMECTS Holdings Pty Ltd
ACN 063 746 823, Fourth Defendant

FURTHER DETAILS ABOUT PLAINTIFF**Plaintiff**

Name Danny Marielle Moussa
Address 37 Wagner Road, Spring Farm NSW 2570

Legal representative for plaintiff

Name André Joseph Adams
Practising certificate number 54345
Firm Mayweathers
Address Level 31, 201 Elizabeth Street
SYDNEY NSW 2000
Telephone (02) 8020 5720
Fax (02) 9012 0146
Email andre.adams@mayweathers.com.au
Electronic service address andre.adams@mayweathers.com.au

DETAILS ABOUT DEFENDANTS**First Defendant**

Name **Camden Council**
Address 70 Central Avenue
ORAN PARK NSW 2570

Second Defendant

Name **Cornish Group Spring Farm Pty Ltd ACN 120 837 381**
Address 7 Ferncreek Court
KELLYVILLE NSW 2155

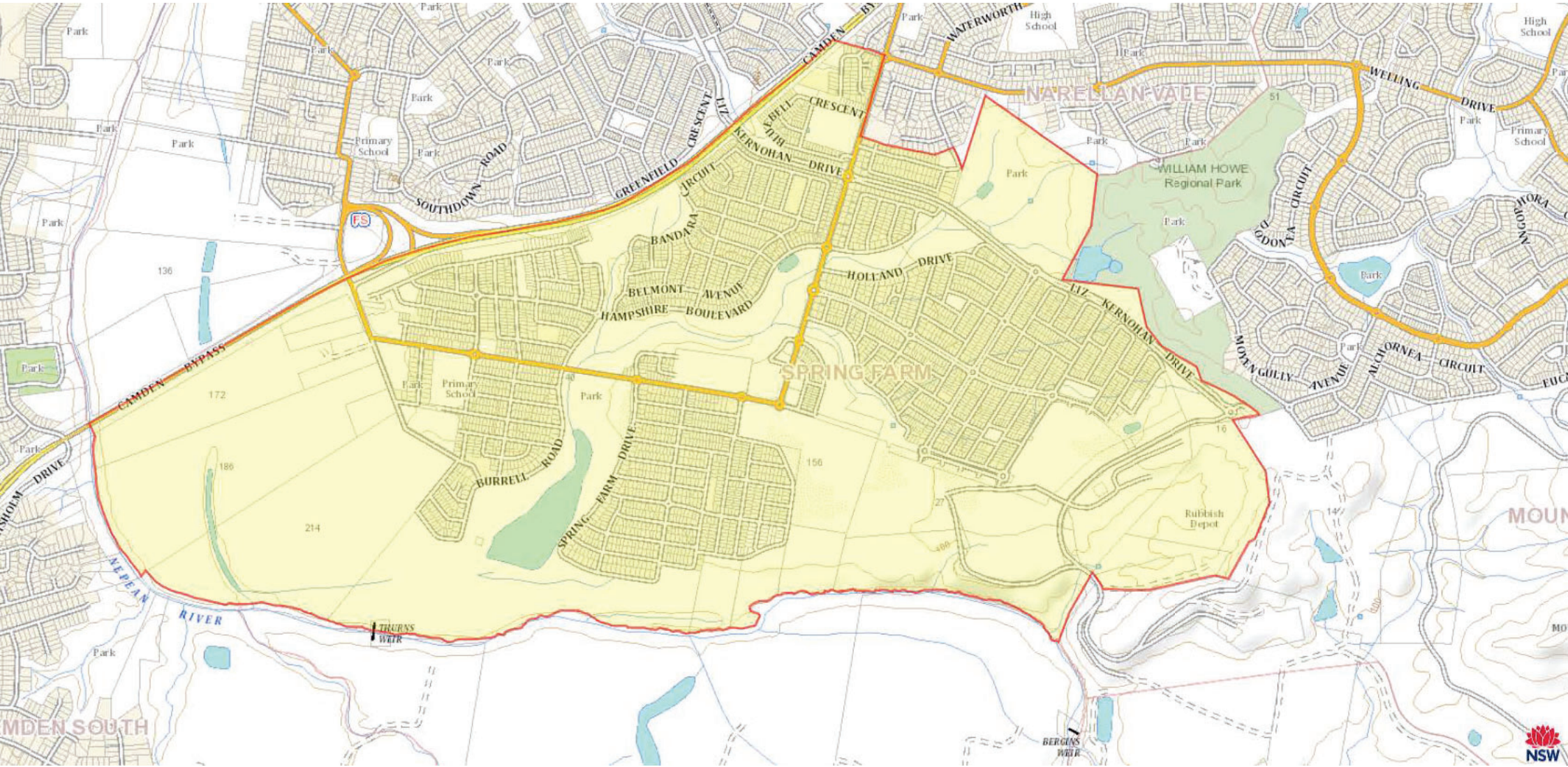
Third Defendant

Name **SMEC Testing Services Pty Ltd (In Liquidation)**
ACN 101 164 792
Address C/- Mr Bruce Gleeson & Mr Daniel Robert Soire,
Partners
Jones Partners
Level 13, 189 – 197 Kent Street
SYDNEY NSW 2000

Fourth Defendant

Name **SMECTS Holdings Pty Ltd ACN 063 746 823**
Address C/- MKP Associates Pty Ltd
Level 5, 219-223 Castlereagh Street
SYDNEY NSW 2000

ANNEXURE A



ANNEXURE A

