



Principal Registrar &  
Chief Executive Officer



Form 7A (version 5)  
UCPR 14.3

## DEFENCE TO FURTHER AMENDED STATEMENT OF CLAIM

### COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	General
Registry	Sydney
Case number	2020/00359004

### TITLE OF PROCEEDINGS

Plaintiff	<b>Danny Marielle Moussa</b>
First Defendant	<b>Camden Council</b>
Second Defendant	<b>Cornish Group Spring Farm Pty Ltd ACN 120 837 381</b>
Third Defendant	<b>SMEC Testing Services Pty Ltd (In Liquidation) ACN 101 164 792</b>

### FILING DETAILS

Filed for	<b>SMEC Testing Services Pty Ltd (in liquidation) (ACN 101 164 792)</b> , Third Defendant
Legal representative	Andrew Moore Wotton + Kearney L26/85 Castlereagh St, Sydney NSW 2000
Legal representative reference	ASM 9002776 MTS
Contact name and telephone	Marcus Saw +61 3 9116 7827
Contact email	Marcus.Saw@wottonkearney.com.au

### HEARING DETAILS

If the proceedings do not already have a listing date, they are to be listed at

### PLEADINGS AND PARTICULARS

- A. *Capitalised terms used in this document that are not defined in this document take their definition from the current version of the Statement of Claim filed in these proceedings (**Statement of Claim**). The fact that the Third Defendant uses those definitions for ease of reference does not mean or imply any admission on the part of the Third Defendant.*
- B. *For ease of reference, the headings used in this document reflect the headings used in the Statement of Claim. The fact that the Third Defendant refers to those headings*

*for ease of reference does not mean or imply any admission on the part of the Third Defendant.*

- C. *References to paragraphs and sub-paragraphs in this document are references to paragraphs and sub-paragraphs of the Statement of Claim, unless this document states otherwise.*

### **The Parties**

1. In answer to paragraph 1, the Third Defendant:
  - 1.1 admits sub-paragraph (1)(a);
  - 1.2 does not know and does not admit sub-paragraph (1)(b);
  - 1.3 as to sub-paragraph (1)(c):
    - (a) admits that the plaintiff purports to commence these proceedings as a representative proceeding pursuant to s 157 of the CPA;
    - (b) does not know whether and does not admit that at the time the plaintiff commenced the proceedings, there were 7 or more people who claimed to meet the description of one or more of sub-paragraphs (1)(c)(i), (ii) or (iii) and did not meet any of the descriptions in sub-paragraphs (1)(c)(iv)(A), (B), (C), (D), or (E); and
    - (c) otherwise denies the paragraph.
2. In answer to paragraph 2, the Third Defendant:
  - 2.1 does not know whether and does not admit that immediately prior to the commencement of these proceedings, 7 or more persons claimed to be entitled to relief against the Defendants on the bases set out in sub-paragraph (1)(c) within the meaning of s 157 of the CPA; and
  - 2.2 otherwise denies the paragraph.
3. The Third Defendant denies paragraph 3.
4. In answer to paragraph 4, the Third Defendant:
  - 4.1 admits the paragraph; and
  - 4.2 says further that it does not know whether Camden Council has ever owned all of the land comprising the Spring Farm Area.
5. The Third Defendant admits paragraph 5.
6. In answer to paragraph 6, the Third Defendant:

- 6.1 admits sub-paragraph (a);
- 6.2 as to sub-paragraph (b):
- (a) admits that:
    - (i) prior to its liquidation, it carried on the business of providing professional services in the nature of geotechnical engineering services;
    - (ii) it provided such services at times material to these proceedings;
    - (iii) otherwise denies the paragraph; and
    - (iv) says further that, since it was placed in liquidation, it has ceased providing such services, or any services;
  - (b) admits sub-paragraph (c) (on the basis that the entity identified as the Fourth Defendant is SMECTS Holdings Pty Ltd ACN 063 746 823); and
  - (c) denies sub-paragraph (d) (on the basis that the entity identified as the Fourth Defendant is SMECTS Holdings Pty Ltd ACN 063 746 823).

7. [not used]

### **Factual circumstances**

8. In answer to paragraph 8, the Third Defendant:
- 8.1 admits that as at May 2007, Camden Council was the owner of the Council Land; and
  - 8.2 otherwise does not know and does not admit the paragraph.
9. The Third Defendant does not know and does not admit paragraph 9.
10. The Third Defendant admits paragraph 10.
11. In answer to paragraph 11, the Third Defendant:
- 11.1 does not know and does not admit the paragraph; and
  - 11.2 says further that the paragraph is embarrassing, and the paragraph is liable to be struck out.
12. In answer to paragraph 12, the Third Defendant:
- 12.1 says that the Deed was entered into on or about 10 May 2007; and
  - 12.2 otherwise admits the paragraph.
13. In answer to paragraph 13, the Third Defendant:

- 13.1 says that it will rely on the Deed for its full effect; and
- 13.2 otherwise does not admit the paragraph.
14. The Third Defendant does not know and does not admit paragraph 14.
15. In answer to paragraph 15, the Third Defendant:
- 15.1 does not know and does not admit the paragraph; and
- 15.2 says further that the paragraph is embarrassing, and the paragraph is liable to be struck out.
16. In answer to paragraph 16, the Third Defendant:
- 16.1 does not know and does not admit the paragraph; and
- 16.2 says further that the paragraph is embarrassing, and the paragraph is liable to be struck out.
17. In answer to paragraph 17, the Third Defendant:
- 17.1 does not know and does not admit the paragraph; and
- 17.2 says further that the paragraph is embarrassing, and the paragraph is liable to be struck out.
18. The Third Defendant does not know and does not admit paragraph 18.
- 18A. In answer to paragraph 18A, the Third Defendant:
- 18A.1 admits that development approvals DA2013/50 and DA2013/754 were granted;
- 18A.2 says further that:
- (a) DA2013/50 was granted on or around 25 March 2014;
  - (b) DA2013/50 applied to 5 of the 6 lots identified as the Council Land, but did not expressly apply to lot 3/158953;
  - (c) DA2013/754 was granted on or around 13 March 2014; and
  - (d) DA2013/754 did not expressly apply to any of the lots identified as Council Land; and
- 18A.2 otherwise does not know and does not admit paragraph 18A.
- 18B. In answer to paragraph 18B, the Third Defendant:
- 18B.1 admits that development approval DA50/2013 at least initially specified that "*All proposed civil and structural engineering work associated with the development*

*must be designed and constructed strictly in accordance with Camden Council's current Engineering Specifications";*

18B.2 admits that development approval DA754/2013 at least initially specified that *"All proposed civil and structural engineering work associated with the development must be designed and constructed strictly in accordance with... Camden Council's current Engineering Specifications, and... Camden Council's Development Control Plan 2011";*

18B.3 otherwise does not know and does not admit paragraph 18B; and

18B.4 says further that it will rely upon each development approval (as amended or modified) for its full effect.

18C In answer to paragraph 18C, the Third Defendant repeats paragraph 18B above and otherwise admits paragraph 18C.

19. In answer to paragraph 19, the Third Defendant:

19.1 admits that:

(a) on about 21 December 2012, Camden Council issued planning certificates numbered 20122833, 20122829, 20122827, 20122828, 20122834, 20122830, 20122831, 20122832

(b) the planning certificates numbered 20122829, 20122827, 20122828, 20122830, 20122832 were with respect to a lot identified as part of the Council Land (4/620435, 1/158953, 2/158953, 5/620435, and Y/162529 respectively); and

(c) each of those certificates stated to the effect that some or all of the land encompassed by the certificate was zoned General Residential, permitting development for dwelling houses with development consent;

19.2 says further that each planning certificate referred to above including, amongst other things, the following:

*The plan is within a proclaimed Mine Subsidence District under the Mine Subsidence Compensation Act 1961. The approval of the Mine Subsidence Board is required for all subdivision and building, except for certain minor structures. Surface development controls are in place to prevent damage from old, current or future mining. It is strongly recommended prospective purchasers consult with the Mine Subsidence Board regarding mine subsidence and any surface development guidelines. The Board can assist with information about*

*mine subsidence and advise whether existing structures comply with the requirements of the Act. Telephone 02 4677 1967.; and*

- 19.3 otherwise does not know and does not admit the paragraph.
20. The Third Defendant admits paragraph 20.
- 20A. The Third Defendant does not know and does not admit paragraph 20A.
- 20B. The Third Defendant does not admit paragraph 20B.
- 20C. The Third Defendant does not admit paragraph 20C.
- 20D. The Third Defendant admits paragraph 20D.
21. In answer to paragraph 21, the Third Defendant:
- 21.1 admits that:
- (a) it was retained by the relevant project manager to provide certain geotechnical services to CGSF; and
  - (b) those services included geotechnical investigation services;
- 21.2 does not admit that:
- (a) the period of time recorded in the paragraph is accurate; and
  - (b) the purpose recorded in the paragraph was one of the primary purposes of retaining the Third Defendant;
- 21.3 denies that the paragraphs record the terms upon which the Third Defendant was retained, and otherwise denies the paragraph; and
- 21.4 says further that:
- (a) the geotechnical services for which the Third Defendant was engaged included, inter alia, testing and certification at identified field locations; and
  - (b) those geotechnical services included, inter alia, the publication of certain Site Classification Reports.
22. The Third Defendant admits paragraph 22.
- 22A. The Third Defendant does not know and does not admit paragraph 22A.
23. The Third Defendant does not know and does not admit paragraph 23.
24. The Third Defendant does not know and does not admit paragraph 24.
25. In answer to paragraph 25, the Third Defendant:

- 25.1 admits that in about January 2015, it created and issued SCRs with respect to the lots identified in Annexure A to this Defence;
- 25.2 does not admit that it created and issued a SCR with respect to each new lot referred to in the paragraph;
- 25.3 denies that:
- (a) each SCR classified the lot to which it applied as Class M, Class S or Class H1 for the purposes of cl 2.5.3 of Australian Standard 2870-2011; and
  - (b) the SCRs that it created and issued constituted representations to the effect pleaded;
- 25.4 otherwise denies the paragraph; and
- 25.5 says further that each SCR identified the testing conducted that gave rise to the classification.
- 25A. In answer to paragraph 25A, the Third Defendant:
- 25A.1 admits the paragraph; and
- 25A.2 says further that:
- (a) the plaintiff was represented by a solicitor in connection with the Contract of Sale;
  - (b) it was a term of the Contract of Sale that the vendor must do everything reasonable to enable the plaintiff, subject to the rights of any tenant, to have the property inspected to obtain any certificate or report reasonably required, and to apply for any certificate that can be given in respect of the property under legislation or for a copy of any approval, certificate, consent, direction, notice or order in respect of the property given under legislation; and
  - (c) it was a term of the contract that the Contract of Sale was conditional upon the plaintiff entering into a building contract with Firststyle Homes Pty Limited on or by the completion date.
- 25B. The Third Defendant admits paragraph 25B.
26. The Third Defendant does not know and does not admit paragraph 26.
27. The Third Defendant admits paragraph 27.
28. In answer to paragraph 28, the Third Defendant:

- 28.1 does not know and does not admit the paragraph; and
- 28.2 says further that the paragraph is embarrassing, and the paragraph is liable to be struck out.
- 29. In answer to paragraph 29, the Third Defendant:
  - 29.1 does not know and does not admit the paragraph; and
  - 29.2 says further that the paragraph is embarrassing, and the paragraph is liable to be struck out.
- 30. In answer to paragraph 30, the Third Defendant:
  - 30.1 does not know and does not admit the paragraph; and
  - 30.2 says further that the paragraph is embarrassing, and the paragraph is liable to be struck out.
- 31. In answer to paragraph 31, the Third Defendant:
  - 31.1 does not know and does not admit the paragraph; and
  - 31.2 says further that the paragraph is embarrassing, and the paragraph is liable to be struck out.
- 32. In answer to paragraph 32, the Third Defendant:
  - 32.1 does not know and does not admit the paragraph; and
  - 32.2 says further that the paragraph is embarrassing, and the paragraph is liable to be struck out.
- 33. In answer to paragraph 33, the Third Defendant:
  - 33.1 does not know and does not admit the paragraph; and
  - 33.2 says further that the paragraph is embarrassing, and the paragraph is liable to be struck out.
- 34. In answer to paragraph 34, the Third Defendant:
  - 34.1 does not know and does not admit the paragraph; and
  - 34.2 says further that the paragraph is embarrassing, and the paragraph is liable to be struck out.
- 35. The Third Defendant denies paragraph 35.



**Risk of Harm**

35A. The Third Defendant denies paragraph 35A.

**Camden Council**

36. The Third Defendant does not admit paragraph 36.

37. The Third Defendant does not admit paragraph 37.

38. The Third Defendant does not admit paragraph 38.

39. The Third Defendant does not admit paragraph 39.

40. The Third Defendant does not admit paragraph 40.

41. The Third Defendant does not admit paragraph 41.

42. The Third Defendant does not admit paragraph 42.

43. The Third Defendant does not admit paragraph 43.

44. The Third Defendant does not admit paragraph 44.

*Causation and loss*

45. The Third Defendant does not admit paragraph 45.

46. The Third Defendant does not admit paragraph 46.

**CGSF**

*Negligence*

47. The Third Defendant does not admit paragraph 47.

48. The Third Defendant does not admit paragraph 48.

49. The Third Defendant does not admit paragraph 49.

50. The Third Defendant does not admit paragraph 50.

51. The Third Defendant does not admit paragraph 51.

52. The Third Defendant does not admit paragraph 52.

53. The Third Defendant does not admit paragraph 53.

54. The Third Defendant does not admit paragraph 54.

*Australian Consumer Law*

55. The Third Defendant does not admit paragraph 55.

55A. The Third Defendant does not admit paragraph 55A.

55B. The Third Defendant does not admit paragraph 55B.

56. The Third Defendant does not admit paragraph 56.

57. The Third Defendant does not admit paragraph 57.

57A. The Third Defendant does not admit paragraph 57A.

*Causation and loss*

58. The Third Defendant does not admit paragraph 58.

59. The Third Defendant does not admit paragraph 59.

**SMEC TS**

*Negligence*

60. In answer to paragraph 60, the Third Defendant:

60.1 admits that prior to issuing the SCRs, it knew or ought reasonably to have known that each lot in respect of which it had been engaged to issue an SCR was likely to be used for residential building development; and

60.2 otherwise denies the paragraph.

61. The Third Defendant denies paragraph 61.

62. In answer to paragraph 62, the Third Defendant:

62.1 denies the paragraph; and

62.2 says further that the Plaintiff and the Group Members had the capacity to protect themselves from the risk of loss of the kind pleaded in the paragraph, or to avoid, reduce or mitigate the consequences thereof; and

**Particulars**

1. The Plaintiff could have taken one of the steps referred to in paragraphs 1.a to 1.e of the particulars to paragraph 74.2(a) below.

2. Particulars about Group Members may be provided after these proceedings are de-grouped.

63. The Third Defendant denies paragraph 63.

64. [not used]

65. The Third Defendant denies paragraph 65.

66. The Third Defendant denies paragraph 66.

67. In answer to paragraph 67, the Third Defendant:

67.1 admits that a reasonable person in the position of the Third Defendant would have exercised due care and skill in the preparation and issuance of the SCRs (but for the avoidance of any doubt denies that it had any duty to the plaintiff or the Group Members to do so);

67.2 otherwise denies the paragraph; and

67.3 says further that:

(a) the purported reasonable precautions referred to in paragraphs 67(a)-(d) would constitute conduct that goes beyond that which the Third Defendant was engaged to do; and

(b) a reasonable person in the position of the Third Defendant would have exercised due care and skill in providing those services it was engaged to provide (but for the avoidance of any doubt denies that it had any duty to the plaintiff or the Group Members to do so).

68. The Third Defendant does not admit paragraph 68.

69. The Third Defendant denies paragraph 69.

*Australian Consumer Law*

70. In answer to paragraph 70, the Third Defendant:

70.1 admits that in providing those services it was engaged to provide, it was engaged in conduct in trade or commerce for the purposes of the ACL; and

70.2 otherwise denies the paragraph.

70A. The Third Defendant denies paragraph 70A.

70B. In answer to paragraph 70B, the Third Defendant:

70B.1 says that the paragraph is embarrassing as the allegation about uncontrolled fill and the settlement thereof is not adequately pleaded or particularised, and the paragraph is liable to be struck out; and

70B.2 does not admit the paragraph.

71. The Third Defendant denies paragraph 71.

72. The Third Defendant denies paragraph 72.

72A. The Third Defendant denies paragraph 72A.

*Causation and loss*

73. The Third Defendant denies paragraph 73.

74. In answer to paragraph 74, the Third Defendant:

74.1 denies the paragraph; and

74.2 says further that:

- (a) any loss or damage suffered by the plaintiff or Group Members of the kind particularised was caused by the failure of the plaintiff or Group Members to protect their own interests;

#### **Particulars**

1. A reasonable person in the position of the plaintiff would have taken the following reasonable precautions:
  - a. Prior to purchasing the Property, engaging an appropriately qualified engineer to conduct his or her own assessment of the structural adequacy (or otherwise) of the property and its foundations.
  - b. Prior to purchasing the property:
    - i. reviewing the information under the heading "Mine Subsidence" in the s 149 certificate that was attached to the contract for the sale of land; and
    - ii. consulting the Mine Subsidence Board regarding mine subsidence and any surface development guidelines, including by calling the telephone number identified in the s 149 certificate.
  - c. Including in the contract for the sale of land terms that protected himself against the risk of undue settlement, or the consequences thereof, such as promises or warranties about the characteristics of the land and the use to which it could be put (including in respect of land within the Council Land, the Cornish Masterplan Area, or the Spring Farm Area other than the Property).
  - d. Prior to completing his purchase of the Property, engaging an appropriately qualified engineer to conduct his or her own assessment of the structural adequacy (or otherwise) of the property and its foundations.

- e. Prior to constructing a house on the Property, engaging an appropriately qualified engineer to conduct his or her own assessment of the property to ascertain whether or not the Property was appropriate for the building the plaintiff proposed to build.
2. Particulars about Group Members may be provided after these proceedings are de-grouped.
- (b) further or alternatively, if property values in the Spring Farm Area have been diminished by some perception of stigma, such perception is as a result of the plaintiff or his litigation funder (or both), bringing these proceedings, publicising these proceedings, or both;
  - (c) further or alternatively, if it is the case that all properties in the Spring Farm Area have been become stigmatised, then any Group Member who purchased their property after that became the case would not have suffered any loss as a result of any such stigma, because such Group Member would have purchased the property at a price already affected by the stigma; and
  - (d) further or alternatively, if and to the extent that any Group Member has received any compensation from CGSF of the kind referred to in paragraph 87 of CGSF's Commercial List Response, such compensation reduced the amount of any loss or suffered by any such Group Member.

#### **Common Questions of Law or Fact**

75. In answer to paragraph 75, the Third Defendant:

75.1 says that there are likely to be some questions of law or fact that, if answered by the Court in respect of the plaintiff, would also effectively dispose of a question of fact or law in respect of one or more other Group Members, and so would be appropriate for the Court to designate as a common question; and

75.2 denies that any of the questions set out in paragraph 75 are such questions, and otherwise denies the paragraph.

#### **Initial Case Conference – Practice Note SC Gen 17 clause 4.2(e)**

76. The Third Defendant admits paragraph 76.

**Limitations – Plaintiff**

77. In answer to the whole of the plaintiff's action under s 236(1) of the *Australian Consumer Law*, the Third Defendant says that:

77.1 The plaintiff entered into the Contract for Sale on 24 February 2015.

77.2 The plaintiff's cause of action accrued on 24 February 2015.

77.3 The plaintiff's proceedings against the Third Defendant commenced on 1 July 2021.

**Particulars**

1. At the time that the initial Statement of Claim was filed, the Third Defendant was already in liquidation, and proceedings could not be commenced against it without leave: *Corporations Act 2001* (Cth), s 500.
2. Leave was granted to commence the proceedings against the Third Defendant on 1 July 2021. That leave was granted *nunc pro tunc* does not affect the date upon which the proceedings were commenced for the purposes of s 236(2) of the *Australian Consumer Law*, which is a rule of substantive law.

77.4 In the premises, the plaintiff did not commence his action under s 236(1) of the *Australian Consumer Law* at any time within 6 years after the day on which the cause of action accrued.

77.5 In the premises, the plaintiff may not recover any amount in his action under s 236(1) of the *Australian Consumer Law*, by operation of s 236(2) of the *Australian Consumer Law*.

78. In answer to the whole of the plaintiff's action at common law, the Third Defendant says that:

78.1 The plaintiff entered into the Contract for Sale on 24 February 2015.

78.2 The plaintiff's cause of action accrued on 24 February 2015.

78.3 The plaintiff's proceedings against the Third Defendant commenced on 1 July 2021.

**Particulars**

1. At the time that the initial Statement of Claim was filed, the Third Defendant was already in liquidation, and proceedings could not be commenced against it without leave: *Corporations Act 2001* (Cth), s 500.

2. Leave was granted to commence the proceedings against the Third Defendant on 1 July 2021. That leave was granted *nunc pro tunc* does not affect the date upon which the proceedings were commenced for the purposes of s 14(1) of the *Limitation Act 1969* (NSW), which is a rule of substantive law.

78.4 In the premises, the plaintiff's action at common law was brought after the expiration of a limitation period of 6 years running from the date on which the cause of action first accrued to the plaintiff.

78.5 In the premises, the plaintiff's action at common law is not maintainable by operation of s 14(1) of the *Limitation Act 1969* (NSW).

### **Limitations – Group Members**

79. In answer to the whole of the Group Member's action under s 236(1) of the *Australian Consumer Law*, the Third Defendant says that:

79.1 Any Group Member who purchased property who claims to have suffered damage to property or economic loss as a result of damage to residential buildings located on their properties and/or their properties being in a defective condition, because the land owned by them is unsound for building, and who:

- (a) entered into a contract to purchase such property on or prior to 1 July 2015 (being the date 6 years prior to leave being granted for these proceedings to be commenced as against the Third Defendant);
- (b) or alternatively, completed a contract to purchase such property, or otherwise received a transfer of such property, on or prior to 1 July 2015;
- (c) or alternatively, entered into a contract to purchase such property on or prior to 18 December 2014 (being the date 6 years prior to these proceedings being commenced as against the first and second defendants);
- (d) or alternatively, completed a contract to purchase such property, or otherwise received a transfer of such property, on or prior to 18 December 2014;
- (e) or alternatively, otherwise suffered loss or damage prior to 1 July 2015, or alternatively 18 December 2014,

may not recover any amount in an action under s 236(1) of the *Australian Consumer Law*, by operation of s 236(2) of the *Australian Consumer Law*,

because such action was not commenced at any time within 6 years after the day on which the cause of action accrued.

79.2 Any Group Member who claims to have suffered damage to property or economic loss as a result of damage to residential buildings located on their properties and/or their properties being in a defective condition, because the land owned by them is unsound for building, and who:

- (a) entered into a contract to purchase such property on or prior to 1 July 2015 (being the date 6 years prior to leave being granted for these proceedings to be commenced as against the Third Defendant);
- (b) or alternatively, completed a contract to purchase such property, or otherwise received a transfer of such property, on or prior to 1 July 2015;
- (c) or alternatively, entered into a contract to purchase such property on or prior to 18 December 2014 (being the date 6 years prior to these proceedings being commenced as against the first and second defendants),
- (d) or alternatively, completed a contract to purchase such property, or otherwise received a transfer of such property, on or prior to 18 December 2014;
- (e) or alternatively, otherwise suffered loss or damage prior to 1 July 2015, or alternatively 18 December 2014,

does not have a maintainable action at common law, by operation of s 14(1) of the *Limitation Act 1969* (NSW), because such action was brought after the expiration of a limitation period of 6 years running from the date on which the cause of action first accrued.

### **Contributory negligence**

80. In answer to the whole of the plaintiff's claim, if (which is denied) the Third Defendant breached any duty of care by reason of the matters alleged in the Statement of Claim, and (which is also denied) those breaches caused the plaintiff to suffer any damage, and only in that event, then:

80.1 A reasonable person in the position of the plaintiff would have taken the precautions referred to in the particulars to paragraph 74.2(a) above.

80.2 The plaintiff did not take any of those precautions.

80.3 In the premises:



- (a) any damage that the plaintiff alleges he has suffered was suffered at least partly the result of the plaintiff's failure to take reasonable care;
- (b) as a consequence, the plaintiff has suffered damage as the result partly of the plaintiff's failure to take reasonable care (contributory negligence) and partly of the wrong (as defined in section 8 of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) (the **Law Reform Act**) of the Third Defendant;
- (c) by operation of section 9(1)(b) of the Law Reform Act, the damages recoverable by the plaintiff in respect of the wrong are to be reduced to such extent as the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage; and
- (d) the plaintiff's share in the responsibility for the damage is such that the plaintiff's damages should be reduced by 100%.

80.4 Pleadings and particulars in relation to the Third Defendant's contributory negligence defence in respect of Group Members may be provided after these proceedings are de-grouped.

81. In answer to the whole of the plaintiff's claim, if (which is denied) the Third Defendant contravened s 18 of the *Australian Consumer Law* by reason of the matters alleged in the Statement of Claim, and (which is also denied) those breaches caused the plaintiff to suffer any damage, and only in that event, then:

81.1 Paragraphs 80.1 to 80.2 above are repeated.

81.2 In the premises:

- (a) any damage that the plaintiff alleges he has suffered was suffered at least partly the result of the plaintiff's failure to take reasonable care;
- (b) as a consequence, the plaintiff has suffered damage as the result partly of the plaintiff's failure to take reasonable care and partly of the conduct of the Third Defendant (of the kind identified in s 137B(c)(ii) of the *Competition and Consumer Act 2010* (Cth) (**Competition and Consumer Act**);
- (c) the Third Defendant did not intend to cause the loss or damage and did not fraudulently cause the loss or damage;
- (d) by operation of section 137B of the Competition and Consumer Act, the damages recoverable by the plaintiff in respect of the wrong are to be

reduced to such extent as the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage; and

- (e) the plaintiff's share in the responsibility for the damage is such that the plaintiff's damages should be reduced by 100%.

81.3 Pleadings and particulars in relation to the Third Defendant's contributory negligence defence in respect of Group Members may be provided after these proceedings are de-grouped.

### **Proportionate liability**

#### *Introductory*

82. In answer to the whole of the plaintiff's claim, in the event that the Court finds:

82.1 that (which is denied):

- (a) the Third Defendant contravened s 18 of the *Australian Consumer Law* by reason of the matters alleged in the Statement of Claim; and/or
- (b) the Third Defendant breached a duty of care owed to the Plaintiff or Group Members by reason of the matters alleged in the Statement of Claim; and

82.2 that such contravention or breach caused the plaintiff or any Group Member to suffer any loss or damage (which is also denied),

and only in that event, then the Third Defendant makes the allegations in paragraphs 83 and following below, and does so only for the purposes of its proportionate liability defence.

83. The plaintiff's claims against the Third Defendant in respect of contravention of s 18 of the *Australian Consumer Law* are apportionable claims for the purposes of s 87CB(1).

84. The plaintiff's claims against the Third Defendant at general law are apportionable claims for the purposes of s 87CB(1).

85. The Third Defendant repeats paragraphs 1 to 35A.

#### *Camden Council*

86. The Third Defendant repeats paragraphs 36 to 46 of the Statement of Claim as if set out herein.

87. The Third Defendant repeats paragraphs 25 to 34 alleged by CSGF in proceedings 2019/147031 as if set out herein.

88. In the premises, Camden Council is a concurrent wrongdoer with the Third Defendant in respect of the damage or loss the subject of the plaintiff's claim for the purposes of s 34 of the *Civil Liability Act* and s 87CB of the Competition and Consumer Act.
89. In the premises, the Third Defendant's liability in relation to the plaintiff's claim is limited to an amount reflecting the proportion of the damage or loss claimed that the Court considers just having regard to the extent of the Third Defendant's responsibility for the damage or loss.

#### *CGSF*

90. The Third Defendant repeats paragraphs 47 to 59 of the Statement of Claim as if set out herein.
91. In the premises, CGSF is a concurrent wrongdoer with the Third Defendant in respect of the damage or loss the subject of the plaintiff's claim for the purposes of s 34 of the *Civil Liability Act* and s 87CB of the Competition and Consumer Act.
92. In the premises, the Third Defendant's liability in relation to the plaintiff's claim is limited to an amount reflecting the proportion of the damage or loss claimed that the Court considers just having regard to the extent of the Third Defendant's responsibility for the damage or loss.

#### *Landfill Projects NSW Pty Ltd*

##### Negligence

93. On or around 26 October 2010, Landfill Projects NSW Pty Ltd (**Landfill Projects**) contracted with CGSF to provide landfill and associated spread and compaction earthworks, including cut and fill, at a number of lots in the Cornish Masterplan Area, including the lots identified as the Council Land (**Landfill Projects Contract**).
94. Thereafter, Landfill Projects provided landfill and associated spread and compaction earthworks, including cut and fill, at a number of lots in the Cornish Masterplan Area, including the lots identified as the Council Land (the **Fill Works**).
95. At the time it carried out the Fill Works, Landfill Projects knew or ought to have known that the Cornish Masterplan Area, including the Council Land, was likely to be used for residential building development.
96. Paragraph 62 of the Statement of Claim is repeated as if set out in full herein, save that the reference to SMEC TS be substituted with a reference to Landfill Projects.
97. Paragraph 63 of the Statement of Claim is repeated as if set out in full herein, save that the reference to SMEC TS be substituted with a reference to Landfill Projects.

98. At all relevant times the Risk of Harm was:

98.1 foreseeable to Landfill Projects; and

98.2 not insignificant.

#### **Particulars**

1. Landfill Projects, in conducting businesses providing works in the nature of the Fill Works, were or ought to have been aware of:

a. the significant risks of damage to buildings constructed on land that was unsound for building; and

b. the potential adverse effect on residential property value where the land was or might be perceived to be unsound for building.

99. As a result of the matters pleaded and particulars in paragraphs 93 to 98 above:

99.1 there was a significant risk of harm if reasonable precautions were not taken against the Risk of Harm;

99.2 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;

99.3 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

99.4 the social utility of Landfill Projects' relevant activities was not so great as to have impeded it from taking reasonable precautions against the Risk of Harm.

100. As a result of the matters pleaded and particulars in paragraphs 93 to 99 above, a reasonable person in the position of Landfill Projects would have taken the following precautions against the materialisation of the Risk of Harm:

100.1 properly conducting the Fill Works necessary to make the Council Land, and certain other parts of the Cornish Masterplan Area, suitable for residential building development;

100.2 taking reasonable steps to ensure that any material used for the Fill Works necessary to make the Council Land, and certain other parts of the Cornish Masterplan Area, suitable for residential building development would itself be suitable; and

100.3 exercising due care and skill in carrying out the Fill Works,  
(together and separately, the **Landfill Projects Reasonable Precautions**).

101. Landfill Projects failed to take any of the Landfill Projects Reasonable Precautions.

#### Australian Consumer Law

102. Paragraph 70 of the Statement of Claim is repeated as if set out in full herein, save that the reference to SMEC TS be substituted with a reference to Landfill Projects.

103. By entering into the Landfill Projects Contract, performing or purporting to perform the Fill Works, and accepting payment for performing the Fill Works, Landfill Projects represented to the Plaintiffs and members of the public who are purchasers or potential purchasers of residential lots in the Cornish Masterplan Area (including some Group Members) that their performance of the Fill Works was adequate to enable the land upon which the Fill Works was undertaken to be the subject of residential development (**Landfill Projects representation**).

104. Contrary to the Landfill Projects Representation, by reason of the use of uncontrolled fill and the subsequent settlement, or risk of settlement, of that uncontrolled fill, some or all of the residential lots located in the Cornish Masterplan Area are unsuitable for residential building.

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

106. The Plaintiff and some Group Members relied on the Landfill Projects representation, and the conduct of Landfill Projects pleaded in paragraph 105 above, in purchasing residential lots in the Cornish Masterplan Area.

#### Causation and loss

107. Had Landfill Projects not breached its duty of care and s 18 of the ACL:

107.1 paragraphs 58(a)-(f) of the Statement of Claim are repeated as if set out herein.

108. In the circumstances the Plaintiff and the Group Members have suffered loss and damage as a result of Landfill Works' breach of duty of care and breach of s 18 of the ACL.

#### **Particulars**

1. The particulars to paragraph 59 are repeated as if set out herein.

Application of proportionate liability legislation

109. In the premises, Landfill Projects is a concurrent wrongdoer with the Third Defendant in respect of the damage or loss the subject of the plaintiff's claim for the purposes of s 34 of the *Civil Liability Act* and s 87CB of the Competition and Consumer Act.
110. In the premises, the Third Defendant's liability in relation to the plaintiff's claim is limited to an amount reflecting the proportion of the damage or loss claimed that the Court considers just having regard to the extent of the Third Defendant's responsibility for the damage or loss.

**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 defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature



Capacity

Andrew Moore solicitor for the Defendant

Date of signature

21 September 2022

**AFFIDAVIT VERIFYING**

Name	<a href="#">Deponent Name</a>
Address	<a href="#">Deponent address</a>
Occupation	<a href="#">Deponent Position</a>
Date	<a href="#">Deponent date</a>

I, [Deponent Name](#) say on oath/affirm

111. I am the [Individual or Organisation](#).
112. I believe that the allegations of fact contained in the defence are true.
113. I believe that the allegations of fact that are denied in the defence are untrue.
114. After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

<a href="#">Sworn/Affirmed at</a>	<a href="#">Place Sworn Affirmed</a>
-----------------------------------	--------------------------------------

Signature of deponent

Name of witness

[Witness name](#)

Address of witness

[Witness address](#)

Capacity of witness

[Witness Capacity](#)

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

**Witness Certification - Facial**

[Affidavit ID Documents](#)

Identification document relied on (may be original or certified copy) <sup>†</sup>

Signature of witness

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

[\* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

**Annexure A**

Lots 4001-4020, Stage 40, Spring Farm (classified M)

Lots 4101-4133, Stage 41, Spring Farm (classified M)

Lots 4201-4210, Stage 42, Spring Farm (classified S)

Lots 4211-4215, Stage 42, Spring Farm (classified M)

Lots 4216-4219, Stage 42, Spring Farm (classified H1)

Lots 4220-4254, Stage 42, Spring Farm (classified M)

Lots 4301-4311, Stage 43, Spring Farm (classified M)

Lot 4312, Stage 43, Spring Farm (classified H1)

Lot 4313, Stage 43, Spring Farm (classified M)

Lot 4314, Stage 43, Spring Farm (classified H1)

Lot 4315, Stage 43, Spring Farm (classified M)

Lot 4316, Stage 43, Spring Farm (classified H1)

Lots 4317-4326, Stage 43, Spring Farm (classified M)



Lots 4327-4328, Stage 43, Spring Farm (classified S)

Lots 4329-4332, Stage 43, Spring Farm (classified M)

Lots 4333-4334, Stage 43, Spring Farm (classified S)

Lots 4335-4344, Stage 43, Spring Farm (classified M)

Lots 4345-4346, Stage 43, Spring Farm (classified S)

Lots 4347-4348, Stage 43, Spring Farm (classified A)

Lots 4349-4352, Stage 43, Spring Farm (classified S)

Lots 4401-4420, Stage 44, Spring Farm (classified S)