

DEFENCE

COURT DETAILS

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

TITLE OF PROCEEDINGS

Plaintiff	Danny Marielle Moussa
First defendant	Camden Council
Number of defendants (if more than two)	4

FILING DETAILS

Filed for	SMECTS Holdings Pty Ltd , fourth defendant
Filed in relation to	Plaintiff's claim
Legal representative	Marcus McCarthy, Nexus Lawyers
Legal representative reference	MBH: 18182
Contact name and telephone	Michael Holmes, (02) 9016 0141
Contact email	mbh@nexuslawyers.com.au

PLEADINGS AND PARTICULARS

In response to the plaintiff's Amended Statement of Claim filed 17 September 2021, the fourth defendant (**SMECTS Holdings**) says as follows:

The Parties

- 1 SMECTS Holdings does not admit paragraph 1.
- 2 SMECTS Holdings does not admit paragraph 2.
- 3 SMECTS Holdings does not admit paragraph 3.
- 4 In answer to paragraph 4, SMECTS Holdings:
 - (a) admits paragraph 4(a), (c) and (d);
 - (b) does not admit paragraph 4(b).

5 In answer to paragraph 5, SMECTS Holdings:

- (a) admits paragraph 5(a);
- (b) does not admit paragraphs 5(b), (c) and (d).

6 In answer to paragraph 6, SMECTS Holdings:

- (a) admits paragraphs 6(a), (b) and (c);
- (b) admits that the directors of SMECTS Holdings were also directors of SMEC TS at all material times until 30 September 2020;
- (c) says that:
 - (i) SMEC TS is and was a separate legal entity from SMECTS Holdings;
 - (ii) SMECTS Holdings was a holding company that did not have any operational functions or employ any staff;
 - (iii) SMEC TS was the entity responsible providing geotechnical consulting services and employed all of the technical staff;
 - (iv) SMEC TS was the entity that held the National Association of Testing Authorities (**NATA**) accreditation to carry out relevant testing, and SMECTS Holdings did not hold this accreditation;
 - (v) on around 30 September 2020, SMECTS Holdings was acquired by STS Commercial Pty Ltd (ACN 644 700 443) and different directors were appointed;
- (d) otherwise denies the paragraph.

7 In answer to paragraph 7, SMECTS Holdings:

- (a) admits paragraphs 7(a) and (c);
- (b) repeats paragraph 6(b) and 6(c) above;
- (c) otherwise denies the paragraph.

Factual circumstances

8 SMECTS Holdings does not admit paragraph 8.

9 SMECTS Holdings does not admit paragraph 9.

10 In answer to paragraph 10, SMECTS Holdings:

- (a) admits that the *Camden Local Environment Plan No 121 – Spring Farm* contemplated that some parts of the area the subject to plan would involve residential building development;

(b) otherwise does not admit the paragraph.

11 SMECTS Holdings does not admit paragraph 11.

12 SMECTS Holdings does not admit paragraph 12.

13 SMECTS Holdings does not admit paragraph 13.

14 SMECTS Holdings does not admit paragraph 14.

15 SMECTS Holdings does not admit paragraph 15.

16 SMECTS Holdings does not admit paragraph 16.

17 SMECTS Holdings does not admit paragraph 17.

18 SMECTS Holdings does not admit paragraph 18.

18A SMECTS Holdings does not admit paragraph 18A.

18B SMECTS Holdings does not admit paragraph 18B.

18C SMECTS Holdings does not admit paragraph 18C.

19 SMECTS Holdings does not admit paragraph 19.

20 SMECTS Holdings does not admit paragraph 20.

20A *[not used]*

20B SMECTS Holdings admits paragraph 20B.

20C SMECTS Holdings does not admit paragraph 20C.

20D In answer to paragraph 20D, SMECTS Holdings:

(a) denies the paragraph;

(b) says that s 109J of the EPAA (as in force) provided that a subdivision certificate must not be issued for a subdivision unless the applicant has complied with all conditions of any development consent that, by its terms, are required to be complied with before a subdivision certificate may be issued in relation to the plan of subdivision.

21 In answer to paragraph 21, SMECTS Holdings:

(a) denies that it was engaged by CGSF to perform any services in respect of the Cornish Masterplan Area;

(b) otherwise does not admit the paragraph.

22 SMECTS Holdings does not admit paragraph 22.

22A SMECTS Holdings does not admit paragraph 22A.

- 23 SMECTS Holdings does not admit paragraph 23.
- 24 SMECTS Holdings does not admit paragraph 24.
- 25 In answer to paragraph 25, SMECTS Holdings:
- (a) denies it issued any SCRs in respect of any lots;
 - (b) otherwise does not admit the paragraph.
- 25A SMECTS Holdings does not admit paragraph 25A.
- 25B SMECTS Holdings does not admit paragraph 25B.
- 26 SMECTS Holdings does not admit paragraph 26.
- 27 SMECTS Holdings does not admit paragraph 27.
- 28 SMECTS Holdings does not admit paragraph 28.
- 29 SMECTS Holdings does not admit paragraph 29.
- 30 SMECTS Holdings does not admit paragraph 30.
- 31 SMECTS Holdings does not admit paragraph 31.
- 32 SMECTS Holdings does not admit paragraph 32.
- 33 SMECTS Holdings does not admit paragraph 33.
- 34 SMECTS Holdings does not admit paragraph 34.
- 35 SMECTS Holdings does not admit paragraph 35.

Risk of Harm

- 35A SMECTS Holdings denies paragraph 35A.

Camden Council

- 36 SMECTS Holdings does not admit paragraph 36.
- 37 SMECTS Holdings does not admit paragraph 37.
- 38 SMECTS Holdings does not admit paragraph 38.
- 39 SMECTS Holdings does not admit paragraph 39.
- 40 SMECTS Holdings does not admit paragraph 40.
- 41 SMECTS Holdings does not admit paragraph 41.
- 42 SMECTS Holdings does not admit paragraph 42.
- 43 SMECTS Holdings does not admit paragraph 43.
- 44 SMECTS Holdings does not admit paragraph 44.

45 SMECTS Holdings does not admit paragraph 45.

46 SMECTS Holdings does not admit paragraph 46.

CGSF

47 SMECTS Holdings does not admit paragraph 47.

48 SMECTS Holdings does not admit paragraph 48.

49 SMECTS Holdings does not admit paragraph 49.

50 SMECTS Holdings does not admit paragraph 50.

51 SMECTS Holdings does not admit paragraph 51.

52 SMECTS Holdings does not admit paragraph 52.

53 SMECTS Holdings does not admit paragraph 53.

54 SMECTS Holdings does not admit paragraph 54.

55 SMECTS Holdings does not admit paragraph 55.

55A SMECTS Holdings does not admit paragraph 55A.

55B SMECTS Holdings does not admit paragraph 55B.

55C SMECTS Holdings does not admit paragraph 55C.

56 SMECTS Holdings does not admit paragraph 56.

57 SMECTS Holdings does not admit paragraph 57.

57A SMECTS Holdings does not admit paragraph 57A.

58 SMECTS Holdings does not admit paragraph 58.

59 SMECTS Holdings does not admit paragraph 59.

SMEC TS and SMECTS Holdings

Alleged negligence

60 SMECTS Holdings denies paragraph 60.

61 In answer to paragraph 61, SMECTS Holdings:

(a) denies the paragraph;

(b) says further that it did not perform any geotechnical investigation works on the Cornish Masterplan Area, the Council Land or the new lots.

62 In answer to paragraph 62, SMECTS Holdings:

(a) denies the paragraph;

(b) says further that SMECTS Holdings was only a holding company and was not in any position to take precautions against the identified Risk of Harm.

63 SMECTS Holdings denies paragraph 63.

64 SMECTS Holdings denies paragraph 64.

65 SMECTS Holdings denies paragraph 65.

66 SMECTS Holdings denies paragraph 66.

67 In answer to paragraph 67, SMECTS Holdings:

(a) denies the paragraph;

(b) says that it was not in a position to take any of the SMEC Reasonable Precautions pleaded in that paragraph as:

(i) it was a holding company with no employees;

(ii) it was not engaged to provide any geotechnical investigations or remedial earthwork support services in relation to the relevant land;

(iii) it did not hold the relevant NATA accreditation to undertake geotechnical work in relation to the relevant land;

(iv) it did not prepare or issue the SCRs.

68 SMECTS Holdings denies paragraph 68.

69 SMECTS Holdings denies paragraph 69.

Australian Consumer Law

70 SMECTS Holdings denies paragraph 70.

70A In answer to paragraph 70A, SMECTS Holdings:

(a) denies the paragraph;

(b) says further that it did not prepare or issue the SCRs.

70B SMECTS Holdings denies paragraph 70B.

71 SMECTS Holdings denies paragraph 71.

72 SMECTS Holdings denies paragraph 72.

72A SMECTS Holdings denies paragraph 72A.

Causation and loss

73 SMECTS Holdings denies paragraph 73.

74 SMECTS Holdings denies paragraph 74.

Common Questions of law and fact

75 SMECTS Holdings does not admit paragraph 75.

Limitations

In further answer to the plaintiff's claim:

76 Insofar as the plaintiff alleges that SMECTS Holdings is liable to group members who acquired their properties and/or suffered loss on or before six years prior to 18 December 2020, then those claims are not maintainable by reason of s 14 of the *Limitation Act 1969* (NSW) and s 236(2) of the *Australian Consumer Law*.

Proportionate liability defence

In further answer to the plaintiff's claim:

77 If (which is denied) SMECTS Holdings is found liable to the plaintiff or group members by reason of the allegations made by the plaintiff then:

(a) the plaintiff's and group members' claim:

(i) for economic loss and/or damage for negligence; and

(ii) for damages caused by misleading or deceptive conduct in contravention of s 18 of the *Australian Consumer Law*,

(the **Apportionable Claims**),

are apportionable claims within the meaning of s 34 of the *Civil Liability Act 2002* (NSW) and s 87CB of the *Competition and Consumer Act 2010* (Cth), respectively;

(b) for the reasons set out below, each of:

(i) Camden Council;

(ii) CGSF; and

(iii) SMEC TS,

are concurrent wrongdoers with respect to the Apportionable Claims within the meaning of s 34 of the *Civil Liability Act 2002* (NSW) and s 87CB of the *Competition and Consumer Act 2010* (Cth);

(c) pursuant to s 35 of the *Civil Liability Act 2002* (NSW) and s 87CD of the *Competition and Consumer Act 2010* (Cth):

(i) SMECTS Holdings' liability in respect of the Apportionable Claims is limited to an amount reflecting the proportion of damage or loss that

the Court considers just having regard to the extent of SMECTS Holdings responsibility for that loss;

- (ii) any judgment against SMECTS Holdings is not to be for more than that amount.

78 For the purposes of this apportionment defence only (and without admission), SMECTS Holdings:

- (a) repeats [35A]-[46] of the Amended Statement of Claim;
- (b) says that the plaintiff and group members' loss and damage (if any) has been caused in whole or in part by Camden Council's negligence.

79 For the purposes of this apportionment defence only (and without admission), SMECTS Holdings:

- (a) repeats [35A], [47]-[59] of the Amended Statement of Claim;
- (b) says that the plaintiff and group members' loss and damage (if any) has been caused in whole or in part by CGSF's negligence and/or contraventions of s 18 of the *Australian Consumer Law*.

80 For the purposes of this apportionment defence only (and without admission), SMECTS Holdings:

- (a) repeats [35A], [60]-[74] of the Amended Statement of Claim insofar as they concern SMECTS;
- (b) says that the plaintiff and group members' loss and damage (if any) has been caused in whole or in part by SMECTS' negligence and/or contraventions of s 18 of the *Australian Consumer Law*.

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

Date of signature


Solicitor for the Fourth Defendant

5 November 2021

AFFIDAVIT VERIFYING

Name Vagner Jordan
 Address 6.01, 55 Miller St, Pyrmont, NSW
 Occupation Director
 Date 5 November 2021

I say on oath:

- 1 I am a director of the fourth defendant in these proceedings.
- 2 I believe that the allegations of fact contained in the defence are true.
- 3 I believe that the allegations of fact that are denied in the defence are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

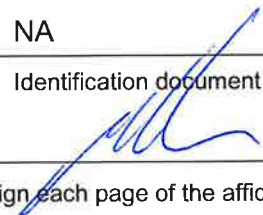
SWORN at Sydney 
 Signature of deponent _____
 Name of witness Michael Holmes
 Address of witness 9/123 Pitt St, Sydney, NSW
 Capacity of witness Solicitor

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. [OR, delete whichever option is inapplicable]
~~#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.*~~
- 2 #I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable]
~~#I have confirmed the deponent's identity using the following identification document:~~

NA

Identification document relied on (may be original or certified copy) †

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.]

#FURTHER DETAILS ABOUT FILING PARTY**Filing party**

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