Form 7A (version 5)
UCPR 14.3

DEFENCE TO SECOND FURTHER AMENDED STATEMENT OF CLAIM

Filed pursuant to UCPR, r 14.3(1).

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**
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**

FILING DETAILS	
Filed for	**SMEC Testing Services Pty Ltd (in liquidation) (ACN 101 164 792)**, Third Defendant
Legal representative	Andrew Moore Wotton + Kearney L26/85 Castlereagh St, Sydney NSW 2000
Legal representative reference	ASM 9002776 MTS
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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.*

D. *Underline indicates an insertion and strikethrough indicates an omission, pursuant to Uniform Civil Procedure Rules 2005 (NSW) r 19.5(2).*

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. In answer to paragraph 5, ~~T~~ the Third Defendant:

   5.1 admits the paragraph; and

   5.2 says further that, for the avoidance of any doubt, it does not plead to the particulars appended to 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~~ denies 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~~ denies 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~~ denies 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~~ denies 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; and

(c) the paragraph is embarrassing, and has a tendency to cause prejudice, embarrassment or delay in the proceedings, and is liable to be struck out.

22. The Third Defendant admits paragraph 22.

22A. The Third Defendant does not know and does not admit paragraph 22A.

23. In answer to paragraph 23, the Third Defendant:

23.1 denies the paragraph; and

23.2 says further that the paragraph is embarrassing, and the paragraph is liable to be struck out.

~~The Third Defendant does not know and does not admit paragraph 23.~~

24. In answer to paragraph 24, the Third Defendant:

24.1 denies the paragraph; and

24.2 says further that the paragraph is embarrassing, and the paragraph is liable to be struck out.

~~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:

(a) each SCR identified the testing conducted that gave rise to the classification; and

(b) the paragraph is embarrassing, and the paragraph is liable to be struck out.

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 Firstyle 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~~ denies 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~~ denies 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~~ denies 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~~ denies 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~~ denies the paragraph; and

34.2 says further that the paragraph is embarrassing, and the paragraph is liable to be struck out.

35. In answer to paragraph 35, ~~T~~the Third Defendant:

35.1 denies the paragraph; and

35.2 says further that the paragraph is embarrassing, and the paragraph is liable to be struck out~~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.

Particulars

1. On or around 29 July 2015, Firstyle Homes Pty Ltd (**Firstyle Homes**) entered into a contract, recorded in writing, with the Plaintiff to construct a dwelling on the Property (**Construction Contract**).
2. The Plaintiff was the beneficiary of a warranty from Firstyle Homes that the building works to be carried out, completed and handed over to the owner in accordance with the Construction Contract as shown in the contract documents (as defined) (including any variations) would result, to the extent that those works were conducted, in a dwelling that is reasonably fit for occupation as a dwelling (the **Firstyle Fitness for Purpose Warranty**).
3. The Plaintiff was the beneficiary of a warranty from Firstyle Homes that the building works (as defined) would be performed with due care and skill and in accordance with the plans and the specifications attached to the Construction Contract (the **Firstyle Due Care and Skill Warranty**).
4. The Firstyle Fitness for Purpose Warranty and the Firstyle Due Care and Skill Warranty were mandated by s 18B of the *Home Building Act 1989* (NSW) (the **Home Building Act**). The protection afforded by those statutory warranties was part of a statutory scheme that had the effect of allocating the risks associated with (amongst other things) residential dwellings that were not fit for purpose, and with failures to perform building

works with due care and skill, in new residential dwellings to (amongst other people) the builders of those dwellings and requiring those builders to obtain insurance so that claims for breach of that statutory warranty (and others) could be satisfied.

5. Further, the Plaintiff could have taken one of the steps referred to in paragraphs 1.a to 1.g of the particulars to paragraph 73.2(b) below.

6. By operation of ss 18B(1)(a), 18B(1)(e), 18B(2), 18C(2), and 18D of the Home Building Act, some of the Group Members had the benefit of statutory warranties given by holders of contractor licences (within the meaning of s 18B of the Home Building Act) who did residential building work, or given by developers (within the meaning of s 3A of the Home Building Act). The content of those statutory warranties was equivalent to that of the Firstyle Fitness for Purpose Warranty and the Firstyle Due Care and Skill Warranty.

7. Further particulars about Group Members may be provided after these proceedings are de-grouped.

63. The Third Defendant denies paragraph 63.

64. The Third Defendant denies paragraph 64.

65. The Third Defendant denies paragraph 65.

66. In answer to paragraph 66, the Third Defendant:

66.1 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);

66.2 otherwise denies the paragraph; and

66.3 says further that:

(a) the purported reasonable precautions referred to in paragraphs 66(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).

67. The Third Defendant does not admit paragraph 67.

68. The Third Defendant denies paragraph 68.

Australian Consumer Law

69. In answer to paragraph 69, the Third Defendant:

69.1 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

69.2 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.

70. The Third Defendant denies paragraph 70.

71. The Third Defendant denies paragraph 71.

72A. In answer to paragraph 72A, the Third Defendant:

72A.1 denies the paragraph ~~72A~~; and

72A.2 says further that:

(a) the allegation that the preparation and issuing of SCRs which characterised the land other than as Class P, in accordance with clause 2.5.3 of the Australian Standard 2870, was required for the land to be subdivided, is embarrassing, does not disclose a reasonable cause of action appropriate to the nature of the pleading, has a tendency to cause prejudice, embarrassment or delay in the proceedings, and is liable to be struck out;

Particulars

1. The Third Defendant has sought, on multiple occasions, particulars of this allegation. The particulars provided do not reasonably support this allegation.

(b) the allegation that the Plaintiff and the Group Members relied on the alleged representations, other than by reason of the matter alleged in

paragraph 72A.2(a) above, is embarrassing, has a tendency to cause prejudice, embarrassment or delay in the proceedings, and is liable to be struck out; and

(c) the footing system for the dwelling constructed on the Property was designed for a Class P site in accordance with Australian Standard 2870 – 2011.

Particulars

1. The Slab Plan prepared by Secta Consulting Engineers Pty Ltd, a copy of which is at page 493 to Exhibit DMM-1 to the witness statement of the Plaintiff dated 7 July 2022, records (amongst other things):

SITE CLASSIFICATION:

THE FOOTING SYSTEM HAS BEEN DESIGNED FOR A CLASS P SITE IN ACCORDANCE WITH AS 2870 - 2011.

Causation and loss

72. The Third Defendant denies paragraph 72.

73. In answer to paragraph 73, the Third Defendant:

73.1 denies the paragraph; and

73.2 says further that:

(a) paragraph 72A.2 above is repeated, and the allegations in paragraph 72(a1) and 72(f) are embarrassing, do not disclose a reasonable cause of action appropriate to the nature of the pleading, have a tendency to cause prejudice, embarrassment or delay in the proceedings, and are liable to be struck out;

(b) 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.

f. If and when it became apparent to the Plaintiff that the dwelling on the Property was not reasonably fit for occupation as a dwelling – making a claim against Firstyle Homes for breach of the Firstyle Fitness for Purpose Warranty.

g. If and when it became apparent to the Plaintiff that the building works had not been performed with due care and

skill and in accordance with the plans and the specifications attached to the Construction Contract – making a claim against Firstyle Homes for breach of the Firstyle Due Care and Skill Warranty.

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

(c) 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;

(d) 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

(e) 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

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

74.1 says that:

(a) 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 common questions; and

(b) there may also be some questions of law or fact that are common to Group Members but do not arise on the plaintiff's case, and which may be appropriate for the Court to designate as common questions, or issues of commonality, subject to there being appropriate directions

providing for sub-group members or sample group members and for the alleged facts underlying such questions or issues to be pleaded; and

74.2 denies that any of the questions set out in paragraph 74 are such questions, and otherwise denies the paragraph.

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

75. The Third Defendant admits paragraph 75.

Limitations – Plaintiff

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

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

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

76.3 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.

76.4 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.

76.5 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*.

77. In answer to the whole of the plaintiff's action at common 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 14(1) of the *Limitation Act 1969* (NSW), which is a rule of substantive law.

77.4 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.

77.5 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

78. 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:

78.1 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.

78.2 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

79. 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:

79.1 A reasonable person in the position of the plaintiff would have taken the precautions referred to in the particulars to paragraph 73.2(b) above.

79.2 The plaintiff did not take any of those precautions.

79.3 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%.

79.4 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.

80. 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:

80.1 Paragraphs 79.1 to 79.2 above are repeated.

80.2 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%.

80.3 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

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

81.1 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

81.2 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 82 and following below, and does so only for the purposes of its proportionate liability defence.

82. 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).

83. The plaintiff's claims against the Third Defendant at general law are apportionable claims for the purposes of the *Civil Liability Act*.

84. The Third Defendant repeats paragraphs 1 to 35A of the Statement of Claim as if set out herein.

Camden Council

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

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

87. 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.

88. 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

89. The Third Defendant repeats paragraphs 47 to 59 of the Statement of Claim as if set out herein.

90. 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.

91. 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

92. 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**).

93. 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**).

94. 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.

95A. At the time it carried out the Fill Works, Landfill Projects knew or ought to have known of the Risk of Harm.

95. 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.

96. 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.

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

97.1 foreseeable to Landfill Projects; and

97.2 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.

98. As a result of the matters pleaded and particulars in paragraphs 92 to 97 above:

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

98.2 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;

98.3 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

98.4 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.

99. As a result of the matters pleaded and particulars in paragraphs 92 to 98 above, a reasonable person in the position of Landfill Projects would have taken the following precautions against the materialisation of the Risk of Harm:

    99.1 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;

    99.2 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

    99.3 exercising due care and skill in carrying out the Fill Works,

    (together and separately, the **Landfill Projects Reasonable Precautions**).

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

Australian Consumer Law

101. Paragraph 69 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.

102. 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**).

103. 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.

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

105. The Plaintiff and some Group Members relied on the Landfill Projects representation, and the conduct of Landfill Projects pleaded in paragraph 104 above, in purchasing residential lots in the Cornish Masterplan Area.

Causation and loss

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

106.1 paragraphs 72(a)-(f) of the Statement of Claim are repeated as if set out herein.

107. 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 73 of the Statement of Claim are repeated as if set out herein.

Application of proportionate liability legislation

108. 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.

109. 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.

Firstyle Homes

110. On or around 29 July 2015, the Plaintiff and Firstyle Homes entered into the Construction Contract.

111. The Firstyle Due Care and Skill Warranty was a term of the Construction Contract.

Particulars

1. The term was express: see cl 39 of the document on page 394 of Exhibit DMM-1 to the Plaintiff's witness statement dated 7 July 2022.
2. The term was implied by law: see s 18B(1)(a) of the Home Building Act.

112. Secta Consulting Engineers Pty Ltd (**Secta Engineers**) prepared the structural design for the dwelling to be constructed pursuant to the Construction Contract (**Structural Design**).

Particulars

1. The Structural Design was in writing: see pages 492 to 500 of Exhibit DMM-1 to the Plaintiff's witness statement dated 7 July 2022.

113. The Structural Design included 'Foundation Notes', including the following:

113.1 "*2...Foundation material shall be approved by a suitably qualified engineer before commencing footing construction*"

113.2 "*3. Where soft spots (bearing capacity of less than 100 kPal) are encountered by natural foundation material or building platform, or where fill exceeds 300mm then additional piers to suitable founding material may be required as directed by the engineer at the time of construction.*"

Particulars

1. See Drawing Number E-00 Rev A dated 8 July 2015: page 492 of Exhibit DMM-1 to the Plaintiff's witness statement dated 7 July 2022.

114. By reason of the matters pleaded in paragraphs 111 to 113 above, a reasonable person in the position of Firstyle Homes would have taken the precaution of having the foundation material approved by a suitably qualified engineer before commencing footing construction.

115. The foundation material was not approved by a suitably qualified engineer before footing construction.

116. By reason of the matters pleaded in paragraphs 111 to 115 above, Firstyle Homes breached the Firstyle Due Care and Skill Warranty.

117. The fill at the Property underlying the dwelling constructed by Firstyle Homes exceeded 300mm.

118. By reason of the matters pleaded in paragraphs 111 to 113 and 117 above, a reasonable person in the position of Firstyle Homes would have taken the precaution of requesting a suitably qualified engineer to consider whether additional piers to suitable foundation material ought to be included in the design of the dwelling constructed by Firstyle Homes on the Property.

119. Firstyle Homes did not request a suitably qualified engineer to consider whether additional piers to suitable foundation material ought to be included in the design of the dwelling constructed by Firstyle Homes on the Property.

120. By reason of the matters pleaded in paragraphs 111 to 113 and 117 to 119 above, Firstyle Homes breached the Firstyle Due Care and Skill Warranty.

121. By reason of Firstyle Homes' breach of the Firstyle Due Care and Skill Warranty, the plaintiff has suffered loss or damage.

Particulars

1. Had the Firstyle Due Care and Skill Warranty been true, then one or both of the following would have occurred:
    a. the foundation material would have been approved by a suitably qualified engineer before commencing footing construction;
    b. Firstyle Homes would have requested a suitably qualified engineer consider whether additional piers to suitable foundation material ought to be included in the design of the dwelling constructed by Firstyle Homes on the Property because the fill exceeded 300mm
2. Had the foundation material been approved by a suitably qualified engineer before commencing footing construction, or had Firstyle Homes requested a suitably qualified engineer consider whether additional piers to suitable foundation material ought to be included in the design of the dwelling constructed by Firstyle Homes on the Property because the fill exceeded 300mm, that engineer would have identified that there was at least 1500mm of fill underlying the dwelling.
3. Had that occurred, the engineer would have identified to Firstyle Homes that one or more of the following should occur:
    a. the piers featured in the Structural Design would need to be deeper (and perhaps also more numerous) than as then set out in the Structural Design;
    b. the fill would need to be compacted or otherwise treated.
4. As a consequence of that identification, a dwelling would have been constructed on the Property that was materially free from the structural damage (as defined in paragraph 30 of the Statement of Claim).

122. In the premises, the plaintiff is entitled to recover damages for breach of warranty from Firstyle Homes, such damages to be calculated such that they would place the Plaintiff in the position in which he would have been had the Firstyle Due Care and Skill Warranty been true (so far as it is possible for damages to do so).

123. The Firstyle Fitness for Purpose Warranty was a term of the Construction Contract.

Particulars

1. The term was express: see cl 39 of the document on page 394 of Exhibit DMM-1 to the Plaintiff's witness statement dated 7 July 2022.

2. The term was implied by law: see s 18B(1)(e) of the Home Building Act.

124. In the premises of paragraphs 1 to 35 of the Statement of Claim, Firstyle Homes breached the Firstyle Fitness for Purpose Warranty.

125. By reason of Firstyle Homes' breach of the Firstyle Fitness for Purpose Warranty, the plaintiff suffered loss or damage.

Particulars

1. Had the Firstyle Fitness for Purpose Warranty been true, a dwelling would have been constructed on the Property that was materially free from the structural damage (as defined in paragraph 30 of the Statement of Claim).
2. Further or alternatively, had Firstyle Homes complied with the Firstyle Fitness for Purpose Warranty, the Plaintiff would have constructed a dwelling on the Property that was materially free from any structural damage (as defined in paragraph 30 of the Statement of Claim), or alternatively the Plaintiff would have received indemnity against any loss or damage he suffered as a result of any structural damage (as defined in paragraph 30 of the Statement of Claim).

126. In the premises, the plaintiff is entitled to recover damages for breach of warranty from Firstyle Homes, such damages to be calculated such that they would place the Plaintiff in the position in which he would have been had the Firstyle Fitness for Purpose Warranty been true (so far as it is possible for damages to do so).

127. In the premises, Firstyle Homes 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.

128. 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.

Secta Engineers

129. On or before 8 July 2015, Secta Engineers entered into a contract to do residential building work with Firstyle Homes (**Engineering Contract**).

130. The preparation of the Structural Design was work done pursuant to the Engineering Contract.

131. It was a term of the Engineering Contract that the work done pursuant to the Engineering Contract will be done with due care and skill and in accordance with the plans and specifications set out in the contract (**Secta Due Care and Skill Warranty**).

Particulars

1. The term was implied by law: see s 18B(1)(e) of the Home Building Act.

132. The Plaintiff has the same rights that Firstyle Homes has in respect of the Secta Due Care and Skill Warranty.

Particulars

1. Section 18D(1A) of the Home Building Act and (if the Engineering Contract was entered into prior to the Plaintiff owning the Property) s 18D(1) of the Home Building Act.

133. At the time it prepared the Structural Design, Secta Engineers knew or ought reasonably to have known that the Structural Design was likely to be used by Firstyle Homes to build a residential dwelling on the Property.

134. At the time it prepared the Structural Design, Secta Engineers knew or ought reasonably to have known that if it failed to exercise reasonable care and skill in preparing that design, there was a risk of damage to property and economic loss being suffered by the Plaintiff (**Risk of Structural Damage**).

135. At all material times the Plaintiff:

135.1 had no or no practicable ability to prevent, avoid or minimise suffering damage to property or pure economic loss as a result of Secta Engineers failing to exercise reasonable care and skill in preparing the Structural Design;

135.2 was dependent for the protection of his property and economic interests upon Secta Engineers taking precautions against the Risk of Structural Damage.

136. As a result of the matters pleaded in paragraphs 129 to 135 above, Secta Engineers at all relevant times owed a duty of care to the Plaintiff to exercise reasonable care and to take reasonable precautions against the possibility of the materialisation of the Risk of Structural Damage.

137. At all relevant times the Risk of Structural Damage was:

137.1 foreseeable to Secta Engineers; and

137.2 not insignificant.

Particulars

1. Secta Engineers, in conducting businesses preparing designs in the nature of the Structural Design, were or ought to have been aware of:
    a. the significant risks of damage to buildings constructed in accordance with structural designs that were not prepared with due care and skill; and
    b. the potential adverse effect on residential property value where a dwelling constructing on land was or might be perceived to be structurally unsound.

138. As a result of the matters pleaded in paragraphs 133 to 137 above:

138.1 there was a significant risk of harm if reasonable precautions were not taken against the Risk of Structural Damage;

138.2 the harm that could occur in the event that the Risk of Structural Damage eventuated was serious in that it could involve significant damage to property and significant economic loss;

138.3 the burden of taking reasonable precautions against the Risk of Structural Damage was low or moderate or, in the alternative, was not unreasonable having regard to the probability that the Risk of Structural Damage would eventuate and the potential seriousness of the harm if that occurred; and

138.4 the social utility of Secta Engineers' relevant activities was not so great as to have impeded it from taking reasonable precautions against the Risk of Structural Damage.

139. As a result of the matters pleaded in paragraphs 133 to 138 above, a reasonable person in the position of Secta Engineers would have taken the following precautions against the materialisation of the Risk of Structural Damage:

139.1 made investigations as to the depth of fill on the Property, including by making enquiries of one or more of Firstyle Homes, the Council or Cornish;

139.2 conducted its own tests as to the depth of fill on the Property;

139.3 engaged a suitably qualified geotechnical engineer to conduct tests as to the depth of fill on the Property;

139.4 exercised due care and skill in preparing the Structural Design,

(together and separately, the **Secta Engineers Reasonable Precautions**).

140. Secta Engineers failed to take any of the Secta Engineers Reasonable Precautions.

141. By reason of the matters alleged in paragraphs 129 to 140 above, Secta Engineers breached the Secta Due Care and Skill Warranty.

142. By reason of the matters alleged in paragraphs 133 to 140 above, Secta Engineers breached its duty of care to the Plaintiff.

143. Had Secta Engineers not breached the Secta Due Care and Skill Warranty or its duty of care:

143.1 Secta Engineers would have identified that there was at least 1500mm of fill underlying the dwelling.

143.2 Had that occurred, Secta Engineers would have identified to Firstyle Homes that one or more of the following should occur:

(a) the piers featured in the Structural Design would need to be deeper (and perhaps also more numerous) than as then set out in the Structural Design;

(b) the fill would need to be compacted or otherwise treated.

143.3 As a consequence of that identification, a dwelling would have been constructed on the Property that was materially free from the structural damage (as defined in paragraph 30 of the Statement of Claim).

144. In the circumstances the Plaintiff has suffered loss and damage as a result of Secta Engineers' breach of the Secta Due Care and Skill Warranty and duty of care.

Particulars

1. The structural damage to the dwelling on the Property.
2. Any cost of demolition, remediation, replacement, or repair of that dwelling.
3. Any cost associated with investigating or otherwise ameliorating the structural damage to the dwelling.
4. Any adverse affectation of the value of the Property.
5. The cost of purchasing the Property, including transaction costs in relation to selling or attempting to sell the Property.
6. Inconvenience, distress and vexation.

145. In the premises, the plaintiff is entitled to recover damages for breach of warranty from Secta Engineers, such damages to be calculated such that they would place the

Plaintiff in the position in which he would have been had the Secta Due Care and Skill Warranty been true (so far as it is possible for damages to do so), and damages for breach of duty of care, such damages to be calculated such that they would place the Plaintiff in the position in which he would have been had Secta Engineers not breached its duty of care.

146. In the premises, Secta Engineers 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.

147. 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

AFFIDAVIT VERIFYING

Name	Gabija Simmonds
Address	1 Farrer Pl, Sydney, NSW 2000
Occupation	Lawyer
Date	30 April 2024

I, Gabija Simmonds, affirm:

1. I am an officer of Liberty Mutual Insurance Company, Australia Branch. That is a body corporate incorporated in the Commonwealth of Massachusetts, United States of America. That corporation trades in Australia under the business name 'Liberty Specialty Markets' (**LSM**). In my role as Vice President, Chief Legal Counsel – Asia Pacific, I make or participate in making decisions that affect the whole or a substantial part of LSM's business.
2. I am authorised to make this affidavit on behalf of LSM.
3. LSM insures the third defendant pursuant to a policy of professional indemnity insurance (**Policy**). LSM has taken over the conduct of these proceedings for the third defendant pursuant to the terms of the policy.
4. I believe that the allegations of fact contained in the defence are true.
5. I believe that the allegations of fact that are denied in the defence are untrue.
6. After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

AFFIRMED at Sydney	
Signature of deponent	
Name of witness	Andrew Stewart Moore
Address of witness	L9, Grosvenor Pl, 225 George 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.

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

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)