

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	Shannon & Anor v Residential Reports Pty Ltd & Anor
Citation:	[2026] ACTSC 66
Hearing Dates:	29 April 2024 – 2 May 2024, 8 May 2024
Decision Date:	26 February 2026
Before:	Loukas-Karlsson J
Decision:	See [753]
Catchwords:	CIVIL LAW – COMMON LAW – Duty as to reasonable care and skill – misleading or deceptive conduct – inspection report – where that inspection report was made without due care and skill – where that inspection report was deceptive and or misleading – expert evidence – breach of statutory duty – causation – quantum of damages
Legislation Cited:	<i>Civil Law (Sale of Residential Property) Act 2003</i> (ACT) ss 9(1)(h)(iv), s 19 <i>Civil Law (Sale of Residential Property) Regulations 2003</i> (ACT), regulation 10 <i>Competition and Consumer Act 2010</i> (Cth) Sch 2 – Australian Consumer Law, s 3, s 18, s 60, s 61, s 137B, s 236, s 237, s 267 <i>Court Procedures Rules 2006</i> (ACT), rr 407(1)(m) <i>Australian Standard 4349.1 – 2007</i> <i>Australian Standard 4349.3 – 2010</i> <i>Australian Standard 3660.1</i> <i>Australian Standard 3660.2 – 2017</i> <i>Civil Law (Wrongs) Act 2002</i> (ACT), s 41, s 43, s 45 <i>Civil Liability Act 2002</i> (NSW) <i>Legislation Act 2001</i> (ACT) <i>Trade Practices Act 1974</i> , s 82
Cases Cited:	<i>Browne v Dunn</i> (1893) 6 R 67 <i>Ashell Homes v Kobus</i> [2024] ACTCA 32 <i>Let's Go Adventures Pty Ltd v Barrett</i> [2017] NSWCA 243 <i>Rogers v Whitaker</i> (1992) 175 CLR 479 <i>Adeels Palace Pty Ltd v Moubarak</i> [2009] HCA 49; 239 CLR 420 <i>Benic v State of New South Wales</i> [2010] NSWSC 1039 <i>South Sydney Junior Rugby League Club Ltd v Gazis</i> [2016] NSWCA 8

Wheeler v Ecroplot Pty Ltd [2010] NSWCA 61
Swan v Residential Reports Pty Ltd [2020] ACAT 76 (*Swan No 1*)
Swan v Residential Reports Pty Ltd [2021] ACAT 7 (*Swan No 2*)
Global Sportsman Pty Ltd v Mirror Newspapers (1984) 2 FCR 82 at 88
Johnson & Johnson Pacific Pty Ltd v Unilever Australia (No 2) [2006] FCA 1646
Hatt v Magro [2007] WASCA 124; 34 WAR 256
Alexandrou v Pacific Pest Control Ltd [2016] NSWDC 193
Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd [2023] HCA 8; 277 CLR 186
National Exchange Pty Ltd v Australian Securities and Investments Commission [2004] FCAFC 50; 49 ACSR 369
Butcher v Lachlan Elder Realty [2004] HCA 60; 218 CLR 592
Invisalign Australia Pty Ltd v SmileDirectClub LLC [2023] FCA 395
Wardley v Western Australia (1992) 175 CLR 514 at 525
Henville v Walker [2001] HCA 52; 206 CLR 459
Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd (1992) 38 FCR 471 at 483
Barnes v Forty Two International Pty Ltd [2014] FCAFC 152
Lean v Cosmorex Coffee Pty Ltd [2016] ACTSC 309
Amaca Pty Ltd v Booth [2011] HCA 53; 246 CLR 36
Ford Motor Company of Australia Ltd v Arrowcrest Group Pty Ltd [2003] FCAFC 313; 134 FCR 522
Campbell v Backoffice Investments Pty Ltd [2009] HCA 25; 238 CLR 304
Corkhill v Commonwealth (No 3) [2018] ACTSC 87
Marks v GIO Australia Holdings Ltd [1998] HCA 69; 196 CLR 494
Sweetman v Bradfield Management Services Pty Ltd (1994) ATPR
Gould v Vaggelas (1985) 157 CLR 215 at 221-2
De Bortoli Wines Pty Ltd v HIH Insurance Ltd (in liq) [2011] FCA 645; 200 FCR 253
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Keys Consulting Pty Ltd v CAT Enterprises Pty Ltd [2019] VSCA 136
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[2018] QCA

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McCrohon v Harith [2010] NSWCA 67

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Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1997] AC 245

Manwelland Pty Ltd v Dames & Moore Pty Ltd [2001] QCA 436;
ATPR 41-485

HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd [2004]
HCA 54; 217 CLR 640

Texts Cited: *Cheshire and Fifoot Law of Contract*

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Jennifer Anne Westacott (Second Plaintiff)
Residential Reports Pty Ltd (First Defendant)
Scott Maher (Second Defendant)

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File Number: SC 92 of 2022

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LOUKAS-KARLSSON J:

Introduction

1. This case concerns a termite infestation at a house in the suburb of Bruce in the ACT. This is an action brought by Ms Shannon (the first plaintiff) and Ms Westacott (the second plaintiff) against Residential Report Pty Ltd (the first defendant) and Mr Maher (the second defendant), concerning that termite infestation.¹
2. The first defendant was² retained by the then owners of the property in Bruce, to prepare a building and compliance inspection report and a pest inspection report ('the Inspection Report') for the sale of that property. That Inspection Report was to be provided to prospective purchasers. The second defendant was a director and employee of the first defendant, and attended the property on 18 October 2019³ and purported to undertake the relevant inspection. That Inspection Report was dated 21 October 2019. Subsequently, the plaintiffs purchased the house and discovered a termite infestation within 12 months of the production of that Inspection Report.
3. The plaintiffs sought the following relief in their Originating Claim (OC) and Amended Statement of Claim (ASOC) of 18 October 2023:
 - (a) compensation (stated as damages) pursuant to s 19 of the *Civil Law (Sale of Residential Property) Act 2003* (ACT) (*CL(SRP) Act*).⁴
 - (b) In the alternative, damages pursuant to *Competition and Consumer Act 2010* (Cth), Sch 2 – Australian Consumer Law, s 236 (ACL).
 - (c) In the alternative, an order pursuant to s 237 of the ACL.
 - (d) In the alternative, damages pursuant to s 267 of the ACL.⁵
 - (e) In the alternative, damages arising from the defendants' negligent misstatement of fact and/or opinion.⁶
 - (f) In the alternative, damages at common law.⁷

¹ I regret that the Judgment in this matter was delayed as a result of my diagnosis with cancer, and subsequent treatment throughout 2025.

² Amended Statement of Claim (ASOC) at [4]; Admitted by the defendants: see First Defendant Amended Defence (Defence 1) at [3]; Second Defendant Amended Defence (Defence) at [3].

³ The plaintiff's amended statement of claim nominated 19 October, but the chronology, the Inspection Report and page four of the plaintiff's tender bundle nominated 18 October.

⁴ See ASOC [33](a).

⁵ ASOC [33](bb); item 2 of the Originating claim

⁶ This appears in the plaintiff's originating claim but does not appear to be pressed in the statement of claim.

⁷ Originating claim at item 3A; ASOC at [[33] (bc).

(g) Interest and costs.⁸

4. The sums claimed by the plaintiffs were set out in a spreadsheet, tendered as an aide-memoire⁹ in these proceedings, and evolved¹⁰ over the course of the hearing. The final quantum of the plaintiff's claim (excluding interest) was set out in a finalised spreadsheet tendered on the final day of the hearing (MFI-8) and was for a sum of \$1,113,133.38 in damages.¹¹
5. For the following reasons, I am satisfied that the plaintiffs' claim has been made good. I award \$1,113,133.38 in damages and additionally award interest on this sum under r 1619 of the *Court Procedures Rules 2006* (ACT) (*CPR*).

Background Facts¹²

6. Factual disputes were not a major feature of this case and were of limited compass.¹³ In the main, facts were agreed or otherwise admitted¹⁴ by the defendants. The plaintiffs prepared a chronology that was not contested by the defendants.¹⁵
7. The first defendant carried¹⁶ out a business of, among other things, providing building and compliance reports as well as pest inspection reports to current and prospective homeowners. The second defendant, for a specific period of time was a director and employee of the first defendant, that is, between mid-2017 and 2021.¹⁷
8. As noted above at [2], the first defendant was¹⁸ retained by the then owners of the property to prepare an inspection report. Pursuant to the retainer, the second defendant attended the property on 18 October 2019¹⁹. It was conceded²⁰ by the defendants that the second defendant undertook a visual inspection only, although the defendants contested the inference to be drawn from this fact. With respect to²¹ the visual inspection, both defendants pleaded that the inspections occurred within the meaning of the form and methodology of the inspection report, including that:

⁸ See ASOC at [3]-[4], [33] (bb) and (c).

⁹ Transcript, Day 1, page 39 [33].

¹⁰ First mentioned in Transcript, Day 1, page 38 [16]-[19], where Mr Katekar already said it needed amendment. An updated version without pen markings were tendered in Day 2: See Transcript, page 112, line [36]-[42].

¹¹ Plaintiff MFI - 8.

¹² In so far as the defendants admitted to certain pleadings, those facts are assumed to be agreed and not contested.

¹³ Transcript, day 4, page 438 [34], 439 [29]-[30]

¹⁴ Amended Defence 1 and 2.

¹⁵ Counsel for the defendants did not raise concerns with the timeline during final oral submissions.

¹⁶ See ASOC at [2], admitted in Defence 1 and 2 at [3]. PWS at [10](a).

¹⁷ Transcript, day 3, page 385 [37]. See ASOC at [3], admitted in Defence 1 and 2 at [3]. See also PWS at [10](b)

¹⁸ ASOC at [4]-[5], admitted in Defence 1 and 2 at [3]. PWS at [10](c).

¹⁹ The plaintiff's amended statement of claim nominated 19 October, but the chronology, the Inspection Report and page four of the plaintiff's tender bundle nominated 18 October.

²⁰ ASOC at [6], [8], admitted in part in Defence 1 at [4], [6] and Defence 2 at [4], [6]. See also PWS at [10](e).

²¹ Defence 1 at [4](c) (i)-(iii); Defence 2 at [4].

- (a) The building report was to be prepared with reference to AS 4349.0-2007 and AS 4349.1-2007, and would be the result of a visual inspection only (AS 4349.0 – 2007 and AS 4349.1 – 2007 are Australian Standards for inspection of buildings and pre-purchase inspections respectively).²²
 - (b) the inspection would not involve the removal of any structure within and around the building.
 - (c) the inspection will include only “accessible areas and areas that are within the inspector’s line of sight and close enough to enable reasonable appraisal”.
9. I will refer to this as the “inspection methodology”, following the terms adopted by the defendants in their amended defence. At this juncture, I interpolate to note the Australian Standard AS4349.3 – 2010, which covers timber pest inspections. This will be further discussed later in this judgment at [83] – [106]
10. Following the inspection, the first and second defendant prepared²³ an inspection report combining both a building and compliance inspection report and a pest inspection report.
11. Subsequently, an inspection report dated 21 October 2019²⁴ was provided to the then-owners of the property. This inspection report was included in the plaintiff’s tender bundle and was separately exhibited as Exhibit 9 in these proceedings.
12. I note that it was conceded by both defendants that the first defendant published the Inspection Report. Further both defendants maintained²⁵ that at all material times the second defendant was an employee of the first defendant, and as such did not provide the Inspection Report in a separate capacity. The plaintiffs in their chronology noted that the second defendant was merely the author of the Inspection Report.²⁶
13. I also note that the first defendant pleaded that, with reference to vicarious liability,²⁷ it indemnifies “any and all liability arising from acts and/or omissions” of the second defendant. As noted by the plaintiffs, the first defendant therefore conceded that it is vicariously liable for the acts and/or omissions of the second defendant. At the hearing, counsel for the first defendant noted that the implication of the vicarious liability concession and indemnity is that Court could make a “single order” in relation

²² Based on the Standards Australia website.

²³ ASOC at [7]; admitted in Defence 1 and 2. PWS at [10](f).

²⁴ ASOC at [9], admitted in Defence 1 and 2 to the extent that only the first defendant provided the Inspection Report (see [7]).

²⁵ ASOC at [9], admitted partially by the Defence 1 at [7](b)(i); Defence 2 at [7]

²⁶ Chronology at page 1.

²⁷ PTB 1 at [2].

to damages were the Court to find for the plaintiffs.²⁸ Consequently I have made a single order in relation to damages having found for the plaintiffs.

14. For convenience, I will refer to this concession as the “vicarious liability concession” in accordance with the defendants’ own terminology.²⁹
15. It was conceded³⁰ by the defendants that, at the time the Inspection Report was prepared and published, both defendants knew that the Inspection Report would be used in connection with the sale of the property and would be provided to prospective purchasers. It was also not contested³¹ that the Inspection Report contained a “pest inspection report” within the meaning of s 9(1)(h)(iv) of the *CL(SRP) Act*. It is the pest inspection aspect of the Inspection Report that the plaintiffs take issue with, in this case.³²
16. As prospective purchasers of the property, the plaintiffs were accordingly³³ provided with the Inspection Report on or about 28 October 2019.³⁴ In response to further and better particulars, sought, the solicitors for the plaintiffs particularised that the plaintiffs read the Inspection Report by 8 November 2019 and were represented by solicitors during the conveyance.³⁵
17. The contract for purchase of the property was entered³⁶ on 8 November 2019³⁷ and completed³⁸ on 6 December 2019. A copy of the contract was included in the plaintiff’s first tender bundle.³⁹ I note that the schedule to the contract listed both plaintiffs as the buyers,⁴⁰ with the purchase price being \$1,835,000.00.⁴¹
18. In January 2020, the plaintiffs engaged the residential renovation company of Mr Fisher, Smith & Sons, to carry out renovations to the property.⁴² On 7 October 2020,⁴³ that is within 12 months of the production of the Inspection Report, the building company discovered⁴⁴ termites and termite damage when carrying out internal

²⁸ Transcript, Day 5, page 451 [4]-[5].

²⁹ Defence 1 at [8].

³⁰ ASOC at [10], admitted in Defence 1 at [9] and Defence 2 at [8]. PWS at [10](g).

³¹ ASOC at [11], admitted in Defence 1 at [9] and Defence 2 at [8]. PWS at [10](j).

³² Transcript, page 22 [4]-[7].

³³ ASOC at [12], admitted in defence 1 at [9] and Defence 2 at [8]. PWS at [10](h).

³⁴ See also Chronology.

³⁵ Response to FBP at [2.3], CB at [35].

³⁶ Chronology page 1, PTB 1 page 129. A letter dated 13 November 2019 from Griffin Legal confirmed that contracts were exchanged on 8 November 2019: Ex 20 at page 1.

³⁷ Transcript page 12 [1]-[2].

³⁸ ASOC at [14], admitted at [11] of Defence 1 and [10] in Defence 2. See also PWS at [10](i).

³⁹ See page 129.

⁴⁰ PTB 1 page 129.

⁴¹ See Chronology at page 1.

⁴² See Chronology page 1, citing page 3 of the Fisher report page 3; Transcript, day 1, page 90 [11]-[17].

⁴³ Transcript, Day 1, page 12 [1]-[2].

⁴⁴ Chronology page 2, PTB 1 page 310-1.

renovations. In the plaintiffs' response to a request for further and better particulars, the plaintiffs particularised that the damage discovered as the following:

- (a) Large termite tracking in the master suite wardrobe.
- (b) Damage to structural wall timbers.
- (c) Live termites in a structural timber wall frame junction.
- (d) Termite infestations in the walk-in robe area, one wall of the master bedroom, and ensuite.
- (e) Termite activity within 6 metres of the sub-floor access door.
- (f) Termite tunnels on the brick piers or foundations leading to the structural timber door.⁴⁵

- 19. The existence of termites and damage caused to the property was confirmed in a report by Mr Barry Walker of Armageddon Pest Control dated 20 October 2020 (the Walker report). Specifically, the Walker report found 14 shelter tubes to the subfloor, which the plaintiffs submitted was "a substantial number of attacks or at least access" by termite colonies.⁴⁶
- 20. A bundle of photographs taken⁴⁷ of the termite infestation was also tendered as part of the plaintiff's second tender bundle exhibited in these proceedings.⁴⁸
- 21. A later report of Mr Rod Jenkins and Mr Pierre Dragh dated 5 November 2020 (the Emmadale Projects report) opined that, as of inspection of 2 November 2020, the property was not safe for occupation due to the evidence of termite damage.⁴⁹
- 22. The plaintiffs eventually moved to a rental property in Forrest, ACT in March 2021.⁵⁰
- 23. On 11 June 2022, the plaintiffs entered into a contract of sale for the property in the sum of \$2,475,000.00.⁵¹ At the hearing, counsel for the plaintiffs noted that the sale⁵² occurred as a "knock-down rebuilt proposition" due to the termite infestation. The property was uninhabitable, as the termite damage had affected so many parts of the

⁴⁵ Response to Request for Further and Better Particulars at

⁴⁶ Transcript, day 5, page 502 [25]-[26]. The Walker report was tendered as part of the plaintiffs' first tender bundle.

⁴⁷ See PTB 1 page 317 onwards. Discussed In Transcript, Day 1, page 36-38

⁴⁸ Transcript, page 36, [7], [17]. The photographs were taken around late September to early October 2020.

⁴⁹ Chronology page 2, see also PTB 1 page 348. The Emmadale Projects report was tendered as part of the plaintiffs' first tender bundle.

⁵⁰ Chronology page 2, citing PTB 1 page 369. A copy of the rental agreement was tendered as part of the plaintiffs' first tender bundle.

⁵¹ Chronology page 2, citing PTB 1 page 145

⁵² Transcript, Day 1, page 12 [38]-[40].

property; and parts of such structural importance, that the house had become structurally unsound and would need to be demolished and rebuilt.⁵³ The plaintiffs formed the view that they could not live at the home due to the structural damage, as well as the noise and disturbance caused by the live infestation.⁵⁴

24. In March 2022, the plaintiffs commenced their action against the defendants.

The Inspection Report

25. Central to this case is the Inspection Report. It is, therefore, convenient at the outset to set out the structure and content of the Inspection Report. A copy of the Inspection Report was tendered as part of the Court Book, with a colour copy separately tendered as Exhibit 9. The full Inspection Report is annexed to my judgment as Appendix 1.
26. As previously noted, the Inspection Report is a 25-page document and that Inspection Report is a combined building inspection and pest inspection report.
27. After the cover page, the second page of the Inspection Report is headed “Important Information Relating to the Report”, and contains introductory warnings and information on the Inspection Report. Relevantly, it noted that the Inspection Report was the result of a visual inspection only, and that any discrepancies between the “Report Summary” and the Detailed Report, that the information contained in the latter should be relied upon. As will be discussed later below at [532], counsel for the plaintiffs properly queried what part of the Inspection Report is the “detailed report” referred to in that sentence. Also noted at page two was:

It is important that you carefully read the complete report including the Warranty & Use, Scope of Inspection and the Scope & Limitations sections prior to making any critical decisions that may be influenced by this report.

28. The Inspection Report at page three contained a “Report Summary” and “Key Data” as it pertains to the property. The Inspection Report Summary listed the second defendant as the inspector, with an inspection date of 18 October 2019.⁵⁵ Relevantly, the “Key Data” section contained the first mention of the Timber Pest Report as well as a note that the Inspection Report is intended to be read in its entirety:

⁵³ Response to FBT at [2.6].

⁵⁴ Response to FBT at [2.10].

⁵⁵ The plaintiff’s amended statement of claim nominated 19 October, but the chronology, the Inspection Report and page four of the plaintiff’s tender bundle nominated 18 October.

Timber Pest Report: no evidence of active subterranean termites (live species) was found at the time of our inspection

This Report is intended to be read in its entirety. Please read the full document including detailed inspection and Scope & Limitations of the Report before reaching any conclusions regarding the condition of the property. If there are any discrepancies between the “Key Data” and the Detailed Report, the detailed report information should be relied upon.

29. Page four of the Inspection Report contained three sections. The first section was headed “Scope of Inspection”. The second section was headed “Standard Indicators”, and the third section was headed “Our Approach”. There appeared to be a focus on identifying structural defects in the property. Further, the section also provided definitions for the terms used in the Inspection Report.
30. In particular, the first section reiterated that the role of the defendants was to conduct a thorough visual inspection of the property and report on “areas of concern”.⁵⁶ As highlighted by the plaintiffs, the “Standard Indicator” section provides a definition for terms used in the Inspection Report to describe the standard of a building or a particular item. Importantly, “Defects have been identified” is a term applied where:

The inspector has identified defects that require remedial action or investigation. Remedial action is considered to be necessary rather than discretionary. Good, Fair or Poor may be used when an area has been given this condition.

31. In a sidebar on page four, the Inspection Report referred to AS4349.1- 2007, and separately defined “Good”, “Fair” and “Poor”:
- (a) Good: “The feature subject to comment is, in the inspector’s opinion, of sufficient standard to not require any significant remedial action. There may be imperfections in the finish or the structure.”
 - (b) Fair: The feature subject to comment is, in the inspector’s opinion, usable but has deteriorated and would benefit from cosmetic or remedial repair work. For Instance, painting may be required, render may require patching, and four fittings may require adjustment or repair.”
 - (c) Poor: “The feature subject to comment in the inspector’s opinion, requires remedial action. Repairs or replacement are considered necessary rather than discretionary.

⁵⁶ See also PWS at [24].

32. At the bottom of page four, the “Our Approach” section contained the following statement regarding the “repetitive” nature of the Inspection Report, with the first two sentences being capitalised:

WE ARE AWARE THAT MANY COMMENTS MADE THROUGHOUT THE REPORT ARE REPETITIVE. HOWEVER, THIS IS DESIGNED TO INFORM THE READER THAT THE ELEMENTS COMMENTED ON HAVE BEEN INSPECTED. To provide relevance and value for the reader, at the end of this report we have included a summary showing aspects that are considered during our inspection. We recommend that you read this information carefully to gain perspective about the detail of our examination. Comment on many items will only be provided in the event of an adverse finding that may have an influence on any decisions relating to the value of the property.

33. Pages five to nine of the Inspection Report contains the property report for the “Interior” of the Property. As noted by counsel for the plaintiffs, most of the items were classified as “good” with a few “fair to good”.⁵⁷
34. Pages 10 to 13 of the Inspection Report is the property report for the “Exterior” of the Property and is of significance. In this section, the second defendant relevantly noted that the overall condition of some areas as “Defects have been identified”.
35. As counsel for the plaintiffs noted in opening submissions the Inspection Report stated concerning Doors and External Windows that “timber decay was detected in the bathroom window frame”.⁵⁸ Counsel for the plaintiffs referred⁵⁹ to a note in relation to the “Sub Floor” of the property:

Defects have been identified.

- [O]ur inspection was significantly restricted by low clearances and ductwork, **not all areas of the subfloor could be inspected**
- [T]here was **some surface moisture present** at the time of our ‘Inspection. Moisture levels should be monitored ‘to determine if this is an ongoing condition. Remedial action should include a review of surface and sub-surface drainage, garden bed location, garden watering and run off from hard surfaces to ensure that moisture is directed away from the sub-floor. **Elevated humidity levels contribute to creating an environment that is conducive to timber pest infestation.** Additional, saturated footings can create conditions that may compromise their structural integrity
- [T]here is **evidence of old termite activity (mud trails) to the sub floor walls, no live termites were sighted**

⁵⁷ PWS at [28].

⁵⁸ Transcript, Day 1 page 23 [37]. See also PWS at [29].

⁵⁹ Transcript, day 1, page 24-25. See also PWS at [29].

- [E]fflorescence is present on the wall surface, efflorescence occurs when excess salts within the masonry are leached to the surface due to water transfer. It is typically seen as white salt deposits on the surfaces of concrete pavement or mortar between bricks or tiles⁶⁰. Efflorescence is typically only of aesthetic concern and does not pose any structural threat to the concrete or mortar. [Report also noted further information is provided in the index to the report and referring the reader to read 'resource 8 – Efflorescence in Masonry Walls'.

(emphasis added)

36. The Inspection Report also identified some defects in relation to “Fences and Gates”, including that “timber decay” is evident in cross-timber and timbers in contact with the ground in some areas and that previous termite activities was sighted:

[P]revious termite activity was sighted to some fencing timbers. No live termites were sighted. **We recommend removing and replacing the affected timbers**

(emphasis added).

37. Pages 14 to 15 of the Inspection Report is headed “Compliance Report”. This section of the Inspection Report appears to deal with relevant planning and property law issues in relation to the property.
38. Of critical significance in this case, is page 16 of the Inspection Report, which contains the purported “Timber Pest Report”. The top of the page noted the visual inspection undertaken by the defendants to identify subterranean termites, borers, and timber decay (rot) fungi. The Inspection Report also identified the areas examined during the timber pest inspection, where applicable and there is reasonable access, including relevantly interior and exterior of structures, roof cavity, subfloor, “pergolas and decks, structures, fences, and trees within 30m of the building within the boundaries of the property”.⁶⁰
39. Additionally, page 16 contained a table with inspection results for timber pests, alongside a text box elaborating on the implications of a high-risk assessment in smaller font. It is important to set out the relevant results in full,

Live Species: no evidence of active subterranean termites (live species) was found at the time of our inspection

Timber Pest Evidence:

[evidence of previous termite activity was sighted in]

⁶⁰ Page 16 of the Inspection Report.

- evidence of old termite activity was sighted in... some fencing timbers. No live termites were sighted. We recommend removing and replacing the affected timber....
- there is evidence of old termite activity (mud trails) to the sub floor walls, no live termites were sighted.

[there is evidence of timber decay]

- there is timber decay noted in the bathroom window frame
- timber decay was detected in some fencing timbers, notably those in direct contact with the ground and in some cross-rails.
- timber pest damage was sighted to some tree trunks/ stumps. Having conducted a visual inspection only, we are unable to confirm that there is no termite and borer activity or extensive timber decay occurring beyond the exposed surfaces. No live species were sighted at the time of inspection.

Subfloor Drainage and Ventilation: our limited subfloor inspection indicates that the subfloor drainage is generally fair, however, ventilation is poor.

Recent Termite Treatments & Recommendations: There was previously a chemical treatment notice posted in the meter box.

- Biflex duo was applied to the perimeter on 05/02/2011

at the time of the inspection a treatment in accordance with Australian Standard 3660.1 to control or prevent subterranean termites from infesting and causing damage to the property was not considered necessary.

Overall Susceptibility of the Building to Timber Pest Infestation: considering all of the relevant factors, it is our opinion that the overall degree of timber pest infestation to the property is MODERATE to HIGH – we strongly recommend that regular inspections are undertaken,

It should be noted that if the risk factor noted in this report is considered to be high, this is not designed to deter an intending purchaser; it is simply encouraging awareness that increased vigilance is warranted and any recommendation regarding reducing conducive conditions or frequency of inspections should be observed. It is recommended that a full pest inspection be [undertaken] every 6-12 months. Regular inspections DO NOT prevent timber pest attack; they are designed to limit the amount of damage that may occur through early detection.

(emphasis added).

40. Counsel for the plaintiffs properly submitted that the second defendant gave evidence in cross-examination that the final paragraph regarding the significance of a “high” risk was standard text that was included in all reports prepared by the first defendant.⁶¹

⁶¹ PWS at [33].

41. Page 17 of the Inspection Report detailed the access the defendants had to the property. Relevantly, a note at the top of the page noted that “whilst every effort has been made to conduct a comprehensive roof cavity and subfloor inspection there are limitations relative to safe access requirements which include low clearances, the availability of safe walkways... which when applicable will limit the scope of the inspection”.
42. In particular, page 17 listed restrictions relating to the subfloor as “low clearances”, “duct work”, and “insufficient crawl space in part of the subfloor”. In light of the latter, the Inspection Report noted that some areas were therefore viewed from a distance due to restricted access, and referred to the reader to the scope and limitations section at the end of the Inspection Report under the heading “Safe and Reasonable Access”.
43. As for the roof cavity, page 17 lists “low clearances”, “insulation covering the ceiling framing”, and “duct work”, and that work health and safety requirements restricted the scope of the inspection and that “not all areas of the roof cavity could be inspected due to limited access points”.
44. Page 18 contained a section headed “Warranty & Use of Our Reports”. The section noted that the Inspection Report was written solely for the use and benefit of the then owner of the property and the purchaser of the property. The section also contained limitations of liability clauses in some circumstances. Page 18 contains the signature of the second defendant, Mr Scott Maher, on behalf of the first defendant.
45. The remainder of the Inspection Report covers the scope and limitations of the Inspection Report. On page 19, the Inspection Report noted that the Inspection Report is intended to be read in its entirety:

This report is intended to be read in its entirety. Please read the detailed inspection information and the Scope & Limitations of Report sections before reaching any conclusions regarding the condition of the property. Any person who relies upon the contents of this report does so acknowledging that the following clauses, which define the Scope and Limitations of the inspection, form an integral part of the report.
46. Page 19 also again noted that the Inspection Report was prepared as a result of visual inspection, with reference to AS4349.0 – 2007, AS4349.1 – 2007, and, crucially, AS4349.3 – 2010. The Inspection Report also noted that the inspection⁶² was limited to the condition of those areas of the property that were fully accessible and visible to

⁶² The Inspection Report uses the word “It”, which appears to refer to the inspection.

the second defendant at the time of inspection. A “Limitation of Liability” section next to this column again noted that the inspection was completely visual.

47. Pages 19 to 21 contained a section that shows (but do not limit) aspects of the property that may be examined by the inspector, where visual inspection is possible. The Inspection Report noted that the items were extracted from AS4349.1 – Inspection of Buildings (Pre-purchase inspections – Residential Buildings).
48. Relevantly, page 20 noted that for “timber and metal windows”, rotting frames (timber) are one of the items that may be examined by the inspector.
49. At page 21, the Report also noted the following areas that may be inspected by the inspector in the subfloor (capitalisation in original):

Dampness, debris, drainage, ventilation, cracked or leaking pipes; TIMBER CONSTRUCTION: bearers & joists, framing, piers/stumps; SUSPENDED CONCRETE FLOOR CONSTRUCTION: concrete condition, cracking

If moisture is noted, it is recommended that the sub-floor area be monitored to ensure that surface and sub-surface moisture ingress is not an ongoing issue. If the area remains damp, consideration should be given to upgrading subterranean and surface kept drainage systems to ensure that moisture is directed away from the building foundations and the sub-floor area is dry. A qualified drainage expert should be consulted with regard to drainage issues.

Many serious foundation problems are caused by reactive soil types and trees and gardens being planted too close to the building. Generally, the clay soils which are common in the ACT, are reactive soils, large trees use vast amounts of water and can quickly draw moisture out of the ground during dry periods, this results in destabilised moisture content of the soils around the building and ultimately may cause a foundation problem. Over watering gardens close to the building may have the opposite "heaving" effect, especially with clay soil. Over watering increases the moisture content of the soil which can result in of the foundations adjacent to the garden. When watering close to the building you should avoid 'pooling' of water in a particular area, as this also affects the moisture content of the soil which in turn can cause damage to footings and foundations. Too much or too little water near the perimeter of the building may cause serious problems with foundations and footings and damage can cause major structural problems, resulting in costly repairs.

50. The same section also gave five hints as to “avoiding problems and costly repairs”.
51. On pages 21 to 22, the Inspection Report contained a section headed “Safety & Reasonable Access”, referring to AS 4349.1 – 2007 3.2.2. The Inspection Report noted that the extent of the accessible areas shall be determined by the inspector at the time of the inspection, and the inspector shall also determine whether sufficient space is available to allow safe access. The paragraph also refers to a definition provided in AS4349.3 on “reasonable access” , namely “areas where safe, unobstructed access is provided and the minimum clearances are available; or , where these clearances are not available, areas within the consultant’s unobstructed

line of sight and within arm's length", noting that "reasonable access does not include removing screws and bolts to access covers".

52. I pause to note that it is not clear from which section of the AS4349.3 this definition is taken from. The Inspection Report did not provide a specific clause.⁶³
53. A table containing the dimensions for reasonable access is included in page 22 of the Inspection Report. The table noted that "reasonable access is determined in accordance with the provisions of the following work health and safety requirements". Relevantly, the table nominated a crawl space dimension of 400mm vertical clearance for crawl space in timber floor subfloors.
54. Pages 22 to 24 contained disclaimers and limitations clauses pertaining to the "Property Report" section of the Inspection Report. Relevantly, on pages 22 and 23, the Inspection Report noted that the inspection does not involve invasive procedures:

Concealed Surfaces - The inspection did not include breaking apart, dismantling, removing or moving objects... The inspector cannot see inside walls, between floors, inside force or perform any other goods or any other areas that are concealed or obstructed. The inspector did not dig, gouge, property, invasive procedures. Visible timbers have not been destructively probed or hit... Therefore, we cannot comment on the condition of the surfaces obscured or concealed by these or other items.
55. Page 23 of the Inspection Report also contained a brief limitation clause or "disclaimer" in relation to timber pests, strongly recommending an independent inspection and report be obtained from an accredited pest inspector to determine whether the property is "free from infestation (whether active or dormant)". The Inspection Report did include a timber pest inspection report.
56. Page 24 lists warnings and limitations regarding the "Compliance Report".
57. Finally, the remainder of pages 24 and 25 of the Inspection Report contains certain warnings and limitations in relation to the timber pest report. As will be further discussed, the defendants placed particular reliance on this section of the Inspection Report. As such, it is important to set out at some length the relevant contents of the page.
58. The section on Timber Pest Report on page 24 begins by, again, noting that the report is the result of a visual inspection, relevantly that said inspection is completed with reference to AS4349.3. The section continues over the page by noting that the second

⁶³ Rather it appears the Inspection Report uses a combination of the general idea of access and areas of inspection per 3.2 and 3.2.1 of AS4349.3 - 2007

defendant did not use invasive procedures and does not warrant that inaccessible areas have not been, infested by timber pests:

This report is the result of a VISUAL INSPECTION ONLY. **Inspection of the property and this report have been completed with reference to AUSTRALIAN STANDARD AS 4349.3 - 2010 inspection of buildings Part 3: Timber Pest Inspections.** In all instances throughout this report the inspector is referring to accessible areas only. Areas that were not accessible at the time of inspection or were concealed from-view are not covered by this report. **The inspector does not imply that inaccessible or partly inaccessible areas of the property were not, or have not been, infested by Timber Pests.** This Report is not a guarantee that an infestation or future infestation and/or damage does not exist in any inaccessible or partly inaccessible areas of the property. This inspection DID NOT include breaking, removing, or moving objects, floor and wall coverings ... **At NO TIME did the inspector use invasive procedures or bang/tap surfaces to reach conclusions...**

(emphasis added)

59. On page 25, the Inspection Report noted the following information under the heading "Important Information" regarding subfloor drainage and ventilation, as well as a repeating the "disclaimer" in page 16 regarding the significance of a high-risk rating.

... **Poor subfloor drainage increases the likelihood of termite attack.** If drainage is considered inadequate, a plumber or other building expert should be consulted, **Ventilation of the sub-floor region is important in minimising the opportunity for subterranean termites to establish themselves.** If the ventilation is found to be inadequate, remedial measures should be taken. Consideration should be given to installing high air flow vents and/or improve the cross flow of air within the subfloor ... **it should be noted that if the risk factor is considered to be high, this is not to deter an intending purchaser;** it is simply **encouraging awareness that increased vigilance is warranted and any recommendations regarding reducing conducive conditions or frequency of inspections should be observed.** It is recommended that a full pest inspection be undertaken every 6-12 months. **Regular inspections DO NOT prevent timber pest attack;** they are designed to limit the amount of damage that may occur through early detection.

(emphasis added)

60. The same section also set out how the rating of the overall degree of risk is reached in the Inspection Report, noting that it is a subjective assessment:

The overall degree of risk of Timber Pest Infestation cited in this report is a subjective assessment by the inspector at the time of the inspection, taking into account many factors which include, but are not limited to, location and proximity to bushland and trees and/or other timber structures, evidence of timber pest damage or activity close to the inspected structure or within the inspected structure, conducive conditions that raise the potential of timber pest attack, such as timbers in contact with soil, inaccessible areas, slab on ground construction, or other factors that, in the inspector's opinion, raise the risk of future timber pest attack.

(emphasis added)

61. Page 25 of the Inspection Report also noted the following about the significance of discovery of damage, under the heading "Determining Extent of Damage".

This Report is NOT a structural damage report. You agree that we are not responsible or liable for the repair of any damage, whether disclosed by our report or not. Our inspectors are not necessarily specialised builders and any inexperienced opinion provided with respect to timber damage CANNOT be relied upon. **This Report will not state the full extent of any timber pest damage; rather we may provide comment on the damage for your information. If evidence of Timber Pest activity and/or damage is reported in the structure(s) or the grounds of the property, then you must assume that there may be further concealed structural damage within the building(s). This concealed damage may only be found when invasive procedures are applied to reveal previously concealed timbers. In the case of Timber Pest activity and/or damage WE STRONGLY RECOMMEND an invasive Timber Pest Inspection is undertaken and a qualified person ... be engaged to carry out a structural inspection to determine the full extent of the damage and repairs that may be required.**

(emphasis added)

62. After a brief note on how mould is not considered a timber pest, the Inspection Report concludes with another “Important Information” section. Relevantly, the section noted that the Inspection Report is based on the condition of the property existing at the time of the inspection, and that timber pests, particularly termites, may have gained entry since.

IMPORTANT INFORMATION:

This Report reflects the conditions of the property existing at the time of the inspection date and may not reflect the current state. Timber pests, particularly termites, may have gained entry to the property since the inspection date. Termites can, in a relatively short period, cause significant damage to both structural and non-structural timbers within and around the buildings of the property. Termites are difficult to detect and much of the damage caused may not be readily visible.

63. The note continues that it is therefore “strongly recommended” that the reader promptly arrange for an inspection in accordance with AS4349.3 if the Inspection Report is read after 180 days after the inspection.
64. The section finally recommends certain actions if the Inspection Report indicated the presence of termites, termite damage, or previous activity or treatment:

If the Report indicated the presence of termites, termite damage, previous activity or treatment... you should obtain copies of **the treatment proposal, any certificates of treatments carried out, details of all repairs including copies of quotations, invoices and any other reports**. It is strongly recommended that you arrange for an inspection in accordance with AS 4349.3 to **verify that the treatment has been successful** and carried out in accordance with AS 3660.2 and arrange for a further building inspection in accordance with AS 4349.1. [The Defendants] will have no liability to you for any damage or loss you suffer as a result of your entering the contract to purchase the property or in connection with completing the purchase of the property as a result of your failure to heed the advice given in this report, and may use such failure in defence of any claim you may later make...

(emphasis added)

The pleadings

65. Unquestionably, pleadings are the parameters of a litigation.⁶⁴ It is convenient therefore to set out the plaintiffs' case as pleaded and the defendants' pleaded defence. Further, I note there was no difference of substance in relation to the two defences.⁶⁵
66. The plaintiffs' claim as pleaded, specifically relied on s 19 of the *CL (SRP) Act* as well as ss 18, 60 and 61 of the *ACL*.
67. The plaintiffs also initially claimed common law negligence. During the hearing, counsel for the plaintiffs indicated that he was not advancing a general negligence claim.⁶⁶
68. In their closing submissions, counsel for the plaintiffs ultimately summarised their three claims as follows:⁶⁷
- (a) A claim under s 19 of the *CL (SRP) Act*: the Inspection Report was false or misleading in a material particular, or was otherwise prepared without the exercise of reasonable care and skill. Therefore, the plaintiffs suffered loss or expenses that the defendants are liable to compensate for.
 - (b) A claim under s 18 of the *ACL*: the Inspection Report was misleading or deceptive, or likely to mislead or deceive. Because of this, the plaintiffs are entitled to compensation under s 236 of the *ACL*.
 - (c) Claims relying on guarantees under ss 60 and 61 of the *ACL*: The plaintiffs are entitled to compensation under s 267 of the *ACL* for the contravention of the guarantee of the Inspection Report being prepared with due care and skill and reasonably fit for purpose for the plaintiffs assessing the property when considering whether to purchase it.
69. In their respective defences and subsequent submissions, the defendants set out their defence to the three claims advanced above as follows:⁶⁸
- (a) That no cause of action arises under s 19 of the *CL (SRP) Act*. The plaintiff bears the onus, and has not met the onus, to establish that the Inspection

⁶⁴ Transcript, day 5, page 577 [38]-[40].

⁶⁵ Transcript, Day 1, page 5 [34]-[44].

⁶⁶ Transcript, Day 5, page 13-14.

⁶⁷ PWS at [9](a)-(c).

⁶⁸ As summarised from the First and Second Defendant's written submissions and amended defence (Filed 21 December 2023),

Report was not written with reasonable skill and care, nor that it was indeed false, misleading or deceptive.

- (b) The Plaintiffs have not established causation in terms of the breach of duty.
- (c) That the Defendants have not contravened the guarantees given to the Plaintiffs as relied on under ss 60 and 61 of the ACL and therefore, are not entitled to any compensation arising.

70. It is appropriate to set out the statutory framework for the claims separately later in the judgment at [460]-[489], with particular reference to the pleadings, the relevant responses to the request for further and better particulars, and the submissions. This is particularly pertinent in circumstances where the defendants have claimed that the case advanced by the plaintiffs does not lie within the bounds of the pleadings. This is a matter that I sought further submissions on following the conclusion of the hearing, and which I will address later [277]-[282].⁶⁹

71. It is appropriate that I state my conclusion at this point in the judgment. That conclusion is that the plaintiffs' case does fall within the scope of the pleadings.⁷⁰

Issues at hearing

72. Counsel for the plaintiffs noted that there was no dispute as to the existence of the relevant duties⁷¹ on the part of the defendants. As such, there are three main area of dispute in this case:⁷²

- (a) Whether the relevant statutory duties are breached.⁷³
- (b) Causation.⁷⁴
- (c) Quantum of damages to be awarded if the former two are established.⁷⁵

73. On the first day of hearing, counsel for the plaintiffs submitted that the pleaded actions "essentially require proof of exactly the same things"⁷⁶ and "lead to the same outcome with no relevant difference". In other words, all of the actions require that the four

⁶⁹ Addressed later at [277]-[282].

⁷⁰ My reasons for this conclusion are set out later in this judgment at [277]-[282].

⁷¹ Transcript, Day 1, page 15 [8]-[9].

⁷² Transcript, day 5, page 575 [4]-[7].

⁷³ Transcript, day 5, page 575 [4]-[7].

⁷⁴ See Transcript, Day 1, pp 15 [30], 16[14]-[15].

⁷⁵ Transcript, Day 1, page 17 [11].

⁷⁶ Transcript, Day 1, page 13-4.

elements of “duty, breach, causation, loss”⁷⁷ be established. Indeed, as noted above, the pleadings relied on to support the statutory claims are in essence the same.

74. The nub⁷⁸ of the plaintiffs’ case is that the Inspection Report, in particular the pest inspection section, prepared by the second defendant and issued by the first defendant was prepared negligently. Counsel for the plaintiffs submitted that, in reliance on the Inspection Report, the plaintiffs bought the property, which was later found to have a “very severe infestation of termites”.⁷⁹
75. In opening submissions, counsel for the plaintiffs submitted that the factual crux of the plaintiffs’ claim is that the lack⁸⁰ of sighting of live termites does not inform the issue as termites are subterranean creatures. Indeed, the presence of “mud trails”, it was submitted, meant that termites have entered the property at some stage, as termites hide in the trails. As such, counsel for the plaintiffs submitted that the sighting of the mud trails created an obligation for the defendants to warn the plaintiffs of the requirement to make further investigations to establish damage. At the very least, counsel for the plaintiffs submitted that a sighting of a mud trail would have been enough for “any competent pest inspector”⁸¹ to call for a further investigation to ascertain the damage to the property. I have accepted this submission.
76. Ultimately, as refined in closing submissions,⁸² counsel for the plaintiffs submitted the plaintiffs would be entitled to succeed if the Court was satisfied of any of three alternative grounds. These are three alternative grounds. I am satisfied as to the following grounds:
- (a) A breach of the standard (ie. AS 4349.3 – 2010). Such a finding creates “cascade”⁸³ effect as it entails a finding of a lack of due care and skill as well as misleading and deceptive conduct given what the Inspection Report stated regarding compliance with the standard and the legislative requirements of the *CL(SRP) Act* and *CL(SRP) Regulations*.⁸⁴ This is the plaintiff’s primary claim, and it is established.⁸⁵
 - (b) Even were there “strict” compliance with the standard, there were aspects of the Inspection Report that failed to comply with industry practice so as to

⁷⁷ Transcript, Day 1, page 14 [43].

⁷⁸ Transcript Day 1, page 11 [1]-[16].

⁷⁹ Transcript, Day 1, page 11 [19]-[25].

⁸⁰ Transcript, Day 1, pages 25-26.

⁸¹ Transcript, Day 1, page 26 [9]-[10]. Words harken to the words used in Mr Clarke’s report.

⁸² In final oral submissions on 8 May 2024.

⁸³ Your wording adopted by counsel at Transcript, Day 5, 459 [38]-[40].

⁸⁴ Transcript, Day 5, 459 [30]-[36].

⁸⁵ Transcript, Day 5, 459 [46]-[47]; 460 [35]-[39].

demonstrate negligence⁸⁶ or failure to exercise due care and skill. Counsel for the plaintiffs in particular referred to the evidence of one of their experts, Mr Clarke. I accept Mr Clarkes evidence on this issue unreservedly.

- (c) The plaintiffs were misled by the Inspection Report, when the Inspection Report is read as a whole and despite the presence of the “disclaimers” at the back of the Inspection Report.⁸⁷ That is, the manner in which the Inspection Report was expressed was misleading in the relevant sense.⁸⁸

77. In closing submissions,⁸⁹ counsel for the second defendants ultimately submitted that, on the balance of probabilities, the plaintiffs failed to discharge their onus and therefore no cause of action is established under the *CL(SRP) Act* or the *ACL*.⁹⁰ Alternatively, counsel submitted that the plaintiffs have not established that any breach of duty on the part of the defendants was “causative of any loss by the plaintiffs”.⁹¹ It follows that I have not accepted these submissions.

78. Similarly, counsel for the first defendant submitted that the plaintiffs have not discharged their onus (particularly with respect to causation).⁹² In relation to breach, counsel for the first defendant cavilled, in particular, with the plaintiffs’ submissions concerning live termites.⁹³

79. It follows from my findings that I do not accept the submissions of the defendants.

80. In summary, the plaintiffs asserted that the Inspection Report was defective in ten respects. In my view the evidence clearly supports the submissions made by the plaintiffs as follows:

- (a) The Inspection Report Summary section stated that there was no evidence of live termites at the time of the inspection. It should have warned that termites and extensive termites damage could have been present in areas not accessed by the second defendant and that further investigations were required (Statement 1).
- (b) The Inspection Report represented that there were no live termites in the property, and failed to warn that live termites could be present in concealed

⁸⁶ Transcript, Day 5, 460 [1]-[12].

⁸⁷ Transcript, Day 5, 460 [16]-[18].

⁸⁸ Transcript, day 5, page 460 [25]-[27]

⁸⁹ In the Second Defendant Written Submissions, dated 7 May 2024.

⁹⁰ SDWS at [1.1].

⁹¹ SDWS at [1.2]

⁹² FDWS at [1], [12], [21].

⁹³ FDWS at [29].

areas that the second defendant could not inspect or that damage must have existed in concealed areas even if the termite infestation was in the past (Statement 2)

- (c) The Inspection Report erroneously recommended the removal and replacement of fencing timbers where there was evidence of old termite activity (Statement 3)
- (d) The Inspection Report noted the evidence of timber decay to the bathroom windowsill, fencing timbers, and tree trunks or stumps, without noting extensive timber decay to the subfloor where large mycelium growths were also present to the flooring. (Statement 4).
- (e) The Inspection Report noted that ventilation in the subfloor was poor, without explaining why that was so, the importance of ventilation, that ventilation should be improved, or that major works were required to improve said ventilation (Statement 5).
- (f) The Inspection Report did not recommend further investigations despite stating that inspection of the subfloor was limited (Statement 6).
- (g) The Inspection Report erroneously reported that the subfloor drainage was generally fair, when it was not fair (Statement 7).
- (h) The Inspection Report failed to recommend further investigations of the trees in circumstances where the Report noted that there were damage sighted to tree trunks or stumps and that the Report was unable to confirm any termite activity due to the second defendant having conducted visual inspections only (and that no live termites had been sighted at the time of the inspection) (Statement 8).
- (i) The Inspection Report referred to there being a chemical treatment notice to the effect that Biflex Duo was applied to the perimeter on 5 February 2011, while failing to provide certain further warnings and advice regarding chemical treatments (Statement 9).
- (j) The Inspection Report had made incorrect recommendations on page 16 of the Inspection Report, including noting that a treatment in accordance with AS3660.1 was not considered necessary, that the risk of future timber pest infestation were “moderate to high”, and that even if the risk was assessed as high, the assessment was, among other things, not intended to deter an intending purchaser and was simply encouraging increased vigilance (Statement 10).

81. In written submissions, the plaintiffs provided a table which addressed each of the above statements, and further elaborated on the manner in which the defendants were in breach. Subsequently, the defendants provided a table that set out their respective responses to the points outlined by the plaintiff. A consolidated version of these tables – whereby the two respective tables have been combined – is attached to this judgment at Annexure B.
82. Counsel for the defendants submitted that the breaches particularised in relation to statements 3-5 and 7-8 were not pleaded, nor put to the plaintiffs in evidence in chief, and further submitted it is unclear what causal connection it has to the plaintiffs' loss. This is an issue that the parties provided further submissions in January 2025, and to which I will return later in the judgment at [277]. In my view, critically, the Inspection Report should have recommended that a further investigation was required: see paragraph [80](a).

AS4349.3 – 2010

83. A central aspect of this case concerns the provisions of AS4349.3 – 2010. Reliance on AS4349.3 – 2010 was the plaintiffs' primary claim.⁹⁴ Given the centrality to the issues I have determined, it is therefore germane to summarise the relevant portions of AS4349.3 – 2010 for the purpose of this judgment.
84. First, counsel highlighted the following excerpts from the preface and foreword of AS 4349.3 – 2010. Concerning pre-purchase inspections for timber pest issues:⁹⁵

The objective of this Standard is to provide persons and organizations concerned with timber pest inspections of residential dwellings, commercial and industrial buildings **with the basic criteria necessary** in order to facilitate inspections and reports that satisfy the requirements of both the client and the inspector. This Standard is to be used for pre-purchase inspections for timber pest issues.⁹⁶

...

Every year many buildings in Australia are damaged by fungal decay (rot), wood-boring insects, by subterranean termites (the latter are also commonly but incorrectly called 'white ants') or other timber pests. Persons who wish to purchase or maintain a property that includes timber structures may require advice to determine whether the pests are or have been present in the building, there is heightened risk of timber pest presence, or there is damage caused by timber pests. A uniform system of inspection will help to ensure that all inspections meet **a minimum acceptable standard**.⁹⁷

⁹⁴ Closing Oral submissions

⁹⁵ AS 3660.1 deals generally with termite management, and AS 3660.2 covers guidelines for termite management in or around existing building: Appendix D to the Ewart report, page 29

⁹⁶ CB page 126.

⁹⁷ CB page 129.

85. Second, counsel referred to the following specific clauses of AS 4349.3 – 2010:

[Clause 1.1 – Scope]: This Standard provides minimum requirements for non-invasive inspection for buildings for the activity of timber pests and preparation of associated reports. The inspection is to be carried out by a suitably qualified inspector.⁹⁸

[Clause 2.2 – Purpose of Inspection]: The purpose of the inspection is to provide advice within the agreed scope to a prospective purchaser, an owner or another interested party regarding the condition of the property, at the time of inspection, in relation to the activity of timber pests.⁹⁹

86. In relation to cl 1.1, counsel also noted that the standard envisaged a non-invasive inspection supplemented by non-marking sounding of elements and assessment of moisture content of materials.¹⁰⁰ Further, counsel highlighted that, for the purposes of the standard, timber pests that damage timber are “subterranean and damp-wood termites, borers of season timber and wood decay fungi”.¹⁰¹

87. Third, in submissions, counsel highlighted the following clauses headed “Scope of Inspection”, the relevant portions of which I reproduce here:

[Clause 2.3.1: General]: The inspection shall comprise non-invasive of the property for timber pest activity as set out below... A pre-purchase timber pest inspection shall include non-invasive inspection for all timber pest in accordance with the standard.¹⁰²

[Clause 2.3.2: Areas of inspection]: The inspection shall include all accessible areas of the site and does not include areas that are not accessible. The Inspector shall determine the extent of the accessible areas at the time of the inspection, based on the conditions encountered at the time of inspection...¹⁰³

[Clause 2.3.3: Inspection process]: The inspection shall comprise non-invasive inspection of the property for the evidence of timber pests and damage caused by timber pests and to form an opinion regarding the susceptibility to infestation of the property by timber pests at the time of the inspection.

The inspection shall include evidence of timber pests and damage whether or not the timber pests are considered active at the time of inspection.¹⁰⁴

[Clause 2.3.5 – Extent of Reporting]: Items to be reported are as follows:¹⁰⁵

- a. Evidence of the presence of timber pests, irrespective of whether past or current;

⁹⁸ CB page 130; PWS at [14].

⁹⁹ CB page 134; PWS at [15].

¹⁰⁰ CB page 130.

¹⁰¹ Ewart report page 28.

¹⁰² Transcript, day 5, page 465 [35]-[40], Ewart report page 32.

¹⁰³ Transcript, day 5, 466 [1]-[14].

¹⁰⁴ Transcript, day 5, page 466 [18]-[21], Ewart report page 33

¹⁰⁵ CB page 135-6; PWS at [16]

- b. Evidence of damage caused by timber pests and resultant hazards where applicable;
- c. Conditions conducive to timber pests;
- d. An opinion regarding the susceptibility of the building to timber pests; and
- e. Recommendations for further investigations.¹⁰⁶

88. Also highlighted was cl 3.3 of AS4349.3-2010. Among other things, the standard included that the inspection shall include all accessible areas on the site, and that it will exclude inaccessible areas including areas where “reasonable and safe entry is denied” or otherwise unavailable are excluded and do not form part of the inspection.¹⁰⁷ Counsel for the plaintiffs correctly underlined that cl 3.3 also stated that where sufficient access is not available to enable inspection and testing in accordance with the scope of the inspection, “recommendations shall be made for gaining access”.¹⁰⁸

89. Fourth, counsel underlined that cl 3.4 of AS4349.3 – 2010 stated that all timber in accessible areas shall be inspected (except as excluded within the section), and this include “structural timbers, eg. subfloor...”.¹⁰⁹

90. Additionally, cl 3.5 of AS4349.3 – 2010 deals with “Inspection Procedure”. Clause 3.5.1(a)-(b) noted that the inspection shall involve “detection and appraisal” of the presence of timber pests and conditions that are conducive to timber pests.¹¹⁰ Clause 3.5.2 covers the detection and appraisal of presence of timber pests more generally, which opens by noting that:

Inspection for the presence of timber pests shall include damage probably caused by timber pest activity, sign of past or present timber pest activity or past treatment for timber pest activity.¹¹¹

91. Clause 3.5.2 contained a table that identifies signs of timber pest activity (Table 3.2). Counsel particularly emphasised the row detailing “visible signs of timber pests”.¹¹²

¹⁰⁶ Although not highlighted by counsel, I note for completeness that there was a text box that contains commentaries on cl 2.3.5(e) that reads:

If in the opinion of the inspector, there exists a major safety hazard to occupants due to timber pests it is considered that the inspector has a professional duty to ensure that the report clearly identifies the hazard in such a manner that it is not easily overlooked by a reader of the Report.

¹⁰⁷ Ewart report page 35.

¹⁰⁸ Ewart report page 36, Transcript, day 5, page 466-7.

¹⁰⁹ Transcript, day 5, page 467 [25]-[26], Ewart report page 36.

¹¹⁰ Transcript day,5, page 467 [27]-[30].

¹¹¹ Transcript, day 5, page 467 [28]-[30]. Ewart report page 37.

¹¹² Transcript, day 5, page 467-8

In particular, I note that for “subterranean termites” the indications were “mudding, visible nests, swarms or termites”.¹¹³

92. Clause 3.5.2 also referred to guidelines in relation to specific types of timber pests and timber pests, namely borers, fungal decay of timber, and termite damage in timber. These guidelines are included as appendices B-D to the AS 4349.3 – 2010. Appendix B is not relevant in this case as it deals with borers.¹¹⁴
93. References were made to appendix C, first to a picture of a “mycelium” fungus¹¹⁵ and later to the following passage regarding types of decay in Australia (at C4):

In general, decay of floorboards is caused by brown rot fungi, decay of window joinery by either brown rot or white rot fungi and decay of weatherboards often white rot but sometimes by brown rot fungi. *Serpula lacymans* [brown rot fungus]¹¹⁶... is the world's most destructive fungal decayer of timber in buildings. This brown rot fungus has an optimum temperature for growth of 20°C ...Consequently, this fungus causes widespread damage in poorly ventilated subfloor areas in Melbourne where subfloor areas may be protected from the extreme of external temperatures.

94. Counsel further highlighted the note in clause C5.2 of appendix C ('Moisture Content of Timber') to AS4349.3 – 2010, which among other things notes that while the presence of vegetative growth is not necessarily an indication of the presence of decay, the presence of a “reproductive fruiting body” of the fungus is usually associated with “significant wood decay warranting [at least partial] replacement of timber”.¹¹⁷
95. Appendix D is significant given the focus on termite damage in timber and detection of subterranean termites. Counsel highlighted that¹¹⁸ clause D2 of the appendix headed “Detection of Infestation” relevantly stated:

A certain amount of technical knowledge and experience is necessary to determine if there is termite infestation in a building, particularly in the early stages when the attack has just started or when it is confined to remote locations. The inspector should note the habits of termites in general, manner in which they work...

The inspector should carry a pointed instrument (eg., a screwdriver or knife) to probe into woodwork.¹¹⁹...

Termites have soft bodies that cannot withstand the desiccating effects of dry air. They move about in sheltered mud tubes, which they build when they have to cross open spaces that

¹¹³ Ewart report page 37, Transcript, day 5, page 467-8. Mycelium (fungal) and Frass (for borers) was also discussed.

¹¹⁴ Transcript, day 5, page 470 [4]-[5].

¹¹⁵ Ewart report page 54

¹¹⁶ Transcript, day 5, page 471 [9]-[11].

¹¹⁷ Ewart report page 60, transcript, day 5, page 471-2.

¹¹⁸ Transcript, day 5, page 472 [23]-[40]

¹¹⁹ Ewart report, page 64.

are exposed to the air... The presence of shelter tubes is the most positive indicator of a termite infestation. An inspector should be able to distinguish between old and new shelter tubes.¹²⁰

...

If termite activity is noticed in any one location of a building, it is advisable to make a thorough search of the entire building.

...

A search should be made for nests for distances up to a distance of 30m from the main building and within the boundary.¹²¹

96. Reference was made to cl 3.5.3 of AS4349.3 – 2010, which sets out the inspection procedure for detection and appraisal of conditions conducive to timber pests.¹²² Cl 3.5.3 noted that the inspection shall include inspection for “the potential for or presence of water or dampness in unintended locations”, as follows:
- (a) Absent or ineffective moisture barriers.
 - (b) Poor subfloor drainage and/or inadequate subfloor ventilation.
 - (c) Water entry due to, for example, leaks from plumbing or waterproofing membranes.
 - (d) Excessive moisture in building elements, as defined in Table 3.4.¹²³ Table 3.4 lists moisture conditions conducive to timber pest activity, including “moisture content” or “MC”.
97. Relevantly, cl 3.5.3 closed by noting that while AS4349.3 – 2010 does not require the use of a moisture meter to determine the moisture content, the inspector must be able to demonstrate (where required) an alternative basis for the determination of moisture content if the meter was not used. Usage of a moisture meter is not considered an invasive or destructive test for the purposes of AS4349.3 – 2010.¹²⁴
98. Also referred to in cl 3.5.3 is appendix E, which contains aspects of moisture management that are important to a timber pest inspector. The appendix explains that moisture is required by two “of the most important classes” of wood-destroying timber pests, being termites and wood-rotting fungi.¹²⁵ The presence of elevated moisture

¹²⁰ Ewart report page 64, page 473 [5]-[15].

¹²¹ Ewart report, page 65, Transcript, day 5, page 473 [19]-[23]

¹²² Transcript, day 5, page 468 [16]-[17].

¹²³ Ewart report page 38.

¹²⁴ Transcript, day 5, 468 [37]-[39], Ewart report page 39.

¹²⁵ See Ewart report page 72.

levels “may provide conditions conducive” to future timber pest activity or possibly indicate activity of termites or fungal decay (rot) in the locations where such levels exist.¹²⁶ The authors of AS4349.3 – 2010 therefore noted that importance of moisture management issues, warrants the inclusion of appendix E.¹²⁷

99. In relation to appendix E, counsel for the plaintiffs referred the Court to the relevant section on detecting leaks and elevated moisture levels¹²⁸ in subfloor drainage (cl E3.6). As later noted in cl E3.9 of appendix E, the subfloor is “possibly one of the most important areas” on the property for inspection by a timber pest inspection. So much is noted by counsel for the plaintiffs.¹²⁹ Counsel for the plaintiffs in particular noted the following criteria in cl E3.6 of appendix E, with reference to Mr Clarke’s evidence regarding the state of the subfloor during his inspection:¹³⁰

(a) “Signs that excessive moisture has been moving up through perimeter brickwork, eg, presence of thick layer of ‘salt damp’ on internal faces of perimeter brickwork”.¹³¹

100. Counsel also referred to cl E3.7, which discussed the same issues but in relation to “Wall Drainage”. The clause notes that “weep holes” are usually incorporated as “omitted mortar at the vertical abutments of adjacent bricks along the relevant brick course.”¹³² Clause E3.7 noted that the inspector may check that the bases of the “weep holes” are being clear of, among other things, ground and garden beds, and that “weep holes” are not blocked by addition of “render to the exterior of the walls”.¹³³
101. Relatedly, as referred to by counsel for the plaintiffs, clause C7.2 of appendix C states that the moisture content of timber should be “checked in all areas” perceived to be damp or where ventilation is considered to be inadequate.¹³⁴
102. Reference was made to Table C2 and section C5 of appendix C, both of which deals with moisture content values and moisture content levels respectively Counsel submitted that moisture content in the subfloor is of “central importance” as it both creates the conditions for termites and for things that may otherwise decay timber (eg. brown rot fungus).¹³⁵ Further, counsel also noted the warning in cl C5.1 of appendix

¹²⁶ Ewart report, page 72, Transcript, page 473 [34]-[37].

¹²⁷ Transcript, day 5, page 473 [30]-[33].

¹²⁸ See heading to E3 in page 73 of the Ewart report.

¹²⁹ Transcript, day 5, page 474 [23]-[25], page 76 of the Ewart report.

¹³⁰ See Transcript, day 5, page 475 [15]-[19].

¹³¹ Transcript, day 5, 474 [5]-[7]; page 75 of Ewart report.

¹³² Ewart report, page 76.

¹³³ Ewart report page 76, Transcript, day 5, page 474 [15]-[24]

¹³⁴ Ewart report page 62, Transcript, day 5, page 472 [16]-[18].

¹³⁵ Transcript, day 5, page 471 [20]-[21].

C that “the human senses are not suited to discriminating differences in moisture levels in materials”, and as such suitable instrumentation for determining the critical levels is essential.¹³⁶ A similar warning is also contained in cl E2.2 of appendix E:

... in the absence of such readily visible or indirectly visually detectable water leaks, the human senses are not very efficient at detecting variations in the actual moisture levels in the materials themselves... Therefore, the inspector needs all the help available, in terms of appropriate instrumentation...¹³⁷

103. The final clause of section 3, cl 3.5.6, deals with the written record of the inspection.¹³⁸

104. Section 4 of AS4349.3 – 2010 is of relevance, as it deals with the report of the inspection. Counsel for the plaintiffs highlighted clause 4.1 of the AS4349.3 – 2010, which states that:¹³⁹

[Clause 4.1 – General]: A written report shall be provided either in hardcopy or otherwise in a form agreed with the client that will enable the client to retain a permanent record of the report. ... The report shall be written and formatted such that **the specific findings of the subject inspection and the report summary can be readily distinguished from more general material such as background advice, disclaimers and the like.**¹⁴⁰

(emphasis the plaintiff's)

105. Clause 4.2 of AS 4349.3 deals with the content of a timber pest inspection report. Clause 4.2.1 stated that the report shall include, but not necessarily limited to, items listed in cls 4.2.2 to 4.2.5.¹⁴¹ This includes the following matters:

- (a) The circumstance of inspection (cl 4.2.2), which includes details such as the name of the person who undertook the inspection, the date and time of the inspection, details of inspection agreement, the prevailing conditions at the time of the inspection and the description and identification of the building or other timber structures inspected.¹⁴²
- (b) Any limitations on the inspection (cl 4.2.3), being areas within the scope of the inspection that were not inspected and the reasons why.¹⁴³

¹³⁶ Ewart report page 59; transcript day 5, page 471 [28]-[30].

¹³⁷ Transcript, day 5, page 473[41]-[46], Ewart report page 73.

¹³⁸ Ewart Report page 39, Transcript 468-9.

¹³⁹ I note that the commentary for this section relevantly (and somewhat prophetically) noted:

The facts obtained from the inspection have to be clearly and comprehensively presented in the report... Due to the litigious nature of this industry, it is desirable for the benefit of both the client and the inspector that the report be clearly written.

¹⁴⁰ PWS at [17]; CB at 142.

¹⁴¹ CB at 142; PWS at [18].

¹⁴² PWS at [18](a),

¹⁴³ CB at 142; PWS at [18](b).

- (c) Observations of the inspector (cl 4.2.4), including description of evidence of termite attack (eg. shelter tubes), evidence of past timber pest treatment, presence of damage apparently to timber pests (whether or not the inspector considers the pests to be active), and records of elevated moisture content that could indicate the presence of timber pests and of moisture problems on the property that could increase the likelihood of pest infestation.¹⁴⁴
- (d) Safety hazards (cl 4.2.5) which resulted directly from the activity of timber pests, and which are present and observed during the course of the inspection.¹⁴⁵

106. Finally, AS 4349.3 – 2010 also contains standards pertinent to the recommendations, conclusions and the summary of the relevant report.¹⁴⁶

[Clause 4.2.6 – Recommendations]: Whether the inspector has formed the opinion that further inspection is warranted the report shall include suitable recommendations. Examples of recommendations may include provision of access to allow inspection of an inaccessible area, invasive inspection where infestation is suspected and inspection by a building inspector or engineer where serious damage is present.

The report shall include recommendations for the frequency of future inspections.

[Clause 4.2.7 – Conclusions]: The report shall include the findings of the inspector derived from the observations at the property. For example... the presence of timber pests on the property ... damage due to pest activity including any major safety hazard., the extent to which the inspection ... undertaken was adequate to satisfy the purpose of the inspection and the extent to which further inspection would improve the reliability of the inspection outcomes.

The report shall include an opinion ... regarding the susceptibility of the subject property to sustaining damage from timber pests.

[Clause 4.2.8 – Summary]: The report shall include an overview of the report contents, including –

- a) damage apparently due to timber pests activity detected;
- b) timber pests detected;
- c) further inspections recommended;
- d) major safety hazards due to timber pests observed; and
- e) the inspector's opinion regarding susceptibility to timber pests.

The summary shall not contain material that is not included in the body of the report.

¹⁴⁴ CB at 143; PWS at [18](c).

¹⁴⁵ CB at 143, PWS at [18](d).

¹⁴⁶ CB at 143-4; PWS at [18]-[21].

Evidence

107. The matter was heard over the course of 5 days, during which the Court heard from six witnesses.
108. The following witnesses were called by the plaintiffs:
- (a) Ms Theresa Shannon, the first plaintiff.
 - (b) Ms Jennifer Westacott AO, the second plaintiff.
 - (c) Mr Shane Clarke, as an expert witness.
 - (d) Dr Don Ewart, as an expert witness.
109. As referred to earlier, an expert report by Mr Clarke was tendered at the hearing. Similarly, Dr Ewart's expert report of 2 June 2021 (the Ewart report) and an addendum dated 28 February 2023 (the supplementary Ewart report) was also tendered.
110. Additionally, the plaintiffs tendered an expert report from Mr Adre de Waal, a professional¹⁴⁷ quantity surveyor, dated 4 May 2021 (the de Waal report) as well as a report by Mr Marcus Hon, a certified practicing valuer¹⁴⁸, dated 2 March 2023 (the Hon report). Mr de Waal also prepared a supplementary report dated 24 June 2021 (the supplementary de Waal report), tendered in the proceedings.
111. As might be expected, the significance of the Hon report lies in the assessment of quantum. Mr Hon relevantly assessed the value of the property as \$1,275,000.00 as at 8 November 2019, being vacant land only. Mr Hon reviewed the supplementary Ewart report, the Clarke report, and a report by Smith & Sons, and Mr Hon also carried out the valuation on the "informed assumption" that the estimate costs of remediation would exceed the costs of a knock-down rebuild.
112. In light of these, Mr Hon was of the view that the main building on the property as at 8 November 2019 adds "negligible value" to the property and as such Mr Hon assessed the value of property "As if" it was vacant land.¹⁴⁹
113. The purpose of the de Waal report, on the other hand, was to provide a preliminary expert opinion on whether the property was currently habitable. The supplementary

¹⁴⁷ Plaintiff written submissions at [42].

¹⁴⁸ Plaintiff written submissions (PWS) at [42].

¹⁴⁹ Hon Report page 14, CB 307.

de Waal report, by contrast, was to further investigate the presence of termites in the property, particularly to load-bearing components of the residence.¹⁵⁰

114. The de Waal report noted that there was sufficient reason to conclude that the property was currently not habitable at the time of the report, based on the “two reports”, the presence of termite damage to load-bearing components, and the incomplete inspection of the subfloor and load-bearing walls.¹⁵¹
115. Mr de Waal¹⁵² and Mr Hon were not called nor subjected to cross-examination. As such, their evidence was unchallenged.
116. The following witnesses were called by the defendants:
- (a) Mr Scott Maher, the second defendant.
 - (b) Mr Nicholas Broadhurst, as an expert witness.
117. Mr Broadhurst prepared an expert statement dated 17 April 2023 (the Broadhurst report), tendered at the hearing.
118. The defendants also tendered a further expert report Ms Carolyn Mowbray, a certified practicing valuer,¹⁵³ dated 5 July 2023 (the Mowbray report). Similarly to the Hon report, Ms Mowbray’s report was of relevance to the issue of quantum. Ms Mowbray relevantly assessed the property as having a value of \$1,800,000.00 as of 8 November 2019, having regard to the Inspection Report noting no active subterranean termite but with evidence of previous termite activity. However, if the property did include active termites and were assessed as a “land only offering”, Ms Mowbray assessed the property as having the value of \$1,275,450.00, rounded to \$1,275,000.00.¹⁵⁴
119. Ms Mowbray’s evidence was not challenged.
120. For completeness, I note that that the following expert reports were also tendered in this matter:
- (a) The report of Mr David Fisher of 14 August 2021.
 - (b) The Emmadale Projects report.

¹⁵⁰ See CB page 288.

¹⁵¹ De Waal report at page 8, CB at 279.

¹⁵² PWS at [42].

¹⁵³ Court Book at 358, Mowbray Report page 5; See also PWS at [47].

¹⁵⁴ Mowbray report at pages 19-20, 25, CB 372-3, 378 See also page 5, CB 358.

- (c) The Stephenson report.
- (d) The Walker report.
- (e) An expert report prepared by Mr Symon Badenoch dated 25 November 2020 (the Badenoch report).

121. The authors of these reports were not called to give evidence, and there was in my view arguably less emphasis placed on these reports than the reports of Dr Ewart, Mr Clarke, and Mr Broadhurst (or indeed the Hon, de Waal, and Mowbray reports) I do not propose to set out the contents of these reports separately. However, I will refer to the opinions expressed in these reports in so far as a witness was taken to the reports or if submissions were made in reliance of stated opinions.

122. I will now outline the evidence of witnesses who were called in the trial. It is convenient to discuss the evidence of the lay witnesses first, before discussing the expert evidence.

Evidence of the first plaintiff and the second plaintiff

Ms Theresa Shannon

123. I note at the outset that my assessment of the evidence of Ms Shannon was that her evidence was both highly credible and reliable.

124. Ms Shannon gave lengthy evidence. What follows is a necessarily detailed summary.

Background and purchase of the property

125. Ms Shannon gave evidence¹⁵⁵ that the plaintiffs' move to Canberra was prompted by a notification by the Department of Home Affairs. This was that Ms Khavari, who lived with the plaintiffs in Sydney (and was a refugee and the holder of a Safe Haven Visa) must move to a place outside of Sydney.

126. Ms Shannon gave evidence as to the decision to buy a house in Canberra and the selection of the house:¹⁵⁶

127. Ms Shannon, gave evidence that they moved into the property, around December 2019.¹⁵⁷

¹⁵⁵ Transcript, day 1, page 51-52 [4]-[10].

¹⁵⁷ Transcript, day 2, page 120 [22]-[30].

128. In cross-examination, counsel for the first defendant asked why the plaintiffs chose the property. Ms Shannon gave evidence that they felt¹⁵⁸ “the property really suited [their] needs ... especially in terms of [Ms Khavari’s son]” who was attending primary school at the time.
129. Ms Shannon gave evidence that she first saw the Inspection Report as part of the contract for purchase,¹⁵⁹ before signing the contract. Ms Shannon confirmed that she read¹⁶⁰ the Inspection Report. In cross-examination, Ms Shannon reconfirmed that she read the Inspection Report upon receiving¹⁶¹ it via email at the plaintiffs’ then-home in Kingston. Ms Shannon also confirmed that the second plaintiff also read¹⁶² the Inspection Report.
130. Ms Shannon noted in cross-examination¹⁶³ that the second plaintiff would speak on the phone in the contractual negotiations, before telling her what was said. Further, Ms Shannon gave evidence that the plaintiffs retained a conveyancing lawyer for the purchase and noted¹⁶⁴ that she thought it was “their job” to tell the plaintiffs if they saw there was a problem. In response to questioning as to whether advice was obtained from the lawyer. Ms Shannon gave evidence that the plaintiffs did have a meeting¹⁶⁵ with the conveyancing lawyers. While Ms Shannon could not recall exact dates, Ms Shannon agreed¹⁶⁶ that the meeting occurred on 11 November 2019 upon suggestion by counsel for the first defendant. The plaintiffs signed¹⁶⁷ the contract for purchase on 8 November 2019.
131. Ms Shannon conceded that she was quite content¹⁶⁸ with the contract as a whole and did not feel that she needed advice. Ms Shannon conceded¹⁶⁹ that she did not personally make any further inquiries, inspections, or searches of the property in between the period of reading the Inspection Report in October and the signing of the contract in November 2019. That was because Ms Shannon was of the view that “the conveyancing lawyer would do all the searches”.

¹⁵⁸ Transcript, day 1, page 87 [1]-[6].

¹⁵⁹ Transcript, day 1, page 56 [43]-[44], 57 [1]-[3].

¹⁶⁰ Transcript, day 1, page 57 [5].

¹⁶¹ Transcript, Day 1, page 87, line [36]-[44].

¹⁶² Transcript, day 1, page 87 [46].

¹⁶³ Transcript, day 1, page 88 [16]-[17].

¹⁶⁴ Transcript, Day 1, page 88, line [21]-[26].

¹⁶⁵ Transcript, day 1, page 88 [40]-[43].

¹⁶⁶ Transcript, Day 1, page 88, line [44]-[45], 89 [4].

¹⁶⁷ Transcript, day 1, page 89[6].

¹⁶⁸ Transcript, day 1, page 89 [13]-[15].

¹⁶⁹ Transcript, day 1, page 89 [17]-[21].

Consideration and reliance on the contents of the Inspection Report

132. In cross-examination by the second defendant, Ms Shannon confirmed that she had obtained pest inspection reports when she previously purchased houses in Sydney. However, Ms Shannon answered that in NSW, it is the buyer and not the seller who obtains these reports.¹⁷⁰
133. Ms Shannon gave evidence regarding specific sections of the Inspection Report both in evidence-in-chief and later in cross-examination.
134. In cross-examination, Ms Shannon confirmed the following in relation to the final sentence on page 2 of the Inspection Report:
- MR MARKHAM: And I just want to be clear that the sentence at the end of the first paragraph, that, 'It's important that you carefully read the complete report, including the warranty and use scope and inspection and scope and limitation sections prior to make critical decision.'? ... And you understood that to mean that the report should be read as a whole?
- MS SHANNON: You mean this report?
- MR MARKHAM: The whole of the report?
- MS SHANNON: You don't mean the whole contract; you mean this report?
- MR MARKHAM: To the extent that it's saying... It should be read as a whole?
- MS SHANNON: Yes.
135. Ms Shannon also confirmed that she recalled reading the reference in the second paragraph of the "Important Information" section of the Inspection Report, which stated that where reference has been made to termites, that the advice of a "suitably qualified tradesman" who is able to quantify the extent and cost of appropriate remedial action be obtained prior to purchase.¹⁷¹
136. As to the reference on page 4 that the defendants' role was to perform a thorough visual inspection, Ms Shannon noted her understanding that this meant that the defendants were not going to perform invasive procedures such as "removing the couch from the wall and hitting the skirting boards or something like that".¹⁷²
137. Ms Shannon relevantly gave evidence in examination that she understood¹⁷³ the reference to "no evidence of active subterranean termites (live species) was found at the time of ... inspection" in page 3 of the Inspection Report to mean what it said. Ms

¹⁷⁰ Transcript, page 181 [41]-[45].

¹⁷¹ Inspection Report page 2, Transcript, day 2, page 148-9.

¹⁷² Transcript, day 2, page 149 [15]-[20]. See also Transcript, day 2, page 159 [22]-[25]

¹⁷³ Transcript, day 1, page 57 [19]-[21].

Shannon also confirmed that nothing in the “Property Report”¹⁷⁴ section of the Inspection Report gave Ms Shannon any concern with the property.

138. Ms Shannon was then taken to the “Exterior” portion of the property report section. Ms Shannon gave evidence that the reference to timber decay being detected the bathroom window frame did not cause her concern at the time, attributing the defect¹⁷⁵ to “the bath... the spa thing [...] not working properly, so it leaked a bit of water”. Ms Shannon notably gave the same evidence later in examination, stating that she thought the damage to the bathroom window frame was water and that “I could tell – you could see it was water.”¹⁷⁶
139. Ms Shannon was then asked about the references to defects in the subfloor and fences in pages 10-11 of the Inspection Report. It is useful to reproduce relevant answers below:¹⁷⁷

MS SHANNON: When we came to the part about the termites, **'There's evidence of old termite activity, mud trails to the subfloor but no live termites were sighted.'** So the more we saw that, we – that's kind of more reassuring. So there was nothing there that we were concerned about.

[Ms Shannon was then taken to the next page of the Report, where the Report noted that “Defects have been identified” in relation to “Fences and Gates”].

MR KATEKAR: And I'd invite you to remind yourself of what is written below and ask you whether there was anything of concern in that passage of the Report for you?

MS SHANNON: Yes, Okay. So they said there was some old termite activity there and they **recommended replacing the affected timbers, which we did. We spent a lot of money replacing all the perimeter fences with new Colorbond fences.** And now I find something you said this morning that that wasn't a good idea. But **that's what this report said to do, so we did.**

MR KATEKAR: Did the reference to termite activity on the fences give you any concern about what the state of the house was?

MS SHANNON: **No. Because in the Report, it said there were ... no active termites in the house.**

(emphasis added)

140. Later, Ms Shannon also gave similar evidence¹⁷⁸ that the plaintiffs had decided to mitigate against termites by replacing the fences with “Colourbond... at great cost”.

¹⁷⁴ Transcript, page 57 [33]-[36].

¹⁷⁵ Transcript, page 57 [40]-[47].

¹⁷⁶ Transcript, day 1, page 59 [5]-[6].

¹⁷⁷ Transcript, day 1, page 58 [1]-[26].

¹⁷⁸ Transcript, day 1, page 63 [29]-[34].

Ms Shannon also gave evidence of additionally paying the cost of replacing the plaintiffs' neighbour's fences as well.

141. Ms Shannon was taken to specific portions of page 10 of the Inspection Report in cross-examination. In relation to the reference in the defendants' inspection of the subfloor being significantly restricted by low clearances and ductwork, Ms Shannon noted that this was ambiguous to her mind:

MR MARKHAM: In that the second dot point says 'Our inspections were significantly restricted by low clearances and duct work. Not all areas of the subfloor could be inspected'. What did you understand when you read that?

MS SHANNON: It's not clear whether this inspector actually went under the house is it from that? You can't really tell whether they indeed went under or whether they just went partially under or whether they didn't go under...

MR MARKHAM: So your understanding was that you weren't aware what was inspected under the subfloor?

MS SHANNON: I'm just saying I don't know if they actually physically went under or not.

142. In this regard, Ms Shannon was taken to a similar reference to insufficient crawlspace in the subfloor on page 17 within the "Property Access" section of the Inspection Report. Ms Shannon noted that she imagined this meant "somebody had gone in as far as they could go".¹⁷⁹ Ms Shannon also noted that other people, such as staff from Armageddon, were able to access the subfloor.¹⁸⁰
143. With respect to the warning given in the Inspection Report regarding "surface moisture" and suggested remedial action, Ms Shannon noted her understanding that she be vigilant in the future and to ensure to take actions such as lowering the paving to make the weep holes visible.¹⁸¹ Ms Shannon agreed that the plaintiffs did not take action until it was recommended by Mr Fisher and noted that she did not know about weep holes before "all this happened". Ms Shannon conceded that the suggestion of remedial action in this portion was not a barrier to her purchasing the property.¹⁸²
144. Counsel for the plaintiffs in examination relevantly asked¹⁸³ Ms Shannon regarding her impression of the "Timber Pest Report" section of the Inspection Report in page 16. Ms Shannon was taken to the reference in the Inspection Report to "Live Species" and "Timber Pest Evidence", specifically that there was no evidence of active

¹⁷⁹ Transcript, da 2, page 155 [31]-[34].

¹⁸⁰ Transcript, day 2, page 155-6, 158 [40]-[43].

¹⁸¹ Transcript, day 1, page 1650 [1]-[11].

¹⁸² Transcript, day 1, page 150 [13]-[30].

¹⁸³ Transcript, day 1, page 58 [32]-[40].

subterranean termites found at the time of inspection and findings that no live termites were sighted even though there was “old” termite activity. Ms Shannon noted¹⁸⁴ her understanding such references as follows:

So whenever we saw that, we thought, ‘Okay. They’ve been treated. They’ve gone.’ You know, it’s okay.

145. With respect to “Subfloor Drainage and Ventilation”, the Inspection Report noted that “[the defendants’] limited [subfloor] inspection indicates that the subfloor drainage is generally fair, however, ventilation is poor”. Ms Shannon gave the following answer as to what she took from this in terms of risks of pests:¹⁸⁵

Yes. Because they had been saying like five times through the [R]eport that there were no termites and no live termites, I just imagined that we would, you know, attend to the ventilation once we started renovation.

146. Later, Ms Shannon gave the following similar evidence as to the recommendation in the Inspection Report regarding the ventilation of the subfloor in conjunction with a later reference that remedial measures be taken in page 25:¹⁸⁶

MR MARKHAM: You didn't take any steps to do that treatment [that was recommended], did you?

MS SHANNON: Well, you know, we – we bought the house, and as I said before lunch, that we had – I had worked out that, you know, **we were going to do things in stages** and we were going to, as I said before, take up all the paving outside to - down to the level of the weepholes, and we were going to pull up that flooring; work out a way to ventilate it.

(emphasis added)

147. Ms Shannon was taken to the Inspection Report’s discussion of recent termite treatment. In relation to a previous “Biflex duo” treatment undertaken on 5 February 2011, Ms Shannon noted that she “always get pest inspections... at least [every] 12 months anyway”¹⁸⁷ and thought that the treatment was merely “[m]itigating the dangers”. In response to the Inspection Report’s recommendation that treatment is not considered necessary, Ms Shannon again noted¹⁸⁸ her impression that “there was nothing there and that they weren’t concerned about any live termites”.

¹⁸⁴ Transcript, day 1, page 58 [42]-[47].

¹⁸⁵ Transcript, day 1, page 59 [17]-[20].

¹⁸⁶ Transcript, day 2, page 172 [9]-[10].

¹⁸⁷ Transcript, day 1, page 60 [8]-[11].

¹⁸⁸ Transcript, day 1, page 60 [16]-[17].

148. In cross-examination, Ms Shannon noted that she understood Biflex Duo to be an “insecticide kind of pest treatment”.¹⁸⁹ Ms Shannon denied that she relied on the representation that Biflex Duo was used in drawing her conclusion about old termite activity, as in her mind the treatment could have been used to prevent termites.¹⁹⁰ Ms Shannon did appear to accept that it is possible that termites could have entered in the 8.5 years between the treatment in 2011 and the purchase.¹⁹¹

149. Ms Shannon importantly gave the following evidence as to her impression of the opinion that the degree of risk of timber infestation being assessed as moderate to high and the apparent disclaimer that follows in the bottom of page 16:¹⁹²

Well, I would always have, as I said, pest inspections done as a ... routine maintenance of a home, but then you read down the next paragraph and it said, It should be noted that if the **risk factor noted in this report is considered to be high... which ours wasn't, it was moderate to high**, ...this is not designed to deter an intending purchaser. It's simply encouraging awareness. And then it says, Just undertake pest inspections every six to 12 months and that was – **that was an important thing because it – ours wasn't high. It was moderate to high. And even if it was high, as they say here, they still say, Just get an inspection every six to 12 months and be vigilant.**

(emphasis added and quotation marks removed)

150. In cross-examination, Ms Shannon noted that she did not understand that this risk assessment included not only risk of future infestation, but the “overall” risk of timber pest infestation when the Inspection Report was written.¹⁹³ Counsel pressed Ms Shannon as to how she made sense of the belief that there was “moderate to high” risk of current infestation and the belief that there were no live termites.¹⁹⁴ Ms Shannon noted that what she took from both propositions side-by-side¹⁹⁵ was that the plaintiffs needed to be vigilant.¹⁹⁶ Ms Shannon relevantly noted that the assessment comes with the caveat¹⁹⁷ that is reflected in the next paragraph:

MS SHANNON:... And I'm sorry but you have to read the next paragraph too which is incredibly important:

It should be noted that the risk factor noted in this report is considered to be – if it was considered to be high, it is not designed to deter the intending purchaser. It's simply encouraging awareness that increased vigilance is warranted.¹⁹⁸

¹⁸⁹ Transcript, day 2, page 152 [34]-[35].

¹⁹⁰ Transcript, day 2, page 152-3.

¹⁹¹ Transcript, day 2, page 186 [16]-[19].

¹⁹² Transcript, day 1, page 60 [43]-[47].

¹⁹³ Transcript, day 2, page 153 [11]-[16], [35]-[38].

¹⁹⁴ Transcript, day 2, page 153 [40]-[45].

¹⁹⁵ Transcript, day 2, page 154 [

¹⁹⁶ Transcript, day 2, page 154 [6]-[12], [39]-[41].

¹⁹⁷ Transcript, day 2, page 154 [39]-[41],

¹⁹⁸ Transcript, day 2, page 154 [19]-[25].

You know, you have to go on – this is an expert report. You have to go on what's in front of you.¹⁹⁹

151. Ms Shannon stated in cross-examination that she is not familiar with the industry practice of risk ratings, and that she just went on what was in the Inspection Report.²⁰⁰ Ms Shannon noted that had they purchased the property she would have the property checked every six months,²⁰¹ but conceded that the plaintiffs did not ask another person to conduct an invasive pest inspection prior to purchasing the property as they “went on [the Inspection Report] as the expert report”.²⁰² Later, Ms Shannon gave similar evidence in cross-examination:²⁰³

MR MARKHAM: But you made no further inquiries perhaps warning under Important Information on page 26?

MS SHANNON: No, but there was nothing else. There was nothing in the bundle of information that was left in the house for us, nothing to do with - anything to do with termites or treatments.

MR MARKHAM: So you didn't follow the warning?

MS SHANNON: I mean, as soon as we kind of - I would have had six-monthly inspections done, Mr Markham, on this house. **So I did - I would have followed this warning, but did we - did I get another pest inspection done when we bought house? No.**

(emphasis added).

152. Ms Shannon was later taken to the “Scope and Limitations” section of the Inspection Report.²⁰⁴ With respect to the Inspection Report being limited to the “condition of those areas of the property that were fully accessible”.²⁰⁵

MS SHANNON: Yes. So I read that to mean that – that they got in as far as they could. They looked everywhere they could. If they couldn't get in, you know, they're not – they're relinquishing responsibility for that but, you know, that makes sense.

MR MARKHAM: Do you accept they're indicating that for the parts of the house they can't physically inspect and see?

MS SHANNON: Yes, yes

MR MARKHAM: That they're not accepting that they're making any representation or liability?

¹⁹⁹ Transcript, day 2, page 154 [19]-[25].

²⁰⁰ Transcript, day 2, page 154 [30]-[31].

²⁰¹ Transcript, day 2, page 155 [5]-[6].

²⁰² Transcript, day 2, page 155 [8]-[15].

²⁰³ Transcript, day 2, page 163 [5]-[14].

²⁰⁴ See in particular Transcript, day 2, page 159.

²⁰⁵ See Inspection Report page 19, PTB 1 page 20.

MS SHANNON: -- if they can't get in, they're not -- they're not going to say 'we saw everything' because we couldn't get in and see it.

153. Later, Ms Shannon conceded that, at the time in reading the Inspection Report, Ms Shannon accepted that "if [the defendants] couldn't get to the really narrow places, so be it" and that the subfloor was obstructed in parts.²⁰⁶
154. Ms Shannon was also taken to a reference in page 18 of the Inspection Report that no liability is accepted on account of failure to report termite activity or damage in physically inaccessible area of the property. Ms Shannon sensibly noted that this speaks for itself.²⁰⁷
155. With respect to the recommendation in page 21 of the Inspection Report that the subfloor area be monitored if moisture is noted, Ms Shannon conceded that while she only engaged Mr Fisher for that issue in October 2020,²⁰⁸ the plaintiffs intended to fix the ventilation including by potentially pulling the floorboards up.²⁰⁹
156. Ultimately, when Ms Shannon was taken to page 24 of the Inspection Report under the heading "Timber Pest Report", Ms Shannon accepted that "The inspector does not imply that inaccessible or partly inaccessible areas of the property were not, or have not been, infested by Timber Pests", would indicate that there were risks in inaccessible areas that an infestation was there, but again noted that there were five mentions in the Inspection Report that there were no live termites. Not being experts, Ms Shannon asserted that the plaintiffs took these representations at face value.²¹⁰ Ms Shannon also accepted that the representation of present infestation was limited to accessible areas, and that it was not a guarantee in relation to inaccessible areas.²¹¹ That is, Ms Shannon accepted that the Inspection Report does not give a "general warranty" across the building.²¹²
157. Finally, Ms Shannon was taken²¹³ to the reference in page 25 of the Inspection Report discussing "Determining extent of damage". Ms Shannon confirmed her reading²¹⁴ of this paragraph in 2019 and noted her impression of this section as follows:

What I understood from -- from this was that **these were disclaimers** that you'd find in many kind of documents, and it just says that the report's not the important part of this report to us

²⁰⁶ Transcript day 2, page 159 [1]-[4]

²⁰⁷ Transcript, day 2, page 157 [24]-[32].

²⁰⁸ Transcript, day 2, page 158 [14]-[15] [30]-[32]

²⁰⁹ Transcript, day 2, page 158 [30]-[32].

²¹⁰ Transcript, day 2, page 159-60.

²¹¹ Transcript, day 2, page 169 [32]-[46].

²¹² Transcript, day 2, page 170 [12]-[13]

²¹³ Transcript, day 1 page 60 [37]-[39].

²¹⁴ Transcript, day 1, page 60 [41], 46].

was the part that referred to our potential home, which was **the first part of the [R]eport that said there were no live termites** and no evidence of live termites. So when I read that I just thought, 'Okay, that's a – a disclaimer and it's in their...' - you know. I understood what it meant. Yes.²¹⁵

158. I note relevant evidence from²¹⁶ Ms Shannon as to her understanding of the warning in the Inspection Report that if timber pest activity or damage is reported the reader must assume there might be further concealed damage:

MR KATEKAR: Okay. Can I just ask you this question directly? About in the fifth line [of page 25, "Determining Extent of Damage" section] ... it says, 'If evidence of timber pest activity and/or damage is reported in structures, then you must assume there may be further concealed structural damage.' ... What was your understanding about what this report was telling you about evidence of timber pest activity and/or damage?

MS SHANNON: If evidence of timber pest activity and/or damage is reported in the structure or grounds that the concealed damage may only be found when invasive procedures are applied to reveal...' **Yes, so they're just basically saying that ... their report doesn't – their – their inspection doesn't – they don't do invasive reports – sorry, invasive procedures, and - - -**

MR KATEKAR: I probably wasn't being ... helpful with my question. **Did you understand this report to be telling you earlier that there was evidence of timber pest activity and/or damage reported in the structures?**

MS SHANNON: **No.**

(emphasis added)

159. As noted by the first defendant,²¹⁷ Ms Shannon later gave further evidence in cross-examination regarding her specific understanding of the individual warnings in page 25 of the Inspection Report:²¹⁸

MR MARKHAM: Can I take you to page 25? So the sentence in the middle of that page for determining extent of damage. It starts with ... , **'If evidence of timber pest activity or damage is reported in the structure on the grounds of the property then you must assume that there may be further concealed structural damage within the buildings. The concealed damage may only be found when invasive procedures are applied to reveal previously concealed timbers. We strongly recommend an invasive timber pest inspection is undertaken.'** What did you understand by the expression 'If evidence of timber pest activity or damage'?

²¹⁵ Transcript, day 1, page 60-61.

²¹⁶ Transcript, day 1, page 61 [8]-[24].

²¹⁷ Transcript, day 5, page 545.

²¹⁸ Transcript, day 2, page 161 [39]-[46].

MS SHANNON: **We understood that there was no pest activity.** And they **keep using 'previous' and 'old'**, so we understood that they had been there at one point and they weren't there now.

MR MARKHAM: ... you'll see there at the second line, **'Termites can in a relatively short period cause significant damage to both structural and non-structural timbers with and around the building. Termites are difficult to detect and much of the damage caused may not readily be visible damage exists. It may be costly to repair. It's therefore recommended that you arrange an inspection.'** So what did you understand that to mean?

MS SHANNON: That I - that I would, you know, arrange regular pest infection - inspections on this house.

...

MR MARKHAM: **'If the report indicates the presence of termites, termite damage, previous activity or treatments or recommends a treatment, you should obtain copies of the treatment proposals, any certificates of treatment, details of all repairs, including copies of quotation, invoices and any other reports.'** Now, what did you understand that expression to mean?

MS SHANNON: So they said there was a sticker, you remember, in the - they said there's a sticker in the front meter box that talked about that pesticide we were looking at before. When I went to look for that it wasn't there and I asked one of the tradesmen was I looking in the wrong place and they said, no, it's not there anymore... [s]omewhere around [October 2020] and I couldn't find it.

(emphasis added)

160. In relation to the reference in the Inspection Report that there may be future concealed structural damage if timber pest activity or damage is reported, Ms Shannon was also asked in cross-examination regarding the damage to fences. Ms Shannon confirmed that she is aware that there had been some activity and that the fences were damaged.²¹⁹ However, Ms Shannon noted that this did not lead the plaintiffs to conclude that they must assume there to be further structural damage:

No because, as I said before, five times within the report that referred to this home it said that there were no live termites detected and I understand what you're saying but my answer's no.²²⁰

In any case, Ms Shannon later noted that she did not recall the fences being "very damaged".²²¹

²¹⁹ Transcript, day 2, page 171 [18]-[20].

²²⁰ Transcript, day 2, page 171 [21]-[24].

²²¹ Transcript, day 2, page 173 [13]-[14]. m

161. Counsel for the plaintiffs put counterfactuals²²² to Ms Shannon in relation to the “Inspection Results” of the Inspection Report.²²³ I note the following responses from Ms Shannon in examination and later cross-examination:

(a) Had the Inspection Report said that there was old evidence of termite infestation, which meant that there was either past or present termite infestation in the property, Ms Shannon gave evidence²²⁴ that the plaintiffs would not have bought the property.

1. In cross-examination, Ms Shannon clarified that “active” is the key word and they would not have bought the property if the Inspection Report had said this.²²⁵ That is, the plaintiffs would not have bought the property if the Inspection Report said there were present termites.²²⁶

(b) Had the Inspection Report said that evidence of past infestation at the house meant²²⁷ that the house has suffered damage from the infestation, Ms Shannon gave evidence that the plaintiffs would not have bought the property.

1. In cross-examination, Ms Shannon gave in my view a quite definitive answer: regardless of the extent of the damage, the plaintiffs would not have bought the property if it was damaged by termites.²²⁸

(c) Had the “Inspection Results” portion of the Inspection Report said that further investigation was required to ascertain the extent of pest infestation and any damage, Ms Shannon would have had another pest inspection performed.²²⁹

1. In cross-examination, Ms Shannon noted that if the Inspection Report had recommended a further invasive pest inspection, the plaintiffs would have done so.²³⁰

2. In questioning by counsel for the second defendant, Ms Shannon noted that she had pest inspections conducted every six to 12 months beginning when the plaintiffs first bought a house in Sydney in the 1980s.²³¹

²²² Transcript, day 1, page 62 [21]-[26].

²²³ PTB1 page 17

²²⁴ Transcript, day 1, page 62 [21]-[26].

²²⁵ Transcript, day 2, page 164 [25]-[31].

²²⁶ Transcript, day 2, page 168 [12]-[17].

²²⁷ Transcript, day 1, page 62 [28]-[31].

²²⁸ Transcript, day 2, page 170 [33]-[40].

²²⁹ Transcript, day 1, page 62 [33]-[38].

²³⁰ Transcript, day 2, page 171 [30]-[32]; 172 [33]-[37V].

²³¹ Transcript, day 2, page 180 [10]-[11], [16]-[18], [40].

- (d) Similarly, Ms Shannon gave²³² evidence that had the Inspection Report noted that treatment for subterranean termites was considered necessary, the plaintiffs would have followed the advice.
- (e) Finally, if the Inspection Report had noted²³³ that the overall susceptibility of the property termites was “high to extreme” as opposed to “moderate to high”, Ms Shannon stated that “[w]e would not have gone near [the property]. We would not have bought it”. Ms Shannon gave similar evidence during cross-examination by the first defendant.²³⁴

162. In questioning by counsel for the second defendant, Ms Shannon confirmed when she lived in a house Sydney from the 1980s to 2014, ²³⁵ she obtained a pest inspection report every 12 months and ensured that the reports up to date.²³⁶ Ms Shannon also agreed that she has read pest inspection reports before, but noted that given the combined nature of the Inspection Report, the pest inspection reports she previously read were not as long.²³⁷

163. Counsel for the first defendant put to Ms Shannon that there were three separate warnings urging the plaintiffs to take action in relation to the risk of termites, and they were not followed. Ms Shannon gave the following relevant evidence regarding the placement of these warnings:

.. You know, this is – it should have been in the front of the report where we could see it clearly and we would have done it, Mr Markham. Honestly.²³⁸

164. Later, counsel for the first defendant returned to this topic.²³⁹ Ms Shannon reconfirmed her understanding of the Inspection Report noting that there were no live termites and “old” termite activity means that the property was free of termites. As an illustration, I note the following exchange:

MS SHANNON: So, all I was going to say was that when I read that it actually gave - funny as it sounds, I was encouraged by that because it says 'No live termites...' - you asked me what I thought when I read it. **And there's five references to that throughout the report so I really did honestly believe that we were okay.**

MR MARKHAM: Your evidence is that you read the Report in full?... Including what you say is disclaimers but which is actually defined as important information the Report?

²³² Transcript, day 1, page 62 [40]-[46].

²³³ Transcript, day 1, page 63 [1]-[5].

²³⁴ Transcript, day 2, page 154 [36]-[37].

²³⁵ Transcript, day 2, page 181 [9]-[10].

²³⁶ Transcript, day 2, page 181 [12]-[14].

²³⁷ Transcript, day 2, page 182 [1]-[10].

²³⁸ Transcript, day 2, page 173 [16]-[19].

²³⁹ Transcript, day 2, page 150-2. See also page 162.

MS SHANNON: Right.

...

MR MARKHAM: .. The question that was put to you is there is evidence of old termite activity on the subfloor walls. No live termites were sighted. What did you understand from that representation?

MS SHANNON: Well, as a layperson, **I understood that maybe perhaps they were there once and then now they were gone**, not knowing what I know now.

...

MR MARKHAM: You understood [the expression "No live termites were sighted"] was not a representation that there would no termites in the property?

MS SHANNON: **Well I understood that there were no termites in the property reading that.**

...

MR MARKHAM: ... But you accept that there was evidence of termite activity?

MS SHANNON: I asked what they called old.

MR MARKHAM: But that they had detected in the subfloor termite activity?

MS SHANNON: Yes.

(emphasis added)

165. In cross-examination, Ms Shannon reiterated that the plaintiffs simply would not have bought the property if they had known what they were getting into and that the plaintiffs would have arranged for another inspection if recommended:

MR MARKHAM: 'Evidence of old termite activity was sighted to some fencing timbers and evidence of old termite activity to subfloors'?

MS SHANNON: Old and previous are the words. We would never bought the property, Mr Markham, had we known what we were in for. Seriously, we wouldn't... If it [had] said get another, proper, you know, pest controller to check it, we would have because we spent so much money on the house. It would've been nothing to get another done.²⁴⁰

166. Similarly, Ms Shannon reiterated in cross-examination that, to her mind, the usage of the word "old" or "previous" initially meant that there were no longer active termites in the property.²⁴¹

Well, when they use the word 'old', to - in my mind at this time - I've since found out I was - when they use the word 'old' and 'previous', I, as I said, **assumed that they had flown off**

²⁴⁰ Transcript, day2, page 161 [10]-[13], [15]-[18].

²⁴¹ Transcript, day 2, page 162 [40]-[45].

and gone somewhere else, that the - **there were no active termites in this house.** I've since found out that, you know, **there's no such thing as old to us. Once - you know, you have to kind of check the mud trails and all of that,** but that's not for me, I'm not an expert.

(emphasis added)²⁴²

167. In cross-examination, Ms Shannon did accept²⁴³ that she made no independent inquiries regarding the issues identified in the Inspection Report, noting that "the report satisfied [the plaintiffs] there was no need to worry".²⁴⁴ Ms Shannon agreed²⁴⁵ that reading the contract was the sum of the investigation Ms Shannon made. Ms Shannon explained this lack of inquiries as follows:

MR MARKHAM: So for any of the issues contained in the sale contract ... or any of the issues identified in the building report and pest report, you made no independent inquiries of those issues?

MS SHANNON: No, we didn't because - I mean, **we thought that report was detailed and, as we've been through [in examination], no termites, you know,** so, no.

MR MARKHAM: We'll come to that, but you were aware in the report, were you not, that there was old termite activity?

MS SHANNON: That's what it said.

MR MARKHAM: And you made[e] enough questions or inquiries in that period?

MS SHANNON: The report was - **satisfied us that there was no need to worry.**

(emphasis added)²⁴⁶

168. Ms Shannon further gave the following answers, which encapsulates various streams of evidence the first plaintiff gave in relation to her understanding of the Inspection Report:

MR SCHOFIELD: Right, and you said that you were very aware of the risk of termites before you bought this house in Bruce, is that the case?

MS SHANNON: I didn't say I was very aware of it. I - I don't recall saying that, but it was something that when we read that pest report, we thought, okay, well, we don't want to buy a place with termites, obviously. Who would? And so we - when - I mean, now that, you know, Mr Markham has been talking to me and, you know, **it sounds ridiculous that, you know, we didn't get another report done but we didn't because we based it on the fact that this was the expert report.** You know, it was. That's how I understood - I understood it to be the expert report. It had already been done. In New South Wales you have to get it

²⁴² See also similar evidence in Transcript, day 2, page 184 [37]-[45].

²⁴³ See Transcript, Day 1, page 89 line [30]-[42].

²⁴⁴ Transcript, day 1, page 89 [38]-[39].

²⁴⁵ Transcript, day 1, page 90 [1]-[5].

²⁴⁶ Transcript, day 1, page 89 [23]-[39].

done yourself. We **just said, 'Oh, well, they've got it done here.'** The - **sellers had it done and there's no live termites. That's how I read it.**²⁴⁷

...

MR SCHOFIELD: You said in your evidence just 10 minutes ago of Mr Markham that the warning should have been at the front of the report where you could see them but your evidence is that you read the entire report, isn't it?

MS SHANNON: Yes, what I - yes, but what I was saying was that the front of this report refers specifically to the house we were buying and **if you understand how termites work, which of course I didn't at the time, if you saw mud trails there should be something in the front of this report that stands out to you and says, 'There are mud trails. You have to get an invasive pest' – you know, it says, you know, 'This isn't designed to deter the purchaser'. That's what this says. But it should also say, 'But we highly recommend that you get an invasive pest control inspection done' and we would have done it. I don't know how else to say that.**²⁴⁸

(emphasis added)

Discovery of termites and subsequent actions

169. Ms Shannon was asked questions concerning the discovery of termites in the property. Ms Shannon gave evidence in examination that the internal works relating to the renovations had commenced around September 2020.²⁴⁹ In Ms Shannon's account,²⁵⁰ an employee of Mr Fisher went under the house and encountered mud trails.²⁵¹ Ms Shannon gave evidence of engaging a pest inspector and controller in response to the discovery.²⁵²

MS SHANNON: So we took some photos. I took some photos, they took some photos. And then I was so - kind of couldn't believe it, so **I decided I better get a pest inspector and pest controller in.** I'm sorry, but it's sad. So I did get somebody in and he went under and he just said, **'This is really terrible,' and, 'Do you want it treated?'** and we took it from there.

MR KATEKAR: Well, who was that person who went under?

MS SHANNON: Armageddon.

MR KATEKAR: Okay. Mr Buckley?

MS SHANNON: No, Walker.

MR KATEKAR: Mr Walker. Barry Walker?

²⁴⁷ Transcript, day, page 182 [12]-[23].

²⁴⁸ Transcript, day 1, page 186 [35]-[46].

²⁴⁹ Transcript, day 1, page 63 [36]-[37].

²⁵⁰ Transcript, day 1, page 63-4.

²⁵¹ See also PTB 1 page 320-325 (pictures) and Transcript, Day 1, page 65 [26]-[39].

²⁵² Transcript, day 1, page 64 [2]-[13].

MS SHANNON: Barry Walker.

170. In cross-examination, Ms Shannon agreed²⁵³ that the engagement of the builder, Mr Walker, occurred sometime in January 2020.
171. Ms Shannon gave evidence that Mr Walker did a “thorough”²⁵⁴ inspection upon his arrival, including tapping the skirting boards. On one occasion, one of the boards “kind of collapsed”²⁵⁵ upon tapping. Ms Shannon gave evidence²⁵⁶ that Mr Walker verbally gave her a report explaining the nature of the extent of the problem, noting that they can “treat it but ... [its] really bad”. Ms Shannon noted that the plaintiffs “went along” with some treatments²⁵⁷ as at that point they were not sure “what was happening”.
172. Ms Shannon was taken²⁵⁸ in examination to the Emmadale Projects report. Ms Shannon confirmed that she was present during²⁵⁹ the Emmadale team’s building inspection visit on 2 November 2020, alongside a builder (Mr Jenkins), a structural engineer (Mr Dragh), and Emmadale Manager’s operations manager Ms Gaitantzis. Ms Shannon was also taken to the pictures²⁶⁰ of the property included in the Emmadale Projects report.
173. Ms Shannon was then taken to a pest inspection report prepared²⁶¹ by Mr Stephenson of Pest Industry Consultants (the Stephenson report). Ms Shannon confirmed being present during the relevant inspection for the report on 19 November 2020, including speaking²⁶² with Mr Stephenson through a hole in wall from the kitchen area as Mr Stephenson inspected the subfloor. Ms Shannon was taken to the pictures included in the Stephenson report, identifying where she²⁶³ thought they were taken.
174. Ms Shannon was also taken to a picture of a tree in a neighbouring property, next to the property’s perimeter²⁶⁴ fence and near the property’s back garage²⁶⁵ that the plaintiffs converted to a gym. I note that the Stephenson report opined that “there is a strong possibility that the termite colony responsible” may be located in one of the

²⁵³ Transcript, day 1, page 90 [11]-[13].

²⁵⁴ Transcript, day 1, page 77 [5]-[7].

²⁵⁵ Transcript, Day 1, page 77, line [1]-[7].

²⁵⁶ Transcript, Day 1, page 77 [23]-[31].

²⁵⁷ Transcript, Day 1, page 77, line [30]-[34].

²⁵⁸ PTB 1 page 342, see Transcript page 72, line [28]-[29].

²⁵⁹ Transcript, page 72 [28]-[30].

²⁶⁰ See Transcript, Day 1, page 73.

²⁶¹ : See PTB 1 page 349. Transcript Day 1, 73-74.

²⁶² : Transcript, Day 1, page 74 line [7]-[9].

²⁶³ See, eg, Transcript, Day 1, page 74 [26]-[28], [46]-[47], viz picture in PTB 1 352.

²⁶⁴ Transcript, Day 1, pages 75-6.

²⁶⁵ Transcript, Day 1, page 76 [35]-[36]

trees, given that native Australian trees is in the Stephenson's report assessment "favoured subterranean termite nesting site".²⁶⁶

175. In cross-examination, Ms Shannon also gave further evidence as to what happened during the initial discovery of the termites in September 2020:²⁶⁷

MR MARKHAM: But that's [referring to the reference to 7 October in Exhibit 5] not the first time termites were discovered, was it?

MS SHANNON: So prior to that in September we'd found them ... under the subfloor in the kitchen and the dining room and so on. The – we were still – we were still unaware that there was – that the problem was really as extensive as it was so we were still thinking that we were going to do, excuse me, renovations... So we wanted to get the walk-in wardrobe done so to do that we had to, you know, pull off the – the Gyprock [the works undertaken by Smith & Sons]...²⁶⁸ But before that **we had the swarm and that indicated that there was something really wrong.**

(emphasis added)

176. Ms Shannon was then asked about the works undertaken by ACT Pest Control, occurring in September 2020.²⁶⁹ Ms Shannon noted that ACT Pest Control conducted inspections²⁷⁰ of the subfloor and recommended invasive searches. Ms Shannon gave evidence that ACT Pest Control did not remove any plasterboards, and conducted a "tap test" on the skirting boards.²⁷¹ However, Ms Shannon noted²⁷² that ACT Pest Control did not go into detail about damages to the structures (e.g. the structural beams), merely noting that it is "a really big problem". Ms Shannon did not end up continuing to retain the company.²⁷³

177. In cross-examination, Ms Shannon also gave evidence that she did not²⁷⁴ direct Mr Fisher and Smith & Sons to conduct an invasive inspection of the house. In response to a question as to whether an invasive search was undertaken only on 7 October 2020, Ms Shannon noted²⁷⁵ that there were effectively two issues at the time, the issue identified in the kitchen in September 2020 and the issue identified when the plasterboard at the back of the house was removed in October 2020. Ms Shannon was taken to the report prepared by Armageddon Pest Control in cross-examination.²⁷⁶ In response to the recommendation of the report, Ms Shannon

²⁶⁶ See PTB 1 357.

²⁶⁷ Transcript, day 1, page 98 [35]-[47].

²⁶⁸ See Fisher Report page 3

²⁶⁹ See page 29 of the Second PTB.

²⁷⁰ Transcript, day 1, page 99 [32]-[35].

²⁷¹ Transcript, Day 1, page 100, line [8]-[12].

²⁷² Transcript, day 1, page 100 [4]-[6].

²⁷³ Transcript, day 1, page 100 [1]-[2],[22].

²⁷⁴ Transcript, day 1, page 100 [46]-[47].

²⁷⁵ Transcript, DAY 1, page 101 [1]-[5]

²⁷⁶ See page 301 onwards of the First PTB.

confirmed²⁷⁷ that Mr Walker was reengaged to conduct a further invasive inspection (eg. putting on baits around the property).

178. In cross-examination, Ms Shannon noted that she was not aware of the risk surrounding the weep holes of the property until told²⁷⁸ by Mr Fisher, and Ms Shannon noted to the second plaintiff that the next part of the renovation should be to “pull up”²⁷⁹ the pavers so that the weep holes are exposed. Ms Shannon noted that she cannot²⁸⁰ recall any other remedial works being performed prior to Mr Fisher giving her advice regarding the weep holes. Ms Shannon noted that she did not recall²⁸¹ exactly when she and Mr Fisher spoke regarding the weep holes, but gave evidence that she did not discuss²⁸² removing the pavers with Mr Fisher (only with the second plaintiff).
179. Ms Shannon noted in examination that the plaintiffs eventually followed Mr Dragh’s recommendation that the plaintiffs move out²⁸³ as the property was not safe. In cross-examination, Ms Shannon also confirmed that she was informed of the Emmadale Projects conclusion that the property may need to be demolished down to the base²⁸⁴ verbally during the inspection of 2 November 2020.²⁸⁵
180. In cross-examination, Ms Shannon confirmed that the plaintiffs begun searching for a new place to live in November 2020.²⁸⁶
181. Ms Shannon stated²⁸⁷ that they secured a new place in Forrest on March 2021 and sold the property in June 2022. In cross-examination, Ms Shannon also reconfirmed²⁸⁸ that the plaintiffs did not move out of the property until they received the Emmadale Projects report. Further, Ms Shannon gave evidence that even as they were searching for a new property, the plaintiffs “were still” in the property between November 2020 and March 2021 “cleaning up” as best as they can.²⁸⁹ Ms Shannon later clarified that the plaintiffs were on holiday in Coffs Harbour for six

²⁷⁷ Transcript, day 1, page 101 [44]-[47]

²⁷⁸ Transcript, Day 1, page 102 [43]-[44], 103 [10]-[13]

²⁷⁹ See Transcript, Day 1, page 103 line [1]-[2], [12]-[13].

²⁸⁰ Transcript, Day 1, page 103 [20]-[22].

²⁸¹ Transcript, day 1, page 103 [40]-[42]

²⁸² Transcript, day 1, page 103 [36]-[38].

²⁸³ Transcript, page 77, line [41]-[44], 78 [3]

²⁸⁴ See Emmadale Projects page 7; CB page 348.

²⁸⁵ Transcript, day 2, page 122 [24]-[35].

²⁸⁶ Transcript, day 2, page 121 [24]-[25]

²⁸⁷ Transcript, day 1, page 78[1]-[6].

²⁸⁸ Transcript, day 1, 102 [45]-[46].

²⁸⁹ Transcript, day 2, page 121 [27]-[30], [37]-[38].

weeks between November 2020 and March 2021, so the plaintiffs were not in the property a lot of the time during the period.²⁹⁰

182. Counsel for the first defendant asked Ms Shannon why the works on the property nevertheless continued²⁹¹ even after the plaintiffs was advised that the house was not habitable. Ms Shannon relevantly clarified the plaintiffs' consideration as follows with respect to the pool:²⁹²

So the pool was up here and we knew we were going to sell it as a knockdown/rebuild. They'd already started working before we knew that, they'd already started renovating the pool and all the – the old bricks were pulled up, it was all just a really big mess and we decided that we would get the pool finished because we – you know, whoever bought the house, we didn't know if they wanted the pool or not, you know, so we continued to do that to make **it look nice for resale** and also it really was a terrible mess and I'd already bought the – I think if we look at Artisan Stone, 6 November, I – I purchased the – the stones, the stone tiles. So he was already there doing it so we continued to finish it...

(emphasis added).

183. In cross-examination, Ms Shannon confirmed that, at least at December 2020, the plaintiffs were still trying to salvage the situation, and the plaintiffs were yet to make a decision as to whether to sell the house as a knock-down rebuild. In the end, however, the plaintiffs decided that they could not.²⁹³
184. Ms Shannon was also asked in cross-examination as to an inspection by Dr Ewart on 13 May 2021. Ms Shannon gave evidence that while Ms Shannon did not see the Ewart report before taking the stand, Ms Shannon confirmed that Dr Ewart informed her that there are termites in the property.²⁹⁴
185. Ms Shannon also agreed that, with the benefit of her current knowledge, that not sighting a live termite is different proposition to saying that there is or is not a termite infestation, and that one has to be cautious.²⁹⁵ In relation to this understanding, I also note the following relevant answers in cross-examination by the second defendant:²⁹⁶

MR SCHOFIELD: Do you understand the difference between a statement that there's no evidence of termites and a statement that there are no termites?

MS SHANNON: Yes.

²⁹⁰ Transcript, day 2, page 122 [41]-[44]. See also page 123.

²⁹¹ See Transcript, day 2, pages 128-9.

²⁹² Transcript, day 2, page 128 [31]-[40].

²⁹³ See Transcript, day 2, page 130 [4]-[7], [9]-[18].

²⁹⁴ Transcript, day 2, page 179 [18]-[20].

²⁹⁵ Transcript, day 2, page 179 [22]-[24].

²⁹⁶ Transcript, day 2, page 185 [11]-[25].

MR SCHOFIELD: They're two different statements aren't they?

MS SHANNON: Yes. Yes, they are.

MR SCHOFIELD: And you've always understood that?

MS SHANNON: Yes.²⁹⁷

186. Nevertheless, Ms Shannon noted that she assumed that there were no termites from the statement "no evidence of termites".²⁹⁸
187. Ms Shannon was asked further question as to when the plaintiffs made up their mind to sell the property as a knock-down rebuild. Ms Shannon confirmed that the plaintiffs begun considering whether they are able to maintain the property and that a decision was "probably" reached some months before June 2022.²⁹⁹
188. Ms Shannon was further pressed as to why the plaintiffs claimed costs of associated reconstruction of the property on the original statement of claim on March 2022³⁰⁰ and then engaged agents to sell the property in mid-April 2022.³⁰¹ Ms Shannon noted that she could not recall exactly the timeframe in which the plaintiffs decided to sell the property instead of rebuilding.³⁰² Ms Shannon accepted that the timeframe³⁰³ for the decision is more than likely the three weeks between 31 March 2022 and mid-April 2022.
189. After the morning tea adjournment on day 2, both parties agreed on several relevant dates surrounding the sale of the property and the dates were then put to Ms Shannon.³⁰⁴ Relevantly, the first listing of the property on Allhomes occurred on 20 May 2022.³⁰⁵ The property was successfully sold on 11 June 2022.³⁰⁶ In cross-examination by the second defendant, Ms Shannon confirmed that the property was sold for a \$640,000.00 profit and that while it was a relief to get "it off [the plaintiffs'] hands" Ms Shannon did not see the sale as a windfall or capital gain.³⁰⁷ Ms Shannon noted that the plaintiffs has been paying so much money in addition to mortgage and rent.³⁰⁸

²⁹⁷ Transcript, day 2, page 185 [12]-[16].

²⁹⁸ Transcript, day 2, page 185 [23]-[25].

²⁹⁹ Transcript, day 2, page 131 [14]-[21].

³⁰⁰ See CB page 16.

³⁰¹ Transcript, day 2, page 133 [21]-[29].

³⁰² Transcript, day 2, page 134.

³⁰³ Transcript, day 2, page 134[18]-[19].

³⁰⁴ Transcript, day 2, page 139

³⁰⁵ Transcript, day 2, page 139 [26]-[27].

³⁰⁶ Transcript, day 2, page 139 [29].

³⁰⁷ Transcript, day 2, page 188 [19]-[23].

³⁰⁸ Transcript, day 2, page 189 [19]-[24].

190. A copy of the marketing listing of the property was also tendered in these proceedings. Ms Shannon accepted in cross-examination that the marketing for the property was for a property with “substantial infrastructure improvements”.³⁰⁹ Ms Shannon noted that while there was a reference that “planning has begun for the removal of the existing home”, the plaintiffs have not planned anything at the stage and have not put any notices to government agencies (although she unsure whether the agent has done so).³¹⁰
191. Upon questioning by counsel for the second defendant, Ms Shannon confirmed that the house was sold as a “knock-down/rebuild” and that the plaintiffs were upfront of this with the prospective buyers.³¹¹
192. Upon leaving the property, Ms Shannon gave evidence of moving to Forrest from 2021 to March 2022, before moving to an apartment in Civic³¹². Ms Shannon noted that the plaintiffs had bought a couple of apartments off the plan, as the plaintiffs “always had in ³¹³back our mind we wanted to set [Ms Khavari and her son] up with a future”. Ms Shannon noted³¹⁴ that it is not entirely certain when the apartments are to be finished but nominated “July or August [2024] maybe”.
193. In cross-examination, Ms Shannon also gave evidence that prior to obtaining a new rental property in February 2022,³¹⁵ the plaintiffs obtained a rental valuation report of the property. As to why, Ms Shannon explained:
- Because we wanted to understand what that was worth in relation to what we could rent, and anything over that, we would subsidise ourselves. Anything under that, we would, kind of, you know, it was so it would be an equal amount.³¹⁶
194. Ms Shannon noted in cross-examination that the plaintiffs had in mind a rent around \$1,300.00 - \$1,400.00 per week, which “was where [the plaintiffs] were with [the [property]]” when they were looking for new properties.³¹⁷
195. Ms Shannon accepted in cross-examination that the plaintiffs paid more rent for their rental property in Forrest compared to their previous property in Kingston.³¹⁸ While the plaintiffs considered more affordable units, they were partially motivated to

³⁰⁹ Transcript, day 2, page 141 [18]-[20].

³¹⁰ Transcript, day 2, page 141-2.

³¹¹ Transcript, day 2, page 189 [38]-[46].

³¹² Transcript, page 83, line [21]-[34].

³¹³ Transcript, page 83, line [32]-[34].

³¹⁴ Transcript, page 83 line [39]-[40],

³¹⁵ Transcript, page 144 [28]-[29].

³¹⁶ Transcript, page 144 [32]-[35].

³¹⁷ Transcript, page 145-6.

³¹⁸ Transcript, page 145 [4].

achieve the same amenity (allowing Ms Khavari's family some "separation" from them) as the previous property (even if the property was much smaller).³¹⁹

196. Ms Shannon was also asked questions regarding the purchase of the apartments in cross-examination by the first defendant.³²⁰ Ms Shannon confirmed that the apartments are on the same floor.³²¹

*Ms Jennifer Westacott*³²²

197. I note at the outset that my assessment of the evidence of Ms Westacott was that her evidence was both highly credible and reliable.

Consideration of, and reliance on, the Inspection Report

198. Ms Westacott gave evidence that she first received the Inspection Report around 28 October 2019, and that she read the Inspection Report three times and thoroughly.³²³ Ms Westacott gave evidence as to what she understood the Inspection Report to mean.³²⁴
199. In relation to the reference in the Key Data section of the Inspection Report, Ms Westacott noted that she read this section at the time and that she understood this to mean that there was "no active termite activity" at the property.³²⁵
200. In relation to the "Property Report" section of the Inspection Report in pages five through to nine, Ms Westacott also confirmed that she read the section and that she formed the impression the Inspection Report was "very detailed" and that the overall condition of the Property was "good", being the highest-ranking condition outlined in the Inspection Report.³²⁶ In cross-examination, Ms Westacott also noted the totality of the Inspection Report, and that the property was "good in many circumstances".³²⁷
201. Later in examination, Ms Westacott noted that she did not consider the condition of subfloor drainage and ventilation reported in page 16 as a basis to not proceed with the purchase of the property.³²⁸

³¹⁹ Transcript, day 2, page 145 [30]-[38].

³²⁰ See Transcript, day 2, page 143-4.

³²¹ Transcript, page 143 [40].

³²² The evidence of Ms Westacott canvases pages 194 to 268 of the Transcript.

³²³ Transcript, day 2, page 195 [29]-[33].

³²⁴ Transcript, Day 5, page 504 [18]-[20], [23]-[25]. See also PTB 1 page 277, Rapid report.

³²⁵ Transcript, day 2, page 196 [1]-[8].

³²⁶ Transcript, day 2, page 196 [24]-[28].

³²⁷ Transcript, day 2, page 210 [1]-[6].

³²⁸ Transcript, day 2, page 199 [42]-[47].

202. In relation to the reference to “timber decay” in page 10 regarding “Doors and External Windows”, Ms Westacott confirmed that she saw this reference prior to purchasing the property, and that she recalled this was due to water damage which Ms Westacott confirmed by examining (eg. looking at the proximity of the window to the bath).³²⁹ In cross-examination, Ms Westacott was taken to a reference to timber decay in the bathroom window frame in a section discussing of the Inspection Report regarding timber pests. Ms Westacott acknowledged that the second defendant was telling the plaintiffs that the window frame was damaged by timber pests, but in light of the other representations as to the absence of live termite species, and the need to read the Inspection Report in totality, Ms Westacott did not make further enquiries about potential damage.³³⁰ Nor did this, in her evidence, change Ms Westacott’s decision to purchase the property.³³¹
203. Ms Westacott gave the following evidence regarding the part of the Inspection Report that noted that “defects have been identified” in relation to the subfloor:
- MS WESTACOTT: I paid close attention to evidence of old termite activity, no live termites being sighted.
- MR KATEKAR: ... what did you understand that to be informing you of?
- MS WESTACOTT: That there was no major termite issue with the property, no termite issue with the property.³³²
204. Ms Westacott gave evidence that she recalled looking at the perimeter fences, and that she paid particular attention because the Inspection Report mentioned termites. Nevertheless, Ms Westacott noted that no live termites were sighted, and that they followed the recommendation to “remove and replace” the timbers.³³³ In cross-examination, Ms Westacott gave evidence that the plaintiffs returned to the property, after visiting the property for an inspection, prior to purchase to inspect the fences, and that the plaintiffs had by this time decided to replace said fences.³³⁴ Ms Westacott gave evidence that the plaintiffs also inspected and decided to remove the trees in the property,³³⁵ but this decision was primarily taken due to fire risk.
205. Ms Westacott was then taken to page 16 of the Inspection Report. It is relevant to note Ms Westacott’s specific impression of this section of the Inspection Report.

³²⁹ Transcript, day 2, page 196 [38]-[42].

³³⁰ Transcript, day 2, page 208 [27]-[28].

³³¹ Transcript, day 2, page 208 [40].

³³² Transcript, day 2, page 197 [1]-[8].

³³³ Transcript, day 2, page 199 [16]-[23].

³³⁴ Transcript, day 3, page 233 [16]-[19].

³³⁵ Transcript, day 3, page 233 [21]-[22], [32]-[35], [37]-[38].

206. First, Ms Westacott gave the following evidence in relation to the reference to previous termite activity:

MR KATEKAR SC: And then it refers to previous [termite]³³⁶activity in the next two dot points [in “Timber Pest Evidence” in page 16]. What was your impression of those pieces of information in terms of how you reacted to them at the time before you purchased this property?

MS WESTACOTT: I remember noting them with interest because, again, if you see the word 'termite', you do pay a lot of attention to it, and particularly, looking at no live termites being sighted, evidence of older termite activity, and again, particularly referring to the perimeter fences. **So again, I thought on the basis of that, that there – there were no termite issues with the property.**³³⁷

(emphasis added)

207. Ms Westacott was taken to the reported results in page 16 of “Timber Pest Evidence” in cross-examination. Ms Westacott noted that she was mostly aware to references that no live termites were sighted, and that the focus was on previous activity particularly in the perimeter fences.³³⁸

208. With respect to the Inspection Report’s mention of a previous Biflex Duo treatment, Ms Westacott noted that the Inspection Report said that no additional treatment is considered necessary at the time.³³⁹

209. In examination, Ms Westacott noted her understanding “moderate to high” risk rating and the “disclaimer” at the bottom of page 16 as follows:

Well, again, it was moderate to high, but again, **taking into account the whole report, taking into account the constant references to no active termites, no live termites, I did not consider that to be a risk rating that would prevent us from purchasing [the property]** and, to me, it was something that I would expect to be said that you undertake regular inspections...

[Regarding the disclaimer] Even if it was high, it's not intended to discourage the purchaser, but it's recommended that vigilance is warranted, but particularly, that a pest inspection be taken – be undertaken every six to 12 months. So again, taking the whole report into consideration, the **overwhelming use of the word 'good' throughout the report, the level of detail in the report, I did not consider that to be a basis on which not to purchase the property.**³⁴⁰

(emphasis added)

³³⁶ Transcript, day 2 page 199 [30], recorded as “term of”.

³³⁷ Transcript, day, 2, page 199 [30]-[37].

³³⁸ Transcript, day 3, page 208 [17]-[21].

³³⁹ Transcript, day 2, page 200 [5]-[9].

³⁴⁰ Transcript, page 200 [15]-[32].

210. In cross-examination, Ms Westacott agreed that the Inspection Report did not say that there was only a low risk. Mr Westacott did note that the Inspection Report did not recommend an immediate invasive inspection in page 16 as, in her reading, even if the risk was high, it was not intended to deter a purchaser but rather to recommend a full pest inspection every six to 12 months.³⁴¹
211. Similarly, Ms Westacott gave evidence that, in totality of the Inspection Report, she did not consider the fact that there was some areas that were inaccessible to the second defendant to be a basis not to proceed with the purchase of the property.³⁴² In relation to the Inspection Report noting restricted access to the subfloor, Ms Westacott noted that she did not remember specifically reading this section, but noted that she has read the Inspection Report “very comprehensively”. At any rate, in her evidence it was not uncommon for properties to have limited crawl space.³⁴³
212. In cross-examination, Ms Westacott confirmed that she was aware that the second defendant did not perform invasive inspections and did not inspect all areas of the property including the subfloor.³⁴⁴ Ms Westacott agreed that the plaintiffs knew of the inspection’s limitations when they bought the property.³⁴⁵ Later, Ms Westacott also gave evidence that the plaintiffs bought the property regardless on the basis that there was only moderate to high risk of timber pest infestation, “no active termites”, and that the rest of the property is in good condition:

MR SCHOFIELD: So is it fair to say that you bought the house despite knowing that there was a risk of both termites and previous damage from termites?

MS WESTACOTT: On the basis of moderate to high and on the basis of no active termites being sought, on the basis that the rest of the report says the property is in good condition, yes.³⁴⁶

213. Ms Westacott was then taken to page 24-25 of the Inspection Report. Ms Westacott gave evidence that she saw portions of the Inspection Report as “general disclaimers”. This included the statement in page 24 that there were inaccessible areas that the inspector does not imply that such areas were not or have not been infested by the termites³⁴⁷ and the reference in page 25 notifying the reader to assume that there may be further concealed structural damage if timber pest activity

³⁴¹ Transcript, day 3, page 229 [12]-[16]

³⁴² Transcript, page 201 [20]-[21]

³⁴³ Transcript, page 200 [43]-[46].

³⁴⁴ Transcript, page 213 [15]-[19],

³⁴⁵ Transcript, page 213 [42]-[44].

³⁴⁶ Transcript, page 229 [23]-[25]

³⁴⁷ Transcript, page 201 [9]-[13],

and/or damage is reported.³⁴⁸ In the relation to the latter, it is appropriate to reproduce the relevant portions of Ms Westacott's evidence:

Its's not particular advice in relation to the property. But [I]t also has a – a reference, as I recall, to live species. So again, you know, it's not – it's not the same as the specific advice that we were given earlier in the report about our property.³⁴⁹

... I didn't see it as a qualification [of what Ms Westacott read earlier in the Inspection Report].³⁵⁰

214. In light of the constant references to there being no live termites the Inspection Report, Ms Westacott gave evidence that she took a similar message from the Inspection Report's statements under the heading "Important Information" in page 25:

MR KATEKAR SC: There's a sentence that starts, 'If the report indicated the presence of termite damage, previous activity, or treatments,' and continues, 'you should obtain copies of the treatment proposal,' et cetera. Do you remember reading that piece of information at the time you read this report?

MS WESTACOTT: Yes, I do remember that. Yes.

MR KATEKAR SC: What understanding did you have as to what this was suggesting you should do?

MS WESTACOTT: **Well, again, on the basis that there were no live termites constantly referred to in the report, no further treatment, and in the actual recommendations about the property, inspections over the next six to 12 months, I didn't regard this as changing the decision to purchase the property**

(emphasis added)

215. In cross-examination, Ms Westacott was challenged on her reading of the Inspection Report as telling that there were no live termites.³⁵¹ Ms Westacott accepted that there was a difference between stating "there are no timber pests" and "there is no evidence of timber pests". Ms Westacott accepted that the latter is different to saying that there are no live termites.³⁵² Nevertheless, Ms Westacott noted that this difference needs to be read in conjunction with the reference in page 16 that no live termites were sighted.³⁵³ I also note a later relevant exchange between Ms Westacott and counsel for the second defendant:

MR SCHOFIELD: When you bought the house you didn't know that there were no termites in the house, did you?

³⁴⁸ Transcript, page 201 [30]-[37].

³⁴⁹ Transcript, page 201

³⁵⁰ Transcript, page 201 [39]-[41].

³⁵¹ Transcript, page 208-9.

³⁵² Transcript, page 209 [22]-[23]

³⁵³ Transcript, page 209 [16]-[23].

MS WESTACOTT: We believed there were no active termites in the house based on the report that we received.

MR SCHOFIELD: But the report didn't tell you that there were no active termites, did it?

MS WESTACOTT: Well, it said no live termites sighted, no evidence of active subterranean termites.

MR SCHOFIELD: Yes, and you agreed earlier with the proposition that the statement about evidence is different from a statement about the thing?

MS WESTACOTT: **Yes, but how would – how would one second guess that against an expert report?**

(emphasis added)³⁵⁴

216. In later evidence on cross-examination, Ms Westacott relevantly named the statement that “No evidence of active subterranean termites found” in page 16 as stating, to her mind, that there were no termites, Ms Westacott also gave the following important evidence as to her state of mind when reading the Inspection Report:³⁵⁵

MR SCHOFIELD: Where does it say, ‘There are no termites?’

MS WESTACOTT: I'm saying it says there are no active termites. But I don't understand the point of the question. What you are asking me is to say that on the reading of this report, I should have formed the view that the counterfactual existed and got another inspection on the basis of the report that's in front of me that I looked at that said **there was no evidence of active termites, that no treatment was required, that an inspection should be done within six to 12 months, and I did not form the view that there were termites there.** I did not form the view that there was damage to the property on the basis of this report, on the basis of the report about our property.

MR SCHOFIELD: Ms Westacott, the statement in the section of page 16 ... marked 'Live species,' it says the following, doesn't it? 'No evidence of active subterranean termites live species was found at the time of our inspection.' It says that, doesn't it?

MS WESTACOTT: That's correct.

MR SCHOFIELD: [combined question that was cut off by Ms Westacott's answer] It doesn't say, 'There were no termites,' at the property, does it?³⁵⁶

MS WESTACOTT: [combined answer] No, it doesn't say that... But **as a lay person**, you look at this report and you look at **it in its totality where it's overwhelmingly the property**

³⁵⁴ Transcript, page 213 [1]-[12].

³⁵⁵ See Transcript, day 2, page 223 [1]-[3], 224 [1]-[2], page 227 [16]-[18].

³⁵⁶ The interaction reads as follows in the transcript:

It doesn't say, 'There were no termites,' - - -?---No, it doesn't say that.

- - - at the property, does it?---It doesn't say that. But as a lay person, you look at this report and you look at it in its totality where it's overwhelmingly the property is in good condition, and you see no evidence of active termites, no requirement for further treatment, an inspection in six to 12 months. If you've – I think it's fair for a lay person to form the view that there's no basis on which to order another inspection of the property.

is in good condition, and you see no evidence of active termites, no requirement for further treatment, an inspection in six to 12 months. If you've – I think it's fair for a lay person to form the view that there's no basis on which to order another inspection of the property.³⁵⁷

(emphasis added)

217. Ms Westacott agreed in cross-examination that there were indications from the Inspection Report of previous termite activity in the property, but noted what she perceives as the totality of the Inspection Report, the “good” nature of the Inspection Report, and the constant reference to no active termites. Ultimately, these were the bases upon which Ms Westacott said the plaintiffs made the decision to purchase the property.³⁵⁸
218. Ms Westacott rejected the suggestion put to her in cross-examination that the Inspection Report had actually informed her that if there was timber pest activity or damage there may be further concealed structural damage.³⁵⁹ Ms Westacott agreed that the Inspection Report said what it said on this subject in page 25 of the Inspection Report, but gave evidence the statement was couched in terms of “if” there was timber pest activity. In relation to the plaintiffs property, Ms Westacott noted that the Inspection Report said there was no activity,³⁶⁰ and that the totality of the Inspection Report to her mind said that there were no active termites.³⁶¹ Ms Westacott did agree that the statement was not couched in terms of “old” or “new” termite pest activity, but only activity.³⁶²
219. Ms Westacott also accepted the suggestion put by counsel for the second defendant that the Inspection Report mentioned old activity (mudtrails) in the subfloor.³⁶³ However, Ms Westacott maintained her view that the Inspection Report had repeatedly stated that there were no active termites, and cavilled with the suggestion counsel was in her view trying to put to her:

[T]he report repeatedly says, 'There are no active termites,' and, you know, again, I make the point that you're asking me to say that on the basis of this report, in its totality, on the basis of those comments at page 16, that **I should form the view that there were termites at the property and damage, let alone colossal damage, end to end damage in the house when, in fact, page 16 which is pertinent to our property says, 'There are no active termites, no live species, no need for further treatment and an inspection in six to 12 months.'** It does not say on page 16, 'You need to get an invasive inspection.' It

³⁵⁷ Transcript, day 2, page 225 [4]-[28].

³⁵⁸ Transcript, day 2, page 211 [16]-[23].

³⁵⁹ Transcript, day 3, page 222 [1]-[5].

³⁶⁰ Transcript, day 2, page 222-3.

³⁶¹ Transcript, day 3, page 223 [33]-[35]; 224 [1]-[3].

³⁶² Transcript, day 3, page 226 [24]-[32].

³⁶³ Transcript, day 2, page 226 [15]-[22].

says, 'Get an inspection in six to 12 months. That is the clauses that relate to our property versus this general disclaimer.

(emphasis added)

220. Ms Westacott rejected the suggestion that this meant the plaintiffs were aware that the property had termite damage in light of the totality of the Inspection Report.³⁶⁴ Given it is an expert report, Ms Westacott noted that she did not question whether there was significant damage to the property.³⁶⁵
221. Counsel for the second defendant took Ms Westacott to the next sentence in this "Determining Extent of Damage" section. Ms Westacott agreed that the Inspection Report stated that concealed damage may only be found through invasive procedures but noted that the sentence that follows referenced "timber pest activity". Ms Westacott gave evidence that she essentially looked at the word "activity" in light of the "constant comments" in the Inspection Report that there were no active termites sighted.³⁶⁶
222. In cross-examination, Ms Westacott did not accept that the Inspection Report had recommended that the plaintiffs obtained an invasive timber pest inspection based on this section in page 25 of the Inspection Report:

I do not believe that that is correct, because again this is a general disclaimer. The relevant section to our property, the advice to us about our property, is at page 16 where it says repeatedly no active termites, no live species, no requirement for treatment, inspection in six to 12 months. **That is the clause that relates to our property, not a general disclaimer that could relate to any property, so I do not accept what you're saying.**³⁶⁷

(emphasis added)

223. When asked regarding a further invasive pest inspection, Ms Westacott relevantly maintained her evidence that the Inspection Report must be taken in its totality, querying the purpose of the Inspection Report if the reader cannot rely on sections that, in her view, provided information on the property itself.³⁶⁸

If you take that clause [in page 25] and you take page 16 and you take the rest of the report that has the property overwhelmingly rated as good, **then I did not form the view, on the basis of that, that I should get an invasive inspection.** I mean, what is the point of these reports if - if you can't rely on the information that's provided about your home? Should the disclaimer say, 'Everything you're about to read should be taken with a grain of salt'?... When you take it in its totality, when you look at all of their remarks, good, good, good, good, good,

³⁶⁴ Transcript, day 2, page 211 [25]-[27], [31]-[33], [43]. See also page 212-3.

³⁶⁵ Transcript, day 2, page 212 [1]-[2].

³⁶⁶ Transcript, day 3, page 228 [14]-[15].

³⁶⁷ Transcript, day 3, page 228 [20]-[28].

³⁶⁸ Transcript, day 3, page 228-9.

when you take page 16 which relates to our property, looking at that clause I did not believe that the advice given to us, which is inconsistent with the advice at page 16, was requiring me to have an invasive pest inspection done.³⁶⁹

224. Ms Westacott agreed that despite reading the Inspection Report thoroughly the plaintiffs bought the house without undertaking further invasive inspection.³⁷⁰ Ms Westacott ultimately gave the following evidence regarding the plaintiffs' awareness of the risk posed by the property:

We were aware of the risk stated in the report which said no active termites, no live termites, evidence of previous termite activity on the perimeter fences which should be removed, which we did. We were not aware of the colossal damage that was done to the property 5 end to end, side to side, wall to wall. If you go through the report, every room, good, good, good. So we were aware of the moderate to high risk but balancing that against the constant references in the report to no active, no live species. We did not believe that it was necessary to carry out a further investigation.

225. Ms Westacott also noted her assumption that since the Inspection Report formed part of the property's contract of sale, that the Inspection Report would be done by a competent person under a standard and that the plaintiffs as laypersons had to accept prima facie that the Inspection Report was prepared by a competent, qualified person.³⁷¹ Similarly, Ms Westacott also gave her view that the plaintiffs would be on balance correct not to order a further inspection when the Inspection Report said that there was no current termite activity and no major damage to the property.³⁷²

226. Similarly to Ms Shannon, a range of assumptions were also put to Ms Westacott by counsel for the plaintiffs. Counsel for the first defendant also queried Ms Westacott regarding the assumptions. I reproduce the assumptions put to Ms Westacott below:

- (a) If the fact that there was old evidence of termite infestation of means that there was either past or present termite infestation, Ms Westacott would have ordered another report.³⁷³
- (b) If past infestation "must means" that the house has suffered damage from that infestation, Ms Westacott would not have purchased the property.³⁷⁴
- (c) If Ms Westacott was asked to assume the above two assumptions, Ms Westacott would have at the very least ordered another report.³⁷⁵

³⁶⁹ Transcript, day 3, page 228-0.

³⁷⁰ Transcript, day 3, page 230 [41]-[43]

³⁷¹ Transcript, day 3, page 231 [9]-[17].

³⁷² Transcript, day 3, page 231 [9]-[17]

³⁷³ Transcript, page 203 [32]-[35].

³⁷⁴ Transcript, day 2, page 203 [37]-[39].

³⁷⁵ Transcript, day 2, page 203 [[22]-[28].

- (d) If the Inspection Report had stated that further investigation was required to ascertain the extent of the infestation, Ms Westacott would have had commissioned another report.³⁷⁶
 - (e) If the Inspection Report has stated that it was necessary to undertake a treatment, Ms Westacott would have ordered another inspection.³⁷⁷
 - (f) If the Inspection Report had stated that the risk of present termite infestation was “high to extreme”, Ms Westacott would at the very least ordered another inspection.³⁷⁸
1. In cross-examination by counsel for the first defendant, Ms Westacott believed that the usage of “high” would have made a difference, giving evidence that if she thought if the risk was “high” a lot of other assumptions in the Inspection Report would have changed.³⁷⁹ Ms Westacott also noted that in October 2019 she was a “lay person” when it comes to risk ratings for termites.³⁸⁰

227. In cross-examination, Ms Westacott gave evidence that while the plaintiffs discussed potentially having another pest inspection report on the basis of the Inspection Report, they did not think it was necessary as they took the Inspection Report as saying there was no termite activity.³⁸¹ Ms Westacott also confirmed that the plaintiffs did not speak with the defendants further prior to the purchase. Nor had they asked the second defendants for photographs of the inspection, even though they could have done so.³⁸²

Discovery of termites and subsequent actions

228. In evidence, Ms Westacott was asked regarding events after the discovery of swarms of termites and the Emmadale Projects report being obtained in the aftermath. Ms Westacott noted that she understood that the property was structurally unsound at the time, and that the advice was that it was no longer safe to live in.³⁸³
229. Ms Westacott stated that the plaintiffs left the property in March 2021, with the property eventually sold in June 2022. Ms Westacott relevantly noted that initially after

³⁷⁶ Transcript, day 2, page 203 [41]–[44].

³⁷⁷ Transcript, day 2, page 204 [1]–[6].

³⁷⁸ Transcript, day 2, page 204 [8]–[12].

³⁷⁹ Transcript, day 3, page 232 [15]–[19].

³⁸⁰ Transcript, day 3, page 232–3.

³⁸¹ Transcript, day 2, page 210 [15]–[19]. See also day 2, page 210 [25]–[29].

³⁸² Transcript, day 2, page 210–1.

³⁸³ Transcript, day 2, page 204 [21]–[23]

March 2021 the plaintiffs had wanted to knock down the house and rebuild it themselves. Mr Fisher had, in Ms Westacott evidence, advised the plaintiffs that the property could not be salvaged in its current form and needed to be rebuilt. However, after looking at the requisite costs and time, the plaintiffs eventually decided to sell the property.³⁸⁴

230. In cross-examination by the second defendant, Ms Westacott confirmed it does sound correct that in relation to a property bought in the 1980s Ms Shannon obtained inspection reports every 12 months.³⁸⁵ Ms Westacott noted that she has read those reports herself, estimating that she has read 20 inspection reports prior to purchasing the property.³⁸⁶ As such, Ms Westacott agreed that she was aware of the risk that termites might damage houses before the purchase.³⁸⁷ On questioning by counsel for the first defendant, Ms Westacott gave evidence that she does not recall seeing a report that assessed the risk as “high to extremely high”.³⁸⁸
231. In cross-examination by counsel for the first defendant, Ms Westacott was also asked questions relevant to quantum.
232. Ms Westacott was first taken to the Badenoch report dealing with comparable rent to the property that was also alluded to in Ms Shannon’s evidence at [194].³⁸⁹ Ms Westacott gave evidence that the plaintiffs requested their lawyers to obtain the Badenoch report on their advice that the plaintiffs should obtain comparable rent to the property,³⁹⁰ to try and give the plaintiffs a “like-for-like” when it comes to the rent that the plaintiffs should be aiming for.³⁹¹ Ms Westacott gave evidence that the plaintiffs’ lawyers advised that if litigation is to be pursued, part of the case would be the recovery of costs of having to rent an alternative property and as such a comparable rent equivalent to the property needed to be established.³⁹²
233. On this subject, Ms Westacott conceded that a “like-for-like” basis was not the basis on which the plaintiffs made their decision to enter the rental in Forrest in March 2021:

³⁸⁴ Transcript, day 2, page 204 [30]-[38].

³⁸⁵ Transcript, day 2, page 206 [11]-[13]; Mr Schofield later, unfairly in my view, put forward that Ms Westacott was deliberately dishonest for stating that the plaintiffs owned 3 properties, omitting the further two units in 2022 (Transcript, day 3, page 263 [13] to page 266 [31]). Ms Westacott accepted that the evidence was incorrect but denied that she was deliberately dishonest. As I stated at the hearing, it is ultimately a matter of weight given to the answers, that must be viewed in the context of all the evidence and a different understanding of terms used.

³⁸⁶ Transcript, day 3, page 206 [25].

³⁸⁷ Transcript, day 3, page 206 [29]-[30].

³⁸⁸ Transcript, day 3, page 232 [36]-[42].

³⁸⁹ Transcript, day 3, page 235 [28]-[30].

³⁹⁰ Transcript, day 3, page 235 [26]-[28].

³⁹¹ Transcript, day 2, page 234 [33]-[36].

³⁹² Transcript, day 3, page 235 [38]-[43].

That was on the basis of wanting a property for our family that suited our family needs knowing that in any compensation claim you can't claim a rental that's beyond the comparable cost so we wanted to set a benchmark but **that was not the basis on which we then made a decision about the property at ... Forrest. That was a basis on we needed a particular property for our family.**³⁹³

234. Ultimately, Ms Westacott later agreed in cross-examination that the plaintiffs had “structured [their] rental arrangements on the basis of compensation valuation”.³⁹⁴

235. Ms Westacott was then taken by counsel for the second defendant to a demand letter sent to the defendants. This letter was tendered as exhibit 11. Ms Shannon confirmed that the letter indicated (in its discussion of “Duty to mitigate loss”) that the plaintiffs’ position by January 2022 was to demolish the building in the property.³⁹⁵

236. Counsel for the first defendant then took Ms Westacott to the ASOC. Ms Westacott agreed that the pleadings, particularly [31](g)-(j), were “broadly consistent” with rebuilding the house.³⁹⁶ On the question of what changed between the filing of the claim on 31 March 2022 and the retaining of a real estate agent (for the purpose instead of selling the property) on 14 April 2022 to change the plaintiffs mind, Ms Westacott gave the following evidence:

Well a number of things. Firstly, our builder, David Fisher, told us what the cost of the rebuild would be and what the time would be, which was a long period of time. We were paying rent and a mortgage at the same time which was causing severe hardship on our family, and by the time the house was going to be rebuilt the whole point of the house, which was to have a family home for our grandson, for him to enjoy his life, was going to be pointless and so we decided that we would sell the house.³⁹⁷

237. Ms Westacott also further added while she assumed the change of position occurred within the two weeks, the plaintiffs had been having a number of conversations with Mr Fisher prior. As such, Ms Westacott conceded that the change of position may or may not have occurred within the period, and that she cannot recall the exact date.³⁹⁸ Ms Westacott also gave evidence that the discussions with Mr Fisher was based on a “proper architect” design prepared by Mill Architects.³⁹⁹ Ms Westacott cannot recall exactly when the plaintiffs received this design, giving evidence that Ms Shannon handled these matters.⁴⁰⁰ Ms Westacott nevertheless accepted that businesses

³⁹³ Transcript, day 3, page 235-6.

³⁹⁴ Transcript, day 3, page 261 [16]-[20]. In context, apparently refers to the Badenoch report and the assessment outlined above.

³⁹⁵ Transcript, day 3, page 237 [5]-[29].

³⁹⁶ Transcript, day 3, page 238 [20]-[47].

³⁹⁷ Transcript, day 3, page 238 [35]-[42].

³⁹⁸ Transcript, day 3, page 239 [1]-[5].

³⁹⁹ Transcript, day 3, page 239 [26]-[44].

⁴⁰⁰ Transcript, day 3, page 240 [20]-[29].

usually invoice after work is done (the date of Mill Architects invoice being June 2021) and that Ms Westacott had reviewed some of the plans by June 2021.⁴⁰¹

238. Ms Westacott also gave evidence as to the discussions between June 2021 and April 2022, which counsel for the first defendant characterised as the “critical point” for the plaintiffs’ decision to sell the property:

Well, there were a number of discussions with Mr Fisher. There were a number of discussions between Ms Shannon and I. You have to remember we're in the middle of COVID here... And so it wasn't until the following year when we, of course, had had quite a long period time of paying both a mortgage and rent, and then sitting down with Mr Fisher where he outlined, based now on the construction industry being able to go again ... that he said, 'This would be the timeframe, this will be the cost,' and we, on that basis of that meeting, and we'd had a number of meetings with Mr Fisher, said, 'We can't go on like this. We need to sell the property.'⁴⁰²

239. Ms Westacott was also asked in cross-examination by counsel for the first defendant regarding a conflict of interest that caused the plaintiffs to change their solicitors to MV Law for a time.⁴⁰³ At some point, the defendants were apparently uninsured⁴⁰⁴ and the plaintiffs’ solicitor on record at the time informed Ms Westacott that he was also pursuing a matter against the defendants.⁴⁰⁵ Ms Westacott gave evidence that she was also aware that advice had been sought and obtained from the ACT Law Society regarding the issue.⁴⁰⁶ Ms Westacott noted that she was not aware of when the conflict of interest⁴⁰⁷ was declared and the exact date.⁴⁰⁸ Ms Westacott maintained this evidence when taken to emails between the solicitors.⁴⁰⁹

240. In any case, Ms Westacott denied that the awareness of the insurance issue was the reason for the “about face” change in the two weeks between 31 March 2022 and 14 April 2022, giving evidence that the issue of insurance was not clear for some period of time.⁴¹⁰ Ms Westacott accepted that the plaintiffs were aware that the first defendant potentially had no insurance on 18 March 2022, but that the plaintiffs were aware of this for quite a long period of time.⁴¹¹ Later, Ms Westacott denied that the decision to move to new units were motivated by the defendants’ lack of insurance.⁴¹²

⁴⁰¹ Transcript, day 3, page 240 [25]-[29].

⁴⁰² Transcript, day 3, page 240 [31]-[46].

⁴⁰³ Transcript, day 3, page 241 [21]-[22].

⁴⁰⁴ Transcript, day 3, page 244 [12]-[14].

⁴⁰⁵ Transcript, day 3, page 244 [32]-[34].

⁴⁰⁶ Transcript, day 3, page 254 [12]-[13].

⁴⁰⁷ Transcript, day 3, page 242-3.

⁴⁰⁸ Transcript, day 3, page 244 [1]-[3].

⁴⁰⁹ Transcript, day 3, page 252-3.

⁴¹⁰ Transcript, day 3, page 245 [6]-[10].

⁴¹¹ Transcript, day 3, page 254 [1]-[5].

⁴¹² Transcript, day 3, page 261 [11]-[14], [22]-[24].

241. Counsel for the first defendant then took Ms Westacott to the sale contracts for the two apartment units that the plaintiffs were purchasing, exhibited as Exhibit 14 and 15 respectively.⁴¹³ Ms Westacott did not object to counsel for the first defendant's suggestion that the properties carried a stamp duty burden of \$72,419.00 and \$72,413.00 respectively.⁴¹⁴ As such, Ms Westacott agreed that the total liability for the new units was \$3,313,918.00.⁴¹⁵
242. Ms Westacott was queried as to whether Ms Westacott saw this as a financial hardship, given Ms Westacott's previous evidence that a major factor in the decision to sell the property was the cost of building and paying rent simultaneously.⁴¹⁶ Ms Westacott noted that in the period of 31 March 2022 and 14 April 2022 the plaintiffs were only required to pay a 5% deposit and that there would be delay in settlement as the units were off-the-plan properties.⁴¹⁷
243. Ms Westacott further clarified that, while it was a considerable purchase, the nature of the hardship was that the plaintiffs were paying rent and a mortgage at the same time in relation to a property the plaintiffs could not live in.⁴¹⁸ Ms Westacott also noted in cross-examination that the plaintiffs bought the property as it allowed them to secure a property in a place where Ms Khavari's son, who Ms Westacott considered to be her grandson, could live in safely without having to service a mortgage.⁴¹⁹
244. In cross-examination, Ms Westacott noted that as the plaintiffs only had an estimate, Ms Westacott feels unable to answer whether the cost of the new units were higher than the build and holding costs for the property.⁴²⁰ Ms Westacott also noted that the plaintiffs do not have a formal quote regarding the build costs of the property if they were to rebuild the building in the property.⁴²¹
245. Nevertheless, Ms Westacott noted that the cost of the kind of house they wanted to build in the property was considerable and that it would be on-top of the mortgage.⁴²² While Ms Westacott could not say whether the cost of acquiring the new property would be higher, Ms Westacott noted that in her view the cost of building in the property in addition to the mortgage would be "more substantial".⁴²³ Ms Westacott

⁴¹³ Transcript, day 3, page 248-9.

⁴¹⁴ Transcript, day 3, page 255 [7]-[8], [46]-[47] 256 [1]-[5]

⁴¹⁵ Transcript, day 3, page 256 [7]-[9].

⁴¹⁶ Transcript, day 3, page 256 [5], [17]-[18].

⁴¹⁷ Transcript, day 3, page 257 [5]-[12].

⁴¹⁸ Transcript, day 3, page 257 [34]-[35].

⁴¹⁹ Transcript, day 3, page 257 [31]-[35].

⁴²⁰ Transcript, day 3, page 257 [41]-[46].

⁴²¹ Transcript, day 3, page 258 [17]-[19], the phrase "build costs" was used by both Mr Markham and Ms Westacott.

⁴²² Transcript, day 3, page 257 [41]-[46].

⁴²³ Transcript, day 3, page 258 [25]-[27].

noted that, on balance, it would have been more “cost-effective” and “less traumatic” to sell the property.⁴²⁴

246. Ms Westacott also disputed in cross-examination that the decision to purchase the new units was lifestyle related as opposed to financial,⁴²⁵ and strenuously⁴²⁶ denied the suggestion put by counsel for the first defendant that the plaintiffs moved to the two units as they wanted units that would be newly built.

247. There was no re-examination of Ms Westacott.⁴²⁷

Consideration of the evidence of the plaintiffs

248. Counsel for the plaintiffs submitted that both Ms Shannon and Ms Westacott were impressive witnesses,⁴²⁸ who gave evidence with precision in a forthright and straightforward manner. On my assessment of both witnesses and their evidence, this submission is soundly based. I accept the evidence of the first and second plaintiffs. The evidence of the first plaintiff was highly credible and reliable as was the evidence of the second plaintiff.

249. At the hearing, counsel for the plaintiffs noted that the sum of the first plaintiff's evidence on the Inspection Report was that she understood the Inspection Report as saying that there were no infestation and that monitoring was all that required. Coupled with the good condition of the property reflected in the rest of the Inspection Report, the first plaintiff was submitted to have understood that there was no termite infestation problem. In turn, this prompted the plaintiffs to buy the house.⁴²⁹ The evidence of the second plaintiff was, in counsel's submissions, also relevantly the same.⁴³⁰ I accept this submission as it accords with my view of the evidence of both the first plaintiff and the second plaintiff.

250. By contrast, counsel for the first defendant submitted that the Court should reject the evidence of the plaintiffs' understanding as to what level of termite activity or damage was reported in October 2019.⁴³¹ Counsel for the first defendant submitted the following:

⁴²⁴ Transcript, day 3, page 259 [5]-[7].

⁴²⁵ Transcript, day 3, page 259 [9]-[11].

⁴²⁶ Transcript, day 3, page 259 [13]-[35].

⁴²⁷ Transcript, day 3, page 266 [16].

⁴²⁸ PWS at [37].

⁴²⁹ Transcript, Day 5, page 504 [4]-[14].

⁴³⁰ Transcript, Day 5, page 504 [18]-[20]

⁴³¹ PWS at [60].

- (a) Counsel for the first defendant submitted that each of the plaintiff's evidence was contradictory. I do not accept this submission. This judgment summarises the evidence of both witnesses from [123] to [247]. This submission is not borne out on my analysis of the evidence. In my view, there is no contradiction of any significance.
- (b) Counsel for the first defendant submitted that their evidence appeared to have been informed by the plaintiffs' legal analysis from 2024. Again, in my view, this submission is not borne out on my analysis of the evidence.
- (c) Counsel for the first defendant submitted that the plaintiffs were evasive on the questions of fact relevant to 2019. In my view the first plaintiff and the second plaintiff were not evasive in giving their evidence. Both witnesses gave clear and straightforward evidence; both in evidence-in-chief and cross-examination. In my view Ms Shannon and Ms Westacott were both impressive witnesses of truth; at the risk of repetition, I emphasise that the evidence of both witnesses in my view, was generally highly credible and highly reliable.

251. Further, counsel for the first defendant submitted that it is implausible that the plaintiffs did not understand and accept a "Moderate to High" risk of present termite infestation or damage.⁴³² I do not accept this submission for reasons that I discuss in context of the expert evidence at [283] to [459].
252. Counsel for the first defendant submitted that the Court should have regard to the conduct of the plaintiffs, in particular Ms Shannon, in accepting the warnings of the Inspection Report while supposedly failing to follow the "four unchallenged recommendations as to remedial action or investigation in the period between October 2019 to October 2020". Counsel submitted that the failure to action key advice or steps disclosed by Ms Shannon's evidence should weigh in favour for the conclusion that the plaintiffs were unlikely to undertake further investigation or treatment even where it was recommended and if it had appeared elsewhere in the Inspection Report. This submission is not borne out by my analysis and my detailed summary of the evidence.
253. Counsel for the first defendant noted that the evidence of the plaintiffs was that they did read and understand the warnings, and that they allegedly "did not emphasise or place importance" on what was said to be disclaimers or standard text. The plaintiffs

⁴³² FDWS at [60].

were characterised as having considered that such text was not relevant to “their” house. Counsel submitted that a distinction between relevant report and standard text is artificial.⁴³³ I do not accept this submission for reasons that are discussed in context of the expert evidence at [283] to [459].

Conclusion of consideration concerning the evidence of the plaintiffs

254. As discussed above, the plaintiffs gave clear and forthright evidence. I do not accept the submissions made by the first defendant concerning the evidence of the plaintiffs for the reasons discussed above.

⁴³³ FDWS at [62].

Evidence of the Second Defendant

255. The defendants ultimately called two witnesses, Mr Maher and Mr Broadhurst. Mr Broadhurst was called as an expert witness, and his evidence will be considered later alongside the two expert witnesses called by the plaintiffs. A second lay witness, Ms Hill, was foreshadowed but ultimately not called.⁴³⁴
256. Mr Scott Maher is the second defendant in this proceeding. Mr Maher self-evidently did not give evidence in the capacity of an independent expert. The evidence given by Mr Maher was not a matter of significant dispute between the parties.
257. Mr Maher worked for the first defendant from mid-2017⁴³⁵ and ceased to be employed by the first defendant “about two and half years ago”⁴³⁶ in about the end of 2021.⁴³⁷ Mr Maher gave evidence that he was now working as a passive fire inspection technician.⁴³⁸
258. In terms of his qualifications to inspect houses, Mr Maher nominated his carpentry work and his involvement in building.⁴³⁹ Mr Maher noted that at the commencement of his employment with the first defendant, he was put through a training program for pest inspectors run by a TAFE in Sydney.⁴⁴⁰
259. In cross-examination, Mr Maher gave evidence that after joining the first defendant, he was given training that involved working alongside other inspectors, who were also directors of the first defendant.⁴⁴¹ Mr Maher noted that he started to prepare reports on his own after “probably about 4 weeks”.⁴⁴² Further, Mr Maher clarified that the TAFE course was a self-paced course, and that he had 12 months to complete the course. Mr Maher agreed that he started the TAFE course “no earlier than” February 2018 as he completed the course in February 2019.⁴⁴³
260. I note that Mr Maher’s certificate of attainment was tendered in these proceedings, and listed Mr Maher as completing the following courses:
- (a) “Manage pests by applying pesticides”.
 - (b) “Inspect for and report on timber pests”.

⁴³⁴ Transcript, day 4 page 399 [21]-[22].

⁴³⁵ Transcript, day 3, page 271 [1]-[2].

⁴³⁶ At the time of the hearing of this matter in 2024.

⁴³⁷ Transcript, day 4, page 385 [37].

⁴³⁸ Transcript, day 3, page 272 [14]-[18].

⁴³⁹ Transcript, day 3, page 272 [25]-[28].

⁴⁴⁰ Transcript, day 3, page 272 [30]-[42]; see also page 378 [22]-[27]

⁴⁴¹ Transcript, day 4, page 387 [1]-[5], [29]-[30].

⁴⁴² Transcript, day 4, page 387 [21]-[23]

⁴⁴³ Transcript, day 4, page 387 [36]-[39].

(c) “Control timber pests”.⁴⁴⁴

261. Mr Maher gave evidence that, prior to inspecting the property, he had inspected roughly a thousand houses.⁴⁴⁵ In cross-examination, Mr Maher stated that he had prepared “a large number” of reports and estimated he would average around 10 to 15 reports per week.⁴⁴⁶
262. Mr Maher gave evidence that the inspection of the property took around 1 hour and 30 minutes to 1 hour and 45 minutes and covered energy ratings, the building report, compliance, and timber pests.⁴⁴⁷ During the inspection, Mr Maher confirmed that he inspected the interior and exterior of the house, as well as the property more generally (including the land).⁴⁴⁸ In cross-examination, Mr Maher gave evidence that he also completed another one or two other property inspections on the day.⁴⁴⁹ Relevantly, Mr Maher confirmed that he did not inspect all of the subfloor, as there was not enough room for access due to low clearances and duct working running through the area.⁴⁵⁰
263. In cross-examination, Mr Maher was questioned on the process of creating the Inspection Report.⁴⁵¹ Mr Maher was taken to the “Job Preparation Writing Protocol” for the first defendant, which was apparently the procedure that is generally adopted in preparing reports for the first defendant.⁴⁵² Mr Maher agreed that this is a description of the software the first defendant’s inspector used to generate reports.⁴⁵³ Mr Maher agreed that he travelled to the property with an electronic tablet, which had the report generating software installed on it,⁴⁵⁴⁴⁵⁵ which consisted of dropdown menus for Mr Maher to select from.⁴⁵⁶ Mr Maher also confirmed that he took photographs during the inspection, and that upon the completion of the inspection Mr Maher returned to the first defendant’s office to provide the completed outcome.⁴⁵⁷
264. In cross-examination, Mr Maher then gave evidence that the Inspection Report was then proofed by a team of proofers, who checked for typos and went through the photographs to see if there was anything to discuss with the inspectors.⁴⁵⁸ Mr Maher

⁴⁴⁴ Exhibit 20

⁴⁴⁵ Transcript, day 3, page 273 [1]-[4].

⁴⁴⁶ Transcript, day 4, page 386 [15]-[20].

⁴⁴⁷ Transcript, day 3, page 273 [28]-[29], [31]-[32].

⁴⁴⁸ Transcript, day 3, page 273 [34]-[39].

⁴⁴⁹ Transcript, day 4, page 386 [25]-[26].

⁴⁵⁰ Transcript, day 3, page 273 [45]-[47].

⁴⁵¹ Transcript, day 4, page 392 [22]-[23].

⁴⁵² Transcript, day 3, page 388 [43]-[44].

⁴⁵³ Transcript, day 4, page 389 [14]-[15].

⁴⁵⁴ Transcript, day 4, page 389 [20]-[21].

⁴⁵⁵ Transcript, day 4, page 389-90.

⁴⁵⁶ Transcript, day 4, page 389 [37]-[38].

⁴⁵⁷ Transcript, day 4, page 390 [1]-[3].

⁴⁵⁸ Transcript, day 4, page 390 [33]-[37].

could not recall if the proofing team called him with any queries regarding the inspection of the property.⁴⁵⁹ As noted by the plaintiffs,⁴⁶⁰ Mr Maher gave evidence that he did not see the final version of the Inspection Report, as he was not given the opportunity to review the Inspection Report prior to it being sent out.⁴⁶¹

265. Mr Maher was taken to the Inspection Report. In cross-examination, Mr Maher gave evidence of his understanding that he prepared the Inspection Report in the capacity of an employee of the first defendant and that he had been indemnified by the first defendant for any liability that may arise from the Inspection Report.⁴⁶² Mr Maher agreed that in preparing the Inspection Report he was fulfilling what he was required to do by the first defendant in the manner expected of him.⁴⁶³
266. In relation to the reference to “Timber Pest Evidence” on page 16, Mr Maher gave evidence that he saw up to three mud trails in the subfloor walls.⁴⁶⁴ Mr Maher also confirmed these mud trails with reference to photographs⁴⁶⁵ taken of the inspection. Relevantly, Mr Maher confirmed that one of the pictures⁴⁶⁶ was of a “broken” mud trail, being a trail that was not a single trail going from the ground “all the way up”.⁴⁶⁷ Mr Maher gave evidence that it was the sighting of the broken mud trails, as well as the lack of sighting of live termites, that led to him making the note in page 16 of the Inspection Report that there was evidence of old termite activity.⁴⁶⁸
267. Initially, Mr Maher gave evidence in cross-examination that he could not recall which standard he had to work to. Upon being taken to the Inspection Report, Mr Maher agreed that the Inspection Report needed to be prepared with reference AS4349.3-2010.⁴⁶⁹
268. Mr Maher was queried as to his opinion that the evidence of termite mud trails to the subfloor walls were old in page 16 of the Inspection Report. Mr Maher gave evidence that the mud trails were “broken up”, “wasn’t a consistent lead”, and looked “very dull” in terms of colour. Mr Maher also noted that some areas had “efflorescence” where the trail had previously been.⁴⁷⁰

⁴⁵⁹ Transcript, day 4, page 391 [4]-[6]

⁴⁶⁰ PWS at [56].

⁴⁶¹ Transcript, day 4, page 391 [20]-[21].

⁴⁶² Transcript, day 4, page 387-8.

⁴⁶³ Transcript, day 4, page 397 [7]-[14].

⁴⁶⁴ Transcript, Day 3, page 274 [33]-[37].

⁴⁶⁵ Contained in pages 269, 273-7 and 283 to 286 of the plaintiff’s third tender bundle.

⁴⁶⁶ The picture in page 287 of the plaintiff’s third tender bundle.

⁴⁶⁷ Transcript, day 3, page 276 [29]-[33].

⁴⁶⁸ Transcript, day 3, page 276 [35]-[39].

⁴⁶⁹ Transcript, day 4, page 388 [13]-[15], [35]-[36]

⁴⁷⁰ Transcript, day 4, page 383 [6]-[12].

269. Mr Maher was asked with reference to page 25 of the Inspection Report as to whether he banged or tapped on surfaces.⁴⁷¹ I note that at the top of page 25 of the Inspection Report, the Inspection Report noted under the heading “Timber Pest Report” that:

AT NO TIME did the inspector use invasive procedures or **bang/tap surfaces** to reach conclusions.

(emphasis added, capitalised in original)

270. Mr Maher gave evidence that he banged on the surface of the subfloor using a “termite tapper”, a stick with a ball at the end of it used to sound out timber. Mr Maher explained that the device allows the user to hear if the timber is hollow or solid, and that if the timber was hollow the device will “crack and break, sometimes penetrate” the timber.⁴⁷² Mr Maher explained that he struck the timber as hard as he could with limited space under the subfloor.⁴⁷³

271. Mr Maher was then retaken in evidence to several photographs and asked why the specific photographs were taken. This included photographs, that the second defendant took to show rot to the windowsill outside of the bathroom ⁴⁷⁴ and the condition of the fence.⁴⁷⁵

272. Mr Maher was taken to [9.9.2] of the Ewart report, where Dr Ewart opined that it would be “extremely rare” to come face to face with a live termite in a non-invasive timber pest inspection unless “surfaces were broken to expose them”. Mr Maher gave evidence that he did break surfaces to expose termites, namely by using his finger to move the mud trails to expose the galleries. Mr Maher confirmed that he had seen live termites when inspecting other properties, and that he managed to see live termites by using his finger to move mud trails.⁴⁷⁶

273. In cross-examination, Mr Maher was questioned as to which parts of the Inspection Report were “standard language” that Mr Maher did not write.⁴⁷⁷ Mr Maher confirmed that:

(a) Page four contained standard information within the first defendant’s reporting system.⁴⁷⁸

⁴⁷¹ Transcript, day 4, page 383 [34]-[35].

⁴⁷² Transcript, day 4, page 383 [41]-[45].

⁴⁷³ Transcript, day 4, page 383 [37]-[40].

⁴⁷⁴ Transcript, day 3, page 384 [14]-[22], PTB 3 pages 166-8.

⁴⁷⁵ Transcript, day 3, page 384 [24]-[30], PTB 3, page 177, 213-220.

⁴⁷⁶ Transcript, day 3, page 380 [16]-[19].

⁴⁷⁷ Transcript, day 4, page 393 [1]-[3]

⁴⁷⁸ Transcript, day 4, page 394 [20]-[32].

- (b) The results of the Property Report in page five were allocated a “Good” rating by Mr Maher.⁴⁷⁹
- (c) With reference to page six, Mr Maher explained that there was a drop-down menu but that he inserted bullet points under the “shower screen” heading.⁴⁸⁰
- (d) Similarly, on page ten, Mr Maher used a drop-down menu to note that defects had been identified in the subfloor and wrote the related dot points while inspecting the property.⁴⁸¹
- (e) On page 16, the top part of the “Timber Pest Report” were standard text.⁴⁸²
- (f) In relation to the inspection results on page 16, Mr Maher gave evidence that the results in the “Semi-Furnished”, “Live Species”, “Timber Pest Evidence” and “Subfloor Drainage and Ventilation” rows were generated when he clicked on a drop-down menu, and that he typed any bullet points himself.⁴⁸³
- (g) Mr Maher noted that he entered the results for “Recent Termite Treatments and Recommendations” himself on page 16 as opposed to clicking a drop-down menu,⁴⁸⁴ except for the sentence noting that the treatment was in accordance with Australian Standard 3660.1.⁴⁸⁵
- (h) In relation to the “overall susceptibility” on page 16 of the Inspection Report, Mr Maher noted that he used a drop-down menu selection.⁴⁸⁶
- (i) Importantly, Mr Maher gave evidence that the following text, located in a textbox at the bottom of page 16, was standard text contained in all of the reports produced by the first defendant.

It should be noted that if the risk factor noted in this report is considered to be high, this is not designed to deter an intending purchaser; it is simply encouraging awareness that increased awareness is warranted and any recommendations regarding reducing conducive conditions or frequency of inspections should be observed. It is recommended that a full pest inspection be under-taken every 6-12 months. Regular inspections DO NOT prevent timber pest attack; they are designed to limit the amount of damage that may occur through early detection.

⁴⁷⁹ Transcript, day 4, page 394 [25]-[26]

⁴⁸⁰ Transcript, day 4, page 394 [34]-[35]

⁴⁸¹ Transcript, day 4, page 395 [5]-[16].

⁴⁸² Transcript, day 4, page 395 [21]-[29].

⁴⁸³ Transcript, day 4, page 395-6 [1]-[14].

⁴⁸⁴ Transcript, day 4, page 396 [14]

⁴⁸⁵ Transcript, day 4, page 396 [21]-[23]

⁴⁸⁶ Transcript, day 4, page 396 [29].

- (j) Finally, Mr Maher gave evidence that pages 16 to 25 of the Inspection Report are all standard text contained in all of the first defendant's reports.⁴⁸⁷

274. In cross-examination by counsel for the first defendant, Mr Maher also noted his understanding that the standard text would be "read together or included".⁴⁸⁸ In re-examination by counsel for the second defendant, Mr Maher gave evidence that he is "very familiar" with the standard parts of the Inspection Report referred to by counsel for the plaintiffs.⁴⁸⁹

Consideration of the evidence of the second defendant

275. Counsel for the plaintiffs submitted that there was no challenge as to the evidence of Mr Maher.⁴⁹⁰ Counsel for the plaintiffs did however underline the evidence that the passages of the Inspection Report at [273(i)] appeared in every one of the reports produced by the first defendant. Thus, in counsel's submissions, it appears⁴⁹¹ that the first defendant's standard process was to "downplay" the risk of termites in any building (even if it was recorded as high risk) so as to "not deter an intending purchaser". I accept this submission as it accords with my analysis of the report.

276. Counsel for the second defendant correctly noted that the plaintiff's concession that Mr Maher's evidence was not challenged meant that the plaintiffs accepted the following evidence from Mr Maher:⁴⁹²

- (a) Mr Maher did not see live termites at the property.
- (b) Mr Maher did not inspect all of the sub-floor because there was "not enough room for access", there were "low clearances and ductwork running throughout the subfloor" and there was "no room to get through to all the areas".
- (c) Mr Maher did "bang" on timber in the sub-floor by using a "termite tapper stick" in order to hear whether the timber was hollow or solid.
- (d) Mr Maher saw up to three shelter tubes for termites. The shelter tubes which Mr Maher saw were "broken", in that the tubes were not single trails going "all the way up" from the ground to the house. Mr Maher disturbed the shelter tubes to

⁴⁸⁷ Transcript, day 4, page 396-7.

⁴⁸⁸ It appears that this suggestion was that the Inspection Report was to be read as a whole.

⁴⁸⁹ Transcript, day 4, page 397 [26]-[30].

⁴⁹⁰ PWS at [43].

⁴⁹¹ PWS at [32].

⁴⁹² SDWS at [2.2]

expose the galleries, and that Mr Maher had previously seen live termites by disturbing shelter tubes in previous inspections at different properties.

- (e) Mr Maher formed the view that the termite activity was “old” because the shelter tubes were “broken up” and not “consistent”, and the colour of the shelter tubes was “very dull”.
- (f) Mr Maher did not observe any timber pest evidence that he did not include in the Inspection Report.

277. Counsel for the second defendant also submitted that none of the alleged breaches particularised in appendix A of the plaintiff’s written submissions were put to Mr Maher.⁴⁹³ Counsel asserted that this raised issues of procedural fairness and a breach of the rule in *Browne v Dunn*. Mr Maher, a “crucial witness and a party to the proceeding” was not asked to respond to any allegations of negligence in his inspection and writing of the Inspection Report.⁴⁹⁴ As such, in oral submissions, counsel submitted that I should be reluctant to conclude that the second defendant has not acted with care or skill, or otherwise has been misleading.⁴⁹⁵ In relation to this submission I underline the following.

278. I note that I raised the possibility of recalling Mr Maher during the final day of the trial, be it through phone or AVL,⁴⁹⁶ should counsel for the second defendant desire such a course in relation to this *Browne v Dunn* issue. I queried counsel for the second defendant as to which specific questions he submitted should have been put to the second defendant by counsel for the plaintiffs. Counsel for the second defendant gave the following answer:

- (a) The allegation that the Inspection Report should not have recommended the removal of affected fence timber.
- (b) The allegation that the Inspection Report failed to recommend further investigations of the trees.
- (c) The allegation that the Inspection Report did not recommend further investigations.
- (d) The allegations surrounding the importance of poor ventilation.

⁴⁹³ SDWS at [2.4].

⁴⁹⁴ SDWS at [2.4]. 1

⁴⁹⁵ Transcript, day 5, page 529 [37]-[41].

⁴⁹⁶ Transcript, day 5, page 530

279. Counsel for the second defendant nevertheless accepted that some of these allegations can be responded to by simply referring to the Inspection Report and statements that, in his submission, “obviously contradict” the assertions.⁴⁹⁷
280. For the plaintiffs’ part, counsel submitted that the case put against⁴⁹⁸ the second defendant was clear on the pleadings and expert reports. Counsel for the plaintiffs properly submitted that the main relevance of Mr Maher’s evidence was what Mr Maher did and this is already identifiable in the Inspection Report.⁴⁹⁹ Importantly, counsel emphasised that submissions have not been made contrary to what the second defendant stated in his evidence-in-chief and therefore required no cross-examination.
281. Further concerning this matter, counsel for the plaintiffs submitted that there was nothing in the second defendant’s evidence-in-chief that counsel specifically needed to query in cross-examination beyond what counsel had already done.⁵⁰⁰ Whether or not Mr Maher had breached his duty is a legal question. As such, it was submitted it was unnecessary to put to Mr Maher each of the items raised by the plaintiff’s expert, Mr Clarke, as to breach of duty.⁵⁰¹ I accept the submission of the plaintiffs’ counsel in this regard that the question of a breach of duty is a legal question in this case. The expert in the defendant’s case was Mr Broadhurst not Mr Maher.

Conclusion

282. Mr Maher, the second defendant gave evidence as to his involvement in the inspection and preparation of the Inspection Report. That evidence was not a matter of factual dispute. The legal question of breach of duty is a question that this Court must determine. There is, in my view, no issue of procedural fairness (see *Ashell Homes v Kobus* [2024] ACTCA 32) nor does a *Browne v Dunn* issue arise, for the reasons discussed above.

⁴⁹⁷ Transcript, day 5, page 530 [24]-[32].

⁴⁹⁸ Transcript, day 5, page 563 [33]-[35].

⁴⁹⁹ Transcript, day 5, page 563 [28]-[30], see also 563-4.

⁵⁰⁰ Transcript, day 5, page 563 [19]-[21], [40]-[45].

⁵⁰¹ Transcript, day 5, page 563-4. See also written submissions of the plaintiffs and the defendants from February 2025. In particular, the plaintiffs comprehensively answer the defendant’s submissions concerning statements 3-5 and 7-8.

Expert Witnesses

*Dr Don Ewart*⁵⁰²

283. The first expert called by the plaintiffs was Dr Don Ewart. Dr Ewart gave evidence in this case through the telephone.⁵⁰³ I note that there was no contest as to Dr Ewart's expertise.⁵⁰⁴ Dr Ewart's experience is clear from the following.
284. In his first report, Dr Ewart noted that he was chair of the Standards Australia Committee BD-074, which in his evidence prepared revisions to the 3660 series of standards covering termite management in and around structures. Among his qualifications, Dr Ewart noted that he has a PhD with a basis in termite research, and that he has been working with timber pest for more than three decades across Australia and abroad.⁵⁰⁵ Included in his expertise, Dr Ewart listed "termite risk to structures and measures available to mitigate that risk", "inspection of buildings for termites", and "prior-to-purchase timber pest inspection".
285. I note that, Dr Ewart properly conceded in cross-examination that he has seen "an awful lot of houses" since the property. He stated he had spent three hours reading "all the documents" relevant to the matter.⁵⁰⁶
286. Dr Ewart prepared two reports in relation to the matter.⁵⁰⁷ It is instructive that I set out parts of both reports in this section, particularly the parts where the reports that were referred to in submissions and the parts of the reports where Dr Ewart was taken to in oral evidence.
287. In preparing his reports, Dr Ewart had access to the Clarke report, the Stephenson report, and the Walker report.⁵⁰⁸ I will return to what the Ewart report noted in relation to these other reports later in this judgment, at [323].
288. It is useful at this juncture to note the portions of the Ewart report relied on by the plaintiffs to support the statements in Annexure B.

Statement 1

289. To support the allegation in statement 1, that the Inspection Report summary failed to warn that termites and termite damage could be present in areas not accessed by the

⁵⁰² Evidence of Dr Ewart, Transcript, day 3, page 289 to page 314

⁵⁰³ Transcript, day 3, page 284 [15]-[16], [40]-[44].

⁵⁰⁴ Transcript, day 3, page 293 [24]-[25]

⁵⁰⁵ Ewart Report at [2.1]; Transcript, Day 5, page 493 [41]-[43].

⁵⁰⁶ Transcript, day 3, page [16]-[19].

⁵⁰⁷ Transcript, day 3, page 290 [19]-[25]. Entire Court Book made exhibit.

⁵⁰⁸ Ewart Report at [7.2]-[7.4].

second defendant and that further investigations are needed, counsel for the plaintiffs referred to the following opinion in Dr Ewart's report at [9.9.2].⁵⁰⁹

The concept of 'live termite activity' is not particularly helpful and in my opinion, is not particularly useful when assessing the risks applicable to a house for sale. **The pest termites are subterranean and are only rarely visible.** It would be **extremely rare to come face to face with a live termite when doing a non-invasive timber pest inspection** (AS4349.3, Section 1, Scope) unless surfaces were broken to expose them. These termites, as the photos of others show, construct earthen shelter tubes over non-food surfaces and while these tubes are readily visible, it is not possible to visually assess a tube and know for certain that it has or hasn't been used by termites on that day.

(emphasis added).

Statement 2

290. This same opinion, alongside the following other opinions (lifted from the Ewart report at [9.9.3]-[9.9.4]), were also relied on to support the arguments made in relation to statement 2:

9.9.3 Because live activity is so unlikely to be seen, to provide value, an inspector is expected to go beyond detection of live termites and assess and report on (AS4349.3–2010 at Clause 1.1, Scope):

- (a) Evidence of timber pests
- (b) Existence of visually observable damage caused by timber pests.
- (c) Susceptibility of building to timber pests.
- (d) Further investigations required.

9.9.4. Taking the scope of the standard as the minimum expected of a reasonably skilled professional providing the service, I would have expected great detail of explanation of **the importance and weight to be placed on the factors which contributed to the susceptibility** including the presence of shelter tubes, poor ventilation, raised soil levels, concealed access paths and evidence of prior chemical reapplication. The Foreword of AS4349.3–2010 speaks of persons wishing to purchase a property that they may "require advice to determine whether the pests are or have been present in the building, there is heightened risk of timber pest presence or, there is damage caused by timber pests. A uniform system of inspection will help to ensure that all inspections meet a minimum acceptable standard." **On this basis, having not found live termites, I would expect an inspector to still assess risk based on the presentation of the property and the signs of past activity and for an inspection report to warn strongly of the risks of undetected activity, concealed damage and works required to manage that risk.**

(emphasis added)

⁵⁰⁹ Ewart report at [9.9.2]

Statement 10

291. Similarly, in relation to statement 10, the opinion at [9.9.4] of the Ewart report was relied on in conjunction with the following opinion at [9.9.6] to demonstrate that the recommendations included within the Inspection Report were wrong:

I believe that **the advice given in the Report should be taken as incorrect and possibly negligent** where under “Recent termite treatment & recommendations” and “Overall susceptibility of the building to timber pest inspection” the report states “at the time of the inspection a treatment in accordance with Australian Standard 3660.1 to control or prevent subterranean termites from infesting and causing damage to the property was not considered necessary” and “considering all of the relevant factors, it is our opinion that the overall degree of risk of timber pest infestation to the property is MODERATE to HIGH – we strongly recommend that regular inspections are undertaken.” **I regard these two statements as contradictory. The reference to AS3660.1 is in my opinion, not competent, in that the management of existing structures falls under AS3660.2 and involves more than the application of chemicals.**

(emphasis added)

Statement 5

292. The plaintiffs then relied on the opinion expressed at [9.6.5]-[9.6.6] of the Ewart report regarding the nature of the ventilation in the property to support statement 5:

The raised soil levels and paving that covered sub-floor vents and the concrete slab edges, in my understanding, provides multiple [areas] for easy access by termites. This in my understanding would greatly increase termite risks over a house that had been properly maintained in relation to termite risks.

The extensive installation of ducts to the sub-floor has the effect of reducing cross-flow ventilation and so contribution to moisture retention and also blocks access for an inspector.

Statement 9

293. Finally, Dr Ewart’s opinion regarding what, in his view, a competent inspector should have appreciated from the fact that the most recent record of chemical application was, at the time of the inspection, “some eight years earlier” was also relied on to support statement 9:

I would have expected a competent inspector, with minimal knowledge of termite risk management, to understand and report that that chemical could no longer be expected to be contributing to termite deterrence and that additional works were immediately required.

Cross-examination

294. The main issue in cross-examination, as foreshadowed by counsel for the first defendant, was whether Dr Ewart was exercising his expertise when he expressed “parts” of his opinion.⁵¹⁰

295. In his first report, Dr Ewart summarised his opinion at [6.4]⁵¹¹ that among other things, he was of the belief that:

I believe that on the expectation termite activity in areas not inspected and of the risks of concealed structural damage of unknown extent, that the [Report] should have strongly advised that further, invasive, inspection was necessary to properly assess the property.⁵¹²

296. In cross-examination, counsel for the second defendant put to Dr Ewart that the Inspection Report actually made such recommendations regarding further inspection.⁵¹³ However, Dr Ewart, importantly in the context of the facts in this case, noted that his opinion in the above excerpt was addressed to an “obvious need that should have been clearly demonstrated” that:

[It] is common for the pro formas for these reports to include lots of little out clauses that were inserted after various court cases and **there’s usually a hidden recommendation for invasive inspection**, but in this case I’m referring to an obvious need that this should have been clearly demonstrated.⁵¹⁴

(emphasis added)

297. Counsel for the second defendant took Dr Ewart to the note made on page 25 that the reader should assume there may be further concealed structural damage if timber pest activity or damage is reported, and that any concealed may only be found after invasive procedures are conducted.⁵¹⁵ While accepting that the Inspection Report contained the statements, importantly in the context of the facts in this case, Dr Ewart noted that this does not mean that the Inspection Report recommended further invasive procedures:

MR SCHOFIELD: So to return to your paragraph 6.4, do you accept that what you say the [Report] should have done, it actually does?

DR EWART: **No**. This is the difference. What we’re looking at way down on page 25 is a large pile of pro forma text. The average consumer doesn’t understand or read through this possibly ever and this is where we get a lot of issues. So what **[the second defendant]**

⁵¹⁰ Transcript, day 3, page 292 [27]. [35]-[37].

⁵¹¹ Transcript, day 5, page 494 [8]-[9], where the plaintiffs in their closing submissions also highlight this.

⁵¹² Ewart Report at [6.4]; Transcript, Day 5, page 494 [8]-[9].

⁵¹³ Transcript, day 3, page 293 [31]-[32].

⁵¹⁴ Transcript, day 3, page 293 [35]-[38].

⁵¹⁵ Transcript, day 3, page 294-5.

needed to do was to provide this in the text that he added to the document, not the material that's always present. It needed to be clearly explained to the purchaser.

MR SCHOFIELD: Yes, but you do accept that it's in the report, don't you?

DR EWART: It is ... but not in the report in a manner which **is pertinent or useful** to the client. There is a lot of stuff in all those little fine print bits, but it doesn't mean that it's understood by the purchaser.

(emphasis added)

298. Relatedly, Dr Ewart confirmed in cross-examination that he has read the code of conduct, that was part-written by him.⁵¹⁶ Counsel for the first defendant took Dr Ewart to [11.2] of the code, which stated:

It is important to note that the summary should not be solely relied upon by the purchaser as much more information is required and provided in the main body of the report. To make an informed decision regarding the purchase of the property, the full report must be read and understood. Any questions should be directed to the timber pest inspector prior to any decision to proceed with the purchase.

299. Dr Ewart agreed that he either wrote or part-wrote this guideline.⁵¹⁷ However, Dr Ewart further importantly explained the significance of all the "proforma stuff down the back":

MR MARKHAM: So why is it that you say that there [are] standard terms at the back of the report?

DR EWART: Okay. So I'm sorry, you're a bit misunderstanding here, so I'll try to explain that more clearly. If you're providing such a report to a client, mostly they want to make an instant decision and they'll usually do that on the summary at the top of the report. **But it is important where the inspector explains everything that was found and the risks, that the client actually reads all of that and makes sure that they get the proper meaning of what was intended in the summary. That's not the same as all the proforma stuff down the back.** Obviously **that still has to be read and it's reasonable to expect that but a competent pest manager writing their report puts in a lot of detail about the termite risk**

... we're talking about roughly three sections within the report, the summary, the explanation of what was found that is important and then usually down the back all the reference materials for the person to follow up on.

(emphasis added)

⁵¹⁶ Transcript, day 3, page 298 [41]-[42].

⁵¹⁷ Transcript, day 3, page 299 [7]-[8].

Opinion

300. At this juncture, I interpolate to note that Dr Ewart's opinion at [6.2]-[6.3] of his report, which I accept on the basis of his clear expertise and his depth of knowledge in this specific field; is as follows:

- (a) The Inspection Report "fails to properly report the significance of the evidence obtained in their inspection and did not properly warn of the importance of the risks".
- (b) The Inspection Report "falls significantly below the minimum expectation as set out in AS 4349.3- 2010", even allowing for the ACT's use of vendor-supplied inspection reporting.

Extreme

301. In cross-examination by the first defendant, Dr Ewart was taken to the assessment and asked questions as to the meaning of the term "Extreme" in relation to the rating of the risk of the timber pest infestation in the Inspection Report, which relevantly assessed the risk as "moderate to high". Dr Ewart noted that "extreme" as a rating was often used in discussions with clients, and its use is not solely confined to the Code of Practice.⁵¹⁸ Dr Ewart noted that the use of this term was not contentious.

Five years of termite attacks

302. As noted by the plaintiffs, Dr Ewart was of the opinion in his initial report that the property had been subject to termite attack for many years, probably sporadically from a few years from the property's first construction.⁵¹⁹ Further, as at [9.7.3], Dr Ewart was of the view that the observed damage "most probably involved at least five years of attacks... and possibly longer".⁵²⁰

Inevitable

303. Counsel for the plaintiffs noted Dr Ewart's view expressed in his first report (at [9.6.3] and [9.6.7]) that,⁵²¹ given the area and the nature of the property, termite attacks were almost inevitable:

[R]enovations, additions and perimeter works that increased soil heights all greatly increased the risk of termite attack and this property has had all three. Thus, it is fair to regard the chances of attack as almost inevitable.

⁵¹⁸ Transcript, day 3, page 297 [36]-[41].

⁵¹⁹ Ewart Report at [9.1.2], cited in Transcript, page 494 [8]-[9].

⁵²⁰ Ewart Report at [9.7.3], cited in Transcript, page 494 [35]-[37]; 535.

⁵²¹ Highlighted in Transcript, Day 5, page 494 [29]-[31].

...

... I would regard that the location of the property, its age and the changes it has undergone mean that the property is at a relatively much higher **risk than would be expected as average in the area and for a house that had not undergone the same level of renovations, extension and paving works**. I would regard the **infestation risk**, because there was no evidence of an ongoing, effective termite management system as being **that termite attacks were inevitable**.

347 Days

304. Dr Ewart also prepared a supplementary report. The supplementary Ewart report appears to focus on the extent of termite damage as of the date of sale (8 November 2019).⁵²² As noted by the plaintiffs,⁵²³ this supplementary Ewart report addressed among other things any environmental factors that may have affected the levels of termite activity between the sale date and Mr Walker's inspection that confirmed the presence of termites (a period of 347 days).⁵²⁴
305. Of particular importance is the opinion expressed at pages 5-6 of the supplementary Ewart report. Dr Ewart noted in his supplementary report that the Walker report "adds little" to his understanding on the attack to the property. However, Dr Ewart observed that it was of interest that Mr Walker observed *Coptotermes* attacking the property from "14 shelter tubes in the subfloor". Dr Ewart took the evidence of these 14 entries and that Mr Walker identified live termites as "evidence of a current and significant infestation".
306. While noting that much can happen between the inspection done by the second defendant and the inspection by Mr Walker, Dr Ewart gave evidence that Mr Walker's opinion and the photos taken by the second defendant (not previously seen in preparing the initial report), provided evidence of a "significant and extensive attack". In his opinion (at 2.3[i]-[iv]), such an attack:
- (a) has an origin going back some years and, was a significant attack at the date of sale.
 - (b) being of such size and significance is unlikely to have been much affected by environmental and climate factors over that time.

⁵²² Supplementary Ewart report at [2].

⁵²³ Transcript, Day 5,

⁵²⁴ Supplementary Ewart Report at [2.3]; Transcript, Day 5, page 495 [17]-[24]. See also Transcript, day 3, page 306 [15]-[20].

- (c) although “it is possible that the attack changed in intensity and spread such that number and size of the shelter tubes observable in the sub-floor had grown significantly over that time”.
- (d) given the damage observed in the photographs and a shelter tube shown in “Image 16”, it is Dr Ewart’s opinion that “the bulk of the attacks and the extent of the attacks would be unlikely to have grown in that time by any clearly significant amount”.

307. Dr Ewart noted that he was particularly disturbed by “Image 16” which shows in his opinion a long established *Coptotermes* (a genus of termites) shelter tube “of a size that indicates a significant attack”. This image was included in the plaintiff’s first tender bundle.⁵²⁵

Significant Attack at the date of sale

308. In Dr Ewart’s opinion, the Walker report and the photos Dr Ewart sighted “provided evidence of a significant and extensive attack” that “has an origin going back some years and... was a significant attack at the date of sale”.⁵²⁶ Dr Ewart was also of the opinion that the attack was such a size and significance that it is unlikely to have been much affected by environmental and climate factors over the time⁵²⁷ and given the damage observed in the photographs (including Image 16) the bulk and extent of the attacks would be unlikely to have grown during this time.⁵²⁸ However, as noted by the first defendant,⁵²⁹ Dr Ewart was also of the view that it was possible that the attack changed in intensity and spread such that the number and size of shelter tubes observable in the subfloor had grown significantly over time.⁵³⁰

309. In cross-examination, Dr Ewart noted that image 16 is an “established” shelter tube through which termites can travel “with comfort”.⁵³¹ Dr Ewart also explained the features that makes the tube, in his opinion, a “mature shelter” established over “at least weeks or months”.⁵³²

310. Dr Ewart also noted in cross-examination that image 16 shows one shelter tube, but that it does not have to be the “original path” taken by termites in attacking the residence. In accordance with Dr Ewart’s evidence, termites “typically” attack a

⁵²⁵ Transcript, day 3, page 304 [33]-[34]. PTB 1 page 321 and 332 (332 is the agreed but 321 is a duplicate image)

⁵²⁶ Supplementary Ewart Report at [2.3]; Transcript, Day 5, page 495 [21]-[22].

⁵²⁷ Ewart Report at [2.3](ii).

⁵²⁸ Ewart Report at [2.3](iv).

⁵²⁹ Transcript, day 5, 92[8]-[11]

⁵³⁰ Ewart Report at [2.3](iii)

⁵³¹ Transcript, day 3, page 305 [34]-[38].

⁵³² Transcript, day 3, page 306 [1]-[13].

building at the shortest point from the ground to the food (wood), and so not in a tube such as that shown in image 16. Accordingly, a large tube such as that in Image 16 is often created as an additional tube “after the attack was extensive”.⁵³³

311. In cross-examination, it was put to Dr Ewart that he had relied on several assumptions to reach the conclusion that there was a “mature infestation” and a significant attack⁵³⁴ at the time of the sale of the property.⁵³⁵ Dr Ewart’s response to these assumptions are set out below.

(a) Dr Ewart denied that he was drawing an assumption that the tube in image 16 is not the original shelter tube.⁵³⁶

(b) In relation to the proposition that Dr Ewart has made assumptions as to the species, and number of species, involved in the termite infestation, Dr Ewart gave evidence that we cannot know if there was more than one colony, but there will be at least one.⁵³⁷ Dr Ewart noted that, in his view, the bulk of the attack was committed by *Coptotermes* and then later *Nasutitermes*.

1. Dr Ewart also noted that it is quite possible for *Nasutitermes* to not be detected by a reasonable inspector, and that even with a moisture reader it is not unreasonable for them to be missed.⁵³⁸

(c) Dr Ewart gave evidence that it is not possible to know whether or not there was a termite nest in a nearby tree. It is possible, in Dr Ewart’s opinion, that a house is built over an old stump and that there was a nest directly under it. Sometimes the termites may move there.⁵³⁹

1. Dr Ewart also noted that the Clarke report mentioned Mr Clarke detecting a colony in nearby trees using his dogs. Dr Ewart noted that Mr Clarke’s dogs are “very good” at finding things and as such is not a tool one would expect the second defendant to have used on this occasion.⁵⁴⁰

2. In Dr Ewart’s view, a termite colony can be spread out, with a central nest where breeding is taking place.⁵⁴¹ However, it is not really relevant in Dr

⁵³³ Transcript, day 3, page 306 [24]-[32].

⁵³⁴ Transcript, day 3, page 306 [34]-[38]

⁵³⁵ Transcript, Day 3, page 306-7.

⁵³⁶ Transcript, page 307

⁵³⁷ Transcript, day 3, page 307 [45]-[47], page 309 [18]-[20]

⁵³⁸ Transcript, day 3, page 307 [40]-[43].

⁵³⁹ Transcript, day 3, page 308 [9]-[12].

⁵⁴⁰ Transcript, day 3, page 308 [1]-[7].

⁵⁴¹ Transcript, day 3, page 309 [41]-[45].

Ewart's view to know where "any of that is" for purposes of a pest inspection.⁵⁴²

3. However, Dr Ewart accepted that the location of a termite colony is relevant to the amount of damage a colony can cause.⁵⁴³

312. As noted by the plaintiffs,⁵⁴⁴ Dr Ewart gave the following evidence when cross-examined as to the effect environmental and climate factors had on the attacking termite colony:⁵⁴⁵

MR MARKHAM: So you again have made an assumption that there is a – that there has not been much effect on any colony by environmental or climate factors?

DR EWART: I draw the conclusion. So we had the extensive damage through the building which was disclosed by others and wasn't really available to the inspector on the day but because of the amount of that, **what we thought very unlikely to have been not present at the time. I mean, it's absurd to think that that much could have been eaten in the short period.**

(emphasis added by this court)

Inspection Report did not properly explain moisture risk

313. Dr Ewart also gave evidence that, over a short period of time, environmental or climate factors such as whether it is a "winter or summer event", whether it was wet or dry, and whether the house was occupied would make a difference and that "all sort of things" can affect the extent to which damage increases.⁵⁴⁶ Dr Ewart also gave evidence that one of the problems with the Inspection Report was that it did not "properly" explain the elevated moisture risk to the side of the building.⁵⁴⁷
314. In cross-examination, Dr Ewart was also taken back to the opinion he expressed at [9.6.7] of his first report. Dr Ewart gave the following evidence in response to a suggestion that an assumption would need to be made as to the speed of the infestation:

DR EWART: I'm not understanding your language. These termites are local native animals in their own environment, so we expect them to be there. **So if the property is not maintained, it's poorly constructed, if it's easy for them to get in, then we do expect an attack to be inevitable.**

⁵⁴² Transcript, day 3, page 309 [44]-[44]

⁵⁴³ Transcript, day 3, page 310 [1]-[7].

⁵⁴⁴ Transcript, day 5, page 566 [30]-[34].

⁵⁴⁵ Transcript, day 3, page 308 [40]-[45].

⁵⁴⁶ Transcript, day 3, page 310 [9]-[14].

⁵⁴⁷ Transcript, day 3, page 310 [20]-[21].

MR MARKHAM: And those attacks are likely to be more significant than where there were barriers?

DR EWART: We don't use the term barrier [anymore]. Where there are impediments to the termites getting in, essentially what we're talking about is, **the termites are happiest if they can get in in a way which is not involving exposure**. So in the photograph we were describing earlier [image 16], the termites had constructed a shelter tube to support their attack. In their primary attack they would just create a mud near, but in preference, they would have a fully concealed run to something like the brickwork or where the paving is elevated, the edge of a window frame, and they would start at that point where they didn't have to put in much effort to start their attack.

(emphasis added)⁵⁴⁸

315. Counsel for the first defendant ultimately put to Dr Ewart that without the “various assumptions” Dr Ewart would have had to make, there was no reliable way for Dr Ewart would be able to know that the origin of the attack went back some years and there was a significant attack at point of sale.⁵⁴⁹ Dr Ewart thought the question was “strange” and noted that he has outlined the basis of his opinion:

Okay, that's a bit strange. So I have laid out on the basis of which I have made my decision from my knowledge and the evidence available, so without my knowledge and the evidence available, I would not have made that comment at point 1 [of page 6 of the supplementary Ewart report].⁵⁵⁰

316. Dr Ewart further elaborated as to how he reached the conclusion that there would have already been a significant attack in October 2019 absent the assumptions:

MR MARKHAM:⁵⁵¹ No where in your report can I find a finding as to the species, the number of colonies, the location of the colonies, the climate and environmental factors, the significance or otherwise on time of termite barriers or I think we said obstacles. I simply can't find any of this so how do you reach that conclusion that it would have been a significant attack at 2019?

DR EWART: ... We have **a large extent of damage**. We have **the visible shelter tubes**. We have **the history of the building**. We have **the nature of the damage** and all of that points to that damage having taken some time and that therefore a significant amount of damage was present when the inspector did his inspection. Now ... the number of colonies

⁵⁴⁸ Transcript, day 3, page 310-1.

⁵⁴⁹ Transcript, day 3, page 311 [6]-[10], [15].

⁵⁵⁰ Transcript, day 3, page 311 [14]-[16]

⁵⁵¹ Note that in closing submissions (transcript day 5, page 538, [13] – [24]) Mr Markham made the following submission, potentially misspeaking on this question:

MR MARKHAM: And you will see particularly at lines 20 to 30, 'We identified that we can't find...' - or I put to the witness that 'We can't find 15 anywhere in his report where he identifies the numbers', and I read 'I'm finding the species, the number of colonies, the location of the colonies, the climate and environmental factors and the significance of otherwise...' - it should read '...on time of termite barriers or obstacles'. And I say 'I simply can't find any of this' - - -

HER HONOUR: Sorry, are you saying there should be a correction to the transcript.

MR MARKHAM: No, it may have been that I misspoke on the day.

and things is not relevant for the poor inspector. The inspector can only go into a house that's prepared for sale and using minimum tools in a non-destructive way try and see what the evidence that's there. ... **So no inspector is expected to know how many colonies** were attacking .. An inspector has to look at the evidence, largely visible, available on the day and draw the conclusion.

...

MR MARKHAM: Dr Ewart, I accept entirely the proposition that you can't generalise and it leads to misunderstanding and for that reason **I put to you that you're not exercising your expertise in forming a view as to the likely level of attack in 2019** but rather you are speculating on a personal view as to what could have happened?

DR EWART: Well you can assume whatever you like. **I stand by my opinion**

(emphasis added)⁵⁵²

317. In relation to the last exchange above, Dr Ewart had given evidence in cross-examination that one cannot generalise to a large extent as to how to measure termite infestation, as the nature and form of termite attack varies with geography and type of building. To generalise, in Dr Ewart's view, can lead to a "lot of misunderstandings".⁵⁵³

318. In response to a question in cross-examination as to whether Dr Ewart had training in measurement of mud trails or shelter tubes to duration of infestation, Dr Ewart gave the following evidence and relevantly made a point as to the difficulties of obtaining knowledge regarding the issue:

In this country at the moment I am the main person to provide such training not to receive such training. So what we have of our understanding of the development of these tubes is based on observations of a large number of infestations over time and discussions about what can be inspected. **Nobody has gone out and torn apart, you know, a thousand houses to do a forensic study of the nature of these tubes. That's sort of – like it's just not possible. So it's all based on observational material.** I have done expansive experiments on termites where I've built model houses and things but those usually only run for two or three years and you can't extrapolate too far from a field test like that. So that sort of evidence isn't really around, I'm sorry.⁵⁵⁴

(emphasis added)

319. As noted by the first defendant,⁵⁵⁵ Dr Ewart clarified his opinion regarding "bulk" and "extent of attacks in [2.3](iv) of the supplementary Ewart report. Relevantly, Dr Ewart

⁵⁵² Transcript, day 3, page 311-2.

⁵⁵³ Transcript, day 3, page 311-2.

⁵⁵⁴ Transcript, day 3, page 312

⁵⁵⁵ Transcript, day 5, page 540/

also noted that there was so much damage that it would not be likely to have happened after inspection:

MR MARKHAM: [Referring to opinion in [2.3](iv) of the Supplementary Ewart Report] I'm assuming you mean the extent of the damage when you say 'extent of the attacks'?

DR EWART: No. **Attack and damage are not necessarily the same thing**... it may well be that property had termites eating in it from a start point until they were killed off. But it's also possible that the termites came and went over time. They may have been from different colonies... So attacks of periods of termite activity or areas within the structure where the termites have been feeding...

MR MARKHAM: ... The attacks and the extent of the attacks would unlikely to have grown in that time, being the time of the sale in 2019 by any clearly significant amount. So do we understand that you're suggesting that that was a consistent level of attacks and extent of the attacks?

DR EWART: No, what I'm **saying is that there was so much damage it would be not likely that much happened between the inspection and the infection**. Clearly it could not have all taken place in that time. There was damage previously but ... **the inspector isn't expected to understand the extent of damage or full amount of damage, the inspector is just looking for available evidence or termites and of risk and of conducive conditions and making a report based on that. We mustn't ask too much of the inspector.**⁵⁵⁶

(emphasis added to original)

The second defendant is caught by not properly interpreting the evidence he reported

320. In relation to the last sentence, Dr Ewart had importantly noted his opinion in his first report (at [6.1])⁵⁵⁷ that:

I consider it highly likely that the property had active termite infestation on 18 October 2019 but have found no evidence to suggest that evidence of active infestation would necessarily have been apparent to [the second defendant] in areas of the property which, under AS4349, he was expected to reach.

321. When asked as to his present position as to the opinion expressed at [6.1], Dr Ewart noted the following:

DR EWART: Yes, though we can't know for sure that they were active on any day unless we saw them face to face, **but in a prepurchase inspection, the inspector is very limited**. They can't find a shelter tube and open it. They can't poke a hole in the wall. They can look for things. They can use their moisture meter. They might pull out the termite radar. **But it's very rare for them to actually see a termite.**

(emphasis added).

⁵⁵⁶ Transcript, Day 3, page 312-3.

⁵⁵⁷ CB page 106.

322. With this being said, Dr Ewart nevertheless is of the opinion that the second defendant is “caught” by not properly interpreting the evidence he reported.⁵⁵⁸

MR MARKHAM: [A]ccepting paragraph 6.1, you would also accept that the level of damage, as you may have considered existed in – as you may have found existed in 2019, rather, that there was no damage observable to the inspector - damage to timber?

DR EWART: ...[L]ook damage to timber can be very subtle. Sometimes, it's just a slight variation in the surface of the timber that you'd see by shining your torch along it... **I'd have to go right back through my notes to make sure that there was no sign of damage. But I think in this case, the inspector is caught by not properly interpreting the evidence he reported.**

(emphasis added).⁵⁵⁹

Dr Ewart on other reports

323. In considering the other expert evidence (and the authors of that expert evidence) provided in relation to the property, Dr Ewart noted the following:

- (a) Dr Ewart noted that he viewed the Walker report as generally competent, although he noted that the “Subterranean termite management proposal” section of the Walker report was not sufficiently detailed to meet the requirements of s 4 of AS3660.2-2017.⁵⁶⁰ Dr Ewart also noted that the Walker report used the “Report Systems Australia” standard reporting format (a system widely used in the industry).⁵⁶¹ As a result, in his opinion, the Walker report contains significant material that did not address the matters at hand, but rather included significant portions of pro forma text, “apparently crafted to reduce potential liability”.⁵⁶²
- (b) As for the Stephenson report, Dr Ewart was of the view that the report does not adequately “address the issues of the quality of the pre-purchase inspection in terms” helpful in this matter, and that the Stephenson report did not adequately discuss what of the evidence Mr Stephenson saw that should have been seen by the second defendant. Dr Ewart also disagreed with Mr Stephenson, although Dr Ewart noted that his disagreement is in areas not “absolutely pertinent”.⁵⁶³

⁵⁵⁸ Transcript, day 3, page 314 [21]-[23].

⁵⁵⁹ Transcript, day 3, page 314 [15]-[23]

⁵⁶⁰ Ewart report at [9.5.1],[9.5.3].

⁵⁶¹ Ewart Report at [9.5.2]

⁵⁶² Ewart report at [9.5.3]

⁵⁶³ Ewart report at [9.3.1]-[9.3.2]

- (c) In contrast, Dr Ewart was (save in one area) in general agreement with Mr Clarke. I will return to this when I discuss Mr Clarke's evidence.⁵⁶⁴
- (d) Relatedly, in his report, Dr Ewart described having had "prior interaction" with both Mr Clarke and Mr Stephenson through the Australian Environment Pest Managers Association (the association), of which⁵⁶⁵ Dr Ewart gave evidence that he was a distinguished associate member.⁵⁶⁶
- (e) Dr Ewart noted that Mr Clarke was previously a member of the association, and that they were co-authors (among others) of the Code of Practice for prior-to-purchase timber pest inspection in September 2017.⁵⁶⁷

Minimum Standards

- 324. Dr Ewart⁵⁶⁸ was in any case of the view that the code is irrelevant to the proceedings as the second defendant was not following the code,⁵⁶⁹ despite citing it in the Inspection Report. This is consistent with the assumption in the Ewart report that the minimum standard for inspection of buildings is as set out in AS4349.3, "apart from conflict with ACT law".⁵⁷⁰
- 325. Relevantly, however, Dr Ewart explained that it was considered by the association that a code was needed in light of the nature of the "minimum standards" as follows:

That code was written for professional pest managers doing inspections. So it has the assumption that the person has a competent knowledge of termites. **The relative Australian standard is written largely by builders, and it makes no such assumption so that builder without any training in timber pests is able to do a tim[b]er pest inspection.** On the basis of this, the industry body thought it was important that what their members do was explicitly set out.⁵⁷¹

Mr Shane Clarke

- 326. The second expert called by the plaintiff was Mr Shane Clarke. Mr Clarke prepared a report in this proceeding and was called in evidence for the to tender of his report and to make him available for examination.⁵⁷² At the hearing, counsel for the plaintiffs

⁵⁶⁴ Ewart report at [9.4.1].

⁵⁶⁵ Ewart Report at page 5, [8], CB page 107.

⁵⁶⁶ Transcript, day 3, page 296 [20]-[21], [31]-[35].

⁵⁶⁷ Transcript, day 3, page 296-7 [1]-[2].

⁵⁶⁸ Transcript, day 3, page 297 [14]-[19], [21]-[24]

⁵⁶⁹ Transcript, day 3, page 298 [31]-[32].

⁵⁷⁰ Ewart report at [4.1.3].

⁵⁷¹ Transcript, day 3, page 297 [5]-[12].

⁵⁷² Transcript, day 3, page 331 [

indicated⁵⁷³ that Mr Clarke is the plaintiffs' primary expert on liability.⁵⁷⁴ So much is evident from the substantial reliance on the Clarke report.

Expertise

327. As emphasised by the plaintiffs, Mr Clarke noted in his report that he is an expert in termite management with 32 years of experience. As also foreshadowed by the evidence of Dr Ewart, Mr Clarke noted that he was the principal author of the Code of Practice for Prior to Purchase Timber Pest Inspections.⁵⁷⁵ In my view, the expertise of Mr Clarke in this case is clear on the evidence.

Inspection

328. In preparing his report, Mr Clarke noted that he had carried out an investigation through various means, and that he had relevantly read the Inspection Report, the Walker report, and the Emmadale Projects report. Mr Clarke additionally conducted his own inspection of the property.⁵⁷⁶ As noted in the Clarke report, this included deploying a detection dog to detect termites and termite damage to the property's exterior and interior.⁵⁷⁷

Photographs

329. Mr Clarke's letter of instruction from the plaintiff's solicitor was exhibited in this proceeding. In cross-examination, Mr Clarke gave evidence that while he had reviewed photographs taken by the plaintiffs on or about 28 October 2020 and 13 November 2020, he had not reviewed photographs taken by the second defendant at the time of the initial inspection for the preparation of the Inspection Report.⁵⁷⁸ Mr Clarke relevantly noted that had these photographs been included in the Inspection Report it would have been valuable evidence, but that nonetheless he was able to compare the Inspection Report (as it had been provided to the plaintiffs) with the appropriate standards and "the physical house before me".⁵⁷⁹

The new owner did not receive the required advice

330. Mr Clarke was "scathing"⁵⁸⁰ of the quality of the Inspection Report in his executive summary.

⁵⁷³ Transcript, Day 1, page 4 [13]-[14].

⁵⁷⁴ Transcript, Day 1, page 7 [15]-[18].

⁵⁷⁵ Clarke Report, page 4, CB page 58 [3.1], [3.9]; Transcript, Day 5, page 484 [37], [41].

⁵⁷⁶ Clarke report at [5.1].

⁵⁷⁷ Clarke report at [8.1].

⁵⁷⁸ Transcript, day 4, page 357 [41]-[47].

⁵⁷⁹ Transcript, day 4, page 358 [9]-[16].

⁵⁸⁰ PWS at [57]-[58].

- 7.1 The timber pest inspection report carried out by [the first defendant] on 21 October 2019 completely failed to communicate the critical issues with regard to evidence of termites found during that inspection, The result of this is **the new owner did not get the required advice to fully investigate the termite issue** and determine the extent of damage present, the risk of future infestation or carry out further tests for concealed termite activity or implement any mitigation process to reduce these risks
- 7.2 Although the structure contains a multitude of conditions conducive to termite activity and concealed damage to the property, the report completely fails to make the appropriate recommendations for further tests and management of termites resulting in extensive damage now requiring major repair or replacement to render the house habitable. **Due to the lack of recommendation the buyer was unaware of actions they should have taken prior to purchasing the property. Further the buyer also did not take required actions after buying the property, directly following advice contained in the report, resulting in more damage to the house.**
- 7.3 **The writer has shown disregard for the purchaser and a complete lack of understanding of termite management** resulting in major costs to the buyer to both manage the active termites and to repair the extensive catastrophic damage present, The very purpose of the subject report was to allow the buyer to avoid this very situation, however because of the negligence of [the first defendant] the new owners of the property are left with major losses that should have been avoided.⁵⁸¹

Other Reports

331. It is also convenient to highlight that, Dr Ewart noted in his first report that he was in general agreement with conclusions drawn by Mr Clarke.⁵⁸²

I am in general agreement with Mr Shane Clarke's appraisal that the original inspection was wanting. I believe that it did not properly address the risks at the property, failed to properly warn of the likely presence of extensive concealed damage and its consequence and failed to provide a proper description of the risks at the property that could be readily understood by a non-expert purchaser.

(emphasis added)

332. However, Dr Ewart expressed that the Clarke report did not discuss the nuance in applying AS4349.3 for a vendor pre-purchase report in the ACT.⁵⁸³
333. Mr Clarke stated in his oral evidence that he considers Dr Ewart to be "first class".⁵⁸⁴ The Clarke report also provided a review of the Walker report⁵⁸⁵ and the Emmadale projects report.⁵⁸⁶ Mr Clarke is generally positive about the recommendations and observations of these reports.

⁵⁸¹ CB, page 60-61.

⁵⁸² Ewart Report at [9.9.1]

⁵⁸³ Ewart Report at [9.4.1]-[9.4.2]

⁵⁸⁴ Transcript, day 4, page 360 [9]-[13].

⁵⁸⁵ See Clarke report at page 29-30.

⁵⁸⁶ Clarke report at page 31

334. As with Dr Ewart, the examination in chief of Mr Clarke was brief. In counsel for the plaintiff's submission, all of the evidence given in the Clarke report had been admitted without objection.⁵⁸⁷ Given the plaintiff's approach, it is useful to reproduce sections of the Clarke report in this section, particularly the sections that have been referred to by the plaintiffs in appendix A.

Review of the Inspection Report by Mr Clarke

335. Mr Clarke conducted a review of the Inspection Report, with an apparent focus on page 16. First, the Clarke report criticised the summary for stating that there was "no evidence of active subterranean termites", noting that (at [9.6.1]):⁵⁸⁸

...on page 16 under Inspection results that the evidence of termites was noted to the fences and subfloor of the property. The omission of this important information from the summary is an important oversight.⁵⁸⁹

336. The Clarke report also made the following observations at [9.6.2]-[9.6.6], with reference to cl 4.2.8 of the AS 4349.3 - 2010:

- (a) Evidence of termites is invariably associated with damage caused by termites, and in this case the inspector has failed to note the evidence of termites reported later in the Inspection Report.⁵⁹⁰
- (b) Due to the evidence reported, the second defendant as the inspector should have recommended further inspections to determine if the infestation was in fact active and to determine the extent of any damage.⁵⁹¹
- (c) The susceptibility of the building can only be "high or extreme" when it has been previously attacked by termites.⁵⁹²
- (d) The Inspection Report summary completely fails to communicate the condition of the building at the time of the inspection or the risk of timber pest damage to the building at the time of inspection.
 - 1. This omission, in Mr Clarke's view, negated the Inspection Report recommendation under the heading "Important Information" that the defendants recommend that prior to making a decision to purchase the property the advice of a suitably qualified tradesman who is able to quantify

⁵⁸⁷ Transcript, day 4, page 346 [11]-[12].

⁵⁸⁸ CB page 62, Clarke Report at [9.6.1].

⁵⁸⁹ Transcript, Day 5, page 485 [18]-[19].

⁵⁹⁰ CB page 62, Clarke Report at [9.6.3].

⁵⁹¹ CB page 62, Clarke Report at [9.6.4].

⁵⁹² CB page 62, Clarke Report at [9.6.5].

the extent and cost of appropriate remedial action, where reference has been made to termites.⁵⁹³

Statement 1

337. The entirety of Mr Clarke's opinion at [9.6] was relied upon to support statement one in appendix A. I note that in closing oral submissions counsel for the plaintiffs also referred to appendix D to the Ewart report. The appendix noted that if termite activity is noticed in any one location, it was advisable to make a "thorough search" of the entire building and recommended that a search be made for nests for up to a distance of 30 metres from the main building and within the boundary if termite activity is located in any one location.⁵⁹⁴

Use of terms "previous" and "old" is misleading

338. Mr Clarke criticised the usage of "previous" and "old" in relation to termite attacks in page 16 (see [9.11]-[9.12]). Mr Clarke noted at [9.12.1] of his report that the usage of "previous" and "old" is misleading to the reader, and that the fact that no live termites were seen was not evidence that the infestation is "old or in the past":

The use of the words "**previous**" and "**old**" is misleading to the reader. It is not possible to know when termites had last visited the area where the evidence is located. It is not possible to know if the galleries are active or not. Termites will often come and go from any particular area of their network of galleries. The fact that no live termites were seen is not evidence that the infestation is old or in the past. This is well known in the industry and acknowledged by the Australian Standard 3660.2-2017... it is not possible, without benefit of subsequent inspections and evaluations over a period of time, to ascertain whether an infestation is active or inactive (refer also to AS4349.3)."

(emphasis added)

339. Mr Clarke also made the following observations at [9.12.2]-[9.12.5]:

- (a) The second defendant had assumed that the infestation was in the past, without providing a reason for the conclusion. In Mr Clarke's view, the second defendant should have warned the reader that live termites could be present in concealed areas that the second defendant did not inspect.
- (b) The second defendant had, in Mr Clarke's opinion, not considered the fact that even if the infestation was in the past and had been adequately managed, damage must exist in concealed areas as the only reason termites construct mud tunnels up foundation walls is to access timber, remove them, and

⁵⁹³ CB page 62, Clarke Report at [9.6.6]. See also Transcript, Day 5, 486 [1]-[16].

⁵⁹⁴ Transcript, Day 5, page 473 [21]-[27]; CB page 166-7.

transport timber to their colony. Among other things, Mr Clarke noted that it is “normal industry practice” to warn readers of the need to carry out further investigations, and noting that this is exactly the situation contemplated by cl 4.2.6 AS4349.3 – 2010.

1. Mr Clarke observed that this failure was further evidence of the second defendant’s neglect of the purchaser in not advising further inspections.
- (c) Mr Clarke noted again that the second defendant has not demonstrated the basis for the conclusion that the infestation is old, in the past, and no longer a threat. Mr Clarke referred to Information Box C3.6 of AS4349.3 – 2010, which noted that it was expected that an inspector, being an expert practitioner, will be able to demonstrate the basis of their conclusions in the event of problems. In Mr Clarke’s view, the second defendant’s opinion is without basis in fact or evidence.
- (d) In circumstances where the second defendant found evidence to the subfloor and have advised that his inspection was limited, any competent inspector cannot arrive at any other conclusion than “further investigations are required”.

Statement 2

340. As may be expected, the opinion at [9.12] of the Clarke report was relied on to support statement 2. It was also referred to by counsel for the plaintiffs in their closing oral submissions.⁵⁹⁵

Statement 3

341. In an opinion relied on to support statement three, Mr Clarke expressed disagreement with the recommendation in page 16 of the Inspection Report to remove and replace the affected timber in the fence. Mr Clarke was of the view that removing the affected timber means that timber termites are more likely to be disturbed, leave the area, and become more active in other areas.⁵⁹⁶ The fact that the plaintiffs followed this advice has, in Dr Clarke’s view, increased the risk of further infestation and resultant damage, and demonstrates the second defendant’s lack of understanding of termite management and behaviour that is required by cl 3.2 of AS 4349.3 – 2010.

⁵⁹⁵ Transcript, day 5, pages 487-8.

⁵⁹⁶ Clarke report at [9.13.1]

Statement 4

342. These opinions were relied on to support statement four in appendix A. Similarly, the opinion in [9.14.5] were relied on in conjunction with paragraph of the Clarke report support statement 5 (at [9.14.3]):

9.13. Termites have soft bodies and are very susceptible to desiccation. The purpose of the mud tunnels is to allow termites to keep their environment at the appropriate moisture level. These tunnels are extensions of the nest that reach out for food sources remote to the colony. They continually manage the temperature and humidity inside the gallery system, When a subfloor of a house is damp termites will attack far more aggressively than if it is dry, I know this from my experience and training.

Statement 5

343. Also relied on to support statement five is the criticism made by Mr Clarke at [9.17]. Mr Clarke noted that the Inspection Report noted poor ventilation without explaining the cause, did not inform that major works are required to improve the ventilation (or indeed to improve ventilation at all), nor warn of the reason why ventilation is important. Mr Clarke explained that poor subfloor ventilation makes the property “a lot more susceptible” to termite activity, and the failure to note this is, in Mr Clarke’s view, a breach of cl 4.2.4 of the AS 4349.3 – 2010. As noted by counsel for the plaintiffs, Mr Clarke was also of the view that “any competent inspector” would have advised a purchaser to consult with a ventilation expert to provide advice and costs for rectification before proceeding with the purchase.⁵⁹⁷

344. At [9.14.1], Mr Clarke was also critical of the Inspection Report failure to report “extensive decay” to the subfloor, beyond noting the decay in bathroom window and fending. The Clarke report noted at [9.14.2] that a large amount of decay caused by fungus is both a pest in its own right and is highly conducive to termite attack. As noted by the plaintiffs, Mr Clarke was of the view that the non-reporting shows “a high degree” of incompetence as “all the flags are present”.⁵⁹⁸ Namely, Mr Clarke stated that the Inspection Report itself should have noted that ventilation in the subfloor is inadequate, and that this was the cause of the moisture that provided the condition for decay fungus to grow. In [9.14.5], Mr Clarke opined that at the time of the inspection the ventilation was blocked at various points in the house so that there were only working vents on one side of the house.

⁵⁹⁷ Clarke Report at [9.17.2], highlighted in Transcript, Day 5, 490 [1]-[3].

⁵⁹⁸ Clarke Report at [9.14.2], highlighted In Transcript, Day 5, 489 [1]-[7].

Statement 6

345. As to the opinion in page 16 that, from the limited inspection, the subfloor drainage in generally fair, Mr Clarke was of the view (at [9.16.1]) that if the inspection was limited, the second defendant should have recommended further inspections in accordance with cl 4.2.6 of AS4349.3 – 2010. This opinion was relied on to support statement 6.

Statement 7

346. Relatedly, Mr Clarke noted that the subfloor drainage was, in his view, not “fair” and as such contrary to the Inspection Report. This opinion was relied on to support statement seven.

Statement 8

347. In response to the Inspection Report opinion in page 16 concerning trees, Mr Clarke noted at [9.15.1] that the trees surrounding the house “should have raised warnings” without reporting of any evidence of timber pest damage to the trees. Mr Clarke was also of the view that the wording of the opinion was “ambiguous”:

[A]s the reader I am confused about the nature of the evidence found. Was it termites or decay or both? We can never know now because the trees have been removed.

348. Mr Clarke was of the view that as the second defendant confirmed that he was otherwise unable to confirm if infestation was present, the second defendant should have recommended further investigations of the trees, and trees are a “major harbourage” for termite colonies and are often rendered unsafe due to termite attack or decay. Failure to recommend further inspections, in Mr Clarke’s view, was a breach of AS4349.3 – 2010.⁵⁹⁹ Mr Clarke noted that the Inspection Report reassured the reader by stating that no live specimens were found, despite the non-finding in Mr Clarke’s view not being evidence of anything.⁶⁰⁰ Mr Clarke noted that, indeed, evidence of timber pest attack is evidence that live specimens are likely to be found. As such, the Inspection Report should have focused on reporting what was found instead of reporting what was not.

349. These opinions at [9.15] were relied on for statement eight in appendix A.

Statement 9

350. As for the observations in the Inspection Report regarding the Biflex Duo treatment, statement nine relied on the observations at [9.18] of the Clarke report. First, Mr

⁵⁹⁹ Clarke report at [9.15.2]

⁶⁰⁰ Clarke at [9.15.3]

Clarke noted at [9.18.1] that there was no notice in the meter box, and the reader was not informed how the second defendant was aware of something that no longer existed (e.g. from the vendor or a past inspection).

351. At any rate, Mr Clarke observed that there was evidence of drilling consistent with such an application, but such application to the soil under timber steps was, in his experience, unlikely to be successful as termites could pass through gaps of untreated soil.⁶⁰¹ Mr Clarke noted that the presence of paving at the property “compromises” this approach, and that termites were currently, at the time of the Clarke report’s inspection, attacking the house from below a concrete slab extension. Mr Clarke was of the view that such a risk should have been recognised by the second defendant. As per normal industry practice, the second defendant should have also provided recommendations to seek out the full history of that application.⁶⁰²

352. Finally, Mr Clarke also noted that the area where the treatment was carried out was the perimeter, which could not prevent any termite attack to the subfloor.⁶⁰³ Indeed, Mr Clarke noted that the first defendant’s own evidence showed that the subfloor had no protection. Further, Mr Clarke noted that chemical applications required maintenance and that:

If the writer had any knowledge of termite management he would have known that this application carried out as far back as 2011 would require at least some level of reapplication. Only a year after this report and termites are attacking the house from many areas of the perimeter and subfloor at will. It is as if no protection exists at all...

Statement 10

353. Finally, as relied on in relation to statement 10, Mr Clarke was also critical of the specific recommendations made in the Inspection Report.

354. First, Mr Clarke was critical of the Inspection Report noting that page 16, at the time of inspection, a treatment to control subterranean termites from infesting or causing damage was not considered necessary at [9.19]:

- (a) The Inspection Report referred to the wrong Australian Standard, with the correct one being AS3660.2 (which deals with existing, as opposed to new buildings).

⁶⁰¹ Clarke at [9.18.2]

⁶⁰² Clarke Report at [9.18.3]-[9.18.5])

⁶⁰³ Clarke report at [9.18.7]

- (b) The conclusion that no termite management other than inspections was necessary was “clearly wrong”, with the Inspection Report already noting evidence of termites to the subfloor and with the only identified treatment in the permitter. This conclusion was, in Mr Clarke’s view, “completely nonsensical” and that the second defendant has no understanding of the principles that apply to termite management or termite behaviour or biology (cf cl 3.2 of AS4349.3 – 2010).
- (c) Had the second defendant had the required understanding the second defendant would have known that the treatment attempt to the perimeter was deeply flawed and further activity was likely, and that damage would have existed, and further termite management was required.

355. Second, Mr Clarke was critical of the Inspection Report assessment of the susceptibility of the property to timber pest infestation as “moderate to high”. Although Mr Clarke conceded at [9.20.1] that such an opinion is subjective, he did not consider that the Inspection Report had considered all of the factors. Mr Clarke noted that external levels of the paving and gardens were not reported nor considered, and the lack of access alluded to concerning the subfloor was similarly in Mr Clarke’s view was not considered. Mr Clarke also noted that the Inspection Report did not consider the “many conditions conducive to termite attack”, such as (at [9.20.1](a)-(j)):

- (a) The mixed construction, which is of “high termite risk” because of the difficulty in protecting the interface between the timber floor and the concrete slab. Mr Clarke noted that termites can be seen tracking from below the slab extension to the timber frame floor construction.
- (b) The apparent lack of termite management system installed during construction.
- (c) The lack of mention of “high external levels and the blocked ventilation system”.
- (d) The presence of timber posts in the subfloor in direct ground contact, with Mr Clarke noting that a wood forming a bridge from the ground is “about as conducive as it gets”, and indeed Mr Clarke noted sightings of termites using it to attack the property.
- (e) The presence of large gum tree within termite range of the house.
- (f) The lack of noting in the Inspection Report of the risk of re-infestation, despite noting the evidence of termites. Mr Clarke noted that, from his training and expertise, a house that has been infested is much more likely to be infested again in the future; termites will readily invade and use the galleries of other

termites particularly those abandoned or not defended. Indeed, termites can access gallery system from far from the structure and be guided to it. Mr Clarke was of the view that the increased risk this poses is “extreme”.

- (g) The associated damage to the building was not reported despite evidence of termites being noted in the subfloor. The risk of concealed damage to the building was also not adequately reported.
- (h) Virtually all the conditions conducive to termites in cl 3.5.3 of AS4349.3 – 2010 were present in the property and not reported adequately.

356. As to the Inspection Report recommendation for regular inspections, while such inspections were recommended the frequency of inspections was not entirely clear⁶⁰⁴ and that a “clear recommendation” for three-monthly inspections should have been provided as part of an ongoing termite management program in response to the evidence of termites and the “many” conducive conditions to further activity. Importantly, Mr Clarke noted that the plaintiffs had, in any case, followed the advice for pest inspection every 6-12 months,⁶⁰⁵ and yet this in Mr Clarke’s view had not limited the amount of termite damage.⁶⁰⁶ Mr Clarke critically noted for the purposes of the issues in this case at [9.21.2] of his report that:

Extensive damage is likely to have occurred before purchase based on the finding of the evidence under the house of multiple “mud trails” by the subject report and, that damage has continued after purchase, **(I saw and heard live termites during my inspection)**, due to the lack of appropriate recommendations in this report...

(emphasis added)

357. Mr Clarke reiterated that no actual recommendations were made to reduce the conducive conditions, and that the “ambiguous” recommendation at the bottom of page 16 was the only recommendation made in the “main body” of the Inspection Report.

358. Finally, Mr Clarke took issue with the description of property access in page 17. The Clarke report at [9.22] noted that the Inspection Report did not effectively communicate that extensive damage could be present to areas with limited access, and that further access and inspection is required. Indeed, Mr Clarke was of the view that this section should have been accompanied by recommendations of cl 4.3.2 of

⁶⁰⁴ Clarke report at [9.21].

⁶⁰⁵ I note the 12 month period was not over.

⁶⁰⁶ Clarke report at [9.21], [9.21.3].

AS4349.3 – 2010, which I note is a standard that allows a timber pest inspection to be conditional or limited.

359. In appendix A, counsel for the plaintiffs properly submitted that the Inspection Report should have noted the following conclusions made at [12.6.20] of the Clarke report. Mr Clarke stated that the conditions would have been made by any competent timber pest inspector upon the inspection:

- (a) The house had been subjected to termite attack and also subjected to fungal decay.
- (b) The house had many conditions conducive to termite attack and fungal decay.
- (c) The house had no evidence of any termite management system being installed during construction and as such the property is at greater risk of concealed termite attack both in the past and in the future. This is because installing such a system post construction is not practical.
- (d) The house is likely to have concealed damage from termites to timber framing. The risk of concealed live termites within the house is very high to extreme.
- (e) Further tests are required to detect this possible concealed termite activity. Further investigations are required to determine the extent of damage within the house.
- (f) Repairs due to termite damage will be required. A full termite management program is required to manage future infestations in the property.
- (g) Major works are required to correct the external levels where they have been raised above the height of the ventilators. This is to allow the ventilation system to achieve the correct “cross flow of air to the subfloor area”.

360. Further, counsel for the plaintiffs also asserted in appendix A that the Inspection Report should have contained the warnings noted at [12.6.21] of the Clarke report. Mr Clarke noted that the conclusions identified at [12.6.20] would lead to any competent timber pest inspector to provide the following warnings:

- (a) Evidence of termite attack was found to the house and to the grounds and fences. Further concealed live termites that had not been detected could be present, and further tests carried out over time will be required to determine if further live termite activity is present.
- (b) Evidence of fungal decay or wet rot was found to the subfloor area.

- (c) If the timber pest inspector was limited in the manner the Inspection Report identified, then the inspection was incomplete and further access was required in order to complete the inspection.
- (d) The second defendant has not determined the extent of damage that has resulted from this termite attack, and as such a builder or suitably qualified expert should be commissioned to determine the extent of this damage prior to proceeding with any purchase.
- (e) A full termite management program must be implemented and maintained for the life of the house, and that any purchaser should confirm the costs of this program before deciding to buy the house. The history of termite management should be gained from the vendor to assist in the design and implementation of the required termite management plan.
- (f) Regular ongoing inspections at intervals not exceeding three-months will be required for the life of the house. These inspections should include additional tests such as thermal imaging or the use of detection dogs as the risk of concealed termite activity is high and will remain high for the life of the house due to the nature of the construction.
- (g) A building consultant or other suitably qualified expert is required to determine if and what repairs are required as a result of wet rot prior to the reader of the Inspection Report proceeding with the purchase of the house.
- (h) The paved area abutting the foundation walls and gardens abutting the house will need to be lowered to the correct levels, and that the costs of doing so should be considered prior to purchase.
- (i) Further works to the ventilation system may also be required as the concrete slab extension permanently blocked the ventilation system, and the potential costs of this should be considered prior to purchase.

Cross-examination

361. Mr Clarke was first cross-examined by counsel for the first defendant regarding the “high or extreme” rating with respect to the code. Mr Clarke reiterated that the risk when it comes to the property does not “get much higher” and the property actually had termites.⁶⁰⁷

⁶⁰⁷ Transcript, day 4, page 360 [45]-[46].

362. Mr Clarke gave evidence that he was the chair of working party that wrote the code,⁶⁰⁸ and that the code went over the standards prescribed by the AS4349.3 – 2010 as the code also included recommendations on ongoing management of termites and other issues. By contrast, in Mr Clarke’s view the standard was essentially part of a “suite of codes” that was written for building inspectors generally, as opposed to timber pest inspections.⁶⁰⁹ In that sense, the code went beyond the standard and was written to allow for differentiation between a report prepared by a building consultant as opposed to a specialist timber pest inspector.⁶¹⁰
363. Counsel for the first defendant referred⁶¹¹ to s 10.9 of code, which defines “Relative Timber Pest risk” ratings. As for “Extreme”, the code noted that this is used when “a property has active pest problems and/or is in disrepair such that conducive conditions abound”. Mr Clarke noted that this particular definition is not included in the Australian Standards, although the latter talks about risks.⁶¹² Mr Clarke also noted that he was unaware how widely used the risk scale in the code as opposed to other scales.⁶¹³
364. Mr Clarke conceded in cross-examination (consistently with his report) that assessment of risks are subjective opinion, and that it will vary between inspectors.⁶¹⁴ For his part, Mr Clarke gave evidence that he would assume any house that has had an issue with termites, where termites had actually been in the building, cannot have anything but the highest possible risk especially if this is combined with a structure with “every condition conducive to termites”, including timber going from the ground to the house.⁶¹⁵

Use of the term “moderate”

365. Mr Clarke gave evidence that he particularly cavilled with the Inspection Report’s usage of “moderate”:

... I just had problems with this particular report because it talks about moderate, you know, which is a reducing of the risk from high. You know, I don't understand how you could use the word 'moderate'. I mean, moderate is ... an annoying term because you know, a report might say there's moderate damage, only half of the house is eaten. Right? Or it might be there's only moderate damage, only half of one joist is eaten. [sic] And I've always been annoyed by these terms because **they mean nothing to the purchaser in practical terms.**

⁶⁰⁸ Transcript, day 4, page 360 [6]-[7].

⁶⁰⁹ Transcript, day 4, page 360 [15]-[37].

⁶¹⁰ Transcript, day 4, page 360 [35]-[37].

⁶¹¹ Transcript, day 4, page 3610-1.

⁶¹² Transcript, day 4, page 361 [14]-[22].

⁶¹³ Transcript, day 4, page 362 [25]-[27].

⁶¹⁴ Transcript, day 4, page 361 [20]-[22], referring apparently to Clarke report at [9.20] at CB page 77.

⁶¹⁵ Transcript, day 4, page 362 [1]-[3].

(emphasis added)

366. Mr Clarke also gave evidence that while the ACT is an area of lower relative risk for termites compared to, for example, Sydney, any property that actually has termites will “forever going to be a very high risk” as once termites have constructed galleries into the building “they will remain forever”.⁶¹⁶ As such, in Mr Clarke’s opinion “the word “moderate” should not be anywhere near” a house that had actually suffered an infestation.⁶¹⁷ Mr Clarke also noted that he found a colony near a neighbouring property that could have easily been the source of the issue.⁶¹⁸

Biflex Duo

367. In relation to the Inspection Report’s observation regarding the “Biflex duo” treatment in the perimeter, Mr Clarke noted that in his experience such an application to the soil under timber steps “is not likely to be successful” as any treated soil would contain gaps of untreated soil that would allow termites to pass to the house.⁶¹⁹ As such, in Mr Clarke’s view, if the second defendant had the required understanding the second defendant would have known that the treatment attempt to the perimeter was deeply flawed.⁶²⁰

Inspection Report not prepared with the appropriate care and skill required

368. I interpolate to note that the Clarke report concluded that the Inspection Report in question in this case, was not prepared with appropriate care and skill,⁶²¹ with Mr Clarke identifying the following elements of the Inspection Report as insufficient (at [12.5.2]-[12.5.10]):

- (a) The lack of recommendation for further investigation of the evidence found during the inspection; any competent inspector would have known that damage will be caused to the structure if evidence of termites found.
- (b) The Inspection Report did not “reveal the condition of the property”, and glossed over the finding of evidence of termites and concluded it was “old” when in Mr Clarke’s view time has shown this conclusion was wrong. In Mr Clarke’s view, the condition of the property was very different to the one reported.

⁶¹⁶ Transcript, day 4, page 362 [14]-[16].

⁶¹⁷ Transcript, day 4, page 362 [20]-[23].

⁶¹⁸ Transcript, day 4, page 362 [17]-[18].

⁶¹⁹ Clarke Report at [9.18.2]; Transcript, Day 5, 490 [1]-[7].

⁶²⁰ Clarke Report at [9.19.3]; Transcript Day 5, page 490 [16]-[19].

⁶²¹ Clarke Report at [12.5]; Transcript, Day 5, page 491 [6]-[10]/

- (c) The conclusion that no treatment was required was “poorly considered”, with the second defendant having no evidence that the infestation had been adequately managed or rectified.
- (d) Lack of identification of conducive conditions to termite attack.
- (e) Failure to outline the risks associated with the lack of any “termite shielding or ant capping” to the subfloor. The second defendant, in Mr Clarke’s view, should have known that due to this building fact there was a high risk of undetected activity in the property.
- (f) The Inspection Report did not advise the reader of the added risks provided by the nature of the construction.
- (g) The Inspection Report did not describe the risk of undetected termite activity.
- (h) The Inspection Report did not identify “bridging”⁶²² of any inspection.
- (i) The Inspection Report did not recommend any additional tests.

369. Relatedly, I note that there was an exchange between counsel for the first defendant and Mr Clarke regarding the latter’s opinion that the second defendant had breached his duty of care⁶²³. Counsel for the first defendant correctly noted that whether the defendants breached the duty of care is a legal question, and Mr Clarke later attempted to elaborate on his evidence as follows:

MR CLARKE: Now, I understand that any inspector, and I understand that there’s – when I was an employer and I was doing these private purchase property inspections and I have done thousands of them. And I certainly did a course, in particular, provided by the Australian Environmental Pest Management Association, which was a legal aspects course, which was a course designed for timber pest inspectors to understand their legal responsibility to their client, and to understand their duty of care to their client. And so when I talk about that I’m only coming from that education and training which I have had.

MR MARKHAM: So, you’re asserting to this court that you have a qualification to express legal opinions?

MR CLARKE: No. I’m not. I’m simply saying that as an employer I did training which made me very aware of my legal obligations and duty of care to my clients so that I could fulfill that. And that’s all I’m saying...

MR MARKHAM: And on the basis you have ---?

⁶²²By “bridging”, it appears from the context of the Clarke report, that this term refers to the means of access to a building for termites.

⁶²³ Transcript, day 4, page 363 [21]-[23].

MR CLARKE: And that any inspector has a duty of care to at least meet that minimum standard.⁶²⁴

370. The cross-examination by the second defendant first focused on Mr Clarke's opinion as to what a reasonable pest inspector exercising reasonable care and skill would have done. The Clarke report relevantly noted the question Mr Clarke was asked to consider in this regard (see 12.6] of the Clarke report):

Describe the extent a pest inspector exercising reasonable care and skill would have inspected the Property, including any tests (if any) that ought to have been carried out or areas that ought to have been investigated, the conclusions he or she ought to have drawn and warnings that ought to have been provided to our clients.

371. Mr Clarke did first note that he did not know what tests the second defendant used, and that he has neither assessed the procedure the second defendant used nor the second defendant's training and expertise.⁶²⁵ Nevertheless, Mr Clarke's response to the question was extensive.⁶²⁶

372. Aside from the conclusions and warnings at [12.6.20]-[12.6.21] that I have reproduced above, Mr Clarke's opinions was of the opinion (at [12.6.5]) that the subfloor area should be inspected, and that any competent inspector subfloor would have accessed all of the subfloor area, particularly the "interface" between the extension and the original house in the property. Based on his experience, training and expertise, Mr Clarke's was of the opinion this is where termites or evidence of termites are likely to be found.⁶²⁷

373. Mr Clarke also elaborated on his opinion at [12.6.8] regarding what he views as the lack of specificity in the Inspection Report as to the limit of the access:

The inspector has indicated his inspection of the subfloor was limited but has not specified the extent of that limitation. .. while [the first defendant] had very limited subfloor access both Armageddon and myself had not such problems. Any limitation of access would naturally be followed by recommendations to overcome the issue. [cl 2.3.4 of AS4349.3 – 2010 was set out]. In this case the inspector **failed to report the extent of the areas inspected**. Did he have access to half the subfloor or did he poke his head in the access hole? What was it that limited his access? Was it the ducting? If it was, there is access around the ducting in all areas. Was it the clearance? **In which case he could have recommended a person of smaller stature return and complete the inspection**. He could have also recommended further traps be cut in the timber floor to provide further access. In this case there is access both through the foundation wall and also through an access hole in the floor itself at the rear of the house adjoining the rear extension. I was able to go from one access point to the other without danger or hazard. Further inspections or tests could have been recommended if he

⁶²⁴ Transcript, day 4, page 364 [28]-[43].

⁶²⁵ Clarke report at [12.6.1]-[12.6.2]

⁶²⁶ Full response not reproduced there. See pages 42 to 47 of the Clarke report which set out that answer.

⁶²⁷ Clarke Report at [12.6.5].

did have limitations however no such solutions were recommended. The only area of the subfloor where I was limited was around the main bathroom where full area should be made by the removal of bricks from the subfloor to allow full access.

(emphasis added).

374. Mr Clarke was of the view that any competent inspector would have advised the buyer to carry out additional tests to detect concealed activity (see [12.6.11]). Examples of additional tests include the usage of detection dogs, thermal imaging technology, or using a movement-detecting device called “Termatrack”.⁶²⁸ Mr Clarke gave evidence in cross-examination that he was of the view that the AS 4349.3 – 2010 obliged the second defendant to make these recommendations, in the sense that the second defendant must recommend additional tests if visual inspection is not sufficient. Mr Clarke also noted that it is commonplace for the additional tests to include additional tools and invasive inspection, and that Mr Clarke himself had used the methods he nominated.⁶²⁹
375. In cross-examination by counsel for the second defendant, Mr Clarke noted that the standards largely left to the individual inspector the minimum height and space the inspector is expected to access, and in this case the second defendant suggested 400 mm was the minimum he could have accessed.⁶³⁰ If the second defendant was unable to access an area for some reason, Mr Clarke noted that the second defendant should be recommending further inspections.⁶³¹ Mr Clarke gave evidence that for “some 35 years” Mr Clarke would give strict instructions to his employees that they should stipulate in their reports if they were unable to access an area. Mr Clarke noted that he would then in response send another employee of “slighter stature” or recommend additional tests.⁶³²
376. Counsel for the second defendant took Mr Clarke to s 3.3 of the AS4349.3 – 2010,⁶³³ which Mr Clarke agreed did state that the minimum dimensions for reasonable access for roof interior is 600 x 600 mm. Mr Clarke disagreed with counsel for the second defendant’s suggestion that the second defendant went beyond the requirement of AS4349.3.⁶³⁴ In his view, the reason for the bigger dimension in the roof is that the roof area is more difficult with the inspector needing to climb over joists.⁶³⁵ That is,

⁶²⁸ CB page 97.

⁶²⁹ Transcript, day 4, page 339 [38]-[46], 340.

⁶³⁰ Transcript, day 4, page 332 [41]-[44].

⁶³¹ Transcript, day 4, page 333 [1]-[4],

⁶³² Transcript, day 4, page 335 [11]-[16].

⁶³³ Table 3.1., page 137 of the CB and page 35 of the Ewart report.

⁶³⁴ Transcript, day 4, page 334 [38]-[39].

⁶³⁵ Transcript, day 4, page 334 [30]-[33].

roof space is, in his view, more difficult than the subfloor,⁶³⁶ and in this case the property has a suitable space in which the second defendant can move about.⁶³⁷ Mr Clarke noted that he himself managed to obtain “full and free access” to the subfloor through one area under a bathroom.⁶³⁸

377. Ultimately, Mr Clarke accepted that the second defendant did in fact inspect the subfloor and satisfied the “minimum requirement” for inspecting the subfloor. However, Mr Clarke noted that the second defendant should have made appropriate recommendations for further inspections if he was unable to carry out a complete inspection, as required by the standard.⁶³⁹

378. Mr Clarke was asked regarding his opinion at [12.6.4], namely that the second defendant could have recommended further traps be cut in the timber floor. Contrary to the second defendant’s suggestion, Mr Clarke was of the view that this was required by the standard:⁶⁴⁰

[T]he standard's very specific, your Honour, in that the only recommendations... within this particular standard relate to further inspections which may include - I think from memory it's paragraph 3.2.1 of that standard. The only recommendations within that standard relate to further inspections, your Honour, which may include additional invasive inspections. **And so if the inspector conducting the visual inspection is not happy that he can comment accurately on the building because of lack of access, then he has an obligation to recommend further inspections including, if necessary, invasive inspections.**

(emphasis added)

379. In [12.6.7] of his report, Mr Clarke also opined that an inspector with reasonable care and skill would sound all accessible timber for termite damage, in particular the base plates of walls.⁶⁴¹ Mr Clarke explained in his report that it would involve using a tool or a probe to “strike timbers to listen for damages” within.⁶⁴²

380. In cross-examination, Mr Clarke agreed that a “non-invasive” inspection is an inspection that does not mark the surface of the timber. Mr Clarke gave evidence that using a probe is not an invasive inspection in so far as a probe will not mark the surface if it is only being used to tap the timber.⁶⁴³ Mr Clarke gave evidence as to what, in his opinion, the second defendant should have done:

⁶³⁶ Transcript, day 4, page 334 [38]-[39].

⁶³⁷ Transcript, day 4, page 334 [45]-[46].

⁶³⁸ Transcript, day 4, page 335 [1]-[2].

⁶³⁹ Transcript, day 4, page 335 [22]-[25].

⁶⁴⁰ Transcript, day 4, page 338 [31]-[40].

⁶⁴¹ CB page 96, Transcript, day 4, page 335-6.

⁶⁴² CB page 96

⁶⁴³ Transcript, day 4, page 337 [1]-[9].

In this case, of course, the [second defendant] was employed by the vendor of the house, or the owner of the house, and so it's easy for him to get permission if he wants to do some slight invasive inspection. But in this case, it's irrelevant anyway. **He can use his probe to tap the timbers and he should tap all of the accessible timbers within that subfloor area, and he should be using it to investigate evidence of termites found such as the mud tubes to see if there are live termites within it – within. I mean, it would be ridiculous to suggest that he would see evidence of termites, being a mud tube, and then not use his probe to take off a piece of the mud to look for actual insects within.**

(emphasis added)

381. Mr Clarke also maintained his opinion that it would have been “easy” for the second defendant to obtain permission to perform an invasive inspection if the defendants were employed by the vendor and was given access by the vendor.⁶⁴⁴ In his experience, Mr Clarke noted that vendors would rather find out during their own inspections rather than through a purchaser, which could “spear a sale at the eleventh hour”.⁶⁴⁵ I note that Mr Clarke lives in New South Wales, and that he noted his awareness of the difference between the ACT and NSW systems.⁶⁴⁶
382. Relatedly, Mr Clarke also maintained his view expressed in [12.6.9] of the Clarke report that “no evidence of any inspection or testing of the timber framing is apparent”.⁶⁴⁷ Mr Clarke noted that there was not necessarily evidence of the second defendant invasively probing timbers. Mr Clarke also noted that he reviewed the Inspection Report to ensure that the second defendant had “actually done a diligent inspection and actually ... looked hard for termites”.⁶⁴⁸
383. Mr Clarke was also cross-examined on his view of the statement in page 25 of the Inspection Report under the heading of “Determining Extent of Damage”.⁶⁴⁹ Mr Clarke had stated in his report that any competent inspector in these circumstances would have recommended an “extent of damage investigation” following the discovery of termites in the subfloor area (see at [12.6.12]).⁶⁵⁰
384. As noted by counsel for the plaintiffs,⁶⁵¹ Mr Clarke gave evidence in cross-examination that page 25 was not properly informative:

⁶⁴⁴ Transcript, day 4, page 337 [26]-[29].

⁶⁴⁵ Transcript, day 4, page 337 [32]-[38].

⁶⁴⁶ Transcript, day 4, page 337 [40]-[43]. A basic difference is that in NSW the buyer has the responsibility of obtaining the pest inspection report. In the ACT it is incumbent on the seller, as defined by the *Civil Law (Sale of Residential Property) Act 2003*; see sections 18 and 19.

⁶⁴⁷ See CB page 86.

⁶⁴⁸ Transcript, day 4 page 339 [4]-[9].

⁶⁴⁹ See Transcript, Day 4, page 340 [30]-[46].

⁶⁵⁰ CB page 97.

⁶⁵¹ Transcript, Day 5, page 493 [16]-[19].

MR SCHOFIELD: Now, do you maintain that that's - what you say in [para [12.6.12] of the Clarke Report] is correct [in light of the disclaimer]?

MR CLARKE: Well, look, we've got ... a page and a bit within all of this document that gives specific information relating to this house. Now, within that specific information, if [the second defendant] had of said, 'refer to page 25 and where I recommend.' You know, 'Where we say that it's not a structural damage.' And bearing in mind he's reported no actual damage to the house, he reported some mud trails, and made no specific recommendations relating to those mud trails. **This is general information provided to every report, provided with every customer... [T]his is not specific information relating to this property... I don't see how the client should be expected to wade through 25 pages of mostly general information to find that one comment and then know somehow, that customer with no knowledge, is meant to know that that relates to their specific house in a report with so few specific findings about timber destroying pests. I think that's - that's completely wrong.**⁶⁵²

(emphasis added)

Moisture Testing

385. Mr Clarke was then taken to his opinion at [12.6.14] regarding moisture testing.⁶⁵³ Mr Clarke had observed in his report that there was no evidence that the second defendant performed moisture testing as the second defendant only reported on visible signs of moisture. Further, Mr Clarke also opined that while the usage of a moisture meter was not required by the standard, the standard does require an inspector to demonstrate an alternative basis for determining the timber's moisture content. Mr Clarke gave further context to this opinion in oral evidence regarding this particular part of the standard:

I was on the ... committee when this standard was being written. And at the time, there was one device available to test for moisture, and so it's not the part of the standard to require a particular proprietary device. And so the committee was advised, your Honour, that we couldn't require the inspectors to carry a particular moisture metre or device. And **so to get around that, we said, 'Well, if you're not going to carry a device to test for moisture, you have to demonstrate how you tested for moisture.'**⁶⁵⁴

(emphasis added)

386. In relation to this, I note that counsel for the plaintiffs later referred to section 5 of appendix C of the Ewart report, which observed that the "human senses are not suited to discriminating differences in moisture levels" and hence suitable instrumentation is essential.⁶⁵⁵

⁶⁵² See Transcript. Day 4, page 341 [24]-[45].

⁶⁵³ CB page 97

⁶⁵⁴ Transcript, day 4, page 342 [11]-[17]. See also Transcript, Day 5, 468 [37]-[39]; CB page 141.

⁶⁵⁵ Transcript, Day 5, 471 [25]-[30]; CB page 161. See also later Transcript, Day 5, page 473 [27]-[30], citing Appendix E section 1, page 174 of CB.

387. Mr Clarke noted in his report at [12.6.15] that para [c] of page 55 of AS4349.3 – 2010 described how an inspector should be looking for any ventilations which though present are “totally buried (no daylight entering). Mr Clarke noted that in this case the ventilation system in the property was compromised by “high external levels” and that the blocked vents are “clearly visible” from the subfloor.

388. In cross-examination, Mr Clarke agreed that the second defendant had reported that ventilation in the subfloor was poor. However, Mr Clarke was of the opinion that the second defendant did not recommend steps to be done to rectify this.⁶⁵⁶ Mr Clarke also explained why, in his view, ventilation was poor in the property:

And the trouble is, your Honour, that since that house was originally built, **paving was added right up one side of the house which buried all of the existing vents. And an extension was added to the rear of the house which covered all of those existing vents. And so the subfloor ventilation was severely compromised.** And, in fact, termites were entering the house. Within my report, you'll find a photograph of termites entering the house through one of those buried vents and gaining access to the build.⁶⁵⁷

389. Mr Clarke was then queried on his view on the “Important information” section in page 25 noting the risk of poor subfloor drainage and ventilation, as well as a recommendation for remedial measures if ventilation is found to be inadequate. Mr Clarke conceded that the Inspection Report contained “general information” regarding risks of poor ventilation,⁶⁵⁸ but gave evidence that this was essentially inadequate:

[I]t's within the information provided to every ... client on every report. Within the area, where it specifically talks about ventilation, it just says, **'The ventilation is inadequate.' He leaves it up to the client, again, to wade through all of this information** and find that line within of that - within all of that and then **go back ...and forth** through the report. ... Where he found the ventilation was inadequate, you know, surely he would say to the client, 'Go to page 25 and read this line.' **Or he would just say it straight up, you know. 'The ventilation is inadequate. I recommend you get an expert in to fix it.**

[Y]ou talked about drainage ... and your Honour, [the second defendant] did say the drainage was adequate. But in fact, the drainage is inadequate ... So you'll see in my report, you'll see where there's water stains on the foundation walls where water has been pouring into the subfloor and the drainage is far from adequate. **And so again, you know, the client is expected to wade through this and think 'Well, that line doesn't apply to me, but the next line does apply to me.'** I mean, you know, the – **this timber pest inspection industry has to realise that they are hired as experts to provide specific information.**⁶⁵⁹

(emphasis added)⁶⁶⁰

⁶⁵⁶ Transcript, day 4, page 342 [28]-[30].

⁶⁵⁷ Transcript, day 4, page 342 [28]-[37].

⁶⁵⁸ Transcript, day 4, page 343 [9]-[3].

⁶⁵⁹ Transcript, day 4, page 343 [15]-[39].

⁶⁶⁰ There was an objection at this point by Mr Markham that the witness should be told that in this case the Inspection Report was read as a whole and thoroughly – Transcript, day 4, page 343 from [4]. That objection was not upheld. Mr Markham then

390. Mr Clarke also gave similar evidence regarding potential confusion of the reader of the Inspection Report when it comes to moisture in the subfloor:

Well this is the confusing thing, your Honour, that's in one part of the report, yes, the building inspection part of the report does make some reference to drainage but if we look at the timber pest inspection report which is the area I'm concerned with, you'll see there under subfloor and drainage on page 16 of that report it says:

Our limited subfloor inspection indicates that the subfloor drainage is generally fair

And if the subfloor drainage is not generally fair, the subfloor drainage is incredibly poor... But he clearly says here the – the drainage is generally fair so, you know, the report is contradictory it's - **it's very confusing for the client to understand what he's actually getting at. I mean, which part of the report is the client to believe?**⁶⁶¹

(emphasis added)

391. Mr Clarke did agree that page 10 of the Inspection Report did discuss some problems regarding moisture and general advice regarding subsurface drainage, although the Inspection Report did not say that moisture was in Mr Clarke's opinion "currently pouring into the subfloor".⁶⁶²

392. Separately, Mr Clarke gave evidence that, in his view, a reader will take from page 13 of the Inspection Report that the drainage was not tested by the second defendant.⁶⁶³ Mr Clarke was, however, of the opinion that the second defendant was required to so test under cl 4.2.4 of AS4349.3⁶⁶⁴ and that the conclusion in that page that the drainage was in a good "condition" was wrong in any case.⁶⁶⁵ Mr Clarke ultimately gave this evidence in cross-examination regarding moisture:

[The Report] talks about moisture - - - but it says that the drainage is good which is – which is wrong, and it fails to talk about the evidence of moisture in the subfloor area of the house. It fails to talk about the marks where the water's been coming from the outside of the foundation wall through the foundation wall to the interior of the subfloor. You know, the report should have said, **'The drainage is inadequate. You need to completely remove all the paving above in the exterior foundation wall and lower the height of all of that side of the house to provide proper drainage.'**

(emphasis added)

objected on the basis that further assumptions should not be added beyond the ones already put to Ms Shannon – Transcript, day 4 page 346, from [7]. That further objection was not upheld.

⁶⁶¹ Transcript, day 4, page 350 [11]-[20].

⁶⁶² Transcript, day 4, page 350 [22]-[27].

⁶⁶³ Transcript, day 4, page 351 [9]-[17].

⁶⁶⁴ Transcript, page

⁶⁶⁵ Transcript, day 4, page 350 [39]-[40].

Splinter Test

393. Another test that, in Mr Clarke's view, a pest inspector exercising reasonable care and skill would have administered was a splinter test. In Mr Clarke's view, the test should have been performed and explained the nature of the splinter test (see [12.6.19]):

Suspect timber found anywhere on the property is probed and splinter tests are performed to determine if the timber has suffered a loss of strength due to decay. (A splinter test involves the removal of a splinter from the suspect timber element, and compressing it between the thumb and index finger, end to end. If the timber is affected by rot the splinter will bend, and fail. If the damage is caused by termites their galleries will be revealed by the removal of the splinter and the splinter itself will not have suffered a loss of strength.).⁶⁶⁶

394. I interpolate here to note that Mr Clarke expressed a related opinion at [12.6.16] regarding the necessity for all internal wall linings, internal joinery, and timber work to be sounded:

All internal wall linings would be inspected and sounded for nesting material in the walls, and all internal joinery and timber work would be sounded for timber pest damage. Further moisture testing would be carried out to all internal wall linings looking for variation in moisture readings as indicators of concealed termite damage and excessive moisture.

395. In cross-examination, Mr Clarke noted that the splinter test described above is "generally used" in the timber pest industry and is a test that all trained inspectors are "educated" to use.⁶⁶⁷ Mr Clarke did agree that an inspector will not be ripping apart timbers during a visual inspection, and that the AS4349.3 – 2010 states that timbers are not to be marked during the inspection.⁶⁶⁸

396. In relation to cross-examination regarding using a knife to check the wood as part of a splinter test, I note that counsel for the plaintiffs referred me to cl 2.4 of appendix A to the AS 4349.3 – 2010. In counsel's submissions, the standard envisaged that "this very thing should happen".⁶⁶⁹ Appendix A of AS4349.3-2010 covers "Types of Timbers", with cl 2.4 (headed "Determination of types of timber") noted that:

To aid in determining whether timber is hardwood or softwood, the use of a 10x hand lens and a sharp blade or a Stanley knife is of assistance.⁶⁷⁰

397. I also note that, as noted by counsel for the plaintiffs, clause C7.1 in appendix C of AS4349.3-2010 describes the splinter test to determine strength loss, noting that the

⁶⁶⁶ CB page 96.

⁶⁶⁷ Transcript, day 4, page 352 [10]-[11], [18]-[19]

⁶⁶⁸ Transcript, day 4, page 352 [19]-[23].

⁶⁶⁹ Transcript, Day 5, page 470 [4]-[9]. For the standard see CB page 146.

⁶⁷⁰ Ewart report page 44.

test is “basically simple” even if some practice is necessary and using a sharp instrument (e.g. a knife) is preferable.⁶⁷¹

398. Mr Clarke was also of the view that all accessible roof cavities and timbers within reach should be sounded for timber pest damage,⁶⁷² and that moisture meters are to be further used in the roof cavities. In relation to the first part of this opinion, Mr Clarke agreed that if the second defendant went into the roof cavity and did this, the second defendant would have met the minimum standards. However, Mr Clarke noted that the second defendant said that access to the roof was very limited by ducting and the like.⁶⁷³

Damage

399. For completeness, I also note that Mr Clarke was of the opinion (at [12.6.13]) that, in this case, although the second defendant found evidence of termites he made no effort to find damage; no mention was made in the Inspection Report that damage must have existed due to the found evidence.

Inspection Report is deficient

400. Ultimately,⁶⁷⁴ Mr Clarke was asked in cross-examination by the second defendant as to what, in his view, the second defendant did well. Mr Clarke found answering this difficult, and instead listed what in his view was deficient with the second defendant’s inspection. It is instructive to the relevant portions of Mr Clarke’s lengthy response:

MR CLARKE: Well, ... I certainly have trouble, your Honour. On reading his report and looking at the house, I actually wondered if he'd inspected the correct house.⁶⁷⁵ ... I have trouble finding anything that he did well. ... in his summary, he's – at the beginning of the report, the summary only talks about what he didn't find, that being that he found no evidence of live termites, and yet, in the body of the report, he found mud trails of termites. Now, those mud trails are evidence of active termites. You don't get mud trails unless you've already had active termites. And so I don't see – you know, **I don't really see anything that he – that he did well within that report.** He - he spent more words describing what he didn't find, that being that he didn't find any live termites at the time of the inspection, than he did reporting on the – what he did find which was some mud trails under the house.⁶⁷⁶

[The second defendant] didn't **report on any of the myriad of conditions conducive** to termites or conducive to concealed activity. He ... reported that his access in the subfloor was limited, and yet, he made **no recommendations to complete the inspection.** He found

⁶⁷¹ Ewart report page 61, Transcript, day 5, page 472 [6]-[12].

⁶⁷² Transcript, day 4, page 352 [25]-[27]. CB page 98.

⁶⁷³ Transcript, day 5, page 352 [31]-[36].

⁶⁷⁴ Referred by the plaintiff in Transcript, Day 5, page 493 [16]-[19].

⁶⁷⁵ Transcript, Day 4, page 353

⁶⁷⁶ Transcript, day 4, page 353.

evidence of termites and he made no appropriate recommendations that follow on from that. [Mr Clarke then referred to the first part cl 4.2.6 of AS4349.3 – 2010].⁶⁷⁷

Now, here we have a report on a house ... [that] has ... no evidence of any termite management system installed during construction, in that there's no ant capping in the subfloor which is designed to expose termites coming into the building. This is a house where [the second defendant] found actual termite mud leads in the subfloor of the house and to the fences around the house, and **his recommendations only include the removal of the timber fence which, if you read my report, I disagree with that recommendation.** It is a bad recommendation... [b]ecause [it has] made the situation worse because all the fencing has now been replaced with Colourbond and so we no longer have an indicator of termite activity, and he's failed to make appropriate recommendations as per the standard with what he found.

...

[The second defendant] should have **recommended a full extent of damage report.** He's found evidence of termites in the structure and he's made no recommendations. In fact, he's assumed that it's past or previous. He says it's old. **Now, he doesn't say how he's come to that conclusion that it's old. He doesn't say how he's come to the conclusion that it's previous.** He simply states that and so the homeowner naturally thinks it's all in the past. He talks about a – a treatment notice that was removed some years earlier. **He doesn't say how he knew it was there,** even though it wasn't present when he did his inspection, but he's made no – no recommendations appropriate to the structure.

And so, yes, I have real ... trouble finding that he's done anything well at all. Other than perhaps his ability to come up with a general ... report that's full of general statements that you could, you know, within a very blurred view, apply to any structure that exists.... So no, I don't find anything that [the second defendant] done well. **Certainly not to the buyers benefit...** maybe he did things well if he was writing the [R]eport for the vendor's benefit because ... he constantly tried to minimise the impact of the termites.⁶⁷⁸ [The second defendant] even says, 'Where we find evidence of termites it's important that you know that, you know, that doesn't mean you shouldn't buy the house' or words to that effect.⁶⁷⁹

(emphasis added)

401. Mr Clarke disagreed that he was holding the second defendant to an unreasonable standard beyond AS4349.3 – 2010.⁶⁸⁰ Mr Clarke also rejected⁶⁸¹ a later suggestion from the second defendant that he had become an advocate for the plaintiffs:

MR SCHOFIELD: Mr Clarke, when it comes to submissions in this trial, I will be asking the court to take the view that your evidence, that **you have misunderstood your role in these proceedings** and that **you have approached this matter as an advocate for the**

⁶⁷⁷ Where the inspector has formed the opinion that further inspection is warranted, the report shall include suitable recommendations. Examples of such recommendations may include provision of access to allow inspection of all of an inaccessible area, invasive inspection where infestation is suspected, and inspection by a building inspector or engineer where serious damage is present.

Also included in cl 4.2.6 but not read out by Mr Clarke was:

The report shall include recommendations for the frequency of future inspections.

⁶⁷⁸ Transcript, Day 4, page 354 [30]-[43].

⁶⁷⁹ Transcript, day 4, page 353-4.

⁶⁸⁰ Transcript, day 4, page 352 [38]-[40].

⁶⁸¹ Transcript, day 4 page 355 [6]-[34].

plaintiffs. And I am going to say that **because of your extensive submissions which go well beyond the question that has been asked of you. I am going to say that because you have been reluctant and had difficulty making reasonable concessions and refused to make reasonable concessions.** And I'm going to do that also because of **your reluctance or inability** to see anything positive about Mr Maher's report. Do 15 you have anything you wish to say about that?

MR CLARKE: Obviously I disagree. I take my duty to the court, your Honour, very seriously. [I]t's very, very rare, in fact, that I'll prepare a report where it appears to be so one sided. But you know, this particular case is just frankly unbelievable. I accept, you know, what the counsel is saying about my evidence but in reply, **all I can do is hold up my hand and say I can only play the cards I'm dealt. I mean, there's just nothing in this report for me to say that he did right...** I apologise if that's the way you feel, [counsel], but all I can say is I've looked at it... I am used to reading a pest inspection report where the specific information about that house might go over 10, 11, 13 pages of a report and here the specific information is on one single page. A page and a half. And the second half of the page is just talking about what he didn't find.⁶⁸²

(emphasis added)

Photographs

402. In cross-examination by counsel for the first defendant, Mr Clarke had accepted that his opinion "perhaps" may well change if he had been presented with the photographs referred to above at [329].⁶⁸³ Mr Clarke noted that, as with the plaintiffs, he only had the Inspection Report to rely on and that he was able to compare the Inspection Report with the appropriate standards and the physical house in the property.⁶⁸⁴
403. Counsel for the first defendant asked, with reference to the s 1.3(k) of Expert Witness Court of Conduct (see *Court Procedure Rules 2006* (ACT) sch 1), whether Mr Clarke considered it appropriate to make enquiries regarding the documents related to the inspection.⁶⁸⁵ Mr Clarke confirmed that he did not so consider, noting that he did not consider the evidence to be insufficient:

MR CLARKE: Well, I was given the evidence I was given, being the report that was carried out. I have got the structure before me and as the purchaser only had the report to rely on, that is what I formed my opinions on.

MR MARKHAM: And you didn't think that that would have constituted insufficient data?

MR CLARKE: No. I don't think so. No.⁶⁸⁶

⁶⁸² Transcript, day 4 page 355 [15]-[34].

⁶⁸³ Transcript, day 4, page 358 [22]-[24].

⁶⁸⁴ Transcript, day 4, page 358 [29]-[31].

⁶⁸⁵ Transcript, day 4, page 359 [22]-[23].

⁶⁸⁶ Transcript, day 4, page 359 [25]-[30].

Not a consumer advocate

404. Counsel for the first defendant put to Mr Clarke that, in light of the fact whether it is fair to say, given the fact that Mr Clarke's answers were based on reading the Inspection Report and inspecting the property, that Mr Clarke was "interpreting [his] duty" as to be a consumer advocate as opposed to giving evidence on industry practice.⁶⁸⁷ Mr Clarke rejected the suggestion, stating:

I was provided with the report. The same report the purchaser was provided which the purchaser wasn't given other photographs. ...– when I'm – when I do get other information and other photographs, it's often – you know – it can provide – can provide information that's helpful to either party. But, in this case, **they're of little relevance because this report found things, being evidence of termites, and then failed to make the recommendations that are required by the Australian Standard.** ... And he's made assumptions on the evidence he found, that being the mud trails where he's called them 'old'. And he said, 'They're previous.' And he had no – you know – the home owner thinks, 'Oh, it's old. It's in the past. I don't need to worry about this issue. He hasn't recommended further tests. So they proceed in by the house. I mean... they are failings that go to the core of why a purchaser needs a pest inspection report.'⁶⁸⁸

(emphasis added)

405. Ultimately, Mr Clarke maintained his view in cross-examination:

MR CLARKE: I reject that [the proposition Mr Clarke is a consumer advocate]. I can say very clearly that [the Inspection Report] failed to comply with or even get close to the minimum standard, let alone the Code of Conduct or the competency standard which I wrote, the Code of Practice, which I wrote... it came nowhere near the Australian Standard, let alone [the "much higher" standard of the code and the Code of Practice that he wrote].⁶⁸⁹

Photographs Viewed

406. In re-examination, Mr Clarke was taken by counsel for the plaintiffs to a selection of 20 photographs,⁶⁹⁰ that was said to be "central" to the issues covered in the Clarke report.⁶⁹¹ Mr Clarke noted that, having seen the photographs, he maintained his view as expressed in the Clarke report.⁶⁹²

Termite risk

407. As a matter of completeness, I note that Mr Clarke expressed the view that, due to the area in which the property is located, it was immediately apparent to Mr Clarke that the property was at a greater termite risk. Mr Clarke was of the view that the

⁶⁸⁷ Transcript, day 4, page 362 [32]-[38].

⁶⁸⁸ Transcript, day 4, page 363 [6]-[30].

⁶⁸⁹ Transcript, day 4, page 364 [21]-[23].

⁶⁹⁰ Photographs are to be found in PTB 3 on pages, 213 – 216, 222 – 225, 250, 255 – 256, 263, 268 – 273, 276 – 282, 287 and 289.

⁶⁹¹ Transcript, day 4, page 367 [13]-[17].

⁶⁹² Transcript, day 4, page 371 [33]-[35].

location would have raised “red flags” for any competent inspector and “centres” their attention. However, the second defendant was in Mr Clarke’s view unconcerned even with evidence of termites being found.⁶⁹³

Conclusion

408. Ultimately, I note that Mr Clarke’s report concludes with this damning opinion (at [13.1]-[13.2]):

[The first defendant] **did not prepare the report with the buyers’ interests in mind at all.** Rather than illustrate the risks this properly presents, the writer reassures the buyer by **referring to evidence as old and in the past, with no recommendations for additional tests to find more evidence, or concealed termite, damage. The complete neglect** of the report to advise the buyer to ensure the property was fully accessed, the damage extent determined, that the termites were appropriately treated and managed **could not have been more complete, but rather, it glosses over the evidence found** and fails to recommend the buyer ensure the extent of any damage present is determined prior to purchase, or to even implement strategies to minimise the risk of further termite activity and damage after ownership. Further the recommendations to remove the timber fences has made the situation worse by removing this food source for the termites and therefore increasing activity within the house...

The end result is that the new owner is left with catastrophic damage and costs that the report should have protected them against. This is the purpose of the report being carried out in the first place and **the failure could not have been more complete.**

(emphasis added)

Mr Nicholas Broadhurst

409. The second witness and the only expert witness for the defendants, Mr Broadhurst is a building inspector.⁶⁹⁴ Mr Broadhurst noted that he is also a Class A Builder and holds a Bachelor’s degree in Architecture.⁶⁹⁵ In the Broadhurst report, Mr Broadhurst noted that he is a termite and timber pest inspector in the ACT and NSW, and that he performed termite and timber pest inspections in conjunction with building inspections from 2014 to 2023.⁶⁹⁶

410. In cross-examination, Mr Broadhurst stated that he had been in the workforce for about 31 years, and that he worked in the building industry during this period including as a project manager.⁶⁹⁷ Mr Broadhurst noted that he has a building inspection business as a termite and timber pest inspector since 2014.⁶⁹⁸

⁶⁹³ See Clarke report at [12.7.1].

⁶⁹⁴ Transcript, day 4, page 402 [24]-[25].

⁶⁹⁵ Transcript, day 4, page 404 [[21]-[23].

⁶⁹⁶ CB page 348, Broadhurst Report CV.

⁶⁹⁷ Transcript, day 4, page 405 [41]-[42].

⁶⁹⁸ Transcript, day 4, page 406 [1]-[5]/

411. In preparing his report, Mr Broadhurst noted that he has read other reports including that of Mr Clarke and Dr Ewart, as well as viewed the photographs from the inspection of 18 October 2019.⁶⁹⁹ Mr Broadhurst's brief was also separately tendered in this proceeding.⁷⁰⁰
412. In cross-examination by counsel for the plaintiffs, Mr Broadhurst conceded that he did not list being a termite and timber pest inspector as his core competencies in his report.⁷⁰¹ Mr Broadhurst agreed that his primary experience and qualifications are in building, Mr Broadhurst noted in his report that he had completed 1,500 combined inspections, being termite and timber pest inspections where the person requesting inspections was also getting inspection reports on another subject.⁷⁰² Mr Broadhurst also noted that he would also check the work of other inspectors, and that he encourages people to do the same with his own results.⁷⁰³
413. Counsel for the plaintiffs took Mr Broadhurst to cl 3.2 of the AS 4349.3 – 2010, which covers the qualifications for timber pest inspector. Mr Broadhurst agreed that he has experience in construction.⁷⁰⁴ As to whether he is informed on "ecology, behaviour and identification of timber pests" and "familiarity with the damage [termites] cause and procedures required for management and control", Mr Broadhurst stated that he has completed a course in TAFE South Australia in 2014.⁷⁰⁵ Mr Broadhurst noted that this was the course recommended by his insurance company, as Mr Broadhurst cannot be registered in the ACT without insurance.⁷⁰⁶
414. As with the plaintiff's experts, Mr Broadhurst was not substantively asked questions in examination. As such, it is convenient to set out portions of the Broadhurst report in this discussion of his evidence.
415. Mr Broadhurst was first asked to comment, after reviewing other expert reports in the matter, on the findings of termite damage and locations. Mr Broadhurst was also asked to opine whether there was termite damage or active termite activity.⁷⁰⁷
416. Mr Broadhurst opined (at 6.3) that it appears that there had been termite damage and active termite activity at the time of the inspections conducted for the Ewart report and

⁶⁹⁹ CB page 341, Broadhurst report page 1. The plaintiff's amended statement of claim nominated 19 October, but the chronology, the Inspection Report and page four of the plaintiff's tender bundle nominated 18 October.

⁷⁰⁰ Transcript, day 4, page 401 [5].

⁷⁰¹ Transcript, day 4, page 405 [33]-[34].

⁷⁰² Transcript, day 4, page 406 [26]-[30].

⁷⁰³ Transcript day 4, page [36]-[38].

⁷⁰⁴ Transcript, day 4, page 408 [32].

⁷⁰⁵ Transcript, day 4, page 408 [38]-[46], 409.

⁷⁰⁶ Transcript, day 4, page 409 [1]-[4].

⁷⁰⁷ Ex 21, page 3, q 6.3.

the supplementary Ewart report, Stephenson report, and the Walker report.⁷⁰⁸ Mr Broadhurst specifically noted the identification in Walker report of active termites in front of the house and damage in a bedroom; and also noted that Mr Stephenson found additional live termites in an earthen tunnel attached to a brick foundation tier in the subfloor area underneath the kitchen or hallway. Mr Broadhurst did note the opinion of Mr Stephenson that he cannot be 100% certain that the visual evidence of the termite activity described in his report would have been apparent at the time of the pre-purchase inspection on 21 November 2019.⁷⁰⁹

417. Mr Broadhurst was of the opinion at [6.4] that, at the time of the inspections for the Ewart reports, and the reports of Mr Stephenson and Mr Walker, it was not possible to make a representation that the property had no existing or ongoing termite activity.⁷¹⁰ Mr Broadhurst was also of the opinion that it appears that each of the locations identified has evidence of past termite activity.⁷¹¹

418. Relatedly, however, Mr Broadhurst expressed the following opinions (at [6.9]) on whether the following defects would have been observable at the time of the inspection:⁷¹²

- (a) **There was existing or ongoing termite activity:** Mr Broadhurst was of the view that it was not observable from the evidence that there was ongoing termite activity.
- (b) **Whether there was any apparent termite damage beyond some fence palings:** While there was apparent termite activity beyond the palings, it cannot be ascertained if there was more damage. A further inspection would be needed as, in Mr Broadhurst's view, the Inspection Report strongly suggested.
- (c) **That the condition of interior walls, architraves, and skirting boards were not in good condition:** This is "really unknown" in Mr Broadhurst's view.

419. In response to the question of how quickly termite activity could develop in each of the locations identified by Mr Broadhurst,⁷¹³ Mr Broadhurst noted at [6.6] of his report that it was hard to determine how quickly termite activity could develop in the identified locations, and that he had limited experience in how fast termites grow as colonies. Mr Broadhurst did note that the speed of termite activity can seem to "vary

⁷⁰⁸ Broadhurst report at [6.3] CB 341, Briefing Letter page 4.

⁷⁰⁹ Broadhurst report at [6.3], CB 341.

⁷¹⁰ See Ex 21, page 4, q 6.4.]

⁷¹¹ Ex 21, page 4, q [6.4], Answer q 6.5.

⁷¹² Letter of instruction, q 5, page 4.

⁷¹³ Ex 21, page 4 q [6.6]

dramatically”, and referred to the following comment made later in his report, where he recalled an incident where termites became riddled with an entire colony of termites within 18 months:

To me, I believe that termites can spread fast under certain circumstances. For example, I recall doing an inspection of a home which became riddled with an entire colony of termites in a period of 18 months after a tree was removed from the road, about 35 meters away. The house had a concrete floor. I recall the damage being about \$180,000. **So the damage that happened at [the property] could have happened quickly after the inspection under the right conditions.**

(emphasis added)

420. In a comment that immediately follows this, Mr Broadhurst also noted that there was a notice of previous termite treatment plan in the meter box, but the notice vanished. Mr Broadhurst was of the view that this notice would have highlighted that the property was potentially at “High” Risk, but the purchaser could not read who issued it. Further, Mr Broadhurst opined:⁷¹⁴

My feeling is that there may be someone else who knew of the termite dangers and for some reason wanted to hide them.

421. In relation to the significance of lack of any termite protection, Mr Broadhurst referred to a statement in page 25 under the heading “Important Information” of the Inspection Report as the best answer (at [6.13]):

Timber Pests, particularly termites, may have gained entry to the property since the inspection date. Termites can, in a relatively short period, cause significant damage to both structural and non-structural timbers within and around the buildings of the property. Termites are difficult to detect and much of the damage caused may not be readily visible, if damage exists, it may be costly to repair.

422. Mr Broadhurst was asked whether the second defendant was in compliance with relevant Australian Standards, on the basis that the inspection he conducted was a visual inspection.⁷¹⁵ I note that Mr Broadhurst’s opinion regarding the compliance of the Inspection Report with AS4349.3 - 2010 is equivocal, stating at [6.7] that he does not know if the second defendant complied with AS4349.3 – 2010 as Mr Broadhurst was not there with the second defendant during the inspection.

⁷¹⁴ See Broadhurst Report page 7.

⁷¹⁵ Exhibit 21, page 4.

423. Mr Broadhurst was then asked whether, on the basis of a visual inspection, certain representations could be made.⁷¹⁶ Mr Broadhurst's opinion on each representation follows:⁷¹⁷

- (a) Mr Broadhurst was of the view that "it is possible" to make the representation that the property had no existing or ongoing termite activity, but such a representation cannot be categorical and must be noted as a degree of risk. Mr Broadhurst would have expressed it as "possible", but unlikely.
- (b) Regarding representation that there was no apparent termite damage to the property beyond some fence paling, Mr Broadhurst noted that there were mud tunnel(s) found under and leading up to the floor.
 - 1. Nevertheless, Mr Broadhurst noted the Inspection Report was clear on what must be assumed, noting the statement in page 25 of the Inspection Report under the "Determining Extent of Damage" heading that if evidence of timber pest activity and/or damage is reported the reader must assume there might be further concealed structural damage.
 - 2. Mr Broadhurst was of the view (at [6.8](b)) the assumption referred to above turned out to be "very correct", but he did not see evidence that the warning was acted on or why the warning would not have been acted on.
- (c) Mr Broadhurst was of the view that the conditions of the property's interior walls, architraves, and skirting boards cannot be ascertained to say they were good or otherwise. Mr Broadhurst noted that the second defendant in the Inspection Report itself noted that he was unable to access "the inside of wall, between flooring, inside eaves and skillion roofing".⁷¹⁸
 - 1. Mr Broadhurst did note that there was a significant time difference between when the Inspection Report was done and the skirting and architraves reported as damaged. As such, Mr Broadhurst was of the view that it was "possible" later, but not known how probable.
 - 2. Mr Broadhurst nevertheless referred to the statement in page 25 highlighted previously, and was of the view that based on the statement it cannot be said either that the areas were good or not good.

⁷¹⁶ Exhibit 21, page 4, q [6.8]

⁷¹⁷ Broadhurst report at pages 2 -3

⁷¹⁸ See page 3 of the Inspection Report.

- (d) As for the representation that the Inspection Report was prepared in accordance with AS4349.3 – 2010, Mr Broadhurst again noted that he was unable to say whether the Inspection Report was prepared in accordance with AS4349.3 – 2010 as he needed to be present during the inspection. Mr Broadhurst also noted that he was not there to have an opinion on whether a thorough search was conducted of the entire building as required by AS4349.3 if termite activity was noted.

424. Separately and later in the Inspection Report, Mr Broadhurst noted that there was previous chemical treatment (Biflex Duo) applied to the perimeter of the property. Mr Broadhurst was of the view that this meant that the mud trails seen by the second defendant were old (at [6.10]) of the Inspection Report:

This could have the effect that the mud trails that the Residential Reports inspector had seen were old and that the termites of then had been dealt with. But the Report still contained significant warnings, highlighting what possibly might be there.

425. Mr Broadhurst was also of the opinion⁷¹⁹ that further investigations for ongoing termite activity did need to be made, in response to whether it would be possible to represent that further investigations did not need to be undertaken to ascertain existing or ongoing termite activity or nature and extent of the damage.⁷²⁰ Nevertheless, Mr Broadhurst again noted the statements in page 25 regarding “Determining Extent of Damage”, and expressed his view that this was sufficient warning of the risk:

(e) Further investigations for ongoing termite activity did need to be made from the evidence found. The Report states, in relation to the above assumption that there is concealed damage in the building. *This concealed damage may only be found when invasive procedures are applied to reveal previously concealed timbers.*

(f) Further investigation did need to be undertaken and the Report stated the following: *In the case of Timber Pest activity and/or damage WE STRONGLY RECOMMEND an invasive Timber Pest Inspection is undertaken and a qualified person such as a Builder, Structural Engineer, or Architect be engaged to carry out a structural inspection to determine the full extent of the damage and repairs that may be required.*

The use of upper case letters is showing emphasis of those words over the other words in the sentence. **If, as an inspector, you strongly recommend something, but you are not able to speak with the buyer, then I believe the above capitalization of those words should be enough.** It is in upper case. It is then on the buyer to read it, and then take the risk if they do not wish to follow what is being strongly recommended.

While some comments have been made that the report does not highlight the risk sufficiently, I think it does. As a comment, we also do not know how many potential buyers

⁷¹⁹ Transcript, day 4, page 409-410.

⁷²⁰ Broadhurst report at 3, CB 343

walked away from the house purchase after reading the warning. The warning may also have had a depreciative devaluing of the property price down to a level whereupon someone then wants to take the risk of ignoring the recommendation.

(emphasis added)

426. Mr Broadhurst was asked whether, as per Mr Stephenson's view, a necessary warning should have been given in the report that the risk was "high to extreme".⁷²¹ Mr Broadhurst noted at [6.10] that a rating of "high to extreme" was subjective and not necessarily in line with other reporting systems. Mr Broadhurst noted that the template he used for his own termite and timber pest reports, *Standard Timber Pest Report Australian Capital Territory (ACT) only*, only has a rating that goes as high as "High" and not "High to Extreme".⁷²²
427. In cross-examination, counsel for the plaintiffs took Mr Broadhurst to pages 19-25 of the Inspection Report, with reference to page 16 of the Inspection Report. Mr Broadhurst disagreed with the suggestion that the entirety of the timber pest report in this matter was contained in page 16-17⁷²³ and that the rest of the Inspection Report is also contained⁷²⁴ in pages that he quoted including page 25.
428. Mr Broadhurst was taken to page 3 of the Inspection Report. Mr Broadhurst agreed that "Report Summary" does not recommend an invasive inspection be undertaken.⁷²⁵ Similarly, Mr Broadhurst agreed that page 16 does not recommend any invasive timber pest inspection.⁷²⁶
429. In response, counsel for the plaintiffs queried Mr Broadhurst with reference to the requirement under cl 4.2.8(c) of the AS4349.3 – 2010 headed "Summary", which I reproduced above at [106]. The following exchange occurred:

MR KATEKAR SC: And it says, 'The report shall include an overview of the report contents including...', and I'll just draw your attention to (c), 'Further inspection is recommended.'?... Do you agree with me that neither the summary that I took you to earlier nor the inspection results page that I took you to earlier contained any such recommendation?

MR BROADHURST: Well, it doesn't say 'summary'. It says 'overview'.

MR KATEKAR SC: And the heading is, '4.2.8, Summary'. Do you see that?

⁷²¹ Briefing letter page 4.

⁷²² See CB page 344.

⁷²³ Transcript, day 4, page 410 [16]-[19].

⁷²⁴ Transcript, day 4, page 411 [23]-[24].

⁷²⁵ Transcript, day 4, page 413 [1]-[2].

⁷²⁶ Transcript, day 4, page 413 [24]-[26].

MR BROADHURST: Yes, but that's a summary of what's been going before this. ⁷²⁷

430. Mr Broadhurst was asked in cross-examination to identify which parts of the Inspection Report would qualify as the “overview”. Mr Broadhurst rejected page three, “Report Summary”, as a candidate, giving the following explanation expressing concern for his own position as an inspector:

MR BROADHURST: No, an overview means an overview. It doesn't mean having a title and setting it up with an underline and saying 'This is overview' end of paragraph. Overview is an overview.

MR KATEKAR SC: Exactly?

MR BROADHURST: It means it's over – you view the whole thing so when you have a report, if you say it needs another inspection you say it needs another inspection so if this case is all about where you put that in these 20 pages, **that's very scary for me as a building inspector.** ⁷²⁸

(emphasis added)

431. Mr Broadhurst initially disagreed that cl 4.2.8 required that a report contained a “summary” section, ⁷²⁹ giving further evidence as to what he reads cl 4.2.8 to require:

MR BROADHURST: No, it doesn't. It says 4.2.8, summary. In other words, it's summarising what's before. The report shall include an overview of the report contents.

MR KATEKAR: That's right?

MR BROADHURST: It just says an overview. It doesn't say a section labelled 'Overview'. It just says an overview. It's like – that's what overview means. It's like you're looking over it. It's a view over the whole thing. If we had a dictionary like an Oxford or a Webster's or something. ⁷³⁰

432. Mr Broadhurst was then taken to a reference to cl 4.2.8 that the “summary shall not contain material that is not included in the body of the report”. Mr Broadhurst relevantly and somewhat unusually expressed some concerns for his own inspection results. This cast something of a forensic shadow over the reliability of this part of his evidence, for example, when answering:

MR BROADHURST: I'm just trying to understand. 'The summary shall not contain material that is not included in the body of the report'. So does that mean that the body of the report becomes a summary? Because you have to put the whole report - - -

⁷²⁷ Transcript, day 4, page 413 [10]-[19]

⁷²⁸ Transcript, day 4, page 415 [11]-[20].

⁷²⁹ Transcript, day 4, page 415 [

⁷³⁰ Transcript, day 4, page 415-6].

HER HONOUR: Now, Mr Broadhurst ---?

MR BROADHURST: **My mind's racing for my own inspection results so I don't get caught, right.**

HER HONOUR: I understand your concern for your own position ... [b]ut you can't ask me questions?

(emphasis added)

433. Putting this aside, Mr Broadhurst did agree that cl 4.2.8 did require a summary section to be included.⁷³¹ Mr Broadhurst initially agreed that the Inspection Report does not contain a summary section that contains a recommendation that further investigations be undertaken:

MR KATEKAR SC: What you have said, and I will just – so my next proposition is that the summary – this report does not contain a summary section which includes any recommendation that further investigations be undertaken.

MR BROADHURST: Yes, I didn't see a summary, as you said.

MR KATEKAR SC: And that the only warning that you rely on in your report appears right at the back of the report. Do you agree with that?

MR BROADHURST: **That's right.**

(emphasis added)

434. Mr Broadhurst was asked to express whether, in his view, the warning provided by the Inspection Report is sufficient and, if so, the basis of his opinion.⁷³² In his report, Mr Broadhurst confirmed at [6.11] that in his opinion the Inspection Report's warnings were sufficient. Mr Broadhurst elaborated on the basis of his opinion at [6.11], with reference to statements made on page 24-25 of the Inspection Report: ⁷³³

I contend the warning is sufficient. It explains to the reader that more inspection is necessary and it recommends it to be done. It recommends that there can be damage, and that it can be costly to repair.

The report states [at page 24]: *This report is not a guarantee that an infestation or future infestation and / or damage does not exist in any inaccessible or partly inaccessible areas of property.*

The report further states [at page 25]: *The inspector does not have access to the inside of walls, between flooring, inside eaves and skillion roofing.*

⁷³¹ Transcript, day 4, page 417 [4]-[6].

⁷³² Letter of instruction at page 4-5; Transcript, day 4, page [14]-[19].

⁷³³ CB page 344, Inspection Report page 4.

And the Report next states: *The overall degree of risk of Timber Pest Infestation cited in this report is a subjective assessment by the inspector at the time of the inspection, taking into account many factors which include, but are not limited to, location and proximity to bushland and trees and/or other timber structures, evidence of timber pest damage or activity close to the inspected structure or within the inspected structure, conducive conditions that raise the potential of timber pest attack, such as timbers in contact with soil, inaccessible areas, slab on ground construction, or other factors that, in the inspector's opinion, raise the risk of future timber pest attack.*

The Report more importantly states: *If evidence of Timber Pest activity and/or damage is reported in the structure(s) or the grounds of the property, then you must assume that there may be further concealed structural damage within the building(s). This concealed damage may only be found when invasive procedures are applied to reveal previously concealed timbers. In the case of Timber Pest activity and/or damage WE STRONGLY RECOMMEND an invasive Timber Pest Inspection is undertaken and a qualified person such as a Builder, Structural Engineer, or Architect be engaged to carry out a structural inspection to determine the full extent of the damage and repairs that may be required.*

The Report also states this: *IMPORTANT INFORMATION: This Report reflects the condition of the property existing at the time of the inspection date and may not reflect the current state. Timber Pests, particularly termites, may have gained entry to the property since the inspection date. Termites can, in a relatively short period, cause significant damage to both structural and non-structural timbers within and around the buildings of the property. Termites are difficult to detect and much of the damage caused may not be readily visible, if damage exists, it may be costly to repair.*

(emphasis added, underlining in original)

435. Later, Mr Broadhurst gave evidence in cross-examination that if these warnings were “upfront” the warnings would be sufficient:

MR KATEKAR SC: My proposition to you, Mr Broadhurst is that where that [warning in page 25 in “Determining Extent of Damage” appears in this report is not in any summary section of this report. Do you agree with that?

[Combined response] MR BROADHURST: So this hinges on that it's in the wrong place... That's what it's about. **Is that - I mean, I can see it here. It says, ... under - apart for determining extent of damage, talking about timber pest, and that's giving the warning.**

...

MR KATEKAR SC: On the assumption, I could argue with you for a day, Mr Broadhurst, as to whether that warning is sufficient?

MR BROADHURST: Right... **But if it was upfront, it would be sufficient.**

(emphasis added)

436. Counsel for the plaintiffs asked Mr Broadhurst whether, in light of the cl 4.2.4 of AS 4349.3 – 2010 (and in his opinion in his report at 6.8(f) of the Broadhurst report)⁷³⁴ whether if recommendations are made, they needed to be included in the report's summary section.⁷³⁵ Mr Broadhurst gave this following equivocal evidence:

Depends. I actually don't know what the summary – the summary is not what we said before – overview and then there was this other things that you referred to. What was it? Yes.⁷³⁶

437. Mr Broadhurst queried the meaning of the word “summary” within AS4349.3 – 2010, but importantly agreed again that the “Report Summary” section of the Inspection Report does not contain recommendations for further investigations:

MR KATEKAR SC: This page, at least to the extent that it says that it's the report summary, doesn't contain the recommendations. Agree with that?

MR BROADHURST: Look, before I agree to anything, I'm just going to say that words have a lot of variable meanings, right. I've spend 10,000 hours of a life time looking up dictionaries for what words mean. Word – the word 'good' means – would you say that's good? I go, 'No, it's 26 different definitions' or in the expanded. Oxford it may be 50, right, so the word 'summary', I want to go and have a look what that word means... But I just want to know, right, that this word 'summary' is the same as the summary in the – in the Code.

MR KATEKAR SC: Well, my suggestion ... this report summary where it says 'Report summary' does not contain any recommendations to do further investigations?

MR BROADHURST: Yes, correct. Yes, I agree on that, yes.⁷³⁷

438. Counsel for the plaintiffs relevantly put the following proposition to Mr Broadhurst in relation to burying a warning in the disclaimers:

MR KATEKAR SC: So I think I've gone about as far ... as I can with this witness, your Honour, I'm just putting my case to you as best that I can in terms of - as far as this on your report, I'm going to invite her Honour not to accept that a warning sufficient at least because it was not contained in any summary section. **It was buried in the disclaimers at the back of the report and my submission to her Honour is - will be to her Honour is that the standard requires that if the building inspector is going to recommend - strongly recommend as you identified a timber pest - invasive timber pest inspection report that it's got to be contained in the summary section and it wasn't.** And at least for that reason, this report doesn't comply with the standard. That's my proposition, **do you agree with that?**

MR BROADHURST: I'm going to go back and have a look at my own which I used to - from Report Systems Australia, but I'm not sure- - -

MR KATEKAR SC: And so in answer to my question, **you're not sure, is that right?**

⁷³⁴ Transcript, day 4, page 420 [16]-[18].

⁷³⁵ Transcript, day 4, page 420 [20]-[24].

⁷³⁶ Transcript, day 4, page 420 [24]-[26].

⁷³⁷ Transcript, day 4, page 422-3.

MR BROADHURST: Yes, I'm - I'm just - I'm - **I don't understand what you're asking again.**
Say it again.⁷³⁸

(emphasis added)

439. Ultimately, Mr Broadhurst refused to identify which part of the Inspection Report is the “summary” without first reviewing the dictionary.⁷³⁹ As such, Mr Broadhurst confirmed that he was unsure as to whether the warning under the “Determining Extent of Damage” should be included in a summary in the Inspection Report.⁷⁴⁰

440. Finally, Mr Broadhurst was taken to the results on page 16 of the Inspection Report in cross-examination.⁷⁴¹ Counsel for the plaintiffs then asked whether, in light of the Inspection Report as a whole, the “warning” given in page 25 of the Inspection Report is insufficient to warn the reader of a recommendation to perform an invasive inspection:

MR KATEKAR SC: ... I'm just putting it absolutely clearly. I'm suggesting to you that this - looking at the report as a whole, this warning is not sufficient to amount to a warning to the reader of this report that a recommendation was being made to conduct an invasive inspection?

MR BROADHURST: And that's because it's in the wrong place. Is that right?

MR KATEKAR SC: I'm just going to tell you that looking at this as a whole – not just because it's in the wrong place but what it says earlier in the report – about there being no evidence of live species you don't need to do a treatment. Just do further investigations down the track every six to 12 months?

MR BROADHURST: No. There is. **I mean the mud trails are an evidence of something. It doesn't mean they're all dead.**

(emphasis added)

441. In re-examination by counsel for the first defendant, Mr Broadhurst was asked to give his understanding as to the purpose of the warnings in the Inspection Report:

Okay. So the purpose of a warning is to bring an awareness of the person who is using the report. That's obviously what it's for. Right? And that's in anything – whether it's a car or a timber pest – whatever – the same. That's what it's for. To bring an awareness of the person that there's something there that is there – or could be. Could be.⁷⁴²

442. Mr Broadhurst also gave evidence in cross-examination that an “invasive inspection” means that the inspection will “pull things apart” and it ceases to be a visual

⁷³⁸ Transcript, day 4, page 424 [16]-[31].

⁷³⁹ Transcript day 4, page 425

⁷⁴⁰ Transcript, day 4, page 424 [36]-[47], 425 [18]-[21].

⁷⁴¹ Transcript, day 4, page 426-8. Several objections were also made.

⁷⁴² Transcript, day 4, page 430 [26]-[31].

inspection.⁷⁴³ Mr Broadhurst noted that such inspection will determine damage, if the damage is found.⁷⁴⁴

443. For completeness, I also note that Mr Broadhurst made further comments in his report. Mr Broadhurst noted that inspecting buildings commercially is “extremely hard” for many reasons.⁷⁴⁵ Mr Broadhurst highlighted the difficulty of conducting inspection in the subfloor and the roof area:

If you look at photos [269] onwards [contained in Plaintiff's Tender Bundle 3 in these proceedings] for that section you will see the termite tracks. But what I see is the number of bricks. Each brick is 86 mm high. The clearance is less than 400 high, less than a minimum code crawl space. Under those conditions it is very hard to turn your body, turn your head in every direction. As an example, you cannot crawl on your back and see upwards. You have your torch in one hand, and a camera in the other. Even if your camera is in your pocket, it is so hard to get it out.

I wear gloves in case there is a tiger snake...

Then there are the obstructions, such as ducts. If you squash or break them you are in trouble. So you cannot go under them or over them in most cases. And then there is the junk people store under their homes and you must navigate through that, and their pet snakes they keep there. ... I often think, as I am looking for termites, trying to contort myself into a slightly better and less painful position.

And then there are the expected obstructions. Termites can be in walls and cannot be seen. They can be hidden by insulation batts in the roof, or under the floor insulation. They can be in the eaves, which is never inspected. **In the case of the [property], its skillion roof space cannot be inspected.**

Then you have the attic roof space, which does not have crawl boards. You are meant to have a 600 x 600 crawl space. To me, that means you have space 600 wide to put your knees on to crawl. Such a space is extraordinarily rare. If you are fortunate you have one board wide space to travel on, with ducting and plant in the way, balancing as you will. And if you slip, you can fall through the ceiling and break. **So the risk of not being able to see due to obstructions is heavy.**

(emphasis added)

Consideration of expert evidence

444. Counsel for the plaintiffs submitted that, on the evidence, there “can be little doubt that” the Inspection Report failed to comply with the Australian Standard AS 4349.3, was prepared without reasonable care and skill and was misleading.⁷⁴⁶ I accept that submission on the basis of the expert evidence before me.

⁷⁴³ Transcript, day, page 431 [16]-[19].

⁷⁴⁴ Transcript, day 4, page 431 [21].

⁷⁴⁵ Broadhurst report, comments point 3, page 6.

⁷⁴⁶ PWS at [4].

445. Counsel for the plaintiffs properly submitted that both experts called for the plaintiffs were “scathing” in their assessment of the Inspection Report, noting the difficulty Mr Clarke had to find “anything in the Inspection Report that was done well”.⁷⁴⁷ I agree that the reliability and credibility of the evidence of the plaintiffs’ experts was not eroded in cross-examination of either expert. Dr Ewart and Mr Clarke demonstrated an extensive knowledge of AS4349.3 – 2010 and its application to the preparation of pest inspection reports.
446. In my considered view, both Dr Ewart and Mr Clarke were impressive expert witnesses. I accept their evidence, without reservation.
447. In contradistinction, counsel for the plaintiffs submitted that Mr Broadhurst’s expertise was “vastly inferior” to that of Dr Ewart and Mr Clarke.⁷⁴⁸ I agree that the expertise of Mr Broadhurst is obviously not at the higher level of specialist expertise; that was clear in the evidence of both Mr Clarke and Dr Ewart. Pest inspection reporting was correctly submitted to not have not been recorded by Mr Broadhurst as one of his “core competencies”, with Mr Broadhurst initially qualified as an architect and principally describing himself as a project or construction manager.⁷⁴⁹ Mr Broadhurst accepted in cross-examination that his primary experience and qualifications are in building, although he did complete a course in pest inspections in a TAFE in South Australia in 2014.⁷⁵⁰
448. Further, counsel for the plaintiffs correctly, in my view, highlighted the following features of Mr Broadhurst’s evidence:
- (a) Mr Broadhurst displayed a lack of understanding of, and familiarity with, the Standard in cross-examination. Counsel specifically highlighted Mr Broadhurst’s “struggle” with answering questions on whether cl 4.2.8 of the Standard required a summary to be included in a pest inspection report.⁷⁵¹ As I have described above Mr Broadhurst argued with counsel about the meaning of words, before conceding that he was unsure⁷⁵² if the Inspection Report

⁷⁴⁷ PWS at [4].

⁷⁴⁸ PWS at [44].

⁷⁴⁹ PWS at [44].

⁷⁵⁰ PWS at [44].

⁷⁵¹ PWS at [45].

⁷⁵² As an example, I note the following exchange on in day 4 of the hearing:

MR KATEKAR SC: My proposition to you is that if that's a warning in this report about this property, it had to be included in a summary section in the report?

MR BROADHURST: But isn't that a summary where it says, 'Timber pest inspection report.' That is a summary as well in its own right?

...

needed to include a summary that contained recommendations for further inspection.

- (b) Mr Broadhurst “displayed a propensity to advocate for his client”.
- (c) Mr Broadhurst was “evasive in order to avoid making a concession that might” in any way damage “his client’s” case”.⁷⁵³

449. I accept the evidence of Dr Ewart and Mr Clarke as indicated earlier without reservation. I prefer their evidence where inconsistent with Mr Broadhurst’s evidence.⁷⁵⁴

450. Counsel for the first defendant conceded that the expert evidence of Dr Ewart regarding the standard of inspection should be preferred. However, counsel for the first defendant urged “caution” to the extent that Dr Ewart adopted the findings and conclusions of Mr Clarke. Further, counsel for the first defendant submitted that the expert opinion⁷⁵⁵ of a termite attack and damage in October 2019 should be rejected on the basis that it “disclosed no specialist training expertise or body of scientific study”.⁷⁵⁶ I do not accept this submission. The first defendants’ submission is not soundly based on the evidence. As will be further discussed at [638] to [666], this forms a key element on the first defendant’s submissions on lack of causation.

451. Counsel for the second defendant submitted that Mr Clarke held the second defendant to an “unreasonable and unrealistic standard” that is above the minimum required by AS 4349.3-210.⁷⁵⁷ Counsel for the second defendant highlighted the following examples:

- (a) Mr Clarke asserted in his report that “any competent inspector” would have accessed all of the sub-floor area. However, counsel for the second defendant

MR KATEKAR SC: There's two candidates for a summary section in this report. One is on page 3 which says, 'Report summary.' And the other is on page 16 which says, 'Inspection results.' My suggestion to you is that they're the two possible candidates for a report summary about timber pest inspection and you've agreed with me that neither of those sections contained a recommendation to do an invasive pest inspection?

MR BROADHURST: As I said, I will get hold of a dictionary later tonight and I'll find out.

MR KATEKAR SC: Just so that we're absolutely clear, you're not sure of the answer to my question, is that right? -

MR BROADHURST: Yes, because I'm not sure what the word really means and I totally - and how it was used in this sentence and where it is used - and I will - yes

⁷⁵³ PWS at [45].

⁷⁵⁴ PWS at [46]

⁷⁵⁵ While counsel did not identify which opinion, it appears in context to be that of Dr Ewart.

⁷⁵⁶ FDWS at [63].

⁷⁵⁷ SDWS at [2.6]

submitted that Mr Clarke “conceded” that Mr Maher did satisfy the minimum requirements of AS 4349.3 in cross-examination.

- (b) Mr Clarke asserted that an inspection should involve probing timber to listen for damage, although he later “conceded” in cross-examination that probing timber is an invasive method of inspection which is not required by AS 4349.3.
- (c) Mr Clarke asserted that the Inspection Report did not recommend an extent of damage investigation be carried out to the concealed timbers in the house, although Mr Clarke later agreed in cross-examination the Inspection Report does make such a recommendation in page 25, and then making “uninvited” submissions as to why the recommendation was not specific enough.
- (d) Mr Clarke asserted that a competent inspection would involve the use of a moisture metre, despite agreeing under cross-examination that AS 4349.3 does not require the use of said metre.
- (e) Mr Clarke asserted that the Inspection Report did not recommend “what needed to be done to rectify the ventilation problems”. In cross-examination, Mr Clarke was said to have conceded that the Inspection Report does contain recommendations for rectifying ventilation problems, and then he made “uninvited” submissions as to why those recommendations were inadequate.
- (f) Mr Clarke asserted that the Inspection Report failed to make recommendations to address the problems with underfloor moisture and drainage problems, although he later conceded that the Inspection Report does contain recommendations for remedial action in those respects on page 10.

452. Mr Clarke was therefore said to have failed to meet his duty to assist the Court impartially, and refrain from advocating for a party.⁷⁵⁸ Counsel noted that even Mr Clarke “appeared to have accepted the proposition”, referring to an answer from Mr Clarke “I accept, you know, what the counsel is saying about my evidence...”.⁷⁵⁹

453. I have previously reproduced the exchange referred to by counsel for the second defendant in full above at [400]-[401]. It is sufficient for me to note that this answer must be read in context of the chapeau of Mr Clarke’s answer, in which Mr Clarke cogently, properly and, in my view, with admirable rectitude and understanding of the

⁷⁵⁸ SDWS at [2.8]- [2.9].

⁷⁵⁹ SDWS at [2.8]

importance of integrity in his role as an expert witness, disagreed with the proposition that he had misunderstood his role:

Obviously I disagree [that he had misunderstood his role in the proceeding]. I take my duty to the court, your Honour, very seriously. And it's very, very rare, in fact, that I'll prepare a report where it appears to be so one sided. But you know, this particular case is just frankly unbelievable. This report – this building report is just so inadequate. **You know, I accept, you know, what the counsel is saying about my evidence but in reply, all I can do is hold up my hand and say I can only play the cards I'm dealt.** I mean, there's just nothing in this report for me to say that he did right.

(emphasis added)

454. I do not accept the second defendants' submission that Mr Clarke held the second defendant to "an unreasonable and unrealistic standard" above what was required by AS 4349.3-2010. Nor do I accept the submission that Mr Clark advocated for a party. In my view, this submission is without foundation on the evidence.
455. Counsel for the second defendant submitted that Mr Clarke's evidence should not be relied upon.⁷⁶⁰ I do not accept this submission. I have stated earlier in this judgment at [446] that I consider Mr Clarke to be an impressive expert in his field. Counsel further asserted that, in assessing Mr Clarke's evidence, the Court should also have in mind Dr Ewart's "sensible" advice reproduced at [319] that "we [must not] ask too much of the inspector" and the second defendant as the inspector is not "expected to understand the extent or damage or the full amount of damage", and was only responsible for looking for the "available evidence of termites and of risk and of conducive conditions and making the report based on that".⁷⁶¹ This submission takes the evidence of Dr Ewart on this point entirely out of context.
456. Nevertheless, despite this submission apparently supporting Dr Ewart's evidence, counsel for the second defendant also criticised the evidence of Dr Ewart. Indeed, counsel for the second defendant submitted that Dr Ewart failed to follow his own "sensible suggestion" that too much should not be asked of the second defendant.⁷⁶² Given the nature of the attack, it is convenient for me to canvass the second defendant's specific submissions regarding the evidence of Dr Ewart when I discuss breach of s 19 of the *CL(SRP) Act* later in this judgment.
457. Counsel for the second defendant also cavilled with the plaintiffs' characterisation that Mr Broadhurst showed propensity to advocate for the Defendants as well as being

⁷⁶⁰ SDWS at [2.8]

⁷⁶¹ SDWS at [2.7]

⁷⁶² SDWS at [2.11].

“evasive” to avoid making a concession that may damage the defendants’ case. Highlighting the evidence of Mr Broadhurst, counsel instead characterised Mr Broadhurst’s reluctance to make concessions as stemming from his reluctance from “incriminating” himself and hurting his own business. Counsel submitted that it appears to be the case that Mr Broadhurst may not be including a summary of inspections suggested in cross-examination by the counsel for the plaintiff into his own reports.⁷⁶³ This submission does not assist the defendants. An expert witness who is concerned for his own position in relation to his own business does not in my view possess the necessary impartiality to be of great forensic assistance to the Court as an expert witness.

458. In any event, counsel for the second defendant submitted that whether the Inspection Report met the requirements of AS 4349.3 is a legal question and not a matter for expert evidence. While pest inspection is a “field with a certain amount” of specialised knowledge, the question of compliance is outside of the field of the specialised knowledge.⁷⁶⁴ As such, Mr Broadhurst’s opinion on this does not have any probative value.⁷⁶⁵ As such, the opinions from Dr Ewart and Mr Clarke should also be given little, if any weight.⁷⁶⁶ I do not accept this submission. At the risk of repeating myself the expert opinions of Dr Ewart and Mr Clarke carry great weight, in my view, on the issues in this case.

Conclusion on the expert evidence

459. I prefer and accept Dr Ewart’s expert evidence and Mr Clarke’s expert evidence over Mr Broadhurst’s expert evidence. That is, I prefer the plaintiffs’ experts where there is disagreement with the defendant’s expert for the following reasons:
- (a) Dr Ewart has a PhD with a basis in termite research and has extensive experience in the area of timber pests. That experience extends over three decades across Australia and overseas. See paragraph [284] in this judgment.
 - (b) Mr Clarke is an expert in termite management with over three decades experience. Mr Clarke was a principal author of the Code of Practice for prior to purchase timber pest inspection.
 - (c) Mr Broadhurst’s evidence suffered from concerns for his own position as an inspector. Mr Broadhurst possessed qualifications and expertise in building. His

⁷⁶³ SDWS at [2.17].

⁷⁶⁴ SDWS at [2.18].

⁷⁶⁵ SDWS AT [2.18].

⁷⁶⁶ SDWS at [2.18].

expertise and experience in the area of termites was not as extensive as either Dr Ewart's nor Mr Clarke's.

- (d) Neither Dr Ewart nor Mr Clarke was shaken to any significant extent in cross-examination.
- (e) Whereas Mr Broadhurst's impartiality was to my mind, clouded in cross-examination by his concerns for his own position in his authorship of inspection reports.
- (f) Mr Broadhurst struggled in cross-examination with the concept of what was required by way of a summary in a pest report. Perplexingly, in my view, he struggled with the word "summary".

Statutory Framework

460. I am satisfied that the plaintiffs have made good their claim on all grounds. It is convenient that I set out at this juncture the statutory framework for all grounds:

1. *Civil Law (Sale of Residential Property) Act 2003 (ACT)*
2. *Australian Consumer Law s18*
3. *Australian Consumer Law s 60 and s 61*

Civil Law (Sale of Residential Property) Act 2003 (ACT)

461. There was no dispute as to the applicable statutory framework in relation to the *CL (SRP) Act*.⁷⁶⁷ Relevantly, ss 9 and 19 of the *CL (SRP) Act* provide as follows:

9 Meaning of *required documents*

- (1) For this part, the ***required documents***, in relation to a sale of residential property, are a copy of the proposed contract for the sale of the property (other than the excluded particulars) including the following documents:

....

- (h) for each residence covered by the proposed contract, a copy of each of the following:

...

- (iv) if the residence has been occupied—a pest inspection report from an inspection carried out not earlier than 3 months before the day the property was first advertised or offered for sale or listed by an agent (and, if the seller has obtained 2 or more reports in the 6 months before that date, each report);

19 Compensation to buyer for false report etc

⁷⁶⁷ Transcript, Day 5, page 457 [1]-[9].

- (1) This section applies if—
 - (a) a person buys residential property under a contract; and
 - (b) a statement or report mentioned in section 9 (1) (h) ... (iv)...., is made available to the buyer; and
 - (c) the statement or report is false or misleading in a material particular or is otherwise prepared without the exercise of reasonable skill and care; and
 - (d) because of that, the buyer incurs loss or expense.
- (2) The person who prepared the statement or report is liable to compensate the buyer for the loss or expense.

462. Further,⁷⁶⁸ reg 10 of the *Civil Law (Sale of Residential Property) Regulation 2004* (ACT) (*CL(SRP) Regulations*) sets requirements for a pest inspection report prepared under the *CL(SRP) Act*. Among other things, the *CL(SRP) Act* requires that a report be prepared in accordance with AS4349.3:

10 Pest inspection report—Act, dictionary, def pest inspection report

- (1) A pest inspection report must be completed in accordance with AS 4349.3.

...

- (6) In this section:

AS 4349.3 means AS 4349.3 (Inspection of buildings – Timber pest inspections), as in force from time to time.

463. Standard AS4349.3 differs from the AS standards 4349.0-2007 and AS4349.1-2007 referred to on page two of the Inspection Report. Counsel noted that these standards related to inspections of buildings generally.⁷⁶⁹

464. Self-evidently, the focus of the plaintiffs' case was on AS4349.3 – 2010. A copy of this standard was included in the plaintiffs' court book, as an appendix to a report by the plaintiff's expert, Dr Ewart.⁷⁷⁰ I have discussed the specific portions of the standard earlier in my reasons at [83] to [106].

465. As noted above in [15], it is not contentious that the Inspection Report included ⁷⁷¹a "pest inspection report" within the meaning of s 9(1)(h)(iv) of the *CL(SRP) Act*. Similarly, there were also no dispute that the property in this case is a "residential property": *CL(SRP) Act* s 8.⁷⁷²

⁷⁶⁸ PWS at [11]

⁷⁶⁹ Transcript, Day 5, page 475 [25]-[29]

⁷⁷⁰ See CB page 123 onwards.

⁷⁷¹ See also Transcript, Day 5, page 475 [32]-[34].

⁷⁷² Transcript, Day 5, page 451-2.

466. In pleadings, the plaintiffs relied on both “limbs” of s 19(1)(c) of the *CL (SRP) Act*. First, the plaintiffs alleged in para [18] of their ASOC that the Inspection Report is false or misleading in a material particular as the Inspection Report represented:⁷⁷³

- (a) that there was no existing or ongoing termite activity, when there “was no proper basis for that representation as visual inspection alone of termite mud trails cannot determine whether there is existing or ongoing termite activity”.
- (b) that there was “no apparent termite damage to the property beyond some fence palings, when there was no proper basis for that representation”.
- (c) that the condition of the interior walls, architraves and skirting “were all good, when there was no proper basis for that representation”.
- (d) that the Inspection Report had been prepared in accordance with Australian Standard AS 4393.3, when it was not.
- (e) that there was no need for treatment to be undertaken “to kill or deter termites, when there was no proper basis for that representation and such treatment was required”.
- (f) the overall risk of timber pest as “moderate to high” only when in fact it was very high to extreme.⁷⁷⁴
- (g) that further investigations did not need to be undertaken to ascertain if there was any existing or going termite activity, “by not recommending such investigations”.
- (h) that further investigations did not need to be undertaken to ascertain the nature and extent of damage from termites, by not recommending such investigations.

467. In their response to requests for further and better particulars, the plaintiffs particularised in relation to point (b) above that the representation was false and misleading as the Inspection Report had also noted the presence of mud trails, and that the representation was also made without conducting a proper inspection:

[[T]he second defendant] identified the presence of **mud trails in the sub-floor walls**, such trails being evidence of apparent and ongoing termite damage or activity, yet represented that there was no such apparent damage beyond some fence palings. **The author of the report also made this representation without conducting a proper inspection**, including

⁷⁷³ ASOC at [18](a)-(h).

⁷⁷⁴ ASOC at [18](f).

without conducting any sounding of exposed timber members. meaning that the stated conclusion that the timber palings were the only timbers was misleading.⁷⁷⁵

(emphasis added)

468. The plaintiffs also alleged that the Inspection Report was not prepared with the exercise of reasonable skill and care, relying on para [18] of the ASOC reproduced above and the following pleadings in [19] of the ASOC:

- (a) no description or photographs were included in the Inspection Report of the nature or extent of the “termite activity (mud trails) to the sub floor walls”.
- (b) no information was provided that “a visual inspection alone of termite mud trails cannot determine whether there is existing or going termite activity”.
- (c) sounding of exposed timber was not undertaken.
- (d) no information was provided that the failure to see live termites “did not mean that termites were not present or active at the property”.
- (e) no statement was made that the presence or activity of termites should be investigated.
- (f) no statement was made that the risk of termite activity was “very high or extreme”.

469. As foreshadowed above, the plaintiffs’ response to a request for further and better particulars by the solicitors acting for the plaintiffs,⁷⁷⁶ at the time referred to cl 1.1 as to what will constitute sounding of exposed timbers, being a “non-marking sounding” for which the use of any hard object which did not mark the exposed timber would be sufficient. The sounding is also to be understood in context of what is required by an inspector acting accordingly with the AS4349.3 – 2010, in the plaintiff’s claim.⁷⁷⁷

470. The plaintiffs pleaded that they have incurred loss and expenses by reason of the first and second defendants’ conduct.

471. Thus, counsel for the plaintiffs submitted that the question before the Court in relation to this limb is whether⁷⁷⁸:

⁷⁷⁵ Request for further and better particulars at [2.12]

⁷⁷⁶ At one point, due to a conflict issue, the plaintiffs were represented by MV Law. This was also a response to para [8] of the pleadings and not [18], regarding “soundings”.

⁷⁷⁷ Response to Further and Better particulars at [2.2].

⁷⁷⁸ PWS at [50].

(a) The Inspection Report was prepared without the exercise of reasonable care and skill; and/or

(b) The Inspection Report is false and misleading in a material particular.

472. For their part, the defendants denied the above allegations made in [18] and [19] of the ASOC.⁷⁷⁹ The defendants also did not admit that the plaintiffs suffered any incurred loss and expense as pleaded in the ASOC.⁷⁸⁰

473. In relation to the allegation that the Inspection Report was false or misleading in reliance of s 19 of the *CL(SRP) Act* (and the ACL), the defendants pleaded that any representations set out in [18]⁷⁸¹ that were made in the Inspection Report were both made with proper basis and was within the limitations of the inspection methodology. Further, the defendants pleaded that the scope and limitations of the Inspection Report were disclosed in the Inspection Report itself.

474. In relation to the allegation that the Inspection Report was prepared without the exercise of reasonable care and skill,⁷⁸² the defendants also pleaded that photographs⁷⁸³ were taken and again noted that any representations in [18] of the ASOC that were made⁷⁸⁴ in the Inspection Report were both made with proper basis and within the limitations of the inspection methodology, and that the scope and limitations of the Inspection Report were set out in the Inspection Report itself.

475. More specifically, the defendants also denied⁷⁸⁵ the plaintiffs' claim that the second defendant did not undertake any soundings of exposed timber, as well as the plaintiff's claim that the first defendant was aware that the second defendant did not undertake any such soundings.

Australian Consumer Law – s 18

476. Section 18 relevantly provides:

18 Misleading or deceptive conduct

- (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

⁷⁷⁹ See Defence 1 at [14]-[15]; Defence 2 at [13]-[14].

⁷⁸⁰ In response to ASOC at [20], Defence 1 at [16] and Defence 2 at [15]. See also ASOC at [31], denied in Defence 1 at [24], repeated in Defence 2 at [23].

⁷⁸¹ Defence 1 14(b)(i) -(ii); Defence 2 at [13].

⁷⁸² Defence 1 at [15](a)

⁷⁸³ Defence 1 at [15](b)(i), Defence 2 at [14].

⁷⁸⁴ Defence 1 15(b)(ii); Defence 2 at [14].

⁷⁸⁵ ASOC at [6], [8]. Denied in Defence 1 at [4](b), [6](b); Defence 2 at [4], [6].

477. In their pleaded defences, the defendants do not dispute that they were engaged⁷⁸⁶ in trade and commerce in preparing the Inspection Report, in the course of its business for reward and providing the Inspection Report in and under its corporate name and style. It was similarly not apparently contested in the pleadings⁷⁸⁷ that the second defendant was involved in the conduct of the first defendant, being the person who conducted the inspection upon which the Inspection Report was based and the person who ultimately signed the Inspection Report.
478. However, as will be discussed later in the context of the issue of causation at [637] to [714], counsel for the first defendant would later seek to confine the implication of this concession concerning the issues of causation.
479. In [23]-[23A] of the ASOC, the plaintiffs alleged that the defendants had engaged in misleading or deceptive conduct in issuing the Inspection Report for use in connection with the sale of the property and for prospective purchasers by making representations that:⁷⁸⁸
- (a) there was no existing or ongoing termite activity in the property, when there was “no proper basis for that representation as visual inspection alone of termite mud trails cannot determine whether there is existing or ongoing termite activity”.
 - (b) there was no apparent termite damage to the property beyond some fence palings, when there was no proper basis for that representation.
 - (c) the condition of the interior walls, architraves and skirting boards were all good, when there was no proper basis for that representation.
 - (d) the Inspection Report had been prepared in accordance with AS 4393.3, when it had not.
 - (e) there was no need for “treatment [to] be undertaken” to kill or deter termites, when there was no proper basis for that representation and the treatment was required.
 - (f) the overall risk of timber pest infestation as “moderate to high” only when in fact it was “very high to extreme”.

⁷⁸⁶ ASOC at [21], admitted in Defence 1 at [17] and Defence 2 at [16], PWS at [10](k).

⁷⁸⁷ ASOC at [22], admitted subject to qualification in [18](a) of Defence 1 and [17]. PWS at [10](n).

⁷⁸⁸ ASOC at [23](a)-(h). I note that the pleadings here is pretty much the same as the earlier pleading at [18].

- (g) further investigations did not need to be undertaken to ascertain if there was any existing or ongoing termite activity, by not recommending such investigations.
- (h) further investigations did not need to be undertaken to ascertain the nature and extent of damage from termites, by not recommending such investigations.

480. I note that these pleadings are identical to the ones made at [18] of the ASOC.

481. Both defendants denied that they have engaged in misleading or deceptive conduct in contravention of s 18 of the ACL.⁷⁸⁹ The defendants maintained in their amended defences that any representation made were within “the extent of the inspection as was conducted” within the limitation of the inspection methodology. The defendants also repeated that the representations listed in [18] of the ASOC were made with a proper basis and within the limitations of the inspection methodology, and that the scope and limitations of the Inspection Report were disclosed in the Inspection Report itself.

482. In so far as the second defendant was engaged in the conduct, both defendants also noted the vicarious liability concession discussed at [14], being that the first defendant indemnifies any and all liability arising from acts and/or omissions of the second defendant.

Australian Consumer Law – s 60 and s 61

483. Both provisions deal with consumer guarantees relating to supply of services. Relevantly, ss 60 and 61 provides as follows:

60 Guarantee as to due care and skill

If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

61 Guarantees as to fitness for a particular purpose etc.

(1) If:

- (a) a person (the **supplier**) supplies, in trade or commerce, services to a consumer; and
- (b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;

there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.

⁷⁸⁹ In response to ASOC at [23], see defence 1 at [19] and defence 2 at [18].

- ...
- (3) This section does not apply if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier.
- ...

484. As properly submitted by counsel for the plaintiffs and counsel for the first defendant,⁷⁹⁰ the phrase “due care and skill” in s 60 of the ACL is equivalent to the common law duty to take reasonable care: *Let’s Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243 at [6] (Basten and Gleeson JJA) (*Let’s Go Adventures*). It is useful in this context to set out the observations of Basten and Gleeson JJA in *Let’s Go Adventures*:

The plaintiff’s pleading assumed, no doubt correctly, that **the standard set by the guarantee of “due care and skill” could properly be equated with the common law duty to take reasonable care, if the scope of the services was adequately identified.** (Negligence was relied upon as an alternative cause of action.) However, a **different analysis was required with respect to the guarantee of fitness for a particular purpose**, language which was not addressed at the trial. With respect to damages, attention should also be paid to s 267 of the Australian Consumer Law.

(emphasis added, footnotes omitted)

485. The term “consumer” is in turn relevantly defined as follows in ss 2 and 3 of the ACL:

2 Definitions

...

consumer: see section 3.

...

3 Meaning of consumer

Acquiring services as a consumer

- (3) A person is taken to have acquired particular services as a **consumer** if, and only if:
- (a) the amount paid or payable for the services, as worked out under subsections (4) to (9), did not exceed:
- (i) \$40,000; or
- (ii) if a greater amount is prescribed for the purposes of subsection (1)(a)—that greater amount; or
- the services were of a kind **ordinarily acquired for personal, domestic or household use or consumption.**
- ...

⁷⁹⁰ PWS at [75]; FDWS at [23].

(12) In this Schedule, a reference to a supply of goods or services to a consumer is a reference to a supply of goods or services to a person who is taken to have acquired them as a consumer.

(emphasis added)

486. As noted above at [477], it was not contentious that the first defendant engaged in trade and commerce and that (subject to the vicarious liability concession that the first defendant indemnifies any and all liability arising from acts and/or omissions of the second defendant.) that the second defendant was involved in the first defendant's conduct: see ACL ss 60, 60(1)(a).

487. I further note that it was not contested in the pleadings that:

- (a) The first and second defendants supplied⁷⁹¹ services to the plaintiffs, by issuing the Inspection Report to the-then owners of the property for use in connection with its sale and for prospective purchasers: see ACL ss 60 and 61(1)(a).
- (b) The services provided⁷⁹² by the defendants were of a kind ordinarily acquired for personal use: ACL s 3(3)(b).
- (c) The plaintiffs acquired⁷⁹³ the services of the defendants by receiving, accepting and relying upon the Inspection Report: see ACL s 3(12).
- (d) By virtue of the three matters mentioned above, the plaintiffs were⁷⁹⁴ consumers of services provided by the defendants.
- (e) The plaintiffs impliedly⁷⁹⁵ made known to the defendants the particular purpose for which their services were being acquired, namely for assessment of the state of the property when considering purchase: ACL s 61(1)(b).

488. Consequently, the defendants effectively conceded⁷⁹⁶ in their pleadings that they guaranteed that the Inspection Report would be prepared with due care and skill under s 60 of the ACL. Similarly,⁷⁹⁷ the first defendant also conceded in the pleadings that the first and second defendants guaranteed that the Inspection Report would be

⁷⁹¹ ASOC at [24]; admitted in Defence 1 at [20]; Defence 2 at [19]. See also Transcript, Day 5, page 457 [44]-[45].

⁷⁹² ASOC at [25], admitted in Defence 1 at [20]; Defence 2 at [19].

⁷⁹³ ASOC at [26], admitted in Defence 1 at [20] and Defence 2 at [19].

⁷⁹⁴ ASOC at [27], admitted in Defence 1 at [20] and Defence 2 at [19].

⁷⁹⁵ ASOC at [29], admitted in Defence 1 at [22] and Defence 2 at [21].

⁷⁹⁶ ASOC at 27A, admitted in Defence 1 at [20] and Defence 2 at [19]. See PWS at [10](l) -(m), PWS at [74].

⁷⁹⁷ ASOC at [29A]. Admitted by the first defendant in Defence 1 at [22]. However, the second defendant did not address [29A] in their defence. This may suggest that they deny the paragraph in so far that they note that issue is joined if not addressed expressly in Defence 2: see at [2].

reasonably fit for purpose under s 61 of the ACL.⁷⁹⁸ Indeed, it would have been very difficult to for the defendants to dispute that the defendants gave these guarantees.⁷⁹⁹

489. Referring to the matters described in [18] and [19] of the ASOC, the plaintiffs pleaded⁸⁰⁰ that the Inspection Report was not prepared with due care and skill and that the Inspection Report was not reasonably fit for purpose. Consequently, the plaintiffs alleged⁸⁰¹ that the defendants contravened the guarantees enumerated in ss 60 and 61 of the ACL. The plaintiffs also asserted⁸⁰² that it was reasonably foreseeable that purchasers would suffer loss and damage as a result of the defendants' asserted failure to prepare the Inspection Report with due care and skill. As such, the plaintiffs claimed damages⁸⁰³ under s 267 of the ACL for the breaches of the guarantees.

490. In their response to the defendant's request for further and better particulars, the plaintiffs particularised that it relies on the whole of the matters pleaded at [18] and [19] of the ASOC to support the conclusion that the Inspection Report was prepared without due care and skill.⁸⁰⁴

491. For their part, the defendants did not admit⁸⁰⁵ that the Inspection Report was prepared without due care and skill or that the Inspection Report was not reasonably fit for purpose. The defendants also repeated⁸⁰⁶, to the extent relevant, their pleadings that any representations listed in [18] of the ASOC were made with proper basis and within the limitation of the inspection methodology, and that the scope and limitations of the Inspection Report were disclosed in the Inspection Report itself.

492. Ultimately, the defendants pleaded⁸⁰⁷ that the Inspection Report was both prepared with due care and skill and was reasonably fit for its purposes. Consequently, the Inspection Report did not contravene the guarantees in ss 60 and 61 of the ACL. Further, the defendants also pleaded⁸⁰⁸ that neither the plaintiffs nor any purchaser, having read the inspection methodology and the limitations of the Inspection Report, would have suffered a reasonably foreseeable loss.

⁷⁹⁸ See PWS at [76].

⁷⁹⁹ Transcript, Day 5, page 458 [6]-[9].

⁸⁰⁰ See ASOC at [28] and [29A].

⁸⁰¹ See ASOC at [30A].

⁸⁰² ASOC at [30B].

⁸⁰³ Transcript, Day 1, page 14 [11]-[2].

⁸⁰⁴ Response to Request for FBT at [2.19].

⁸⁰⁵ Defence 1 at [21](a), [23](a); Defence 2 at [20], [22A].

⁸⁰⁶ See Defence 1 at [21](b) and ([23](b)), Defence 2 at [20] and [22].

⁸⁰⁷ Defence 1 at [23A]; Defence 2 at [22A].

⁸⁰⁸ Defence 1 at [23B]; Defence 2 at [22B].

The Defendants breached their statutory duties

493. I will now turn to the question of breach and the question of whether the defendants breached their statutory duty. In my view the defendants have breached their statutory duties for the following reasons.

494. It is convenient to commence with the “reasonable care and skill” arm of s 19 of the *CL(SRP) Act*, followed by claims relying on misleading or deceptive conduct under s 18 of the ACL and s 19 of the *CL(SRP) Act*, and concluding with the claims relying on the consumer guarantees under ss 60 and 61 of the ACL.

Was the Inspection Report prepared without the exercise of reasonable skill (CL(SRP) Act s 19)?

495. The statutory framework for a claim under s 19 of the *CL(SRP) Act* is outlined above at [460].

496. As a matter of construction, a claim for compensation for the “without the exercise of reasonable skill and care” limb in s 19(1)(c) is a claim for harm resulting from negligence. As correctly submitted by counsel for the plaintiffs, ch 4 of the *Civil Law (Wrongs) Act 2002* (ACT) (*Wrongs Act*) applies to all claims for harm resulting from negligence, whether the claim is brought under tort, contract, statute or otherwise: *Wrongs Act* ss 41(1)-(2). Harm and negligence are defined as follows:

40 Definitions—ch 4

(1) In this chapter:

harm means harm of any kind, and includes—
personal injury; and
damage to property; and
economic loss.

negligence means failure to exercise reasonable care and skill.

497. Further, it is well-established⁸⁰⁹ that the relevant standard of care required of the defendants is set out in s 42 of the *Wrongs Act*. It is that of a reasonable person in the defendants’ position as expressed below:

42 Standard of care

For deciding whether a person (the ***defendant***) was negligent, the standard of care required of the defendant is **that of a reasonable person in the defendant’s position who was in possession of all the information that the**

⁸⁰⁹ PWS at [53].

defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose.

(emphasis added)

498. It is important to underline concerning the standard of care expected of professionals that the ACT does not have an equivalent provision to s 50 of the *Civil Liability Act 2002* (NSW) (CLA).⁸¹⁰ Therefore, the common law position as elucidated in *Rogers v Whitaker* (1992) 175 CLR 479 (*Rogers*) remains applicable.⁸¹¹ Counsel for the plaintiffs noted the following observations by majority (Mason CJ, Brennan, Toohey, Gaudron and McHugh JJ) at 487:

In Australia, it has been accepted that **the standard of care to be observed** by a person with some special skill or competence is that of **the ordinary skilled person exercising and professing to have that special skill**. But, that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade. ... **Further, and more importantly, particularly in the field of non-disclosure of risk and the provision of advice and information**, the *Bolam* principle has been discarded and, instead, the courts have adopted the principle that, while **evidence of acceptable medical practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care** after giving weight to "the paramount consideration that a person is entitled to make his own decisions about his life".

(emphasis added, footnotes omitted)

499. Thus, while evidence of acceptable practice is a useful guide for the courts, it is nevertheless for the courts to adjudicate on what is the appropriate standard of care.
500. Further, I note concerning foreseeability, precautions and liability for negligence⁸¹² the relevance of ss 43 and 44 of the *Wrongs Act*:

43 Precautions against risk—general principles

- (1) A person is not negligent in failing to take precautions against a risk of harm unless—
 - the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
 - the risk was not insignificant; and
 - in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court must consider the following (among other relevant things):
 - the probability that the harm would happen if precautions were not taken;
 - the likely seriousness of the harm;

⁸¹⁰ Transcript, Day 5, page 462 [31]-[34].

⁸¹¹ Transcript, Day 5, page 462 [38]-[39].

⁸¹² PWS at [63]-[64].

the burden of taking precautions to avoid the risk of harm;
the social utility of the activity creating the risk of harm.

44 Precautions against risk—other principles

In a proceeding in relation to liability for negligence—

- (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and

the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which it was done; and

the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and is not of itself an admission of liability in relation to the risk.

501. Counsel referred to *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 49; 239 CLR 420 at [13], [27], where the High Court noted in relation to equivalent provisions in the CLA:

- 13. Although ss 5B and 5C [of the CLA] appear beneath the heading “Duty of care”, that heading is apt to mislead. The sections provided:

“5B General principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless:

- (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

- (b) the risk was not insignificant, and

- (c) in the circumstances, a reasonable person in the person’s position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

- (a) the probability that the harm would occur if care were not taken,

- (b) the likely seriousness of the harm,

- (c) the burden of taking precautions to avoid the risk of harm,

- (d) the social utility of the activity that creates the risk of harm.

5C Other principles

In proceedings relating to liability for negligence:

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.”

Both provisions are evidently directed to questions of breach of duty.

...

27. The question of breach of duty must be considered by reference to the relevant provisions of the *Civil Liability Act* – in particular s 5B

502. Counsel for the first defendant agreed that the *Wrongs Act* is relevant.⁸¹³

503. In this case, counsel for the plaintiffs additionally submitted that the fact that *Rogers* is the position in the ACT and that the ACT does not have an equivalent to s 50 of the *CLA* was not material.⁸¹⁴ In counsel's submissions, the experts in this case (Mr Clarke, Dr Ewart and Mr Broadhurst) all agreed that further investigations were required. In my view, that is plainly correct on the evidence.⁸¹⁵ Counsel submitted that on whatever lens the Court uses, the Court has evidence that it is a matter of “competent professional practice within that field of pest inspectors”. Again, that is plainly correct on the evidence. This standard, counsel submitted, is the standard to apply in determining whether or not there had been a breach of due care and skill.⁸¹⁶ I accept this submission.

504. Counsel for the plaintiffs highlighted,⁸¹⁷ the evidence of Mr Maher on the parts of the Inspection Report that were specific to the inspection (discussed above at [255]-[281]). Counsel characterised Mr Maher's evidence as follows: that the only parts of the Inspection Report that were specific to the inspection of the property was information contained in pages 3, 6, 14, 16 and 17. The rest of the Inspection Report were standard text included in all the reports produced by the first defendant, including

⁸¹³ FDWS at [23]. Note: the guarantee of due care and skill implied by section 60 is equivalent to and assessed according to the common law duty to take reasonable care. Further, the relevant statute is the Civil Law (Wrongs) Act 2002 (ACT).

⁸¹⁴ Transcript, Day 5, page 462 [43]-[44].

⁸¹⁵ Transcript, Day 5, page 463 [8], 469 [26]-[28].

⁸¹⁶ Transcript Day 5, page 463 [8]-[11].

⁸¹⁷ PWS at [56].

significantly, the statement on page 16 regarding the implications of a “high” risk factor.

505. I pause to interpolate at this juncture that Mr Maher did give evidence that he allocated the “Good” ratings on page 5 of the Inspection Report as well as the dot points when discussing the subfloor in page 10 of the Inspection Report.⁸¹⁸ Further, I note that Mr Maher was not questioned in cross-examination regarding page 17 of the Inspection Report.⁸¹⁹

506. Counsel for the plaintiffs properly highlighted the opinion of Mr Broadhurst at [6.8](d)⁸²⁰ that he was unable to tell if the Inspection Report was prepared in accordance with AS4349.3 –2010:

I cannot tell if the [Inspection Report] was prepared in accordance with AS 4393.3-2010. I would need to be present during the inspection. It states in AS 4349.3, “If termite activity is noticed in any one location in a building, it is advisable to make a thorough search of the entire building.” I was not there to have an opinion of if this was done or not.⁸²¹

507. In the same vein, counsel for the plaintiffs referred to “similar” additional comments in the report of Dr Ewart⁸²²:

I am in general agreement with Mr Shane Clarke’s appraisal that the original inspection was wanting. I believe that it did not properly address the risks at the property, failed to properly warn of the likely presence of extensive concealed damage and its consequence **and failed to provide a proper description of the risks at the property that could be readily understood by a non-expert purchaser.**⁸²³

(emphasis added)

508. Counsel for the plaintiffs referred to the statements in appendix A in their closing submissions. In summary, in relation to, due care and skill, counsel submitted in relation to breach that the Inspection Report was defective as⁸²⁴:

(a) The Inspection Report “effectively” told the plaintiffs that there were no active termites in the property; that while there was evidence of old or previous termite activity no treatment was required. I underline that I accept this submission as it accords with my overall assessment of the Inspection Report.

⁸¹⁸ Transcript, day 4, page 394 [25]-[29], 395 [1]-[9].

⁸¹⁹ Transcript, day 4, page 396 [31]-[36], examination jumps to page 18 immediately after 16.

⁸²⁰ PWS at [57].

⁸²¹ CB page 343, Broadhurst page 3.

⁸²² PWS at [59].

⁸²³ CB at page 11, page 8 of the Ewart report.

⁸²⁴ PWS at [60]-[61].

- (b) The Inspection Report did not recommend an invasive inspection. This accords with my overall assessment of the Inspection Report.
- (c) The Inspection Report, despite stating the “susceptibility” of the property to pests was moderate to high, also stated that this was not intended to deter an intending purchaser but to simply encourage awareness that increased vigilance was warranted; it merely suggested that pest inspections be done every 6 to 12 months. I accept this submission as it accords with my overall assessment and review of the Inspection Report. I underline that the Inspection Report was published on 21 October 2019, and the termites were discovered within the 12 month period recommended in the Inspection Report.

509. Counsel for the plaintiff, in my view properly and correctly, submitted that the Inspection Report should have stated in the “Report Summary” or “Timber Pest Report” sections that there was a “high or extreme risk” that the property was susceptible to timber pests.⁸²⁵ Above all, counsel submitted that the Inspection Report should not have stated such a warning was not intended to deter an intending purchaser, and should have instead recommended in the summary and on page 16 that further investigations should be carried out to determine the extent of any termite activity or damage.⁸²⁶ I emphasise that after carefully reviewing all the evidence before me, and in particular the expert evidence of Dr Ewart and Mr Clarke on this point, I accept this submission.

510. In my view, this submission is soundly based concerning the “not intended to deter the intending purchaser” text box, on my assessment as to the overall impact of the Inspection Report. The text box again reads in full:

“It should be noted that if the risk factor noted in this report is considered to be high, this is not designed to deter an intending purchaser; **It is simply encouraging awareness that increased vigilance is warranted and any recommendations regarding reducing conducive conditions or frequency of inspections should be observed. It is recommended that a full pest inspection be under-taken every 6-12 months.** Regular inspections DO NOT prevent timber pest attack; they are designed to limit the amount of damage that may occur through early detection.”

(emphasis added)

511. On the indicia set out in s 43 of the *Wrongs Act*, counsel for the plaintiffs characterised the relevant risk of harm as the risk that the plaintiffs would suffer economic loss as a

⁸²⁵ PWS at [62].

⁸²⁶ PWS at [62]; Transcript, day 3, page 295 [15]-[27].

result of purchasing a property that the plaintiffs were not aware was infested and had been severely damaged by termites.⁸²⁷

512. Counsel for the plaintiffs submitted⁸²⁸ that such a risk was foreseeable: Wrongs Act s 43(1)(a). I agree. The plaintiffs must establish either actual knowledge of the risk on the part of the defendants or otherwise constructive knowledge of the risk of harm: *Benic v State of New South Wales* [2010] NSWSC 1039 at [90] (Garling J) (*Benic*). In this case, on the evidence I am satisfied on the balance of probabilities of the constructive knowledge of the risk of harm. This is because the defendants were in the business of providing building reports including pest inspection reports to homeowners and prospective homeowners. As such, I am satisfied they must have known of the risk of harm to the plaintiffs.⁸²⁹ The business was, the business of providing reports including as to termites.

513. As to whether the risk of harm was not insignificant, the risk of harm was clearly significant. Reference was made,⁸³⁰ in this context to the observations of Basten JA in *South Sydney Junior Rugby League Club Ltd v Gazis* [2016] NSWCA 8 concerning the factors that bear upon such an assessment. That case concerned an equivalent provision in New South Wales (at [89]):

The requirement that a foreseeable risk be “not insignificant”... engages a different set of considerations, although not at the same level of generality as would suffice for a finding of a foreseeable risk. The significance of a risk will depend upon a variety of factors, including obviousness, likelihood of occurrence and seriousness of consequences.

514. Further reference was made to,⁸³¹ the observations of Garling J in *Benic* at [101] as to the assessment of “not insignificant”. It is useful to set this out in full:

I will now attempt to draw together this variety of sources to state what approach, in my opinion, is the appropriate one to interpreting the phrase “not insignificant”:

- (a) The assessment of the risk of harm is one **made in prospect and not retrospect**. Hindsight has no part to play;
- (b) The phrase is of **a higher order than the common law test**, and this was intended to limit liability being imposed too easily;
- (c) The phrase “**not insignificant**” is intended to refer to the probability of the occurrence of the risk;

⁸²⁷ PWS at [65].

⁸²⁸ PWS at [66].

⁸²⁹ PWS at [67].

⁸³⁰ PWS at [68].

⁸³¹ PWS at [69].

- (d) In the realm of tort law, **the probability of an occurrence is both a quantitative measurement, which may, but does not necessarily reflect a statistical and numerical assessment, and also an evaluative measurement.** The statutory phrase is a protean one which depends upon the context of facts, matters and circumstances for its meaning;
- (e) Whether a risk is “not insignificant” **must be judged from the defendant’s perspective** and must be judged on a broader base than a mere reductionist mathematical formula.

(emphasis added)

515. In my view, at the time of the preparation of the Inspection Report the relevant risk of harm was obviously significant.⁸³² I make this finding taking into account that the assessment of risk of harm is not made in hindsight and that the phrase is of a “higher order” than the common law test. I have judged the risk to be significant from the defendants’ perspective and not on a limited and reductionist formula but rather it is based on an evaluation of the facts in this case; that is, in particular the preparation of a report to be read by an intending purchaser in this case.

516. As to whether a reasonable person in the defendants’ position would have taken precautions against the risk of harm (*Wrongs Act* ss 43(1)(c) and 43(2)), counsel for the plaintiffs properly, in my view on the evidence before me, submitted the following:⁸³³

- (a) The precautions “were simple”, in that the defendants should have included the statements “missing” from the Inspection Report as outlined in appendix A and that I have set out in the table above at [80]. In summary, the plaintiffs submitted that the Inspection Report:
 - 1. In the “Summary” section, the Inspection Report failed to warn that termites and extensive damage could be present in areas that had not been accessed by the inspector, that further investigations were required, and to identify that there was a “high or extreme risk” in the “Summary” section.⁸³⁴
 - 2. At page 16, the Inspection Report failed to warn that live termites could be present in concealed areas that the inspector could not inspect, or that, even if the infestation was in the past, damage may have existed in concealed areas.

⁸³² PWS at [70].

⁸³³ PWS at [71]-[72].

⁸³⁴ See the “Breach” and “Reason for Breach” columns in Appendix A, page 1.

3. At page 16, the Inspection Report should not have recommended removal of the affected timber in the fencing.⁸³⁵
 4. At page 16, the Inspection Report failed to note extensive timber decay to the subfloor areas of the property.⁸³⁶
 5. At page 16, the Inspection Report failed to explain the importance of ventilation, and noting that the ventilation in the property was poor, should be improved, and that it will require major works to do so.⁸³⁷
 6. At page 17, the Inspection Report failed to recommend further investigation of the subfloor despite stating that the inspection of the subfloor was limited.⁸³⁸
 7. At page 16, the Inspection Report erroneously noted that the subfloor drainage was fair. It was not.⁸³⁹
 8. At page 16, the Inspection Report failed to recommend further investigations of the trees.⁸⁴⁰
 9. At page 16, the Inspection Report failed to warn of the limitations concerning the Biflex Duo Treatment.⁸⁴¹
 10. At page 16, the Inspection Report failed to make the correct recommendations that extensive damage could be present in areas that had not been accessed and that further investigation was required. The Inspection Report should have also contained the conclusions expressed at [12.6.20] of the Clarke report and the warnings at [12.6.21] of same.⁸⁴²
- (b) A reasonable person in the position of the defendants would have “plainly” taken precautions against the risk of harm as:
1. The probability of harm was significant.

⁸³⁵ See Statement 3, Appendix A page 5.

⁸³⁶ Appendix A, page 6.

⁸³⁷ Appendix A, page 7.

⁸³⁸ Appendix A, page 8.

⁸³⁹ Appendix A, page 8.

⁸⁴⁰ Appendix A, pages 8-9.

⁸⁴¹ Appendix A, pages 10-11.

⁸⁴² Appendix A, pages 12-14.

2. The harm was likely to be very serious. I accept this submission as infestation by termites is indeed a serious matter in the context of purchasing a house.
3. The burden of taking precautions to avoid the risk of harm was minimal. Again, I accept this submission.

517. Thus, counsel for the plaintiffs ultimately submitted that this Court would be “comfortably satisfied” that the Inspection Report was prepared without the exercise of reasonable skill and care under s 19 of the *CL(SRP) Act*. I am so satisfied on the facts of this case.

518. As noted above at [84], counsel for the plaintiffs also took the Court to relevant portions of the standards. Counsel for the plaintiffs correctly submitted that “objective standards” such as the Australian Standards (eg. AS4349.3 – 2010), are “of significant relevance”⁸⁴³ in determining the standard of care. I agree: see *Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61 at [10] (Macfarlan JA, McColl and Basten JJA agreeing) (*Wheeler*).

519. In *Wheeler*, the NSW Court of Appeal stated the following in relation to a different Australian Standard (I note that *Wheeler* involved a warranty contained in a contract (at [8], [10]):

The contractual provisions as to the concrete slab to be used for the construction and as to the footings were sourced from Australian Standard AS2870-1996 “Residential Slabs and Footings – Construction”. In my view it is unnecessary to determine whether that Standard formed part of the contract between the parties. It is sufficient, for the purposes of these proceedings, that **it is clear that the Standard was at least an external standard available to be considered** in assessing whether the respondent builder had complied with its obligation to perform the building works “**in a proper and workmanlike manner**”.

(emphasis added)

520. In this case the external standard is available to be considered in relation to the Inspection Report prepared by the defendants.

521. Counsel conceded difficulties in locating authorities in relation to s 19. The only cases located were two cases from the ACT Civil and Administrative Tribunal. I note for completeness that the cases also involve the defendants in these proceedings: *Swan v Residential Reports Pty Ltd* [2020] ACAT 76 (*Swan No 1*); *Swan v Residential Reports Pty Ltd* [2021] ACAT 7 (*Swan No 2*). *Swan No 2* was a partially successful

⁸⁴³ PWS at [53].

appeal by the plaintiffs in *Swan No 1: Swan No 2* at [91] (Presidential Member Robinson, Member Selby).

522. These cases, however, concern a building report and not a timber pest inspection report as such. Of course, these cases are not binding upon this Court. Counsel for the plaintiffs sought to rely on these cases in so far as the cases demonstrate how a breach of s 19 of the *CL (SRP) Act* (and guarantees in s 60 of the *ACL*) can be established by a finding that a defendant did not comply with the relevant Australian Standard, in that case AS4349.1 – 2010.⁸⁴⁴
523. The Appeal Division of ACAT did find that the report in the matter should have also identified that the defects to the fascia/barge boards were “major defects” and the relevant report should have put the plaintiffs in that case on notice that repairs or replacements were necessary: *Swan No 2* at [82]-[83].
524. Relevantly, reference was made to the clauses in AS 4349.3 – 2010. Counsel noted that the provisions of the standards, such as cl 2.2 reproduced above at [87] are the “sorts of provisions that engage the questions of foreseeability”:⁸⁴⁵ That submission, in my view, is clearly correct on the issue of foreseeability.
525. In relation to the mud trails, counsel for the plaintiffs referred to appendix D to AS4349.3 - 2010. This appendix covers “useful information” on termite damage in timber and the detection of subterranean termite infestation, as well as necessary steps to correctly identify the found species of termites.⁸⁴⁶ In the section dealing with detection of infestation,⁸⁴⁷ the appendix outlined that termites build sheltered mud tubes to move as they have soft bodies that cannot withstand the “desiccating” effects of dry air. As such, the presence of mud tubes is the most positive indicator of a termite infestation whether broken or unbroken.⁸⁴⁸ It is important in the context of the facts in this case, in my view, to note this specific wording: whether broken or unbroken.
526. Further,⁸⁴⁹ counsel for the plaintiffs referred to section D2 of appendix A to AS4349.3 – 2010 which states that an inspector should carry a pointed instrument (eg. a screwdriver or knife) to probe into woodwork. The inspector should also know of habits

⁸⁴⁴ PWS at [51].

⁸⁴⁵ Transcript, Day 5, page 465 [35]-[40].

⁸⁴⁶ Ewart report page 64.

⁸⁴⁷ See Ewart report page 64-8.

⁸⁴⁸ Transcript, Day 5, page 473 [5]-[11]; CB at page 166.

⁸⁴⁹ as noted above at [95] to [97].

of termites in general, as well as the manner in which they work as well as the places where they are likely to be found and signs showing their presence.⁸⁵⁰

527. At the hearing, counsel for the plaintiffs referred to section 3 of the AS 4349.3 – 2010, in particular cl 3.3.⁸⁵¹ Counsel properly and correctly noted that the Inspection Report effectively did not recommend further action with respect to inspection to inaccessible areas beyond noting the existence of such areas.⁸⁵² In contrast, importantly cl 3.3 stated expressly that:

Where sufficient access to enable inspection and testing in accordance with the scope of inspection is not available, recommendations shall be made for gaining access.⁸⁵³

528. It is clear in my view that recommendations should have explicitly been made, in the Inspection Report, for gaining access.
529. Counsel for the plaintiffs correctly in my view submitted that a “key integer” of the defendants’ defence in this case is answered by cl 4.1 of the AS 4349.3 – 2010, which I have reproduced above at [104]. The clause required that the summary section of the Inspection Report must be “readily distinguished” from more general material such as background advice and disclaimers.⁸⁵⁴ At the hearing, counsel for the plaintiffs specifically referred again to cl 4.2.8 of the standard. Counsel submitted that this clause requires that the summary be a “subset” of what is in the body of the Inspection Report and that it should include certain things, such as recommended further inspections. Regrettably, there were no such recommendations in the Inspection Report. In that regard, in my view it is clear, the requirement of the standard is breached.⁸⁵⁵
530. In submissions that appear to be germane to statements 4 and 5 in appendix A of the plaintiff’s written submissions, counsel for the plaintiffs also took me to appendix C of the standard. This particular appendix deals with fungal decay of timber. In particular, counsel referred me to section C4 of the appendix, which counsel submitted demonstrated the “central importance” of moisture in the subfloor as it creates conditions for fungi such as the brown rot fungi and termites.⁸⁵⁶ Again, I emphasise that, the question of moisture and conditions for termites is important in this case.

⁸⁵⁰ Ewart report page 64, Transcript, day 5, page 472 [23]-[40] 473 [1]-[3]

⁸⁵¹ Transcript, Day 5, page 466 [40]-[47].

⁸⁵² Transcript, Day 5, page 467 [1]-[2]

⁸⁵³ Transcript, Day 5, page 466 [45]-[47].

⁸⁵⁴ Transcript, Day 5, page 469 [7]- [7].

⁸⁵⁵ Transcript, Day 5, page 468-70.

⁸⁵⁶ Transcript, page 471 [15]-[21]; The standard itself can be found in CB page 160, at the bottom of the page.

531. Related to statements 4 and 5 of the appendix A of the plaintiff's written submissions, counsel for the plaintiffs underlined that section 7.2 of appendix C of the standard noted that the moisture content of timber should be checked in all areas that are perceived to be damp or where ventilation was considered inadequate.⁸⁵⁷
532. Counsel for the plaintiffs referred the Court to specific portions of the Inspection Report during the hearing and made submissions in relation to the statements and breach identified in appendix A of the plaintiff's written submissions. Significantly, counsel for the plaintiffs correctly submitted, in my view, that in so far as the Inspection Report's summary refers to a detailed report, page 16 of the Inspection Report, is that detailed report in its entirety, in so far as it relates to the timber pest report.⁸⁵⁸
533. In final submissions, counsel for the plaintiffs emphasised the Clarke report. I have previously reproduced the relevant portions of Mr Clarke's report above at [330]-[360]. It is, in this case pivotal, to repeat, in summary form, the expert opinion of Mr Clarke regarding the sections of the Inspection Report that he considered to be deficient.⁸⁵⁹
- (a) The second defendant did not recommend any further investigation of the evidence found. In Mr Clarke's view, any competent inspector would know that when evidence of termites is found to the foundation walls, damage will exist to the structure. The Inspection Report should have warned of this risk, and recommended further investigations as per cl 4.2.6 of the AS 4349.3-2010.⁸⁶⁰ I agree. I accept the expert opinion of Mr Clarke. The Inspection Report of the defendants should have recommended further investigations. The importance of a recommendation for further investigation is critical in this case.
 - (b) The Inspection Report did not reveal the condition of the property. The Inspection Report glossed over evidence of termites and concluded that the evidence of termites was old. The Inspection Report had, in Mr Clarke's view, failed in every way to provide the advice the plaintiffs required to avoid the situation that they now found themselves. I agree. I accept unreservedly the expert opinion of Mr Clarke in this regard.
 - (c) The conclusion that no treatment was required was "clearly... poorly considered". I agree. Again, I accept unreservedly the expert opinion of Mr Clarke in this regard.

⁸⁵⁷ Transcript, Day 5, page 472 [16]-[19], CB page 164.

⁸⁵⁸ Transcript, Day 5, page 477 [44]-[45].

⁸⁵⁹ Transcript, Day 4, page 354 [31]-[34].

⁸⁶⁰ Clarke Report [12.5.2.]

- (d) The Inspection Report did not specifically indicate conditions conducive to termite attack, including in relation to paving.
- (e) The Inspection Report did not outline the risk associated with lack of any termite shielding or ant capping to the subfloor.
- (f) The Inspection Report did not advise the reader of the Inspection Report of the added risks provided by the nature of the construction of the property, such as the low clearance in the subfloor.
- (g) The Inspection Report did not describe the risk of any undetected termite activity as required by AS 4349.3-2010.
- (h) The Inspection Report did not identify “bridging of any inspection zone” by attachments not having the “correct distance off”.

534. The most glaring deficiency in my view, was that the Inspection Report did not, in clear terms, recommend further investigation. Counsel in particular noted Mr Clarke’s recommendations for further tests⁸⁶¹ and that these additional tests that any competent inspector exercising reasonable care and skill would advise include, thermal imaging, or a “movement detecting device called Termatrack”.⁸⁶² I note that Mr Clarke additionally suggested Detection Dogs but Dr Ewart was not persuaded of that additional matter as discussed below.

535. I pause at this juncture to note that, with respect to the suggestion of Mr Clarke concerning detection dogs, Dr Ewart was of the view that it was not a tool he would have expected the second defendant to use in the inspection (see above at [311]). Further, I accept the evidence of Dr Ewart in this regard. I note this was the only matter of variance of significance as between the evidence of Dr Ewart and Mr Clarke and does not, in my view, detract in the cogency of the evidence of either expert.

536. Counsel for the plaintiffs properly placed emphasis on Mr Clarke’s expert view that any competent inspector would have recommended an extent of damage investigation be carried out including to concealed timbers in the house following discovery of evidence of termites.⁸⁶³ This, in my view, is a critical matter in the resolution of the issues in this case.

⁸⁶¹ Transcript, Day 5, page 491 [30]-[32]; see, eg, [12.6.8]- [12.6.9] in CB page 96.

⁸⁶² Clarke Report at [12.6.11]

⁸⁶³ Clarke Report at [12.6.12] at Transcript, page 492 [16]-[19].

537. In conclusion, as stated earlier, I am satisfied that the Inspection Report was prepared without the exercise of reasonable skill and care under s 19 of the *CL(SRP) Act*.

538. Counsel for the first defendant cavilled⁸⁶⁴ with the plaintiffs' submissions as to what representations were made in the Inspection Report. I have reproduced the defendants' response to appendix A earlier at [78] of my reasons. In particular, counsel for the first defendant submitted that this Court could conclude on the basis of their response that the Inspection Report did not:

- (a) Represent that there were no live termites in the property.
- (b) Fail to warn that live termite could be present in concealed areas that the inspector could not inspect.
- (c) Fail to warn that even if infestation was in the past, damage must have existed in concealed areas.

539. The fundamental problem, in my view, with this submission of the first defendant is that it does not grapple to any substantial extent with the evidence of the experts Dr Ewart and Mr Clarke.

540. Notwithstanding these submissions by the first defendant, it is significant that the defendants' expert, Mr Broadhurst, considered that a further investigation of the property was warranted.⁸⁶⁵ I have reproduced this opinion at [409]-[443].⁸⁶⁶ Both experts called by the plaintiffs, Mr Clarke and Dr Ewart, expressed the view, which I accept, that the second defendant had made an inadequate investigation as to the existence of damage.⁸⁶⁷ Counsel for the plaintiffs correctly submitted that Mr Clarke's and Dr Ewart's expert evidence was that:

- (a) **It is unlikely for an inspector to see live termites**, and that the sight of shelter mud tubes and other signs seen by the second defendant should have been enough for the second defendant to "raise the warning" about the requirement for further investigations.⁸⁶⁸ This is a critical matter, in my view, on the clear evidence in this case.
- (b) The sighting of a **non-active shelter tubes does not necessarily mean no infestation**. Again, this is critical, in my view, on the evidence in this case.

⁸⁶⁴ FDWS at [29]-[30].

⁸⁶⁵ Transcript, day 5, page 562 [29]-[33].

⁸⁶⁶ See Broadhurst Report page 3 Q4[e]-[f].

⁸⁶⁷ Transcript, day 5, page 562 [35]-[36].

⁸⁶⁸ Transcript, day 5, page 562 [35]-[40].

- (c) Mr Maher in any event agreed that he did not access the entirety of the subfloor, and this meant **he ought to have taken the step of suggesting further investigations.**⁸⁶⁹ Again this is critical on the evidence, in my view, in this case.

(Emphasis added by this Court.)

541. I underline that cl 2.3.1 of AS 4349.3 – 2010 required that a pre-purchase pest inspection be undertaken in accordance with the standard. Additionally, reg 10 of the *CL(SRP) Regulations* required such compliance.⁸⁷⁰
542. Counsel for the first defendant submitted that the plaintiffs' statement of claim and ASOC originally proceeded almost entirely on the basis that it was in the preparation of the Inspection Report, not in the conduct of the inspection itself, that the defendants engaged in any breach or wrong.⁸⁷¹ The only exception was the allegation that no sounding of exposed timbers took place, although counsel for the first defendant noted the evidence by Mr Maher that he did sound exposed timbers in the parts of the subfloor that he was able to and did access.⁸⁷² As such, counsel for the first defendant submitted that this case turns on the information contained within the Inspection Report and not the inspection itself.⁸⁷³ At the hearing, counsel for the second defendant also made a similar submission.⁸⁷⁴
543. I do not accept that submission. The Inspection Report is a report of the inspection. The submission therefore posits a distinction without a difference. The submission, in my view, is a spurious submission. It is a submission without any forensic foundation.
544. Further, counsel for the first defendant submitted that, in so far as the Inspection Report provided an opinion, such as when the Inspection Report noted the overall degree of risk is moderate to high in page 16, the Inspection Report did no more than state the fact that such opinions were held (as long as the opinions were honestly held): *Global Sportsman Pty Ltd v Mirror Newspapers* (1984) 2 FCR 82 at 88; *Johnson & Johnson Pacific Pty Ltd v Unilever Australia (No 2)* [2006] FCA 1646 at [177]; *Hatt v Magro* [2007] WASCA 124; 34 WAR 256 at [33]. As an example of an opinion, counsel gave the example of the statement that "it is our opinion that the overall degree of risk of timber pest infestation to the property is MODERATE to HIGH" given in the Inspection Report.⁸⁷⁵ I do not accept this submission. This submission simply

⁸⁶⁹ Transcript, day 5, page 562 [35]-[40]

⁸⁷⁰ Transcript, day 5, page 563 [7]-[13].

⁸⁷¹ FDWS at [37]-[38].

⁸⁷² FDWS at [37], citing Transcript.

⁸⁷³ FDWS at [37], [39]. \

⁸⁷⁴ Transcript, Day 5, page 521 [40]-[45].

⁸⁷⁵ FDWS at [25].

does not grapple with the expert evidence of Mr Clarke and Dr Ewart as to the deficiencies of the Inspection Report.

545. Essentially, counsel for the first defendant characterised the plaintiffs' claims in negligence as being that the information which the plaintiffs took from the Inspection Report was different to what it actually said, either in isolation or as a whole.⁸⁷⁶ Counsel submitted that this is to be addressed by misleading or deceptive conduct, and not duty of care. A duty of care does not, in counsel's submissions, include a "duty not to engage in misleading and deceptive conduct" such an analysis conflates wrongs.⁸⁷⁷ This submission of the first defendant does not assist the Court. This submission is something of a *reductio ad absurdum*; it follows a false premise to an extreme conclusion positing conflating wrongs. The submission, in my view, is wrong.
546. In any case, it was submitted that it was not foreseeable under s 43 of the *Wrongs Act* that the plaintiffs would read the Inspection Report in the "selective" manner as the plaintiffs supposedly did in "such a serious transaction". I do not accept, on the evidence before me, that the plaintiffs read the Inspection Report in a selective manner.
547. Nor was it foreseeable, in counsel's submissions, that having read the disclaimers and qualifying information the plaintiffs would have disregarded them because they were disclaimers which the plaintiffs did not consider applied to them.⁸⁷⁸ A risk that a prospective purchaser would have read the Inspection Report in that manner, was submitted to be insignificant, and as such a reasonable person in the defendants' position would have done no more than what was already done in preparing the Inspection Report.⁸⁷⁹ Again, this submission ignores the evidence of the experts. I accept the evidence of the plaintiffs' experts concerning this matter.
548. Counsel for the first defendant also referred to the second defendant's written submissions in so far as it identifies limitations of an inspection report compared to a report detailing treatment and remedial action.⁸⁸⁰ Counsel noted that the latter category of care and skill cannot be said to arise from the scope of contract in this case.⁸⁸¹ Again, this submission does not grapple with the expert evidence of Dr Ewart

⁸⁷⁶ FDWS at [26].

⁸⁷⁷ FDWS at [26].

⁸⁷⁸ FDWS at [26].

⁸⁷⁹ FDWS at [27].

⁸⁸⁰ FDWS at [28].

⁸⁸¹ FDWS at [29].

and Mr Clarke. The submission proceeds by way of assertion, in my view, without a forensic foundation in the evidence.

549. Counsel for the first defendant made submissions as to who “prepared” the Inspection Report for the purpose of s 19(2) of the *CL(SRP) Act*.⁸⁸² I note that this is of significance as only those who prepared the Inspection Report are liable to compensate any loss or expense incurred for a breach of s 19(1)(c).
550. Counsel for the first defendant noted that “persons” may refer to a corporation as well as an individual: *Legislation Act 2001* (ACT) s 60. While conceding that this is likely to be a question of fact to be determined in each case, counsel for the first defendant submitted that it cannot be that every contributor to a report is a person who has “prepared the report”.⁸⁸³
551. In this case, counsel for the first defendant submitted that it was the first defendant who was the relevant person.⁸⁸⁴ Counsel referred to the following evidence:
- (a) Mr Maher conducted the inspection and contributed to the Inspection Report by entering the details of the inspection, in the capacity of being an employee of the first defendant.
 - (b) Mr Maher relied heavily on a “pre-built” or template which the first defendant required him to use.
 - (c) Mr Maher signed the Inspection Report on behalf of the first defendant.
 - (d) After Mr Maher has signed the Inspection Report, a proofing team from the first defendant reviewed the Inspection Report and may have made alterations to it.
 - (e) The content of the Inspection Report was overwhelmingly prepared by the first defendant.
552. As such, counsel for the first defendant submitted that it is only the first defendant who is liable to compensate the plaintiffs.⁸⁸⁵ Counsel noted that the plaintiffs have not provided an authority to the effect that an employee of a company supplying a report

⁸⁸² FDWS at [32]. I note that the next several paragraphs could be discussed under breach or causation. If the submissions were made good that the second defendant was not liable to compensate under s 19(2), a finding of breach on his part is moot in any event.

⁸⁸³ FDWS at [32]-[33].

⁸⁸⁴ FDWS at [34].

⁸⁸⁵ FDWS at [35].

is “necessarily” a person who prepared the report by merely contributing to a report which is adjusted and published later by the company.⁸⁸⁶

553. For his part, counsel for the plaintiffs submitted in reply that both defendants were the entities who “prepared” the Inspection Report for the purposes of s 19(2) of the *CL(SRP) Act*. Counsel noted that the evidence was that the second defendant inspected the property and the second defendant was also a director of the first defendant. The Inspection Report also went through the first defendant’s proofing system was issued by the first defendant without the second defendant seeing it again.⁸⁸⁷ I accept the submissions that both defendants were entities who prepared the Inspection Report for the purposes of 19(2). So much is clear from the evidence and my acceptance of the foregoing plaintiffs’ submissions

554. At any rate, counsel for the plaintiffs submitted that whether the second defendant was the one that “prepared” the Inspection Report did not matter in terms of the outcome of this case.⁸⁸⁸ Counsel submitted that there was an admission in the defendants’ pleadings that the second defendant was involved in the first defendant’s misleading conduct, if such a finding is made out.⁸⁸⁹ As such, the second defendant would regardless still be liable as an accessory for misleading or deceptive conduct given that he is a director of the first defendant.⁸⁹⁰ As will be seen in the next section, however, counsel for the first defendant cavilled with the characterisation of this “concession” in the pleadings.

555. Returning to the first defendant’s submissions, counsel for the first defendants relatedly submitted that the case against the second defendant was “artificial”, in the sense that the plaintiffs supposedly constructed a distinction between the “standard” text of the report against “non-standard” information inputted by the second defendant.⁸⁹¹ Counsel submitted that it was standard industry practice for pest inspection reports to be prepared using templates as opposed to “unique text” for every individual property.⁸⁹² Counsel for the first defendant noted that the defendants’ expert, Mr Broadhurst, did not appear to understand the significance of a “summary”

⁸⁸⁶ FDWS at [36].

⁸⁸⁷ Transcript, Day 5, page 454 [20]-[38].

⁸⁸⁸ Transcript, page 454-5.

⁸⁸⁹ Transcript, page 455 [1]-[8].

⁸⁹⁰ Transcript, page 455 [10]-[20].

⁸⁹¹ FDWS at [41]

⁸⁹² FDWS at [42].

as distinct from the rest of the Inspection Report.⁸⁹³ I have previously commented, in this judgment, on the unsatisfactory nature of this aspect of Mr Broadhurst's evidence.

556. I pause to interpolate that the pinpoints⁸⁹⁴ to Dr Ewart's oral evidence provided by the first defendant do not appear, in my view, to support the first defendants' latter submission.

557. Counsel for the first defendant submitted that it was artificial to submit that the second defendant had committed a wrong by contributing to a report – as an employee – using a pre-set system and templates set by the first defendant that did not “significantly depart from general industry practice”. As such, in counsel's submission, the second defendant committed no wrong given his lack of control in such matters in making the contribution to the Inspection Report.⁸⁹⁵ In any event, I note, that it was conceded by both defendants that the first defendant published the report, and that the first defendant pleaded that the second defendant was indemnified by the first defendant; see paragraphs [12]-[13] of this judgment.

558. Counsel for the second defendant first noted that due to the alleged breaches in appendix A not being raised with the second defendant in cross-examination, the Court should “exercise a high degree of a caution” before making any findings that impugn the second defendant's degree of care and skill exercised in connection with the Inspection Report.⁸⁹⁶ I note that this matter is discussed and dealt with earlier in this judgment at paragraphs [277]-[282].

559. As previously foreshadowed, counsel for the second defendant referred to the evidence of Dr Ewart in cross-examination, reproduced above at [319], that “[w]e mustn't ask too much of the inspector”. In counsel's submission, Mr Clarke had done so; Mr Clarke was submitted to have held the second defendant to a standard of care exceeding the standard of care of a reasonable person in the second defendant's position.⁸⁹⁷ It is clear from my judgment and it is a matter I underline, that I reject the proposition that the expert Mr Clarke had held the second defendant to a standard of care, exceeding the standard of care of a reasonable person in the second defendant's position.

⁸⁹³ FDWS at [42].

⁸⁹⁴ Counsel for the first defendant referred to page 296 of the transcript. In this page, Dr Ewart was being cross-examined on the Australian Pest Managers Association and his relationship with Mr Clarke.

⁸⁹⁵ FDWS at [43].

⁸⁹⁶ SDWS at [2.5].

⁸⁹⁷ SDWS at [2.7].

560. Further, counsel for the second defendant submitted that AS 4349.3 did not require a pest inspection report to contain recommendations for remedial work. Counsel submitted that the only recommendations required by cl 4.2.6 of AS 4349.3 is for further inspection, and that a pest inspection report is not obliged to contain recommendations to remove conducive environments for pests. Counsel also submitted that AS4349.3 requires an inspection report to contain observations of elevated moisture content only. As such, in counsel's submissions, the Inspection Report actually went beyond the requirement of AS 4349.3 in making recommendations for remedial work.⁸⁹⁸ In my view, the critical aspect here is that a further inspection was not recommended. A further inspection should have been recommended as underlined in the evidence of both Dr Ewart and Mr Clarke.
561. At the hearing, counsel for the second defendant also referred to cl 2.2 of AS 4349.3, which noted that the purpose of the inspection is to provide advice "within the agreed scope". Counsel submitted that this case is unlike *Rogers* in that there was not a general duty for the second defendant to advise within his expertise. Rather, there was a "very precise" scope of agreement.⁸⁹⁹ Yet again, this submission does not grapple with the expert evidence of Dr Ewart and Mr Clarke. I have accepted the evidence of these two acknowledged experts in this regard.
562. In any case, counsel the second defendant also submitted that Dr Ewart has failed to follow his own "sensible" suggestions.⁹⁰⁰ As an example, counsel highlighted Dr Ewart's view in his first report that the Inspection Report "did not properly address the risks at the property", and that he "would have expected greater detail of explanation of the importance and weight to be placed on the factors which contributed to the susceptibility including the presence of shelter tubes, poor ventilation, raised soil levels, concealed access paths and evidence of prior chemical reapplication". Counsel for the second defendant submitted that the AS 4349.3 does not require an inspector to provide a "great detail of explanation" about those matters.
563. Further, counsel for the second defendant submitted that AS 4349.3 merely requires, with respect to the reporting of "risk", that a report "include an opinion from the inspector regarding the susceptibility of the subject property to sustaining damage from timber pests." Counsel submitted that the second defendant have done so by expressing the opinion that there was a "moderate to high" risk of timber pest

⁸⁹⁸ SDWS at [2.6] (g).

⁸⁹⁹ Transcript, Day 5, page 520 [4]-[10].

⁹⁰⁰ FDWS at [2.10].

infestation to the property.⁹⁰¹ In my view, it is clear on the evidence of both the experts Dr Ewart and Mr Clarke that what the second defendant had written was not enough.

564. Counsel for the second defendant submitted that the second defendant had actually provided considerable reference to and discussion of the factors relevant to understanding the second defendant's opinion on susceptibility. Counsel for the second defendant in particular highlighted the following:

- (a) The second defendant discussed potential problems in the sub-floor, including elevated humidity level.
- (b) The second defendant made an explicit reference to the existence of shelter tubes.
- (c) The second defendant recommended "remedial action".
- (d) The second defendant "specifically drew" the reader's attention to what he considered to be evidence of termite damage in fences and tree stump.

565. As such, counsel for the second defendant submitted that the second defendant did provide "considerable reference to and discussion of the factors" relevant to his opinion on the property's susceptibility. Counsel also noted the last seven lines contained in the "Important Information" in page 25 of the Inspection Report.⁹⁰² Counsel submitted that Dr Ewart has, by not recognising this, fallen into error by asking too much of the second defendant. In my view, this submission fails on the expert evidence of Mr Clarke and Dr Ewart on this point. The standard requires a summary to make it clear what the report recommends with regard to the specific property. General disclaimers at the back of the Inspection Report cannot answer the point.

566. Further, counsel for the second defendant submitted that the assertion from Dr Ewart that the Inspection Report "failed to warn of the likely presence of extensive concealed damage and its consequence" should not be accepted. The Inspection Report was said to have contained "very clear warning" to assume that there may be concealed structural damage if evidence of timber pest is reported in page 25 of the Inspection Report.⁹⁰³ Indeed, counsel noted that Dr Ewart was said to have conceded in cross-examination that the Inspection Report did contain such a warning", although Dr Ewart

⁹⁰¹ SDWS at [2.11].

⁹⁰² SDWS at [2.12].

⁹⁰³ SDWS at [2.13]

described the warning as “fine print”.⁹⁰⁴ The assertion from Dr Ewart of the Inspection Report’s failure in this regard was also submitted to be “inconsistent” with his evidence that “the inspector [is not] expected to understand” the extent or full amount of the damage. It was submitted that the second defendant could not be expected to have warned of presence of extensive concealed damage without performing an invasive inspection, an inspection of the entire sub-floor, and without having seen any such damage.⁹⁰⁵

567. It is instructive to reproduce the relevant answer by Dr Ewart regarding “the fine print” proposition, for this matter should be placed in context:

MR SCHOFIELD: Yes, but you do accept that [a statement in page 25 on concealed damage] in the report, don't you?

DR EWART: **It is in the report**, but it is **not in the report in a manner which is pertinent or useful to the client**. There is a lot of stuff in all those little **fine print bits**, **but it doesn't mean that it's understood by the purchaser**.⁹⁰⁶

(emphasis added)

568. The answer from Dr Ewart which I accept, answers this point.
569. Similarly, counsel for the second defendant submitted that AS 4349.3 also did not require a report to note undetected damage or to warn of the presence of concealed damage and consequences. Counsel submitted that all the standard requires was for the report to report on damages actually detected, which the second defendant was submitted to have done by reporting the damages in the tree stumps and fences.⁹⁰⁷ Counsel submitted that the second defendant did not detect any such damage to the structure of the house (ie. subfloors) and it was not put to the second defendant in cross-examination that he should have, and failed to do so.⁹⁰⁸ Again, Dr Ewart was said to have asked too much of the second defendant in this regard. Again, this submission does not accord with the evidence given by Dr Ewart.
570. Counsel for the second defendant also characterised that nothing in AS 4349.3 obliged a report to recommend further invasive inspection where evidence of past termites were observed by the inspector. Counsel noted that the terms of cl 4.2.6 of

⁹⁰⁴ SDWS at [2.13].

⁹⁰⁵ SDWS at [2.13].

⁹⁰⁶ Transcript, day 3, page 295 [24]-[28].

⁹⁰⁷ SDWS at [2.14].

⁹⁰⁸ SDWS at [2.13].

AS4349.3 suggested that such a recommendation should only be made “where infestation is suspected”. The second defendant did not so suspect, but nevertheless still made recommendations to obtain such an invasive inspection in the Inspection Report. As such, counsel submitted that the second defendant actually again went beyond the requirement of the standard.⁹⁰⁹ This submission, in my view, is an assertion not properly based on the evidence.

571. Counsel for the second defendant also noted that Dr Ewart gave evidence that he found no evidence to suggest an active infestation that would necessarily been apparent to the second defendant in areas of the property he was expected to reach under AS 4349.3 -2010⁹¹⁰ Counsel for the second defendant submitted that it is not the plaintiffs’ suggestion that this Court should reach a contrary conclusion.⁹¹¹
572. Again, however, context is important. The opinion that Dr Ewart maintained (in full) at [6.1] of the Ewart Report was:

I consider it highly likely that the property had active termite infestation on 18 October 2019 but have found no evidence to suggest that evidence of active infestation would necessarily have been apparent to [the second defendant] in areas of the property which, under AS4349, he was expected to reach.

(emphasis added)

573. I also note the following nuanced evidence of Dr Ewart regarding what evidence may be observable during the inspection. In my view, it is important to understand Dr Ewart’s evidence in the context of the nature of a pre-purchase inspection. The submissions of the defendant simply do not grapple properly with this evidence:

This is a very difficult one [whether Dr Ewart changed his opinion on that there was no evidence to suggest the evidence of active infestation would have been visible to the second defendant in light of further materials] .I apologise to the court that I haven't managed to go through it all but, for example, the picture of the shelter tube [Image 16] we had **was reachable by crawling through the subfloor and passing the flexible duct. Now, the inspector may argue that the presence of the duct was sufficient to stop them crawling that far and seeing the obvious shelter tube, so that becomes a bit of an issue.** But the inspector did refer to other signs of termites and past damage, so on that basis, yes, I'm – I'm quite happy with my opinion.

...

[W]e can't know for sure that they were active on any day unless we saw them face to face, but in a prepurchase inspection, the inspector is very limited. They can't find a shelter tube and open it. They can't poke a hole in the wall. **They can look for things. They can use**

⁹⁰⁹ SDWS at [2.16].

⁹¹⁰ SDWS at [2.15].

⁹¹¹ SDWS at [2.15]

their moisture meter. They might pull out the termite radar. But it's very rare for them to actually see a termite.

(emphasis added)

574. Counsel for the second defendant's ultimate submission was that this Court should be reluctant to conclude that the second defendant's warning could have been different or any stronger. The second defendant, counsel submitted, simply did not observe any live termites. The shelter tubes that were observed by the second defendant appeared to be old and broken, and the second defendant did not observe damage to the property's timber structure. As such, it was reasonable for the second defendant to make no *specific* recommendations for further invasive inspection.⁹¹² I disagree. In this regard, I accept the evidence of the plaintiffs' experts.
575. At the hearing, counsel for the second defendant and counsel for the first defendant submitted their understanding of the plaintiffs' case was not that there were deficiencies with the conduct of the inspection itself as opposed the preparation of the Inspection Report. As such, counsel elected not to discuss section 3 of AS4349.3.⁹¹³ I pause to note that section 3 of AS4349.3 – 2010 contained what in my view is important information as to what is expected of an inspector in performing their timber pest inspections. This should not be glossed over.
576. At any rate, counsel for the second defendants further added in oral submissions that there was "no problem whatsoever" in the Inspection Report.⁹¹⁴ This submission, in my view, is clearly wrong on the evidence of the experts Dr Ewart and Mr Clarke.
577. In this vein, Counsel for the second defendant first specifically took me to the cl 4.2 of the AS4349.3 – 2010 regarding what an Inspection Report should contain. Aside from standards which are in his submission inapplicable, counsel for the second defendant noted that the Inspection Report has satisfied the standards, including relevantly:
- (a) Clause 4.2.3 does not arise in this case as there was no suggestion in the Inspection Report that there was exclusion from agreed areas of inspection.⁹¹⁵
 - (b) In relation to cl 4.2.4, the Inspection Report complied "to some extent" to the requirement when timber pests are detected as the Inspection Report referred to termites. While the Inspection Report did not identify the termite using any

⁹¹² FDWS at [2.15].

⁹¹³ Transcript, day 5, page 521 [40]-[45].

⁹¹⁴ Transcript, Day 5, page 528 [45]-[47]

⁹¹⁵ Transcript, Day 5, page 522 [29]-[31].

specific or scientific term, the second defendant was incapable of doing that as he did not see any live termites.⁹¹⁶

- (c) The Inspection Report described evidence of termite attack (such as shelter tubes) and past timber pest treatment, at least as far as the second defendant is aware, in accordance with cl 4.2.4.⁹¹⁷
- (d) The Inspection Report identified damage apparently caused by timber pests whether or not the inspector considered the pest to be active at the time of inspection in pages 10-11 and 16 of the Inspection Report, as required by cl 4.2.4.⁹¹⁸
- (e) As per cl 4.2.4, the Inspection Report was also submitted to have recorded elevated moisture content. Counsel noted that the Inspection Report in page 10 stated “some surface moisture present at the time of inspection” and should be monitored. The Inspection Report was also said to have recommended remedial actions⁹¹⁹ and noted that elevated humidity levels contribute to creating a conducive environment to timber pest infestation.⁹²⁰

578. Relatedly, counsel for the second defendant in his submissions further noted the reference to “recommendations” in cl 4.2.6 relates to further inspection, including potentially inspections of inaccessible areas or invasive inspections where infestation is suspected. As the Inspection Report did not suspect infestation, counsel submitted that there was no obligation on the second defendant to suggest an invasive inspection. In other words, the second defendant simply did not form the opinion that further inspection was warranted.⁹²¹ Similarly, the second defendant was submitted to have not recommend an inspection by a building inspector or engineer as they did not form an opinion that serious damage is present; the second defendant only seeing previous evidence of termites.⁹²²

579. Further, counsel for the second defendant also submitted that the Inspection Report had included recommendations for frequency of further inspections (cl 4.2.6), by including the text at the bottom of page 17 of the Report.⁹²³

⁹¹⁶ Transcript, Day 5, page 522 [41]-[46]; 523.

⁹¹⁷ Transcript, Day 5, page 523 [5]-[11].

⁹¹⁸ Transcript, Day 5, page 523 [14]-[20].

⁹¹⁹ Transcript, Day 5, page 523 [41]-[45].

⁹²⁰ Transcript Day 5, page 524 [1]-[4].

⁹²¹ Transcript, Day 5, page 525 [10]-[11].

⁹²² Transcript, day 5, page 557 [19]-[22].

⁹²³ Transcript, day 5, page 524 [45]-[47].

580. In so far as the Inspection Report recommended further inspection where there is evidence of timber pest activity, counsel for the second defendant noted it is a good recommendation made to all who received a report from the defendants. The recommendation was good as, in counsel's submission, the Inspection Report makes clear that there was no way the second defendant could know the extent of the damage as he did not perform an invasive inspection.⁹²⁴
581. Further, counsel for the second defendant also submitted that the Inspection Report met what is required by cl 4.2.7 of the AS4349.3 – 2010.⁹²⁵ Counsel in particular noted that the standard gave an example of the *opinion* of the inspector regarding the *presence* of timber pests, not the likelihood or even whether or not timber pests were in the property. Counsel noted that the scope of the agreement between the first defendant and the vendor was not for the first defendant to determine the presence of pests. Nor is it something the inspector can do.⁹²⁶ All the defendants were required to do, in counsel's submission, was to look at the accessible areas of the property and provide opinions which was relevant to timber pests.⁹²⁷ Counsel submitted that the plaintiffs were putting forward an obligation which went far beyond what AS4349.3-2010 required the defendants to do.⁹²⁸ Again, the submission set out in paragraphs [575]-[580] are at the level of assertion without responding in terms to the clear expert evidence on the inadequacy of the Inspection Report insofar as the Inspection Report concerned termites.
582. In relation to the reference in cl 4.2.7 as to the extent to which further inspection would improve reliability of inspection outcomes, counsel for the second defendant submitted that the warning in page 25 to assume the possibility of further structural damage where timber pest evidence is reported (and a strong recommendation to obtain an invasive timber inspection) meets this clause.⁹²⁹ Counsel noted that it was perfectly justified that this does not appear in page 16 of the Inspection Report instead, as it is type of a recommendation that would "apply to anyone" and no active timber pest infestation was observed in the property.⁹³⁰ I do not accept this submission. I prefer the expert evidence of the experts Dr Ewart and Mr Clarke on this point.

⁹²⁴ Transcript, Day 5, page 525 [19]-[29].

⁹²⁵ Transcript, Day 5, page 526 [1]-[5].

⁹²⁶ Transcript, Day 5, page 525 [31]-[45].

⁹²⁷ Transcript, day 5, page 526 [1]-[5].

⁹²⁸ Transcript, day 5, page 526 [5].

⁹²⁹ Transcript, day 5, page 526 [22]-[25].

⁹³⁰ Transcript, day 5, page 526 [30]-[38]. See also Transcript, page 527 [26]-[28].

583. I interpolate at this stage to note that, later in closing submissions, counsel for the first defendant submitted that they seek to correct the second defendant's submissions in so far as it may suggest that pages 24 and 25 of the Inspection Report are "specific" to the property. Rather, counsel for the first defendant submitted that the defendants are saying that the Inspection Report should be read as a whole, and that the warning and the risks contained in the Inspection Report are linked "very directly".⁹³¹ I find this submission to be somewhat perplexing, as I did not understand counsel for the second defendant to have necessarily submitted what counsel for the first defendant contended for.
584. With respect to the "summary" in the Inspection Report, counsel for the second defendant submitted,⁹³² that the section contained all the requirements of cl 4.2.4, 4.2.6 and 4.2.7. Counsel also submitted that there were relevant references in the body of the Inspection Report in a more detailed section dealing with specific inspections or parts of the property.⁹³³ I do not accept this submission as it does not accord with my review of the Inspection Report and nor does it accord with the evidence of the plaintiffs' experts.
585. With respect to the cl 4.2.8(c), counsel for the second defendant submitted that this clause does not oblige an inspector to recommend that further investigations be performed to determine extent of damage. However, the recommendation contained in page 25 of the Inspection Report was such a recommendation; one that was not technically required by the standard.⁹³⁴ As such, while the "summary" in page 16 does not recommend further inspection, this is in compliance with AS 4349.3 – 2020 as, at the time the Inspection Report was written, it was not apprehended that there was a current infestation.⁹³⁵ Again, I do not accept this submission as the evidence of the plaintiffs experts answer this assertion.
586. As for the risk rating, counsel for the second defendant submitted that the second defendant's rating of "moderate to high" was "perfectly reasonable".⁹³⁶ Counsel noted the limitations in cl 4.3.1 of the AS 4349.03 – 2010, which proscribes inspectors from expressing an opinion on the likelihood of termites in areas no inspection, and does not oblige the inspector to give an assessment on termites other than what he saw.⁹³⁷

⁹³¹ Transcript, day 5, page 544 [35]-[42].

⁹³² Transcript, Day 5, page 527 [11]-[13].

⁹³³ Transcript, Day 5, page 527 [11]-[17].

⁹³⁴ Transcript, Day 5, page 528 [37]-[39]; [43]-[46].

⁹³⁵ Transcript, Day 5, page 528 [19]-[23].

⁹³⁶ Transcript, Day 5, page 528 [40]-[41].

⁹³⁷ Transcript, Day 5, page 528 [32]-[33].

Counsel submitted that the second defendant simply did not see evidence of active infestation and cannot speculate as to what might be under the house.⁹³⁸ The second defendant can only give an opinion as to what he detected, and he did not detect extensive timber decay, live termites, or an active shelter tube. Again, this submission does not grapple with, nor answer the clear evidence of the plaintiff's expert witnesses.

587. Ultimately, counsel for the second defendant concluded by noting that it is easy with benefit of hindsight to look at the Inspection Report to determine problems with it.⁹³⁹ Counsel invited the Court to note by contrast the "good things" that the Inspection Report has done and its effect on the reader.⁹⁴⁰ Regrettably, I must conclude that the "good things" were not good enough to meet the standard required by s 19(1)(c).

The Defendants engaged in misleading or deceptive conduct under s 18 of the ACL

588. I have set out the relevant statutory provisions concerning a claim under s 18 of the ACL above at [476]-[482]. I will now turn to the consideration of the submissions.

589. As correctly referred to by the plaintiffs' counsel, the relevant elements of a claim under s 18⁹⁴¹ were relatively recently discussed by the High Court in *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* [2023] HCA 8; 277 CLR 186 (*Self Care IP*) at [80]-[83]:

80. The principles are well established. Determining whether a person has breached s 18 of the ACL involves four steps: **first, identifying with precision the "conduct"** said to contravene s 18; second, considering whether the identified conduct was conduct "in trade or commerce"; third, **considering what meaning that conduct conveyed**; and **fourth, determining whether that conduct in light of that meaning was "misleading or deceptive or ... likely to mislead or deceive"**
81. The first step requires asking: "**what is the alleged conduct?**" and "**does the evidence establish that the person engaged in the conduct?**". The third step considers what meaning that conduct **conveyed to its intended audience**... where the pleaded conduct is said to amount to a representation, it is necessary to determine whether the alleged representation is established by the evidence. The fourth step is to ask whether the **conduct in light of that meaning meets the statutory description of "misleading or deceptive or ... likely to mislead or deceive"**; that is, whether it has the tendency to lead into error. Each of those steps involves "quintessential question[s] of fact".
82. The third and fourth steps require the court to characterise, as an objective matter, the **conduct viewed as a whole and its notional effects**, judged by reference to its

⁹³⁸ Transcript, Day 5, page 528 [40]

⁹³⁹ Transcript, day 5, page 559-60.

⁹⁴⁰ Transcript, day 5, page 560 [1]-[16].

⁹⁴¹ PWS at [79].

context, on the state of mind of the relevant person or class of persons. That context includes the immediate context – relevantly, all the words in the document or other communication and the manner in which those words are conveyed, not just a word or phrase in isolation – and the broader context of the relevant surrounding facts and circumstances. It has been said that “[m]uch more often than not, the simpler the description of the conduct that is said to be misleading or deceptive or likely to be so, the easier it will be to focus upon whether that conduct has the requisite character”. That said, the description of the conduct alleged and identified at the first step should be sufficiently comprehensive to expose the complaint, because it is that conduct that will ultimately, as a whole, be determined to be or not to be misleading or deceptive.

83. Where the conduct was directed to the public or part of the public, the third and fourth steps must be undertaken by reference to the **effect or likely effect of the conduct on the ordinary and reasonable members of the relevant class of persons**. The relevant class of persons may be defined according to the nature of the conduct, by geographical distribution, age or some other common attribute, habit or interest. **It is necessary to isolate an ordinary and reasonable “representative member” (or members) of that class, to objectively attribute characteristics and knowledge to that hypothetical person (or persons), and to consider the effect or likely effect of the conduct on their state of mind. This hypothetical construct “avoids using the very ignorant or the very knowledgeable to assess effect or likely effect; it also avoids using those credited with habitual caution or exceptional carelessness; it also avoids considering the assumptions of persons which are extreme or fanciful”. The construct allows for a range of reasonable reactions to the conduct by the ordinary and reasonable member (or members) of the class.**

(emphasis added, footnotes omitted)

590. In my view, the Inspection Report in this case was misleading in the relevant sense, taking into account the four steps identified in *Self-Care IP*.

591. I accept⁹⁴² that the “relevant conduct” included representations made by the defendants in the Inspection Report (see appendix A).

592. I accept that the defendants’ conduct was in “trade and commerce”.⁹⁴³

593. Third, I agree with counsel’s submission⁹⁴⁴ that the Inspection Report represented to the plaintiffs that:

- (a) there were no active termites in the property because there was no evidence of live termites at the time of the inspection; there was only evidence of old or previous termite activity.
- (b) the risk of future infestation was “moderate to high” but also that no treatment was required.

⁹⁴² PWS at [82](a)

⁹⁴³ PWS at [82](b).

⁹⁴⁴ PWS at [82](c).

- (c) even if the risk was high, this was not intended to deter an intending purchaser, merely that increased vigilance was warranted and as such pest inspections should be undertaken every 6 to 12 months.

594. Fourth and finally, due to the matters summarised in appendix A, counsel submitted⁹⁴⁵ that the “conduct” was misleading or deceptive or likely to mislead or deceive. In summary, counsel for the plaintiffs properly submitted that the Inspection Report:

- (a) should have stated in its “Report Summary” or “Timber Pest Report” section that there was a “high or extreme risk” that the property was susceptible to timber pests.
- (b) that “evidence of past infestation meant that the house had been damaged by timber pests”.
- (c) that “an invasive inspection was required to ascertain the extent of that damage”.
- (d) should not have said that such a warning was not intended to deter an intending purchaser.
- (e) did not recommend that further investigations be carried out to determine the extent of termite activity or damage in neither the “Report Summary” or the “Timber Pest Report”. Counsel submitted that such a recommendation was “required to be contained”.⁹⁴⁶

595. In my view the Inspection Report clearly falls under the category of being “likely to mislead or deceive” because the above matters are established. All five matters in my view are established on the balance of probabilities.

596. Finally, in relation what may be termed “disclaimers” and “qualifications”, reference was properly made to the observations of Jacobson and Bennett JJ in *National Exchange Pty Ltd v Australian Securities and Investments Commission* [2004] FCAFC 50; 49 ACSR 369 (*National Exchange*) on when statements could be misleading or deceptive. I refer to relevant paragraphs below concerning the principle that qualifying material must be sufficiently prominent to prevent the primary statement from being misleading. In this case on the evidence, in my view, the primary statement was misleading in the relevant sense, in the Inspection Report:⁹⁴⁷

⁹⁴⁵ PWS at [82](d).

⁹⁴⁶ PWS at [82](d).

⁹⁴⁷ PWS at [80]-[81].

50. ... A document which, when read as a whole, is factually true and accurate may still be capable of being misleading if it **contains a potentially misleading primary statement which is corrected elsewhere in the document but without the reader's attention being adequately drawn to the correction.**
51. **The principle which applies to those cases is that the qualifying material must be sufficiently prominent or conspicuous** to prevent the primary statement from being misleading; see *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289 at [35] – [38] (per Stone J with whom Mansfield J agreed); see also J D Heydon, *Trade Practices Law*, Law Book Company Sydney 1989 at [11.730].
52. As Mason J said in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 210-211 (*"Puxu"*):
- "There may be situations where to exploit mistaken views of the public would contravene s 52 and would not be corrected by an inconspicuous accurate representation made in e.g. a concealed label or the 'fine print' of a contract."
53. [On relevant document in that case] The striking feature of the document when read as a whole is the disparity between the impression created by the primary statement... [T]he primary statement is made in bold so as to emphasise it to the reader and it is repeated and reinforced in the comparative table.
- ...
55. Where the disparity between the primary statement and the true position is great it is necessary for the maker of the statement to draw the attention of the reader to the true position in the clearest possible way.
56. An analogy is to be found in cases dealing with exemption clauses. In *Curtis v Chemical Cleaning & Dyeing Co* [1951] 1 KB 805 at 809, Denning LJ said:
- "When one party puts forward a printed form for signature, failure by him to draw attention to the existence or extent of the exemption clause may in some circumstances convey the impression that there is no exemption at all, or at any rate not so wide an exemption as that which is in fact contained in the document."
57. His Lordship's remarks in *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461 were even more pointed. His Honour said at 466:-
- "... the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."
58. A similar approach is justified by the remarks of Stone J in one of the "asterisk cases", *ACCC v Signature Security Group Pty Ltd* [2003] FCA 3; (2003) ATPR 41-908. Her Honour observed at [27] that the degree of prominence which must be given to a qualifying statement may well vary with the potential of the primary statement to be misleading and deceptive.

(emphasis added)

597. Counsel for the first defendant submitted that the plaintiffs did not properly deal with the third and fourth steps identified in *Self-Care IP*.⁹⁴⁸ I disagree. I set out the first defendant's submissions below.
598. Counsel for the first defendant submitted that where conduct was directed to a class of persons (in this case, prospective purchasers of the property), an assessment must be undertaken by reference to the effect or likely effect of the conduct on the ordinary and reasonable members of the class.⁹⁴⁹ I underline that my conclusions are drawn on the basis of the ordinary and reasonable members of the class.
599. Counsel for the first defendant submitted that the Court must then consider the effect of the defendants' conduct on the mind of the hypothetical person, in the context in which the conduct occurred. This context included all the words in the document and the manner in which those words are conveyed (not just a word or phrase in isolation), and the broader context of relevant surrounding facts and circumstances.⁹⁵⁰ I underline that I have carefully considered the context.
600. Counsel for the first defendant submitted that, in this case, the prospective purchaser of the property would have been:
- (a) significantly wealthier than the general population, and therefore the class would be small.
 - (b) would have the resources to procure legal or other advice regarding the purchase.
 - (c) although there may be more or less intelligent persons within the class, the hypothetical reasonable person representing the class would be intelligent.⁹⁵¹
601. I have taken all these matters into account. Regardless of the level of intelligence or resources, this Inspection Report was, in my view, likely to mislead or deceive.
602. Counsel for the first defendant sought to draw an analogy with the description of the relevant class in *Butcher v Lachlan Elder Realty* [2004] HCA 60; 218 CLR 592, where Gleeson CJ, Hayne and Heydon JJ at [36] noted that:

[q]uestions of allegedly misleading conduct, including questions as to what the conduct was, can be analysed from two points of view. One is employed in relation to "members of a class to which the conduct in question [is] directed in a general sense". The other, urged by the

⁹⁴⁸ FDWS at [45].

⁹⁴⁹ FDWS at [45].

⁹⁵⁰ FDWS at [49].

⁹⁵¹ FDWS at [48].

purchasers here, is employed where the objects of the conduct are “identified individuals to whom a particular misrepresentation has been made or from whom a relevant fact, circumstance or proposal was withheld”; they are considered quite apart from any class into which they fall. Adoption of the former point of view requires isolation by some criterion or criteria of a representative member of the class. **To some extent the trial judge adopted the former approach, pointing out that the class — potential home buyers for Pittwater properties in a price range exceeding \$1 million — was small (as suggested by the fact that only 100 brochures were printed), and its members could be expected to have access to legal advice.**

(emphasis added)

603. As for context, counsel for the first defendant noted that the alleged conduct occurred in connection of a sale of a “very expensive” property. Counsel submitted that this would be a very serious purchase by any measure.⁹⁵² A reasonable person in the class of purchasers would, in counsel’s submission, give “very serious thought” and review all available information before committing to the purchase. Counsel also submitted that that the reasonable person would have access to legal advice and professional advisers. With both in mind, counsel for the first defendant submitted that the reasonable person is unlikely to be misled by the defendants’ conduct.⁹⁵³ I do not accept these submissions. The reasonable person is likely to be misled, in my view, and the plaintiffs were, in fact, misled.
604. Counsel for the first defendant submitted that the defendants’ conduct is “unlikely to lead the reasonable hypothetical person of that class” into the sort of errors alleged by the plaintiffs.⁹⁵⁴ I reject that submission as patently unrealistic and inconsistent with the evidence
605. Counsel for the plaintiffs correctly characterised the “high point” for the defendants’ submissions as to why the Inspection Report is not misleading or deceptive as a reliance on passages at the start of the Inspection Report that the Inspection Report must be read as a whole, as well as the disclaimers contained in the back of the Inspection Report.⁹⁵⁵
606. It is clear, in my view that cl 4.2.8(c) of AS 4349.3 – 2010 required that any further recommendation for investigations be put in the summary of the Inspection Report. This was not done.⁹⁵⁶ The Inspection Report, in my view, was likely to mislead on the

⁹⁵² FDWS at [50].

⁹⁵³ FDWS at [50].

⁹⁵⁴ FDWS at [51]

⁹⁵⁵ Transcript, Day 5, page 498 [24]-[27].

⁹⁵⁶ Transcript, Day 5, 499-500.

balance of probabilities and did in fact mislead the plaintiffs on the balance of probabilities.

607. The obvious reason for a summary is to make tolerably clear what the Inspection Report is saying. AS 4349.3 – 2010 requires that the Inspection Report makes it clear what is in fact being recommended for the specific property in question.⁹⁵⁷
608. In relation to disclaimers, counsel for the first defendant submitted⁹⁵⁸ that disclaimers regarding conduct cannot be divorced from the conduct and other circumstances that may qualify the conduct's character: *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; 218 CLR 592 at [39] (Gleeson CJ, Hayne and Heydon JJ).
609. The first defendant did not concede that what the plaintiffs referred to as "disclaimers" were in fact disclaimers or qualifying information.⁹⁵⁹ Counsel submitted that the material that appears in the Inspection Report was substantive information and that it appeared in every report produced by the first defendant because it is "relevant for and applies to all properties" for which it is included.⁹⁶⁰ Counsel drew an analogy with warnings given in cigarette packets, which are not less substantive or applicable simply because it appears on all.⁹⁶¹ That analogy, in my view, is not apt. The submission is rejected.
610. Further, to the extent that any information are disclaimers, counsel for the first defendant submitted the reference on page three of the Inspection Report that directs the reader to read the Inspection Report in its entirety, including its scope and limitations, and that the detailed report should be relied upon over the "Key Data" section.⁹⁶² Counsel for the first defendant submitted that this statement is "sufficiently prominent" as per *National Exchange*: see also *Invisalign Australia Pty Ltd v SmileDirectClub LLC* [2023] FCA 395. In my view, contrary to this submission there was not sufficient prominence when the statement is read as a whole.
611. Additionally, counsel for the first defendant submitted his understanding of the plaintiffs' evidence was that they believed that the information the plaintiffs refer to as "disclaimers" were not applicable to their situation and as such ignored it. As such, counsel submitted that the placement of the supposed disclaimer would not have

⁹⁵⁷ Transcript, day 5, page 565-6.

⁹⁵⁸ FDWS at [54].

⁹⁵⁹ FDWS at [54].

⁹⁶⁰ FDWS at [54].

⁹⁶¹ FDWS at [54].

⁹⁶² FDWS at [55].

made any difference to the plaintiffs' decision to supposedly disregard them. I reject this submission as it does not accord with the evidence of the plaintiffs.

612. Therefore, counsel for the first defendants submitted that, even if the defendants' conduct was misleading in isolation, the sufficiently prominent and otherwise unambiguously worded disclaimers would have neutralised the conduct's effect.⁹⁶³ Again, I disagree as the submission does not accord with the evidence in the case.
613. With respect to the disclaimers, in any event, I accept the submission of counsel for the plaintiffs that the statements were not "engaged" as they were predicated with the words "if".⁹⁶⁴ That is, these disclaimers cannot be read consistently with the detail of the Inspection Report as the Inspection Report noted that there were no live termites and treatment was not necessary.⁹⁶⁵ I pause to note that this echoed the evidence given by Ms Westacott, which I have reproduced at [197].
614. In any event, counsel for the plaintiffs noted that if the defendants sought to rely on the disclaimers to negate the effect of the front of the Inspection Report, the Inspection Report remains misleading.⁹⁶⁶ I accept this submission. The Inspection Report was likely to mislead and did in fact mislead the plaintiffs. In my view, more must be done so that there is no room for misunderstanding. Counsel correctly submitted that there was a failure to make it clear to the reader, on the face of the Inspection Report, that the back of the Inspection Report applied and contradicted the front of the Inspection Report.⁹⁶⁷
615. The Inspection Report, in counsel for the second defendant's submission, does not state that there were no active termites in the property. Counsel submitted that no reasonable person would construe that the second defendant stated that he detected no live termites as representing that there were no live termites. I reject this submission as it does not deal with the evidence in a holistic form but rather in a selective fashion.
616. Counsel for the first defendant also submitted while it was accepted that the second defendant was "involved" in the first defendant's conduct, this should not imply an acceptance that the second defendant was "involved" within the meaning of the ACL.

⁹⁶³ See FDWS at [59].

⁹⁶⁴ Transcript, Day 5, page 498 [31]-[36].

⁹⁶⁵ Transcript, day 5, 498 [31]-[36].

⁹⁶⁶ Transcript, Day 5, 498 [40]-[46].

⁹⁶⁷ Transcript, day 5, page 566 [1]-[5].

617. In relation to this submission, counsel for the plaintiffs correctly and properly submitted in reply that both defendants admitted in the pleadings that the second defendant was involved in the first defendant's engagement in trade and commerce. Further, counsel for the plaintiff also noted that both defendants have conceded in their pleaded defence that they gave guarantees under the ACL.
618. Counsel for the second defendant submitted that Mr Maher "reasonably considered" that the evidence of termite activity detected was old, and it was not put to him in cross-examination that Mr Maher could or should have identified the presence of live termites. Further counsel for the second defendant referred to appendix D to AS 4349.3 – 2010 (see at [96]),⁹⁶⁸ which noted that an inspector should be able to distinguish between "old and new shelter tubes".⁹⁶⁹ Counsel again noted the second defendant's evidence was that he did see three shelter tubes / mud trails underneath the house and that they were broken.⁹⁷⁰ In these circumstances, counsel for the second defendant submitted that it was "perfectly reasonable" for the second defendant to use the word "old" was also submitted to not be consistent with a conclusion that there was an intent to mislead.⁹⁷¹ I reject this submission as yet again the submission does not in fact grapple with the evidence of the plaintiffs nor the evidence of the plaintiff's expert witnesses.
619. Ultimately, in oral submissions, counsel for the second defendant submitted that there was no misleading conduct on the part of the second defendant. The second defendant reported what he saw, and recommendations were made.⁹⁷²
620. I do not accept this submission as it runs contrary to the overwhelming expert evidence in this case which I have accepted. As to recommendations made, there should, in my view, have been a recommendation in the summary for further investigation.

The Defendants contravened the guarantees in ss 60 and 61 of the ACL

621. I have set out the relevant provisions and statutory framework for ss 60 and 61 above at [483]-[485].
622. It was not in dispute that:⁹⁷³

⁹⁶⁸ Discussion of AS4349.3-2010 begins at 84 but appendix D 96.

⁹⁶⁹ CB page 166; Ewart Report page 64 and Transcript, day 5, page 521 [32]-[34].

⁹⁷⁰ Transcript, Day 5, page 521 [31]-[34]

⁹⁷¹ Transcript, Day 5, page 521 [31]-[38]

⁹⁷² Transcript, page 560 [36]-[40].

⁹⁷³ PWS at [74], [77].

(a) the Inspection Report should be prepared with due care and skill under s 60 of the ACL.

(b) that the Inspection Report should be reasonably fit for purpose for the plaintiffs assessing the state of the property when considering whether to purchase it.

623. Counsel for the plaintiffs correctly in my view submitted that the Inspection Report was not prepared with due care and skill under s 60 of the ACL. That is for the same reasons that the Inspection Report was prepared without the exercise of reasonable skill and care under s 19 of the *CL(SRP) Act*.⁹⁷⁴ Further counsel for the plaintiffs correctly submitted that in so far a breach of a standard would lead to breach of care, a breach of a standard such as AS 4349.3 – 2010 would in turn inform the breach of s 60.⁹⁷⁵ I accept that submission.

624. Similarly, counsel for the plaintiffs submitted that the Inspection Report was not reasonably fit for purpose under s 61 of the *ACL* for the same reasons that the Inspection Report was prepared without the exercise of reasonable skill and care under s 19 of the *CL(SRP) Act*.⁹⁷⁶ Counsel correctly submitted that an Inspection Report that is not compliant with the applicable standards, or is otherwise misleading or prepared in breach of due care, would not be reasonably fit for its intended purposes under s 61 of the *ACL*.⁹⁷⁷ Consequently, the plaintiffs submitted that the defendants breached the guarantees in ss 60 and 61 of the *ACL*.⁹⁷⁸ I accept that submission.

625. I also note for completeness that the defendants did not make specific submissions as to the guarantees in ss 60 and 61 of the *ACL*. Given the nature of the plaintiffs' case in closing submissions, I interpolate that I inferred that the defendants were content to rely on their previous submissions in relation to s 19 of the *CL(SRP) Act* and, where relevant, s 18 of the *ACL* discussed above.

⁹⁷⁴ PWS at [76]

⁹⁷⁵ Transcript, Day 5, page 498 [11]-[13].

⁹⁷⁶ PWS at [77].

⁹⁷⁷ Transcript, Day 5, page 498 [17]-[20]

⁹⁷⁸ PWS at [78].

Conclusion on Breach

626. Accordingly, I am satisfied that plaintiffs have made good their claims that:

- (a) The Inspection Report was false or misleading or was prepared without reasonable care and skill, contrary to s 19 of the *CL(SRP) Act*.
- (b) The Defendants engaged in misleading or deceptive conduct, contrary to s 18 of the *ACL*.
- (c) The Defendants have breached the guarantees under ss 60 and 61 of the *ACL*.

Causation

627. As I am satisfied as to breach, the question to be determined is whether the defendants' conduct could be said to have caused the plaintiffs' loss. I am satisfied that the defendants conduct caused the plaintiffs loss for the following reasons.

628. The plaintiffs are entitled to be compensated for "any"⁹⁷⁹ loss or expense incurred by the plaintiffs "because of" the Inspection Report having been prepared without the exercise of reasonable skill or care or being false or misleading in a material particular: *CL(SRP) Act* ss 19.

629. Counsel for the plaintiffs correctly submitted⁹⁸⁰ that the tests under ss 236(1) and ss 267(4) of the *ACL* similarly entitle the plaintiffs to damages "because of" conduct that contravene ss 18, 60, 61:

236 Actions for damages

- (1) If:
 - (a) a person (the claimant) suffers loss or damage **because of** the conduct of another person; and
 - (b) the conduct contravened a provision of Chapter 2 or 3;the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

...

267 Action against suppliers of services

- (1) A consumer may take action under this section if:
 - (a) a person (the **supplier**) supplies, in trade or commerce, services to the consumer; and

⁹⁷⁹ PWS at [84].

⁹⁸⁰ PWS at [85].

- (b) a guarantee that applies to the supply under Subdivision B of Division 1 of Part 3-2 is not complied with; and
 - (c) unless the guarantee is the guarantee under section 60—the failure to comply with the guarantee did not occur only because of:
 - (i) an act, default or omission of, or a representation made by, any person other than the supplier, or an agent or employee of the supplier; or
 - (ii) a cause independent of human control that occurred after the services were supplied.
- ...
- (4) The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer **because of** the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

630. I accept counsel for the plaintiff's submission that the same principles⁹⁸¹ apply to s 19 of the *CL(SRP) Act* and ss 236(1) and 267(4) of the *ACL* given the similarities between the provisions.

631. In this regard, I note that there is a slight difference between the provisions in so far as s 267(4) also includes a further qualifier that it must be reasonably foreseeable that the plaintiffs would suffer loss or damage as a result of the defendants' failure.

632. Counsel for the plaintiffs noted that a plaintiff seeking damages⁹⁸² under s 236(1) must demonstrate the existence of a sufficient causal link between the defendants' conduct and the loss or damage the plaintiff has suffered: see, eg, *Wardley v Western Australia* (1992) 175 CLR 514 at 525 (*Wardley*). Counsel properly submitted that, "in most cases" this inquiry would involve taking on the "common law practical or commonsense causation".

633. It is also clear that the impugned cause does not have to be the sole cause; a causal connection will ordinarily exist as long as the breach contributed materially to the damage, even if the breach without more would not have brought about the damage: *Henville v Walker* [2001] HCA 52; 206 CLR 459 at [92]-[109] (*Henville*).⁹⁸³

634. In this case, counsel for the plaintiffs correctly in my view submitted that there is "plainly a sufficient" causal link between the defendants' conduct and the damages claimed by the plaintiffs.⁹⁸⁴ Counsel referred to the evidence given by Ms Shannon (see at [190]) and Ms Westacott (see at [257]) that:

⁹⁸¹ PWS at [86].

⁹⁸² PWS at [88].

⁹⁸³ See also Transcript, day 5, page 500-1.

⁹⁸⁴ PWS at [94]-[95].

- (a) they relied on the Inspection Report to purchase the property.
- (b) had they been warned that there was a high risk that the property was infested by termites, they would not have purchased the property. I note Ms Westacott's evidence would have at least arranged for a further invasive inspection in such a circumstance.
- (c) they would have arranged for an invasive inspection to be carried out had the Inspection Report made such a recommendation.

635. The question is an objective one,⁹⁸⁵ although in this case counsel noted that both plaintiffs gave evidence that they would not have bought the property.

636. Counsel for the plaintiffs also submitted⁹⁸⁶ that, in any event, direct evidence of reliance is not necessary, as any question of what the person claiming reliance would have done with information is "necessarily hypothetical and might well be regarded as carrying little weight": *Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd* (1992) 38 FCR 471 at 483 (Beaumont, Foster and Hill JJ) (*Dominelli*); *Barnes v Forty Two International Pty Ltd* [2014] FCAFC 152 at [184] (Beach J, Siopsis and Flick JJ agreeing) (*Forty Two International*).

637. Relevantly, in *Dominelli*, the managing director of the respondent was not asked, nor gave evidence, as to what his attitude would have been to an in-substance sale of stock (particularly water pumps) if he was informed of the problems faced by the appellant with the supplier: at 481-2. Specifically, the managing director did not give evidence as to whether he would have gone ahead with the transaction. After observing (at 482) that the primary judge had other materials to draw such an inference, the Full Court of the Federal Court observed that:

Although direct evidence of reliance might have been obtained by the appropriate questioning of [the managing director] we do not regard the absence of this evidence as fatal in the sense that it necessarily precludes the finding of reliance. Indeed, as the information as to the prior problems with the supplier had been withheld from [the managing director], any question as to what he would have done had it been disclosed to him, would necessarily be hypothetical. As such, the answer, in itself, might well be regarded as carrying little weight and being essentially self-serving. In this regard the case appears to be essentially different from that considered in *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389. In any event, we are satisfied that *Gould* provides clear authority for the course taken by the trial judge. We concur in the inference that he drew.

⁹⁸⁵ Transcript, day 5, page 501 [31]-[32].

⁹⁸⁶ PWS at [88].

638. Similarly, the Full Court of the Federal Court in *Forty-Two International* observed (at [184]):

Further, direct evidence of reliance was not necessary. As was said by this Court in *Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd* (1992) 38 FCR 471 at 483 per Beaumont, Foster and Hill JJ, absence of direct evidence of reliance is not fatal. Absence of such direct evidence does not necessarily preclude a finding of reliance. Moreover, any question of what [the witnesses] would have done if the information had been disclosed would necessarily be hypothetical. As was said by this Court, “[a]s such, the answer, in itself, might well be regarded as carrying little weight and being essentially self-serving”.

639. Counsel for the first defendant submitted that it must be proven on the evidence that any breaches on the part of the defendants, had they not occurred, would have identified infestation in October 2019 and actual damage.⁹⁸⁷

640. It is clear that the words “because of” in ss 236 and 267⁹⁸⁸ of the ACL should be understood as importing the common law “practical or common sense” concept of causation except insofar as it is expressly or implicitly modified or supplemented by legislation: *Wardley* at 525.⁹⁸⁹

641. The similarity of wording in s 19 of the *CL(SRP)* means that the provision can be understood on the same basis.⁹⁹⁰ In my view on the basis of proper principles of statutory construction, the language of the provision suggests that the question of causation in the case of s 19 may be assessed according to the same principles as ss 18, 60 and 236-8 of the ACL.⁹⁹¹

642. Further, counsel for the first defendant submitted⁹⁹² that s 45 of the *Wrongs Act* is relevant in determining causation in so far as it relates to the plaintiffs’ claim in negligence (eg. part of the claim relying on s 19(1) of the *CL(SRP) Act*).

45 General principles

- (1) A decision that negligence caused particular harm comprises the following elements:
 - (a) that the negligence was a necessary condition of the happening of the harm (‘factual causation’);
 - (b) that it is appropriate for the scope of the negligent person’s liability to extend to the harm so caused (the **scope of liability**).
- (2) However, if a person (the **plaintiff**) has been negligently exposed to a similar risk of harm by a number of different people (the **defendants**) and it is not possible to assign responsibility for causing the harm to 1 or more of them—

⁹⁸⁷ Transcript, Day 5, page 532 [21]-[28]

⁹⁸⁸ I note that this was listed as s 237 in the first defendant’s written submissions. While s 237 contained similar wording, in context this appears to be a typo and should read s 267, in context.

⁹⁸⁹ FDWS at [3].

⁹⁹⁰ FDWS at [3].

⁹⁹¹ FDWS at [31]. Not including s 267.

⁹⁹² FDWS at [9].

- (a) the court may continue to apply the established common law principle under which responsibility may be assigned to the defendants for causing the harm; but
 - (b) the court must consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability.
- (3) In deciding the scope of liability, the court must consider (among other relevant things) whether or not, and why, responsibility for the harm should be imposed on the negligent party

643. I pause to note that, in so far as counsel for the first defendant submitted that s 45 of the *Wrongs Act* applied, there is an apparent divergence on the part of the first defendant's submissions that the approach to causation when it comes to s 19 of the *CL(SRP) Act* is on all fours with ss 236 and 267 of the *ACL*. As the *Wrongs Act* only applies to claims for damages for harm resulting in negligence (see s 41), the *Wrongs Act* would not have applied to a claim for damages under ss 236 and 267 in so far as the claims relied on ss 18 or s 61 of the *ACL*. See, by way of comparison, *Lean v Cosmorex Coffee Pty Ltd* [2016] ACTSC 309 at [147]-[148] (Mossop AsJ).

644. Counsel for the first defendant then submitted that there were two "sub issues" in relation to the plaintiffs' argument for causation.⁹⁹³

645. First, it was submitted that the plaintiffs have not established that there was actual damage to the property or actual termite infestation as of the time of inspection by the second defendant on 18 October 2019.⁹⁹⁴

646. Counsel for the first defendant submitted that the Court should adopt a similar approach as in *Alexandrou*. I note that in *Alexandrou*, Montgomery SC DCJ found that the defendants retained to produce a pre-purchase building condition and pest inspection report were not liable in negligence under s 5B of the *CLA* or s 60 of the *ACL*: *Alexandrou* at [67], [74]. Among other things, his Honour declined to positively infer from a supposed later discovery of termite activity and damage that they would have been evident during an earlier visual inspection, so as to imply negligence on the part of the defendants: *Alexandrou* at [27], [32], [47].

647. In oral submissions, counsel for the first defendant in particular noted⁹⁹⁵ the following paragraph (at [47]) of the *Alexandrou* regarding the assumptions the NSW District

⁹⁹³ FDWS at [3]

⁹⁹⁴ FDWS at [4]. The plaintiff's amended statement of claim nominated 19 October, but the chronology, the Inspection Report and page four of the plaintiff's tender bundle nominated 18 October.

⁹⁹⁵ Transcript, day 5, page 542 [6]-[11].

Court was asked to make in that case and Montgomery DCJ's refusal to make said assumption:

47. Ultimately, the question for consideration is whether the fact of what was discovered from 25 January 2014 supports a positive inference that the presence of termites and/or termite damage was available to visual inspection on 16 December 2013 such as would imply negligence by Mr Francis, as an affirmative conclusion established to the reasonable satisfaction of a judicial mind: *Jones v Dunkell* (1959) 101 CLR 298 per Dixon CJ at 304. In my opinion, it does not.
648. Counsel for the first defendant also highlighted in written submissions what counsel submitted to be “important” similarities between this case and *Alexandrou*. Nevertheless, *Alexandrou* stands on its own facts.⁹⁹⁶
649. Concerning “a continuity of infestation”, counsel for the first defendant submitted that such a conclusion was “heavily guarded” by Dr Ewart and guarded on the part of Mr Clarke.
650. In my view, Dr Ewart’s opinion that the property had “likely suffered significant damage at the time of the inspection”⁹⁹⁷ is clear. It is based on his extensive experience. Having reviewed the entirety of the evidence and, having reviewed in particular, the cross examination of Dr Ewart on this topic, I accept this opinion.
651. As to the Dr Ewart’s lack of ability to make a “definitive statement” as to the presence of termites during the inspection day, this in my view needs to be viewed in context his expert opinion in full (at [9.8.1]). As can be seen, the opinion takes a different complexion to that asserted by the first defendant:

I am not able to make **any definitive statement** as to the presence of termites on the day of the inspection. I **would regard** it from my inspection and the reports of others when live termites were found, **to be improbable that live termites were not present** somewhere on the property.

(emphasis added)

652. In relation to the expert report of Mr Clarke, counsel for the first defendant appears to rely on Mr Clarke’s view of the Walker report. Mr Clarke was of the view that the fact that the Walker report confirmed the sighting of active termites is not an indication that termites were present in the past. Mr Clarke noted that termites may have visited and left the house many times over during the period.⁹⁹⁸ Later, Mr Clarke gave evidence that it was not possible to know what damage occurred when or what evidence

⁹⁹⁶ Regrettably, the first defendant did not provide pinpoints. Pinpoints were added by this Court.

⁹⁹⁷ Transcript, page 567 [23]-[25].

⁹⁹⁸ Clarke report at [10.3.1]

occurred when, in response to the Walker's report finding of widespread termite workings and damage to the subfloor.⁹⁹⁹ Mr Clarke also noted that given that at least one section was active "we know that at least some of this evidence and damage must have occurred after the" second defendant's inspection.

653. Importantly, however, I note that Mr Clarke was of the opinion that "termites were active in the house at some time" before the original inspection in his review of the Walker report.¹⁰⁰⁰

654. Mr Clarke did note in the concluding section of his report (at [12.3.1]) that there were many unknowns that limit his ability to determine how long termites have been present,¹⁰⁰¹ identifying a number of such unknowns (at [12.3.2]).¹⁰⁰² Mr Clarke gave evidence that due to these unknowns, Mr Clarke was unable to say (at [12.4.1]) whether live termites would have been detectable by a pest inspector exercising reasonable care and skill.¹⁰⁰³

655. Again, however, these opinions in my view must be seen in context. Mr Clarke maintained that termites had attacked the property prior to the defendants' inspection. While it is not possible to know the exact period, Mr Clarke was of the view that the first defendant has:

been negligent in their advice that the infestation was "old" and "previous" because they had no way to know this due to the above unknowns.¹⁰⁰⁴

656. As such, while it was not possible to define the period of time termites have been attacking the house, Mr Clarke was able to say that the termite attack commenced between the time the house was built and the date of the inspection by the second defendant. Mr Clarke was also of the view that these attacks had been occurring for long enough to establish several mud tunnels and "has continued after that date", and was active during Mr Clarke's inspection.

657. Counsel for the first defendant submitted as follows: if this Court cannot be satisfied on balance probabilities that there was actual structural damage that was in existence in October 2019, then the plaintiffs must fail.¹⁰⁰⁵ It was submitted that a positive finding of active infestation and damage to the building in October 2019 could not be

⁹⁹⁹ Clarke report at [10.10].

¹⁰⁰⁰ See Clarke report at [10.3.1].

¹⁰⁰¹ Clarke report at [12.3.1].

¹⁰⁰² Clarke report at [12.3.2].

¹⁰⁰³ Clarke report at [12.4.1].

¹⁰⁰⁴ Clarke report at [12.3.3]-[12.3.4].

¹⁰⁰⁵ Transcript, day 5, page 532 [30]-[33].

made.¹⁰⁰⁶ Counsel submitted that the Inspection Report's reference to "old" infestation was the determinative factor for Ms Shannon as to whether to purchase the property.¹⁰⁰⁷

658. Counsel for the first defendant submitted that the height ¹⁰⁰⁸of the evidence available before this Court regarding continuity of infestation is the opinion expressed in the Ewart report that the observed damage most probably involved at least five years of attack noted above at [302].

659. Counsel for the first defendant referred to Dr Ewart's opinion in the supplementary Ewart report at [2.3](iv) expressed as "the bulk" and "extent" of the attacks.¹⁰⁰⁹ Counsel noted that Dr Ewart gave evidence that "attack and damage are not necessarily the same thing" in cross-examination (see above at [319]).¹⁰¹⁰ That is, counsel submitted that the evidence of Dr Ewart is that "the bulk" and "extent" of attacks is not correlated with damage, nor active infestation. As such, counsel for the first defendant submitted that Dr Ewart's evidence cannot be evidence as to the state of affairs in October 2019.¹⁰¹¹

660. It is important at this juncture that I underline Dr Ewart's subsequent response to questions by Mr Markham for the first defendant that in my view, support the causal link between the attack at the property and the state of affairs in October 2019:¹⁰¹²

MR MARKHAM: So I understand that the attacks vary. I'm just trying to understand your opinion that you've said here. The attacks and the extent of the attacks would unlikely to have grown in that time, being the time of the sale in 2019 by any clearly significant amount. So do we understand that you're suggesting that that was a consistent level of attacks and extent of the attacks?

DR EWART: **No, what I'm saying is that there was so much damage that it would be not likely that much more happened between the inspection and the infection. Clearly it could not have all taken place in that time.**

(emphasis added)

661. Ultimately, counsel for the first defendant submitted that both Mr Clarke and Dr Ewart support no continuous infestation: see *Amaca Pty Ltd v Booth* [2011] HCA 53; 246 CLR 36 at [41]-[43] (French CJ) (*Amaca*) regarding causation.¹⁰¹³

¹⁰⁰⁶ Transcript, day 5, page 543 [34]-[41].

¹⁰⁰⁷ Transcript, day 5, page 546 [13]-[15].

¹⁰⁰⁸ Transcript, day 5, 535 [1]-[15].

¹⁰⁰⁹ Transcript, day 5, page 539 [35]-[37].

¹⁰¹⁰ Transcript, day 5, page 540 [10]-[15].

¹⁰¹¹ Transcript, day 5, page 540 [21]-[29].

¹⁰¹² Transcript, day 3, page 312 [39]-[47].

¹⁰¹³ Transcript, day 5, 541 [40]-[42].

662. As a general reply to these submissions, counsel for the plaintiffs cavilled with the first defendant's submissions that the plaintiffs needed to prove that there was an actual or present infestation in October 2019.¹⁰¹⁴
663. In particular, counsel for the plaintiffs submitted, and I accept this submission, that it is sufficient for the plaintiffs to prove that the Inspection Report fell short of the standard AS4349.3 – 2010 and that had the standard been met the plaintiffs would not have purchased the property.¹⁰¹⁵ These matters, in my view, have been proven. In other words, the Inspection Report should have warned the plaintiffs of any damage caused by termites, its extent, and exposure to further infestation. Whether a termite infestation was actually active, is ultimately not the point.¹⁰¹⁶ Additionally, the evidence of both experts was that termites come and go in any case.¹⁰¹⁷ Taking into account the extent of termite damage in October 2020 and the evidence of Dr Ewart, in my view, on the balance of probabilities, it is likely that that a further inspection would have found damage in 2019 if the plaintiffs had commissioned such a further inspection.¹⁰¹⁸ In my view causation is established on the balance of probabilities.
664. Counsel for the first defendant submitted that the Inspection Report or any information within it "by no means can be said to be" calculated or intended to induce a person to enter into a contract of sale for the property.¹⁰¹⁹ This was submitted to be because the contract to supply the Inspection Report is between the vendor of the property and the supplier.
665. It is convenient to note at this juncture that, page 18 of the Inspection Report is titled "Warranty & Use of Our Reports" stated that the Inspection Report was written for the use and benefit of both the vendor and the purchaser of the property.¹⁰²⁰
666. Additionally, counsel for the first defendant submitted that, in this case, there appears to be "no reliable evidence" from the plaintiffs that they relied on the Inspection Report in entering into the contract in any case: see *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; 238 CLR 304 at [147] (Gummow, Hayne, Heydon and Kiefel JJ) (*Campbell*). This submission in my view does not accord with the evidence.

¹⁰¹⁴ Transcript, 565 [6].

¹⁰¹⁵ Transcript, 565 [16] – [19].

¹⁰¹⁶ Transcript, page 565 [21]-[27].

¹⁰¹⁷ Transcript, page 565 [21]-[23].

¹⁰¹⁸ Transcript, page 496 [45]-[47].

¹⁰¹⁹ FDWS at [15].

¹⁰²⁰ Transcript, Day 5, page 479 [33]-[40]; PTB 1 page 19, Inspection Report page 18.

667. Counsel for the second defendant submitted that even if the second defendant did breach a relevant duty, the breach was not causative of the plaintiff's loss. Rather, counsel submitted that the plaintiff's loss was caused by their own failure to heed the Inspection Report's warnings and recommendations, the latter of which went beyond the requirement of AS 4349.3.¹⁰²¹ Again this submission, in my view, does not accord with the evidence. In any event contributory negligence is not an issue in this case.

Conclusion on Causation Consideration

668. The starting point is to consider whether, as submitted by the plaintiffs, the approach to causation should be considered to be on all fours when it comes to s 19 of the *CL(SRP) Act*, and ss 236 and 267 of the *ACL*. As noted above, counsel for the first defendant submitted that s 45 of the *Wrongs Act* applied. If this is so, then I am required to consider both whether:

- (a) The negligence was a necessary condition of the happening of the harm (factual causation): *Wrongs Act* s 45(1)(a).
- (b) It is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability): *Wrongs Act* s 45(1)(b). In considering this, I must also consider (among other relevant things) whether or not and why responsibility for harm should be imposed on the negligent party: *Wrongs Act* s 45(3).

669. With that being said, I note that in my view there is little difference between the factual causation under s 45(1)(a) of the *Wrongs Act* and the "because of" test in ss 236 and 267 of the *ACL*. Both involves the application of the "but for" test: *Corkhill v Commonwealth (No 3)* [2018] ACTSC 87 at [385] (Refshauge J); *Marks v GIO Australia Holdings Ltd* [1998] HCA 69; 196 CLR 494 at [42] (McHugh, Hayne and Callinan JJ) (*Marks*).

670. With respect to s 236 and 267, it is convenient to start with the well-known discussion by the majority (Mason CJ, Dawson, Gaudron and McHugh JJ) in *Wardley* (at 525) when considering the-then s 82 of the *TPA*.¹⁰²²

The statutory cause of action [under s 82] arises when the plaintiff suffers loss or damage "by" contravening conduct of another person. "By" is a curious word to use. One might have expected "by means of", "by reason of", "in consequence of" or "as a result of". **But the word**

¹⁰²¹ SDWS at [3.1]

¹⁰²² TPA – Trade Practices Act 1974

clearly expresses the notion of causation without defining or elucidating it. In this situation, s. 82(1) should be understood as taking up the common law practical or common-sense concept of causation recently discussed by this Court in *March v. Stramare (E. & M. H.) Pty. Ltd.*, except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act. Had Parliament intended to say something else, it would have been natural and easy to have said so.

(emphasis added)

671. In *Wardley*, the High Court also noted that while it would not be right to conclude that the measure of damages recoverable under s 82(1) of the *TPA* “necessarily coincides” with the measure of damages in an action in deceit or negligent misrepresentation, the common law measure of damages will be an appropriate guide in many cases (subject to legislative intention): *Wardley* at 526.

672. *Wardley* involved an alleged misleading representation inducing the respondent to enter into an indemnity agreement: see 520-2. In such a circumstance, the majority observed that it may be assumed that a plaintiff is entitled:

to recover “a sum representing the prejudice or disadvantage [the plaintiff] has suffered in consequence of his altering his position under the inducement” [citing, among others, *Potts v Miller* (1940) 64 CLR 282 at 297; *Gould* at 220] of the misleading conduct or “the actual damage directly flowing from” that conduct, to take up and adapt well-known statements of the measure of damage applicable in an action of deceit.

673. *Cheshire and Fifoot Law of Contract* observed that the terms “because of” in s 236 renders it necessary to show that the misleading conduct has led a party into error and the error either caused loss or induced a contract with the plaintiff: at [11.127]. Further, given that the normal principles of causation applies, the authors observed that it is always open for a defendant to argue a break in causation at some stage: at [11.127]. For example, the chain would have been broken if a party would have entered into the contract in any case: *Sweetman v Bradfield Management Services Pty Ltd* (1994) ATPR 41-290.

674. It is also necessary to discuss the “inference of inducement” and the need for reliance on the part of the plaintiffs. In a case highlighted by the first defendant, the Full Court of the Federal Court (Lander J, Hill and Jacobson JJ agreeing) in *Ford Motor Company* observed that *Wardley* (among other cases) is not authority for the proposition that a plaintiff does not need to establish reliance for a claim relying on ss 82 of the *TPA*: see [107] in particular and [107]-[122]. While the misrepresentation need not play the sole role in inducing a party to enter into a contract (indeed, it may play only a minor part), it does need to play some role in the formation of the contract: see [110], citing *Gould* at 236 (Wilson J). That is, causation cannot be established in

a misrepresentation case without proof that the misrepresentations were relied upon: at [123]. In my view, this is not such a case. The misrepresentations were relied upon.

675. The principles were also usefully discussed by Stone J in *De Bortoli Wines Pty Ltd v HIH Insurance Ltd (in liq)* [2011] FCA 645; 200 FCR 253 at [54]-[73] (*De Bortoli Wines*) appeal dismissed in *De Bortoli Wines Pty Ltd v HIH Insurance Ltd (in liq)* [2012] FCAFC 28.

676. For the foregoing reasons, causation is established. That is, the causal connection between the breaches and the loss suffered by the plaintiffs. I accept, on the evidence, the submissions of counsel for the plaintiffs that:¹⁰²³

- (a) The plaintiffs relied on the Inspection Report to purchase the property.
- (b) The plaintiffs would not have purchased the property if they had been warned that there was a high risk that the property was infested by termites. Or if they had been warned of the fact that there was evidence of past termite infestation meant that there was either past or present termite infestation and that the house had suffered damage from that infestation.
- (c) The plaintiffs would have arranged for an invasive inspection of the property to be carried out if the Inspection Report had contained such a recommendation.

Quantum of Damages

677. I am ultimately satisfied that the defendants' breach caused the plaintiffs to suffer loss. The main outstanding question, therefore, is the amount of damages the plaintiffs are entitled to.

678. As I noted at [4], the sums ultimately claimed by the plaintiffs evolved over the course of the hearing. The ultimate claim listed in MFI-8 was for \$1,113,133.38, consisting of the following heads of claim:

- (a) \$560,000.00, being the claimed difference in what the property was bought for in December 2019 (\$1,835,000.00) with the land value in December 2019 (\$1,275,000.00).
- (b) \$86,833.95, being the claimed cost on purchase for the property (ie. stamp duty, legal fees, and costs of reports).

¹⁰²³ Transcript, day 1 pages 56 to 63 and transcript day 2, pages 195 to 204.

- (c) \$283,074.56, being costs claimed to be incurred by the plaintiffs in renovating and maintaining the property until its sale in June 2022.
- (d) \$183,224.87, being rental costs claimed to be incurred by the plaintiffs after they allegedly had to move out due to the uninhabitability of the property up until the property's sale.

679. The plaintiffs also claimed interest for the first and second head of claim from 6 December 2018, and from 14 October 2022 for the third and fourth.¹⁰²⁴

680. For completeness, I note that there was a fifth head of damage that was initially pleaded by the plaintiffs. However, this head of damage was not pressed.

681. On the final day of hearing, counsel for the plaintiffs confirmed that parties had reached agreement on the numbers that should be contained in MFI-8 should I find for the plaintiffs. That is, if I accept the plaintiff's submissions as to causation and quantum in its entirety, the sums I should award are listed in MFI-8.¹⁰²⁵ Nevertheless, the submission from the first defendant was that the approach to take with respect to quantum is not binary.¹⁰²⁶ Indeed, counsel for the defendants did put forward three alternative quantification of damages that would see the plaintiffs received nil damages or either \$305,000.00 or \$560,000.00 respectively for the first head of damages.¹⁰²⁷

682. It is convenient to first set out relevant submissions from the parties regarding the general framework to be adopted for assessing quantum, before turning to submissions relating to specific heads of claim.

Applicable Law

The plaintiff's submissions

683. Counsel for the plaintiffs relevantly submitted¹⁰²⁸ that once causation is established, there was nothing in s 19 of the *CL(SRP) Act* or ss 236 and 267 of the *ACL* to suggest that recoverable amounts in reliance on the sections should be limited by drawing some analogy with contract, tort, or equitable remedies (once causal connection is established): *Marks* at [38] (*Marks*); *Henville* at [130]. However, as correctly

¹⁰²⁴ PWS at [114].

¹⁰²⁵ Transcript, page 573 [26]-[32].

¹⁰²⁶ Transcript, page 576 [4]-[15].

¹⁰²⁷ See FDWS at [70] and tables provided by p 16 of the FD written submissions. The approach is further elaborated upon in oral submissions in Transcript, day 5, pages 555 - 557.

¹⁰²⁸ PWS at [89]-[90].

highlighted by counsel, this does not mean that the common law is not of assistance. As McHugh, Hayne and Callinan JJ stated in *Marks* (at [41]-[42]):

41. This is not to say that no help can be had from the common law in deciding what damages may be allowed under s 82 in cases of conduct contravening s 52. Very often, the amount of the loss or damage caused by a contravention of s 52 will coincide with what would have been allowed in an action for deceit.... **But the analogy cannot be pressed too far.** It should not be pressed **to the point of concluding that the only damages that may be allowed under s 82 are those that would be allowed in an action for deceit.** The question presented by s 82 is not what would be allowed in deceit, it is what loss or damage has been caused by the conduct contravening the Act.
42. It follows, then, that a comparison must be made **between the position in which the party that allegedly has suffered loss or damage is and the position in which that party** would have been but for the contravening conduct. And even this inquiry may not conclude the question. Analysing the question of causation only by reference to what is, in essence, a "but for" test has been found wanting in other contexts and it may well be that it is not an exclusive test of causation in this area either... For the moment it is enough to say **that s 82 requires identification of a causal link between loss or damage and conduct done in contravention of the Act**

(emphasis added, footnotes omitted)

684. Similarly, counsel for the plaintiffs noted that McHugh J in *Henville* observed that (at [130]):

The Court has concluded that in most cases the measure of damages in tort is the appropriate guide in determining an award of damages under s 82. However, in assessing damages under s 82, **courts are not bound to choose between the measure of damages in deceit or other torts or contract.** In *Marks v GIO Australia Holdings Ltd*, the Court said that the central issue under s 82 is to establish a causal connection between the loss claimed and the contravening conduct. Once such a connection is found to exist, **nothing in s 82 suggests that the recoverable amount should be limited by drawing an analogy with contract, tort or equitable remedies although they will usually be of great assistance.** As Gummow J said in *Marks*, "[a]nalogy, like the rules of procedure, is a servant not a master".

(emphasis added, footnotes omitted)

685. I note, however, that *Marks* and *Henville* was dealing with an equivalent provision (s 82) in the old *Trade Practices Act 1974* (Cth), with slightly different wording ("because of", rather than "by conduct of").

686. The principles were carefully summarised by the Victorian Court of Appeal (Maxwell CJ, Niall JA, Macaulay AJA) in *Keys Consulting Pty Ltd v CAT Enterprises Pty Ltd* [2019] VSCA 136 at [88] (*Keys Consulting*) in relation to an action under s 18 of the ACL:

- (a) the plaintiff bears the onus of proving both the fact of loss and the amount of loss.

- (b) a plaintiff must establish both elements with as much certainty and particularity as is reasonable in the circumstances.
- (c) while difficulty in quantifying damages may permit a court to estimate them as best it can, that principle will not avail a plaintiff who has simply failed to produce evidence which it could have produced, and failure to do so in that situation will ordinarily mean that it has failed to prove its case on damages.
- (d) the measure of loss caused by misleading and deceptive conduct in breach of s 18 of the *ACL* is the measure of loss for the tort of deceit. I pause to note that this proposition appears to be somewhat contradict the observations in *Marks* and *Henville* discussed above.
- (e) where the impugned conduct has induced the purchase of an asset, the ordinary measure is the difference between the price paid and the true value of the asset at the date of its acquisition.
- (f) the fact and amount of loss is established by the proof of both constituent elements, namely the price paid and the true value at the date of acquisition.
- (g) in ascertaining the true value at the date of acquisition, the court is to take into account (and the plaintiff must prove with as much certainty and particularity as is reasonable) events after the sale that arise from the nature or use of the asset that illuminate the value of the asset as at that date (subject to due allowance for any changes in relevant conditions).

687. Counsel for the plaintiffs correctly in my view, submitted that the value of the property at the date of its sale is not to the point.¹⁰²⁹ Counsel submitted that this Court should not advantage a defendant and deprive the plaintiff of a capital gain: *O’Kelly Holdings Pty Ltd v Dalrymple Holdings* (1993) 45 FCR 145 at 157, 159 (*O’Kelly Holdings*); *Makings Custodian Pty Ltd v Orchid Avenue Realty Pty Ltd* [2018] QCA at [80]-[81] (*Makings Custodian*). to the observations of Lee J in *O’Kelly Holdings* (at 159):

The property was sold in April 1990 for a price of \$410,000. [The primary judge] correctly stated that the price obtained for the property in April 1990 did not mean that Dalrymple had not suffered loss in April 1987 when it paid a purchase price of \$170,000 but the price paid in April 1990 would be part of the evidence relevant to establishing the value of the property in April 1987.¹⁰³⁰

¹⁰²⁹ PWS at [92].

¹⁰³⁰ Transcript, Day 5, page 513-4.

688. Similarly, counsel for the plaintiff also noted the observations of Gotterson JA (Morrison JA and Henry J agreeing) in *Makings Custodian* at [80]-[81]:

80. The learned trial judge adopted as the measure of damages the difference between the contract price of \$6,900,000 and the value that she found on the evidence that The Piazza had at 25 September 2009, \$4,910,000. This measure contemplates as the value to be subtracted the real value at the time of purchase. It was endorsed by the High Court in *Potts v Miller*. Its frequent application in assessing damages under s 82 of the TPA was later noted by the Court in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd*.

81. OA Realty has submitted that a different measure of damages ought to have been adopted, namely, one that took into account the value of The Piazza at the date of trial. This submission must be rejected. In the first place, the measure adopted by her Honour accords with well-established principle. No error is shown in its adoption. **Secondly, the proposed measure would have the effect of depriving the plaintiffs of the capital gain they would have enjoyed if The Piazza had been purchased at real value at the time. There is no reason in principle to advantage OA Realty by depriving the plaintiffs in this way.**

(emphasis added, footnotes omitted).

689. Ultimately, the plaintiffs' submissions is to the effect that any capital gain of the plaintiffs from selling the property in this case is "irrelevant" to the plaintiff's entitlement to their claimed loss arising from buying the property at significantly value, due to the termite infestation contained within it.¹⁰³¹ This will be of particular relevance when I discuss the first head of claim.

690. Finally, counsel for the plaintiffs also submitted that the Court may allow additional consequential losses in addition to losses measured by the difference between price paid and true value at date of acquisition.¹⁰³² This is as long as the consequential losses are directly referable to the misleading conduct and not to a supervening cause (eg. ineptitude or third-party intervention): *Gould v Vaggelas* (1985) 157 CLR 215 at 221-2 (Gibbs CJ) (*Gould*); *Keys Consulting* at [80]. As noted by the plaintiffs, Gibbs CJ observed that rule may be more flexible than *Potts v Miller* may suggest (in context of a purchase of a business) (at 221-2):

This rule, is, with all respect, not quite as inflexible as *Potts v. Miller* might suggest. There may be cases in which the purchaser continues to trade, either because he has no real alternative or because he has not become aware of the nature of the fraud, and in those circumstances incurs losses which are not represented by the difference between the price and value of the business. **There is no reason in principle why the defrauded purchaser should not recover damages for all the loss that flowed directly from the fraudulent inducement (unless, possibly, the loss was not foreseeable).** If the purchaser, besides

¹⁰³¹ Transcript, Day 5, page 505 [25]-[28].

¹⁰³² PWS at [93].

paying more for the business than it was worth, has suffered additional losses which resulted directly from the fraud [they] ought be compensated for them.

691. Gibbs CJ did note that the Court must be first satisfied that the loss resulted directly from the fraud, and not from a “supervening cause” such as “folly, error, or misfortune” of the purchaser: *Gould* at 222.
692. In this case, counsel for the plaintiff submitted that the consequential losses included matters such as stamp duty and other costs incurred by the plaintiffs having done things they would have not if they did not buy the property.¹⁰³³

The defendants’ submissions

693. Counsel for the first defendant submitted that the “overriding compensatory principle” is that the plaintiffs must be “fairly” compensated: *Johnson v Perez* (1988) 166 CLR 351 at 356-357 (*Johnson*); *Narni Pty Ltd v National Australia Bank Ltd* [2001] VSCA 31 at [29]; *McCrohon v Harith* [2010] NSWCA 67 at [55]; *Chep Australia Ltd v Bunnings Group Ltd* [2010] NSWSC 301 at [227]. What is “fair”, it was submitted, take into account both the plaintiff and the defendant. Further, counsel also submitted that “ordinary measure” of damages are not rigid and will yield where another approach is warranted in the particular circumstances: *Johnson* at 356-7.
694. I will now turn to the parties’ submissions in relation to the specific heads of claim.

First head of claim – difference in value (\$560,000.00)

695. The first head of claim for \$560,000.00 remains unchanged between MFI-1 and MFI-8. In opening submissions, counsel for the plaintiffs explained that this head of claim represented the difference between what the plaintiffs bought the property for and what the property was worth at the time of purchase in December 2019.¹⁰³⁴ Counsel for the plaintiffs noted that both parties’ experts, Mr Hon and Ms Mowbray, agreed that the property value (assessed as land only) was \$1,275,000.00.¹⁰³⁵ There was also no dispute as to the amount paid by the plaintiffs for the property.
696. In oral submissions, counsel for the plaintiffs noted that the only assumptions that Mr Hon was asked to make in his instructions to prepare¹⁰³⁶ the Inspection Report was that the sale occurred on 8 November 2019, the risk of termite infestation was “high to extreme” and the observations of Dr Ewart in the supplementary Ewart report (with

¹⁰³³ Transcript, Day 5, page 507 [12]-[13].

¹⁰³⁴ Transcript, day 1, page 40 [19]-[22], [35]-[36].

¹⁰³⁵ Transcript, Day 1, page 40 [35]-[36], [40]-[41]. CB at 318; Hon report at 25. CB at 372; Mowbray report page 19. See also Transcript, Day 5, page 512 [29]-[30].

¹⁰³⁶ See CB page 327.

particular regard to the bulk and extent of termite damage evident in the bundle of photographs of November 2020).¹⁰³⁷ Despite this, as I noted above at [111], Mr Hon also appeared to have taken into the account the Clarke report, the de Waal report, and the report by Smith and Sons in the assessment of the value of the property.¹⁰³⁸ It is the case, however, that Mr Hon did not take into account the work the plaintiffs did improving the property's tennis court or pool.¹⁰³⁹

697. In submissions, counsel for the plaintiffs explained that this head of claim is what the plaintiffs overpaid for the property in December 2019. That is, the difference between what the plaintiffs paid for the property and what they ought to have paid if they had known that the property was infested with termites and the house was a knock-down rebuild.¹⁰⁴⁰

698. Counsel for the plaintiffs submitted that the amount was calculated by deducting from the amount paid for the property (\$1,835,000.00) an amount of \$1,275,000.00. Counsel for the plaintiffs noted that this was the market value of the property in November 2019 on the basis of its land value only, as the property was submitted to be "only ever a knock down rebuild".¹⁰⁴¹

699. Counsel for the plaintiffs also noted that the de Waal report,¹⁰⁴² and the "contemporaneous" Emmadale Projects report¹⁰⁴³ and the Stephenson report confirmed that:

- (a) termites have caused substantial damage to the property, including the load bearing components of the property.
- (b) remediation of the damage was complex, risky and unviable.¹⁰⁴⁴
- (c) the practical and responsible course was to demolish the property.¹⁰⁴⁵

700. Counsel for the plaintiffs also referred¹⁰⁴⁶ to the supplementary Ewart report, where Dr Ewart opined that:

[T]he Residential Reports photos and the report of Mr Barry Walker, provide evidence of a significant and extensive attack that, in my opinion:

¹⁰³⁷ Transcript, Day 5, page 511 [15]-[19].

¹⁰³⁸ See Hon report pages 13, CB 306.

¹⁰³⁹ Transcript, day 5, page 511 [26]-[29]

¹⁰⁴⁰ PWS at [97].

¹⁰⁴¹ PWS at [98]

¹⁰⁴² CB at 293; de Waal report page 10.

¹⁰⁴³ PTB 1 page 348; Emmadale Projects report page 7.

¹⁰⁴⁴ De Waal report page 10; CB page 293.

¹⁰⁴⁵ De Waal report page 10; CB page 293; PTB 1 page 348; Emmadale Projects page 7.

¹⁰⁴⁶ PWS at [100]

- (i) has an origin going back some years and, was a significant attack at the date of sale;
- (ii) being of such size and significance is unlikely to have been much affected by environmental and climate factors over that time;
- (iii) it is possible that the attack changed in intensity and spread such that number and size of the shelter tubes observable in the sub-floor had grown significantly over that time; and
- (iv) given the damage observed in the ... Bundle of Photographs dated November 2020 part 1, and the shelter tube shown in image 16, it is my opinion that the bulk of the attacks and the extent of the attacks would be unlikely to have grown in that time by any clearly significant amount.

701. Counsel for the first defendant in submissions highlighted that the plaintiffs had since sold the property for what counsel characterised was a “substantial profit”¹⁰⁴⁷ of around \$600,000.00. In his submission, there was a question as to what to make of the plaintiffs’ profit and whether it should be treated as windfall or a “discounting factor”¹⁰⁴⁸ or mitigation¹⁰⁴⁹.
702. Noting that the case is a “non-transaction” case, counsel for the first defendant submitted that there was no evidence¹⁰⁵⁰ as to any alternative investment or houses that would have been bought had the transaction not occurred. Absent any evidence of what alternative investment the plaintiffs would have made, counsel for the first defendant submitted that the profit made from the sale of the property by the plaintiffs should “come off”¹⁰⁵¹. If the plaintiffs had avoided the purchase of property, it was submitted that the plaintiffs would not have received the capital gains from its sale.
703. In reply, counsel for the plaintiffs correctly noted¹⁰⁵² that the first defendants’ submissions were not addressing a “no-transaction” case – which was the case run – but an “alternative transaction” case in the sense that the plaintiffs would not have bought the property over another. On the authorities, counsel for the plaintiffs submitted¹⁰⁵³ that there is no need to account for the profit or capital gains made from the sale of the property in a “no-transaction” case. I accept that submission on the evidence in this case.
704. In submissions, counsel for the plaintiffs reiterated that there was no basis for the Court to take into account any capital gain the plaintiffs may have received upon the

¹⁰⁴⁷ Transcript, Day 1, page 42 [1]-[12]. There were also submissions raising procedural fairness issues with the pleadings not amended to reflect MFI-8 (see page 41 [21]-[41].

¹⁰⁴⁸ Transcript, Day 1, page 42, line [5]-[6].

¹⁰⁴⁹ Transcript, Day 1, page 43, [8]-[12].

¹⁰⁵⁰ Transcript Day 1, page 42 line [32]-[46].

¹⁰⁵¹ Transcript, Day 1, page 43[32]-[35].

¹⁰⁵² Transcript, Day 1, page 44 [32]-[38], page 45 [1]-[4].

¹⁰⁵³ Transcript, Day 1, page 45 [26]-[30].

sale of the property in June 2022: *O’Kelly Holdings; Makings Custodian*. Counsel referred to the evidence of Ms Shannon, who gave evidence that the plaintiffs would have bought another house in Canberra if they had not purchased the property.¹⁰⁵⁴

705. By contrast, counsel for the first defendant submitted that in relation to the first head, an “in-hand” analysis is more appropriate as opposed to the “orthodox” *Potts v Miller* (1940) 64 CLR 282 approach that the plaintiffs have adopted.¹⁰⁵⁵ Under this analysis, counsel noted that damages are calculated as whatever is left in the plaintiffs hands as at the time of hearing.¹⁰⁵⁶

706. At the hearing, counsel for the first defendant also referred to the case of *Viterra Malt Pty Ltd v Cargill Australia Ltd* [2023] VSCA 157 (*Viterra Malt*). As noted by counsel,¹⁰⁵⁷ the Victorian Court of Appeal (Sifris, Walker and Whelan JJA) reviewed relevant High Court authorities on the measure of damage when a party is misled into acquiring an asset, summarising the applicable principles as follows (at [873]-[874])

The principles to be drawn from these High Court authorities as to the measure of damage where a party is misled or deceived into acquiring an asset are the following:

- (1) The measure described by Dixon J in *Potts v Miller* as the difference between the price paid and the true value at the time of acquisition is ‘well established’ as ‘usually applicable’ (*Gould v Vaggelas*, per Gibbs CJ). It has been ‘consistently held’ to be the ‘proper measure’ (Kizbeau), and described as ‘commonly employed’ (HTW Valuers)

However, the legislation **does not prescribe this approach: it is no more than a guide** (HTW Valuers). It is a particular application of the general principle that a plaintiff is entitled to recover a sum representing the prejudice or disadvantage suffered as a consequence of altering its position (*Gould v Vaggelas*).

- (2) True value is to be determined objectively by reference to what price freely contracting, fully informed parties would have offered and accepted, not according to what either or both of the parties to the contract believed it would obtain (*Marks*).
- (3) However, true value is not the same as market value. Events subsequent to the acquisition may indicate or reflect the true value and thus the measure of the loss earlier suffered. This is, to use Dixon J’s own word, a ‘qualification’ on the *Potts v Miller* approach. Subsequent events may fall within the ambit of this ‘qualification’ if they are unaffected by ‘extraneous causes’ (*HTW Valuers*). Whether subsequent events give a reliable indication or reflection of the loss suffered upon acquisition depends on all the circumstances (*Kizbeau*).

¹⁰⁵⁴ PWS at [101], citing Transcript, day 1, page 52 [40]-[43]

¹⁰⁵⁵ FDWS at [67].

¹⁰⁵⁶ FDWS at [67].

¹⁰⁵⁷ Transcript, Day 5, page 548.

- (4) Additional consequential losses, over and above those calculated by the *Potts v Miller* approach, may be recoverable in an appropriate case (*Gould v Vaggelas*, per Gibbs CJ), although given that true value at the time of the acquisition is based upon projected profitability (in the light of subsequent events where appropriate), care would then need to be taken to avoid double counting (*Gould v Vaggelas*, per Dawson J). In a similar way, subsequent events may reveal that an apparent loss at the time of acquisition had not in fact been sustained as matters had transpired (*Kizbeau*).
- (5) One reason why the *Potts v Miller* approach is generally adopted is the **desirability of separating out losses resulting from extraneous factors** in the later history of the asset (*HTW Valuers*). This is particularly so where there has been a significant lapse of time.
- (6) A 'left in hands' approach **may be particularly appropriate** where no issue of separating out subsequent losses resulting from extraneous events arises (*HTW Valuers*).
- (7) There is **not a binary choice** between a *Potts v Miller* approach and a 'left in hands' approach (and there may be other options in certain cases) in which one option is wrong and the other correct. Both might be open in a given case (*HTW Valuers*). In every case, the initial question is: what loss does the claimant allege (*Berry*)?

(emphasis added)

- 707. Counsel for the first defendant submitted that the case for damages has been put strictly on a *Potts v Miller* approach, which counsel for the first defendant submitted was an understandable approach to "hide" a \$640,000.00 capital gain.¹⁰⁵⁸
- 708. Counsel for the first defendant submitted that, on the in-hand analysis, the plaintiffs had suffered no loss: see *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 245 at 266-7 (Lord Browne-Wilkinson, Lord Keith of Kinkel and Lord Slynn of Hadley agreeing).
- 709. Counsel for the first defendant also referred¹⁰⁵⁹ to *Viterra Malt, Manwelland Pty Ltd v Dames & Moore Pty Ltd* [2001] QCA 436; ATPR 41-485 (*Manwellland*).
- 710. Counsel submitted that this is akin to a "loss opportunity" case, which the plaintiffs have elected not to run in this case: see *Manwellland at [22]*; *Viterra Malt at [897]*. See also *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* [2004] HCA 54; 217 CLR 640

¹⁰⁵⁸ Transcript, day 5, page 549 [11]-[14].

¹⁰⁵⁹ Transcript, day 5, page 550 [1]-[7].

711. As such, counsel for the first defendant submitted that the Court cannot adopt a *Potts v Miller* approach on the date of purchase in October 2019. It could only adopt 4 May 2021, or the date the plaintiffs moved out on 12 March 2021.¹⁰⁶⁰

712. I note the following observations in *Keys Consulting* as to the difference between a situation where there is uncertainty as to the value of damages and that in which a plaintiff simply has not produced evidence (at [70]):

However, there is a distinction to be drawn between a situation that does not permit damages to be assessed with certainty, and one in which the plaintiff has simply failed to produce evidence that was otherwise reasonably available. The plaintiff is entitled to have the court do the best it can in the former case, but not in the latter. Where a party is able to produce evidence about loss and damage, they must do so with as much certainty and particularity as is reasonable in the circumstances. This principle is long established.¹⁰⁶¹

(footnotes omitted)

713. Finally, counsel for the first defendant also submitted that if the *Potts v Miller* approach is adopted, it is unclear why the plaintiffs should be allowed to claim the other heads of claims of rental losses and wasted expenses.

714. In reply, counsel for the plaintiffs conceded that some complicated cases – such as a purchase of a business at an overvalue concerning profits – may lead a Court to favour a losses-in-hand approach.¹⁰⁶² However, counsel correctly, in my view, submitted that this case is a straightforward application of *Potts v Miller*; the facts in this case are analogous.¹⁰⁶³ In my view, this case is a straightforward case of a property that would not have been purchased. It follows that I do not accept the defendant's submissions.

715. The basis of the Hon report was Dr Ewart's opinion that the property was very likely to have been infested for some years.¹⁰⁶⁴

716. Additionally, in my view, rental losses are consequential losses suffered by the plaintiffs.¹⁰⁶⁵

¹⁰⁶⁰ Transcript, page 554 [19]-[28].

¹⁰⁶¹ Transcript, page 552 [16]-[25].

¹⁰⁶² Transcript, page 571 [1]-[4].

¹⁰⁶³ Transcript, page 571 [13]-[15].

¹⁰⁶⁴ Transcript, page 572 [16]-[24].

¹⁰⁶⁵ Transcript, page 573 [1]-[9].

Second head of claim – stamp duty and legal fees (\$86,833.95)

717. It follows from my findings that this second head of claim should be awarded.

Third head of claim – wasted expenses / renovations (\$ 319,210.39)

718. In written submissions, counsel for the plaintiffs submitted that this head of damage represented the wasted expenses the plaintiffs incurred to renovate and maintain the property until it was sold in June 2022.¹⁰⁶⁶
719. Counsel for the plaintiffs noted that the total expenditure actually amounted to \$488,067.01, comprising of expenses on:
- (a) the house, totalling \$192,847.43;
 - (b) the carport and garage, totalling \$124,211.87;
 - (c) the landscaping and fencing, totalling \$83,206.74;
 - (d) the pool and the pool fencing, totalling \$42,101.00;
 - (e) the tennis court, totalling \$2,543.75; and
 - (f) maintenance, totalling \$43,156.22.
720. Counsel for the plaintiff noted that significant amounts were spent by the plaintiffs on renovating the carports and garage, the pool, and tennis court.¹⁰⁶⁷ Counsel for the plaintiffs conceded that it was possible that these improvements may have ultimately factored in the sale price in June 2022. As such, the plaintiffs did not press for these amounts; so as to avoid double-dipping.
721. At the hearing, counsel for the plaintiffs properly conceded that marketing material for the sale of the property included pictures of at least one of the garages, the pool, and tennis court.¹⁰⁶⁸ It was therefore unclear to what extent the purchaser of the property from the plaintiffs placed value on those things, but in any case counsel did not seek to submit that the plaintiffs had suffered loss in renovating those areas.¹⁰⁶⁹ Further, counsel submitted that excluding these costs is an appropriate course of action to ensure no double dipping in circumstances where there was no evidence before the Court one way or the other in relation to windfall, in the sense of evidence of the “returns” the plaintiffs received (in form of increased sale price) for the amounts the plaintiffs incurred in improving the property.¹⁰⁷⁰

¹⁰⁶⁶ PWS at [103].

¹⁰⁶⁷ See also Transcript, day 5, page 508 [32]-[35]; CB page 279; De Waal report page 164.

¹⁰⁶⁸ Transcript, Day 5, page 508 [12]-[15], citing Exhibit 7/

¹⁰⁶⁹ See Transcript, Day 5, page 508 [17]-[23].

¹⁰⁷⁰ Transcript, Day 5, page 509 [25]-[38].

722. However, counsel for the plaintiffs noted that none of the landscaping and fencing, and maintenance would have been expenses on the house, incurred if the plaintiffs had not purchased the house, and were accordingly “wasted”.¹⁰⁷¹

723. In light of above points, the plaintiffs therefore only pressed \$319,210.39 for this head of claim.¹⁰⁷²

724. I note that in evidence, Ms Shannon gave evidence that she already had renovations in mind¹⁰⁷³ before the property was bought and at the time of Ms Shannon reading the Inspection Report.¹⁰⁷⁴ Ms Shannon gave the following evidence as to the nature of the renovations planned:¹⁰⁷⁵

[W]e thought it was good for our family and we wanted to make some changes, like, to give them a bit more privacy at the back of the house, and pull out that old bathroom that was leaking and do some changes in the kitchen, put in a new fridge. Not massive renovations but... everything adds up so it would have, you know – it's expensive in the end but ...we really wanted to make it a liv[e]able house and modernise it a bit.

725. I also note that Ms Shannon was examined and cross-examined with respect to certain invoices and engagements.¹⁰⁷⁶ However, with the tendering of MFI-8, if I accept the plaintiffs’ proposed approach with respect to quantum entirely, counsel for the plaintiffs submitted that there would be no need to refer to specific invoices.¹⁰⁷⁷ To this extent, this submission was not objected to by the defendants.

726. However, counsel for the first defendant submitted that the plaintiffs cannot establish that these lost expenses (and rent) were connected to the conduct of the defendants. I do not accept this submission. These damages, in my view, flow from the breach.

¹⁰⁷¹ PWS at [105]-[106].

¹⁰⁷² PWS at [107].

¹⁰⁷³ Transcript, page 59, line [22]-[24].

¹⁰⁷⁴ Transcript, day 1 page 59, line [35]-[39].

¹⁰⁷⁵ Transcript, Day 1, page [26]-[32].

¹⁰⁷⁶ See also FDWS at [73].

¹⁰⁷⁷ Transcript, Day 5, page 573 [36]-[38].

Fourth head of claim – wasted rent (\$183,224.87)

727. As explained by counsel for the plaintiffs, this head of damage is the amount of rent incurred by the plaintiffs when they moved out of the property in March 2021 until the sale of the property in June 2022. As counsel noted, the Emmadale Projects report had noted that the property was not safe for occupation due to evidence of termite damage throughout the home.¹⁰⁷⁸ Consequently, the plaintiffs moved to a rental property in Hobart Avenue.¹⁰⁷⁹
728. Counsel for the plaintiffs submitted that the date of settlement for the sale of the property was 9 October 2022, being 120 days after the date of the contract (11 June 2022).¹⁰⁸⁰ As such, the plaintiffs claimed for rent for the following period:¹⁰⁸¹
- (a) rent between 12 March 2021 and 16 March 2022 of \$121,999.90.
 - (b) rent between 16 March 2022 and 14 October 2022 of \$61,244.97.
729. Counsel for the first defendant submitted that the amount of rent awarded to the plaintiffs should be capped at \$135,000.00. This is because counsel for the plaintiffs only sought rent up until June 2022 and abandoned further claims for rent. In counsel's submissions, it is not open for the plaintiffs to now resile from this abandonment by seeking further rent from June and October 2022.¹⁰⁸²
730. However, at the hearing, counsel for the first defendant appeared to no longer cavil with a claim for rent for the period of June 2022 to October 2022, when the plaintiff had in fact sold the property.¹⁰⁸³ Counsel for the first defendant did submit that the figure was, in fact, a "positive transaction" and the Court must take into account capital gains. Counsel noted, as an example, that it is open for me to take into account some of the capital gains between October 2019 and May 2021 as a "buffer".
731. In my view, these rental expenses are consequential losses under the *Potts v Miller* approach.

¹⁰⁷⁸ PWS at [109], CB 348, Emmadale Projects page 7.

¹⁰⁷⁹ PWS at [110].

¹⁰⁸⁰ PWS at [111]; PTB 1, page 145. In written submissions there is a reference to 14 June 2022. This is erroneous. Parties confirmed via emails to Chambers dated 23 February 2026 and 26 February 2026 that the 11 June 2022 date is correct for the contract, and as such 120 days after that date would place settlement on 09 October 2022 rather than 14 October 2022.

¹⁰⁸¹ PWS at [114].

¹⁰⁸² FDWS at [74].

¹⁰⁸³ Transcript, day 5, page 556 [5]-[7].

Overall Conclusion

Duty

732. Duty is clearly established and consists of a requirement that the relevant pest inspection is completed in accordance with the relevant Australian Standard. Arising from both the *Civil Law (Sale of Residential Property) Act* and the *Civil Law (Sale of Residential Property) Regulation* is a requirement that a “pest inspection report must be completed in accordance with AS 4349.3”.

733. The misleading and deceptive conduct claims under the *Australian Consumer Law* includes compliance with this Australian Standard.

Breach

734. The case as to breach is established on the basis of the expert evidence which compares the Inspection Report with the Australian Standard. Based on the expert evidence, in particular that of Dr Ewart and Mr Clarke, there is clearly evidence before the court which demonstrates that the Inspection Report produced following the inspection of the property was in breach of the of the statutory requirements.

Causation

735. Based on the expert evidence (in particular that of Dr Ewart), a finding as to such termite infestation or damage at the time of the inspection is open to be made, on the balance of probabilities and I have made that finding taking into account on all the evidence.

736. I note that the parties did not refer to any case law as to the applicable causation test imported into s 19 of the *Civil Law (Sale of Residential Property) Act*.

737. It is evident that in an action for misleading and deceptive conduct, the common law, ‘common sense’ test of causation applies. However, in respect of s 19 of the *Civil Law (Sale of Residential Property) Act*, the picture is not quite as clear. To understand why, consideration must first be given to the *Civil Law (Wrongs Act)*, which at s 45, relevantly states the following:

45 General principles

- (1) A decision that negligence caused particular harm comprises the following elements:
- (a) that the negligence was a necessary condition of the happening of the harm ('factual causation');
 - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (the *scope of liability*).

738. Further, ss 40 and 41 states the following:

40 Definitions—ch 4

In this chapter:

harm means harm of any kind, and includes—

- (a) personal injury; and
- (b) damage to property; and
- (c) economic loss.

negligence means failure to exercise reasonable care and skill.

41 Application—ch 4

- (1) This chapter applies to all claims for damages for harm resulting from negligence, whether the claim is brought in tort, in contract, under statute or otherwise.
- (2) However, this chapter does not apply to a claim under the *Workers Compensation Act 1951*.

739. I note that s 45 is within ch 4 of this act.

740. I note that while similar in nature, the test for causation within s 45 is different to that which applies at common law. The question then becomes whether s 19 of the *Civil Law (Sale of Residential Property) Act* sits within this framework.

19 Compensation to buyer for false report etc

- (1) This section applies if—
 - (a) a person buys residential property under a contract; and
 - (b) a statement or report mentioned in section 9 (1) (h) (ii), (iii) or (iv) or in section 10A (7), definition of **later required documents**, paragraph (a) (iv), (c) (i) or (ii), is made available to the buyer; and
 - (c) the statement or report is false or misleading in a material particular or is otherwise prepared without the exercise of reasonable skill and care; and
 - (d) because of that, the buyer incurs loss or expense.
- (2) The person who prepared the statement or report is liable to compensate the buyer for the loss or expense.

741. Unfortunately, this question is not easily answered. The operative provision within this section, being (c) in the above excerpt, imports the exact terms of the definition of *negligence* as in s 40 (which is within ch 4 of the *Wrongs Act*), but additionally refers to the report or statement being “false or misleading in material particular”, which would not fall within ch 4. It is therefore unclear as to what test for causation applies, and whether two different tests of causation apply to the two different variations of conduct that sit within s 19.

742. As to the correct test of causation to apply, counsel for the plaintiff submitted that the common law test would apply to *all* the causes of action, while counsel for the defendants expressed agreement on this approach and identified legal nuances as to the applicability of s 45 of the *Wrongs Act* to part of s 19 of the *SORP Act*.

743. Ultimately, in my view, the material difference between the two tests for causation is minimal. Further, in my view, the same result is produced on either test, in this case. On either test there is no material difference. In my view, causation is established.

Damages

744. This issue largely relates to the selection of the method by which damages are to be calculated. The two options here are first, as in *Potts v Miller*, (calculated by reducing the ‘real’ value of the asset from the price paid for the asset plus associated consequential losses), and second, the ‘*in hand*’ approach (which is that considered in the case of *HTW Valuers* and consists of a consideration of the overall financial position of the plaintiff in respect of the transaction at the time of the hearing). It is also clear that it is not necessarily a binary choice, and difference approaches could arguably apply for different heads of damage.

745. The main reason for the differing proposed methods of calculating damages is due to the sale of the residence by the plaintiffs in June 2022. The house was sold at this time for \$2.475 million, on the basis that the residence would be knocked down (and the real estate listings from this time have the residence blurred out in photos). This is a capital gain. Under the plaintiff's proposed method of calculating damages, such a capital gain is irrelevant to the calculation. Alternatively, under the defendant's proposed method of calculation, such a capital gain is considered, and so the quantum of damages is significantly reduced.
746. The *Potts v Miller* approach to damages requires a determination as to the condition of the property as at the time of purchase in 2019. A similar finding is made in the consideration of causation. A further finding was argued to be required that the damage was so significant at the time of the purchase that the building was uninhabitable. I do not accept the submission that there is a further element to causation. I have made the finding that causation is established, see paragraph [676].
747. The first defendant proposed that the damages should be calculated on the basis of what remains in the hand of the plaintiffs. The reason for this is that the property was sold for a capital gain in June 2022.
748. While the plaintiffs did make a capital gain on the sale of the property, the house was clearly sold on the basis that the building would need to be knocked down, and so even where the plaintiff did in fact receive a total capital gain on the basis of the sale price of the purchase, such price would have been higher (and so the capital gain would have been even higher), *but for* the termite damage. Indeed, expert evidence before the Court demonstrates the difference between the value of the land with and without a residence at the time of purchase in November 2019. In my view, there is nothing in the evidence to suggest that a gap as to the value of the property, with and without the residence would not have existed in June 2022.

Summary of Final Conclusion

749. The plaintiffs have established that the Inspection Report failed to meet the requirements of the standard. Had the Inspection Report met the requirements of the standard the plaintiffs would not have bought the property; see paragraph [676]. These matters are established on the balance of probabilities.
750. Dr Ewart's expert evidence was clear, that it was likely the property had suffered significant damage at the time of the inspection and, likely to have been infested for a number of years. Causation is established as discussed in these reasons on the balance of probabilities; see paragraphs [627]-[676].

751. All three causes of action are established on the balance of probabilities.

752. The Plaintiffs are entitled to damages including consequential losses as discussed in these reasons; see paragraphs [676]-[731].

Orders

753. For the reasons above, the orders of the Court are:

- (1) Judgement be entered for the plaintiff against the defendants in the sum of \$1,113,133.38.
- (2) The parties are to send via email to judge's associates an agreed or competing calculation as to interest under CPR's as to pre-judgment interest within seven days.¹⁰⁸⁴
- (3) The defendants are to pay the plaintiff's costs as agreed or assessed.

I certify that the preceding seven hundred and fifty-three [753] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Justice Loukas-Karlsson.

Associate: M.G. Malouf

Date: 18 March 2026

¹⁰⁸⁴ This order was amended via an in chambers order on 05 March 2026 reading as follows:

"Order 2 of the judgment is amended such that parties are to send via email to the judge's associates an agreed or competing calculation as to interest under the *Court Procedure Rules* as to pre-judgment interest within seven days of the date that the parties receive the written reasons for the judgment of Loukas-Karlsson J."

An In chambers order was made on 25 March 2026 as follows:

"In accordance with the annexed interest calculations agreed upon by the parties, I award the total interest sum of \$372,823.27"

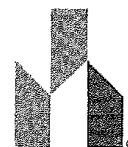
ANNEXURE A: The Inspection Report



61 Jaeger Circuit
Bruce

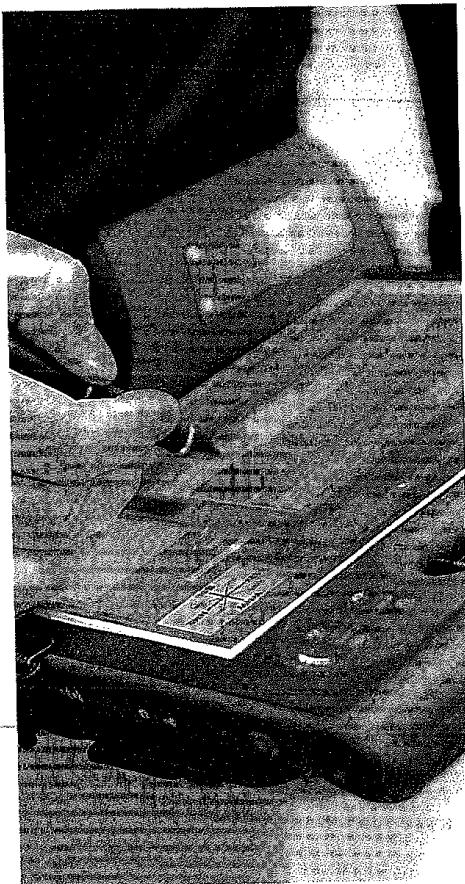
Report Prepared: 21 October 2019

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IMPORTANT INFORMATION RELATING TO THIS REPORT



This report is written with reference to Australian Standard AS 4349.0-2007 Inspection of Buildings (General requirements) and AS 4349.1-2007 Inspection of Buildings (Pre-purchase inspections - Residential Buildings) and is the result of a VISUAL INSPECTION ONLY. It is intended to be read in its entirety. If there are any discrepancies between the "Report Summary" and the Detailed Report, the detailed report information should be relied upon. It is important that you carefully read the complete report including the Warranty & Use, Scope of Inspection and the Scope & Limitations sections prior to making any critical decisions that may be influenced by this report.

Significant structural defects or maintenance items that have a substantial cost associated with repairs, or where in our opinion may have an influence on the decision to purchase the property are documented in this report. Where reference has been made to termites, maintenance items or defects of significance we recommend that prior to making a decision to purchase the property the advice of a suitably qualified tradesman who is able to quantify the extent and cost of appropriate remedial action is obtained.

Where reference has been made in this report to cracking, settlement, movement or an opinion has been provided on structural integrity, it is important to note that we are not experts in this area and our advice is limited accordingly. If considered necessary, further advice should be obtained from a Structural Engineer before critical decisions are made. Any cracking reported should be monitored for further movement. Superficial or hairline cracks that are considered to have no immediate structural implications will not be identified. Please refer to the Compliance Report to ensure that you identify any



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REPORT SUMMARY

ADDRESS	61 Jaeger Circuit Bruce
BLOCK NUMBER	16
SECTION NUMBER	26
INSPECTION DATE	18 October 2019
INSPECTOR	Scott Maher
CLIENT	Darren John Toohey & Ruth Anne Toohey
JOB REFERENCE	26435
WEATHER CONDITIONS	Fine

Key Data

Living Area (approx. sqm)	268
Occupancy Status	semi-furnished
Wall Construction	brick veneer and weatherboard cladding
Roof Construction	cut hardwood and flat framed construction concrete tile roof covering
Floor Construction	timber bearers and joists with construction particle board flooring, concrete slab to the extension
Energy Rating	1.5 stars
Construction	the dwelling is of adequate construction and structural workmanship for this type of residential development and its condition is commensurate with the era of construction, design, age and use
Maintenance	there are maintenance items detailed in this report, please read the entire report carefully
Timber Pest Report	no evidence of active subterranean termites (live species) was found at the time of our inspection

This report is intended to be read in its entirety. Please read the full document including detailed inspection information and Scope & Limitations of Report before reaching any conclusions regarding the condition of the property. If there are any discrepancies between the "Key Data" and the Detailed Report, the detailed report information should be relied upon.

SCOPE OF INSPECTION

It is our role to conduct a thorough visual inspection of the property and report only on areas of concern, identifying critical defects for an intending purchaser, insofar as an inspector can reasonably identify those defects. When reading this report, the age of the building must be taken into consideration. Some items may not have been detailed as they are considered a normal occurrence or general wear and tear for a building of this age. Electrical appliances and utilities such as water reticulation, electrical wiring or gas installations, swimming pool and spa equipment were not inspected. Qualified technicians should be consulted in regard to these items. The report is not designed to quantify features of the property, generally, ongoing maintenance items, upgrading, cosmetic works and minor defects or faults will not be detailed.

STANDARD INDICATORS

The Property Inspector uses the following terms when describing the standard of a building or a particular item being evaluated:

No significant defects have been identified

This overall condition is applied where the inspector has not identified any defects that are considered to be significant from a structural or functional perspective. The subject area may present with minor defects. Remedial action, if required, is discretionary. Good, Fair or Poor may be used when an area has been given this condition.

Defects have been identified

This overall condition is applied where the inspector has identified defects that require remedial action or investigation. Remedial action is considered to be necessary rather than discretionary. Good, Fair or Poor may be used when an area has been given this condition.

All of the above terms are used having regard for the age, quality of workmanship, style and type of construction of the building being inspected. For example, the features and finishes considered "good" in a 50 year old building are not necessarily going to be so in a modern dwelling. Our inspectors do not quantify the cost of repairs to any defects as this will be highly variable based on your service provider and the remedial action chosen. Extracts from the Australian Standard incorporated into this report have been reproduced with the permission of SAI Global under Residential Reports' Copyright Licence 1104-c092

OUR APPROACH

WE ARE AWARE THAT MANY COMMENTS MADE THROUGHOUT THIS REPORT ARE REPETITIVE. HOWEVER, THIS IS DESIGNED TO INFORM THE READER THAT THE ELEMENTS COMMENTED ON HAVE BEEN INSPECTED. To provide relevance and value for the reader, at the end of this report we have included a summary showing aspects that are considered during our inspection. We recommend that you read this information carefully to gain perspective about the detail of our examination. Comment on many items will only be provided in the event of an adverse finding that may have an influence on any decisions relating to the value of the property.

The following extracts from the Australian Standard AS 4349.1-2007 should assist the reader to understand how we have approached the inspection and define the general focus of the report:

2.3.1 GENERAL - The inspection shall comprise visual assessment of the property to identify major defects and to form an opinion regarding the general condition of the property at the time of inspection.

4.1 GENERAL - It is necessary to inspect each of the areas and items set out in Section 3; however, it is not necessary to report on each one. An inspector may choose to report only on an 'exceptions basis', i.e., listing only defects, rather than also reporting items that are in acceptable condition.

GOOD: The feature subject to comment is, in the inspector's opinion, of sufficient standard to not require any significant remedial action. There may be imperfections in the finish or the structure.

FAIR: The feature subject to comment is, in the inspector's opinion, usable but has deteriorated and would benefit from cosmetic or remedial repair work. For instance, painting may be required, render may require patching, and door fittings may require adjustment or repair.

POOR: The feature subject to comment in the inspector's opinion, requires remedial action. Repairs or replacement are considered necessary rather than discretionary.

PROPERTY REPORT

INTERIOR

Entry and Hallway

ceiling	good
walls	good
architraves and skirting boards	good
doors and windows	good
internal	

Bedroom One

ceiling	good
architraves and skirting boards	good
walls	good
doors and windows	good
internal	

Bedroom Two

ceiling	good
architraves and skirting boards	good
walls	good
doors and windows	good
internal	

Bedroom Three

ceiling	good
architraves and skirting boards	good
walls	good
doors and windows	good
internal	

Bedroom Four

ceiling	good
architraves and skirting boards	good
walls	good
doors and windows	good
internal	

Loft

ceiling	good
architraves and skirting	good
boards	
walls	good
doors and windows	good
internal	

Study

ceiling	good
architraves and skirting	good
boards	
walls	good
doors and windows	good
internal	
steps and stairs internal	good

Ensuite

ceiling	good
walls	good
architraves	good
doors and windows	good
internal	
vanity and basin	good
shower screen	good

- moisture has penetrated between the laminated glass. This is a deteriorating defect and it will worsen over time

toilet suite	good
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ventilation	◦ ventilation is provided by a wall mounted exhaust fan
-------------	---

water leakage	◦ no water leakage was detected
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wall tiles	good
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- there is a cracked and chipped tile

floor tiles	good
-------------	------

fit-out	good
---------	------

hardware, fixtures and fittings	good
---------------------------------	------

Bathroom and Toilet

ceiling	good
architraves	good
walls	good
doors and windows	good
internal	
vanity/hand basin	fair to good
	• the vanity has been mildly affected by water penetration
shower screen	good
	• moisture has penetrated between the laminated glass. This is a deteriorating defect and it will worsen over time
bath	good
	• spa bath - the pump has not been tested
ventilation	• ceiling fan unit (with heat lamps)
toilet suite	good
water leakage	• no water leakage detected
wall tiles	fair to good
	• wall tile grouting requires repairs in some areas
	• there are some cracked wall tiles
floor tiles	fair to good
	• resealing at the intersection between the wall and floor tiles is recommended
	• the floor tile grouting requires repairs in some areas
fit-out	good
hardware, fixtures and fittings	good

Toilet

ceiling	good
walls	good
doors and windows	good
internal	
architraves	good
toilet suite	good
water leakage	• no water leakage was detected
wall tiles	good
floor tiles	good
hardware, fixtures and fittings	good

Laundry

ceiling	good
architraves	good
walls	good
doors and windows	good
internal	
laundry tub	good
	• resealing is recommended between the bench top and wall tiles
water leakage	• no water leakage was detected
wall tiles	good
	• there is a cracked wall tile
floor tiles	good
	• resealing at the intersection between the wall and floor tiles is recommended
hardware, fixtures and fittings	good
fit-out	good

Kitchen and Family Area

ceiling	good
architraves and skirting boards	good
walls	good
splashback	good
doors and windows	good
internal ventilation	• ventilation is provided by an externally ducted range hood
kitchen fit-out	good
hardware, fixtures and fittings	good
sink	good
steps	good
	• there is a tile missing to the side of the rumpus step

Multi-Purpose Room

ceiling	good
architraves and skirting boards	good
walls	good
doors and windows	good
internal	

Rumpus Area

ceiling	good
architraves and skirting boards	good
walls	good
doors and windows	good
internal	

Living and Dining Area

ceiling	good
architraves and skirting boards	good
walls	good
doors and windows	good
internal	
steps	good

Hallway - Bedroom Four

ceiling	good
architraves and skirting boards	good
walls	good
doors and windows	good
internal	

Walk in Linen

ceiling	good
architraves and skirting boards	good
walls	good
door	good

Staircase and Hallway Area - Bed One

ceiling	good
architraves and skirting boards	good
walls	good
doors	good
balustrades and handrails	good

• handrails are not built to regulation height in accordance with the current Building Code. Due to the age of the construction this is not a requirement. However, in the interests of safety it should be noted that regulation height balustrades and railings provide for a higher level of safety, particularly where the safety of children is concerned

Roof Cavity

insulation
sarking

- the roof cavity is insulated with fibreglass batts
- sarking has been installed in the roof cavity
- FOR MORE INFORMATION Go to the index page at the end of this report and read resource 16 - Sarking
- cut hardwood and flat framed construction

roof construction

EXTERIOR

Roof Exterior

no significant defects

- concrete tile roof covering
- the condition of the tiled roof covering is commensurate with the age of construction, on older roofs over time, tiles and pointing can crack and there may be corner breakages, sometimes flashings may need to be repositioned. No leakage was detected at the time of inspection

Gutters and Downpipes

no significant defects

- there is leakage occurring at some downpipe section joins. Remedial action may include sealing of the leak with an appropriate sealant. In some cases the section may need to be repaired or replaced by a qualified roof plumber.
- gutters need to be cleared of leaf litter, silt and debris to ensure that maximum roof drainage occurs in all weather conditions. Additionally, the leaf litter may be concealing rust or damage to gutter system

Eaves, Fascia and Barge Ends

no significant defects

Wall Construction Exterior

no significant defects

- brick veneer and weatherboard cladding
- our inspection did not identify any cracks in the exterior masonry that were considered to be structurally significant. Cracking of masonry walls is very common, particularly with the regions volatile clay soils. Cracks that were considered to have no structural implications have not been individually identified

Doors and Windows External

defects have been identified

- timber decay was detected in the bathroom window frame

Floor Construction

no significant defects

- timber bearers and joists with construction particle board flooring, concrete slab to the extension

Sub Floor

defects have been identified

- our inspection was significantly restricted by low clearances and ductwork, not all areas of the sub floor could be inspected
- there was some surface moisture present at the time of our inspection. Moisture levels should be monitored to determine if this is an ongoing condition. Remedial action should include a review of surface and sub-surface drainage, garden bed location, garden watering and run-off from hard surfaces to ensure that moisture is directed away from the sub-floor. Elevated humidity levels contribute to creating an environment that is conducive to timber pest infestation. Additionally, saturated footings can create conditions that may compromise their structural integrity
- there is evidence of old termite activity (mud trails) to the sub floor walls, no live termites were sighted
- efflorescence is present on the wall surface, efflorescence occurs when excess salts within the masonry are leached to the surface due to water transfer. It is typically seen as white salt deposits on the surfaces of concrete pavement or mortar between bricks or tiles. Efflorescence is typically only of aesthetic concern and does not pose any structural threat to the concrete or mortar
- FOR MORE INFORMATION: Go to the index page at the end of this report and read resource 8 – Efflorescence in Masonry Walls

Driveway	no significant defects the condition of the driveway paving is commensurate with the age of the development, typically over time the paving will develop cracks and undulations often as a result of tree root intrusion or the subsidence of the sub soil. Mostly the deterioration is significant from a cosmetic perspective, vehicle access is generally acceptable
Paths and Paving	no significant defects some areas of paving are undulating due to movement in the substrate, rectification would require the pavers to be lifted, the substrate levelled and the pavers replaced
Steps and Stairs External	no significant defects
Retaining Walls	no significant defects there are some cracks in the masonry retaining walls
Balustrades and Handrails	no significant defects handrails/balustrades are not built to regulation height in accordance with the current Building Code. Due to the age of the construction this is not a requirement. However, in the interests of safety it should be noted that regulation height balustrades and railings provide for a higher level of safety, particularly where the safety of children is concerned
Swimming Pool or Spa	- the swimming pool, filtration equipment and safety fencing, gates and other aspects of swimming pool safety are not included in this report. To obtain specific information relative to these items it will be necessary to commission an inspection by a suitably qualified technician. Safety requirements are not related to the specifications contained in the current Building Code of Australia - FOR MORE INFORMATION: Go to the index page at the end of this report and read; - Swimming Pool and Spa Regulations (Resource 26) - Swimming Pool and Spa Safety (Resource 27)
Fences and Gates	defects have been identified - timber decay is evident in cross-timber and timbers in contact with the ground in some areas - repairs are required to some areas of the timber fencing - previous termite activity was sighted to some fencing timbers. No live termites were sighted. We recommend removing and replacing the affected timbers - over-growth of vegetation and screening in some areas of the fence line limited our inspection. We were unable to determine the condition of the fencing in those areas - movement was noted to the side masonry wall at the garage, this is not considered to be structurally significant at the time of the inspection

Garage and Studio

description	• detached brick garage
roof covering	good • concrete tile roof covering • the condition of the tiled roof covering is commensurate with the age of construction, on older roofs over time, tiles and pointing can crack and there may be corner breakages
gutters and downpipes	fair to good • gutters should be cleared of silt and debris to ensure that maximum roof drainage occurs in all weather conditions. Additionally, silt and debris may be concealing rust or damage to gutter system • there is leakage occurring at the downpipe section joins. Remedial action may include sealing of the leak with an appropriate sealant. In some cases the section may need to be repaired or replaced by a qualified roof plumber.
wall construction exterior	good • brick construction
floor construction	good • concrete slab construction • there are cracks in the concrete slab, however, we are of the opinion they are not structurally significant. Cracks need to be monitored over time to determine if any remedial action is required
doors	good • one roller door has been fitted
ceilings and cornices	good
doors and windows	good
internal walls	good

Carport with Storage Area

carport type	• double carport with storage
roof covering	good • concrete tile roof covering
gutters and downpipes	good • gutters need to be cleared of leaf litter, silt and debris to ensure that maximum roof drainage occurs in all weather conditions. Additionally, the leaf litter may be concealing rust or damage to gutter system
structural integrity	good • surface rust was noted to the steel posts in some areas, preventative maintenance may be a consideration
wall construction exterior	good • brick construction • efflorescence is present on the wall surface, efflorescence occurs when excess salts within the masonry are leached to the surface due to water transfer. It is typically seen as white salt deposits on the surfaces of concrete pavement or mortar between bricks or tiles. Efflorescence is typically only of aesthetic concern and does not pose any structural threat to the concrete or mortar • FOR MORE INFORMATION: Go to the index page at the end of this report and read resource 8 – Efflorescence in Masonry Walls

Pergola

pergola roof	good
pergola timbers	good
structural integrity	good

Tennis Pavilion

roof covering

good

pavilion timbers

• metal deck roof

fair to good

structural integrity

• some areas of the pavilion timbers are deteriorating, repainting is recommended to prevent further deterioration

gutters and downpipes

good

good

• gutters should be cleared of silt and debris to ensure that maximum roof drainage occurs in all weather conditions. Additionally, silt and debris may be concealing rust or damage to gutter system

Front Porch

porch construction

good

drainage

• concrete slab

good

• drainage appears to be directed away from the dwelling, however, this was not tested at the time of inspection

COMPLIANCE REPORT

IMPORTANT NOTE: This report relates to Building and Development approvals only. If you are considering obtaining approval for unapproved structures or alterations prior to or following the sale of this property, please contact our office on 6288 0402 and our expert Certification team will make your project a priority.

Plan No. (if applicable)	Description	Date of COU Approvals (Certificate of Occupancy)	Comments
65996	brick veneer residence	2/08/1985	previously known as block 9 section 26 Bruce
65996	brick garage	29/08/1985	
65996/A	screen & retaining walls	17/06/2011	retaining walls have been removed
65996/B/C/D	tennis court		no certificate of occupancy for plan 65996/B/C/D - application only this plan has been superseded no Certificate of Occupancy for plan 65996/E - permit only this extension no longer exists
65996/E	extensions & alterations to residence		
65996/F	existing external structures - tennis court, screen, pergola & new tennis pavilion	17/06/2011	
65996/G	inground pool	8/11/1991	
65996/H/I	extension & alterations	30/03/1992	
65996/J	carport & storeroom	17/06/2011	
	addition of walk in linen		approval is not required
	additions and alterations to kitchen		building or development approval is not required
	garage internal additions and alterations - convert one side to studio		approval is not required
	bird enclosure		approval is not required
	garden pond		

Survey Reports	Date	Comments
Sowden, Lilley & Associates	8/03/1985	the surveyor's report indicates that there are no encroachments onto this property nor by this property onto adjoining properties

COMPLIANCE REPORT NOTATION

For information regarding current dimensions and approvals: planning.act.gov.au/topics/design_build/da_assessment/exempt_work
A Building File from Access Canberra has been obtained to complete your Compliance Report. Documentation in this file may include: floor plans, site elevations, Certificates of Occupancy & Use, file index, survey reports and drainage plans. This report is based on an examination of these documents and a visual inspection and deals with matters of compliance from the file provided. Please note that where the detail on plans has been compromised or is illegible, Residential Reports will not accept any liability for omissions or errors in our report. Please read the Compliance Notation in our Scope & Limitations.

EASEMENTS: An easement is a section of land registered on your property which gives another party the right to access it for a specific purpose. An example is a section of the property that contains municipal services such as electricity, water or drainage infrastructure. If a structure requires approval and is located on an easement the appropriate utility provider is consulted during the certification process and it is they who determine if an application for approval will be supported.

TCCS, PLUMBING & ELECTRICAL APPROVAL: If this report reveals structures or alterations that require Transport Canberra & City Services (TCCS), Plumbing or Electrical Approval or cites plumbing and electrical additions and or alterations, please note that approval may have been granted, however, documentation is not provided in the building file. The Environment & Planning Directorate or the owner may have further information.

DEVELOPMENT APPROVAL: If this report identifies structures that require Development Approval, information relating to the status of Development Approvals relative to those structures will be shown on the Lease Conveyancing Enquiry provided by the solicitor. This will be included in the Conveyancing Contract for Sale. Development Approval information is not contained within the building file we receive.

TIMBER PEST REPORT

Our visual inspection is undertaken to identify the following timber pests:

- Subterranean termites
- Borers
- Timber decay (rot) fungi

Where applicable and where there is reasonable access, the following areas are examined during our Timber Pest inspection: interior and exterior of structures, roof cavity, subfloor, garage or carport, garden and storage sheds/outbuildings, retaining walls and garden borders, pergolas and decks, structures, fences and trees within 30m of the building within the boundaries of the property.

INSPECTION RESULTS

Occupancy Status

Live Species

semi-furnished

no evidence of active subterranean termites (live species) was found at the time of our inspection

Timber Pest Evidence

evidence of previous termite activity was sighted in;

- evidence of old termite activity was sighted to some fencing timbers. No live termites were sighted. We recommend removing and replacing the affected timber
- there is evidence of old termite activity (mud trails) to the sub floor walls, no live termites were sighted

there is evidence of timber decay;

- there is timber decay noted in the bathroom window frame
- timber decay was detected in some fencing timbers, notably those in direct contact with the ground and in some cross-rails
- timber pest damage was sighted to some tree trunks/stumps. Having conducted a visual inspection only, we are unable to confirm that there is no termite and borer activity or extensive timber decay occurring beyond the exposed surfaces. No live species were sighted at the time of inspection

Subfloor Drainage & Ventilation

our limited sub floor inspection indicates that the subfloor drainage is generally fair, however, ventilation is poor

Recent Termite

Treatments &

Recommendations

there was previously a chemical treatment notice posted in the meter box

- biflex duo was applied to the perimeter on 5/2//2011

at the time of the inspection a treatment in accordance with Australian Standard 3660.1 to control or prevent subterranean termites from infesting and causing damage to the property was not considered necessary

Overall Susceptibility of the Building to

Timber Pest Infestation

considering all of the relevant factors, it is our opinion that the overall degree of risk of timber pest infestation to the property is MODERATE to HIGH - we strongly recommend that regular inspections are undertaken

It should be noted that if the risk factor noted in this report is considered to be high, this is not designed to deter an intending purchaser; it is simply encouraging awareness that increased vigilance is warranted and any recommendations regarding reducing conducive conditions or frequency of inspections should be observed. It is recommended that a full pest inspection be under-taken every 6-12 months. Regular inspections DO NOT prevent timber pest attack; they are designed to limit the amount of damage that may occur through early detection.

PROPERTY ACCESS

Restricted access caused by stored goods, furnishings, window treatments, floor coverings, security devices, vegetation, duct work, confined spaces, insulation and other impediments will limit the scope of this inspection. Whilst every effort has been made to conduct a comprehensive roof cavity and subfloor inspection there are limitations relative to safe access requirements which include low clearances, the availability of safe walk-ways and work-safe temperatures, which when applicable, will limit the scope of the inspection. The roof exterior is inspected when accessible from a 3.6 metre ladder, or from ground level where there are height restrictions.

61 Jaeger Circuit Bruce

Area	Restrictions
interior	- furniture and stored goods - window treatments and floor coverings
subfloor	- the property was under renovation in some areas - low clearances - duct work - there is insufficient crawl space in part of the sub-floor and therefore some areas were viewed from a distance due to restricted access. Please refer to our Scope and Limitations section at the end of this report under the heading "Safe and Reasonable Access"
roof cavity	- work health and safety requirements restricted the scope of the inspection - low clearances - insulation covering the ceiling framing - duct work - work health and safety requirements restricted the scope of the inspection
roof exterior	- not all areas of the roof cavity could be inspected due to limited access points - safe access considerations required a top of ladder inspection for some areas and ground level inspection for the height restricted areas
external structures	- garden foliage or overgrowth restricted access to some structures

WARRANTY & USE OF OUR REPORTS

This report is written solely for the use and benefit of:

1. **The Client** named in this report
2. **The Purchaser** of this property

NO LIABILITY or responsibility in contract or tort or statute is accepted to any **Other Party** who may rely on the report wholly or in part. Any **Other Party** acting or relying on this report, wholly or in part, does so at their own risk.

NO LIABILITY or responsibility will be accepted if the invoice for this report is not paid on or before settlement of the sale contract or within one hundred and eighty (180) days from the date of inspection.

NO LIABILITY shall be accepted on account of failure of the report to notify any termite activity and/ or damage present at or prior to the date of the report in any areas of the subject property physically inaccessible, or to which access for inspection is denied by or to the Inspector including but not limited to any areas so specified by the Report.

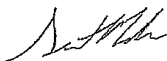
NO LIABILITY shall be accepted where documents supplied by external agencies, the client or their representative, have any omissions, errors or are incomplete, inaccurate or illegible.

The report is only an opinion of Residential Reports and is valid for one hundred and eighty (180) days from the date of inspection as per the Civil Law (Sale of Residential Property) Act. No liability will be accepted or claims considered after the expiration of this period of liability.

If it is claimed that a defect has not been documented or it is claimed that there is any other omission relating to this report, Residential Reports must be notified in writing before ANY action is taken. **NO LIABILITY** shall be accepted where any costs (including for remedial action or professional advice) are incurred by the claimant prior to Residential Reports receiving written notification of the defect or omission along with evidence of the defect or omission, being given a reasonable opportunity to re-inspect the property, identify the defect or omission, obtain professional advice and propose a resolution or arrange for rectification work to be undertaken. Unless costs are specified and agreed to in writing, no liability will be accepted.

NO LIABILITY shall be accepted for any costs incurred in excess of the reasonable costs required to rectify the defect or omission claimed only. This report supersedes any other report, verbal or written, given to you by this company in respect of this property. Please feel free to contact our Inspector at any time if you have questions or require clarification prior to acting on this report.

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Signed on behalf of:
Residential Reports Pty Limited
ABN 38 609 880 122
Scott Maher

SCOPE & LIMITATIONS OF OUR INSPECTION

This report is intended to be read in its entirety. Please read the detailed inspection information and the Scope & Limitations of Report sections before reaching any conclusions regarding the condition of the property. Any person who relies upon the contents of this report does so acknowledging that the following clauses, which define the Scope and Limitations of the inspection, form an integral part of the report.

This report has been prepared as a result of a VISUAL INSPECTION with reference to the requirements of Australian Standard AS 4349.0-2007 Inspection of Buildings (General requirements), AS 4349.1-2007 Inspection of Buildings (Pre-purchase inspections - Residential Buildings) and AS 4349.3 - 2010 Inspection of Buildings Part 3: Timber Pest Inspections. It is limited to the condition of those areas of the property that were fully accessible (see Safety and Reasonable Access) and visible to the inspector at the time of inspection. In the case of a Strata type property, our inspector only undertakes an examination of the interior of the unit.

AS 4349.1 - 2007 Inspection of buildings excludes reporting of the following items: footings, concealed damp-proof course, electrical installations, smoke detectors and residual current devices; plumbing, drainage, gas fitting, air conditioning and heating; garage door opening mechanisms; swimming pools, spas, saunas and associated equipment; the operation of fireplaces and chimneys; alarm systems and intercom systems; soft floor coverings including carpet and vinyl, floating floors; window treatments; appliances including dishwashers, garbage disposal units, ovens, ducted vacuum systems; paint coatings; landscaping.

LIMITATION OF LIABILITY

This report is valid on the date of inspection. No responsibility is accepted for any matter not existing or evident or for any deterioration occurring after the inspection date. The inspection is completely visual. Concealed areas where access is unavailable are unable to be inspected and are not reported on; such defects could include, but are not limited to:

- Breakage, blockage or interference with any concealed pipes, broken window mechanisms (sash cords) etc.
- Any part of the structure which is underground or concealed e.g. footings, wall framing, under floor coverings. Areas concealed by furnishings or stored goods or low clearances

No responsibility can be accepted for defects which are latent or otherwise not reasonably detected on a visual inspection without interference with or removal of any of the structure including fixtures, fittings, furniture, insulation or stored items within and around the building.

What the Inspector Examines to Prepare a Property Report

To provide relevance and value for our readers, the following pages show (but do not limit) aspects of the property that may be examined, where visual inspection is possible. These items have been extracted from the Australian Standard AS4349.1—2007 Inspection of buildings (Pre-purchase inspections - Residential buildings) and are considered as the inspector reviews each room or area. In most circumstances comment on a particular area or item may only be provided in the event of an adverse finding considered to be worthy of mention. The inspector did not move or remove any wall coverings, floor coverings, furnishings, equipment, appliances, pictures or other household goods. In an occupied property, these items may be concealing defects. Where structures are obscured by foliage, or other concealments, evidence of timber pest activity, damage or other defects may be concealed.

WALL CONSTRUCTION

Distortion (significant), nail popping, defective lining, dampness/water damage, cracking, defective or damaged plaster/render. Settlement cracks, if present, need to be monitored over a period of time to determine if an ongoing structural problem exists. If any reference has been made in this report to cracking, settlement and/or movement, it should be noted that we are not experts in this area and further advice should be obtained from a Structural Engineer.

FLOORS

TIMBER: Springy or squeaky boards/sheeting, timber decay (rot), out of level – significant, undulations - significant, dampness/water damage; CONCRETE: cracking, out of level – significant; HARD FLOORING: cracking, loose or drummy units, dampness/water damage

INTERNAL & EXTERNAL DOORS & DOOR FRAMES

Defective hardware – significant, rotting/corroded frames, loose/badly fitting doors, damage.

TIMBER & METAL WINDOWS

Putty/glazing sealant, broken glass, rotting frames (timber), corrosion (metal), sills, fittings/hardware, damage. In most cases access to windows is restricted by window treatments, furniture or security locks. Older style timber windows can sometimes bind with the frame. This is viewed as a general maintenance issue. Sash windows sometimes require maintenance to the window balance mechanism or sash cords. A visual inspection cannot provide a guarantee that windows will operate smoothly. Sometimes window runners, sashes and balance mechanisms will require maintenance or replacement.

PAINTWORK

The condition of painted surfaces is often a subjective matter. Areas that appear to be acceptable when furnished may not always be considered so when devoid of obstructions. Paint work is normally not considered in Property Inspections. To prevent wood decay of timber surfaces and deterioration of metal components, the condition of these surfaces should be monitored and repainting carried out regularly. Corrosion of any metal roof sheeting should be repaired, treated and painted to avoid water leakages. Painted surfaces can mask areas where timber has deteriorated. Our visual inspection may not detect instances where this has occurred. The opinions provided here are of a general nature only, given that there can be significant differences in the condition of painted surfaces in each area of the property. The reader of this report is urged to conduct their own detailed inspection before reaching a conclusion regarding the acceptability of painted surfaces

WET AREAS

Fixtures and fittings, ventilation, cistern/pan, taps, basins, tubs, leakage, sealants, drummy/cracked/missing tiles, grout defects, vanity, shower leakage, broken/cracked glass. If a wet area was not in service prior to and or at the time of inspection and no elevated moisture readings were recorded, or there was no visible evidence of current water leakage, then it is possible that an existing water leak will remain undetected.

WATERPROOFING

A VISUAL INSPECTION OF THE AREA CANNOT PROVIDE CONCLUSIVE EVIDENCE THAT THE AREA IS WATERPROOF. Compliance with Australian Standard AS 370-2004 Waterproofing of Wet Areas is critical to meeting waterproofing requirements.

Should conclusive evidence be required regarding the integrity of waterproofing of wet areas, in particular shower areas, we recommend that a qualified technician be engaged to complete a comprehensive test to include:

- Capping the shower rose and leaving the water reticulation system under pressure and then checking for evidence of water leakage around tap spindles etc. (the sound of escaping air when the shower rose cap is removed indicates a water tight system). The technician may be engaged to complete a comprehensive pressure test of the entire water reticulation system.
 - Plugging the floor drain of the shower cubicle and filling the base with water to the maximum level. Allowing the water to remain in the base for an extended period and checking that the level has not dropped. If the water has diminished it is most likely that the waterproofing system has failed. In this event, extensive repairs to correct the problem are often the outcome.
-

KITCHEN

Fitout, sealants, ventilation, taps, leakage, sink, drummy/cracked/missing tiles, grout defects. This report does not cover any matters relating to the operation of electrical or gas appliances. Any comments made in this regard are from a general observation only.

INTERNAL & EXTERNAL STAIRCASES

Stringers, handrails, balustrades, newel posts, treads (goings), risers

INTERNAL ROOF SPACE

Framing, insulation, sarking, party walls (if applicable). Sarking is a foil insulation/vapour barrier. Used in conjunction with bulk insulation, sarking provides an ideal insulation system for the control of heat and condensation. Sarking can only be installed during construction.

EXTERNAL ROOF COVERING, FASCIAS, GUTTERS & DOWNPIPES

Tiles/slates, sheet roofing, flashing, skylights, vents, downpipes, valleys, guttering, eaves, fascia boards, barge ends. Roof waterproof integrity and roof drainage is not tested during our inspection therefore it is not possible to determine the effectiveness of the roof cover and drainage system under all conditions. It is important to note that a visual inspection of the roof covering may not identify roof leakages. Roof design can have a significant impact on roof drainage. Low pitched

construction can, in adverse weather conditions lead to flooding of the roof cover. Effective roof drainage is absolutely critical for a flat framed or low pitch roof. Flooding of the roof cover can result in water ingress within the building envelope. Roof drainage and the stormwater systems are not tested at the inspection. Inadequate, blocked or non-existent stormwater drains are often accountable for problems relating to roof drainage. Repainting of timber can mask the existence of timber rot. We cannot guarantee that all timbers are sound. A visual inspection may not, in some circumstances, detect roofing timbers affected by rot.

EXTERNAL WALLS & NON STRUCTURAL RETAINING WALLS

Bricks, mortar, render, cracking/movement, dampness, visible flashing, weep holes, joint sealants, perpends, decay. Settlement cracks, if present, need to be monitored over a period of time to determine if an ongoing structural problem exists. If any reference has been made in this report to cracking, settlement and or movement, it should be noted that we are not experts in this area and further advice, if considered necessary, should be obtained from a Structural Engineer.

PATHS, PAVING & DRIVEWAY

Cracking, movement, uplifting, sinking, alignment, roof penetration.

FENCES & GATES

Palings/panels, rails, posts, sagging, timber decay (rot).

SUB FLOOR

Dampness, debris, drainage, ventilation, cracked or leaking pipes; TIMBER CONSTRUCTION: bearers & joists, framing, piers/stumps; SUSPENDED CONCRETE FLOOR CONSTRUCTION: concrete condition, cracking
If moisture is noted, it is recommended that the sub-floor area be monitored to ensure that surface and sub-surface moisture ingress is not an ongoing issue. If the area remains damp, consideration should be given to upgrading subterranean and surface drainage systems to ensure that moisture is directed away from the building foundations and the sub-floor area is kept dry. A qualified drainage expert should be consulted with regard to drainage issues.

Many serious foundation problems are caused by reactive soil types and trees and gardens being planted too close to the building. Generally, clay soils which are common in the ACT, are reactive soils. Large trees use vast amounts of water and can quickly draw moisture out of the ground during dry periods, this results in destabilised moisture content of the soils around the building and ultimately may cause a foundation problem. Over watering gardens close to the building may have the opposite effect, especially with clay soil. Over watering increases the moisture content of the soil which can result in "heaving" of the foundations adjacent to the garden. When watering close to the building you should avoid 'pooling' of water in a particular area, as this also affects the moisture content of the soil which in turn can cause damage to footings and foundations. Too much or too little water near the perimeter of the building may cause serious problems with foundations and footings and damage can cause major structural problems, resulting in costly repairs.

HINTS FOR AVOIDING PROBLEMS AND COSTLY REPAIRS:

- Water gardens evenly close to the building and do not over water
- Ensure the ground is graded away from the walls of the building and that the property has adequate drainage
- Promptly repair broken downpipes, leaking taps, sewerage pipes and other water services
- Hot water system overflows should be directed away from the area immediately adjacent to the foundations and the services maintained to ensure excessive leakage does not occur
- Garden beds should not be located against the house

SPECIAL PURPOSE REPORTS

Improvements such as swimming pools and spas are subject to a Special Purpose Report and are not included in our inspection and reports. We recommend that a qualified technician be engaged to report on these items and to advise on current regulations relating to safety fencing and equipment.

Safety & Reasonable Access

Australian Standard 4349.1 – 2007 3.2.2 The extent of accessible areas shall be determined by the inspector at the time of inspection, based on the conditions encountered at the time of inspection. The inspector shall also determine whether sufficient space is available to allow safe access. The inspection shall include only accessible areas and areas that are within the inspector's line of sight and close enough to enable reasonable appraisal. The Australian Standard 4349.3 defines reasonable access as "areas where safe, unobstructed access is provided and the minimum clearances are available; or, where these clearances are not available, areas within the consultant's unobstructed line of sight and within arm's length. NOTE: Reasonable access does not include removing screws and bolts to access covers."

Reasonable access is determined in accordance with the provisions of the following WHS requirements

Area	Access Manhole MM	Crawl Space MM	Height
Subfloor	500 x 400	Vertical clearance - Timber Floor: 400* Concrete Floor: 500	
Roof Interior	400 x 500	600 x 600	Accessible from a 3.6 m ladder
Roof Exterior			Accessible from a 3.6 m ladder

* To underside of bearer, joist or other obstruction to access.

Roof Cover Inspection - Work Health and Safety requirements determine that an inspector accessing a roof cover must be protected by harnessed safety lines and or edge protection. These safety measures are not practical during a presale inspection, therefore, this report is restricted to a "top-of-ladder" inspection. This report is not a guarantee that defects and/or damage do not exist in any part of the property not specifically seen and described by the inspector. This report is not a warranty against problems that may develop in the future.

Work Health and Safety Act 2011 - A non-residential building and the common property of some group residential buildings will fall within the definition of a workplace for the purposes of the Work Health and Safety Act 2011,

The owners of workplaces must ensure that:

- premises are safe and without risk
- plant and substances are used without risk
- workers are trained in WHS, are aware of their obligations and do, in fact, act in a safe manner

A pre-purchase building inspection may identify some safety issues in the common area but it is not an audit conducted for that specific purpose. It is essential that every Owners' Corporation or Company consult an appropriately qualified specialist to ensure it meets its legislative obligations.

Safe Working Temperatures for the Inspector - When the temperature of a workspace (for example a ceiling cavity) exceeds the level considered to be safe according to WHS guidelines, the inspector will complete a risk assessment and the inspection will be limited accordingly. In the event that the inspector determines that the temperature exceeds safe working limits, generally, the inspection will be limited to the area immediately adjacent to the access for inspection.

Property Report

This report does not and cannot make comment upon: defects which may have been concealed; the assessment or detection of defects (including rising damp or leaks) which may be subject to the prevailing weather conditions; whether or not services have been used for some time prior to the inspection and whether this will affect the detection of leaks or other defects; the presence or absence of timber pests; gas fittings; environmental concerns; the proximity of the property to flight paths, railways, or busy traffic; noise levels; health and safety issues; heritage concerns; security concerns, fire protection; site drainage (apart from surface water drainage); the operation of swimming pools and spas; detection and identification of unapproved building work; detection and identification of illegal or inadequate plumbing or electrical work; durability of exposed finishes; neighbourhood problems; document analysis; any matters solely regulated by statute; any area or item that could not be inspected by the inspector. Unless otherwise specified, no examination has been made of any documentation of any type. We have not referred to statutory authority records nor have we examined any survey or water and sewerage service diagram or any other document prepared by any statutory authority or other party.

Purpose of This Report - The purpose of this report is to identify major defects in the building, decks, pergolas, garages and other similar significant improvements insofar as a property inspector can reasonably identify those defects. Structures, not limited to but including, garden sheds, play equipment, garden trellis', swimming pools and spas are not inspected or included in this report. A Special Purpose Report may be commissioned for these types of improvements. This report contains numerous observations but is not intended to list every defect. Defects are common to all structures and generally are commensurate with the age of the construction and use. Ongoing maintenance, upgrading or replacement requirements, cosmetic works and minor defects or faults are subjective and have not been included.

Concealed Surfaces - The inspection did not include breaking apart, dismantling, removing or moving objects, including but not limited to foliage, mouldings, roof insulation or sisalation, floor or wall coverings, sidings, ceilings, floors,

furnishings, equipment, appliances, or personal possessions. The inspector cannot see inside walls, between floors, inside skillion roofing, behind stored goods or any other areas that are concealed or obstructed. The inspector did not dig, gouge, force or perform any other invasive procedures. Visible timbers have not been destructively probed or hit. In an occupied property, furnishings or household items may be concealing defects. Some defects may only be visible once furniture and other items have been removed from a property or when alterations are carried out. Built-in cupboards are usually filled with personal items and clothing. Some exterior surfaces may be obscured due to overgrown vegetation. Therefore, we cannot comment on the condition of the surfaces obscured or concealed by these or other items.

Roof Drainage and Water Penetration - Some water penetration problems and/or dampness do not become apparent and sometimes cannot be detected unless there has been recent heavy rain or prolonged periods of rain. Roof drainage is not tested. Therefore, no guarantee is given or implied that the roof will remain weatherproof in all weather conditions. If there is reference in the report to water stains within the interior of the property this is evidence that the roof and/or drainage system has previously leaked. If moisture has been identified by the inspector using electronic testing equipment then it will be noted in the report. We recommend that you contact the inspector to discuss the probability of ongoing roof leakage. Particularly with respect to older properties and where the roof has a low pitch, engaging the services of qualified roof plumber to provide an expert opinion should be considered. The very best roof drainage systems can fail in extreme weather conditions sometimes impacted by conditions not related to the property under review. (Blocked or impaired stormwater drains for example).

Fire Protection Equipment & Ordinance Requirements - These are not covered by this report and these matters should be checked with the statutory authority. Any fire protection equipment has not been tested, e.g. smoke detectors etc.

Hazardous Materials & Contamination - Our inspection and report does not cover any hazardous materials or prior use of the land and building or any chemicals applied to land and buildings, which may have caused contamination.

Retaining Walls & Structural Columns - We are not engineers. Comment in respect of large and/or structural retaining walls and columns are beyond the scope of this report. It is not possible to determine from a visual inspection whether a retaining wall or column has been built in accordance with sound engineering principles and, even if it has, whether it is or will remain sound. An engineer should be consulted in any case where there are large, or structural, retaining walls, columns or similar building elements.

Internal Walls & Ceilings - Movement cracking in ceiling and wall linings are common to most structures particularly older developments. Mostly they are cosmetic and generally have no structural implications. Reparation is usually undertaken during routine maintenance. Undulations in ceiling linings are often associated with older structures and are a result of the deterioration of the adhesive used to fix plasterboard to the ceiling battens. Typically, this is a cosmetic defect, however, in some circumstances the plasterboard may require refixing to the battens.

Cracking/Settlement/Movement & Structural Integrity - Where reference has been made in this report to cracking, settlement, movement or an opinion has been provided on structural integrity, it is important to note that we are not experts in this area and our advice is limited accordingly. If considered necessary, further advice should be obtained from a Structural Engineer before critical decisions are made. Any cracking reported should be monitored for further movement. If further movement is noted, a Structural Engineer should be consulted at the earliest opportunity. Cracking of masonry walls is very common in the ACT, particularly where there are volatile clay soils. There may be some superficial or hairline cracks that we consider have no structural implications which have not been identified.

Electrical, Gas & Other Service Installations - We are not licensed electricians, gas fitters or mechanical engineers. This report does not cover any matters relating to electrical and gas installations or any apparatus operated by electronic, mechanical or hydraulic means. This report does not cover any matters relating to the operation of electrical or gas appliances. Any comments made in this regard are from a general observation only. You should satisfy yourself as to the operation and condition of any appliances or other installations. Any comments made in this regard are from general observation only. There has been no electrical, data, security or fire detection system testing or investigation.

Plumbing & Drainage - We are not licensed plumbers and a specialist inspection of the water service, plumbing and drainage system including roof drainage is excluded from this report. We recommend an inspection by a licensed plumber and drainer to identify any plumbing faults or drainage problems.

Timber Pests - If this report does not include one, we strongly recommend that an independent inspection and report be obtained from an accredited Pest Inspector to determine whether the property is free from infestation (whether active or dormant).

Boundaries - Unless otherwise stated, the inspector has not gained access to any neighbouring properties and is therefore unable to comment upon the external state of any boundary fences and walls. The common areas of unit developments are not inspected. Any comments made in relation to common areas are strictly observational.

Rural Property Inspection - This inspection and report relates to the residential structure; rural improvements on the property are not inspected or reported on, any comments contained in this report relative to rural improvements are strictly observational.

Areas and Dimensions - Whilst every care has been taken to accurately quantify dimensions referenced in this report, we accept no responsibility for inaccuracies as supplying this information exceeds the requirements of a standard building inspection as per Australian Standard 4349.1-2007. In many instances scale plans are not available and therefore the reader should not rely on this report when making critical decisions relating to dimensions.

Elevated Structures - Where reference has been made in this report to an elevated structure such as a deck balcony or verandah, it is important to note that we are not Structural Engineers and accordingly our advice is limited. Any opinion relating to structural integrity is relative to weight loadings typical of a normal household event. Prior to loading the structure beyond normal which may occur at a larger gathering, we recommend that professional advice be obtained to determine that the structure will safely cope with the weight loading. Additionally, the structure should be regularly inspected to ensure that structural integrity is maintained.

Special Purpose Reports - This Property Report does not contain any assessment or opinion in relation to any item which is the subject of a Special Purpose Property Report, or any matter where the inspection or assessment of which is solely regulated by Statute. Special Purpose Property Reports include comment on the following: common property areas, environmental concerns such as sunlight, privacy, streetscape and views, proximity of property to flight paths, railways and busy traffic or other neighbourhood issues; noise levels; WHS issues including, but not limited to the presence of asbestos, lead or other hazardous materials; heritage concerns; security or fire protection systems; climate control or water heating systems; analysis of site drainage apart from surface water drainage; swimming pools and spas; detection and identification of illegal and unauthorised plumbing work; durability of exposed finishes.

Compliance Report

The information within this report relies on the plans, survey reports, certificates of occupancy and other relevant documents supplied by the Environment & Planning Directorate (EPD), the appropriate local council or Directorate, the client or their agent. Our company or its employees are not responsible for any omissions or errors where incomplete, inaccurate or illegible information is supplied. It is the responsibility of the property owner to resolve any file discrepancies with the relevant authority. Documentation of any plumbing or electrical alterations is not included in the building file. If required, this documentation can be obtained by the title holder from the relevant utilities provider. If the subject property features a second driveway or verge crossing, Transport Canberra & City Services approval may be required. This information is not supplied in the building conveyancing file. If this report confirms that certification is 'pending' for an unapproved structure, it is important that you are aware that this process can take weeks and involve more than one agency including but not limited to the Environment & Planning Directorate, Icon & Transport Canberra & City Services. Whilst it is rare, in some instances throughout the approvals process an application may be rejected. The Compliance Report relies on documentation provided in the Building File. Residential Reports Inspectors are not Building Surveyors. Certifications included in the file are not cross referenced with the Building Code of Australia (BCA) applicable at the time of construction to confirm that the improvements are compliant with the BCA. This is the responsibility of the Building Surveyor prior to issuing a Certificate of Occupancy. No attempt is made in this inspection and reporting process to confirm that the existing improvements on the subject property are in strict accordance with approved plans. There may be variations in design, features and dimensions that conflict with each other. Additionally, there is no guarantee given that improvements are in accordance with the current Building Code of Australia. In most circumstances, there is no requirement to upgrade specifications to the current Building Code.

Timber Pest Report

This report is the result of a VISUAL INSPECTION ONLY. Inspection of the property and this report has been completed with reference to AUSTRALIAN STANDARD AS 4349.3 - 2010 Inspection of buildings Part 3: Timber Pest Inspections. In all instances throughout this report the inspector is referring to accessible areas only. Areas that were not accessible at the time of inspection or were concealed from view are not covered by this report. The inspector does not imply that inaccessible or partly inaccessible areas of the property were not, or have not been, infested by Timber Pests. This Report is not a guarantee that an infestation or future infestation and/or damage does not exist in any inaccessible or partly inaccessible areas of the property. This inspection DID NOT include breaking, removing or moving objects, floor and wall

coverings, roof insulation, foliage, furniture, appliances stored goods and personal possessions - these may all limit the scope of inspection. The inspector does not have access to the inside of walls, between flooring, inside eaves and skillion roofing. At NO TIME did the inspector use invasive procedures or bang/tap surfaces to reach conclusions. This Report is confined to reporting infestation and/or damage caused by white ants (subterranean and damp wood termites), borers of seasoned timber and Timber Pests (wood decay fungi), present on the date of the inspection. The inspection did not cover any other pests and this Report does not comment on them. Dry wood termites and European House Borer (*Hylotrupes badius* Linnaeus) are excluded from the inspection due to the extreme difficulty in locating the small colonies. Some species of termite and house borers, if discovered, will be reported (by law) to Government Authorities.

Important Information - Where a property is furnished at the time of inspection, you will appreciate that the furnishings, floor coverings and stored goods may be concealing any evidence of Timber Pest Activity which may only be revealed when the items are moved. Where fences are obscured by foliage, overgrowth or structures, evidence of timber pest activity or damage may be concealed. Poor subfloor drainage increases the likelihood of termite attack. If drainage is considered inadequate, a plumber or other building expert should be consulted. Ventilation of the sub-floor region is important in minimising the opportunity for subterranean termites to establish themselves. If the ventilation is found to be inadequate, remedial measures should be taken. Consideration should be given to installing high air flow vents and/or improve the cross flow of air within the subfloor to produce ventilation equivalent to 8400 sq mm net ventilation area per lineal metre on external and internal walls. It should be noted that if the risk factor is considered to be high, this is not meant to deter an intending purchaser; it is simply encouraging awareness that increased vigilance is warranted and any recommendations regarding reducing conducive conditions or frequency of inspections should be observed. It is recommended that a full pest inspection be under-taken every 6-12 months. Regular inspections DO NOT prevent timber pest attack; they are designed to limit the amount of damage that may occur through early detection. The overall degree of risk of Timber Pest Infestation cited in this report is a subjective assessment by the inspector at the time of the inspection, taking into account many factors which include, but are not limited to, location and proximity to bushland and trees and/or other timber structures, evidence of timber pest damage or activity close to the inspected structure or within the inspected structure, conducive conditions that raise the potential of timber pest attack, such as timbers in contact with soil, inaccessible areas, slab on ground construction, or other factors that, in the inspector's opinion, raise the risk of future timber pest attack.

Determining Extent of Damage - This Report is NOT a structural damage report. You agree that we are not responsible or liable for the repair of any damage, whether disclosed by our report or not. Our inspectors are not necessarily specialised builders and any inexpert opinion provided with respect to timber damage CANNOT be relied upon. The Report will not state the full extent of any timber pest damage; rather, we may provide comment on the damage for your information. If evidence of Timber Pest activity and/or damage is reported in the structure(s) or the grounds of the property, then you must assume that there may be further concealed structural damage within the building(s). This concealed damage may only be found when invasive procedures are applied to reveal previously concealed timbers. In the case of Timber Pest activity and/or damage WE STRONGLY RECOMMEND an invasive Timber Pest Inspection is undertaken and a qualified person such as a Builder, Structural Engineer, or Architect be engaged to carry out a structural inspection to determine the full extent of the damage and repairs that may be required.

Mould - Mould (also referred to as Mildew and non wood decay fungi) is not considered a Timber Pest. This report does not cover the inspection of Mould. If evidence of mould was observed during the inspection, it may be noted for your information. If you are concerned as to the possible health risk resulting from the presence of mould then you should seek advice from your local State or Commonwealth Government Health Department expert.

IMPORTANT INFORMATION:

This Report reflects the condition of the property existing at the time of the inspection date and may not reflect the current state. Timber Pests, particularly termites, may have gained entry to the property since the inspection date. Termites can, in a relatively short period, cause significant damage to both structural and non-structural timbers within and around the buildings of the property. Termites are difficult to detect and much of the damage caused may not be readily visible, if damage exists, it may be costly to repair. It is, therefore, strongly recommended that you promptly arrange for an inspection in accordance with Australian Standard AS4349.3 if this report is being read after one hundred and eighty (180) days from the date of inspection. If the Report indicated the presence of termites, termite damage, previous activity or treatments, or recommends a treatment, you should obtain copies of the treatment proposal, any certificates of treatments carried out, details of all repairs including copies of quotations, invoices and any other reports. It is strongly recommended that you arrange for an inspection in accordance with AS 4349.3 to verify that the treatment has been successful and carried out in accordance with AS 3660.2 and arrange for a further building inspection in accordance with AS 4349.1. The person carrying out the inspection and this company will have no liability to you for any damage or loss you may suffer as a result of your entering the contract to purchase the property or in connection with completing the purchase of the property as a result of your failure to heed the advice given in this report, and may use such failure in defence of any claim that you may later make against any of them.

ANNEXURE B: Consolidated Table

No	Statement	Alleged Breach	Plaintiff	Defendants' Response
1	The "REPORT SUMMARY" states that no evidence of live termites ¹⁰⁸⁵ was found at the time of the inspection (Statement 1)	The "REPORT SUMMARY" failed to warn that termites and extensive termite damage could be present in areas that had not been accessed by the inspector and that further investigations were required	- The "REPORT SUMMARY" should, it was submitted, include an overview of the contents of the Inspection Report, including whether there was damage detected that was apparently due to the activity of timber pests, whether timber pests were detected, whether further inspections were recommended and the inspector's opinion regarding the susceptibility of the property to timber pests. - The "REPORT SUMMARY" breached the requirements of paragraph 4.2.8 of AS4349.3 as it supposedly failed to: - note the evidence of termite activity referred to later in the Inspection Report. Evidence of termites is invariably associated with damage caused by termites; recommend further inspections to determine the extent of any termite activity and the extent of any damage; identify that there was a high or extreme risk that the property was susceptible to timber pests due to the presence of mud trails, which the Inspection Report refers to later, indicates the house had been undergoing attack by termites before the inspection and further when a building has been attacked by termites, it is much more likely to be attacked again in the future because termites will readily access the network of galleries abandoned by other termite colonies and so will be guided directly to the building and the timber it contains. - The "REPORT SUMMARY" should, it was submitted, have focused on what was found rather than reporting what was not found. Evidence of timber pest attack is submitted to be evidence that live specimens are likely to be present. The non-finding of live specimens was submitted to be evidence of anything. - Counsel for the plaintiff submitted that the concept of 'live termite activity' is not helpful and is not useful when assessing the risks	- The Inspection Report did state that there was no evidence of live termites in page 3. - However, the Inspection Report also noted in the same page that, among other things, the Inspection Report is intended to be read it is entirely¹⁰⁸⁸ emphasised in blue text. - It is submitted that any "alleged deficiency or deficient effect" of the Inspection Report's summary is effectively cured by this passage and other information in the Inspection Report which said the same thing that could have been included in the summary. - On the alleged breach, counsel also referred to responses to statement 2.

¹⁰⁸⁵ The phrased used by the first plaintiff "no evidence of active subterranean termites (live species)".

¹⁰⁸⁸ PTB 1, page 4. Inspection Report 3.

No	Statement	Alleged Breach	Plaintiff	Defendants' Response
			applicable to a house for sale. Termites are said to be subterranean and are only rarely visible. As such, it would be extremely rare to come face to face with a live termite when doing a non-invasive timber pest inspection unless surfaces were broken to expose them. Termites construct earthen shelter tubes over non-food surfaces and while these tubes are readily visible it is submitted that it is not possible to visually assess a tube and know for certain whether it has been used by termites on the day. - Counsel for the plaintiffs also referred to the evidence of the defendants' expert, Mr Broadhurst,¹⁰⁸⁶ who gave evidence that while it is possible to make a representation that the property had no existing or ongoing termite activity, such a representation cannot be categorical and would have been noted as a degree of risk. Mr Broadhurst would have said "it is possible, it is also unlikely". - Counsel for the plaintiffs also noted Mr Broadhurst's agreeing that further investigations for ongoing termite activity did need to be made on the evidence found on the 18 October 2019 inspection.¹⁰⁸⁷	
2	The Inspection Report represented that there were no live termites in the Property ¹⁰⁸⁹ (Statement 2)	The Inspection Report allegedly failed to warn that live termites could be present in concealed areas that the inspector could not inspect, or that, even if the infestation was in the past, damage must have existed in concealed areas.	- Counsel submitted that the Inspection Report impliedly reassures the reader that there are no live termites. Counsel submitted that it was not possible to know when termites had last visited the area where the evidence is located; it is not possible to know if the galleries are active or not. It is said that termites will often come and go from any particular area of their network of galleries, and the fact that termites were seen is not evidence that the infestation is old or in the past. The Inspection Report assumed the latter. - Counsel submitted that even if the infestation was in the past and had been adequately managed, damage must exist in the concealed areas. The only reason termites construct mud tunnels up foundation walls is, it was submitted, to access timber to remove and transport back to their colony. It is submitted to be normal industry practice to warn the reader of the need to carry out further investigations to determine the full extent of the damage to the property.	- The Inspection Report neither stated nor represented that there were no live termites in the property. Counsel submitted that it is not open to say so. - Counsel noted that: - The Inspection Report stated that "no evidence of active subterranean termites (live species) was found at the time of our inspection" in pages 3 and 16.¹⁰⁹⁰ - The Inspection Report noted that "no live termites were sighted".¹⁰⁹¹ - The Inspection Report noted in page 16 that "having conducted a visual inspection only, [the defendants] are unable to confirm that there is no termite and borer activity or

¹⁰⁸⁶ CB 342, Broadhurst report page 2 [6.8] d

¹⁰⁸⁷ CB 342, Broadhurst report page 3 [6.8e]. The plaintiff's amended statement of claim nominated 19 October, but the chronology, the Inspection Report and page four of the plaintiff's tender bundle nominated 18 October.

¹⁰⁸⁹ PTB 1, page 17; Inspection Report page 16.

¹⁰⁹⁰ PTB 1, page 4, 16,

¹⁰⁹¹ PTB 1, page 16.

No	Statement	Alleged Breach	Plaintiff	Defendants' Response
			- Counsel submitted that any competent timber pest inspector would assume the likelihood of concealed or undetected live infestation and damage where several mud trails are seen going into the building. The fact that the second defendant says his inspection of the subfloor was limited made the need for further inspection more important. Counsel submitted that no conclusion other than further investigations were required could have been arrived at by any competent inspector in this situation. - Counsel also referred to paragraph 4.2.6 of AS4349.3.	extensive timber decay occurring beyond the exposed surfaces. No live species were sighted at the time of inspection. - The Inspection Report assessed the risk of timber pest infestation as "moderate to high". - In page 24, the Inspection Report noted that in all instances in this Inspection Report the second defendant is referring to accessible areas only and that "[a]reas that were not accessible at the time of inspection or were concealed from-view are not covered by this [R]eport"¹⁰⁹² and that the second defendant does not imply that the inaccessible or partly inaccessible areas of the property were not or have not been infested by timber pests. - The Inspection Report noted in page 25 that timber pests, particularly termites, may have gained entry to the property since the inspection date.¹⁰⁹³
3	The Inspection Report referred to evidence of old termite activity in some fencing timbers and recommended removing and replacing the affected timber (Statement 3) ¹⁰⁹⁴	Inspection Report should not have recommended removal of the affected timber.	- Counsel submitted that it is far better to monitor the affected timber because this is where termites are most likely to return. Baits could have been installed to the affected timber. By removing the affected timber termites are more likely to be disturbed and leave this area and become active in other areas. - In this case, counsel noted that the plaintiffs have followed this bad advice by removing the affected timber and installing colour bond fencing. This means that feeding is likely to have increased in other areas of the gallery system constructed by the termites as a result of removing this food source for the colony or colonies. This has effectively increased the risk of further infestation and resultant damage to the house.	- Counsel noted that the recommendation was to remove and replace the affected timber, and a natural reading of this is that the timber should be replaced with a new timber as opposed to a new, non-timber fence that the plaintiffs did. - This alleged breach was submitted to have not been pleaded, not put to the plaintiffs in evidence in chief, and unclear what connection it is said to have to the plaintiff's loss.
4	The Inspection Report noted evidence of timber decay to the bathroom	The Inspection Report failed to note the extensive timber decay to	Decay or rot was submitted to be an important timber destroying pest as more houses are affected by it than even termites. Further, a large	Counsel noted that the evidence of Mr Clarke was of conditions when Mr Clarke performed his inspection,

¹⁰⁹² PTB 1, page 25

¹⁰⁹³ CB page 26, Inspection Report page 25.

¹⁰⁹⁴ CB page 17, Inspection Report page 16

No	Statement	Alleged Breach	Plaintiff	Defendants' Response
	window sill ¹⁰⁹⁵ and fencing, some fencing timbers and tree trunks or tree stumps (Statement 4). ¹⁰⁹⁶	the subfloor area of the house. Large mycelium growths of fungus were present to the flooring with sections of the particle board falling on the ground.	amount of decay is both a pest in its own right and also highly conducive to termite attack. • Counsel submitted that the plaintiff notes that the ventilation in the subfloor is inadequate. This was said to be the cause of the moisture that provides the conditions for decay fungus to grow and so the second defendant should have known that decay to the flooring was likely. • Counsel submitted that a non-reporting of the widespread decay to the flooring shows a high degree of incompetence as all the flags are present to warn the inspector of its presence even before he entered the subfloor area. ○ Counsel submitted that from the exterior it can be seen that the ventilation was blocked in front of the house by garden beds, down the side of the house by the pavers and at the rear of the house by the concrete slab extension. Normally vents are provided on all four sides of the house to provide a cross flow. ○ At the house, working vents only existed on one side of the house. Any competent inspector should, in the plaintiff's submission, have seen this and known decay would be found under the house.	and not when the defendants did so. • Counsel noted that Mr Clarke was "briefly" shown the photographs of the subfloor taken by the first defendant and was asked whether there was any change to the opinions he expressed of the Inspection Report. ○ The portions¹⁰⁹⁷ of the Clarke report referred to by the plaintiffs was not expressing an opinion, but factual findings of Mr Clarke's investigation. • Counsel submitted that there is no evidence before the Court that there was extensive timber decay to the subfloor at the time of the inspection of first defendant, or that there was extensive timber decay in the areas of the subfloor inspected by the second defendant. • The photographs taken¹⁰⁹⁸ by Mr Clarke do not appear at all similar to the photographs of the second defendant. • It was not put, in the defendant's submissions, to the second defendant that the condition of the bathroom decay or the subfloor area of the house was the same as evidenced by Mr Clarke's investigation. • This alleged breach was submitted to have not been pleaded, not put to the plaintiffs in evidence in chief, and unclear what connection it is said to have to the plaintiff's loss.
5	The Inspection Report noted that ventilation in the subfloor was poor (Statement 5). ¹⁰⁹⁹	The Inspection Report failed to explain: • why the ventilation was poor; • why ventilation was important;	• Counsel submitted that the ventilation in the subfloor was poor because ventilation was blocked in front of the house by garden beds, down the side of the house by the pavers and at the rear of the house by the concrete slab extension. Counsel submitted that vents are normally provided on all four sides of the house to provide a cross flow. At the house, working vents only existed on one side of the house.	• Counsel referred to a warning in the Inspection Report at page 25 "ventilation of the sub-floor region is important in minimising the opportunity for subterranean termites to establish themselves. If the ventilation is found to be inadequate, remedial measures should be taken improve the cross flow of air within the subfloor to produce ventilation equivalent to 8400 sq mm net

¹⁰⁹⁵ The Inspection Report itself uses the term "bathroom window frame". [KT Note: Only included the term "bathroom window frame" as our description diverts from it. "Fencing timbers" were used in the appendix A]

¹⁰⁹⁶ CB page 17, Inspection Report page 16

¹⁰⁹⁷ Namely [9.14.1]- [9.14.2] and [9.14.5]

¹⁰⁹⁸ Contained in page 66 of the Court Book.

¹⁰⁹⁹ CB 17; Inspection Report page 16 "Subfloor drainage & ventilation".

No	Statement	Alleged Breach	Plaintiff	Defendants' Response
		- that the ventilation should be improved; or - that major works were required to improve the ventilation.	- Counsel submitted that poor subfloor ventilation makes the building a lot more susceptible to termite attack because of the moisture that accumulates in the subfloor. Termites was said to have soft bodies and are very susceptible to desiccation. The purpose of mud tunnels is to allow termites to keep their environment at the appropriate moisture level. These tunnels are extensions of the nest that reach for food sources remote to the colony. They¹¹⁰⁰ continually manage the temperature and humidity inside the gallery system. - When a subfloor of a house is damp, counsel submitted that termites will attack far more aggressively than if it is dry. The importance of this is not highlighted at all by the Inspection Report. - Counsel submitted that any competent inspector would also advise the purchaser to consult with a ventilation expert to provide advice and costs for rectification prior to proceeding any purchase of the property. Clear, simple advice to lower the external levels back to the original level below the ventilation system should have been provided, in the plaintiffs' submissions.	ventilation area per lineal meant metre on external and internal walls". This alleged breach was submitted to have not been pleaded, not put to the plaintiffs in evidence in chief, and unclear what connection it is said to have to the plaintiffs' loss.
6	The Inspection Report stated that the inspection of the subfloor was limited (Statement 6). ¹¹⁰¹	The Inspection Report did not recommend further investigations	Counsel submitted that further investigations should have been commenced as required paragraph 4.2.6 of AS 4349.3 – 2010.	- Counsel noted that: - The Inspection Report recommended in pages 16 and 24 that a full pest inspection be undertaken every 6 to 12 months. - The Inspection Report also noted that the defendants strongly recommend¹¹⁰² that an invasive timber pest

¹¹⁰⁰ Presumably a reference to termites.

¹¹⁰¹ The full statement as it relates to the subfloor is as follows for context:

"There is insufficient crawl space in part of the sub-floor and therefore some areas were viewed from a distance due to restricted access. Please refer to our Scope and Limitations section at the end of this report under the heading "Safe and Reasonable Access".

This later heading, titled "Safety & Reasonable Access" quoted AS4349.1 – 2007 and AS 4349.3:

"Australian Standard 4349.1 — 2007 3.2.2 The extent of accessible areas shall be determined by the inspector at the time of inspection, based on the conditions encountered at the time of inspection. The inspector shall also determine whether sufficient space is available to allow safe access. The inspection shall include only accessible areas and areas that are within the inspector's line of sight and close enough to enable reasonable appraisal. The Australian Standard 4349.3 defines reasonable where access as "areas where safe, unobstructed access is provided and the minimum clearances are available; or, these clearances are not available, areas within the consultant's unobstructed line of sight and within arm's length. NOTE: Reasonable access does not include removing screws and bolts to access covers."

¹¹⁰² The relevant recommendation in page 25 of the Inspection Report reads:

This concealed damage may only be found when invasive procedures are applied to reveal previously concealed timbers. In the case of Timber Pest activity and/or damage WE STRONGLY RECOMMEND an invasive Timber Pest Inspection is undertaken and a qualified person such as a Builder, Structural Engineer, or Architect be engaged to carry out a structural inspection to determine the full extent of the damage and repairs that may be required.

No	Statement	Alleged Breach	Plaintiff	Defendants' Response
				inspection is undertaken in case of timber pest activity and/or damage.
7	The Inspection Report stated that the subfloor drainage was generally fair (Statement 7). ¹¹⁰³	The subfloor drainage was not fair.	- Counsel submitted that due to the high external ground levels, water run-off from the exterior foundation walls enters the subfloor area. - Counsel noted that the paving around the house was not falling away from the building, directing water into the sub-floor. Marks on the foundation walls indicate that this was an issue for this house. Counsel submitted that the second defendant should have understood that. This was submitted to be a long-term problem.	- Counsel noted that "fair" is not a positive term, and it can mean "neither good or bad" in the context and is similarly defined as such in page 4 of the Inspection Report. - Counsel also noted a statement¹¹⁰⁴ in page 21 of the Inspection Report regarding dampness in the subfloor, and recommendation that the subfloor area be monitored if dampness is detected to ensure that surface and subsurface ingress is not an issue. The Inspection Report also recommended that consideration should be given to upgrading the subterranean and surface drainage system to ensure that moisture is directed away from the foundations. - This alleged breach was submitted to have not been pleaded, not put to the plaintiffs in evidence in chief, and unclear what connection it is said to have to the plaintiff's loss
8	The Inspection Report stated that there was timber pest damage sighted to some tree trunks or tree stumps but that, having conducted a visual inspection only, the Inspection Report was unable to confirm if there was any termite activity or extensive timber decay occurring beyond the exposed services, but that no live termites were sighted at the time of the inspection (Statement 8). ¹¹⁰⁵	The Inspection Report failed to recommend further investigations of the trees. Trees surrounding the house should have raised warnings even without the reporting of any evidence of timber pest damage to the trees.	- Counsel submitted that trees are a major harbourage for termite colonies and are often rendered unsafe due to termite attack or decay affecting the structural integrity of the trees. The Inspection Report was submitted to should have recommended further investigations of the trees in accordance with the AS 4349.3. - Counsel submitted that should have focused on what was found rather than reporting what was not found. Instead, the Inspection Report reassures the reader by stating that no live species were found.	Counsel referred to a statement¹¹⁰⁶ in the Inspection Report in page 25 headed "Determining Extent of Damage". Among other things, that the reader should assume that there may be further concealed structural damage if timber pest activity and/or damage is reported in the structure(s) or grounds of the property. Such concealed damage may only be found when invasive procedures are applied, and that in case of such timber pest activity or damage the defendants strongly recommend that an

¹¹⁰³ CB 17, Inspection Report page 16

¹¹⁰⁴ The statement in page 22 reads:

Dampness, debris, drainage, ventilation, cracked or leaking pipes; TIMBER CONSTRUCTION: bearers & joists, framing, piers/stumps; SUSPENDED CONCRETE FLOOR CONSTRUCTION: concrete condition, cracking

If moisture is noted, it is recommended that the sub-floor area be monitored to ensure that surface and sub-surface moisture ingress is not an ongoing issue. If the area remains damp, consideration should be given to upgrading subterranean and surface kept drainage systems to ensure that moisture is directed away from the building foundations and the sub-floor area is dry. A qualified drainage expert should be consulted with regard to drainage issues.

¹¹⁰⁵ CB 17, Inspection Report page 16 "Timber Pest Evidence".

¹¹⁰⁶ The full statement in page 25 of the Inspection Report is: If evidence of Timber Pest activity and/or damage is reported in the structure(s) or the grounds of the property, then you must assume that there may be further concealed structural damage within the building(s). This concealed damage may only be found when invasive procedures are applied to reveal previously concealed timbers. In the case of Timber Pest activity and/or damage WE STRONGLY RECOMMEND an invasive Timber Pest Inspection is undertake

No	Statement	Alleged Breach	Plaintiff	Defendants' Response
			Counsel submitted that evidence of timber pest attack is evidence that live specimens are likely to be present, and that the non-finding of any live specimens is not evidence of anything.	invasive timber pest inspection is undertaken. This alleged breach was submitted to have not been pleaded, not put to the plaintiffs in evidence in chief, and unclear what connection it is said to have to the plaintiff's loss
9	The Inspection Report refers to there being a chemical treatment notice being posted in the meter box to the effect that Biflex Duo was applied to the perimeter on 5 February 2011 (Statement 9)	The Inspection Report fails to: - warn of the risk that any chemical treatment was not likely to be successful as a form of prevention or control; - advise that the presence of paving renders any chemical application to the soil at the house perimeter obsolete; - warn of the risk that termites could be attacking the house from below the concrete slab extension at the rear of the property; - warn that any chemical treatment to the perimeter would not prevent any termite attack from the subfloor; - recommend that the full history of the chemical treatment be provided by the vendors; - warn that the purchasers should take no comfort from a chemical application to the	- Counsel submitted that an application of a chemical treatment was not likely to be successful as a form of prevention or control because any treated soil would contain gaps of untreated soil that would allow termites to pass into the house despite the treatment. Counsel submitted that it is simply not possible to treat all the soil. - Counsel submitted that the presence of paving also renders any chemical application to the soil at the house perimeter obsolete. Even if all of the soil was treated from the base of the paving to the foundation on the external foundation wall, counsel submitted that termites can bridge this treatment by tracking between the pavers themselves. Counsel put forward that any competent timber pest inspector would know this and respond with appropriate recommendations. - Counsel also noted that the application to the perimeter also could not prevent any termite attack from the subfloor of the house. The Inspection Report notes evidence of termites to the subfloor and reported evidence of chemical treatment to the perimeter. There was submitted to be no reference in the Inspection Report that the subfloor area has any chemical protection. - Further, counsel noted that chemical applications require maintenance. Counsel noted that when soil moves bridges of untreated material are created. If soil is disturbed by gardening or movement of water, counsel submitted that retreatment is required. A chemical treatment carried out as far back as 2011 would, in the plaintiff's submissions, require at least some level of reapplication. No comfort would be gained, it was submitted, from any chemical application to the perimeter in 2011 with the aim of deterring termite ingress.	- Counsel referred to a statement in page 25 of the Inspection Report under the heading "Important Information": - If the Inspection Report indicated the presence of termites, termite damage, previous activity or treatment, or recommends a treatment, the Inspection Report noted that the reader should obtain copies of the treatment proposal, any certificates of treatments carried out, details of all repairs including copies of quotations, invoices and any other reports. The Inspection Report noted that it is strongly recommended that the reader arrange for an inspection in accordance with AS 4349.3 to verify that the treatment has been successful and carried out in accordance with AS 3660.2 and arrange for a further building inspection in accordance with AS 4349.1.

No	Statement	Alleged Breach	Plaintiff	Defendants' Response
		perimeter in 2011.		
10	The Inspection Report: - recommended that a treatment in accordance with AS 3660.1 to control or prevent subterranean termites from infesting or causing damage to the property was not considered necessary. - represented that the risk of future timber pest infestation to the house was moderate to high; - recommended that regular inspections be undertaken; - represented that, even if the risk factor was high, this was not intended to deter an intending purchaser it was simply encouraging awareness that increased vigilance was warranted and any recommendations regarding reducing conducive conditions or frequency of inspections should be observed.¹¹⁰⁷ (Statement 10)	There recommendations were wrong.	- Counsel submitted that the reference to AS 3660.1 is incorrect – the reference ought to have been to AS 3660.2.¹¹⁰⁸ At the hearing, counsel noted that AS 3660.1 applies to new buildings. - Further, counsel submitted that the conclusion that no termite management other than inspections was required was clearly wrong. - Counsel submitted that the Inspection Report should have stated that extensive termite damage could be present in areas that had not been accessed and that further investigations were required. - Finally, counsel submitted that the Inspection Report should also contain the conclusions and warnings of the Clarke report.	- Counsel submitted that the Inspection Report did not conclude that no termite management beyond inspections were required. - Counsel referred to a statement in page 25 of the Inspection Report discussed in the response to statement 9. - Counsel noted that the Inspection Report mentioned in page 24 that it is not a guarantee that an infestation or future infestation and/or damage does not exist in any inaccessible or partly inaccessible areas. - Counsel also referred to the statement under the heading “Determining Extent of Damage” in page 25 of the Inspection Report that: - The Inspection Report will not state the full extent of any timber pest damage and that the defendants may provide comment on the damage for the reader’s information. - That the reader should assume that there may be further concealed structural damage if there was evidence of timber pest activity or damage reported in the structures or grounds of the property. - That this concealed damage may only be found when invasive procedures are applied. - That the Inspection Report “STRONGLY RECOMMENDS” such invasive procedures and that a qualified person (eg. builder, structural engineer or architect) be engaged to carry out a structural inspection.

¹¹⁰⁷ CB 17, Inspection Report page 16, “Recommendations” and “Overall Susceptibility of the Building of Timber Pest Infestation”.

¹¹⁰⁸ Transcript, Day 5, page 479 [1]-[6].

