

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1163/2017

### CATCHWORDS

*Australian Consumer Law* s18, s60, s236; s4; Applicants engaged first respondent to carry out pre-purchase building inspection report on condition of property that they were purchasing; applicants claim that first respondent's website and pre-purchase inspection report were misleading and that it failed to provide its services with due care and skill; applicants claim that the second respondent was personally liable as an accessory; whether the first respondent liable for misleading or deceptive conduct; whether the first respondent failed to provide its services with due care and skill; whether the second respondent liable as an accessory, whether applicants entitled to damages.

<b>FIRST APPLICANT</b>	Terence Garrett
<b>SECOND APPLICANT</b>	Mary Garrett
<b>FIRST RESPONDENT</b>	Elim House Pty Ltd (ACN: 094 318 448) t/as Elim Property Inspections
<b>SECOND RESPONDENT</b>	Richard Paul Ford
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	F. Marks, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	21 May, 8 June and 23 July 2018
<b>DATE OF ORDER</b>	3 December 2018
<b>CITATION</b>	Garrett v Elim House Pty Ltd (Building and Property) [2018] VCAT 1862

### ORDERS

- 1 The respondents must pay the applicants \$500.
- 2 The applicants' claims are otherwise dismissed.

F. Marks  
**Member**

**APPEARANCES:**

For the First Applicant

Mr T Garrett

For the Second Applicant

Mrs M Garrett

For the Respondents

Mr R Ford, director

## REASONS

### INTRODUCTION

- 1 Mrs Garrett is the owner of a property in the country town of Avoca which she purchased in 2014 for \$172,000. The property comprises a single storey timber house which is about 100 years old.
- 2 In July 2014 the Garretts engaged Elim House Pty Ltd trading as Elim Property Inspections (**Elim**) to inspect and report on the condition of the property. Mr Ford, a registered builder and director of Elim, inspected the property and provided a written report (**Elim report**). Subsequently, Mrs Garrett purchased the property. The Garretts found termites in the house in late September 2014 after settlement of the purchase.

### THE GARRETTS' CLAIM

- 3 The Garretts' claim that they relied on Elim's website in engaging Elim to inspect the property and report on its condition. They say Mrs Garrett purchased the property in reliance on the Elim report. They say the Elim website and the Elim report were both misleading. They also claim that Elim did not provide its inspection services with due care and skill.
- 4 They say that at the time of Mr Ford's inspection, there were termites in the house and the house had major structural issues, including the floors being seriously out of level. They say Mr Ford failed to tell them that the house had termites and major structural issues including subsidence.
- 5 The Garretts claim damages of \$344,528 for the demolition of the house and the construction of a new house. Alternatively, they seek orders that Elim repair the house to a fit and proper condition. The Garretts claim that Mr Ford is personally liable as an accessory because he was knowingly involved in, and a party, to Elim's conduct.
- 6 Elim and Mr Ford deny the Garretts' claims.

### THE GARRETTS' CHANGE OF CASE

- 7 The Garretts' claim is premised on Elim and Ford having been asked to inspect the property and not telling the Garretts about termites and major structural damage.
- 8 In their points of claim the Garretts say that if the Elim report had identified termites and major structural issues Mrs Garrett would have withdrawn from the contract of sale [points of claim at 12].
- 9 At the start of the hearing the Garretts changed their claim. They did so after I pointed out that the contract of sale on which they relied was signed by Mrs Garrett on 25 July 2014, after Mr Ford's inspection on 10 July 2014 and after he sent them the Elim report on 11 July 2014.

- 10 Mr Garrett contended instead that Mrs Garrett relied on the Elim report in entering into the contract of sale. The evidence and submissions of the Garretts was confusing on this point.
- 11 It appeared that Mrs Garrett signed an earlier contract of sale that predated the Elim report. The Garretts' points of claim referred to a special condition in the contract allowing purchasers to withdraw from the contract if within 7 days of signing they sent the vendor a report showing pest infestation or major structural damage.
- 12 The Garretts were unable to produce a copy of the first contract of sale which Mrs Garrett was said to have signed and were vague about the date on which it was signed. Mr Garrett contended that the price agreed in the second contract of sale was \$2,000 less than the original contract price because of the presence of asbestos.
- 13 In the context of whether Mrs Garrett would have withdrawn from the first contract of sale or would not have signed the second contract of sale, the essential point was that Mrs Garrett would not have purchased the property if the Elim report had advised her that the house had termites and major structural issues.
- 14 Mr Ford did not object to the change in the Garretts' claim and it was conducted on that basis.

#### **ELIM'S DEFENCE**

- 15 The respondents did not file points of defence. From the hearing it became apparent that Elim's defence was that:
  - (a) The material on Elim's website was true.
  - (b) The Elim report clearly set out the scope of work of Mr Ford's inspection.
  - (c) The report was based on a visual inspection and accessibility.
  - (d) The report made clear that the house was tenanted and heavily furnished at the time of inspection.
  - (e) The report made clear that Mr Ford could not access all parts of the property and had limited access to the perimeters of the rooms.
  - (f) The report made clear that Mr Ford would not move furniture and fixtures.
  - (g) The report made clear that Mr Ford reported on what he could see and found.
  - (h) Mr Ford inspected the property with due care and skill.
  - (i) Mr Ford advised Mrs Garrett by email, about the state of the floors and other matters, before sending Mrs Garrett the Elim report and before she signed the contract of sale.

- (j) The Garretts did not suffer loss as a result of any misleading conduct or Elim failing to provide its services with due care and skill.

## HEARING

- 16 The Garretts represented themselves at the hearing and gave evidence. Mr Ford represented himself and Elim and gave evidence.
- 17 The Garretts sought to rely on a timber pest detection report prepared by pest inspector, Kim Odgers, dated 2 October 2014 (**Mr Odgers' report**) and a building report of Brent Driscoll, dated 13 January 2015 (**Mr Driscoll's report**). Neither Mr Odgers nor Mr Driscoll were called to give evidence.

## WHAT HAPPENED?

- 18 The relevant timing of events in July 2014 was that:
- (a) On or about 5 July the Garretts inspected the property and made an offer to purchase the property.
  - (b) On about 7 July the Garretts looked at Elim's website.
  - (c) On 7 July Mrs Garrett contacted Mr Ford and discussed the property and engaged Mr Ford to do a pre-purchase inspection and written report for an agreed fee of \$500.
  - (d) On 10 July Mr Ford inspected the property.
  - (e) On 11 July Mr Ford notified Mrs Garrett by email of various issues relating to the property.
  - (f) On about 11 July Mr Ford sent Mrs Garrett the Elim report.
  - (g) On 13 July Mr Garrett emailed Mr Ford and asked specific questions about the Elim report.
  - (h) On about 13 or 14 July Mr Ford emailed his answers to Mr Garrett.
  - (i) On 25 July Mrs Garrett signed the contract of sale (for \$173,000 and not \$172,000), which was settled on 4 September 2014.

## THE ISSUES

- 19 The principal issues are:
- (a) Whether the material on Elim's website was misleading.
  - (b) If yes, whether Mr Ford is personally liable?
  - (c) Whether Mr Ford's inspection was not carried out with due care and skill.
  - (d) Whether the Elim report was misleading.
  - (e) If so, whether the Garretts have suffered any loss or damage.

- 20 To succeed with their claims, the Garretts need to satisfy me on the balance of probabilities that the conduct complained of occurred and caused them loss and damage.

### **WHAT WERE THE REPRESENTATIONS ON ELIM'S WEBSITE?**

- 21 The Garretts claim that Elim represented on its website that it would do a more thorough investigation than was done by Mr Ford. I am satisfied that this claim is made out.
- 22 The Garretts allege that in July 2014 they relied on the following information on Elim's website [points of claim at 6]:
- (a) Mr Ford was the only local property inspector who was a qualified building practitioner and he had 32 years building experience, 20 years of local;
  - (b) Elim offered to "roadworthy the property before you buy it";
  - (c) a video clip presenting the services offered by Mr Ford highlighted his thoroughness and the links to which he would go in uncovering hidden problems for prospective purchasers and reporting on them;
  - (d) Elim's strengths over its competitors was the high level of technology it employed in carrying out its inspections and in preparing the reports.
- 23 They claim Elim represented that Mr Ford had local knowledge, special expertise, superior technology, and the capacity to carry out a full detailed inspection of the property and identify any problems, including hidden problems [points of claim at 7].
- 24 They claim they relied on the verbal and written representations in engaging Elim to provide their services [points of claim at 18]. They claim the respondents failed to act in accordance, and consistently, with those representations and that they have suffered loss and damage [points of claim at 19].
- 25 By way of defence Elim claims that the representations on its website were true and that Mr Ford inspected the property and reported to the Garretts in the manner represented on Elim's website.

### **The evidence**

- 26 The Garretts gave evidence that they were impressed with Mr Ford's video where he stated he uncovered hidden problems, used high level technology and the latest equipment to access areas that were difficult to access. They said they engaged Elim to do a pre-purchase inspection and report on the condition of the property, because of these representations.
- 27 Mr Ford gave evidence of his inspection of the property and the state of the tenanted house at that time. He said his report clearly stated that he carried out a visual inspection and his report noted what he saw and found. He said

the report set out the limitations of his visual inspection which was based on accessibility.

### **WERE THE REPRESENTATIONS MISLEADING?**

- 28 Section 18 (1) of the *Australian Consumer Law* provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- 29 There is no doubt that Elim’s website and video emphasised Mr Ford’s experience, skills, and thoroughness in carrying out pre-purchase inspections of properties.
- 30 Elim’s website was directed to members of the general public. It was apparent that the purpose of the website and video was to provide information about Elim’s pre-purchase inspection services. It is obvious that the representations were made to highlight to the public, the benefits of using Mr Ford’s services. I deal with each of the claimed misrepresentations.

### **Was the representation about Mr Ford’s experience misleading?**

- 31 In July 2014, Mr Ford was a registered builder with 32 years’ experience and with 20 years of experience working as a local builder.
- 32 I find that Mr Ford’s representations about his experience to be true and not misleading.

### **Was the ‘roadworthy’ representation misleading?**

- 33 Neither Mr Ford nor the Garretts defined or explained what they meant by “roadworthy” but it was clearly an idiomatic expression, particularly in the context of something other than a road vehicle. Mr Ford contended that he carried out a “roadworthy” on the properties he inspected and set out his findings in his reports. Mr Garrett contended that Mr Ford did not do a “roadworthy” of the property because if he had done so, he would have found termites and subsidence.
- 34 The shorter Oxford English dictionary (sixth edition) defines roadworthy as:
1. Fit for the road; in a suitable condition for using on public roads.
  - 2 of a person: fit to travel.
- 35 The definition set out above refers to the term “roadworthy” in the context of vehicles. That is, vehicles must be of a specified standard to be fit for use on roads.
- 36 In the context of Elim’s website, the term “a roadworthy” appears to describe Elim’s pre-purchase inspection services. The services as stated on the website include Mr Ford assessing the positive and negative aspects of a property and providing a fair and balanced report.

37 I am not satisfied, on the evidence that Elim’s representation about giving the property “a roadworthy”, in the process of a property inspection, was misleading in the context in which it was used. In my opinion Mr Ford inspected the property and reported on what he was able to see and what he found.

**Was the representation about thoroughness of services misleading?**

38 The following representation appeared under the heading “Roadworthy the property before you buy it”:

photos are included (in the report), showing you any hidden problems.

39 Page 1 of the Elim Report commences with the heading “IMPORTANT INFORMATION” It states that the inspection was based on accessibility and only covered visual aspects of the property. It continues by stating that areas not inspected would be noted in the report. No items of furniture or fixtures would be moved. Items and conditions covered by such furnishings and fittings would not be assessed or considered.

40 Page 4 of the Elim Report commences with an Introduction which states:

The house was heavily furnished at the time of inspection and it was not possible to gain access to the perimeter of the rooms or the interior of the cupboards.

41 Mr Ford used a camera during his inspection of the property. In the Introduction to Elim’s report, Mr Ford apologised for some of the photos being of poor quality because the setting button was dislodged during the first part of his inspection. He said this did not have any impact on his findings because the issue related to the depth of colour and not the resolution.

42 In my opinion, Elim’s representations about finding any hidden problems, taking photos of hidden problems, getting into all nooks and crannies, and using a high level of technology not used by its competitors, created an impression that Mr Ford would provide a very detailed and comprehensive report on all aspects of the property.

43 What is clear is that Mr Ford did not carry out his inspection by doing all the things represented on Elim’s website. The Elim Report included qualifications, limitations, and disclaimers about the inspection. Mr Ford admitted that his inspection was limited to what he could access and what he could see. Mr Ford did not find every hidden problem during his inspection. He made that clear in his report.

44 It was glaringly apparent that Mr Ford did not do what Elim’s website represented he would do when carrying out an inspection of a property. In my opinion these representations on Elim’s website were misleading.

45 In so far as Elim represented that its report would show any hidden problems, I find such representation to be with respect to future matters. I



find that Elim did not have reasonable grounds for making the representation.

### **Was the high level of technology representation misleading?**

- 46 In addition to a camera, Mr Ford used a moisture meter to identify elevated moisture levels in the substrate. There was no evidence given by Mr Ford as to how this equipment set Elim apart from its competitors. Nor was there any evidence about how Elim's services differed from its competitors.
- 47 Having reviewed the relevant material on the website and Mr Ford's video I am not satisfied that Mr Ford used a high level of technology that set Elim apart from its competitors. I find that these representations were misleading.

### **ANALYSIS**

- 48 Elim's website was misleading because regardless of what the website said, the Elim report and Mr Ford's email dated 11 July 2014 to Mrs Garrett makes clear that he did not inspect all the property because of access issues.
- 49 I have found that where the misleading representations related to future matters, Elim did not have reasonable grounds for making the representations.
- 50 The Garretts gave evidence that if they had known when they read the website, that Elim's services would be limited in the way that its report was limited, and not as detailed as the website suggested, they would not have paid Elim \$500 to do an inspection and report.
- 51 I have found that specific representations on the website were misleading. I find that in reliance on the representations on Elim's website the Garretts engaged Elim to carry out its services. I find that the Garretts suffered loss and damage because of Elim's misleading representations on its website. I find that the Garretts are entitled to a refund of \$500 from Elim for the fee paid for its services.
- 52 The Garretts claim that Mr Ford was personally liable because he was knowingly concerned in Elim's conduct [points of claim at 15]. For Mr Ford to be liable as an accessory, The Garretts must prove that Mr Ford knew that the representation was misleading or knew that Elim had no reasonable grounds for making it.
- 53 The video was presented by Mr Ford who appeared to be the author of the statements made in his video. On the evidence before me I am satisfied that Mr Ford knew that his ability to fully inspect houses and find any hidden problems depended on him having full access to all areas of the property. I am satisfied that here, Mr Ford intended to only carry out a visual inspection, which by its very nature, could not disclose all hidden defects. This is stated very clearly in the Elim report.
- 54 I therefore find that Mr Ford was knowingly concerned in Elim's is liable as an accessory in relation to Elim's concerned the Elim's misleading conduct

where it made representations that Mr Ford would find any hidden problems when inspecting the property.

#### **DID MR FORD INSPECT THE PROPERTY WITH DUE CARE AND SKILL?**

55 Section 60 of the *Australian Consumer Law* provides that 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.

56 The Garretts claim that Elim and Mr Ford breached the *Australian Consumer Law* because Mr Ford did not inspect the property with reasonable care and skill [points of claim at 14].

57 The Garretts claim Mr Ford did not find and advise them about termites and subsidence issues [points of claim at 14(b)]. The particulars of this claim are:

The respondents failed to advise the applicant that the property had numerous and substantial defects including defective footings and stumps, evidence of termite galleries/tracks on the stumps, dado wall panelling, bathroom architraves and in the roof, subsidence, and floors out of level in various areas by amounts up to 100 mm and a range of other serious structural issues.

The respondent should have been aware from his own photographs of the subfloor, floor levels and other easily observed issues that the subfloor area warranted closer inspection.

58 The Garretts also claim that Elim and Mr Ford breached the *Australian Consumer Law* because Mr Ford did not properly and competently conduct the inspection. They claim a proper and competent inspection would have revealed termites and structural issues [points of claim at 14(c)]. The particulars of this claim are:

Had the inspection been conducted in a proper and competent manner numerous defects would have been revealed including subsidence, termite presence, foundation and footing damage, indication of termites in the roof timbers. The defects were immediately obvious to two further experts who inspected the property subsequent to the applicant becoming the registered proprietor. The applicant refers to the two reports (of Mr Odgers and Mr Driscoll) and Mr Garretts' omissions paper.

59 In my opinion, paragraph 14(c) is included in paragraph 14(b) of the points of claim and I have dealt with these claims as one.

60 The Garretts say Mr Ford's failure to inspect with due care and skill, caused them loss. They say they relied on the Elim report. They say Mrs Garrett purchased the property without knowing about the termites and alleged major structural problems.

## **DUE CARE AND SKILL - NOT FINDING TERMITES**

- 61 The Garretts claim that Mr Ford did not inspect the property with due care and skill because he failed to find and advise them of:
- (a) evidence of termites in the dado wall panelling (in the third bedroom) [14(b)] (**termites in third bedroom**).
  - (b) termite presence, and evidence of termite galleries/tracks on the stumps, bathroom architraves and in the roof and roof timbers [14(b) and 14(c)] (**termites in other areas**).
- 62 I deal with each of these claims in turn.

### **Termites in Third bedroom**

- 63 The reason why Mr Ford did not find termites in the dado wall panelling in the third bedroom is because he did not move items in the – heavily furnished and tenanted – property, in order to see what lay behind them.
- 64 However, I am not satisfied that Elim failed to use reasonable care and skill in inspecting the property without moving items. The Elim report made it very clear that, contrary to the representation on the Elim website that Mr Ford would find all hidden problems, Mr Ford did a visual inspection, did not move items, and could not access all the property. No evidence was called by the Garretts to say that it was standard industry practice, when carrying out a pre-purchase inspection, to move stored items which limited or prevented inspection.

### **Termites in other areas**

- 65 The reason why Mr Ford did not find termites on the stumps in the subfloor is because he did not have access to the subfloor due the perimeter of the house being enclosed by timber base boards. The photos that Mr Ford took of the subfloor by levering out a floor board inside the house and looking through a gap in the floor, did not show termites.
- 66 The reason why Mr Ford did not find termites in the bathroom architrave and the roof is because he did a visual inspection and did not see termites. He did not do an invasive investigation.
- 67 I find that Mr Ford did not fail to use reasonable care and skill in inspecting the property without inspecting areas that he could not access and only doing a visual inspection. Again, the Elim report made clear that Mr Ford did a visual inspection of areas that he could access and clearly set out the limitations of the inspection.
- 68 Further, I find that the Elim report made 3 references to the possibility of termites being found in the future when the Garretts carried out their proposed renovations. The Elim report made this clear in its statement about the subfloor area and the roof space. It also made it clear in its conclusion on pest activity. It stated it was reasonable to assume that there

may be timber decay from both native borer and termites found as part of future renovation work.

- 69 Shortly after Mr Ford sent Mrs Garrett the Elim report Mr Garrett emailed Mr Ford about specific issues in the report. Mr Garrett did not ask any questions about termites or question the report's statements about the possibility of termites being found during the Garretts' proposed renovations. Although the statements in the Elim report were qualified, the Garretts did not ask Mr Ford to return to the property and carry out a more detailed inspection.

## **THE ELIM REPORT**

- 70 At the start the Elim report states:

### **IMPORTANT INFORMATION**

This report is based on the condition of the property at the time of the inspection and the consultant having reasonable access to all areas. Areas not inspected are noted in the report. This inspection report covers the visual aspects of the property.

The consultant is not a licensed pest controller. However, visual evidence of pest infestation will be reported, and risk factors, such as elevated moisture levels will be checked. When necessary, the customer is advised to contact a member of the Pest and Weed Control Association for a full report, and for treatment as required.

No item of furniture or fixtures will be removed, moved, or modified during the inspection, and items and conditions covered by such furnishings and fixtures are not assessed or considered. Should subsequent removal of fixtures and fittings reveal inconsistencies with the surrounding conditions, you should contact your consultant to discuss and reinspect if necessary.

- 71 The second page is headed "**PRE-PURCHASE PROPERTY REPORT**" and states:

Our pre-purchase property report should not be seen as an all-encompassing report dealing with a building from every aspect. Rather, it should be seen as a reasonable attempt to identify any significant defects visible at the time of the inspection. Whether or not a defect should be regarded as significant, depends largely upon the age, and the type of building being inspected.

- 72 The heading "2. Limitations and Conditions" on the third page states:

#### 2.1 Limitations

The pre-purchase property report may not contain any assessment or opinion in relation to any item or area which was not, or could not be inspected by the consultant...

#### 2.2 Conditions

This property report may be conditional upon, or in relation to apparent concealment of possible defects....

- 73 The report included a definition of terms to describe the condition of inspected items. The report provided definitions of the following: excellent condition, good condition, fair, poor and functional. In each case the definitions referred to what was visible.
- 74 In the introduction to the report, the second sentence states:  
The house was heavily furnished at the time of inspection and it was not possible to gain access to the perimeter of the rooms or the interiors of the cupboards.
- 75 The report describes the floors of the third bedroom as:  
also heavily occupied with limited access.
- 76 It describes the walls, ceiling and timber trims “as per the front room”. It describes the window as being:  
north facing timber double hung window with broken ropes and difficult to access and typical maintenance required....
- 77 As to the roof space the Elim report relevantly provides:  
**Evidence of pest activity:** there were some minor areas of native borer activity and hardwood timbers but no evidence of any previous or current termite activity seen. It is reasonable to assume that as part of future renovations there may be some exposed. There is some evidence of rodent activity and I suggest preventative baits are installed.
- 78 As to the subfloor space the Elim report relevantly provides:  
**Bearers and joists:** there is no subfloor access to the house and the majority [of] the perimeter is enclosed with a timber board.  
**Evidence of pest activity:** although not seen it is reasonable to discern that there will be some areas of native borer activity in the external corners of hardwood timbers. There may also be evidence of some old termite activity found as part of a renovation work though no obvious areas of concern seen during the inspection.
- 79 As to moisture levels the Elim report relevantly provides:  
Note that the moisture metre used in this inspection does not record surface water, it records the moisture in the substrate as a percentage value.  
There were no elevated moisture levels found during this inspection.
- 80 As to pest activity the report relevantly concludes:  
If you have any concern regarding the comments made in this report and we recommend that you consult a registered member of the weed and pest control Association. They have local inspectors who can provide further advice and treatment.  
As per comments in the body of the report.

There was no evidence of termite activity found during this inspection.

It is reasonable to assume there may be timber decay from both native borer and termites found as part of future renovation work.

Externally there is a lot of old timber work and detritus and I suggest you remove any unnecessary timber/rubbish from the perimeter sheds as this can act as a catalyst for pest activity.

81 The Elim report's general conclusion states:

As per the body of the report above the house has some upgrading work carried out ...

There were no overall areas of concern seen.....

82 It followed that all the Elim report said was that where the property could be accessed – which did not include all the perimeters of the rooms or the subfloor – no termites could be seen. I am satisfied that this statement was accurate.

### **The evidence**

83 The Garretts gave evidence that they inspected the property on about 5 July 2014, before engaging Mr Ford to carry out his inspection. Mrs Garrett said she spent about half an hour in the house which was well furnished and quite tidy. She went into each of the rooms, including the third bedroom which was small and being used as a studio. She could not recall whether there was anything in front of the window in the third bedroom.

84 Mr Garrett said that when he inspected the house with Mrs Garrett and the real estate agent in early July 2014, the house was tenanted and cluttered. He went into each of the rooms but did not recall spending any length of time in any of the rooms or looking at the house in any detail.

85 After settlement of the contract of sale, Mr Garrett said he visited the property on 29 September 2014 and found termites in the dado board just under the window in the third bedroom. He said at that time he took photos of the termites [omissions document – p 79 to 81]. His photos show numerous frames and canvasses leaning against the wall under the window but not covering the window.

86 Mr Garrett said that the walls in the third bedroom had 1.2 metre dado timber panelling but the walls in the front room did not. He said that Mr Ford's failure to notice this difference resulted in Mr Ford failing to notice termites in the dado panelling in the third bedroom.

87 Mr Ford said that Mrs Garrett advised him that they intended to renovate the house. He said he sent an email stating that the house was older, but she was keen to know what they would need to do to bring the house up to standard as the Garretts intended to live in it. He said when determining what was meant by bringing the house up to standard, he took into account

the fact that the house was nearly 100 years old and people had a different view of what “up to standard” meant.

- 88 Mr Ford said the third bedroom was heavily furnished and being used as a store room and there were art canvasses stacked everywhere among the existing furniture. He could only see the top part of the window as the tenant’s art work was against the window. He could not see the bottom section of the window.
- 89 Mr Ford said that the walls in the third bedroom were obscured by stored goods and there was restricted physical access to the room. He did not see a timber dado. He said that his report dealt with what he could see.
- 90 Mr Ford produced two photos of the third bedroom, one of which showed the broken sash cord at the top of the window. He said that the online advertising photos also showed that the room was heavily occupied with stored goods.

## **ANALYSIS**

- 91 I accept Mr Ford’s evidence as accurate. I reject Mr Garretts’ submission that the dado panelling under the window was not obscured at the time of Mr Ford’s inspection.
- 92 It does not follow, that because Mr Garrett saw the termites in the third bedroom in late September 2014, because there was nothing covering the window, that there was nothing against the window when Mr Ford inspected the third bedroom in July 2014.

## **Mr Odgers’ report**

- 93 Mr Garrett said he engaged Mr Odgers to inspect the property after he found termites in the dado panel under the window in the third bedroom. On 2 October 2014 Mr Odgers inspected the property and provided a report. He inspected the roof, interior and exterior of the house. He did not inspect the subfloor which was too low for access. Mr Odgers’ report confirmed the presence of termites in the dado board in the third bedroom which had already been seen by Mr Garrett.
- 94 Mr Garrett gave evidence that Mr Odgers told him that the termites were active, and it would be better to treat them and do a more thorough examination once the tenant had left the property. Mr Garrett said Mr Odgers said there was no need to deal with the termites immediately. He said Mr Odgers advised him that it was important not to disturb the termites and that they had probably been there for at least 6 to 12 months or longer as they were a slow-moving variety.
- 95 The Garretts relied on Mr Odgers’ report but did call Mr Odgers to give evidence. Mr Odgers’ report stated that the house was occupied at the time of inspection and was heavily furnished. These issues were noted in the Elim report. Mr Odgers noted active termites in the interior wall in the dado

board in the (third) bedroom known as *Nasutitermes exitiosus*. He did not find a nest.

- 96 Mr Odgers' report noted there was no perimeter ventilation and that the base boards were in contact with the ground. He did not find evidence of excessive moisture. Each of these points was noted in the Elim report.
- 97 Mr Odgers noted there were no termite shields and large amounts of stored firewood against the side fence. He recommended a further inspection in 12 months and the carrying out of a subterranean termite management proposal using termidor dust to dust the termites in the third bedroom.
- 98 After settlement and after the third bedroom appeared to have been cleared, the fact that Mr Odgers found termites in the dado board of the third bedroom is not to the point. The point is that Mr Ford could not see the termites when he inspected the property 3 months earlier, because of the art work, and his report made clear that he was not moving things.
- 99 Mr Garrett gave evidence that on or about 17 November 2014 Mr Odgers returned to the property when it had been vacated, to conduct a more detailed examination of the dado board in the third bedroom and to start the termite treatment. Mr Garretts' evidence was vague about what Mr Odgers did during his inspection.
- 100 Mr Garrett said Mr Odgers suggested to him that he remove some of the base boards around the house, which he did when Mr Odgers left. On removing some of the baseboards Mr Garrett found termites. Mr Garrett then contacted Mr Odgers and asked him to return to the property. On Mr Odgers' third visit, they removed more base boards which Mr Garrett said exposed termite eaten joists, bearers and corner posts.
- 101 Again, the fact that Mr Garrett found termites in the subfloor after removing the base boards is not to the point. The point is that when Mr Ford inspected the house 3 months earlier, he could not see termite damage in the subfloor because at the time of his inspection the presence of the baseboards made the subfloor inaccessible. The Elim report included photos which Mr Ford said he took through the floor near the bathroom/hot water service and also by levering a board out in the living room. Mr Ford said that his photos of the poorly lit and inaccessible area subfloor area did not show evidence of termites. The report stated that the subfloor area appeared to be typical hardwood bearer and joist construction.
- 102 Mr Garrett said Mr Odgers recommended that he get a local builder to quote on fixing the sub frame structure of the house which had been damaged by termites as Mr Odgers could not guarantee proper pest control without accessing that area.
- 103 Subsequently Mr Garrett engaged Mr Driscoll to provide a quotation on fixing the subfloor timber damaged by termites. However, Mr Driscoll did not provide Mr Garrett with a quotation to fix the timber damaged by termites.



## **Mr Driscoll's report**

- 104 Mr Garrett sought to rely on Mr Driscoll's report of his inspection of the property dated 13 January 2015. I have difficulty with Mr Driscoll's report. Mr Driscoll's inspection took place 6 months after Mr Ford's inspection and with the knowledge of the presence of termites. Mr Driscoll carried out an invasive investigation of a house which was empty and unoccupied and which was not in the same state as that inspected by Mr Ford. Further, Mr Driscoll was not available to be cross examined by Mr Ford or to answer questions that I would have put to him concerning his report.
- 105 Mr Garrett conceded that both he and Mr Driscoll had pulled off exterior weatherboards, plaster and wallpaper and done an invasive investigation of the house with the knowledge that the house had termites before Mr Driscoll prepared his report. Mr Garrett conceded that this was done to see what else they could find so that Mr Driscoll could advise him as to what needed to be done to bring the house "up to standard". Mr Garrett also conceded that the Council had confirmed that Avoca was not a designated termite area at the time of Mr Ford's inspection.
- 106 When Mr Driscoll first visited the property in November 2014 to provide a quotation to rectify the damaged timber, he was aware of the presence of termites. Mr Garrett said Mr Driscoll would not provide a quotation because there were too many unknowns. Mr Garrett said Mr Driscoll told him on entering the house that it needed restumping and there were subsidence issues. He said Mr Driscoll told him the internal and external cladding needed to be removed to examine the termite issue and that the Avoca region was known for termites.
- 107 Mr Garrett said that because Mr Driscoll would not provide the requested quotation he asked Mr Driscoll to return to the property and do a building inspection, so Mr Garrett could get a clearer perspective on what it would take to bring the house "up to standard". Mr Garrett did not explain what he meant by this term.
- 108 Nevertheless, Mr Garrett submitted that Mr Ford should have identified and noted and advised the Garretts of the issues raised by Mr Driscoll and that failure to do so showed that Elim had not provided its services with due care and skill.
- 109 Mr Ford said he had seen old termite damage in this area, but he had never found active termites in the area. He said that Avoca was not a designated termite zone and there was no requirement for builders to install termite proofing as part of a new build. I accept Mr Ford's evidence.
- 110 Mr Ford objected to Mr Driscoll's report being received into evidence. He submitted that I should not accept the report or alternatively, not give it any weight. He submitted Mr Driscoll's report was prepared months after his inspection with knowledge of the termite damage and the Garretts' dissatisfaction with the property.

111 Mr Ford submitted that:

- (a) Mr Driscoll carried out the inspection when the house was empty, and no longer tenanted.
- (b) The report did not comply with the Tribunal's practice note for expert witnesses and did not constitute an expert report.
- (c) Mr Driscoll's registration as a builder was limited and under the VBA definition, restricted him to doing "carpentry, general concreting, external wall cladding, and sub floor works".
- (d) Mr Driscoll found termites after being told of their existence and after doing an invasive investigation.
- (e) Avoca was not a listed termite area and the local council did not require a 400 mm clearance from the underside of a bearer for a 100-year-old home.

112 Mr Ford submitted that neither he nor Mr Odgers, the pest inspector, had found termites in the roof or other areas of the interior of the house. He said that the Elim report clearly stated that termites may be found when the Garretts carried out their proposed renovation work in the future.

113 Mr Ford said that termite activity in the exterior north wall was not evident during his inspection. He submitted that it was not there when Mr Odgers inspected the property in October 2014 or it would have been noted by Mr Odgers. Mr Ford submitted that Mr Odgers found no other activity of termites except in the third bedroom wall after they had been discovered by Mr Garrett. Mr Ford said Mr Odgers carried out a comprehensive investigation and did not find termites which Mr Driscoll found after an invasive investigation.

114 As for the other areas where the Driscoll report noted the presence of termites, Mr Ford said he did not see these termites during a visual inspection, that he had no access to the subfloor and that his photos did not show evidence of termite activity. He reiterated that his inspection was visual with limited access and that he had raised the issue of the possibility of termites being found when the Garretts renovated. I accept Mr Ford's evidence.

#### **ANALYSIS OF MR DRISCOLL'S REPORT**

115 As the Garretts were self-represented, I received the Driscoll report into evidence. However, I made it clear to the Garretts on a number of occasions during the hearing that I would determine the weight, if any, I would give to the Driscoll report. I accept Mr Ford's submissions about the Driscoll report.

116 I find Mr Driscoll's report has little probative value on the issue of whether Elim carried out the inspection and report with due care and skill. Mr Driscoll was able to make invasive and destructive investigations in an

empty house. Elim was not able to do that. I find this to be an apples/oranges comparison.

- 117 I find that the Driscoll report was prepared 6 months after Mr Ford's inspection, with knowledge of the presence of termites in the house and after doing an invasive investigation. I find that the Driscoll report was prepared when the house was vacant and empty, and no longer tenanted. I find this inspection to be in stark contrast to Mr Ford's visual inspection of a heavily furnished and tenanted house with limited accessibility. I also find it to be in stark contrast to Mr Odgers' report.
- 118 I find that Mr Driscoll inspected the house in January 2015 for the purpose of advising the Garretts about what needed to be done to bring the house up to a "liveable standard" which was not defined.
- 119 I find that the scope of Mr Driscoll's inspection in January 2015 differed from the scope of Mr Ford's inspection in July 2014. Mr Ford's inspection was visual, and Mr Driscoll's was not. Mr Driscoll inspected the property where some flooring cover, wallpaper and base boards had been removed by either Mr Garrett or Mr Driscoll allowing Mr Driscoll access to areas that were not accessible to Mr Ford.
- 120 Again, it does not follow, that because Mr Driscoll found termites in January 2015, that the termites were visible for Mr Ford to see when he inspected the house in July 2014, or even present, as there may have been a subsequent infestation.

#### **Mr Garretts' photos taken in October 2014**

- 121 Mr Garrett produced enlarged digital photographs which he had taken of the subfloor of the house in October 2014 after Mr Garrett removed the base boards around the exterior of the house [Garretts' omissions document pages 3,6 and 7]. The photos were taken nearly 3 months after Mr Ford's inspection. He submitted that they showed evidence of a termite gallery which he said Mr Ford failed to identify.
- 122 Mr Ford said that Mr Garretts' greatly enlarged photos showed a termite track but that there was no evidence that the track was active. He said Mr Garrett had taken these photos after the baseboards had been removed from the exterior of the house.
- 123 Mr Ford reiterated that he did not have access to the subfloor, that he took a couple of photos through gaps in the floor on which he commented. He said his report made it clear that the subfloor was inaccessible and that termites may be found when the Garretts renovated.
- 124 Again, Mr Garretts' photos taken in October 2014 are not relevant. These photos were taken three months after Mr Ford's inspection and when the baseboards had been removed and invasive investigation had been done. I am satisfied that the Elim report made clear the scope of the inspection and its limitations and findings of what Mr Ford observed.

### **Elim's photos enlarged by Mr Garrett**

125 Mr Garrett said that one of the photos in the Elim report, which he had enlarged, showed discolouration of the stump which was not identified by Mr Ford [Garretts' omissions document page 5]. Mr Garrett said that the Elim report stated in relation to piers/stumps:

appear to be a combination of some brick and some timber stumps as far as could be seen under that area of the house.

126 Mr Garrett said that his photo of the same pier [Garrett omissions document page 6], showed considerable discolouration which was ignored by Mr Ford. He said, more importantly, Mr Ford did not notice the termite gallery above the stump /bearer.

127 Mr Ford said that he could not see discolouration of the stump from his photo and that, Mr Garretts' photo was taken after the base boards had been removed and with a zoom camera and enhanced light. Mr Ford said he stated that he did not have access to the subfloor. I accept Mr Ford's evidence.

### **DUE CARE AND SKILL – IDENTIFYING MAJOR STRUCTURAL ISSUES**

128 The Garretts claim that Mr Ford did not inspect the property with due care and skill because he failed to find and advise them of various defects. I list these defects and deal with each of them in turn:

- (a) Subsidence.
- (b) Floors out of level in various areas by amounts up to 100 mm.
- (c) Defective footings and stumps.
- (d) Foundation and footing damage.
- (e) The subfloor area warranted closer inspection (as claimed to be seen from Mr Ford's photos, the floor levels and other easily observed issues).
- (f) A range of other serious structural issues.

### **Did Mr Ford fail to advise of subsidence issues?**

129 The Garretts did not define the term "subsidence". The shorter Oxford English dictionary defines subsidence and subside:

**Subsidence:** to subside. 2. The settling (of solid or heavy things) to the bottom...3. A fall in the level of ground.

**Subside:** 1. To sink down, fall to the bottom, precipitate. 2. To sink to a low or lower level.

130 The LEXIS-NEXIS Australian legal dictionary defines subsidence as;

*Building and construction* Movement of the foundation, other than movement caused by earthquake.

131 Subsidence, in a building context, means the lowering or sinking of the foundations. That is a fall in the ground level. I am not satisfied on the evidence that the house was subsiding. The context in which the Garretts used the term subsidence, was that the floors were out of level and the stumps and footings were defective.

**Did Mr Ford fail to advise that the floors were out of level?**

132 On 11 July 2014, the day after Mr Ford’s inspection, he emailed Mrs Garrett and explained that the house appeared to be the original construction with 1970s upgrade. As to the level of the floors, Mr Ford’s email stated:

There are obvious areas internally where the floors are sloping and out of alignment, but it is a bit hard to discern due to the high level of finishing [should read furnishing] in the house and limited access to the perimeter of the rooms.

133 After Mr Ford emailed the Elim report to Mrs Garrett, he received an email from Mr Garrett with a list of questions. One of the questions was what was meant in the Elim report by the words “some soft areas underfoot” in the laundry.

134 Mr Ford’s email to Mr Garrett stated:

“Soft areas underfoot” indicates that there is likely to be some repairs required to the floorboards as part of future renovation work. When I carry out an inspection I only wear my socks, so you can feel independently where there is springiness or movement to the boards. I can’t be more definitive than that.

135 Mr Garrett submitted that Mr Ford’s email to Mrs Garrett dated 11 July 2014 did no more than note a couple of points and that the Garretts relied on what was in the Elim report. Mr Garrett appeared to ignore the significance of Mr Ford’s email. He submitted that the Garretts were not notified that the floors sloped and were out of alignment and that the floors were not level.

136 I reject Mr Garretts’ submission. In my opinion, Mr Ford’s email could not have been clearer. Mr Ford’s email clearly points out that there were obvious areas in the house where the floors were sloping and out of alignment.

137 Further, Mr Ford made it clear that he could not comment further because of the high level of furnishing in the house and the lack of access to the perimeter of the rooms. On being told that the floors were sloping and out of alignment the Garretts did not raise this issue for further discussion or clarification.

138 I find that the Elim report clearly made reference to the state of the floors. Under the heading INTERIOR of the house the Elim report relevantly states:

**Entrance/hallway/living room: Front door:** the door jams on the edge

**Front living room: Floors:** this room is also very heavily furnished .....with some unevenness underfoot. **Door:** original door is out of square and jams on the frame.

**Hallway:** There is some squeaking and movement to the floor.

**North east corner bedroom:** (third bedroom): **Floors:** also heavily occupied and limited access and some minor movement underfoot. **Door:** also requires adjustment.

**Main bedroom:** catches on the latch edge.

**Kitchen/dining:** some unevenness underfoot and vinyl flooring is in fair condition and feels a bit uneven underfoot where it appears that original wall has been removed and there would obviously be some patching to the floor at that point.

**Bathroom: Floors:** because of the unusual floor plan of the hallway area the small angled access point to the bathroom is a bit unusual. The room is [should read “has”] also had the 1970 style upgrade and tiled floor has some cracks and reasonable to assume you will gut it out and reconfigure as part of upgrading.

**Laundry: Floors:** vinyl sheet flooring with defects seen through the coating. This floor is on the same level as the rear veranda as per photo below. There are some soft areas underfoot.

**Subfloor space:** There is no subfloor access to the house and the majority [of] the perimeter is enclosed with a timber board. I was able to photograph through [should read though] near the bathroom/hot water service and also by lever in abroad [should read levering a board] out under the front north-west living room. .... As commented there is some unevenness underfoot inside the house and it may be possible to carry out some repacking/levelling as part of your renovation work.

- 139 Mr Garrett conceded that the Elim report stated that there was unevenness under foot and that the doors jammed. Numerous times he submitted that Mr Ford should have told him that the floors were out of level and that the cause of this problem was subsidence.
- 140 Mr Garrett continued to rely on Mr Driscoll’s report to support his submission that Mr Ford had failed to advise that the floors were out of level by amounts up to 100 mm. As stated, I have found Mr Driscoll’s report to be of little probative value.
- 141 I find that the Garretts were notified by email that the floors sloped and were out of alignment. I find that the Elim report made it clear that the floors were soft underfoot and that the doors jammed. I am satisfied that although Mr Ford did not state the amount by which the floors were out of level, he made it clear that the floors were out alignment and sloped. I find

that Mr Ford notified the Garretts of these issues before Mrs Garrett signed the contract of sale.

**Did Mr Ford fail to advise of defective footings and stumps?**

- 142 Mr Garrett relied on Mr Driscoll's report to support his submission that Mr Ford had failed to advise the Garretts of defective footings and stumps. Again, for the reasons that I have given already, I have found Mr Driscoll's report to be of little probative value.
- 143 Mr Ford gave evidence that the house did not require restumping. He said that if the issue of potential re-stumping had been raised he would have advised Mr Garrett against re stumping because it would cause the asbestos cement sheeting to crack.
- 144 In Mr Ford's opinion the sloping floors and unevenness underfoot did not amount to a major structural issue. He said the way to deal with the floors was to level them. He said he made this clear in his report. No expert evidence was given which contradicted Mr Ford's evidence. I accept Mr Ford's evidence.

**Did Mr Ford fail to advise of foundation and footing damage?**

- 145 I have dealt with the issue of footing damage under the heading "Defective footings and stumps".

**Did the subfloor area warrant closer inspection?**

- 146 The Elim report made clear that there was no ventilation to the subfloor and that there was no access to the subfloor space. The Elim report stated that Mr Ford only noted his inspection was visual. The Elim report made clear that Mr Ford was not inspecting areas that he could not reasonably access.
- 147 I am satisfied that the Elim report set out the limitations of the inspection and that Elim was not required to advise the Garretts that the subfloor area required closer inspection. I find that Mr Ford was not required to advise the Garretts that the subfloor area warranted closer inspection.

**Did Elim fail to provide its services in accordance with its website?**

- 148 The Garretts claim that Elim and Mr Ford breached the *Australian Consumer Law* because they failed to carry out the inspection and prepare the Elim report in accordance with the representations made by them as referred to in paragraph 6 of points of claim [points of claim 14(a)].
- 149 The particulars of this claim are:

The respondents failed to advise the applicant that the property had numerous and substantial defects including defective footings and stumps, evidence of termite galleries/tracks on the stumps, dado wall panelling, bathroom architraves and in the roof, subsistence, and floors out of level in various areas by amounts of up to 100 mm and a range of other serious structural issues.

150 I have dealt with the Garretts' claim that Mr Ford failed to inspect and prepare the Elim report in accordance with representations made on the Elim website, earlier in my reasons. I have found that Mr Ford did not carry out his inspection in accordance with specific representations on the Elim website. I have found that his own report made this clear.

**Did Elim fail to provide its services in a proper and workmanlike manner?**

151 The Garretts claim that Elim and Mr Ford breached the *Australian Consumer Law* because they failed to carry out the inspection and prepare the Elim report in a proper and workmanlike manner [points of claim at 14].

152 The obligation for Elim to provide services in a "proper and workmanlike manner" is a specific warranty for a domestic building contract governed by the *Domestic Building Contracts Act 1995*. It is a similar obligation to providing inspection services with due care and skill. I have therefore dealt with this claim in addressing whether Elim carried out its services with due care and skill.

**Was the Elim report false or misleading?**

153 The Garretts claim that the Elim report was false and misleading and deceptive [points of claim at 14 (d)].

154 The particulars of claim are:

At the time of the inspection the house was subject to serious subsidence issues and showed evidence of termite damage etc., as set out in subsequent reports obtained by the applicant. The subsequent reports are filed in the proceeding. Any competent builder properly conducting an inspection of the house in July 2014 should have been aware of serious subsidence problems and seen evidence of termites. The Elim report gave false and misleading view of the house and its serious defects.

155 This, they say, caused the Garretts' loss because Mrs Garrett relied on the report (which did not find termites or major structural problems) and then bought the property without knowing about the termites and alleged major structural problems.

156 However, I have found that the Elim report was not misleading or deceptive as it set out the limited scope of Mr Ford's inspection. I have found that the Elim report documented what Mr Ford saw and found in the heavily furnished and tenanted house where he had limited access to the perimeter of the rooms and no access to the subfloor.

157 I am not satisfied on the evidence that the house was subject to serious subsidence issues at the time of Mr Ford's inspection on 10 July 2014.

**Was the Elim report negligently prepared?**

158 The Garretts claimed that that the Elim report was negligently prepared [points of claim at 14 (d)]. The Garretts' particulars of claim are the same as



those set out in paragraph 148 above. The Garretts relied on Mr Odgers' report. I have found that the fact that Mr Odgers found termites in October 2014 after being advised of their presence is not to the point. The Garretts also relied on Mr Driscoll's report to which I have given little probative value.

159 As I have stated earlier in my reasons, I am not satisfied on the evidence that Mr Ford failed to carry out the inspection services with due care and skill or failed to prepare the Elim report with due care and skill.

**Did the Elim report fail to properly identify and evaluate substantial issues?**

160 The Garretts claim the Elim report failed to properly identify and evaluate substantial issues with the house including subsidence, the evidence of termite tracks, severely out of level floors and doors opening, lack of termite shields and caps [points of claim at 14 (e)].

161 Their particulars of this claim are:

There were termite tracks evident from the foundations, dado panelling within the house, as well as in the roof timbers. Reports obtained from Driscoll Home Maintenance and Natural Pest control which stated that the house had multiple defects, severe subsidence and extensive termite damage. Driscoll home maintenance stated that he could not offer a quote to repair the house in his view was only fit for demolition. In the terms used by the respondents it should not have been classed as "roadworthy".

162 I have dealt with each of these issues already. The Odgers' report does not state that the house had multiple defects, severe subsidence. Mr Odgers was aware of the presence of termites at the time he prepared his report. He only found termites in the dado panelling in the third room and not in the roof or elsewhere in the interior or exterior of the house.

163 In so far as the Garretts submitted that I should find for them on the basis of Mr Driscoll's report, I have found that his report was of little probative value.

164 On the last day of the hearing Mr Garrett produced a document from the Pyrenees Shire Council dated 19 July 2018 which stated that the township and Parish of Avoca was not a designated termite area. There was no evidence from the Council that the Avoca area was a designated termite area in 2014. In fact this point was conceded by the Garretts and confirmed by Mr Ford.

165 As I have already stated in my reasons I am satisfied that Mr Ford notified the Garretts by email on 11 July 2014 of the floors sloping and being out of alignment. I am satisfied that the Elim report notified the Garretts of issues with the doors opening.

166 I am not satisfied that Elim failed to use due care and skill in not identifying subsidence, evidence of termites tracks in the lack of termite shields of

caps. I am not satisfied that Elim failed to use due care and skill in carrying out its services in this regard. Again Mr Ford set out what he observed and found based on his visual inspection.

## **CONCLUSION**

- 167 I have found that specific representations made by Elim on its website set out above were misleading or deceptive in contravention of s18 of the *Australian Consumer Law*. I have found that the Garretts relied on those representations in engaging Elim to carry out its pre-purchase inspection services and suffered loss and damage in engaging Elim to inspect and report on the state of the property. I have found that Mr Ford was personally liable in relation to Elim's representations about finding any hidden problems. I have found that the Garretts are entitled to a refund of the \$500 being the fee which they paid Elim for its services. I have otherwise dismissed the Garretts' claims.
- 168 I find that a reasonable person would not have relied on the Elim website in purchasing the house because it was superseded by the Elim report. On the evidence before me I am not satisfied that Mrs Garrett entered into the contract of sale for the Avoca property in reliance on the representations on Elim's website.
- 169 I am satisfied that the Elim report clearly set out the condition of the 100-year-old property and reported on various issues that were observed by Mr Ford. I have found that the Elim report set out the limitations of Mr Ford's inspection. The report made clear that Mr Ford was only carrying out a visual inspection. It also noted areas which he was unable to access.
- 170 I find that the Garretts failed to address Mr Ford's email dated 11 July 2014, notifying them of various issues with the property, including the sloping floors and the floors being out of alignment. I find that the Garretts also failed to take into account the limitations and disclaimers set out in the Elim report.
- 171 I find that at the time Mrs Garrett signed the contract of sale she was on notice that Mr Ford had only carried out a visual inspection and did not access all areas of the property. I find that Mrs Garrett was on notice that Mr Ford's inspection did not uncover hidden defects that he could not see.

## **THE GARRETTS' SUBMISSIONS**

- 172 Mr Garrett filed written submissions of many pages on the Elim report. He also filed a lengthy document entitled "omissions document" in which he included numerous photos of the property that he took some time in October 2014 and in January 2015. He also relied on over 100 photos of the property taken by Mr Driscoll in January 2015.
- 173 Mr Garrett conceded he had stripped back plaster so he could see the termites, removed plywood covering and some of the wall paper and

stripped off some of the wall covering and that many of the photos were taken after this work had been done.

- 174 Mr Garrett submitted that Mr Ford should have carried out a much more thorough inspection than he did, that he missed items and failed to properly comment on and advise on many issues. He submitted that Mr Ford should have raised as a significant issue and explained the ramifications of not having access to areas such as the subfloor.
- 175 He submitted that the Elim website showed many photos of the subfloor and foundations of houses inspected by Mr Ford. He submitted that this issue should have been seen as a concern as he submitted every floor in the house had an indication of movement and subsidence.
- 176 I reject Mr Garretts' submissions for the reasons that I have already given. Again Mr Garrett appeared to disregard the fact that the Garretts had been notified that the floors were out of alignment and sloping before Mr Ford sent the Elim report to them.
- 177 Mr Garrett also appeared to disregard the limitations and disclaimers in the Elim report and sought to rely on the representations on the Elim website. The fact that the Garretts submitted that Mrs Garrett chose to rely on the Elim website when she signed the Contract of sale cannot take away from the fact that the Elim report made clear that Mr Ford did not inspect every hidden area. In fact the report made clear that he did not. It was a report limited to what Mr Ford could see and access.
- 178 I am not satisfied that the house had major subsidence issues and I have accepted Mr Ford's evidence that levelling and repacking of the floors was the best way to proceed. I have not accepted the Garretts' submissions about the Elim report.
- 179 Mr Garrett submitted that the Elim report contained a number of errors. Examples included a missing downpipe, the connection of pipes to drains, electrical wiring, the guttering and the front verandah to name but a few. These items were not particularised in the points of claim but raised by Mr Garrett during the hearing.
- 180 Mr Ford responded to each issue and conceded that he had missed noting that one of the drain pipes was missing. However, he said that this did not result in the house having subsidence issues. Again he noted what he had seen at the time of inspection.
- 181 The issue with the Garretts' claim is that they submitted that they should have received a report which went beyond the scope of the report. If the Garretts were unhappy with the fact that Mr Ford did not inspect the property in the manner set out on Elim's website then they should have raised this issue with him and asked him to do a more detailed inspection. They did not do that.
- 182 Having accepted the Elim report for what it was the Garretts are not entitled to claim that the report should have been far more informative about areas

that Mr Ford could not see or access. However they made a decision for Mrs Garrett to purchase the property aware of the Elim report's limitations.

- 183 The Garretts based their submissions on Mr Driscoll's reports. I have set out my findings on the Driscoll report and have given it little probative value. Further on many occasions Mr Garrett sought to give expert evidence about building issues of which he conceded he had no expertise.
- 184 Having heard all of the evidence it became apparent to me that there was a major disconnect between the Garretts' expectation of the services to be provided by Mr Ford and Mr Ford's understanding of the services that he was providing. Mr Ford referred to a number of items which he said required maintenance. In each case Mr Garrett said these were issues that should have been listed as defective. He referred to issues such as rotting timber and the state of the guttering.
- 185 In each case Mr Ford said he was inspecting a 100 year old home. In each case the Garretts submitted that they did not understand the ramifications of Mr Ford's findings and that each of the items classified as requiring maintenance were defective requiring rectification. Again there appears to have been a disconnect between what Mr Ford required as maintenance of a 100 year old home and what the Garretts expected was involved in bringing a 100 year old home "up to standard". At the end of the day the Elim report clearly set out Mr Ford's observations and findings.

#### **HAS ELIM CAUSED THE GARRETTS TO SUFFER LOSS OR DAMAGE?**

- 186 The Garretts did not satisfy me on the balance of probabilities that they have suffered any loss or damage in Mrs Garrett purchasing the property, where the loss or damage arises from Mr Ford's conduct, the Elim website and/or the Elim report. Mr Garrett's claim for loss and damage must fail as he did not enter into a contract of sale to purchase the property. The contract of sale was signed by Mrs Garrett who is the registered owner of the property.
- 187 Mr Garrett said Mr Driscoll told him the house needed to be demolished and rebuilt because he considered it to be of land value only. However there was no evidence of the cost of doing any rectification work to make such an assumption. I have accepted Mr Ford's evidence and submissions and find there was no basis for the assumptions made by Mr Driscoll even if I had accorded them weight.
- 188 At the end of the hearing Mr Garrett submitted that they did not seek the cost of demolishing and rebuilding a new house of the same dimensions as their 100-year-old timber house. He said they sought rectification of the house to a satisfactory standard. Again no explanation was given as to the meaning of this term. The Garretts were given every opportunity to obtain quotations for the cost of rectifying the damaged timber but did not do so.
- 189 I gave the Garretts an opportunity to provide further evidence in support of their damages claim. The Garretts produced an email from Ms Elizabeth

Teal of Elders real estate dated 4 June 2018. Ms Teal valued the Garretts' property in 2014, based on land value only after demolition. Having given Mr Driscoll's report little probative value, I find that there was no basis for Ms Teal's assumption that the property was of land value only.

## **ORDERS**

190 The orders I will make are:

- (a) The respondents must pay the applicants by way of refund, Elim's fee of \$500.
- (b) The applicants' claims against the respondents are otherwise dismissed.

F. Marks  
**Member**