



Legal Update for ASBC Sydney

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**Pre-purchase pest inspections
–proof of negligence**

Trends in hot tubbing

Pre-purchase pest inspections – a case study in proof of negligence

- *Alexandrou v Pacific Pest Control Pty Ltd*
[2016] NSWDC 193
- Inspector reported that neither active termites nor termite workings or damage were found
- Significant termite damage discovered 40 days after purchase

Background

- Pre-purchase inspection undertaken 16 December 2013.
- Visual inspection in accordance with AS4349.3
- Inspector reported that neither active termites nor termite workings or damage were found.
- After completion the purchasers inspected the property on 24 and 25 January 2014.
- As purchaser was leaning on a window sill “it crumbled and termites started spewing out of the hole”.
- Beneath the bathroom wall lining panels it was apparent that the studs and noggins within were significantly termite damaged.
- In the roof void over the bathroom ceiling were “mud tracks and after further investigation I saw termites eating the wood in the roof”.

The evidence

- The inspector denied any termite activity was able to be detected visually without an invasive inspection on 16 December 2013.
- The purchaser's expert inspected on 6 February 2014.
- He said he performed a visual inspection and was able to observe:
 - termite workings in the rafters which were substantial and fresh,
 - termite activity which was present in the subfloor area where a joist had termite damage and termite tunnelling was evident leading up from the ground to the joist, and
 - termite workings inside the external which were visible without the need to remove or disturb the cladding

The law

- There was an implied term or condition of the contract between the purchasers and the inspector that both the visual inspection and the report provided by the defendant would be performed with due skill and care.
- Those terms were implied at common law and pursuant to s 60 *Australian Consumer Law (ACL)*.
- The obligation to exercise due care and skill is assessed at a common law negligence standard.
- Disclaimers in the contract which limit the obligation of due skill and care are ineffective because they offend s 64 ACL.

The result and reasons

- The inspector was not liable.
- The plaintiffs did not prove identifiable signs of termite activity or termite damage was observable or detectable on visual inspection at the time of his inspection on 16 December 2013.
- Nor did the purchasers identify precautions which the inspector failed to take during his inspection and reporting.
- Rather, the purchasers' case on liability was to rely upon the extent of infestation discovered after completion of the purchase.
- However the plaintiffs did not rely on expert opinion evidence that the damage and termite activity found after completion of the purchase was
 - Activity and damage observable to an inspector prudently conducting a visual inspection on 16 December 2013; or
 - Damage or activity of which presentation ought to have been detected by a prudent pest inspector performing a visual inspection of the property on 16 December 2013.

The result and reasons

- In the absence of expert evidence, there is no presumption of continuity of termite activity merely due to the brevity of the period 16 December 2013 to 25 January 2014 (40 days).
- Nor will the Court infer from the extent of the damage that, absent evidence to the contrary, that it must have occurred over a long period.
- That is, the mere post purchase discovery of termites, termite workings and termite damage do not permit the Court as a lay observer to conclude that signs of it ought to have been detected on the initial inspection.

Trends in hot tubbing

a survey into the use of concurrent evidence by Korda Mentha and the Australian Bar Association

High-level findings

- Over 85% of participants agreed or strongly agreed that concurrent evidence was a useful tool.
- The biggest concerns respondents raised were with how the concurrent evidence process is executed

Feedback on process

- Lack of consistency in execution of the concurrent evidence phase of that process - *'no two concurrent evidence sessions have been the same'*.
- Interest in a harmonised guide for superior courts to ensure consistency.
- The decision to use concurrent evidence and how it should be used should be made earlier.
- The large majority (78%) of all groups of participants wanted judges involved in asking questions during concurrent evidence.
- The effectiveness of concurrent evidence depends on the conclave process being properly conducted.
- More clarity in practice notes regulating conclaves is required.



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