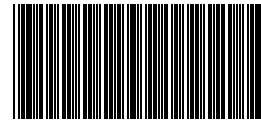




Filed: 8 November 2019 2:56 PM



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Commercial List Response

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Commercial
Registry	Supreme Court Sydney
Case number	2019/00232749

TITLE OF PROCEEDINGS

First Plaintiff	Terry Williamson
First Defendant	SYDNEY OLYMPIC PARK AUTHORITY trading as Sydney Olympic Park Authority ABN 68010941405

TITLE OF THIS CROSS-CLAIM

First Cross Claimant	SYDNEY OLYMPIC PARK AUTHORITY trading as Sydney Olympic Park Authority ABN 68010941405
First Cross Defendant	Australia Avenue Developments Pty Ltd ACN 104573391
Second Cross Defendant	Ecove Group Pty Ltd
Number of Cross Defendants	3

FILING DETAILS

Filed for	Icon Co (NSW) Pty Ltd, Cross Defendant 3
Filed in relation to	Cross-Claim 1
Legal representative	Peter Gavan Wood
Legal representative reference	
Telephone	03 8608 2537
Your reference	1238049

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document,

along with any other documents listed below, were filed by the Court.

Commercial List Response (Response to SOPAs Commercial List Cross-Claim Statement (ME 8 Nov 2019) .pdf)

[attach.]

Form 1 (version 4)
UCPR 45.6

RESPONSE TO COMMERCIAL LIST CROSS-CLAIM STATEMENT

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Commercial List
Registry	Sydney
Case number	2019/00232749

TITLE OF PROCEEDINGS

First Plaintiff	Terry Walter Williamson
Second Plaintiff	Helen Therese Williamson
Defendant	Sydney Olympic Park Authority

TITLE OF FIRST CROSS-CLAIM

Cross-Claimant	Sydney Olympic Park Authority
First Cross-Defendant	Australia Avenue Developments Pty Ltd ACN 104 573 391
Second Cross-Defendant	Ecove Group Pty Ltd ACN 065 207 918
Third Cross-Defendant	Icon Co (NSW) Pty Ltd ACN 604 790 409

FILING DETAILS

Filed for	Third Cross-Defendant, Icon Co (NSW) Pty Ltd
Legal representative	Peter Wood, MinterEllison
Legal representative reference	1238049
Contact name and telephone	Michelle Knight, (02) 9921 4064
Contact email	Michelle.Knight@minterellison.com

A. NATURE OF DISPUTE

1. The third cross-defendant (**Icon**) broadly agrees with the description of the background to the dispute set out by the cross-claimant (**SOPA**).
2. Icon denies that it is liable to SOPA for the reasons alleged by SOPA or at all.

3. Icon also says it is not bound by any concessions or admissions made by SOPA in the proceedings brought by the plaintiffs and that in the events that have occurred, including the fact that the plaintiffs suffered no physical damage to their unit ('dwelling' (as defined)) by reason of any defect(s) in 'residential building work' (as defined), SOPA has no liability to the plaintiffs.
4. Icon further says that in the circumstances that have occurred, including the fact that:
 - (a) although SOPA is the registered proprietor of certain lots in strata plan 97315, it has not received, and will not receive in the future, the proceeds of any sale of those lots (as pleaded in sub-paragraphs 75(b)(iv) and (v) below); and
 - (b) SOPA has not at any stage sought to lease any of its units,

SOPA has not suffered, and will not suffer, any loss or damage as a unit owner.

B. ISSUES LIKELY TO ARISE ON THIS CROSS-CLAIM

1. The extent of, locations of, and cause of, any damage that has been observed in the Opal Tower building due to the matters alleged by the plaintiffs.
2. Are any of the units in the Opal Tower building that are owned by either SOPA, or the plaintiffs, the subject of such defects?
3. Noting in particular the definitions of 'residential building work' and 'dwelling' in the *Home Building Act 1989* (NSW) (**HB Act**), and the allegations as to damage and the locations thereof, did either the first cross-defendant (**AAD**), or Icon, breach any of the statutory warranties in the HB Act in respect of the units in the Opal Tower building that are owned by SOPA or the plaintiffs?
4. Is SOPA liable to the plaintiffs or Group Members for any breach of the statutory warranties in the HB Act?
5. If the answer to question 4 is 'no', is SOPA able to sue on any indemnities and warranties in the contract between AAD and Icon (being a contract to which SOPA is not a party) in respect of alleged statutory warranty breaches by SOPA?
6. Is SOPA otherwise entitled to sue on any of the indemnities and warranties in the contract between AAD and Icon (being a contract to which SOPA is not a party)?

7. If the answer to question 6 is 'yes', is Icon liable to indemnify SOPA in respect of SOPA's alleged liability to the plaintiffs or any other of the Group Members?
8. Having regard to the circumstances by which SOPA continues to own or hold units in the development, is Icon liable in damages to SOPA for alleged breaches of the HB Act as regards units owned by SOPA?
9. Noting that:
 - (a) Icon has (at its own cost) repaired (or is in the process of repairing) all of the alleged structural defects, and resultant damage, in the building;
 - (b) Icon has carried out such repairs and remedial works only after providing all designs therefor to structural engineers retained by the plaintiffs and the owners corporation of the building, and only once all inquiries, objections and requests as regards same had been addressed;
 - (c) Icon has or will have reimbursed the plaintiffs (and most of the other Group Members) for loss of rental income, or, for the cost of alternative accommodation for periods when their unit could not be occupied while repair works were being undertaken;
 - (d) as far as Icon is aware, SOPA did not ever let any of the residential lots owned by it (as further pleaded at sub-paragraphs 75(b)(iv) and (v) below);
 - (e) although SOPA is the registered proprietor of certain lots in the building, it has not received, and will not receive in the future, the proceeds of any sale of those lots; and
 - (f) the period of the Icon repair works corresponded with a downturn in the residential, and residential apartment, markets as a whole,

have the plaintiffs and SOPA, or either of them, suffered loss and damage, including in the nature of a diminution in value, and if so how is such diminution to be calculated?

C. THIRD CROSS-DEFENDANT'S RESPONSE TO THE ALLEGATIONS IN THE CROSS-CLAIM STATEMENT

As to the contentions of SOPA in its cross-claim statement, Icon says as follows, adopting, without admission and where relevant, the headings and definitions used in the cross-claim statement.

For ease of reference, Icon's response to a particular numbered paragraph in SOPA's cross-claim statement is to be found in the same numbered paragraph in this response. By way of example, Icon's response to paragraph 33 of SOPA's cross-claim statement is to be found in paragraph 33 below.

CLAIM-CLAIMANT'S CONTENTIONS

- 1-4. Icon admits paragraphs 1 to 4 inclusive of the cross-claim statement, save that Icon:
- (a) says that, pending discovery, Icon proceeds on the basis that SOPA at no time let, or sought to let, any of the residential units in the building that were held in its name; and
 - (b) although SOPA is the registered proprietor of certain lots in the building, it has not received, and will not receive in the future, the proceeds of any sale of those lots as pleaded in sub-paragraphs 75(b)(iv) and (v) below).

CLAIM AGAINST AAD

- 5-32. Icon denies paragraphs 5 to 32 inclusive of the cross-claim statement as no allegations are made against it in those paragraphs.

AAD Statutory Warranties

33. Insofar as the allegations made by the plaintiffs in paragraphs 9, and 16 to 20, of their List Statement are repeated by SOPA in paragraph 33 of the cross-claim statement against Icon, Icon (as regards allegations in the plaintiffs' List Statement):
- (a) admits paragraph 9 of the plaintiffs' List Statement, save that it was not a party to that agreement and does not admit that it was at any material time privy to any or the full terms thereof;
 - (b) subject to sub-paragraph (d) below, admits paragraph 16 of the plaintiffs' List Statement;
 - (c) admits paragraph 17(a) of the plaintiffs' List Statement;
 - (d) denies paragraph 17(b) of the plaintiffs' List Statement;
 - (e) in answer to paragraph 18 of the plaintiffs' List Statement:
 - (i) denies the paragraph; and
 - (ii) says further that the structures or elements described in paragraph 17(b) of the plaintiffs' List Statement do not constitute 'dwellings' within the meaning of cl 3(1) of Schedule 1 to the HB Act as they do not constitute

major elements of a or the non-residential part of the Opal Tower that gives support or access to the residential part of the Opal Tower (per clause 3(2)(d) of Schedule 1 to the HB Act);

- (f) in answer to paragraph 19 of the plaintiffs' List Statement:
- (i) admits that the Opal Work was 'residential building work' within the meaning of the HB Act except:
 - (A) to the extent that the Opal Work consisted of 'design work'; and
 - (B) to the extent that the Opal Work involved the construction of structures that do not constitute 'dwellings' within the meaning of cl 3(1) of Schedule 1 to the HB Act for the reasons set out in sub-paragraph 33(e)(ii) above;
 - (ii) admits that the D&C Contract was a contract to do 'residential building work' except:
 - (A) to the extent that the D&C Contract imposed design obligations upon Icon; and
 - (B) to the extent that the D&C Contract imposed an obligation upon Icon to construct structures that do not constitute 'dwellings' within the meaning of cl 3(1) of Schedule 1 to the HB Act for the reasons set out in sub-paragraph 33(e)(ii) above; but further says that; and
 - (iii) if, contrary to 33(f)(i)(A) above, it be found that on a proper construction of the HB Act design work for the Opal Tower (which was carried out and approved by WSP Structures Pty Ltd (**WSP**)) was 'residential building work' (because it was 'work involved ... in the construction of a dwelling' within the meaning of cl 2(1) of Schedule 1 to the HB Act), then in such circumstances only, Icon would:
 - (A) admit that the Opal Work constituted 'residential building work' but only insofar as it involved the design and construction of 'dwellings' within the meaning of 'dwellings' in cl 3(1) of Schedule 1 to the HB Act; and
 - (B) admit that the D&C Contract was a contract that required Icon to do 'residential building work' insofar as the D&C Contract obliged

Icon to design and construct 'dwellings' within the meaning of 'dwellings' in cl 3(1) of Schedule 1 to the HB Act;

(iv) further, and only in the event it be found that work for the design of the Opal Tower constituted 'residential building work', then in such circumstances it would follow that:

(A) the statutory warranties in s 18B of the HB Act were also implied into the agreement between Icon and WSP (by which WSP agreed to design to the Opal Tower) (**WSP Consultancy Agreement**) by reason of s 18B(2) of the HB Act; and

(B) any provision in the WSP Consultancy Agreement that sought to limit WSP's liability to Icon would be void by reason of s 18G of the HB Act; and

(v) says further that if contrary to paragraph 33(f)(i)(B) above, the Opal Work was comprised solely of the design and construction of structures that constituted 'dwellings' within the meaning of cl 3(1) of Schedule 1 to the HB Act, then in such circumstances it would follow that:

(A) the construction of those structures would constitute 'home building work'; and

(B) if it be found the designing of the Opal Tower constituted 'residential building work', the design of those structures would constitute 'home building work'; and

(g) in answer to paragraph 20 of the plaintiffs' List Statement:

(i) admits that the Statutory Warranties were implied into the D&C Contract insofar as the D&C Contract was a contract to do 'residential building work'; and

(ii) repeats the matters pleaded in sub-paragraph (f) above.

34. Icon denies paragraph 34 of the cross-claim statement as no allegations are made against it in the paragraph.

35. Icon denies paragraph 35 of the cross-claim statement as no allegations are made against it in the paragraph.

The plaintiffs' contentions (as repeated or adopted in the cross claimant's cross-claim statement)

36. In answer to paragraph 36 of the cross-claim statement, Icon:
- (a) admits that the plaintiffs' List Statement contains the allegations pleaded in sub-paragraphs (a)-(c) of paragraph 36; and
 - (b) insofar as the allegations made by the plaintiffs in their List Statement are repeated by SOPA in sub-paragraphs (a)-(c) of paragraph 36:
 - (i) admits sub-paragraphs (a) and (b) thereof, but denies that design work is 'residential building work' for the purposes of the HB Act;
 - (ii) admits sub-paragraph (c)(i) thereof;
 - (iii) as to sub-paragraph (c)(ii):
 - (A) admits that the building was constructed so as to incorporate 'precast panels' which form a 'precast wall' as shown on the structural drawings approved by WSP; but
 - (B) denies the sub-paragraph for the reason that the precast walls transmit the loads from the columns above the wall to the columns below the wall, such that the precast walls themselves are not columns and do not act as columns; and
 - (iv) admits sub-paragraph (c)(iii) (on the premise that it is intending to refer to precast walls).
37. In answer to paragraph 37 of the cross-claim statement, Icon:
- (a) admits that the plaintiffs' List Statement contains the allegations pleaded in sub-paragraphs (a)-(c) of paragraph 37; and
 - (b) insofar as the allegations made by the plaintiffs in their List Statement are repeated by SOPA in sub-paragraphs (a)-(c) of paragraph 37 then:
 - (i) in answer to sub-paragraph (a):
 - (A) denies the sub-paragraph on the basis that the plaintiffs and SOPA have not properly particularised, and therefore Icon cannot understand:
 - (1) in what respect(s) the System, in whole or in part, was not designed or constructed to the capacity required by

clauses 2.1.1 and 2.2.1 of AS3600:2009 having regard to the requirements of those clauses; and

- (2) if it is alleged that part(s) of the System did not meet the capacity required by clauses 2.1.1 and 2.2.1 of AS3600:2009, which part of the System did not do so;
 - (B) otherwise denies sub-paragraph (a);
 - (C) says further in answer to sub-paragraph (a), that the design of the Opal Tower was prepared or approved by structural engineers, WSP, which design(s) Icon followed in its construction of the Opal Tower; and
 - (D) reserves the right to further plead, or amend its response, to this sub-paragraph upon the exchange of expert evidence, or further or proper particularisation by the plaintiffs or SOPA;
- (ii) in answer to sub-paragraph (b)(i):
 - (A) admits that the joints between the hob beams and precast walls on elevations 1, 4, 5, 8, 9 and 12 were not grouted to full width as shown on FC Drawing S06.010[A]; but
 - (B) says that such partial grouting occurred as a result of WSP approving a design change as pleaded in (1)-(3) below:
 - (1) the supplier of the said precast panels / panel system, Evolution Precast Systems Pty Ltd (**Evolution**), issued a series of shop drawings which proposed a change to the grouting of the joints between the hob beams and precast walls on elevations 1, 4, 5, 8, 9 and 12, such that grouting would be placed on the inner portion of the hob only (**Design Change**);
 - (2) WSP approved Evolution's proposed Design Change (which design was then constructed) as shown on Evolution shop drawing DE01 'precast detail page';
 - (3) the Design Change which was approved by WSP was not thereafter administratively incorporated by WSP into any amended 'for construction' design drawings, including FC Drawing S06.010[A], although it was required to be, and

was, followed by Icon such that Icon built what had been designed or approved by Evolution and (or) WSP; and

- (4) pending the service of expert evidence, Icon denies that the partial grouting referred to in (1)-(3) above was causative of any structural defects or failures at the relevant locations;

(iii) denies sub-paragraph (b)(ii) and further:

- (A) says that, contrary to what is alleged, there is no Hob Beam on level 10 between columns C16 and C34;
- (B) says that FC Drawing S09.220C is a Level 4 General Arrangement Drawing; and
- (C) reserves the right to further plead to this sub-paragraph upon the plaintiffs, or SOPA, amending or further or properly particularising the allegations therein;

(iv) denies sub-paragraph (b)(iii) and further:

- (A) says that, contrary to what is alleged, there is no precast wall on level 10 between columns C2 and C34;
- (B) says that FC Drawing S09.220C is a Level 4 General Arrangement Drawing; and
- (C) reserves the right to further plead to this sub-paragraph upon the plaintiffs, or SOPA, amending or further or properly particularising the allegations therein;

(v) in answer to sub-paragraph (b)(iv):

- (A) denies that each (all or any) of the precast panels within the precast walls in elevations 1, 4, 5, 8, 9 and 12 was manufactured to be at least 20mm thicker than the width specified in the FC Drawings;
- (B) says further in answer to sub-paragraph (b)(iv) that WSP approved an increase in thickness to the panels within the precast walls in elevations 8 and 12 by Aconex correspondence dated 14 December 2016; and

- (C) pending the service of expert evidence, denies that this alleged fact was causative of any structural defects or failures at the relevant locations;
 - (vi) admits sub-paragraph (c)(i) but says further that:
 - (A) during the course of construction WSP was aware that an electrical conduit had been placed within the zone of construction but did not advise or indicate to Icon that such placement was not in accordance with the design it prepared, or was not otherwise acceptable construction work; and
 - (B) pending the service of expert evidence, denies that the design and construction of the matters in sub-paragraph (c)(i) were causative of any structural defects or failures in the relevant location; and
 - (vii) denies sub-paragraph (c)(ii) on the basis that it does not know whether the dowel bar on level 10 was cut during construction or at all, and (pending service of expert evidence) says further that if it was cut as alleged, that it was not causative of any structural defects or failures in the relevant location.
38. In answer to paragraph 38 of the cross-claim statement, Icon:
- (a) admits that the plaintiffs' List Statement contains the allegations pleaded in sub-paragraphs (a)-(b) of paragraph 38; and
 - (b) insofar as the allegations made by the plaintiffs in their List Statement are repeated by SOPA in sub-paragraphs (a)-(b) of paragraph 38 (the alleged 'Strength Defects'):
 - (i) denies sub-paragraph (a) on the basis that the FC Drawings specified a specific concrete strength for each component of the System, which was more or less than 65MPa, depending on the component;
 - (ii) denies sub-paragraph (b);
 - (iii) says further as to both sub-paragraphs (a) and (b) that it utilised and placed concrete of the strengths and characteristics specified by WSP for each part of the System, except in the case of the hob beam in which it utilised and placed concrete of a higher strength and characteristic than was specified by WSP;

- (iv) reserves the right to further plead to these sub-paragraphs upon the exchange of expert evidence; and
- (v) otherwise denies the said sub-paragraphs.

39. In answer to paragraph 39 of the cross-claim statement, Icon:

- (a) admits that the plaintiffs' List Statement contains the allegations in sub-paragraphs (a)-(e) of paragraph 39; and
- (b) insofar as the allegations made by the plaintiffs in their List Statement are repeated by SOPA in sub-paragraphs (a)-(e) of paragraph 39:
 - (i) admits sub-paragraph (a);
 - (ii) in respect of sub-paragraph (b):
 - (A) denies that cracks were identified in a column; and
 - (B) says further that on 24 December 2018 cracks were visually identified in a precast panel and hob beam on level 10 of the Opal Tower;
 - (iii) admits sub-paragraph (c) and says further that the evacuation of the residents occurred on 24 December 2018;
 - (iv) in respect of sub-paragraph (d):
 - (A) denies that physical damage was identified to the Slot Walls, Columns, Beams and Slabs in the locations particularised in sub-paragraph (d)(i)-(iii); and
 - (B) says further that following the evacuation physical damage was identified as follows:
 - (1) at level 4:
 - (a) spalling and cracking of a hob beam and a precast panel (at grid reference 4B-0.5, above columns C2 and C22); and
 - (b) spalling and cracking of a hob beam and a precast panel (at grid reference 4A-10.5, above columns C16 and C34);
 - (2) at level 10:

- (a) spalling and cracking of a hob beam and a precast panel (at grid reference 10C-14.5, above columns C21 and C38), noting that this is the damage referred to in paragraph 39(b) of the cross-claim list statement; and
 - (b) vertical displacement and cracking of the slab on level 10 (in the vicinity of the hob beam and precast panel at grid reference 10C-14.5); and
 - (3) at level 16:
 - (a) cracking of a precast panel (at grid reference 16B-0.5, above columns C2 and C22);
 - (b) cracking of a precast panel (at grid reference 16C-5.5, above columns C9 and C40); and
 - (c) cracking of a precast panel (at grid reference 16A-10.5, above columns C16 and C34); and
 - (v) in respect of sub-paragraph (e):
 - (A) denies the paragraph; and
 - (B) repeats paragraphs 37, 38 and 39(b) above.
40. In answer to paragraph 40 of the cross-claim statement, Icon:
- (a) admits the paragraph; and
 - (b) repeats the matters pleaded in paragraph 37 above.
- 41-51. Icon denies paragraphs 41 to 51 inclusive of the cross-claim statement as no allegations are made against it in those paragraphs.
52. In answer to paragraph 52 of the cross-claim statement, Icon:
- (a) says that clause 62(d) of the D&C Contract is in the following terms:

[AAD] holds for itself and on trust for the *Principal's Associates, the Financier, Financier's Associates, SOPA and SOPA's Associates* the benefit of each warranty and indemnity in this *Contract* expressed to be for the benefit of the *Principal's Associates, the Financier, Financier's Associates, SOPA and SOPA's Associates*.

- (b) denies that SOPA is entitled, or has standing, to enforce any of the warranties or indemnities in the D&C Contract; and
- (c) says further that to the extent that the benefit of any of the warranties or indemnities in the D&C Contract is held on trust by AAD for SOPA by reason of clause 62(d) of the D&C Contract, the proper party to enforce the benefit of such warranties or indemnities, if any such right exists, is AAD as trustee.

53. Icon denies the allegations in paragraph 53 of the cross-claim statement and, in doing so, repeats the matters pleaded in sub-paragraphs 52(b) and (c) above.

54. Icon denies the allegations in paragraph 54 of the cross-claim statement and, in doing so, repeats the matters pleaded in sub-paragraphs 52(b) and (c) above.

CLAIM AGAINST ECOVE

55. Icon denies paragraph 55 of the cross-claim statement on the basis that no allegations are made against it in the paragraph.

56. Icon denies paragraph 56 of the cross-claim statement on the basis that no allegations are made against it in the paragraph.

57. Icon denies paragraph 57 of the cross-claim statement on the basis that the matters alleged are not within Icon's knowledge.

CLAIM AGAINST ICON

58A. In answer to the entirety of the allegations that SOPA makes against Icon, Icon pleads as follows:

- (a) Icon is not bound by any concession or admission that SOPA has made in its response to the plaintiffs' List Statement;
- (b) although SOPA has conceded or admitted the matters in paragraph 17(b) of the plaintiffs' List Statement, such is wrongly made, and is denied as a matter of fact and law by Icon, as the structures described in paragraph 17(b) of the plaintiffs' List Statement do not constitute 'dwellings' within the meaning of cl 3(1) of Schedule 1 to the HB Act as they do not constitute major elements of the non-residential part of the Opal Tower that gives support or access to the residential part of the Opal Tower, including the residential part of the Opal Tower where the plaintiffs' unit is located;
- (c) in the premises of (b) above:

- (i) the construction of the structures described in paragraph 17(b) of the plaintiffs' List Statement did not constitute 'residential building work' to which the HB Act applies; and
 - (ii) Icon therefore denies that SOPA is entitled to pass through to Icon any liability that SOPA might have, or admit or concede, to the plaintiffs, or the Group Members, by reason of its concession or admission of the allegations in paragraph 17(b) of the plaintiffs' List Statement;
- (d) Icon says further in answer to the entirety of SOPA's claim (and the entirety of the plaintiffs' claim against SOPA), that the plaintiffs, and each of the individual Group Members, have the benefit of the warranties in s 18B of the HB Act but only insofar as they pertain to work done in relation each owner's 'lot' as defined in s 4(1) of the *Strata Schemes Development Act 2015 (NSW)* (**SSD Act**), the boundaries of which, in accordance with s 6(1) of the SSD Act, are:
- (i) for a vertical boundary in which the base of a wall corresponds substantially with a base line – the inner surface of the wall; and
 - (ii) for a horizontal boundary in which a floor or ceiling joins a vertical boundary of the lot – the upper surface of the floor and the under surface of the ceiling;

Particulars

The Owners Strata Plan 62930 v Kell & Rigby Holdings Pty Ltd [2010]
NSWSC 612 at [90]-[91]

- (e) in the premises of (d) above, the plaintiffs have not suffered any compensable loss as:
 - (i) there were not, and are not, any structural defects within the boundaries of the plaintiffs' 'dwelling' or lot (**Lot 64**) (referred to by the plaintiffs as Unit 604), the consequence being that Lot 64 did not, and does not, suffer from any structural defects; and
 - (ii) there was therefore no breach of the warranties in s 18B of the HB Act with respect to Lot 64;
- (f) Icon says further that to the extent that the plaintiffs have been unable to occupy or lease Lot 64 since 24 December 2018, this is not a consequence of Lot 64 suffering from any structural defects or a consequence of any breach of the warranties in s 18B of the HB Act, but is a consequence of Icon being granted a licence, for which consideration has been paid by Icon or will be paid, in

respect of Lot 64 to enable it to undertake remediation works on common property in other parts of the Opal Tower;

Particulars of licence granted in respect of Lot 64

Lot 64 was vacated on 24 December 2018. At the time it was vacated Lot 64 was tenanted, and the tenants were not able to return to Lot 64 (and have not returned since that date). Lot 64 was vacated so that Icon could access it and install propping as directed by WSP. The plaintiffs did not seek to enjoin Icon from having such access.

On 20 September 2019, the plaintiffs agreed in writing that Icon would be permitted access to Lot 64 to enable it to remove the propping and reinstate that part of Lot 64 that was affected by the rectification work. It is anticipated that Lot 64 reinstatement work will be completed on or about 25 November 2019.

During the period in which Icon has had access to Lot 64, the plaintiffs have been or will have been paid the full amount they would have received had a licence fee been negotiated.

- (g) Icon says that in the premises of (f) above, any claim for loss of rental income by the plaintiffs is a claim based on Icon being granted the licence referred to in (f) above, and is not a claim consequent upon any breach of s 18B of the HB Act;
- (h) Icon says that it has or will have in any event reimbursed the plaintiffs for all loss of rental income by reason of the matters referred to in (f) above;
- (i) Icon says that to the extent that any part of the Opal Tower was structurally defective, such structural defects were present only in common property, which vested in the owners' corporation of strata plan 97315 (**Owners Corporation**) pursuant to s 28 of the SSD Act (**Common Property**);
- (j) Icon says that there were not, and are not, any structural defects within the boundaries of any of the lots owned by any of the Group Members, the consequence being that there was no breach of warranties in s 18B of the HB Act with respect to any Group Member or with respect to any of the lots owned by any of the Group Members;
- (k) Icon says that since early 2019:
 - (i) *ex gratia* payments totalling \$144,913.39 have been made to certain Group Members in circumstances where those Group Members were unable to lease their lots following the evacuation of the Opal Tower and during the period in which rectification work was being carried out;

- (ii) *ex gratia* payments totalling \$6,786,322.95 have been made to, or directly to accommodation providers and storage providers (including related insurance costs) for the benefit of, certain Group Members who were unable to live in their units and were therefore required to seek alternative accommodation arrangements following the evacuation of the Opal Tower and during the period in which rectification work was being carried out;
- (iii) *ex gratia* payments totalling \$3,984,026.81 have been made to certain lessees of units in the Opal Tower who were, and have been, unable to live in the lots they leased and therefore were required to seek alternative accommodation arrangements following the evacuation of the Opal Tower and during the period in which rectification work was being carried out;
- (iv) payments totalling \$128,531 have been made, or will be made, to certain Group Members on account of Icon being granted a licence to occupy the lots owned by those Group Members so as to enable Icon to conduct rectification work on the Common Property; and

Particulars

Icon repeats the particulars to paragraph 58A(f) above

- (v) payments of \$1,705,613.12 have been made to the Owners Corporation so that the Owners Corporation had sufficient funds to insure that part of the Opal Tower comprised in strata plan 97315 for the period 31 May 2019 to 30 May 2020, thus obviating the need for the Owners Corporation to levy the lot owners further (which the Owners Corporation would otherwise be required to do under s 81(4) of the *Strata Schemes Management Act 2015* (NSW) (**SSM Act**) had Icon not made such payments);
- (l) Icon says that to the extent that the Common Property suffered from structural defects, Icon has rectified at its own expense, or is in the process of rectifying at its own expense, such defects, and this process will be completed in early 2020;
- (m) Icon says that as at the date of this List Response, Icon has expended \$13,731,407.32 in rectifying the Common Property;

- (n) Icon says that given that the Common Property that vests in the Owners Corporation is not saleable, a claim for diminution in value of the Common Property is not available to the Owners Corporation; and
- (o) to the extent not already denied, Icon denies that the plaintiffs have, or will, in the circumstances suffer damage in the nature of a diminution in value.

D&C Contract

- 58. Icon admits paragraph 58 of the cross-claim statement on the basis that paragraph 40 is also admitted.
- 59. Icon admits that the D&C Contract contains provisions to the effect described in paragraph 59 of the cross-claim statement but otherwise relies on the terms of the D&C Contract as if they were fully set out herein.
- 60. Icon admits paragraph 60 of the cross-claim statement.
- 61. Icon admits that the effect of clause 8.4.3 of the D&C Contract is as generally described in paragraph 61 of the cross-claim statement but otherwise relies on the terms of clause 8.4.3 of the D&C Contract as if it were fully set out herein.
- 62. Icon admits paragraph 62 of the cross-claim statement.
- 63. Icon admits paragraph 63 of the cross-claim statement.
- 64. In answer to paragraph 64 of the cross-claim statement, Icon:
 - (a) admits that the first sentence of clause 15.3 of the D&C Contract states as follows:

With respect to the *Works* carried out by [*Icon*], [*Icon*] indemnifies the *Principal*, *SOPA* and their *Associates* (including the *Superintendent*) on demand from and against any *claim* or loss suffered or incurred arising out of or in relation to the enforcement of any right a person has or may have against the indemnified parties under or by reason of section 18C of the *Home Building Act*.
 - (b) denies that SOPA, which is not a party to the D&C Contract, is entitled, or has standing, to enforce clause 15.3 of the D&C Contract; and
 - (c) says further that to the extent that the benefit of clause 15.3 of the D&C Contract is at law held on trust by AAD for SOPA by reason of clause 62(d) of the D&C Contract, the proper party to enforce clause 15.3 is AAD as trustee.

Particulars

If the benefit of clause 15.3 is held on trust for SOPA (such benefit being trust property in the form of a chose in action), SOPA may only enforce it by way of action if there are 'special circumstances'. SOPA has not identified any such 'special circumstances'.

Absent special circumstances, SOPA's remedy is to sue AAD for execution of the trust and then apply for leave to sue in the name of AAD: JD Heydon and MJ Leeming (eds), *Jacobs' Law of Trusts in Australia*, (8th ed, 2016), at [2303].

See also *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432 at [436]-[437]; *Lidden v Composite Buyers Ltd* (1996) 67 FCR 560 at [563]-[564]; *TAL Life Ltd v Shuetrim*; *MetLife Insurance Ltd v Shuetrim* [2016] NSWCA 68 at [53]-[54].

65. Icon admits paragraph 65 of the cross-claim statement.
66. In answer to paragraph 66 of the cross-claim statement, Icon:
- (a) admits that clause 39.12 of the D&C Contract states as follows:

[Icon] indemnifies *SOPA* and its *Associates* against any liability or loss arising out of, and any costs incurred in connection with a substantial breach of the *[D&C Contract]* by *[Icon]*.
 - (b) denies that SOPA, which is not a party to the D&C Contract, is entitled, or has standing, to enforce clause 39.12 of the D&C Contract; and
 - (c) says further that to the extent that the benefit of clause 39.12 of the D&C Contract is held on trust by AAD for SOPA by reason of clause 62(d) of the D&C Contract, the proper party to enforce clause 39.12 is AAD as trustee.

Particulars

Icon repeats *mutatis mutandis* the particulars to paragraph 64(c) above

67. In answer to paragraph 67 of the cross-claim statement, Icon:
- (a) admits that the effect of clause 55 of the D&C Contract is as generally described in paragraph 67 of the cross-claim statement; and
 - (b) relies on the terms of clause 55 of the D&C Contract as if they were fully set out herein.
68. Icon admits paragraph 68 of the cross-claim statement.
69. In answer to paragraph 69 of the cross-claim statement, Icon:

- (a) admits that by deed poll dated 18 October 2015 (which is Annexure Part E to the D&C Contract), Icon represented and warranted to AAD and SOPA the matters pleaded in subparagraphs (a)-(e) of paragraph 69 of the cross-claim statement; and
- (b) says further that the benefit of warranties that were expressed to be given to SOPA in Annexure Part E are held on trust for SOPA by AAD by reason of clause 62(d) of the D&C Contract.

70. Icon denies paragraph 70 on the basis of the matters pleaded in paragraph 58A above.

71. In answer to paragraph 71 of the cross-claim statement, Icon:

- (a) denies the paragraph; and
- (b) repeats the matters pleaded in paragraphs 58A, 64, 66 and 70 above.

Home Building Act

72. Icon denies paragraph 72 of the cross-claim statement and repeats the matters pleaded in respect of paragraph 49 of the cross-claim statement at paragraph 41 above.

73. In answer to paragraph 73 of the cross-claim statement, Icon:

- (a) as to sub-paragraph (a) thereof, admits that the D&C Contract is a contract that imposed obligations on Icon to do 'residential building work' as that term is defined in cl 2(1) of Schedule 1 to the HB Act, but otherwise denies the allegations in the sub-paragraph;
- (b) says further that the D&C Contract also imposed upon Icon an obligation to design the Opal Tower, which design work did not constitute 'residential building work';
- (c) says further that Icon subcontracted its design obligation under the D&C Contract to WSP, which prepared and (or) approved the design for the Opal Tower, which design(s) Icon followed in its construction of the Opal Tower; and
- (d) admits sub-paragraph (b) thereof.

74. In answer to paragraph 74 of the cross-claim statement, Icon:

- (a) admits the paragraph;

- (b) says further that SOPA has the benefit of the warranties in s 18B of the HB Act but only insofar as they pertain to work done in relation to each 'lot' owned by SOPA (as 'lot' is defined in s 4(1) of the SSD Act) the boundaries of which (in the case of a 'lot'), in accordance with s 6(1) of the SSD Act, are:
 - (i) for a vertical boundary in which the base of a wall corresponds substantially with a base line – the inner surface of the wall; and
 - (ii) for a horizontal boundary in which a floor or ceiling joins a vertical boundary of the lot – the upper surface of the floor and the under surface of the ceiling;
- (c) in the premises of (b) above, SOPA has not suffered any compensable loss:
 - (i) as there were not, and are not, any structural defects within the boundaries of any of the Retained Units (each being a 'lot'), the consequence being that the Retained Units did not, and do not, suffer from any structural defects;
 - (ii) as there was therefore no breach of the warranties in s 18B of the HB Act with respect to SOPA or the Retained Units; and
 - (iii) for the reasons set out at sub-paragraphs 1-4(a) and (b) above, and sub-paragraphs 75(b)(iv) and (v) below;
- (d) says further that to the extent that any part of the Opal Tower was structurally defective, such structural defects were present only in Common Property;
- (e) says further that to the extent that the Common Property suffered from structural defects, Icon has rectified at its own expense, or is in the process of rectifying at its own expense, such defects, which process will be completed in early 2020; and
- (f) says further that all lots in the Opal Tower will be able to be occupied on and from 17 December 2019, and to the extent that any further repair works will be required, they will be limited to the exterior of the Opal Tower (and will be completed in early 2020) and will be done in a way that does not affect the occupation, use or enjoyment of the building.

75. In answer to paragraph 75 of the cross-claim statement, Icon:

- (a) denies the paragraph on the basis of the matters pleaded in paragraph 74 above; and

- (b) further says as follows insofar as SOPA, in paragraph 75, repeats against Icon the particulars to paragraph 51 of the cross-claim statement:
- (i) as to particular (i) of paragraph 51, Icon repeats the matters pleaded in sub-paragraphs 74(b) and (c) above;
 - (ii) in further answer to particular (i) of paragraph 51, Icon says that to the extent that any part of the Opal Tower was structurally defective, such structural defects were present only in Common Property, which Icon has rectified, or is in the process of rectifying, at its own expense;
 - (iii) as to particular (ii) of paragraph 51, Icon repeats the matters pleaded in sub-paragraphs 74(b) and (c) above;
 - (iv) in further answer to particular (ii) of paragraph 51, Icon says that under the PDA, AAD and SOPA agreed that although SOPA would be the registered proprietor of each of the lots in strata plan 97315 upon the registration of such strata plan, AAD would receive the proceeds of any subsequent sales of the lots of which SOPA was the registered proprietor;
 - (v) in consequence of the matters pleaded in paragraph (iv) above, any risk of diminution in value of the lots in the strata plan owned by SOPA (including the Retained Units) is a risk that was, and is, assumed, by AAD, the consequence being that SOPA will suffer no loss by reason of any diminution in value of the Retained Units;
 - (vi) as to particular (iii) of paragraph 51, Icon says that, to the best of its knowledge, and pending discovery, SOPA has not sought to lease any of the Retained Units such that SOPA could not be said to have suffered a loss in the form of 'loss of rental income';
 - (vii) in answer to particular (iii) of paragraph 51, Icon repeats the matters pleaded in sub-paragraph 58A(k)(E) above; and
 - (viii) in further answer to particular (iii) of paragraph 51, Icon does not know, and therefore denies, what 'legal and other professional costs' may have been incurred by SOPA.

Relief

76. Icon denies that SOPA is entitled to the relief claimed in its Cross-Summons or at all.

D. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE

At this stage, Icon does not consider that the proceedings at this stage raise any issue or question that could appropriately be dealt with by a referee.

**E. A STATEMENT AS TO WHETHER THE PARTIES HAVE ATTEMPTED MEDIATION;
WHETHER THE PARTY IS WILLING TO PROCEED TO MEDIATION AT AN
APPROPRIATE TIME**

The parties have not yet attempted mediation. Icon is willing to mediate at the appropriate time.

SIGNATURE

Signature of legal representative

Signature of or on behalf of party
if not legally represented

Capacity

Date of signature



Solicitor for the third cross-defendant

8 November 2019