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Commercial List Statement**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	WSP Structures Pty Ltd ABN 78006769339
First Cross Defendant	EVOLUTION PRECAST SYSTEMS PTY LTD ABN 17608136518
Second Cross Defendant	Icon Co (NSW) Pty Ltd

FILING DETAILS

Filed for	WSP Structures Pty Ltd, Cross Claimant 1
Filed in relation to	Cross-Claim 3
Legal representative	Tricia Marguerite Hobson
Legal representative reference	
Telephone	02 9330 8000
Your reference	4014154

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 Statement (2019.12.20 - Commercial List Third Cross-Claim Statement (Class Action).pdf)

[attach.]

COMMERCIAL LIST THIRD 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 ABN 68 010 941 405

TITLE OF THIS CROSS-CLAIM

Cross-claimant	WSP Structures Pty Ltd ABN 78 006 769 339
First cross-defendant	Evolution Precast Systems Pty Ltd ABN 17 608 136 518
Second cross-defendant	Icon Co (NSW) Pty Ltd ACN 604 790 409

FILING DETAILS

Filed for	WSP Structures Pty Ltd ABN 78 006 769 339, Cross-Claimant
Legal representative	Tricia Hobson, Norton Rose Fulbright Australia
Legal representative reference	4014154
Contact name and telephone	Melissa Tan 02 9330 8926
Contact email	melissa.tan@nortonrosefulbright.com

A. NATURE OF DISPUTE

1. On or about 29 October 2015, Australia Avenue Developments Pty Limited (**AAD**) entered into a contract with Icon Co (NSW) Pty Limited (**Icon**), whereby Icon agreed to design and construct a high-rise mixed residential and commercial development known as Opal Tower located at Sydney Olympic Park, NSW.
2. On 24 November 2015, Icon and WSP Structures Pty Limited (**WSP**) entered into an agreement (**Consultancy Agreement**) by which WSP agreed to provide structural and civil engineering design services for the development of the Opal Tower development.
3. Icon achieved practical completion as follows:
 - (a) Separable Portion 1 on 22 June 2018;

- (b) Separable Portion 2 on 2 July 2018; and
 - (c) Separable Portion 3 on 8 August 2018.
4. In late December 2018, cracking was observed on levels 4, 10 and 16 of the building. Residents of the building were evacuated following this discovery.
 5. On 26 July 2019, the plaintiffs commenced representative proceedings under Part 10 of the *Civil Procedure Act 2005* (NSW) against Sydney Olympic Park Authority (**SOPA**), alleging that they, and the Group Members, have suffered loss and damage by reason of SOPA's alleged breach of the statutory warranties in the *Home Building Act 1989* (NSW) (**HB Act**).
 6. SOPA, in turn, in its Cross-Claim List Statement filed on 27 September 2019 (**SOPA's Cross Claim List Statement**) has cross-claimed against Icon, alleging that:
 - a. if SOPA is found to be liable to the plaintiffs or the Group Members, Icon must indemnify SOPA for such liability; and
 - b. if the building was, or is, affected by certain alleged defects, Icon breached the statutory warranties under the HB Act in relation to the lots in the building owned by SOPA (the 'Retained Units') and SOPA has suffered loss and damage as a result.
 7. On 8 November 2019, Icon filed its Commercial List Response to SOPA's Cross Claim List Statement.
 8. In its Commercial List Second Cross-Claim Statement filed 3 December 2019 (**Icon's Cross-Claim Statement**), Icon alleges that to the extent that SOPA has suffered a loss (which Icon denies), that is a consequence of WSP's breach of the Consultancy Agreement and because WSP contravened s 18 of the of the Australian Consumer Law set out in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**ACL**).
 9. Icon also alleges that WSP has caused Icon to suffer further losses by reason of its breach of the Consultancy Agreement and its contravention of s 18 of the ACL.
 10. WSP denies that it breached the Consultancy Agreement and denies that it contravened s 18 of the ACL. WSP denies that it is liable to Icon.
 11. The first cross-defendant to the third cross-claim (**Evolution**) designed, manufactured and installed the precast wall panels for the building, pursuant to an agreement with Icon.

12. WSP issued a 'for construction' drawing which specified full grout coverage between the precast wall panel and the hob.
13. Evolution issued shop drawings which Icon alleges, and WSP denies, proposed a change to the grouting such that grouting would be placed on the inner portion of the hob only.
14. Icon further alleges, and WSP denies, that:
 - (a) WSP approved Evolution's proposed design change; and
 - (b) Icon followed the alleged design change.
15. In the event that:
 - (a) Evolution's shop drawings did propose the alleged design change; and
 - (b) the failure to fully grout was a cause of the structural defects,WSP alleges that:
 - (c) in issuing the shop drawings which did not comply with WSP's 'for construction' drawing; alternatively,
 - (d) in failing to expressly raise with WSP that it was proposing the design change,Evolution breached its duty of care to Icon.
16. WSP also alleges that Evolution engaged in misleading or deceptive conduct, and, in failing to fully grout, breached other clauses of its contract with Icon.
17. WSP also claims from Icon its fees for providing remedial structural engineering services.

B. ISSUES LIKELY TO ARISE

1. The extent, and cause, of any damage that has been observed to the building.
2. Did Evolution breach its duty of care to Icon, causing Icon and WSP loss and damage?
3. Did Evolution breach its contract with Icon, causing Icon and WSP loss and damage?
4. Did Evolution engage in misleading or deceptive conduct, causing Icon and WSP loss and damage?

5. Are WSP and Evolution under a co-ordinate liability to Icon in respect of the same damage and if so, is WSP entitled to contribution from Evolution?
6. Is WSP entitled to its fees from Icon incurred in relation to the remedial structural engineering services?

C. CROSS-CLAIMANT'S CONTENTIONS

A. PARTIES

1. The cross-claimant, **WSP**, is a company able to sue, and carries on business as a firm of consulting engineers.
2. The first cross-defendant, **Evolution**, is a company able to be sued, and is in the business of providing construction services, specialising in the production of architectural precast concrete walls.
3. The second cross-defendant, **Icon**, is a company able to be sued, and is in the business of providing construction services.

B. CONSULTANCY AGREEMENT BETWEEN ICON AND WSP

4. On or about 29 October 2015, AAD entered into a contract with Icon (**Head Contract**) whereby Icon agreed to design and construct a high-rise mixed residential and commercial development (**Opal Tower Development**) known as the Opal Tower (**Building**) located at Sydney Olympic Park, NSW.
5. The Head Contract is comprised of:
 - (a) the formal instrument of agreement;
 - (b) the general conditions of contract and annexures thereto;
 - (c) the Project Delivery Agreement (redacted);
 - (d) development consent;
 - (e) schedule of rates; and
 - (f) AAD's project requirements.
6. On 24 November 2015, Icon and WSP entered into the Consultancy Agreement by which WSP agreed to provide structural and civil engineering design and associated

services in relation to the design of the structural elements (excluding external and landscaping works) of the Opal Tower Development.

7. The Consultancy Agreement is comprised of:
 - (a) the formal instrument of agreement;
 - (b) the general conditions of contract; and
 - (c) any further documents annexed to or incorporated by express reference in Part A of the Annexure to the Consultancy Agreement.

C. THE EVOLUTION SUBCONTRACT

8. By subcontract dated 31 August 2016, Icon entered into an agreement with Evolution whereby Evolution agreed to design, manufacture and install the precast wall panels (**the Subcontract**) for the Building.
9. The Subcontract comprised a number of documents, including the General Conditions of Subcontract (**General Subcontract Conditions**), and Scope of Works dated 23 August 2016 (Appendix 1) (**Scope of Works**).

Particulars

- (i) Clause 1 Formal Instrument of Agreement.
10. Pursuant to the definition of "Subcontractor's design obligations" in Clause 1 of the General Subcontract Conditions, Evolution, as part of its design obligations, was required to:
 - (a) ensure that the design documents (including any design documents which were not produced by Evolution) satisfy Icon's project requirements, all legislative requirements and any requirements of an authority;
 - (b) ensure that the design documents contained sufficient detail to construct the work under the subcontract (**WUS**) so that the WUS, when completed, satisfied Evolution's warranties in Clause 2.6;
 - (c) ensure that the details contained in any design documents prepared by Evolution are coordinated with the details contained in all other design documents;

- (d) design the subcontract works so that the subcontract works, when constructed, shall be structurally and aesthetically sound.
11. Pursuant to Clause 2.6 of the General Subcontract Conditions, Evolution warranted to Icon that Evolution:
- (a) would exercise the due skill, care and diligence in the execution and completion of the WUS expected of a competent subcontractor;
 - (b) would execute the WUS so that the subcontract works when complete shall be fit and adequate for their purpose, suitable for their intended use or occupation and comply with all laws and requirements of the Subcontract including any design documents;
 - (c) would construct and complete the WUS in accordance with the Subcontract documents so that the subcontract works, when completed, would comply with all the requirements of the Subcontract and other approvals;
 - (d) would carry out the work in a proper and workmanlike manner and in accordance with the plans and specifications set out in the Subcontract;
 - (e) would carry out the work with reasonable care and skill;
 - (f) would carry out and complete Evolution's design obligations to accord with Icon's project requirements, so that when complete the subcontract works would be without defects, fit for their intended purpose, and comply with all the requirements of the Subcontract and all legislative requirements.
12. Clause 2.7 of the General Subcontract Conditions provided that the warranties remained unaffected notwithstanding that design work has been completed by or on behalf of Icon or AAD.
13. Pursuant to Clause 2.8 of the General Subcontract Conditions, Evolution agreed to indemnify Icon and its employees, agents and consultants (**Indemnified Parties**) to the maximum extent permitted by law from and against all losses (including direct, indirect and consequential loss), damages, liabilities, actions, suits, claims, demands, costs and expenses (including legal fees on a full indemnity basis) which the Indemnified Parties may suffer, sustain or incur in any way arising out of, as a result or consequence of, or in connection with any:
- (a) breach by Evolution of its obligations under the Subcontract;

- (b) damage to property in connection with the undertaking of the work under the Subcontract by Evolution;
 - (c) negligent or wrongful conduct, act or omission on the part of Evolution in connection with the undertaking of the WUS.
- 14. Pursuant to Clause 2.8 of the General Subcontract Conditions, Icon and Evolution agreed that, to the extent permitted by law, the operation of Part 4 of the *Civil Liability Act 2002 (NSW)* (**CLA**) was excluded in relation to all and any rights, obligations and liabilities arising under or in relation to the Subcontract however such rights, obligations or liabilities were sought to be enforced.
- 15. Clause 2.9 of the General Subcontract Conditions provided that all representations and warranties in the Subcontract:
 - (a) remained in full force and effect following completion of the subcontract works and the issue of the final certificate;
 - (b) were given with the intent that liability thereunder shall not be confined to breaches thereof discovered prior to the date of the Subcontract; and that:
 - (i) each indemnity in the Subcontract was a continuing obligation;
 - (ii) each indemnity in the Subcontract constituted a separate and independent obligation of the party giving the indemnity from its other obligations under the Subcontract.
- 16. Pursuant to Clause 2.10 of the General Subcontract Conditions, Evolution warranted as follows:
 - (a) all activities of Evolution under the Subcontract, including the WUS, would be performed in a proper and workmanlike manner and in accordance with the Subcontract;
 - (b) Evolution's activities under the Subcontract, including the WUS, would result, to the extent of the work conducted, in a dwelling that was reasonably fit for occupation as a dwelling.
- 17. Clause 3 of the Scope of Works set out Evolution's design obligations under the Subcontract.
- 18. Clause 3.1.1 of the Scope of Works defined "shop drawings" as:

comprehensive installation and manufacturing drawings with notes and or specifications and or catalogue pamphlets as required for the execution of WUS which identify all work associated with WUS including work which is to be executed by others

19. Clause 3.1.1 of the Scope of Works provided that shop drawings should include set outs, hobs and plinth sizes, their location and structural requirements.
20. Clause 4.1.1 of the Scope of Works required Evolution to acknowledge that the scope of the subcontract works included the design and that Evolution would develop, change and finalise the design of the subcontract works (with the written approval of Icon) to ensure that the subcontract works achieved and were fit for their intended purpose.
21. Clause 5.1.1 of the Scope of Works provided that the scope of the works involved the design and construction of all precast concrete works associated with the project.
22. Clause 5.2.7 of the Scope of Works provided that the design of the precast panels must comply with WSP's design intent for the building and all panel design criteria was to be approved by Icon prior to manufacture.
23. Appendix 10 of the Subcontract provided a breakdown of the Subcontract sum and included, in respect of each level of the Building, amounts due for shop drawings, manufacture, installation and post-installation.

D. SERVICES PROVIDED BY EVOLUTION

24. On about 16 September 2016, WSP issued a 'for construction' Drawing No. 4419 S06.010[A] containing an express note stating 'GROUT PANEL JOINT FOR FULL WIDTH', specifying full grout coverage between the precast panel and the hob.
25. On about 20 September 2016, Evolution issued a Drawing No. DE01[P2] for level 1, detail 1 of which contained an express note stating 'INTERNAL GROUTING BETWEEN PANEL TO INSITU BY EVOLUTION' (**Evolution Shop Drawing 1**).
26. On 22 September 2016, WSP stamped Evolution Shop Drawing 1 and ticked the box next to the words "REVIEWED, NO COMMENTS".
27. WSP's stamp also contained the following words:

This drawing has been checked for structural adequacy only in the final condition, and compliance with the design intent. Omissions, dimensions, fit and temporary works are specifically excluded from this review. This review does not relieve the builder of responsibility under the contract. Compliance with specified requirements and statutory regulations remain the responsibility of the builder

28. On or about 31 October 2016, Evolution issued a Drawing No. DE01[P5], detail 1 of which contained an express note stating 'INTERNAL GROUTING BETWEEN PANEL TO INSITU BY EVOLUTION' (**Evolution Shop Drawing 2**).
29. On 3 November 2016, WSP stamped Evolution Shop Drawing 2 and ticked the box next to the words "REVIEWED, NO COMMENTS".
30. WSP's stamp also contained the following words:

This drawing has been checked for structural adequacy only in the final condition, and compliance with the design intent. Omissions, dimensions, fit and temporary works are specifically excluded from this review. This review does not relieve the builder of responsibility under the contract. Compliance with specified requirements and statutory regulations remain the responsibility of the builder

31. Evolution manufactured and installed the precast wall panels for the Building.

E. DAMAGE OBSERVED ON THE BUILDING AND RESPONSE THERETO

32. On 24 December 2018, cracking was observed in the load bearing panels (and the hob beam which supported the panels) on level 10 of the Building.
33. On 24 December 2018, all residents were evacuated from the Building.
34. On 24 December 2018, residents were allowed to return to the Building.
35. On about 24 December 2018, Mr James McCutcheon, a director of WSP, was requested by Mr Michael Clunie of Icon to attend for the purpose of investigating the damage to the Building.
36. On 27 December 2018, AAD, Icon and WSP carried out an inspection of the Building and identified further damage in the form of cracking on levels 4, 10 and 16 of the Building (**Building Damage**).
37. On 27 December 2018, all residents were told to again evacuate the Building by 28 December 2018.
38. Since 28 December 2018, Icon has:
 - (a) carried out stabilisation work by installing props under levels 4 and 10 of the Building as a precautionary measure so as to ensure the safety of these areas of the Building;

- (b) in conjunction with WSP, Australasian Prestressing Services Pty Ltd and Bates Smart Architects Pty Ltd, prepared a remediation design;
- (c) provided to the owners of apartments in the Building, on an iterative basis, a document entitled "Structural Repairs Action Plan", which contains information about the proposed rectification design, how the proposed rectification works are to be carried out and how various units in the Building will be affected by the proposed rectification work; and
- (d) carried out rectification work on the Building.

((a)-(d) collectively are henceforth referred to as the **Rectification Works**).

- 39. Prior to 1 January 2019, Mr Wayne Bretherton of WSP, spoke with Mr Julian Doyle of Icon to the effect that WSP needed commercial terms for WSP to provide structural engineering services to Icon in relation to the Building Damage (**the Remedial Structural Engineering Services**), and WSP would send proposed terms to Icon for review.
- 40. By cover of email dated 2 January 2019, WSP sent Icon a proposed professional services agreement for Remedial Structural Engineering Services (**the Remedial Proposal**).
- 41. Icon did not respond to WSP's email dated 2 January 2019.
- 42. To Icon's knowledge, WSP continued to provide the Remedial Structural Engineering Services.
- 43. Mr Bretherton sent Mr Doyle a further email dated 8 January 2019.
- 44. Icon did not respond to WSP's email dated 8 January 2019.
- 45. To Icon's knowledge, WSP continued to provide the Remedial Structural Engineering Services.
- 46. Mr Bretherton sent Mr Doyle a further email dated 17 January 2019.
- 47. Icon sent WSP a letter dated 17 January 2019.
- 48. In response to Icon's letter dated 17 January 2019, Mr Bretherton sent Mr Jason Coombes of Icon an email dated 18 January 2019.
- 49. Icon did not respond to Mr Bretherton's email dated 18 January 2019.

50. To Icon's knowledge, WSP continued to provide the Remedial Structural Engineering Services.
51. WSP sent Icon a letter dated 26 March 2019 stating amongst other things that WSP would continue to provide the Remedial Structural Engineering Services under the terms of the Remedial Proposal, and that if Icon did not wish WSP to continue to do so, Icon should instruct WSP to demobilise.
52. Icon did not instruct WSP to demobilise.
53. To Icon's knowledge, WSP continued to provide Remedial Structural Engineering Services.
54. As at the date of Icon's Cross-Claim Statement, Icon alleges that it:
 - (a) has incurred costs in the sum of \$13,731,407.32 in carrying out the Rectification Works referable to common property (**Icon's Incurred Rectification Costs**);
 - (b) has incurred costs in the sum of \$144,913.39 in payments to certain Group Members 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 (**Group Members' Loss of Rent Costs**);
 - (c) has incurred costs in the sum of \$6,786,322.95 in payments 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 (**Group Members' Alternative Accommodation Costs**);
 - (d) will continue to incur costs in carrying out the Rectification Work (**Icon's Future Rectification Costs**);
 - (e) has incurred costs in the sum of \$3,984,026.81 in payments 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 (**Lessees' Alternative Accommodation Costs**);

- (f) has incurred costs in the sum of \$128,531 in payments made, or payments which 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 (**Licence Occupation Fees**);
- (g) has incurred costs in the sum of \$1,705,613.12 in payments 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 (**Owners Corporation's Insurance Costs**); and
- (h) has suffered loss and damage because it:
 - (i) was terminated from at least one contract that it has been awarded;
 - (ii) was not awarded contracts for other projects:
 - (A) having tendered for such projects; and/or
 - (B) having been issued a letter of intent for such projects; and
 - (iii) was not permitted to tender for other projects;

as a result of the matters in paragraphs 32 and 36 above becoming publicly known (**Icon's Loss of Opportunity / Loss of Contract Damages**).

F. CLAIMS IN THE PROCEEDINGS

- 55. The plaintiffs have commenced these proceedings against SOPA alleging that they, and the Group Members, have suffered loss and damage by reason of SOPA's breach of the statutory warranties in the HB Act.
- 56. SOPA has cross-claimed against Icon, alleging that if the Building was, or is, affected by certain alleged structural defects, Icon is liable to SOPA.
- 57. Icon has cross-claimed against WSP in relation to the alleged structural defects.
- 58. In paragraphs 39 – 47 and 113(f) of Icon's Cross-Claim Statement, Icon alleges, and WSP denies, that:

- (a) On or around 21 September 2016 and 31 October 2016, Evolution issued drawings which proposed a change to the grouting such that grouting would be placed on the inner portion of the hob only;
- (b) WSP approved Evolution's Shop Drawings;
- (c) The alleged design change was nevertheless followed by Icon, such that Icon built what had allegedly been designed and/or approved by WSP.

G. WSP'S CLAIMS AGAINST EVOLUTION

59. In the event that:

- (a) the failure to grout the full width of the hob between the precast panel and the hob was causative of the structural damage (which is not admitted); and
- (b) WSP is liable to Icon in relation to the failure to fully grout (which is denied),

WSP pleads as follows, without admissions.

Contribution between tortfeasors

- 60. So far as the design obligations in the Subcontract are concerned, the Subcontract was a contract for professional services, and it was a term of the Subcontract, implied by law, that Evolution owed Icon a duty to carry out its design obligations with reasonable care and skill.
- 61. If Evolution did not design the subcontract works with reasonable care and skill, there was a risk of harm that the Building might suffer structural damage.
- 62. The risk of harm was foreseeable, and not insignificant.
- 63. A reasonable person in the position of Evolution would have taken precautions against the risk of harm, by issuing shop drawings which were consistent with WSP's Drawing No. 4419 S06.010[A], namely, which specified full grout coverage between the precast panel and the hob.
- 64. Alternatively, in the event that Evolution intended to change WSP's design, a reasonable person in the position of Evolution would have expressly raised with WSP, either by email or in a conversation, that Evolution intended to change WSP's design, and sought WSP's advice about it.

65. In the event (which is not admitted) that Evolution Shop Drawing 1 and Evolution Shop Drawing 2 indicated grout to be placed on the inner portion of the hob only, in issuing Evolution Shop Drawing 1 and Evolution Shop Drawing 2, Evolution breached its duty of care to Icon, and was, by reason of s 5B of the CLA, negligent.
66. Further, in the event that it was Evolution's intention to change WSP's design, it failed to expressly raise the proposal with WSP, either by email or in a conversation, and failed to seek WSP's advice about it, and was, by reason of s 5B of the CLA, negligent.
67. By reason of the breaches, Icon has suffered and will suffer the following loss and damage:
- (a) the amount of any liability that Icon has to SOPA (**SOPA Liability Damages**);
 - (b) Icon's Incurred Rectification Costs;
 - (c) Group Members' Loss of Rent Costs;
 - (d) Group Members' Alternative Accommodation Costs;
 - (e) Icon's Future Rectification Costs;
 - (f) Lessees' Alternative Accommodation Costs;
 - (g) Licence Occupation Fees;
 - (h) Owners Corporation's Insurance Costs; and
 - (i) Icon's Loss of Opportunity / Loss of Contract Damages.
68. In the event that WSP was in breach of its duty of care to Icon, by reason of the matters pleaded in paragraphs 39 – 47 and 113(f) of Icon's Cross-Claim Statement (which is denied), then in the premises, in respect of the same damage for which WSP and Evolution are both liable to Icon, WSP and Evolution are joint tortfeasors, and WSP is entitled to indemnity or contribution from Evolution, pursuant to s 5 *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).

Misleading or deceptive conduct

69. In issuing Evolution Shop Drawing 1, Evolution represented that Evolution Shop Drawing 1 had been prepared with reasonable care and skill, and was consistent with WSP's Drawing No. 4419 S06.010[A] (**the First Evolution Shop Drawing Representation**).

70. In issuing Evolution Shop Drawing 2, Evolution represented that Evolution Shop Drawing 2 had been prepared with reasonable care and skill, and was consistent with WSP's Drawing No. 4419 S06.010[A] (**the Second Evolution Shop Drawing Representation**).
71. In the event (which is not admitted) that Evolution Shop Drawing 1 and Evolution Shop Drawing 2 indicated grout to be placed on the inner portion of the hob only, the First Evolution Shop Drawing Representation and the Second Evolution Shop Drawing Representation (together, **Representations**), which were made in trade or commerce, were false.
72. By making the false Representations, Evolution engaged in misleading or deceptive conduct in contravention of s 18 of the ACL.
73. Had Evolution not made the false Representations, the hobs would not have been constructed with grout on the inner portion of the hobs only, and the structural damage would not have occurred.
74. In the circumstances pleaded above, WSP has suffered and will suffer loss or damage because of Evolution's misleading or deceptive conduct done in contravention of s 18 of the ACL, and is entitled to damages pursuant to s 236 of the ACL, comprising:
 - (a) any liability that WSP has to Icon;
 - (b) WSP's fees for the Remedial Structural Engineering Services.
75. Further, WSP is entitled to an indemnity under ss 237 and 243 of the ACL to the effect that WSP be, and is entitled to be, indemnified by Evolution in respect of the loss or damage pleaded at paragraph 74 above.

Co-ordinate liability

76. If, which is not admitted, Evolution Shop Drawing 1 did indicate that grouting would be placed on the inner portion of the hob only, in issuing Evolution Shop Drawing 1, Evolution breached the clauses of the Subcontract set out in paragraphs 10 and 11 above.
77. If, which is not admitted, Evolution Shop Drawing 2 did indicate that grouting would be placed on the inner portion of the hob only, in issuing Evolution Shop Drawing 2, Evolution breached the clauses of the Subcontract set out in paragraphs 10 and 11 above.

78. By reason of the breaches, Icon has suffered and will suffer the following loss and damage:

- (a) SOPA Liability Damages;
- (b) Icon's Incurred Rectification Costs;
- (c) Group Members' Loss of Rent Costs;
- (d) Group Members' Alternative Accommodation Costs;
- (e) Icon's Future Rectification Costs;
- (f) Lessees' Alternative Accommodation Costs;
- (g) Licence Occupation Fees;
- (h) Owners Corporation's Insurance Costs; and
- (i) Icon's Loss of Opportunity / Loss of Contract Damages.

79. In failing to grout the full width of the hob between the precast panel and the hob, as required by WSP's Drawing No. 4419 S06.010[A], Evolution breached the clauses of the Subcontract set out in paragraphs 11 and 16 above.

80. By reason of the breaches, Icon has suffered and will suffer the following loss and damage:

- (a) SOPA Liability Damages;
- (b) Icon's Incurred Rectification Costs;
- (c) Group Members' Loss of Rent Costs;
- (d) Group Members' Alternative Accommodation Costs;
- (e) Icon's Future Rectification Costs;
- (f) Lessees' Alternative Accommodation Costs;
- (g) Licence Occupation Fees;
- (h) Owners Corporation's Insurance Costs; and
- (i) Icon's Loss of Opportunity / Loss of Contract Damages.

81. If (which is denied) WSP is liable to Icon in contract for WSP's Warranty Breaches (as defined in paragraph 114 of Icon's Cross-Claim Statement) in relation to the failure to fully grout the hobs, to the extent that the liability is in respect of the same damage, then WSP and Evolution are under a co-ordinate liability to Icon, and WSP is entitled to contribution from Evolution.
82. Further, by reason of Clause 2.8 of the General Subcontract Conditions, Evolution must indemnify Icon in respect of the damage referred to in paragraph 80 above.
83. If, which is denied, WSP is liable to indemnify Icon as pleaded in paragraphs 117 and 120 of Icon's Cross-Claim Statement, then WSP and Evolution are under a co-ordinate liability to Icon, and WSP is entitled to contribution from Evolution.

H. WSP'S CLAIM AGAINST ICON

84. WSP's provision of the Remedial Structural Engineering Services was for the benefit of Icon.
85. Further, the circumstances set out in paragraphs 35, and 39 – 53 above indicated that WSP would be paid for the provision of its services in accordance with the terms of the Remedial Proposal.
86. By reason of the matters referred to in paragraphs 35, 39 – 53 and 84 – 85 above, Icon accepted the Remedial Proposal, giving rise to a binding contract, on the terms of the Remedial Proposal (**the Retainer for Remedial Engineering Services**).
87. Pursuant to the Retainer for Remedial Engineering Services, WSP carried out Remedial Structural Engineering Services and sent to Icon invoices seeking payment thereof (**WSP Invoices**).

Particulars of Remedial Structural Engineering Services

The particulars of the Remedial Structural Engineering Services are contained in the WSP Invoices, set out below:

Payment Claim No	Invoice No.	Date of Invoice	Sum Claimed (\$ (Excl GST)	Amount Received
1	64031596	18-02-19	812,670.02	Nil
2	64032955	12-03-19	177,109.50	Nil
3	64034468	04-04-19	36,902.21	Nil

4	N/A	07-05-19	27,348.58	Nil
5	N/A	06-06-19	12,596.48	Nil
6	N/A	19-12-19	47,669.77	Nil
TOTAL			1,114,296.56	Nil

88. In breach of the Retainer for Remedial Engineering Services, Icon has refused to pay WSP's Invoices for the Remedial Structural Engineering Services.
89. Alternatively, in the event that there is no binding contract, in the circumstances set out in paragraphs 35, and 39 – 53 above, WSP provided the Remedial Structural Engineering Services at the request (either express or implied) of Icon, such that WSP is entitled to a reasonable sum (quantum meruit) in relation to the Remedial Structural Engineering Services, being the amount of the WSP Invoices.
90. Alternatively, in circumstances where Icon has failed to pay WSP for the Remedial Structural Engineering Services:
- (a) Icon has been enriched;
 - (b) the enrichment has come at the expense of WSP;
 - (c) the enrichment is unjust.
91. By reason of the matters set in paragraph 90 above, WSP is entitled to a quantum meruit in relation to the Remedial Structural Engineering Services, being the amount of the WSP Invoices.

D. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE

1. At this stage, none.

E. STATEMENT AS TO MEDIATION

1. The parties have not attempted mediation.
2. WSP is willing to proceed to mediation at an appropriate time.

SIGNATURE

Signature of legal representative

A handwritten signature in black ink, appearing to be 'Lobiel'.

Capacity

Solicitor

Date of signature

20 December 2019

