

COMMERCIAL LIST RESPONSE TO COMMERCIAL LIST FOURTH CROSS-CLAIM STATEMENT

COURT DETAILS

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

TITLE OF PROCEEDINGS

First Plaintiff	TERRY WALTER WILLIAMSON
Second Plaintiff	HELEN THERESE WILLIAMSON
First Defendant	SYDNEY OLYMPIC PARK AUTHORITY (ABN 68 010 941 405)

TITLE OF CROSS- PROCEEDINGS

Cross-Claimant	ICON CO (NSW) PTY LTD (ABN 16 604 790 409)
Cross-Defendant	EVOLUTION PRECAST SYSTEMS PTY LTD (ABN 17 608 136 518)

FILING DETAILS

Filed for	Evolution Precast Systems Pty Ltd, Cross-Defendant
Filed in relation to	Fourth Cross Claim
Legal representative	Patrick Kaluski (PCN: 30370), Moray & Agnew
Legal representative reference	PZK/MZP:424921
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A. NATURE OF DISPUTE

1. Without admissions, Evolution Precast Systems Pty Ltd (**Evolution**) agrees generally with Icon Co (NSW) Pty Ltd (**Icon**) description of the dispute, but does not agree with the description of Evolution's obligations by Icon.

B. ISSUES LIKELY TO ARISE

1. In addition to the issues identified by Icon's Fourth Cross Claim List Statement, Evolution says the following issues are likely to arise:
 - (a) Did Evolution have any design obligations in its contract with Icon, and if so what were the extent of those obligations?
 - (b) Did WSP Structures Pty Ltd (**WSP**) approve Evolution's shop drawings, and if so what is the effect of that approval?
 - (c) Did Icon rely on any conduct of Evolution?
 - (d) Did Icon cause or contribute to its own loss?

C. CROSS-DEFENDANT'S RESPONSE TO THE CROSS-CLAIMANT'S CONTENTIONS

Without admissions, and for convenience, the headings and defined terms used in Icon's Fourth Cross-Claim Statement have been adopted in this List Response unless otherwise indicated.

As to the contentions of Icon in its Fourth Cross-Claim Statement, Evolution says as follows.

A. BACKGROUND

Parties

1. Evolution admits paragraph 1 of the Fourth Cross-Claim Statement.
2. In relation to paragraph 2 of the Fourth Cross-Claim Statement Evolution:
 - (a) admits paragraphs 2(a) and 2(c);
 - (b) says that it is in the business of providing precast concrete works including the manufacture and installation of precast concrete wall panels;
 - (c) otherwise denies the paragraph.

Contractual chain

3. In relation to paragraph 3 of the Fourth Cross-Claim Statement, Evolution:

- (a) does not know the matters set out in the paragraph; and
 - (b) otherwise denies the paragraph.
4. In relation to paragraph 4 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know the matters set out in the paragraph; and
 - (b) otherwise denies the paragraph.
5. In relation to paragraph 5 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that it entered into a subcontract with Icon on or about 31 August 2016;

Particulars

Subcontract titled "Major Works Subcontract Agreement Between Icon Co (NSW) Pty Ltd and Subcontractor: Evolution Precast Systems Pty Ltd Subcontract number 15-002/13-100" (the **Subcontract**).

- (b) says that pursuant to the Subcontract it was required to manufacture, supply, transport, and install the precast panels including supply of all labour, materials, tools, plant, equipment and supervision;
- Particulars**
- Subcontract, Appendix 1.
- (c) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (d) repeats the matters set out in paragraphs 6, 8, 9, and 12 below;
 - (e) otherwise denies the paragraph.
6. In relation to paragraph 6 of the Fourth Cross-Claim Statement, Evolution:
- (a) says that clause 1 of the "Formal Instrument of Agreement" lists the documents comprising the Subcontract;
 - (b) says that the terms of the Subcontract included:
 - (i) Annexure Part A of the General Conditions of Subcontract;
 - (ii) Appendix 1 (Scope of Works);
 - (c) says that the General Conditions of Subcontract and the Scope of Works adopted a standard form of contractual wording;
 - (d) says that Annexure Part A of the General Conditions of Subcontract qualified the general terms contained in the General Conditions of Subcontract;
 - (e) says that Appendix 1 to the Scope of Works qualified the general terms contained in the Scope of Works;

- (f) admits that, pursuant to clause 1 of the "Formal Instrument of Agreement", the General Conditions of Subcontract and the Scope of Works (being Appendix 1 to the Subcontract) form part of the Subcontract;
 - (g) otherwise refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (h) otherwise denies the paragraph.
7. In relation to paragraph 7 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 2.1 of the General Conditions includes a term that accords with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) repeats the matters set out in paragraphs 5 and 6 above and 8, 9, and 12 below;
 - (d) otherwise denies the paragraph.
8. In relation to paragraph 8 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 1 of the General Conditions and clauses 1 and 5.1.1 of the Scope of Works includes terms that accord with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) repeats the matters set out in paragraphs 5 and 6 above, and 9 and 12 below;
 - (d) otherwise denies the paragraph.
9. In relation to paragraph 9 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clauses 3.1.1, 4.1.1, 5.2.4, 5.2.5 and 5.2.7 of the Scope of Works include terms that accord with the description set out in sub-paragraphs (a), (b), (c), (d) and (e) of the paragraph;
 - (b) repeats the matters referred to in paragraphs 5, 6 and 8 above, and 12 below;
 - (c) further says that it was WSP's responsibility to review and approve the shop drawings prepared by Evolution;

Particulars

- (i) Australian Standards 3850.2, Prefabricated Concrete Elements: Part 2 Building Construction section 2.10.3.1.
- (ii) Subcontract Scope of Work clauses 3.1.2, 3.1.7, 3.1.11, 5.2.3.
- (d) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
- (e) otherwise denies the paragraph.

10. In relation to paragraph 10 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 1 of the General Conditions includes a term that accords with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.
11. In relation to paragraph 11 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 1 of the Scope of Works includes a term that accords with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.
12. In relation to paragraph 12 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 1 of the General Conditions includes a term that accords with the description set out in the paragraph;
 - (b) repeats the matters set out in paragraphs 5, 6, 8 and 9 above;
 - (c) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (d) denies that the work under the Subcontract included "*design work*";

Particulars

Subcontract, Annexure Part A, item 38.

- (e) says that any "*design obligations*" under the Subcontract were removed or limited by Annexure Part A to the General Conditions of Subcontract item 38 and Item 11 of Appendix 1 (Scope of Works);
- (f) says that on the proper construction of the Subcontract, its obligations were confined to the manufacture and installation of the precast panels to a design directed and approved by WSP;
- (g) repeats, for the purposes of this List Response only, paragraphs 5 to 10 of the Second Cross Claim Statement filed by Icon in these proceedings on 3 December 2019;
- (h) says that WSP was responsible for providing Icon with structural and civil engineering design and associated services;
- (i) refers to and repeats paragraph 37(b)(i)(C) of Icon's List Response filed on 8 November 2019 to the First Cross Claim Statement;
- (j) refers to and repeats paragraphs 10, 13, 42, and 46 of the Second Cross Claim Statement filed by Icon in these proceedings on 3 December 2019;

- (k) denies that it had any “*design obligations*” or was obliged to conduct any “*design work*”;
- (l) otherwise denies the paragraph.

Warranties and indemnities provided by Evolution under the Evolution Subcontract and the Evolution Warranty Deed

- 13. In relation to paragraph 13 of the Fourth Cross-Claim Statement, Evolution:
 - (a) admits that clause 2.6 of the General Subcontract Conditions contains various warranties by Evolution;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) repeats the matters set out in paragraphs 5, 6, 8, 9 and 12 above;
 - (d) otherwise denies the paragraph.

- 14. In relation to paragraph 14 of the Fourth Cross-Claim Statement, Evolution:
 - (a) admits that clause 2.7 of the General Conditions includes a term that accords with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.

- 15. In relation to paragraph 15 of the Fourth Cross-Claim Statement, Evolution:
 - (a) admits that clause 2.8 of the General Conditions contains the terms of an indemnity given by Evolution;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.

- 16. In relation to paragraph 16 of the Fourth Cross-Claim Statement, Evolution:
 - (a) admits that clause 2.8 of the General Conditions includes a term that accords with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) says that clause 2 of the General Conditions is not effective at law to exclude the operation of Part 4 of the *Civil Liability Act 2002* (NSW);
 - (d) otherwise denies the paragraph.

- 17. In relation to paragraph 17 of the Fourth Cross-Claim Statement, Evolution:
 - (a) admits that clause 2.9 of the General Conditions includes terms that accord with the description set out in the paragraph;

- (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.
18. In relation to paragraph 18 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 2.9 of the General Conditions includes terms that accord with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.
19. In relation to paragraph 19 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 2.10 of the General Subcontract Conditions contains terms that accord with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.
20. In relation to paragraph 20 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 5.4 of the General Conditions contains terms that accord with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.
21. In relation to paragraph 21 of the Fourth Cross-Claim Statement, Evolution:
- (a) says that clause 16B of the General Conditions is headed "*Professional Indemnity Insurance*";
 - (b) repeats the matters set out in paragraphs 5, 6, 8, 9, and 12 above;
 - (c) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (d) says that item 38 of Annexure Part A says that "*Does the work under the Subcontract include design work?*" and that item 38 specified "*No*";
 - (e) says that clause 16B of the General Conditions only applied where the subcontractor was required to prepare "*design documents*";
 - (f) says that in such a case, the levels of professional indemnity insurance required to be effected and maintained were not less than those stated in item 42(a) of the Annexure Part A;
 - (g) says that item 42 of Annexure Part A for professional indemnity insurance referable to clause 16B of the General Conditions is specified as "*N/A*";

- (h) in the premises, says that there was no obligation on the part of Evolution to effect and maintain professional indemnity insurance;

Particulars

Subcontract, Annexure Part A, item 42.

- (i) otherwise denies the paragraph.
22. In relation to paragraph 22 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that it did not effect and maintain professional indemnity insurance;
 - (b) refers to and repeats paragraph 21 above;
 - (c) otherwise denies the paragraph.
23. In relation to paragraph 23 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 17 of the General Conditions contains terms that accord with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.
24. In relation to paragraph 24 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 19.1 of the General Conditions contains terms that accord with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) repeats the matters set out in paragraph 21 above;
 - (d) says that in the premises there was no obligation to provide evidence that it had effected a professional indemnity policy of insurance;
 - (e) otherwise denies the paragraph.
25. Evolution admits paragraph 25 of the Fourth Cross-Claim Statement.
26. In relation to paragraph 26 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that it did not provide a copy any professional indemnity policy to Icon;
 - (b) says that for the reasons set out in paragraphs 21 and 24 above, it had no obligation to obtain or provide a copy of any professional indemnity policy to Icon;
 - (c) says that it provided a copy of a public and products liability certificate of currency to Icon from time to time;

- (d) says that at no time prior to the completion of the works did Icon inform it that the provision of a professional indemnity policy was required (whether under the Subcontract or otherwise);
- (e) says that having regard to the content of Annexure Part A to the Subcontract and the absence of any complaint by Icon as to the failure by Evolution to provide it with a copy of a professional indemnity policy, Icon represented that no such policy was required by it whether under the Subcontract or otherwise;
- (f) in reliance on the representation, Evolution did not take any steps to take out any professional indemnity policy;
- (g) further, and in the alternative, each of Icon and Evolution acted on the assumed state of affairs that a professional indemnity policy was not required to be taken out and supplied to Icon by Evolution, whether under the Subcontract or otherwise;
- (h) in the premises, Icon is now estopped from relying on any allegation that Evolution was obliged to take out and supply to Icon a professional indemnity policy.

27. In relation to paragraph 27 of the Fourth Cross-Claim Statement, Evolution:

- (a) admits that clause 5.5.12 of the Scope of Works contains terms that accord with the description set out in the paragraph;
- (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
- (c) otherwise denies the paragraph.

First Evolution Warranty Deed

28. Evolution admits paragraph 28 of the Fourth Cross-Claim Statement.

29. In relation to paragraph 29 of the Fourth Cross-Claim Statement, Evolution:

- (a) admits that clause 1 of the First Evolution Warranty Deed contains terms that accord with the description set out in the paragraph;
- (b) refers to and repeats the whole of the First Evolution Warranty Deed terms as if fully set out herein;
- (c) otherwise denies the paragraph.

30. In relation to paragraph 30 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 4 of the First Evolution Warranty Deed contains terms that accord with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the First Evolution Warranty Deed terms as if fully set out herein;
 - (c) otherwise denies the paragraph.

Second Evolution Warranty Deed

31. Evolution admits paragraph 31 of the Fourth Cross-Claim Statement.
32. In relation to paragraph 32 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 1 of the Second Evolution Warranty Deed contains terms that accord with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Second Evolution Warranty Deed terms as if fully set out herein;
 - (c) otherwise denies the paragraph.

HB Act

33. In relation to paragraph 33 of the Fourth Cross-Claim Statement, Evolution:
- (a) denies that the services provided by Evolution in the Subcontract constituted '*residential building work*' for the purposes of the HB Act;
 - (b) otherwise denies the paragraph.

B. THE DESIGN OF THE BUILDING AND THE SERVICES PROVIDED BY EVOLUTION

34. In relation to paragraph 34 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know the matters alleged in the paragraph; and
 - (b) otherwise denies the paragraph.
35. In relation to paragraph 35 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know the matters alleged in the paragraph; and
 - (b) otherwise denies the paragraph.
36. In relation to paragraph 36 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know the matters alleged in the paragraph; and
 - (b) otherwise denies the paragraph.

37. In relation to paragraph 37 of the Fourth Cross-Claim Statement, Evolution:
- (a) says that on or about 16 September 2016 WSP issued a drawing numbered 4419 S06.010 A, titled "Typical Precast Wall Details – Sheet 01" and marked "issued for construction";
 - (b) says that on or about 19 September 2016 Icon emailed Evolution a bundle of drawings including the WSP drawing numbered 4419 S06.010 A;

Particulars

Aconex from Icon to Evolution dated 19 September 2016 at 10.34am (Mail No NSWIcon-Transmit-000389);

- (c) refers to the drawing for its full terms and effect as if reproduced herein; and
 - (d) refers to the matters set out in paragraph 42 below;
 - (e) otherwise denies the paragraph.
38. In relation to paragraph 38 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12 and 37, above and 42, 43 and 47 below;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.

Services provided by Evolution

39. In relation to paragraph 39 of the Fourth Cross-Claim Statement, Evolution:
- (a) says that clause 5.1.1 of the Scope of Works includes terms that accords with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) repeats the matters set out in paragraphs 5, 6, 8, 9 and 12 above;
 - (d) otherwise denies the paragraph.
40. In relation to paragraph 40 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9 and 12 above;
 - (b) otherwise denies the paragraph.
41. In relation to paragraph 41 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9 and 12 above;
 - (b) repeats the matters set out in paragraph 43 and 47 below;
 - (c) otherwise denies the paragraph.

The grouting design change

42. In relation to paragraph 42 of the Fourth Cross-Claim Statement, Evolution:
- (a) says that on or about 16 September 2016 WSP issued a drawing numbered 4419 S06.010 A, titled "Typical Precast Wall Details – Sheet 01" and marked "issued for construction";
 - (b) says that the drawing numbered 4419 S06.010 A depicted a precast panel to hob connection on the bottom left side of the drawing above the heading "*Typical load bearing external precast wall joint*", however, the depiction did not show full grout coverage of the joint between the precast panel and the hob beam;
 - (c) refers to the drawing for its full terms and effect as if reproduced herein;
 - (d) otherwise denies the paragraph.
43. In relation to paragraph 43 of the Fourth Cross-Claim Statement, Evolution:
- (a) says that on about 21 September 2016, Evolution's shop detailer issued Drawing DE01 P2;
 - (b) says that Drawing DE01 P2 did not only relate to level 1 of the Building but to all levels where this detail was depicted on the shop drawings;
 - (c) refers to the drawing for its full terms and effect as if reproduced herein;
 - (d) further says that:
 - (i) on 29 August 2016 Icon sent Evolution an email requesting "Evolution's detail submission of first upturn at level".

Particulars

Aconex from Icon to Evolution dated 29 August 2016 at 11.06 am
(mail no NSWIcon – RFI-000149.).

- (ii) in response to the email from Icon at paragraph 43(d)(i) above, on 29 August 2016 Evolution's shop detailer sent Icon an email attaching the typical detail of the standard shiplap detail and the standard shiplap detail with slab upturn.

Particulars

Aconex from Evolution to Icon dated 29 August 2016 at 11.41am
(mail no EVOPS-SUBADV-000008.).

- (iii) on 29 August 2016 Icon sent WSP an email from Evolution's shop detailer attaching the typical detail of the standard shiplap detail and the standard shiplap detail with slab upturn.

Particulars

Aconex from Icon to WSP and Bates Smart dated 29 August 2016 at 2:29 pm (mail no. NSWIcon-HCADV-002191).

- (iv) on 30 August 2016, representatives of WSP, Bates Smart, Evolution and Icon attended a meeting where shiplap profile was discussed.
- (v) following the 30 August 2016 meeting, Icon sent an email to WSP, Bates Smart and Evolution attaching a marked-up shiplap profile with handwritten makings made during that meeting.

Particulars

Aconex from Icon to WSP, Evolution and Bates Smart dated 30 August 2016 at 4:45 pm (mail no. NSWIcon-HCADV-002204).

- (vi) on 8 September 2016 Evolution's shop detailer sent an email to Icon, WSP and Bates Smart attaching Level 1 shop drawings, including drawing number DE01 RevP1.

Particulars

Aconex from Evolution to WSP, Icon and Bates Smart dated 8 September 2016 at 2:38 pm (mail no. EVOPS-TRANSMIT-000002).

- (vii) on 8 September 2016, Icon sent an email to Bates Smart, which was copied to WSP, initiating a precast workflow for Evolution's shop drawings and attaching copies of those drawings including drawing number DE01 RevP1.

Particulars

Aconex from Icon to Bates Smart, WSP and others dated 8 September 2016 at 4:40 pm (mail no. NSWIcon-WTRAN-000088).

- (viii) on 8 September 2016, Icon sent an email to Bates Smart, Evolution and WSP attaching drawing number DE01 RevP1 with handwritten amendments in red and requesting that WSP check the shop drawings.

Particulars

Aconex from Icon to WSP, Bates Smart and Evolution dated 8 September 2016 at 6:18 pm (mail no. NSWIcon-HCADV-002425).

- (ix) on 12 September 2016, Icon sent an email to WSP initiating a precast workflow for Evolution's shop drawings and attaching copies of those drawings including drawing number DE01 RevP1.

Particulars

Aconex from Icon to WSP and others dated 12 September 2016 at 12:50 pm (mail no. NSWIcon-WTRAN-000089).

- (x) on 12 September 2016, Icon sent an email to AMA Windows, which was copied to WSP, initiating a precast workflow for Evolution's shop drawings and attaching copies of those drawings including drawing number DE01 RevP1.

Particulars

Aconex from Icon to AMA Windows, WSP and others dated 12 September 2016 at 12:51 pm (mail no. NSWIcon-WTRAN-000090).

- (xi) on 12 September 2016, Icon sent an email to other representatives of Icon, which was copied to WSP, initiating a precast workflow for Evolution's shop drawings and attaching copies of those drawings including drawing number DE01 RevP1.

Particulars

Aconex from Icon to Icon, WSP and others dated 12 September 2016 at 12:54 pm (mail no. NSWIcon-WTRAN-000092).

- (xii) on 12 September 2016, Evolution's shop detailer sent an email to Icon attaching Evolution's Level 1 shop drawings, including drawing number DE01 RevP1.

Particulars

Aconex from Evolution to WSP, Icon and Bates Smart dated 12 September 2016 at 1:11 pm (mail no. EVOPS-TRANSMIT-000003).

- (xiii) On 12 September 2016, Icon sent an email to Bates Smart, which was copied to WSP, initiating a precast workflow for Evolution's shop drawings and attaching copies of those drawings including drawing number DE01 RevP1.

Particulars

Aconex from Icon to Bates Smart, WSP and others dated
12 September 2016 at 2:46 pm (mail no. NSWIcon-WTRAN-000098).

- (xiv) on 12 September 2016, Bates Smart sent an email to Icon and WSP attaching, inter alia, drawing number DE01 RevP1 containing handwritten amendments in green together with a red stamp dated 12 September 2016 stating 'EXAMINED' and indicating that the following applied with respect to shop drawing DE01 RevP1:

- (A) *'Resubmit'*; and
(B) *'Make corrections as Noted'*.

Particulars

Aconex from Bates Smart to WSP and Icon dated 12 September
2016 at 6:28 pm (mail no. B Smart-CADV-000707).

- (xv) on 15 September 2016, Icon sent an email to Evolution, which was copied to WSP, forwarding the email from Bates Smart, referred to in sub-paragraph (xiv) above attaching, inter alia, drawing number DE01 RevP1 containing Bates Smart's handwritten amendments.

Particulars

Aconex from Icon to Evolution, WSP and others dated 15 September
2016 at 12:39 pm (mail no. NSWIcon-HCADV-002518).

- (xvi) on 19 September 2016, WSP reviewed and approved Evolution's drawing number DE01 RevP1;

Particulars

Aconex from WSP to Evolution and Icon dated 19 September 2016 at
3:29 pm (mail no. WSP(SA)-CADV-000562).

- (xvii) on 19 September 2016, Icon sent an email to Evolution, which was copied to WSP, attaching, inter alia, drawing number DE01 RevP1 which had been approved by WSP.

Particulars

Aconex from Icon to Evolution, WSP and others dated 19 September 2016 at 4:55 pm (mail no. NSWIcon-RFI-000229).

- (xviii) on 21 September 2016, Evolution's shop detailer issued Evolution's Level 1 shop drawings to WSP for re-approval including drawing number DE01 RevP2, known as Evolution Shop Drawing 1.

Particulars

Aconex from Evolution to Icon and copied to WSP, dated 21 September 2016 at 2:50 am (mail no. EVOPS-SUBADV-000028).

- (xix) On 21 September 2016, WSP sent an email to Evolution, Icon and others that stated "*I have done a quick review and nothing stands out as a major change. I will do a thorough going over and stamp them.*"

Particulars

Aconex from WSP to Evolution, Icon and others dated 21 September 2016 at 10:49 am (mail no. WSP(SA)-CADV-000573).

- (xx) on 21 September 2016, Bates Smart sent an email to Icon and Evolution, which was copied to WSP, attaching, inter alia, Evolution Shop Drawing 1 containing amendments in green and red together with a red stamp dated 21 September 2016 stating 'EXAMINED' and indicating that the following applied with respect to Evolution Shop Drawing 1:

- (A) *'Resubmit'*; and
- (B) *'Make corrections as Noted'*.

Particulars

Aconex from Bates Smart to Evolution, Icon and WSP dated 21 September 2016 at 8:19 pm (mail no. B Smart-CADV-000750).

- (xxi) on 22 September 2016, Icon sent an email to Evolution, which was copied to WSP, attaching, inter alia, Evolution Shop Drawing 1 containing amendments received from AMA Windows.

Particulars

Aconex from Icon to Evolution, WSP and others dated 22 September 2016 at 11:55 am (mail no. NSWIcon-HCADV-002668).

(xxii) on 22 September 2016, WSP reviewed and approved Evolution Shop Drawing 1.

Particulars

Aconex from WSP to Evolution and others dated 22 September 2016 at 2:42 pm (mail no. WSP(SA)-CADV-000581).

- (e) otherwise denies the paragraph.
- 44. In relation to paragraph 44 of the Fourth Cross-Claim Statement, Evolution:
 - (a) refers to paragraphs 42 and 43 above;
 - (b) otherwise denies the paragraph.
- 45. In relation to paragraph 45 of the Fourth Cross-Claim Statement, Evolution:
 - (a) admits the paragraph;
 - (b) further refers to and repeats paragraph 127 of Icon's Second Cross Claim Statement against WSP filed on 3 December 2019.
- 46. Evolution admits paragraph 46 of the Fourth Cross-Claim Statement.
- 47. In relation to paragraph 47 of the Fourth Cross-Claim Statement, Evolution says that:
 - (a) on 22 September 2016, Evolution's shop detailer issued Evolution's Level 1 precast package for construction, including drawing number DE01 RevP3.

Particulars

- (i) Aconex from Evolution to Icon, copied to WSP and others, dated 22 September 2016 at 9:26 pm (mail no. EVOPS-TRANSMIT-000004).
- (ii) Aconex from Evolution to Icon, copied to WSP and others, dated 22 September 2016 at 9:32 pm (mail no. EVOPS-TRANSMIT-000005).
- (b) on 23 September 2016, Icon sent an email to Evolution, which was copied to WSP, attaching, inter alia, drawing number DE01 RevP3 containing Icon's comments on that drawing.

Particulars

Aconex from Icon to Evolution, WSP and others dated 23 September 2016 at 12:37 pm (mail no. NSWIcon-HCADV-002721).

- (c) on 12 October 2016, Evolution's shop detailer issued Evolution's Level 2 precast package for construction, including drawing number DE01 RevP4.

Particulars

Aconex from Evolution to Icon dated 12 October 2016 at 2:46 (mail no. EVOPS-TRANSMIT-000009).

- (d) on 14 October 2016, Icon sent an email to WSP and others forwarding an email from Evolution shop detailer issuing Evolution's Level 2 precast package for construction, including drawing number DE01 RevP4.

Particulars

Aconex from Icon to WSP and others dated 14 October 2016 at 7:37 am (mail no. NSWIcon-TRANSMIT-000516).

- (e) on 31 October 2016:
 - (i) Evolution's shop detailer issued Evolution's Level 3 precast package for re-approval including Drawing DE01 P5.

Particulars

Aconex from Evolution to Icon, copied to WSP, dated 31 October 2016 at 3:36 pm (mail no. EVOPS-TRANSMIT-000014).

- (ii) Icon sent an email to WSP and others forwarding Evolution's Level 3 precast package for review, including Drawing DE01 P5.

Particulars

Aconex from Icon to WSP and others dated 31 October 2016 at 5:33 pm (mail no. NSWIcon-TRANSMIT-000579).

- (f) on 1 November 2016, Bates Smart sent an email to WSP and others attaching, inter alia, Drawing DE01 P5 containing amendments in green together with a red stamp dated 1 November 2016 stating 'EXAMINED' and indicating that the following applied with respect to Drawing DE01 P5:
 - (i) 'Resubmit'; and
 - (ii) 'Make corrections as Noted'.

Particulars

Aconex from Bates Smart to WSP and others dated 1 November 2016 at 6:23 pm (mail no. B Smart-CADV-000912).

- (g) on 2 November 2016, Icon sent an email to Evolution forwarding the email in subparagraph (f) above.

Particulars

Aconex from Icon to Evolution dated 2 November 2016 at 9:01am (mail no. NSWIcon-HCADV-003417).

- (h) on 3 November 2016, WSP reviewed and approved Evolution Drawing DE01 P5.

Particulars

Aconex from WSP to Icon and Bates Smart dated 3 November 2016 at 5:21 pm (mail no. WSP(SA)-CADV-000684).

- (i) on 16 May 2017, Evolution's shop detailer issued 2 drawings, including, drawing DE01 P6.

Particulars

Aconex from Evolution to Icon dated 16 May 2017 at 5:48pm (mail no. EVOPS-Transmit-000049).

- (j) on 19 May 2017, Icon sent an email to Evolution commenting on the drawings sent to it by Evolution in subparagraph (i) above.

Particulars

Aconex from Icon to Evolution dated 19 May 2017 at 1:08pm (mail no. NSWIcon-HCADV-006561).

- (k) on 5 July 2017, Evolution's shop detailer issued Levels 35 to Roof precast package for construction including drawing DE01 Rev A.

Particulars

Aconex from Evolution to Icon dated 5 July 2017 at 11:00am (mail no. EVOPS-Transmit-000061).

- (l) otherwise denies the paragraph.

48. In relation to paragraph 48 of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraph 47 above;
(b) otherwise denies the paragraph.

49. In relation to paragraph 49 of the Fourth Cross-Claim Evolution:

- (a) admits the paragraph;
(b) further refers to and repeats paragraph 128 of Icon's Second Cross Claim Statement against WSP filed on 3 December 2019.

50. In relation to paragraph 50 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 43 and 47 above;
 - (b) otherwise denies the paragraph.
51. In relation to paragraph 51 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 43, 47 and 50 above;
 - (b) otherwise denies the paragraph.

C. DAMAGE OBSERVED IN THE BUILDING

52. In relation to paragraph 52 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know the matters alleged in the paragraph;
 - (b) otherwise denies the paragraph.
53. In relation to paragraph 53 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know the matters alleged in the paragraph;
 - (b) otherwise denies the paragraph.
54. In relation to paragraph 54 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know when residents were allowed to return to the Building;
 - (b) otherwise denies the paragraph.
55. In relation to paragraph 55 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know the matters alleged in the paragraph;
 - (b) otherwise denies the paragraph.
56. In relation to paragraph 56 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know when residents were told to evacuate the Building or who gave the direction;
 - (b) otherwise denies the paragraph.
57. In relation to paragraph 57 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know the matters alleged in the paragraph;
 - (b) otherwise denies the paragraph.
58. Evolution notes paragraph 58 of the Fourth Cross-Claim Statement.

D. RECTIFICATION DESIGN AND RECTIFICATION WORKS

59. In relation to paragraph 59 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that WSP prepared a rectification design and that Icon undertook rectification work;
 - (b) says it had no role in the preparation of the remediation design;
 - (c) otherwise denies the paragraph.
60. In relation to paragraph 60 of the Fourth Cross-Claim Statement, Evolution:
- (a) notes that paragraph 60 contains a summary of the loss and damage alleged to have been suffered by Icon;
 - (b) otherwise denies the paragraph.

E. ALLEGATIONS MADE IN THE PROCEEDINGS*The plaintiff's claim*

61. Evolution admits that the plaintiffs have made the allegations summarised in paragraph 61 of the Fourth Cross-Claim Statement.
62. Evolution admits that SOPA has made the allegations summarised in paragraph 62 of the Fourth Cross-Claim Statement.

SOPA's Cross-claim against Icon

63. Evolution admits that SOPA has made the allegations summarised in paragraph 63 of the Fourth Cross-Claim Statement.
64. Evolution notes paragraph 64 of the Fourth Cross-Claim Statement.

Icon's cross-claim against WSP

65. Evolution admits that Icon has made the allegations summarised in paragraph 65 of the Fourth Cross-Claim Statement.
66. Evolution admits that Icon has made the allegations summarised in paragraph 66 of the Fourth Cross-Claim Statement.
67. Evolution admits that Icon has made the allegations summarised in paragraph 67 of the Fourth Cross-Claim Statement.

68. Evolution admits that WSP has made the allegations summarised in paragraph 68 of the Fourth Cross-Claim Statement.

E. ICON'S CLAIMS AGAINST EVOLUTION

Evolution breached the Evolution Subcontract, the First Evolution Warranty Deed and the Second Evolution Warranty Deed

69. In relation to paragraph 69 of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 41, 43, 47, 48 and 51 above;
- (b) otherwise denies the paragraph.

70. Evolution denies paragraph 70 of the Fourth Cross-Claim Statement.

71. In relation to paragraph 71 of the Fourth Cross-Claim Statement, Evolution:

- (a) denies the alleged "breaches";
- (b) does not know whether and the extent to which Icon has suffered and will suffer the Icon Loss and Damage;
- (c) denies that it is responsible for any loss or damage suffered by Icon; and
- (d) otherwise denies the paragraph.

72. Evolution denies paragraph 72 of the Fourth Cross-Claim Statement.

73. Evolution denies paragraph 73 of the Fourth Cross-Claim Statement.

74. Evolution notes paragraph 74 of the Fourth Cross-Claim Statement.

75. Evolution denies paragraph 75 of the Fourth Cross-Claim Statement.

76. Evolution denies paragraph 76 of the Fourth Cross-Claim Statement.

Evolution engaged in misleading or deceptive conduct in contravention of the Australian Consumer Law

77. In relation to paragraph 77 of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraphs 43, 47 and 48 above;
- (b) otherwise denies the paragraph.

78. In relation to paragraph 78 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 43, and 47 above;
 - (b) otherwise denies the paragraph.
79. In relation to paragraph 79 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9 and 12 above;
 - (b) otherwise denies the paragraph.
80. In relation to paragraph 80 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 43, 47 and 79 above;
 - (b) otherwise denies the paragraph.
81. In relation to paragraph 81 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 43, 47, 78, 79 and 80 above;
 - (b) otherwise denies the paragraph.
82. In relation to paragraph 82 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 78, 79, 80 and 81 above;
 - (b) otherwise denies the paragraph.

The representations were false, or misleading, such that Evolution engaged in misleading or deceptive conduct in making them

83. In relation to paragraph 83 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 43, 47, 78, 79, 80 and 81 above;
 - (b) otherwise denies the paragraph.
84. In relation to paragraph 84 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 43, 47, 78, 79, 80 and 81 above;
 - (b) otherwise denies the paragraph.
85. In relation to paragraph 85 of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 43, 47, 78, 79, 80, 81 and 83 above;
 - (b) otherwise denies the paragraph.
86. In relation to paragraph 86 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraph 85 above;
 - (b) otherwise denies the paragraph.
87. In relation to paragraph 87 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 83, 84, 85 and 86 above;
 - (b) otherwise denies the paragraph.
88. In relation to paragraph 88 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 43, 45, 47, 78, 79, 80, 81, 83, 84, 85, 86 and 87 above;
 - (b) otherwise denies the paragraph.
89. In relation to paragraph 89 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 43, 45, 47 and 49 above;
 - (b) otherwise admits the paragraph.
90. In relation to paragraph 90 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraph 89 above;
 - (b) denies that it constructed the Building;
 - (c) otherwise denies the paragraph.
91. In relation to paragraph 91 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 43, 47 and 88 above;
 - (b) otherwise denies the paragraph.
92. In relation to paragraph 92 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 43, 47, 88 and 91 above;
 - (b) otherwise denies the paragraph.

93. Evolution denies paragraph 93 of the Fourth Cross-Claim Statement.
94. Evolution denies paragraph 94 of the Fourth Cross-Claim Statement.
95. Evolution denies paragraph 95 of the Fourth Cross-Claim Statement.
96. In relation to paragraph 96 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know whether and the extent to which Icon has suffered and will suffer loss and damage as alleged in paragraph 96;
 - (b) denies that it is responsible for any loss or damage suffered by Icon; and
 - (c) otherwise denies the paragraph.
97. In relation to paragraph 97 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know whether and the extent to which Icon has suffered and will suffer loss and damage as alleged in paragraph 97;
 - (b) denies that it is responsible for any loss or damage suffered by Icon; and
 - (c) otherwise denies the paragraph.
98. Evolution denies paragraph 98 of the Fourth Cross-Claim Statement.

OTHER

99. In answer to the Fourth Cross-Claim Statement against Evolution as a whole, Evolution denies that Icon is entitled to relief sought against it, as claimed in the Fourth Cross-Claim Statement.
100. In further answer to the whole of the Fourth Cross-Claim Statement, Evolution says that if it is liable to Icon as alleged in the Fourth Cross-Claim Statement (which is denied) and if clause 2.8 of the General Conditions is not effective at law to exclude Part 4 of the *Civil Liability Act 2002* (NSW), then:
- (a) Icon's claim against Evolution is a single apportionable claim within the meaning of section 34 of the *Civil Liability Act 2002*;
 - (b) for the reasons set out in Icon's Second Cross-Claim Statement against WSP filed on 3 December 2019, WSP's acts or omissions caused Icon to suffer loss and damage;
 - (c) that loss or damage is the same loss or damage that is the subject of Icon's claim against Evolution alleged in the Fourth Cross-Claim Statement;
 - (d) in the premises:

- (i) WSP is a concurrent wrongdoer in respect of Icon's claim against Evolution in the Fourth Cross-Claim Statement;
- (ii) Evolution's liability in respect of that claim is limited to an amount reflecting the proportion of the damage or loss claimed that the Court considers just having regard to the extent of Evolution's responsibility for that damage or loss.

101. In further answer to the claims made at paragraphs 77 to 97 of the Fourth Cross-Claim Statement, Evolution says that if it is liable to Icon as alleged in the Fourth Cross-Claim Statement (which is denied):

- (a) Icon's claim against Evolution is a single apportionable claim within the meaning of section 87CB of the *Competition and Consumer Act 2010*;
- (b) for the reasons set out in the Second Cross-Claim Statement against WSP filed on 3 December 2019, WSP's acts or omissions caused Icon to suffer loss and damage; and
- (c) that loss or damage is the same loss or damage that is the subject of Icon's claim against Evolution alleged in the Fourth Cross-Claim Statement;
- (d) in the premises:
 - (i) WSP is a concurrent wrongdoer in respect of Icon's claim against Evolution for damages under section 236 of the *Australian Consumer Law* alleged to have been caused by a contravention of section 18 of the *Australian Consumer Law*;
 - (ii) Evolution's liability in respect of that claim is limited to an amount reflecting the proportion of the damage or loss claimed that the Court considers just having regard to the extent of Evolution's responsibility for that damage or loss.

102. In further answer to the whole of the Fourth Cross-Claim Statement, Evolution says that if it is liable to Icon as alleged in the Fourth Cross-Claim Statement (which is denied):

- (a) refers to and repeats paragraphs 43 and 47 above and says that:
 - (i) Icon was aware of the content of those communications;
 - (ii) despite having provided comments on those drawings from time to time, failed to raise with WSP and/or Evolution any matter concerning the detail specified in any drawing alleged to have been prepared by Evolution;
 - (iii) that failure by Icon was a failure to take reasonable care;
- (b) refers to and repeats paragraphs 169 to 182 of the Commercial List Second Cross Claim Response filed for WSP on 31 January 2020;

- (c) further says that:
- (i) in about September 2007, a crack developed in the southernmost hob on level 10 of the building;
 - (ii) in about September 2007, Icon directed that the crack be patched and repaired;
 - (iii) Icon did not alert WSP and/or Evolution to the crack in the hob;
 - (iv) that failure by Icon was a failure by it to take reasonable care;
 - (v) had Icon alerted WSP and/or Evolution to the crack in the hob in September 2017:
 - (A) WSP and/or Evolution would have recommended that investigations be carried out which would have revealed structural deficiencies in the hob;
 - (B) appropriate rectification measures could have been taken to rectify any structural deficiencies in the hobs throughout the whole of the Building;
 - (C) any loss or damage suffered by Icon (if any) would be substantially less than the alleged "*Icon's Loss and Damage*";
- (d) says that to the extent that it is found that Icon suffered loss or damage as a consequence of Evolution's conduct (which is denied), Evolution did not intend to cause that loss or damage;
- (e) says that in the premises, to the extent that it is found that Icon suffered loss or damage as a consequence of Evolution's conduct (which is denied), any such loss or damage is suffered partly as a result of Evolution's conduct and partly as a result of Icon's failure to take reasonable care;
- (f) says that in the premises, any loss or damage recoverable by Icon from Evolution is to be reduced by such extent as the Court thinks just and equitable having regard to Icon's share in the responsibility for that loss or damage pursuant to:
- (i) section 9(1) of the *Law Reform (Miscellaneous Provisions) Act 1965*; and/or
 - (ii) section 137B of the *Competition and Consumer Act 2010*.

D. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE

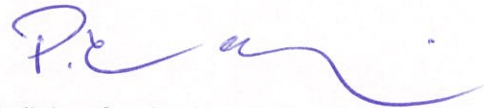
- 1 At this stage Evolution does not consider that it is appropriate to refer any issue or question to a referee.

E. STATEMENT AS TO MEDIATION

- 1 The parties have not participated in mediation. Evolution is willing to mediate at an appropriate time.

SIGNATURE

Signature of legal representative



Capacity

Solicitor for the First Cross-Defendant

Date of signature

6 May 2020