

COMMERCIAL LIST SIXTH 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	EVOLUTION PRECAST SYSTEMS PTY LTD (ABN 17 608 136 518)
First Cross-Defendant	WSP STRUCTURES PTY LTD (ABN 78 006 769 339)

FILING DETAILS

Filed for	Evolution Precast Systems Pty Ltd, Cross-Claimant
Filed in relation to	Sixth Cross Claim
Legal representative	Patrick Kaluski (PCN: 30370), Moray & Agnew
Legal representative reference	PZK/MZP:424921
Contact name and telephone	Megan Palmer, +61 2 4911 5400
Contact email	mpalmer@moray.com.au

A. NATURE OF DISPUTE

1. Without making any admissions, Evolution Precast Systems Pty Ltd (**Evolution**), accepts for the purposes of this Commercial List Sixth Cross-Claim Statement (**Sixth Cross-Claim**) only that the Nature of the Dispute is generally described in the Commercial List Fourth Cross-Claim Statement filed by Icon Co (NSW) Pty Ltd against Evolution Precast Systems Pty Ltd (**Evolution**) on 20 March 2020 (**Fourth Cross-Claim**), but does not accept the description of Evolution's obligations.

B. ISSUES LIKELY TO ARISE

1. The issues set out in the List Response to the Third Cross-Claim filed on 30 March 2020.
2. Is Evolution entitled to an indemnity or contribution from WSP?
3. Is Evolution entitled to damages from WSP?
4. Did WSP breach the Consultancy Agreement causing Icon loss and damage?
5. Did WSP breach its duty of care to Icon causing Icon loss and damage?
6. Did WSP engage in misleading or deceptive conduct in contravention of:
 - (a) section 18 and/or 29 of the *Australian Consumer Law* set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth); and/or
 - (b) section 18 and/or 29 of the *Australian Consumer Law (NSW)* as applied by section 28 of the *Fair Trading Act 1987 (NSW)*,
 (together referred to as the **ACL**) causing Icon/and or Evolution loss or damage?

C. CROSS-CLAIMANT'S CONTENTIONS

Defined terms in these contentions have the meaning given to them in the Fourth Cross-Claim Statement unless otherwise indicated.

Parties

1. Evolution Precast Systems Pty Ltd (**Evolution**) is a corporation capable of suing and being sued in its corporate name.
2. Icon Co (NSW) Pty Ltd (**Icon**) is a corporation capable of suing and being sued in its corporate name.
3. WSP Structures Pty Ltd (**WSP**):
 - (a) is a corporation capable of suing and being sued in its corporate name;

- (b) carries on business as a firm of consulting engineers;
- (c) is the cross-defendant to the Second Cross-Claim brought against it by Icon;
- (d) is the cross-claimant in respect of the Third Cross-Claim brought against Icon and Evolution.

Evolution's Cross-Claim against WSP

4. If Evolution is liable to Icon as alleged in the Fourth Cross-Claim Statement (which is denied), then for the purposes of this Cross-Claim only, Evolution pleads the following matters, without admissions.

Contribution between tortfeasors

5. The WSP Consultancy Agreement was a contract for professional services.
6. WSP owed Icon a duty to carry out its obligations under the WSP Consultancy Agreement with due care and skill.
7. If WSP did not perform its obligations under the WSP Agreement with due care and skill:
- (a) there was a risk of harm that the "*Building*" might suffer structural damage;
 - (b) there was a risk of harm that the owners of units in the Building might suffer property damage and/or property loss; and
 - (c) that risk of harm was foreseeable.
8. In the event that Evolution:
- (a) is in breach of any duty of care owed by it to Icon in respect of the matters alleged by Icon in the Fourth Cross-Claim Statement (which is denied); and
 - (b) is liable to Icon in respect of the loss or damage claimed by Icon in the Fourth Cross-Claim Statement (which is also denied),

Evolution says that:

- (i) WSP breached its duty to Icon for the reasons set out in the Commercial List Second Cross-Claim Statement filed by Icon on 3 December 2019 (**Second Cross-Claim Statement**);
- (ii) WSP is liable to Icon in respect of the same damage for the reasons set out in the Second Cross-Claim Statement;
- (iii) WSP and Evolution are joint tortfeasors;

- (iv) it is entitled to indemnity or contribution from WSP in accordance with section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).

Misleading or deceptive conduct

9. Evolution:

- (a) repeats the matters set out in paragraph 25(d) of its List Response to the Third Cross-Claim Statement filed on 30 March 2020;
- (b) says that on or about 19 September 2016, WSP placed a stamp on drawing DE01 P1 in the following terms:

WSP STRUCTURES PTY LTD	
ABN: 73 006 769 339	
<input checked="" type="checkbox"/>	REVIEWED, NO COMMENTS.
<input type="checkbox"/>	REVIEWED, AMEND AS NOTED.
<input type="checkbox"/>	REVISE AND RESUBMIT.
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	
Initial: JH	Date: 19/09/2016

- (c) says on or about 19 September 2016, WSP sent the stamped drawing DE01 P1 to Icon and Evolution;

Particulars

Aconex from WSP to Evolution and others dated 19 September 2016 at 3.29pm (mail no. WSP(SA)-CADV-000562);

- (d) says by reason of the matters referred to in sub-paragraphs (a)-(c) above, WSP represented that:
- (i) it had reviewed the detail depicted in drawing DE01 P1;
- (ii) it had checked the detail depicted in drawing DE01 P1:
- (A) for structural adequacy; and/or
- (B) compliance with the general design intent;
- (iii) it approved the detail set out in drawing DE01 P1, including that it:
- (A) was structurally adequate; and/or
- (B) complied with the design intent;

- (iv) the detail depicted in drawing DE01 P1 was:
 - (A) structurally adequate; and/or
 - (B) complied with the design intent;
- (v) in reviewing, checking and/or approving the detail set out in drawing DE01 P1, WSP applied due care and skill.

(WSP's First September 2016 Representation).

10. WSP's First September 2016 Representation was made in trade or commerce.
11. WSP's First September 2016 Representation was not thereafter corrected or modified by WSP.
12. In reliance on WSP's First September 2016 Representation, Evolution's shop detailer prepared further iterations of the drawing DE01 that included the same detail as had been depicted in drawing DE01 P1, including as to the connection between the hob and the precast panel.
13. Evolution:
 - (a) repeats the matters set out in paragraph 25(d) of its List Response to the Third Cross-Claim Statement filed on 30 March 2020;
 - (b) says that on or about 22 September 2016, WSP placed a stamp on drawing DE01 P2 in the following terms:

WSP STRUCTURES PTY LTD	
ABN: 75 006 769 339	
<input checked="" type="checkbox"/>	REVIEWED, NO COMMENTS.
<input type="checkbox"/>	REVIEWED, AMEND AS NOTED.
<input type="checkbox"/>	REVISE AND RESUBMIT.
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	
Initial: JH	Date: 22/09/2016

- (c) says on or about 22 September 2016, WSP sent the stamped drawing DE01 P2 to Icon and Evolution;

Particulars

Aconex from WSP to Evolution and others dated 22 September 2016 at
2.42pm (mail no. WSP(SA)-CADV-000581)

- (d) says by reason of the matters referred to in sub-paragraphs (a)-(c) above, WSP represented that:
- (i) it had reviewed the detail depicted in drawing DE01 P2;
 - (ii) it had checked the detail depicted in drawing DE01 P2:
 - (A) for structural adequacy; and/or
 - (B) compliance with the general design intent;
 - (iii) it approved the detail set out in drawing DE01 P2, including that it:
 - (A) was structurally adequate; and/or
 - (B) complied with the design intent;
 - (iv) the detail depicted in drawing DE01 P2 was:
 - (A) structurally adequate; and/or
 - (B) complied with the design intent;
 - (v) in reviewing, checking and/or approving the detail set out in drawing DE01 P2, WSP applied due care and skill.

(WSP's Second September 2016 Representation).

- 14. WSP's Second September 2016 Representation was made in trade or commerce.
- 15. WSP's Second September 2016 Representation was not thereafter corrected or modified by WSP.
- 16. In reliance on WSP's Second September 2016 Representation, Evolution's shop detailer prepared further iterations of the drawing DE01 that included the same detail as had been depicted in drawing DE01 P2, including as to the connection between the hob and the precast panel.
- 17. Evolution:
 - (a) repeats the matters set out in paragraph 28 of its List Response to the Third Cross-Claim Statement filed on 30 March 2020;
 - (b) says that on about 3 November 2016, WSP placed a stamp on drawing DE01 P5 in the following terms:

WSP STRUCTURES PTY LTD	
ABN: 78 006 769 339	
<input checked="" type="checkbox"/>	REVIEWED, NO COMMENTS.
<input type="checkbox"/>	REVIEWED, AMEND AS NOTED.
<input type="checkbox"/>	REVISE AND RESUBMIT.
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	
Initial: JH	Date: 03/11/2016

- (c) says on or about 3 November 2016 WSP sent the stamped drawing DE01 P5 to Icon. Icon then forwarded the stamped drawing to Evolution;

Particulars

- (i) Aconex from WSP to Icon and Bates Smart dated 3 November 2016 at 5.21pm (mail no. WSP(SA)-CADV-00684).
- (ii) Aconex from Icon to Evolution dated 3 November 2016 at 5.30pm (mail no. NSWIcon-RFI-000411)
- (d) says by reason of the matters referred to in sub-paragraphs (a)-(c) above, WSP represented that:
- (i) it had reviewed the detail depicted in drawing DE01 P5;
- (ii) it had checked the detail depicted in drawing DE01 P5:
- (A) for structural adequacy; and/or
- (B) compliance with the general design intent;
- (iii) it approved the detail set out in drawing DE01 P5, including that it:
- (A) was structurally adequate; and/or
- (B) complied with the design intent;
- (iv) the detail depicted in drawing DE01 P5 was:
- (A) structurally adequate; and/or
- (B) complied with the design intent;
- (v) in reviewing, checking and/or approving the detail set out in drawing DE01 P5, WSP applied due care and skill.

(WSP's November 2016 Representation).

18. WSP's November 2016 Representation was made in trade or commerce.
19. WSP's November 2016 Representation was not thereafter corrected or modified by WSP.
20. In reliance on:
 - (a) WSP's First September 2016 Representation;
 - (b) WSP's Second September 2016 Representation;
 - (c) WSP's November 2016 Representation,(individually or in combination) Evolution manufactured and installed the precast panels.
21. Had WSP not made any or all of:
 - (a) WSP's First September 2016 Representation;
 - (b) WSP's Second September 2016 Representation;
 - (c) WSP's November 2016 Representation,the precast panels would not have been installed with "Partial Grouting" as alleged by Icon in the Fourth Cross-Claim Statement.
22. If the Court finds that Evolution is liable to Icon as alleged in the Fourth Cross-Claim Statement (which is denied), Evolution says that:
 - (a) WSP's conduct in making WSP's First September 2016 Representation, WSP's Second September 2016 Representation and/or WSP's November 2016 Representation (whether individually or in combination) was misleading or deceptive, or likely to mislead or deceive, in that:
 - (i) the detail depicted in drawing DE01 P1, drawing DE01 P2 and/or drawing DE01 P5, including as to the connection between the hob and the precast panel, was not structurally sound and/or consistent with the design intent;
 - (ii) WSP had not reviewed, checked, and/or approved the detail depicted in drawing DE01 P1, drawing DE01 P2 and/or drawing DE01 P5, including that the connection between the hob and the precast panel was structurally sound and/or consistent with the design intent; and/or
 - (iii) WSP had not applied due care and skill in reviewing, checking, and/or approving that the detail depicted in drawing DE01 P1, drawing DE01 P2

and/or drawing DE01 P5, including that the connection between the hob and the precast panel was structurally sound and/or consistent with the design intent,

- (b) by reason of that conduct, WSP contravened section 18 and/or 29 of the *ACL*;
- (c) in the premises, it will have suffered loss or damage because of WSP's contravening conduct.

Particulars of loss or damage

Any liability Evolution is found to have to Icon.

- 23. Further, and in the alternative, if the Court finds that Evolution is liable to Icon as alleged in the Fourth Cross-Claim Statement (which is denied) Evolution will have suffered loss or damage because of WSP's misleading or deceptive conduct as alleged by Icon against WSP in the Second Cross-Claim Statement.

Particulars of loss or damage

Any liability Evolution is found to have to Icon.

- 24. In the premises, Evolution is entitled to damages pursuant to s 236 of the *ACL*.

Particulars of loss or damage

Any liability Evolution is found to have to Icon.

- 25. Further, and in the alternative, Evolution is entitled to an indemnity pursuant to sections 237 and 243 of the *ACL*, such that Evolution is entitled to be indemnified by WSP in respect of any amount which Evolution is found to be liable to Icon.

Co-ordinate liability

- 26. To the extent that Evolution is found to be liable to Icon as alleged by Icon in the Fourth Cross-Claim Statement (which is denied), Evolution says that WSP is liable to Icon for the reasons set out in the Second Cross-Claim Statement.
- 27. In the premises, if Evolution is found to be liable to Icon as alleged in the Fourth-Cross Claim Statement (which is denied) to the extent of any such liability, Evolution and WSP are under a co-ordinate liability and Evolution is entitled to contribution from WSP.
- 28. Further, for the purposes of this Cross-Claim only (and without admissions), Evolution repeats paragraphs 20 and 21 of the Second Cross-Claim Statement.

29. If, which is denied, Evolution is liable to indemnify Icon as alleged in the Fourth Cross-Claim Statement, then:

- (a) Evolution and WSP are under a co-ordinate liability to Icon in respect of that same amount; and
- (b) Evolution is entitled to contribution from WSP.

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 Cross-Claimant

Date of signature

6 May 2020