

## RESPONSE TO AMENDED COMMERCIAL LIST 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	<b>Terry Williamson</b>
Second Plaintiff	<b>Helen Therese Williamson</b>
Defendant	<b>Sydney Olympic Park Authority (ABN 68 010 941 405)</b>

### TITLE OF THIS CROSS-CLAIM

Cross- Claimant	<b>Sydney Olympic Park Authority (ABN 68010941405)</b>
First Cross-Defendant	<b>Australia Avenue Developments Pty Limited (ACN 104 573 391)</b>
Second Cross-Defendant	<b>Ecove Group Pty Ltd (ACN 065 207 918)</b>
Third Cross-Defendant	<b>Icon Co (NSW) Pty Ltd (ACN 604 790 409)</b>
<u>Fourth Cross-Defendant</u>	<b><u>WSP Structures Pty Ltd (ABN 79 006 769 339)</u></b>

### FILING DETAILS

Filed for	<b>Australia Avenue Developments Pty Ltd, (ACN 104 573 391), First Cross-Defendant Ecove Group Pty Ltd, (ACN 065 207 918), Second Cross-Defendant</b>
Legal representative	David Jury, HWL Ebsworth Lawyers
Legal representative reference	DJ:917604
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**A. NATURE OF DISPUTE**

1. Australia Avenue Developments Pty Ltd (**AAD**), the first cross-defendant, and Ecove Group Pty Ltd (**Ecove**), the second cross-defendant, broadly agree with the outline as to the nature of the dispute as set out in the Amended Commercial List Cross-Claim Statement filed ~~27 September 2019~~ 05 July 2021.
2. AAD and Ecove deny that they are liable to the cross claimant (**SOPA**) for the reasons alleged by SOPA or at all. They say that if SOPA has suffered any loss or damage including by reason of the claim brought by the plaintiffs against SOPA then the third cross-defendant (**Icon**) is liable to SOPA for that loss or damage.

**B. ISSUES LIKELY TO ARISE**

1. AAD and Ecove agree that the issues likely to arise are those identified in section B of the Amended Commercial List Cross-Claim Statement and those identified in section B of the Response to Amended Commercial List Cross-Claim Statement filed 16 July 2021 ~~8 November 2019~~ on behalf of Icon.

**C. RESPONSE TO CROSS-CLAIMANT'S CONTENTIONS**

1. AAD and Ecove admit paragraph 1 of the Contentions in the Amended Commercial List Cross-Claim Statement (**Contentions**).
2. AAD and Ecove admit paragraph 2 of the Contentions.
3. AAD and Ecove admit paragraph 3 of the Contentions.
4. AAD and Ecove admit paragraphs 4 and 4A of the Contentions.

**CLAIM AGAINST AAD**

**Project Delivery Agreement**

5. AAD and Ecove admit paragraph 5 of the Contentions.
6. As to paragraph 6 of the Contentions, AAD and Ecove:
  - (a) rely on the terms of the Development Agreement for their full meaning and effect;
  - (b) otherwise admit the paragraph.
7. As to paragraph 7 of the Contentions, AAD and Ecove:
  - (a) rely on the terms of the Development Agreement for their full meaning and effect;
  - (b) otherwise admit the paragraph.

8. As to paragraph 8 of the Contentions, AAD and Ecove:
  - (a) rely on the terms of the Development Agreement for their full meaning and effect;
  - (b) otherwise admit the paragraph.
9. As to paragraph 9 of the Contentions, AAD and Ecove:
  - (a) rely on the terms of the Development Agreement for their full meaning and effect;
  - (b) otherwise admit the paragraph.
10. As to paragraph 10 of the Contentions, AAD and Ecove:
  - (a) rely on the terms of the Development Agreement for their full meaning and effect;
  - (b) otherwise admit the paragraph.
11. As to paragraph 11 of the Contentions, AAD and Ecove:
  - (a) rely on the terms of the Development Agreement for their full meaning and effect;
  - (b) otherwise admit the paragraph.
12. As to paragraph 12 of the Contentions, AAD and Ecove:
  - (a) rely on the terms of the Development Agreement for their full meaning and effect;
  - (b) otherwise admit the paragraph.
13. As to paragraph 13 of the Contentions, AAD and Ecove:
  - (a) rely on the terms of the Development Agreement for their full meaning and effect;
  - (b) say that the release was limited in that it did not apply to the extent that such injury, loss or damage is caused or contributed to by the negligent act or omission of SOPA or its employees, agents or contractors;
  - (c) otherwise admit the paragraph.
14. As to paragraph 14 of the Contentions, AAD and Ecove:
  - (a) rely on the terms of the Development Agreement for their full meaning and effect;

- (b) otherwise admit the paragraph.
- 15. As to paragraph 15 of the Contentions, AAD and Ecove:
  - (a) rely on the terms of the Development Agreement for their full meaning and effect;
  - (b) otherwise admit the paragraph.
- 16. As to paragraph 16 of the Contentions, AAD and Ecove:
  - (a) rely on the terms of the Development Agreement for their full meaning and effect;
  - (b) otherwise admit the paragraph.
- 17. As to paragraph 17 of the Contentions, AAD and Ecove:
  - (a) rely on the terms of the Development Agreement for their full meaning and effect;
  - (b) otherwise admit the paragraph.
- 18. As to paragraph 18 of the Contentions, AAD and Ecove:
  - (a) rely on the terms of the Development Agreement for their full meaning and effect;
  - (b) otherwise admit the paragraph.
- 19. As to paragraph 19 of the Contentions, AAD and Ecove:
  - (a) rely on the terms of the Development Agreement for their full meaning and effect;
  - (b) otherwise admit the paragraph.
- 20. As to paragraph 20 of the Contentions, AAD and Ecove:
  - (a) rely on the terms of the Development Agreement for their full meaning and effect;
  - (b) otherwise admit the paragraph.
- 21. As to paragraph 21 of the Contentions, AAD and Ecove:
  - (a) rely on the terms of the Development Agreement for their full meaning and effect;
  - (b) otherwise admit the paragraph.
- 22. As to paragraph 22 of the Contentions, AAD and Ecove:

- (a) rely on the terms of the Development Agreement for their full meaning and effect;
- (b) otherwise admit the paragraph.

23. As to paragraph 23 of the Contentions, AAD and Ecove:

- (a) rely on the terms of the Development Agreement for their full meaning and effect;
- (b) otherwise admit the paragraph.

**Guarantee by Ecove**

24. As to paragraph 24 of the Contentions, AAD and Ecove:

- (a) rely on the terms of the Development Agreement for their full meaning and effect;
- (b) otherwise admit the paragraph.

25. As to paragraph 25 of the Contentions, AAD and Ecove:

- (a) rely on the terms of the Development Agreement for their full meaning and effect;
- (b) otherwise admit the paragraph.

26. As to paragraph 26 of the Contentions, AAD and Ecove:

- (a) rely on the terms of the Development Agreement for their full meaning and effect;
- (b) otherwise admit the paragraph.

27. As to paragraph 27 of the Contentions, AAD and Ecove:

- (a) rely on the terms of the Development Agreement for their full meaning and effect;
- (b) otherwise admit the paragraph.

28. As to paragraph 28 of the Contentions, AAD and Ecove:

- (a) rely on the terms of the Development Agreement for their full meaning and effect;
- (b) otherwise admit the paragraph.

29. As to paragraph 29 of the Contentions, AAD and Ecove:

- (a) rely on the terms of the Development Agreement for their full meaning and effect;
- (b) otherwise admit the paragraph.

30. As to paragraph 30 of the Contentions, AAD and Ecove:

- (a) rely on the terms of the Development Agreement for their full meaning and effect;
- (b) otherwise admit the paragraph.

**Duty of care**

31. As to paragraph 31 of the Contentions, AAD and Ecove:

- (a) admit paragraph 31(a);
- (b) otherwise deny the paragraph.

32. AAD and Ecove deny paragraph 32 of the Contentions.

**AAD Statutory Warranties**

33. As to paragraph 33 of the Contentions, AAD and Ecove:

- (a) note the matters set out in that paragraph;
- (b) note the content of paragraphs 9 and 16 to 20 of the Amended Commercial List Statement filed by the plaintiffs on 5 May 2021 (**Amended List Statement**)
- (c) note the position taken by SOPA in its Amended Commercial List Response (**Amended Response**) filed in answer to the Amended Commercial List Statement filed 26 July 2019 (**List Statement**);
- ~~(b)~~(d) admit paragraph 9 of the Amended List Statement and rely on the Development Agreement for its full meaning and effect;
- ~~(e)~~(e) admit paragraph 16 of the Amended List Statement;
- ~~(d)~~(f) admit paragraph 17(a) of the Amended List Statement;
- ~~(e)~~(g) deny paragraph 17(b) of the Amended List Statement and say that the structures or elements described in paragraph 17(b) of the List Statement do not constitute 'dwellings' within the meaning of cl 3(1) of Schedule 1 to the HB Act as they do not constitute major elements of a or the non-residential part of the Opal Tower that gives support or access to the residential part of the Opal Tower (per clause 3(2)(d) of Schedule 1 to the *Home Building Act 1989* (NSW) (**HB Act**));

~~(f)~~(h) as to paragraph 18 of the Amended List Statement:

- (i) repeat the matters set out in paragraphs 33(f) and (g) above,
- (ii) otherwise deny the paragraph;

~~(g)~~(i) as to paragraph 19 of the Amended List Statement:

- (i) admit that the Opal Work was 'residential building work' within the meaning of the HB Act except:

- A. to the extent that the Opal Work consisted of 'design work'; and
- B. to the extent that the Opal Work involved the construction of structures that do not constitute 'dwellings' within the meaning of cl 3(1) of Schedule 1 to the HB Act for the reasons set out in subparagraph 33(g) above;

- (ii) admit that the D&C Contract was a contract to do 'residential building work' except:

- A. to the extent that the D&C Contract imposed design obligations upon Icon; and
- B. to the extent that the D&C Contract imposed an obligation upon Icon to construct structures that do not constitute 'dwellings' within the meaning of cl 3(1) of Schedule 1 to the HB Act for the reasons set out in subparagraph 33(g) and (h) above;

but further say that;

- (iii) if, contrary to 33(i)(i) above, it be found that on a proper construction of the HB Act design work for the Opal Tower was 'residential building work' (because it was 'work involved ... in the construction of a dwelling' within the meaning of cl 2(1) of Schedule 1 to the HB Act), then in such circumstances only, AAD and Ecove would:

- A. admit that the Opal Work constituted 'residential building work' but only insofar as it involved the design and construction of 'dwellings' within the meaning of 'dwellings' in cl 3(1) of Schedule 1 to the HB Act; and
- B. admit that the D&C Contract was a contract that required Icon to do 'residential building work' insofar as the D&C Contract obliged Icon to design and construct 'dwellings' within the meaning of 'dwellings' in cl 3(1) of Schedule 1 to the HB Act;

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

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

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

~~(h)~~(j) as to paragraph 20 of the Amended List Statement:

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

(ii) repeat the matters pleaded in paragraphs 33(g) to (j) and ~~(h)~~ above.

34. As to paragraph 34 of the Contentions, AAD and Ecove say that:

(a) on the basis of the matters set out at paragraph 33 above, the Development Agreement was a contract to do "residential building work" only to the extent that the D&C Contract was also a contract to do "residential building work" say that the Development Agreement was a Contract to do work other than "Residential Building Work" for the purposes of the HB Act; and

(b) if, contrary to the matters pleaded at paragraph 33 above, it is found that that the D&C Contract in its entirety is a contract to do "residential building work", then paragraph 34 of the Contentions is admitted otherwise deny the paragraph.

35. Subject to the matters pleaded at paragraphs 33 and 34 above, AAD and Ecove admit paragraph 35 of the Contentions. As to paragraph 35 of the Contentions, AAD and Ecove:

~~36. repeat paragraph 34 above;~~

~~37. otherwise deny the paragraph.~~

### **The plaintiffs' contentions**

~~38.~~36. As to paragraph 36 of the Contentions, AAD and Ecove:

(a) rely on the Amended List Statement for its full meaning and effect;



- (b) note the position taken by SOPA in the Amended Response, including the response to the denial of the matters alleged in paragraph 56 and paragraphs 56A to 56S of the Amended List Statement; and
- (c) otherwise admit the paragraph.

~~39.~~37. As to paragraph 37 of the Contentions, AAD and Ecove:

- (a) rely on the Amended List Statement for its full meaning and effect;
- (b) note the position taken by SOPA in the Amended Response, including the response to the denial of the matters alleged in paragraph 57 of the Amended List Statement; and
- (c) otherwise admit the paragraph.

~~40.~~38. As to paragraph 38 of the Contentions, AAD and Ecove:

- (a) rely on the Amended List Statement for its full meaning and effect;
- (b) note the position taken by SOPA in the Amended Response, including the response to paragraph 58 of the Amended List Statement; and
- (c) otherwise admit the paragraph.

~~41.~~39. As to paragraph 39 of the Contentions, AAD and Ecove:

- (a) rely on the Amended List Statement for its full meaning and effect;
- (b) note the position taken by SOPA in the Amended Response, including the response to paragraphs 58 59 to 61 of the Amended List Statement; and
- (c) otherwise admit the paragraph.

~~42.~~40. As to paragraph 40 of the Contentions, AAD and Ecove:

- (a) admit that pursuant to the Development Agreement AAD agreed to design and construct the Opal Work or procure the design and construction of the Opal Work (as that term is defined in paragraph 10 of the Amended List Statement), which the plaintiffs allege contained or were affected by the FC System Defects and the Strength Defects;
- (b) say that they retained Icon to design and construct the Opal Work, which the plaintiffs allege contain or were affected by the FC System Defects and the Strength Defects; and
- (c) otherwise deny the paragraph.

### **Breach of the Development Agreement**

43.41. As to paragraph 41 of the Contentions, AAD and Ecove:

- (a) repeat the matters in paragraphs 6 to 10, 12, 13, 16, 19, 33(g), 33(h), 33(i), and 33(j) above;
- (b) say that SOPA does not have a liability to the plaintiffs for the reasons set out in the Amended Response and in this Response;
- (c) say that there is no loss or damage as contended in paragraph 69 of the Amended List Statement or at all;
- (d) admit paragraph 41(e) if the matters pleaded in paragraphs 41(a) and, (b) and (e) are made out and if the matters in paragraph 41(d) are established.

44.42. As to paragraph 42 of the Contentions, AAD and Ecove:

- (a) repeat the matters in paragraphs 14, 22, 23 and 41 above;
- (b) say that the plaintiffs have not suffered loss and damage as contended in paragraph 69 of the Amended List Statement or at all; and
- (c) otherwise deny the paragraph.

### **~~Breach of the Duty of Care~~ AAD's negligence**

45.43. As to paragraph 43 of the Contentions, AAD and Ecove repeats paragraphs 36 to 40 above.

46.44. As to paragraph 44 of the Contentions, AAD and Ecove:

- (a) repeat paragraphs 32, 33(g), 33(h), 33(i), 33(j) and 41~~(e)~~ 41 above;
- (b) say that SOPA does not have a liability to the plaintiffs for the reasons set out in the Response and in this Response;
- (c) say that there is no loss or damage as contended in paragraph 69 of the Amended List Statement or at all;
- (d) otherwise deny the paragraph.

47.45. AAD and Ecove deny paragraph 45 of the Contentions.

### **Breach of the AAD Statutory Warranties**

48.46. As to paragraph 46 of the Contentions, AAD and Ecove:

- (a) note that the position taken by SOPA in the Response;
- (b) repeat paragraphs 33(g), 33(h), 33(i), 33(j) and 34 above;

- (c) admit paragraphs 26 to 36 of the Amended List Statement;
- (d) as to paragraph 37 of the Amended List Statement:
  - (i) say that the applicable Building Code of Australia is that Code as in force on the date the application for the relevant complying development certificate is made; and
  - (ii) otherwise admit the paragraph;
- (e) admit paragraphs 38 to 44 of the Amended List Statement;
- (f) as to paragraph 45 of the Amended List Statement:
  - (i) repeat paragraph 46(d) above;
  - (ii) say that on that basis the applicable National Construction Code of Australia is that Code as in force on the date the application for the relevant complying development certificate is made; and
  - (iii) otherwise admit the paragraph;
- (g) as to paragraph 46 of the Amended List Statement:
  - (i) repeat paragraph 46(d) above;
  - (ii) say that on that basis the applicable National Construction Code of Australia is that Code as in force on the date the application for the relevant complying development certificate was made; and
  - (iii) otherwise admit the paragraph, except insofar as the Opal Work constituted design work;
- (h) deny paragraph 47 of the Amended List Statement given the obligation to deny or admit matters as required by the Practice Note;
- (i) deny paragraph 48 of the Amended List Statement given the obligation to deny or admit matters as required by the Practice Note;
- (j) deny paragraph 49 of the Amended List Statement given the obligation to deny or admit matters as required by the Practice Note;
- (k) as to paragraph 50 of the Amended List Statement:
  - (i) deny subparagraph (a) on the basis that the D&C Contract is a contract to do residential building work entered into between the holder of a contractor licence and a developer in relation to the work, within the meaning of s7AA of the HB Act;

- (ii) rely on the D&C Contract for its full meaning and effect;
- (iii) admit subparagraphs (b) and (c);
- (l) deny paragraph 51 of the Amended List Statement given the obligation to deny or admit matters as required by the Practice Note;
- (m) deny paragraphs 52 and 53 of the Amended List Statement;
- (n) admit paragraph 54 of the Amended List Statement;
- (o) as to paragraph 55 of the Amended List Statement:
  - (i) admit those requirements were stated in the notes referred to;
  - (ii) otherwise deny the paragraph.

~~49. AAD and Ecove note that paragraph 47 is not used in the Contentions. As to paragraph 47 of the Contentions, AAD and Ecove:~~

~~50. repeat paragraphs 33(f), 33(g), 33(h), 33(i), 34, 35, 37 and 38 above;~~

~~51.47. otherwise deny the paragraph.~~

48. As to paragraph 48 of the Contentions, AAD and Ecove:

~~(a)~~

~~(b)(a) repeat paragraphs 33(g), 33(h), 33(i), 33(j), 34, 35, 37 and 38 above 47 above;~~  
and

~~(e)(b) otherwise deny the paragraph.~~

49. AAD and Ecove deny paragraph 49 of the Contentions.

50. As to paragraph 50 of the Contentions, AAD and Ecove:

- (a) repeat paragraphs ~~47 and 44 and~~ 48 above;
- (b) say that SOPA does not have a liability to the plaintiffs for the reasons set out in the Amended Response and in this Response;
- (c) say that there is no loss or damage as contended in paragraph 69 of the Amended List Statement or at all; and
- (d) otherwise deny the paragraph.

~~54.51.~~ As to paragraph 51 of the Contentions, AAD and Ecove:

- (a) repeat the matters in paragraph 50 above;

- (b) say that under the Development Agreement, AAD and SOPA agreed that although SOPA would be the registered proprietor of each of the lots in strata plan 97315 upon the registration of such strata plan, AAD would receive the proceeds of any subsequent sales of the lots (except for the Retained Units) of which SOPA was the registered proprietor ;
- (c) in consequence of the matters pleaded in paragraph (b) above, any risk of diminution in value of the lots in the strata plan owned by SOPA (including the Retained Units) is a risk that was, and is, assumed, by AAD, the consequence being that SOPA will suffer no loss by reason of any diminution in value of the Retained Units;
- (d) say that, to the best of their knowledge, and pending discovery, SOPA has leased the Retained Units and agreed to the grant of an easement over at least 1 of the Retained Units but otherwise SOPA could not be said to have suffered a loss in the form of 'loss of rental income';
- (e) say that they do not know, and therefore deny, what 'legal and other professional costs' may have been incurred by SOPA; and
- (f) otherwise deny the paragraph.

~~55.52.~~ As to paragraph 52 of the Contentions, AAD and Ecove:

- (a) rely on the D&C Contract for its full meaning and effect;
- (b) otherwise admit the paragraph.

~~56.53.~~ AAD and Ecove note paragraph 53 of the Contentions.

~~57.54.~~ AAD and Ecove note paragraph 54 of the Contentions.

### **CLAIM AGAINST ECOVE**

~~58.55.~~ As to paragraph 55 of the Contentions, AAD and Ecove:

- (c) repeat the matters in paragraphs 41, 42 and 45 above;
- (d) otherwise admit the paragraph if the matters pleaded in paragraphs 55(a) and (b) are established.

~~59.56.~~ As to paragraph 56 of the Contentions, AAD and Ecove:

- (a) repeat the matters in paragraphs 26, 27, 41, 42 and 45 above;
- (b) otherwise admit the paragraph if the matters pleaded in paragraphs 56(a) and (b) are established.

~~60-57.~~ As to paragraph 57 of the Contentions, AAD and Ecove:

- (a) repeat paragraphs 55 and 56 above;
- (b) say that no obligation to indemnify SOPA has arisen;
- (c) otherwise admit the paragraph.

**CLAIM AGAINST ICON PARAGRAPHS 58 TO 135 OF THE CONTENTIONS**

**D&C Contract**

~~61.— As paragraphs 58 to 135, inclusive, of the Contentions contain no allegations against them, neither AAD nor Ecove pleads in reply to those paragraphs. AAD and Ecove do not plead to paragraph 58 of the Contentions as it contains no allegation against them.~~

~~62.— AAD and Ecove do not plead to paragraph 59 of the Contentions as it contains no allegation against them.~~

~~63.— AAD and Ecove do not plead to paragraph 60 of the Contentions as it contains no allegation against them.~~

~~64.— AAD and Ecove do not plead to paragraph 61 of the Contentions as it contains no allegation against them.~~

~~65.— AAD and Ecove do not plead to paragraph 62 of the Contentions as it contains no allegation against them.~~

~~66.— AAD and Ecove do not plead to paragraph 63 of the Contentions as it contains no allegation against them.~~

~~67.— AAD and Ecove do not plead to paragraph 64 of the Contentions as it contains no allegation against them.~~

~~68.— AAD and Ecove do not plead to paragraph 65 of the Contentions as it contains no allegation against them.~~

~~69.— AAD and Ecove do not plead to paragraph 66 of the Contentions as it contains no allegation against them.~~

~~70.— AAD and Ecove do not plead to paragraph 67 of the Contentions as it contains no allegation against them.~~

~~71.— AAD and Ecove do not plead to paragraph 68 of the Contentions as it contains no allegation against them.~~

~~72.— AAD and Ecove do not plead to paragraph 69 of the Contentions as it contains no allegation against them.~~

~~73. AAD and Ecove do not plead to paragraph 70 of the Contentions as it contains no allegation against them.~~

~~74. AAD and Ecove do not plead to paragraph 71 of the Contentions as it contains no allegation against them.~~

~~75. Home Building Act~~

~~76. AAD and Ecove do not plead to paragraph 72 of the Contentions as it contains no allegation against them.~~

~~77. AAD and Ecove do not plead to paragraph 73 of the Contentions as it contains no allegation against them.~~

~~78. AAD and Ecove do not plead to paragraph 74 of the Contentions as it contains no allegation against them.~~

~~79. AAD and Ecove do not plead to paragraph 75 of the Contentions as it contains no allegation against them.~~

#### **FURTHER MATTERS ~~Further Matters~~**

~~80.59~~ Further, and in answer to the entirety of the allegations that SOPA makes against AAD and Ecove, they AAD and Ecove plead as follows:

- (a) AAD and Ecove are not bound by any concession or admission that SOPA has made in the Response;
- (b) although SOPA has admitted the matters in paragraph 17(b) of the List Statement, such is wrongly made, and is denied as a matter of fact and law, as the structures described in paragraph 17(b) of the List Statement do not constitute 'dwellings' within the meaning of cl 3(1) of Schedule 1 to the HB Act as they do not constitute major elements of the non-residential part of the Opal Tower that gives support or access to the residential part of the Opal Tower, including the residential part of the Opal Tower where the plaintiffs' unit is located;
- (c) in the premises of (b) above:
  - (i) the construction of the structures described in paragraph 17(b) of the List Statement did not constitute 'residential building work' to which the HB Act applies; and
  - (ii) AAD and Ecove therefore deny that SOPA is entitled to pass through to them any liability that SOPA might have, or admit or concede, to the

plaintiffs, or the Group Members, by reason of its concession or admission of the allegations in paragraph 17(b) of the List Statement;

- (d) AAD and Ecove say further in answer to the entirety of SOPA's claim (and the entirety of the plaintiffs' claim against SOPA), that the plaintiffs, and each of the individual Group Members, have the benefit of the warranties in s 18B of the HB Act but only insofar as they pertain to work done in relation each owner's 'lot' as defined in s 4(1) of the *Strata Schemes Development Act 2015* (NSW) (SSD Act), the boundaries of which, in accordance with s 6(1) of the SSD Act, are:
- (i) for a vertical boundary in which the base of a wall corresponds substantially with a base line — the inner surface of the wall; and
  - (ii) for a horizontal boundary in which a floor or ceiling joins a vertical boundary of the lot — the upper surface of the floor and the under surface of the ceiling;

Particulars

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

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

Particulars of licence granted in respect of Lot 64

- i. Lot 64 was vacated on 24 December 2018. At the time it was vacated Lot 64 was tenanted, and the tenants were not able to return to Lot 64 (and have not returned since that date). Lot 64 was vacated so that Icon



could access it and install propping as directed by WSP. The plaintiffs did not seek to enjoin Icon from having such access.

- ii. On 20 September 2019, the plaintiffs agreed in writing that Icon would be permitted access to Lot 64 to enable it to remove the propping and reinstate that part of Lot 64 that was affected by the rectification work.
  - iii. It is anticipated that Lot 64 reinstatement work will be completed on or about 25 November 2019.
  - iv. During the period in which Icon has had access to Lot 64, the plaintiffs have been or will have been paid the full amount they would have received had a licence fee been negotiated.
- (g) AAD and Ecove say that in the premises of paragraph 59(f) above, any claim for loss of rental income by the plaintiffs is a claim based on Icon being granted the licence referred to in paragraph 59(f) above, and is not a claim consequent upon any breach of s 18B of the HB Act;
- (h) AAD and Ecove say that Icon has or will have in any event reimbursed the plaintiffs for all loss of rental income by reason of the matters referred to in paragraph 59(f) above;
- (i) AAD and Ecove say that to the extent that any part of the Opal Tower was structurally defective, such structural defects were present only in common property, which vested in the owners' corporation of strata plan 97315 (**Owners Corporation**) pursuant to s 28 of the SSD Act (**Common Property**);
- (j) AAD and Ecove say that there were not, and are not, any structural defects within the boundaries of any of the lots owned by any of the Group Members, the consequence being that there was no breach of warranties in s 18B of the HB Act with respect to any Group Member or with respect to any of the lots owned by any of the Group Members;
- (k) AAD and Ecove say that since early 2019 Icon has made ex gratia payments to certain Group Members and the Owners Corporation;

#### Particulars

- i. AAD and Ecove repeat paragraphs 58A(k)(i) to (v) of the Response to the Commercial List Cross Claim Statement filed on 8 November 2019 on behalf of Icon
- (l) AAD and Ecove say that to the extent that the Common Property suffered from structural defects, Icon has rectified, or is in the process of rectifying, such

defects, and this process will be completed in early 2020 and to the extent that the rectification process complies with the D&C Contract remains a matter for approval by AAD and Ecove;

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

**D QUESTIONS APPROPRIATE FOR REFERRAL**

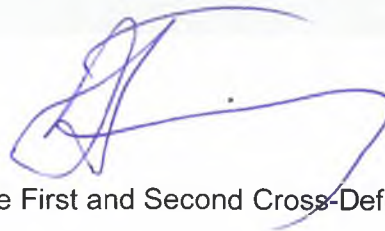
- 1. AAD and Ecove consider that there are no questions appropriate for referral to a referee at this time. AAD and Ecove propose to further consider what questions (if any) are appropriate for referral after the service of expert evidence.

**E MEDIATION**

- 1. The parties have not attempted mediation. AAD and Ecove are willing to proceed to mediation at an appropriate time.

**SIGNATURE**

Signature of legal representative



Capacity

Solicitor for the First and Second Cross-Defendants

Date of signature

12 November 2021