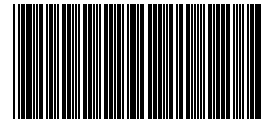




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D00016RW43

### Commercial List Statement

#### COURT DETAILS

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

#### TITLE OF PROCEEDINGS

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

#### TITLE OF THIS CROSS-CLAIM

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

#### FILING DETAILS

Filed for	SYDNEY OLYMPIC PARK AUTHORITY trading as Sydney Olympic Park Authority, Cross Claimant 1
Filed in relation to	Cross-Claim 1
Legal representative	Sean Emmett O'Connor
Legal representative reference	
Telephone	02 8273 9826
Your reference	SOC 9000156 RAF

#### ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Commercial List Statement (Commercial List Cross Claim Statement.pdf)

[attach.]

## COMMERCIAL LIST CROSS-CLAIM STATEMENT

### COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Commercial
Registry	Sydney
Case number	2019/232749

### TITLE OF PROCEEDINGS

First Plaintiff	<b>Terry Walter 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 68 010 941 405)</b>
First Cross-Defendant	<b>Australia Avenue Developments Pty Ltd (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>

### FILING DETAILS

Filed for	<b>Sydney Olympic Park Authority, Defendant</b>
Legal representative	Sean O'Connor, Wotton + Kearney
Legal representative reference	SOC 9000156 RAF
Contact name and telephone	Robert Finnigan, 02 8273 9850
Contact email	Robert.finnigan@wottonkearney.com.au

**A. NATURE OF DISPUTE**

- 1 Sydney Olympic Park Authority (**SOPA**) was established on 1 July 2001 as a statutory body of the New South Wales Government under the *Sydney Olympic Park Authority Act 2001* (NSW).
- 2 At all material times prior to the registration of Strata Plan 97315, SOPA was the registered proprietor of land that was previously known as Site 68 Bennelong Parkway, Sydney, being Lots 73 and 75 and DP 1134933 (the **Original Site**).
- 3 On or around 20 March 2014, SOPA entered into a project delivery agreement (**Development Agreement**) with Australia Avenue Developments Pty Limited (**AAD**) and Ecove Group Pty Limited (**Ecove**) (as guarantor for AAD). Pursuant to that agreement, AAD was required to develop the Original Site, including by designing and constructing a mixed residential and commercial building known as the "Opal Tower" (**Opal Tower**).
- 4 On or around 29 October 2015, AAD entered into a "design and construct" contract (**D&C Contract**) with Icon Co (NSW) Pty Ltd (**Icon**), pursuant to which AAD engaged Icon to carry out the work.
- 5 SOPA is not the holder of a contractor licence and did not itself undertake any residential building work for the purposes of the *Home Building Act 1989* (NSW) (**Home Building Act**) in relation to the project.
- 6 The plaintiffs are owners of an apartment in Opal Tower. They allege that Opal Tower is affected by defects that have caused them and other Group Members loss for which SOPA is liable.
- 7 SOPA contends that if and insofar as it is liable to the plaintiffs or any Group Members as alleged, SOPA is entitled to relief against the cross-defendants as set out in this cross-claim.

**B. ISSUES LIKELY TO ARISE**

- 1 Whether and to what extent AAD is liable to indemnify SOPA in respect of SOPA's alleged liability to the plaintiffs or any other Group Members.
- 2 Whether and to what extent AAD is liable to SOPA in damages for breach of contract or negligence in respect of SOPA's alleged liability to the plaintiffs or any other Group Members or in respect of the lots owned by SOPA.

3 Whether and to what extent Icon is liable to indemnify SOPA in respect of SOPA's alleged liability to the plaintiffs or any other Group Members.

4 Whether and to what extent AAD or Icon is liable to SOPA for alleged breaches of the *Home Building Act*.

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

1 SOPA:

- a. is and was at all material times a corporation constituted by section 5 of the *Sydney Olympic Park Authority Act 2001 (NSW)*; and
- b. is able sue in its own name.

2 AAD:

- a. is and was at all material times a company incorporated in Australia;
- b. carries on the business of property development; and
- c. is able to be sued in and by its corporate name and style.

3 Ecove:

- a. is, and was at all material times, a company incorporated in Australia;
- b. is, and was at all material times, the ultimate holding company of AAD;
- c. carries on the business of property development; and
- d. is able to be sued in and by its corporate name and style.

4 Icon:

- a. is, and was at all material times, a company incorporated in Australia; and
- b. has since 11 June 2015 held (and was required to hold) a contractor licence under the *Home Building Act 1989 (NSW)* (***Home Building Act***); and
- c. is able to be sued in and by its corporate name and style.

**Particulars**

Contractor Licence No. 282954C, commencing 11 June 2015 and expiring on 10 June 2022.

## **CLAIM AGAINST AAD**

### **Project Delivery Agreement**

5 On or around 20 March 2014, SOPA entered into the Development Agreement with AAD.

#### **Particulars**

Deed entitled "Site 68 Project Delivery Agreement" and dated 20 March 2014 consisting of general conditions together with the following<sup>2</sup> annexures:

- i. Annexure A – Existing Rights;
- ii. Annexure B – Plan;
- iii. Annexure C – Child Care Centre Guidelines;
- iv. Annexure D – Financier's Side Deed;
- v. Annexure E – Independent Certifier's Deed;
- vi. Annexure F – Public Positive Comment;
- vii. Annexure G – Restriction on use;
- viii. Annexure H – Subdivision Plan;
- ix. Annexure I – Expert Agreement;
- x. Annexure J – Urban Elements Design Manual;
- xi. Annexure K – Development Program;
- xii. Annexure L – Disclosure Materials;
- xiii. Annexure M – SOPA By-law Requirements;
- xiv. Annexure O – Construction Lease;
- xv. Annexure P – Licence Plan and Licence Works;
- xvi. Annexure Q – Prescribed Works Plan;
- xvii. Annexure R – Slattery Quantity Surveyors Report;
- xviii. Annexure S – Code of Development.

6 It was a term of the Development Agreement that AAD agreed to:

- a. perform its design obligations with the skill, care and diligence expected of a professional designer experienced in projects of a similar nature to the Project (as that term is defined in the Development Agreement);
- b. ensure that each member appointed to AAD's design team performs its design responsibilities with the skill, care and diligence expected of a professional designer experienced in carrying out those responsibilities.

**Particulars**

Clause 6.2 of the Development Agreement.

7 It was a term of the Development Agreement that AAD agreed to ensure that the design of the Works (as defined):

- a. was consistent with the Transaction Documents (as defined);
- b. ensures the completed works are suitable for their intended purpose;
- c. does not adversely affect:
  - i. the functional integrity of the Works; or
  - ii. the quality standard of the Works required under the Development Agreement.

**Particulars**

Clauses 6.3 and 40 of the Development Agreement.

8 Under the Development Agreement, AAD agreed to develop the Original Site by carrying out or procuring the Works to be carried out in accordance with:

- a. the Documentation;
- b. the Transaction Documents;
- c. the Guidelines;
- d. the Codes;
- e. the Development Agreement;
- f. all laws; and
- g. any policy of the New South Wales Government relating to construction works (including the Works);

as those terms are defined in the Development Agreement.

**Particulars**

Clauses 10 and 40 of the Development Agreement.

- 9 It was a term of the Development Agreement that ADD must carry out the Works in an expeditious, proper and workmanlike manner under adequate and competent supervision, and in accordance with the best practices of the various trades involved, using good quality new materials.

**Particulars**

Clause 10.2 of the Development Agreement.

- 10 It was a term of the Development Agreement that AAD must carry out or procure that the Works are carried out in accordance with quality assurance systems conforming to the Quality Management Systems Guidelines for Construction as amended March 2012 – AS/NZS 9000 series of standards.

**Particulars**

Clause 10.18(a) of the Development Agreement.

- 11 It was a term of the Development Agreement that AAD must ensure that all major contractors engaged in respect of the Works have certified quality assurance systems and have achieved substantial implementation of a quality assurance system conforming to the Quality Management Systems Guidelines for Construction as amended March 2012 – AS/NZS 9000 series.

**Particulars**

Clause 10.18(b) of the Development Agreement.

- 12 It was a term of the Development Agreement that AAD warranted that the Works when completed would be fit for their intended purpose and comply with all other requirements of the Development Agreement.

**Particulars**

Clause 10.19 of the Development Agreement.

- 13 It was a term of the Development Agreement that AAD releases SOPA from liability or loss arising from, and Costs incurred in connection with, loss of or damage to the Development (as those terms are defined).

**Particulars**

Clauses 21.1 and 40 of the Development Agreement.



14 It was a term of the Development Agreement that AAD will indemnify SOPA against any liability or loss arising from, and any Costs incurred in connection with, amongst other things, any breach of a Transaction Document (as that term is defined in the Development Agreement) by:

- a. AAD; or
- b. AAD's employees, officers, agents, contractors, service suppliers, licensees, invitees and those persons who are on the Original Site,

**(Indemnity Clause).**

**Particulars**

Clauses 21.2 and 40 of the Development Agreement.

15 It was a term of the Development Agreement that the obligations of AAD under clause 21 of the Development Agreement, including the Indemnity Clause, continue after the expiration of the Term or other determination of the Development Agreement in connection with any act, matter or thing occurring before the expiration of the Term or determination.

**Particulars**

Clauses 21.5 and 40 of the Development Agreement.

16 It was a term of the Development Agreement that AAD must comply with, and observe at its expense, all laws in connection with:

- a. the Original Site;
- b. the Works;
- c. the Development;
- d. the use or occupation of the Original Site,

whether or not those laws are imposed on SOPA or AAD.

**Particulars**

Clauses 26.1 and 40 of the Development Agreement.

17 AAD acknowledged and agreed that in complying with the laws referred to in clause 26.1, AAD may be required to effect demolition, structural or capital works and alterations, additions and improvements on the Original Site.

**Particulars**

Clause 26.2 of the Development Agreement.

- 18 AAD and Ecove each represented and warranted that its obligations under the Transaction Documents are valid and binding and are enforceable against AAD and/or Ecove in accordance with their terms.

**Particulars**

Clause 27.1(d) of the Development Agreement.

- 19 It was a term of the Development Agreement that AAD warranted that:
- a. the Works will be performed in a proper and workmanlike manner and in accordance with the Development Agreement;
  - b. all materials supplied by AAD will be good and suitable for the purpose for which they are used and, unless otherwise required by the Development Agreement, will be new;
  - c. the Works will be performed in accordance with, and will comply with, the *Home Building Act* and all other laws;
  - d. the Works will be performed with due diligence and within the time stipulated in the Development Agreement;
  - e. any dwelling, as defined in the *Home Building Act*, which forms part of the Works, will be reasonably fit for occupation as a dwelling; and
  - f. the Works, and any materials used in performing the Works, will be reasonably fit for any specified purpose or result expressly made known to AAD.

**Particulars**

Clauses 27.4 and 40 of the Development Agreement.

- 20 It was a term of the Development Agreement that AAD warranted that it has, and will hold, a valid licence when doing the Work under the Development Agreement, as required under the *Home Building Act*.

**Particulars**

Clause 27.7 of the Development Agreement.

21 AAD and Ecove acknowledged that the warranties in clause 27.1 of the Development Agreement and the Transaction Documents remain unaffected notwithstanding:

- a. the design carried out by or on behalf of SOPA in connection with the Development; and
- b. any receipt or review or, or comment or direction on, documentation prepared by AAD.

**Particulars**

Clause 27.10 of the Development Agreement.

22 It was a term of the Development Agreement that AAD must pay or reimburse SOPA on demand for the Costs reasonably incurred by SOPA in connection with or considering any exercise or non-exercise of rights arising from a breach by AAD of its obligations under the Development Agreement.

**Particulars**

Clause 33.1 of the Development Agreement.

23 It was a term of the Development Agreement that AAD will indemnify SOPA against any liability or loss arising from, and any Costs incurred in connection with the payment, omission to make payment or delay in making payment of an amount referred to in clause 33.1 including legal costs on a full indemnity basis or solicitor and own client basis, whichever is the higher.

**Particulars**

Clause 33.5 of the Development Agreement.

**Guarantee by Ecove**

24 Ecove acknowledged that SOPA was acting in reliance on Ecove incurring obligations and giving rights under clause 37 of the Development Agreement.

**Particulars**

Clause 37.1 of the Development Agreement.

25 It was a term of the Development Agreement that Ecove unconditionally and irrevocably guaranteed to SOPA the due and punctual performance and observance by AAD of all of AAD's agreements, obligations and liabilities in

connection with the Transaction Documents, including the Development Agreement (**Guarantee**).

**Particulars**

Clause 37.2 of the Development Agreement.

- 26 It was a term of the Development Agreement that Ecove unconditionally and irrevocably indemnifies SOPA for all losses, costs, expenses, damages and liabilities which it incurs or suffers because AAD fails to duly and punctually perform and observe the Guaranteed Obligations (as that term is defined).

**Particulars**

Clauses 37.3 and 40 of the Development Agreement.

- 27 It was a term of the Development Agreement that Ecove unconditionally and irrevocably indemnifies SOPA against any loss SOPA suffers because:
- a. AAD does not perform, observe or comply with the Guaranteed Obligations;
  - b. AAD disregards an order for specific performance of the Guaranteed Obligations; and
  - c. AAD does not pay any consideration or sum that would have been payable under the Development Agreement if it has complied with its obligations under the Development Agreement.

**Particulars**

Clauses 37.4 and 40 of the Development Agreement.

- 28 It was a term of the Development Agreement that Ecove, as principal debtor, agrees to pay SOPA on demand a sum equal to the amount of any loss described in clause 37.3 and 37.4.

**Particulars**

Clause 37.5 of the Development Agreement.

- 29 It was a term of the Development Agreement that:
- a. each indemnity in the Development Agreement is a continuing obligation, separate and independent from the other obligations of the indemnifying party and survives expiry or termination of the Development Agreement; and

- b. it is not necessary for the indemnified party to incur expense or make payment before enforcing a right of indemnity conferred by the Development Agreement.

**Particulars**

Clause 39.11 of the Development Agreement.

- 30 It was a term of the Development Agreement that the expiry of the Development Agreement does not affect the rights of the parties to the Development Agreement for a breach of the Development Agreement by the other party or parties before the expiry or determination.

**Particulars**

Clause 39.13 of the Development Agreement.

**Duty of care**

- 31 Further and in the alternative to paragraphs 5 to 30 above:
- a. at all material times, AAD held itself out to SOPA as suitably qualified and experienced in property development, including designing and constructing or procuring the design and construction of mixed residential and commercial buildings similar to the Works;
  - b. at all material times, SOPA relied on AAD to apply its qualifications, experience, skill and judgment in the design and construction or procuring of the design and construction of the Works;
  - c. at all material times, AAD knew or ought to have known that SOPA was relying on it to perform the Works in accordance with the Development Agreement and with due skill, care and diligence;
  - d. it was reasonably foreseeable that SOPA would suffer loss and damage in the event that the Works contained defects or were not performed in accordance with the Development Agreement and with due skill, care and diligence;
  - e. the risk of harm to SOPA was not insignificant if AAD failed to carry out the Works in accordance with the Development Agreement and with due skill, care and diligence;
  - f. in the circumstances:

- i. SOPA was vulnerable to harm if AAD did not perform the Works in accordance with the Development Agreement and with due skill, care and diligence; and
- ii. a reasonable person in AAD's position would have taken precautions against a risk of harm to SOPA;

#### **Particulars**

A reasonable person in AAD's position would have taken the following precautions against a risk of harm to SOPA:

- i. designing and constructing or procuring the design and construction of the Works, with due skill, care and diligence such that it did not contain defects;
- ii. ensuring that the Works was performed in a proper and workmanlike manner;
- iii. ensuring that all materials to be used in the performance of the Works were good and suitable for the purpose for which they are used;
- iv. ensuring that the Works were done in accordance with the Building Code of Australia (**BCA**), the National Construction Code (**NCC**), all applicable Australian Standards, and any applicable laws.

32 By reason of sub-paragraphs 31(a) to (f) above, AAD owed SOPA a duty of care to exercise due skill, care and diligence in carrying out the Works under the Development Agreement.

#### **AAD Statutory Warranties**

33 For the purpose of this Cross-Claim only, and without admission, SOPA repeats paragraphs 9 and 16 to 20 of the List Statement, and adopts the definitions contained therein.

34 By reason of the matters pleaded in paragraphs 16 to 18 of the List Statement:

- a. the Works (as defined in the Development Agreement):
  - i. were materially identical to; or
  - ii. alternatively included; or

- iii. alternatively involved the coordination or supervision of, the Opal Work; and
- b. the Development Agreement was therefore a contract to do “residential building work” for the purpose of the *Home Building Act*.

#### **Particulars**

*Home Building Act*, Schedule 1, clause 2(1).

35 By reason of the matters referred to at paragraph 34 above, the following warranties by AAD were implied into the Development Agreement insofar as the Works were identical to or included or involved the coordination or supervision of the Opal Work (**the AAD Work**):

- a. a warranty that the Works would be done:
  - i. with due care and skill (**Due Care and Skill Warranty**);
  - ii. in accordance with the plans and specifications set out in the Development Agreement (**Plans and Specifications Warranty**);
  - iii. in accordance with, and would comply with, all requirements imposed by law (**Legal Compliance Warranty**); and
- b. a warranty that:
  - i. all materials supplied by AAD would be good and suitable for the purpose for which they were used (**Materials Warranty**); and
  - ii. if the Works consisted of the construction of a dwelling, the work would result in a dwelling that was reasonably fit for occupation as a dwelling (**the Fit for Occupation Warranty**),

(together, the **AAD Statutory Warranties**).

#### **Particulars**

Section 18B of the *Home Building Act*.

#### **The plaintiffs’ contentions**

36 The plaintiffs contend in their Commercial List Statement filed on 26 July 2019 (**List Statement**) that:

- a. on or around 29 October 2015, AAD entered into an amended form of AS 4902-2000 Design & Construct Contract with Icon (**the D&C Contract**),

pursuant to which AAD engaged Icon to carrying out the Works (as defined in the D&C Contract);

- b. between October 2015 and around August 2018, Icon both directly and through engaging sub-contractors and consultants, purported to carry out the Opal Work (as that term is defined in the List Statement);
- c. Opal Tower, as designed and constructed, possessed the following structural features:
  - i. the building was a reinforced concrete structure with post-tensioned concrete floor slabs (**Slabs**);
  - ii. "inset slots" were located on each external face of the building, with the walls of those slot sections (**Slot Walls**):
    - 1. constructed from precast reinforced concrete panels and other in-situ elements; and
    - 2. acting as columns transmitting vertical loads to the individual supporting columns beneath each Slot Wall (**Columns**); and
  - iii. supporting columns below each Slot Wall were connected to the Slot Wall by horizontal, load-bearing "hob beams" (**Hob Beams**), (together, **the System**).

### **Particulars**

SOPA repeats the particulars to paragraph 56 of the List Statement

37 The plaintiffs contend in the List Statement that the System in whole or in part:

- a. was not designed or constructed:
  - i. to the capacity required by clauses 2.1. and 2.2.1 of AS3600:2009 having regard to the actual loads to which the System in whole or in part was subjected or likely to be subjected; and
  - ii. to the capacity required by clauses 2.1.1 and 2.2.1 of AS3600:2009 having regard to the design loads for the System in whole or in part determined under AS1170.1:2002;
- b. was not otherwise constructed in accordance with the FC Drawings (as defined in the List Statement) in that:



- i. joints between the Hob Beams and each of the Slot Walls 1, 4, 5, 8, 9 and 12 were not grouted to full width in accordance with detail 1 shown on FC Drawing s06.010 E;
  - ii. part of a Hob Beam at level 10 immediately above Columns C16 and C34 was not constructed using the top reinforcement specified in FC Drawing S09.220C;
  - iii. part of a Hob Beam at level 10 immediately above Columns C2 and C34 was not constructed using the top reinforcement specified in drawing S09.220 C;
  - iv. each of the Slot Walls 1, 4, 5, 8, 9 and 12 was manufactured to be at least 20mm thicker than the width specified in the FC Drawings; and
- c. was designed or constructed such that:
- i. an electrical conduit was placed in the zone of concrete covering the area immediately above Column C38; and
  - ii. a dowel bar used to connect the reinforced and precast concrete elements between the Hob Beam on level 10 was cut during construction,

(together, the **System Defects**).

### Particulars

Paragraph 57 of the List Statement.

38 The plaintiffs contend, further and in the alternative to the matters referred to at paragraph 37 above, that:

- a. the concrete supplied and used by Icon to construct the System:
  - i. was less than the strength specified in the FC Drawings (65Mpa); and
  - ii. by reason of the matter referred to in sub-paragraph (i) above, not concrete that was good and/or suitable for the purpose for which the concrete was being used; and
- b. further or in the alternative to the matter referred to in sub-paragraph (a) above, the FC Drawings did not identify, or did not adequately identify, the

required strength of the concrete to be supplied and used by Icon to construct the System,

(together, **Strength Defects**).

### Particulars

Paragraph 58 of the List Statement.

39 The plaintiffs contend that:

- a. on 24 December 2018 residents of Opal Tower reported hearing loud cracking noises within Opal Tower;
- b. cracks were visually identified in a Column on level 10 of Opal Tower;
- c. all of the residents of Opal Tower were evacuated;
- d. following the evacuation physical damage was identified to the Slot Walls, Columns, Beams and Slabs as follows:
  - i. at level 4:
    1. spalling and cracking of Hob Beam and precast concrete panels which comprise Slot Wall 1 (that is, Columns C2 and C22);
    2. spalling and cracking of Hob Beam and precast concrete panels which comprise Slot Wall 9 (that is, Columns C16 and C34); and
    3. cracking the slab in the vicinity of Slot Walls 1 and 9 on level 4;
  - ii. at level 10:
    1. spalling and cracking of Hob Beam and precast concrete panels which comprise Slot Wall 12 (that is, Columns C21 and C38); and
    2. permanent vertical displacement, deformation and cracking of the Slab in the vicinity of Slot Wall 12 at level 10; and
  - iii. at level 16:
    1. cracking of precast concrete panels which comprise Slot Wall 1 (that is, Columns C2 and C22);

2. cracking of precast concrete panels which comprise Slot Wall 5 (that is, Columns C9 and C40); and
3. cracking of precast concrete panels which comprise Slot Wall 9 (that is, Columns C16 and C34),

(the **Observed Damage**),

- e. the System Defects or further or in the alternative the Strength Defects (or any them) caused damage to Opal Tower, including the Observed Damage.

40 Pursuant to the Development Agreement, AAD designed and constructed or procured the design and construction of the Opal Work (as that term is used in the List Statement), which the plaintiffs allege contained or were affected by the System Defects and the Strength Defects.

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

41 If it is found that:

- a. the System Defects or the Strength Defects exist;
- b. SOPA is liable by reason of those defects for breaches of one or more of the Statutory Warranties referred to in paragraph 20 of the List Statement (**Statutory Warranties**); and
- c. as a result of any of those breaches:
  - i. the plaintiffs and the Group Members suffered loss and damage as contended in paragraph 69 of the List Statement; and
  - ii. SOPA is liable to the plaintiffs and the Group Members for that or any loss and damage,

then SOPA says that such liability:

- d. arises out of or in connection with breaches by AAD of the terms of the Development Agreement identified in paragraphs 6, 7, 8, 9, 10, 12, 13, 16 and 19 above; and
- e. constitutes liability or loss for the purposes of clause 21.2 of the Development Agreement.

**Particulars**

In that event:

- i. AAD failed to:
  - a. design and construct or procure the design and construction of the AAD Work, including the System, with due care, skill and diligence such that the AAD Work did not contain the defects;
  - b. perform its design obligations with the skill, care and diligence expected of a professional designer experienced in projects of a similar nature to the AAD Work.
  - c. ensure that the design of the Opal Work:
    - i. was consistent with the Transaction Documents;
    - ii. was suitable for their intended purpose;
  - d. develop the Original Site by carrying out or procuring the Works to be carried out in accordance with the Approvals and the Development Agreement;
  - e. allow for the AAD Work to be constructed in accordance with the Development Agreement without the need for variation;
  - f. achieve the functional integrity or the quality standard of the ADD Work under the Development Agreement.
  - g. carry out the ADD Work in a proper and workmanlike manner, in accordance with the best practise of the various trades involved, using good quality new materials.
- ii. The ADD Work when completed will not have been fit for their intended purpose and comply with all requirements of the Development Agreement.
- iii. The ADD Work will not have been carried out or procured to be carried out in compliance with all laws.
- iv. In breach of the Statutory Warranties the Residential Units were not reasonably fit for occupation.

- v. The materials used in performing the ADD Work will not have been reasonably fit for the specified purpose or result expressly made known to AAD.

42 In that event, AAD is liable to SOPA in respect SOPA's liability to the plaintiffs and the Group Members:

- a. in damages for breach of the Development Agreement; and
- b. by reason of the indemnities identified in paragraphs 14, 22 and 23 above.

**Breach of the Duty of Care**

43 SOPA refers to and repeats paragraph 40 above.

44 If it is found that:

- a. the System Defects or the Strength Defects exist by reason of a breach by SOPA of any of the Statutory Warranties; and
- b. as a result of any of those breaches:
  - i. the plaintiffs and the Group Members suffered loss and damage as contended in paragraph 69 of the List Statement; and
  - ii. SOPA is liable to the plaintiffs and the Group Members for that or any loss and damage,

then SOPA says that such liability arises out of or in connection with breaches by AAD of the duty of care it owed to SOPA referred to in paragraph 32 above.

**Particulars**

Repeats the particulars of paragraph 41 above.

AAD did not perform or procure the AAD Work or alternatively the Opal Work with due skill care and diligence such that it did not contain the System Defects or the Strength Defects.

45 In that event, SOPA has suffered loss and damage, for which AAD is liable to SOPA in negligence.

**Particulars**

So much of SOPA's liability to the plaintiffs and the Group Members that arises out of or in connection with AAD's breaches of its duty of care to SOPA.

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

- 46 For the purpose of this Cross-Claim only, and without admission, SOPA repeats paragraphs 26 to 55 of the List Statement, and adopts the definitions contained therein.
- 47 If the AAD Work is defective as alleged by the plaintiffs by reason of:
- a. the matters referred to in subparagraphs 37a., 37b., 37c. or 38a. above (or any of them), then AAD breached the Due Skill and Care Warranty;
  - b. the matters referred to in subparagraphs 37a., 37b., or 38a. above (or any of them), then AAD breached the Plans and Specifications Warranty; and
  - c. the matters referred to in subparagraphs 37a. above, then AAD breached the Legal Compliance Warranty.
- 48 In the circumstances referred to in paragraph 47 above, AAD breached the AAD Statutory Warranties.
- 49 SOPA owns 11 residential units in Opal Tower (**Retained Units**).

#### **Particulars**

SOPA is the title holder for lots 2, 5, 18, 29, 40, 68, 80, 114, 138, 283 and 302 in Strata Plan SP 97315.

- 50 If it is found that:
- a. the System Defects or the Strength Defects exist by reason of a breach by SOPA of any of the Statutory Warranties; and
  - b. as a result of any of those breaches:
    - i. the plaintiffs and the Group Members suffered loss and damage as contended in paragraph 69 of the List Statement; and
    - ii. SOPA is liable to the plaintiffs and the Group Members for the loss and damage,

then SOPA says that such liability arises out of or in connection with breaches by AAD of the AAD Statutory Warranties.

#### **Particulars**

SOPA repeats paragraphs 47 and 48 above.

- 51 In that event, SOPA:

- a. has incurred liability for the loss and damage claimed by the plaintiffs and the Group Members at paragraph 69 of the list Statement; and
- b. has itself suffered loss and damage as an owner of the Retained Units.

#### **Particulars**

In that event, SOPA's loss and damage as an owner of the Retained Units includes:

- i. the cost of rectifying the Retained Units;
- ii. further or the alternative to (ii), the diminution in value of the Retained Units resulting from the System Defects, further or in the alternative, the Strength Defects (or any of System Defects and Strength Defects) insofar as any diminution in value is established;
- iii. loss of rental income; and
- iv. strata fees paid or payable by SOPA to fund any increased insurance premiums, legal and other professional costs incurred as a result of the System Defects, further or in the alternative, the Strength Defects (or any of System Defects and strength Defects).

Further particulars of loss may be provided after service of evidence in chief.

52 It was a term of the D&C Contract that AAD holds on trust for SOPA and SOPA's Associates (as defined in the D&C Contract) the benefit of each warranty and indemnity in the D&C Contract expressed to be for the benefit of SOPA and SOPA's Associates.

#### **Particulars**

Clause 62(d) of the D&C Contract

53 By this cross-claim, SOPA notifies AAD that SOPA requires AAD to enforce against Icon the warranties and indemnities referred to in paragraphs 64 and 66 below in respect of any liability SOPA is found to owe to the plaintiffs and any Group Members by reason of the claims the subject of these proceedings.

54 In the circumstances, SOPA is entitled to the proceeds of any cross-claim filed by AAD against Icon seeking relief on SOPA's behalf in respect of the warranties and indemnities referred to in paragraphs 52 and 53 above.

**CLAIM AGAINST ECOVE**

55 If:

- a. it is found that AAD is liable to SOPA as alleged in paragraphs 42 or 45 above; and
- b. AAD fails to discharge that liability, then:

Ecove is liable under the Guarantee to indemnify SOPA for the amount so awarded by the court as payable by AAD to SOPA.

56 Further or in the alternative to paragraph 55, if:

- a. it is found that AAD is liable to SOPA as alleged in paragraphs 42 or 45 above; and
- b. AAD fails to discharge that liability, then:

Ecove is liable to indemnify SOPA for the amount so awarded by the court as payable by AAD to SOPA by reason of the indemnities referred to in paragraphs 26 and 27 above.

57 To date, Ecove has not indemnified SOPA in respect of any liability referred to in paragraphs 55 or 56 above.

**CLAIM AGAINST ICON****D&C Contract**

58 SOPA refers to and repeats paragraph 40 above.

59 It was a term of the D&C Contract that Icon:

- a. will carry out and complete the "Contractor's design obligations" (as defined in the D&C Contract) so that the design of the Works (as defined in the D&C Contract) does not adversely affect:
  - 1. the functional integrity of the Works; or
  - 2. the quality or standard of the Works required under the "Principal's project requirements" (as defined in the D&C Contract);
- b. would complete the Works so that when completed they were fit for purpose;
- c. would construct and complete the Works:



- i. so, when completed it will comply with the requirements of the D&C Contract and the Approvals;
- ii. so as to create a high quality (in terms of design, construction, operation and management) Building Complex having regard to the Principal's project requirements, including:
  - 1. a high-quality urban form and amenity;
  - 2. design outcomes which are of a high quality;
  - 3. high quality residential development in accordance with the Approvals and SOPA Guidelines;

#### **Particulars**

Definitions of Contractor's design obligations, Principal's project requirements, Building Complex, and Approvals in the D&C Contract.

- d. shall execute the Works in a proper and workmanlike manner and in accordance with the high-quality workmanship of the various trades involved;
- e. warranted there would be no failure or deterioration, apart from deterioration caused by ordinary wear and tear to "Structures" as referred to in Annexure Part M (Warranty Requirements).

#### **Particulars**

Clause 2.2 of the D&C Contract.

Annexure Part M of the D&C Contract (Warranty Requirements).

Definition of Structures in the D&C Contract.

60 It was a term of the D&C Contract that Icon warranted that the Works would comply with the statutory warranties in section 18B of the *Home Building Act*.

#### **Particulars**

Clause 2.5 of the D&C Contract.

61 It was a term of the D&C Contract that Icon shall satisfy the design obligations identified in the Development Agreement, including:

- a. designing the Works so that the Works, when constructed, shall be structurally and aesthetically sound;

- b. ensure an appropriately skilled, experienced and qualified person acceptable to AAD acting reasonably at all times supervises and coordinates the:
  - i. design and specification of the Works; and
  - ii. the construction of the Works in accordance with the "*design documents*".

**Particulars**

Clause 8.4.3 of the D&C Contract.

- 62 It was a term of the D&C Contract that Icon was to provide AAD with an executed copy of the "*Contractor's Warranty*" documents in the form contained at Annexure Part E of the D&C Contract.

**Particulars**

Clause 9.6(c) of the D&C Contract.

- 63 It was a term of the D&C Contract that Icon shall satisfy all "*legislative requirements*" and any requirements of an Authority (subject to some exceptions that are presently immaterial).

**Particulars**

Clause 11.1 of the D&C Contract.

- 64 It was a term of the D&C Contract that, with respect to the Works carried out by Icon, Icon indemnifies SOPA on demand from and against any "claim" or loss suffered or incurred arising out of or in relation to the enforcement of any right a person has against SOPA under or by reason of section 18C of the *Home Building Act*.

**Particulars**

Clause 15.3 of the D&C Contract.

- 65 It was a term of the D&C Contract that, in the performance of the Works, Icon would use:
- a. suitable new materials which are in good condition, of high quality and suitable for the purpose for which they are intended;
  - b. all proper care, skill and diligence; and

c. proper and trademanslike workmanship,  
and the Works would meet the requirements of all Authorities, applicable Australian Standards and the Building Code of Australia.

**Particulars**

Clause 29.1 of the D&C Contract.

66 It was a term of the D&C Contract that Icon indemnifies SOPA against any liability or loss arising out of, and any costs incurred in connection with a substantial breach of the D&C Contract by Icon.

**Particulars**

Clause 39.12 of the D&C Contract.

67 It was a term of the D&C Contract that Icon warranted the Works would comply with the "Codes" and "Guidelines".

**Particulars**

Clause 55 of the D&C Contract.

68 It was a term of the D&C Contract that Icon must perform its obligations under the D&C Contract so as to satisfy AAD's corresponding obligations under the Development Agreement.

**Particulars**

Clause 58(b)(i) of the D&C Contract.

69 It was a term of the D&C Contract that Icon expressly warranted to SOPA that:

- a. it will perform its obligations under the D&C Contract to a standard of care, skill, judgment and diligence commensurate with a competent contractor experienced in work of a similar nature to the WUC (as defined in the D&C Contract);
- b. it will perform its obligations under the D&C Contract in accordance with the D&C Contract and all applicable legislative requirements;
- c. it shall carry out and complete the WUC in accordance with the "design documents" so that the Works, when completed shall be fit for their stated purpose and comply with all requirements of the D&C Contract;
- d. the Works when completed will be free from defects and deficiencies; and

- e. in addition to its obligations under the D&C Contract and at law, there will be no failures or deterioration, apart from the deterioration that is caused by ordinary wear and tear, in the items of the Works referred to in Annexure Part M (Warranty Requirements), including “Structures” for the periods referred to in that annexure from the date of practical completion, (the **Contractor’s Warranty**).

#### **Particulars**

Contractor’s Warranty (Annexure Part E of the D&C Contract).

Clause 9.6 of the D&C Contract.

Annexure M of the D&C Contract – Warranty Requirements.

70 If it is found that:

- a. the System Defects or the Strength Defects exist by reason of a breach by SOPA of the Statutory Warranties; and
- b. as a result of any of those breaches:
  - i. the plaintiffs and the Group Members suffered loss and damage as contended in paragraph 69 of the List Statement; and
  - ii. SOPA is liable to the plaintiffs and the Group Members for that or any loss and damage,

then SOPA says that such liability:

- iii. arises out of a “claim” or loss suffered or incurred from the enforcement of a right under section 18C of the *Home Building Act* by the plaintiffs and the Group Members against SOPA;
- iv. arises out of or in connection with a substantial breach by Icon of one or more of the terms of the D&C Contract referred to in paragraphs 59 to 69;
- v. arises out of or constitutes a failure by Icon to perform its obligations under the D&C Contract; and/or
- vi. constitutes a breach of the Contractor’s Warranty.

71 In that event, SOPA will suffer loss and damage for which Icon is liable to SOPA by reason of the indemnities provided by Icon to SOPA identified in paragraphs 64 and 66 above.

**Home Building Act**

72 SOPA repeats paragraph 49 above.

73 Further and in the alternative:

- a. the D&C Contract is a contract to do residential building work on land within the meaning of section 18D(1A) of the *Home Building Act*;
- b. SOPA is a non-contracting owner of the Retained Units in relation to that contract within the meaning of section 18D(1A) of the *Home Building Act*.

**Particulars**

Section 18D(1A) of the *Home Building Act*.

74 By reason of the matters pleaded in paragraph 73 above, SOPA is entitled in respect of the Retained Units to the same rights as those that a party to the D&C Contract has in respect of the Statutory Warranties.

**Particulars**

Section 18D(1A) of the *Home Building Act*.

75 If it is found that the System Defects or the Strength Defects exist by reason of a breach of the Statutory Warranties then SOPA says that it has suffered loss and damage by reason of Icon's breach or breaches of the Statutory Warranties and is entitled to relief against Icon on that basis.

**Particulars**

SOPA repeats the particulars to paragraph 51 above.

**D. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE**

- 1 SOPA considers there are no questions appropriate for referral to a referee at this stage.
- 2 SOPA proposes 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. SOPA is willing to proceed to mediation at an appropriate time.

**SIGNATURE**

I certify under clause 4 of Schedule 2 to the **Legal Profession Uniform Law Application Act 2014** that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in this cross claim has reasonable prospects of success.

I have advised the cross-claimant that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature of legal representative

Capacity

Date of signature



Sean O'Connor  
Solicitor

27 September 2019