

AMENDED COMMERCIAL LIST FOURTH CROSS-CLAIM STATEMENT

COURT DETAILS

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

TITLE OF PROCEEDINGS

First plaintiff	Terry Walter Williamson
Second plaintiff	Helen Therese Williamson
First Defendant	Sydney Olympic Park Authority ABN 68 010 941 405
<u>Number of defendants</u>	<u>3</u>

TITLE OF THIS CROSS-CLAIM

Cross-claimant	Icon Co (NSW) Pty Ltd ACN 604 790 409
Cross-defendant	Evolution Precast Systems Pty Ltd ABN 17 608 136 518

FILING DETAILS

Filed for	Cross-claimant
Legal representative	Peter Wood, MinterEllison
Legal representative reference	1238049
Contact name and telephone	Michelle Knight, (02) 9921 4064
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A. NATURE OF DISPUTE

1. On 18 June 2015, the NSW Department of Planning and Environment approved the development of a high-rise mixed residential and commercial development, referred to as the '**Opal Tower Development**' at Sydney Olympic Park, NSW (**Development Consent**).
2. On or about 29 October 2015, Australia Avenue Developments Pty Limited (**AAD**) entered into a contract with Icon Co (NSW) Pty Ltd (**Icon**), whereby Icon agreed to design and construct the Opal Tower Development.
3. On 24 November 2015, Icon and WSP Structures Pty Ltd (**WSP**) entered into an agreement (**Consultancy Agreement**) by which WSP agreed to provide structural and civil engineering design services to Icon for the development of the Opal Tower Development.
4. On 31 August 2016, Icon and Evolution Precast Systems Pty Ltd (**Evolution**) entered into a consultancy agreement by which Evolution agreed to provide precast concrete works, including design, manufacture and installation services for precast wall panels in relation to the Opal Tower Development (**Evolution Subcontract**).
5. Icon achieved practical completion as follows:
 - (a) Separable Portion 1 on 22 June 2018;
 - (b) Separable Portion 2 on 2 July 2018; and
 - (c) Separable Portion 3 on 8 August 2018.
6. In or around late December 2018, damage was observed on levels 4, 10 and 16 of the building. Icon has, since this date, and without admission of liability, taken steps (to date, at its own cost) to rectify the damage, and, where necessary, pay owners and residents' costs, where temporary relocation has

been necessary in order to complete these works. ~~This~~ The main rectification work ~~will be~~ was completed in early March 2020.

7. On 26 July 2019, the plaintiffs commenced representative proceedings under Part 10 of the *Civil Procedure Act 2005* (NSW) against Sydney Olympic Park Authority (**SOPA**), alleging that they, and the Group Members, have suffered loss and damage by reason of SOPA's alleged breach of the statutory warranties in the *Home Building Act 1989* (NSW) (**HB Act**).

The plaintiffs' claim

8. The plaintiffs have alleged in their Amended Commercial List Statement that they, and the Group Members, have suffered loss and damage by reason of SOPA's breach of the statutory warranties in the HB Act.
9. In its Amended Commercial List Response, SOPA denies:
 - (a) that it breached the statutory warranties in the HB Act; and
 - (b) that the plaintiff, and the Group Members, have suffered loss and damage as a result of any breach of the statutory warranties in the HB Act.
- 9A. The plaintiffs have also alleged in their Amended Commercial List Statement that they, and the Group Members, have suffered loss and damage by reason of WSP's and Icon's alleged negligence and alleged misleading or deceptive conduct in contravention of s 18 or s 29 of the Australian Consumer Law.
- 9B. In its Commercial List Response, Icon:
 - (a) denies that it engaged in misleading or deceptive conduct or that it was negligent;
 - (b) says further that WSP was negligent and engaged in misleading or deceptive conduct;

(c) says further that the necessary condition for the occurrence of the structural damaged that occurred on 24 December 2018 on levels 4, 10 and 16 of the building was the failure of WSP to design the hobs to ensure that there was:

(i) sufficient transverse steel reinforcement across the thickness of the hob so as to resist bursting tension; and

(ii) sufficient steel reinforcement so as to control inclined cracking in the hob; and

(d) denies that the plaintiffs, or the Group Members, have suffered loss and damage as alleged.

SOPA's cross-claim against Icon

10. In its Amended Commercial List Cross-Claim Statement (**SOPA's Amended Cross-Claim Statement**), SOPA alleges, insofar as Icon is concerned, that:

(a) if SOPA is found to be liable to the plaintiffs or the Group Members, Icon must indemnify SOPA for such liability; and

(b) if the building was, or is, affected by the alleged FC System Defects or Strength Defects (as defined in SOPA's Amended Cross-Claim Statement), Icon:

(i) breached the statutory warranties under the HB Act in relation to the lots in the building owned by SOPA (the '**Retained Units**');

(ii) breached the duty to exercise reasonable care to avoid economic loss caused by defects that is imposed upon each of Icon and WSP by s 37(1) of the DBP Act in relation to the Retained Units; and

(iii) engaged in misleading or deceptive conduct in contravention of s 18 or s 29 of the Australian Consumer Law,

and has suffered loss and damage as a result.

11. Icon repeats its response to SOPA's allegations that are set out in Icon's First Cross-Claim List Response (**Icon First Cross-Claim List Response**) and, in particular, repeats paragraph 58A(a) of such response where Icon pleads that it is not bound by any admission that SOPA has made in its Amended Commercial List Response.

Icon's Amended cross-claim against WSP

12. Icon has alleged in its Amended Commercial List Second Cross-Claim Statement (**Icon's Amended Second Cross-Claim Statement**), in summary (and amongst other things), that:
 - (a) in preparing its design of the hob-beam referred to in paragraph 34 below, WSP failed to design for bursting stresses, contrary to what was required by AS 3600;
 - (b) such design defect was the cause of the Observed Damage (as defined in Icon's Amended Second Cross-Claim Statement); and
 - (c) WSP therefore breached the Consultancy Agreement,

and that Icon has suffered loss or damage as a result and is entitled to damages.
13. Icon also alleges that if it be found that the Partial Grouting (as defined in Icon's Amended Second Cross-Claim Statement) of the precast panel joints on levels 4, 10 and 16 caused, or materially contributed to, the Observed Damage, WSP in any event approved a change to the design of the building such that Partial Grouting would be used.
14. In addition to a claim that WSP breached the Consultancy Agreement, Icon alleges that WSP engaged in misleading or deceptive conduct in contravention of s 18 of the Australian Consumer Law.

15. In response to Icon's claim against it, WSP denies that it breached the Consultancy Agreement or engaged in misleading and deceptive conduct in contravention of s 18 of the Australian Consumer Law.

WSP's cross-claim against Evolution

16. WSP has alleged in its Commercial List Third Cross-Claim Statement (**WSP's Third Cross-Claim Statement**), in summary (and amongst other things), that:

(a) in the event that:

- (i) Evolution's shop drawings did propose the alleged design change (to Partial Grouting); and
- (ii) the failure to fully grout was a cause of the structural defects,

WSP alleges that:

- (iii) in issuing the shop drawings which did not comply with WSP's 'for construction' drawing; alternatively
- (iv) in failing to expressly raise with WSP that it was proposing the design change,

Evolution breached its duty of care to Icon; and

- (b) Evolution engaged in misleading or deceptive conduct in representing to WSP that the partial grouting design was prepared with reasonable care and skill, and, in failing to fully grout, breached other clauses of the Evolution Subcontract.

Icon's Amended cross-claim against Evolution

17. In this Amended Commercial List Fourth Cross-Claim Statement (**Amended Fourth Cross-Claim Statement**), Icon alleges, in summary (and amongst other things), that:

- (a) Evolution breached the Evolution Subcontract; and
- (b) Evolution engaged in misleading or deceptive conduct in contravention of s 18 of the Australian Consumer Law,

causing Icon loss and damage (such loss or damage including Icon's potential liability to SOPA, as well as other losses).

18. In the Fifth Cross-Claim List Statement filed on 27 April 2020 (AAD/ECOVE's Cross Claim List Statement):

- (a) AAD alleges, amongst other things, that Icon is liable to AAD under the Head Contract in respect of any liability that AAD is found to have to SOPA; and
- (b) ECOVE Group Pty Ltd (ECOVE) alleges that Icon is liable to it in negligence.

19. Icon repeats its response to AAD and ECOVE's allegations that is set out in Icon's List Response to AAD/ECOVE's Cross Claim List Statement.

B. ISSUES LIKELY TO ARISE

1. Did Evolution breach the Evolution Subcontract, causing Icon loss and damage (such loss or damage including Icon's potential liability to other parties in the proceedings, as well as other losses)?
2. Did Evolution engage in misleading or deceptive conduct in contravention of ss 18 and 29 of:
 - (a) the Australian Consumer Law, being Schedule 2 of the *Competition and Consumer Act 2010* (Cth); or
 - (b) the Australian Consumer Law (NSW), being the Australian Consumer Law as applied by s 28 of the *Fair Trading Act NSW* (1987),

causing Icon loss and damage (such loss or damage including Icon's potential liability to other parties in the proceedings, as well as other losses)?

3. Is Icon entitled to contribution from Evolution pursuant to s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)*?

C. CROSS-CLAIMANT'S CONTENTIONS

The use of italics (for example, '*design documents*' or '*project requirements*') denotes the use of a term that is defined in the Evolution Subcontract.

A. BACKGROUND

Parties

1. Icon, the cross-claimant on the Amended Fourth Cross-Claim Statement:
 - (a) is a corporation that can sue and be sued in its corporate name and style;
 - (b) is in the business of providing construction services;
 - (c) is the third cross-defendant to the First Cross-Claim brought against it and others by SOPA;
 - (d) is the cross-claimant in respect of the Second Cross-Claim filed against WSP; ~~and~~
 - (e) is the second cross-defendant to the Third Cross-Claim brought against it and Evolution by WSP;
 - (f) is the third defendant to the claim brought against it and others by the plaintiffs (and Group Members); and
 - (g) is the first cross-defendant to the Fifth Cross-Claim brought against it and others by AAD and Ecove.

2. Evolution, the cross-defendant to the Amended Fourth Cross-Claim Statement:

- (a) is a corporation that can sue and be sued in its corporate name and style;
- (b) is in the business of providing precast concrete works and, as part of this business, designs, manufactures and installs precast concrete wall panels; and
- (c) is the first cross-defendant to the Third Cross-Claim brought against it and Icon by WSP.

Contractual chain

3. On or about 29 October 2015, AAD and Icon entered into a contract (**Head Contract**), whereby Icon agreed to design and construct the Opal Tower Development, which included the residential building known as the Opal Tower (**Building**).
4. On 24 November 2015, Icon and WSP entered into the Consultancy Agreement by which WSP agreed to provide structural and civil engineering design and associated services in relation to the design of the structural elements (excluding external and landscaping works) of the Opal Tower Development.
5. On 31 August 2016, Icon and Evolution entered into the Evolution Subcontract, pursuant to which Evolution agreed to provide precast concrete works, and to design, manufacture and install concrete precast panels for the Opal Tower Development.
6. The Evolution Subcontract is comprised of:
 - (a) the formal instrument of agreement;
 - (b) the General Conditions of Subcontract (**General Conditions**);
 - (c) the scope of works dated 23 August 2016 (Appendix 1) (**Scope of Works**); and

- (d) any further documents annexed to or incorporated by reference into the Evolution Subcontract.

Particulars

Clause 1 Formal Instrument of Agreement

7. By clause 2.1 of the General Conditions, Evolution agreed that it would carry out and complete the *WUS* ('work under the Evolution Subcontract') in accordance with the Evolution Subcontract and the directions authorised by the Evolution Subcontract.
8. The services that Evolution was obliged to perform under the Evolution Subcontract included, but was not limited to, the design and construction of all precast concrete works associated with the Opal Tower project.

Particulars

Scope of Works, clauses 1 and 5.1.1 and, in particular, the definition of *Subcontractor's Design Obligations*, the *Subcontract works* and *WUS* in clause 1 of the General Conditions

9. In addition, the Scope of Works provided, amongst other things, that:
- (a) by clause 3.1.1, all shop drawings (being comprehensive installation and manufacturing drawings with notes and/or specifications and/or catalogue pamphlets as required for the execution of *WUS* which identify all work associated with *WUS* including work which is to be executed by others) prepared and provided by Evolution were to be of a scale which adequately and clearly shows the relevant information as approved by Icon, and should include set-outs, hobs and plinth sizes, their location and structural requirements;
- (b) by clause 4.1.1, Evolution was obliged to develop, change and finalise the design of the subcontract works to ensure that the subcontract works achieve and are fit for their intended purpose;

- (c) by clause 5.2.4, approved shop drawings shall take precedence over all other drawings;
 - (d) by clause 5.2.5, Evolution was to fully dimension all shop drawings, and was to be responsible for the accuracy of all dimensional information; and
 - (e) by clause 5.2.7, the design of the precast panels must comply with WSP's design intent for the Building.
10. The General Conditions refer, on a number of occasions, to the *Main Contractor's [i.e. Icon's] Project Requirements*. That term is defined in clause 1 of the General Conditions to mean Icon's written requirements for *the Subcontract works* described in the documents stated in Annexure Part A, which documents include the Scope of Works.
11. Clause 1 of the Scope of Works in turn identifies the nature of the Opal Tower project which Icon had been contracted to design and construct as follows:
- '[Icon] has been engaged to design and construct the Opal Tower on behalf of [AAD]. The works include; Three levels of basement Car parking; associated Stormwater and Landscaping works; Ground floor entry, retail & commercial tenancies, Thirty Six (36) residential floors with 392 residential dwellings and a Roof plantroom'.*
12. By the definition of *Subcontractor's [i.e. Evolution's] design obligations* in clause 1 of the General Conditions, Evolution was obliged, amongst other things, to:
- (a) ensure that the *design documents* (including any *design documents* which were not produced by Evolution) satisfy the *Main Contractor's [i.e. Icon's] project requirements*, all *legislative requirements* and any requirements of an *Authority*;
 - (b) ensure that the *design documents* contained sufficient detail to construct the *work under the Subcontract (WUS)* so that the *WUS*, when completed,

satisfied Evolution's warranties in clause 2.6 of the General Conditions (**Design Detail Obligation**);

- (c) ensure that the details contained in any *design documents* prepared by Evolution were coordinated with the details contained in all other *design documents* (**Design Co-ordination Obligation**); and
- (d) design *the Subcontract Works* so that *the Subcontract Works*, when constructed, shall be structurally and aesthetically sound (**Structural Outcome Obligation**).

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

13. Pursuant to clause 2.6 of the General Conditions, Evolution warranted to Icon that:

- (a) Evolution would at all times be suitably qualified and experienced and would exercise the due skill, care and diligence in the execution and completion of the *WUS* expected of a competent subcontractor;
- (b) Evolution would execute the *WUS* so that *the Subcontract Works* when complete would be fit and adequate for their purpose, suitable for their intended use or occupation and comply with all *Laws* and requirements of the Evolution Subcontract including any *design documents*;
- (c) Evolution would construct and complete the *WUS*:
 - (i) in accordance with the Evolution Subcontract documents so that *the Subcontract Works*, when completed, would comply with all the requirements of the Evolution Subcontract and *Other Approvals*; and
 - (ii) so as to create a high quality (in terms of design, construction, operation and management) *Building Complex* having regard to the specified finishes and the requirements of the *Main Contractor's [i.e. Icon's] Project Requirements* which includes:

- (A) high quality urban form and amenity;
 - (B) design outcomes which are of a high quality consistent with the recent development of venues and facilities within *Sydney Olympic Park*; and
 - (C) high quality residential development in accordance with the *legislative requirements, Other Approvals* and *SOPA Guidelines*;
- (d) Evolution would carry out the work in a proper and workmanlike manner and in accordance with the plans and specifications set out in the Evolution Subcontract;
 - (e) Evolution would supply materials for use in the work which are good and suitable for the purpose for which they are used and that, unless otherwise stated in the Evolution Subcontract, those materials will be new;
 - (f) Evolution would carry out the work with reasonable care and skill;
 - (g) Evolution would carry out the *WUS* so that it will be suitable for occupation at the time the work is completed;
 - (h) in circumstances where the purpose for which the work was to be carried out was identified in paragraph 1 of the Scope of Works (as pleaded in paragraph 11 above), the work Evolution was to carry out and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result; and
 - (i) Evolution would carry out and complete the *Subcontractor's [i.e. Evolution's] design obligations*, (which obligations include the Design Detail Obligation, the Design Co-ordination Obligation and the Structural Outcome Obligation) to accord with the *Main Contractor's [i.e. Icon's] Project Requirements* (which, as pleaded in paragraph 9(e) above,

includes the Scope of Works) so that when complete, *the Subcontract Works* shall be:

- (i) without *defects*;
- (ii) fit for their intended purpose; and
- (iii) comply with all the requirements of the Evolution Subcontract and all *legislative requirements*.

14. Clause 2.7 of the General Conditions provided that the warranties remained unaffected notwithstanding that design work has been carried out by or on behalf of Icon or AAD.
15. Pursuant to clause 2.8 of the General Conditions, Evolution agreed to indemnify Icon and its employees, agents and consultants (**Indemnified Parties**) to the maximum extent permitted by law from and against all losses (including direct, indirect and consequential loss), damages, liabilities, actions, suits, claims, demands, costs and expenses (including legal fees on a full indemnity basis) which the Indemnified Parties may suffer, sustain or incur in any way arising out of, as a result or consequence of, or in connection with any:
- (a) breach by Evolution of its obligations under the Evolution Subcontract;
 - (b) damage to property in connection with the undertaking of the work under the Evolution Subcontract by Evolution; and
 - (c) negligent or wrongful conduct, act or omission, on the part of Evolution in connection with the undertaking of the *WUS*.
16. Pursuant to clause 2.8 of the General Conditions, Icon and Evolution agreed that to the extent permitted by law, the operation of Part 4 of the *Civil Liability Act 2002* (NSW) (**Civil Liability Act**) was excluded in relation to all and any rights, obligations and liabilities arising under or in relation to the Evolution

Subcontract however such rights, obligations or liabilities were sought to be enforced.

17. Clause 2.9 of the General Conditions provided that all representations and warranties in the Evolution Subcontract:
 - (a) remained in full force and effect following completion of *the Subcontract Works* and the issue of the final certificate; and
 - (b) were given with the intent that liability thereunder shall not be confined to breaches thereof discovered prior to the date of the Evolution Subcontract.

18. Clause 2.9 of the General Conditions also provided that each indemnity in the Evolution Subcontract:
 - (a) was a continuing obligation;
 - (b) constituted a separate and independent obligation of the party giving the indemnity from its other obligations under the Evolution Subcontract; and
 - (c) survived termination of the Evolution Subcontract.

19. By clause 2.10 of the General Conditions, Evolution also warranted that:
 - (a) all activities of Evolution under the Evolution Subcontract, including the *WUS*, would be performed in a proper and workmanlike manner and in accordance with the Evolution Subcontract;
 - (b) all activities of Evolution under the Evolution Subcontract, including the *WUS*, would be done in accordance with, and will comply with, the HB Act and all *legislative requirements*;
 - (c) Evolution's activities under the Evolution Subcontract, including the *WUS*, would result, to the extent of the work conducted, in a dwelling that was reasonably fit for occupation as a dwelling; and

- (d) *the Subcontract Works* and any materials used in doing *the Subcontract Works* will be reasonably fit for the specified purpose or result.
20. By clause 5.4 of the General Conditions, it was a condition precedent to the reduction and release of *security* that Evolution execute and return to Icon the warranty deeds in substantially the same form as those included in Appendices 7 and 8 of the Evolution Subcontract.
21. By clause 16B of the General Conditions, Evolution was required to effect, and maintain until the final certificate is issued and for a period of seven years thereafter, professional indemnity insurance with a level of cover of not less than \$AUD 10 million.
22. In breach of clause 16B of the General Conditions, Evolution failed to effect and maintain professional indemnity insurance before commencing the *WUS* or at any time thereafter.
23. By clause 17 of the General Conditions (noting that Alternative 2 therein was agreed by the parties in item 24 of Annexure Part A) Evolution was required to:
- (a) effect, and maintain for the duration of the Evolution Subcontract, a public liability policy of insurance with a level of cover of not less than \$AUD 20 million per occurrence;
 - (b) ensure that any such public liability policy of insurance named AAD and Icon as insureds; and
 - (c) ensure that any such public liability policy of insurance covered the parties' respective liability to each other for loss or damage to property.
24. By clause 19.1 of the General Conditions, Evolution is obliged to provide satisfactory evidence that it effected:
- (a) a professional indemnity policy of insurance as required by clause 16B of the General Conditions; and

- (b) a public liability policy of insurance as required by clause 17 of the General Conditions,

whenever requested to do so in writing by Icon.

25. On 1 January 2019, Icon requested that Evolution provide copies of the professional indemnity policy, and the public liability policy, that it was required to effect by reason of clauses 16B and 17 of the General Conditions.
26. As at the date of this Amended Fourth Cross-Claim Statement, Evolution has not provided the policies of insurance referred to in paragraph 25 above.
27. By clause 5.5.12 of the Scope of Works, Evolution was required to '*warrant and comply with plans and specifications provided by the Main Contractor: 7 year warranty for workmanship and materials including any caulking*'.

First Evolution Warranty Deed

28. On or about 29 November 2017, Evolution executed a warranty deed (**First Evolution Warranty Deed**) in favour of Icon.
29. By clause 1 of the First Evolution Warranty Deed, Evolution warranted to Icon that all work performed and all materials or parts supplied by Evolution in the course of the Evolution Subcontract Works will be:
- (a) at least of the quality into the standard required by the Evolution Subcontract;
- (b) to the extent that the level of quality or standard are not stipulated in the Evolution Subcontract, of good workmanship and merchantable quality; and
- (c) fit for the purpose or purposes for which they are required.
30. Clause 4 of the First Evolution Warranty Deed provided that Evolution will indemnify Icon against any direct, indirect or consequential loss or damage

of any nature whatsoever, directly or indirectly arising out of any breach of the warranties, covenants or other conditions given by Evolution.

Second Evolution Warranty Deed

31. On or about 29 November 2017, Evolution executed a warranty deed (**Second Evolution Warranty Deed**) in favour of Icon and AAD.
32. By clause 1 of the Second Evolution Warranty Deed, Evolution represented and warranted to Icon and AAD that upon their delivery to Icon or upon their installation, the precast panels:
 - (a) will meet the requirements of the *Specification*;
 - (b) will be of merchantable quality;
 - (c) will be fit for the purpose required; and
 - (d) will be free from *defects* and deficiencies.

HB Act

33. If it be found, on a proper construction of the HB Act, that the services that Evolution provided pursuant to the Evolution Subcontract constituted '*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:
 - (a) the statutory warranties in s 18B of the HB Act were, by reason of s 18B(2) of the HB Act, implied into the Evolution Subcontract to the extent that such agreement required Evolution to design 'dwellings' as that expression is defined in cl 3(1) of Schedule 1 to the HB Act; and
 - (b) any provision in the Evolution Subcontract that sought to limit Evolution's liability to Icon would be void by reason of s 18G of the HB Act.

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

34. WSP, as the designer of the structural elements of the Building, designed the Building such that a hob-beam would be placed in the common property area of the Building at external areas at levels 4, 10 and 16 with either a precast panel (or precast panels) or in-situ wall installed on top of the hob-beam to form a wall.
35. The Building, including levels 4, 10 and 16, was designed by WSP such that:
- (a) the precast panels (which form a precast wall) would be (and were) placed on a load bearing concrete hob-beam and, in the case of the in-situ walls at Level 4, 4C-5.5 and Level 16, 16C-5.5, the walls were cast on a load bearing concrete hob-beam;
 - (b) the precast panels were connected to the hob-beam by a grouted joint; and
 - (c) the loads from the wall are transmitted through the hob beam to the columns supporting the hob-beam.
36. The WSP design assumes that the hob-beam carries load induced by the precast panels above the hob-beam through grout that is placed between the precast panel and the hob-beam, and that this load is concentrated over a bearing area above the supporting columns and is transmitted to the columns below the hob-beam by compressive struts.
37. On and from 19 September 2016, Evolution was provided with WSP 'for construction drawings', which contained the design as described in paragraphs 35 and 36 above.
38. In carrying out its work under the Evolution Subcontract, Evolution was required to carry out such work consistently with the WSP design as described in paragraphs 35 and 36 above.

Services provided by Evolution

39. Under the Evolution Subcontract, Evolution was engaged to design and construct all precast concrete works associated with the Opal Tower project.

Particulars

Clause 5.1.1 of the Scope of Works (see Appendix 1 to the Evolution Subcontract)

40. The Scope of Works under the Evolution Subcontract included the design, manufacture, supply and installation of the precast panels referred to in paragraphs 34 to 36 above.
41. Evolution provided services pursuant to the Evolution Subcontract during the period 31 August 2016 to 8 November 2017, during which time Evolution:
- (a) designed and manufactured the precast panels to be placed on the load bearing concrete hobs ~~beams~~ on levels 4, 10 and 16;
 - (b) issued shop drawings that specified how precast panels were to be installed, which were given to WSP for its approval; and
 - (c) installed precast panels in the Building, including on levels 4, 10 and 16.

The grouting design change

42. On 16 September 2016, WSP issued 'Typical Precast Wall Details' Drawing No. 4419 S06.010[A] marked as 'For Construction' which specified the use of a 20mm grout bed in the joint between the precast panel and the hob where the precast panels were less than 180mm thick ~~showed full grout coverage of the joint between the precast panel and the hob beam~~ (**WSP's Precast Panel Design**).
- 42A. As at 16 September 2016, neither Drawing 4419 S06.010[A], nor any other design drawing prepared by WSP, specified the use of grouting in the joint

between the precast panel and the hob where the precast panels exceeded 180mm in thickness.

43. On or around 21 September 2016, Evolution issued a drawing to Icon, WSP and others entitled 'Precast Detail Page' DE01 Revision P2 (**Drawing DE01 P2**), which specified design details for:
- (a) hob ~~beam~~ to precast panel connections;
 - (b) precast panel to precast panel connections; and
 - (c) precast panel to suspended slab connections,

that were to apply to areas of the Building where other drawings nominated or called up the use of such detail.

Particulars

Aconex from Evolution to Icon, Bates Smart and WSP dated 21 September 2016 timed 2:50am (mail no. EVOPS-SUBADV-000028) including attachments '20-09-2016 ICON - OPAL TOWER precast package level 1 for re-approval.zip', '20-09-2016 MA01 - ELEVATION.dwg' and '20-09-2016 MA01 - LAYOUT.dwg'

44. Drawing DE01 P2, in Detail 1 and Detail 1A, ~~changed the grouting of~~ recorded that the joints between the hob beams and precast panels were to be grouted, ~~such that rather than there being full width grout, grouting would be placed on the inner portion of the hob beam only~~ (**Partial Grouting**).
45. On 22 September 2016, WSP placed a stamp on Drawing DE01 P2 in the following terms (**Reviewal Stamp**):

<input checked="" type="checkbox"/>	REVIEWED, NO COMMENTS
-------------------------------------	-----------------------

<input type="checkbox"/>	REVIEW, AMEND AS NOTED
<input type="checkbox"/>	REVISE AND RESUBMIT
<p>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</p>	

46. On 22 September 2016, WSP issued Drawing DE01 P2 with the Reviewal Stamp to Icon.
47. Between 21 September 2016 and 5 July 2017, Evolution issued revisions of Drawing DE01 P2, each revision including Detail 1 and Detail 1A, showing Partial Grouting.
48. On or around 31 October 2016, Evolution issued a further revision titled 'Precast Detail Page' DE01 Revision P5 (**Drawing DE01 P5**) to Icon, WSP and others which included Detail 1 and Detail 1A, showing Partial Grouting.
49. On 3 November 2016, WSP placed a Reviewal Stamp on Drawing DE01 P5 with the terms set out in paragraph 45 above.
50. WSP's approval of the design change on this typical precast details sheet drawing for Partial Grouting between the hob-beam and precast panels (**Grouting Design Change**):
 - (a) applied as the applicable detail where a hob-beam to precast panel connection was to be constructed throughout the Building; and

- (b) was not thereafter administratively incorporated by WSP into any amended 'for construction' drawings (**FC Drawings**), including FC Drawing No. 4419 S06.010[A].

51. Following the Grouting Design Change, and subject to the matters pleaded in paragraphs 51A to 51C below, Evolution installed the precast panels at, amongst other locations, locations 4A-10.5, 4B-0.5, 10C-14.5, 16A-10.5 and 16B-0.5 on levels 4, 10 and 16 with Partial Grouting.

51A. On 26 January 2019, WSP issued structural design advice SDA #081 to the Department of Planning and Environment, which stated that a void (which extended a minimum of 500mm in length) had been found in the grouting of the joint between the precast panel and the hob that had been installed by Evolution at location 4A-10.5 (**Grouting Void**).

51B. Icon does not admit:

(a) that the joint between the precast panel and the hob at location 4A-10.5 contained the Grouting Void; or

(b) that Evolution otherwise failed properly to install the precast panel at location 4A-10.5 with Partial Grouting in accordance with the requirements of Evolution Drawing DE01 P5.

51C. Icon further says that if it be found that Evolution failed properly to grout the joint between the hob and precast panel at location 4A-10.5 because the joint contained the Grouting Void, it follows that Evolution's installation of the precast panel at location 4A-10.5 was not done in accordance with the requirements of Evolution Drawing DE01 P5, which was approved by WSP in the circumstances pleaded in paragraphs 48 - 50 above.

Panel Reinforcement

51D. On 16 September 2016, WSP issued 'Typical Precast Wall Details – Sheet 02' Drawing No. 4419 S06.011[A] marked as 'For Construction' which showed

the reinforcement required in each precast panel type in the Building (**WSP's Panel Reinforcement Design**).

51E. WSP's Panel Reinforcement Design required 11N28 horizontal reinforcement bars at 100 centres to be installed in the precast panel at 10C-14.5.

Particulars

WSP Drawing No. 4419 S06.011[C]

51F. During the period 30 August 2016 to 3 August 2017, Evolution issued shop drawings for precast panels to be installed at various locations (**Precast Panel Shop Drawings**).

51G. Evolution's Precast Panel Shop Drawing for Panel C1012-R at 10C-14.5 showed 11N28 horizontal reinforcement bars at 100 centres to be installed in the bottom portion of the precast panel at 10C-14.5.

Particulars

Evolution Drawing No. C1012-R [1]

51H. On 19 December 2016, WSP issued Drawing C1012-R[1] with the Reviewal Stamp to Icon.

51I. During the period 24 October 2016 to 24 August 2017, Evolution installed the precast panels in various locations in the Building.

51J. In their Amended Commercial List Statement the plaintiffs plead at paragraph 57(b)(iv) that panel 10C-14.5 at level 10 (otherwise known as location 10C-14.5) was not constructed using the bottom horizontal reinforcement as shown on FC Drawing 4419 S06.011[C] (**Evolution's Inverted Reinforcement Error**).

51K. In a report dated 20 November 2020 that had been served by AAD and Ecove in these proceedings, the author (Stephen Branch) expressed the view that the precast panel at location 10C-14.5 (which had been installed by Evolution)

also contained insufficient steel reinforcement in the bottom area of the precast panel (**Alleged Insufficient Reinforcement Error**).

51L. Icon does not know, and does not admit, that the Alleged Insufficient Reinforcement Error occurred as the precast panels were delivered to the building site for installation in a fully complete state with the steel reinforcement encased in concrete.

C. DAMAGE OBSERVED IN THE BUILDING

52. On 24 December 2018, damage occurred and was visually identified in the Building in a precast panel and hob-~~beam~~ at Level 10, 10C-14.5.
53. On 24 December 2018, all residents were evacuated from the Building under the instruction of emergency services.
54. On 25 December 2018, all residents except for residents in 51 apartments were permitted to reoccupy the Building.
55. On 27 December 2018, further damage was identified in a precast panel and hob-~~beam~~ at Level 4, 4A-10.5.
56. On 27 December 2018, WSP directed all residents to evacuate the Building which process was completed on or about 28 December 2018.
57. The damage identified in the Building on and from 24 December 2018 included the following:
 - (a) damage on level 4 in the form of:
 - (i) spalling and cracking of a hob-~~beam~~ and a precast panel at Level 4, 4B-0.5; and
 - (ii) spalling and cracking of a hob-~~beam~~ and a precast panel at Level 4, 4A-10.5, noting that this includes the damage referred to in paragraph 55 above,

(Level 4 Damage);

- (b) damage on level 10 in the form of:
- (i) spalling and cracking of a hob-beam and a precast panel at Level 10, 10C-14.5, noting that this includes the damage referred to in paragraph 52 above; and
 - (ii) vertical displacement and cracking of the slab on level 10 (in the vicinity of the hob-beam and precast panel at Level 10, 10C-14.5),

(Level 10 Damage); and

- (c) damage on level 16 in the form of:
- (i) cracking of a precast panel at Level 16, 16B-0.5, above columns C2 and C22;
 - (ii) cracking of an in-situ wall at Level 16, 16C-5.5, above columns C9 and C40; and
 - (iii) cracking of a precast panel at Level 16, 16A-10.5, above columns C16 and C34,

(Level 16 Damage).

58. The Level 4 Damage, Level 10 Damage and Level 16 Damage is together referred to as the '**Observed Damage**'.

D. RECTIFICATION DESIGN AND RECTIFICATION WORKS

59. Following the identification of the damage on 24 December 2018:
- (a) WSP prepared a rectification design (as pleaded in paragraph 69 of Icon's Amended Second Cross-Claim Statement); and

- (b) Icon undertook rectification work (as pleaded in paragraphs 76, 77 and 79 of Icon's Amended Second Cross-Claim Statement) in accordance with the full rectification design scope prepared by WSP.

60. As at 11 June 2021 ~~the date of this Fourth Cross-Claim Statement~~, Icon:

- (a) has incurred ~~\$24,967,764.55~~ \$16,907,409 in rectifying the common property and associated costs (**Icon's Incurred Rectification Costs**);
- (b) will incur further costs in rectifying the common property (**Icon's Future Rectification Costs**);
- (c) has made ~~\$280,804.39~~ \$220,734 in payments to certain Group Members in circumstances where those Group Members were unable to lease their lots following the evacuation of the Opal Tower and during the period in which rectification work was being carried out (**Group Members' Loss of Rent Costs**);
- (d) has made ~~\$6,679,999.08~~ \$6,679,999.08 in payments to, or directly to accommodation providers and storage providers (including related insurance costs and associated costs) for the benefit of, certain Group Members who were unable to live in their units and were therefore required to seek alternative accommodation arrangements following the evacuation of the Opal Tower and during the period in which rectification work was being carried out (**Group Members' Alternative Accommodation Costs**);
- (e) has made ~~\$4,103,560.74~~ \$3,984,026.84 in payments to certain lessees of units or lots in the Opal Tower (and associated costs) who were, and have been, unable to live in or had restricted use of the lots they leased and therefore were required to seek alternative accommodation arrangements or compensation following the evacuation of the Opal Tower and during the period in which rectification work was being carried out (**Lessees' Alternative Accommodation Costs**);

- (f) has made \$128,531 in payments made, or payments which will be made, to certain Group Members on account of Icon being granted a licence to occupy the lots owned by those Group Members so as to enable Icon to conduct rectification work on the common property (**Licence Occupation Fees**);
- (g) has made \$1,705,613.12 in payments to the Owners Corporation so that the Owners Corporation had sufficient funds to insure that part of the Opal Tower comprised in strata plan 97315 for the period 31 May 2019 to 30 May 2020, thus obviating the need for the Owners Corporation to levy the lot owners further (**Owners Corporation's Insurance Costs**);
- (h) has suffered loss and damage because it:
- (i) was terminated from at least one contract that it had been awarded;
 - (ii) was not awarded contracts for other projects:
 - (A) having tendered for such projects; and/or
 - (B) having been issued a letter of intent for such projects; and
 - (iii) was not permitted to tender for other projects,
- as a result of the matters in paragraphs 52 to 57 above becoming publicly known (**Icon's Loss of Opportunity / Loss of Contract Damages**); and
- (i) has paid AAD (and did so on 10 March 2020) the sum of \$3,867,677.78, which payment was made to AAD in lieu of AAD having recourse to a bank guarantee in the same amount, in circumstances where this Court held in *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2020] NSWSC 178 that AAD was entitled to have recourse to the bank guarantee (**Bank Guarantee Sum**); and

- (j) has incurred and will continue to incur legal costs in addition to the legal costs incurred in defending the proceedings (Legal Costs),

((a)-(j) collectively, **Icon's Loss and Damage**, excluding interest thereon).

E. ALLEGATIONS MADE IN THE PROCEEDINGS

The plaintiffs' claim

61. The plaintiffs have alleged in their Amended Commercial List Statement that they, and the Group Members, have suffered loss and damage by reason of SOPA's breach of the statutory warranties in the HB Act.

62. In its Commercial List Response, SOPA denies:

- (a) that it breached the statutory warranties in the HB Act; and
- (b) that the plaintiff, and the Group Members, have suffered loss and damage as a result of any breach of the statutory warranties in the HB Act.

62A. The plaintiffs have also alleged in their Amended Commercial List Statement that they, and the Group Members, have suffered loss and damage by reason of WSP's and Icon's alleged negligence and alleged misleading or deceptive conduct in contravention of s 18 or s 29 of the Australian Consumer Law.

62B. In its Commercial List Response, Icon:

- (a) denies that it engaged in misleading or deceptive conduct or that it was negligent;
- (b) says further that WSP was negligent and engaged in misleading or deceptive conduct;
- (c) says further that the necessary condition for the occurrence of the structural damaged that occurred on 24 December 2018 on levels 4, 10 and 16 of the building was the failure of WSP to design the hobs to ensure that there was:

(i) sufficient transverse steel reinforcement across the thickness of the hob so as to resist bursting tension; and

(ii) sufficient steel reinforcement so as to control inclined cracking in the hob.

(c) denies that the plaintiffs, or the Group Members, have suffered loss and damage as alleged.

SOPA's cross-claim against Icon

63. In SOPA's Amended Cross-Claim Statement, SOPA alleges, insofar as Icon is concerned, that:

- (a) if SOPA is found to be liable to the plaintiffs or the Group Members, Icon must indemnify SOPA for such liability; and
- (b) if the Building was, or is, affected by the alleged FC System Defects or Strength Defects (as defined in SOPA's Amended Cross-Claim Statement), Icon breached the statutory warranties under the HB Act in relation to the lots in the Building owned by SOPA (the '**Retained Units**') and has suffered loss and damage as a result.

64. Icon repeats its response to SOPA's allegations that are set out in the Icon's First Cross-Claim List Response and, in particular, repeats paragraph 58A(a) of such response where Icon pleads that it is not bound by any admission that SOPA has made in its Amended Commercial List Response.

Icon's Amended cross-claim against WSP

65. Icon has alleged in Icon's Amended Second Cross-Claim Statement, in summary (and amongst other things), that:

- (a) in preparing its design of the hob ~~beam~~ referred to in paragraph 34 above, WSP failed to design for bursting stresses, contrary to what was required by AS 3600;

- (b) such design defect was the cause of the Observed Damage; and
- (c) WSP therefore breached the Consultancy Agreement,

and that Icon has suffered loss or damage as a result.

66. Icon also alleges that if it be found that the Partial Grouting of the precast panel joints on levels 4, 10 and 16 caused, or materially contributed to, the Observed Damage, WSP in any event approved a change to the design of the Building such that Partial Grouting would be used.
67. In addition to a claim that WSP breached the Consultancy Agreement, Icon alleges that WSP engaged in misleading or deceptive conduct in contravention of s 18 of the Australian Consumer Law.
68. In response to Icon's claim against it, WSP:
- (a) denies that it breached the Consultancy Agreement or engaged in misleading and deceptive conduct in contravention of s 18 of the Australian Consumer Law;
 - (b) says further that Icon is guilty of contributory negligence; and
 - (c) says further that if, which WSP denies, the failure to grout the full width of the ~~hob-beam~~ between the precast panel and the ~~hob-beam~~ was causative of the structural damage on the Building and that WSP is liable to Icon as a result:
 - (i) Icon's claim that WSP breached the Consultancy Agreement is a claim for loss arising from a failure to take reasonable care and is therefore an 'apportionable claim' within the meaning of s 34(1) of the Civil Liability Act;
 - (ii) Evolution is a 'concurrent wrongdoer' within the meaning of s 34(2) of the Civil Liability Act as Evolution is a person whose acts or omissions caused Icon's Loss and Damage;

- (iii) Icon's claim for damages under s 236 of the Australian Consumer Law is an apportionable claim within the meaning of s 87(1) of the *Competition and Consumer Act 2010* (Cth); and
- (iv) Evolution is a concurrent wrongdoer within the meaning of s 87CB(3) of the *Competition and Consumer Act 2010* (Cth) as Evolution is a person whose acts or omissions caused Icon's Loss and Damage.

68A. In AAD/Ecove's Cross Claim List Statement:

- (a) AAD alleges that, amongst other things, Icon is liable to AAD under the Head Contract in respect of any liability that AAD is found to have to SOPA; and
- (b) Ecove alleges that Icon is liable to it in negligence.

68B. Icon repeats its response to AAD and Ecove's allegations that is set out in Icon's List Response to AAD/Ecove's Cross Claim List Statement.

F. ICON'S BREACH OF CONTRACT CLAIM AGAINST EVOLUTION

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

69. As pleaded in paragraphs 41, 48, and 51 and 51A to 51L above, Evolution:

- (a) designed and manufactured the precast panels to be placed on the load bearing concrete hobs ~~beams~~ on levels 4, 10 and 16 and issued shop drawings that showed how precast panels were to be installed;
- (b) issued Drawing DE01 P2 and Drawing DE01 P5, which showed Partial Grouting; and

- (c) installed the precast panels (including with Partial Grouting) at, amongst other locations, locations 4A-10.5, 4B-0.5, 10A-4.5, 10B-9.5, 10C-14.5, 16A-10.5 and 16B-0.5 on levels 4, 10 and 16.

70. If it be found that: ~~the manner in which Evolution installed (including with Partial Grouting) the precast panels at~~

(aa) Evolution's installation of the precast panels with Partial Grouting consistently with Detail 1 and 1A in Drawing DE01 P5 at locations 4A-10.5, 4B-0.5, 10A-4.5, 10B-9.5, 10C-14.5, 16A-10.5 and 16B-0.5 on levels 4, 10 and 16; and/or

(ab) Evolution's Inverted Reinforcement Error (referred to in paragraph 51J above); and/or

(ac) the Alleged Insufficient Reinforcement Error (referred to in paragraph 51K above), assuming that such error occurred, which is not admitted by Icon; and/or

(ad) the joint between the hob and panel at location 4A-10.5 contained the Grouting Void, meaning that Evolution failed properly to grout the joint at that location in accordance with the requirements of Evolution Drawing DE01 P5 (which was approved by WSP in the circumstances pleaded in paragraphs 48 - 50 above).

caused, or materially contributed to, the Observed Damage (or any part of it), it follows that:

- (a) Evolution breached clause 2.6(b) of the General Conditions by failing to exercise the due skill, care and diligence in the execution of the *WUS* expected of a competent *subcontractor* (defined in cl 1 as 'a subcontractor skilled and experienced in carrying out work similar in nature, size and complexity to *the Subcontract Works*');
- (b) Evolution breached clause 2.6(c) of the General Conditions by failing to execute the *WUS* so that *the Subcontract Works* when complete would

be fit and adequate for their purpose, suitable for their intended use or occupation and comply with all laws and requirements of the Evolution Subcontract including any *design documents*;

- (c) Evolution breached clause 2.6(d) of the General Conditions by:
 - (i) failing to construct and complete the *WUS* in accordance with the Evolution Subcontract documents so that *the Subcontract Works*, when completed, would comply with all the requirements of the Evolution Subcontract and *Other Approvals*; and
 - (ii) failing to construct and complete the *WUS* so as to create a high quality (in terms of design, construction, operation and management) *Building Complex* having regard to the specified finishes and the requirements of the *Main Contractor's [i.e. Icon's] Project Requirements*;
- (d) Evolution breached clause 2.6(h) of the General Conditions by failing to carry out the work in a proper and workmanlike manner and in accordance with the plans and specifications set out in the Evolution Subcontract;
- (e) Evolution breached clause 2.6(j) of the General Conditions failing to carry out the work with reasonable care and skill;
- (f) Evolution breached clause 2.6(k) of the General Conditions by failing to carry out the *WUS* (which included installation of the precast panels on levels 4, 10 and 16) so that it will be suitable for occupation at the time the work is completed;
- (g) Evolution breached clause 2.6(l) of the General Conditions (in circumstances where the purpose for which the work to be carried out was identified in paragraph 1 of the Scope of Works (as pleaded in paragraph 11 above)), by failing to ensure that the works were fit for their intended

purpose or were of such nature and quality that they might reasonably be expected to achieve that result;

- (h) Evolution breached clause 2.6(m)(ii) of the General Conditions by failing to carry out and complete the *Subcontractor's [i.e. Evolution's] design obligations* (which obligations include the Structural Outcome Obligation) to accord with the *Main Contractor's [i.e. Icon's] Project Requirements* (which includes the Scope of Works, paragraph 1 of which identifies (as pleaded in paragraph 10 above) the nature of the Opal Tower project which Icon had been contracted to design and construct) so that when complete, *the Subcontract Works* were:
 - (i) without defects;
 - (ii) fit for their intended purpose; and
 - (iii) and comply with all the requirements of the Evolution Subcontract and all *legislative requirements*.
- (i) Evolution breached clause 2.10 of the General Conditions by failing to ensure that its design and installation of the precast panels on levels 4, 10 and 16 was performed in a proper and workmanlike manner and in accordance with the requirements of the HB Act and all *legislative requirements*;
- (j) Evolution breached clause 2.10 of the General Conditions by failing to ensure that its activities resulted in a dwelling that was reasonably fit for occupation as a dwelling;
- (k) Evolution breached clause 4.1.1 of the Scope of Works by failing to develop and finalise the design of the works to ensure they were fit for their intended purpose;
- (l) Evolution breached clause 5.2.5 of the Scope of Works by failing to dimension all shop drawings and by failing to ensure that the dimensional information in all shop drawings was accurate;

- (m) Evolution breached clause 5.2.7 of the Scope of Works by failing to ensure that the design of the precast panels complied with WSP's design intent for the Building;
- (n) Evolution breached clause 1 of the First Evolution Warranty Deed by failing to ensure that its design of the precast panels on levels 4, 10 and 16:
 - (i) was of the quality and standard required by the Evolution Subcontract; and
 - (ii) was a design that was fit for purpose;
- (o) Evolution breached clause 1 of the First Evolution Warranty Deed by failing to ensure that its installation of the precast panels on levels 4, 10 and 16:
 - (i) was performed to the quality and to the standard required by the Evolution Subcontract;
 - (ii) was done in accordance with standards of good workmanship; and
 - (iii) resulted in the precast panels on levels 4, 10 and 16, once installed, being fit for the purpose for which they were required; and
- (p) Evolution breached clause 1 of the Second Evolution Warranty Deed by failing to ensure that the precast panels, when installed:
 - (i) met the requirements of the *Specification*;
 - (ii) were fit for the purpose required; and
 - (iii) were free from *defects* and deficiencies.

71. If it be found that: ~~the manner in which Evolution installed (including with Partial Grouting) the precast panels at~~

(aa) Evolution's installation of the precast panels with Partial Grouting consistently with Detail 1 and 1A in Drawing DE01 P5 at locations 4A-10.5, 4B-0.5, 10A-4.5, 10B-9.5, 10C-14.5, 16A-10.5 and 16B-0.5 on levels 4, 10 and 16; and/or

(ab) Evolution's Inverted Reinforcement Error (referred to in paragraph 51J above), if it existed; and/or

(ac) the Alleged Insufficient Reinforcement Error (referred to in paragraph 51K above), assuming that such error occurred, which is not admitted by Icon; and/or

(ad) the joint between the hob and panel at location 4A-10.5 contained the Grouting Void, meaning that Evolution failed properly to grout the joint at that location in accordance with the requirements of Evolution Drawing DE01 P5 (which was approved by WSP in the circumstances pleaded in paragraphs 48 - 50 above),

caused, or materially contributed to, the Observed Damage (or any part of it) such that Evolution breached (as pleaded in paragraph 70 above):

- (a) the Evolution Subcontract;
- (b) the First Evolution Warranty Deed; and
- (c) the Second Evolution Warranty Deed,

Icon's Loss and Damage represents the loss that Icon has suffered because of such breaches (either individually or by any combination thereof) given that:

- (d) had Evolution not committed such breaches, Icon would not have suffered such loss and damage; and

- (e) such loss and damage flowed ordinarily or naturally from Evolution's breaches.

72. In addition to damages and/or indemnity for Icon's Loss and Damage, Icon will be entitled to damages from Evolution, and/or indemnity under clause 2.8 of the General Conditions in the Evolution Subcontract and clause 4 of the First Evolution Warranty Deed, in an amount equivalent to:

- (a) the amount of any liability that Icon is found to have to WSP in these proceedings (noting that in paragraphs [84]-[91] of its Third Cross-Claim Statement, WSP alleges that Icon is liable to make payment to WSP in the sum of \$1,114,296.56 as a result of WSP providing engineering services following the identification of the Observed Damage);
- (b) the amount of any liability that Icon is found to have to SOPA in these proceedings; and
- (c) the amount of any liability that Icon is found to have to AAD and/or Ecove in these proceedings.
- (d) the amount of any liability that Icon is found to have to the plaintiffs and/or Group Members in these proceedings.

73. Further to the matters pleaded in paragraph 72 above, if the Court finds that:

- (a) Evolution breached, as alleged by Icon, clause 16B of the General Conditions by failing to effect and maintain a professional indemnity policy of insurance for the amount specified in Item 42(c) of Annexure Part A to the General Conditions or for the period specified in Item 42(d) of Annexure Part A; and
- (b) as alleged by Icon, the professional indemnity policy that Evolution was required to effect and maintain by reason of clause 16B would have responded, either in whole or in part, to the claims that Icon makes against Evolution in these proceedings,

Icon will be entitled to damages and/or indemnity from Evolution in an amount equivalent to the amount of indemnity that the professional indemnity policy would have provided to Evolution arising out of Icon's claims against Evolution.

74. The damages referred to in paragraphs 72 and 73 above are referred to collectively as **Icon's Further Loss and Damage**.
75. In the premises of paragraphs 70 to 73 above, and by reason of clause 2.8 of the General Conditions in the Evolution Subcontract and clause 4 of the First Evolution Warranty Deed, Evolution is liable to indemnify Icon for an amount equivalent to the entirety of Icon's Loss and Damage and Icon's Further Loss and Damage.
76. In the alternative to the matters pleaded in paragraph 75 above, Icon is entitled to damages for Evolution's breach of the Evolution Subcontract, the First Evolution Warranty Deed and the Second Evolution Warranty Deed, in an amount equivalent to the entirety of Icon's Loss and Damage and Icon's Further Loss and Damage.

G. CONTRIBUTION PURSUANT TO THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1946 (NSW)

Evolution engaged in 'construction work' and therefore owed a duty of care by reason of the Design and Building Practitioners Act 2020 (NSW).

76A. As pleaded in paragraphs 41 and 69 above, Evolution was engaged to provide design and construction services in respect of the Opal Tower Development and provided such services during the period 31 August 2016 to 8 November 2017.

76B. The design and construction services that Evolution provided during the period identified in paragraph 76A above, being building work and the preparation of regulated designs or other design for building work, constituted 'construction work' (Evolution's Construction Work) as that term is defined in s 36(1) of the Design and Building Practitioners Act 2020 (NSW) (DBP Act).

76C. By reason of s 37(1) of the DBP Act, Evolution was under a duty when carrying out Evolution's Construction Work to exercise reasonable care to avoid economic loss caused by defects:

- (a) in or related to the Building (it being the building for which Evolution's Construction Work was done); and
- (b) arising from Evolution's Construction Work.

76D. By reason of s 37(3) of the DBP Act, any person to whom Evolution owed the statutory duty is entitled to damages for the breach of the duty as if the duty was a duty established by the common law.

76E. The duty owed by Evolution referred to in paragraph 76C above was, by reason of s 37(2) of the DBP Act, owed to each of:

- (a) the plaintiffs;
- (b) the lot owners in strata plan 97315 (ie each of the lot owners in the Building);
- (c) the owners corporation - strata plan 97315; and
- (d) SOPA.

each being either:

- (e) an 'owner' (as that term is defined in s 36(1) of the DBP Act) of the land in relation to which Evolution's Construction Work was carried out; or
- (f) a subsequent owner of such land.

Icon also engaged in 'construction work' and therefore owed a duty of care by reason of the DBP Act

76F. As pleaded in paragraph 3 above, Icon was engaged to design and construct the Building.

76G. During the period 2015 to 2018, Icon constructed the Building and during this period engaged in 'construction work' within the meaning of that term as defined in s 36(1) of the DBP Act.

76H. By reason of s 37(1) of the DBP Act, Icon, as the builder of the Building, had a duty, when constructing the Building, to exercise reasonable care to avoid economic loss caused by defects:

- (a) in or related to the Building (it being the building for which Icon's construction work was done); and
- (b) arising from the construction work carried out by Icon.

76I. The duty owed by Icon referred to in paragraph 76H above was, by reason of s 37(2) of the DBP Act, owed to each of the persons referred to in paragraph 76E above.

If Icon is found liable to SOPA, Icon is entitled to contribution from Evolution:

76J. As pleaded in:

- (a) paragraph 62A above, the plaintiffs (and Group Members) have filed an Amended Commercial List Statement; and
- (b) paragraph 63 above, SOPA has filed an Amended Cross-Claim List Statement,

seeking damages and/or indemnity from Icon.

76K. If, which is denied, the Court finds that:

- (a) Icon failed to exercise reasonable care to avoid economic loss caused by defects when it carried out the relevant 'construction work' such that it breached the duty it owed to SOPA and/or the plaintiffs (and Group Members); and

(b) Icon's breach of duty owed to SOPA caused, or materially contributed to, the loss and damage allegedly suffered by SOPA and/or the plaintiffs (and Group Members).

it follows that Icon is a 'tortfeasor liable' to SOPA and/or the plaintiffs (and Group Members) within the meaning of 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946 (NSW) (LRMP Act)*.

76L. Icon repeats the allegations in paragraphs 69 to 76 above and says further that if the Court finds that the Observed Damage occurred because of the manner in which Evolution designed, manufactured and/or installed the precast panels as set out in paragraphs 69 and 70 above, it follows that:

(a) the Observed Damage was caused by Evolution's failure to take reasonable care when undertaking Evolution's Construction Work in relation to the Building;

(b) any loss and damage suffered by SOPA (being loss or damage that is consequential upon the Observed Damage and which SOPA seeks to pass through to Icon in these proceedings) was therefore caused by Evolution's breach of the duty (imposed by s 37(1) of the DBP Act) that it owed to SOPA when carrying out Evolution's Construction Work in relation to the Building;

(c) any loss and damage suffered by the plaintiffs (and Group Members) was therefore caused by Evolution's breach of the duty (imposed by s 37(1) of the DBP Act) that it owed to the plaintiffs (and Group Members) when carrying out Evolution's Construction Work in relation to the Building; and

(d) for the purposes of s 5(1)(c) of the LRMP Act, Evolution is:

(i) a tortfeasor that, if sued by SOPA, would be liable to SOPA for the damage it has suffered;

(ii) a tortfeasor liable to the plaintiffs (and Group Members).

76M. In the circumstances pleaded in paragraphs 76K and 76L above, and by reason of s 5(2) of the LRMP Act, Icon is entitled to contribution from Evolution in respect of any liability that Icon has to SOPA and/or the plaintiffs (and Group Members) in an amount as may be found by the Court to be just and equitable having regard to the extent of Evolution's responsibility for the damage suffered by SOPA and/or the plaintiffs (and Group Members).

H. EVOLUTION ENGAGED IN MISLEADING OR DECEPTIVE CONDUCT IN CONTRAVENTION OF THE AUSTRALIAN CONSUMER LAW

77. As pleaded in paragraphs 43 and 48 above:

- (a) on or around 21 September 2016, Evolution issued Drawing DE01 P2 which, in Detail 1 and Detail 1A, showed Partial Grouting of the joint between the hob-beam and the precast panel; and
- (b) on or around 31 October 2016, Evolution issued Drawing DE01 P5 which, in Detail 1 and Detail 1A, showed Partial Grouting of the joint between the hob-beam and the precast panel.

78. In issuing Drawing DE01 P2, Evolution represented that:

- (a) Drawing DE01 P2 was the product of the exercise of reasonable care and skill (**Care and Skill Representation**); and
- (b) the installation of the precast panels in accordance with what was specified in Detail 1 and Detail 1A of Drawing DE01 P2 would result in the wall that is formed by the hob-beam and precast panel connection being structurally sound (**Structural Soundness Representation**).

79. Evolution's issuing of Drawing DE01 P2 occurred in the context of it owing the Design Co-ordination Obligation (as pleaded in paragraph 12(c) above).

80. In the context of the matters pleaded in paragraph 79 above, in issuing Drawing DE01 P2, Evolution also represented that the detail in the drawing was consistent with WSP's design of the hob-beam to precast panel

connection (**WSP's Precast Panel Design**) for the Building (**Consistency Representation**).

81. Evolution repeated each of the Care and Skill Representation, the Consistency Representation and the Structural Soundness Representation when it issued Drawing DE01 P5.
82. Each of the Care and Skill Representation, the Consistency Representation and the Structural Soundness Representation were made by Evolution in trade or commerce within the meaning of ss 18 and 29 of:
 - (a) the Australian Consumer Law, being Schedule 2 of the *Competition and Consumer Act 2010* (Cth); and
 - (b) the Australian Consumer Law (NSW), being the Australian Consumer Law as applied by s 28 of the *Fair Trading Act NSW* (1987).

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

83. The Care and Skill Representation was false as Drawing DE01 P2 and Drawing DE01 P5 were not the product of reasonable skill and care given that an ordinary skilled designer and installer of precast panels, exercising reasonable skill and care, would not have designed a hob-beam to precast panel connection in a way that permitted partial grouting in the joint between the hob-beam and precast panel.
84. The Consistency Representation was false because Drawing DE01 P2 and Drawing DE01 P5 were not consistent with WSP's Precast Panel Design as WSP's Precast Panel Design required full grouting between the hob-beam and precast panel.
85. The Structural Soundness Representation, which was a representation as to a future matter within the meaning of s 4(1) of the Australian Consumer Law and s 4(1) the Australian Consumer Law (NSW), was made by Evolution in

circumstances where it did not, for the reasons pleaded in paragraph 83 above, have reasonable grounds for making the representation.

86. By reason of the matters pleaded in paragraph 85 above, and by reason of s 4(1) of the Australian Consumer Law and s 4(1) of the Australian Consumer Law (NSW), the Structural Soundness Representation was a misleading representation.

87. In making:

- (a) the Care and Skill Representation, which was false (as pleaded in paragraph 83 above);
- (b) the Consistency Representation, which was false (as pleaded in paragraph 84 above); and
- (c) the Structural Soundness Representation in the circumstances pleaded in paragraphs 85 and 86 above,

Evolution therefore:

- (d) made false or misleading representations about the quality or standard of services provided, in contravention of s 29(1)(b) of the Australian Consumer Law and s 29(1)(b) of the Australian Consumer Law (NSW); and
- (e) engaged in misleading or deceptive conduct in contravention of s 18 of the Australian Consumer Law and s 18 of the Australian Consumer Law (NSW);

88. In reliance on each of the Care and Skill Representation, the Consistency Representation and the Structural Soundness Representation (as is inferentially alleged by WSP in paragraph 72 of its Third Cross-Claim List Statement against Evolution), WSP:

- (a) approved the detail in Drawing DE01 P2 and Drawing DE01 P5; and

- (b) indicated such approval by placing the Reviewal Stamp (the terms are of which are pleaded in paragraph 45 above) on each of those drawings.

89. WSP's act of:

- (a) approving the detail in Drawing DE01 P2 and Drawing DE01 P5; and
- (b) placing the Reviewal Stamp on each of Drawing DE01 P2 and Drawing DE01 P5,

occurred as part of the process of WSP checking shop drawings, being a process that formed part of WSP's scope of services in the Consultancy Agreement between WSP and Icon.

90. Following WSP's placement of the Reviewal Stamp on each of Drawing DE01 P2 and Drawing DE01 P5, Evolution subsequently constructed the Building on the basis that the detail in Drawing DE01 P2 and Drawing DE01 P5 was to apply to all relevant levels of the Building.

91. If it be found that WSP relied on all, or any, of the Care and Skill Representation, the Consistency Representation or the Structural Soundness Representation, had Evolution, prior to the installation of the precast panels on levels 4, 10 and 16:

- (a) corrected the Care and Skill Representation by advising either WSP or Icon that ordinary skilled concrete works designers do not typically design hob-beam to precast panel connections in a way that permits Partial Grouting in the joint between the hob-beam and precast panel;
- (b) corrected the Consistency Representation by advising either WSP or Icon that Drawing DE01 P2 and Drawing DE01 P5 were not consistent with WSP's design of the precast panels as WSP's design ~~Precast Panel Design as WSP's Precast Panel Design~~ required full grouting between the hob-beam and precast panel; or

- (c) indicated that it did not have a reasonable basis for making the Structural Soundness Representation because ordinary skilled concrete works designers do not typically design hob-beam to precast panel connections in a way that permits partial grouting in the joint between the hob-beam and precast panel,

WSP would have then:

- (d) informed Evolution that it did not approve the detail in Drawing DE01 P2 and Drawing DE01 P5; and
- (e) independently, or in conjunction with Icon, required that the precast panels be installed on levels 4, 10 and 16 such that full grouting was placed in the joint between the hob-beam and the precast panels.

92. Further to the matters pleaded in paragraph 91 above, had Evolution corrected or withdrawn the Care and Skill Representation, the Consistency Representation and the Structural Soundness Representation:

- (a) after the precast panels had been installed on levels 4, 10 and 16; and
- (b) before the Building was occupied,

WSP and Icon would have undertaken appropriate rectification work to ensure that the wall formed by the hob-beam to precast panel connection was fully grouted.

93. If it be found that the Observed Damage, or any part of it, was caused by the Partial Grouting of the joint that connected the hobs-beams and the precast panels on levels 4, 10 and 16:

- (a) then such Observed Damage, or such part of it, occurred because Evolution installed the precast panels on levels 4, 10 and 16 in accordance with Drawing DE01 P2 and Drawing DE01 P5; and
- (b) Evolution's:

- (i) false or misleading representations about the quality or standard of services provided (as pleaded in paragraph 87(d) above); and
- (ii) misleading or deceptive conduct (as pleaded in paragraph 87(e) above) therefore materially contributed to, or was a material cause of, the Observed Damage or such part of it.

94. Had the Observed Damage, or any part of it, not occurred:

- (a) the evacuation of residents of the Building above would not have needed to have taken place; and
- (b) Icon would not have suffered Icon's Loss and Damage (referred to in paragraph 65 above).

95. If it be found that the Observed Damage, or any part of it, was caused by the Partial Grouting, the loss and damage suffered by Icon referred to in paragraph 94(b) above was caused by Evolution's:

- (a) false or misleading representations about the quality or standard of services provided (as pleaded in paragraph 87(d) above); and
- (b) misleading or deceptive conduct (as pleaded in paragraph 87(e) above).

96. In the circumstances pleaded in paragraph 95 above, by reason of WSP's reliance on representations of Evolution pleaded in paragraphs 78 and 80 above, Icon has suffered loss and damage and is entitled to damages pursuant to s 236 of the Australian Consumer Law or s 236 of the Australian Consumer Law (NSW) in an amount equivalent to Icon's Loss and Damage and Icon's Further Loss and Damage.

97. Further, and in the alternative, Icon is entitled to an indemnity under s 237 and s 243 of the Australian Consumer Law, or under s 237 and 243 of the Australian Consumer Law (NSW), to the effect that Icon be, and is entitled to

be, indemnified by Evolution in respect of Icon's Loss and Damage and Icon's Further Loss and Damage.

Relief

98. In the premises, Icon is entitled to the relief claimed in its Amended Cross-Summons.

D. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE

Icon does not consider that it is appropriate at this stage for any issues or questions arising out of this Amended Fourth Cross-Claim Statement to be the subject of a referral.

E. A STATEMENT AS TO WHETHER THE PARTIES HAVE ATTEMPTED MEDIATION; WHETHER THE PARTY IS WILLING TO PROCEED TO MEDIATION AT AN APPROPRIATE TIME

Icon is willing to proceed to mediation at an appropriate time.

SIGNATURE

Signature of legal representative



Capacity

As employed solicitor of legal representative

Date of signature

~~20 March 2020~~ 9 July 2021