

## AMENDED COMMERCIAL LIST THIRD CROSS-CLAIM STATEMENT

### COURT DETAILS

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

### TITLE OF PROCEEDINGS

First Plaintiff	<b>Terry Walter Williamson</b>
Second plaintiff	<b>Helen Therese Williamson</b>
First Defendant	<b>Sydney Olympic Park Authority ABN 68 010 941 405</b>

### TITLE OF THIS AMENDED CROSS-CLAIM

Cross-claimant	<b>WSP Structures Pty Limited ABN 78 006 769 339</b>
First cross-defendant	<b>Evolution Precast Systems Pty Ltd ABN 17 608 136 518</b>
Second cross-defendant	<b>Icon Co (NSW) Pty Ltd ACN 604 790 409</b>

### FILING DETAILS

Filed for	<b>WSP Structures Pty Limited ABN 78 006 769 339,</b> Cross-Claimant
Legal representative	Tricia Hobson, <del>Norton Rose Fulbright Australia</del> <a href="#">DLA Piper Australia</a>
Legal representative reference	4014154
Contact name and telephone	<del>Matthew Taylor 9330 8386</del> <a href="#">Tricia Hobson, (02) 9286 8023</a>
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### A. NATURE OF THE DISPUTE

- 1 On or about 29 October 2015, Australia Avenue Developments Pty Limited (**AAD**) entered into a contract with Icon Co (NSW) Pty Limited (**Icon**), whereby Icon agreed to design and construct a high-rise mixed residential and commercial development known as Opal Tower located at Sydney Olympic Park, NSW.
- 2 On 24 November 2015, Icon and WSP Structures Pty Limited (**WSP**) entered into an agreement (**Consultancy Agreement**) by which WSP agreed to provide structural and civil engineering design services for the development of the Opal Tower development.

3 Icon achieved practical completion as follows:

- (a) Separable Portion 1 on 22 June 2018;
- (b) Separable Portion 2 on 2 July 2018;
- (c) Separable Portion 3 on 8 August 2018.

4 In late December 2018, cracking was observed on levels 4, 10 and 16 of the building. Residents of the building were evacuated following this discovery.

5 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**).

5A In their Amended Commercial List Statement filed 5 May 2021 (the Plaintiffs' List Statement), the plaintiffs allege that SOPA, Icon and WSP are liable to them and Group Members for damages in relation to alleged defects in the building.

6 SOPA, in turn, in its Amended Cross-Claim List Statement filed on 5 July 2021~~27 September 2019~~ (**SOPA's Cross Claim List Statement**) has cross-claimed against AAD, Evove, Icon and WSP, alleging, *inter alia*, 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 certain alleged defects, Icon breached:

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

(ii) a duty to exercise reasonable care pursuant to s 37(1) of the *Design and Building Practitioners Act 2020* (NSW) (D&BP Act);

(iii) ss 18 and/or 29(1) of the ACL; and

SOPA has suffered loss and damage as a result;

~~(b)~~(c) if the building was, or is, affected by certain alleged defects, WSP breached a duty to exercise reasonable care pursuant to s 37(1) of the D&BP Act and/or s 18 and/or s 29(1) of the ACL, and WSP is liable to SOPA.

- 7 ~~On 8 November 2019, Icon filed its Commercial List Response to SOPA's Cross-Claim List Statement.~~
- 8 In its [Amended Commercial List Second Cross-Claim Statement](#) filed ~~9 July 2021~~<sup>3</sup> ~~December 2019~~ (**Icon's Cross-Claim List Statement**), Icon alleges that to the extent that SOPA has suffered a loss (which Icon denies) [and the Court finds that Icon is liable to SOPA, AAD, Ecove, the plaintiffs, and/or Group Members](#), that is a consequence of WSP's breach of the Consultancy Agreement and because WSP contravened s 18 of the of the Australian Consumer Law set out in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**ACL**).
- 9 Icon also alleges that WSP has caused Icon to suffer further losses by reason of its breach of the Consultancy Agreement and its contravention of s 18 of the ACL.
- 9A [In its Commercial List Sixth Cross-Claim Statement](#) filed 6 May 2020 (**Evolution's Cross-Claim List Statement**) [Evolution Precast Systems Pty Ltd \(the first cross-defendant to this Amended Commercial List Third Cross-Claim Statement\)](#) (**Evolution**), alleges that to the extent it is liable to Icon, that is a consequence of WSP's contraventions of s 18 and/or s 29 of the ACL, and that WSP and Evolution are under a co-ordinate liability and Evolution is entitled to contribution from WSP.
- 10 WSP denies that it breached the Consultancy Agreement and denies that it contravened s 18 or s 29 of the ACL. WSP denies that it is liable to [the plaintiffs, SOPA, Icon and/or Evolution](#).
- 11 ~~The first cross-defendant to the third cross-claim (Evolution)~~ designed, manufactured and installed the precast wall panels for the building, pursuant to an agreement with Icon.
- 12 WSP issued a 'for construction' drawing which specified full grout coverage between the precast wall panel and the hob.
- 13 Evolution issued shop drawings which Icon alleges, and WSP denies, proposed a change to the grouting such that grouting would be placed on the inner portion of the hob only.
- 14 Icon further alleges, and WSP denies, that:
- (a) WSP approved Evolution's proposed design change; and

(b) Icon followed the alleged design change.

15 In the event that:

(a) Evolution's shop drawings did propose the alleged design change; and

(b) the failure to fully grout was a cause of the structural defects,

WSP alleges that:

(c) in issuing the shop drawings which did not comply with WSP's 'for construction' drawing; alternatively,

(d) in failing to expressly raise with WSP that it was proposing the design change,

Evolution breached its duty of care to [the plaintiffs, the Group Members, SOPA and Icon](#).

16 WSP also alleges that Evolution engaged in misleading or deceptive conduct [or made false or misleading representations](#), and, in failing to fully grout, breached other clauses of its contract with Icon.

[16A WSP also alleges that Evolution breached its duty of care to the plaintiffs, the Group Members, SOPA and Icon in that it:](#)

[\(a\) failed to install reinforcement in the wall panel over C 38 on level 10 of the building \(Panel C1012\) and constructed and installed precast panels which were less than the compressive strength specified in WSP's 'for construction' drawings;](#)

[\(b\) knew about a prior failure of Panel C1012 in situ and failed to alert WSP of it.](#)

[16B As against Icon, WSP seeks indemnity or contribution from it in relation to the claims brought against WSP by the plaintiffs, the Group Members, SOPA and Evolution and in addition to the claims made by certain of those parties against Icon, WSP alleges that Icon breached its duty of care in that it:](#)

[\(a\) failed to notice that Evolution's shop drawings were inconsistent with WSP's drawings and draw it to the attention of WSP and Evolution and seek advice in relation to it;](#)

[\(b\) failed to install reinforcement in Panel C102, and knew or ought to have known about its prior failure in situ, and failed to alert WSP of it and provide WSP with](#)

a copy of a defects notice of 5 August 2018 from the superintendent in relation to it;

- (c) failed to draw to the attention of WSP prior to the construction of the hobs any failure of WSP's 'for construction' drawings to adequately identify the required strength of the concrete for use in the hobs;
- (d) failed to install tie reinforcement in the hobs contrary to WSP's 'for construction' drawings;
- (e) left a void in the grout bed between the hob and precast panel on level 4;
- (a)(f) failed to alert WSP of the significant cracking and spalling of a hob under load above column C38 on level 10 in 2017 (and attempted to repair it).

- 17 WSP also claims from Icon its fees for providing remedial structural engineering services.

## **B. ISSUES LIKELY TO ARISE**

- 1 The extent, and cause, of any damage that has been observed to the building.
  - 2 Did Evolution breach its duty of care to the plaintiffs, the Group Members, SOPA and Icon, causing the plaintiffs, the Group Members, SOPA, Icon and WSP loss and damage?
  - 3 Did Evolution breach its contract with Icon, causing the plaintiffs, the Group Members, SOPA, Icon and WSP loss and damage?
  - 4 Did Evolution engage in misleading or deceptive conduct or make false or misleading representations, causing the plaintiffs, Group Members, SOPA, Icon and WSP loss and damage?
  - 5 Are WSP and Evolution joint tortfeasors or under a co-ordinate liability to the plaintiffs, Group Members, SOPA and Icon in respect of the same damage and if so, is WSP entitled to contribution from Evolution?
- 5A Did Icon breach its duty of care to the plaintiffs, the Group Members and SOPA, causing the plaintiffs, the Group Members, SOPA and WSP loss and damage?
- 5B Did Icon engage in misleading or deceptive conduct or make false or misleading representations, causing the plaintiffs, Group Members, SOPA, Evolution and WSP loss and damage?

5C Are WSP and Icon joint tortfeasors or under a co-ordinate liability to the plaintiffs, Group Members, SOPA and Evolution in respect of the same damage and if so, is WSP entitled to contribution from Icon?

6 Is WSP entitled to its fees from Icon incurred in relation to the remedial structural engineering services?

## CROSS-CLAIMANT'S CONTENTIONS

### A. PARTIES

- 1 The cross-claimant, **WSP**, is a company able to sue, and carries on business as a firm of consulting engineers.
- 2 The first cross-defendant, **Evolution**, is a company able to be sued, and is in the business of providing construction services, specialising in the production of architectural precast concrete walls.
- 3 The second cross-defendant, **Icon**, is a company able to be sued, and is in the business of providing construction services.

### B. CONSULTANCY AGREEMENT BETWEEN ICON AND WSP

- 4 On or about 29 October 2015, AAD entered into a contract with Icon (**Head Contract**) whereby Icon agreed to design and construct a high-rise mixed residential and commercial development (**Opal Tower Development**) known as the Opal Tower (**Building**) located at Sydney Olympic Park, NSW.
- 5 The Head Contract is comprised of:
  - (a) the formal instrument of agreement;
  - (b) the general conditions of contract and annexures thereto;
  - (c) the Project Delivery Agreement (redacted);
  - (d) development consent;
  - (e) schedule of rates; and
  - (f) AAD's project requirements.

- 6 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.
- 7 The Consultancy Agreement is comprised of:
- (a) the formal instrument of agreement;
  - (b) the general conditions of contract; and
  - (c) any further documents annexed to or incorporated by express reference in Part A of the Annexure to the Consultancy Agreement.

### **C. THE EVOLUTION SUBCONTRACT**

- 8 By subcontract dated 31 August 2016, Icon entered into an agreement with Evolution whereby Evolution agreed to design, manufacture and install the precast wall panels (**the Subcontract**) for the Building.
- 9 The Subcontract comprised a number of documents, including the General Conditions of Subcontract (**General Subcontract Conditions**), and Scope of Works dated 23 August 2016 (Appendix 1) (**Scope of Works**) [\(the Evolution Work\)](#).

#### **Particulars**

- (i) Clause 1 Formal Instrument of Agreement.
- 10 Pursuant to the definition of “Subcontractor’s design obligations” in Clause 1 of the General Subcontract Conditions, Evolution, as part of its design obligations, was required to:
- (a) ensure that the design documents (including any design documents which were not produced by Evolution) satisfy 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;

- (c) ensure that the details contained in any design documents prepared by Evolution are coordinated with the details contained in all other design documents;
  - (d) design the subcontract works so that the subcontract works, when constructed, shall be structurally and aesthetically sound.
- 11 Pursuant to Clause 2.6 of the General Subcontract Conditions, Evolution warranted to Icon that Evolution:
- (a) would exercise the due skill, care and diligence in the execution and completion of the WUS expected of a competent subcontractor;
  - (b) would execute the WUS so that the subcontract works when complete shall be fit and adequate for their purpose, suitable for their intended use or occupation and comply with all laws and requirements of the Subcontract including any design documents;
  - (c) would construct and complete the WUS in accordance with the Subcontract documents so that the subcontract works, when completed, would comply with all the requirements of the Subcontract and other approvals;
  - (d) would carry out the work in a proper and workmanlike manner and in accordance with the plans and specifications set out in the Subcontract;
  - (e) would carry out the work with reasonable care and skill;
  - (f) would carry out and complete Evolution's design obligations to accord with Icon's project requirements, so that when complete the subcontract works would be without defects, fit for their intended purpose, and comply with all the requirements of the Subcontract and all legislative requirements.
- 12 Clause 2.7 of the General Subcontract Conditions provided that the warranties remained unaffected notwithstanding that design work has been completed by or on behalf of Icon or AAD.
- 13 Pursuant to Clause 2.8 of the General Subcontract 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 Subcontract;
- (b) damage to property in connection with the undertaking of the work under the Subcontract by Evolution;
- (c) negligent or wrongful conduct, act or omission on the part of Evolution in connection with the undertaking of the WUS.

14 Pursuant to Clause 2.8 of the General Subcontract Conditions, Icon and Evolution agreed that, to the extent permitted by law, the operation of Part 4 of the *Civil Liability Act 2002* (NSW) (**CLA**) was excluded in relation to all and any rights, obligations and liabilities arising under or in relation to the Subcontract however such rights, obligations or liabilities were sought to be enforced.

15 Clause 2.9 of the General Subcontract Conditions provided that all representations and warranties in the Subcontract:

- (a) remained in full force and effect following completion of the subcontract works and the issue of the final certificate;
- (b) were given with the intent that liability thereunder shall not be confined to breaches thereof discovered prior to the date of the Subcontract; and that:
  - (i) each indemnity in the Subcontract was a continuing obligation;
  - (ii) each indemnity in the Subcontract constituted a separate and independent obligation of the party giving the indemnity from its other obligations under the Subcontract.

16 Pursuant to Clause 2.10 of the General Subcontract Conditions, Evolution warranted as follows:

- (a) all activities of Evolution under the Subcontract, including the WUS, would be performed in a proper and workmanlike manner and in accordance with the Subcontract;

- (b) Evolution's activities under the 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.
- 17 Clause 3 of the Scope of Works set out Evolution's design obligations under the Subcontract.
- 18 Clause 3.1.1 of the Scope of Works defined "shop drawings" as:
- 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*
- 19 Clause 3.1.1 of the Scope of Works provided that shop drawings should include set outs, hobs and plinth sizes, their location and structural requirements.
- 20 Clause 4.1.1 of the Scope of Works required Evolution to acknowledge that the scope of the subcontract works included the design and that Evolution would develop, change and finalise the design of the subcontract works (with the written approval of Icon) to ensure that the subcontract works achieved and were fit for their intended purpose.
- 21 Clause 5.1.1 of the Scope of Works provided that the scope of the works involved the design and construction of all precast concrete works associated with the project.
- 22 Clause 5.2.7 of the Scope of Works provided that the design of the precast panels must comply with WSP's design intent for the building and all panel design criteria was to be approved by Icon prior to manufacture.
- 23 Appendix 10 of the Subcontract provided a breakdown of the Subcontract sum and included, in respect of each level of the Building, amounts due for shop drawings, manufacture, installation and post-installation.

#### **D. SERVICES PROVIDED BY EVOLUTION**

- 23A On 26 July 2016 at about 5:46 pm, Icon sent an Aconex (Mail Number: NSWIcon-TRANSMIT-000071) to, amongst others, Evolution attaching a number of WSP's drawings 'For information', including WSP drawing S06.010 [2] dated 26 July 2016.
- 23B WSP drawing S06.010 [2] showed full grout coverage between the precast panels and the hobs (Full Grouting).

- 23C On 29 August 2016 at about 11:41 am Evolution sent an Aconex (Mail number: EVOPS-SUBADV-000008) to Icon attaching an extract detail page of its standard shiplap detail, and standard shiplap detail with slab upturn, which was forwarded to WSP by Icon by Aconex (Mail number: NSWIcon-HCADV-002191) on 29 August 2016 at about 2:29 pm.
- 23D On 8 September 2016 at about 2:38 pm Evolution sent an Aconex (Mail no: EVOPS-TRANSMIT-00002) to Icon and WSP attaching a number of Evolution's shop drawings including DEO1 Rev P1 dated 7 September 2016.
- 23E On 8 September 2016 at about 6:18 pm Icon sent an Aconex (Mail no: NSWIcon-HCADV-002425) to Icon and WSP attaching Icon's comments (in red) on a number of Evolution's shop drawings, including DEO1 Rev P1, including a red tick against the notation in detail 1 'INTERNAL GROUTING BETWEEN PANEL TO INSITU BY EVOLUTION'.
- 23F On 19 September 2016 at about 10:34 am Icon sent an Aconex (Mail Number: NSWIcon-TRANSMIT-000389) to, amongst others, Evolution attaching a number of WSP's FC drawings, including S06.010 [A] dated 16 September 2016.
- 23G WSP FC drawing S06.010 [A] showed Full Grouting.
- 23H On 19 September 2016 at about 3:29 pm WSP sent an Aconex (Mail Number: WSP (SA) -CADV-000562) to Icon, Evolution and others attaching WSP's comments on a number of Evolution's shop drawings, including DEO1 Rev P1, which contained WSP's Stamp.
- 23I On 19 September 2016 at about 4:46 pm Icon sent an Aconex (Mail number: NSWICON-RFI-000229) to Evolution in the following terms:
- Could you please update your shop drawings following WSP comments (attached) and the latest set of pre-cast drawings (series S06 for construction) from WSP issued this morning*
- 23J On 21 September 2016 at about 2:50 am Evolution sent an Aconex (Mail number: EVOPS-SUBADV-000028) attaching 'level precast package for re-approval', which included Evolution drawing DE01 Rev P2 dated 20 September 2016.

23K On 22 September 2016 at about 2:42 pm WSP sent an Aconex (Mail Number: WSP (SA) -CADV-000581) to Icon and Evolution attaching Evolution's shop drawings, including DEO1 Rev P2 which contained WSP's stamp.

24 On about 16 September 2016, WSP issued a 'for construction' Drawing No. 4419 S06.010[A] containing an express note stating 'GROUT PANEL JOINT FOR FULL WIDTH', specifying full grout coverage between the precast panel and the hob.

25 On about 20 September 2016, Evolution issued a Drawing No. DE01[P2] for level 1, detail 1 of which contained an express note stating 'INTERNAL GROUTING BETWEEN PANEL TO INSITU BY EVOLUTION' (**Evolution Shop Drawing 1**).

26 On 22 September 2016, WSP stamped Evolution Shop Drawing 1 and ticked the box next to the words "REVIEWED, NO COMMENTS".

27 WSP's stamp also contained the following words:

*~~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~~*

28 On or about 31 October 2016, Evolution issued a Drawing No. DE01[P5], detail 1 of which contained an express note stating 'INTERNAL GROUTING BETWEEN PANEL TO INSITU BY EVOLUTION' (**Evolution Shop Drawing 2**).

29 On 3 November 2016, WSP stamped Evolution Shop Drawing 2 and ticked the box next to the words "REVIEWED, NO COMMENTS".

30 WSP's stamp also contained the following words:

*~~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~~*

31 Evolution manufactured and installed the precast wall panels for the Building.

## E. DAMAGE OBSERVED ON THE BUILDING AND RESPONSE THERETO

- 32 On 24 December 2018, cracking was observed in the load bearing panels (and the hob beam which supported the panels) on level 10 of the Building.
- 33 On 24 December 2018, all residents were evacuated from the Building.
- 34 On 24 December 2018, residents were allowed to return to the Building.
- 35 On about 24 December 2018, Mr James McCutcheon, a director of WSP, was requested by Mr Michael Clunie of Icon to attend for the purpose of investigating the damage to the Building.
- 36 On 27 December 2018, AAD, Icon and WSP carried out an inspection of the Building and identified further damage in the form of cracking on levels 4, 10 and 16 of the Building (**Building Damage**).
- 37 On 27 December 2018, all residents were told to again evacuate the Building by 28 December 2018.
- 38 Since 28 December 2018, Icon has:
- (a) carried out stabilisation work by installing props under levels 4 and 10 of the Building as a precautionary measure so as to ensure the safety of these areas of the Building;
  - (b) in conjunction with WSP, Australasian Prestressing Services Pty Ltd and Bates Smart Architects Pty Ltd, prepared a remediation design;
  - (c) provided to the owners of apartments in the Building, on an iterative basis, a document entitled "Structural Repairs Action Plan", which contains information about the proposed rectification design, how the proposed rectification works are to be carried out and how various units in the Building will be affected by the proposed rectification work; and
  - (d) carried out rectification work on the Building.
- ((a)-(d) collectively are henceforth referred to as the **Rectification Works**).
- 39 Prior to 1 January 2019, Mr Wayne Bretherton of WSP, spoke with Mr Julian Doyle of Icon to the effect that WSP needed commercial terms for WSP to provide structural engineering services to Icon in relation to the Building Damage (**the Remedial**

**Structural Engineering Services**), and WSP would send proposed terms to Icon for review.

- 40 By cover of email dated 2 January 2019, WSP sent Icon a proposed professional services agreement for Remedial Structural Engineering Services (**the Remedial Proposal**).
- 41 Icon did not respond to WSP's email dated 2 January 2019.
- 42 To Icon's knowledge, WSP continued to provide the Remedial Structural Engineering Services.
- 43 Mr Bretherton sent Mr Doyle a further email dated 8 January 2019.
- 44 Icon did not respond to WSP's email dated 8 January 2019.
- 45 To Icon's knowledge, WSP continued to provide the Remedial Structural Engineering Services.
- 46 Mr Bretherton sent Mr Doyle a further email dated 17 January 2019.
- 47 Icon sent WSP a letter dated 17 January 2019.
- 48 In response to Icon's letter dated 17 January 2019, Mr Bretherton sent Mr Jason Coombes of Icon an email dated 18 January 2019.
- 49 Icon did not respond to Mr Bretherton's email dated 18 January 2019.
- 50 To Icon's knowledge, WSP continued to provide the Remedial Structural Engineering Services.
- 51 WSP sent Icon a letter dated 26 March 2019 stating amongst other things that WSP would continue to provide the Remedial Structural Engineering Services under the terms of the Remedial Proposal, and that if Icon did not wish WSP to continue to do so, Icon should instruct WSP to demobilise.
- 52 Icon did not instruct WSP to demobilise.
- 53 To Icon's knowledge, WSP continued to provide Remedial Structural Engineering Services.
- 54 As at the date of Icon's Cross-Claim [List](#) Statement, Icon alleges that it:

- (a) has incurred costs in the sum of \$~~24,967,764.55~~<sup>13,731,407.32</sup> in carrying out the Rectification Works referable to common property and associated costs (**Icon's Incurred Rectification Costs**);
- (b) has incurred costs in the sum of \$~~280,804.39~~<sup>144,913.39</sup> in payments to certain Group Members 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**);
- (c) has incurred costs in the sum of \$~~6,679,999.08~~<sup>6,786,322.95</sup> 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**);
- (d) will continue to incur costs in carrying out the Rectification Work (**Icon's Future Rectification Costs**);
- (e) has incurred costs in the sum of \$~~4,103,560.74~~<sup>3,984,026.81</sup> 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 incurred costs in the sum of \$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 incurred costs in the sum of \$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**); and

- (h) has suffered loss and damage because it:
- (i) was terminated from at least one contract that it has 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 32 and 36 above becoming publicly known (**Icon's Loss of Opportunity / Loss of Contract Damages**);

(i) has incurred costs in the sum of \$3,867,677.78 in payment 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**);

(j) has incurred legal costs in addition to the legal costs incurred in defending the proceedings (**Legal Costs**).

## **F. CLAIMS IN THE PROCEEDINGS**

55 The plaintiffs have ~~sued~~ commenced these proceedings against SOPA, Icon and WSP alleging that they, and the Group Members, have suffered loss and damage by reason of:

(a) SOPA's breach of the statutory warranties in the HB Act;

(b) Icon and WSP's breaches of duty pursuant to s 37(1) of the D&BP Act; and

~~(a)~~(c) Icon and WSP's contraventions of ss 18 and 29(1)(b) of the ACL.

56 SOPA has cross-claimed against Icon and WSP, alleging that if the Building was, or is, affected by certain alleged structural defects, Icon and WSP are liable to SOPA.



57 Icon has cross-claimed against WSP, and separately cross-claimed against Evolution, in relation to the alleged structural defects.

58 In paragraphs 39 – 47 and 113(f) of Icon’s Cross-Claim List Statement, Icon alleges, and WSP denies, that:

- (a) On or around 21 September 2016 and 31 October 2016, Evolution issued drawings which proposed a change to the grouting such that grouting would be placed on the inner portion of the hob only;
- (b) WSP approved Evolution’s Shop Drawings;
- (c) The alleged design change was nevertheless followed by Icon, such that Icon built what had allegedly been designed and/or approved by WSP.

58A Evolution has cross-claimed against WSP in relation to the alleged structural defects.

#### **G. WSP’S CLAIMS AGAINST EVOLUTION**

59 In the event that: WSP is liable to the plaintiffs, the Group Members, SOPA and/or Icon (which is denied), WSP pleads as follows in paragraphs 59A to 83A, without admissions.

- (a) ~~the failure to grout the full width of the hob between the precast panel and the hob was causative of the structural damage (which is not admitted); and~~
- (b) ~~WSP is liable to Icon in relation to the failure to fully grout (which is denied),~~

~~WSP pleads as follows, without admissions.~~

#### *Contribution between tortfeasors*

#### *Evolution’s duty of care to the plaintiffs, Group Members and SOPA*

59A WSP repeats paragraphs 67A and 67B of the plaintiffs’ List Statement and paragraphs 76 and 77 of SOPA’s Cross Claim List Statement.

59B The Evolution Work was “construction work” within the meaning of s. 36(1) of the D&BP Act.

59C Further or in the alternative to paragraph 59B above:

(a) the Evolution Work was residential building work within the meaning of the HBA;

**Particulars**

(i) WSP repeats the matters referred to in paragraphs 16 and 18 of the Plaintiffs' List Statement.

(b) by reason of the matters referred to in (a) above, the Evolution Work was "building work" within the meaning of s. 36(1) of the D&BP Act; and

(c) by reason of the matter referred to in paragraph (b) above, the Evolution work was "construction work" within the meaning of s. 36(1) of the D&BP Act.

59D Further or in the alternative:

(a) the Evolution Work was:

(i) the preparation of regulated and other designs for building work within the meaning of s. 36(1) of the D&BP Act;

(ii) further or in the alternative, the supervision, coordination, project management or otherwise having substantive control over the carrying out of the work referred to in (a)(i) above; and

(b) by reason of the matters referred to in (a)(i) above, further or in the alternative to (a)(ii) above, the Evolution Work was "construction work" within the meaning of s.36(1) of the D&BP Act.

59E In the premises, Evolution:

(a) was a person who carried out construction work within the meaning of s. 36(1) of the D&BP Act for the purposes of s. 37 of the D&BP Act;

(b) had a duty to exercise reasonable care to avoid economic loss caused by defects in or related to the Opal Tower and arising from the Evolution Work, (**Evolution's duty of care**) pursuant to s. 37(1) of the D&BP Act.

59F Evolution's duty of care was owed to the plaintiffs, each of the Group Members, and SOPA pursuant to s. 37(2) of the DB&P Act.

59G The plaintiffs, each of the Group Members and SOPA are entitled to damages from Evolution for any breach of Evolution's duty of care pursuant to s. 37(3) of the DB&P Act as if the duties were established by the common law.

59H There was a risk of harm, which was foreseeable and not insignificant (within the meaning of s. 5B of the CLA), that if Evolution did not take the precautions set out in paragraphs 62A and 62C below, the plaintiffs, each of the Group Members and SOPA would suffer loss and damage.

Evolution's duty of care to Icon **Contribution between tortfeasors**

60 So far as the design obligations in the Subcontract are concerned, the Subcontract was a contract for professional services, and it was a term of the Subcontract, implied by law, that Evolution owed Icon a duty to carry out its design obligations with reasonable care and skill.

60A In the above circumstances and circumstances where Evolution was engaged by Icon to carry out the Evolution Work, Icon was also owed Evolution's duty of care.

61 If Evolution did not design the subcontract works or carry out the Evolution Work by taking the precautions set out in paragraphs 62A and 62C below, with reasonable care and skill, there was a risk of harm that the Building might suffer structural damage and Icon would suffer loss and damage.

62 The risk of harm was foreseeable, and not insignificant.

Evolution's breach of duty owed to the plaintiffs, Group Members, SOPA and Icon

62A Having regard to Evolution's Scope of Works to design, manufacture and install the precast panels, Evolution breached its duty of care to the plaintiffs, to each of the Group Members, to SOPA and to Icon:

**Particulars**

- (i) In the event, which is not admitted, that Evolution's shop drawings showed Partial Grouting:
  - a. Designing a connection detail between load-bearing precast panels and concrete hobs which only required Partial Grouting;
  - b. Failing to expressly raise with Icon and WSP that Evolution was proposing to change WSP's Full Grouting to Partial Grouting;
  - c. Having received WSP's drawing 4419 S06.010 [2] (showing Full Grouting) on 26 July 2016, circulating its

detail standard shiplap details, which only showed Partial Grouting, on about 29 August 2016;

d. Having received WSP's drawing 4419 S06.010 [2] (showing Full Grouting) on 26 July 2016, circulating its shop drawing DE01 Rev P1, which only showed Partial Grouting, on about 8 September 2016;

e. Having received WSP's FC drawing S06.010 [A] (showing Full Grouting) on 19 September 2016 at about 10:34 am, WSP's Aconex message on 19 September 2016 at about 3:29 pm; and Icon's Aconex message on 19 September 2016 at about 4:46 pm;

i. Failing to appreciate that there was an inconsistency between WSP's FC drawing S06.010 [A] (showing Full Grouting), and Evolution's shop drawing DE01 Rev P1, which WSP had stamped, showing Partial Grouting; and failing to raise that inconsistency with Icon and WSP;

ii. Failing to update drawing DE01 Rev P1, to ensure that drawing DE01 Rev P2 (dated 20 September 2016) showed Full Grouting, consistent with WSP's FC drawing S06.010 [A];

iii. Circulating, on 21 September 2016, drawing DE01 Rev 2 showing Partial Grouting;

(ii) Contrary to WSP's FC drawing S06.010 [A] (showing Full Grouting), installing Partial Grouting;

(iii) Failing to install reinforcement in Panel C1012, contrary to Evolution's shop drawing C1012-R [1], as described in Section 5.1 of the Branch report;

(iv) Constructing and installing precast panels which were less than the compressive strength specified in the FC drawings (see paragraph 58(a) of the Plaintiffs' List Statement).

62B Further, at about the time of removal of the Level 10 scaffold, Evolution knew that:

- (a) Panel C1012 on level 10 had cracked in situ;
- (b) a large piece of concrete in Panel C1012 had cracked and delaminated from the rest of the damaged panel;
- (c) the caulking between the window frame and Panel C1012 had also failed.

62C In further breach of Evolution's duty of care to the plaintiffs, to each of the Group Members, to SOPA, and to Icon, Evolution:

- (a) failed to check its design of the connection detail between the load bearing Panel C1012 and the concrete hob;
- (b) failed to alert WSP to the matters in paragraph 58B above, and to seek WSP's advice in relation to those matters;
- (c) without checking its design, and without consulting WSP, decided that the in situ failures were non-structural, and were not evidence of structural failure;
- (d) without checking its design, and without consulting WSP, removed the cracked piece of concrete, patched the void with Unitex, and then applied a skim coat using Aftek skim coat; those products having no structural capacity.

62D Had Evolution alerted WSP to the in situ failures at this time:

- (a) WSP would have recommended that investigations be carried out, which would have revealed that:
  - (i) contrary to WSP's FC Drawing S06.010 [A], Evolution had not grouted to full width the joints between the hobs and the precast panels;
  - (ii) Evolution had failed to install reinforcement in the panel as set out in paragraph 62A above;
- (b) appropriate rectification measures would have been taken to rectify these grouting deficiencies;
- (c) the Observed Damage pleaded in paragraphs 59 and 60 of the Plaintiff's List Statement and paragraph 39 of SOPA's Cross Claim List Statement would not have occurred;
- (d) the Opal Tower residents would not have been evacuated;

(e) the plaintiffs and the Group Members would not have suffered (and will not have suffered) the loss and damage alleged in paragraph 69(b)(iv) of the Plaintiffs' List Statement;

(f) SOPA will not have suffered the loss and damage alleged in paragraph 134(v) of SOPA's Cross Claim List Statement;

(g) Icon would not have suffered (and will not have suffered) the loss and damage alleged in paragraphs 116, 116A, 116B and 119 of Icon's Cross Claim List Statement.

*Evolution's additional breaches of duty owed to Icon*

63 A reasonable person in the position of Evolution would have taken precautions against the risk of harm, by issuing shop drawings which were consistent with WSP's Drawing No. 4419 S06.010[A], namely, which specified full grout coverage between the precast panel and the hob.

64 Alternatively, ~~in the event that Evolution intended to change WSP's design,~~ a reasonable person in the position of Evolution would have expressly raised with WSP, either by email or in a conversation, that Evolution intended to change WSP's design, and sought WSP's advice about it.

65 In the event (which is not admitted) that Evolution's ~~s Shop d~~ Drawings ~~1 and Evolution Shop Drawing 2~~ indicated grout to be placed on the inner portion of the hob only, in issuing ~~them~~ Evolution Shop Drawing 1 and Evolution Shop Drawing 2, Evolution breached its duty of care to Icon, and was, by reason of s 5B of the CLA, negligent.

66 Further, ~~in the event that it was Evolution's intention to change WSP's design,~~ it failed to expressly raise the proposal with WSP, either by email or in a conversation, and failed to seek WSP's advice about it, and was, by reason of s 5B of the CLA, negligent.

*Indemnity or contribution*

66A By reason of the breaches, the plaintiffs and the Group Members have each suffered and will suffer loss and damage as particularised in paragraph 69 of the Plaintiffs' List Statement.

66B By reason of the breaches, SOPA will suffer loss and damage as contended in paragraphs 125 and 135 of SOPA's Cross Claim List Statement.

67 By reason of the breaches, Icon has suffered and will suffer the following loss and damage:

- (a) the amount of any liability that Icon has to SOPA (**SOPA Liability Damages**);
- (b) the amount of any liability that Icon has to AAD and Ecove (**AAD/Ecove Liability Damages**);
- ~~(a)~~(c) the amount of any liability that Icon has to the plaintiffs (and the Group Members) (**Plaintiffs/Group Members' Damages**);
- ~~(b)~~(d) Icon's Incurred Rectification Costs;
- ~~(c)~~(e) Group Members' Loss of Rent Costs;
- ~~(d)~~(f) Group Members' Alternative Accommodation Costs;
- ~~(e)~~(g) Icon's Future Rectification Costs;
- ~~(f)~~(h) Lessees' Alternative Accommodation Costs;
- ~~(g)~~(i) Licence Occupation Fees;
- ~~(h)~~(j) Owners Corporation's Insurance Costs; ~~and~~
- (k) Icon's Loss of Opportunity / Loss of Contract Damages;
- (l) Bank Guarantee Sum; and
- ~~(i)~~(m) Legal Costs.

67A In the event that WSP was in breach of its duty of care to the plaintiffs and Group Members, by reason of the matters pleaded in paragraphs 56B – 56G, 57(b)(i), 57(b)(iv) and 61 of the Plaintiffs' List Statement (which is denied), then in the premises, in respect of the same damage for which WSP and Evolution are both liable to the plaintiffs and Group Members, WSP and Evolution are joint tortfeasors, and WSP is entitled to indemnity or contribution from Evolution, pursuant to s 5 *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)* (**LRMP Act**).

67B In the event that WSP was in breach of its duty of care to SOPA, by reason of the matters pleaded in paragraphs 37(b)(i), 37(b)(iv), 39(e), 124 and 134 of SOPA's Cross Claim List Statement (which is denied), then in the premises, in respect of the same

damage for which WSP and Evolution are both liable to SOPA, WSP and Evolution are joint tortfeasors, and WSP is entitled to indemnity or contribution from Evolution, pursuant to s 5 LRMP Act.

68 In the event that WSP was in breach of its duty of care to Icon, by reason of the matters pleaded in paragraphs 39 – 47 and 113(f) of Icon’s Cross-Claim List Statement, paragraphs 57(b)(iv) and 61 of the Plaintiffs’ List Statement and paragraph and paragraphs 39(e) and 124 of SOPA’s Cross Claim List Statement (which is denied), then in the premises, in respect of the same damage for which WSP and Evolution are both liable to Icon, WSP and Evolution are joint tortfeasors, and WSP is entitled to indemnity or contribution from Evolution, pursuant to s 5 *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).

**Evolution’s breaches of the ACL~~Misleading or deceptive conduct~~**

The shop drawing breaches

68A In issuing its standard shiplap details on 29 August 2016, its shop drawing DE01 Rev P1 on 8 September 2016, and its shop drawing DE01 Rev P2 on 21 September 2016, Evolution represented, in trade or commerce, that those details and drawings:

(a) were consistent with WSP’s drawings S06.010 [2] and/or WSP’s FC drawing S06.010 [A];

(b) had been prepared with reasonable care and skill,

**(the shop drawing representations).**

68B The shop drawing representations were misleading or deceptive, and false or misleading, in breach of s. 18 of the ACL and s. 29(1)(b) of the ACL, because, contrary to WSP’s drawings, Evolution’s shop drawings showed Partial Grouting.

68C Had Evolution not made the shop drawing representations, then the joints between the hobs and the precast panels would have been fully grouted, and in the event, as pleaded in paragraph 61 of the ALS, that Partial Grouting caused damage to Opal Tower, including the Observed Damage, that damage would not have occurred.

68D Because of the breaches, WSP has suffered and will suffer loss or damage.

**Particulars**

(i) WSP repeats paragraph 74 below



*The certification breaches*

- 68E On 29 November 2016, Evolution issued a certificate titled Installation Compliance certifying that precast panels C401, C402 and C406 had been manufactured in accordance with AS 3600, AS 3610, AS 3850, WSP's FC Drawings, and Evolution's approved shop drawings.
- 68F On 15 February 2017, Evolution issued a certificate titled Installation Compliance certifying that precast panels C1003, C1004, C1007, C1009, C1011 and C 1012 had been manufactured in accordance with AS 3600, AS 3610, AS 3850, WSP's FC Drawings, and Evolution's approved shop drawings.
- 68G The conduct in paragraphs 68E and 68F above amounted to representations, in trade or commerce, that the precast panels had in fact been manufactured in accordance with AS 3600, AS 3610, AS 3850, WSP's FC Drawings, and Evolution's approved shop drawings (**the certification representations**).
- 68H The certification representations were misleading or deceptive, and false or misleading, in breach of s. 18 of the ACL and s. 29(1)(b) of the ACL, because, as pleaded in paragraph 58(a) of the Plaintiffs' List Statement and 38(a) of SOPA's Cross Claim List Statement, the precast panels were manufactured of concrete which had a compressive strength less than the compressive strength specified in the FC Drawings, and, as pleaded in paragraph 62A(iii) above, Panel C1012 had not been manufactured with appropriate reinforcement.
- 68I Icon relied on the certification representations by allowing the precast panels to be installed, or alternatively, allowing them to remain in situ.
- 68J Had Icon been aware of the falsity the certification representations, it would not have allowed the precast panels to be installed, or alternatively, would not have allowed them to remain in situ.
- 68K In paragraph 61 of the Plaintiffs' List Statement, the plaintiffs allege that the understrength concrete in the precast panels, and the inadequate reinforcement in Panel C1012, caused damage to Opal Tower, including the Observed Damage.
- 68L If those allegations are true, then because of the breaches, WSP has suffered and will suffer loss or damage.

### Particulars

(i) WSP repeats paragraph 74 below.

- 69 ~~In issuing Evolution Shop Drawing 1, Evolution represented that Evolution Shop Drawing 1 had been prepared with reasonable care and skill, and was consistent with WSP's Drawing No. 4419 S06.010[A] (the **First Evolution Shop Drawing Representation**).~~
- 70 ~~In issuing Evolution Shop Drawing 2, Evolution represented that Evolution Shop Drawing 2 had been prepared with reasonable care and skill, and was consistent with WSP's Drawing No. 4419 S06.010[A] (the **Second Evolution Shop Drawing Representation**).~~
- 71 ~~In the event (which is not admitted) that Evolution Shop Drawing 1 and Evolution Shop Drawing 2 indicated grout to be placed on the inner portion of the hob only, the **First Evolution Shop Drawing Representation** and the **Second Evolution Shop Drawing Representation** (together, **Representations**), which were made in trade or commerce, were false.~~
- 72 ~~By making the false Representations, Evolution engaged in misleading or deceptive conduct in contravention of s 18 of the ACL.~~
- 73 ~~Had Evolution not made the false Representations, the hobs would not have been constructed with grout on the inner portion of the hobs only, and the structural damage would not have occurred.~~
- 74 In the circumstances pleaded above, WSP has suffered and will suffer loss or damage because of Evolution's misleading or deceptive conduct done in contravention of s 18 of the ACL and/or because of Evolution's false or misleading representations made in contravention of s 29(1)(b) of the ACL, and is entitled to damages pursuant to s 236 of the ACL, comprising:
- (a) any liability that WSP has to the plaintiffs, Group Members, SOPA and/or Icon;
  - (b) WSP's fees for the Remedial Structural Engineering Services.
- 75 Further, WSP is entitled to an indemnity under ss 237 and 243 of the ACL to the effect that WSP be, and is entitled to be, indemnified by Evolution in respect of the loss or damage pleaded at paragraph 74 above.

**Co-ordinate liability**

- 76 If, which is not admitted, Evolution's Shop Drawing showed Partial Grouting ~~1~~ did indicate that grouting would be placed on the inner portion of the hob only, in issuing ~~Evolution Shop Drawing 1~~, Evolution breached the clauses of the Subcontract set out in paragraphs 10 and 11 above.
- 77 ~~If, which is not admitted, Evolution Shop Drawing 2 did indicate that grouting would be placed on the inner portion of the hob only, in issuing Evolution Shop Drawing 2, Evolution breached the clauses of the Subcontract set out in paragraphs 10 and 11 above.~~
- 78 By reason of the breaches, Icon has suffered and will suffer the following loss and damage:
- (a) SOPA Liability Damages;
  - (b) AAD/ECOVE Liability Damages;
  - ~~(a)~~(c) Plaintiffs/Group Members' Damages;
  - ~~(b)~~(d) Icon's Incurred Rectification Costs;
  - ~~(c)~~(e) Group Members' Loss of Rent Costs;
  - ~~(d)~~(f) Group Members' Alternative Accommodation Costs;
  - ~~(e)~~(g) Icon's Future Rectification Costs;
  - ~~(f)~~(h) Lessees' Alternative Accommodation Costs;
  - ~~(g)~~(i) Licence Occupation Fees;
  - ~~(h)~~(j) Owners Corporation's Insurance Costs; and
  - (k) Icon's Loss of Opportunity / Loss of Contract Damages;
  - (l) Bank Guarantee Sum; and
  - ~~(i)~~(m) Legal Costs.

- 79 In installing Partial Grouting ~~failing to grout the full width of the hob between the precast panel and the hob, as required by WSP's Drawing No. 4419 S06.010[A],~~ Evolution breached the clauses of the Subcontract set out in paragraphs 11 and 16 above.
- 80 By reason of the breaches, Icon has suffered and will suffer the following loss and damage:
- (a) SOPA Liability Damages;
  - (b) AAD/Ecove Liability Damages;
  - ~~(a)~~(c) Plaintiffs/Group Members' Damages;
  - ~~(b)~~(d) Icon's Incurred Rectification Costs;
  - ~~(c)~~(e) Group Members' Loss of Rent Costs;
  - ~~(d)~~(f) Group Members' Alternative Accommodation Costs;
  - ~~(e)~~(g) Icon's Future Rectification Costs;
  - ~~(f)~~(h) Lessees' Alternative Accommodation Costs;
  - ~~(g)~~(i) Licence Occupation Fees;
  - ~~(h)~~(j) Owners Corporation's Insurance Costs; and
  - (k) Icon's Loss of Opportunity / Loss of Contract Damages;
  - (l) Bank Guarantee Sum; and
  - ~~(i)~~(m) Legal Costs.
- 81 If (which is denied) WSP is liable to Icon in contract for WSP's Warranty Breaches (as defined in paragraph 114 of Icon's Cross-Claim List Statement) ~~in relation to the failure to fully grout the hobs,~~ to the extent that the liability is in respect of the same damage, then WSP and Evolution are under a co-ordinate liability to Icon, and WSP is entitled to contribution from Evolution.
- 82 Further, by reason of Clause 2.8 of the General Subcontract Conditions, Evolution must indemnify Icon in respect of the damage referred to in paragraph 80 above.

83 If, which is denied, WSP is liable to indemnify Icon as pleaded in paragraphs 117 and 120 of Icon's Cross-Claim [List](#) Statement, then WSP and Evolution are under a co-ordinate liability to Icon, and WSP is entitled to contribution from Evolution.

[83A If, which is denied, WSP is liable to the plaintiffs, Group Members and/or SOPA for breach of duty pursuant to s 37\(1\) of the DB&P Act and/or s 18 and/or s 29\(1\)\(b\) of the ACL, to the extent that the liability is in respect of the same damage, then WSP and Evolution are under a co-ordinate liability to the plaintiffs, Group Members and/or SOPA, and WSP is entitled to contribution from Evolution.](#)

#### **H. WSP'S CLAIM AGAINST ICON**

[83B In the event that WSP is liable to the plaintiffs, the Group Members, SOPA and/or Evolution, WSP pleads as follows in paragraphs 83C to 83S, without admissions.](#)

##### **Contribution between tortfeasors**

##### **Icon's duty of care to the plaintiffs, the Group Members and SOPA**

[83C WSP repeats paragraphs 67A to 67I of the Plaintiffs' List Statement and paragraphs 78 to 82 of SOPA's Cross Claim List Statement.](#)

##### **Icon's breach of duty**

[83D There was a risk of harm, which was foreseeable and not insignificant \(within the meaning of s. 5B of the CLA\), that if Icon did not take the precautions set out in paragraphs 83E, 83F and 83G below, the plaintiffs, each of the Group Members and SOPA would suffer loss and damage.](#)

[83E Icon breached its duty of care to the plaintiffs, each of the Group Members and SOPA:](#)

##### **Particulars**

[\(i\) In the event, which is not admitted, that Evolution's shop drawings showed Partial Grouting \(as defined in paragraph 56D of the Plaintiffs' List Statement\), Icon failed to notice that the shop drawings were inconsistent with WSP's drawings, which showed Full Grouting, and failed to draw the inconsistency to the attention of WSP and Evolution, and to seek advice in relation to the inconsistency;](#)

[\(ii\) WSP repeats the allegations in paragraph 57\(b\) of the Plaintiffs' List Statement and paragraph 37\(b\) of SOPA's Cross Claim List Statement;](#)

- (iii) Icon failed to install reinforcement in the wall panel over C 38 on level 10 (Panel C1012), contrary to Evolution's shop drawing C1012-R [1], as described in Section 5.1 of the report dated 20 November 2020 of Stephen Branch (the Branch Report);
- (iv) Save that it does not allege that its FC Drawings specified a concrete strength of 65 MPa for the hobs for levels 4, 10 and 16, WSP repeats the allegations in paragraph 58(a) of the Plaintiffs' List Statement and paragraph 38(a) of SOPA's Cross Claim List Statement;
- (v) In the event, which is denied, that the FC drawings did not identify, or did not adequately identify, the required strength of the concrete for use in the hobs, Icon failed to draw that to the attention of WSP prior to construction of the hobs;
- (vi) Icon failed to install tie reinforcement in the hobs, contrary to WSP's FC drawings S.06.001 [C] and S09.240 [A], as described in Section 5.2 of the Branch Report;
- (vii) On level 4, Icon left a void in the grout bed between the hob and precast panels at 4A – 10.5;
- (viii) WSP repeats the allegations in paragraph 67K of the Plaintiffs' List Statement.

83F Further, at about the time of removal of the Level 10 scaffold, Icon was aware, or should have been aware, that:

- (a) Panel C1012 above column C38 on level 10 had cracked in situ;
- (b) a large piece of concrete in Panel C1012 had cracked and delaminated from the rest of Panel C1012;
- (c) the caulking between the window frame and Panel C1012 had also failed.

83G In further breach of Icon's duty of care to the plaintiffs, each of the Group Members and SOPA, Icon:

- (a) failed to alert WSP to the matters in paragraph 83F above, and to seek WSP's advice in relation to those matters;
- (b) without consulting WSP, decided that the in situ failures were non-structural, and were not evidence of structural failure;

(c) without consulting WSP, removed the cracked piece of concrete, patched the void with Unitex, and then applied a skim coat using Aftek skim coat; those products having no structural capacity.

83H Had Icon alerted WSP to the in situ failures at this time:

(a) WSP would have recommended that investigations be carried out, which would have revealed that:

(i) contrary to WSP's FC Drawing S06.010 [A], Icon's subcontractor Evolution had not carried out Full Grouting between the hobs and the precast panels;

(ii) Evolution had failed to install reinforcement in Panel C1012 as set out in paragraph 83E(iii) above;

(b) appropriate rectification measures would have been taken to rectify these grouting deficiencies;

(c) the Observed Damage pleaded in paragraphs 59 and 60 of the Plaintiffs' List Statement and paragraph 39 of SOPA's Cross Claim List Statement would not have occurred;

(d) the Opal Tower residents would not have been evacuated;

(e) the plaintiffs, would not have suffered (and will not have suffered) the loss and damage alleged in paragraph 69(b)(iv) of the Plaintiffs' List Statement;

(f) SOPA will not have suffered the loss and damage alleged in paragraph 134(v) of SOPA's Cross Claim List Statement.

83I Further, on 5 August 2018, the Superintendent issued to Icon defects notice no. 84, which:

(a) directed Icon to patch and refinish Panel C1012 on level 10;

(b) contained a photograph of Panel C1012, describing the photograph as indicating that mastic pointing behind the aluminium door frame was falling out due to excessive movement, and directed Icon to check that movement was within tolerance and to re-point the aluminium frame.

83J In further breach of Icon's duty of care to the plaintiffs, to each of the Group Members and to SOPA, Icon:

(a) failed to provide WSP with a copy of Defects Notice No 84;

(b) contrary to the Superintendent's direction, failed to ask WSP to check that the movement was within tolerance;

(c) failed, again, to alert WSP to the matters in paragraphs 83F and 83G above.

83K Had Icon done these things:

(a) WSP would have recommended that investigations be carried out, which would have revealed that:

(i) contrary to WSP's FC Drawing S06.010 [A], Icon's subcontractor Evolution had not carried out Full Grouting between the hobs and the precast panels;

(ii) Evolution had failed to install reinforcement in Panel C1012 as set out in paragraph 83E(iii) above;

(b) appropriate rectification measures would have been taken to rectify these grouting deficiencies;

(c) the Observed Damage pleaded in paragraphs 59 and 60 of the Plaintiffs' List Statement and paragraph 39 of SOPA's Cross Claim List Statement would not have occurred;

(d) the Opal Tower residents would not have been evacuated;

(e) the plaintiffs would not have suffered (and will not have suffered) the loss and damage alleged in paragraph 69(b)(iv) of the Plaintiffs' List Statement;

(f) SOPA will not have suffered the loss and damage alleged in paragraph 134(v) of SOPA's Cross Claim List Statement.

83L Further, as at about September 2017, Icon was aware that the hob above column C38 on level 10 had cracked and spalled under load.

83M In further breach of Icon's duty of care to the plaintiffs, each of the Group Members and SOPA, Icon:

(a) failed to alert WSP to the matters in paragraph 83L above, and to seek WSP's advice in relation to it;

(b) without consulting WSP, attempted to repair the hob.

83N Had Icon alerted WSP to the failure of the hob at or about this time:

(a) WSP would have recommended that investigations be carried out, which would have revealed that Icon's subcontractor, Traino Group Pty Ltd, supplied or used



concrete in the hobs that had less compressive strength than that specified in WSP's 'for construction' drawings:

- (b) appropriate rectification measures would have been taken to rectify these concrete deficiencies:
- (c) WSP would have recommended that investigations be carried out, which would have revealed that, contrary to WSP's FC drawing S06.010 [A], Icon's subcontractor, Evolution, had not carried out Full Grouting between the hobs and the precast panels:
- (d) appropriate rectification measures would have been taken to rectify these grouting deficiencies:
- (e) the Observed Damage pleaded in paragraphs 59 and 60 of the Plaintiffs' List Statement and paragraph 39 of SOPA's Cross Claim List Statement would not have occurred:
- (f) the Opal Tower residents would not have been evacuated:
- (g) the plaintiffs would not have suffered (and will not have suffered) the loss and damage alleged in paragraph 69(b)(iv) of the Plaintiffs' List Statement:
- (a)(h) SOPA will not have suffered the loss and damage alleged in paragraph 134(v) of SOPA's Cross Claim List Statement.

83O By reason of the breaches, the plaintiffs and the Group Members have each suffered and will suffer loss and damage as particularised in paragraph 69 of the Plaintiffs' List Statement.

83P By reason of the breaches, SOPA will suffer loss and damage as contended in paragraphs 125 and 126 of SOPA's Cross Claim List Statement.

83Q In the event that WSP was in breach of its duty of care to the plaintiffs and Group Members, by reason of the matters pleaded in paragraphs 56B – 56G, 57(b)(i), 57(b)(iv) and 61 of the Plaintiffs' List Statement (which is denied), then in the premises, in respect of the same damage for which WSP and Icon are both liable to the plaintiffs and Group Members, WSP and Icon are joint tortfeasors, and WSP is entitled to indemnity or contribution from Icon, pursuant to s 5 LRMP Act.

83R In the event that WSP was in breach of its duty of care to SOPA, by reason of the matters pleaded in paragraphs 37(b)(i), 37(b)(iv), 39(e), 124 and 134 of SOPA's Cross Claim List Statement (which is denied), then in the premises, in respect of the same

damage for which WSP and Icon are both liable to SOPA, WSP and Icon are joint tortfeasors, and WSP is entitled to indemnity or contribution from Icon, pursuant to s 5 LRMP Act.

**Icon's breaches of the ACL**

83S WSP repeats the allegations in paragraphs 67AL-67BD, and 69(c) of the Plaintiffs' List Statement and paragraphs 91 to 98 of SOPA's Cross Claim List Statement.

83T In the circumstances pleaded above, WSP has suffered and will suffer loss or damage because of Icon's misleading or deceptive conduct done in contravention of s 18 of the ACL and/or because of Icon's false or misleading representations made in contravention of s 29(1)(b) of the ACL, and is entitled to damages pursuant to s 236 of the ACL, comprising:

(a) any liability that WSP has to the plaintiffs, Group Members, SOPA and/or Evolution;

(b) WSP's fees for the Remedial Structural Engineering Services.

83U Further, WSP is entitled to an indemnity under ss 237 and 243 of the ACL to the effect that WSP be, and is entitled to be, indemnified by Icon in respect of the loss or damage pleaded at paragraph 83P above.

**Co-ordinate liability**

83V If, which is denied, WSP is liable to the plaintiffs, Group Members, SOPA and/or Evolution for breach of duty pursuant to s 37(1) of the DB&P Act and/or s 18 and/or s 29(1)(b) of the ACL, to the extent that the liability is in respect of the same damage, then WSP and Icon are under a co-ordinate liability to the plaintiffs, Group Members, SOPA and/or Evolution, and WSP is entitled to contribution from Icon.

**Remedial Structural Engineering Services**

84 WSP's provision of the Remedial Structural Engineering Services was for the benefit of Icon.

85 Further, the circumstances set out in paragraphs 35, and 39 – 53 above indicated that WSP would be paid for the provision of its services in accordance with the terms of the Remedial Proposal.

86 By reason of the matters referred to in paragraphs 35, 39 – 53 and 84 – 85 above, Icon accepted the Remedial Proposal, giving rise to a binding contract, on the terms of the Remedial Proposal (**the Retainer for Remedial Engineering Services**).

87 Pursuant to the Retainer for Remedial Engineering Services, WSP carried out Remedial Structural Engineering Services and sent to Icon invoices seeking payment thereof (**WSP Invoices**).

#### **Particulars of Remedial Structural Engineering Services**

The particulars of the Remedial Structural Engineering Services are contained in the WSP Invoices, set out below:

<b>Payment Claim No</b>	<b>Invoice No.</b>	<b>Date of Invoice</b>	<b>Sum Claimed (\$ (Excl GST)</b>	<b>Amount Received</b>
1	64031596	18-02-19	812,670.02	Nil
2	64032955	12-03-19	177,109.50	Nil
3	64034468	04-04-19	36,902.21	Nil
4	N/A	07-05-19	27,348.58	Nil
5	N/A	06-06-19	12,596.48	Nil
6	N/A	19-12-19	47,669.77	Nil
<b>TOTAL</b>			<b>1,114,296.56</b>	Nil

88 In breach of the Retainer for Remedial Engineering Services, Icon has refused to pay WSP's Invoices for the Remedial Structural Engineering Services.

89 Alternatively, in the event that there is no binding contract, in the circumstances set out in paragraphs 35, and 39 – 53 above, WSP provided the Remedial Structural Engineering Services at the request (either express or implied) of Icon, such that WSP is entitled to a reasonable sum (quantum meruit) in relation to the Remedial Structural Engineering Services, being the amount of the WSP Invoices.

90 Alternatively, in circumstances where Icon has failed to pay WSP for the Remedial Structural Engineering Services:

- (a) Icon has been enriched;
- (b) the enrichment has come at the expense of WSP;

(c) the enrichment is unjust.

91 By reason of the matters set in paragraph 90 above, WSP is entitled to a quantum meruit in relation to the Remedial Structural Engineering Services, being the amount of the WSP Invoices.

**D. QUESTIONS APPROPRIATE TO BE REFERRED TO A REFEREE**

1 At this stage, none.

**E. STATEMENT AS TO MEDIATION**

1 The parties have not attempted mediation.

2 WSP is willing to proceed to mediation at an appropriate time.

**SIGNATURE**

Signature of legal representative



Capacity

Solicitor

Date of signature

~~20 December 2020~~ 6 September 2021