

**AMENDED COMMERCIAL LIST RESPONSE TO
AMENDED COMMERCIAL LIST FOURTH CROSS-CLAIM
STATEMENT**

(Filed pursuant to the orders of Hammerschlag J made on 27 August 2021)

COURT DETAILS

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

TITLE OF PROCEEDINGS

First Plaintiff	TERRY WALTER WILLIAMSON
Second Plaintiff	HELEN THERESE WILLIAMSON
First Defendant	SYDNEY OLYMPIC PARK AUTHORITY (ABN 68 010 941 405)

TITLE OF CROSS- PROCEEDINGS

Cross-Claimant	ICON CO (NSW) PTY LTD (ABN 16 604 790 409)
Cross-Defendant	EVOLUTION PRECAST SYSTEMS PTY LTD (ABN 17 608 136 518)

FILING DETAILS

Filed for	Evolution Precast Systems Pty Ltd, Cross-Defendant
Filed in relation to	Fourth Cross Claim
Legal representative	Patrick Kaluski (PCN: 30370), Moray & Agnew
Legal representative reference	PZK/MZP:424921
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A. NATURE OF DISPUTE

1. Without admissions, Evolution Precast Systems Pty Ltd (**Evolution**) agrees generally with Icon Co (NSW) Pty Ltd's (**Icon**) description of the dispute, but does not agree with the description of Evolution's obligations by Icon.

B. ISSUES LIKELY TO ARISE

1. In addition to the issues identified by Icon's Amended Fourth Cross Claim Commercial List Statement filed on 9 July 2021 (**Fourth Cross-Claim Statement**), Evolution says the following issues are likely to arise:
 - (a) Did Evolution have any design obligations in its contract with Icon, and if so what were the extent of those obligations?
 - (b) Did WSP Structures Pty Ltd (**WSP**) approve Evolution's shop drawings, and if so what is the effect of that approval?
 - (c) Did Icon rely on any conduct of Evolution?
 - (d) Did Icon cause or contribute to its own loss?

C. CROSS-DEFENDANT'S RESPONSE TO THE CROSS-CLAIMANT'S CONTENTIONS

Without admissions, and for convenience, the headings and defined terms used in Icon's Fourth Cross-Claim Statement have been adopted in this List Response unless otherwise indicated.

As to the contentions of Icon in its Fourth Cross-Claim Statement, Evolution says as follows.

A. BACKGROUND

Parties

1. Evolution admits paragraph 1 of the Fourth Cross-Claim Statement.
2. In relation to paragraph 2 of the Fourth Cross-Claim Statement, Evolution:
 - (a) admits paragraphs 2(a) and 2(c);
 - (b) says that it is in the business of providing precast concrete works including the manufacture and installation of precast concrete wall panels;

- (c) otherwise denies the paragraph.

Contractual chain

- 3. In relation to paragraph 3 of the Fourth Cross-Claim Statement, Evolution:
 - (a) does not know the matters set out in the paragraph; and
 - (b) otherwise denies the paragraph.
- 4. In relation to paragraph 4 of the Fourth Cross-Claim Statement, Evolution:
 - (a) does not know the matters set out in the paragraph; and
 - (b) otherwise denies the paragraph.
- 5. In relation to paragraph 5 of the Fourth Cross-Claim Statement, Evolution:
 - (a) admits that it entered into a subcontract with Icon;

Particulars

Subcontract titled “Major Works Subcontract Agreement Between Icon Co (NSW) Pty Ltd and Subcontractor: Evolution Precast Systems Pty Ltd Subcontract number 15-002/13-100” (the **Subcontract**).

- (b) says that it entered into the Subcontract on or about 7 October 2016;

Particulars

Evolution received the concluded form of Subcontract on or after 5 October 2016, which it signed and returned to Icon on or about 7 October 2016. Part of Appendix 1 (Scope of Works) to the Subcontract had been initialled on behalf of Evolution on 23 September 2016, during a meeting between Nick Manefield of Evolution and Santo Orsina and Brad Smith of Icon.

- (c) says that pursuant to the Subcontract it was required to manufacture, supply, transport, and install the precast panels including supply of all labour, materials, tools, plant, equipment and supervision;

Particulars

Subcontract, Appendix 1 (Scope of Works).

- (d) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (e) repeats the matters set out in paragraphs 6, 8, 9, and 12 below;
 - (f) otherwise denies the paragraph.
6. In relation to paragraph 6 of the Fourth Cross-Claim Statement, Evolution:
- (a) says that clause 1 of the “Formal Instrument of Agreement” lists the documents comprising the Subcontract;
 - (b) says that the terms of the Subcontract included:
 - (i) Annexure Part A of the General Conditions of Subcontract;
 - (ii) Appendix 1 (Scope of Works);
 - (c) says that the General Conditions of Subcontract adopted a standard form of contractual wording;
 - (d) says that Annexure Part A of the General Conditions of Subcontract qualified the general terms contained in the General Conditions of Subcontract;
 - (e) says that the first page of Appendix 1 (Scope of Works) (numbered page 93) qualified the general terms contained in the remainder of Appendix 1 (Scope of Works), the remainder comprising a ‘Scope of Works’ document dated 23 August 2016 (**Scope of Works**);
 - (f) admits that, pursuant to clause 1 of the “Formal Instrument of Agreement”, the General Conditions of Subcontract and Appendix 1 (Scope of Works) form part of the Subcontract;
 - (g) otherwise refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (h) otherwise denies the paragraph.
7. In relation to paragraph 7 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 2.1 of the General Conditions includes a term that accords with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;

- (c) repeats the matters set out in paragraphs 5 and 6 above and 8, 9, and 12 below;
 - (d) otherwise denies the paragraph.
8. In relation to paragraph 8 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 1 of the General Conditions and clauses 1 and 5.1.1 of the Scope of Works includes terms that accord with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) repeats the matters set out in paragraphs 5 and 6 above, and 9 and 12 below;
 - (d) otherwise denies the paragraph.
9. In relation to paragraph 9 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clauses 3.1.1, 4.1.1, 5.2.4, 5.2.5 and 5.2.7 of the Scope of Works include terms that accord with the description set out in sub-paragraphs (a), (b), (c), (d) and (e) of the paragraph;
 - (b) repeats the matters referred to in paragraphs 5, 6 and 8 above, and 12 below;
 - (c) further says that it was WSP's responsibility to review and approve the shop drawings prepared by Evolution;

Particulars

- (i) Australian Standards 3850.2, Prefabricated Concrete Elements: Part 2 Building Construction section 2.10.3.1.
 - (ii) Scope of Work, clauses 3.1.2, 3.1.7, 3.1.11, 5.2.3.
- (d) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (e) otherwise denies the paragraph.

10. In relation to paragraph 10 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 1 of the General Conditions includes a term that accords with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.
11. In relation to paragraph 11 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 1 of the Scope of Works includes a term that accords with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.
12. In relation to paragraph 12 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 1 of the General Conditions includes a term that accords with the description set out in the paragraph;
 - (b) repeats the matters set out in paragraphs 5, 6, 8 and 9 above;
 - (c) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (d) denies that the work under the Subcontract included "*design work*";

Particulars

Subcontract, Annexure Part A, item 38.

- (e) says that any "*design obligations*" under the Subcontract were removed or limited by Annexure Part A to the General Conditions of Subcontract item 38 and Item 11 of the first page of Appendix 1 (Scope of Works);
- (f) says that on the proper construction of the Subcontract, its obligations were confined to the manufacture and installation of the precast panels to a design directed and approved by WSP;

- (g) repeats, for the purposes of this List Response only, paragraphs 5 to 10 inclusive, 13, 42 and 46 of the Amended Second Cross Claim Statement filed by Icon in these proceedings on 9 July 2021;
- (h) says that WSP was responsible for providing Icon with structural and civil engineering design and associated services;
- (i) refers to and repeats paragraph 37(b) of Icon's List Response filed on 16 July 2021 to the Amended First Cross Claim Statement;
- (j) denies that it had any "*design obligations*" or was obliged to conduct any "*design work*";
- (k) otherwise denies the paragraph.

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

13. In relation to paragraph 13 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 2.6 of the General Subcontract Conditions contains various warranties by Evolution;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) repeats the matters set out in paragraphs 5, 6, 8, 9 and 12 above;
 - (d) otherwise denies the paragraph.
14. In relation to paragraph 14 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 2.7 of the General Conditions includes a term that accords with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.
15. In relation to paragraph 15 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 2.8 of the General Conditions contains the terms of an indemnity given by Evolution;

- (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.
16. In relation to paragraph 16 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 2.8 of the General Conditions includes a term that accords with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) says that clause 2 of the General Conditions is not effective at law to exclude the operation of Part 4 of the *Civil Liability Act 2002 (NSW)*;
 - (d) otherwise denies the paragraph.
17. In relation to paragraph 17 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 2.9 of the General Conditions includes terms that accord with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.
18. In relation to paragraph 18 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 2.9 of the General Conditions includes terms that accord with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.
19. In relation to paragraph 19 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 2.10 of the General Subcontract Conditions contains terms that accord with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.
20. In relation to paragraph 20 of the Fourth Cross-Claim Statement, Evolution:

- (a) admits that clause 5.4 of the General Conditions contains terms that accord with the description set out in the paragraph;
- (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
- (c) otherwise denies the paragraph.

21. In relation to paragraph 21 of the Fourth Cross-Claim Statement, Evolution:

- (a) says that clause 16B of the General Conditions is headed "*Professional Indemnity Insurance*";
- (b) repeats the matters set out in paragraphs 5, 6, 8, 9, and 12 above;
- (c) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
- (d) says that item 38 of Annexure Part A says that "*Does the work under the Subcontract include design work?*" and that item 38 specified "*No*";
- (e) says that clause 16B of the General Conditions only applied where the subcontractor was required to prepare "*design documents*";
- (f) says that in such a case, the levels of professional indemnity insurance required to be effected and maintained were not less than those stated in item 42(a) of the Annexure Part A;
- (g) says that item 42 of Annexure Part A for professional indemnity insurance referable to clause 16B of the General Conditions is specified as "*N/A*";
- (h) in the premises, says that there was no obligation on the part of Evolution to effect and maintain professional indemnity insurance;

Particulars

Subcontract, Annexure Part A, item 42.

- (i) otherwise denies the paragraph.

22. In relation to paragraph 22 of the Fourth Cross-Claim Statement, Evolution:

- (a) admits that it did not effect and maintain professional indemnity insurance;
- (b) refers to and repeats paragraph 21 above;

- (c) otherwise denies the paragraph.
23. In relation to paragraph 23 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 17 of the General Conditions contains terms that accord with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) otherwise denies the paragraph.
24. In relation to paragraph 24 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that clause 19.1 of the General Conditions contains terms that accord with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
 - (c) repeats the matters set out in paragraph 21 above;
 - (d) says that in the premises there was no obligation to provide evidence that it had effected a professional indemnity policy of insurance;
 - (e) otherwise denies the paragraph.
25. Evolution admits paragraph 25 of the Fourth Cross-Claim Statement.
26. In relation to paragraph 26 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that it did not provide a copy any professional indemnity policy to Icon;
 - (b) says that for the reasons set out in paragraphs 21 and 24 above, it had no obligation to obtain or provide a copy of any professional indemnity policy to Icon;
 - (c) says that it provided a copy of a public and products liability certificate of currency to Icon from time to time;
 - (d) says that at no time prior to the completion of the works did Icon inform it that the provision of a professional indemnity policy was required (whether under the Subcontract or otherwise);
 - (e) says that having regard to the content of Annexure Part A to the Subcontract and the absence of any complaint by Icon as to the failure by Evolution to provide it

with a copy of a professional indemnity policy, Icon represented that no such policy was required by it whether under the Subcontract or otherwise;

- (f) in reliance on the representation, Evolution did not take any steps to take out any professional indemnity policy;
- (g) further, and in the alternative, each of Icon and Evolution acted on the assumed state of affairs that a professional indemnity policy was not required to be taken out and supplied to Icon by Evolution, whether under the Subcontract or otherwise;
- (h) in the premises, Icon is now estopped from relying on any allegation that Evolution was obliged to take out and supply to Icon a professional indemnity policy.

27. In relation to paragraph 27 of the Fourth Cross-Claim Statement, Evolution:

- (a) admits that clause 5.5.12 of the Scope of Works contains terms that accord with the description set out in the paragraph;
- (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
- (c) otherwise denies the paragraph.

First Evolution Warranty Deed

28. Evolution admits paragraph 28 of the Fourth Cross-Claim Statement.

29. In relation to paragraph 29 of the Fourth Cross-Claim Statement, Evolution:

- (a) admits that clause 1 of the First Evolution Warranty Deed contains terms that accord with the description set out in the paragraph;
- (b) refers to and repeats the whole of the First Evolution Warranty Deed terms as if fully set out herein;
- (c) otherwise denies the paragraph.

30. In relation to paragraph 30 of the Fourth Cross-Claim Statement, Evolution:

- (a) admits that clause 4 of the First Evolution Warranty Deed contains terms that accord with the description set out in the paragraph;

- (b) refers to and repeats the whole of the First Evolution Warranty Deed terms as if fully set out herein;
- (c) otherwise denies the paragraph.

Second Evolution Warranty Deed

- 31. Evolution admits paragraph 31 of the Fourth Cross-Claim Statement.
- 32. In relation to paragraph 32 of the Fourth Cross-Claim Statement, Evolution:
 - (a) admits that clause 1 of the Second Evolution Warranty Deed contains terms that accord with the description set out in the paragraph;
 - (b) refers to and repeats the whole of the Second Evolution Warranty Deed terms as if fully set out herein;
 - (c) otherwise denies the paragraph.

HB Act

- 33. In relation to paragraph 33 of the Fourth Cross-Claim Statement, Evolution:
 - (a) denies that the services provided by Evolution in the Subcontract constituted '*residential building work*' for the purposes of the HB Act;
 - (b) otherwise denies the paragraph.

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

- 34. In relation to paragraph 34 of the Fourth Cross-Claim Statement, Evolution:
 - (a) does not know the matters alleged in the paragraph; and
 - (b) otherwise denies the paragraph.
- 35. In relation to paragraph 35 of the Fourth Cross-Claim Statement, Evolution:
 - (a) does not know the matters alleged in the paragraph; and
 - (b) otherwise denies the paragraph.
- 36. In relation to paragraph 36 of the Fourth Cross-Claim Statement, Evolution:

- (a) does not know the matters alleged in the paragraph; and
- (b) otherwise denies the paragraph.

37. In relation to paragraph 37 of the Fourth Cross-Claim Statement, Evolution:

- (a) says that on or about 16 September 2016 WSP issued a drawing numbered 4419 S06.010 A, titled "Typical Precast Wall Details – Sheet 01" and marked "issued for construction";
- (b) says that on or about 19 September 2016 Icon emailed Evolution a bundle of drawings including the WSP drawing numbered 4419 S06.010 A;

Particulars

Aconex from Icon to Evolution dated 19 September 2016 at 10.34am (Mail No NSWIcon-Transmit-000389);

- (c) refers to the drawing for its full terms and effect as if reproduced herein; and
- (d) refers to the matters set out in paragraph 42 below;
- (e) otherwise denies the paragraph.

38. In relation to paragraph 38 of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12 and 37 above and paragraphs 42, 43 and 47 below;
- (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
- (c) otherwise denies the paragraph.

Services provided by Evolution

39. In relation to paragraph 39 of the Fourth Cross-Claim Statement, Evolution:

- (a) says that clause 5.1.1 of the Scope of Works includes terms that accords with the description set out in the paragraph;
- (b) refers to and repeats the whole of the Subcontract terms as if fully set out herein;
- (c) repeats the matters set out in paragraphs 5, 6, 8, 9 and 12 above;

(d) otherwise denies the paragraph.

40. In relation to paragraph 40 of the Fourth Cross-Claim Statement, Evolution:

(a) repeats the matters set out in paragraphs 5, 6, 8, 9 and 12 above;

(b) otherwise denies the paragraph.

41. In relation to paragraph 41 of the Fourth Cross-Claim Statement, Evolution:

(a) repeats the matters set out in paragraphs 5, 6, 8, 9 and 12 above;

(b) repeats the matters set out in paragraphs 43 and 47 below;

(c) otherwise denies the paragraph.

The alleged grouting design change

42. Evolution admits paragraph 42 of the Fourth Cross-Claim Statement.

42A. Evolution admits paragraph 42A of the Fourth Cross-Claim Statement.

43. In relation to paragraph 43 of the Fourth Cross-Claim Statement, Evolution:

(a) says that on about 21 September 2016, Evolution's shop detailer issued Drawing DE01 P2;

(b) says that Drawing DE01 P2 did not only relate to level 1 of the Building but to all levels where this detail was depicted on the shop drawings;

(c) refers to the drawing for its full terms and effect as if reproduced herein;

(d) further says that:

(i) on 29 August 2016 Icon sent Evolution an email requesting "Evolution's detail submission of first upturn at level";

Particulars

Aconex from Icon to Evolution dated 29 August 2016 at 11.06 am
(mail no NSWIcon – RFI-000149.).

(ii) in response to the email from Icon at paragraph 43(d)(i) above, on 29 August 2016 Evolution's shop detailer sent Icon an email attaching the

typical detail of the standard shiplap detail and the standard shiplap detail with slab upturn;

Particulars

Aconex from Evolution to Icon dated 29 August 2016 at 11.41 am (mail no EVOPS-SUBADV-000008.).

- (iii) on 29 August 2016 Icon sent WSP an email from Evolution's shop detailer attaching the typical detail of the standard shiplap detail and the standard shiplap detail with slab upturn;

Particulars

Aconex from Icon to WSP and Bates Smart dated 29 August 2016 at 2:29 pm (mail no. NSWIcon-HCADV-002191).

- (iv) on 30 August 2016, representatives of WSP, Bates Smart, Evolution and Icon attended a meeting where shiplap profile was discussed;
- (v) following the 30 August 2016 meeting, Icon sent an email to WSP, Bates Smart and Evolution attaching a marked-up shiplap profile with handwritten makings made during that meeting;

Particulars

Aconex from Icon to WSP, Evolution and Bates Smart dated 30 August 2016 at 4:45 pm (mail no. NSWIcon-HCADV-002204).

- (vi) on 8 September 2016 Evolution's shop detailer sent an email to Icon, WSP and Bates Smart attaching Level 1 shop drawings, including drawing number DE01 RevP1;

Particulars

Aconex from Evolution to WSP, Icon and Bates Smart dated 8 September 2016 at 2:38 pm (mail no. EVOPS-TRANSMIT-000002).

- (vii) on 8 September 2016, Icon sent an email to Bates Smart, which was copied to WSP, initiating a precast workflow for Evolution's shop drawings and attaching copies of those drawings including drawing number DE01 RevP1;

Particulars

Aconex from Icon to Bates Smart, WSP and others dated
8 September 2016 at 4:40 pm (mail no. NSWIcon-WTRAN-000088).

- (viii) on 8 September 2016, Icon sent an email to Bates Smart, Evolution and WSP attaching drawing number DE01 RevP1 with handwritten amendments in red and requesting that WSP check the shop drawings;

Particulars

Aconex from Icon to WSP, Bates Smart and Evolution dated
8 September 2016 at 6:18 pm (mail no. NSWIcon-HCADV-002425).

- (ix) on 12 September 2016, Icon sent an email to WSP initiating a precast workflow for Evolution's shop drawings and attaching copies of those drawings including drawing number DE01 RevP1;

Particulars

Aconex from Icon to WSP and others dated 12 September 2016 at
12:50 pm (mail no. NSWIcon-WTRAN-000089).

- (x) on 12 September 2016, Icon sent an email to AMA Windows, which was copied to WSP, initiating a precast workflow for Evolution's shop drawings and attaching copies of those drawings including drawing number DE01 RevP1;

Particulars

Aconex from Icon to AMA Windows, WSP and others dated
12 September 2016 at 12:51 pm (mail no. NSWIcon-WTRAN-
000090).

- (xi) on 12 September 2016, Icon sent an email to other representatives of Icon, which was copied to WSP, initiating a precast workflow for Evolution's shop drawings and attaching copies of those drawings including drawing number DE01 RevP1;

Particulars

Aconex from Icon to Icon, WSP and others dated 12 September 2016 at 12:54 pm (mail no. NSWIcon-WTRAN-000092).

- (xii) on 12 September 2016, Evolution's shop detailer sent an email to Icon attaching Evolution's Level 1 shop drawings, including drawing number DE01 RevP1;

Particulars

Aconex from Evolution to WSP, Icon and Bates Smart dated 12 September 2016 at 1:11 pm (mail no. EVOPS-TRANSMIT-000003).

- (xiii) On 12 September 2016, Icon sent an email to Bates Smart, which was copied to WSP, initiating a precast workflow for Evolution's shop drawings and attaching copies of those drawings including drawing number DE01 RevP1;

Particulars

Aconex from Icon to Bates Smart, WSP and others dated 12 September 2016 at 2:46 pm (mail no. NSWIcon-WTRAN-000098).

- (xiv) on 12 September 2016, Bates Smart sent an email to Icon and WSP attaching, inter alia, drawing number DE01 RevP1 containing handwritten amendments in green together with a red stamp dated 12 September 2016 stating '*EXAMINED*' and indicating that the following applied with respect to shop drawing DE01 RevP1:

- (A) '*Resubmit*'; and
 (B) '*Make corrections as Noted*';

Particulars

Aconex from Bates Smart to WSP and Icon dated 12 September 2016 at 6:28 pm (mail no. B Smart-CADV-000707).

- (xv) on 15 September 2016, Icon sent an email to Evolution, which was copied to WSP, forwarding the email from Bates Smart, referred to in sub-

paragraph (xiv) above attaching, inter alia, drawing number DE01 RevP1 containing Bates Smart's handwritten amendments;

Particulars

Aconex from Icon to Evolution, WSP and others dated 15 September 2016 at 12:39 pm (mail no. NSWIcon-HCADV-002518).

(xvi) on 19 September 2016, WSP reviewed and approved Evolution's drawing number DE01 RevP1;

Particulars

Aconex from WSP to Evolution and Icon dated 19 September 2016 at 3:29 pm (mail no. WSP(SA)-CADV-000562).

(xvii) on 19 September 2016, Icon sent an email to Evolution, which was copied to WSP, attaching, inter alia, drawing number DE01 RevP1 which had been approved by WSP;

Particulars

Aconex from Icon to Evolution, WSP and others dated 19 September 2016 at 4:55 pm (mail no. NSWIcon-RFI-000229).

(xviii) on 21 September 2016, Evolution's shop detailer issued Evolution's Level 1 shop drawings to WSP for re-approval including drawing number DE01 RevP2 (**Evolution Shop Drawing 1**);

Particulars

Aconex from Evolution to Icon and copied to WSP, dated 21 September 2016 at 2:50 am (mail no. EVOPS-SUBADV-000028).

(xix) On 21 September 2016, WSP sent an email to Evolution, Icon and others that stated "*I have done a quick review and nothing stands out as a major change. I will do a thorough going over and stamp them*";

Particulars

Aconex from WSP to Evolution, Icon and others dated 21 September 2016 at 10:49 am (mail no. WSP(SA)-CADV-000573).

(xx) on 21 September 2016, Bates Smart sent an email to Icon and Evolution, which was copied to WSP, attaching, inter alia, Evolution Shop Drawing 1 containing amendments in green and red together with a red stamp dated 21 September 2016 stating 'EXAMINED' and indicating that the following applied with respect to Evolution Shop Drawing 1:

- (A) *'Resubmit'*; and
- (B) *'Make corrections as Noted'*;

Particulars

Aconex from Bates Smart to Evolution, Icon and WSP dated 21 September 2016 at 8:19 pm (mail no. B Smart-CADV-000750).

(xxi) on 22 September 2016, Icon sent an email to Evolution, which was copied to WSP, attaching, inter alia, Evolution Shop Drawing 1 containing amendments received from AMA Windows;

Particulars

Aconex from Icon to Evolution, WSP and others dated 22 September 2016 at 11:55 am (mail no. NSWIcon-HCADV-002668).

(xxii) on 22 September 2016, WSP reviewed and approved Evolution Shop Drawing 1;

Particulars

Aconex from WSP to Evolution and others dated 22 September 2016 at 2:42 pm (mail no. WSP(SA)-CADV-000581).

(e) otherwise denies the paragraph.

44. In relation to paragraph 44 of the Fourth Cross-Claim Statement, Evolution:

- (a) refers to paragraphs 42 and 43 above;
- (b) admits that Evolution Shop Drawing 1 (which Icon calls 'Drawing DE01 P2') included as 'Detail 1' and 'Detail 1A' a standard shiplap detail and a standard shiplap detail with slab upturn for a joint between a hob and precast panel;

- (c) admits that the standard shiplap detail and the standard shiplap detail with slab upturn showed grouting on the inner portion of the hob only;
 - (d) otherwise denies the paragraph.
45. In relation to paragraph 45 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits the paragraph;
 - (b) further refers to and repeats paragraph 127 of Icon's Amended Second Cross Claim Statement against WSP filed on 9 July 2021.
46. Evolution admits paragraph 46 of the Fourth Cross-Claim Statement.
47. In relation to paragraph 47 of the Fourth Cross-Claim Statement, Evolution says that:
- (a) on 22 September 2016, Evolution's shop detailer issued Evolution's Level 1 precast package for construction, including drawing number DE01 RevP3;

Particulars

- (i) Aconex from Evolution to Icon, copied to WSP and others, dated 22 September 2016 at 9:26 pm (mail no. EVOPS-TRANSMIT-000004).
 - (ii) Aconex from Evolution to Icon, copied to WSP and others, dated 22 September 2016 at 9:32 pm (mail no. EVOPS-TRANSMIT-000005).
- (b) on 23 September 2016, Icon sent an email to Evolution, which was copied to WSP, attaching, inter alia, drawing number DE01 RevP3 containing Icon's comments on that drawing;

Particulars

- Aconex from Icon to Evolution, WSP and others dated 23 September 2016 at 12:37 pm (mail no. NSWIcon-HCADV-002721).
- (c) on 12 October 2016, Evolution's shop detailer issued Evolution's Level 2 precast package for construction, including drawing number DE01 RevP4;

Particulars

Aconex from Evolution to Icon dated 12 October 2016 at 2:46 pm (mail no. EVOPS-TRANSMIT-000009).

- (d) on 14 October 2016, Icon sent an email to WSP and others forwarding an email from Evolution shop detailer issuing Evolution's Level 2 precast package for construction, including drawing number DE01 RevP4;

Particulars

Aconex from Icon to WSP and others dated 14 October 2016 at 7:37 am (mail no. NSWIcon-TRANSMIT-000516).

- (e) on 31 October 2016:
 - (i) Evolution's shop detailer issued Evolution's Level 3 precast package for re-approval including Drawing DE01 P5;

Particulars

Aconex from Evolution to Icon, copied to WSP, dated 31 October 2016 at 3:36 pm (mail no. EVOPS-TRANSMIT-000014).

- (ii) Icon sent an email to WSP and others forwarding Evolution's Level 3 precast package for review, including Drawing DE01 P5;

Particulars

Aconex from Icon to WSP and others dated 31 October 2016 at 5:33 pm (mail no. NSWIcon-TRANSMIT-000579).

- (f) on 1 November 2016, Bates Smart sent an email to WSP and others attaching, inter alia, Drawing DE01 P5 containing amendments in green together with a red stamp dated 1 November 2016 stating 'EXAMINED' and indicating that the following applied with respect to Drawing DE01 P5:
 - (i) 'Resubmit'; and
 - (ii) 'Make corrections as Noted';

Particulars

Aconex from Bates Smart to WSP and others dated 1 November 2016 at 6:23 pm (mail no. B Smart-CADV-000912).

- (g) on 2 November 2016, Icon sent an email to Evolution forwarding the email in subparagraph (f) above;

Particulars

Aconex from Icon to Evolution dated 2 November 2016 at 9:01 am (mail no. NSWIcon-HCADV-003417).

- (h) on 3 November 2016, WSP reviewed and approved Evolution Drawing DE01 P5;

Particulars

Aconex from WSP to Icon and Bates Smart dated 3 November 2016 at 5:21 pm (mail no. WSP(SA)-CADV-000684).

- (i) on 16 May 2017, Evolution's shop detailer issued two drawings, including, drawing DE01 P6;

Particulars

Aconex from Evolution to Icon dated 16 May 2017 at 5:48 pm (mail no. EVOPS-Transmit-000049).

- (j) on 19 May 2017, Icon sent an email to Evolution commenting on the drawings sent to it by Evolution in subparagraph (i) above;

Particulars

Aconex from Icon to Evolution dated 19 May 2017 at 1:08 pm (mail no. NSWIcon-HCADV-006561).

- (k) on 5 July 2017, Evolution's shop detailer issued Levels 35 to Roof precast package for construction including drawing DE01 Rev A;

Particulars

Aconex from Evolution to Icon dated 5 July 2017 at 11:00 am (mail no. EVOPS-Transmit-000061).

- (l) admits that the shop drawings referred to above included as 'Detail 1' and 'Detail 1A' a standard shiplap detail and a standard shiplap detail with slab upturn for a joint between a hob and precast panel;

- (m) admits that the standard shiplap detail and the standard shiplap detail with slab upturn showed grouting on the inner portion of the hob only;
 - (n) otherwise denies the paragraph.
48. In relation to paragraph 48 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraph 47 above;
 - (b) otherwise denies the paragraph.
49. In relation to paragraph 49 of the Fourth Cross-Claim Evolution:
- (a) admits the paragraph;
 - (b) further refers to and repeats paragraph 128 of Icon's Amended Second Cross Claim Statement against WSP filed on 9 July 2021.
50. In relation to paragraph 50 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 43, 44 and 47 above;
 - (b) otherwise denies the paragraph.
51. In relation to paragraph 51 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 43, 44, 47 and 50 above and paragraphs 51A and 51B below;
 - (b) says that precast panels were installed by subcontractors of Evolution and not by Evolution;
 - (c) says that Evolution provided to its installation subcontractors the shop drawings:
 - (i) approved by WSP; and
 - (ii) which included, as 'Detail 1' and 'Detail 1A', a standard shiplap detail and a standard shiplap detail with slab upturn for a joint between a hob and precast panel, showing grouting on the inner portion of the hob only;
 - (d) says that one of Evolution's subcontractors installed grout in the joint between precast panel C409 and the hob at location 4A-10.5, with grout adjacent to the outer face of the panel and hob only;

- (e) says that its subcontractor was:
 - (i) informed by Icon that Icon would be re-forming the in situ hob at location 4A-10.5;
 - (ii) directed by Icon to grout the joint between that hob and panel C409 in the way described in subparagraph (d) above; and
 - (iii) informed by Icon that Icon would itself arrange for the further grouting of the joint between the precast panel C409 and that hob, once the hob had been re-formed;
- (f) says that its subcontractor could not have installed grout in the joint at location 4A-10.5 in accordance with 'Detail 1' and 'Detail 1A' because, as a result of the matters set out at paragraphs 51A and 51B(c) below, the joint did not resemble the joint depicted in those details;
- (g) otherwise denies the paragraph.

51A. In relation to paragraph 51A of the Fourth Cross-Claim Statement, Evolution:

- (a) admits that on 26 January 2019, WSP issued structural design advice SDA #081 to the Department of Planning and Environment;
- (b) otherwise denies the paragraph;
- (c) refers to and repeats the whole of structural design advice SDA #081 as if fully set out herein;
- (d) says that structural design advice communicated by both text and drawing (diagram titled "*Wall 4A-10.5; Sketch of WSP Design through joint and the 'As constructed' based upon the recent coring of the joint*") that:
 - (i) the in situ hob at location 4A-10.5:
 - (A) was constructed with a 60 millimetre wide shiplap joint on the internal face; and
 - (B) was not constructed in accordance with the WSP design;
 - (ii) as a result, the hob did not align with the bottom of the precast panel, creating a void between them;

- (e) repeats subparagraphs 51(d), (e) and (f) above says further that:
 - (i) Icon was responsible for the construction of the in situ hob at location 4A-10.5; and
 - (ii) neither Evolution nor its subcontractors installed the in situ hob at location 4A-10.5.

51B. In relation to paragraph 51B of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraph 51A above;
- (b) denies that structural design advice SDA #081 contained any advice to the effect stated in subparagraph 51B(b);
- (c) says that the requirements of Evolution's drawing DE01 P5:
 - (i) were applicable to the joint between a precast panel and an in situ hob where the panel and hob had been formed in accordance with the 'WSP design' as identified in structural design advice SDA #081; and
 - (ii) could not be applied at location 4A-10.5, because the in situ hob had been formed in a manner which did not accord with the WSP design as identified in structural design advice SDA #081;
- (d) otherwise denies the paragraph.

51C. In relation to paragraph 51C of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraphs 51, 51A and 51B;
- (b) otherwise denies the paragraph.

Panel Reinforcement

51D. In relation to paragraph 51D of the Fourth Cross-Claim Statement, Evolution:

- (a) says that on 19 September 2016, Icon sent a number of WSP drawings to Evolution including drawing no. 4419 S06.011[A];

Particulars

Aconex from Icon to Evolution dated 19 September 2016 at 10.34 am (mail no. NSWIcon-Transmit-000389).

- (b) says that drawing no. 4419 S06.011[A]:
 - (i) was dated 16 September 2016 and marked as 'For Construction'; and
 - (ii) showed the reinforcement required in each precast panel type in the Building (**WSP's Panel Reinforcement Design**);
- (c) otherwise denies the paragraph.

51E. In relation to paragraph 51E of the Fourth Cross-Claim Statement, Evolution:

- (a) says that in WSP's Panel Reinforcement Design, the precast panel type for level 10 was panel type A;

Particulars

WSP drawing titled 'Precast Wall Elevation Sheet 05' drawing number 4419 S06.005A

- (b) says that panel type A required 11N28 horizontal reinforcement bars at 100 centres to be installed in the bottom 1000 millimetre portion of the precast panel;
- (c) otherwise admits the paragraph.

51F. In relation to paragraph 51F of the Fourth Cross-Claim Statement, Evolution:

- (a) says that between 8 September 2016 and 3 August 2017, it issued shop drawings for precast panels to be installed at various levels;
- (b) otherwise denies the paragraph.

51G. Evolution admits paragraph 51G of the Fourth Cross-Claim Statement.

51H. Evolution admits paragraph 51H of the Fourth Cross-Claim Statement.

51I. In relation to paragraph 51I of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraph 51 above;

(b) says that its subcontractors installed precast panels in various locations in the Building between 30 October 2016 and 9 September 2017;

(c) otherwise denies the paragraph.

51J. In relation to paragraph 51J of the Fourth Cross-Claim Statement, Evolution:

(a) admits the paragraph;

(b) says that panel C1012-R for location 10C-14.5 on level 10 of the Building was constructed with an incorrect placement of the bottom horizontal reinforcement specified in that part of WSP's Panel Reinforcement Design applicable to that panel (**Inverted Reinforcement Error**).

51K. In relation to paragraph 51K of the Fourth Cross-Claim Statement, Evolution:

(a) repeats the matters set out in paragraphs 51E and 51I above;

(b) otherwise admits the paragraph;

(c) says that despite the Inverted Reinforcement Error, the precast panel C1012-R at location 10C-14.5 contained:

(i) 11N28 horizontal reinforcement bars at 100 centres; and

(ii) an amount of steel reinforcement which corresponded with that specified in that part of WSP's Panel Reinforcement Design applicable to that panel.

51L. In relation to paragraph 51L of the Fourth Cross-Claim Statement, Evolution:

(a) repeats the matters set out in paragraph 51K above;

(b) denies that the Alleged Insufficient Reinforcement Error occurred;

(c) admits that the precast panels were delivered to the building site with the steel reinforcement encased in concrete;

(d) otherwise denies the paragraph.

C. DAMAGE OBSERVED IN THE BUILDING

52. In relation to paragraph 52 of the Fourth Cross-Claim Statement, Evolution:

- (a) does not know the matters alleged in the paragraph;
 - (b) otherwise denies the paragraph.
53. In relation to paragraph 53 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know the matters alleged in the paragraph;
 - (b) otherwise denies the paragraph.
54. In relation to paragraph 54 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know when residents were allowed to return to the Building;
 - (b) otherwise denies the paragraph.
55. In relation to paragraph 55 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that damage was identified in a precast panel and hob located in the Building at Level 4, 4A-10.5;
 - (b) does not know when that damage was identified;
 - (c) otherwise denies the paragraph.
56. In relation to paragraph 56 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know when residents were told to evacuate the Building or who gave the direction;
 - (b) otherwise denies the paragraph.
57. In relation to paragraph 57 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that damage was identified on levels 4, 10 and 16 of the Building;
 - (b) does not know when that damage was identified;
 - (c) otherwise denies the paragraph.
58. Evolution notes the definition of '**Observed Damage**' contained in paragraph 58 of the Fourth Cross-Claim Statement.

D. RECTIFICATION DESIGN AND RECTIFICATION WORKS

59. In relation to paragraph 59 of the Fourth Cross-Claim Statement, Evolution:
- (a) admits that WSP prepared a rectification design and that Icon undertook rectification work;
 - (b) says it had no role in the preparation of the remediation design;
 - (c) otherwise denies the paragraph.
60. In relation to paragraph 60 of the Fourth Cross-Claim Statement, Evolution:
- (a) notes that paragraph 60 contains a summary of the loss and damage alleged to have been suffered by Icon;
 - (b) otherwise denies the paragraph.

E. ALLEGATIONS MADE IN THE PROCEEDINGS

The plaintiff's claim

61. Evolution admits paragraph 61 of the Fourth Cross-Claim Statement.
62. Evolution admits paragraph 62 of the Fourth Cross-Claim Statement.
- 62A. Evolution admits paragraph 62A of the Fourth Cross-Claim Statement.
- 62B. Evolution admits paragraph 62B of the Fourth Cross-Claim Statement.

SOPA's Cross-claim against Icon

63. Evolution admits paragraph 63 of the Fourth Cross-Claim Statement.
64. In response to paragraph 64 of the Fourth Cross-Claim Statement, Evolution:
- (a) as to paragraph 36(b)(iv)(F) of Icon's First Cross-Claim List Response, admits that WSP FC Drawing No S06.010[A] specified the use of a 20 millimetre grout bed in the joint between the precast panel and the hob where the precast panels were less than 180 millimetres thick;
 - (b) as to paragraph 37(b)(iii) of Icon's First Cross-Claim List Response, admits that the Inverted Reinforcement Error was de minimis and not a necessary condition

for the occurrence, or a cause, of the Observed Damage, either on its own or in combination with any other matter;

- (c) as to paragraph 38(b)(i)(B) and paragraph 38(b)(i)(C) of Icon's First Cross-Claim List Response, admits that the precast panels:
 - (i) on levels 4 and 10 of the Building were constructed by Evolution with concrete which achieved a concrete strength of at least 80 MPa; and
 - (ii) on level 16 of the Building were constructed by Evolution with concrete which achieved a concrete strength of at least 65 MPa;
- (d) as to paragraph 124 of Icon's First Cross-Claim List Response, admits that:
 - (i) the necessary condition of the occurrence of the Observed Damage, and therefore the cause of it, was WSP's failure to:
 - (A) design the hobs to include sufficient steel reinforcement to comply with clauses 2.2, 2.3, 7.2.4, 7.3 and 12.6 of Australian Standard AS 3600:2009 (**AS 3600**); and
 - (B) design the hob to prevent bursting and control cracking in the hobs in the area where the tensile forces in the hob created a risk of bursting;
 - (ii) had WSP designed the hobs to contain sufficient steel reinforcement as required by AS 3600 to account for the tensile forces inherent in the design specified and/or approved by WSP and to prevent bursting, the Observed Damage would not have occurred;
- (e) otherwise denies the paragraph.

Icon's amended cross-claim against WSP

- 65. Evolution admits paragraph 65 of the Fourth Cross-Claim Statement.
- 66. Evolution admits paragraph 66 of the Fourth Cross-Claim Statement.
- 67. Evolution admits paragraph 67 of the Fourth Cross-Claim Statement.
- 68. Evolution admits paragraph 68 of the Fourth Cross-Claim Statement.
- 68A. Evolution admits paragraph 68A of the Fourth Cross-Claim Statement.

68B. In relation to paragraph 68B of the Fourth Cross-Claim Statement, Evolution:

- (a) notes what is repeated by Icon in that paragraph; and
- (b) otherwise denies the paragraph.

F. ICON'S CLAIMS AGAINST EVOLUTION

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

69. In relation to paragraph 69 of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 41, 43, 44, 47, 48, 51 and 51A to 51L above;
- (b) otherwise denies the paragraph.

70. In relation to paragraph 70 of the Fourth Cross-Claim Statement, Evolution:

- (a) denies the paragraph;
- (b) repeats the matters set out in paragraphs 51, 51A, 51B, 51J, 51K, 51L and 64 above;
- (c) repeats the matters set out in:
 - (i) paragraph 62B(c) of the Fourth Cross-Claim Statement; and
 - (ii) paragraphs 61 and 67J(e) of Icon's Commercial List Response to the plaintiffs' Amended Commercial List Statement.

71. In relation to paragraph 71 of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraph 70 above;
- (b) denies that it is responsible for any loss or damage suffered by Icon;
- (c) otherwise denies the paragraph.

72. Evolution denies paragraph 72 of the Fourth Cross-Claim Statement.

73. Evolution denies paragraph 73 of the Fourth Cross-Claim Statement.

74. Evolution notes paragraph 74 of the Fourth Cross-Claim Statement.
75. Evolution denies paragraph 75 of the Fourth Cross-Claim Statement.
76. Evolution denies paragraph 76 of the Fourth Cross-Claim Statement.

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. In relation to paragraph 76A of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 43, 47, 51, 51A, 51B and 69 above;
- (b) otherwise denies the paragraph.

76B. In relation to paragraph 76B of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraph 76A above;
- (b) says that:
 - (i) under the Subcontract, it manufactured and supplied to Icon precast panels for the Building;
 - (ii) the precast panels were:
 - (A) a 'building product';
 - (B) used for 'building work',

within the meaning of Part 4 of the *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**);
- (c) in the premises, admits it carried out 'construction work' within the meaning of Part 4 of the DBP Act (**Construction Work**) by the manufacture and supply of precast panels for the Building;
- (d) says to the extent that 'building work' within the meaning of Part 4 of the DBP Act was carried out by Evolution's subcontractors in relation to the Building, that Construction Work was not carried out by Evolution;

(e) otherwise denies the paragraph.

76C. In relation to paragraph 76C of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraph 76B above;
- (b) admits that by reason of section 37(1) of the DBP Act, when carrying out Construction Work referred to in subparagraph 76B(c) above, it had a duty to exercise reasonable care to avoid economic loss caused by defects:
 - (i) in or relating to the Building; and
 - (ii) arising from that Construction Work;
- (c) says that the persons to whom that duty was owed are as provided for in section 37(2) of the DBP Act;
- (d) otherwise denies the paragraph.

76D. In relation to paragraph 76D of the Fourth Cross-Claim Statement, Evolution:

- (a) admits that any person to whom the duty of care referred to in paragraph 76C above was owed is, by reason of section 37(3) of the DBP Act, entitled to damages for the breach of the duty as if the duty were a duty established by the common law;
- (b) denies that Evolution breached the duty;
- (c) otherwise denies the paragraph.

76E. In relation to paragraph 76E of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraphs 76B and 76C above;
- (b) admits that by reason of section 37(2) of the DBP Act, when carrying out Construction Work referred to in subparagraph 76B(c) above, Evolution owed the duty of care referred to in paragraph 76C above to each of the plaintiffs, lot owners in strata plan 97315, the Owners Corporation – Strata Plan 97315 and SOPA;
- (c) otherwise denies the paragraph.

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

76F. In relation to paragraph 76F of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraph 3 above;
- (b) otherwise denies the paragraph.

76G. In relation to paragraph 76G of the Fourth Cross-Claim Statement, Evolution:

- (a) says it does not know the period in which Icon constructed the Building;
- (b) otherwise admits the paragraph.

76H. In relation to paragraph 76H of the Fourth Cross-Claim Statement, Evolution:

- (a) admits that by reason of section 37(1) of the DBP Act, when Icon carried out any Construction Work in the construction of the Building, it had a duty to exercise reasonable care to avoid economic loss caused by defects:
 - (i) in or relating to the Building; and
 - (ii) arising from that Construction Work;
- (b) otherwise denies the paragraph.

76I. In relation to paragraph 76I of the Fourth Cross-Claim Statement, Evolution:

- (a) admits that the duty referred to in paragraph 76H above was, by reason of section 37(2) of the DBP Act, owed to each of the plaintiffs, lot owners in strata plan 97315, the owners corporation – strata plan 97315 and SOPA;
- (b) otherwise denies the paragraph.

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

76J. Evolution admits paragraph 76J of the Fourth Cross-Claim Statement.

76K. Evolution denies paragraph 76K of the Fourth Cross-Claim Statement.

76L. Evolution denies paragraph 76L of the Fourth Cross-Claim Statement.

76M. Evolution denies paragraph 76M of the Fourth Cross-Claim Statement.

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

77. In relation to paragraph 77 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 43, 47 and 48 above;
 - (b) otherwise denies the paragraph.
78. In relation to paragraph 78 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 42A, 43, and 47 above;
 - (b) otherwise denies the paragraph.
79. In relation to paragraph 79 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9 and 12 above;
 - (b) otherwise denies the paragraph.
80. In relation to paragraph 80 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 42A, 43, 47 and 79 above;
 - (b) repeats paragraphs 42 and 42A of the Fourth Cross-Claim Statement and says that when it issued drawing DE01 P2, WSP had not issued any design of a hob to precast panel connection for the Building where the precast panels exceeded 180 millimetres in thickness;
 - (c) in the premises, says there was no design by WSP about which Evolution could make the alleged representation;
 - (d) otherwise denies the paragraph.
81. In relation to paragraph 81 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 42A, 43, 47, 78, 79 and 80 above;
 - (b) otherwise denies the paragraph.

82. In relation to paragraph 82 of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraphs 78, 79, 80 and 81 above;
- (b) otherwise denies the paragraph.

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

83. In relation to paragraph 83 of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 43, 47, 78, 79, 80 and 81 above;
- (b) otherwise denies the paragraph.

84. In relation to paragraph 84 of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 42A, 43, 47, 79, 80 and 81 above;
- (b) otherwise denies the paragraph.

85. In relation to paragraph 85 of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 43, 47, 79, 80, 81 and 83 above;
- (b) otherwise denies the paragraph.

86. In relation to paragraph 86 of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraph 85 above;
- (b) otherwise denies the paragraph.

87. In relation to paragraph 87 of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraphs 83, 84, 85 and 86 above;
- (b) otherwise denies the paragraph.

88. In relation to paragraph 88 of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 42A, 43, 45, 47, 78, 79, 80, 81, 83, 84, 85, 86 and 87 above;
 - (b) otherwise denies the paragraph.
89. In relation to paragraph 89 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 42A, 43, 45, 47 and 49 above;
 - (b) otherwise admits the paragraph.
90. In relation to paragraph 90 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 51, 51A, 51B and 89 above;
 - (b) denies that it constructed the Building;
 - (c) otherwise denies the paragraph.
91. In relation to paragraph 91 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 42A, 43, 47 and 88 above;
 - (b) otherwise denies the paragraph.
92. In relation to paragraph 92 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 5, 6, 8, 9, 12, 42, 42A, 43, 47, 88 and 91 above;
 - (b) otherwise denies the paragraph.
93. In relation to paragraph 93 of the Fourth Cross-Claim Statement, Evolution:
- (a) repeats the matters set out in paragraphs 70 and 87 above;
 - (b) otherwise denies the paragraph.
94. Evolution denies paragraph 94 of the Fourth Cross-Claim Statement.
95. In relation to paragraph 95 of the Fourth Cross-Claim Statement, Evolution:

- (a) repeats the matters set out in paragraphs 70 and 87 above;
 - (b) denies that it is responsible for any loss or damage suffered by Icon;
 - (c) otherwise denies the paragraph.
96. In relation to paragraph 96 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know whether and the extent to which Icon has suffered and will suffer loss and damage as alleged in paragraph 96;
 - (b) denies that it is responsible for any loss or damage suffered by Icon; and
 - (c) otherwise denies the paragraph.
97. In relation to paragraph 97 of the Fourth Cross-Claim Statement, Evolution:
- (a) does not know whether and the extent to which Icon has suffered and will suffer loss and damage as alleged in paragraph 97;
 - (b) denies that it is responsible for any loss or damage suffered by Icon; and
 - (c) otherwise denies the paragraph.
98. Evolution denies paragraph 98 of the Fourth Cross-Claim Statement.

I. OTHER RESPONSES

99. In answer to the Fourth Cross-Claim Statement against Evolution as a whole, Evolution denies that Icon is entitled to relief sought against it, as claimed in the Fourth Cross-Claim Statement.

Proportionate liability

100. In further answer to the whole of the Fourth Cross-Claim Statement, Evolution says that if it is liable to Icon as alleged in the Fourth Cross-Claim Statement (which is denied) and if clause 2.8 of the General Conditions is not effective at law to exclude Part 4 of the *Civil Liability Act 2002* (NSW), then:
- (a) Icon's claim against Evolution is a single apportionable claim within the meaning of section 34 of the *Civil Liability Act 2002* (NSW);

- (b) for the reasons set out in Icon's Amended Second Cross-Claim Statement against WSP filed on 9 July 2021, WSP's acts or omissions caused Icon to suffer loss and damage;
- (c) that loss or damage is the same loss or damage that is the subject of Icon's claim against Evolution alleged in the Fourth Cross-Claim Statement;
- (d) in the premises:
 - (i) WSP is a concurrent wrongdoer in respect of Icon's claim against Evolution in the Fourth Cross-Claim Statement;
 - (ii) Evolution's liability in respect of that claim is limited to an amount reflecting the proportion of the damage or loss claimed that the Court considers just having regard to the extent of Evolution's responsibility for that damage or loss.

101. In further answer to the claims made at paragraphs 77 to 97 of the Fourth Cross-Claim Statement, Evolution says that if it is liable to Icon as alleged in the Fourth Cross-Claim Statement (which is denied), then:

- (a) Icon's claim against Evolution is a single apportionable claim within the meaning of section 87CB of the *Competition and Consumer Act 2010* (Cth);
- (b) for the reasons set out in the Amended Second Cross-Claim Statement against WSP filed on 9 July 2021, WSP's acts or omissions caused Icon to suffer loss and damage;
- (c) that loss or damage is the same loss or damage that is the subject of Icon's claim against Evolution alleged in the Fourth Cross-Claim Statement;
- (d) in the premises:
 - (i) WSP is a concurrent wrongdoer in respect of Icon's claim against Evolution for damages under section 236 of the *Australian Consumer Law* alleged to have been caused by a contravention of section 18 of the *Australian Consumer Law*;
 - (ii) Evolution's liability in respect of that claim is limited to an amount reflecting the proportion of the damage or loss claimed that the Court considers just

having regard to the extent of Evolution's responsibility for that damage or loss.

Contributory negligence

102. In further answer to the whole of the Fourth Cross-Claim Statement, Evolution says that if it is liable to Icon as alleged in the Fourth Cross-Claim Statement (which is denied), then Evolution:

- (a) refers to and repeats paragraphs 43 and 47 above and says that:
 - (i) Icon was aware of the content of those communications;
 - (ii) despite having provided comments on those drawings from time to time, Icon failed to raise with WSP and/or Evolution any matter concerning the detail specified in any drawing alleged to have been prepared by Evolution;
 - (iii) that failure by Icon was a failure to take reasonable care;
- (b) refers to and repeats paragraphs 51, 51A and 51B above and says that if it be found that the void between the hob and precast panel C409 in location 4A-10.5 caused or contributed to Observed Damage, Icon failed to take reasonable care in and about:
 - (i) the construction of the in situ hob at location 4A-10.5, including any re-forming or failure to re-form the hob; and
 - (ii) any grouting of or failure to grout any part of the joint between the precast panel C409 and that hob;
- (c) refers to and repeats paragraphs 139 to 149 inclusive of WSP's Commercial List Response to SOPA's Amended Commercial List Cross-Claim Statement and says:
 - (i) if it be found that the matters referred to there occurred and caused or contributed to Observed Damage;
 - (ii) then Icon failed to take reasonable care in and about those matters;
- (d) says that to the extent that it is found that Icon suffered loss or damage as a consequence of Evolution's conduct (which is denied), Evolution did not intend to cause that loss or damage;

- (e) says that in the premises, to the extent that it is found that Icon suffered loss or damage as a consequence of Evolution's conduct (which is denied), any such loss or damage is suffered partly as a result of Evolution's conduct and partly as a result of Icon's failure to take reasonable care;
- (f) says that in the premises, any loss or damage recoverable by Icon from Evolution is to be reduced by such extent as the Court thinks just and equitable having regard to Icon's share in the responsibility for that loss or damage pursuant to:
 - (i) section 9(1) of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW); and/or
 - (ii) section 137B of the *Competition and Consumer Act 2010* (Cth).

Waiver of subrogation / circuity of action

103. In or about September 2015, Liberty Mutual Insurance Company (Liberty), by its agent Chase Underwriting Pty Ltd, issued a policy of liability insurance numbered 438396 to Icon Co Nominee Pty Ltd (Liberty Policy).

Particulars

The Liberty Policy was comprised of a document entitled 'Chase Underwriting Third Party Liability Policy', including a page describing the policy as issued to Icon Co Nominee Pty Ltd, a Schedule and a policy wording

Insureds

104. The Liberty Policy defined 'Insured' to include:

- (a) the Insured named in the Schedule;
- (b) sub-contractors engaged by the Insured named in the Schedule; and
- (c) parties for whom the Insured is required under contract to provide insurance protection.

Particulars

Definition of 'Insured' in the wording (page 16).

105. By reason of having been named in the Schedule, Icon is an 'Insured' within the meaning of the Liberty Policy.

Particulars

Definition of 'Insured' in the wording (page 16); Schedule ('Insured').

106. By reason of having been a sub-contractor engaged by Icon, Evolution is an 'Insured' within the meaning of the Liberty Policy.

Particulars

Definition of 'Insured' in the wording (page 16); Schedule ('Insured').

107. Further, Evolution is an 'Insured' under the Liberty Policy because Icon was required under contract to provide broadform public liability insurance protection for Evolution.

Particulars

Clause 17 of the design and construct contract between Icon and AAD entered into on 29 October 2015.

108. In the premises, Icon and Evolution are co-insureds under the Liberty Policy.

Period of Insurance

109. The Liberty Policy had a Period of Insurance from 20 September 2015 at 4:00 pm local standard time to 20 September 2016 at 4:00 pm local standard time.

110. It was a term of the Liberty Policy that:

- (a) subject to written instructions from the Insured to Liberty prior to expiry of the Period of Insurance, the Liberty Policy would continue in full force and effect at terms and conditions prevailing immediately prior to expiry for all incomplete contracts as at the date of expiry until completion of those contracts, including any testing and/or defects liability and/or maintenance periods; and
- (b) the Insured was required to provide Liberty with a list of contracts requiring Run Off and additional premium was to be calculated on expiring rates applied to value of works declared for completion of projects after expiry of the Period of Insurance,

(Run Off Condition).**Particulars**

Wording, condition numbered 15 (page 14).

111. In December 2015, Icon invoked the Run Off Condition and thereby obtained insurance cover from Liberty in terms of the Run Off Condition for the Head Contract and the Opal Tower Development in accordance with the terms and conditions of the Liberty Policy, up to and including the end of any testing and/or defects liability and/or maintenance periods under the contracts which Icon entered into and under which Icon performed work in connection with the Head Contract and Opal Tower Development, and thereby up to and including at least 24 December and 27 December 2018.

Particulars

Order 3(a) made by the Full Court of the Federal Court, as recorded in *Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd (No 2)* [2021] FCAFC 131.

Waiver of subrogation

112. It was a term of the Liberty Policy that Liberty waived all rights of subrogation or action which it may have or acquire against any of the persons comprising the Insured thereunder (Waiver Condition).

Particulars

Wording, condition numbered 5 ('Cross Liability') (page 11).

Insuring promises in the Liberty Policy

113. The terms of the Liberty Policy included that:

- (a) Liberty agreed to indemnify the Insured in respect of all amounts which the Insured shall become legally liable to pay in respect of 'Property Damage' happening during the Period of Insurance as a result of an 'Occurrence' in connection with the 'Insured's Business';
- (b) Liberty agreed to defend at their expense in the name of and on behalf of the Insured, any claim or suit against the Insured to recover compensation in respect of and/or arising out of Occurrences covered hereby;

- (c) Liberty agreed to pay in addition to the Limit of Liability expressed in the Schedule all expenses incurred by or with the permission of Liberty for investigation, negotiation and defence of claims and suits;

Particulars

Wording, insuring clauses 1, 2 and 3.2 (page 6).

- (d) Property Damage means loss of and/or damage to and/or destruction of tangible property including the 'Loss of Use' of tangible property, whether or not that tangible property has been lost and/or damaged and/or destroyed;

Particulars

Definitions in the wording (page 17).

- (e) Occurrence includes an event, or continuous or repeated exposure to conditions, which results in Property Damage provided the Insured did not intend that such loss would result;

Particulars

Definitions in wording (page 16).

- (f) Loss of Use means economic loss suffered by any person or party consequent upon Property Damage of or to any other persons' or parties' tangible property;

Particulars

Definitions in the wording (page 16).

- (g) Insured's Business includes all of the Insured's businesses, occupations and/or activities as described in the Schedule and or other incidental and associated operations, trades and activities;

Particulars

Definitions in the wording (page 15) and the Insured's businesses, occupations and/or activities described in the Schedule (under the heading 'Insured's Business').

Occurrence and damage

114. For the purposes of this part of its response, Evolution repeats paragraphs 52 to 58 inclusive of the Fourth Cross-Claim Statement.

115. The Observed Damage was damage to and/or destruction of tangible property constituting 'Property Damage' within the meaning of the Liberty Policy.

116. The Observed Damage reflected or was the result of an 'Occurrence' in connection with the 'Insured's Business' within the meaning of the Liberty Policy, that occurred within the period of cover of the Liberty Policy (2018 Occurrence).

Particulars

Order 3(b) made by the Full Court of the Federal Court, as recorded in *Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd (No 2)* [2021] FCAFC 131.

Liability of Liberty to Icon and its consequence

117. The claims for loss and damage that:

- (a) the plaintiffs and Group Members make against Icon in this proceeding;
- (b) SOPA makes against Icon in SOPA's Cross-Claim;
- (c) WSP makes against Icon in the Third Cross-Claim;
- (d) AAD and Ecove make against Icon in the Fifth Cross-Claim,

(collectively the **Third Party Claims**), are claims or suits against Icon to recover compensation in respect of or arising out of an Occurrence covered by the Liberty Policy.

118. If and to the extent that Icon is found to be liable to pay sums to the plaintiffs, Group Members, SOPA, AAD, Ecove or WSP as claimed by the Third Party Claims, that is legal liability to pay an amount in respect of 'Property Damage' within the meaning of the Liberty Policy, being liability in respect of:

- (a) the Observed Damage, which constitutes 'Property Damage' within the meaning of the Liberty Policy; and/or

(b) economic loss suffered consequent upon the Observed Damage, which constitutes 'Loss of Use' and therefore 'Property Damage' within the meaning of the Liberty Policy.

119. By reason of the matters referred to above, Liberty is and/or will be liable under the Liberty Policy to indemnify Icon against:

(a) the costs and expenses incurred for the investigation, negotiation and/or defence of the Third Party Claims; and

(b) any amounts which Icon shall become legally liable to pay in respect of the Third Party Claims up to the policy limit of the Liberty Policy,

(together, the **Liberty Indemnified Amounts**).

120. In the event that Liberty indemnifies Icon in relation to the Liberty Indemnified Amounts, which it is obliged to do:

(a) by the Waiver Condition, Liberty waived all rights of subrogation or action which it may have or acquire against Evolution; and

(b) Liberty has no right of subrogation entitling it to bring or maintain an action in the name of Icon against Evolution in respect of the Liberty Indemnified Amounts.

Liability of Liberty to Evolution and its consequence

121. If as alleged in the Fourth Cross-Claim Statement, Evolution is liable to Icon for amounts representing the Liberty Indemnified Amounts (which is denied), the 2018 Occurrence was in connection with Evolution's business as a construction contractor and was thereby in connection with the 'Insured's Business' within the meaning of the Liberty Policy.

122. If as alleged in the Fourth Cross-Claim Statement, Evolution is liable to Icon for amounts representing the Liberty Indemnified Amounts (which is denied), that will be legal liability to pay amounts in respect of 'Property Damage' within the meaning of the Liberty Policy, being liability in respect of:

(a) the Observed Damage, which constitutes 'Property Damage' within the meaning of the Liberty Policy; and/or

(b) economic loss suffered consequent upon the Observed Damage, which constitutes 'Loss of Use' and therefore 'Property Damage' within the meaning of the Liberty Policy.

123. By reason of the matters referred to above:

(a) Liberty will be liable to indemnify Evolution under the Liberty Policy against the Liberty Indemnified Amounts; and

(b) paragraph 120 above is repeated.

124. By reason of the matters referred to above, Icon is barred by law from pursuing its co-insured, Evolution, for the Liberty Indemnified Amounts, that are recoverable by Icon under the Liberty Policy.

125. Further, Icon is not entitled to recover in these proceedings more than its loss.

126. The matters referred to in paragraphs 120, 123 and 124 above are required to be taken into account in determining the amount of any liability of Evolution to Icon (if any).

D. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE

At this stage Evolution does not consider that it is appropriate to refer any issue or question to a referee.

E. STATEMENT AS TO MEDIATION

The parties have not participated in mediation. Evolution is willing to mediate at an appropriate time.

SIGNATURE

Signature of legal representative



Capacity

Patrick Kaluski by his employed solicitor
Megan Palmer

Solicitor for the First Cross-Defendant

Date of signature

6 August 2021–17 September 2021