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**Commercial List Response****COURT DETAILS**

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

**TITLE OF PROCEEDINGS**

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

**TITLE OF THIS CROSS-CLAIM**

First Cross Claimant	Icon Co (NSW) Pty Ltd ACN 604790409
First Cross Defendant	WSP Structures Pty Ltd ABN 78006769339

**FILING DETAILS**

Filed for	WSP Structures Pty Ltd, Cross Defendant 1
Filed in relation to	Cross-Claim 2
Legal representative	Tricia Marguerite Hobson
Legal representative reference	
Telephone	02 9330 8000
Your reference	4014154

**ATTACHMENT DETAILS**

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

Commercial List Response (2020.01.31 - Final Commercial List Cross-Claim Statementemement.pdf)

[attach.]

## COMMERCIAL LIST SECOND CROSS-CLAIM RESPONSE

### 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>
Defendant	<b>Sydney Olympic Park Authority ABN 68 010 941 405</b>

### TITLE OF THIS CROSS-CLAIM

Cross-claimant	<b>Icon Co (NSW) Pty Limited ABN 16 604 790 409</b>
Cross-defendant	<b>WSP Structures Pty Limited ABN 78 006 769 339</b>

### FILING DETAILS

Filed for	<b>WSP Structures Pty Limited Cross-Defendant</b>
Filed in relation to	Second Cross-Claim
Legal representative	Tricia Hobson, Norton Rose Fulbright Australia
Legal representative reference	4014154
Contact name and telephone	Melissa Tan 9330 8926
Contact email	melissa.tan@nortonrosefulbright.com

### A. NATURE OF DISPUTE

- 1 The Cross-Defendant, WSP Structures Pty Limited ABN 78 006 769 339 (**WSP**) generally agrees with the description of the Nature of Dispute set out by the Cross-Claimant, Icon Co (NSW) Pty Limited (**Icon**) in the Commercial List Second Cross-Claim Statement filed in these proceedings on 3 December 2019 (**the Cross-Claim**).
- 2 WSP denies that it breached the Consultancy Agreement (as defined in paragraph 3 of Part A of the Cross-Claim) and denies that it contravened s 18 of the Australian Consumer Law (**ACL**), being Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**CCA**). WSP denies that it is liable to Icon.

### B. ISSUES LIKELY TO ARISE

- 1 WSP says that in addition to the issues set out by Icon in the Cross-Claim, the following issues are likely to arise:

- (a) the proper construction of the Consultancy Agreement, including Clauses 9 and 32 of the General Conditions;
- (b) whether the losses defined by Icon as the SOPA Liability Damages, Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs and Icon's Loss of Opportunity / Loss of Contract Damages are economic, indirect or consequential loss, or loss of contract or profit within the meaning of Clause 32 of the General Conditions, such that WSP has no liability to Icon for the SOPA Liability Damages, Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs and Icon's Loss of Opportunity / Loss of Contract Damages;
- (c) whether Icon is guilty of contributory negligence in respect of grouting, and concrete strength, and placement of an electrical conduit within the zone of concrete in the hob wall immediately above column C38 and if so, what is the amount reflecting that proportion of the damage or loss claimed that the Court considers just, having regard to the extent of Icon's responsibility for the damage or loss;
- (d) whether, in respect of grouting, Evolution Precast Systems Pty Ltd (ABN 17 608 136 518) (**Evolution**) is a concurrent wrongdoer in relation to Icon's claims for the WSP Warranty Breaches, and claims for damages pursuant to s 236 ACL, and if so, what is the amount reflecting that proportion of the damage or loss claimed that the Court considers just, having regard to the extent of Evolution's responsibility for the damage or loss;
- (e) whether any liability that WSP has to Icon is limited to amounts recovered by WSP under a policy of professional indemnity insurance which WSP was required to effect, up to a maximum of \$20 million.

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

In response to the Cross-Claimant's allegations contained in Part C of the Cross-Claim (adopting the defined terms contained in the Cross-Claim, unless otherwise defined):

#### **A. BACKGROUND**

##### **Parties**

- 1 WSP admits the allegations in paragraph 1.

2 WSP admits the allegations in paragraph 2.

**Consultancy Agreement between Icon and WSP**

3 WSP admits the allegations in paragraph 3.

4 WSP admits the allegations in paragraph 4.

5 WSP admits the allegations in paragraph 5.

6 Save for the word "into" in paragraph 6(c) being replaced with "in", WSP admits the allegations in paragraph 6.

7 WSP admits the allegations in paragraph 7.

8 WSP admits the allegations in paragraph 8.

9 As to the allegations in paragraph 9, WSP:

(a) says that the matters pleaded in sub-paragraphs (a) to (k) of paragraph 9 of the Cross-Claim are as set out in Annexure Part B of the General Conditions;

(b) otherwise admits the allegations therein.

10 As to the allegations in paragraph 10, WSP:

(a) says that the matters pleaded in sub-paragraphs (a) to (m) of paragraph 10 of the Cross-Claim are as set out in Annexure Part B of the General Conditions;

(b) otherwise admits the allegations therein.

**Warranties provided by WSP under the Consultancy Agreement**

11 WSP admits the allegations in paragraph 11.

12 As to the allegations in paragraph 12, WSP:

(a) relies on the express words of the Consultancy Agreement;

(b) says that clause 3A of the General Conditions states "*[t]he Services must be performed by the Consultant with recognised methods and standards of professional practice*";

(c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

13 WSP admits the allegations in paragraph 13.

14 WSP admits the allegations in paragraph 14.

15 As to the allegations in paragraph 15, WSP:

(a) relies on the express words of the Consultancy Agreement;

- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 16 As to the allegations in paragraph 16, WSP:
- (a) relies on the express words of the Consultancy Agreement;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 17 As to the allegations in paragraph 17, WSP:
- (a) relies on the express words of the Consultancy Agreement;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 18 As to the allegations in paragraph 18, WSP:
- (a) repeats paragraph 17 above;
- (b) says that Annexure Part B of the General Conditions states "*Final Certification*" under the heading "*Construction Phase*";
- (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 19 WSP denies the allegations in paragraph 19.

**Indemnities provided by WSP under the Consultancy Agreement**

- 20 As to the allegations in paragraph 20, WSP:
- (a) relies on the express words of the Consultancy Agreement;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 21 As to the allegations in paragraph 21, WSP:
- (a) relies on the express words of the Consultancy Agreement;
- (b) says that Clause 32 of the General Conditions provided that notwithstanding any other provision of the Consultancy Agreement, and except to the extent that liability cannot be legally limited or excluded:
- (i) in no event shall WSP be liable for economic loss, loss of contract, loss of profit or revenue, loss of data, loss of production or production stoppage, financing costs or expenses however characterised,

increased costs and expenses of construction or operation, indirect or consequential loss; and

(ii) WSP's total liability arising out of or in connection with the Consultancy Agreement was limited to the greater of:

A. amounts recovered under a policy of professional indemnity insurance required to be effected by WSP under the Consultancy Agreement, to a maximum of \$20 million; and

B. the amount of \$1 million;

(c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

22 As to the allegations in paragraph 22, WSP:

(a) repeats paragraph 26 below;

(b) otherwise denies the allegations therein.

**B. SERVICES PROVIDED BY WSP**

23 WSP admits the allegations in paragraph 23.

24 WSP admits the allegations in paragraph 24.

25 As to the allegations in paragraph 25, WSP:

(a) admits that between 24 November 2015 to 8 August 2018, it provided design services pursuant to the Consultancy Agreement, during which it issued multiple versions of the structural design drawings and a number of design certificates;

(b) says that from 24 December 2018 to 22 January 2019 it assisted in the inspection and investigation of the Building and provided advice in relation to the structural safety propping and stabilization works, but denies it did so pursuant to, or governed by the Consultancy Agreement;

(c) says that from early January 2019 to 9 April 2019, it prepared a design to rectify the damage on levels 4, 10 and 16 of the Building, but denies it did so pursuant to, or governed by the Consultancy Agreement;

(d) says that commencing on 6 May 2019, it carried out periodic inspections of the rectification work, and provided site inspection reports, but denies it did so pursuant to, or governed by the Consultancy Agreement;

(e) otherwise denies the allegations therein.

26 As to the allegations in paragraph 26, WSP:

- (a) refers to paragraphs 33(f) and 73(b)-(c) of Icon's Response to Commercial List Cross-Claim Statement filed 8 November 2019 (**Icon's List Response**);
- (b) denies that on a proper construction of the HB Act that the design *Services* that WSP provided pursuant to the Consultancy Agreement constituted 'residential building work';
- (c) otherwise denies the allegations therein.

**C. WSP'S DESIGN OF THE HOB BEAM**

- 27 As to the allegations in paragraph 27, WSP:
- (a) admits that the Plaintiffs' Commercial List Statement filed 26 July 2019 contains the allegations contended in paragraph 36(c) of Sydney Olympic Park Authority's (**SOPA**) Commercial List Cross-Claim Statement filed 27 September 2019;
  - (b) otherwise says that paragraphs 36(b)(ii) to (iv) of Icon's List Response do not make any contentions against WSP;
  - (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 28 As to the allegations in paragraph 28, WSP:
- (a) says that it designed a hob wall (**hob wall**) and precast panels or in-situ walls on top of the hob wall to form a wall at the locations referred to;
  - (b) says that the hob wall was part of the wall structure;
  - (c) otherwise denies the allegations therein.
- 29 As to the allegations in paragraph 29, WSP:
- (a) repeats paragraph 28 above;
  - (b) subject to replacing the expression 'hob beam' with 'hob wall', otherwise admits the allegations therein.
- 30 As to the allegations in paragraph 30, WSP:
- (a) relies on the Aconex from WSP to Icon dated 29 November 2016 timed 5:03pm (mail no. WSP(SA)-CADV-000734);
  - (b) says that pursuant to a written request by Icon, WSP approved a change at Level 4, 4C-5.5 to replace a precast panel with an equivalent wall panel cast in situ of the same strength and reinforcing configuration;
  - (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

- 31 As to the allegations in paragraph 31, WSP:
- (a) relies on the Aconex from WSP to Icon, Dalma Form and Evolution dated 6 December 2016 timed 1:18pm (mail no. WSP(SA)-CADV-000760);
  - (b) says that pursuant to a written request by Icon, WSP approved a change at Level 16, 16C-5.5 to replace a precast panel with an equivalent wall panel cast in situ of the same strength and reinforcing configuration;
  - (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 32 As to the allegations in paragraph 32, WSP:
- (a) says that the changes to incorporate an in-situ wall at Level 4, 4C-5.5 and level 16, 16C-5.5 were not thereafter administratively incorporated by WSP into any amended 'for construction' drawings;
  - (b) denies that WSP had any obligation to do so;
  - (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 33 As to the allegations in paragraph 33, WSP:
- (a) refers to paragraph 28 above;
  - (b) says that the Building was designed by WSP such that:
    - (i) the precast panels (which form a precast wall) would be placed on a load bearing concrete hob wall and, in the case of the in-situ walls at Level 4, 4C-5.5 and level 16, 16C-5.5, the walls were cast on or incorporating the concrete hob wall as an integral element, at the written request of Icon;
    - (ii) the precast panels would be connected to the hob wall by a grouted joint and dowel bars;
    - (iii) the vertical loads in the wall would be transferred through the hob wall and into the supporting columns to the underside;
  - (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 34 As to the allegations in paragraph 34, WSP:
- (a) refers to paragraph 28 above;

- (b) says that the hob wall was designed to transfer the vertical load from the precast wall over and into the supporting columns to the underside;
- (c) says that the lower level of precast wall was designed to also act as a transfer wall to horizontally distribute the load towards the ends of the panels and to transfer into the hob wall and columns to the underside;
- (d) says that the grout bed, between the precast panel and in situ hob wall, was designed to transmit the vertical load via bearing between the two different structural elements (precast and in situ);
- (e) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

35 As to the allegations in paragraph 35, WSP:

- (a) repeats paragraph 28 above;
- (b) repeats paragraphs 39-40 below;
- (c) otherwise denies the allegations therein.

*WSP's Concrete Strength Design*

36 As to the allegations in paragraph 36, WSP:

- (a) repeats paragraph 28 above;
- (b) denies that its 'for construction' design depicted the hob wall as cast as part of the floor element;
- (c) says that its 'for construction drawings' should be read as a whole;
- (d) says that:

- (i) note G1. on Drawing No. 4419 S00.003[A] states as follows:

*These drawings shall be read in conjunction with architectural and other consultants drawings and specifications and with such other written instructions or sketches as may be issued during the course of the contract. Any discrepancy shall be referred to the Superintendent before proceeding with work*

- (ii) in the event, which is denied, that there is a discrepancy in WSP's drawings in relation to the concrete strength of the hob walls, Icon failed to refer the discrepancy to either the Superintendent or WSP;

- (e) says that in the event, which is denied, that WSP's 'for construction' drawings, when read as a whole, specified a concrete strength of 40 MPa as alleged, Icon did not rely on such specification;
- (f) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

37 As to the allegations in paragraph 37, WSP:

- (a) repeats paragraph 28 above;
- (b) repeats paragraph 36 above;
- (c) otherwise denies the allegations therein.

38 As to the allegations in paragraph 38, WSP:

- (a) repeats paragraph 28 above;
- (b) repeats paragraph 37 above;
- (c) otherwise denies the allegations therein.

*WSP's Grouting Design Change*

39 As to the allegations in paragraph 39, WSP:

- (a) repeats paragraph 28 above;
- (b) says that Drawing No. 4419 S06.010[A] was a 'design document' as defined in Clause 1 of the General Conditions, and as defined in Clause 1 of the general conditions of the Head Contract;
- (c) subject to replacing the expression 'hob beam' with 'hob wall', otherwise admits the allegations therein.

40 As to the allegations in paragraph 40, WSP:

- (a) repeats paragraph 28 above;
- (b) says that Evolution entered into a contract with Icon dated 31 August 2016;
- (c) says that 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;
- (d) says that on about 21 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);**

- (e) says that any proposed change to WSP's design from full grout coverage between the precast panel and the hob, to grout being placed on the inner portion of the hob only, would have been a significant and important matter;
- (f) says that at no time did Evolution ever ask WSP, in terms, either orally or in writing, for permission or approval to change WSP's design from full grout coverage between the precast panel and the hob, to grout being placed on the inner portion of the hob only;
- (g) says it was not Evolution's intention to change WSP's design from full grout coverage between the precast panel and the hob, to grout being placed on the inner portion of the hob only;
- (h) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

41 As to the allegations in paragraph 41, WSP:

- (a) repeats paragraph 28 above;
- (b) repeats paragraph 40 above;
- (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

42 As to the allegations in paragraph 42, WSP:

- (a) says that on 22 September 2016 WSP stamped Evolution Shop Drawing 1 and ticked the box next to the words "REVIEWED, NO COMMENTS";
- (b) says that 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*

- (c) otherwise admits the allegations therein.

43 As to the allegations in paragraph 43, WSP:

- (a) says that on 22 September 2016 it caused a copy of Evolution Shop Drawing 1 with WSP's stamp as referred to in paragraph 42 above to be sent to, *inter alia*, Icon via Aconex;

**Particulars**

Aconex from WSP to, *inter alia*, Icon dated 22 September 2016 timed 2:42pm (mail no. WSP(SA)-CADV-000581).

- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

44 As to the allegations in paragraph 44, WSP:

- (a) admits that between 21 September 2016 and 5 July 2017, Evolution issued revisions of Drawing DE01 P2;
- (b) repeats paragraphs 28, 40 and 41 above;
- (c) otherwise denies the allegations therein.

45 As to the allegations in paragraph 45, WSP:

- (a) repeats paragraphs 40(a)-(b) above;
- (b) says that on 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**);
- (c) repeats paragraphs 40(d)-(g) above;
- (d) repeats paragraph 44 above;
- (e) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

46 As to the allegations in paragraph 46, WSP:

- (a) says that on 3 November 2016 WSP stamped Evolution Shop Drawing 2 and ticked the box next to the words "REVIEWED, NO COMMENTS";
- (b) says that 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*

(c) otherwise admits the allegations therein.

47 As to the allegations in paragraph 47, WSP:

(a) repeats paragraph 28 above;

(b) repeats paragraphs 40, 42 and 46 above;

(c) denies that it approved any design change;

(d) says that a reasonably competent design and construct contractor in the position of Icon would not have understood that WSP's stamp on Evolution Shop Drawing 1 and/or Evolution Shop Drawing 2 approved a change to WSP's design, from full grout coverage between the precast panel and the hob, to grout being placed on the inner portion of the hob only;

(e) says that if, which is denied, the Evolution Shop Drawing 1 and/or Evolution Shop Drawing 2 did indicate that grouting would be placed on the inner portion of the hob only, Icon did not refer the discrepancy to the Superintendent or to WSP;

(f) says that the alleged design change was not thereafter administratively incorporated by WSP into any amended FC Drawings, including FC Drawing No. 4419 S06.010[A];

(g) otherwise denies the allegations therein.

*WSP's Panel Thickness Design Change*

48 WSP admits the allegations in paragraph 48.

49 WSP admits the allegations in paragraph 49.

50 As to the allegations in paragraph 50, WSP:

(a) repeats paragraph 49 above;

(b) otherwise admits the allegations therein.

*WSP's Electrical Conduit Placement Approval*

51 As to the allegations in paragraph 51, WSP:

(a) repeats paragraph 28 above;

(b) subject to replacing the expression 'hob beam' with 'hob wall', otherwise admits the allegations therein.

52 As to the allegations in paragraph 52, WSP:

- (a) admits that it replied to Icon's correspondence dated 21 February 2017 on or about 23 February 2017 with site inspection report number 43;
- (b) refers to Aconex from WSP to Icon dated 23 February 2017 timed 11:26am (mail no. WSP(SA)-CADV-000850) including attachment titled '20170223 4419\_SIR43\_JYH closed out.pdf' as if set out herein in full;
- (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

53 As to the allegations in paragraph 53, WSP:

- (a) repeats paragraph 28 above;
- (b) otherwise denies the allegations therein.

**D. WSP'S INSPECTION AND CERTIFICATION**

54 As to the allegations in paragraph 54, WSP:

- (a) repeats paragraph 28 above;
- (b) admits it issued certificates of design for December 2015, January 2016, February 2016, March 2016, May 2016, November 2016, February 2017, March 2017 and July 2017;
- (c) does not admit it issued a certificate of design for June 2016;
- (d) admits it carried out periodic site inspections of the construction work, but not on at least 143 occasions;
- (e) otherwise denies the allegations therein.

55 As to the allegations in paragraph 55, WSP:

- (a) admits it issued a certificate dated 15 May 2018;
- (b) relies on the terms of the certificate;
- (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

56 As to the allegations in paragraph 56, WSP:

- (a) admits it issued a 'statement of compliance' dated 5 June 2018;
- (b) relies on the terms of the statement of compliance;
- (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

57 WSP admits the allegations in paragraph 57.

58 WSP admits the allegations in paragraph 58.

59 WSP admits the allegations in paragraph 59.

**E. DAMAGE OBSERVED IN THE BUILDING**

60 As to the allegations in paragraph 60, WSP:

(a) repeats paragraph 28 above;

(b) subject to replacing the expression 'hob beam' with 'hob wall', otherwise admits the allegations therein.

61 WSP admits the allegations in paragraph 61.

62 WSP admits the allegations in paragraph 62.

63 As to the allegations in paragraph 63, WSP:

(a) repeats paragraph 28 above;

(b) subject to replacing the expression 'hob beam' with 'hob wall', otherwise admits the allegations therein.

64 As to the allegations in paragraph 64, WSP:

(a) says that it sent an email dated 26 December 2018 at about 10:43pm to Icon;

(b) says that it sent an email dated 27 December 2018 at about 8:54am to Icon;

(c) says that it sent an email dated 27 December 2018 at about 6:54pm to Icon;

(d) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

65 As to the allegations in paragraph 65, WSP:

(a) repeats paragraph 28 above;

(b) says that the damage on level 4 was not identified until 27 December 2018;

(c) subject to replacing the expression 'hob beam' with 'hob wall', otherwise admits the allegations therein.

66 WSP notes the definition of 'Observed Damage' in paragraph 66.

67 As to the allegations in paragraph 67, WSP:

(a) repeats paragraph 28 above;

(b) admits that a report was published;

(c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

68 As to the allegations in paragraph 68, WSP:

- (a) repeats paragraph 28 above;
- (b) otherwise denies the allegations therein.

**F. RECTIFICATION DESIGN AND RECTIFICATION WORKS**

*Rectification Design*

69 As to the allegations in paragraph 69, WSP:

- (a) repeats paragraph 28 above;
- (b) refers to its Rectification Design in full;
- (c) says it prepared a design for the installation of propping, as a precautionary measure:
  - (i) under Level 10, 10C-14.5 from level 4 to level 9 to provide temporary support if required;
  - (ii) under Level 4, 4A-10.5 from basement level B3 to level 3 to provide temporary support if required;
  - (iii) under Level 4, 4B-0.5 from basement level B3 to level 3 to provide temporary support if required;
- (d) says it prepared a design for the installation of structural grout, additional to the grout that had been installed by Evolution (contrary to WSP's 'for construction' Drawing No. 4419 S06.010[A] as pleaded in paragraph 40 above):
  - (i) to fully grout the joints in accordance with WSP's 'for construction' design;
  - (ii) for the injection of epoxy into all damaged precast panels and hob walls on levels 4, 10 and 16;
- (e) denies subparagraph (c), having regard to paragraph 11(b) of Practice Note SC Eq 3;
- (f) otherwise denies the balance of the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

70 As to the allegations in paragraph 70, WSP:

- (a) repeats paragraphs 16 to 19 above;
- (b) otherwise denies the allegations therein.

71 As to the allegations in paragraph 71, WSP:

- (a) admits that WSP issued a statement for residents on 31 December 2018;
- (b) refers to the contents of the statement particularised as if set out herein in full;
- (c) otherwise admits the allegations therein;

72 As to the allegations in paragraph 72, WSP:

- (a) admits that WSP issued a statement for residents on 24 January 2019;
- (b) refers to the contents of the statement particularised as if set out herein in full;
- (c) otherwise admits the allegations therein

73 WSP admits the allegations in paragraph 73.

74 WSP admits the allegations in paragraph 74.

75 WSP admits the allegations in paragraph 75.

*Rectification Works*

76 WSP admits the allegations in paragraph 76.

77 WSP admits the allegations in paragraph 77.

78 WSP admits the allegations in paragraph 78.

79 As to the allegations in paragraph 79, WSP:

- (a) says that Icon has carried out rectification work;
- (b) says that the rectification work is scheduled to be completed by March 2020;
- (c) says that based on WSP's visual inspections and subject to Icon having complied with the subsequent advice provided within the site inspection reports, the works appear to have been completed in general conformance with the rectification design specified by WSP;
- (d) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

80 As to the allegations in paragraph 80, WSP:

- (a) says that it has carried out inspections of the rectification works designed by WSP and issued the relevant site inspection reports on or about the dates set out in Attachment B;
- (b) says that the rectification works are ongoing;
- (c) otherwise admits the allegations therein.

81 As to the allegations in paragraph 81, WSP:

- (a) refers to the contents of the letter particularised as if set out herein in full;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

82 As to the allegations in paragraph 82, WSP:

- (a) refers to the contents of the letter particularised as if set out herein in full;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

83 As to the allegations in paragraph 83, WSP:

- (a) refers to the contents of the letter particularised as if set out herein in full;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

84 As to the allegations in paragraph 84, WSP:

- (a) refers to the contents of the letter particularised as if set out herein in full;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

85 As to the allegations in paragraph 85, WSP:

- (a) repeats paragraph 19 above;
- (b) otherwise denies the allegations therein.

86 As to the allegations in paragraph 86, WSP:

- (a) repeats paragraph 85 above;
- (b) says that on about 16 December 2019, WSP provided a Consultants Design Certificate dated 16 December 2019 to Icon in relation to the Remedial Design comprised of the drawings listed in schedule A of the Consultants Design Certificate;
- (c) says that the Consultants Design Certificate was in a form agreed by Icon;
- (d) otherwise denies the allegations therein.

87 As to the allegations in paragraph 87, WSP:

- (a) repeats paragraph 85 above;
- (b) says further that on about 16 December 2019, WSP provided to Icon a proposed draft Consultants Works Certificate to be signed on completion of the rectification works;

(c) says that between 16 and 17 December 2019, WSP and Icon's lawyers corresponded regarding amendments to the terms of the Consultants Works Certificate, although as at the date of this List Response, Icon has not responded to WSP's suggested amendments to the Consultants Works Certificate, set out in an email dated 17 December 2019 from Melissa Tan of Norton Rose Fulbright to Peter Wood of Minter Ellison;

(d) otherwise denies the allegations therein.

**G. THE CAUSE OF THE OBSERVED DAMAGE**

**AS 3600**

88 As to the allegations in paragraph 88, WSP:

(a) repeats paragraph 28 above;

(b) repeats paragraphs 89 to 91 below;

(c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

89 As to the allegations in paragraph 89, WSP:

(a) repeats paragraph 28 above;

(b) refers to the terms of AS 3600 in full;

(c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

90 As to the allegations in paragraph 90, WSP:

(a) repeats paragraph 28 above;

(b) refers to the terms of AS 3600 in full;

(c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

91 As to the allegations in paragraph 91, WSP:

(a) repeats paragraph 28 above;

(b) refers to the terms of AS 3600 in full;

(c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

92 WSP denies the allegations in paragraph 92, having regard to paragraph 11(b) of Practice Note SC Eq 3.

93 WSP denies the allegations in paragraph 93, having regard to paragraph 11(b) of Practice Note SC Eq 3.

*WSP failed to design for bursting stresses*

94 WSP denies the allegations in paragraph 94.

95 WSP denies the allegations in paragraph 95.

96 WSP denies the allegations in paragraph 96.

*WSP failed to design for bearing stresses*

97 WSP denies the allegations in paragraph 97.

98 WSP denies the allegations in paragraph 98.

*WSP's design caused the Observed Damage*

99 WSP denies the allegations in paragraph 99.

100 As to the allegations in paragraph 100, WSP:

(a) denies that its design of the hob walls had insufficient steel reinforcement;

(b) otherwise denies the allegations therein.

101 As to the allegations in paragraph 101, WSP:

(a) denies that its design was defective;

(b) otherwise denies the allegations therein.

**H. DEFECTS ALLEGED BY SOPA**

102 WSP denies the allegations in paragraph 102.

103 As to the allegations in paragraph 103, WSP:

(a) admits that Icon has denied the paragraphs;

(b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

104 As to the allegations in paragraph 104, WSP:

(a) repeats paragraph 28 above;

(b) repeats paragraphs 39 to 47 above;

(c) repeats paragraphs 48 and 49 above;

(d) repeats paragraphs 51 to 53 above;

(e) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

105 As to the allegations in paragraph 105, WSP:

(a) repeats paragraphs 36 to 38 and 97 to 98 above;

(b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

**I. THE CLAIMS MADE IN THE PROCEEDINGS**

106 WSP admits the allegations in paragraph 106.

107 WSP admits the allegations in paragraph 107.

108 WSP admits the allegations in paragraph 108.

109 WSP denies the allegations in paragraph 109, having regard to paragraph 11(b) of Practice Note SC Eq 3.

**J. WSP BREACHED THE CONSULTANCY AGREEMENT, CAUSING ICON LOSS AND DAMAGE**

110 WSP denies the allegations in paragraph 110, having regard to paragraph 11(b) of Practice Note SC Eq 3.

111 WSP repeats paragraphs 99 to 101 above in relation to the allegations in paragraph 111.

112 WSP denies the allegations in paragraph 112.

113 WSP denies the allegations in paragraph 113.

114 WSP denies the allegations in paragraph 114.

115 WSP denies the allegations in paragraph 115.

*Icon is entitled to an indemnity and/or damages in relation to any liability that Icon is found to have to SOPA*

116 WSP denies the allegations in paragraph 116.

117 As to the allegations in paragraph 117, WSP:

(a) denies it committed WSP's Warranty Breaches and WSP's Certification Breach;

(b) denies WSP's Warranty Breaches and WSP's Certification Breach (if established) caused Icon loss or damage;

- (c) says that the SOPA Liability Damages are economic, indirect or consequential loss within the meaning of Clause 32 of the General Conditions, such that WSP has no liability to Icon for the SOPA Liability Damages;
- (d) alternatively (and without admissions), says that the SOPA Liability Damages are claims in respect of loss of, or damage to, property, arising out of WSP's Warranty Breaches and WSP's Certification Breach, and that, pursuant to Clause 9 of the General Conditions, WSP's obligation to indemnify Icon against that head of damage is reduced proportionally to the extent that the act or omission of Icon or its contractors contributed to the loss or damage;

**Particulars**

(i) WSP repeats paragraphs 166 to 181 below.

(e) says that in any event, by reason of Clause 32 of the General Conditions, WSP's total liability is limited to amounts recovered by WSP under a policy of professional indemnity insurance which WSP was required to effect, up to a maximum of \$20 million;

(f) otherwise denies the allegations therein.

118 As to the allegations in paragraph 118, WSP:

(a) repeats paragraph 117 above;

(b) otherwise denies the allegations therein.

*Icon is entitled to an indemnity and damages for Icon's costs*

119 As to the allegations in paragraph 119, WSP:

(a) denies it committed WSP's Warranty Breaches and WSP's Certification Breach;

(b) denies any of WSP's Warranty Breaches or WSP's Certification Breach (if established) caused Icon loss or damage;

(c) alternatively, says that Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs and Icon's Loss of Opportunity / Loss of Contract Damages are economic, indirect or consequential loss, or loss of contract or profit within the meaning of Clause 32 of the General Conditions, such that WSP has no liability to Icon for Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees,

Owners Corporation's Insurance Costs and Icon's Loss of Opportunity / Loss of Contract Damages;

- (d) says that by reason of the matters referred to in paragraphs 166 to 182 below, Icon is guilty of contributory negligence, and in the event (which is denied) that WSP is liable to Icon, Icon's damages recoverable in respect of WSP's Warranty Breaches and/or WSP's Certification Breach are to be reduced to such extent as the Court thinks just and equitable having regard to Icon's share in the responsibility for the damage, pursuant to s 9(1) *Law Reform (Miscellaneous Provisions) Act 1965 (NSW) (LRA)*;
- (e) says that by reason of the matters referred to in paragraphs 217 to 222 below, Evolution is a "concurrent wrongdoer" for the purposes of s 34(2) *Civil Liability Act 2002 (NSW) (CLA)*, and WSP's liability is limited to an amount reflecting that proportion of the damage or loss claimed that the Court considers just, having regard to the extent of Evolution's responsibility for the damage or loss, pursuant to s 35 CLA;
- (f) says that in any event, by reason of Clause 32 of the General Conditions, WSP's total liability is limited to amounts recovered by WSP under a policy of professional indemnity insurance which WSP was required to effect, up to a maximum of \$20 million;
- (g) otherwise denies the allegations therein.

120 As to the allegations in paragraph 120, WSP:

- (a) denies it committed WSP's Warranty Breaches and WSP's Certification Breach;
- (b) denies any of WSP's Warranty Breaches or WSP's Certification Breach (if established) caused Icon loss or damage;
- (c) alternatively, says that Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs and Icon's Loss of Opportunity / Loss of Contract Damages are economic, indirect or consequential loss, or loss of contract or profit within the meaning of Clause 32 of the General Conditions, such that WSP has no liability to Icon for Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs and Icon's Loss of Opportunity / Loss of Contract Damages;

- (d) alternatively (and without admissions), says that Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners' Corporation's Insurance Costs and Icon's Loss of Opportunity / Loss of Contract Damages are claims in respect of loss of, or damage to, property, arising out of WSP's Warranty Breaches, and that, pursuant to Clause 9 of the General Conditions, WSP's obligation to indemnify Icon against those heads of damage is reduced proportionally to the extent that the act of omission of Icon or its contractors contributed to the loss or damage;
- (e) says that in any event, by reason of Clause 32 of the General Conditions, WSP's total liability is limited to amounts recovered by WSP under a policy of professional indemnity insurance which WSP was required to effect, up to a maximum of \$20 million;
- (f) otherwise denies the allegations therein.

**K. IF WSP DID NOT APPROVE THE GROUTING DESIGN CHANGE (WHICH IS DENIED BY ICON), WSP NEVERTHELESS ENGAGED IN MISLEADING OR DECEPTIVE CONDUCT**

- 121 WSP repeats paragraphs 39 to 47 above in relation to the allegations in paragraph 121.
- 122 WSP denies the allegations in paragraph 122, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 123 As to the allegations in paragraph 123, WSP:
- (a) admits that WSP received the Precast Detail Page Drawing DE01 on the dates alleged for version P1, P2, P3, P5, P6 and A;
- (b) says that WSP received the Precast Detail Page Drawing DE01 version P4 on 14 October 2016;
- (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 124 As to the allegations in paragraph 124, WSP:
- (a) repeats paragraph 42 above;
- (b) otherwise admits the allegations therein.
- 125 As to the allegations in paragraph 125, WSP:
- (a) repeats paragraph 46 above;

(b) otherwise admits the allegations therein.

126 As to the allegations in paragraph 126, WSP:

(a) repeats paragraph 28 above;

(b) repeats paragraph 41 above;

(c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

127 WSP denies the allegations in paragraph 127.

128 WSP denies the allegations in paragraph 128.

129 WSP denies the allegations in paragraph 129.

130 As to the allegations in paragraph 130, WSP repeats paragraph 54 above.

131 WSP denies the allegations in paragraph 131.

132 As to the allegations in paragraph 132, WSP:

(a) says that it did not inform Icon that the detail in Evolution Shop Drawing 1 and/or Evolution Shop Drawing 2 was not to apply to all levels in the Building;

(b) otherwise denies the allegations therein.

133 WSP denies the allegations in paragraph 133.

134 WSP denies the allegations in paragraph 134.

135 WSP denies the allegations in paragraph 135.

136 WSP denies the allegations in paragraph 136.

137 WSP denies the allegations in paragraph 137.

138 WSP denies the allegations in paragraph 138.

139 WSP denies the allegations in paragraph 139.

140 WSP denies the allegations in paragraph 140 and repeats paragraph 154 below.

141 WSP denies the allegations in paragraph 141 and repeats paragraph 155 below.

**L. WSP ENGAGED IN MISLEADING OR DECEPTIVE CONDUCT IN THE PROVISION OF DESIGN CERTIFICATES**

*Provision of design certificates*

142 WSP admits the allegations in paragraph 142.

143 As to the allegations in paragraph 143, WSP:

(a) admits it issued certificates of design for December 2015, January 2016, February 2016, March 2016, May 2016, November 2016, February 2017, March 2017 and July 2017;

(b) does not admit it issued a certificate of design for June 2016;

(c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

144 As to the allegations in paragraph 144, WSP:

(a) repeats paragraph 143 above;

(b) otherwise admits the allegations therein.

145 As to the allegations in paragraph 145, WSP:

(a) repeats paragraph 144 above;

(b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

146 WSP denies the allegations in paragraph 146.

147 As to the allegations in paragraph 147, WSP:

(a) denies that it made the Design Certificate Representations;

(b) denies that the Design Certificate Representations were false;

(c) otherwise denies the allegations therein.

148 As to the allegations in paragraph 148, WSP:

(a) denies that it made the Design Certificate Representations;

(b) denies that the Design Certificate Representations were made in trade or commerce within the meaning of s 18 of the ACL;

(c) otherwise denies the allegations therein.

149 WSP denies the allegations in paragraph 149.

150 As to the allegations in paragraph 150, WSP:

(a) denies that it made the Design Certificate Representations;

(b) denies that the Design Certificate Representations were false;

(c) otherwise denies the allegations therein.

151 As to the allegations in paragraph 151, WSP:

(a) denies that it made the Design Certificate Representations;

- (b) denies that the Design Certificate Representations were false;
- (c) otherwise denies the allegations therein.

152 As to the allegations in paragraph 152, WSP:

- (a) denies that it made the Design Certificate Representations;
- (b) denies that the Design Certificate Representations were false;
- (c) otherwise denies the allegations therein.

153 WSP denies the allegations in paragraph 153.

154 WSP denies the allegations in paragraph 154, and alternatively:

- (a) says that the SOPA Liability Damages, Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs and Icon's Loss of Opportunity / Loss of Contract Damages are economic, indirect or consequential loss, or loss of contract or profit within the meaning of Clause 32 of the General Conditions, such that WSP has no liability to Icon for the SOPA Liability Damages, Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs and Icon's Loss of Opportunity / Loss of Contract Damages;
- (b) says that any damages to which Icon would otherwise be entitled should be reduced to the extent which the Court thinks just and equitable, having regard to Icon's share in the responsibility for the loss or damage, pursuant to s 137B CCA;

**Particulars**

(i) WSP repeats paragraphs 166 to 182 below.

- (c) says that WSP's liability is limited to an amount reflecting that proportion of the damage or loss claimed that the Court considers just having regard to the extent of WSP's responsibility for the damage or loss, pursuant to s 87CD CCA;

**Particulars**

(i) WSP repeats paragraphs 210 to 222 below.

- (d) says that, by reason of Clause 32 of the General Conditions, WSP's total liability is limited to amounts recovered by WSP under a policy of professional indemnity insurance which WSP was required to effect, up to a maximum of \$20 million.

- 155 WSP denies the allegations in paragraph 155, and alternatively:
- (a) says that the SOPA Liability Damages, Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs and Icon's Loss of Opportunity / Loss of Contract Damages are economic, indirect or consequential loss, or loss of contract or profit within the meaning of Clause 32 of the General Conditions, such that WSP has no liability to Icon for the SOPA Liability Damages, Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs and Icon's Loss of Opportunity / Loss of Contract Damages;
  - (b) says that, by reason of Clause 32 of the General Conditions, WSP's total liability is limited to amounts recovered by WSP under a policy of professional indemnity insurance which WSP was required to effect, up to a maximum of \$20 million.

*15 May 2018 Certification*

- 156 As to the allegations in paragraph 156, WSP:
- (a) repeats paragraph 55 above;
  - (b) otherwise admits the allegations therein.
- 157 WSP denies the allegations in paragraph 157, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 158 As to the allegations in paragraph 158, WSP:
- (a) denies that the 15 May 2018 Certification Representation was made in trade or commerce within the meaning of s 18 of the ACL;
  - (b) otherwise denies the allegations therein.
- 159 WSP denies the allegations in paragraph 159.
- 160 As to the allegations in paragraph 160, WSP:
- (a) admits that Icon issued the documents referred to;
  - (b) denies the 15 May 2018 Certification Representation was false;
  - (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 161 As to the allegations in paragraph 161, WSP:
- (a) denies the 15 May 2018 Certification Representation was false;

(b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

162 WSP denies the allegations in paragraph 162.

163 WSP denies the allegations in paragraph 163, and alternatively:

(a) says that the SOPA Liability Damages, Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs and Icon's Loss of Opportunity / Loss of Contract Damages are economic, indirect or consequential loss, or loss of contract or profit within the meaning of Clause 32 of the General Conditions, such that WSP has no liability to Icon for the SOPA Liability Damages, Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs and Icon's Loss of Opportunity / Loss of Contract Damages;

(b) says that any damages to which Icon would otherwise be entitled should be reduced to the extent which the Court thinks just and equitable, having regard to Icon's share in the responsibility for the loss or damage, pursuant to s 137B CCA;

**Particulars**

(i) WSP repeats paragraphs 166 to 182 below.

(c) says that WSP's liability is limited to an amount reflecting that proportion of the damage or loss claimed that the Court considers just having regard to the extent of WSP's responsibility for the damage or loss, pursuant to s 87CD CCA;

**Particulars**

(i) WSP repeats paragraphs 210 to 222 below.

(d) says that, by reason of Clause 32 of the General Conditions, WSP's total liability is limited to amounts recovered by WSP under a policy of professional indemnity insurance which WSP was required to effect, up to a maximum of \$20 million.

164 WSP denies the allegations in paragraph 164, and alternatively:

(a) says that the SOPA Liability Damages, Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs and Icon's Loss of Opportunity / Loss of Contract Damages are economic, indirect or consequential loss, or loss of contract or profit within the

meaning of Clause 32 of the General Conditions, such that WSP has no liability to Icon for the SOPA Liability Damages, Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs and Icon's Loss of Opportunity / Loss of Contract Damages;

- (b) says that, by reason of Clause 32 of the General Conditions, WSP's total liability is limited to amounts recovered by WSP under a policy of professional indemnity insurance which WSP was required to effect, up to a maximum of \$20 million.

### **Relief**

165 WSP denies Icon is entitled to the relief claimed in the Cross-Summons.

### **M. FURTHER MATTERS**

#### *Contributory negligence*

#### **Grouting**

166 In the event that:

- (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 tort, or for breach of WSP's contractual duty of care which is co-extensive with a duty of care in tort, in relation to the failure to fully grout (which is denied),

WSP pleads as follows.

167 In the premises, Icon will have suffered damage partly as a result of WSP's wrong, as defined in s 8 LRA, and partly as a result of Icon's failure to take reasonable care.

#### **Particulars**

- (i) In the event, which is denied, that Icon's subcontractor Evolution (an 'associate' of Icon, as defined in Clause 1 of the General Conditions), intended to change WSP's design, failing, by its subcontractor Evolution, to ask WSP, in terms, either orally or in writing, for permission or approval to change WSP's design from full grout coverage between the precast panel and the hob, to grout being placed on the inner portion of the hob only.
- (ii) In the event, which is denied, that Evolution Shop Drawing 1 and/or Evolution Shop Drawing 2 did indicate that grouting would be placed on

the inner portion of the hob only, issuing, by its subcontractor Evolution, Evolution Shop Drawing 1 and Evolution Shop Drawing 2.

- (iii) In the event, which is denied, that Evolution Shop Drawing 1 and/or Evolution Shop Drawing 2 did indicate that grouting would be placed on the inner portion of the hob only, failing to refer the discrepancy to the Superintendent or to WSP.
- (iv) Failing, by itself or by its subcontractor Evolution, to grout the full width of the hob between the precast panel and the hob, as required by WSP's 'for construction' Drawing No. 4419 S06.010[A].
- (v) Failing to observe that its subcontractor Evolution had failed to grout the full width of the hob between the precast panel and the hob, as required by WSP's 'for construction' Drawing No. 4419 S06.010[A].

168 By reason of the matters referred to in paragraphs 166 to 167 above, Icon's damages recoverable in respect of WSP's wrong are to be reduced to such extent as the Court thinks just and equitable having regard to Icon's share in the responsibility for the damage, pursuant to s 9(1) LRA.

169 Further, in about late 2017 (about the time the Building was 'topped' out) Icon was aware that there had been a failure of a precast panel on level 10 (wall 10C-14.5, as designated during the rectification process), at which time patching was carried out.

170 Icon failed to alert WSP to the failure of the precast panel, and to the patching, which was a failure by Icon to take reasonable care.

171 Had Icon alerted WSP to the failure of the precast panel in about late 2017:

- (a) WSP would have recommended that investigations be carried out, which would have revealed the inadequate grouting between the precast panel and the hob;
- (b) appropriate rectification measures would have been taken to rectify the grouting deficiencies throughout the whole of the Building;
- (c) Icon would have incurred significantly less rectification costs than Icon's Incurred Rectification Costs, and would not have incurred or be at risk of incurring:
  - (i) the SOPA Liability Damages;
  - (ii) Icon's Future Rectification Costs;
  - (iii) Group Members' Loss of Rent Costs;
  - (iv) Group Members' Alternative Accommodation Costs;
  - (v) Lessees' Alternative Accommodation Costs;

- (vi) Licence Occupation Fees;
  - (vii) Owners Corporation's Insurance Costs; and
  - (viii) Icon's Loss of Opportunity / Loss of Contract Damages.
- 172 Further, on 5 August 2018, the Superintendent issued defects notice no. 84, directing Icon to patch and refinish the precast panel on level 10.
- 173 Again, Icon failed to alert WSP to the damage to the precast panel, which was a failure by Icon to take reasonable care.
- 174 Had Icon alerted WSP to the failure of the precast panel in August 2018:
- (a) WSP would have recommended that investigations be carried out, which would have revealed the inadequate grouting between the precast panel and the hob;
  - (b) appropriate rectification measures could have been taken to rectify the grouting deficiencies throughout the whole of the Building;
  - (c) Icon would have incurred significantly less rectification costs than Icon's Incurred Rectification Costs, and would not have incurred or be at risk of incurring:
    - (i) the SOPA Liability Damages;
    - (ii) Icon's Future Rectification Costs;
    - (iii) Group Members' Loss of Rent Costs;
    - (iv) Group Members' Alternative Accommodation Costs;
    - (v) Lessees' Alternative Accommodation Costs;
    - (vi) Licence Occupation Fees;
    - (vii) Owners Corporation's Insurance Costs; and
    - (viii) Icon's Loss of Opportunity / Loss of Contract Damages.
- 175 By reason of the matters referred to in paragraphs 169 to 174 above, Icon's damages recoverable in respect of WSP's wrong are to be reduced to such extent as the Court thinks just and equitable having regard to Icon's share in the responsibility for the damage, pursuant to s 9(1) LRA.

**Concrete strength**

- 176 In the event that:
- (a) the concrete strength of the hobs was causative of the structural damage (which is not admitted), and

(b) WSP is liable to Icon in tort, or for breach of WSP's contractual duty of care which is co-extensive with a duty of care in tort, in relation to the concrete strength of the hobs (which is denied),

WSP pleads as follows.

177 In the premises, Icon will have suffered damage partly as a result of WSP's wrong, as defined in s 8 LRA, and partly as a result of Icon's failure to take reasonable care.

**Particulars**

(i) In the event, which is not admitted, that there is a discrepancy in WSP's drawings in relation to the concrete strength of the hobs, failing to refer the discrepancy to either the Superintendent or WSP.

178 By reason of the matters referred to in paragraphs 176 to 177 above, Icon's damages recoverable in respect of WSP's wrong are to be reduced to such extent as the Court thinks just and equitable having regard to Icon's share in the responsibility for the damage, pursuant to s 9(1) LRA.

**Electrical Conduit Placement**

179 In the event that:

(a) the placement of the electrical conduit within the zone of concrete in the hob wall immediately above column C38 was causative of the structural damage (which is not admitted), and

(b) WSP is liable to Icon in tort, or for breach of WSP's contractual duty of care which is co-extensive with a duty of care in tort, in relation to the electrical conduit placement (which is denied),

WSP pleads as follows.

180 In the premises, Icon will have suffered damage partly as a result of WSP's wrong, as defined in s 8 LRA, and partly as a result of Icon's failure to take reasonable care.

**Particulars**

(i) Placing, either by itself or its sub-contractors, the electrical conduit within the zone of concrete in the hob wall immediately above column C38, contrary to WSP's approved 'for construction' design.

(ii) In the event that the conduit was placed by a sub-contractor, failing to observe the defective placement, and instruct that it be rectified.

181 By reason of the matters referred to in paragraphs 179 to 180 above, Icon's damages recoverable in respect of WSP's wrong are to be reduced to such extent as the Court

thinks just and equitable having regard to Icon's share in the responsibility for the damage, pursuant to s 9(1) LRA.

- 182 Further, WSP repeats paragraphs 166 to 181 above and says that Icon's claim for damages under s 236(1) ACL are to be reduced to the extent which the Court thinks just and equitable having regard to Icon's share in the responsibility for the loss or damage.

*Proportionate liability*

- 183 In the event that:

- (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.

**The Evolution Subcontract**

- 184 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**).
- 185 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**).

**Particulars**

- (i) Clause 1 Formal Instrument of Agreement.

- 186 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.

187 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.

188 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.

189 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 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.

190 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 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.

191 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:
- (c) each indemnity in the Subcontract was a continuing obligation;
- (d) each indemnity in the Subcontract constituted a separate and independent obligation of the party giving the indemnity from its other obligations under the Subcontract.

192 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.

193 Clause 3 of the Scope of Works set out Evolution's design obligations under the Subcontract.

194 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*

- 195 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.
- 196 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.
- 197 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.
- 198 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.
- 199 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.

**Evolution's breaches of the Subcontract**

- 200 If, which is denied, Evolution Shop Drawing 1 and Evolution Shop Drawing 2 did indicate that grouting would be placed on the inner portion of the hob only, in issuing Evolution Shop Drawing 1 and Evolution Shop Drawing 2, Evolution breached the clauses of the Subcontract set out in paragraphs 186 and 187.
- 201 By reason of the breaches, Icon has suffered and will suffer the following loss and damage:
- (a) the SOPA Liability Damages;
  - (b) Icon's Incurred Rectification Costs;
  - (c) Icon's Future Rectification Costs;
  - (d) Group Members' Loss of Rent Costs;
  - (e) Group Members' Alternative Accommodation Costs;
  - (f) Lessees' Alternative Accommodation Costs;
  - (g) Licence Occupation Fees;
  - (h) Owners Corporation's Insurance Costs; and
  - (i) Icon's Loss of Opportunity / Loss of Contract Damages.

- 202 In 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 187 and 192 above.
- 203 By reason of the breaches, Icon has suffered and will suffer the following loss and damage:
- (a) the SOPA Liability Damages;
  - (b) Icon's Incurred Rectification Costs;
  - (c) Icon's Future Rectification Costs;
  - (d) Group Members' Loss of Rent Costs;
  - (e) Group Members' Alternative Accommodation Costs;
  - (f) Lessees' Alternative Accommodation Costs;
  - (g) Licence Occupation Fees;
  - (h) Owners Corporation's Insurance Costs; and
  - (i) Icon's Loss of Opportunity / Loss of Contract Damages.

**Evolution's breach of its duty of care to Icon**

- 204 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.
- 205 If Evolution did not design the subcontract works with reasonable care and skill, there was a risk of harm that the Building might suffer structural damage.
- 206 The risk of harm was foreseeable, and not insignificant.
- 207 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.
- 208 In the event (which is denied) that the Evolution Shop Drawing 1 and Evolution Shop Drawing 2 indicated grout to be placed on the inner portion of the hob only, in issuing the Evolution Shop Drawing 1 and Evolution Shop Drawing 2, Evolution breached its duty of care to Icon, and was, by reason of s 5B CLA, negligent.
- 209 By reason of the breach, Icon has suffered and will suffer the following loss and damage:

- (a) the SOPA Liability Damages;
- (b) Icon's Incurred Rectification Costs;
- (c) Icon's Future Rectification Costs;
- (d) Group Members' Loss of Rent Costs;
- (e) Group Members' Alternative Accommodation Costs;
- (f) Lessees' Alternative Accommodation Costs;
- (g) Licence Occupation Fees;
- (h) Owners Corporation's Insurance Costs; and
- (i) Icon's Loss of Opportunity / Loss of Contract Damages.

**Evolution's misleading or deceptive conduct**

- 210 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**).
- 211 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**).
- 212 In the event, which is denied, 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.
- 213 By making the false Representations, Evolution engaged in misleading or deceptive conduct in contravention of s 18 of the ACL.
- 214 Had Evolution not made the 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.
- 215 In the circumstances pleaded above, Icon 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 is entitled to damages pursuant to s 236 of the ACL, comprising:
- (a) the SOPA Liability Damages;

- (b) Icon's Incurred Rectification Costs;
- (c) Icon's Future Rectification Costs;
- (d) Group Members' Loss of Rent Costs;
- (e) Group Members' Alternative Accommodation Costs;
- (f) Lessees' Alternative Accommodation Costs;
- (g) Licence Occupation Fees;
- (h) Owners Corporation's Insurance Costs; and
- (i) Icon's Loss of Opportunity / Loss of Contract Damages.

216 Further, Icon is entitled to an indemnity under ss 237 and 243 of the ACL to the effect that Icon be, and is entitled to be, indemnified by Evolution in respect of the loss or damage pleaded at paragraph 215 above.

**Evolution is a concurrent wrongdoer**

217 In the premises, Icon's claim against WSP for WSP's Warranty Breaches is a claim for economic loss or damage to property in an action for damages arising from a failure to take reasonable care, and is therefore an 'apportionable claim' within the meaning of s 34 CLA.

218 By reason of the matters referred to above, Evolution is a person whose acts or omissions caused Icon's loss or damage, and is thereby a "concurrent wrongdoer" for the purposes of s 34(2) CLA.

219 By reason of the matters referred to above, WSP's liability is limited to an amount reflecting that proportion of the damage or loss claimed that the Court considers just, having regard to the extent of WSP's responsibility for the damage or loss, pursuant to s 35 CLA.

220 In the premises, Icon's claim against WSP for misleading or deceptive conduct under s 236 ACL is a claim for economic loss or damage to property caused by conduct that was done in contravention of s 18 ACL.

221 By reason of the matters referred to above, Evolution is a person whose acts or omissions caused Icon's loss or damage, and is thereby a "concurrent wrongdoer" for the purposes of s 87CB(3) CCA.

222 By reason of the matters referred to above, WSP's liability for damages under s 236 ACL is limited to an amount reflecting that proportion of the damage or loss claimed that the Court considers just, having regard to the extent of WSP's responsibility for the damage or loss, pursuant to s 87CD(1) CCA.

**D. QUESTIONS APPROPRIATE FOR REFERRAL 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

A handwritten signature in black ink, appearing to read "Lobiel".

Capacity

Solicitor

Date of signature

31 January 2020