

FIFTH COMMERCIAL LIST CROSS-CLAIM STATEMENT

COURT DETAILS

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

TITLE OF PROCEEDINGS

First Plaintiff	Terry Walter Williamson
Second Plaintiff	Helen Therese Williamson
Defendant	Sydney Olympic Park Authority (ABN 68 010 941 405)

TITLE OF THIS CROSS-CLAIM

Cross - Claimant	Australia Avenue Developments Pty Limited ABN 46 104 573 391
Second Cross Claimant	Ecove Group Pty Ltd ACN 065 207 918
First Cross-Defendant	Icon Co (NSW) Pty Ltd ABN 16 604 790 409
Second Cross-Defendant	Kajima Australia Pty Ltd ACN 604 351 966
Third Cross-Defendant	Icon Co Pty Limited ACN 604 136 683

FILING DETAILS

Filed for	Australia Avenue Developments Pty Ltd, First Cross-Claimant Ecove Group Pty Ltd, Second_Cross-Claimant
Legal representative	David Jury HWL Ebsworth Lawyers Level 14, Australia Square 264-278 George Street Sydney NSW 2000
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A. NATURE OF DISPUTE

1. Italicised terms have the same meaning as in the contract referred to in paragraph 4 below.
2. The first cross claimant, Australia Avenue Developments Pty Limited (**AAD**), is a wholly owned subsidiary of the second cross claimant, Ecove Group Pty Ltd (**Ecove**). Ecove is in the business of property development.
3. Ecove obtained a development consent to develop land owned by Sydney Olympic Park Authority (**SOPA**) at 98 Bennelong Parkway, Sydney Olympic Park (**Land**).
4. On 20 March 2014, SOPA, AAD and Ecove (as guarantor for AAD) entered into a project delivery agreement (**PDA**) under which AAD agreed to develop the Land which included the construction of a high rise mixed residential and commercial development known as "Opal Tower" (**Opal Tower**) on the Land (**Project**).
5. On or about 29 October 2015, the common director of Ecove and AAD caused AAD to enter into a contract with the first cross-defendant, Icon Co (NSW) Pty Ltd (**Icon**), where Icon agreed to design and construct Opal Tower for a lump sum price of \$154,707,111 plus GST (**Contract**).
6. On 5 November 2015, the second and third cross-defendants (Kajima Australia Pty Ltd (**Kajima**) and Icon Co Pty Ltd (**Icon Co**), respectively) guaranteed Icon's obligations under the Contract by way of a performance guarantee deed (**Performance Guarantee**).
7. On 24 December 2018, Opal Tower was evacuated due to damage observed that day. This damage was the subject of the Opal Tower Investigation Interim Report dated 14 January 2019 and the Opal Tower Investigation Final Report dated 19 February 2019.
8. Following an investigation by Icon and its structural engineers, Opal Tower was evacuated again on 27 December 2018 and until December 2019, 171 apartments remained incapable of being occupied.
9. At all times Icon has represented that it has performed its obligations under the Contract and the *Superintendent* issued certificates of practical completion.
10. On 26 July 2019, the plaintiffs, as the owners of an apartment in Opal Tower, commenced proceedings on their own behalf and as a representative proceeding by way of summons and a commercial list statement (**Plaintiffs' List Statement**). In the Plaintiffs' List Statement they allege that Opal Tower is affected by defects that have caused them and other Group Members (as defined in the Plaintiffs' List Statement) loss for which SOPA is liable.

11. By way of the first cross-claim filed on 27 September 2019 (**SOPA's Cross-claim Statement**), SOPA relevantly contends that if and insofar as it is liable to the plaintiffs or any Group Members as alleged in the Plaintiffs' List Statement, SOPA is entitled to relief against AAD and Ecove pursuant to the terms and conditions of the PDA.
12. By way of this cross-claim statement, AAD and Ecove contend that if and insofar as they are liable to SOPA, AAD and Ecove are entitled to relief against Icon, Kajima and Icon Co pursuant to the terms and conditions of the Contract and Performance Guarantee.

B. ISSUES LIKELY TO ARISE

In addition to the matters raised by the plaintiffs in the Plaintiffs' List Statement and SOPA in its Commercial List Response and SOPA's Cross-claim Statement:

1. Whether and to what extent Icon has breached its obligations under the Contract in respect of the matters the subject of the Plaintiffs' List Statement.
2. Whether and to what extent Icon is liable under the Contract to indemnify AAD in respect of AAD's alleged liability to SOPA.
3. Whether and to what extent Kajima and/or Icon Co have breached their obligations under the Performance Guarantee in respect of the matters the subject of the Plaintiffs' List Statement.
4. Whether and to what extent Kajima and/or Icon Co are liable under the Performance Guarantee to indemnify AAD in respect of AAD's alleged liability to SOPA.
5. Whether Icon owed a duty of care to Ecove.
6. If so, whether Icon has breached that duty of care.

C. PLAINTIFFS' CONTENTIONS

PART A: BACKGROUND

Parties

1. At all material times, Ecove:
 - (a) was a company duly incorporated according to law and capable of suing;
 - (b) is in the business of property development.
2. At all material times, AAD was a company duly incorporated according to law and capable of suing.
3. At all material times, Mr Bassam Aflak was a director of AAD and Ecove.
4. At all material times, Icon was a company duly incorporated according to law and capable of being sued.

5. At all material times, Kajima was a company duly incorporated according to law and capable of being sued.
6. At all material times, Icon Co was a company duly incorporated according to law and capable of being sued and since 11 June 2015 held (and was required to hold) a contractor's licence under the *Home Building Act*.

Project

7. SOPA is a statutory authority constituted pursuant to section 5 of the *Sydney Olympic Park Act 2001* (NSW).
8. SOPA is the registered proprietor of the lands comprising Sydney Olympic Park, including the Land.
9. On 20 March 2014, SOPA granted AAD, as trustee of the SOP Site 3 Partner Trust, the right to develop the Land into a mixed residential and commercial building via the PDA.

Particulars

Contract entitled "Site 68 Project Delivery Agreement" between SOPA, AAD and Ecove dated 20 March 2014

10. On 15 June 2015, Ecove obtained a *Development Consent* in respect of the Land.
11. Under the PDA, Ecove guaranteed to SOPA AAD's compliance with SOPA's requirements under the PDA.

Particulars

Clause 37.2 of the PDA

12. On 26 July 2019, the plaintiffs, as the owners of an apartment in Opal Tower, commenced proceedings on their own behalf and as a representative proceeding by way of summons and the Plaintiffs' List Statement.

Particulars

Summons and the Plaintiffs' List Statement

13. In the Plaintiffs' List Statement the plaintiffs allege that:
 - (a) Opal Tower is affected by System Defects (as defined in the Plaintiffs' List Statement) in that the System (as defined in the Plaintiffs' List Statement) was not designed or constructed in the manner the plaintiffs allege it ought to have been;

Particulars

Paragraph 57 of the Plaintiffs' List Statement

- (b) Opal Tower is affected by Strength Defects (as defined in the Plaintiffs' List Statement) in that the concrete supplied and used by Icon to construct the System was inadequate in the manner alleged and the FC Drawings did not identify, or did not adequately identify, the required strength of the concrete to be supplied and used by Icon to construct the System;

Particulars

Paragraph 58 of the Plaintiffs' List Statement

- (c) the work to be performed by Icon was 'residential building work' for the purposes of the *Home Building Act* and the Contract was a contract to do 'residential building work' for the purposes of the *Home Building Act* such that various warranties were implied into the Contract;

Particulars

Paragraphs 19 and 20 of the Plaintiffs' List Statement

- (d) the plaintiffs and the Group Members are entitled to the benefit of the statutory warranties implied into the Contract by virtue of the *Home Building Act*;

Particulars

Paragraphs 23 to 25 of the Plaintiffs' List Statement

- (e) by reason of the matters pleaded in paragraphs 13(a) and (b) above, the warranties pleaded in paragraph 13(c) above were breached;

Particulars

Paragraphs 62 to 66 of the Plaintiffs' List Statement

- (f) by reason of the matters pleaded in the Plaintiffs' List Statement, as summarised above, the plaintiffs and other Group Members have suffered loss and damage for which SOPA is liable.

Particulars

Paragraph 69 of the Plaintiffs' List Statement

14. On 27 September 2019 SOPA filed a Cross Summons and SOPA's Cross-claim Statement.

Particulars

Cross Summons and SOPA's Cross-claim Statement

15. By way of SOPA's Cross-claim Statement, SOPA contends that if and insofar as it is liable to the plaintiffs or any Group Members as alleged in the Plaintiffs' List Statement, SOPA is entitled to relief against AAD and Ecove.

Particulars

Paragraphs 1 to 3, 5 – 57 Cross Summons and SOPA's Cross-claim Statement

PART B: THE DESIGN AND CONSTRUCTION CONTRACT

The Contract

16. On or about 29 October 2015, Ecove caused AAD to enter into the Contract with Icon whereby Icon agreed to carry out the *Works* for a lump sum price of \$154,707,111 plus GST subject to adjustment only in accordance with the terms of the Contract.

Particulars

The Contract is comprised of:

- (i) Formal Instrument of Agreement;
 - (ii) General Conditions of Contract based on AS4902-2000;
 - (iii) Annexures Parts A to W to AS4902-2000;
 - (iv) redacted PDA;
 - (v) Development Consent;
 - (vi) Schedule of rates.
17. The Contract included the *Principal's project requirements (PPR)*.

Particulars

- (a) Item 10 at Annexure Part A to the General Conditions of Contract
- (b) Annexure Part R to the General Conditions of Contract

Design and construction obligations

18. It was a term of the Contract that Icon was required to ensure that it exercised due skill, care and diligence in the carrying out and completion of the *WUC*.

Particulars

Clause 2.2(a)(i) of the General Conditions of Contract

19. It was a term of the Contract that Icon was required to ensure that it carried out and completed *Contractor's design obligations* in accordance with the PPR.

Particulars

Clause 2.2(a)(iii)(A) of the General Conditions of Contract

20. It was a term of the Contract that Icon was required to ensure that it carried out and completed its design obligations so that the design of the *Works* did not adversely affect the functional integrity of the *Works* or the quality or standard of the *Works* required under the PPR.

Particulars

Clause 2.2(a)(iii)(C) of the General Conditions of Contract

21. It was a term of the Contract that Icon was required to ensure that it carried out and completed the *WUC* in accordance with the *design documents* so that the *Works*, when completed, were fit for their stated purpose or result.

Particulars

Clause 2.2(a)(iv)(A) of the General Conditions of Contract

22. It was a term of the Contract that Icon was required to ensure that it carried out and completed the *WUC* in accordance with the *design documents* so that the *Works*, when completed, would comply with all the requirements of the Contract and all *legislative requirements*.

Particulars

Clause 2.2(a)(iv)(B) of the General Conditions of Contract

23. It was a term of the Contract that Icon was required to ensure that it carried out and completed the *WUC* in accordance with the *design documents* so that the *Works*, when completed, complied with the PPR, including the requirements in respect of the *Sales Contracts*.

Particulars

Clause 2.2(a)(iv)(C) of the General Conditions of Contract

24. It was a term of the Contract that Icon would ensure that each design *consultant* would perform its design responsibilities with skill, care and diligence.

Particulars

Clause 2.2(d) of the General Conditions of Contract

25. It was a term of the Contract that Icon would construct and complete the *WUC* in accordance with the Contract documents so that the *Works*, when completed, would comply with all the requirements of the Contract.

Particulars

Clause 2.2(e)(i) of the General Conditions of Contract

26. It was a term of the Contract that Icon would construct and complete the *WUC* so as to create a high quality (in terms of design, construction, operation and management) *Building Complex* having regard to the specified finishes and the requirements of the PPR.

Particulars

- (a) Clause 2.2(e)(ii) of the General Conditions of Contract
- (b) Clause C3.2.2(a) of the PPR

27. It was a term of the Contract that Icon would execute the *WUC* in a proper and workmanlike manner and in accordance with the high quality workmanship of the various trades involved.

Particulars

Clause 2.2(h) of the General Conditions of Contract

28. It was a term of the Contract that Icon would ensure that there would be no failures or deterioration, apart from the deterioration that is caused by ordinary wear and tear, in the items of the *Works* referred to in Annexure Part M to the Contract for the periods referred to in that Annexure from the *date of practical completion*.

Particulars

Clause 2.2(m) of the General Conditions of Contract

29. It was a term of the Contract that in compliance with section 7(2) and 18B of the *Home Building Act* that:
- (a) all activities of Icon under the Contract, including the *WUC*, would be performed in a proper and workmanlike manner and in accordance with the Contract;
 - (b) all material supplied by Icon would be good and suitable for the purpose for which they were used;
 - (c) all activities of Icon under the Contract, including the *WUC*, would be done in accordance with and comply with the legislative requirements, relevantly including Australian Standard for Concrete Structures AS3600 2009 and the National Construction Code Vol 1.
 - (d) the activities of Icon under the Contract, including the *WUC* would be done with due diligence;

- (e) activities of Icon under the Contract, including the *WUC*, will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling; and
- (f) the *Works* and any materials used in doing the *Works* would be reasonably fit for its purpose.

Particulars

Clause 2.5 (a) - (f) of the General Conditions of Contract

30. It was a term of the Contract that Icon was to design the *Works* so that the *Works*, when constructed, shall be structurally sound.

Particulars

Clause 8.4.3(i) of the General Conditions of Contract

31. It was a term of the Contract that Icon was to ensure that the construction of the *Works* was in accordance with the *design documents*.

Particulars

Clause 8.4.3(j)(ii) of the General Conditions of Contract

32. It was a term of the Contract that Icon was to use in the performance of the *WUC*:
- (a) suitable new materials which were in good condition, of high quality and suitable for the purpose for which they were intended;
 - (b) all proper care, skill and diligence;
 - (c) proper and tradesmanlike workmanship,
33. It was a term of the Contract that the *WUC* was to meet the requirements of all *Authorities*, Australian Standards and the Building Code of Australia, including relevantly Australian Standard for Concrete Structures AS3600 2009 and the National Construction Code Vol 1.

Particulars

Clause 29.1 of the General Conditions of Contract

34. It was a term of the Contract that *practical completion* of the *WUC* or a separable portion of the *WUC* was the stage in the carrying out and completion of the *WUC* or separable portion when the *Works* were complete and fit for use and occupation except for minor defects:
- (a) which did not prevent the *Works* from being reasonably capable of being used for their stated purpose;

- (b) which the *Superintendent* determined Icon had reasonable grounds for not promptly rectifying;
- (c) the rectification of which will not prejudice the convenient use of the *Works*.

Particulars

Clause 1 and clause 34.6 of the General Conditions of Contract

35. It was a term of the Contract that Icon was to ensure that the design and construction of the Apartments met the requirements of the PPR.

Particulars

Clause 47.4(d) of the General Conditions of Contract

36. It was a term of the Contract that Icon was required to carry out the *WUC* in accordance with the objectives for the Project, which relevantly included that:

- (a) the development, design, construction, operation, management and maintenance outcomes for the Project were to be of high quality and durable;

Particulars

Clauses C1.1.3, C2.1 and C3.1.1(a) and (b), C3.2.2 and C4.3.1 of the PPR

- (b) the Project would be fit for its intended purpose at *practical completion*;

Particulars

Clauses C3.1.1(d) and C3.2.2 of the PPR

- (c) the Project would be delivered free from defects and fully commissioned by the *date(s) for practical completion* and at *practical completion* would be in compliance with the Contract;

Particulars

Clauses C3.1.1(f), C3.2.2 and C4.3.4 of the PPR

- (d) as at the *date of practical completion* the Project could operate and function on an uninterrupted basis;

Particulars

Clauses C3.1.1(g) and C3.2.2 of the PPR

- (e) meet and exceed industry standards in every aspect of the *WUC*, including the design of the *Works* and the quality, finish and durability of the completed *Works*.

Particulars

Clauses C3.2.2 and C4.3.2 of the PPR

37. It was a term of the Contract that Icon must design and construct the *Works* to meet various objectives, which included:

- (a) to complete the *Development* on time so that, at practical completion, it will be fit to its intended purpose;
- (b) to complete the *Development* in accordance with AAD's obligations in connection with its marketing commitments and *Sales Contracts*;
- (c) for Icon to deliver the *Development* free of defects and fully commissioned by the date(s) for *practical completion*;
- (d) at the date of *practical completion* a *Development* that can operate and function on an uninterrupted basis.

Particulars

Clause C3.2.1 and 3.1.1 (d)-(g) of the PPR

38. It was a term of the Contract that Icon was responsible for ensuring that the design submissions are compliant with the Contract.

Particulars

Clause C4.1.4 of the PPR

Obligations under the PDA

39. It was a term of the Contract that Icon was to perform its obligations under the Contract to satisfy AAD's corresponding obligations under the PDA and perform its obligations under the Contract so that no unauthorised act or omission of it or default by it under the Contract at any time constitutes or causes any breach by AAD of its obligations under the PDA.

Particulars

Clause 58(b)(i) and (ii) of the General Conditions of Contract

40. It was a term of the Contract that notwithstanding any other provision of the Contract, Icon must not do anything, and must ensure that its *Associates* and subcontractors did not do anything which could result in AAD being in breach of any of its obligations under the PDA.

Particulars

Clause 58(c) of the General Conditions of Contract

Indemnities under the Contract

41. It was a term of the Contract that Icon indemnifies AAD, SOPA and their *Associates* against any *claim* made by an *Owner* against AAD or SOPA under a *Sales Contract* arising out of a failure by Icon to design or construct the *Works* in accordance with the *Sales Contract* arising out of or in connection with or as a consequence of Icon carrying out the *WUC*.

Particulars

Clause 15.1(d) of the General Conditions of Contract

42. It was a term of the Contract that Icon indemnifies AAD, SOPA and their *Associates* (including the *Superintendent*) on demand from and against any claim or loss suffered or incurred arising out of or in relation to the enforcement of any right a person has or may have against the indemnified parties under or by reason of section 18C of the *Home Building Act*.

Particulars

Clause 15.3 of the General Conditions of Contract

43. It was a term of the Contract that Icon indemnifies and holds harmless AAD and AAD's Associates (and each of them) against all loss, liability, expense or damage, arising out of or in connection with any act or omission by Icon or Icon's Associates or subcontractors which causes AAD to breach any of its obligations under the PDA.

Particulars

Clause 58(d) of the General Conditions of Contract

The Deed

44. In 2015 Icon entered into a Deed Poll with AAD (**the Deed**) whereby Icon agreed that:
- (a) it would perform its obligations under the Contract to a standard of care, skill, judgment and diligence commensurate with a competent experienced contractor experienced in work of a similar nature of the *WUC*;
 - (b) it would perform its obligations under the Contract in accordance with the Contract and all applicable legislative requirements;
 - (c) it would carry out and complete the *WUC* in accordance with the design documents so that the *Works*, when completed would be fit for their stated purpose and comply with the requirements of the Contract;
 - (d) the *Works* when completed would be free from defects and deficiencies;

- (e) there would be no failures or deterioration, apart from the deterioration that is caused by ordinary wear and tear.

Particulars

Contractor's Warranty Deed

PART C: PERFORMANCE GUARANTEE

45. On 5 November 2015, Icon Co and/or Kajima (**Guarantors**) provided to AAD the Performance Guarantee.

Particulars

Performance Guarantee dated 5 November 2015

46. It was a term of the Performance Guarantee that the Guarantors unconditionally and irrevocably guaranteed Icon's due and punctual performance under the Contract.

Particulars

Clause 2(a) of the Performance Guarantee

47. It was a term of the Performance Guarantee that the Guarantors separately indemnify AAD against Loss incurred by it in connection with any default by Icon in performing its obligations under the Contract.

Particulars

Clause 2(b) of the Performance Guarantee

PART D: DUTY OF CARE TO ECOVE

48. Further, and in the alternative Ecove says that at all material times Icon owed it a duty of care.

Particulars

It was foreseeable, in that Icon knew, or ought to have known that, if it did not perform its obligations in accordance with the Contract such that AAD was in breach of its obligations under the PDA SOPA may call on the indemnity given by Ecove under the PDA, as Icon had been provided a copy of the PDA at the time it entered into the Contract.

The risk was not insignificant given the quantum of money involved in the Contract and that the matter involved the construction of a building that was to be used for residential purposes.

In the circumstances, a reasonable person in Icon's position would have taken precautions, including ensuring that it complied with the Contract and the Deed.

The probability that the harm would occur if care were not taken was high given the nature of the work to be performed under the Contract.

The likely seriousness of the harm was significant given that it involved the construction of a building that was to be used for residential purposes.

The burden of taking precautions to avoid the risk of harm was minor given that Icon had been paid by AAD to perform such work with due care and skill and in accordance with the terms of the Contract and the Deed, relevantly comprising those terms pleaded above.

Ecove was vulnerable in that it was not a party to any contract with Icon and Icon was to perform the works under the Contract and the Deed.

49. The duty of care owed by Icon to Ecove was:
- (a) to perform the works under the Contract with due care and skill and in accordance with the terms of the Contract and the Deed, relevantly comprising those terms pleaded in paragraphs 18 to 38 above;
 - (b) perform its obligations under the Contract to satisfy AAD's corresponding obligations under the PDA and perform its obligations under the Contract so that no unauthorised act or omission of it or default by it under the Contract at any time constituted or caused any breach by AAD of its obligations under the PDA contrary to the matter pleaded at paragraph 39 above;
 - (c) carry out its design and construction obligations under the Contract in a manner that could result in AAD being in breach of any of its obligations under the PDA contrary to the matter pleaded at paragraph 40 above;
 - (d) carry out its design and construction obligations in accordance with the Deed pleaded in paragraph 44 above.

PART E: BREACHES OF THE CONTRACT

50. For the purpose of this cross-claim only, and without admission, AAD and Ecove repeat paragraphs 5 to 57 of SOPA's Cross-Claim Statement and adopt the definitions therein.
51. If, despite the matters pleaded by AAD and Ecove in their Commercial List Response filed 8 November 2020 AAD is found liable then such liability arises because Icon:
- (a) breached its obligations under the Contract as pleaded in paragraphs 18 to 38 above;
 - (b) did not perform its obligations under the Contract to satisfy AAD's corresponding obligations under the PDA and perform its obligations under the Contract so that no unauthorised act or omission of it or default by it under the Contract at any

time constituted or caused any breach by AAD of its obligations under the PDA contrary to the matter pleaded at paragraph 39 above;

(c) carried out its design and construction obligations under the Contract in a manner that could result in AAD being in breach of any of its obligations under the PDA contrary to the matter pleaded at paragraph 40 above;

(d) breached its obligations under the Deed as pleaded in paragraph 44 above;

in carrying out and performing its design and construct works in the manner alleged at paragraphs 57 and 58 of the Plaintiffs' List Statement and paragraphs 37, 38 and 40 of SOPA's Cross-claim Statement and particularised in paragraphs 41, 44 and 50 of SOPA's Cross-claim Statement.

52. In the circumstances pleaded, if AAD is liable to SOPA it has suffered loss and damage by reason of Icon's breaches as pleaded in paragraph 51 above.

Particulars

Any damages, interest and costs ordered against AAD pursuant to SOPA's Cross-claim Statement

Any loss or damage suffered by reason of AAD having to indemnify SOPA

AAD's costs in defending SOPA's Cross-claim Statement and bringing this cross-claim

PART F: INDEMNITIES

53. Further and in the alternative:

(a) in the circumstances pleaded in paragraph 13 above an *Owner* has made a claim against SOPA under a *Sales Contract* arising out of a failure by Icon to design or construct the *Works* in accordance with the *Sales Contract* arising out of or in connection with or as a consequence of Icon carrying out the *WUC*;

(b) in the circumstances pleaded in paragraphs 41 and 53(a) above Icon is obligated to indemnify AAD and SOPA against that claim;

(c) in breach of that obligation Icon has not indemnified AAD or SOPA against that claim;

(d) as a consequence of that breach, AAD has suffered loss and damage.

Particulars of loss

Any damages, interest and costs ordered against AAD pursuant to SOPA's Cross-claim Statement

Any damages, interest and costs ordered against SOPA pursuant to the Plaintiffs' List Statement

Any loss or damage suffered by reason of AAD having to indemnify SOPA

AAD's costs in defending SOPA's Cross-claim Statement and bringing this cross-claim

SOPA's costs in defending the Plaintiffs' List Statement and bringing its cross-claim

54. Further and in the alternative:

- (a) in the circumstances pleaded in paragraphs 13 to 15 above there is a claim or loss suffered or incurred arising out of or in relation to the enforcement of any right a person has or may have against SOPA under or by reason of section 18C of the *Home Building Act*;
- (b) in the circumstances pleaded in paragraphs 42 and 54(a) above Icon is obligated to indemnify AAD and SOPA against that claim or loss;
- (c) in breach of that obligation Icon has not indemnified AAD or SOPA against that claim or loss;
- (d) as a consequence of that breach, AAD has suffered loss and damage.

Particulars of loss

The particulars to paragraph 53(d) are repeated here

55. Further and in the alternative:

- (a) in the circumstances pleaded in paragraphs 13, 14, 15, 50, 51 and 52 above there is loss, liability, expense or damage, arising out of or in connection with an act or omission by Icon or Icon's Associates or subcontractors which causes AAD to breach its obligations under the PDA;

Particulars of loss

The particulars to paragraph 53(d) are repeated here

- (b) in the circumstances pleaded in paragraphs 43 and 55(a) above Icon is obligated to indemnify and hold harmless AAD and SOPA against that claim or loss;
- (c) in breach of that obligation Icon has not indemnified and held harmless AAD and SOPA against that claim or loss;
- (d) as a consequence of that breach, AAD has suffered loss and damage.

Particulars of loss

The particulars to paragraph 53(d) are repeated here

PART F: OBLIGATION UNDER PERFORMANCE GUARANTEE

56. Further and in the alternative:

- (a) in the circumstances pleaded in paragraphs 50, 51 and 52 above Icon has not performed its obligations under the Contract when due and punctually;
- (b) in the circumstances pleaded in paragraph 56(a) above the Guarantors are in breach of the guarantee pleaded in paragraph 46 above;
- (c) as a consequence of that breach, AAD has suffered loss and damage.

Particulars of loss

The particulars to paragraph 53(d) are repeated here

57. Further and in the alternative:

- (a) in the circumstances pleaded in paragraphs 50, 51 and 52 above there is a default by Icon in performing its obligations under the Contract;
- (b) in the circumstances pleaded in paragraphs 12 to 15 above AAD has suffered and will, if SOPA is successful in its cross claim against AAD, suffer Loss in connection with the default pleaded in paragraph 57(a) above;
- (c) the Guarantors have not indemnified AAD for the Loss in connection with the default pleaded in paragraph 57(a) above;
- (d) in the circumstances pleaded in paragraph 75(c) above, the Guarantors are in breach of the obligation pleaded in paragraph 47 above;
- (e) as a consequence of that breach, AAD has suffered loss and damage.

Particulars of loss

The particulars to paragraph 53(d) are repeated here

PART G: BREACH OF DUTY OF CARE

58. Further and in the alternative:

- (a) for the purpose of this cross-claim only, and without admission, Ecove repeats paragraphs 5 to 57 of SOPA's Cross-Claim Statement and adopts the definitions therein;
- (b) if, despite the matters pleaded by AAD and Ecove in their Commercial List Response filed 8 November 2020 Ecove is found liable then such liability arises because Icon engaged in the conduct pleaded in paragraph 51 above and by doing so breached the duty of care it owed to Ecove as pleaded in paragraph above;

- (c) in the circumstances Ecove has suffered and will, if SOPA is successful in its cross claim against Ecove, suffer loss and damage in connection with the breaches pleaded in paragraph 58(b) above.

Particulars of loss

Any damages, interest and costs ordered against Ecove pursuant to SOPA's Cross-claim Statement

Any loss or damage suffered by reason of Ecove having to indemnify SOPA

Ecove's costs in defending SOPA's Cross-claim Statement and bringing this cross-claim

D QUESTIONS APPROPRIATE FOR REFERRAL

59. AAD and Ecove consider that there are no questions appropriate for referral to a referee at this time. AAD and Ecove propose to consider what questions (if any) are appropriate for referral to a referee after the service of expert evidence.

E MEDIATION

60. The parties have not attempted mediation. The cross claimants are willing to proceed to mediation at an appropriate time.

SIGNATURE

Signature of legal representative



Capacity

Solicitor

Date of signature

27 April 2020