

COMMERCIAL LIST RESPONSE TO AMENDED COMMERCIAL LIST CROSS-CLAIM STATEMENT

COURT DETAILS

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

TITLE OF PROCEEDINGS

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

TITLE OF THIS AMENDED CROSS-CLAIM

Cross-Claimant	Sydney Olympic Part Authority (ABN 68 010 941 405)
First Cross-defendant	Australia Avenue Developments Pty Ltd (ACN 104 573 391)
Second Cross-Defendant	Ecove Group Pty Ltd (ACN 065 207 918)
Third Cross-Defendant	Icon Co (NSW) Pty Limited (ACN 604 790 409)
Fourth Cross-Defendant	WSP Structures Pty Limited (ABN 78 006 769 339)

FILING DETAILS

Filed for	WSP Structures Pty Limited - Fourth Cross-Defendant
Filed in relation to	Amended Commercial List Cross-Claim Statement
Legal representative	Tricia Hobson, DLA Piper Australia
Legal representative reference	4014154
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A. NATURE OF DISPUTE

In this Commercial List Response to Sydney Olympic Park Authority's (**SOPA**) Amended Commercial List Cross-Claim Statement filed 5 July 2021 (**CCS**), WSP adopts the defined terms contained in the CCS, unless otherwise defined.

- 1 WSP generally agrees with the description of the Nature of Dispute in the CCS.
- 2 WSP denies that it breached any duty that it may have owed to SOPA pursuant to s. 37(1) of the DBPA.
- 3 WSP denies that any breaches of duty caused any loss or damage. For one, although the Plaintiffs' expert Professor Uy criticises the amount of transverse

reinforcement (R 10 horizontal bars) specified by WSP in the hobs, the evidence suggests that, at least on levels 4 and 10, Icon did not install the transverse reinforcement that was so specified.

4 WSP also denies that it breached any provisions of the ACL. In particular, it denies that it made any representations that its services were of a particular standard, quality, value or grade, within the meaning of s. 29(1)(b) of the ACL, and that it breached that provision. Again, it denies that SOPA suffered any loss 'because of' any contravention of the ACL.

5 WSP says SOPA's claims against it are 'apportionable claims' within the meaning of the relevant provisions of the *Civil Liability Act 2002* (NSW) (**CLA**), and the *Competition and Consumer Act 2010* (Cth) (**CCA**). WSP names as concurrent wrongdoers:

(a) Icon;

(b) Evolution Precast Systems Pty Ltd (ACN 608 136 518) (**Evolution**);

(c) Traino Group Pty Ltd (ACN 110 168 815) (**Traino**).

6 Two significant issues in the case, which are not pleaded by SOPA, are that both the hob and precast panel above the hob on level 10, which failed on 24 December 2018, had previously failed under load in situ, to the knowledge of Icon (in relation to the hob), and both Icon and Evolution (in relation to the precast panel).

7 In relation to the hob, Icon failed to alert WSP of the significant cracking and spalling of the hob, and attempted to repair it.

8 In relation to the precast panel, a large piece of concrete (described by Evolution on 8 January 2019 as being approximately 320 mm long, 100 mm high, and to a maximum depth of 40 mm) had delaminated from the rest of the precast panel. However, WSP was not informed about this. Instead, Icon/Evolution made a decision, without reference to WSP, that the failure was non-structural, and patched the panel. Unsurprisingly, it failed again. Further, and contrary to Evolution's own shop drawings, there was no reinforcement in the section of concrete in the panel which delaminated. A photograph of the patched area, marked up by Icon/Evolution (WSP.022.001.9085), is annexed and marked 'A'.

9 WSP otherwise refers to the additional matters set out in paragraphs 7 to 19 of Part A of its Commercial List Response to the Plaintiffs' Amended Commercial List Statement, filed 18 June 2021 (**WSP's List Response to the Plaintiffs' List Statement**).

B. ISSUES LIKELY TO ARISE

- 1 In addition to the issues identified in Part B of WSP's List Response to the Plaintiffs' List Statement, WSP says that the following issues are likely to arise.

DBPA

- 2 Did Icon owe SOPA a duty to exercise reasonable care to avoid economic loss caused by defects in or related to Opal Tower and arising from the construction of Opal Tower?
- 3 Did WSP owe SOPA a duty to exercise reasonable care to avoid economic loss caused by defects in or related to Opal Tower and arising from the construction of Opal Tower?
- 4 Did Evolution owe SOPA a duty to exercise reasonable care to avoid economic loss caused by defects in or related to Opal Tower and arising from the construction of Opal Tower?
- 5 Did Traino owe SOPA a duty to exercise reasonable care to avoid economic loss caused by defects in or related to Opal Tower and arising from the construction of Opal Tower?
- 6 If Icon owed the duty of care referred to in issue 2 above, did Icon breach that duty of care, having regard to s. 5B(1) of the CLA?
- 7 If WSP owed the duty of care referred to in issue 3 above, did WSP breach that duty of care, having regard to s. 5B(1) of the CLA?
- 8 If Evolution owed the duty of care referred to in issue 4 above, did Evolution breach that duty of care, having regard to s. 5B(1) of the CLA?
- 9 If Traino owed the duty of care referred to in issue 5 above, did Traino breach that duty of care, having regard to s. 5B(1) of the CLA?

ACL Claims

- 10 Did Icon make the Icon Statement of Compliance Representation?
- 11 Did Icon make the Icon Subcontractor Certificates Representation?
- 12 Did Icon make the First Notice of Practical Completion Representation?
- 13 Did Icon make the Second Notice of Practical Completion Representation?
- 14 Did Icon make the Icon Quality of Services Representation?
- 15 If Icon made on or more of:

- a. the Icon Statement of Compliance Representation;
- b. the Icon Subcontractor Certificates Representation;
- c. the First Notice of Practical Completion Representation;
- d. the Second Notice of Practical Completion Representation,

did Icon thereby engage in misleading or deceptive conduct in contravention of s. 18 of the ACL?

- 16 If Icon made the Icon Quality of Services Representation did Icon thereby make a false or misleading representation in contravention of s 29(1) of the ACL?
- 17 Did WSP make the WSP Design Certificate Representations?
- 18 Did WSP make the WSP Structural Certificate for Design Representations?
- 19 Did WSP make the Further WSP Structural Design and Construction Representation?
- 20 Did WSP make the WSP Statement of Compliance Representation?
- 21 Did WSP make the WSP Quality of Services Representations?
- 22 If WSP made one or more of:
- a. the WSP Design Certificate Representations;
 - b. the WSP Structural Certificate for Design Representations;
 - c. the Further WSP Structural Design and Construction Representation;
 - d. the WSP Statement of Compliance Representation,
- did WSP thereby engage in misleading or deceptive conduct in contravention of s. 18 of the ACL?
- 23 If WSP made the WSP Quality of Services Representations did WSP thereby make a false or misleading representation in contravention of s 29(1) of the ACL?
- 24 Did Evolution make the shop drawings representations and the certification representations?
- 25 If Evolution made those representations, did it thereby contravene s 18 and/or s 29(1)(b) of the ACL?

Causation

- 26 Did any breaches of duty by Icon cause the SOPA's loss and damage, having regard to s. 5D of the CLA?
- 27 Did any breaches of duty by WSP cause SOPA's loss and damage, having regard to s. 5D of the CLA?

- 28 Did any breaches of duty by Evolution cause SOPA's loss and damage, having regard to s. 5D of the CLA?
- 29 Did any breaches of duty by Traino cause SOPA's loss and damage, having regard to s. 5D of the CLA?
- 30 Did SOPA suffer loss because of any contravention of s. 18 and/or s. 29(1) of the ACL by Icon, WSP, Evolution or Traino, within the meaning of s. 236 of the ACL?

Loss and Damage

- 31 If Icon owed the duty of care referred to in issue 22 above, and breached that duty of care, are damages recoverable by SOPA as a result?
- 32 If WSP owed the duty of care referred to in issue 3 above, and breached that duty of care, are damages recoverable by SOPA as a result?
- 33 If Icon contravened the ACL as alleged, are damages recoverable by SOPA because of that contravention or those contraventions?
- 34 If WSP contravened the ACL as alleged, are damages recoverable by SOPA because of that contravention or those contraventions?

Proportionate liability

- 35 Are SOPA's claims against each of Icon and WSP "apportionable claims" within the meaning of:
- (a) s. 34(1) of the CLA; and/or
 - (b) s. 87CB(1) of the CCA.
- 36 If the answer to issue 35 is "yes", are:
- (a) Icon;
 - (b) WSP;
 - (c) Evolution; and/or
 - (d) Traino,
- "concurrent wrongdoers" within the meaning of:
- (d) s. 34(2) of the CLA; or
 - (e) s. 87CB(3) of the CCA?

37 If the answer to issue 36 is “yes”, what is the extent of:

- (a) Icon’s;
- (b) WSP’s;
- (c) Evolution’s;
- (d) Traino’s,

responsibility for the loss and damage claimed by the SOPA having regard to s. 35(1) of the CLA and s. 87CD(1) of the CCA?

C. CROSS-DEFENDANT’S RESPONSE TO CROSS-CLAIMANT’S CONTENTIONS

In response to SOPA’s allegations contained in Part C of the CCS:

INTRODUCTION

1 WSP admits the allegations in paragraph 1.

2 As to the allegations in paragraph 2, WSP:

- (a) admits sub-paragraphs (a) and (c);
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

3 As to the allegations in paragraph 3, WSP:

- (a) admits sub-paragraphs (a) and (d);
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

4 As to the allegations in paragraph 4, WSP:

- (a) admits sub-paragraphs (a) and (c);
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

4A WSP admits the allegations in paragraph 4A.

CLAIM AGAINST AAD

Project Delivery Agreement

5 WSP admits the allegations in paragraph 5.

6 As to the allegations in paragraph 6, WSP:

- (a) relies on clause 6.2 of the Development Agreement as if it were fully set out herein;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 7 As to the allegations in paragraph 7, WSP:
 - (a) relies on clauses 6.3 and 40 of the Development Agreement as if they were fully set out herein;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 8 As to the allegations in paragraph 8, WSP:
 - (a) relies on clauses 10 and 40 of the Development Agreement as if they were fully set out herein;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 9 As to the allegations in paragraph 9, WSP:
 - (a) relies on clause 10.2 of the Development Agreement as if it were fully set out herein;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 10 As to the allegations in paragraph 10, WSP:
 - (a) relies on clause 10.18(a) of the Development Agreement as if it were fully set out herein;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 11 As to the allegations in paragraph 11, WSP:
 - (a) relies on clause 10.18(b) of the Development Agreement as if it were fully set out herein;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 12 As to the allegations in paragraph 12, WSP:
 - (a) relies on clause 10.19 of the Development Agreement as if it were fully set out herein;

- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 13 As to the allegations in paragraph 13, WSP:
- (a) relies on clauses 21.1 and 40 of the Development Agreement as if they were fully set out herein;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 14 As to the allegations in paragraph 14, WSP:
- (a) relies on clauses 21.2 and 40 of the Development Agreement as if they were fully set out herein;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 15 As to the allegations in paragraph 15, WSP:
- (a) relies on clauses 21.5 and 40 of the Development Agreement as if they were fully set out herein;
- (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 clauses 26.1 and 40 of the Development Agreement as if they were fully set out herein;
- (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 clause 26.2 of the Development Agreement as if it were fully set out herein;
- (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) relies on clause 27.1(d) of the Development Agreement as if it were fully set out herein;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

- 19 As to the allegations in paragraph 19, WPS:
- (a) relies on clauses 27.4 and 40 of the Development Agreement as if they were fully set out herein;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 20 As to the allegations in paragraph 20, WSP:
- (a) relies on clause 27.7 of the Development Agreement as if it were fully set out herein;
 - (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 clause 27.10 of the Development Agreement as if it were fully set out herein;
 - (b) 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) relies on clause 33.1 of the Development Agreement as if it were fully set out herein;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 23 As to the allegations in paragraph 23, WSP:
- (a) relies on clause 33.5 of the Development Agreement as if it were fully set out herein;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

Guarantee by Ecove

- 24 As to the allegations in paragraph 24, WSP:
- (a) relies on clause 37.1 of the Development Agreement as if it were fully set out herein;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

- 25 As to the allegations in paragraph 25, WSP:
- (a) relies on clause 37.2 of the Development Agreement as if it were fully set out herein;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 26 As to the allegations in paragraph 26, WSP:
- (a) relies on clauses 37.3 and 40 of the Development Agreement as if they were fully set out herein;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 27 As to the allegations in paragraph 27, WSP:
- (a) relies on clauses 37.4 and 40 of the Development Agreement as if they were fully set out herein;
 - (b) 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) relies on clause 37.5 of the Development Agreement as if it were fully set out herein;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 29 As to the allegations in paragraph 29, WSP:
- (a) relies on clause 39.11 of the Development Agreement as if it were fully set out herein;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 30 As to the allegations in paragraph 30, WSP:
- (a) relies on clause 39.13 of the Development Agreement as if it were fully set out herein;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

AAD's Duty of Care

31 WSP denies paragraph 31, having regard to paragraph 11(b) of Practice Note SC Eq 3.

32 WSP denies paragraph 32, having regard to paragraph 11(b) of Practice Note SC Eq 3.

AAD Statutory Warranties

33 As to the allegations in paragraph 33, WSP:

(a) repeats paragraphs 9 and 16 to 20 of WSP's List Response to the Plaintiffs' List Statement;

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

34 WSP denies paragraph 34, having regard to paragraph 11(b) of Practice Note SC Eq 3.

35 WSP denies paragraph 35, having regard to paragraph 11(b) of Practice Note SC Eq 3.

The plaintiff's contentions

36 As to the allegations in paragraph 36, WSP:

(a) repeats paragraphs 10, 11, 56, 56A, 56B, 56C, 56D, 56E, 56F, 56G, 56H and 56I of WSP's List Response to the Plaintiffs' List Statement;

(b) 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 57 of WSP's List Response to the Plaintiffs' List Statement;

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

38 As to the allegations in paragraph 38, WSP:

(a) repeats paragraph 58 of WSP's List Response to the Plaintiffs' List Statement;

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

39 As to the allegations in paragraph 39, WSP:

(a) repeats paragraphs 59, 60 and 61 of WSP's List Response to the Plaintiffs' List Statement;

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

40 As to the allegations in paragraph 40, WSP:

(a) repeats paragraph 39 above;

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

Breach of the Development Agreement

41 As to the allegations in paragraph 41, WSP:

(a) repeats paragraph 40 above and paragraph 20 of WSP's List Response to the Plaintiffs' List Statement;

(b) 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) repeats paragraph 41 above;

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

AAD's negligence

43 As to the allegations in paragraph 43, WSP:

(a) repeats paragraph 36 to 39 above;

(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) repeats paragraph 41 above;

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

45 As to the allegations in paragraph 45, WSP:

(a) repeats paragraph 44 above;

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

Breach of the AAD Statutory Warranties

46 As to the allegations in paragraph 46, WSP:

(a) repeats paragraphs 26 to 60 of WSP's List Response to the Plaintiffs' List Statement;

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

47 Not used.

48 As to the allegations in paragraph 48, WSP:

(a) repeats paragraph 46 above;

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

49 WSP denies paragraph 49, having regard to paragraph 11(b) of Practice Note SC Eq 3.

50 As to the allegations in paragraph 50, WSP:

(a) repeats paragraph 41 above;

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

51 As to the allegations in paragraph 51, WSP:

(a) repeats paragraph 50 above and paragraphs 68 and 69 of WSP's List Response to the Plaintiffs' List Statement;

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

AAD holds benefit of warranties and indemnities on trust

52 As to the allegations in paragraph 52, WSP:

(a) relies on clause 62(d) of the D&C Contract as if it were fully set out herein;

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

53 WSP denies paragraph 53, having regard to paragraph 11(b) of Practice Note SC Eq 3.

54 WSP denies paragraph 54, having regard to paragraph 11(b) of Practice Note SC Eq 3.

CLAIM AGAINST ECOVE

55 WSP denies paragraph 55, having regard to paragraph 11(b) of Practice Note SC Eq 3.

56 WSP denies paragraph 56, having regard to paragraph 11(b) of Practice Note SC Eq 3.

57 WSP denies paragraph 57, having regard to paragraph 11(b) of Practice Note SC Eq 3.

CLAIM AGAINST ICON

D&C Contract

58 As to the allegations in paragraph 58, WSP:

(a) repeats paragraph 40 above;

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

59 As to the allegations in paragraph 59, WSP:

(a) relies on the terms of the D&C Contract as if they were fully set out herein;

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

60 As to the allegations in paragraph 60, WSP:

(a) relies on clause 2.5 of the D&C Contract as if it were fully set out herein;

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

61 As to the allegations in paragraph 61, WSP:

(a) relies on clause 8.4.3 of the D&C Contract as if it were fully set out herein;

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

62 As to the allegations in paragraph 62, WSP:

(a) relies on clause 9.6(c) of the D&C Contract as if it were fully set out herein;

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

63 As to the allegations in paragraph 63, WSP:

(a) relies on clause 11.1 of the D&C Contract as if it were fully set out herein;

- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 64 As to the allegations in paragraph 64, WSP:
- (a) relies on clause 15.3 of the D&C Contract as if it were fully set out herein;
- (b) 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) relies on clause 29.1 of the D&C Contract as if it were fully set out herein;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 66 As to the allegations in paragraph 66, WSP:
- (a) relies on clause 39.12 of the D&C Contract as if it were fully set out herein;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 67 As to the allegations in paragraph 67, WSP:
- (a) relies on clause 55 of the D&C Contract as if it were fully set out herein;
- (b) 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) relies on clause 58(b)(i) of the D&C Contract as if it were fully set out herein;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 69 As to the allegations in paragraph 69, WSP:
- (a) relies on the terms of the D&C Contract as if they were fully set out herein;
- (b) otherwise denies 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 paragraph 51 above;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 71 As to the allegations in paragraph 71, WSP:

(a) repeats paragraph 70 above;

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

Home Building Act – Retained Units

72 As to the allegations in paragraph 72, WSP:

(a) repeats paragraph 49 above;

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

73 As to the allegations in paragraph 73, WSP:

(a) says that the design *Services* that WSP provided pursuant to the Consultancy Agreement between it and Icon did not constitute “residential building work” for the purposes of the *Home Building Act*;

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

74 As to the allegations in paragraph 74, WSP:

(a) repeats paragraph 73 above;

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

75 As to the allegations in paragraph 75, WSP:

(a) repeats paragraphs 51 and 74 above;

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

Icon’s negligence

76 WSP admits the allegations in paragraph 76.

77 As to the allegations in paragraph 77, WSP:

(a) says that if SOPA owns the Retained Units it is an “owner” within the meaning of s 36(1) of the DBPA;

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

Icon’s Duty of Care

- 78 As to the allegations in paragraph 78, WSP:
- (a) repeats paragraphs 58 to 69 above;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 79 WSP denies paragraph 79, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 80 As to the allegations in paragraph 80, WSP:
- (a) repeats paragraphs 76 to 79 above;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 81 As to the allegations in paragraph 81, WSP:
- (a) repeats paragraph 80 above;
 - (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) repeats paragraphs 81 above;
 - (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) repeats paragraph 51 above;
 - (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) repeats paragraph 83 above;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

Certification by Icon and McKenzie Group

- 85 As to the allegations in paragraph 85, WSP:
- (a) admits that Icon issued the document referred to in sub-paragraph (a) and repeats the contents of that document as if it were fully set out herein;

(b) says that paragraph 80 of the AAD and Ecove's Further Amended Technology & Construction List Statement filed on 1 April 2020 in Supreme Court Proceedings 2019/64406 (**Developer List Statement**) is a deleted paragraph and did not refer to any warranties, statements, deeds and certificates of compliance;

(c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq3.

86 WSP denies paragraph 86, having regard to paragraph 11(b) of Practice Note SC Eq 3.

87 WSP denies paragraph 87, having regard to paragraph 11(b) of Practice Note SC Eq 3.

88 As to the allegations in paragraph 88, WSP:

(a) admits that Icon issued a document with the subject "Notice of Practical Completion" to AAD and the Superintendent on or about 18 June 2018 and repeats the contents of that document as if it were fully set out herein;

(b) 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) admits that Icon issued a document with the subject "Notice of Practical Completion" to AAD and the Superintendent on or about 27 June 2018 and repeats the contents of that document as if it were fully set out herein;

(b) 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) admits that McKenzie Group issued a document identified as "OCCUPATION CERTIFICATE No. 18/123378-8" on or about 8 August 2018 and repeats the contents of that document as if it were fully set out herein;

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

Icon's representatives (representations)

91 As to the allegations in paragraph 91, WSP:

(a) repeats paragraph 85 above;

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

92 As to the allegations in paragraph 92, WSP:

(a) repeats paragraph 85 above;

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

93 As to the allegations in paragraph 93, WSP:

(a) repeats paragraph 88 above;

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

94 As to the allegations in paragraph 94, WSP:

(a) repeats paragraph 89 above;

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

95 As to the allegations in paragraph 95, WSP:

(a) repeats paragraphs 91 to 94 above;

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

Icon's breaches of the ACL

96 As to the allegations in paragraph 96, WSP:

(a) repeats paragraph 36 to 39 above;

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

97 As to the allegations in paragraph 97, WSP:

(a) repeats paragraph 51 above;

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

98 As to the allegations in paragraph 98, WSP:

(a) repeats paragraph 97 above;

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

CLAIM AGAINST WSP**Consultancy Agreement**

99 As to the allegations in paragraph 99, WSP:

(a) says that on 24 November 2015, Icon and WSP entered into a Consultancy Agreement by which WSP agreed to provide structural and civil engineering design and associated services in relation to the design of the structural elements (excluding external and landscaping works) for Opal Tower;

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

100 As to the allegations in paragraph 100, WSP:

(a) says that the Consultancy Agreement is comprised of:

(i) the formal instrument of agreement;

(ii) the general conditions of contract (**General Conditions**); and

(iii) any further documents annexed to or incorporated by express reference in Part A of the Annexure to the Consultancy Agreement;

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

101 As to the allegations in paragraph 101, WSP:

(a) relies on the express words of the Consultancy Agreement, including Annexure Part B of the General Conditions, as if they were fully set out herein;

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

102 As to the allegations in paragraph 102, WSP:

(a) relies on the express words of the Consultancy Agreement, including clause 2.2 of the General Conditions and the definition of "Consultant's Warranties" in clause 1 of the General Conditions, as if they were fully set out herein;

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

103 As to the allegations in paragraph 103, WSP:

(a) relies on the express words of the Consultancy Agreement, including clause 5.9 of the General Conditions, as if they were fully set out herein;

(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) relies on the express words of the Consultancy Agreement, including clause 5.15 of the General Conditions, as if they were fully set out herein;

(b) 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) relies on the express words of the Consultancy Agreement, including the definitions of “legislative requirements” and “Development Consent” in clause 1 of the General Conditions, as if they were fully set out herein;

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

106 As to the allegations in paragraph 106, WSP:

(a) relies on the express words of the Consultancy Agreement, including clause 5.22 of the General Conditions, as if they were fully set out herein;

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

107 As to the allegations in paragraph 107, WSP:

(a) relies on the express words of the Consultancy Agreement, including clause 42 of the General Conditions, as if they were fully set out herein;

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

WSP's design

108 As to the allegations in paragraph 108, WSP:

(a) repeats paragraph 36 above;

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

109 As to the allegations in paragraph 109, WSP:

(a) denies that its ‘for construction’ design depicted the hob wall as cast as part of the floor element;

(b) says that its 'for construction' drawings should be read as a whole;

(c) says that:

(i) note G1. on Drawing No 4419 S00.0003[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;

(d) 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;

(e) otherwise denies the allegations therein.

110 As to the allegations in paragraph 110, WSP:

(a) repeats paragraph 109 above;

(b) otherwise denies the allegation therein.

111 As to the allegations in paragraph 111, WSP:

(a) repeats paragraph 110 above;

(b) otherwise denies the allegations therein.

WSP's certification

112 As to the allegations in paragraph 112, WSP:

(a) admits that 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) admits it carried out periodic site inspections of the construction work, but not on at least 143 occasions;

(d) otherwise denies the allegations therein.

113 As to the allegations in paragraph 113, WSP:

- (a) repeats sub-paragraphs 112(a) and (b) above;
 - (b) admits that certain of the drawings pleaded are referred to in certain of the certificates for design pleaded;
 - (c) denies that any such drawings are referred to in its certificates for design for November 2016, February 2017 and March 2017;
 - (d) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 114 WSP admits the allegations in paragraph 114.
- 115 As to the allegations in paragraph 115, WSP:
- (a) repeats paragraph 114 above;
 - (b) repeats the contents of the WSP Structural Certificate for Design as if it were fully set out herein;
 - (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 116 As to the allegations in paragraph 116, WSP:
- (a) admits it issued a certificate on or about 15 May 2018;
 - (b) repeats the contents of the certificate as if it were fully set out herein;
 - (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 117 As to the allegations in paragraph 117, WSP:
- (a) admits it issued a statement of compliance on or about 5 June 2018;
 - (b) repeats the contents of the statement as if it were fully set out herein;
 - (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

WSP's negligence

- 118 As to the allegations in paragraph 118, WSP:
- (a) repeats paragraph 76 and 77 above;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 119 As to the allegations in paragraph 119, WSP:
- (a) repeats paragraphs 73, 99 to 107 above;

- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 120 As to the allegations in paragraph 120, WSP:
- (a) repeats paragraph 76, 77, and 119 above;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 121 As to the allegations in paragraph 121, WSP:
- (a) repeats paragraph 120 above;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 122 As to the allegations in paragraph 122, WSP:
- (a) repeats paragraph 121 above;
- (b) denies it breached any duty to exercise reasonable care to avoid economic loss caused by defects in Opal Tower or arising from the Opal Design Work pursuant to s. 37(1) of the DBPA;
- (c) denies SOPA is entitled to damages from WSP for any such breach pursuant to s. 37(3) of the DBPA;
- (d) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 123 As to the allegations in paragraph 123, WSP:
- (a) refers to and repeats paragraphs 36 to 39;
- (b) 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 paragraphs 51 and 122 above; and
- (b) otherwise denies the allegations therein.
- 125 As to the allegations in paragraph 125, WSP:
- (a) repeats paragraph 124 above;
- (b) otherwise denies the allegations therein.

WSP's representations

- 126 As to the allegations in paragraph 126, WSP:

- (a) relies on the express words of the Consultancy Agreement, including clause 42 of the General Conditions, as if they were fully set out herein;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 127 As to the allegations in paragraph 127, WSP:
- (a) repeats paragraph 112(a) and (b) above;
 - (b) repeats the contents of the WSP Design Certificates as if they were full set out herein;
 - (c) otherwise admits the allegations therein.
- 128 As to the allegations in paragraph 128, WSP:
- (a) repeats paragraph 115 above;
 - (b) otherwise denies the allegations therein.
- 129 As to the allegations in paragraph 129, WSP:
- (a) repeats paragraph 116 above;
 - (b) otherwise denies the allegations therein.
- 130 As to the allegations in paragraph 130, WSP:
- (a) repeats paragraph 117 above;
 - (b) otherwise denies the allegations therein.
- 131 As to the allegations in paragraph 131, WSP:
- (a) repeats paragraphs 126 to 130 above;
 - (b) otherwise denies the allegations therein.

WSP's breaches of the ACL

- 132 As to the allegations in paragraph 132, WSP:
- (a) repeats paragraphs 36 to 39 above;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 133 As to the allegations in paragraph 133, WSP:
- (a) repeats paragraph 131 above;
 - (b) denies that the WSP Design Certificate Representations, WSP Structural Certificate for Design Representation, Further WSP Structural Design and

Construction Representation, WSP Statement of Compliance Representation or the WSP Quality of Services Representations were made in trade or commerce within the meaning of ss. 18 and 29 of the ACL;

(c) otherwise denies the allegations therein.

134 WSP denies the allegations in paragraph 138.

135 WSP denies the allegations in paragraph 139.

OTHER MATTERS

SECTION 50 OF THE CLA

136 In complete answer to SOPA's claim for damages for negligence, WSP says that:

(a) it was a professional carrying out a professional service within the meaning of s. 50 of the CLA;

(b) at the time WSP's services were provided it acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice,

such that, pursuant to s. 50 of the CLA, it is not liable to SOPA in negligence.

PROPORTIONATE LIABILITY

137 In the event, which is denied, that WSP is liable to SOPA, WSP pleads as follows, without admissions.

Icon

Icon's duty of care to SOPA

138 WSP repeats paragraphs 76 to 81 of the CCS.

Icon's breach of duty

139 There was a risk of harm, which was foreseeable and not insignificant (within the meaning of s. 5B of the CLA), that if Icon did not take the precautions set out in paragraphs 140, 142, 145 and 148 below, SOPA would suffer loss and damage.

140 Icon breached its duty of care to SOPA:

Particulars

(i) In the event, which is not admitted, that Evolution's shop drawings showed a change of 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 (**Partial Grouting**), Icon failed to notice that the shop drawings were inconsistent with WSP's drawings, which showed full grout coverage between the precast panels and the hobs (**Full Grouting**), and failed to draw the inconsistency to the attention of WSP and Evolution, and to seek advice in relation to the inconsistency;

- (ii) WSP repeats the allegations in paragraph 57(b) of the Plaintiffs' Amended Commercial List Statement filed 5 May 2021 (**Plaintiffs' List Statement**);
- (iii) Icon failed to install reinforcement in the wall panel over C 38 on level 10 (**Panel C1012**), contrary to Evolution's shop drawing C1012-R [1], as described in Section 5.1 of the report dated 20 November 2020 of Stephen Branch (**the Branch Report**);
- (iv) Save that it does not allege that its 'for construction' drawings specified a concrete strength of 65 MPa for the hobs for levels 4, 10 and 16, WSP repeats the allegations in paragraph 58(a) of the Plaintiffs' List Statement;
- (v) In the event, which is denied, that WSP's 'for construction' drawings did not identify, or did not adequately identify, the required strength of the concrete for use in the hobs, Icon failed to draw that to the attention of WSP prior to construction of the hobs;
- (vi) Icon failed to install tie reinforcement in the hobs, contrary to WSP's drawings S.06.001 [C] and S09.240 [A], as described in Section 5.2 of the Branch Report;
- (vii) On level 4, Icon left a void in the grout bed between the hob and precast panels at 4A – 10.5;
- (viii) WSP repeats the allegations in paragraph 67K of the Plaintiffs' List Statement.

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

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

142 In further breach of Icon's duty of care to SOPA, Icon:

- (a) failed to alert WSP to the matters in paragraph 141 above, and to seek WSP's advice in relation to those matters;
- (b) without consulting WSP, decided that the in situ failures were non-structural, and were not evidence of structural failure;
- (c) without consulting WSP, removed the cracked piece of concrete, patched the void with Unitex, and then applied a skim coat using Aftek skim coat; those products having no structural capacity.

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

- (a) WSP would have recommended that investigations be carried out, which would have revealed that:
 - (i) contrary to WSP's Drawing S06.010 [A], Icon's subcontractor Evolution had not carried out Full Grouting between the hobs and the precast panels;
 - (ii) Evolution had failed to install reinforcement in Panel C1012 as set out in paragraph 140(iii) above;
- (b) appropriate rectification measures would have been taken to rectify these grouting deficiencies;
- (c) the Observed Damage pleaded in paragraphs 59 and 60 of the Plaintiffs' List Statement would not have occurred;
- (d) SOPA would not be liable to the plaintiffs and the Group Members as alleged in paragraphs 124 and 125 of the CCS.

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

- (a) directed Icon to patch and refinish Panel C1012 on level 10;
- (b) contained a photograph of Panel C1012, describing the photograph as indicating that mastic pointing behind the aluminium door frame was falling out due to excessive movement, and directed Icon to check that movement was within tolerance and to re-point the aluminium frame.

145 In further breach of Icon's duty of care to SOPA, Icon:

- (a) failed to provide WSP with a copy of Defects Notice No 84;
- (b) contrary to the Superintendent's direction, failed to ask WSP to check that the movement was within tolerance;

(c) failed, again, to alert WSP to the matters in paragraphs 141 and 142 above.

146 Had Icon done these things:

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

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

(ii) Evolution had failed to install reinforcement in Panel C1012 as set out in paragraph 140(iii) above;

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

(c) the Observed Damage pleaded in paragraphs 59 and 60 of the Plaintiffs' List Statement would not have occurred;

(d) SOPA would not be liable to the plaintiffs and the Group Members as alleged in paragraphs 124 and 125 of the CCS.

147 Further, as at about September 2017, Icon was aware that the hob above column C38 on level 10 had cracked and spalled under load and that, at this location, the concrete in the hob had not been formed properly and there was an area at the top of the hob where concrete was missing.

148 In further breach of Icon's duty of care to SOPA, Icon:

(a) failed to alert WSP to the matters in paragraph 147 above, and to seek WSP's advice in relation to it;

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

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

(a) WSP would have recommended that investigations be carried out, which would have revealed that Icon's subcontractor, Traino, supplied or used concrete in the hobs that had less compressive strength than that specified in WSP's 'for construction' drawings:

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

(c) WSP would have recommended that investigations be carried out, which would have revealed that, contrary to WSP's FC drawing S06.010 [A], Icon's

subcontractor, Evolution, had not carried out Full Grouting between the hobs and the precast panels;

- (d) appropriate rectification measures would have been taken to rectify these grouting deficiencies;
- (e) the Observed Damage pleaded in paragraphs 59 and 60 of the Plaintiffs' List Statement would not have occurred;
- (f) SOPA would not be liable to the plaintiffs and the Group Members as alleged in paragraphs 124 and 125 of the CCS.

Icon's breaches of the ACL

150 WSP repeats the allegations in paragraphs 91 to 98 of the CCS.

Icon is a concurrent wrongdoer

151 In the premises, SOPA's claims against WSP for breach of duty are claims for economic loss or damage to property in an action for damages arising from a failure to take reasonable care, and are therefore 'apportionable claims' within the meaning of s. 34 of the CLA.

152 By reason of the matters referred to above, to the extent that Icon's breaches caused SOPA's loss and damage, Icon is a person:

- (a) whose acts or omissions caused SOPA's loss or damage, and
- (b) which is liable to SOPA in relation to its loss,

and is thereby a "concurrent wrongdoer" for the purposes of s. 34(2) of the CLA.

153 By reason of the matters referred to above, in the event (which is denied) that WSP is liable to SOPA, 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 of the CLA.

154 In the premises, SOPA's claims against WSP for damages under s. 236 of the ACL are claims for economic loss or damage to property caused by conduct that was done in contravention of s. 18 of the ACL, and are therefore 'apportionable claims' within the meaning of s. 87 CB(1) of the CCA.

155 By reason of the matters referred to above, to the extent that Icon's breaches caused SOPA's loss and damage, Icon is a person:

- (a) whose acts or omissions caused SOPA's loss or damage, and

(b) which is liable to SOPA in relation to its loss,
and is thereby a “concurrent wrongdoer” for the purposes of s. 87CB(3) of the CCA.

156 By reason of the matters referred to above, WSP’s liability for damages under s. 236 of the 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) of the CCA.

Evolution

The Evolution Subcontract

157 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 Evolution Subcontract**).

158 The Evolution 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) (**Evolution Scope of Works**) (**the Evolution Work**).

Particulars

Clause 1 Formal Instrument of Agreement.

159 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.

160 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 Evolution Subcontract including any design documents;
- (c) would construct and complete the WUS in accordance with the Evolution Subcontract documents so that the subcontract works, when completed, would comply with all the requirements of the Evolution Subcontract and other approvals;
- (d) would carry out the work in a proper and workmanlike manner and in accordance with the plans and specifications set out in the Evolution Subcontract;
- (e) 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 Evolution Subcontract and all legislative requirements.

161 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.

162 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 Evolution Subcontract;
- (b) damage to property in connection with the undertaking of the work under the Evolution Subcontract by Evolution;
- (c) negligent or wrongful conduct, act or omission on the part of Evolution in connection with the undertaking of the WUS.

- 163 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 Evolution Subcontract however such rights, obligations or liabilities were sought to be enforced.
- 164 Clause 2.9 of the General Subcontract Conditions provided that all representations and warranties in the Evolution Subcontract:
- (a) remained in full force and effect following completion of the subcontract works and the issue of the final certificate;
 - (b) were given with the intent that liability thereunder shall not be confined to breaches thereof discovered prior to the date of the Evolution Subcontract; and that:
 - (i) each indemnity in the Evolution Subcontract was a continuing obligation;
 - (ii) each indemnity in the Evolution Subcontract constituted a separate and independent obligation of the party giving the indemnity from its other obligations under the Evolution Subcontract.
- 165 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 Evolution Subcontract;
 - (b) Evolution's activities under the Evolution Subcontract, including the WUS, would result, to the extent of the work conducted, in a dwelling that was reasonably fit for occupation as a dwelling.
- 166 Clause 3 of the Evolution Scope of Works set out Evolution's design obligations under the Evolution Subcontract.
- 167 Clause 3.1.1 of the Evolution 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*
- 168 Clause 3.1.1 of the Evolution Scope of Works provided that shop drawings should include set outs, hobs and plinth sizes, their location and structural requirements.

- 169 Clause 4.1.1 of the Evolution 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.
- 170 Clause 5.1.1 of the Evolution Scope of Works provided that the scope of the works involved the design and construction of all precast concrete works associated with the project.
- 171 Clause 5.2.7 of the Evolution 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.
- 172 Appendix 10 of the Evolution 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 alleged 'change' to WSP's design

- 173 On 26 July 2016 at about 5:46 pm, Icon sent an Aconex (Mail Number: NSWIcon-TRANSMIT-000071) to, amongst others, Evolution attaching a number of WSP's drawings 'For information', including WSP drawing S06.010 [2] dated 26 July 2016.
- 174 WSP drawing S06.010 [2] showed full grout coverage between the precast panels and the hobs (**Full Grouting**).
- 175 On 29 August 2016 at about 11:41 am Evolution sent an Aconex (Mail number: EVOPS-SUBADV-000008) to Icon attaching an extract detail page of its standard shiplap detail, and standard shiplap detail with slab upturn, which was forwarded to WSP by Icon by Aconex (Mail number: NSWIcon-HCADV-002191) on 29 August 2016 at about 2:29 pm.
- 176 On 8 September 2016 at about 2:38 pm Evolution sent an Aconex (Mail no: EVOPS-TRANSMIT-00002) to Icon and WSP attaching a number of Evolution's shop drawings including DEO1 Rev P1 dated 7 September 2016.
- 177 On 8 September 2016 at about 6:18 pm Icon sent an Aconex (Mail no: NSWIcon-HCADV-002425) to Icon and WSP attaching Icon's comments (in red) on a number of Evolution's shop drawings, including DEO1 Rev P1, including a red tick against the notation in detail 1 'INTERNAL GROUTING BETWEEN PANEL TO INSITU BY EVOLUTION'.

- 178 On 19 September 2016 at about 10:34 am Icon sent an Aconex (Mail Number: NSWIcon-TRANSMIT-000389) to, amongst others, Evolution attaching a number of WSP's drawings, including S06.010 [A] dated 16 September 2016.
- 179 WSP drawing S06.010 [A] showed Full Grouting.
- 180 On 19 September 2016 at about 3:29 pm WSP sent an Aconex (Mail Number: WSP (SA) -CADV-000562) to Icon, Evolution and others attaching WSP's comments on a number of Evolution's shop drawings, including DEO1 Rev P1, which contained WSP's Stamp.
- 181 On 19 September 2016 at about 4:46 pm Icon sent an Aconex (Mail number: NSWICON-RFI-000229) to Evolution in the following terms:
- Could you please update your shop drawings following WSP comments (attached) and the latest set of pre-cast drawings (series S06 for construction) from WSP issued this morning*
- 182 On 21 September 2016 at about 2:50 am Evolution sent an Aconex (Mail number: EVOPS-SUBADV-000028) attaching 'level precast package for re-approval', which included Evolution drawing DE01 Rev P2 dated 20 September 2016.
- 183 On 22 September 2016 at about 2:42 pm WSP sent an Aconex (Mail Number: WSP (SA) -CADV-000581) to Icon and Evolution attaching Evolution's shop drawings, including DEO1 Rev P2 which contained WSP's stamp.

Evolution's duty of care to SOPA

- 184 WSP repeats paragraphs 76 and 77 of the CCS.
- 185 The Evolution Work was "construction work" within the meaning of s.36(1) of the DBPA.
- 186 Further or in the alternative to paragraph 185 above:
- (a) the Evolution Work was residential building work within the meaning of the *Home Building Act*;

Particulars

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

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

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

187 Further or in the alternative:

(a) the Evolution Work was:

- (i) the preparation of regulated and other designs for building work within the meaning of s. 36(1) of the DBPA;
- (ii) further or in the alternative, the supervision, coordination, project management or otherwise having substantive control over the carrying out of the work referred to in (a)(i) above; and

(b) by reason of the matters referred to in (a)(i) above, further or in the alternative to (a)(ii) above, the Evolution Work was “construction work” within the meaning of s.36(1) of the DBPA.

188 In the premises, Evolution:

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

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

189 Evolution’s duty of care was owed to SOPA pursuant to s. 37(2) of the DBPA.

190 SOPA is entitled to damages from Evolution for any breach of Evolution’s duty of care pursuant to s. 37(3) of the DBPA as if the duties were established by the common law.

Evolution’s breach of duty

191 There was a risk of harm, which was foreseeable and not insignificant (within the meaning of s. 5B of the CLA), that if Evolution did not take the precautions set out in paragraphs 192 and 194 below, SOPA would suffer loss and damage.

192 Evolution breached its duty of care to SOPA:

Particulars

- (i) In the event, which is not admitted, that Evolution’s shop drawings showed Partial Grouting:
 - a. Designing a connection detail between load-bearing precast panels and concrete hobs which only required Partial Grouting;

- b. Failing to expressly raise with Icon and WSP that Evolution was proposing to change WSP's Full Grouting to Partial Grouting;
 - c. Having received WSP's drawing 4419 S06.010 [2] (showing Full Grouting) on 26 July 2016, circulating its detail standard shiplap details, which only showed Partial Grouting, on about 29 August 2016;
 - d. Having received WSP's drawing 4419 S06.010 [2] (showing Full Grouting) on 26 July 2016, circulating its shop drawing DE01 Rev P1, which only showed Partial Grouting, on about 8 September 2016;
 - e. Having received WSP's drawing S06.010 [A] (showing Full Grouting) on 19 September 2016 at about 10:34 am, WSP's Aconex message on 19 September 2016 at about 3:29 pm; and Icon's Aconex message on 19 September 2016 at about 4:46 pm:
 - i. Failing to appreciate that there was an inconsistency between WSP's drawing S06.010 [A] (showing Full Grouting), and Evolution's shop drawing DE01 Rev P1, which WSP had stamped, showing Partial Grouting; and failing to raise that inconsistency with Icon and WSP;
 - ii. Failing to update drawing DE01 Rev P1, to ensure that drawing DE01 Rev P2 (dated 20 September 2016) showed Full Grouting, consistent with WSP's drawing S06.010 [A];
 - iii. Circulating, on 21 September 2016, drawing DE01 Rev 2 showing Partial Grouting;
- (ii) Contrary to WSP's drawing S06.010 [A] (showing Full Grouting), installing Partial Grouting;
 - (iii) Failing to install reinforcement in Panel C1012, contrary to Evolution's shop drawing C1012-R [1], as described in Section 5.1 of the Branch report;

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

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

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

194 In further breach of Evolution's duty of care to SOPA, Evolution:

- (a) failed to check its design of the connection detail between the load bearing Panel C1012 and the concrete hob, which only required Partial Grouting;
- (b) failed to alert WSP to the matters in paragraph 193 above, and to seek WSP's advice in relation to those matters;
- (c) without checking its design, and without consulting WSP, decided that the in situ failures were non-structural, and were not evidence of structural failure;
- (d) without checking its design, and without consulting WSP, removed the cracked piece of concrete, patched the void with Unitex, and then applied a skim coat using Aftek skim coat; those products having no structural capacity.

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

- (a) WSP would have recommended that investigations be carried out, which would have revealed that:
 - (i) contrary to WSP's Drawing S06.010 [A], Evolution had not grouted to full width the joints between the hobs and the precast panels;
 - (ii) Evolution had failed to install reinforcement in the panel as set out in paragraph 192 above;
- (b) appropriate rectification measures would have been taken to rectify these grouting deficiencies;
- (c) the Observed Damage pleaded in paragraphs 59 and 60 of the Plaintiffs' List Statement would not have occurred;
- (d) SOPA would not be liable to the plaintiffs and the Group Members for the loss and damage alleged in paragraphs 124 and 125 of the CCS.

Evolution's breaches of the ACL

The shop drawing breaches

- 196 In issuing its standard shiplap details on 29 August 2016, its shop drawing DE01 Rev P1 on 8 September 2016, and its shop drawing DE01 Rev P2 on 21 September 2016, Evolution represented, in trade or commerce, that those details and drawings:
- (a) were consistent with WSP's drawings S06.010 [2] and/or WSP's drawing S06.010 [A];
- (b) had been prepared with reasonable care and skill,
- (the shop drawing representations).**
- 197 The shop drawing representations were misleading or deceptive, and false or misleading, in breach of s. 18 of the ACL and s. 29(1)(b) of the ACL, because, contrary to WSP's drawings, Evolution's shop drawings showed Partial Grouting.
- 198 Had Evolution not made the shop drawing representations, then the joints between the hobs and the precast panels would have been fully grouted, and in the event, as pleaded in paragraph 61 of the Plaintiffs' List Statement, that Partial Grouting caused damage to Opal Tower, including the Observed Damage, that damage would not have occurred.
- 199 Because of the breaches, SOPA will incur liability for the loss and damage claimed by the plaintiffs and the Group Members as pleaded in paragraphs 134 and 135 of the CCS.

The certification breaches

- 200 On 29 November 2016, Evolution issued a certificate titled Installation Compliance certifying that precast panels C401, C402 and C406 had been manufactured in accordance with AS 3600, AS 3610, AS 3850, WSP's FC Drawings, and Evolution's approved shop drawings.
- 201 On 15 February 2017, Evolution issued a certificate titled Installation Compliance certifying that precast panels C1003, C1004, C1007, C1009, C1011 and C 1012 had been manufactured in accordance with AS 3600, AS 3610, AS 3850, WSP's FC Drawings, and Evolution's approved shop drawings.
- 202 The conduct in paragraphs 200 and 201 above amounted to representations, in trade or commerce, that the precast panels had in fact been manufactured in accordance with AS 3600, AS 3610, AS 3850, WSP's 'for construction' drawings, and Evolution's approved shop drawings **(the certification representations)**.
- 203 The certification representations were misleading or deceptive, and false or misleading, in breach of s. 18 of the ACL and s. 29(1)(b) of the ACL, because the

precast panels were manufactured of concrete which had a compressive strength less than the compressive strength specified in the 'for construction' drawings, and Panel C1012 had not been manufactured with appropriate reinforcement.

204 Icon relied on the certification representations by allowing the precast panels to be installed, or alternatively, allowing them to remain in situ.

205 Had Icon been aware of the falsity the certification representations, it would not have allowed the precast panels to be installed, or alternatively, would not have allowed them to remain in situ.

206 In paragraph 61 of the Plaintiffs' List Statement it is alleged that the understrength concrete in the precast panels, and the inadequate reinforcement in Panel C1012, caused damage to Opal Tower.

207 If those allegations are true, then because of the breaches, SOPA will suffer loss and damage, as pleaded in paragraphs 134 and 135 of the CCS.

Evolution is a concurrent wrongdoer

208 In the premises, SOPA's claims against WSP for breach of duty are claims for economic loss or damage to property in an action for damages arising from a failure to take reasonable care, and are therefore 'apportionable claims' within the meaning of s. 34 of the CLA.

209 By reason of the matters referred to above, to the extent that Evolution's breaches caused SOPA's loss and damage, Evolution is a person:

(a) whose acts or omissions caused SOPA's loss or damage, and

(b) which is liable to SOPA in relation to its loss,

and is thereby a "concurrent wrongdoer" for the purposes of s 34(2) of the CLA.

210 By reason of the matters referred to above, in the event (which is denied) that WSP is liable to SOPA, 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 of the CLA.

211 In the premises, SOPA's claims against WSP for damages under s. 236 of the ACL are claims for economic loss or damage to property caused by conduct that was done in contravention of s. 18 of the ACL, and are therefore 'apportionable claims' within the meaning of s. 87CB(1) of the CCA.

212 By reason of the matters referred to above, to the extent that Evolution's breaches caused SOPA's loss and damage, Evolution is a person:

(a) whose acts or omissions caused SOPA's loss or damage, and

(b) which is liable to SOPA in relation to its loss,

and is thereby a "concurrent wrongdoer" for the purposes of s 87CB(3) of the CCA.

213 By reason of the matters referred to above, WSP's liability for damages under s. 236 of the 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) of the CCA.

Traino

The Traino Subcontract

214 By subcontract dated 13 May 2016, Icon entered into an agreement with Traino whereby Traino agreed to supply, test and place (including compaction, finishing and curing) all cast in situ concrete associated with Opal Tower, including the hobs (**the Traino Subcontract**).

215 The Traino Subcontract comprised a number of documents, including the formal instrument of agreement, subcontract conditions (amended from AS4901-1998), Annexure Part A and Appendix 1 (scope of work).

Traino's duty of care to SOPA

216 The work carried out by Traino pursuant to the Traino Subcontract (**the Traino Work**) was "construction work" within the meaning of s. 36(1) of the DBPA.

217 Further or in the alternative to paragraph 216 above:

(a) the Traino Work was residential building work within the meaning of the *Home Building Act*;

Particulars

WSP repeats the matters referred to in paragraphs 16 and 18 of the Class Action ALS.

(b) by reason of the matters referred to in (a) above, the Traino work is "building work" within the meaning of s. 36(1) of the DBPA; and

(c) by reason of the matter referred to in (b) above, the Traino work is "construction work" within the meaning of s. 36(1) of the DBPA.

218 In the premises, Traino:

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

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

219 Traino's duty of care was owed to SOPA pursuant to s. 37(2) of the DBPA.

220 SOPA is entitled to damages from Traino for any breach of Traino's duty of care pursuant to s. 37(3) of the DBPA as if the duties were established by the common law.

Traino's breach of duty

221 There was a risk of harm, which was foreseeable and not insignificant (within the meaning of s. 5B of the CLA), that if Traino did not supply and place concrete in the hobs with the compressive strength specified in Icon's 'For Construction' drawings, SOPA would suffer loss and damage.

222 In paragraph 58(a) of the Plaintiffs' List Statement it is alleged that the concrete used to construct the hobs was less than the compressive strength specified in the FC drawings.

223 If those contentions are true, then Traino breached Traino's duty of care, by supplying and placing concrete in the hobs which was less than the compressive strength specified in the FC drawings.

224 Further, if, as pleaded in paragraph 58(b) of the Plaintiffs' List Statement, WSP's 'for construction' drawings did not identify, or did not adequately identify, the required strength of the concrete for use in the hobs (which WSP denies), Traino, in further breach of its duty to SOPA, failed to draw that to the attention of Icon and WSP prior to construction of the hobs.

Traino is a concurrent wrongdoer

225 In the premises, SOPA's claims against WSP for breach of duty are claims for economic loss or damage to property in an action for damages arising from a failure to take reasonable care, and are therefore 'apportionable claims' within the meaning of s. 34 of the CLA.

226 By reason of the matters referred to above, to the extent that Traino's breaches caused SOPA's loss and damage, Traino is a person:

(a) whose acts or omissions caused SOPA's loss or damage, and

(b) which is liable to SOPA in relation to their loss,

and is thereby a "concurrent wrongdoer" for the purposes of s. 34(2) of the CLA.

227 By reason of the matters referred to above, in the event (which is denied) that WSP is liable to SOPA, 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 of the CLA.

228 In the premises, SOPA's claims against WSP for damages under s. 236 of the ACL are claims for economic loss or damage to property caused by conduct that was done in contravention of s 18 of the ACL, and are therefore 'apportionable claims' within the meaning of s. 87 CB(1) of the CCA.

229 By reason of the matters referred to above, to the extent that Traino's breaches caused SOPA's loss and damage, Traino is a person:

(a) whose acts or omissions caused the SOPA's loss or damage, and

(b) which is liable to SOPA in relation to their loss,

and is thereby a "concurrent wrongdoer" for the purposes of s. 87CB(3) of the CCA.

230 By reason of the matters referred to above, WSP's liability for damages under s. 236 of the 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) of the 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



Capacity

Solicitor

Date of signature

23 July 2021