

COMMERCIAL LIST ~~SECOND-CROSS-CLAIM~~ RESPONSE TO AMENDED
COMMERCIAL LIST SECOND 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	Icon Co (NSW) Pty Limited ABN 16 604 790 409
Cross-defendant	WSP Structures Pty Limited ABN 78 006 769 339

FILING DETAILS

Filed for	WSP Structures Pty Limited - Cross-Defendant
Filed in relation to	<u>Amended</u> Second Cross-Claim
Legal representative	Tricia Hobson, Norton Rose Fulbright <u>DLA Piper Australia</u>
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A. NATURE OF DISPUTE

- 1 The Cross-Defendant, WSP Structures Pty Limited ABN 78 006 769 339 (**WSP**) generally agrees with the description of the Nature of Dispute set out by the Cross-Claimant, Icon Co (NSW) Pty Limited (**Icon**) in the Amended Commercial List Second Cross-Claim Statement filed in these proceedings on ~~3 December 2019~~ 9 July 2021 (**the Cross-Claim**). In this Commercial List Response to the Cross-Claim, WSP adopts the defined terms contained in the Cross-Claim, unless otherwise defined.

2 WSP denies that it breached the Consultancy Agreement (as defined in paragraph 3 of Part A of the Cross-Claim) and denies that it contravened s 18 of the Australian Consumer Law (ACL), being Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (CCA). WSP denies that it is liable to Icon, or any other party.-

2A WSP says Icon's claims against it are 'apportionable claims' within the meaning of the relevant provisions of the Civil Liability Act 2002 (NSW) (CLA), and the CCA. WSP names as concurrent wrongdoers:

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

(b) Traino Group Pty Ltd (ACN 110 168 815) (Traino).

2B Two significant issues in the case, which are not pleaded by Icon, are that both a hob (hob 10C-14.5) and the 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).

2C In relation to the hob, Icon failed to alert WSP to the significant cracking and spalling of the hob, and attempted to repair it.

2D In relation to the precast panel, a large piece of concrete 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.

2E Thus, Icon had actual knowledge of evidence of serious structural failures on level 10, well prior to completion of the Building, yet did not tell WSP about them.

2F WSP contends that had Icon informed it of these matters, appropriate rectification works would have been undertaken well prior to occupation of the Building, and much of the loss incurred by Icon, and indeed all of the loss alleged to have been suffered by the Plaintiffs, Group Members and SOPA, would never have occurred. WSP contends that Icon's failures in this regard were intervening acts or events which should be treated in a practical sense as the sole cause of such damage; and that, within the meaning of section 5D (1)(b) of the CLA, it would not be appropriate for the scope of any liability in WSP to extend to such harm.

2G Further, the Full Federal Court recently upheld Icon’s entitlement to indemnity on a third party liability policy underwritten by Liberty¹. WSP says it is also entitled to indemnity on the Liberty Policy, and that Liberty has no right of subrogation entitling it to bring or maintain an action in the name of Icon against WSP. In such circumstances, and given that Icon cannot recover more than its loss, this may affect the amount of any judgment (if any) to which Icon is entitled as against WSP.

2H 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. WSP says that in addition to the issues set out by Icon in the Cross-Claim, the issues identified in Part B of WSP’s List Response to the Plaintiffs’ List Statement and the issues identified in Part B of WSP’s List Response to SOPA’s Amended Commercial List Cross-Claim Statement filed 23 July 2021 (WSP’s List Response to SOPA’s List Statement), the following issues are likely to arise:
 - (a) the proper construction of the Consultancy Agreement, including Clauses 9 and 32 of the General Conditions;
 - (b) whether the losses defined by Icon as the SOPA Liability Damages, AAD/Ecove Liability Damages, Plaintiffs/Group Members’ Damages, Group Members’ Loss of Rent Costs, Group Members’ Alternative Accommodation Costs, Lessees’ Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation’s Insurance Costs, ~~and~~ Icon’s Loss of Opportunity / Loss of Contract Damages, Bank Guarantee Sum and Legal Costs are economic, indirect or consequential loss, or loss of contract or profit within the meaning of Clause 32 of the General Conditions, such that WSP has no liability to Icon for the SOPA Liability Damages, AAD/Ecove Liability Damages, Plaintiffs/Group Members’ Damages, Group Members’ Loss of Rent Costs, Group Members’ Alternative Accommodation Costs, Lessees’ Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation’s Insurance Costs, ~~and~~ Icon’s Loss of Opportunity / Loss of Contract Damages, Bank Guarantee Sum and Legal Costs;

¹ Liberty Mutual Insurance Company Australian Branch v Icon Co (NSW) Pty Ltd [2021] FCAFC 126 [Full Federal Court Judgment]

- (c) whether Icon is guilty of contributory negligence ~~in respect of grouting, and concrete strength, and placement of an electrical conduit within the zone of concrete in the hob wall immediately above column C38~~ and if so, what is the amount reflecting that proportion of the damage or loss claimed that the Court considers just, having regard to the extent of Icon's responsibility for the damage or loss;
- (d) whether, ~~in respect of grouting, Evolution Precast Systems Pty Ltd (ABN 17 608 136 518) (Evolution) is a~~ and Traino are concurrent wrongdoers in relation to Icon's claims for the WSP Warranty Breaches, and claims for damages pursuant to s 236 ACL, and if so, what is the amount reflecting that proportion of the damage or loss claimed that the Court considers just, having regard to the extent of Evolution and Traino's responsibility for the damage or loss;
- (e) whether any liability that WSP has to Icon is limited to amounts recovered by WSP under a policy of professional indemnity insurance which WSP was required to effect, up to a maximum of \$20 million.

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

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

A. BACKGROUND

Parties

1 WSP admits the allegations in paragraph 1.

2 WSP admits the allegations in paragraph 2.

Consultancy Agreement between Icon and WSP

3 WSP admits the allegations in paragraph 3.

4 WSP admits the allegations in paragraph 4.

5 WSP admits the allegations in paragraph 5.

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

7 WSP admits the allegations in paragraph 7.

8 WSP admits the allegations in paragraph 8.

9 As to the allegations in paragraph 9, WSP:

- (a) says that the matters pleaded in sub-paragraphs (a) to (k) of paragraph 9 of the Cross-Claim are as set out in Annexure Part B of the General Conditions;
 - (b) otherwise admits the allegations therein.
- 10 As to the allegations in paragraph 10, WSP:
- (a) says that the matters pleaded in sub-paragraphs (a) to (m) of paragraph 10 of the Cross-Claim are as set out in Annexure Part B of the General Conditions;
 - (b) otherwise admits the allegations therein.

Warranties provided by WSP under the Consultancy Agreement

- 11 WSP admits the allegations in paragraph 11.
- 12 As to the allegations in paragraph 12, WSP:
- (a) relies on the express words of the Consultancy Agreement;
 - (b) says that clause 3A of the General Conditions states "*[t]he Services must be performed by the Consultant with recognised methods and standards of professional practice*";
 - (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 13 WSP admits the allegations in paragraph 13.
- 14 WSP admits the allegations in paragraph 14.
- 15 As to the allegations in paragraph 15, WSP:
- (a) relies on the express words of the Consultancy Agreement;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 16 As to the allegations in paragraph 16, WSP:
- (a) relies on the express words of the Consultancy Agreement;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 17 As to the allegations in paragraph 17, WSP:
- (a) relies on the express words of the Consultancy Agreement;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

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

19 WSP denies the allegations in paragraph 19.

Indemnities provided by WSP under the Consultancy Agreement

- 20 As to the allegations in paragraph 20, WSP:
- (a) relies on the express words of the Consultancy Agreement;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 21 As to the allegations in paragraph 21, WSP:
- (a) relies on the express words of the Consultancy Agreement;
 - (b) says that Clause 32 of the General Conditions provided that notwithstanding any other provision of the Consultancy Agreement, and except to the extent that liability cannot be legally limited or excluded:
 - (i) in no event shall WSP be liable for economic loss, loss of contract, loss of profit or revenue, loss of data, loss of production or production stoppage, financing costs or expenses however characterised, increased costs and expenses of construction or operation, indirect or consequential loss; and
 - (ii) WSP's total liability arising out of or in connection with the Consultancy Agreement was limited to the greater of:
 - A. amounts recovered under a policy of professional indemnity insurance required to be effected by WSP under the Consultancy Agreement, to a maximum of \$20 million; and
 - B. the amount of \$1 million;
 - (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 22 As to the allegations in paragraph 22, WSP:

- (a) repeats paragraph 26 below;
- (b) otherwise denies the allegations therein.

B. SERVICES PROVIDED BY WSP

23 WSP admits the allegations in paragraph 23.

24 WSP admits the allegations in paragraph 24.

25 As to the allegations in paragraph 25, WSP:

- (a) admits that between 24 November 2015 to 8 August 2018, it provided design services pursuant to the Consultancy Agreement, during which it issued multiple versions of the structural design drawings and a number of design certificates;
- (b) says that from 24 December 2018 to 22 January 2019 it assisted in the inspection and investigation of the Building and provided advice in relation to the structural safety propping and stabilization works, but denies it did so pursuant to, or governed by the Consultancy Agreement;
- (c) says that from early January 2019 to 9 April 2019, it prepared a design to rectify the damage on levels 4, 10 and 16 of the Building, but denies it did so pursuant to, or governed by the Consultancy Agreement;
- (d) says that commencing on 6 May 2019, it carried out periodic inspections of the rectification work, and provided site inspection reports, but denies it did so pursuant to, or governed by the Consultancy Agreement;
- (e) otherwise denies the allegations therein.

26 As to the allegations in paragraph 26, WSP:

- (a) refers to paragraphs 33(f) and 73(b)-(c) of Icon's Response to [Amended](#) Commercial List Cross-Claim Statement filed ~~16 July 2021~~ ~~8 November 2019~~ (**Icon's List Response**);
- (b) denies that on a proper construction of the HB Act that the design *Services* that WSP provided pursuant to the Consultancy Agreement constituted 'residential building work';
- (c) otherwise denies the allegations therein.

C. WSP'S DESIGN OF THE HOB-BEAM

27 As to the allegations in paragraph 27, WSP:

- (a) admits that the Plaintiffs' Amended Commercial List Statement filed 5 May 2021~~26 July 2019~~ (Plaintiffs' List Statement) contains the allegations contended in paragraph 36(c) of Sydney Olympic Park Authority's (SOPA) Amended Commercial List Cross-Claim Statement filed 5 July 2021 (SOPA's Cross-Claim)~~filed 27 September 2019~~;
- ~~(b) otherwise says that paragraphs 36(b)(ii) to (iv) of Icon's List Response do not make any contentions against WSP;~~
- ~~(c)(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) says that it designed a hob wall (**hob wall**) and precast panels or in-situ walls on top of the hob wall to form a wall at the locations referred to;
- (b) says that the hob wall was part of the wall structure;
- (c) otherwise denies the allegations therein.

29 As to the allegations in paragraph 29, WSP:

- (a) repeats paragraph 28 above;
- (b) subject to replacing the expression 'hob-beam' with 'hob wall', otherwise admits the allegations therein.

30 As to the allegations in paragraph 30, WSP:

- (a) relies on the Aconex from WSP to Icon dated 29 November 2016 timed 5:03pm (mail no. WSP(SA)-CADV-000734);
- (b) says that pursuant to a written request by Icon, WSP approved a change at Level 4, 4C-5.5 to replace a precast panel with an equivalent wall panel cast in situ of the same strength and reinforcing configuration;
- (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

31 As to the allegations in paragraph 31, WSP:

- (a) relies on the Aconex from WSP to Icon, Dalma Form and Evolution dated 6 December 2016 timed 1:18pm (mail no. WSP(SA)-CADV-000760);
- (b) says that pursuant to a written request by Icon, WSP approved a change at Level 16, 16C-5.5 to replace a precast panel with an equivalent wall panel cast in situ of the same strength and reinforcing configuration;

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

32 As to the allegations in paragraph 32, WSP:

- (a) says that the changes to incorporate an in-situ wall at Level 4, 4C-5.5 and level 16, 16C-5.5 were not thereafter administratively incorporated by WSP into any amended 'for construction' drawings;
- (b) denies that WSP had any obligation to do so;
- (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

33 As to the allegations in paragraph 33, WSP:

- (a) refers to paragraph 28 above;
- (b) says that the Building was designed by WSP such that:
 - (i) the precast panels (which form a precast wall) would be placed on a load bearing concrete hob wall and, in the case of the in-situ walls at Level 4, 4C-5.5 and level 16, 16C-5.5, the walls were cast on or incorporating the concrete hob wall as an integral element, at the written request of Icon;
 - (ii) the precast panels would be connected to the hob wall by a grouted joint and dowel bars;
 - (iii) the vertical loads in the wall would be transferred through the hob wall and into the supporting columns to the underside;
- (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

34 As to the allegations in paragraph 34, WSP:

- (a) refers to paragraph 28 above;
- (b) says that the hob wall was designed to transfer the vertical load from the precast wall over and into the supporting columns to the underside;
- (c) says that the lower level of precast wall was designed to also act as a transfer wall to horizontally distribute the load towards the ends of the panels and to transfer into the hob wall and columns to the underside;

- (d) says that the grout bed, between the precast panel and in situ hob wall, was designed to transmit the vertical load via bearing between the two different structural elements (precast and in situ);
- (e) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

35 As to the allegations in paragraph 35, WSP:

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

WSP's Concrete Strength Design

36 As to the allegations in paragraph 36, WSP:

- (a) repeats paragraph 28 above;
- (b) denies that its 'for construction' design depicted the hob wall as cast as part of the floor element;
- (c) says that its 'for construction drawings' should be read as a whole;
- (d) says that:
 - (i) note G1. on Drawing No. 4419 S00.003[A] states as follows:

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

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

37 As to the allegations in paragraph 37, WSP:

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

38 As to the allegations in paragraph 38, WSP:

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

WSP's Grouting Design Change

39 As to the allegations in paragraph 39, WSP:

- (a) repeats paragraph 28 above;
- (b) says that Drawing No. 4419 S06.010[A], [issued on 16 September 2016](#), was a 'design document' as defined in Clause 1 of the General Conditions, and as defined in Clause 1 of the general conditions of the Head Contract;
- (c) [says that Drawing No. 4419 S06.101\[A\] showed full grout coverage between the precast panels and the hob walls](#)~~subject to replacing the expression 'hob beam' with 'hob wall', otherwise admits the allegations therein.~~
- ~~(e)~~(d) [otherwise denies the allegations therein.](#)

39A. As to the allegations in paragraph 39A, WSP:

- (a) repeats paragraph 39 above;
- (b) otherwise denies the allegations therein.

40 As to the allegations in paragraph 40, WSP:

- (a) repeats paragraphs [28 and 39](#) above;
- (b) says that Evolution entered into a contract with Icon dated 31 August 2016 [pursuant to which Evolution agreed to design, manufacture and install the precast wall panels](#);
- (c) says that on about 16 September 2016 WSP issued a 'for construction' Drawing No. 4419 S06.010[A] containing an express note stating 'GROUT PANEL JOINT FOR FULL WIDTH', specifying full grout coverage between the precast panel and the hob;

- (d) says that on about 21 September 2016 Evolution issued a Drawing No. DE01[P2] for level 1, detail 1 of which contained an express note stating 'INTERNAL GROUTING BETWEEN PANEL TO INSITU BY EVOLUTION' (**Evolution Shop Drawing 1**);
- (e) says that any proposed change to WSP's design from full grout coverage between the precast panel and the hob, to grout being placed on the inner portion of the hob only, would have been a significant and important matter;
- (f) says that at no time did Evolution ever ask WSP, in terms, either orally or in writing, for permission or approval to change WSP's design from full grout coverage between the precast panel and the hob, to grout being placed on the inner portion of the hob only;
- ~~(g) — says it was not Evolution's intention to change WSP's design from full grout coverage between the precast panel and the hob, to grout being placed on the inner portion of the hob only;~~
- ~~(h)~~(g) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

41 As to the allegations in paragraph 41, WSP:

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

42 As to the allegations in paragraph 42, WSP:

(a) repeats paragraph 40 above;

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

~~(b)~~(c) says that WSP's stamp also contained the following words:

This drawing has been checked for structural adequacy only in the final condition, and compliance with the design intent. Omissions, dimensions, fit and temporary works are specifically excluded from this review. This review does not relieve the builder of responsibility under the contract. Compliance with specified requirements and statutory regulations remain the responsibility of the builder

~~(e)~~(d) otherwise admits the allegations therein.

43 As to the allegations in paragraph 43, WSP:

[\(a\) repeats paragraph 42 above;](#)

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

Particulars

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

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

44 As to the allegations in paragraph 44, WSP:

(a) admits that between 21 September 2016 and 5 July 2017, Evolution issued revisions of Drawing DE01 P2;

(b) repeats paragraphs 28, 40 and 41 above;

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

45 As to the allegations in paragraph 45, WSP:

(a) repeats paragraphs 40(a)-40(c)~~(b)~~ above;

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

(c) repeats paragraphs 40(d)-40(g)~~(a)~~ above;

(d) repeats paragraph 44 above;

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

46 As to the allegations in paragraph 46, WSP:

[\(a\) repeats paragraph 45 above;](#)

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

~~(b)~~(c) says that WSP's stamp also contained the following words:

This drawing has been checked for structural adequacy only in the final condition, and compliance with the design intent. Omissions, dimensions, fit and temporary works are specifically excluded from this review. This review does not relieve the builder of responsibility under the contract. Compliance with specified requirements and statutory regulations remain the responsibility of the builder

~~(e)~~(d) otherwise admits the allegations therein.

47 As to the allegations in paragraph 47, WSP:

- (a) repeats paragraph 28 above;
- (b) repeats paragraphs 40, 42 and 46 above;
- (c) denies that it approved any design change;
- (d) says that a reasonably competent design and construct contractor in the position of Icon would not have understood that WSP's stamp on Evolution Shop Drawing 1 and/or Evolution Shop Drawing 2 approved a change to WSP's design, from full grout coverage between the precast panel and the hob, to grout being placed on the inner portion of the hob only;
- (e) says that if, which is ~~not admitted~~denied, the Evolution Shop Drawing 1 and/or Evolution Shop Drawing 2 did indicate that grouting would be placed on the inner portion of the hob only, Icon did not refer the discrepancy to the Superintendent or to WSP;
- (f) says that the alleged design change was not thereafter administratively incorporated by WSP into any amended FC Drawings, including FC Drawing No. 4419 S06.010[A];
- (g) otherwise denies the allegations therein.

WSP's Panel Thickness Design Change

48 WSP admits the allegations in paragraph 48.

49 WSP admits the allegations in paragraph 49.

50 As to the allegations in paragraph 50, WSP:

- (a) repeats paragraph 49 above;
- (b) otherwise admits the allegations therein.

WSP's Electrical Conduit Placement Approval

51 As to the allegations in paragraph 51, WSP:

(a) repeats paragraph 28 above;

~~(a)~~(b) repeats paragraph 54 below;

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

52 As to the allegations in paragraph 52, WSP:

(a) admits that it replied to Icon's correspondence dated 21 February 2017 on or about 23 February 2017 with site inspection report number 43;

(b) refers to Aconex from WSP to Icon dated 23 February 2017 timed 11:26am (mail no. WSP(SA)-CADV-000850) including attachment titled '20170223 4419_SIR43_JYH closed out.pdf' as if set out herein in full;

~~(b)~~(c) repeats paragraph 54 below;

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

53 As to the allegations in paragraph 53, WSP:

(a) repeats paragraphs 28 ~~and 52~~ above;

(b) repeats paragraph 54 below;

~~(a)~~(c) otherwise denies the allegations therein.

D. WSP'S INSPECTION AND CERTIFICATION

54 As to the allegations in paragraph 54, WSP:

(a) repeats paragraph 28 above;

(b) admits it issued certificates of design for December 2015, January 2016, February 2016, March 2016, April 2016, May 2016, August 2016, September 2016, October 2016, November 2016, December 2016, January 2017, February 2017, March 2017, April 2017, ~~and~~ July 2017, August 2017, October 2017, November 2017 and December 2017;

(c) does not admit it issued a certificate of design for December 2015 (Amended), January 2016 (Amended), February 2016 (Amended) or June 2016;

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

(e) says that none of WSP's Warranty Breaches (as defined in paragraph 114 of the Cross-Claim) relate to any of WSP's periodic site inspections of the construction work (or work shown in photographs which were issued by Icon to WSP); and further:

In relation to Level 4

~~(e)~~(f) says that Icon poured the concrete for the hob on level 4, 4A-11.5 (which exhibited damage on about 27 December 2018) during Pour 1 on 26 November 2016;

~~(f)~~(g) says that prior to pouring the concrete for hob 4A-11.5, Icon did not:

(i) ask WSP to come to site to inspect the reinforcement placed for hob 4A-11.5;
or

(ii) send WSP photographs of the reinforcement placed for hob 4A-11.5;

(h) denies that prior to Icon pouring the concrete for hob 4A-11.5, WSP either expressly or implicitly gave its approval to pour the concrete;

(i) denies that in deciding to pour, and then pouring, the concrete for hob 4A-11.5, Icon relied on any act or omission of WSP;

~~(g)~~(j) says that on 29 November 2016 at about 8:05 pm, WSP issued SIR#35 by Aconex (WSP(SA) -CADV-00739) which stated to the effect that:

(i) the hob on level 4, 4C-5.5 (which exhibited no damage) complied with the structural drawings;

(ii) a photo of the hob on level 4, 4B-0.5 needed to be taken;

(k) says that Icon poured the concrete for hob 4B-0.5 during Pour 2 on 30 November 2016;

(l) says that on 30 November 2016 at 10:33 am, Alexy El-Haddad of Icon sent James Hallahan of WSP 3 photographs of hob 4B-0.5;

(m) denies that prior to Icon pouring the concrete for hob 4B-0.5, WSP either expressly or implicitly gave its approval to place the concrete;

(n) denies that in deciding to pour, and then pouring, the concrete for the hob 4B-0.5, Icon relied on any act or omission of WSP;

(o) says that it was not until 3 November 2017, almost 1 year later, that WSP issued a revised SIR#35, which stated 'Photos provided by Icon suggest that the pre-cast hob aforementioned [4B-0.5] complies with structural drawings'

In relation to Level 10

(p) says that Icon poured the concrete for the hob on level 10, 10B-9.5 during Pour 1 on 17 February 2017;

~~(h)~~(q) says that prior to pouring the concrete for hob 10B-9.5, Icon did not:

(i) ask WSP to come to site to inspect the reinforcement placed for hob 10B-9.5;
or

(ii) send WSP photographs of the reinforcement placed for hob 10B-9.5;

(r) denies that prior to Icon pouring the concrete for hob 10B-9.5, WSP either expressly or implicitly gave its approval to place the concrete;

(s) denies that in deciding to pour, and then pour, the concrete for hob 10B-9.5, Icon relied on any act or omission of WSP;

(t) says that Icon poured the concrete for the hob on level 10, 10C-14.5 (which exhibited significant damage on 24 December 2018, causing the evacuation of Opal Tower on 24 December 2018) during Pour 2 on 21 February 2017 at about 12 midday or by about 5:30 pm at the latest;

~~(h)~~(u) says that prior to pouring the concrete for hob 10C-14.5, Icon did not:

(i) ask WSP to come to site to inspect the reinforcement placed for hob 10C-14.5;
or

(ii) send WSP photographs of the reinforcement placed for hob 10C-14.5;

(v) denies that prior to Icon pouring the concrete for hob 10C-14.5, WSP either expressly or implicitly gave its approval to pour the concrete;

(w) denies that in deciding to pour, and then pouring, the concrete for hob 10C-14.5, Icon relied on any act or omission of WSP;

(x) says that on 21 February 2017 at about 5:56 pm (after pouring the concrete), Icon sent WSP an Aconex message (NSWIcon-HCADV-005067) attaching two zip folders of photographs;

(y) says that on 23 February 2017 at about 11:26 am, about 2 days after Icon had already poured the concrete, WSP issued SIR#43 by Aconex (WSP(SA)-CADV-000850) stating to the effect that the photos of columns between level 9 and 10 in Pour 2 for level 10 appeared to comply with the structural drawings;

(z) says that Icon did not understand SIR#43 to relate to the reinforcement in hob 10C-14.5;

(aa) says that Icon poured the concrete for the hob on level 10, 10A-4.5 during Pour 2 on 21 February 2017 at about 12 midday;

(j)(bb) says that prior to pouring hob 10A-4.5, Icon did not:

(i) ask WSP to come to site to inspect the reinforcement placed for hob 10A-4.5;
or

(ii) send WSP photographs of the reinforcement placed for hob 10A-4.5;

(cc) denies that prior to Icon pouring the concrete for hob 10A-4.5, WSP either expressly or implicitly gave its approval to pour the concrete;

(dd) denies that in deciding to pour, and then pouring, the concrete for hob 10A-4.5, Icon relied on any act or omission of WSP;

In relation to Level 16

(ee) says that prior to Icon pouring the concrete for the hob on level 16, 16A-10.5, Pour 1 on 6 April 2017, WSP had issued to Icon SIR#51 dated 5 April 2017 stating ‘the pre-cast hobs in Pour 1 comply with structural drawings’;

(ff) says that prior to pouring the concrete for hobs on level 16, 16B-0.5, and 16C-5.5, Icon did not:

(i) ask WSP to come to site to inspect the reinforcement placed for hobs 16B-0.5 and 16C-5.5; or

(ii) send WSP photographs of the reinforcement placed for hobs 16B-0.5 and 16C-5.5;

(gg) denies that prior to Icon pouring the concrete for hobs 16B-0.5 and 16C-5.5, WSP either expressly or implicitly gave its approval to pour the concrete;

(hh) denies that in deciding to pour, and then pouring, the concrete for hobs 16B-0.5 and 16C-5.5, Icon relied on any act or omission of WSP;

(ii) otherwise denies the allegations therein.

55 As to the allegations in paragraph 55, WSP:

(a) admits it issued a certificate dated 15 May 2018;

(b) relies on the terms of the certificate;

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

56 As to the allegations in paragraph 56, WSP:

(a) admits it issued a 'statement of compliance' dated 5 June 2018;

(b) relies on the terms of the statement of compliance;

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

57 WSP admits the allegations in paragraph 57.

58 WSP admits the allegations in paragraph 58.

59 WSP admits the allegations in paragraph 59.

E. DAMAGE OBSERVED IN THE BUILDING

60 As to the allegations in paragraph 60, WSP:

(a) repeats paragraph 28 above;

(b) ~~subject to replacing the expression 'hob beam' with 'hob wall',~~ otherwise ~~denies~~ admits the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

61 WSP admits the allegations in paragraph 61.

62 WSP admits the allegations in paragraph 62.

63 As to the allegations in paragraph 63, WSP:

(a) repeats paragraph 28 above;

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

64 As to the allegations in paragraph 64, WSP:

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

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

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

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

65 As to the allegations in paragraph 65, WSP:

- (a) repeats paragraph 28 above;
- (b) says that the damage on level 4 was not identified until 27 December 2018;
- (c) subject to replacing the expression ‘hob-beam’ with ‘hob wall’, otherwise admits the allegations therein.

66 WSP notes the definition of ‘Observed Damage’ in paragraph 66.

67 As to the allegations in paragraph 67, WSP:

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

68 As to the allegations in paragraph 68, WSP:

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

F. RECTIFICATION DESIGN AND RECTIFICATION WORKS

Rectification Design

69 As to the allegations in paragraph 69, WSP:

- (a) repeats paragraph 28 above;
- (b) refers to its Rectification Design in full;
- (c) says it prepared a design for the installation of propping, as a precautionary measure:
 - (i) under Level 10, 10C-14.5 from level 4 to level 9 to provide temporary support if required;
 - (ii) under Level 4, 4A-10.5 from basement level B3 to level 3 to provide temporary support if required;
 - (iii) under Level 4, 4B-0.5 from basement level B3 to level 3 to provide temporary support if required;
- (d) says it prepared a design for the installation of structural grout, additional to the grout that had been installed by Evolution (contrary to WSP’s ‘for construction’ Drawing No. 4419 S06.010[A] as pleaded in paragraph 40 above):
 - (i) to fully grout the joints in accordance with WSP’s ‘for construction’ design;

- (ii) for the injection of epoxy into all damaged precast panels and hob walls on levels 4, 10 and 16;
- (e) denies subparagraph (c), having regard to paragraph 11(b) of Practice Note SC Eq 3;
- (f) otherwise denies the balance of the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

70 As to the allegations in paragraph 70, WSP:

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

71 As to the allegations in paragraph 71, WSP:

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

72 As to the allegations in paragraph 72, WSP:

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

73 WSP admits the allegations in paragraph 73.

74 WSP admits the allegations in paragraph 74.

75 WSP admits the allegations in paragraph 75.

Rectification Works

76 ~~WSP admits the allegations in paragraph 76.~~ As to the allegations in paragraph 76, WSP:

(a) admits that between 27 December 2018 and 12 January 2019, Icon installed propping to the locations specified by WSP in the Propping Design and WSP inspected the installation of the propping;

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

77 ~~WSP admits the allegations in paragraph 77.~~ As to the allegations in paragraph 77, WSP:

(a) admits that on and from 12 January 2019, Icon carried out the Grouting Works and WSP progressively inspected the Grouting Works;

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

78 WSP admits the allegations in paragraph 78.

79 As to the allegations in paragraph 79, WSP:

(a) says that Icon has carried out rectification work;

~~(b) says that the rectification work is scheduled to be completed by March 2020;~~

~~(e)~~(b) says that based on WSP's visual inspections and subject to Icon having complied with the subsequent advice provided within the site inspection reports, the works appear to have been completed in general conformance with the rectification design specified by WSP;

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

80 As to the allegations in paragraph 80, WSP:

(a) says that it has carried out inspections of the rectification works designed by WSP and issued the relevant site inspection reports on or about the dates set out in Attachment B;

~~(b) says that the rectification works are ongoing;~~

~~(e)~~(b) otherwise admits the allegations therein.

81 As to the allegations in paragraph 81, WSP:

(a) refers to the ~~contents of the letter~~ particularised email and its attachment as if set out herein in full;

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

81A As to the allegations in paragraph 81A, WSP:

(a) refers to the particularised email and its attachment as if set out herein in full;

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

82 Not used.

~~As to the allegations in paragraph 82, WSP:~~

~~(a) refers to the contents of the letter particularised as if set out herein in full;~~

- ~~(b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.~~
- 83 Not used. As to the allegations in paragraph 83, WSP:
- ~~(a) refers to the contents of the letter particularised as if set out herein in full;~~
- ~~(b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.~~
- 84 Not used. As to the allegations in paragraph 84, WSP:
- ~~(a) refers to the contents of the letter particularised as if set out herein in full;~~
- ~~(b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.~~
- 85 Not used. As to the allegations in paragraph 85, WSP:
- ~~(a) repeats paragraph 19 above;~~
- ~~(b) otherwise denies the allegations therein~~
- 86 Not used. As to the allegations in paragraph 86, WSP:
- ~~(a) repeats paragraph 85 above;~~
- ~~(b) says that on about 16 December 2019, WSP provided a Consultants Design Certificate dated 16 December 2019 to Icon in relation to the Remedial Design comprised of the drawings listed in schedule A of the Consultants Design Certificate;~~
- ~~(c) says that the Consultants Design Certificate was in a form agreed by Icon;~~
- ~~(d) otherwise denies the allegations therein.~~
- 87 Not used. As to the allegations in paragraph 87, WSP:
- ~~(a) repeats paragraph 85 above;~~
- ~~(b) says further that on about 16 December 2019, WSP provided to Icon a proposed draft Consultants Works Certificate to be signed on completion of the rectification works;~~
- ~~(c) says that between 16 and 17 December 2019, WSP and Icon's lawyers corresponded regarding amendments to the terms of the Consultants Works Certificate, although as at the date of this List Response, Icon has not responded to WSP's suggested amendments to the Consultants Works Certificate, set out in an email dated 17 December 2019 from Melissa Tan of Norton Rose Fulbright to Peter Wood of Minter Ellison;~~

~~(d) otherwise denies the allegations therein.~~

G. THE CAUSE OF THE OBSERVED DAMAGE

AS 3600

88 As to the allegations in paragraph 88, WSP:

- (a) repeats paragraph 28 above;
- (b) repeats paragraphs 89 to 91 below;
- (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

89 As to the allegations in paragraph 89, WSP:

- (a) repeats paragraph 28 above;
- (b) refers to the terms of AS 3600 in full;
- (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

90 As to the allegations in paragraph 90, WSP:

- (a) repeats paragraph 28 above;
- (b) refers to the terms of AS 3600 in full;
- (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

91 As to the allegations in paragraph 91, WSP:

- (a) repeats paragraph 28 above;
- (b) refers to the terms of AS 3600 in full;
- (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

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

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

WSP failed to design for bursting stresses

94 WSP denies the allegations in paragraph 94.

95 WSP denies the allegations in paragraph 95.

96 WSP denies the allegations in paragraph 96.

WSP failed to design for bearing stresses

97 WSP denies the allegations in paragraph 97.

98 WSP denies the allegations in paragraph 98.

WSP's design caused the Observed Damage

99 WSP denies the allegations in paragraph 99.

100 As to the allegations in paragraph 100, WSP:

- (a) denies that its design of the hob walls had insufficient steel reinforcement;
- (b) otherwise denies the allegations therein.

101 As to the allegations in paragraph 101, WSP:

- (a) denies that its design was defective;
- (b) otherwise denies the allegations therein.

H. DEFECTS ALLEGED BY THE PLAINTIFFS AND SOPA

102 ~~WSP denies the allegations in paragraph 102.~~ As to the allegations in paragraph 102, WSP:

- (a) repeats paragraphs 57 and 58 of WSP's List Response to the Plaintiffs' List Statement;
- (b) otherwise denies the allegations therein.

103 As to the allegations in paragraph 103, WSP:

- (a) repeats paragraph 102 above ~~admits that Icon has denied the paragraphs;~~
- (b) otherwise denies the allegations therein, ~~having regard to paragraph 11(b) of Practice Note SC Eq 3.~~

104 Not used. ~~As to the allegations in paragraph 104, WSP:~~

- ~~(a) repeats paragraph 28 above;~~
- ~~(b) repeats paragraphs 39 to 47 above;~~
- ~~(c) repeats paragraphs 48 and 49 above;~~
- ~~(d) repeats paragraphs 51 to 53 above;~~
- ~~(e) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3. Not us.~~

105 As to the allegations in paragraph 105, WSP:

- (a) repeats paragraphs 36 to 38, ~~and~~ 97 to 98 and 103 above;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

I. THE CLAIMS MADE IN THE PROCEEDINGS

106 WSP admits the allegations in paragraph 106.

107 WSP admits the allegations in paragraph 107.

107A As to the allegations in paragraph 107A, WSP:

- (a) admits that the plaintiffs make those allegations in their Amended Commercial List Statement;
- (b) denies those allegations insofar as they concern WSP and refers to WSP's List Response to the Plaintiffs' List Statement as if set out herein in full;
- (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

107B As to the allegations in paragraph 107B, WSP:

- (a) repeats paragraph 107A above;
- (b) says that in its Commercial List Response Icon makes denials and allegations of the kind contended;
- (c) denies that it was negligent or engaged in misleading or deceptive conduct;
- (d) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

108 WSP admits the allegations in paragraph 108.

109 As to the allegations, ~~WSP denies the allegations~~ in paragraph 109, WSP:

- (a) repeats paragraph 107B above and its response to SOPA's allegations that are set out in WSP's List Response to SOPA's Amended Cross-Claim Statement filed 23 July 2021;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

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

110 ~~Not used. WSP denies the allegations in paragraph 110, having regard to paragraph 11(b) of Practice Note SC Eq 3.~~

111 ~~Not used. WSP repeats paragraphs 99 to 101 above in relation to the allegations in paragraph 111.~~

112 WSP denies the allegations in paragraph 112.

113 WSP denies the allegations in paragraph 113.

114 WSP denies the allegations in paragraph 114.

115 ~~Not used. WSP denies the allegations in paragraph 115.~~

Icon is entitled to an indemnity and/or damages in relation to any liability that Icon is found to have to SOPA, AAD/-Ecove and the plaintiffs (and the Group Members)

116 WSP denies the allegations in paragraph 116., and further:

(a) repeats paragraph 167 below;

(b) says that Icon's failures to notify WSP of the in situ failures of the hob, and precast panel, and the defective concrete pour of the hob, as set out in paragraph 167 below, were intervening acts or events which should be treated in a practical sense as the sole cause of the SOPA Liability Damages; and that, within the meaning of section 5D (1)(b) of the CLA; it would not be appropriate for the scope of any liability in WSP to extend to the SOPA Liability Damages.

116A WSP denies the allegations in paragraph 116A, and further:

(a) repeats paragraph 167 below;

(b) says that Icon's failures to notify WSP of the in situ failures of the hob, and precast panel, and the defective concrete pour of the hob, as set out in paragraph 167 below, were intervening acts or events which should be treated in a practical sense as the sole cause of the AAD/Ecove Liability Damages; and that, within the meaning of section 5D (1)(b) of the CLA; it would not be appropriate for the scope of any liability in WSP to extend to the AAD/Ecove Liability Damages.

116B WSP denies the allegations in paragraph 116B, and further:

(a) repeats paragraph 167 below;

(b) says that Icon's failures to notify WSP of the in situ failures of the hob, and precast panel, and the defective concrete pour of the hob, as set out in paragraph 167 below,

were intervening acts or events which should be treated in a practical sense as the sole cause of the Plaintiffs/Group Members' Damages; and that, within the meaning of section 5D (1)(b) of the CLA; it would not be appropriate for the scope of any liability in WSP to extend to the Plaintiffs/Group Members' Damages.

117 As to the allegations in paragraph 117, WSP:

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

(b) repeats paragraphs 116, 116A and 116B above;

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

~~(f)~~(d) says that the SOPA Liability Damages, the AAD/ECOVE Liability Damages and the Plaintiffs-/Group Members' Damages are economic, indirect or consequential loss within the meaning of Clause 32 of the General Conditions, such that WSP has no liability to Icon for the SOPA Liability Damages the AAD/ECOVE Liability Damages or the Plaintiffs-/Group Members' Damages;

~~(g)~~(e) alternatively (and without admissions), says that the SOPA Liability Damages, the AAD/ECOVE Liability Damages and the Plaintiffs-/Group Members' Damages are claims in respect of loss of, or damage to, property, arising out of WSP's Warranty Breaches ~~and WSP's Certification Breach~~, and that, pursuant to Clause 9 of the General Conditions, WSP's obligation to indemnify Icon against that head of damage is reduced proportionally to the extent that the act or omission of Icon or its contractors contributed to the loss or damage;

Particulars

(i) WSP repeats paragraphs 166 to ~~234~~ ~~181~~ below.

(f) says that by reason of the matters referred to in paragraphs 166 to 182 below, Icon is guilty of contributory negligence, and in the event (which is denied) that WSP is liable to Icon, Icon's damages recoverable in respect of WSP's Warranty Breaches are to be reduced to such extent as the Court thinks just and equitable having regard to Icon's share in the responsibility for the damage, pursuant to s 9(1) Law Reform (Miscellaneous Provisions) Act 1965 (NSW) (LRA);

(g) says that by reason of the matters referred to in paragraphs 217 to 234 below, Evolution and Traino are each a "concurrent wrongdoer" for the purposes of s 34(2) CLA, and WSP's liability is limited to an amount reflecting that proportion of the damage or loss

claimed that the Court considers just, having regard to the extent of Evolution and Traino's responsibility for the damage or loss, pursuant to s 35 CLA;

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

118 As to the allegations in paragraph 118, WSP:

- (c) repeats paragraph 117 above;
- (d) otherwise denies the allegations therein.

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

119 As to the allegations in paragraph 119, WSP:

(a) repeats paragraph 117 above;

~~(j)(b)~~ denies it committed WSP's Warranty Breaches ~~and WSP's Certification Breach;~~

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

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

(e) alternatively (and without admissions), says that Icon's Incurred Rectification Costs, Icon's Future Rectification Costs, Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs, Icon's Loss of Opportunity / Loss of Contract Damages, Bank Guarantee Sum and Legal Costs are claims in respect of loss of, or damage to, property, arising out of WSP's Warranty

Breaches, and that, pursuant to Clause 9 of the General Conditions, WSP's obligation to indemnify Icon against that head of damage is reduced proportionally to the extent that the act or omission of Icon or its contractors contributed to the loss or damage;

Particulars

(i) WSP repeats paragraphs 166 to 235 below.

~~(f)~~ says that by reason of the matters referred to in paragraphs 166 to 182 below, Icon is guilty of contributory negligence, and in the event (which is denied) that WSP is liable to Icon, Icon's damages recoverable in respect of WSP's Warranty Breaches ~~and/or WSP's Certification Breach~~ are to be reduced to such extent as the Court thinks just and equitable having regard to Icon's share in the responsibility for the damage, pursuant to s 9(1) ~~LRA Law Reform (Miscellaneous Provisions) Act 1965 (NSW) (LRA)~~;

~~(g)~~ says that by reason of the matters referred to in paragraphs 217 to ~~235~~ ~~222~~ below, Evolution and Traino are each is a "concurrent wrongdoer" for the purposes of s 34(2) ~~CLA Civil Liability Act 2002 (NSW) (CLA)~~, and WSP's liability is limited to an amount reflecting that proportion of the damage or loss claimed that the Court considers just, having regard to the extent of Evolution and Traino's responsibility for the damage or loss, pursuant to s 35 CLA;

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

~~(i)~~ otherwise denies the allegations therein.

120 As to the allegations in paragraph 120, WSP:

~~(a)~~ repeats paragraph 119 above ~~denies it committed WSP's Warranty Breaches and WSP's Certification Breach;~~

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

~~(r)~~ ~~alternatively, says that Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs, Bank Guarantee Sum, Legal Costs and Icon's Loss of Opportunity / Loss of Contract Damages are economic, indirect or consequential loss, or loss of contract or profit within the meaning~~

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

~~(s) — alternatively (and without admissions), says that Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs, Bank Guarantee Sum, Legal Costs and Icon's Loss of Opportunity / Loss of Contract Damages are claims in respect of loss of, or damage to, property, arising out of WSP's Warranty Breaches, and that, pursuant to Clause 9 of the General Conditions, WSP's obligation to indemnify Icon against those heads of damage is reduced proportionally to the extent that the act of omission of Icon or its contractors contributed to the loss or damage;~~

~~(t) — says that in any event, by reason of Clause 32 of the General Conditions, WSP's total liability is limited to amounts recovered by WSP under a policy of professional indemnity insurance which WSP was required to effect, up to a maximum of \$20 million;~~

~~(u)~~(b) otherwise denies the allegations therein.

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

121 WSP repeats paragraphs 39 to 47 above in relation to the allegations in paragraph 121.

122 WSP denies the allegations in paragraph 122, having regard to paragraph 11(b) of Practice Note SC Eq 3.

123 As to the allegations in paragraph 123, WSP:

(a) admits that WSP received the Precast Detail Page Drawing DE01 on the dates alleged for version P1, P2, P3, P5, P6 and A;

(b) says that WSP received the Precast Detail Page Drawing DE01 version P4 on 14 October 2016;

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

- 124 As to the allegations in paragraph 124, WSP:
- (a) repeats paragraph 42 above;
 - (b) otherwise admits the allegations therein.
- 125 As to the allegations in paragraph 125, WSP:
- (a) repeats paragraph 46 above;
 - (b) otherwise admits the allegations therein.
- 126 As to the allegations in paragraph 126, WSP:
- (a) repeats paragraph 28 above;
 - (b) repeats paragraph 41 above;
 - (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 127 WSP denies the allegations in paragraph 127.
- 128 WSP denies the allegations in paragraph 128.
- 129 WSP denies the allegations in paragraph 129.
- 130 As to the allegations in paragraph 130, WSP repeats paragraph 54 above.
- 131 WSP denies the allegations in paragraph 131.
- 132 As to the allegations in paragraph 132, WSP:
- (a) says that it did not inform Icon that the detail in Evolution Shop Drawing 1 and/or Evolution Shop Drawing 2 was not to apply to all levels in the Building;
 - (b) otherwise denies the allegations therein.
- 133 WSP denies the allegations in paragraph 133.
- 134 WSP denies the allegations in paragraph 134.
- 135 WSP denies the allegations in paragraph 135.
- 136 WSP denies the allegations in paragraph 136.
- 137 WSP denies the allegations in paragraph 137.
- 138 WSP denies the allegations in paragraph 138.
- 139 WSP denies the allegations in paragraph 139.
- 140 WSP denies the allegations in paragraph 140 and repeats paragraph 154 below.

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

KK. CONTRIBUTION PURSUANT TO THE LAW REFORM MISCELLANEOUS PROVISIONS) ACT 1946 (NSW)

WSP engaged in 'construction work' and therefore owed a duty of care by reason of the Design and Building Practitioners Act 2020 (NSW)

141A As to the allegations in paragraph 141A, WSP:

- (a) repeats paragraph 25 above;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

141B As to the allegations in paragraph 141B, WSP:

- (a) repeats paragraph 141A above;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

141C As to the allegations in paragraph 141C, WSP:

- (a) repeats paragraph 141B above;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

141D As to the allegations in paragraph 141D, WSP:

- (a) repeats paragraph 141C above;
- (b) denies it breached any duty to exercise reasonable care to avoid economic loss caused by defects in or related to the Building and arising from WSP's Construction Work pursuant to s 37(1) of the D&BP Act;
- (c) denies any person is entitled to damages from WSP for any such breach pursuant to s 37(3) of the D&BP Act;
- (d) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

141E As to the allegations in paragraph 141E, WSP:

- (a) repeats paragraph 141D above;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

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

141F As to the allegations in paragraph 141F, WSP:

- (a) repeats paragraph 3 above;
- (b) otherwise admits the allegations therein.

141G As to the allegations in paragraph 141G, WSP:

- (a) admits that during the period 2015 to 2018, Icon constructed the Building;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

141H As to the allegations in paragraph 141H, WSP:

- (a) repeats paragraph 141G above;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

141I As to the allegations in paragraph 141I, WSP:

- (a) repeats paragraph 141H above;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

If Icon is found liable to SOPA or the plaintiffs (or Group Members, Icon is entitled to contribution from WSP

141J As to the allegations in paragraph 141J, WSP:

- (a) repeats paragraphs 107A and 108 above;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

141K WSP denies the allegations in paragraph 141K, having regard to paragraph 11(b) of Practice Note SC Eq 3.

141L WSP denies the allegations in paragraph 141L.

141M WSP denies the allegations in paragraph 141M and repeats paragraph 117 above.

141N WSP denies the allegations in paragraph 141N and repeats paragraph 117 above.

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

Provision of design certificates

- 142 WSP admits the allegations in paragraph 142.
- 143 As to the allegations in paragraph 143, WSP:
- (a) admits it issued certificates of design for December 2015, January 2016, February 2016, March 2016, [April 2016](#), May 2016, [August 2016](#), [September 2016](#), [October 2016](#), November 2016, [December 2016](#), [January 2017](#), February 2017, March 2017, [April 2017](#), ~~and~~ July 2017, [August 2017](#), [October 2017](#), [November 2017](#) and [December 2017](#);
 - (b) does not admit it issued a certificate of design for [December 2015 \(Amended\)](#), [January 2016 \(Amended\)](#), [February 2016 \(Amended\)](#) or June 2016;
 - (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 144 As to the allegations in paragraph 144, WSP:
- (a) repeats paragraph 143 above;
 - (b) otherwise admits the allegations therein.
- 145 As to the allegations in paragraph 145, WSP:
- (a) repeats paragraph 144 above;
 - (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.
- 146 WSP denies the allegations in paragraph 146.
- 147 As to the allegations in paragraph 147, WSP:
- (a) denies that it made the Design Certificate Representations;
 - (b) denies that the Design Certificate Representations were false;
 - (c) otherwise denies the allegations therein.
- 148 As to the allegations in paragraph 148, WSP:
- (a) denies that it made the Design Certificate Representations;
 - (b) denies that the Design Certificate Representations were made in trade or commerce within the meaning of s 18 of the ACL;
 - (c) otherwise denies the allegations therein.
- 149 WSP denies the allegations in paragraph 149.

149A As to the allegations in paragraph 149A, WSP:

- (a) repeats paragraphs 142 to 149 above;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

149B As to the allegations in paragraph 149B, WSP:

- (a) repeats paragraphs 142 to 149A above;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

150 As to the allegations in paragraph 150, WSP:

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

151 As to the allegations in paragraph 151, WSP:

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

152 As to the allegations in paragraph 152, WSP:

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

153 WSP denies the allegations in paragraph 153.

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

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

Icon for the SOPA Liability Damages, [the AAD/Ecove Liability Damages, the Plaintiffs/Group Members' Damages](#), Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs and Icon's Loss of Opportunity / Loss of Contract Damages, [the Bank Guarantee Sum, and Legal Costs](#);

[\(b\) alternatively \(and without admissions\), says that the SOPA Liability Damages, the AAD/Ecove Liability Damages, Icon's Incurred Rectification Costs, Icon's Future Rectification Costs, the Plaintiffs/Group Members' Damages, Group Members' Loss of Rent Costs, Group Members' Alternative Accommodation Costs, Lessees' Alternative Accommodation Costs, Licence Occupation Fees, Owners Corporation's Insurance Costs, Icon's Loss of Opportunity / Loss of Contract Damages, the Bank Guarantee Sum and Legal Costs are claims in respect of loss of, or damage to, property, arising out of WSP's Warranty Breaches, and that, pursuant to Clause 9 of the General Conditions, WSP's obligation to indemnify Icon against that head of damage is reduced proportionally to the extent that the act or omission of Icon or its contractors contributed to the loss or damage.](#)

Particulars

- (i) [WSP repeats paragraphs 166 to 234 below.](#)
- (c) says that any damages to which Icon would otherwise be entitled should be reduced to the extent which the Court thinks just and equitable, having regard to Icon's share in the responsibility for the loss or damage, pursuant to s 137B CCA;

Particulars

- (ii) WSP repeats paragraphs 166 to 182 below.
- (d) says that WSP's liability is limited to an amount reflecting that proportion of the damage or loss claimed that the Court considers just having regard to the extent of WSP's responsibility for the damage or loss, pursuant to s 87CD CCA;

Particulars

- (i) WSP repeats paragraphs ~~210-183~~ to ~~234 222~~ below.
- (e) says that, by reason of Clause 32 of the General Conditions, WSP's total liability is limited to amounts recovered by WSP under a policy of professional indemnity insurance which WSP was required to effect, up to a maximum of \$20 million.

155 WSP denies the allegations in paragraph 155, and alternatively [repeats paragraph 154 above](#);

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

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

15 May 2018 Certification

156 As to the allegations in paragraph 156, WSP:

- (a) repeats paragraph 55 above;
- (b) otherwise admits the allegations therein.

157 WSP denies the allegations in paragraph 157, having regard to paragraph 11(b) of Practice Note SC Eq 3.

158 As to the allegations in paragraph 158, WSP:

- (a) denies that the 15 May 2018 Certification Representation was made in trade or commerce within the meaning of s 18 of the ACL;
- (b) otherwise denies the allegations therein.

159 WSP denies the allegations in paragraph 159.

[159A As to the allegations in paragraph 159A, WSP:](#)

- [\(a\) repeats paragraphs 156 to 159 above;](#)
- [\(b\) otherwise denies the allegations therein, having regard to paragraph 11\(b\) of Practice Note SC Eq 3.](#)

[159B As to the allegations in paragraph 159B, WSP:](#)

(a) repeats paragraphs 156 to 159A above;

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

160 As to the allegations in paragraph 160, WSP:

- (a) admits that Icon issued the documents referred to;
- (b) denies the 15 May 2018 Certification Representation was false;
- (c) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

161 As to the allegations in paragraph 161, WSP:

- (a) denies the 15 May 2018 Certification Representation was false;
- (b) otherwise denies the allegations therein, having regard to paragraph 11(b) of Practice Note SC Eq 3.

162 WSP denies the allegations in paragraph 162.

163 WSP denies the allegations in paragraph 163, and alternatively repeats paragraph 154 above.

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

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

Particulars

~~(ii) — WSP repeats paragraphs 166 to 182 below.~~

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

Particulars

~~(i) — WSP repeats paragraphs 210 to 222 below.~~

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

164 WSP denies the allegations in paragraph 164, and alternatively [repeats paragraph 155 above.](#);

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

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

Relief

165 WSP denies Icon is entitled to the relief claimed in the [Amended Cross-Summons](#).

M. FURTHER MATTERS

[165A Further, in answer to the whole of the Cross-Claim, WSP pleads as follows, without admissions.](#)

SECTION 50 OF THE CLA

[165B In complete answer to Icon's claim for damages, 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 Icon.

CONTRIBUTORY NEGLIGENCE ~~Contributory negligence~~

Grouting

166 In the event that:

(a) ~~the failure to grout the full width of the hob between the precast panel and the hob was causative of the structural damage (which is not admitted), and~~

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

WSP pleads as follows, without admissions.

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

Particulars

(i) In the event, which is not admitted, that Evolution's shop drawings showed 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' 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;
- (ix) 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.
- (x) Further to the above failures to take reasonable care, Icon:
 - A. failed to alert WSP to the matters in (ix) 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;
- (xi) 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:
 - (1) 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;

(2) Evolution had failed to install reinforcement in Panel C1012 as set out in paragraph (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. Icon would not have suffered the loss and damage alleged in paragraph 119 of the Cross-Claim and would not be liable to the plaintiffs, the Group Members, SOPA and AAD/Ecove as alleged in paragraphs 116, 116A and 116B of the Cross-Claim;

(xii) 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;

(xiii) Further to the above failures to take reasonable care, 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 (ix) and (x) above;

(xiv) Had Icon done these things:

A. WSP would have recommended that investigations be carried out, which would have revealed that:

(1) 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;

(2) Evolution had failed to install reinforcement in Panel C1012 as set out in paragraph (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. Icon would not have suffered the loss and damage alleged in paragraph 119 of the Cross -Claim and would not be liable to the plaintiffs, the Group Members, SOPA and AAD/ECOVE as alleged in paragraphs 116, 116A and 116B of the Cross-Claim;
- (xv) 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;
- (xvi) Further to the above failures to take reasonable care, Icon:
- A. failed to alert WSP to the matters in (xv) above, and to seek WSP's advice in relation to it;
 - B. without consulting WSP, attempted to repair the hob.
- (xvii) 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;

A.F. Icon would not have suffered the loss and damage alleged in paragraph 119 of the Cross-Claim and would not be liable to the plaintiffs, the Group Members, SOPA and AAD/Ecove as alleged in paragraphs 116, 116A and 116B of the Cross-Claim;

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

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

~~(ix) In the event, which is denied, that Evolution Shop Drawing 1 and/or Evolution Shop Drawing 2 did indicate that grouting would be placed on the inner portion of the hob only, issuing, by its subcontractor Evolution, Evolution Shop Drawing 1 and Evolution Shop Drawing 2.~~

~~(x) In the event, which is denied, that Evolution Shop Drawing 1 and/or Evolution Shop Drawing 2 did indicate that grouting would be placed on the inner portion of the hob only, failing to refer the discrepancy to the Superintendent or to WSP.~~

~~(xi) Failing, by itself or by its subcontractor Evolution, to grout the full width of the hob between the precast panel and the hob, as required by WSP's 'for construction' Drawing No. 4419 S06.010[A].~~

~~(xii) Failing to observe that its subcontractor Evolution had failed to grout the full width of the hob between the precast panel and the hob, as required by WSP's 'for construction' Drawing No. 4419 S06.010[A].~~

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

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

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

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

~~— (a) — WSP would have recommended that investigations be carried out, which would have revealed the inadequate grouting between the precast panel and the hob;~~

~~— (b) — appropriate rectification measures would have been taken to rectify the grouting deficiencies throughout the whole of the Building;~~

~~— (c) — Icon would have incurred significantly less rectification costs than Icon's Incurred Rectification Costs, and would not have incurred or be at risk of incurring:~~

~~(i) — the SOPA Liability Damages;~~

~~(ii) — Icon's Future Rectification Costs;~~

~~(iii) — Group Members' Loss of Rent Costs;~~

~~(iv) — Group Members' Alternative Accommodation Costs;~~

~~(v) — Lessees' Alternative Accommodation Costs;~~

~~(vi) — Licence Occupation Fees;~~

~~(vii) — Owners Corporation's Insurance Costs; and~~

~~(viii) — Icon's Loss of Opportunity / Loss of Contract Damages.~~

172 Further, on 5 August 2018, the Superintendent issued defects notice no. 84, directing Icon to patch and refinish the precast panel on level 10.

173 Again, Icon failed to alert WSP to the damage to the precast panel, which was a failure by Icon to take reasonable care.

174 Had Icon alerted WSP to the failure of the precast panel in August 2018:

~~(a) — WSP would have recommended that investigations be carried out, which would have revealed the inadequate grouting between the precast panel and the hob;~~

~~(b) — appropriate rectification measures could have been taken to rectify the grouting deficiencies throughout the whole of the Building;~~

~~(c) — Icon would have incurred significantly less rectification costs than Icon's Incurred Rectification Costs, and would not have incurred or be at risk of incurring:~~

~~(i) — the SOPA Liability Damages;~~

- ~~(ii) — Icon’s Future Rectification Costs;~~
- ~~(iii) — Group Members’ Loss of Rent Costs;~~
- ~~(iv) — Group Members’ Alternative Accommodation Costs;~~
- ~~(v) — Lessees’ Alternative Accommodation Costs;~~
- ~~(vi) — Licence Occupation Fees;~~
- ~~(vii) — Owners Corporation’s Insurance Costs; and~~
- ~~(viii) — Icon’s Loss of Opportunity / Loss of Contract Damages.~~

175 By reason of the matters referred to in paragraphs 169 to 174 above, Icon’s damages recoverable in respect of WSP’s wrong are to be reduced to such extent as the Court thinks just and equitable having regard to Icon’s share in the responsibility for the damage, pursuant to s 9(1) LRA.

Concrete strength

176 In the event that:

~~(a) — the concrete strength of the hobs was causative of the structural damage (which is not admitted), and~~

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

~~WSP pleads as follows.~~

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

Particulars

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

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

Electrical Conduit Placement

179 In the event that:

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

~~(b) — WSP is liable to Icon in tort, or for breach of WSP’s contractual duty of care which is co-extensive with a duty of care in tort, in relation to the electrical conduit placement (which is denied); WSP pleads as follows.~~

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

Particulars

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

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

181 ~~By reason of the matters referred to in paragraphs 179 to 180 above, Icon’s damages recoverable in respect of WSP’s wrong are to be reduced to such extent as the Court thinks just and equitable having regard to Icon’s share in the responsibility for the damage, pursuant to s 9(1) LRA.~~

182 Further, WSP repeats paragraphs 166 to ~~168~~ ~~181~~ above and says that Icon’s claim for damages under s 236(1) ACL are to be reduced to the extent which the Court thinks just and equitable having regard to Icon’s share in the responsibility for the loss or damage.

PROPORTIONATE LIABILITY *Proportionate liability*

183 In the event that:

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

WSP pleads as follows, without admissions.

Evolution

The Evolution Subcontract

184 By subcontract dated 31 August 2016, Icon entered into an agreement with Evolution whereby Evolution agreed to design, manufacture and install the precast wall panels (**the Evolution Subcontract**).

185 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) (**Scope of Works**) (the Evolution Work).

Particulars

(i) Clause 1 Formal Instrument of Agreement.

186 Pursuant to the definition of "Subcontractor's design obligations" in Clause 1 of the General Subcontract Conditions, Evolution, as part of its design obligations, was required to:

- (a) ensure that the design documents (including any design documents which were not produced by Evolution) satisfy Icon's project requirements, all legislative requirements and any requirements of an authority;
- (b) ensure that the design documents contained sufficient detail to construct the work under the subcontract (**WUS**) so that the WUS, when completed, satisfied Evolution's warranties in Clause 2.6;
- (c) ensure that the details contained in any design documents prepared by Evolution are coordinated with the details contained in all other design documents;
- (d) design the subcontract works so that the subcontract works, when constructed, shall be structurally and aesthetically sound.

187 Pursuant to Clause 2.6 of the General Subcontract Conditions, Evolution warranted to Icon that Evolution:

- (a) would exercise the due skill, care and diligence in the execution and completion of the WUS expected of a competent subcontractor;
- (b) would execute the WUS so that the subcontract works when complete shall be fit and adequate for their purpose, suitable for their intended use or occupation and comply with all laws and requirements of the Subcontract including any design documents;
- (c) would construct and complete the WUS in accordance with the [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.

- 188 Clause 2.7 of the General Subcontract Conditions provided that the warranties remained unaffected notwithstanding that design work has been completed by or on behalf of Icon or AAD.
- 189 Pursuant to Clause 2.8 of the General Subcontract Conditions, Evolution agreed to indemnify Icon and its employees, agents and consultants (**Indemnified Parties**) to the maximum extent permitted by law from and against all losses (including direct, indirect and consequential loss), damages, liabilities, actions, suits, claims, demands, costs and expenses (including legal fees on a full indemnity basis) which the Indemnified Parties may suffer, sustain or incur in any way arising out of, as a result or consequence of, or connection with any:
- (a) breach by Evolution of its obligations under the [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.
- 190 Pursuant to Clause 2.8 of the General Subcontract Conditions, Icon and Evolution agreed that, to the extent permitted by law, the operation of Part 4 of the CLA was excluded in relation to all and any rights, obligations and liabilities arising under or in relation to the [Evolution](#) Subcontract however such rights, obligations or liabilities were sought to be enforced.
- 191 Clause 2.9 of the General Subcontract Conditions provided that all representations and warranties in the [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.
- 192 Pursuant to Clause 2.10 of the General Subcontract Conditions, Evolution warranted as follows:
- (a) all activities of Evolution under the subcontract, including the WUS, would be performed in a proper and workmanlike manner and in accordance with the [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.
- 193 Clause 3 of the Scope of Works set out Evolution's design obligations under the [Evolution](#) Subcontract.
- 194 Clause 3.1.1 of the Scope of Works defined "shop drawings" as:
- comprehensive installation and manufacturing drawings with notes and or specifications and or catalogue pamphlets as required for the execution of WUS which identify all work associated with WUS including work which is to be executed by others*
- 195 Clause 3.1.1 of the Scope of Works provided that shop drawings should include set outs, hobs and plinth sizes, their location and structural requirements.
- 196 Clause 4.1.1 of the Scope of Works required Evolution to acknowledge that the scope of the subcontract works included the design and that Evolution would develop, change and finalise the design of the subcontract works (with the written approval of Icon) to ensure that the subcontract works achieved and were fit for their intended purpose.
- 197 Clause 5.1.1 of the Scope of Works provided that the scope of the works involved the design and construction of all precast concrete works associated with the project.
- 198 Clause 5.2.7 of the Scope of Works provided that the design of the precast panels must comply with WSP's design intent for the building and all panel design criteria was to be approved by Icon prior to manufacture.
- 199 Appendix 10 of the [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](#)

[199A 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.](#)

[199B WSP drawing S06.010 \[2\] showed Full Grouting.](#)

[199C 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.](#)

199D 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.

199E 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'.

199F 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.

199G WSP drawing S06.010 [A] showed Full Grouting.

199H 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.

199I 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

199J 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.

199K 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 breaches of the [Evolution Subcontract](#)

200 If, which is ~~not admitted~~~~denied~~, Evolution's ~~s~~Shop ~~d~~Drawings ~~showed Partial Grouting-1 and Evolution Shop Drawing 2 did indicate that grouting would be placed on the inner portion of the hob only, in issuing Evolution Shop Drawing 1 and Evolution Shop Drawing 2,~~ Evolution breached the clauses of the [Evolution](#) Subcontract set out in paragraphs 186 and 187.

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

(a) the SOPA Liability Damages;

(b) the AAD/Ecove Liability Damages;

(c) the Plaintiffs/Group Members' Damages;

(d) Icon's Incurred Rectification Costs;

(e) Icon's Future Rectification Costs;

(f) Group Members' Loss of Rent Costs;

(g) Group Members' Alternative Accommodation Costs;

(h) Lessees' Alternative Accommodation Costs;

(i) Licence Occupation Fees;

(j) Owners Corporation's Insurance Costs; ~~and~~

(k) Icon's Loss of Opportunity / Loss of Contract Damages;

(l) Bank Guarantee Sum; and

~~(k)~~(m) Legal Costs.

202 In installing Partial Grouting ~~failing to grout the full width of the hob between the precast panel and the hob, as required by WSP's Drawing No. 4419 S06.010[A]~~, Evolution breached the clauses of the Subcontract set out in paragraphs 187 and 192 above.

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

(a) the SOPA Liability Damages;

(b) the AAD/Ecove Liability Damages;

(c) the Plaintiffs/Group Members' Damages;

~~(a)~~(d) Icon's Incurred Rectification Costs;

~~(b)~~(e) Icon's Future Rectification Costs;

~~(c)~~(f) Group Members' Loss of Rent Costs;

~~(d)~~(g) Group Members' Alternative Accommodation Costs;

~~(e)~~(h) Lessees' Alternative Accommodation Costs;

~~(f)~~(i) Licence Occupation Fees;

~~(g)~~(j) Owners Corporation's Insurance Costs; ~~and~~

~~(h)~~(k) Icon's Loss of Opportunity / Loss of Contract Damages;

~~(i)~~(l) Bank Guarantee Sum; and

(j)(m) Legal Costs.

Evolution's breach of its duty of care to Icon

Evolution's duty of care

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

204A In the above circumstances and circumstances where Evolution was engaged by Icon to carry out the Evolution Work, Icon was also owed "Evolution's duty of care" (as that term is defined in WSP's Amended Third Cross-Claim List Statement.

205 If Evolution did not design the subcontract works or carry out the Evolution Work by taking the precautions set out in 206A and 206C below, with reasonable care and skill, there was a risk of harm that the Building might suffer structural damage and Icon would suffer loss and damage.

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

Evolution's breaches of duty

206A Having regard to Evolution's Scope of Works to design, manufacture and install the precast panels, Evolution breached its duty of care to Icon:

Particulars

(i) In the event, which is not admitted, that Evolution's shop drawings showed Partial Grouting:

A. Designing a connection detail between load-bearing precast panels and concrete hobs which only required Partial Grouting;

B. Failing to expressly raise with Icon and WSP that Evolution was proposing to change WSP's Full Grouting to Partial Grouting;

C. Having received WSP's drawing 4419 S06.010 [2] (showing Full Grouting) on 26 July 2016, circulating its detail standard shiplap details, which only showed Partial Grouting, on about 29 August 2016;

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

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

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

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

(3) Circulating, on 21 September 2016, drawing DE01 Rev 2 showing Partial Grouting;

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

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

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

206B 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.

206C In further breach of Evolution's duty of care to Icon, Evolution:

(a) failed to check its design of the connection detail between the load bearing Panel C1012 and the concrete hob;

- (b) failed to alert WSP to the matters in paragraph 206B 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.

206D Had Evolution alerted WSP to the in situ failures at this time:

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

 - (i) contrary to WSP's FC Drawing S06.010 [A], Evolution had not grouted to full width the joints between the hobs and the precast panels;
 - (ii) Evolution had failed to install reinforcement in the panel as set out in paragraph 206A 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) the Opal Tower residents would not have been evacuated;
- Icon would not have suffered the loss and damage alleged in paragraph 119 of the Cross-Claim and would not be liable to the plaintiffs, the Group Members, SOPA and AAD/Ecove as alleged in paragraphs 116, 116A and 116B of the Cross-Claim.

Evolution's additional breaches of duty

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

207A Alternatively, a reasonable person in the position of Evolution would have expressly raised with WSP, that Evolution intended to change WSP's design, and sought WSP's advice about it.

208 In the event (which is ~~not admitted~~denied) that ~~the Evolution's sShop dDrawings 1 and Evolution Shop Drawing 2~~ indicated grout to be placed on the inner portion of the hob only, in

issuing the ~~m Evolution Shop Drawing 1 and Evolution Shop Drawing 2~~, Evolution breached its duty of care to Icon, and was, by reason of s 5B CLA, negligent.

208A Further, it failed to expressly raise the proposal with WSP, and failed to seek WSP's advice about it, and was, by reason of s 5B of the CLA, negligent.

Loss and damage

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

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

Evolution's misleading or deceptive conduct

The shop drawing breaches

209A In issuing its standard shiplap details on 29 August 2016, its shop drawing DE01 Rev P1 on 8 September 2016, and its shop drawing DE01 Rev P2 on 21 September 2016, Evolution represented, in trade or commerce, that those details and drawings:

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

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

(the shop drawing representations).

209B 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.

209C 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.

209D Because of the breaches, Icon has suffered and will suffer loss or damage.

Particulars

(i) WSP repeats paragraph 215 below.

The certification breaches

209E 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.

209F 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.

209G The conduct in paragraphs 209E and 209F above amounted to representations, in trade or commerce, that the precast panels had in fact been manufactured in accordance with AS 3600, AS 3610, AS 3850, WSP’s FC Drawings, and Evolution’s approved shop drawings (**the certification representations**).

209H The certification representations were misleading or deceptive, and false or misleading, in breach of s. 18 of the ACL and s. 29(1)(b) of the ACL, because, as pleaded in paragraph 58(a) of the Plaintiffs’ List Statement and 38(a) of SOPA’s Cross–Claim, the precast panels were manufactured of concrete which had a compressive strength less than the compressive strength specified in the FC Drawings, and, as pleaded in paragraph 206A(iii) above, Panel C1012 had not been manufactured with appropriate reinforcement.

209I Icon relied on the certification representations by allowing the precast panels to be installed, or alternatively, allowing them to remain in situ.

209J 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.

209K In paragraph 61 of the Plaintiffs' List Statement, the plaintiffs allege that the understrength concrete in the precast panels, and the inadequate reinforcement in Panel C1012, caused damage to Opal Tower, including the Observed Damage.

209L If those allegations are true, then because of the breaches, Icon has suffered and will suffer loss or damage.

Particulars

(i) WSP repeats paragraph 215 below.

~~210 In issuing Evolution Shop Drawing 1, Evolution represented that Evolution Shop Drawing 1 had been prepared with reasonable care and skill, and was consistent with WSP's Drawing No. 4419 S06.010[A] (the First Evolution Shop Drawing Representation).~~

~~211 In issuing Evolution Shop Drawing 2, Evolution represented that Evolution Shop Drawing 2 had been prepared with reasonable care and skill, and was consistent with WSP's Drawing No. 4419 S06.010[A] (the Second Evolution Shop Drawing Representation).~~

~~212 In the event, which is denied, that Evolution Shop Drawing 1 and Evolution Shop Drawing 2 indicated grout to be placed on the inner portion of the hob only, the First Evolution Shop Drawing Representation and the Second Evolution Shop Drawing Representation (together, Representations), which were made in trade or commerce, were false.~~

~~213 By making the false Representations, Evolution engaged in misleading or deceptive conduct in contravention of s 18 of the ACL.~~

~~214 Had Evolution not made the Representations, the hobs would not have been constructed with grout on the inner portion of the hobs only, and the structural damage would not have occurred.~~

215 In the circumstances pleaded above, Icon has suffered and will suffer loss or damage because of Evolution's misleading or deceptive conduct done in contravention of s 18 of the ACL and/or because of Evolution's false or misleading representations made in contravention of s 29(1)(b) of the ACL, and is entitled to damages pursuant to s 236 of the ACL, comprising:

(a) the SOPA Liability Damages;

(b) the AAD/ECOVE Liability Damages;

(c) the Plaintiffs/Group Members' Damages;

- ~~(b)~~(d) Icon's Incurred Rectification Costs;
- ~~(e)~~(e) Icon's Future Rectification Costs;
- ~~(d)~~(f) Group Members' Loss of Rent Costs;
- ~~(e)~~(g) Group Members' Alternative Accommodation Costs;
- ~~(f)~~(h) Lessees' Alternative Accommodation Costs;
- (i) Licence Occupation Fees;
- (j) Owners Corporation's Insurance Costs; ~~and~~
- ~~(g)~~(k) Icon's Loss of Opportunity / Loss of Contract Damages;
- (l) Bank Guarantee Sum; and
- (m) Legal Costs.

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

Evolution is a concurrent wrongdoer

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

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

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

~~218~~ and is thereby a "concurrent wrongdoer" for the purposes of s 34(2) CLA.

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

220 In the premises, Icon's claim against WSP for misleading or deceptive conduct under s 236 ACL is a claim for economic loss or damage to property caused by conduct that was done in contravention of s 18 ACL, and therefore an "apportionable claim" within the meaning of s87CB(1) of the CCA.

221 By reason of the matters referred to above, to the extent that Evolution's breaches caused Icon's loss and damage. Evolution is a person;

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

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

~~221.~~ and is thereby a "concurrent wrongdoer" for the purposes of s 87CB(3) CCA.

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

Traino

223 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**).

224 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).

225 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, Icon would suffer loss and damage.

226 In the above circumstances Traino owed Icon a duty to exercise reasonable care in the supply and placement of concrete in the hobs (**Traino's duty of care**).

227 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.

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

229 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 Icon, failed to draw that to the attention of Icon and WSP prior to construction of the hobs.

230 In the premises, Icon’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.

231 By reason of the matters referred to above, to the extent that Traino’s breaches caused Icon’s loss and damage, Traino is a person:

(a) whose acts or omissions caused Icon’s loss or damage, and

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

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

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

233 In the premises, Icon’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.

234 By reason of the matters referred to above, to the extent that Traino’s breaches caused Icon’s loss and damage, Traino is a person:

(a) whose acts or omissions caused the Icon’s loss or damage, and

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

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

235 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.

FAILURE TO MITIGATE

236 To the extent that SOPA is liable for the Plaintiffs/Group Members’ Damages, then SOPA is entitled to an indemnity from AAD/Ecove in relation to those damages, and AAD/Ecove are in turn entitled to an indemnity from Icon in relation to those damages.

237 By failing to offer to indemnify SOPA/AAD/Ecove, and take over conduct of their defences, Icon has failed to mitigate its loss, and WSP should not be liable to Icon for any amount of the

legal costs of SOPA/AAD/ECOVE which form part of the SOPA Liability Damages and the AAD/ECOVE Liability Damages.

WAIVER OF SUBROGATION / CIRCUMSTANCES OF ACTION

238 Liberty Mutual Insurance Company (**Liberty**) is and was at all relevant times:

- (a) a company incorporated in accordance with the laws of Massachusetts, United States of America;
- (b) a corporation that can sue and be sued in its corporate name and style; and
- (c) a diversified global insurer engaged in the business of (among other things) providing property and casualty insurance in Australia.

The 2015/16 Liberty Policy

239 On or about 18 September 2015, Icon and the Icon Group and Liberty (through their respective agents) agreed the terms of the 2015/16 Liberty Policy.

Particulars

The Liberty Policy was partly in writing and partly implied. To the extent that it was in writing it was comprised of a document entitled ‘Chase Underwriting Third Party Liability Policy’ with policy number 438396 issued to Icon Co Nominees Pty Ltd and naming Icon and various other members of the Icon Group (including Icon Co and Kajima) as the ‘Insured’ and Chase (for and on behalf of Liberty) as the ‘Insurer(s)’ (**Liberty Policy Wording**). To the extent that it was implied, it was implied by law and in fact in order to give business efficacy to the dealings between the parties.

240 The Liberty Policy contained express written terms:

- (a) Insurer(s) agree to indemnify the Insured in respect of all amounts which the Insured shall become legally liable to pay in respect of:
 - (i) Personal Injury;
 - (ii) Property Damage;
 - (iii) Interference with traffic or to property or the enjoyment of use thereof by obstruction, trespass, loss of amenities, nuisance,

happening during the Period of Insurance as a result of an Occurrence in connection with the Insured's Business (the Liberty Policy Insuring Clause 1);

(b) Insurer(s) agree to defend at their expense in the name of and on behalf of the Insured, any claim or suit against the Insured to recover compensation in respect of and/or arising out of Occurrences covered hereby (Liberty Policy Insuring Clause 2);

(c) Insurer(s) agree to pay in addition to the Limit of Liability expressed in the Schedule... all expenses incurred by or with the permission of Insurer(s) for investigation, negotiation and defence of claims in suits (Liberty Policy Insuring Clause 3.2);

(d) Insured means:

(i) the Insured named in the Schedule; and/or

(ii) joint ventures (incorporated or not) in which the Insured is a co-venturer and is responsible for arranging insurance; and/or

(iii) principals and/or owners; and/or

(iv) sub-contractors engaged by any of the above; and/or

(v) lenders and/or financiers for their respective rights and interests; and/or

(vi) directors, officers and employees of any of the above but only in respect of the Business and/or Activities of the Insured; and/or

(vii) manufacturers and suppliers, but only in relation to their manual on-site activities; and/or

(viii) architects, engineers and other professional consultant, but only in relation to their manual on-site activities; and/or

Any other company for which the Insured assumes management together with all other parties for whom the Insured is required under contract or any other legally binding agreement to provide insurance protection are also included as an Insured;

Particulars

Definitions in the Liberty Policy Wording at page 16.

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

Particulars

Definitions in the Liberty Policy Wording at page 17.

(f) Occurrence means an event, or continuous or repeated exposure to conditions, which results in:

(i) Personal Injury suffered or alleged to have been suffered by any person or persons;

(ii) Property Damage;

provided the Insured did not intend that such injury or loss would result.

All exposure to substantially the same general conditions shall be deemed one occurrence;

Particulars

Definitions in the Liberty Policy Wording at page 16.

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

Particulars

Definitions in the Liberty Policy Wording at page 16.

(h) Insured's Business means:

(i) All of the Insured's businesses, occupations and/or activities as described in the Schedule;

(ii) the provision of canteen, social, sports, welfare, organisation or child minding, first aid, fire or ambulance services;

(iii) private work undertaken by employees of the Insured for any director senior executive of the Insured;

(iv) plant and equipment owners, operators and/or hirers;

(v) property owners, occupiers, lessees, lessors and/or developers;

and or other incidental and associated operations, trades and activities;

Particulars

Definitions in the Liberty Policy Wording at page 15 and the Insured's businesses, occupations and/or activities are described in the Schedule (under the heading 'Insured's Business') as:

Principally, all business undertakings and activities of the Insured including, but not limited to builders, engineers, construction contractors, project managers, construction managers property developers, plant and equipment, owners/operators and hirers, property owners and occupiers, lessees, and lessors; and all incidental and associated operations, trades, businesses and activities, including the provision of canteen, social, sports, welfare organisation or first aid facilities, fire or ambulance services, relative to the above.

(i) The Period of Insurance for the Liberty Policy was 20 September 2015 at 4pm to 20 September 2016 at 4pm;

(j) a term that:

subject to written instructions from the Insured to the Insurer(s) prior to expiry of the Period of Insurance, this Policy will continue in full force and effect at terms and conditions prevailing immediately prior to expiry for all incomplete contracts as at the date of expiry until completion of those contracts, including any testing and/or defects liability and/or maintenance periods. The Insured is required to provide the Insurer(s) with a list of contracts requiring Run Off and additional premium is to be calculated on expiring rates applied to value of works declared for completion of projects after expiry of the Period of Insurance (Liberty Policy Condition 15).

Particulars

Condition 15 of the Liberty Policy Wording.

(k) a term that each of the parties comprising the Insured shall for the purposes of the Liberty Policy be considered as a separate and distinct unit and the words "the Insured" shall be considered as applying to each such persons in the same manner as if a separate Policy had been issued to each of them in their name alone and Insurers waived all rights of subrogation or action which they may have or acquire against any of such persons;

Particulars

Condition 5 of the Liberty Policy Wording.

The Incident

241 On 24 December 2018, damage occurred and was visually identified in the Building in a precast panel and hob at Level 10, 10C-14.5.

242 On 24 December 2018, all residents were evacuated from the Building under the instruction of emergency services.

243 On 25 December 2018, all residents except for residents in 51 apartments were permitted to reoccupy the Building.

244 On 27 December 2018, further damage was identified in a precast panel and hob at Level 4, 4A-10.5.

245 On 27 December 2018, WSP directed all residents to evacuate the Building which process was completed on or about 28 December 2018.

246 The damage identified in the Building on and from 24 December 2018 included the following:

(a) damage on level 4 in the form of:

(i) spalling and cracking of a hob and a precast panel at Level 4, 4B-0.5; and

(ii) spalling and cracking of a hob and a precast panel at Level 4, 4A-10.5,

(Level 4 Damage):

(b) damage on level 10 in the form of:

(i) spalling and cracking of a hob and a precast panel at Level 10, 10C-14.5; and

(ii) vertical displacement and cracking of the slab on level 10 (in the vicinity of the hob and precast panel at Level 10, 10C-14.5),

(Level 10 Damage): and

(c) damage on level 16 in the form of:

(i) cracking of a precast panel at Level 16, 16B-0.5, above columns C2 and C22;

(ii) cracking of an in-situ wall at Level 16, 16C-5.5, above columns C9 and C40;
and

(iii) cracking of a precast panel at Level 16, 16A-10.5, above columns C16 and C34,

(Level 16 Damage).

247 The Level 4 Damage, Level 10 Damage and Level 16 Damage is together referred to as the "Observed Damage".

Icon's entitlement to indemnity from Liberty

248 In December 2015, Icon invoked Condition 15 of the 2015/16 Liberty Policy, and thereby obtained insurance cover from Liberty in terms of Condition 15 for the Head Contract and the

Opal Tower Development in accordance with the terms and conditions of the 2015/16 Liberty Policy, up to and including the end of any testing and/or defects liability and/or maintenance periods under the contracts which Icon entered into and under which Icon performed work in connection with the Head Contract and Opal Tower Development, and thereby up to and including at least 24 and 27 December 2018.

Particulars

See paragraph [351] of the Full Federal Court Judgment.

249 Icon, Icon Co and Kajima are each ‘Insureds’ within the meaning of the 2015/16 Liberty Policy.

Particulars

See the Definition of "Insured" in the Schedule to the Liberty Policy Wording.

250 The Observed Damage is damage to and/or destruction of tangible property constituting ‘Property Damage’ within the meaning of the Liberty Policy.

251 The Observed Damage reflected or was the result of an ‘Occurrence’ in connection with the ‘Insured’s Business’ within the meaning of the 2015/16 Liberty Policy that occurred within the period of cover of the 2015/16 Liberty Policy.

Particulars

See paragraph [351] of the Full Federal Court Judgment

252 The claims for loss and damage that:

- (a) the plaintiffs and Group Members make against Icon in this proceeding;
- (b) SOPA makes against Icon in SOPA’s Cross-Claim;
- (c) AAD and Ecove make against Icon, Icon Co and Kajima in the Fifth Cross-Claim, (collectively the **Third Party Claims**).

are claims in respect of ‘Property Damage’ within the meaning of the 2015/16 Liberty Policy on the basis that they are ‘in respect of’:

- (d) the Observed Damage which constitutes ‘Property Damage’ within the meaning of the 2015/16 Liberty Policy; and/or
- (e) economic loss suffered consequent upon the Observed Damage which constitutes ‘Loss of Use’ and therefore ‘Property Damage’ within the meaning of the 2015/16 Liberty Policy.

253 By reason of the matters pleaded above, Liberty is liable to indemnify Icon, Icon Co and Kajima against:

(a) the costs associated with the investigation, negotiation and/or defence of the Third Party Claims, including Icon's legal costs and expenses associated with this proceeding and any legal costs awarded against Icon in this proceeding under Insuring Clauses 2 and 3.2 and 3.3 of the 2015/16 Liberty Policy; and

(b) any amounts which Icon, Icon Co and/or Kajima shall become legally liable to pay in respect of the Third Party Claims up to the policy limit of the 2015/16 Policy under Insuring Clause 1.1 of the 2015/16 Liberty Policy,

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

254 Icon and the Icon Group have sought indemnity from Liberty in respect of the Liberty Indemnified Amounts.

Particulars

Austbrokers (acting on behalf of Icon and the Icon Group) first informed Chase (as agent for Liberty) of the cracking incident at the Building on 24 December 2018. Icon also refers to an email sent by Liberty to Austbrokers (acting on behalf of Icon and the Icon Group) on 15 February 2019; a letter sent by Liberty to Chase (and sent on by Chase to Austbrokers) dated 4 June 2019; a letter from K&L Gates (solicitors for Icon) to Liberty dated 18 June 2019 and a letter from Lander & Rogers (solicitors for Liberty) to K&L Gates dated 25 June 2019. See also the letter from K&L Gates (solicitors for Icon) to Lander & Rogers (solicitors for Liberty) dated 23 July 2021.

255 Liberty has, wrongfully and in breach of the 2015/16 Liberty Policy:

(a) refused to indemnify (and has intimated that it will continue to refuse to indemnify) Icon and the Icon Group in respect of the Liberty Indemnified Amounts;

(b) failed to defend the Third Party Claims at its expense and in the name of and on behalf of Icon, Icon Co and Kajima,

(together the **Liberty Breaches**).

Particulars

See the particulars to paragraph [254] above. See also Liberty's defence to the claim brought by Icon against Liberty in the Federal Court Proceeding.

256 By reason of the Liberty Breaches, Icon, Icon Co and Kajima have suffered loss and damage and may suffer further loss or damage in the future.

Particulars

The loss and damage that has been suffered is equal to the Liberty Indemnified Amounts paid by Icon, Icon and Kajima to date being those associated with the investigation, negotiation and/or defence of the Third Party Claims.

The loss and damage that may be suffered in the future is equal to any Liberty Indemnified Amounts which Icon, Icon and Kajima are legally required to pay in the future including those associated with the investigation, negotiation and/or defence of the Third Party Claims and any awards of damages made against Icon, Icon Co and/or Kajima in respect of the Third Party Claims.

WSP's entitlement to indemnity from Liberty

257 WSP is an 'Insured' on the Liberty Policy, because it was a sub-contractor to Icon.

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

Particulars

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

259 Further, the allegations against WSP in paragraphs 67AE to 67AK of the Plaintiffs' List statement, and the allegations against WSP in paragraphs 156 to 164 of the Cross-Claim, relate to WSP's manual on-site activities, such that WSP is an 'Insured' on the Liberty Policy, in respect of those allegations.

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

261 The Observed Damage reflected or was the result of an 'Occurrence' in connection with the 'Insured's Business' within the meaning of the 2015/16 Liberty Policy that occurred within the period of cover of the 2015/16 Liberty Policy.

Particulars

WSP's business as an engineer.

262 The claims for loss and damage that:

- (a) the plaintiffs and Group Members make against WSP in this proceeding;
- (b) SOPA makes against WSP in SOPA's Cross-Claim;
- (c) Icon makes against WSP in the Cross-Claim;
- (d) Evolution makes against WSP (collectively the **Third Party Claims against WSP**), are claims in respect of 'Property Damage' within the meaning of the 2015/16 Liberty Policy on the basis that they are 'in respect of':
- (e) the Observed Damage which constitutes 'Property Damage' within the meaning of the 2015/16 Liberty Policy; and/or
- (f) economic loss suffered consequent upon the Observed Damage which constitutes 'Loss of Use' and therefore 'Property Damage' within the meaning of the 2015/16 Liberty Policy.

263 By reason of the matters pleaded in above, Liberty is liable to indemnify WSP against:

- (a) the costs associated with the investigation, negotiation and/or defence of the Third Party Claims against WSP, including WSP's legal costs and expenses associated with this proceeding and any legal costs awarded against WSP in this proceeding under Insuring Clauses 2 and 3.2 and 3.3 of the 2015/16 Liberty Policy; and
- (b) any amounts which WSP shall become legally liable to pay in respect of the Third Party Claims against WSP up to the policy limit of the 2015/16 Policy under Insuring Clause 1.1 of the 2015/16 Liberty Policy.

Waiver of subrogation / circuitry of action

264 By reason of the matters referred to above:

- (a) Icon and WSP are co-insureds on the Liberty Policy;
- (b) in the event that Liberty indemnifies Icon, which it is obliged to do, Liberty has no right of subrogation entitling it to bring or maintain an action in the name of Icon against WSP.

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

266 The matters pleaded in paragraphs 264 and 265 above need to be taken into account in determining the amount of the judgment (if any) to which Icon is entitled against WSP.

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

~~31 January 2020~~ 19 August 2021