

Supreme Court
New South Wales

Case Name: The Owners - Strata Plan No 97315 v Icon Co (NSW) Pty Ltd (No 2)

Medium Neutral Citation: [2024] NSWSC 19

Hearing Date(s): On the papers

Date of Orders: 30 January 2024

Decision Date: 30 January 2024

Jurisdiction: Equity - Technology and Construction List

Before: Stevenson J

Decision: There be no order as to the costs of the reference

Catchwords: COSTS – costs of reference – where both parties failed to establish their preferred case

Legislation Cited: Home Building Act 1989 (NSW)

Cases Cited: Australian Receivables Ltd v Tekitu Pty Ltd (Subject to Deed of Company Arrangement) (Deed Administrators Appointed) & ors [2011] NSWSC 1425
Roache v News Group Newspapers Ltd [1992] TLR 551
The Owners - Strata Plan No 97315 v Icon Co (NSW) Pty Ltd [2023] NSWSC 363
The Owners of Strata Plan No 97315 v Icon Co (NSW) Pty Ltd [2023] NSWCA 303

Category: Costs

Parties: The Owners - Strata Plan No 97315 (Plaintiff)
Icon Co (NSW) Pty Ltd (Defendant)

Representation: Counsel:
M J Smith (Defendant)

Solicitors:
Project Lawyers (Plaintiff)
MinterEllison (Defendant)

File Number(s): 2020/175890

JUDGMENT

- 1 The plaintiff is the Owners Corporation in relation to a residential strata scheme in Olympic Park known as “Opal Tower”. The defendant, Icon Co (NSW) Pty Ltd, built the building under a design and construct contract.

- 2 The Owners Corporation commenced these proceedings against Icon in July 2020 alleging the existence of various structural and non-structural defects in Opal Tower.
- 3 On 14 July 2022, the Court ordered that a number of issues be referred to Mr Steven Goldstein for determination.
- 4 During the course of the reference, the parties reached agreement in respect of all defects save for the sunshades on the façade of the building.
- 5 The hearing proceeded before the referee in relation to that issue for four days from 5 December 2022.
- 6 The referee filed his report on 3 February 2023.
- 7 The referee concluded, in summary, that:
 - (a) due to structural inadequacies, the existing installation of all sunshades was defective and in breach of the warranties contained in s 18B(1)(a), (b), (c) and (f) of the *Home Building Act 1989* (NSW); and
 - (b) the “C-Bracket Solution” advanced by Icon was the “proper rectification methodology”.
- 8 On 13 April 2023, Darke J ordered that the referee’s report be adopted.^[1] On 27 November 2023, the Court of Appeal refused to grant leave to the Owners Corporation to appeal that decision.^[2]
- 9 I am now dealing with the costs of the reference.
- 10 The Owners Corporation seeks an order that Icon pay its costs of the reference in respect of the sunshade issue. Icon seeks an order that the Owners Corporation pay 85% of its costs of the reference in respect of the sunshade issue.
- 11 At the time of the reference, Icon’s pleaded position was that it denied liability for any breach of warranty under the *Home Building Act* in respect of the sunshades.
- 12 The parties’ façade experts produced joint reports on 18 August 2022 and 28 September 2022.
- 13 In their report of 18 August 2022, the experts agreed that:
 - (a) the façade horizontal sunshades have design and/or fixing defects;
 - (b) the 150mm deep sunshades are currently unable to withstand the applicable design loads;
 - (c) the 300mm deep sunshades are currently unable to withstand the applicable design loads; and
 - (d) the 450mm deep sunshades are currently unable to withstand the applicable design loads.
- 14 Thus, early in the reference, there was no dispute that the sunshades were defective.
- 15 What continued to divide the parties was the repair work needed to address the structural issues identified by the experts, particularly in relation to the 300mm and 450mm deep sunshades.

- 16 As I have set out, the referee concluded that the “C-Bracket Solution” should be adopted. Icon first advanced that repair methodology on 7 November 2022, four months into the reference, and after the parties’ façade experts had issued two further reports.
- 17 On 21 November 2022, Icon made a settlement offer concerning the “Alleged Façade Defects”, advocating either the “C-Bracket Solution” or, alternatively, another method referred to by its expert. Icon rejected the Owners Corporation’s proposed “Stiffener Plate Method” of repairing the defective sunshades.
- 18 By the time that submissions to the referee were prepared, Icon’s position was that the “focus on this part of the reference” was on the repair scope although, until the last day of the reference, Icon advocated other repair scopes.
- 19 During his opening address to the referee, counsel for Icon said:
- “... [The parties’ façade experts] looked at the existing sunshade framework at some time and formed a view as to the structural adequacy of it all. Put another way, it wasn’t structurally adequate. So all this reference is concerned with obviously enough is the appropriate rectification solution.”
- 20 The referee concluded:^[3]
- “I note that at the hearing before me, Icon ultimately proceeded on the basis that the [C-Bracket Solution] was the most suitable and preferred option. The other options were all effectively abandoned by Icon.^[4]
- Accordingly, the parties ultimately proceeded on the basis that the only issue was whether the Hidden Bracket Solution proposed by [the Owners Corporation’s expert] or the C-Bracket Solution proposed by [Icon’s expert], should be adopted to overcome the structural deficiencies with the 300 Sunshades and the 450 Sunshades.
- Although it is not necessary for me to comment on the abandoned options, I would simply state that I agree with the decision to abandon these options as it was apparent to me that the C-Bracket Solution was a far superior solution. This is because it was much less visually intrusive than either the triangular bracket solution or the strut bracket solution. The performance solution was also unsatisfactory as it did not correct the structural deficiencies and did little more than provide a means of preventing a sunshade from physically falling from the Building in the event that failure of the existing supports occurred.
- Although both Façade Experts were initially critical of the viability of the other’s proposed rectification solution, the Façade Experts ultimately agreed that with further design development, either solution would achieve the desired structural outcome.^[5]
- ...
- Accordingly, I have proceeded on the basis that either of these solutions would, with further design development, be technically viable and would achieve the required structural outcome.”
- 21 In these circumstances, the question is who, “as a matter of substance and reality”, has “won” in relation to the sunshade issue.^[6]
- 22 Each party has achieved some measure of success. But neither party established the case for which it primarily contended.
- 23 Icon put in issue its liability in relation to the sunshades. The Owners Corporation has obtained a finding that the sunshades were defective and must be replaced.
- 24 Ultimately, Icon succeeded in relation to the question of rectification methodology but only on a basis it embraced without qualification at the last moment.

- 25 In those circumstances, “as a matter of substance and reality”, neither party has “won”.
- 26 The appropriate order is that there be no order as to the costs of the reference, with the intent that each party bear its own costs of the reference.
- 27 I so order.

^[1] The Owners - Strata Plan No 97315 v Icon Co (NSW) Pty Ltd [2023] NSWSC 363.

^[2] The Owners of Strata Plan No 97315 v Icon Co (NSW) Pty Ltd [2023] NSWCA 303 (Bell CJ, Meagher and Adamson JJA agreeing).

^[3] At pars 54-58.

^[4] The referee referred to transcript pages from Day 3 of the hearing.

^[5] The referee then referred to a further transcript page from Day 3 of the hearing.

^[6] Roache v News Group Newspapers Ltd [1992] TLR 551 at 551 (Bingham MR), cited with approval in Australian Receivables Ltd v Tekitu Pty Ltd (Subject to Deed of Company Arrangement) (Deed Administrators Appointed) & ors [2011] NSWSC 1425 at [26] (Ward J, as the President then was).