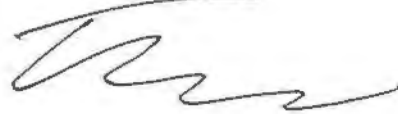


*This & the following 7 pages
is the applicant's summary of
argument for publication
pursuant to paragraph 27
of Practice Note No. SC CA1*



*30 September 2025
Solicitor for applicant*



Filed: 29 September 2025 6:36 PM



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Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00273034

TITLE OF PROCEEDINGS

First Applicant	ALL CIVIL SOLUTIONS GROUP PTY LTD ABN 69610060458
First Respondent	WOONONA-BULLI R S L MEMORIAL CLUB LTD ABN 36001059374

FILING DETAILS

Filed for	ALL CIVIL SOLUTIONS GROUP PTY LTD, Applicant 1
Legal representative	Thomas Howard
Legal representative reference	
Contact name and telephone	Benjamin Chedid 99133377

ATTACHMENT DETAILS

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

Written Submissions (2. Applicant's summary of argument_ocred.pdf)

[attach.]

All Civil Solutions Group Pty Ltd v Woonona-Bulli RSL Memorial Club Ltd

(2025/00273034)

Summary of the Applicant's argument

A. Summary of Argument of the Applicant's Case

1. The sole question (and described by the primary judge at J9 as the critical question) concerns the proper construction of s 11(4) of the *Contractors Debts Act 1997 (NSW) (CD Act)* which provides:

11 Right of recovery if principal fails to pay

....

(4) An unpaid person's right of recovery under this section is subject to any defence that the principal would have had against recovery of the debt by the defaulting contractor had there been no assignment, other than a defence based on something done by the principal after the notice of claim was served on the principal.

2. The question is this: are the defences available to be raised under s 11(4) of the CD Act constrained by s 25(4)(a) of the *Building and Construction Industry Security of Payment Act 1999 (NSW) (SOP Act)* which provides:

25 Filing of adjudication certificate as judgment debt

....

(4) If the respondent commences proceedings to have the judgment set aside, the respondent—

(a) is not, in those proceedings, entitled—

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract

....

3. That question, was, incorrectly answered at J28 in the negative, with the consequence being that a debt which is obtained under the SOP Act and which is subsequently assigned under the CD Act, has the effect of extinguishing the benefit of the "pay now, argue later" policy of the SOP Act contained in s 25(4)(a) of the SOP Act as her Honour found at J29. Her Honour should have found that the respondent was not entitled to raise any defence in relation to

matters arising under the construction contract between the respondent and the contractor engaged by the contractor (**contractual defences**). The judgment which was assigned was a debt of the kind contemplated by s 25(4) of the SOP Act.

4. The applicant's case is that the legislation, which Stevenson J held should, if possible, "*be construed in a way that achieve their harmonious interaction*"¹ should be construed such that the benefit of the policy of the SOP Act is not obliterated by virtue of the debt being assigned under the CD Act; that the combined statutory regimes operate, in effect, to place the beneficiary/assignee of a debt in the same place as the assignor without modification, such that s 25(4), in effect, applies to the debt assigned.

B. The Questions Involved

5. Whether the assignee of a debt under the CD Act, being a debt founded upon the SOP Act, maintains or loses the benefit of s 25(4) of the SOP Act, which applied to the debt before the debt was assigned.

C. Applicant's Argument

6. The facts, which are not in dispute, can be shortly stated (adopting the defined descriptions in the primary judgment):
 - (a) the Builder obtained an adjudication determination under the SOP Act and subsequently obtained judgment against the respondent Club for \$2,141,780.73 (J4);
 - (b) the applicant Subcontractor served on the Club, pursuant to s 6 of the CD Act, "*debt certificates*" issued by the District Court of NSW pursuant

¹ *Warrane Design Construct Fit-Out Pty Ltd v Woonona Bulli RSL Memorial Club Ltd* [2025] NSWSC 123 at [19], citing, inter alia, *Commissioner of Police (NSW) v Cottle* (2002) 276 CLR 62 at 73.

to s 7(1A) together with a notice of claim pursuant to s 8(1) of the CD Act, the effect of which was to assign to the applicant Subcontractor the obligation of the Club to pay money owed to the Builder under the Contract to the value of the debt certificates i.e. \$1,200,670.24: J5 and Stevenson J at [4]-[9].

(c) once assigned, the Club was obliged to pay any "*money owed*" to the Subcontractor (J15).

7. The Club did not pay the money it owed the applicant Subcontractor. The debt is outstanding.
8. The Applicant Subcontractor took proceedings to recover the debt pursuant to s 11(3) CD Act (being the proceedings below).
9. The Club raised "*contractual defences*" available to it vis-à-vis the Builder. The applicant contends that those defences are not defences which "*the [Club] would have had against recovery of the debt by [the Builder] had there been no assignment*" within the meaning of s11(4) CD Act. The primary judge rejected that contention.
10. In so finding, the primary judge erred in the following respects.
11. **First**, in finding at J29-30 that the "*pay now, argue later*" policy of the SOP Act is not replicated in the CD Act on the basis that a subcontractor's ability to recover under the CD Act depends on the existence of a liability by the principal to the head contractor under their contract. In so finding, the primary judge erred in treating a judgment obtained under the SOP Act as not one that is payable by the principal (the Club) to the contractor (the Builder) under contract. Money payable under the SOP Act is treated by the SOP Act as money payable under contract: see for example ss 8(7), 9, 10(1) and 22 of the SOP Act.

12. If the primary judge is correct, it would mean that it is inutile to assign (under the CD Act) a judgment debt obtained under the SOP Act based on an "arrangement" within the meaning of a "construction contract" as defined by s 4 of the SOP Act, because there would never be a liability under any contract and such an assigned debt could never be enforced.
13. Secondly, in finding at J31 that what is assigned to the Subcontractor is (in all cases) a chose in action which is subject to the contract between the principal and subcontractor. That is not the case in respect of a judgment debt under the SOP Act. It may well be the case if the debt assigned is founded in contract and divorced from the SOP Act. The decision *Re Summit Design & Construction* [1999] NSWSC 1136 at [12] relied upon by the primary judge was not concerned with the assignment of a debt under SOP Act nor the operation of s 25(4) of the SOP Act. As such, reliance on that decision was misplaced.
14. Thirdly, in finding as relevant at J37, the fact that the Club would have no means of recovering any sum from the Subcontractor for defective work. Although correct, the finding presupposes that the Club would be without remedy. The Club retains its rights against the Builder: s 32 SOP Act, s 19 CD Act. In other words, the Club is in the same position as if it had paid the Builder and the Builder had voluntarily paid the applicant Subcontractor. In such a situation, the Club would not be able to recover any sum from the Subcontractor for defective works. The decision of White J referred to at J38 is *obiter*, *ex tempore*, related to leave to proceed against a party in liquidation and, with respect, incorrect.
15. The finding at J36 that the provisions of the SOP Act are peculiar to the parties to a construction contract supports the applicant's construction. It is unlikely that

the legislature intended a subcontractor, in order to recover a debt created by the SOP Act and assigned under the CD Act, to be compelled to litigate “contractual defences” in respect of a contract to which it is not privy and devoid of the practical means of meeting a defence of the kind raised.

16. The relevant provision being s 7(1A) of the CD Act was introduced as part of a widespread reform to the SOP Act in 2002.² As stated in the second reading speech:³

Just over three years ago this Parliament enacted the [SOP Act]. The Act was the first of its kind in Australia. It has set a benchmark for dealing with payment problems in the building and construction industry...

Reports received by my department indicate that the Act is proving very successful in reforming these practices. But changes can be made to make the Act even more effective. The purpose of this bill is to enact those changes...

By raising in court defences such as that the work does not have the value claimed or that the claimant has breached the contract by doing defective work, some respondents have been able to delay making a progress payment for a long time. Those respondents have forced claimants to incur considerable legal costs. They have effectively defeated the intention of the Act. To overcome the problem, the bill clarifies that in court proceedings by a claimant to enforce payment of the debt due under the Act, a respondent will not be able to bring any cross-claim against the claimant and will not be able to raise any defence in relation to matters arising under the construction contract.

...

To further enhance the remedies available to a claimant, the bill incorporates an amendment to the [CD Act] to provide that the [CD Act] covers all debts arising under the [SOP Act]. The [CD Act] establishes a debt recovery procedure that allows a claimant to whom money is owed to seek payment of that money from a principal who engaged the defaulting respondent. This amendment will ensure all claimants under the [SOP Act] will be able to avail themselves of this procedure.

² *Building and Construction Industry Security of Payment Amendment Act 2002 (NSW)* ss 3-4 amending the SOP Act and inserting CDA s 7(1A).

³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 November 2002, 6541 (‘Second Reading Speech’).

17. The findings of Rees J,⁴ set out by the primary judge at J34, reveals the correct application of the provisions in issue.

18. Her Honour should have held and declared that on the proper construction of s 11(4) of the CD Act, the Club was not entitled to raise the matters referred to in paragraph 26 and Part 2 of its List Response in defence to the applicant's claim for recovery of the debt owed by the Club to the applicant.

D. Reasons why leave should be granted

19. The general principles concerning leave to appeal are well-established: *The Age Company Ltd v Liu* (2013) 82 NSWLR 268; [2013] NSWCA 26 at [13].

20. First, the application involves a question of principle: the proper construction of s 11(4) of the CD Act.

21. Secondly, the application involves an issue of general importance: there is a dearth of authorities on the CD Act and its interaction with the SOP Act. There are likely, and likely to be, other parties in the same or substantially the same circumstances. An appellate decision will be of substantial guidance for future cases.

22. Thirdly, there is a reasonably clear injustice to the applicant. If the primary judge is correct, the applicant will have lost a substantial right to enforce the debt with the benefit of s 25(4) of the SOP Act.

23. Fourthly, an appellate decision will address the clash between the primary judgment and the *obiter* of Rees J, set out by the primary judge at J34.

⁴ *Woonona-Bulli RSL Memorial Club Ltd v Warrane-Design Construct Fit-Out Pty Ltd (No 2)* [2025] NSWSC 365 (Rees J) at [39]-[40].

E. Costs

24. The applicant accepts that an order for costs in favour of the respondent should be made if the application is refused.

F. Absence of the Public

25. The applicant consents to the application for leave being dealt with in the absence of the public and the attendance of any person.

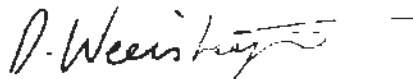
G. Concurrent Hearing

26. The application should be heard with argument on the appeal. The issue is entirely one of statutory construction. It is anticipated that argument on any appeal would be short – in the order of 1.5 hours and not materially longer than argument on the leave application. It is efficient to have a concurrent hearing.

H. Authorities

27. *Building and Construction Industry Security of Payment Act 1999* (NSW).

28. *Contractors Debts Act 1997* (NSW).



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29 July 2025