[Annotated with Blue and Black book references]

Filed: 23 June 2025 2:18 PM

D00026AQ5G

Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00156488

TITLE OF PROCEEDINGS

First Appellant	CBEM HOLDINGS PTY LTD ABN 27628224126 ACN 628224126
First Respondent	SUNSHINE EAST PTY LTD ACN 635418870
Second Respondent	Chunlin Fan

FILING DETAILS

Filed for	CBEM HOLDINGS PTY LTD,Appellant 1
Legal representative	Jock Hamilton
Legal representative reference	
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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 (CBEM Appeal Submissions (23 June 2025).pdf)

[attach.]

CBEM HOLDINGS PTY LTD v SUNSHINE EAST PTY LTD & ANOR
NSWCA Proceedings 2025/00156488

APPELLANT'S SUBMISSIONS

A. Introduction

1. This appeal concerns a contract between the Appellant (**CBEM**) and the Respondents pursuant to which CBEM undertook to perform civil and stormwater works at a residential property owned by the Second Respondent (**Trade Contract**).[1] CBEM performed those works until the Respondents repudiated the Trade Contract.[2] Blue v1 / 91

2. Importantly for the purposes of this appeal, under a separate but related agreement (**Management Contract**), the Respondents appointed ASY as the Construction Manager, being the Respondents' agent for the purpose of administering the Trade Contract.[3] Blue v1 / 60

3. As the Respondents' agent, it was ASY's role to (amongst other things) monitor the work of the trade contractors, review and process all applications for payments made by Trade Contractors (including CBEM) and make recommendations to the Respondents for the issuing of certificates, including payment certificates.[4] Pursuant to clause 9 of the Management Contract, the Respondents were required to make prompt payments to the trade contractors (including CBEM) in accordance with ASY's recommendation.[5]

4. There was no provision in the Trade Contract (as there sometimes is in construction contracts) for payments to be made on account. Rather, each payment claim was to be

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[1] *Sunshine East Pty Ltd v CBEM Holdings Pty Ltd* 28 March 2025 (**J**), [7]; Red 42.

[2] J[7] (Red 42); J[36] (Red 51).

[3] J[6]; Red 41-42.

[4] J[25]; Red 48.

[5] J[26]; Red 48-49.

contemporaneously and finally assessed by ASY, and either approved for payment or disputed.[6]

5. It was in the above context that ASY approved, and the Respondents then paid to CBEM, a total amount of $511,051.90 (excl GST) for works performed and assessed pursuant to progress claims 1 to 3 inclusive. Further, the Respondents were compelled under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOPA**) to pay to CBEM a further amount of $382,683.99 (excl GST) in respect of PC4.

6. The Respondents commenced proceedings in the District Court asserting an "*Overpayment*", calculated as the difference between the total amount the Respondents paid CBEM less the amount the Respondents' quantity surveyor opined was the "*Contract Work Value*" or the "*Market Value*".[7] At the end of the trial, the juridical basis for the Respondents' entitlement to the asserted "*Overpayment*" was said to be by reason of CBEM's misleading or deceptive conduct in respect of payment claims 2 and 3, or in the alternative, by reason of mistake.[8]

B. Ground 1

7. In four separate paragraphs (J[15]; [23]; [70]; [83]), the primary judge stated that CBEM either conceded that it claimed for work that it had not performed, or that it was paid more than the value of the work performed by it pursuant to the Trade Contract. No such concession was made by CBEM, either orally or in writing.

8. What was accepted by CBEM was that it was paid an amount which exceeded the quantity surveying experts' *retrospective* opinion of the value of the work performed. That concession was made in circumstances where the Trade Contract expressly required final contemporaneous assessments of work performed,[9] and the evidence demonstrated

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[6] J[28]-[29]; Red 49.

[7] Red 14-15. See 2FASOC at Red 32.6-32.7

[8] Red 16. The Court will observe that the Respondents did not plead any cause of action based on "*mistake*". That the Respondents relied on a mistake was not identified until its closing submission and was not particularised until after the close of evidence; Red 33-34. See 2FASOC at

[9] Clause 10 of the Trade Contract. Blue v1 / 98

that there were proper commercial reasons for that agreement. The primary judge found – and it is not challenged - that "*weather events*" made the retrospective valuation task "*more difficult*"[10] and "*to some extent changed and potentially obscured work which [the Appellant] had performed*".[11]

9. Ultimately the primary judge's misapprehension of CBEM's position is of little direct legal relevance. However, it seems to have influenced the primary judge's approach.[12] For the avoidance of doubt, CBEM did not run below, and does not seek in this Court, to retain an unmeritorious overpayment on technical grounds. To the contrary, CBEM seeks no more than to maintain the commercial arrangement reached with the Respondents – that is to hold the Respondents to the correct and contemporaneous assessments of their own agent, ASY. The sort of retrospective assessment of value proffered by the Respondents' expert, and ultimately accepted by the primary judge, was not only legally irrelevant under the Trade Contract, but also inaccurate given the passage of time.

10. The Respondents did not lead any evidence (from ASY or otherwise) that ASY was mistaken or misled in performing its role, or that it did anything other than properly assess the value of work performed based on the information that they had at the time.

C. Grounds 2 & 3

11. At J[88] to J[128] the primary judge found that CBEM contravened section 18 of the *Australian Consumer Law* (**ACL**) and that the contravention caused the Respondents loss and damage.

12. CBEM submits that the primary judge erred in two respects.

13. *First*, the primary judge erred by mischaracterising the payment claims as constituting representations of absolute fact as to CBEM's contractual entitlement to payment in the

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[10] J[131]; Red 84.

[11] J[137]; Red 85.

[12] See for example the primary judge's reference to an apparent "tension" in CBEM's pleaded case: J[23]; Red 47.

amount stated in the payment claims (Ground 2).[13] *Second*, if – contrary to Ground 2 - the Appellant did contravene section 18, the primary judge erred in finding that the Respondents suffered loss or damage "*because of*" that conduct within the meaning of section 236 of the ACL (Ground 3).

C.1 Ground 2

14. It is trite that in determining whether the conduct in question was misleading or deceptive, it is necessary to consider that conduct from the perspective of a reasonable person in the position of the person complaining of the conduct.[14] The conduct of the person alleged to have engaged in misleading or deceptive conduct must be viewed as a whole.[15] The question is an objective one that the Court must determine for itself.[16] Whether or not the statement conveyed by the representation is one of belief or opinion, or absolute fact, is similarly to be viewed from the perspective of "*ordinary*" or "*reasonable*" audience to which the statement or representation is directed.[17] A statement by a party to a contract of a legal conclusion may frequently be nothing but an expression of opinion.[18]

15. The critical context for the purposes of determining how a reasonable person in the position of the Respondents ought to have understood what was being represented is the Management Contract and the Trade Contract.

16. In particular:

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[13] See for example J[100] where the finding as to the content of the representation found is most clearly expressed; Red 74.

[14] ***Ireland*** *v WG Riverview Pty Ltd* (2019) 101 NSWLR 658; [2019] NSWCA 307 at [65], citing ***Butcher*** *v Lachlan Elder Realty Pty Ltd* (2004]) 2018 CLR 592; [2004] HCA 60 and *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304; [2009] HCA 25.

[15] *Ireland* at [66].

[16] *Butcher* at [109].

[17] *Ireland* at [30].

[18] ***Norton*** *Property Group Pty Ltd v Ozzy States Pty Ltd (in liq)* [2020] NSWCA 23 at [87] – [100].

(a) as the heading to clause 10 of the Trade Contract states, the clause relates to payment "*claims*", that is a demand or an assertion of a right,[19] but not a statement of absolute contractual entitlement;

(b) it is true that clause 10(c) requires a payment claim to "*accurately identify*" and relate to the work "*actually done*" and to "*properly value the work*", but that requirement cannot be read in isolation;

(c) in particular clause 10(e) of the Trade Contract expressly envisages and allows for a "*dispute or issue*" as to a payment claim. That is, a payment claim cannot be fairly understood to be a document about which there can be no dispute as to entitlement, work performed or value. It is noteworthy that no submission was made that the representations in the payment claim were dishonest or not genuinely believed, and the Court expressly said it did not find any dishonesty;[20]

(d) further, that a payment claim under clause 10 of the Trade Contract could not reasonably be understood as a representation as to absolute entitlement is made plain from clause 11(a) of the Trade Contract which provides that the Principal (Respondent) is to pay the amount "*properly claimed in the payment claim or if that is disputed or adjusted the amount which is consequently admitted as being payable*". That is, clause 11(a) express envisages that a payment claim will need to be reviewed by ASY for accuracy and that parts may not be properly claimed and parts may not be admitted as being payable, but disputed.

17. The payment claims also need to be understood in the context of the Management Contract, and in particular that the Respondents were paying ASY a substantial monthly fee ($35,640) to perform services including assessing the performance of trade

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[19] Macquarie Concise Dictionary (8ed), definition of "*claim*".

[20] J[90] (Red 71); [126] (Red 82 - 83).

contractors,[21] reviewing applications for payment[22] and making recommendations to the Respondents as to payment.[23]

18. The above essential contractual context is consistent with industry experience and common sense. In particular, as the expert evidence demonstrated, even between experts there can be different methodological approaches to measurement and value of the same work. The primary judge found both experts expressed genuinely held opinions not based on inappropriate or misconceived methodologies.[24] In that context, this Court should reject the proposition that an ordinary and reasonable person in the position of the Respondents would be misled into believing that the payment claims should be understood as impeachable statements of absolute fact as to contractual entitlement.[25]

19. The logical extension of the primary judge's conclusion is that participants in the construction industry regularly engage in misleading or deceptive conduct by, despite the absence of dishonesty, by making claims which do not (as finally determined) accord with their contractual entitlements.

20. The Court should find that the payment claims made no representation which contravened section 18 and this aspect of the Respondent's case at first instance should fail.

C.2 Ground 3

21. The central causation finding appears at J[127]. The primary judge found that "*The Plaintiffs [Respondents] relied substantially on the Defendant's [CBEM's] representations, and paid the Defendant money to which it was not entitled, thereby suffering loss. Despite the involvement of ASY, but for the misleading or deceptive*

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[21] Clause 6(k)(i) of the Management Contract. Blue v1 / 68W

[22] Clause 6(l) of the Construction Management Agreement. Blue v1 / 69E

[23] Clause 9(a) of the Construction Management Agreement. Blue v1 / 70K

[24] J[132]; Red 84.

[25] See similar reasoning in *Norton* at [87] – [100].

representations in the Defendant's payment claims, the Plaintiffs would not have suffered loss.".

22. The conclusion that the Respondents relied substantially on CBEM's representations is erroneous because it was based on no evidence at all.[26] To the extent it was based on some evidence (and none can be identified), it is a finding which is "*glaringly improbable*" and "*contrary to compelling inferences*".[27]

23. In his affidavit, Mr Bi on behalf of the First Respondent asserted that "*in reliance*" on representations in the payment claims he authorised the First Respondent to pay the payment claims. The primary judge upheld an objection to that conclusory evidence.[28] The Respondents were given leave to adduce evidence of reliance in admissible form. Counsel for the Respondents sought to adduce this evidence from Mr Bi in chief (Day 1, T.65.17-T69.5). Mr Bi's evidence was, as expected, and as consistent with the contractual arrangements, that he did not rely on any representation in any payment claim, but instead relied on his project manager, Alan Young of ASY to assess the claims and make a recommendation as to payment.[29]

24. Mr Bi's evidence was expanded in cross-examination where he explained that the only person authorised to pay out money was Mr Fan (the Second Respondent)[30] and that the Respondents relied on ASY to monitor the works of the trade contractors[31] and most critically to make a recommendation as to payment.[32] Mr Bi's clear evidence was that he did not base any recommendation to pay on the content of a payment claim but "*based on ASY's recommendation*".[33]

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[26] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355, 356; [1990] HCA 3.

[27] *White Constructions Pty Ltd v PBS Holdings Pty Ltd* [2020] NSWCA 277 at [103].

[28] Day 1, T32.44-T.33.33. **Black 32V-33Q**

[29] Day 1, T67.2-.4; T68.28-.31; T68.45-T69.5. **Black 67D; 68O-P; 68V-69E**

[30] Day 1, T72.1-7. **Black 72C-F**

[31] Day 1, T74.15-17. **Black 74I-J**

[32] Day 1, T75.39-76.4. **Black 75S-76E**

[33] Day 1, T75.43-45. **Black 75U-V**

25. In re-examination, Mr Bi's evidence was even clearer. He said in response to a question from his own counsel"

> "*ASY get [sic] more experience, as he said, about this, all the construction stuff. So that is why he's our PM. When he got the invoice, he should check the things, and if anything wrong give me the suggestion …*".[34]

26. The primary judge's conclusion at J[127] that the Respondents relied "substantially" on CBEM's representations was not supported by any of the admissible evidence given in chief, under cross-examination or in re-examination.

27. The reason for primary judge's erroneous conclusion as to causation seems to be explained by the second sentence in J[127]. There the primary judge seems to have applied the "*but for*" test as the sole test for causation in a manner that the Courts have said it should not be applied.[35] The fact that a breach "*has initiated one train of events rather than another*"[36] is not of itself sufficient to establish causation. The primary judge should not have ignored the actual evidence of what caused the loss, namely a recommendation made by ASY as to an amount to pay. Simply because the payment claim initiated that "train of events" does not mean it was legally causative.

D. Grounds 4 and 5

28. It is a general principle that one party cannot maintain a restitutionary claim against another where inconsistent contractual obligations subsist in relation to the subject matter of that claim.[37] This is one aspect of a broader concern that restitutionary claims not enable parties to redistribute the contractual allocation of risks.[38]

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[34] Day 2, T90.37-43. Black 90R-U

[35] *March v Stramare* (1991) 171 CLR 506 at 516-517 per Mason CJ.

[36] *Alexander v Cambridge Credit Corporation & Anor* (1987) 9 NSWLR 310 at 333-334.

[37] ***Mann** v Paterson Constructions Pty Ltd* (2019) 267 CLR 560; [2019] HCA 32, [19] (Kiefel CJ, Bell, and Keane JJ) and [62]-[63] (Gageler J).

[38] *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 WLR 161, 166 (Lord Goff). See also *Steele v Tardiani* (1946) 72 CLR 386; [1946] HCA 21; ***Lumbers** v W Cook Builders Pty Ltd (in liquidation)* (2008) 232 CLR 635; [2008] HCA 27, [45]-[46] (Gleeson CJ) and [77]-[79] (Gummow, Hayne, Crennan, and Kiefel JJ).

29. *Lumbers* illustrates that this principle extends not only to the contracts between the parties themselves, but also to contracts between each of the parties and others; so, in that case, where the sub-contractor (Builders) sought *quantum meruit* from the owners (Lumbers), who had previously contracted with the head-contractor (Sons) which had (without Lumbers' knowledge) sub-contracted with Builders, Gleeson CJ explained (at [45]) that "[i]n considering Builders' restitutionary claim, the contractual relations between the Lumbers and Sons, and between Sons and Builders, cannot be put to one side as an inconvenient distraction" while Gummow, Hayne, Crennan, and Kiefel JJ said (at [77]) that "the legal relationship between Sons and the Lumbers cannot be dismissed from consideration". Moreover, their Honours warned (at [78]) against applying a flawed framework of analysis to restitution claims expressed at too high a level of abstraction which "creat[ed] a serious risk of producing a result that is discordant with accepted principle, thus creating a lack of coherence with other branches of the law".[39] Their Honours explained that that warning sounded in *Lumbers* in the form of two intersecting questions: *first*, did the posited framework for analysis to the facts of the case extend liability in restitution beyond the circumstances in which a claim should be available, and *secondly* was the result of that analysis "consistent with the obligations relevant parties undertook by their contractual arrangements"?

30. In the present case, the relevant contractual arrangements were between the Respondents and ASY under the Management Contract, and between the Respondents and CBEM under the Trade Contract. The two contracts contained express and implied references to one another (indeed, the Trade Contract was titled "Trade Contract - for use with Construction Management Contract").

31. There is no question as to whether the parties' relevant contractual obligations continued to subsist in respect of the subject matter of the Respondent's claim. The Management Contract remained on foot at all times. As for the Trade Contract, the primary judge held

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[39] Citing *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516; [2001] HCA 68, [73] (Gummow J); *McGinty v Western Australia* (1996) 186 CLR 140; [1996] HCA 48, p 232 (McHugh J); and Sullivan v Moody (2001) 207 CLR 562; [2001] HCA 59, [53]-[55] (Gleeson CJ, Gaudron, McHugh, Hayne, and Callinan JJ).

at J[36] (Red 51-52) that it was repudiated by the Respondents on 1 November 2022 and then terminated by CBEM. His Honour remarked at J[36] (Red 51-52) that nothing ultimately turned upon this finding. That was incorrect, however, because CBEM's entitlements to be paid under the Trade Contract accrued (and were indeed actioned by payment) prior to its termination, and therefore survived termination. This is distinct from the situation which would have obtained if the Trade Contract had been vitiated or set aside, because in that situation those rights would have been a nullity. The primary judge remarked at J[65] (Red 62) that nothing turned upon this distinction (between termination and vitiation) either. That too was incorrect because the fact that CBEM's accrued entitlements under the Trade Contract remained intact meant, in accordance with the matters identified in paragraphs 28 and 29 above, that any restitutionary claim by the respondents against CBEM needed to be consistent with those contractual entitlements which had arisen under the Trade Contract prior to termination.

32. The primary judge appears earlier at J[59] (Red 60) not to have fully appreciated the effect of the matters identified in paragraph 28 and 29 above when he observed that a contractual allocation of risk rendering "enrichment just which would otherwise be unjust" would not "preclude finding for the Plaintiffs if they establish an entitlement to restitution". That too was incorrect because a finding that the contractual regime justified the payments to CBEM would, almost by definition and in line with those matters, preclude a finding that the Respondents were entitled to restitution.[40]

33. The primary judge then observed at J[61] (Red 60) that "[o]bjectively, but for the involvement of ASY, and its contractual obligations to the Plaintiffs, and the Plaintiffs' rights and entitlements with respect to ASY, the Plaintiffs would comfortably satisfy the Court that each of its claims [in restitution] should succeed". That observation, with respect, revealed the underlying problem with the Respondents' restitutionary claims, but his Honour failed to properly act upon it. ASY's involvement and the contractual obligations between the parties (including between ASY and the Respondents, and between the Respondents and CBEM) did more than merely prevent the "comfortable

[40] See, eg, James Edelman & Elise Bant, *Unjust Enrichment* (2nd edn, Hart Publishing 2016) (**Edelman & Bant**) at 140-142.

satisfaction" of the Respondents' restitutionary claims. His Honour's observation echoed a sentiment—chastised by the plurality in *Lumbers*—which treated the parties' contractual relationships as an "inconvenient distraction".

34. Part of the relevant contractual context has already been identified in paragraphs 16 to 18 above when identifying the primary judge's error in characterising the payments claims issued by CBEM as actionable misrepresentations. Further to those matters, the following features of the parties' contractual relationships inform the relevant inconsistency of the Respondents' restitutionary claim.

35. Under the Management Contract:

Blue v1 / 68T

(a) ASY had the sole right to co-ordinate the construction of the "Works": clause 5(b);

(b) ASY was obligated to monitor CBEM "in order to:- … be reasonably satisfied that the work was being performed in accordance with the requirements of the trade contract": clause 6(k)(ii); Blue v1 / 69D

(c) ASY was obligated "to administer trade contracts on behalf of" the Respondents, which included "reviewing and processing of all applications for payment … made by [CBEM] and preparing and submitting those applications to [the Respondents] and recommending to [the Respondents], payment … in accordance with the trade contract": clause 6(l); Blue v1 / 68L

(d) The Respondents were obligated to accept responsibility "for the cost and expense and also for the accuracy … of … matters made known to [ASY] by the Project Team [including CBEM]": clause 8(g); and, Blue v1 / 69R

(e) The Respondents were obligated "to make prompt payments, in accordance with the trade contracts, directly to [CBEM] in accordance with the recommendation of [ASY]": clause 9(a). Blue v1 / 70K

36. Under the Trade Contract:

(a) CBEM was obliged to execute the works "the [ASY's] reasonable satisfaction";

Clause 1(a)(iv); Blue v1 / 97J

Blue v1 / 61-62

(b) Payment claims and payments were subject to the regime in clauses 10 and 11 (already described in paragraph 16 above)—which included provision for the review, admission, and dispute of payment claims followed by the determination of the amount payable.

37. Properly construed, the Management Contract and Trade Contract obligated the Respondents to pay CBEM, and entitled CBEM to payment from the Respondents, following ASY's recommendation that it do so. And this is how the contractual relationships functioned in practice: Mr Bi's evidence was that the Respondents relied upon ASY to assess CBEM's claims and recommend payment (see paragraphs 23 to 25 above). There was no room, within that contractual framework, for the Respondents to otherwise disagree, object, or dispute a payment so recommended. The Respondents could not, for example, refuse to make a payment recommended by ASY on grounds that they considered ASY's recommendation was inaccurate and therefore incorrect (other than according to the specific dispute provisions under the Trade Contract, which they did not do in the present case). Equally, in the present case, the Respondents cannot, having made payment pursuant to ASY's recommendation (and not engaging the dispute provisions under the Trade Contract), seek to claim it back on the basis that ASY's recommendation was allegedly incorrect and this was not known at the time—that is, there was a mistake in the nature of "sheer ignorance"[41] as to the alleged inaccuracy of ASY's recommendation.

38. The present case bears some analogy to the Privy Council's decision in ***Fairfield Sentry*** *Limited (in Liquidation) v Migani* [2014] UKPC 9. The essential facts were that the liquidators of a fund sought to recover redemptions previously paid to members pursuant to the fund's articles of association. Broadly put, those articles provided for redemptions based *inter alia* upon "the Net Asset Value [NAV] per Share" as determined by the directors of the fund, calculated by dividing the net assets of the fund by the number of issued shares subject to adjustments. The rub was that, at the time the directors had made

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[41] See, eg, *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; [1992] HCA 48 at 376 (Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ). See, further, Edelman & Bant at p 173.

their determination resulting in the distributions, 95% of the fund's assets were comprised of investments in the Ponzi-scheme run by Bernie Madoff—and so were, in reality, worthless. The liquidators' sought restitution of the redemptions on the basis that they were paid in the mistaken belief that the fund's assets were as stated by Mr Madoff, when there were in fact no such assets.

39. The liquidators' claim for restitution failed because it was inconsistent with the contractual regime comprised by fund's the articles of association which, on their proper construction, entitled the members to distributions determined by the directors regardless of whether those determinations were ultimate correct or the directors had been mistaken. Lord Sumption delivered the opinion of the Board (comprised also of Lords Neuberger, Mance, Clarke, and Toulson). His Lordship explained (at [18]-[19]):

> The basic principle is not in dispute. The payee of money "cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him": *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 408B (Lord Hope). Or, as Professor Burrows has put it in his *Restatement of the English Law of Unjust Enrichment* (2012) at §3(6), "in general, an enrichment is not unjust if the benefit was owed to the defendant by the claimant under a valid contractual, statutory or other legal obligation." Therefore, to the extent that a payment made under a mistake discharges a contractual debt of the payee, it cannot be recovered, unless (which is not suggested) the mistake is such as to avoid the contract: *Barclays Bank Ltd v W.J.* ***Simms*** *Son & Cooke (Southern) Ltd* [1980] QB 677, 695. So far as the payment exceeds the debt properly due, then the payer is in principle entitled to recover the excess.
>
> It follows that the Fund's claim to recover the redemption payments depends on whether it was bound by the redemption terms to make the payments which it did make. That in turn depends on whether the effect of those terms is that the Fund was obliged upon a redemption to pay (i) the true NAV per share, ascertained in the light of information which subsequently became available about Madoff's frauds, or (ii) the NAV per share which was determined by the Directors at the time of redemption. If (ii) is correct then, the shares having been surrendered in exchange for the amount properly due under the Articles, the redemption payments are irrecoverable.

40. As a matter of construction, the effect of the redemption terms was as per option (ii) identified by his Lordship. The NAV per share was as determined by the Directors at the time of redemption and regardless of whether that determination was correct (at [24]).

41. The principles referred to by Lord Sumption (being of British Virgin Island law but relevantly the same as English Law: at [17]) are the same under Australian law: see, eg,

Cabport Pty Ltd v Marinchek [2013] NSWCA 51, [26] (Meagher JA, Barrett JA and Tobias AJA agreeing) citing *Simms* at 695 and *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; [1992] HCA 48 at 376 (Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ).

42. In the present case, as in *Fairfield Sentry*, the issue is one of construction of the relevant contractual framework—albeit unlike *Fairfield Sentry* that framework is comprised of two agreements and not just one: the Management Contract between ASY and the respondents and the Trade Contract between the respondents and CBEM. This does not make any difference in point of analysis or principle in light of *Lumbers*. The construction issue in the present case then resolves in a similar way to that in *Fairfield Sentry*: ASY's recommendation having been made, there was no occasion for it to be revised after payment and the parties' contractual obligations and entitlements put to one side in favour of a restitutionary claim.

43. Whether this outcome is conceptually based in Ground 4 (there being no operative mistake) of Ground 5 (there being no injustice or unconscionably of retention) probably does not matter. As *Lumbers* makes clear, the relevant inquiry is not upon the posited framework of analysis (here, the existence of an "unjust factor" in form of a mistake or the existence of a "justified" basis for the payment) but instead upon whether liability in restitution extends beyond the circumstances in which a claim should be available, in the sense of being consistent with the parties' contractual arrangements. Here, the payment to CBEM was consistent with the rights and obligations of CBEM, ASY, and the Respondents under each of the Management Contract and Trade Contract. For that reason, the Respondents' restitutionary claim should have failed.

E. Ground 6

44. At J[180], the primary judge concluded the value of work which was not performed by CBEM was $452,961.44 inclusive of GST. That finding was itself erroneous, because some disputed items did not concern performance of work, but rather the appropriate calculation of value under the Trade Contract for completed works (see for example the first dispute, site establishment and supervision J[138] – [142]).

45. Putting that to one side, at J[181] – [185], the primary judge concluded that the appropriate damages for misleading or deceptive conduct and mistake was the total value of work found not to have been performed ($452,961.44 inclusive of GST).

46. However, that was not the appropriate measure of damages for either cause of action.

47. Ultimately the Respondents relied on only payment claims 2 and 3 for the purposes of both their misleading or deceptive conduct (J[97]; Red 73) and mistake (Red 33-34) cases. They did not rely on payment claims 1 or 4.

48. The Respondents led <u>no</u> evidence as to whether:

    (a) payment claims 2 or 3 were misleading or mistaken;

    (b) what additional amounts were paid in respect of either payment claims 2 or 3.

49. Rather, the Respondents elected to run and "all or nothing case" – that is they elected to run a case whereby they sought to reassess the value of the whole of the contract works in a manner divorced from their causes of action. The Respondents expert said he could have assessed incremental changes between progress claims, but he was not instructed to do so.[42]

50. The Respondents seemingly tailored their evidence to an alternate case based on recission (Red 14; Further Amended Statement of Claim [23A] – [26A]). That case was properly abandoned during the course of the trial. Left without a viable pleaded restitutionary case, the Respondents pivoted to a case based on mistake. Over the objection of CBEM, that case was permitted. However, it ultimately must fail (together with the alternative misleading or deceptive conduct case) because no evidence was led in support of any loss on those cases.[43] The Respondents did not provide the Court with any evidence, or rational basis, to assess damages on the cases it ultimately ran. Loss being a necessary

See 2FASOC

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[42] Day 3, T158.44-159.21; T160.1-.12. Black 158U-159L; 160D-H

[43] *Troulis v Vamvoukakis* [1998] NSWCA 237.

integer for both misleading or deceptive conduct and restitution by mistake, the Respondents' case ought to have been dismissed.

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23 June 2025