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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	2025/00156488

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 (submissions.pdf)

[attach.]

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

APPELLANT'S REPLY SUBMISSIONS[1]

A. Introduction

1. These reply submissions primarily address the Respondents' belated Notice of Contention, by which they now seek to justify their entitlement to restitution not on the basis of mistake or misleading or deceptive conduct (being the bases on which the case was argued before the primary judge) but on an alternative basis.

2. Before doing so, however, it is necessary to correct and clarify incorrect assertions made in the introductory parts to RS and then repeated throughout.

3. Contrary to RS [2], the Respondents did not take "action to have the ultimate contractual rights of the parties determined by the Court". Such a course was expressly disavowed by the Respondents in their closing submissions in reply.[2] Consistent with the manner in which the primary judge decided the case, the Respondents pursued causes of action for misleading or deceptive conduct and amounts "unjustly retained",[3] which was, in closing submissions, clarified (for the first time) to be based on mistake.[4]

4. Contrary to RS [3], in this appeal, CBEM does not challenge the "basic operation of the SOPA" and argue that "the Court below had no ability to make an order for restitution". The Respondents pursued two causes of action only. The primary judge decided the case based on those two causes of action. Having failed to plead, and indeed having expressly disavowed any case under the Trade Contract on the basis that the contract does not allow

[1] These submissions are in reply to those filed by the Respondents on 23 July 2025 (**RS**) and are further to those already filed by the Appellant in chief on 23 June 2025 (**ASC**)

[2] Black 400F-K.

[3] Amended Statement of Claim [26] – [29]; Red 15 – 16.

For Second Further Amended Statement of Claim, see Red 32.7.

[4] Black 375U-V.

a post-facto adjustment for overpayment,[5] it is not now open to the Respondents to seek to run such a case in its responsive submissions on this appeal.

B. The Notice of Contention

5. *First*, it is true (as asserted in the Notice of Contention) that Payment Claim 4 in the amount of $420,952.39 was not paid in the mistaken belief that CBEM had performed the work for which it claimed payment. It is equally true (although not expressly stated in the Notice of Contention, but expressly conceded below[6]) that Payment Claim 4 was not paid "because of" any misleading or deceptive conduct. As accepted (and indeed relied upon) by the Respondents themselves, the payment was made under compulsion of SOPA.[7]

6. *Second*, the consequence of the above (proper) concession must be that subject to the Respondents succeeding on their Notice of Contention, Ground 6 of the Notice of Appeal must succeed, with the consequence that the Respondents failed to prove any loss or damage, and the judgement below should be set aside.

7. Contentions 1(b) and (c) and RS [61]-[63] (which *inter alia* now say that contentions 1(b) and (c) concern "the primary cause of the overpayment") suffer from two fundamental and fatal errors.

8. *First*, it is wrong in law that mere payment pursuant to compulsory process "is enough to make" retention of money paid unjust. There is no unjust factor recognised by the law of restitution for unjust enrichment in Australia (or anywhere else, for that matter) of payment under mere compulsion. Instead, there are cases in which money is paid under compulsion of some law that is (or later held to be) invalid.[8] There are also cases in

[5] Black 400F-K; T 04/07/24; Black 233O-T.

[6] Black 409G-I.

[7] Notice of Contention 1(a).

[8] In Australia see, eg, *Redland City Council v Kozik* (2024) 418 ALR 1; [2024] HCA 7. In England, see, eg, *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL). In the United States see, generally, American Law Institute, *Restatement*

which one party is compelled by law to pay the whole or part of another's liability (such as in cases of recoupment and contribution).[9] But merely paying money under a *lawful* compulsory process without more does not create an entitlement to restitution. If it were, then it would mean that claims for restitution would incoherently stultify other parts of the law, including valid legislative schemes and entitlements. It is a fundamental principle that restitutionary claims should not do this.[10] Obviously, there is no challenge to the validity of the SOPA in this case.

9. *Secondly*, contentions 1(b) and (c) are at odds with the long-accepted view (rightly unchallenged by the Respondent in this case) that the SOPA does not create a restitutionary right as of itself.[11] If the Respondents contentions were correct then mere payment under the SOPA (being a payment made under a valid legislative scheme) would trigger a right to restitution of that payment. Every SOPA payment would be repayable in and of itself, and the legislative scheme would be effectively nullified.

10. It is orthodox and well-established that, in order to claim back money paid under the SOPA, the Respondents were required to plead and prove below that "in a final working out of **the contractual mechanisms** … a result different from that determined by the adjudicator" (emphasis added).[12] That is what the Respondents were to "argue later" (cf RS [62]), but have not done so. The Respondents led no evidence as to what, on the final working out of the contractual mechanisms, the value of the work performed pursuant to

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Third, Restitution and Unjust Enrichment (2012) vol 1 Chs 18 (Judgement Subsequently Reversed or Avoided) and 19 (Recovery of Tax Payments).

[9] See, Edelman J and Bant E, *Unjust Enrichment in Australia* (2nd edn, Hart Publishing 2016) pp 293-298. See also (Lord) Andrew Burrows, *Restatement of the English Law of Unjust Enrichment* (OUP, 2012) § 18 (pp 98-103).

[10] See, eg, *Equuscorp Pty Ltd v Haxton*; (2012) 246 CLR 498; [2012] HCA 7, [34]-[45] (French CJ, Crennan, and Kiefel JJ). See also

[11] See *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* (2006) 66 NSWLR 624; (2007) 23 BCL 59; [2006] NSWSC 874, [33]-[37] (McDougall J). This was correctly accepted by the primary judge at J[60]; Red 24M-P.

[12] *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 140 at [45] – [46]; *Ceerose Pty Ltd v Building Products Australia Pty Ltd* [2015] NSWSC 1886 at [10] – [14] per Beech-Jones J.

Payment Claim 4 (or any claim) was. The Respondents did not even plead an express or implied obligation under the contract against which the value of the work could be measured.

11. At RS [72] – [74] the Respondents propose an unpleaded basis on which the Court "may" apparently substitute its decision for that of the Construction Manager. In the absence of that assertion being pleaded below or considered by the primary judge, RS [72] – [74] should not be allowed.[13] Below, the Respondents did not challenge the Contract Manager's recommendation on the basis that it did not perform its contractual task by reference to some standard of reasonableness. Nor did the Respondents challenge the Contract Manager's recommendation on the basis that it was beyond what the Contract Manager was permitted to do according to the contracts. Had the Respondents done so, it is likely (bordering on certainty) that disclosure of the basis on which the Construction Manager assessed the claims and communicated with Mr Bi would have been sought.[14] It is far from improbable that the Construction Manager would have been called, or subpoenaed.

12. Further, RS [72] – [74] continues to elide the real point. In ***Walton*** *v Illawarra* [2011] NSWSC 1188 it was open to the Court to substitute its own decision because such a right arose on the proper construction of that contract (*Walton* [54] – [57]). The Respondents did not plead, and have not identified, any term of the Trade Management Contract which provides a corresponding right.

13. The need to focus on the "contractual mechanism" for recovery exposes the difficulty for the Respondents with regard to Payment Claims 1, 2, and 3 as outlined further below.

14. RS [66] does not properly construe cl 9 of the Management Contract, which anchors payments to (i) the "terms of the trade contracts" and (ii) "the recommendation of the Construction Manager". The relevant terms of the Trade Contract, cll 10-11, create a regime for payment which includes the resolution of disputes regarding payment claims

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[13] *University of Wollongong v Metwally* (1984) 158 CLR 447; [1984] HCA 74.

[14] Black 74Q- 75G.

in accordance with cl 10(e). Clauses 10(a) and 11(b) provide for the Construction Manager's role in that process.

15. RS [69] - [71] seeks to muddy the role of the Construction Manager under cl 9 of the Management Contract by calling in aid the dictionary definition of "recommendation" as not being mandatory. But seeking to define "recommendation" does not assist because cl 9 is expressed in mandatory terms: "the Principal **is to make** prompt payments … in accordance with the recommendation of the Construction Manager" (emphasis added).

16. RS [75] ignores the point made by the High Court in *Lumbers*, identified in AS [28]-[29]: the Respondents are suggesting that, in considering their restitutionary claim against the Appellants, the Management Contract between the Respondents and the Construction Manager should be ignored because the Appellants were not party to that contract. That kind of reasoning was admonished in *Lumbers*. RS [44] (concerning misleading or deceptive conduct) suffers from the same vice. CBEM was not a party to the Construction Management Contract. But that does not mean that how a payment claim made by CBEM on the Respondents, which was to be assessed by the Respondents and their agent under the Construction Management Contract, is irrelevant to determining the nature of the conduct from the perspective of a reasonable person in the position of the Respondents.

17. RS [76] is wrong in fact. J[6] found that the Management Contract was between both Respondents (Sunshine and Fan) and ASY.[15] That is also the position the Respondents took in at trial in both opening and closing submissions.[16]

18. RS [77] is also wrong in fact. J[8] found that the ASY "approved payment of the first three claims". Similarly, J[96] found that there was "little scope for disputing that … the Plaintiffs … relied significantly on the advice of ASY that they should pay the first three payment claims".

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[15] Red 41V.

[16] Black 339O and 368I.

19. RS [78] further exposes the Respondents' failure to grapple with the underlying difficulty for their mistake-based claim arising from the contractual arrangements. It is not to the point whether Mr Bi was mistaken as to the value of the work (though for the reasons already explained AS [7]-[10] of the Appellant's submissions in chief, the primary judge's treatment of the issue of value was in error in any event). Rather, the point is that the Respondents paid the money pursuant to a contractual scheme (or, in the case of Payment Claim 4, a legislative scheme) which is valid and otherwise unimpugned.

20. RS [79] is similarly wrong in fact for the reasons already identified in AS [7]-[10]. The Appellants have never admitted, and their "own evidence" does not show, that they were paid for work they did not perform. The Respondents' continuing recourse to this false premise as justification for a restitutionary claim that is inconsistent with the parties' contractual arrangements and allocation of risk leads nowhere.

C. Ground 6

21. Finally, RS [28] serves to illustrate the point made by CBEM in respect of Ground 6 at AS [44] – [50].

22. The manner in which the Court below valued the work was not pleaded to have, and had, no basis under the Trade Contract, and no rational relationship to the causes of action run; namely, alleged misleading or deceptive conduct or mistake in respect of payment claims 2 and 3 only.[17] Therefore, it does not follow as asserted in RS [29] – [30] that the entirety of the value of the final Payment Claim 4 in the amount of $420,952.39 had been overclaimed. That assumes, without any evidential basis, that no work was performed between payment claim 3 and 4. That is in circumstances where the Respondents abandoned any case in mistake or misleading or deceptive conduct in respect of payment claim 4.[18]

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[17] Red 33 – 34 (for mistake); Black 409G-I (for misleading or deceptive conduct).

[18] Red 33 – 34 (for mistake); Black 409G-I (for misleading or deceptive conduct).

23. Ultimately, there was no case run which linked any alleged cause of action to the right to repayment for any part of payment claim 4.

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11 August 2025