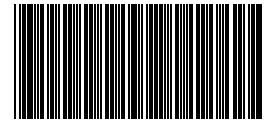




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Written Submissions

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	SUNSHINE EAST PTY LTD, Respondent 1
Legal representative	Elic Tang
Legal representative reference	
Telephone	
Your reference	23CM001

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 (2025.08.20 Respondent's Submissions on the Amended Notice of Contention.pdf)

[attach.]

CBEM HOLDINGS PTY LTD v SUNSHINE EAST PTY LTD & ANOR

NSW Court of Appeal Proceedings 2025 / 00156488

Respondents' Submissions on the Amended Notice of Contention

A. Introduction

1. These submissions are filed pursuant to orders of the Court made on 18 August 2025, in support of an application for leave to rely on an Amended Notice of Contention filed on 20 August 2025 (**ANOC**), and on the merits of the ANOC. The Appellant has reserved its rights to object to the leave being granted.

B. The proposed amendments

2. The Respondents' claim can be split into two amounts that are the subject of different claims. Firstly, there is a claim in restitution for a payment made by mistake of fact in the amount of \$32,009.05 paid by the Respondents to the Appellant in response to the Appellant's Payment Claim 3. This amount is also claimed as damages for a breach of section 18 of the ACL. Secondly there is a claim for the entirety of the amount paid in respect of Payment Claim 4 in the amount of \$420,952.39 paid pursuant to the compulsory processes of the SOPA. This was a claim made by the Respondents expressly in accordance with the principles espoused in the decisions of *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 140 (**John Holland**) at [44] – [45], and *Ceeroose Pty Ltd v Building Products Australia Pty Ltd* [2015] NSWSC 1886 (**Ceeroose**) at [14]. However, the primary judge decided this claim in favour of the Respondents on the basis restitution of a payment made by mistake of fact. It is this second claim that the ANOC deals with.
3. The amendments to grounds 1(b) and 1(c) of the ANOC are by way of clarification only and should not be contentious, and accordingly are dealt with first below. The issue raised by the amendment proposed to ground 1(a) is again meant to clarify the case that the Respondents ran in the Court below, and will seek to raise on the appeal. However, in the Appellant's submissions in reply dated 11 August 2025 (**ASR**), the Appellant disputes that this case was run in the Court below, and it is anticipated that the Appellant will oppose this amendment for that reason.

4. The Amendment to 1(b) merely clarifies that the “entitlement” was payment for work performed under the contract, rather than an entitlement to payment under the contract. This is because the Appellant was unlicensed at the time the work was performed and pursuant to section 10 of the *Home Building Act 1989 (NSW)* (**HBA**), the Appellant was and is unable to rely on the contract for payment, and must instead rely on a claim in quantum meruit. However, pursuant to the authority of *Wright v Foresight Constructions Pty Ltd* [2011] NSWCA 327 at [57]-[59], and *Mann v Paterson* (2019) 267 CLR 560, the contractual valuation of the work determines the maximum quantum meruit entitlement of the Appellant for its work, and this issue is otherwise not material to the proceedings.
5. The amendment to 1(c) is to clarify that the existing words “*further to (b) above*” that commence ground 1(c) are meant to import the fact that the payment made pursuant to the compulsory processes of the SOPA included the payment of an amount above that to which the Appellant was entitled to be paid for work performed under the contract.

The proposed amendment to, and the merits of, ground 1(a)

6. At J[180], the Court below determined that the contractual value of the work that was “*not performed by the [Appellant]*”, was \$452,961.44 including GST.¹ By “*not performed by the [Appellant]*” the Court below was comparing the total value of the work that the Appellant claimed it had performed, with the total value of the work that the Court determined had actually been performed. The Appellant’s claimed total value of work performed was identified in the final payment claim issued by the Appellant, Payment Claim 4,² and also in its final position as submitted to the Court.³ Payment Claim 4 identifies the total value of work “claimed to date” was \$893,735.80 (excl GST),⁴ which is \$983,148.05 including GST.⁵ GST inclusive figures are used because this is a domestic building project paid for by a natural person. The Appellant’s payment claims were paid by the Respondents in full, so \$983,148.05 was also the total amount paid by the Respondents to the Appellant for the work. For that reason, the Court’s determination of the value of the work “not performed” by the Appellant was \$452,961.44 was also a

¹ Red 63D.

² Blue 211-212.

³ See the parties’ final positions spreadsheet at Black 411 – 418. This is the document referred to at J[13] and J[180] as “Exhibit Z1”.

⁴ Blue 212.

⁵ Black 411 – 418, at 418.

determination of the amount that the Appellant had been overpaid by the Respondents on the final working out of the entitlements of the parties.

7. By a process of subtraction, the Court determined that the total value of the Appellant's work actually performed was \$530,148.05, and as detailed in the Respondents submissions dated 23 July 2025 in relation to Appeal Ground 6, at the time Payment Claim 4 was made by the Appellant, more than \$530,148.05 had already been paid to the Appellant. Accordingly, the entirety of Payment Claim 4 was an overclaim. Indeed, the Respondents initially resisted payment of Payment Claim 4 for the express reason that the work claimed to have been performed in that payment claim had not been performed.⁶ However, the Respondents were ultimately required to pay the total amount of Payment Claim 4, \$420,952.39 plus interest, pursuant to a judgment obtained by the Appellant in reliance on the compulsory processes of the *Building and Construction Industry Security of Payment Act 1999 (NSW) (SOPA)*. In that context, the Court below should have ordered repayment of the amount of Payment Claim 4 by the Appellant to the Respondents on a final determination of the entitlements of the parties, in accordance with the principles espoused in the decisions of John Holland and Ceerose.
8. In the ASR at [1] to [4] and [11], the Appellant submits that the Respondents did not plead nor run this case in the Court below. This is wrong in fact. The Respondents raised this case in oral submissions made during the hearing,⁷ and in written submissions,⁸ and the Respondents' pleadings disclose this case, including by the pleading of:
 - (a) the "*Contract Work Value*" which is defined as the total value of the Appellant's works carried out under the Trade Contract, and expressed to be a ceiling on the amount that the Appellant could claim in quantum meruit;⁹
 - (b) the actual amount paid by the Respondents to the Appellant identified as \$985,859.48;¹⁰
 - (c) a pleading that there was an "*Overpayment*" being the amount that was paid by the Respondents to the Appellant that was in excess of the Contract Work Value;¹¹

⁶ Black 77 O to R; Black 250 P to T.

⁷ Black 233.9-29; Black 243.16 – 244.39. Note: the reference to "29(b)" at Black 243.21-26 should read "29B".

⁸ Black 371 C to 373 I; Black 376 I to O; Black 401 Q to W; Black 404 K to P.

⁹ [25] of the 2FASOC.

¹⁰ [26D] of the 2FASOC.

¹¹ [25] and [26E] of the 2FASOC.

- (d) the payment of the amount of Payment Claim 4 in the amount of \$420,952.39 made pursuant to a judgment in reliance on the compulsory processes of the SOPA (**Judgment Award**);¹²
 - (e) a claim that the Court must allow for the Judgment Award in any determination it made in the Court below;¹³ and
 - (f) further and in the alternative, a claim in restitution by reference to a common money count of money had and received, a pleading which is expressly allowed under UCPR r 14.12.¹⁴
9. Further, the parties put on extensive evidence and submissions in respect of the determination of the ultimate rights of the parties under the contract, including expert evidence from quantity surveyors valuing the work performed under the contract. Under the heading “*The value of work performed by CBEM*”, the Court carefully considered that evidence and determined the ultimate rights of the parties under the contract, firstly in relation to each work item, and finally in total.¹⁵ For example, in respect of the first work item “*Site establishment and supervision*”,¹⁶ the Appellant submitted that the value of that item was 100% of the contract amount provided, being \$43,367.50, as claimed in Payment Claim 4,¹⁷ and was “*to be determined on the proper construction of the Trade Contract – clauses 10(a) and 10(c) being relied upon.*”¹⁸ The Court also considered the Respondents’ position that the value of that work item was \$9,600.46, the work being 24% complete at completion. The Court then made a determination of the value of the work performed in respect of that item as being \$9,600.46.¹⁹ The Court below clearly considered the evidence, including the provisions of the contract, to determine the value of the work under the contract. This was then repeated for each work item claimed by the Appellant. The Court then made a determination of the total amount for work that had been claimed as completed by the Appellant but not in fact performed, in the amount of \$452,961.44. It cannot seriously be contended in that context that the Court did not determine the ultimate rights of the parties in this case.

¹² [26B] of the 2FASOC.

¹³ [29B] of the 2FASOC.

¹⁴ [29] of the 2FASOC.

¹⁵ Red 83N to 99E.

¹⁶ Red 50F.

¹⁷ Blue 211.

¹⁸ Red 50X.

¹⁹ Red 51V.

10. However, in some instances, the Respondents referred to its claim for repayment of the amount of Payment Claim 4 as a “*claim in restitution*”.²⁰ Despite this reference, it is clear that the basis of the Respondent’s claim is an order made on a working out by the Court of the ultimate entitlements of the parties. This is made clear from the numerous associated references to the decisions of John Holland at [44] – [45] and Ceerose at [14] that set out the law in this area, and express submissions that the Court was to determine the ultimate or final rights of the parties.²¹ In those instances, the reference to “restitution” in those instances was to the effect of the order sought by the Respondents, being an order for the repayment of money. As stated in John Holland at [45]:

“Section 32(3)(b) may be unnecessary, because an order in the other proceedings that the claimant pay money to the respondent will have the effect of restitution.”

11. In the alternative, if, despite the references to John Holland and Ceerose, the Respondents references to their claim as a “claim in restitution” were to exclude an order based on the ultimate rights of the parties as contended by the Appellant, it is well settled that a respondent – who is made party to the appeal whether he or she likes it or not – is not limited to raising matters on appeal matters that were agitated below.²² Instead, a respondent is entitled to seek to uphold the decision of the Court below on “*any good legal ground appearing upon the evidence, although he did not present it in the Court below.*”²³ This ground is certainly available on the evidence presented to the Court on the entitlements of the parties, and indeed, the Court below has made that determination. Accordingly, the Respondents are entitled to raise this ground 1(a) as pleaded in the ANOC now in any event.
12. Further to the above, the issue raised by the amendment to ground 1(a) of the ANOC is a purely legal issue. As held by Barrett JA in *Hannover Life Re of Australasia Ltd v Dargan* [2012] NSWCA 185 (**Dargan**), “*Points of law ... not argued below are ... particularly suited to being raised by a respondent on appeal.*”²⁴ It is clear that the

²⁰ For example, Black 233. 29 – 38.

²¹ Black 243.21 to 244.39; Black 233.24-27; Black 243.41 to 244.39; Black 371 C to 373 I; Black 376 M to N; Black 401 Q to W.

²² *Mallett v Mallett* (1984) 156 CLR 605 at 629; *Hannover Life Re of Australasia Ltd v Dargan* [2012] NSWCA 185 at [23] – [24].

²³ Per Jordan CJ in *NRMA Insurance Ltd v B & B Shipping and Marine Salvage Co Pty Ltd* (1947) 47 SR (NSW) 273 at 282 cited with approval in *Hannover Life Re of Australasia Ltd v Dargan* [2012] NSWCA 185 at [23].

²⁴ *Hannover Life Re of Australasia Ltd v Dargan* [2012] NSWCA 185 at [24].

parties agitated, and the Court below determined, the ultimate rights of the parties in relation to the work performed under the contract. Accordingly, there is no new issue of fact brought up by the proposed amendment to ground 1(a) of the ANOC, and on that basis the amendments should be allowed.

13. In addition, during the hearing, the Appellant did not restrict itself to issues that were raised in the pleadings.²⁵ Indeed, the Appellant raised defences that it did not plead, including change of position and estoppel,²⁶ and those defences were considered by the Court. The Appellant should not now be permitted to raise fine points of pleading where the issues now sought to be agitated were squarely raised by the Respondents during the hearing.

The Merits of Grounds 1(b) and 1(c) of the ANOC

14. In the context of a submission that the Appellants must independently prove unjustness over and above mistake, the plurality of the High Court in *David Securities Pty Limited v Commonwealth Bank of Australia* (1992) 175 CLR 353 (**David Securities**) recognised a rule that recovery depends on the existence of a qualifying or vitiating factor such as mistake, duress or illegality, categories of case in which the facts give rise to a prima facie obligation to make restitution, in the sense of compensation for the benefit of unjust enrichment, to the person who has sustained the countervailing detriment.²⁷ The Court went on to consider the true basis of unjust enrichment being “failure of consideration”, but found it was unnecessary to determine that question as there was a “defence” of valuable consideration available.²⁸
15. As an alternative to ground 1(a), the Respondents maintain a claim in restitution for the repayment of the money paid to the Appellant on Payment Claim 4 pursuant to the compulsory processes of the SOPA. Given this is the characterisation that the Appellant has chosen to give the Respondent’s claim, there can be no dispute that this cause of action is available to the Respondents.
16. The issue of what is the qualifying or vitiating factor in a claim for restitution of amounts paid under compulsion of the SOPA has not been decided. In the first instance decision in *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2006) 66 NSWLR 624,

²⁵ Black 3.24 - 48; Black 19.28-47; Black 94.22-45; Black 249.13 - 250.14; Black 26.44 – 268.38.

²⁶ Black 321.8-31.

²⁷ *David Securities* at 379.

²⁸ *David Securities* at 380.

McDougall J indicated that there was some room for debate as to the “*precise classification of the restitutionary right*”²⁹ involved, but said that in circumstances where there has been an adjudication found to have been erroneous that there would have been a “*total failure of consideration*” ultimately finding that a “*common money count would lie in those circumstances*.”³⁰ However, the Court of Appeal in *John Holland and Ceerose* did not determine the matter, having decided it on the grounds identified above.

17. However, to the extent it is required, the Respondents say that compulsion of payment under the SOPA, combined with the interim nature of that payment and the fact that the payment included an amount in excess of the entitlement of the recipient, is a qualifying or vitiating factor.
18. While identification of a vitiating or qualifying factor may be required, the determination of the particular factor that is the appropriate one is purely a matter of law, will depend on the determination of the Court, and if it is determined that the proper vitiating or qualifying factor is of another kind to that identified by the Respondents, this is not something that should disentitle the Respondents from the fruits of their case.
19. Further, the Respondents identified their restitution claim as a common money count for “money had and received for the [Respondents] use”. Pursuant to UCPR 14.12(1)(f), this was all that was required of them. No particulars of the Respondents’ restitution claim were ever requested by the Appellant, nor was there any application to strike out the Respondents’ pleading in that regard. Accordingly, the Appellant should not be permitted to now raise the issue of a lack of particularity in the Respondents’ claim.

Leave

20. Leave should be granted to the Respondents to rely on the ANOC, in accordance with the requirements of sections 56 – 60 of the *Civil Procedure Act 2005*, because of the following.
 - (a) The ANOC was filed on 20 August 2025, nearly three weeks prior to the hearing, and only 8 days after the filing of the original Notice of Contention on 12 August 2025 (**NOC**). This allows adequate time for the Appellant to deal with it.

²⁹ John Holland at [38].

³⁰ John Holland at [36].

- (b) There can be little prejudice to the Appellant occurring in the 8 days between the filing of the two notices, and given the time to final hearing. To the extent that there is any such prejudice, it can be cured by a costs order.
- (c) There amendments sought in the ANOC were issues that were raised by the Respondents in the Court below.
- (d) In the alternative, the issues raised by the amendments in the ANOC are purely legal in nature and as held in *Dargan*, points of law not argued below are particularly suited to being raised by a respondent on appeal.³¹
- (e) The interests of justice require the amendments be permitted, as:
 - (i) Ground 1(a) impugns the majority of the decision of the Court below, but was not raised by the Appellant as a ground in the Notice of Appeal. Having raised the issue themselves, the Respondents should be permitted to amend ground 1(a) to clarify their position and properly ventilate the resolution of that issue. Indeed, an injustice would be done if the Respondents having raised the issue, are not permitted to fully ventilate its resolution.
 - (ii) The issues raised by the ANOC are purely legal in nature and do not significantly expand upon the issues raised in the original NOC. In that regard, the issue of the ultimate rights of the parties in ground 1(a) of the ANOC is already an issue in ground 1(b) in the NOC. Further, the Court below has already determined the ultimate rights of the parties.
 - (iii) The amendments are required for the proper resolution of all the issues in dispute in the matter.
 - (iv) In circumstances where it is clear even on its own evidence that the Appellant has retained money for work it has not performed, the Respondents should be allowed to properly ventilate the issues on appeal.



Garth Campbell, Tenth Floor St James Hall Chambers, 20 August 2025

³¹ *Hannover Life Re of Australasia Ltd v Dargan* [2012] NSWCA 185 at [24].