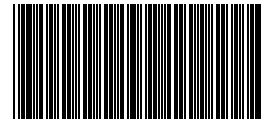




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### Written Submissions

#### 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<br>ABN 27628224126<br>ACN 628224126 |
| First Respondent  | SUNSHINE EAST PTY LTD<br>ACN 635418870                    |
| Second Respondent | Chunlin Fan                                               |

#### FILING DETAILS

|                                |                                    |
|--------------------------------|------------------------------------|
| Filed for                      | CBEM HOLDINGS PTY LTD, Appellant 1 |
| Legal representative           | Jock Hamilton                      |
| Legal representative reference |                                    |
| Telephone                      | 0433654209                         |

#### 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 Subs Notice of Contention 250825304583.pdf)

[attach.]

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

**APPELLANT'S SUBMISSIONS ON THE  
PROPOSED AMENDED NOTICE OF CONTENTION**

1. On 20 August 2025 the Respondents circulated a proposed Amended Notice of Contention.<sup>1</sup> The Appellant opposes the Respondents being granted leave to rely on it. The basis of the amended contentions, as explained in the Respondents' Leave Submissions (RLS), are embarrassing, and by reason of that, prejudicial.

**Proposed amendments to contention 1(a)**

2. RLS [8] claims the Respondents "*raised this case*" below. Exactly what "*this case*" is, however, is not explained.
3. Upon inspection, the references within RLS [8] demonstrate that the Respondents in fact disavowed a claim under contract.<sup>2</sup> RLS [9] then wrongly claims that the Court below determined "*the ultimate rights of the parties under the contract*" with the consequence that the parties' contractual rights for the purposes of a "*final working out*" are in play.
4. To the extent that the proposed amendments to contention 1(a) do no more than seek to capture the Respondents' submission at Black 233.9–.30, then they are doomed to fail. The SOPA does not confer any right of restitution itself.<sup>3</sup> The Respondents have failed to articulate any basis on which "*a final working out*" is to be based.
5. To the extent that the proposed amendments to contention 1(a) seek to introduce a case reliant on the parties' rights under contract (which was expressly disavowed below<sup>4</sup>) that

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<sup>1</sup> The original (unamended) version being circulated months after the time required by r 51.40 but not objected to. The original version was dealt with in the Appellants' Reply Submissions.

<sup>2</sup> Black 233.30–.38, which follows directly after the first reference the Respondents provided at footnote 7 to RS.

<sup>3</sup> J[60]; Red 60M-O.

<sup>4</sup> Black 400F-K.

should not be permitted. It is not to the point that a party may generally raise points of law not argued below (see RLS [11]–[12]). That does not apply where the other party may have answered that new case by adducing evidence at trial (or is otherwise prejudiced): see *Berzins v QBE Insurance (Aust) Ltd* [2014] NSWCA 196 at [57].

6. Here:

- (a) To the extent the issue is truly a point of law, it has not been articulated properly (or at all). How the Trade Contract operated in the process of “*a final working out*” is not identified. The Respondents correctly accepted below that it did not.<sup>5</sup>
- (b) To the extent there might have been “*a final working out*”, that would at least (arguably) involve identifying which parts of PC 4 exceeded the contractual measure (whatever that measure might be, which is not explained). That may have been met with evidence of the value of the parts of PC 4 according to the relevant contractual criteria (whatever they might be, which is again not explained). Because that case was not pleaded, the Respondents were deprived of any such opportunity (including the opportunity to understand it by seeking particulars so as to fill the gaps in its explanation).

**Proposed amendments to contentions 1(b) and 1(c)**

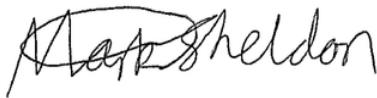
- 7. The form of these proposed amendments are not problematic *per se*. But they should fail in any event for the reasons set out in the Appellants’ Reply Submissions. RLS [14]–[19] are confused, and it is not evident what point is sought to be made by them. The suggestion in RLS [15] seems particularly problematic: it is unclear how the identification by the Appellant’s of the shortcomings in the Respondents’ case (lack of a recognised “unjust factor”) means “there can be no dispute that this cause of action is

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<sup>5</sup> Black 400T-Y.

available to the Respondents”. RLS [19] is demonstrably wrong: the need for the Respondents to identify the basis of their restitution claim loomed large below.<sup>6</sup>

8. The Appellants do, however, oppose the suggestion in RLS [4] (which is not evident on the face of the amendments themselves) that these proposed amendments somehow permit the Respondents to assert that the Appellant’s cannot rely on the Trade Contract to retain payment because of section 10 of the *Home Building Act*. There are no words in the proposed amendments which make clear how that contention is (or could be) put. The paragraphs from *Wright* cited by the Respondents stand for the opposite proposition.
9. Therefore, and to the extent the Respondents seek the amendments to make the point at RLS [4], leave is opposed on the basis that the Appellant is embarrassed by how the submission is to be put, and as it presently understands the contention, it is contrary to authority of this Court.
10. To the extent the proposed amendments add nothing beyond the existing Notice of Contention, they serve no purpose.
11. Leave should therefore be refused with costs.



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**27 August 2025**

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<sup>6</sup> Black 333H – 334K (Opening Submissions); Black 6O–Q; Black 16H–K (Oral opening); Black 349F – 351J (Closing Submissions).