

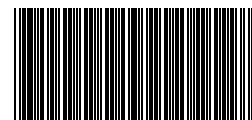
This and the following 13 pages are the First and Second Appellants' submissions for publication pursuant to paragraph 27 of Practice Note No. SC CA 1.



Christopher Nehme
Solicitor for the First and Second Appellants



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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	2025/00261209

TITLE OF PROCEEDINGS

First Appellant	Kaloriziko Pty Ltd as trustee for Ryde Combined Unit Trust ACN 604620831
Second Appellant	Camile Chanine
First Respondent	Calibre Construction Group Pty Ltd ABN 98133828832 ACN 133828832
Second Respondent	Eddie Tran
Number of Respondents	3

FILING DETAILS

Filed for	Kaloriziko Pty Ltd as trustee for Ryde Combined Unit Trust,Appellant 1 Camile Chanine,Appellant 2
Legal representative	Christopher Nehme
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 (250828 - Appellants' Submissions.pdf)

[attach.]

IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

No. 261209 of 2025

KALORIZIKO PTY LTD ATF RYDE COMBINED UNIT TRUST & Anor
(ACN 604 620 831)

First Appellant

Camile Chanine
Second Appellant

CALIBRE CONSTRUCTION GROUP PTY LTD & Ors
(ACN 133 828 832)
Respondents

APPELLANTS' WRITTEN SUBMISSIONS

A Nature of the Appellants' case

1. This is an appeal from a decision of his Honour Justice Stevenson, published on 11 June 2025. The judgment (**J1**) is at [Red 147] with the subsequent judgment regarding the correction to J1 (**J2**) at [Red 202]. On 19 June 2025, his Honour made orders including, by orders 1 and 2 that the First Appellant (**Developer**)¹ pay the First Respondent (**Builder**) \$2,137,430.86 plus interest of \$568,829.14. The orders are at [Red 144]. On 2 July 2025, her Honour Justice Peden ordered the Developer to pay the Builder's costs. The costs orders are at [Red 211].
2. This appeal concerns whether his Honour erred in finding that:
 - a. whether the Developer had "approved" and paid "variations" and, if so, had it therefore "agreed to vary the work under contract (**WUC**)", such that it was now not open to the Developer to challenge this "approval";

¹ For convenience, the terms defined in the judgment are adopted in the Appellant's submissions.

- b. the parties had agreed to vary the Contract to exclude the cost of Consultants' fees;
- c. the date for practical completion of the Contract Works had been varied; and
- d. His Honour could not assess whether the Deed (as defined below) discharged any coordinate liability between the Mortgagors and the Developer.

B The questions involved

- 3. The grounds of appeal can be conveniently grouped into the following issues:
 - a. Grounds 1 to 3 as to whether the Developer's so called "approval" and/or payment of variations was such to satisfy the terms of clause 36 of the Contract so that in fact the WUC was varied so as to preclude the Appellant from arguing that its so called "approval" was nothing more than a payment "on account" only;
 - b. Grounds 4 to 5 as to whether the parties varied the Contract to exclude the costs of consultants' fees;
 - c. Grounds 6 to 7 as to whether the parties varied the Contract to extend the date for practical completion;
 - d. Grounds 8 to 11 as to whether by entering into a **Deed** of Agreement and Set Off the coordinate liability between the Mortgagors (the Third Respondent, **Ninth Campsie** Pty Ltd and three parties related to each of the Second Appellant (Camile **Chanine**) and the Second Respondent (Eddie **Tran**)) and the Developer to the Builder was discharged by the transfer at undervalue by a related party to Tran and Ninth Campsie of the "Arncliffe Properties" to a related party of the Builder.
 - e. Grounds 12 to 15 whether there was evidence of the market value of the Arncliffe Properties and the value of those same properties in February 2024.

C Facts

4. The factual background giving rise to these issues is set out by the Primary Judge at J [1] to [11]. The critical facts are summarised as follows.
5. The Developer and the Builder entered into a Design and Construct **Contract** in 2017 under which the Builder agreed to design and construct, on land owned by the Developer in Ryde, a multi-storey, mixed use residential and commercial development comprising 4 towers and some 100 units.
6. The Contract was constituted by a Formal Instrument of Agreement, **General Conditions** in the AS 4902-2000 format and ancillary documents J [1].
7. The Contract provided for the Developer to retain 5% of the contract sum as security (**retention**) and for the retention to be paid to the Builder over a period of 12 months after the issue of a certificate of practical completion. The retention was to be “held in trust” by the Developer for the Builder.
8. The Developer breached the Contract by not holding in trust for the Builder the retention. The Builder successfully sued to recover the retention, some \$250,000 for the balance of the Contract Sum and some \$270,000 for unpaid variations.
9. The Developer disputed that certain of the work claimed by the Builder as “variations” and which the Developer paid (it claimed on account) was in fact a “variation” within the meaning of the Contract and sought to recover the amounts it had paid in respect of these “variations”, some \$689,922.00, as well as damages for delay and defective work.
10. The Primary Judge asked the parties to set out their competing contentions in relation to the disputed “variations” in a Redfern Schedule and then indicated his decision in relation to each variation J [113]. The effect of his Honour’s decision is that if the Developer were to succeed in relation to Grounds 1 to 3 of this appeal, then, consistent with the Primary Judge’s decision, it would be able to claw back \$576,291.64 in respect of the variations (numbered 7, 11, 13, and 21).

11. The Builder also sought to recover the retention from the Developer's two directors and shareholders, Chanine and Tran, based on their alleged knowing involvement in the Developer's alleged breach of trust and from a company associated with Mr Tran's daughter, Ninth Campsie. Ultimately, this claim failed.
12. The Builder obtained freezing orders against the Developer. Those orders were discharged and substituted with **Mortgages** in favour of the Builder over five properties owned by entities associated with Chanine and Tran including one owned by Ninth Campsie and one owned by Ms Tran. The Mortgages secured the judgment sought by the Respondent in these proceedings.
13. After the commencement of the proceedings, but before the final hearing, the Builder entered into the Deed with Ninth Campsie and Tran (the **Deed**). The effect of the Deed was that Ninth Campsie and Ms Tran (the **Mortgagors**) were released from their liabilities under the Mortgages in exchange for the transfer from a Related Party to Ninth Campsie and Tran of three adjoining residential lots in Arncliffe (**Arncliffe Properties**) to a Related Party to the Builder for \$5 million. From the date of the Deed, the Builder released Tran and Ninth Campsie from any "Litigation Liability" being an amount payable by them to the Builder in the Supreme Court litigation by reason of their units in the Developer.
14. The primary judge accepted that the Mortgagors and the Developer had a coordinate liability for any judgment debt J [58] (see also J2 [8]-[15]).
15. The Developer submitted that the sale of the Arncliffe Properties was at an undervalue of about \$2.9 million and that as such the effect of this undervalue transaction was as if the Mortgagors had discharged the coordinate liability so as to effectively discharge any liability owed by the Developer to the Builder. The primary judge determined that he could not assess if the effect of the Deed was to cause a discharge of that liability to the Builder.
16. As explained at [3(a)] above, insofar as the variations are concerned, the Developer's position is that the payment of any disputed variations was a payment on account only and that it did not vary the work under contract.

D The Appellants' argument

Grounds 1 to 3: The Variations

17. The Appellants' submit that:
 - a. there was an error in primary judge's finding that, having given the direction under clause 36.1 to the Builder to vary the WUC and then having priced that work under 36.4, that it was not open to the Developer to argue that the work did not constitute a "variation" J [110]; and
 - b. the error just described led to the finding at paragraphs J [111]-[112] that because the Developer had "approved" or paid the "variations" that it was now not open to Developer to challenge this approval by contending that the payment was on account only.
18. In arriving at the conclusions set out in paragraph [17] above, the primary judge did not have regard to the Appellants' contentions set out in paragraphs [34] to [38] of its closing submissions which were to the effect that on a proper construction of clauses (a) to (e) of clause 36.1 of the Contract, the WUC could not be varied unless there was strict compliance with the terms of those provisions, and therefore any "payment" made to the Respondent for work performed was "on account only".

The proper construction of clause 36

19. The Appellants submitted to the primary judge, and submit on appeal, that the proper construction of clause 36 is as follows:
20. Variation is defined as having the meaning in clause 36. Clause 36 provides:

36 Variations

36.1 Directing variations

The *Contractor* shall not vary *WUC* except as directed in writing.

The *Principal's Representative*, before the *date of practical completion*, may direct the *Contractor* to vary *WUC* by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the *Contract* (including being within the warranties in subclause 2.2):

- (a) increase, decrease or omit any part;
- (b) change the character or quality of any material or *work*;
- (c) change the levels, lines, positions or dimensions of any part of the *WUC*;
- (d) carry out additional *work*; and
- (e) demolish or remove material or work no longer required by the Principal.

If the *Contractor* is directed to carry out a *variation* pursuant to subclause 36.1(b):

- (i) the *Contractor* shall immediately and prior to the *variation* being priced, carry out the work the subject of the *variation*; and
- (ii) the *variation* will be valued under subclause 36.4 (including any delay costs if applicable) during the carrying out of the work, the subject of the *variation*.

36.2 Proposed variations

The *Principal's Representative* may give the *Contractor* written notice of a proposed variation

The *Contractor* shall as soon as practicable after receiving such direction, notify the Principal's Representative in writing whether the proposed *variation* can be effected, and shall include the following information:

- (a) the scope of the work involved in the proposed variation;
- (b) effect the Contractor anticipates that the proposed *variation* will have on the *program* (including the *date for practical completion*);
- (c) the period of time being claimed as an *EOT* in respect of the proposed variation; and
- (d) a detailed breakdown of the cost (including all warranties and delay costs, if any) of the proposed *variation*.

Upon receipt of the information from the Contractor the *Principal's Representative* may at its sole discretion:

- (a) direct the *Contractor* to provide further information;
- (b) direct the *Contractor* to carry out the proposed *variation* on the condition that the cost of the proposed *variation* will be valued under clause 36.4 (including any *delay costs* if applicable) during the carrying out of the work, the subject of the *variation*;
- (c) negotiate with the *Contractor* in relation to the scope and cost of the proposed *variation*; or
- (d) reject the terms of the *Contractor's* notification in which case the *Contractor* shall have no obligation in respect of the proposed *variation*.

36.3 Variations for convenience of Contractor

If the *Contractor* requests the *Principal's Representative* to direct a *variation* for the convenience of the *Contractor*, the *Principal's Representative* may do so. The *direction* shall be written and may be conditional. Unless the direction provides otherwise, the Contractor shall be entitled to neither extra time nor extra money.

21. Clauses 36.1 and 36.2 set out processes for contractors to follow when seeking payment for "variations": *Construction Law Volume II 2nd Ed.* Julian Baily p 664 footnote 98 and the cases cited therein. See also *Wormald Engineering Pty Ltd*

v Resources Conservations Co International (1988) 8 BCL 158 per Rogers CJ CommD at 9 and 12-13 and *Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd* (1996) 12 BCL 317 at 47 (in relation to contract requirements for a valid EOT); *Jones v Dalcon Construction* [2006] WASCA 205 at [37] and [21] and *Elvidge Pty Ltd v BGC Construction Pty Ltd* [2006] WASCA 264 at [35].

22. The processes prescribed by clauses 36.1 and 36.2 must be strictly adhered to. The reasons for this are obvious: the Principal is entitled to be protected from increases to the Contract Sum (created by these type of clauses), without adherence to specific criteria.
23. The primary judge found:
 - a. that whether work constitutes a variation depends on the nature of the direction given to the Builder by the Developer's Representative; J [94];
 - b. "direction" was defined widely to include an agreement and an approval: J [94]-[95];
 - c. the Builder prepared and submitted to the Developer's Representative a document called "Variation Cost". The Developer's representative then stamped this document approved: J [87];
 - d. the only thing that a developer could "price" was a "variation": J [99];
 - e. clause 36.4 required the Developer's Representative to price "each variation" not something which may or may not constitute a variation: J [102]; and
 - f. once pricing had occurred, then the price was to be added or deducted from the Contract Sum": J [103].
24. The appellants submitted to the primary judge, and submit on appeal that the act of pricing those so-called "variations", and "approving" those "variations" and paying those "variations" does not vary the WUC if the requirements of cl 36.1-.3 are not satisfied. These are strict compliance obligations for the reasons explained in the authorities cited at [21] above.

25. The Builder prepared Variation Cost documents in respect of each of “variations” numbered 7, 11, 13, and 21. These were approved by the Developer. The Developer contended that each of these were not “variations” within the meaning of the contract because they were not “Excluded Items”: J [117]. The primary judge agreed (J [125]-[126]), but nevertheless concluded, consistent with the above flawed analysis, that because the cost of these “variations” had been approved by the Developer, the Developer could not now contend that the payment of these variations was on account only.
26. If the Court allows the Developer’s appeal on grounds 1 to 3, then it follows (giving the primary judge’s finding described at [10] above) that the Developer should be able to recover the overpayments for “variations” numbered 7, 11, 13, and 21 from the Builder which total \$576,291.64.

Grounds 4 to 5 whether parties varied the Contract to exclude the costs of consultants’ fees;

27. As set out above at paragraph [10], the primary judge required the parties to set out their competing contentions in the Redfern Schedule: J [113]. The parties did this in respect of “variation” numbered 44 which concerned the payment of consultants’ fees.
28. The primary judge accepted the Builder’s contentions as expressed in the Redfern Schedule but gave no reasons for that acceptance.
29. This is problematic in circumstances where the Contract (which was executed after the so-called agreement) did not expressly exclude the payment of Consultants’ fees and included an entire agreement clause.
30. In the appellants’ submission, the primary judge could not reach the conclusion that he did in view of the entire agreement clause and the absence of this so-called agreement from the terms of the Contract.

Grounds 6 to 7 whether the parties varied the Contract to extend the date for practical completion?

31. The primary judge found that:
 - a. the date for practical completion had been varied by the parties because a varied contract sum appeared in a “Project Control Group” report prepared by the Respondent: J [152];
 - b. the Project Control Group Report was circulated to the Developer’s Representative and an employee described the Project Control Group Report as “acceptable”: J [153];
 - c. there was no evidence that the Developer’s Representative took issue with 23 May 202 being described in any of the documents: J [155];
 - d. the provision in the Contract providing that a variation to the Contract must be in writing and signed by each party was no barrier to the finding that the date for practical completion had been varied because the Developer’s Representative had “directed” an “extension of time”: J [158] to [159].
32. The Appellants submitted to the Primary Judge, and submit on appeal that the primary judge fell into error when he concluded that the Developer’s Representative had directed an extension of time by describing the Project Control Group Report as acceptable. The developer addressed this argument at paragraphs [107] to [110] of its closing submissions.
33. Plainly the Developer’s Representative agreed that the Project Control Group Report was acceptable, but it cannot be safely concluded that from that, she also directed an extension of time.
34. The Developer submits that if the parties wanted to vary the date for practical completion, then they had to agree in writing to vary the Contract and sign an agreement to that effect. That is to say, a variation to the time to complete the contract was not a matter available by inference. This is especially the case

when other equally likely inferences were available² (the primary one being that the Appellant's representative had not identified the change made to the completion date by the Respondent's representative).

Grounds 8 to 11 whether the coordinate liability between the Mortgagors and the Developer to the Builder was discharged by transfer of the Arncliffe Properties at undervalue to a related party of the Builder

35. The primary judge:

- a. correctly (with respect) found that the mortgagors under the Mortgages and the Developer each had a coordinate liability for the amount of any judgment obtained by the Builder: J [58];
- b. but fell into error when he determined that:
 - i. he had to assess what benefit the Builder obtained by reason of the Deed: J [64];
 - ii. the Builder also "paid" whatever the value might then have been of its claims against Tran and Ninth Campsie: J [64];
 - iii. there was no evidence before him as to the value of that claim as at the date of the Deed: J [65]; and
 - iv. he needed to assess the cost to the Builder of its surrender of its 37A *Conveyancing Act* claim against Ninth Campsie: J [66]; and
 - v. therefore, he could not assess what, if any, extent the effect of the Deed was to cause a discharge of the coordinate liability: J [67].

36. It was no part of the Appellants' case that the transfer of the Arncliffe Properties conferred on the Builder a net benefit. By considering the "benefit the Builder obtained by reason of the Deed", the primary judge misdirected himself. The primary judge should simply have only considered whether the coordinate liability that his Honour concluded existed between the Mortgagors

² *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1.

and the Appellant was discharged or reduced by the transfer of the Arncliffe Properties.

37. Answering this question did not require the primary judge to perform any cost benefit analysis of the change of position of the Builder. Nor did it require the primary judge to determine the prospects of the Builders' 37A claim. It was simply a question of determining the coordinate liability of the mortgagors and whether that liability (in respect of some of those mortgagors) was released by the undervalue sale of the Arncliffe Properties.
38. All the primary judge was required to do was determine what the coordinate liability of the mortgagors was and whether that liability was released by the undervalue sale of the Arncliffe Properties.

Grounds 12 to 15 whether there was evidence of the market value of the Arncliffe Properties and the value of those same properties in February 2024.

39. The primary judge fell into error when he:
 - a. found that there was no evidence before him of the circumstances in which Apolo Apartments purchased the Arncliffe Properties J [72];
 - b. when he concluded that there was no evidence that the sale price of \$6.92 million represented the then market value of the three sites, J [72]; and
 - c. failed to explain why he could not accept the evidence of the Developer's valuer, J [80]-[81],

and

 - d. took into account irrelevant considerations including:
 - i. the absence of information concerning the circumstances of the purchase of the Arncliffe Properties; and
 - ii. the factors that motivated each vendor to sell their home.

40. In any event, the primary judge did have evidence before him as to the circumstances of the purchase of the Arncliffe Properties: he had the names of the vendors and the amounts paid by the purchaser: J [71]. The primary judge had enough information available to him to conclude that Tran had approached three separate homeowners and negotiated to buy their homes with a view to creating a development site, J [72].
41. The primary judge had evidence, which he accepted, that the sales were arms' length transactions facilitated by Tran with three separate vendors, J [72]. The fact that these were arms' length transactions was the best evidence of value of the properties, so much so seems to have been implicitly accepted by the primary judge at J [76].

28 August 2025



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