This and the following 9 pages are the First and Second Appellants' submissions in reply for publication pursuant to paragraph 27 of Practice Note No. SC CA 1.

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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	
Telephone	0292332722
Your reference	26906

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 (251028 - Submissions in Reply_FINAL.pdf)

[attach.]

IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

2025/00261209

KALORIZIKO PTY LTD ATF RYDE COMBINED UNIT TRUST & Anor
(ACN 604 620 831)
First Appellant
CAMILLE CHANINE
Second Appellant
v

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

APPELLANTS' SUBMISSIONS IN REPLY

Grounds 1 to 3: The Variations

1 In reply to ground 3 of the first respondent's (**Calibre**) notice of contention, contrary to the Calibre's submissions, the primary judge did not err in concluding that the works the subject of variations V001, V007, V0011, V0013 and V0021 were not properly the subject of variations.

2 Variations V001, V0013 and V0021 all concern the supply and installation of the substation and street lighting upgrade works. Variations V007 and V0011, comprised "*section 73 works*" that is, water and sewerage infrastructure to be built as required by Sydney Water before it would grant a compliance certificate under s 73 of the *Sydney Water Act 1994* (NSW).

3 "*Excluded items*" means "services of infrastructure upgrades".[1] Contrary to Calibre's submissions (**RS**) at [11], that term must be construed as works that are ancillary to Work under Contract (**WUC**). The critical words in clause 2(b) are "should any work be required". Put another way, the Contract provides for the WUC, but should any work be required to perform services and infrastructure upgrades (additional to the WUC) then that work, including any work incidental to performing that work, will be in addition to the Contract Sum.

4 The Contract,[2] comprised, amongst other things, the Conditions of consent LDA2015-0654 (**Development Consent**):[3] and Architectural Plans including DWG No A1103 GA Basement 1 and DWG No A1104 GA Lower Ground dated November 2017.[4]

[1] CB 432.
[2] CB415-416.
[3] CB302-343.
[4] CB 6151-2.

5 The construction of the substation, the "upgrade to street lighting" and the section 73 works were expressly contemplated by Conditions of consent LDA2015-0654 (**Development Consent**):[5] see conditions 58,[6] 79,[7] and 133.[8] Calibre was required to comply with the conditions of consent, see clause 11.1 of the General conditions of contract for design and construct (**General Conditions**).[9]

6 Similarly:

(a) the Architectural Plans including DWG No A1103 GA Basement 1 and DWG No A1104 GA Lower Ground dated November 2017 which also formed part of the contract showed the substation;[10]

(b) the Construction Programme dated 30 June 2017 (which the parties acknowledged formed part of the contract)**,**[11] provided for the installation of the substation and the testing and commissioning of it at **CB 546,** Affidavit of Ali Mohanna dated 25 September 2023 at [12], **CB 161**, and for the sewer works.

7 The idea that even WUC could be the subject of "excluded items": RS at [11], is a wholly uncommercial construction which is antithetical to the very nature of a design and construct contract. A developer who enters a design and construct contract is outsourcing the majority of project risk to builder. The builder is given a brief (in this case a brief which included a substation, street lighting upgrades and s 73 works) and then bears the risk of designing and constructing the project within the parameters of the brief. It naturally follows that only things that are outside the brief are excluded items.

8 Further, Calibre's proposed construction of "*excluded items*", results in the word "*upgrades*" having no work to do. It assumes that because something is work in relation to services or infrastructure it is therefore excluded but only work in relation to "*services or infrastructure upgrades*" is excluded. There is no evidence that the substation or street lighting or section 73 works are upgrades or improvements to existing services or infrastructure. To the contrary, they were critical pieces of infrastructure for the development itself which were to be newly built and for which the Contract specifically made provision.

9 Finally, there is no substance to Calibre's contention that the Court should infer that the commercial purpose of clause 2(b) of the Formal Instrument of Agreement was to

[5] CB302-343.
[6] CB316.
[7] CB323.
[8] CB337.
[9] CB 449.
[10] CB 6151-2.
[11] CB 541 – 556.

exclude works which could not be priced with reasonable certainty as at the date of the Contract: RS at [12]. *First*, if that were the purpose then the parties could have expressly agreed that purpose in writing and yet they did not. *Second*, there is no evidence that the works could not have been priced with any reasonable certainty at the time of entry into the contract. This was not Calibre's first ever project. It was an experienced builder. The Court would more readily infer that Calibre knew the sorts of work required and could have built in a contingency for the construction of this work into its tender.

10 For these reasons this aspect of the primary judgement should be affirmed.

11 In respect RS [17]-[20], it would seem that Calibre may not have understood appeal grounds 1-3 and in particular that the Appellants are arguing that strict compliance with clause 36 was required before the "WUC" (work under the contract) could be varied (ie "approval of the payment claim" after the work was performed did not vary the WUC). The Respondent has not engaged with the Appellant's argument that this matter is similar to the contract considered by Rogers CJ Comm Div in *Wormald Engineering Pty Ltd v Resources Conservations Co International* (1988) 8 BCL 158 and the other authorities referred to in paragraph [21] of the Appellants' submissions in chief which support that proposition. If the Appellants are correct in that contention then the payments the subject of this part of the appeal were "on account only" (pursuant to clause 37.2 of the Contract). There was no finding by the primary judge that the conditions of clause 36 had been fully complied with because (as stated in ground 1 of the Appellants' Notice of Appeal) His Honour failed to deal with this argument. To the limited extent the Respondent has considered the proper construction of clauses 36 and 37 at all it would seem the Respondent (like the primary judge) has impermissibly started its contract construction analysis from the acts that were performed <u>after</u> the contract had been entered into (ie the "authorising" of the payment) as a basis for construing the terms of the contract.

12 The critical issue in this aspect of the appeal is whether the WUC has been varied; as it affects whether the "Contract Sum" has been varied.

13 Clause 37.2 provides "Payment other than the *final payment* shall be payment on account only"; with the moneys that are finally due between the parties not determined until the final payment claim and (more importantly) the "final certificate" is issued pursuant to clause 37.4.

14 If the Contract Sum is not varied, then consistently with clause 37.2 any adjustments for overpayments can be made prior to the final certificate.

15 Clause 3(j) of the Formal Instrument of Agreement provides that the Contract Sum may be varied in accordance with clause 36.4. Clause 36.4 provides that the Principal's Representative shall price each "*variation*" (as that term is defined in clause 1 of the General Conditions).

16 "Variation" is defined as "having the meaning in clause 36". Clause 36.1 provides that "the *Principal's Representative may direct the Contractor to vary WUC".* There are then the five means ((a)-(e)) by which the *Principal's Representative* may direct the Contractor to vary the *WUC*. There has to be a "direction" by the *Principal's Representative* to vary the *WUC* (either under clause 36.1 or clause 36.2(b) (second "(b)") before the *WUC* can be varied and a "variation" created. If there has not been such a direction (as in this case) then there is no "variation" and therefore no change to the *WUC* and no consequential change to the Contract Sum.

17 It is not to the point that the Kaloriziko authorised payment of the variation claims because these authorisation of payments did not constitute a "*direction to vary WUC*" within the meaning of clause 36.1. At its highest these authorisation of payments were an implicit admission that the works that had been carried out were a "variation" (ie being beyond the scope of the WUC) however as Campbell JA explained in *The Nominal Defendant v Gabriel* (2008) 71 NSWLR 150 at [113] an informal admission is simply a piece of evidence that may be displaced by other evidence that demonstrates that the admission was incorrectly given. More importantly these "admissions" did not vary the *WUC* pursuant to clause 36 and therefore did not alter the Contract Sum.

18 Further the construction for which Calibre contends would mean that a builder could claim that work performed was a 'variation' even if it did not meet the criteria for a variation and, provided that the 'variation' was 'approved', the developer would have no recourse to recover amounts overpaid. That construction is uncommercial. Calibre points to the fact that a reasonable person in the position of the builder would not perform the work the subject of an agreed variation if the developer could later reverse that variation. That argument is a straw man. If the work claimed is WUC and therefore not a variation, then the builder was contractually obligated to complete it any event.

19 Finally, Calibre's claim that the first appellant, Kaloriziko caused its own loss should be rejected: RS [21]. If the position is that Calibre claimed for work that was in substance WUC and not a variation, then Kaloriziko's approval of that variation should make no difference. Calibre caused the loss by seeking payment to which it was not entitled.

20 Grounds 1, 2 and 3 of the appeal should be upheld.

Grounds 4 and 5: consultants' fees

21 In reply to RS [23]-[25], if the Court upholds grounds 1-3 of the Notice of Appeal, then it may be necessary for the Court to re-exercise the primary judge's discretion in connection with variation V044. The primary judge did not give reasons as to whether variation V044 was or was not part of the WUC.

22 Calibre's position is that Calibre and Kaloriziko had an agreement prior to entry into the Contract that Kaloriziko would engage the consultants and their cost would be removed from the Contract Sum: RS at [23].

23 This position cannot be accepted because there is no evidence of any express agreement to exclude from the Contract Sum the costs of consultants and, if the parties had intended to exclude the costs of consultants, then they would have included a term to that effect in the Contract. Further, the Contract contains an entire agreement clause.[12]

Grounds 6 and 7: the date for practical completion

24 In reply to RS [27]-[36], while it is accepted that cl 5(b) of the Formal Instrument of Agreement does not operate as bar to an agreed variation, it would nonetheless have a significant bearing on the Court's assessment of the parties' intentions and of the validity of any purported variation.

25 The question is whether the parties directed or agreed to vary the date for practical completion. Where the parties have recorded their agreement in a carefully drafted Contract, it should not be readily inferred that the parties have reached some different agreement by their subsequent conduct.

26 The primary judge had regard to two Project Control Group Reports and to claims for an extension of time made by Calibre, both of which described the Original Contracted Completion Date as 23 May 2020: J [153]-[154]. He then concluded that because there was no evidence that the Kaloriziko's representative "took issue with 23 May 2020 being described in any of these documents" that he could infer there was an agreement despite the evidence of the sole director of Kaloriziko's representative that he did not notice these entries, because Ms Rizk, another employee of Kaloriziko's representative "did notice the entry in the 2 May 2019" report: J [155]-[157].

27 *First*, all the documents to which the primary judge had regard were documents drafted by Calibre. Absent more they cannot be said to have recorded the parties' 'agreement'.

[12] CB416.

Taken at their highest, they may record what Calibre thought was an agreed position but nothing more.

28 *Second,* to the extent that the primary judge's reference to it being "clear that Ms Rizk did notice the entry in the 2 May 2019 Project Control Group Report" is a reference to Ms Rizk responding "acceptable" then that conclusion is extraordinary. Ms Rizk did not give evidence. We do not know whether she noticed the reference in the document to 2 May 2019 or not. Nor do we know what she meant to convey by the use of the term 'acceptable'. It may well have been that the format of the report was acceptable. It is simply too long a bow to conclude from that act that there was an agreement between the parties to vary the date for practical completion.

29 Grounds 4 and 5 of the appeal should be upheld.

Grounds 8-11: The Deed of Set Off

The notice of contention

30 In reply to grounds 1 and 2 of Calibre's notice of contention.

31 *First*, it is artificial for Calibre to contend that it did not obtain any benefit under the Deed. Calibre was a party to the Deed for reasons including that Calibre was not the purchaser of the properties. There is no dispute that **Aerial** Holdings Pty Ltd, who was the purchaser, is a related party to Calibre; Calibre expressly acknowledged it in D. of Background to the Deed. Aerial's sole shareholder is Calibre's sole director's wife. To that end, there is little dispute that Calibre has indirectly received a benefit.

32 *Second*, the Court must look to the transaction as a whole. Under the terms of the Deed, Aerial's participation in the transaction (and its purchase of the properties) was wholly contingent on Calibre:

(a) releasing the Tran Parties from the Litigation Liability, being any amount payable to Calibre by the Tran Parties in the proceedings provided that the amount payable by the Tran Parties does not exceed 50% of any judgment;
(b) releasing the Tran Parties from all Released Claims; and
(c) discharging the mortgages given by Ninth Campsie (the fourth defendant) and Mr Tran's daughter, Hillary Thi Ngoc My.

33 Put another way, the transaction would only proceed if Calibre released the Tran Parties from the Litigation Liability and then discharged the mortgages provided by Ninth Campsie and Hillary Thi Ngoc My.

34 It follows that it is not to the point that Calibre did not directly receive the benefit

because it consented to any benefit that would have flowed to it being provided to Aerial.

35 *Next*, it is equally artificial for Calibre to contend that none of the parties subject to the coordinate liability did any act under the Deed which could be characterised as a discharge or a reduction of any coordinate liability. First, again there is no dispute that Apolo Apartments Pty Ltd is a related party to the Tran Parties (one of whom, Ninth Campsie was also a Mortgagor) because it the Tran Parties expressly acknowledged it in it in C. of Background to the Deed.

36 It is not to the point that none of the parties said to be subject to the coordinate liability did any act under the Deed which could be characterised as a discharge or reduction of any coordinate liability. The point is that any liability those parties had for Kaloriziko's debt was extinguished by the transaction because under the terms of the deed, Calibre agreed to discharge the mortgages they had given in return for the benefit Arial received from the under value sale of the Arncliffe Properties.

The appeal

37 In reply to RS [51]-[55], under the Mortgages, Calibre accepted the properties as security for the "Secured Moneys". Secured Money is defined clause 1.1 as AUD$2,963,529.21, or upon judgment in respect of each of the defendant parties (other than for costs) the Relevant Judgment Debt.

38 Under the terms of the Deed the Tran Parties' share of the coordinate liability was 50% of the judgment that is, 50% of $2,697,825.34 being the Judgment Debt.

39 The primary judge erred, by not determining the value of the Arncliffe Properties. Had His Honour done so then it would have been a simple exercise of arithmetic to determine whether the difference between the value of the Arncliffe Properties and the $5 million that was paid for them constituted a partial (or total) discharge of the Judgment Debt.

40 The primary judge did not need evidence of the value of Mr Tran's or Ninth Campsie's "claims" because the value of those claims could not alter the fact that Calibre received, (through the benefit obtained by its associated entity (Arial)) from the undervalue purchase of the Arncliffe properties.

41 Grounds 8 to 11 of the appeal should be upheld.

Grounds 12 to 15: Market value of the Arncliffe Properties

42 In reply to RS [56]-[69], Kaloriziko relies on its submissions in chief but adds, by

considering the evidence surrounding the sale of the properties in 2020 was unsatisfactory the primary judge took into account an irrelevant consideration. How or if the properties were marketed in 2020 is entirely irrelevant. The Court had the names of the vendors and the amounts paid for the properties (AS [40]). Absent fraud or some other compelling circumstance to suggest that these sales were not arm's length transactions, then a Court could only conclude that the prices obtained reflected the best evidence of the market value for these properties.

43 To the extent that the circumstances of the sales in 2020 were relevant, then the primary judge had that information. The contracts for sale were in evidence. Those contracts revealed that the same purchaser purchased all three properties from three separate unrelated vendors. It is difficult to understand what other information the primary judge required. It does not matter whether Mr Tran approached each of these people individually and it does not matter whether he individually determined the price that he would pay for their properties, what matters is that was the price paid to these three separate vendors. The Court would not readily infer that a property developer in the position of Mr Tran would willingly overpay for three properties, a proposition accepted by Calibre's valuation expert.[13] It follows that this is simply the best evidence of the market value of the properties. No Court considering the value a property needs to consider "the factors that motivated each vendor to sell their home" as submitted by Calibre at RS [68]. Nor is relevant the properties were not marketed publicly, properties are sold off-market all the time.

Notice of contention

44 In reply to paragraph 2 of the notice of contention:

45 *First*, Mr Nicholas Garnsey, the appellants' property valuer, did not accept as posited by Calibre at RS [71(a)] that the most appropriate valuation method was the "*direct comparison*" method, not a method whereby one took the 2020 sale price and added asserted market increases. Mr Garnsey stated that while the direct comparison is more often used, you have to take into account the history of the property and any previous sales.[14]

46 *Second*, while Mr Garnsey agreed that site 3 was comparable he also pointed out that site 6 was also comparable and another site which he and Mr McDonnell overlapped on. [15] Calibre seeks to ignore site 6. In doing so, Calibre presents a misleading picture

[13] Black 94;17-18.
[14] Black 130;17-29.
[15] Black 131;16-20.

to the Court. True it is that the rate per metre squared for site 3 was $4,173.74 but the rate per square metre for site 6 was $5,028. Mr Garnsey was not cross-examined on site 6. Mr Garnsey's view as set out in paragraph 57 of his report was that the market values of the properties as a consolidated site with DA was in the order of $4,275 per square metre, having regard to the sale of Site 6 minus a 15% allowance for DA.

47 The Court would accept Mr Garnsey's reasoned view of the value of the properties particularly when one compares it to Mr McDonnell's view which was that the value of the properties had decreased 28% from 2020 to 2024[16], notwithstanding that the value of the land had increased 102% and in circumstances where he could point to no empirical evidence in support of his conclusion.[17]

Conclusion

48 For the reasons set out above, the Court should uphold the appeal.

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[16] Black 98; 40-43.
[17] Black 99;11-39, Black 100;5-18.