

I, Snezana Vojvodic, solicitor on the record for the Appellant, hereby certify this and the following 10 pages are a true and correct copy of the Appellant's Written Submissions in Reply for publication on the Supreme Court of New South Wales website pursuant to paragraph 27 of Practice Note No. SC CA 1.

Dated: 3 October 2025


Snezana Vojvodic



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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	2025/00243213

TITLE OF PROCEEDINGS

First Appellant	Student A by his tutor Peter Johnston
First Respondent	COUNCIL OF NEWINGTON COLLEGE ABN 71824382623
Second Respondent	Attorney General of NSW

FILING DETAILS

Filed for	Student A by his tutor Peter Johnston, Appellant 1
Legal representative	Snezana Vojvodic
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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 (2025.10.03 - Submissions in reply.pdf)

[attach.]

STUDENT A BY HIS TUTOR PETER JOHNSTON

v

COUNCIL OF NEWINGTON COLLEGE & ORS

New South Wales Court of Appeal

Proceedings No 2025/00243213

APPELLANT'S REPLY

1. These submissions reply to the submissions of the Council dated 26 September 2025 (CS) and the submissions of the Attorney General dated 24 September 2025 (AGS).

Leave

2. There are several answers to the contentions that the s 101(2)(r)(ii) threshold is not met. **First**, the case referred to at CS [7], *Sidoti v Hardy* (2021) 105 NSWLR 1; [2021] NSWCA 105 at [172], is one where there was a “claim” whose value was less than \$100,000. The case does not deal with an instance where there is a “question” such as was in issue in this case. It makes no sense for a “question” to have a value, a point made by Latham CJ in *Oertel v Crocker* (1947) 75 CLR 267 at 266 (a case cited in *Sidoti*). In such a case, it is the value of the property to which the question relates that matters. **Secondly**, the suggested test that the appellant must be worse off or prejudiced to the amount of \$100,000 (CS [7]) is not universally applicable. As was recognised by Dixon J in *Oertel v Crocker* at 274, and Kitto J in *Ballas v Theophilos (No 1)* (1957) 97 CLR 186 at 196 (also cited in *Sidoti*), there are cases where the test is inapt, including where the appellant sues in a representative capacity or in interests going beyond his own private right. **Thirdly**, as the facts in *Oertel v Crocker* demonstrate, where the claim for relief is not itself susceptible to valuation (in that case, a possession claim), provisions such as s 101(2)(r)(ii) enable attention to be focused on the value of the property involved (in that case, a leasehold interest rather than the fee simple). Here, it is the value of the underlying trust property that is relevant. **Fourthly**, and alternatively, regard may be had to certain consequential claims made by the Appellant in the underlying proceedings, which claims have been

dismissed as a consequence of dismissal of the separate question. They include claims for an account in respect of the expenditure of funds on transitioning to co-education: ASOC at [97]-[108], Red 19-21. The Council has refused to disclose the amount so expended: cf ASOC [105]-[106], Red 20-21. Having regard to the legal complexity, the historical information that has been surveyed and the expertise of the Council's advisors, it may be inferred that the funds so expended exceed \$100,000.

3. As to whether leave should be granted (if required), leave will generally be granted in matters that involve issues of principle, questions of general public importance or an injustice which is reasonably clear, in the sense of going beyond what is merely arguable: e.g. *Allianz Australia Insurance Ltd v Yangzom* [2025] NSWCA 104 at [10]; *Mohareb v NSW* [2025] NSWCA 156 at [3]. Outside the context of an application for an extension of time, the time the applicant has taken to bring its application for leave is not relevant. *Dillon v Boland* [2012] NSWCA 364 at [9], referred to at CS [8], does not hold to the contrary.

Ambiguity

4. The Council refers at CS [20] to a series of principles involving the use of dictionary definitions: CS [20]. It is necessary to treat those authorities with caution. They do not involve the meaning of language used in an ancient document. In such a case, dictionaries are among the evidence admissible to identify contemporaneous meaning, but they are not the only evidence in that category.
5. The Council contends that it does not follow that, because a word has a recognised range of meanings in the abstract, its usage in a particular document is ambiguous: CS [24]. That fails to engage with the Appellant's argument. The Appellant contends that some people in the 19th century used "youth" as if its semantic range was confined to men alone, while others used it as if it could be gender-neutral. These are competing meanings. That is not the same as saying the word has a range of meanings, which might vary according to context. Of course, if the word is gender-neutral, it is correct to say that it may mean men, women or both, depending on context.
6. The Council seeks to distinguish between a "fringe" or "outlier" definition of "youth", and the "ordinary" meaning of the word: CS [25]. Those labels are unhelpful. Even

if many people used “youth” as if it could be gender-neutral, the fact that some used it as if it could only refer to men alone is the reason a constructional choice is available.

7. It is therefore misconceived to suggest (as the Council does at CS [27]) that the Barclay’s dictionary is “wrong” because it does not refer to the “well-established gender-neutral sense” of the word. The Barclays entry demonstrates that at least some people used the word as if it could refer to men only. Where the editors of the Barclays dictionary considered that to be the case, there was no occasion for them to give it a gender-neutral meaning which they did not understand it to bear.
8. The Council refers to authorities concerned with giving constitutions and private documents a broad and ambulatory construction: CS [30]. There are two difficulties with reliance on these authorities. *First*, if one is having regard to such a principle, it can only be because there is a constructional choice as to the meaning of “youth”. If that is the case, regard cannot be had to that principle alone; regard must also be had to the range of extrinsic circumstances on which the Appellant relies. *Secondly*, this is not a case about ambulatory construction. Cases such as *Re Ferguson* (1995) 58 FCR 106 (whether a meeting of directors captures a meeting by telephone) are instances where a word used in an older document is applied to capture a matter which was non-existent at the time of the document. That is removed from the present case, where men and women existed and were educated (albeit in different ways) in the 19th century. Whether “youth” as used in the Trust Deed meant men, or both men and women, is not a matter that anyone is suggesting has changed between 1873 and today. To the contrary, it is accepted by all parties that the word’s meaning is to be determined as at the date of execution of the Trust Deed: e.g. CS [19].
9. For the same reason, the emphasis the Council places on the word “efficient” (CS [31]) does not assist at this point in the analysis. That consideration can only be relevant if there is a constructional choice; it cannot be considered in isolation from the range of extrinsic circumstances on which the Appellant relies.
10. The Council asserts at various points that the ordinary meaning of “youth” is unconstrained by gender: CS [31]-[33]. The Appellant does not accept that that was the “ordinary” meaning of the word in the 19th century. The observations in paragraph 6 above are repeated.

11. For similar reasons, it goes nowhere to say that “[i]f the drafters had intended the word ‘youth’ to have a meaning narrower than the ordinary usage, confined to males, they would have said so”: CS [32]. That is question-begging as to what the drafters thought the word meant. Further, that the drafters might have used clearer language to capture the construction for which the Appellant contends is not a reason for rejecting that construction: *Menz v Wagga Wagga Show Society Inc* (2020) 103 NSWLR 103; [2020] NSWCA 65 at [67](2).

Surrounding circumstances

Continuation of the earlier school

12. The Council distinguishes the subjective intentions of individuals as to the conduct of the earlier school, from the scope of the power to enrol students in that school: CS [36]. The distinction is not to the point. The Appellant does not suggest that Rev Manton was interpreting the terms of a constituent document in stating that the earlier school was a school for boys. Rev Manton’s interpretation of any such document is irrelevant. Reverend Manton’s speech is relevant because the surrounding circumstances include the public recognition that the earlier school is one established for the purpose of accepting boys as pupils.
13. For the same reason, it is irrelevant that Rev Manton was not a party to the Trust Deed: cf CS [39]. The public statements made by him, buttressed by the other evidence referred to in the Appellant’s submissions in chief (**AS**) at [62], identify a background fact that can be taken to be known by the parties to the Trust Deed, who were all members of the council of the existing school, viz, that that school was and was publicly represented to be a school for boys.
14. Contrary to CS [39], the fact that Rev Fletcher, the President of the existing school, became President of the new school, is significant. It underlines the continuity between the existing school and the new one. Again, it is not to the point to say this has nothing to do with *power*. It is a background fact relevant to understanding what the word “youth” means in the Trust Deed. It is the meaning of that word that dictates whether there is power to enrol female students.

15. The Council says that the Appellant attributes to the drafters an “adamantine” attitude: CS [40]. It is difficult to understand this criticism. Either the drafters must be taken to be using “youth” as a word that can refer to men alone, or they must not. Pejorative labels of this kind do not advance the analysis.

Statements made after the Trust Deed was executed

16. Contrary to CS [42], statements made after the Trust Deed was executed are not inadmissible on that count alone. **First**, to the extent there are references after execution of the Trust Deed to boys, and the purpose of educating them for university, those statements are capable of reflecting a continuing intention as to the purpose of the school. **Secondly**, *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [35], referred to by the Council, does not deal with the ancient documents rule which permits the admission of evidence of subsequent conduct.
17. The Council says that this evidence does not go to power but deals only with subjective intention: CS [43]. The comments in paragraph 14 above are repeated.

Kingswood school

18. The Appellant relies on the fact that the Kingswood school, referred to in the Trust Deed, was a boys’ school as supporting his construction. However, contrary to CS [45]-[47], the Appellant does not suggest that any “plan” for the education of Ministers’ children, or the children’s fund, was restricted to men alone.
19. To speculate that the Kingswood school may have had *power* to enrol females but chose not to exercise it (CS [46]) again is beside the point. The reference to an existing boys school is a background fact supporting the inference that the drafters of the Trust Deed understood the school they were establishing would be the same.

Discussions in the Church concerning female education

20. The Council refers to the change from “boys” in the May 1872 resolution of the Council, to “children” in the ultimate resolution of the Conference in February 1873, as a “substantive” change: CS [52]. However, that presupposes that the authors of the change intended it to convey that boys and girls would attend the new school. There is

- no basis for drawing that inference. It is equally possible that the word “children” was used because there is a reference to the “Children’s fund” in the same resolution.
21. The Council says that it may be inferred that the members of the Council (who were also parties to the Trust Deed) knew of the contents of their own resolution: CS [53]. Some but not all of the members of the Council were parties to the May 1872 resolution. It is unclear why other members, not present when it was passed, would know of its contents and have paid attention to and appreciated the differences in language between it and the 1873 resolution of the Conference.
 22. The fact that there were discussions in Church about female education (CS [54]-[57]) does not assist the Council where, as explained by the Appellant in chief at AS [71]-[73], those discussions saw the question of superior female education go down a different track to male education. In light of that, the fact that there was an openness to co-education in Victoria (CS [58]) also cannot assist. In any event, it would be unsafe to draw a conclusion that attitudes to education in one colony in the 19th century reflected attitudes in another. The resistance to co-education in New South Wales is captured in the comments of Sir Henry Parkes quoted at J [31] (Red 61-62).
 23. The suggestion that the 1873 resolution of the Conference used “children” and not “boys” because the question of female education was then under discussion (CS [59]) is pure speculation. The statement that the Trust Deed used the term “youth” to preserve the possibility of female education (CS [59]) is likewise speculation.
 24. As to the suggestion that later events, such as those in 1880 and the opening of MLC, are irrelevant to construction (CS [60]), the comments in paragraph 16 above are repeated.
 25. The fact that the constituent documents of MLC are not in evidence and that the scope of the power to admit students is unknown (CS [60]) is beside the point. The relevance of the opening of MLC as a girls’ school is that it confirms what was already in train before 1873, namely, the pursuit of superior female education as a matter separate to superior male education through the establishment of separate boys and girls schools. That is a background fact relevant to the construction of “youth” in the Trust Deed and therefore relevant to the power to admit females.

NSW government education policy in the mid to late 19th century

26. The Council says that government policy concerning high schools is irrelevant, where there were no governmental high schools before 1880 (CS [62]). However, the relevance of government policy at the time of the *Public Instruction Act* 1880 is that it bears on social attitudes shortly before that point.
27. The Council emphasises the relevance of Church policy, and the fact that the Methodists in Victoria supported co-education (CS [63]). That fact does not assist for the reasons given in paragraph 22 above.
28. The Council says that government policy is not probative of the parties' intentions (CS [64]). However, construction is not an exercise in *proving* the parties' intentions. It is concerned with attributing an intention to the parties based on objective factors. Those factors include surrounding circumstances such as social attitudes to co-education.
29. The Council repeats that there was discussion in the Church about female higher education in the 19th century (CS [65]). That matter does not assist for the reasons given in paragraphs 22 and 23 above.
30. The Council also refers to the existence of co-educational elementary schools in 1873 (CS [66]). That does not assist where the proposed new Collegiate school was not solely an elementary school; to the contrary, it was conceived of as a school for higher education and for the purposes of providing tuition for the University.

Ruling on newspaper articles

31. The Council says the trial judge was right to reject the newspaper articles on which the Appellant relied because it was impossible to conclude from them whether the usages of "youth" contained therein were representative of wider usage (CS [68]). It was unnecessary to draw any such conclusion for the Appellant's argument to succeed. The Appellant's argument is based only on a recognition that some people used "youth" as if it could refer to men alone. That was demonstrated by both the Barclay's dictionary and the articles on which the Appellant relied.

32. For the same reason, it is wrong to say that the balance of the articles contained in the court book below were required to be tendered (cf CS [69]). The Appellant did not deny that there were other articles demonstrating that some people used “youth” as if it could be gender-neutral. The relative proportions between the two categories of article are likewise irrelevant.
33. It adds nothing to say that some articles may need to be interpreted to determine whether the word “youth” is only made gender-specific because of other statements in the document (CS [68]). The Appellant accepts that there will be articles which fit that description. Where that is the case, it is plain that the article cannot establish that “youth” was used as if it refers to men alone. That does not detract from the proposition that some articles do use the word as if it means men alone.

The ancient documents rule

34. In a departure from its position below, the Council apparently contends that the ancient documents rule does not exist: CS [71]-[72]; compare J [158] (Red 94).
35. It is necessary to distinguish clearly the two aspects of the rule: (i) it permits admission of extrinsic evidence to construe a word used in an ancient document; and (ii) it permits admission of subsequent conduct for the same purpose. The trial judge’s criticisms at J [159]-[161] (Red 94-95) are directed only to the latter.
36. That point aside, the trial judge did not find that the rule does not exist; rather, having made the criticisms he did, he did not consider the matter further: J [162] (Red 95).
37. The fact (if it be so) that no Australian authority holds that such a rule exists does not mean it forms no part of the law. The common law of Australia includes the common law of England received into the various colonies, as explained in *Lipohar v The Queen* (1999) 200 CLR 485 at [54]. In any event, in *Minerology Pty Ltd v Sino Iron Pty Ltd (No 6)* (2016) 329 ALR 1; [2015] FCA 825 at [719], referred to at CS [72], Edelman J clearly states that the rule exists, albeit that formed no part of the ratio.
38. The Council suggests the rule cannot assist where the ordinary meaning of the text can be ascertained safely by “conventional” means, such as by dictionaries (CS [73]). The difficulty with that is that a dictionary definition of “youth” today will

undoubtedly establish it is gender-neutral. That does not tell one what it meant in 1873 or whether its meaning has changed. As has been seen, the 19th century dictionaries do not speak with one voice.

39. The Council says the rule applies only where the instrument is ambiguous or obscure: CS [74]-[77]. That limitation is incoherent, for the reasons explained in chief at AS [47]. Contrary to CS [76], the limitation does not emerge from the reasons of Coleridge J in *Shore v Wilson*. In the first passage referred to, 8 ER 450 at 518, Coleridge J proceeds from expressing a view that extrinsic evidence is not admissible in a case where the primary meaning of the words used in the deed is clear, to saying that the position becomes different “in proportion as we are removed from the period in which an author writes”. In other words, the ancient documents rule is an exception to the orthodox position that ambiguity must be found before having resort to extrinsic evidence. In the second passage referred to, 8 ER 450 at 519, Coleridge J’s reference to the reception of evidence that is “legitimate” is a reference to the distinction he draws between evidence of the writer’s subjective intention and evidence of what the words meant at the time. It is not suggesting that ambiguity must first be found before the ancient documents rule can be invoked.
40. Other authorities said to support an ambiguity gateway (CS [77]) either do not do so or need to be understood in their context. In *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 236 at 261E, Lord Wilberforce states that ambiguity is necessary in order to admit evidence of surrounding circumstances in construing a deed; his Lordship does not attach that requirement to the ancient documents rule, which he addresses separately. Each of *Chad v Tilsed* (1821) 129 ER 1022 at 1023, *AG v Corporation of Rochester* (1854) 43 ER 1079 at 1089, *AG v Sidney Sussex College* (1869) LR 4 Ch App 722 at 732 and *Earl de la Warr v Miles* (1881) 17 Ch D 535 at 573 deal with the use of subsequent conduct to interpret an ancient document in the case of ambiguity. They do not address whether or when recourse to evidence of contemporaneous usage is admissible to determine what the word may mean. *Doe v Bevis* (1849) 137 ER 181 at 201 was a case where it was said that contemporaneous and historical conduct could be relied on to interpret a doubtful word.
41. The insistence on a need for ambiguity before having recourse to evidence of contemporaneous usage raises some of the difficulties discussed in *Maintek Services*

Pty Ltd v Stein Heurtey SA (2014) 89 NSWLR 633; [2014] NSWCA 184 at [72]-[86]. They are compounded in the present case by reason of the fact that it is logically impossible to know whether a word used in 1873 is ambiguous without having regard to evidence of usage at that time. The trial judge's approach is at odds with, and more restrictive than, that which this Court applies to the construction of contracts generally: *Cherry v Steele-Park* (2017) 96 NSWLR 548; [2017] NSWCA 295 at [76]-[86], [123].

Efficient education of youth

42. By their Notices of Contention, the Council and the Attorney-General contend that providing an "efficient course of education" for boys does not exclude co-education. That contention must fail. If, on its proper construction, "youth" means boys alone, it cannot be permissible under the terms of the Trust Deed to use the trust property to educate girls. That would not be the efficient education of boys; it would be the efficient education of boys *and girls*.
43. That conclusion is not affected by the presence in the Trust Deed of a power to determine the "terms, conditions and regulations upon which and subject to which the pupils...shall be admitted". Contrary to CS [79], such a power cannot enable the Council to determine the gender of the students eligible to be admitted; the power must be read subject to that which the parties agree is the controlling purpose, namely, providing an efficient course of education for youth: J [11] (Red 58); cf CS [17]. The Attorney-General, properly, accepts that any regulations made by the Council cannot violate the trust's purpose: AGS [22].
44. To say that the Appellant has failed to prove that it is irrational to conclude that boys may benefit from having girls in the classroom (CS [80]) is beside the point. The Appellant never sought to prove that matter. The issue does not arise for the reasons given in paragraph 42 above.

Dated: 3 October 2025



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