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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	

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 (2025.07.23 Respondents' Submissions.pdf)

[attach.]

CBEM HOLDINGS PTY LTD v SUNSHINE EAST PTY LTD & ANOR

NSW Court of Appeal Proceedings 2025 / 00156488

Respondents' Submissions

Introduction

1. These proceedings follow earlier proceedings for summary judgment brought by the Appellant under the provisions of the *Building and Construction Industry Security of Payment Act* 1999 ("**SOPA**"). Those earlier proceedings concerned a payment claim issued by the Appellant on 27 October 2022 in the amount of $420,952.39 ("**Payment Claim 4**"), in response to which no payment schedule was issued, and the Appellant obtained summary judgment. The Respondents appealed the summary judgment in the Supreme Court of NSW on the grounds that the Appellant was unlicensed and uninsured. The Respondents were unsuccessful on that appeal, and the Respondents subsequently paid the amount of Payment Claim 4 to the Appellant.

2. The proceedings the subject of this appeal were commenced when the Respondents took action to have the ultimate contractual rights of the parties determined by the Court below, as contemplated by section 32 of the SOPA. In those proceedings, the Respondents were successful. The Court below determined that the work claimed by the Appellant in its payment claims, and then paid by the Respondents, had been overstated to the extent of the whole of the amount of Payment Claim 4, and some of the previous payment claim ("**Payment Claim 3**"). As a consequence, the Appellant was ordered to repay the amount of the overpayment to the Respondents. As a condition for a stay of execution of the Respondents' judgment obtained in the Court below, the Appellant was ordered to pay the amount of $450,000 into Court pending determination of the appeal, which it has done.

3. In this appeal, *inter alia* the Appellant challenges the basic operation of the SOPA in the circumstances, arguing that the Court below had no ability to make an order for restitution of the amount of the overpayment. The Respondents say that the decision of the Court below should stand.

The Relevant Facts

The Contracts

4. On or about 16 April 2021, Mr Chunlin Fan ("**Mr Fan**"), the Second Respondent, entered into a Master Builders Association standard form construction management services contract ("**Construction Management Contract**") with ASY Construction Pty Ltd ("**ASY**") for the management of the construction of a valuable home on a large property in Dural NSW designed by a third party architectural designer, Denton Homes Pty Ltd ("**Denton Homes**").

5. On or about 4 December 2021, the Appellant ("**CBEM**") and the First and Second Respondents, Sunshine East Pty Ltd ("**Sunshine East**") and Mr Fan, entered into an amended Master Builders Association standard form trade contract for the construction of civil and stormwater works ("**Trade Contract**"). The directors of Sunshine East are Mr Fan, Mr Fan's daughter Ms Xiaojie Fan, and Mr Jianwei Bi ("**Mr Bi**"). In accordance with the terms of the Construction Management Contract, the Trade Contract was executed by ASY on behalf of Mr Fan, and present at that signing was Mr Bi. Throughout the progress of the works, CBEM addressed and submitted its payment claims to Sunshine East, and Sunshine East made payment under the terms of the Trade Contract to CBEM. There is no dispute that the Trade Contract bound both Mr Fan and Sunshine East, even though Sunshine East was not a party to the Construction Management Contract.

6. Importantly, the Construction Management Contract and the Trade Contract had different parties on both sides of each of the contacts.

7. Under the terms of the Construction Management Contract:

   (a) a complex legal structure is put in place where the Construction Manager (ASY) acts as the agent of the Principal (Mr Fan);[1]

   (b) the Construction Manager is required to engage each of the trade contractors as the disclosed agent for the Principal, under the trade contract,[2] and thereafter, the

[1] Clause 2 of the Construction Management Contract: Blue 67.
[2] Subclauses 6(a) and (j) of the Construction Management Contract: Blue 68.

Principal is in a direct contractual relationship with each of the numerous trade contractors;

(c) the Construction Manager administers the trade contracts on behalf of the Principal, including reviewing and processing all payment claims and submitting those payment claims to the Principal along with a payment recommendation "*in accordance with the trade contract*" ("**Recommendation Term**");[3]

(d) the Principal "*is to make prompt payments in accordance with the trade contracts*", and "*directly to all Trade Contractors in accordance with the recommendation of the Construction Manager*" ("**CM Payment Term**");[4]

(e) the Principal must make decisions in respect of the works;[5]

(f) any dispute between the Construction Manager and any other member of the Project Team including the Principal's consultants is to be resolved by the Principal;[6] and

(g) the liability of the Construction Manager for the quality and performance of the works by the trade contractors is excluded by the terms of the Construction Management Contract.[7]

8. Under the terms of the Trade Contract:

(a) the Construction Manager acts as the disclosed agent for the Principal;[8]

(b) the contract price is a lump sum fixed price of $1,611,078.51 (excl GST), which was broken down into individual trade prices in CBEM's quote J0017 – Rev 7 dated 19 November 2021 ("**Quote**");[9]

(c) payment claims must:

[3] Subclause 6(l) of the Construction Management Contract: Blue 69.
[4] Clause 9 of the Construction Management Contract: Blue 70.
[5] Subclause 8(b) of the Construction Management Contract: Blue 69.
[6] Subclause 5(c) of the Construction Management Contract: Blue 68.
[7] Subclause 5(a) of the Construction Management Contract: Blue 68.
[8] Page 3 of the Trade Contract under the heading "THE AGREEMENT": Blue 93.
[9] Schedule C to the Trade Contract: Blue 94.

(i) "*accurately identify the work actually done*" by CBEM by reference to the breakdown of works in the Quote;[10]

(ii) "*properly value the work with reference to the contract price*";[11] and

(iii) "*payments .. to be made as per works completed*",[12]

(together the "**TC Valuation Term**");

(d) the Principal must pay CBEM the amount "*properly claimed*" in the payment claim ("**TC Payment Term**");[13]

(e) CBEM must complete the works to the reasonable satisfaction of the Construction Manager;[14]

(f) the Contractor warrants in favour of the Principal that it will achieve a satisfactory completion of the works within the construction period;[15]

(g) the Principal may terminate the Trade Contract for convenience in certain circumstances including if the project needs to be shut down for more than 3 months, and there is no ability for CBEM to claim loss of profit.[16]

9. Accordingly, under the two separate contracts, the Principal and the trade contractors were in a direct legal relationship that made the trade contractor liable to the Principal in respect of the performance of the actual works, and the Principal liable for payment to the trade contractors. The Construction Manager was only in a direct legal relationship with the Principal, and under that relationship had no (or very little) liability to the Principal. The Construction Manager, while performing some supervision work on site as agent for the Principal, and no contractual liability at all to the trade contractors under the Trade Contract. It was an "all care, no responsibility" kind of arrangement for the Construction Manager.

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[10] Subclause 10(c) of the Trade Contract: Blue 98; Schedule B and red notations added to Schedule D of the Trade Contract: Blue 95.
[11] Subclause 10(c) of the Trade Contract; see also subclause 10(a): Blue 98.
[12] Blue 95.
[13] Subclause 11(a) of the Trade Contract: Blue 98.
[14] Subclause 1(a)(iv) of the Trade Contract: Blue .
[15] Clause 3.
[16] Clause 19.

The Works

10. CBEM commenced work under the Trade Contract in March 2022.

11. On 1 July 2022, CBEM submitted its first payment claim to Sunshine East for its work on the Project, claiming work to the value of $163,677.54 under the Trade Contract had been performed ("**Payment Claim 1**").[17] Payment Claim 1 was subsequently forwarded to Mr Bi by ASY without comment.

12. On 23 August 2022, Mr Bi authorised Sunshine East to pay CBEM the amount claimed in Payment Claim 1.

13. On 29 August 2022, CBEM submitted its second payment claim directly to Sunshine East and ASY for its work on the Project, claiming work to the value of $220,582.45 (incl GST) had been performed under the Trade Contract ("**Payment Claim 2**").[18]

14. On 30 September 2022, CBEM submitted its Payment Claim 3 directly to Sunshine East and ASY for its work on the Project, claiming work to the value of $89,286.78 had been performed under the Trade Contract.[19]

15. On 5 October 2022, having received no recommendation not to pay Payment Claim 2, Mr Bi authorised Sunshine East to pay CBEM $200,000 towards the amount of Payment Claim 2.

16. On 10 October 2022, Mr Bi authorised Sunshine East to pay CBEM the remaining $20,583.45 of Payment Claim 2.

17. On 27 October 2022, CBEM submitted Payment Claim 4 directly to Sunshine East and ASY, claiming work to the value of $420,952.39 had been performed under the Trade Contract.[20] Upon inspecting the work, Mr Bi became aware that some of the work claimed to have been completed in Payment Claim 4, being the installation of a rainwater tank, which was claimed to be 90% installed, [21] had not in fact been completed as there

[17] Blue 143-146.
[18] Blue 201-204.
[19] Blue 205-208.
[20] Blue 209-213.
[21] Blue 211 – item described under number 5 as "*Excavate in OTR, supply, install and backfill with site won material 107,000L Residential Panther Concrete tank with concrete roof to ground level (8.35m ID x 2.35m*

was no tank installed.[22] As a result he decided not to authorise the payment of Payment Claim 4, and instructed a Quantity Surveyor to inspect and determine which works had been completed.

18. On 1 November 2022, having received no recommendation from ASY not to pay Payment Claim 3 to CBEM, Mr Bi authorised Sunshine East to pay the amount of Payment Claim 3.

19. On or about 1 November 2022, Mr Bi received an originating process and a statement of claim by Denton Homes alleging infringement of copyright in the use of the designs for the Project. As a consequence, work on the Project was halted immediately.[23] Denton Homes discontinued this claim some eighteen months later in May 2024.

20. Unfortunately for the First and Second Respondents, no payment schedule was issued in response to Payment Claim 4, creating a statutory liability under section 14(4) of the SOPA that arose on 10 November 2022.

21. On 15 November 2022, CBEM commenced proceedings in the District Court of NSW for summary judgment on a claim for payment of the amount of Payment Claim 4. On 24 March 2023, the District Court of NSW awarded judgment in favour of CBEM ("**SOPA Judgment**").

22. On 20 April 2023, Sunshine East and Mr Fan commenced proceedings against CBEM appealing the SOPA Judgment in the Supreme Court of NSW. Sunshine East and Mr Fan were unsuccessful in that appeal.

23. On 1 May 2023, Sunshine East and Mr Fan commenced the proceedings in the Court below.

24. On 28 March 2025, the Court below delivered judgment in favour of Sunshine East and Mr Fan, determining that the value of the works was $452,961.44 less than that claimed by CBEM.

Depth) Rainwater Tank ONLY" which is claimed 90% complete at $115,631.65. The parties' experts agreed that the excavation work actually performed on this item 5.24 was valued at $15,000: Black 364R.

[22] Black 77.33-34; 105.26 – 106.18; 113.44-48.

[23] Blue 225.

25. On 23 April 2025, CBEM commenced this appeal in respect of the judgment delivered by the Court below on 28 March 2025.

The parties' valuation of the works

26. The parties each adduced expert reports on the valuation of the works. Following the provision of the expert reports, there were three separate conclaves held by the experts, which resulted in an agreed spreadsheet that detailed the positions of the parties after the hearing on 6 December 2024 (**joint spreadsheet**).[24] From the joint spreadsheet it can be seen that the Respondents paid the Applicant $983,109.49 (incl GST) for the works,[25] the final value of the works according to the Appellant's expert was $616,800.31 (incl GST), and the final value of the works according to the Respondents' expert, was $470,371.83 (incl GST).[26]

27. Payment claims submitted by the Appellant to the First Respondent were made progressively as the work was performed. In each case the payment claim stated the total value of the work up to that date in the "Claimed to date" column, and subtracted the amount that had previously been claimed in the "Previously certified" column to obtain the "This Period Claim Amount" in the last column. Accordingly, each payment claim was for the value of work that had been performed by the Appellant since the last payment claim.

28. The Court determined that the amount of $452,961.44 was overpaid by the Respondents to the Appellant based on its assessment of the value of the work performed by the Appellant as a whole. By necessary implication given the total payment of $983,109.49 (incl GST) to the Appellant, the judge found that the total value of the works performed by the Appellant was $530,148.05 (incl GST). As no payment claim could claim more than the total value of all work performed, this figure forms a ceiling on what can be claimed by the Appellant on any given payment claim.

[24] Supplementary Black 411-418.
[25] Ibid at p 418. With the addition of interest on the late payment of Payment Claim 4, this amount increased to $985,859.48 – J[14] at Red 44.
[26] Ibid at p 418.

29. As a result, the entirety of the value of the final Payment Claim 4 in the amount of $420,952.39 had been overclaimed, because all of the work claimed in that payment claim was above the total value of the work claimed overall.

30. Similarly, the value of the work performed by the Appellant at the time of its submission of Payment Claim 3 could not have been more than the total value of all work performed by the Appellant by the end of the Project. The total value of the work claimed as at the date of Payment Claim 3 was $562,157.09. As a result, the amount claimed in Payment Claim 3 must have been at least an overclaim of $32,009.05, as this is the amount of Payment Claim 3 that was above the total value of all work performed by the Appellant.

The appeal

31. The Appellant raises 6 grounds of appeal, which are dealt with in order below.

Ground 1

32. Ground 1 alleges that the primary judge erred in his finding that the Appellant conceded that:

    (a) it claimed for work it had not performed (J915]); and

    (b) it was paid more than the value of the work performed by it pursuant to the Trade Contract (J[23]; J[70]; J[83]).

33. UCPR 51.18(2) provides:

> *the appellant must also specify in the notice of appeal any material facts that the appellant contends that the court below should, or should not, have found.*

34. In *State of NSW v Nash* [2016] NSWCA 98 at [21], Barrett AJA held:

> *It may readily be accepted that a ground of appeal must do more than merely allege that the decision below is wrong or that the judge erred in fact or law or that the verdict was against the weight of the evidence. The aim underlying the rules is to eliminate points that are not in controversy and to leave an intelligible and coherent core to be litigated.*

35. The Appellant frankly concedes at [9] of its submissions that "*Ultimately the primary judge's misapprehension of CBEM's position is of little direct legal relevance*." The absence of any legal effect of this alleged error is readily apparent in circumstances where the Court below made its own detailed assessment and determination as to the value of the work performed by the Appellant,[27] which formed the basis of the primary judge's decision.[28] Accordingly, the Court's finding that there was a concession by the Appellant had no impact on the *ratio* of the primary judgement.

36. Accordingly, ground 1 is a mere statement of an alleged error made by the Court below, without legal effect, which is inadequate to ground an appeal. For that reason alone, ground 1 should be rejected.

37. Further, the Appellant's own expert evidence was that the value of the works performed by the Appellant calculated under the Trade Contract was $616,900.31 (incl GST), and it is common ground that the Respondents paid in total $983,109.49 (incl GST) for the works, which is a difference, and an overpayment, of $366,209.18 (incl GST).[29] Any difficulty the Appellant's expert had that affected his valuation could and should have been expressed by the Appellant's expert in his reports and affidavits, which did not occur.

38. Accordingly, the Appellant's concession referred to in Ground 1 is the concession in the Appellant's own evidence of value, which was well considered, and the Applicant was given every opportunity to ventilate. In that circumstance, it is difficult to see how the primary judge made any error in his finding.

39. However, the thrust of the Appellant's submissions on this point seems to be a legal argument that *regardless of its own evidence of value*, there was an assessment made by the Construction Manager ASY that the full value of each of the payment claims was payable, and the contractual effect of that assessment is that it is final and binding on the parties. As detailed above, this alleged assessment was merely the forwarding of the Appellant's payment claims to the First Respondent without comment. The Respondents took this as an approval to pay in the cases of Payment Claims 1, 2, and 3.

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[27] Red 86 – 99; J[138] – [180].
[28] Red 99 at J[181].
[29] Supplementary Black 418.

40. For the reasons outlined in response to grounds 4 and 5 below, that argument is not supported by the terms of the contracts themselves. In addition, the Court below separately found against the Appellant on that argument, which is the subject of appeal grounds 4 and 5, so ground 1 does not have any independent force or validity.

Ground 2

41. Ground 2 alleges that the primary judge erred in finding that the payment claims issued by the Appellant constituted representations by the Appellant that the Appellant was entitled to be paid the sums claimed in those payment claims, having done the work identified in those payment claims.

42. It is well established that whether a representation is misleading or deceptive must be viewed in all the circumstances of the case: *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 (**Butcher**) per the majority at [39].

43. Clearly, the contractual terms under which the payment claims are made are significant circumstances that govern the meaning of representations contained within a payment claim. Subclause 10(c) of the Trade Contract obliged the Appellant to "*accurately identify the work actually done*" in its payment claims, and "*properly value the work with reference to the contract price*",[30] and the special conditions in Schedule D required payment to the Appellant to be made "*as per works completed*."[31] The primary obligation is on the Appellant under the Trade Contract is to ensure that the contents of its payment claims are accurate. The fact that a payment claim may later be disputed by the Respondents under a separate subclause 10(e) of the Trade Contract does not detract from the obligations of the Appellant under clause 10(c) in relation to the content of the payment claims.

44. The obligation of the Construction Manager to provide the Respondents with his recommendation as to the payment claim occurs under the separate Construction Management Contract, and was for the benefit of the Second Respondent. The Construction Manager's recommendation is not mentioned in the Trade Contract at all. In accordance with the doctrine of privity of contract, the Appellant cannot take

[30] Blue 98.
[31] Blue 95.

advantage of the Construction Manager's recommendation as it seeks to do in its submissions, as it was not a party to the Construction Management Contract.

45. The First and Second Respondents' obligation to pay the payment claims is expressed in subclause 11(a) of the Trade Contract as follows:

> *The* [First and Second Respondent] *is to pay the* [Appellant] *the amount properly claimed in the payment claim or if that is disputed or adjusted the amount which is consequently admitted as being payable.*

The word "*properly*" in the term "*properly claimed*" is picked up in clause 10(c), which requires the Appellant to "*properly value*" its work in the payment claim. There has been no engagement of the dispute resolution mechanism, so the second part of subclause 11(a) is not engaged, and accordingly, in relation to Payment Claims 3 and 4 the Respondents obligation under the Trade Contract is to pay the Appellant only to the extent that the Appellant "*properly claimed*" the value of its work. This obligation is not dependent on the Construction Manager's assessment of the payment claim at all.

46. Contrary to the Appellant's submissions, in those circumstances it was open to the primary judge to find that the Appellant's payment claims contained the representation that the work identified in those claims had been done, and that the claimed amount was properly valued on the work done.

47. Even on its own expert evidence, the Appellant had not done the work identified in the payment claims. Indeed, the primary judge determined that work to the value of the whole of Payment Claim 4 had not been performed. A good example of work claimed that was not done is the rainwater tank identified by Mr Bi. This item was claimed to be 90% complete in Payment Claim 4, to the value of $115,631.65.[32] The parties' experts agreed position was that only $15,000 of work on that item had actually been performed.[33] Indeed, the Appellant conceded that no tank had actually been installed.[34]

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[32] Blue 211 – item described under number 5 as "*Excavate in OTR, supply, install and backfill with site won material 107,000L Residential Panther Concrete tank with concrete roof to ground level (8.35m ID x 2.35m Depth) Rainwater Tank ONLY*" which is claimed 90% complete at $115,631.65.
[33] Supplementary Black 416, item 5.24.
[34] Black 105.26 – 106.18.

48. At [19] of the Appellant's Submissions, the Appellant submits that "*The logical extension of the primary judge's conclusion is that participants in the construction industry regularly engage in misleading or deceptive conduct*". In accordance with well-established authority including the High Court's decision in *Butcher*, whether a payment claim is misleading or deceptive depends on all the particular circumstances of the individual case. Accordingly, a generalised submission of the kind made by the Appellant simply cannot be made.

49. Further, and contrary to the submissions of the Appellant and ground 2b., there is no requirement for the defendant to have a dishonest intention in making a representation for the representation to be misleading or deceptive in breach of section 18 of the ACL.[35] These submissions and ground 2b. are misconceived.

Ground 3

50. The substance of the Appellant's submissions is that the only way that the Respondents can prove causation in their ACL claim is by evidence of direct reliance by the First and Second Respondents on a representation made by the Appellant to the First and Second Respondents. That submission is incorrect.

51. The question of causation in relation to misleading and deceptive conduct is one which arises on a consideration of section 236(1) of the ACL, which provides:

> *If:*
> *(a) a person (the claimant) suffers loss or damage because of the conduct of another person; and*
> *(b) that conduct contravened a provision of Chapter 2 or 3;*
> *the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.*

52. The operative words in relation to causation are "*because of*" in s 236(1)(a), and there is no general requirement that damages can only be recovered where the applicant positively "relies" on the respondent's conduct. The relevant question is whether or not there is sufficient connection between the conduct and the damage suffered for the latter

[35] *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 233.

to be regarded as being "because of" the former. Whether or not that connection exists is essentially a question of fact to be determined by reference to common sense and experience, and is a question into which policy considerations and value judgments necessarily enter. The commonsense approach to be taken to causation means that it cannot be reduced to a simple test to be applied across the spectrum of circumstances and cases as the Appellant's submissions require.

53. Further, the impugned cause does not have to be the sole cause – it must merely be a sufficient or "substantial" cause as opposed to a negligible cause, and as long as the breach materially contributed to the damage, a causal connection will ordinarily exist. Acknowledging that people are often swayed by several considerations, influencing them to varying extents, the law attributes causality to one or more of those considerations, provided it has some substantial rather than negligible effect (see *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109). As with the determination of misleading and deceptive, the context within which the representation was made is also a critical consideration on the issue of causation, and it is unrealistic to expect that fine shades of meaning of particular statements, and their effect on the mind, will be particularly recalled when the person is required to give evidence.

54. From the evidence as it fell during the hearing, ASY did not make any positive recommendation in relation to any of the payment claims. Instead, the Respondents relied on the absence of a recommendation from ASY not to pay in paying Payment Claims 1, 2 and 3. However, that was not the case in respect of the Appellant's Payment Claim 4. Payment Claim 4 was provided directly by the Appellant to the First Respondent, and upon receipt, the First Respondent's Mr Bi personally observed that the works claimed to have been completed in Payment Claim 4 had not been performed.[36] As a result, the Respondents decided not to pay Payment Claim 4.

55. The amount of the payment claim itself was clearly relied on by the Respondents in payment of the amount claimed to the Appellant in its Payment Claims 1, 2 and 3. Clearly, "but for" the conduct of the defendant in making the misrepresentations as to work performed and the value of that work, the plaintiffs would not have overpaid the defendant. While the "but for" test may not be exclusive test of causation in misleading

[36] Blue 143-146; Blue 201-204; Blue 205-208; Blue 209-213; Black 66.16-67.4; Black 68.21-69.10; Black 69.50 – 70.18; Black 90.37-47.

and deceptive conduct, it has been found to be highly persuasive. In *McCarthy v McIntyre* [1999] FCA 784 at [49], the Full Federal Court said:

> *Perhaps there is no simple test capable of formulation. It is necessary that the issue of causation be approached in what the High Court in Wardly called a "practical or commonsense" way. In many areas the courts have applied a "but for" test of causation. As McHugh, Hayne and Callinan JJ pointed out in Marks v GIO Aust Holdings Ltd at 346, the idea that a "but for" test is the exclusive test of causation has been found wanting in some context s and it may yet be found to be wanting in the context of [the ACL] … Whether this be the case or not, the "but for" test , applied in a common sense and not a pedantic way, provides still a useful approach to the issue of causation.*

56. As detailed above, the Appellant submitted its payment claims 2, 3 and 4 directly to the First Respondent and ASY. Even if we are to accept that the absence of a recommendation not to pay is a recommendation to pay, which is denied, the fact that ASY made a recommendation to pay that was fully in accordance with the Appellant's misrepresentation as to value does not break the chain of causation between the Appellant's making of the misrepresentation, and the Respondents' payment that was entirely in accordance with that misrepresentation, and in accordance with ASY's recommendation.

57. Further, even if evidence of reliance was required, it is open to the Court to make inferences of reliance based on the facts detailed above.[37]

58. With respect, the primary judge's decision is correct, and no error in the terms of appeal ground 3 has been demonstrated.

Grounds 4 and 5

59. The Appellant has grouped grounds 4 and 5 together in its submissions, making it plain that these grounds are both aimed at the finding on the Respondents' claim in restitution. The Respondents provide a response to both grounds 4 and 5 in the same vein below.

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[37] *Rosenberg v Percival* (2001) 205 CLR 434 at [25] per McHugh J; *Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd* [1992] FCA 550.

60. Appeal grounds 4 and 5 must fail for the following six reasons:

(a) in relation to the $420,952.39 amount of Payment Claim 4 paid pursuant to the compulsory interim payment provisions of the SOPA:

(i) the scheme of that Act allows the Respondents to have the final contractual rights of the parties determined by the Court; and

(ii) there was no recommendation made by the Construction Manager at all;

(b) in relation to the $32,009.05 amount of the judgment debt that was in relation to Payment Claim 3, and to the extent that the above reasons do not completely dispose of the appeal grounds in relation to Payment Claim 4:

(i) the terms of the contracts do not support the contended "final and binding" assessment of the Construction Manager by way of a "recommendation" under the Construction Management Contract;

(ii) the Appellant is not a party to the Construction Management Contract under which the recommendation is given to the Second Respondent, nor is the First Respondent a party to the Construction Management Contract, and the First Respondent was the entity to which the payment claims were issued, and the entity that paid the payment claims;

(iii) there was no recommendation made by the Construction Manager; and

(iv) the mistake in the Respondents' payment of Payment Claim 3 did not depend on the Respondents' reliance on Payment Claim 3.

(a)(i) The "pay now, argue later" scheme of the SOPA

61. The appeal, and the Appellant's submissions, fail to come to grips with the primary cause of the overpayment determined by the Court below, being the compulsory processes of the *SOPA*. The amount of $420,952.39 out of the total judgment debt of $452,961.44 was a payment that the Respondents were required to make pursuant to its obligation under the provisions of the SOPA. There was no mistake in the making of that payment.

62. The requirement to pay under the scheme of the SOPA is by its very nature an interim obligation. This is reflected in the wording of section 32(3), which provides:

> *In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal--*
> *(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and*
> *(b)* ***may make such orders as it considers appropriate for the restitution of any amount so paid****, and such other orders as it considers appropriate, having regard to its decision in those proceedings.*

The submissions of the Appellant at [28] – [43] run contrary to the express words of the statute in that regard, and also to longstanding authority of this Court in *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 140 ("**John Holland**") at [44] – [45]. That decision repeats the oft quoted characterisation of the scheme under the SOPA as "*pay now, argue later.*" We are in the "argue later" phase in these proceedings, at least in respect of the amount paid on Payment Claim 4, and the Appellant cannot now limit the Court's determination in that regard, as it seeks to do.

(a)(ii) There was no recommendation made by ASY

63. The Appellant's submitted construction of the contracts depends on a recommendation having been made by ASY. As detailed above, there was no "recommendation" from ASY in relation to Payment Claim 4 at all. The submission of Payment Claim 4 was made directly to the First Respondent and no comment in relation to Payment Claim 4 was received from ASY. Unlike the circumstances of Payment Claims 1, 2 and 3, the Respondents did not rely on an absence of recommendation from ASY as being equivalent to a recommendation to pay in relation to Payment Claim 4, because they could see that the work claimed in Payment Claim 4 had not been performed. Accordingly, the Appellant's submissions are irrelevant to the Respondents' claim for repayment of the amount paid to the Appellant on Payment Claim 4.

(b)(i) the contractual "recommendation" of the Construction Manager is not final and binding on the parties

64. The gravamen of the Appellant's submissions on grounds 4 and 5 is that the Construction Management Contract imposes a contractual regime on the Respondents, such that the Construction Manager's recommendation provided under the Construction Management Contract is final and binding on the parties.

65. The principles of contractual interpretation are well established, and do not require repeating here, but may be observed by reference to *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 at [35] and M*ount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2014] HCA 37 at [46] –[49].

66. What is clear is that the terms on which the Appellant relies, including in particular clause 9 of the Construction Management Contract, do not put in place, as the Appellant submits, a final and binding determination under the Trade Contract. The Respondents repeat the submissions at **[4]** to **[**Error! Reference source not found.**]** above in that regard.

67. Further, the Appellant's construction of clause 9 of the Construction Management Contract relied on at [37] of its submissions is illogical. Clause 9(a) relevantly states, with emphasis on the words omitted by the Appellant in its ground 5c.:

> *The Principal is to make prompt payments, **in accordance with the terms of the trade contracts**, directly to all Trade Contractors in accordance with the recommendation of the Construction Manager*."[38]

68. There are two obligations expressed in this clause. The first is the obligation on the Second Respondent to make "*prompt payments*", which obligation is to be effected in accordance with the terms of the Trade Contract. The second obligation is for the Second Respondent to make the payments "*directly to the Trade Contractors*", which is to be performed in accordance with the recommendation of the Construction Manager. The second part of clause 9 supports this interpretation. It provides:

[38] Blue 70.

Nothing in this Contract constitutes or will be taken to impose upon the Construction Manager an obligation to pay Trade Contractors and then to seek reimbursement from the Principal.

69. On the Appellant's construction of clause 9, where the Construction Manager's recommendation is not in accordance with the Trade Contract, as is the case here, there is a tension in the clause, between the Construction Manager's recommendation, and the terms of the Trade Contract, making the clause unworkable.

70. Under clause 11(a) of the Trade Contract, the First and Second Respondents are only required to pay the amount "*properly claimed*" by the Appellant.[39] That amount must be the amount "*properly valued*" in accordance with the work actually done (clause 10(c)[40] and the special conditions of Schedule D[41] of the Trade Contract).

71. However, that internal tension in clause 9 may be resolved by use of the word "recommendation". The word recommendation is defined in the Macquarie Australian Dictionary as follows:

> *noun 1. the act of recommending.*
> *2. a letter or the like recommending a person or thing.*
> *3. representation in favour of a person or thing.*
> *4. anything that serves to recommend a person or thing or induce acceptance or favour.*

The words "induce acceptance" in the above definition do not require mandatory acceptance, and accordingly clause 9 does not have the mandatory effect that the Appellant submits.

72. In addition, even if there was a determination by the Construction Manager under the Construction Management Contract, the Court may still substitute its decision for that of the Construction Manager if the Construction Manager's decision is not in accordance with the terms of the Construction Management Contract. In the case of *Walton v Illawarra* [2011] NSWSC 1188, in similar circumstances to the instant case, the

[39] Blue 98.
[40] Ibid.
[41] Blue 95.

Defendant submitted that the challenged certifications of the Superintendent under a construction contract "*fixed conclusively the full extent of* [the plaintiff's] *entitlements*".[42] In considering that submission, His Honour McDougall J held:

> "*In relation to both extensions of time and the valuation of variations, the court is able to look at the product of the Superintendent's labours, to see whether she has arrived at a reasonable extension of time or a reasonable valuation for a variation. (That is made clear, in relation to extensions of time, by the emphasised words in the definition of "Date for Practical Completion" set out at [13] above.) If the superintendent did not do so, then she has not performed her task, and Walton has not received its contractual entitlement.*
>
> *Accordingly, I conclude that it is open to the court to look at the challenged assessments (for extensions of time and valuation of variations and the like), to determine whether or not they equate to the contractual standard of reasonableness, and to substitute its own determination of what should reasonably have been allowed if they do not. ...*"[43]

73. Even if there was a certification by the Construction Manager that was said to be final and binding on the parties to the Trade Contract, which is denied, that would not be the end of the inquiry. In *Australian Vintage v Belvino Investments No 2 Pty Ltd* [2015] NSWCA 275, a case involving an expert determination under a contract, His Honour Bathurst CJ, with whom Beazley P and McColl JA agreed, held:

> *Nor do I think that the fact that the decision is said to be final and binding compels a contrary conclusion. I respectfully agree with the statement by Nettle JA in AGL Victoria at [76] that such a clause makes very little difference to the question. To the extent that the decision was made in accordance with the terms of the contract, it will be final and binding. To the extent that it is not, it will be subject to review.*[44]

[42] *Walton v Illawarra* [2011] NSWSC 1188 at [35].
[43] Ibid at [56] – [57].
[44] *Australian Vintage v Belvino Investments No 2 Pty Ltd* [2015] NSWCA 275 at [84] – [85].

74. In the instant case, there was no final and binding certification of the Appellant's payment claims by the Construction Manager under the Trade Contract. However, even if the Construction Manager's recommendation under the Construction Management Contract is taken to be a kind of certification under the Trade Contract, the terms of the Construction Management Contract require the Construction Manager to perform this function by "*recommending, to* [the Second Respondent], *payment … in accordance with the* [Trade Contract]."[45] Clearly, on the findings of the primary judge, any such recommendation in relation to Payment Claims 3 and 4 was not in accordance with clause 10(c) and Schedule D of the Trade Contract. Even on the Appellant's own evidence, the alleged recommendation of the Construction Manager in relation to Payment Claim 4 was not in accordance with the Trade Contract. Accordingly, the Court may go behind the Construction Manager's decision and substitute its own in accordance with the terms of the Trade Contract, as the Court below did.

(b)(ii) the Appellant and the First Respondent are not parties to the Construction Management Contract under which the "recommendation" is given

75. As detailed above, there is no mention of the Construction Manager's recommendation to the Second Respondent in the Trade Contract, and the requirement of clause 11(a) of the Trade Contract is for the First and Second Respondents to pay the amount "*properly claimed*" in the Appellant's payment claims. The Construction Manager's recommendation is a creature of the Construction Management Contract, and is for the benefit of the Second Respondent only. The Appellant's attempt to rely on that recommendation should be rejected.

76. Further, the terms of the Construction Management Contract did not bind the First Respondent, which was the entity to which the Appellant submitted its payment claims, and actually made the payments to the Appellant, so the First Respondent was never obliged to take any action on the Construction Manager's recommendation in any event.

(b)(iii) there was no recommendation made by the Construction Manager

77. As detailed above, the Appellant submitted its Payment Claim 3 directly to the First Respondent, and there was no comment or recommendation made by the Construction

[45] Clause 6(l) of the Construction Management Contract: Blue 69.

Manager in relation to it. The fact that the Respondents relied on the absence of a recommendation as equivalent a recommendation in favour of payment does not change the fact that the contractual requirements of clause 6(l) of the Construction Management Contract was not met, and the requirements of clause 9(a) in relation to the Construction Manager's recommendation was therefore not engaged.

(b)(iv) the Respondents' mistake did not depend on the Respondents' reliance on the payment claims

78. Even if Mr Bi based his decision to pay Payment Claim 3 on a recommendation from ASY, which was really the lack of any instruction not to pay,[46] then the First and Second Respondents' mistake is the same. Mr Bi believed that the work claimed in Payment Claim 3 had been performed. This was a mistake because that work had in fact, as and to the extent determined by the Court below, being work to the value of at least $32,009.05, not been performed. The fact that that mistake was furthered by the absence of a recommendation not to pay from ASY does not change the fact that the payment was made by mistake.

Summary in response to grounds 4 and 5

79. On its own evidence, the amounts the Appellant seeks to retain are amounts which it was paid for work that it did not perform. By misconstruing the terms of the contracts, and ignoring the real cause of the large majority of the overpayment, the appellant is attempting to retain amounts to which it is not entitled under the Trade Contract.

[46] Black 90.37-47.

Ground 6

80. Payment Claim 4, which issued on 27 October 2022, stated as follows:[47]

	Excl GST	**Incl GST**
Claimed to date	$893,735.90	$983,109.49
Previously claimed	$511,051.90	$562,157.09
This period claim amount	$382,683.99	$420,952.39

No further payment claims were received from the Appellant, and no further work has been alleged. Accordingly, the total value of all the works claimed by the Appellant was $983,109.49 (incl GST), and this amount was paid to the Appellant.

81. The primary judge found that the Appellant had been overpaid in the amount of $452,961.44 (incl GST).[48] As submitted above, by necessary implication, the judge found that the total value of the works performed by the Appellant was $530,148.05 (incl GST). This figure forms a ceiling on what can be claimed by the Appellant on any payment claim.

82. On 27 October 2022 when Payment Claim 4 was issued by the Appellant, the Appellant had already been paid $562,157.09 (incl GST - see table above). As a result, the Appellant had already been paid $32,009.05 above the total value of the works performed. Accordingly, when Payment Claim 4 was made, it was an overclaim in its entirety. Accordingly, the Respondents claim the entirety of the value of Payment Claim 4 as damage.

[47] Blue 212.
[48] Red 67.

83. Similarly, Payment Claim 3, issued on 30 September 2022, stated as follows:[49]

	Excl GST	**Incl GST**
Claimed to date	$511,051.90	$562,157.09
Previously claimed	$429,882.10	$478,870.31
This period claim amount	$81,169.80	$89,286.78

84. The total value of all works performed by the end of construction, $530,148.05 (incl GST) forms a ceiling on what should have been claimed by the Appellant in Payment Claim 3 as well. As a result, the damage that the Respondents have suffered due to the mistake in payment of Payment Claim 3 was the total value of the works claimed complete as at that date, $562,157.09 (incl GST), less the actual total value of the works, $530,148.05 (incl GST), being a figure of $32,009.05 (incl GST). This amount formed a portion of the payment of $89,286.78 paid by the Respondents to the Appellant in response to Payment Claim 3.

85. Accordingly, logic dictates that the payment of the amount of Payment Claim 3 was mistaken to the amount of $32,009.05 at the very least, as the amount of work claimable in Payment Claim 3 could not have been more than the total value of all work performed on the Project. Indeed, it is likely that some work was done between the submission of Payment Claim 3 on 30 September 2022 and the submission of Payment Claim 4 on 27 October 2022. However, on the basis that the overpayment on Payment Claim 4 in the amount of $420,952.39 is repaid, the only amount then unjustly retained by the Appellant in relation to the mistaken payment of Payment Claim 3 would be $32,009.05, as the remainder would be in respect of work that was performed by the Appellant at some stage.

86. For the above reasons, the primary judgment on quantum should stand.

[49] Blue 207.

Garth Campbell

Tenth Floor St James Hall Chambers

23 July 2025