



AMENDED NOTICE OF APPEAL
(Filed pursuant to order 1 made on 21 May 2025)

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
Registry	Sydney
Case number	2025/00156488

TITLE OF PROCEEDINGS

Appellant	CBEM Holdings Pty Ltd
<u>First Respondent</u>	Sunshine East Pty Ltd
<u>Second Respondent</u>	<u>Chunlin Fan</u>

PROCEEDINGS IN THE COURT BELOW

Title below	Sunshine East Pty Ltd v CBEM Holdings Pty Ltd
Court below	District Court of New South Wales
Case number below	2023/139206
Date[s] of hearing	3, 4 and 5 June 2024; 4 July 2024; 18 November 2024
Material date	28 March 2025
Decision of	Acting Judge I Coleman SC

FILING DETAILS

Filed for	CBEM Holdings Pty Ltd, Appellant
Filed in relation to	Whole of decision below
Legal representative	Jock Hamilton, Hamilton Mott
Contact name and telephone	Jock Hamilton, 0433 654 209
Contact email	jock@hamiltonmott.com.au

HEARING DETAILS

This amended notice of appeal is listed for hearing at 10:15 am on 9 September 2025.

TYPE OF APPEAL

Appeal

DETAILS OF APPEAL

- 1 This appeal is brought under s.127(3) of the *District Court Act 1973* (NSW).
- 2 This notice of appeal is not filed pursuant to leave to appeal.
- 3 The appellant has not filed a notice of intention to appeal.
- 4 The appellant appeals from the whole of the decision below.

APPEAL GROUNDS

- 1 The primary judge wrongly found that the Appellant conceded that
- a. it claimed for work which it had not performed (J[15]); 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]),
- in circumstances where the Appellant made no such concessions, and instead accepted only that the amount it was paid exceeded its independent quantity surveying expert's opinion of the value of work performed, but in a context where:
- c. that expert inspected the works 11 months after the works were complete and "weather events" made the valuation task "more difficult" J[131] and "to some extent changed and potentially obscured work which [the Appellant] had performed": J[137]; and
 - d. the Trade Contract did not permit a retrospective assessment of value by a quantity surveyor, but instead required a contemporaneous assessment of work performed, and its value, by ASY.

Liability for misleading or deceptive conduct

- 2 The primary judge erred at J[89]; J[90]; J[92] ; J[99]; J[100]; J[115]; J[116]; J[125] 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. The primary judge should have found:
- a. the payment claims were a representation by the Appellant that in its opinion the amounts claimed properly valued the work actually done and represented, in the Appellant's opinion, its entitlement to payment;
 - b. because the representations were not dishonest (J[90]; J[99]), and the Appellant genuinely believed them to be true (J[126]), the representations were not misleading or deceptive or likely to mislead or deceive within the meaning of section 18 of the *Australian Consumer Law*.
- 3 Having found:
- a. Mr Bi and the Respondents relied entirely on ASY to review payment claims, make a representation to them about the claims, and to tell them if any of the work claimed in the payment claims had not been completed (J[52]; J[96]);

- b. ASY did not give evidence of the impact upon any representation upon it (including any evidence it was misled or mistaken) (J[96]) and any evidence it could have given would not have assisted the Respondent's case (J[20]);
- c. clause 9 of the Construction Management Contract required the Second Respondent to make prompt payment to all trade contractors (including the Appellant) in accordance with the recommendation of ASY (J[26]); and
- d. The Second Respondent Mr Fan (who made the financial decisions for the First Respondent and ultimately authorised payment to the Appellant) gave no evidence (including that he was mistaken, or as to the impact of any mistake on his decision and authorisation to pay) and any evidence he could have given would not have assisted the Respondent's case (J[96]),

the primary judge erred in finding (J[96]; J[127]) that the Respondents suffered loss or damage "because of the conduct" of the Appellant within the meaning of section 236 of the *Australian Consumer Law*.

Liability for restitution of unjust enrichment

- 4 Having found the matters listed in Ground 3 (a) to (d) above, the primary judge erred in finding (J[71]; J[82]) that the relevant payments were caused by a mistake that the work claimed by the Appellant had actually been performed.
- 5 Further, and in circumstances where:
 - a. clause 6(k) of the Construction Management Contract required ASY to monitor the work of the Appellant and be reasonably satisfied that the work was being performed in accordance with the requirements of the Trade Contract (J[25]);
 - b. clause 6(l) of the Construction Management Contract required ASY to administer the Trade Contract on behalf of the Second Respondent, including reviewing and processing all applications of payment, submitting those applications to the Second Respondent, and recommending to the Second Respondent payment of those applications (J[25]);
 - c. clause 9 of the Construction Management Contract required the Second Respondent to make prompt payment to all trade contractors (including the Appellant) in accordance with the recommendation of ASY (J[26]);
 - d. clause 10 of the Trade Contract required any dispute as to a payment claim to be advised in writing to the Appellant within 10 business days of receipt of the payment claims (J[28]);
 - e. clause 11 of the Trade Contract required that the Respondents pay the Appellant the amount properly claimed in the payment claim, or if that is

disputed or adjusted, then the amount which is consequently admitted as being payable (J[29]); and

- f. the Trade Contract was on foot until 1 November 2022, when it was repudiated by the ~~Plaintiff~~ Respondents and then terminated by the ~~Defendant~~ Appellant (J[36]),

the trial judge erred in finding (J[83], J[84] and J[86]) that it was unjust (by reason of mistake or otherwise) or offensive to conscience for the Appellant to retain the monies paid to it and should have instead found that the Appellant's retention of those monies was consistent with the contractual arrangements between the Appellant, the Respondents, and ASY.

Quantum

- 6 The primary judge erred at J[181]-[185] in assessing the quantum of the Respondent's claim as \$452,961.44 in circumstances where:
 - a. the Respondents accepted that payment claims 1 and 4 were not paid by reason of misleading or deceptive conduct or mistake (J[69]); and
 - b. the Respondents failed to serve any evidence, and as a result the Court was unable to make any findings, as to the quantum:
 - i. of loss alleged by reason of misleading or deceptive conduct; or
 - ii. the overpayment alleged by reason of mistake

in paying payment claims 2 and 3.

ORDERS SOUGHT

- 1 Appeal allowed
- 2 Judgment of the court below be set aside.
- 3 Judgment for the ~~Defendant~~ Appellant.
- 4 The amount of \$450,000 paid into the District Court by the ~~appellant~~ Appellant as a condition of a stay of enforcement be repaid to the ~~appellant~~ Appellant, together with any interest, forthwith.
- 5 The ~~respondents~~ Respondents to pay the ~~appellant's~~ Appellant's costs of the appeal and below.

UCPR 51.22 CERTIFICATE

I certify under UCPR 51.22(2) that the amount in issue in this appeal exceeds the specified amount under s.127 of the *District Court Act*.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

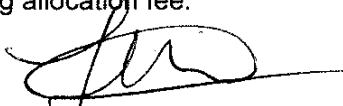
I have advised the appellant[s] that court fees will be payable during these proceedings.

These fees may include a hearing allocation fee.

Signature

Capacity

Date of signature



Solicitor on record

30/5/2025

NOTICE TO RESPONDENTS

If your solicitor, barrister or you do not attend the hearing, the court may give judgment or make orders against you in your absence. The judgment may be for the orders sought in the notice of appeal and for the appellant's costs of bringing these proceedings.

Before you can appear before the court, you must file at the court an appearance in the approved form.

HOW TO RESPOND

Please read this notice of appeal very carefully. If you have any trouble understanding it or require assistance on how to respond to the notice of appeal you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the notice of appeal from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

Court forms are available on the UCPR website at www.ucprforms.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	Supreme Court of New South Wales, Court of Appeal Law Courts Building Queen's Square Level 5, 184 Phillip Street Sydney NSW 2000
Postal address	GPO Box 3 Sydney NSW 2001
Telephone	1300 679 272

PARTY DETAILS

A list of parties must be filed and served with this notice of appeal.

FURTHER DETAILS ABOUT APPELLANT**Appellant**

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Legal representative for appellant

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DETAILS ABOUT RESPONDENTS**First Respondent**

Name Sunshine East Pty Ltd (ACN 635 418 870)
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Second Respondent

Name Chunlin Fan
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