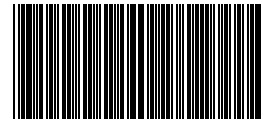



Zeinab Tawbe

Solicitor for the First Respondent



Filed: 13 October 2025 1:34 PM



D00028P4MB

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	Calibre Construction Group Pty Ltd, Respondent 1
Legal representative	Michael Ayache
Legal representative reference	
Telephone	02 8566 2000

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 (Respondent's Written Submissions (Appeal) -13.10.2025.pdf)

[attach.]

IN THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL

PROCEEDINGS NO. 261209 OF 2025

KALORIZIKO PTY LTD ATF RYDE COMBINED UNIT TRUST & ANOR

v

CALIBRE CONSTRUCTION GROUP PTY LTD & ORS

FIRST RESPONDENT'S WRITTEN SUBMISSIONS

Introduction

1. These proceedings concern a contractual dispute between the first appellant (**Kaloriziko**) and the first respondent (**Calibre**). On 30 November 2017, Kaloriziko (as developer) engaged **Calibre** (as builder) to design and construct a mixed use residential and commercial development at 3-9 St Annes Street, Ryde, called the Sky Gardens (the **Contract**).¹
2. The original contract sum was \$31 million.² Over the course of the project, Kaloriziko approved \$1,637,073.23 in variations.³ Kaloriziko refused to pay Calibre \$256,409.41 of those approved variations.⁴ Kaloriziko also failed to pay over \$1.6m in retention. Kaloriziko was obliged to hold that retention on trust for Calibre and to pay it to Calibre 12 months after practical completion.⁵ It did not hold the retention sum on trust and did not pay it to Calibre.⁶
3. On 5 July 2022, Calibre commenced proceedings against Kaloriziko seeking payment of the outstanding amounts.
4. Shortly after the commencement of the proceedings, Kaloriziko transferred nearly all of its remaining assets to related parties for no consideration.⁷ Those acts of dissipation

¹ Decision of Stevenson J in *Calibre Construction Group Pty Ltd v Kaloriziko Pty Ltd atf Ryde Combined Unit Trust; Kaloriziko Pty Ltd atf Ryde Combined Unit Trust v Calibre Construction Group Pty Ltd (No 2)* [2025] NSWSC 593 (**J1**) at [1] and [2], Red 149.

² J1[2]; Red 3.

³ J1 [83], [85], Red 162; J1[111], Red 167.

⁴ J1 [85], Red 162.

⁵ J1[3], Red 3.

⁶ J1[23] to [24], Red 153.

⁷ The dissipation was summarised in Calibre's Written Closing Submissions; Black 355 – 360.

caused Calibre to seek urgent freezing orders, and to join the two directors of Kaloriziko (now the Second Appellant and Second Respondent) to the proceedings for knowing assistance in breach of trust. Freezing orders were made and later replaced with mortgages over properties proffered as security by the defendants.

5. On 8 February 2024 Calibre settled its claim against the Second Respondent pursuant to a Deed of Agreement and Set-Off (the **Deed**).⁸ By its Further Amended List Response, Kaloriziko asserted that any amount awarded by the Court to Calibre was required to be reduced by the alleged benefit Calibre received pursuant to the Deed.
6. On 17 June 2024, Kaloriziko filed a cross-claim by which it claimed damages for delay (or alternatively liquidated damages under the Contract), damages for defective works and sought to claw back variations that it had approved and paid to Calibre.
7. Following a three-day hearing, the primary judge found in favour of Calibre. The primary judge made findings that:
 - (a) it was not open to Kaloriziko, in circumstances where it approved variations, to deny its liability to pay, or to claw back amounts already paid.⁹ That finding is the subject of grounds 1 to 5 of this appeal;
 - (b) Kaloriziko had no entitlement to liquidated damages under the Contract because the “*Original Contracted Completion Date*” was 23 May 2020. With agreed extensions of time, Calibre completed the works on time.¹⁰ That finding is the subject of grounds 6 to 7 of this appeal; and
 - (c) the settlement between the Second Respondent and Calibre under the Deed did not alter any liability that Kaloriziko had to Calibre.¹¹ That finding is the subject of grounds 8 to 15 of this appeal.

Grounds 1 to 3: The Variations

8. Grounds 1 to 3 of the appeal are concerned with five variations claimed by Calibre under the Contract, being variations V001, V007, V0011, V0013 and V0021.¹² Kaloriziko

⁸ J1[8]-[10]; Red 150 – 151.

⁹ J1 [112]; Red 167.

¹⁰ J1 [155] to [161]; Red 173 to 174.

¹¹ J [67]; Red 160.

¹² While the Appellants have not referred to Variation V001 in AS [25], this variation appears to be disputed having regard to the total claimed at AS [26] of the Appellants’ submissions; see also Kaloriziko’s Notice of Appeal; Red 220I-J.

approved and paid those variations. At trial, the Appellants alleged that the work the subject of the variations was already in the scope of the Contract and therefore not within the meaning of a variation. The primary judge found that, on a proper construction of the Contract, it was not open for Kaloriziko to approve a variation but then leave it open to later contend that there was no variation.¹³ On appeal, the Appellants argue that the primary judge erred by making this finding. The Court should reject this argument for the following reasons.

9. *First*, contrary to the Appellants' argument, all the work the subject of the relevant variations fell outside the scope of work priced in the Contract Sum and therefore was properly the subject of a claim for a variation. That argument is raised in Calibre's Notice of Contention.¹⁴ That is, the primary judge should have found that the works the subject of variations V001, V007, V0011, V0013 and V0021 were properly the subject of variations on the basis that they were "*Excluded items*" within the meaning of clause 1 of the General Conditions because they were "*infrastructure upgrades*".

10. The clauses relevant to this argument are set out below:

(a) clause 1 of the General Conditions defined "*excluded items*" as follows:

"excluded items" means any work or costs, fees or charges in relation to the following: . . .

*(v) services or infrastructure upgrades;*¹⁵

(b) "*Services*" is defined broadly and includes:

"water, stormwater, gas, steam, compressed air, electricity, drainage, sewerage, telephone, security, fire services, control systems, or telecommunication pipes, cables, facilities, ducts, wires and conduits including connections and access points. . ."

(c) "*Infrastructure*" is not defined in the Contract. However, the Australian Encyclopaedic Legal Dictionary provides that infrastructure means "*the system of essential services, utilities and public and community facilities necessary for urban*

¹³ J1 [109]; Red 167

¹⁴ Red 225, para 3.

¹⁵ Red 260.

areas to function.” Such infrastructure includes electricity, street lighting and sewerage facilities; and

- (d) clause 2(b) of the Formal Instrument of Agreement provided that any work required to perform the excluded items or incidental to it will be in addition to the Contract Sum and constitute a variation to the Contract. Clause 2(b) states:

*“notwithstanding any other condition in this Contract, the Parties expressly agree that the Excluded Items and any associated fees to authorities and/or service providers in relation to the Excluded Items do not form part of the Contract Sum and should any work be required to perform the Excluded items, that work, including any work incidental to performing that work will be in addition to the Contract Sum and will constitute a Variation to the Contract”*¹⁶

- 11. The effect of these clauses is that any works “*in relation to*” services or infrastructure upgrades (including any incidental work) will constitute a variation to the Contract and will be added to the Contract Sum. That is even if the work was otherwise required to be performed under the Contract and within the Work under Contract (**WUC**).
- 12. Further, the phrase “*services or infrastructure upgrades*” ought not be interpreted narrowly. It can be inferred that the commercial purpose of clause 2(b) of the Formal Instrument of Agreement was to exclude from the Contract Sum those works which could not be priced with reasonable certainty as at the date of the Contract. With respect to “*services or infrastructure upgrades*”, those works could not be priced because it was not known what such works the Council or other authorities may require the builder to undertake. The cost of those upgrades was excluded from the Contract Sum and was to be added later once the precise scope of works was known.
- 13. The evidence indicates that each of Variations V001, V007, V0011, V0013 and V0021 comprised work that is in relation to services or infrastructure upgrades (including any incidental work):
 - (a) Variation V001 comprised two items, the installation of an electrical substation and the upgrade of street lighting.¹⁷ The installation of an electrical substation is work relating to “*services*” (which includes electricity) and it is also an upgrade to

¹⁶ Red 242.

¹⁷ CB 984.

infrastructure because it is an upgrade of the electricity network, which is infrastructure. The upgrade of street lighting is also an infrastructure upgrade because street lighting is itself infrastructure;

- (b) Variation V0013 comprised works relating to Variation V001, namely road restoration costs associated with the installation of the electrical substation and the upgrade of street lighting.¹⁸ Those works were incidental and related to the services and infrastructure upgrade works the subject of Variation V001;
- (c) Variation V007 comprised works required to be completed by Sydney Water, namely various sewer works and water connection works.¹⁹ Those works relate to “services” (which includes water) and also are an upgrade to infrastructure because the sewer and water systems are elements of infrastructure. The works are labelled “section 73 works” because s 73 of the *Sydney Water Act 1994* (NSW) provides that Sydney Water may grant a developer a compliance certificate if the developer has constructed water infrastructure works that are required because of a proposed development. Condition 133 of the Development Consent expressly identified that Section 73 works were works relating to infrastructure²⁰;
- (d) Variation V0011 comprised works associated with locating underground water services at night.²¹ Those works were foreshadowed in variation V007 which stated at Item 1.6 that “*It is anticipated that there remains 1 x Night Works to complete the Cold Water Connection*”. Like Variation V007, those works were incidental or related to sewer and water connection works; and
- (e) Variation V0021 comprised further “section 73” sewer and water connection works required to be completed by Sydney Water.²² Those works resulted in the final completion of the cold water connection and were properly characterised as related to “services” (which includes water) and also as an upgrade to infrastructure.

14. The primary judge dealt with this argument briefly at J1 [123]-[125].²³ His Honour seems to have decided that the works the subject of the variations set out above are not “upgrades” to infrastructure but instead are new items of infrastructure. That is an overly

¹⁸ CB 1061.

¹⁹ CB 1381.

²⁰ CB 337.

²¹ CB 1449, 1450.

²² CB 1555.

²³ Red 169.

narrow view of the term “*infrastructure*”. The Court ought to find that, in this context, infrastructure is the system of essential services and utilities necessary for communities to function and a new item of capital works that adds to that infrastructure is an upgrade of infrastructure. In addition, the variations listed above are also “*services*” for the reasons described above. To find the contrary is to apply an uncommercial construction. For example, whether an authority directs a new substation, or instead directs the enhancement of an existing substation, should not make a difference to the parties’ cost allocation. Both are “upgrades” to infrastructure, even if one is by enhancement of existing infrastructure and the other is by addition of a new substation.

15. For all of these reasons, the Court ought to find that the work the subject of the variations listed above are properly characterised as “*excluded items*” and therefore the work required to perform those excluded items constituted variations.
16. If the Court accepts this argument, then grounds 1, 2 and 3 ought to be rejected. Those grounds rely on clause 36 of the Contract. However, clause 2(b) of the Formal Instrument of Agreement prevails over any other condition of the Contract including clause 36 and the effect of cl 2(b) is that the work the subject of the claims for variations are to be characterised as variations (regardless of whether they are part of the WUC) and added to the Contract Sum.
17. *Secondly*, if the Court rejects the first argument, Calibre relies upon the reasons set out by the primary judge at J1[86] – [112]²⁴. That is, once Kaloriziko approved each of the above variations (J1[111]²⁵) the result was that the price of the variations had been added to the Contract Sum. There was no contractual mechanism available to reverse the variations that had been added to the Contract Sum. In that regard, the following provisions of cl 36 of the Contract are relevant:
 - (a) clause 36.1 provides that “*The Principal’s Representative. . . may direct the Contractor to vary WUC. . .*” Clause 36.2 provides that “*The Principal’s Representative may gave the Contract written notice of a proposed variation*”²⁶;

²⁴ Red 162 to 167.

²⁵ Red 167.

²⁶ Red 296.

- (b) clause 1 defines “*direction*” to include “*agreement, approval. . .notice. . .permission*”. The word “*direct*” in clause 36.1 would similarly mean “*agree, approve, notify or permit*”²⁷; and
- (c) clause 36.4 provides that “*The Principal’s Representative shall, as soon as possible, price each variation*” and “*that price shall be added or deducted from the contract sum.*”²⁸
18. At J1 [87],²⁹ the primary judge recorded the manner in which Kaloriziko approved variations. That is Calibre submitted a document called “*Variation Cost*” to Kaloriziko’s representative. That person stamped the document “*Approved*” and initialled and dated the document next to the “*Approved*” stamp.
19. The variation approval document signed by Kaloriziko’s representative for each variation constituted both a direction in writing for the purposes of clause 36.1 or 36.2 (being an approval of a variation) and the pricing of that variation for the purposes of clause 36.4 (see J1[98]³⁰). The effect of clause 36.4 was that the price of each variation was added to the Contract Sum. Kaloriziko issued documents recording that the Contract Sum had increased by the amount of the approved variations.³¹
20. On appeal, Kaloriziko argues that additions to the Contract Sum resulting from the variations are provisional only, or are “*on account only*” (AS [18]). There is nothing in the Contract which supports this conclusion. There was no contractual mechanism – and none was pointed to – to reverse that addition. Once an amount was added to the Contract Sum, that addition was final (J1[103]³²). It would make little sense for variations to be provisional given that the builder is required to perform the work the subject of the variations. A reasonable businessperson in the position of the builder would hardly agree to perform the work the subject of an agreed variation if the developer could later reverse that variation. For that further reason, grounds 1, 2 and 3 of the appeal should be dismissed.
21. *Thirdly*, it is unclear what cause of action the Appellants rely upon to claim that Calibre must repay variations that Kaloriziko approved and paid. Under clause 36 of the Contract, Kaloriziko (not Calibre) had the power to issue directions to vary the WUC and

²⁷ Red 260; J1 [95] Red 164.

²⁸ Red 297.

²⁹ Red 163.

³⁰ Red 165.

³¹ Eg CB 1967-1968

³² Red 166.

approve variations. Kaloriziko is now complaining about its own conduct in approving those variations. If Kaloriziko suffered any loss, the cause of that loss was not any breach of contract by Calibre; instead, it was Kaloriziko's own voluntary act in approving each variation and causing that approved amount to be added to the Contract Sum. Accordingly, there is no basis to find that Calibre ought to pay damages to Kaloriziko.

22. For all of these reasons, the Court should dismiss grounds 1,2 and 3 of the appeal.

Grounds 4 and 5: Consultants' fees

23. Grounds 4 and 5 of the appeal are concerned with Variation V0044 (Consultants' fees). Like the variations discussed above, Kaloriziko approved Variation V0044.³³ The primary judge dismissed Kaloriziko's claim that Calibre is not entitled to payment of V0044. Mr Mohanna, in his affidavit, explained the circumstances which led to the approval of Variation V044, namely 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.³⁴ Variation 044 reflected a change to that position.
24. In ground 4 of the appeal, the Appellants argue that the primary judge failed to give reasons for his finding. That is not correct. At J1[114]³⁵, the primary judge stated that "*in relation to all the variations, it follows from my conclusion at [112] that the Builder is entitled to payment for each of the variations and that the Developer is not entitled to recover any amount from the Builder on that account. I have signified this in the Redfern Schedule by the words "Allowed", "Approved" and "Claim Rejected" as appropriate.*"
25. In respect of Variation V044, the primary judge indicated "*Allowed – Approved*". It is plain from J1[114] (and its reference to J1[112]) that the reason the primary judge allowed Calibre's claim in respect of this variation was because Kaloriziko had already approved and priced the variation in accordance with clause 36.4 and added to the Contract Sum. There was no contractual mechanism that allowed for the removal of that addition for the reasons set out in paragraphs 17 to 20 above.

³³ CB4359, CB179 [120]

³⁴ Affidavit of Ali Mohanna 25 September 2023 [115]; CB 179

³⁵ Red 167.

26. In ground 5 of the appeal, the Appellants argue that the primary judge should have found that Variation V044 was not a variation. For the reasons expressed in paragraphs 17 to 21 above, that argument should be rejected.

Grounds 6 and 7: The date for practical completion

27. Grounds 6 and 7 of the appeal are concerned with Kaloriziko's claim for liquidated damages for Calibre's delay in reaching practical completion. What is in dispute is whether the parties extended the initial date for practical completion from 20 April 2020 to 23 May 2020.³⁶ It was common ground that practical completion was achieved on 15 September 2020.³⁷ It was also common ground that Kaloriziko granted 102 days extension of time.³⁸ That issue was important because if 102 days of extensions of time is added to 23 May 2020, Calibre completed on time. However, if 102 days of extensions of time is added to 20 April 2020, Calibre completed the works 34 days late entitling Kaloriziko to \$7,500 per day in liquidated damages.
28. The Appellants argue that the primary judge erred in finding that the initial date for practical completion was 23 May 2020 and ought to have found that date was 20 April 2020.
29. The Appellants argue (AS [34]) that *"if the parties wanted to vary the date for practical completion, then they had to agree in writing to vary the Contract and sign an agreement to that effect"*. The Appellants rely on cl 5(b) of the Formal Instrument of Agreement which provides that "The Contract may be varied only by written instrument executed by both parties."³⁹ However, clauses such as this do not prevent variations of a contract by other means.⁴⁰ Further, as the primary judge found, there was no need to vary the Contract to extend the initial date for practical completion. That was because the definition in the Contract of the "date for practical completion" contains a mechanism within to accommodate extensions to the date for practical completion without resort to clause 5(b).
30. The contractual definition of the term "date for practical completion" relevantly provides that:⁴¹

³⁶ J1[148]; Red 172.

³⁷ J1[147]; Red 172.

³⁸ J1[160]; Red 174.

³⁹ Red 244

⁴⁰ *Bundanoon Sandstone v Cenric Group* [2019] NSWCA 87 At [122]

⁴¹ Red 259

“date for practical completion means. . . (b) where Item 7(b) provides a period of time for practical completion, the last day of that period, but if any [extension of time] for practical completion is directed by the Principal’s Representative. . . it means the date resulting therefrom.”

31. The definition set out above refers to Item 7(b). That item provided that the period of time for practical completion was “20 months from the date that Construction Certificate is issued”.⁴² The primary judge correctly observed that the Construction Certificate was issued on 20 August 2018, so 20 months from that date was 20 April 2020.
32. The dispute between the parties was whether the initial date for practical completion of 20 April 2020 had been extended by the parties. The definition of “date for practical completion” provided that the date could be extended if Kaloriziko’s representative directed such an extension. As was observed by the primary judge, the Contract contained a wide definition of “direction”, which included agreement.⁴³ Such an agreement could be reached even if Calibre had not claimed an extension of time.⁴⁴
33. So, the dispute between the parties was whether there was a direction or agreement to extend the initial date for practical completion. In the face of competing lay evidence about whether there was such an agreement or direction to extend the initial date for practical completion from 20 April 2020 to 23 May 2020, the primary judge resolved the dispute in the orthodox way, on the basis of contemporaneous documents, and the apparent logic of events.⁴⁵ In that regard, the contemporaneous documents, and the apparent logic of events all pointed one way.
34. *First*, Project Control Group Reports (such as the reports dated 22 December 2018⁴⁶ and 2 May 2019⁴⁷) recorded the “*Original Construction Complete Date*” as 23 May 2020.⁴⁸ Those reports were finalised after project meetings between Calibre and Kaloriziko. The 2 May 2019 report was sent to Kaloriziko’s Representative prior to the meeting and said in writing by Kaloriziko’s representative to be “*acceptable*”.⁴⁹

⁴² Red 312.

⁴³ J1[151]; Red 173. Also see paragraph 17(b) above.

⁴⁴ Red 294, cl 34.5, third paragraph.

⁴⁵ *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at [31].

⁴⁶ CB 1020 to 1053.

⁴⁷ Exhibit C (tendered at hearing).

⁴⁸ J1[152]; Red 173. CB 1020 to 1053 (22 December 2018 PCG Report), Exhibit C (tendered at hearing).

⁴⁹ J1[153]; Red 173. Exhibit C (tendered at hearing).

35. *Secondly*, Calibre made claims for extensions of time, recording the “*Original Contracted Completion Date*” as 23 May 2020.⁵⁰ Each extension of time claim was marked “*approved*” by Kaloriziko’s representative, and the extended date for completion was calculated on the basis that the “*Original Contracted Completion Date*” was 23 May 2020.
36. On the basis of these matters, the primary judge correctly found that the parties had agreed to extend the initial date for practical completion to 23 May 2020. Accordingly, the Court should dismiss grounds 6 and 7 of notice of appeal.

Grounds 8 to 11: The Deed of Set Off

37. Grounds 8 to 11 of the appeal are concerned with the argument that Kaloriziko’s liability was discharged by reason of Calibre entering into a Deed which released the third and fourth defendants (Mr **Tran** and **Ninth Campsie** Pty Ltd). The claim against Mr Tran was that he was knowingly involved in an alleged breach of trust by Kaloriziko. The claim against Ninth Campsie was that Kaloriziko transferred a property to it with intent to defraud creditors.
38. The Appellants’ argument appears to be that both Kaloriziko, Mr Tran and Ninth Campsie all had a coordinate liability to pay any judgment debt issued against Kaloriziko in favour of Calibre. The Appellants argue that the effect of the Deed was to discharge that coordinate liability because Calibre received a benefit under that Deed which is greater than the judgment debt. The primary judge dismissed that argument. His Honour was correct to do so for the reasons stated in the judgment and for the additional reasons stated in grounds 1 and 2 of the Notice of Contention [Red 225].
39. The legal principles related to these grounds of appeal are not controversial. They are as follows:
- (a) “*When a person pays more than his or her share of a common monetary obligation, the payment pro tanto discharges the obligation of all who owe the common obligation*”⁵¹;

⁵⁰ J1[154] – [155]; Red 173. CB222; Affidavit of Ali Mohanna 2 August 2024 [11]; CB 799-803; CB 855-865; CB 971-974; CB 993 – 994; CB 1003 – 1004

⁵¹ *Burke v LFOT* (2002) 209 CLR 282, 299 [38]

- (b) the principle against double recovery means that a plaintiff cannot recover more than its loss against the defendants to the proceedings⁵²; and
- (c) the release of one or more people subject to a joint and several obligation does not release them all.⁵³

The Deed of Agreement and Mortgages

40. The Appellants' argument relies upon a Deed of Agreement and Set off (**Deed**) entered into between Calibre, Tran, Ninth Campsie, Apolo Apartments Pty Ltd (**Apolo**) and Aerial Holdings Pty Ltd (**Aerial**).⁵⁴ The recitals to the Deed refer to a separate agreement under which Apolo had agreed to sell properties (**Arncliffe Properties**) to Aerial for \$5m. Under the Deed:

- (a) Calibre released the Tran parties (Mr Tran and Ninth Campsie) from any sum that the Tran parties were required to pay Calibre in the present proceedings (cl 4);
- (b) in the event that there is an amount payable by the Tran parties to Calibre in the present proceedings, agreed that sum will be added to the sale price of the property purchased by Aerial (cl 3);
- (c) the effect of adding that sum to the purchase price of the property was that the additional sum added to the purchase price will offset any amount payable to Calibre in the litigation so that no additional sum will be payable by the Tran parties to Calibre (cl 3); and
- (d) Calibre agreed to take all steps necessary to discharge registered mortgages granted by Ninth Campsie and Ms Tran in favour of Calibre (cl 5(d)).⁵⁵

41. The mortgages referred to in paragraph 40(d) above were granted by Ninth Campsie and Ms Tran as part of orders made by the Court on 26 May 2023.⁵⁶ The Court had previously made freezing orders against all the defendants. By consent orders made on 26 May 2023, the Court discharged those freezing orders and made orders that the parties take steps to register mortgages over properties held by Ninth Campsie, Ms Tran and two other companies (Marwan Layla Pty Ltd and The Wave Rockdale Pty Ltd). The

⁵² **Anderson v Canaccord Genuity Financial (No 2)** (2024) 115 NSWLR 1, [2024] NSWCA 161 [67ff]

⁵³ **Anderson**, [170ff]

⁵⁴ CB Sup 3, pp 6614-6631

⁵⁵ Red 157, J1[50]

⁵⁶ Red 155-156, J1 [36]-[42]; CB5980; CB5996; CB5954; CB6927-9

mortgage secured payment of the “Secured Money” which was defined in the mortgages to mean:

AUD 2,963,529.21, or upon judgment in respect of each of the Defendant Parties (other than for costs) the Relevant Judgment Debt

42. In the definition of “Secured Money” set out above, the Defendant Parties was defined to mean all of the defendants and the Relevant Judgment Debt was defined to mean any judgment in the proceedings in favour of Calibre.

The Appellants’ arguments

43. The Appellants, in their Further Amended List Response, pleaded that Tran and Ninth Campsie had reached “an accommodation” in respect of the claims Calibre brought, and to the extent that Calibre has received any benefit from the accommodation, Calibre must account for that benefit. The pleading states:⁵⁷

354. *On or about 8 February 2024, the plaintiff and the third and fourth defendants reached an accommodation in respect of the claims the plaintiff brought against those defendants in these proceedings.*

Particulars

Deed of Agreement and Set Off dated 8 February 2024

355. *To the extent that the plaintiff has received any benefit from the accommodation described in paragraph [354] above, the plaintiff must account for that benefit in its claim against the first and second defendants, with the value of such benefit to be determined by this Court prior to any final orders being made.*

44. The Appellants, in their closing submissions, alleged that “each of the first, second and third defendants have a coordinate liability to Calibre for the contract debts of Kaloriziko.” The Appellants then argued that the coordinate liability was created by the mortgages because those mortgages “*resulted in the defendants sharing a common burden in respect of the obligations owed to Calibre*”. The Appellants argued that coordinate liability was discharged by the discharge of the mortgages.⁵⁸

The primary judgment

45. The primary judge rejected the argument that each of the first, second and third defendants had a coordinate liability. His Honour noted that the only basis on which

⁵⁷ Red 109-110

⁵⁸ Black 414-416

Calibre contended that Mr Chanine and Mr Tran were liable was on the basis that they knowingly assisted Kaloriziko's breach of trust. However, since the primary judge found that there was no breach of trust, there was no coordinate liability arising from the causes of action against the defendants.⁵⁹ The Appellants do not appear to challenge that finding.

46. However, the primary judge found that there was a coordinate liability arising from the mortgages granted by Ninth Campsie, Ms Tran, Marwan Layla Pty Ltd and The Wave Rockdale Pty Ltd. Each of those entities and Kaloriziko had a coordinate liability for any judgment.⁶⁰ As stated in paragraph 41 above, the mortgages secured payment of any judgment debt in these proceedings payable by Kaloriziko.
47. The primary judge then considered whether the effect of the Deed was to discharge fully the coordinate liability of the mortgagors and Kaloriziko to Calibre.⁶¹ His Honour observed that this question turned on what benefit Calibre received under the Deed. However, there was insufficient evidence to assess the benefit that Calibre had received. In order to determine the real benefit that Calibre had received it was necessary to ascertain not only what Calibre received but also what it gave up under the Deed. In that regard, there was no evidence of the value of the claims that Calibre had against Ninth Campsie and Mr Tran. Accordingly, the primary judge held that he could not assess to what extent, if any, the effect of the Deed was to cause a discharge of any coordinate liability to Calibre.

The Notice of Contention

48. In addition to the reasons relied upon by the primary judge, there are two additional reasons why the Deed could not have possibly discharged any coordinate liability owed to Calibre.
49. *First*, Calibre did not obtain any benefit under the Deed.⁶² No clause of the Deed resulted in a payment or other benefit to Calibre. For Calibre's coordinate liability to be discharged it must receive some payment or other benefit that has the effect of discharging the liability owed to it. Kaloriziko alleges that Calibre received a benefit from the purchase of the Arncliffe Properties, but Calibre was not the purchaser of those properties. The sale of the Arncliffe Properties occurred between two entities which are not parties to

⁵⁹ Red 157-158 [51]-[58]

⁶⁰ Red 158 [55]-[58]

⁶¹ Red 158-160 [59]-[67]

⁶² Notice of Contention 1(a); Red 225.

the present proceedings; the property was sold by **Apolo Apartments** Pty Ltd to **Aerial** Holdings Pty Ltd.⁶³ If there was any benefit pursuant to that transaction, it flowed to Aerial, and not Calibre. Further, Calibre and Aerial are owned by different shareholders. Calibre is fully owned by Ali Mohanna and Aerial's sole shareholder is Ramia Farhat.⁶⁴

50. *Secondly*, 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 Appellants rely upon the transfer of the Arncliffe Properties. However, those properties were owned and then transferred by Apolo Apartments, not any of the mortgagors or Kaloriziko. Further, Apolo Apartments is a distinct entity to Tran and Ninth Campsie. It is fully owned by Trish My Le Quach, whereas Ninth Campsie is ultimately owned by Hillary Thi Ngoc My Tran. Accordingly, even if there was a coordinate liability between the mortgagors and Kaloriziko, there was no discharge by them of any coordinate liability.⁶⁵

The arguments made by the Appellants on this appeal

51. The Appellants now argue that the primary judge erred by considering the benefit received by Calibre under the Deed. They argue that the primary judge should only have considered whether a coordinate liability existed and whether it was discharged or reduced by the transfer of the Arncliffe Properties (AS [36]-[38]).
52. That argument misconceives the circumstances in which the payment by one person subject to a coordinate liability will reduce or discharge the liability of the other persons subject to the same liability. If a person pays their share of a coordinate liability, but no more, the other persons subject to the same liability are not discharged from that liability. That is reflected in the principle stated in paragraph 39 above, namely, when a person pays more than his or her share of a common monetary obligation, the payment pro tanto discharges the obligation of all who owe the common obligation."⁶⁶
53. Accordingly, it is not possible to determine whether a payment by one party discharges the liability of the other parties unless one first determines the first person's share of that liability. The primary judge correctly observed that he had no evidence to determine that question. There was no evidence of the value of Mr Tran's or Ninth Campsie's claims.

⁶³ Deed of Agreement and Set Off dated 8 February 2024 (Parties); Red 418.

⁶⁴ CB 6286; CB 6841

⁶⁵ Notice of Contention 1(b); Red 225.

⁶⁶ *Burke v LFOT* (2002) 209 CLR 282, 299 [38]

54. At AS [35(b)], the Appellants allege that the primary judge fell into error when his Honour determined that he had to determine what benefit Calibre obtained by reason of the Deed. The Appellants allege that it “*was no part of the Appellants’ case that the transfer of the Arncliffe Properties conferred on the Builder a net benefit*”. Regardless of whether it was part of the Appellants’ case, the Court was obliged to consider whether Calibre received a net benefit for the reasons stated above. Further, it was plainly part of the Appellants’ case. The Further Amended List Response, extracted at paragraph 43 above, alleges that “*to the extent that the plaintiff has received any benefit from the accommodation described in paragraph [354] above, the plaintiff must account for that benefit in its claim against the first and second defendants, with the value of such benefit to be determined by this Court prior to any final orders being made*”⁶⁷ (emphasis added).
55. The task the Appellants now seek to criticise the primary judge for performing was the precise task the Appellants pleaded should be undertaken. It was also the correct analysis. The Court should dismiss grounds 8 to 11 of the Appeal.

Grounds 12 to 15: Market value of the Arncliffe Properties

56. Grounds 8 to 11 of the appeal are concerned with challenging the primary judge’s conclusion about the value of the Arncliffe Properties. These grounds of appeal only arise if (contrary to the submissions made above) the Court upholds grounds 8 to 11 of the Appeal. In challenging the primary judge’s conclusion on the value of the Arncliffe Properties, it is not sufficient for the Appellants to argue that the primary judge erred in reaching his valuation. The standard of appellate review is equivalent to the *House v The King* standard. As Mason J observed “the valuation of property by a court has many of the characteristics of a discretionary judgment.”⁶⁸

The primary judge’s reasons

57. The primary judge’s reasons with respect to the value of the Arncliffe Properties were obiter. His Honour had already made findings that there was no evidence of what Calibre had given up under the Deed and therefore he could not assess to what extent, if any, the effect of the Deed was to cause a discharge of any coordinate liability to Calibre. In

⁶⁷ *Burke v LFOT* (2002) 209 CLR 282, 299 [38]

⁶⁸ *Commissioner of Taxation (Cth) v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336 at 381; [1981] HCA 4; *Chief Commissioner of State Revenue v Shell Energy Operations No 2 Pty Ltd* [2023] NSWCA 113, [135]

those circumstances, it is understandable that his Honour dealt briefly with the parties' submissions about the value of the Arncliffe Properties.

58. The issue before his Honour was the value of the Arncliffe Properties as at the date of the Deed, being 8 February 2024. The conclusion that his Honour reached was that "The evidence of the experts persuades me that the likely true value of the Arncliffe Properties as at the date of the Deed was more than \$5 million. But otherwise, I am not persuaded that I can come to any conclusion as to their value at that time."
59. There was no error of law in reaching that conclusion. His Honour correctly observed at J1[80] that "*It was for the Developer to prove that Apolo Apartments sold the Arncliffe Properties to Aerial Holdings at an undervalue, and what that undervalue was.*" If the Appellants did not prove those matters it was open to the primary judge to decide the question on the basis that the party on whom the burden of proof lay, failed to discharge that burden.⁶⁹
60. The primary judge referred at [77]-[79] to an attempt to value the Arncliffe Properties in 2024 by reference to a comparable site, known as "Site 3". His Honour observed that there was debate between the experts about what adjustments needed to be made to make Site 3 truly comparable to the Arncliffe Properties. In particular, there was debate as to whether deduction or an increase was required and the extent to which Council contributions of \$9,000 per lot in relation to the Arncliffe Properties should be taken into account. The Appellants' valuer's evidence was shown in cross-examination to be unsatisfactory in that regard. Mr Garnsey admitted that the value of a site should be adjusted for council contributions and that he failed to do so.⁷⁰
61. However, the focus of the Appellants' valuation evidence was that the Arncliffe Properties had been purchased for \$6.92 million in 2020. The Appellants argued that those properties had increased in value from 2020 until the valuation date in 2024. However, the primary judge observed at [72] that the evidence surrounding the sale of the properties in 2020 was unsatisfactory. Importantly, there was no evidence that any of the three Arncliffe Properties had been marketed. There was no evidence that the sale price represented market value.

⁶⁹ *Chen v Zhang & Ors* [2009] NSWCA 202 at [49], citing Lord Brandon in *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948; [1985] 2 All ER 712.

⁷⁰ See Black 133, lines 35-47.

62. After referring to all those matters, the primary judge found that the Appellants had not discharged their onus of proof and his Honour was not persuaded he could come to a conclusion as to the value of the Arncliffe Properties at the date of the Deed.

Errors alleged by the Appellants

63. The first error alleged by the Appellants (appeal ground 12) is that the primary judge erred in finding that there was no evidence before him of the circumstances in which Apolo Apartments purchased the Arncliffe Properties in 2020.
64. In support of this allegation, the Appellants say that the primary judge had the names of the vendors and the amounts paid for the properties (AS [40]). The Appellants also refer to a passage in the judgment at J[72] where the primary judge speculated that Mr Tran may have approached the vendors and negotiated to buy their homes.
65. However, the names of the vendors and the amounts paid are not evidence of the *circumstances* in which the properties were sold. The primary judge made it clear that he was speculating about the circumstances in which the properties were sold and he had no evidence of those matters. The absence of evidence before the primary judge on this issue was not in dispute – the Appellants’ own expert accepted that twice in cross-examination.⁷¹ Accordingly, this ground of appeal should be dismissed.
66. The second error alleged by the Appellants (appeal ground 13) is that “The primary judge should have found that that the combined sale price of \$6.92 million arising from three separate arm’s length transactions between the vendors and Apolo Apartments Pty Limited in February 2020 represented the best evidence of the then market value of the Arncliffe Properties in February 2020.” That is not an error of law – this ground of appeal should be dismissed. In any event, because there was no evidence of the circumstances in which Apolo Apartments purchased the Arncliffe Properties in 2020, the primary judge was right to consider the combined sale price of little, if any, weight.
67. The third error alleged by the Appellants (appeal ground 14) is that “*The primary judge failed to make a finding as to the value of the Arncliffe Properties as at February 2024, or alternatively, give reasons for why he could not form a conclusion as to the value of these properties.*” That appeal ground should be rejected. The primary judge explained his reasons for why he could not form a conclusion about the value of the properties. Those reasons are explained in paragraphs 57 to 61 above.

⁷¹ Black 120, lines 1-50; Black 121, lines 21-25.

68. In their submissions, the Appellants also allege at AS [39] that the primary judge took irrelevant considerations into account, namely the absence of information concerning the circumstances of the purchase of the Arncliffe Properties in 2020 and the factors that motivated each vendor to sell their home. The circumstances in which the properties were sold in 2020 is not an irrelevant factor. The Appellants wished to argue that the sale price of the properties at that time was an indication of market value; whether that is so depends upon the circumstances in which the properties were sold. Something unusual may have happened which would indicate that the properties were not sold at market value. In that regard, it was relevant to note that the properties were not marketed publicly. Further, the primary judge did not take into account the factors that motivated each vendor to sell their home. His Honour simply observed he was not aware what those factors were.
69. For all of these reasons, the Appellants have not established that the primary judge made a *House v The King* error. The Court should dismiss grounds 12-15 of the appeal.

Notice of Contention

70. If the Court upholds grounds one or more of 8 to 11 and 12 to 15 of the Notice of Appeal, it may be necessary for the Court to re-exercise the primary judge's discretion. Paragraph 2 of the Notice of Contention alleges that the primary judge should have concluded that the value of the Arncliffe Properties as at February 2024 was about \$5.5m, or alternatively no greater than \$6,176,000.
71. A detailed submission regarding the basis upon which the Court should make that finding may be found in Calibre's closing submissions at Black 373-377. In summary:
- (a) the most appropriate valuation method was the "*direct comparison*" method, not a method whereby one took the 2020 sale price and added asserted market increases⁷²;
 - (b) both experts agreed site 3 was a suitable comparable site for the purposes of the "*direct comparison method*"⁷³;
 - (c) the rate per metre squared for site 3 was \$4,173.⁷⁴ Mr McDonnell opined that it was appropriate to apply a 5 -10% downwards adjustment to that rate on the basis

⁷² Black 120, Lines 11 to 15;

⁷³ J1 [77] – [78]; Red 161.

⁷⁴ CB 6464, Table 4.

of council contributions and downward movements in market value for development sites.⁷⁵ Mr McDonnell was not squarely challenged on this adjustment. It was never put to him that this downwards adjustment was wrong. Mr Garnsey accepted that significant council contributions would have an effect on the value of a development site⁷⁶; and

(d) applying a 10% downwards adjustment results in a value of \$5,474,520.77.

72. A finding that the market value of the Arncliffe Properties was under \$5.5m as at February 2024 means that the Arncliffe Properties (which were sold for \$5m) were sold within 10% of their market value. In those circumstances, given that market valuations are inherently imprecise, there would be no basis to find that the Arncliffe Properties were sold at a material undervalue.

Conclusion

73. For the reasons set out above, the Court should dismiss the appeal with costs.

13 October 2025



Stefan Balafoutis

10th Floor Selborne/Wentworth Chambers

balafoutis@tenthfloor.org

(02) 9232 0630



Mark Sheldon

7th Floor Wentworth Selborne

mes@7thfloor.com.au

(02) 8224 3044



Yvonne Truong

11 St James Hall

ytruong@stjames.net.au

(02) 8226 2304

⁷⁵ CB 6345 [9.4].

⁷⁶ Black 133, Line 37- to 45.

⁷⁷ CB 6345 (Site Area box).