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REAL PROPERTY CASES 2025

A REVIEW OF REAL PROPERTY CASES AT FIRST INSTANCE AND ON APPEAL DECIDED IN NEW SOUTH WALES FROM JANUARY TO DECEMBER 2024

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Pirrottina v Pirrottina [2025] NSWCA 55

Hearing dates:	29 November 2024
Jurisdiction:	Supreme Court of New South Wales, Court of Appeal
Decision date:	2 April 2025
Before:	Gleeson JA at [1]; Payne JA at [225]; Adamson JA at [226]

ESTOPPEL – proprietary estoppel – encouragement – nature of promise – where parents promised to build house for son on farming property 30 years ago – whether the promise included skirt of land surrounding the house (the Lot) – detrimental reliance – in reliance on the promise the son forewent the parents' offer to buy him another block of land and father-in-law's financial contribution to the son's marriage in favour of expenditure on improvements on the Lot – whether it would have been unconscionable for the parents to resile from the promise

ESTOPPEL – Proprietary estoppel – encouragement – relief – where land jointly owned – where buy-out order made instead of appointing trustees for sale – whether sufficient evidence of value of land – where single joint expert appointed by the parties had valued the Farm and the Lot – whether procedural unfairness in ordering updated valuation after trial

LAND LAW – real property – indefeasible title – in personam exception – whether personal equity in respect of unregistered interest in part of farming property (the Lot) – Farm owned by parents – where parents made promise to older son to build house on the Lot and "it will be yours" – where parents later transferred the Farm to older son and his brother as tenants in common in equal shares for nil consideration – transfer of land subject to conditions that the two sons continue the farming business as partners, not sell the Farm and parents have right of management veto – whether assurances of conduct by the brother that would have preserved older son's interest in the Lot – where assurances given in knowledge that parents were giving the Farm to both sons subject to older son's existing rights and interests

COSTS – party / party – exceptions to general rule that costs follow the event – Calderbank offers – where split trial of partnership proceedings – where partnership accounts not yet finalised – whether premature to make special costs order – whether exercise of costs discretion miscarried

Background

The appellant (Rocco) and respondent (Sam) are brothers. Their parents acquired a 100-acre citrus farm at Mangrove Mountain in the 1960s. In September 1994, when Sam was 26 and had worked on the Farm for 12 years without wages, the parents promised to build him a house on land he had identified, comprising about one acre (the Lot). Mrs Pirrottina Snr said the area "will be yours". The parents paid for the house, and in November 1996, Mrs Pirrottina Snr gave Sam the keys to "your house". Sam relied on the promise by declining his parents' offer to buy him a separate block and by foregoing a financial contribution from his father-in-law, directing it instead to driveway, footpath and landscaping work on the Lot.

In 2002, the parents transferred the farming business and the Farm to Sam and Rocco as tenants in common in equal shares for nil consideration, on the express basis that the brothers would run the business as partners, would not sell the Farm, and the parents would maintain control over the land, improvements and buildings.

After both parents had died, Rocco commenced proceedings in 2022 for dissolution of the partnership and, in the alternative, a s 66G *Conveyancing Act 1919* (NSW) order for sale of partnership property including the Farm. Sam cross-claimed in proprietary estoppel and personal equity, seeking a buyout. The primary judge held the Farm was the separate property of the brothers, that Sam had established an equitable estoppel by encouragement against the parents prior to the 2002 transfer and a personal equity against Rocco operating as an in personam exception to s 42 of the *Real Property Act 1900* (NSW), and ordered a buyout of Rocco's interest at 40 per cent of updated market value, reflecting Sam's 20 per cent equitable interest in the Lot.

Disposition

Content of the 1994 promise (Ground 1): Rocco's contention that the promise was limited to a house and excluded the surrounding land was a new point on appeal. Applying *Whisprun Pty Ltd v Dickson* [2003] HCA 48 and *Coulton v Holcombe* (1986) 162 CLR 1, Sam's objection was upheld; the point had not been squarely put to Sam in cross-examination and might have been met by rebutting evidence. In any event, Rocco failed to surmount the *Fox v Percy* (2003) 214 CLR 118 and *Lee v Lee* (2019) 266 CLR 129 hurdle: the finding was supported by the credit findings, subsequent conduct (Mrs Pirrottina Snr instructing Mr Falvo to landscape "all the areas surrounding the house"; Sam's extensions and shed without complaint), and corroborating evidence.

Reliance and detriment: That the Lot was incapable of subdivision was immaterial: Sam never contemplated separate title, and the 2002 transfer was accepted on the condition that the Farm would not be sold and that Sam would remain on it for his lifetime. Sam's detrimental reliance occurred well before 2002, so his interest had arisen before the transfer: DHJPM v Blackthorn Resources (2011) 83 NSWLR 728; McNab v Graham (2017) 53 VR 311.

Unconscionability: Applying *Giumelli v Giumelli* (1999) 196 CLR 101, *Sidhu v Van Dyke* (2014) 251 CLR 505 and *Kramer v Stone* [2024] HCA 48, it is not the promise itself but the expectation it creates that attracts equity's intervention. The 2002 transfer did not interfere with Sam's interest, nor did the impossibility of a separate lot relieve the parents' conscience.

Indefeasible title and personal equity (Grounds 12 and 13): The personal equity was not determined on an unpleaded basis. Rocco had agreed to accept the 2002 transfer on condition that the parents maintain control over the land and that the Farm not be sold; to depart from that basis was an unconscionable attempt to deny Sam's unregistered interest. Applying *Heggies Bulk Haul v Global Minerals Australia* (2003) 59 NSWLR 312, *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, *Presbyterian Church (NSW) Property Trust v Scots Church Development* [2007] NSWSC 676 and *Snowlong v Choe* (1991) 23 NSWLR 198, Sam established a personal equity operating as an in personam exception outside s 42(1).

Buyout relief (Grounds 6, 7 and 8): No error in declining to appoint trustees for sale. A judicial sale would defeat the interest the parents sought to convey; permitting Sam to buy Rocco's interest at fair value did not prejudice Rocco. Sam's detriment involved "life-changing decisions since 1994 with irreversible consequences of a profoundly personal nature" and was "beyond the measure of money": *Sidhu v Van Dyke; Donis v Donis* (2017) 19 VR 577; *Kramer v Stone*. The single joint expert valuation had been obtained on instructions agreed by Rocco; he could not now complain it was on the "wrong" basis. The updated valuation order was sought by Sam in closing submissions and not opposed: no procedural unfairness.

Partnership property (Ground 11): Applying *O'Brien v Komesaroff* (1982) 150 CLR 310, *Lucas v Lucas* [1962] Qd R 205 and *Bassett v Cameron* [2021] NSWSC 207, the Farm was the brothers' separate property. The brothers' specific instructions to their accountant that the Farm not be included in the partnership accounts were "highly probative" of intention, and the parents' 2003 mutual wills distinguished the business from the Farm. Use of the Farm to conduct partnership business did not displace this: property used by a partnership can remain a partner's separate property (*Williams v Nicoski* [2003] WASC 131).

Privilege (Ground 9): No error in refusing access to documents subject to the parents' legal professional privilege. Sam, as co-executor, did not "maintain" the privilege; he simply declined to consent to its waiver, which would have required action by all relevant executors in their fiduciary capacities: *Farrow Mortgage Services (in liq) v Webb* (1996) 39 NSWLR 601.

Special costs order (Grounds 14 and 15): Allowed. The primary judge failed to engage with Rocco's submission that it was premature to determine indemnity costs before finalisation of the partnership accounts, where Rocco might yet beat his own Calderbank offer of 10 March 2023, apparently misunderstanding the submission as referring to Sam's offer. Applying *Micallef v ICI Australia Operations* [2001] NSWCA 274, the discretion miscarried. The costs orders were set aside and remitted for reconsideration after finalisation of the accounts; the unchallenged indemnity costs order on the notice to admit facts remained.

Orders

Appeal dismissed save as to the special costs order, which was set aside and remitted to the primary judge for reconsideration on finalisation of the partnership accounts.

Practical Takeaways

The decision is a useful application of *Kramer v Stone* refining the four-element formulation for estoppel by encouragement. Gleeson JA's careful distinction between encouragement (no knowledge of reliance required) and acquiescence (knowledge required) is instructive.

The in personam analysis is significant. The reasoning that Rocco's acceptance of the 2002 transfer on conditions imposed by the parents made any subsequent denial of Sam's interest "unconscionable" outside s 42 is a clean application of *Bahr v Nicolay* in a family farm context, and will be of broader utility wherever a registered owner accepts title subject to conditions which would be defeated by reliance on indefeasibility.

The new point on appeal analysis is sharply put: cross-examination that is too general will not put a case sufficiently to displace credit-based findings on appeal, particularly where a more precise putting might have produced rebutting evidence.

The partnership property analysis confirms the practical weight of accountant's instructions in determining intention. Specific instructions to exclude property from partnership accounts will be "highly probative" and difficult to displace by reference to use alone.

The costs miscarriage is a salutary reminder: where prematurity submissions are advanced, particularly where further accounts remain to be taken, the primary judge must engage with the submission rather than proceed on a misunderstanding of which Calderbank offer is in play.

***Grapple Pay Pty Ltd v Conroy* [2025] NSWSC 64**

Hearing dates:	12-13 and 17-18 December 2024
Jurisdiction:	Supreme Court of New South Wales
Decision date:	18 February 2025
Before:	Nixon J

REAL PROPERTY – Conveyancing – Section 37A of the Conveyancing Act 1919 (NSW) – Alienation of property – Intention to defraud creditors – where plaintiff advanced moneys to company – where director of company guaranteed company's obligations in his own right and as trustee of trust – where only asset of trust was a block of land – where land was transferred by the director to his mother, the first defendant, on the same day that the company entered voluntary administration – where director became bankrupt and second defendant was appointed trustee in bankruptcy - whether property was transferred to first defendant for valuable consideration – whether property was transferred to first defendant with intent to defraud creditors – whether first defendant was a purchaser in good faith not having, at the time of the transfer, notice of any intent to defraud creditors

EQUITY – Trusts and Trustees – Trust Instruments – Amendment – whether purported addendums to trust instrument appointed first defendant as trustee of the trust - whether purported addendum appointed third party as trustee of the trust

Facts

Mr Jarrod Conroy held the Property at Bentley, New South Wales, as trustee of the Bungabbee First Light Trust (the Trust). The Property was the Trust's only asset. Mr Conroy was the sole director of Prana Energy Co Ltd, which had entered a Facility Agreement with the plaintiff, Grapple Pay Pty Ltd, on 2 May 2022. Mr Conroy, in his own right and as trustee of the Trust, gave a guarantee and indemnity in respect of Prana's obligations (the Conroy-Grapple Guarantee).

The Property had been purchased in August 2021 for $770,000, funded by $551,790 from Ms Isabel Lucas (Mr Conroy's former partner) and a loan of approximately $188,700 from Sempre Funding secured by a mortgage over the Property and guaranteed by Mr Conroy as trustee.

On 1 September 2022, the same day Prana entered voluntary administration, the Property was transferred to Mr Conroy's mother, Ms Ingrid Conroy. At that time, Prana owed $237,804.01 to Grapple. Ms Conroy paid $195,076.31 to discharge the Sempre Mortgage,

$470,000 to Ms Lucas across two payments (and a further $79,827 in December 2022 via Mr Conroy), and $28,168.17 in stamp duty and associated costs. The contemporaneous valuation of the Property was $700,000.

Grapple obtained default judgment against Mr Conroy in January 2023, and Mr Conroy declared bankruptcy in May 2023. Grapple sought relief under s 37A of the *Conveyancing Act 1919* (NSW), having abandoned by closing submissions any claim based on the "August 2022" Addendum purporting to appoint Ms Conroy as trustee.

Disposition

Credit findings: Nixon J made adverse credit findings against both Mr and Ms Conroy. In an extraordinary admission during cross-examination, Mr Conroy acknowledged having signed a statutory declaration containing "incorrect statements" in May 2023, made for the purpose of trying to recoup stamp duty paid on the transfer. The "May 2022" and "August 2022" Addendums had been backdated, likely being created in 2023. Mr Conroy candidly conceded: "I was trying to create a new narrative to get the stamp duty refund processed." Ms Conroy, who had been copied on the relevant correspondence and had signed the backdated Addendums, did not protest Mr Conroy's repeated written assertions that she had become trustee. Her Honour exercised caution in placing weight on either party's evidence.

Intent to defraud (s 37A(1)): Applying *Marcolongo v Chen* (2011) 242 CLR 546 and *Cannane v J Cannane Pty Ltd (in liq)* (1998) 192 CLR 557, intent could be inferred from surrounding circumstances, assessed against the Oswal indicia (undervalue, voluntary alienation, financial difficulty, family transferee, haste proximate to financial stress).

Undervalue: No. The transfer form recording “without monetary consideration” was given limited weight given Mr Conroy’s demonstrated willingness to mischaracterise transactions for stamp duty purposes. Ms Conroy’s payments totalled $665,076, approximately 95 per cent of the valuation. Applying *Barton v Official Receiver* (1986) 161 CLR 75 and *Wise Investments v Ruddy Tomlins & Baxter* [2019] QCA 271, the discharge of the Sempre Mortgage conferred real and substantial value on the Trust, and the payments to Ms Lucas were in “full and final settlement” of her loan or equitable interest. From the transferor’s perspective, the Trust was released from liabilities well in excess of the $700,000 market value.

Preference: Mr Conroy’s haste was driven by Prana’s looming insolvency, but his motivation was to prefer Ms Lucas over Grapple, not to defraud creditors generally. Applying In the matter of *FW Projects (in liq)* [2019] NSWSC 892 and the line of authority in *Glegg v Bromley* [1912] 3 KB 474, *Abignano v Wenkart* (1998) 9 BPR 16,765, *Wentworth v Rogers* [2004] NSWCA 430 and *Westpac Banking Corporation v Bell Group (in liq) (No 3)* [2012] WASCA 157, a transaction which merely prefers one creditor over another does not engage s 37A unless the disposal is at less than the value of the assets transferred or some benefit is reserved for the debtor. Neither limb was satisfied. Whether Ms Lucas held an equitable interest or merely a loan, the result was the same: either the Trust had no substantive equity available for Grapple, or the transaction merely preferred one creditor over another. The s 37A claim failed.

Good faith (s 37A(3)) (obiter): His Honour would have found Ms Conroy a purchaser in good faith without notice (*Super Vision Resources v AC Holdings* [2020] NSWCA 319: onus on Ms Conroy). She was unaware of Prana’s financial position and the Conroy–Grapple Guarantee; her bookkeeping role was insufficient to impute knowledge; and her intention to occupy the Property as her residence supported her good faith.

Joinder: The contention that Ms Lucas was a necessary party as trustee under the "July 2021" Addendum would not have been accepted: that Addendum was treated with caution given the backdating practice, Mr Conroy had warranted to Grapple in May 2022 that he was sole trustee, and there was no contemporaneous reference to Ms Lucas as trustee.

Orders

Amended Summons dismissed. Costs to be determined on the papers unless an oral hearing is requested.

Practical Takeaways

The decision is a clean illustration of the "preference" line of authority: s 37A does not catch transactions which merely prefer one creditor over another, provided the disposal is for value, and no benefit is reserved for the debtor — applied here despite the obvious haste, family connection and proximity to insolvency. This is an important practical limit on s 37A claims in informal family contexts.

The valuation analysis is instructive on the "from the transferor's perspective" point. Release from contingent liabilities (the Conroy–Sempre Guarantee) and discharge of debts owed to Ms Lucas, totalling more than the market value of the asset, constituted value, following *Wise Investments*. This is useful authority for resisting s 37A claims where the consideration is the discharge of guarantees or contingent obligations rather than cash to the transferor.

Even devastating credit findings — including Mr Conroy's frank admission to "incorrect statements" under oath and the backdated Addendums — did not defeat Ms Conroy's defence, because the s 37A inquiry is ultimately driven by the objective characteristics of the impugned transaction.

The joinder point is a reminder that backdated documents, particularly retrospective trusteeships, require careful corroboration; the absence of contemporaneous references to Ms Lucas as trustee was compelling evidence against the "July 2021" Addendum.

Grapple Pay Pty Ltd v Conroy [2025] NSWCA 171

Hearing dates:	21 July 2025
Jurisdiction:	Supreme Court of New South Wales, Court of Appeal
Decision date:	1 August 2025
Before:	Adamson JA; Ball JA; Free JA

REAL PROPERTY — conveyancing — where land was transferred by director to his mother on same day that company entered voluntary administration — whether property transferred with intent to defraud creditors — whether first respondent was purchaser for good faith without notice — whether first respondent had notice of intent to defraud creditors at time of transfer — alienation of property — Conveyancing Act 1919 (NSW), s 37A

Background

This was the appeal from Nixon J's decision in *Grapple Pay Pty Ltd v Conroy* [2025] NSWSC 64, summarised above. The primary judge had dismissed Grapple's s 37A claim to set aside the transfer of the Bentley property from Mr Conroy (as trustee) to his mother, Ms Ingrid Conroy, registered on 1 September 2022 — the day Prana Energy entered voluntary administration owing Grapple $237,804.01. Ms Conroy had paid $195,076.31 to discharge the Sempre mortgage, $400,000 to Ms Lucas (with a further $79,827 in December 2022) and stamp duty of $26,590 on a $700,000 valuation.

Approach and Principles

The Court reaffirmed the elements of s 37A(1): an alienation of property with an actual intent (not necessarily the sole intent: *Marcolongo* at [57]) to defraud (including to hinder or delay) creditors, and prejudice to the applicant, with intent inferable from the *Oswal* indicia. It also affirmed the long-established proposition from *Middleton v Pollock; ex parte Elliott* (1876) 2 Ch D 104, accepted in *Glegg v Bromley* [1912] 3 KB 474, approved in *Marcolongo* and consistently applied (*Abignano v Wenkart; Re FW Projects Pty Ltd (in liq)* [2019] NSWSC 892; *Cannane* at [12]–[13]): a debtor who transfers property for valuable consideration to discharge a debt does not fall within s 37A(1), because the debtor's net position remains the same. Merely preferring one creditor over another does not support an inference of intent to defraud.

Disposition

The "preference exception" gloss: Counsel sought to confine the preference principle to cases where the transfer was to an existing creditor, and there was no overall depletion of assets. Both glosses were rejected: s 37A is not engaged merely because a debtor prefers one creditor over another unless some additional element supporting an inference of intent to defraud is present. There is no statutory "exception" to be confined.

Depletion of trust assets: The cascading submissions that consideration was nil, $194,544.18, $594,544.18 or at most $665,076 were each rejected. The "no monetary consideration" transfer form was explained by Mr Conroy's misconceived stamp duty exemption attempt; the "incontrovertible evidence" was that Ms Conroy paid $665,076 plus $26,590 stamp duty against a $700,000 valuation, and the 5 per cent difference could not ground an inference of intent to defraud. From the transferor's perspective, the Trust was released from liabilities totalling $746,866.31, which exceeded the market value. Applying *Wise Investments v Ruddy Tomlins & Baxter* [2019] QCA 271 at [58]–[59], discharge of a vendor's secured liabilities constitutes valuable consideration whether paid in cash to the vendor or directly to creditors. The hypothesis that the payments to Ms Lucas were unrelated separation payments was "artificial and flies in the face of objectively established facts", inconsistent with the contemporaneous bank statement narratives ("Isabel Lucas Larnook Purchase").

Ms Lucas as creditor: Applying *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353 and *Galati v Deans* [2023] NSWCA 13, the presumption of resulting trust arose in Ms Lucas's favour given her majority contribution to the purchase price; she had either an equitable interest or a personal claim. The gift hypothesis could be put aside.

Whether the transfer must be to an existing creditor: Grapple's submission that s 37A should be construed by reference to s 122 of the *Bankruptcy Act 1966* (Cth) and s 588FA of the *Corporations Act 2001* (Cth) was firmly rejected: the provisions are not in pari materia. Section 37A operates at the instance of an individual prejudiced creditor; ss 122 and 588FA operate only at the instance of a trustee in bankruptcy or liquidator for all creditors (*Re McCauley; Ex parte Fraser* (1995) 61 FCR 251; *Houvardas v Zaravinos* [2003] NSWSC 387 at [100]). The critical point was that Mr Conroy received effectively full value and used the entire proceeds to repay two creditors, retaining no benefit. That the alienation was to Ms Conroy rather than directly to Ms Lucas was not to the point: the arrangement viewed as a whole benefited existing creditors.

Section 37A(3) (obiter): The Court endorsed the good faith analysis. Ms Conroy paid valuable consideration commensurate with value (*Barton v Official Receiver*); the evidence did not establish her knowledge of Prana's financial position or the guarantee. Knowledge of the "no consideration" statement could not be inferred from her being copied on the email attaching the transfer form: mere access to an attachment is insufficient, and whether she opened or read it was conjectural (*Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1; *Luxton v Vines* (1952) 85 CLR 352). If Grapple wished to assert knowledge of the contents, it was incumbent on trial counsel to put that to her in cross-examination (*Jones v Dunkel*).

Orders

Appeal dismissed. Appellant to pay the first respondent's costs.

Practical Takeaways

The Court of Appeal has now authoritatively confirmed the limits of s 37A in the preference context: the *Middleton v Pollock / Glegg v Bromley* proposition is firmly bedded in, and the decisive question remains the debtor's intent, not whether the consequences disadvantaged a particular creditor.

The rejection of the gloss confining the principle to transfers to existing creditors will be useful authority where it is argued that a tripartite arrangement (debtor sells to third party, third party pays existing creditors) differs from a direct preference. The arrangement viewed as a whole is what matters.

The *Wise Investments* principle — that discharge of a vendor's secured liabilities constitutes valuable consideration regardless of whether funds flow through the vendor's hands — is now reinforced by appellate authority in this jurisdiction, which is significant for tripartite arrangements involving the discharge of guarantees and mortgages.

The s 37A(3) analysis is a useful reminder of the limits of inference from access to documents: being copied on an email attaching a document does not establish knowledge of its contents absent cross-examination eliciting an admission. *Bradshaw v McEwans* and *Jones v Dunkel* operate as a powerful constraint on speculative inferences.

***Kearsley Hotel Hunter Valley Pty Ltd v Iwaszkiewicz* [2025] NSWSC 412**

Hearing dates:	11, 17, 28 April 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	01 May 2025
Before:	Parker J

REAL PROPERTY — Leases — re-entry by landlord — covenant for tenant to reimburse landlord's outgoings — alleged breach — whether notice required under s 129 of the Conveyancing Act 1919 — adequacy of pleaded allegation of breach — summary judgment for tenant

Background

The dispute concerned the Kearsley Hotel in the Hunter Valley. The plaintiff Tenant held an unregistered *Real Property Act* lease granted in January 2022 for a six-year term with four five-year options. The parties had long been in dispute about the performance of their respective obligations. On 13 August and 18 September 2024, the Landlords issued notices under s 129 of the *Conveyancing Act 1919* (NSW), and on 9 October 2024 purported to terminate and re-entered, appointing a third-party manager. The Tenant commenced proceedings the same day; Hammerschlag CJ in Eq established an interlocutory regime permitting the Tenant to return to occupation alongside the manager. The Tenant moved for summary judgment, confined at hearing to a declaration of invalid termination and relief against forfeiture.

Disposition

The termination issue: The Landlords conceded the s 129 notices did not adequately specify the unpaid outgoings and abandoned reliance on non-monetary breaches. Their sole remaining argument was that under cl 19.12 (a deeming provision treating "any moneys due... but unpaid" as rent), unpaid outgoings constituted unpaid rent within the s 129(8) exception, so no compliant notice was required. The Lease distinguished sharply between "Rent" and "Outgoings", and cl 16.1 distinguished Rent (14 days to default) from other monies (7 days). Applying *Drama Unit Pty Ltd v Fearndale Holdings Pty Ltd* [2019] NSWCA 312, the obligation to pay outgoings is not in the nature of rent unless expressed to be part of the rent. The deeming clause could not change this: the very need to deem outgoings to be "rent" underlined that they were not, a literal reading would create absurdity, and more fundamentally the anti-contracting-out prohibition in s 129(10) precluded the parties from converting what was not "rent" into "rent" by a deeming provision. The s 129(8) defence failed, and the re-entry was invalid for non-compliance with s 129(1).

The pleadings issue (alternative ground): Five elements were required to plead outgoings reimbursement default: incurrence in fact, ascertainment of the Tenant's Proportion, a cl 6.6(b) notice, two weeks for payment to fall due, and default for at least 7 (or 14) days. The Defence failed on each count, combining past breaches dating to July 2023 with events after 9 October 2024; the only specific notice referred to (30 September 2024) was too recent to justify termination on 9 October. Given the procedural history — the Landlords' reversal of position, missed deadlines and rejected oral amendment application — no further opportunity to amend was granted.

Relief against forfeiture: The Court doubted whether summary judgment on relief against forfeiture would be appropriate, but the question fell away.

Costs: The Landlords were ordered to pay the Tenant's costs to 17 April 2025 (excluding the works claim). Applying *Fiduciary Ltd v Morningstar Research* (2002) 55 NSWLR 1, a UCPR r 42.7 payment on account of $120,000 was ordered: the subject matter was discrete, the Landlords' conduct supported the order, and final determination was some time off. Such orders are compensatory, not punitive. Mr Strautins' safety report fees were deducted as expenses incurred in complying with interlocutory orders rather than legal costs — recoverable, if at all, under the undertaking as to damages.

Orders

Declaration of invalidity of the re-entry. Judgment for damages to be assessed. Interlocutory regime discharged. Enquiry as to damages under the Landlords' undertaking. Proceedings transferred to the Real Property List. Landlords to pay the Tenant's costs (with the works claim exception) and $120,000 on account.

Practical Takeaways

The decision is significant on the limits of "deemed rent" clauses. The s 129(10) anti-contracting-out prohibition prevents parties from converting non-rent obligations into "rent" for s 129 purposes through a deeming provision. *Drama Unit* is reaffirmed and extended: landlords cannot bypass the s 129 notice regime for outgoings disputes through clever drafting.

The five-element framework for pleading outgoings reimbursement default provides a useful template, and reinforces the discipline required in pleading the precise state of affairs as at the date of re-entry — combining past and post-termination breaches in one paragraph was particularly problematic.

The denial of any further amendment opportunity is a reminder that in contested re-entry cases, speedy determination is essential and a series of failures to articulate a coherent case will not be indulged indefinitely.

The r 42.7 analysis is useful authority that the second Fiduciary factor (misconduct) is not a necessary condition; discrete subject matter and a distant final determination can suffice.

The safety report fees point is worth filing: expenses incurred in complying with an interlocutory order are not legal costs but expenses recoverable, if at all, under the undertaking as to damages. The distinction matters when calculating lump sum costs orders.

Ghalayini v Ghalayini [2025] NSWSC 451

Hearing dates:	15 April 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	12 May 2025
Before:	McGrath J

REAL PROPERTY – Torrens title – Joint tenants – unilateral severance of joint tenancy – where defendant father and two plaintiff children purchase property as joint tenants – where transfer severing joint tenancy lodged with Registrar-General by father – application by children to restrain registration – where agreement not to sever the joint tenancy – HELD – parties reached agreement not to sever joint tenancy and father restrained from severing joint tenancy

CONTRACTS – Formation – Consideration – mutual promises not to sever joint tenancy good consideration

Background

Christopher Ghalayini and his sister Diana Katsiaras sued their father Michael to prevent him severing a joint tenancy in a Roselands property registered to all three. Following the death of his wife in August 2019, Michael indicated he wished to remarry, sell the family properties and purchase a replacement, and from early 2020 a series of family conversations occurred concerning his intention to "protect" his assets for his children in light of the proposed remarriage. The Roselands property was purchased in May 2020 for $1,105,000: Michael contributed $985,000, Christopher and Diana $60,000 each. The solicitor advised on the difference between joint tenancy and tenancy in common, confirming joint tenancy would keep the property "in the ownership of their family by survivorship", and all three took title as joint tenants on 20 May 2020.

Michael subsequently married. On 3 December 2024 he executed a Transfer Severing Joint Tenancy and lodged it with NSW Land Registry Services; the children obtained interlocutory restraints and pressed for final relief. At hearing, no affidavit of Michael was read, and Diana's evidence was relevantly unchallenged.

Approach and Principles

The Court reviewed the orthodox severance principles (*Wright v Gibbons* (1949) 78 CLR 313; *Williams v Hensman* (1861) 1 J & H 546; *Corin v Patton* (1990) 169 CLR 540), s 97 of the *Real Property Act 1900* (NSW) permitting unilateral severance, and the principles in *Goyal v*

Chandra (2006) 68 NSWLR 313 at [15]–[29]: an agreement between joint tenants not to sever is not void as a restraint on alienation, since the property remains alienable and the obligation is personal, and may be enforced in equity. Goyal has since been applied or considered without disapproval in *James v Barker* [2009] NSWSC 725, *Burton v Prior* [2015] NSWSC 295 and *Smith v Smith* [2025] NSWSC 287. On inference of contract terms, the Court drew the common elements from the divergent approaches in *Realestate.com.au Pty Ltd v Hardingham* (2022) 277 CLR 115: agreement is objectively discerned from words and conduct in all the circumstances. On consideration, an exchange of mutual promises is good consideration (*Dunlop Pneumatic Tyre Co v Selfridge & Co* [1915] AC 847; *Perry v Anthony* [2016] NSWCA 56), but a promise to perform an existing legal duty is generally not — provided the duty is owed to the promisee (*Stilk v Myrick; Wigan v Edwards; Musumeci v Winadell*).

Disposition

Agreement not to sever: Established. Michael's repeated statements that he wanted to "protect" his assets for "my kids", the request that the children contribute financially, the legal advice that joint tenancy would achieve the survivorship outcome, and the parties' decision to take title as joint tenants together evidenced a mutual agreement that the property would "remain in the family" — an express purpose which could only be fulfilled by a corollary agreement that none of the parties would unilaterally sever. The discussions about the third sibling receiving his "fair" share through Christopher and Diana were particularly probative of the shared understanding that this was Michael's last opportunity to alienate or devise his interest.

Consideration: Established on two bases: the mutual exchange of promises not to sever, and the children's $60,000 contributions. Michael's argument that the contributions were merely performance of an existing duty under the contract of sale failed because that duty was owed to the vendor, not to Michael: per *Wigan v Edwards*, the existing duty must be owed to the promisee.

Orders

Declaration that the parties agreed in or about May 2020 to purchase as joint tenants and not to sever without unanimous consent. Injunctions restraining Michael from proceeding with any application to sever and the Registrar-General from registering the Transfer. Michael to pay the costs of all other parties including the Registrar-General.

Practical Takeaways

The decision is a significant application of Goyal v Chandra on the merits. While Goyal itself was strictly obiter, this judgment — building on James v Barker and the recent endorsement in Smith v Smith — demonstrates that an agreement not to sever a joint tenancy can be established and enforced on final relief.

The Court's pragmatic synthesis of Realestate.com.au v Hardingham — treating the question whether the agreement was "express" or "inferred" as essentially immaterial provided it is established by objective analysis of words and conduct — will be useful in informal family or commercial dealings lacking formal documentation.

The consideration analysis is instructive on the Stilk v Myrick point: the children's obligation to pay the purchase price ran to the vendor, not to Michael, so payment could still constitute fresh consideration for Michael's promise not to sever. The existing duty rule is rigorously confined to duties owed to the same promisee.

Where unchallenged evidence of detailed conversations is led and the opposing party declines to put on affidavit evidence, the Court's task in finding the agreement is significantly assisted — a reminder that the absence of competing evidence carries forensic weight.

***Metro Cinemas Lakehaven Pty Ltd v Central Coast Council* [2025] NSWSC 931**

Hearing dates:	26–29 May 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	18 August 2025
Before:	Faulkner J

REAL PROPERTY – Commercial lease of premises for a cinema complex – landlord obliged to replace seats when they reach "end of their economic life" – competing cinemas upgraded seats to reclining seats – whether fixed-back seats reached end of economic life – question of construction – no point of principle

Background

The Tenant operates the Metro Cinema complex at Lake Haven under a 22-year lease from the Central Coast Council (two 5-year options), entered in 2015 following a 2014 Agreement for Lease under which the Tenant designed, built and fitted out the complex, paying fixed CPI-indexed rent, 10 per cent turnover rent above a threshold, and all outgoings. The complex opened in December 2014 with 1,115 fixed-back seats across eight theatres, all in perfectly good condition. From 2019 the Tenant's Central Coast competitors refurbished substantially — Event Tuggerah introducing Gold Class recliners, D-Box seats and larger fixed-back seats; Hoyts Erina converting entirely to recliners — both refurbishments also upgrading foyers, food and beverage, and sound and screen. The Tenant's box office share fell from about 17.7 per cent in 2019 to 10.5 per cent. Under cl 5 of Annexure A the Tenant bore all operating costs, maintenance and repairs, excluding "Structural Repairs and Capital Upgrades", defined at cl 5(c) to include replacement of lessor's fixtures "which cannot be practically or reasonably economically repaired or have reached the end of their economic life"; cl 6 made the Landlord responsible for all required Structural Repairs and Capital Upgrades; cl 7 listed the seats among the lessor's fixtures. The Tenant sought declarations that the seats had reached the end of their economic life and a mandatory injunction requiring their replacement with about 600 recliners and 28 daybeds at some $1.4 million — reducing capacity by over 40 per cent — the construction questions being determined separately under UCPR r 28.2.

Approach and Principles

Orthodox commercial construction applied: meaning is objective, by reference to text, context and purpose, with appreciation of the commercial purpose facilitated by understanding the genesis, background and market (*Toll (FGCT) v Alphapharm* (2004) 219 CLR 165 at [40]; *Rinehart v Hancock Prospecting* (2019) 267 CLR 514 at [44]; *Mount Bruce Mining v Wright Prospecting* (2015) 256 CLR 104 at [50]; *Electricity Generation Corporation v Woodside Energy* (2014) 251 CLR 640 at [35]).

Disposition

Construction: The Tenant's construction — that "economic life" concerned income-earning capacity rather than the comparison of repair and replacement cost — was rejected for six reasons: cl 5(c) sits within a coherent allocation of repair and replacement responsibility, into which it is objectively improbable the parties intended to inject the Tenant's revenue concerns; the parties allocated the business risk of future economic productivity to the Tenant, and the construction would reverse that allocation; the Tenant's real complaint concerned the whole seating configuration — leg room, mix, arrangement — which is the Tenant's business risk, not a landlord replacement matter; the construction was unworkable, revenue depending on many factors beyond seat type, making it impossible to know whether replacement would restore revenue; cl 6 applies equally to carpet, curtains, screens, CCTV, fire protection and the safe, items with no relationship to revenue-earning capacity; and on the Tenant's reading neither repair nor replacement cost would matter, obliging the Landlord to replace regardless of cost — implausible. The construction would also oblige the Landlord to upgrade rather than replace, against the drafting contrast with cll 5(a) and 5(b), which expressly mention upgrading where cl 5(c) does not. *Pilbara Infrastructure v Economic Regulation Authority* [2014] WASC 346 was distinguished, its capital-cost-recovery context under the Railways (Access) Code being wholly distinct. The Landlord's construction was accepted: a seat reaches the end of its economic life when replacement will cost less than current required repairs plus estimated ongoing repair and maintenance — the two companion phrases in cl 5(c) drawing a temporal distinction (immediate repair; anticipated future repairs), each tested against replacement cost.

Enlivenment (obiter): Even on the Tenant's construction the evidence failed: Event Tuggerah's share grew despite retaining fixed-back seats in six of ten theatres, contradicting the all-or-nothing case; the competitors' refurbishments went well beyond seats, and the Tenant's own expert conceded multifactorial causation; and the pleaded word "substantial" was given no content — the Metro's far lower ticket prices meant attendance share likely far exceeded revenue share, and there was no evidence on price elasticity or whether other changes could restore revenue.

Orders

Proceedings dismissed. Plaintiff to pay the Defendant's costs.

Practical Takeaways

The decision is a clean illustration of the orthodox approach to allocating business risk in commercial leases: revenue generation risk falls on the tenant unless the lease clearly and unmistakably allocates it to the landlord, and generic phrases such as "economic life" are construed in the context of the parties' relationship, not by importing definitions from unrelated regulatory contexts (the treatment of Pilbara Infrastructure is a useful reminder of those limits).

The harmonious reading of "reasonably economically repaired" and "reached the end of their economic life" within cl 5(c) — the former concerning the immediate repair currently required, the latter the cost of all anticipated future repairs, both tested against replacement cost — produces a coherent comparator framework worth deploying.

The upgrade/replacement distinction matters for drafting and argument alike: where neighbouring clauses expressly contemplate "upgrading or replacement" and the disputed clause says only “replacement”, a claim for upgraded fixtures dressed as a replacement obligation will fail on the text.

The evidentiary autopsy is a template for resisting “loss of economic life” claims: contradictory competitor data, multifactorial causation conceded in cross-examination, and a pleaded qualifier (“substantial”) given no meaning were each fatal — and an all-or-nothing pleading carries serious forensic risk where the evidence cannot exclude alternative explanations or partial remedies.

Finally, the rejection of the argument that one party’s superior knowledge supports a construction permitting unilateral determination is a sound reminder: commercial leases operate as objective allocations of risk, with disputes resolved by orderly mechanisms, not self-assessment.

Alamdo Holdings Pty Ltd v Reece Australia Pty Ltd [2025] NSWSC 946

Hearing dates:	23-26 June 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	20 August 2025
Before:	Nixon J

REAL PROPERTY – COMMERCIAL AND RETAIL LEASES – claim for unpaid rent and outgoings – whether the Defendant validly terminated the lease pursuant to a contractual right of termination – whether the Defendant breached the Lease prior to termination – whether there was a causal link between the Defendant's breach and the event giving rise to the right to termination

Background

Alamdo was landlord of commercial premises at Castle Hill; Reece (the plumbing supplies group) entered a 10-year Lease on 23 December 2022. Article 29 set out a "Procedure to be Followed" governing the path to occupation: Reece was to apply for development consent on or before 23 December 2022 and to provide all plans, statements and other information required for Council to expeditiously process the application; the Landlord was to consent without delay and carry out base building BCA compliance works expeditiously and continually; and either party could terminate if an Occupation Certificate was not obtained within six months of the Commencement Date — by 23 June 2023 (Article 29(9)).

No Occupation Certificate was obtained by that date, and Reece purported to terminate on 27 June 2023. Alamdo called on Reece's $149,640 bank guarantee and sued for rent and outgoings; Reece cross-claimed for repayment. The chronology revealed substantial delay: Reece's BCA consultant produced a Version 1 report in less than a day, based on drawings that did not exist for this project; Council issued three Requests for Information; and a compliant clause-by-clause assessment (Version 6) was not provided until 18 May 2023, with Development Consent issuing on 23 May 2023 — one month before the long-stop date. A Fire Safety Order issued against Alamdo in August 2021 remained partially unperformed throughout.

Approach and Principles

Applying *Toll (FGCT) v Alphapharm and Mount Bruce Mining*, Article 29 imposed on each party an obligation to take steps expeditiously and continually to achieve the shared commercial objective of an Occupation Certificate within six months. Article 29(2) required Reece not merely to provide what was strictly necessary but to do so in a manner enabling expeditious processing. The Court also reasoned from the implied duty of cooperation (*Mackay v Dick* (1881) 6 App Cas 251; *Secured Income Real Estate (Australia) v St Martins Investments* (1979) 144 CLR 596). On termination, the Court applied the line of authority from New Zealand

Shipping v Société des Ateliers et Chantiers de France [1919] AC 1, including *Suttor v Gundowda* (1950) 81 CLR 418, *Foran v Wight* (1989) 168 CLR 385, *Sanctuary Investments v St James Capital* (1999) NSW ConvR 55-918 and *Hunyor v Reardon Investments* (1995) 6 BPR 14,028: a party may not rely on a contractual right of termination conditioned on the non-fulfilment of an event where its own breach caused or materially contributed to that non-fulfilment. A "but for" analysis is inappropriate; material contribution suffices.

Disposition

Breach: Reece breached Article 29(2). Version 1 was deficient on its face; the First RFI of 2 February 2023 made clear a clause-by-clause assessment was required; it took until 18 May for one to be provided; and Reece's own witness conceded the response was not expeditious, the process poorly managed and treated without urgency, and that a fulsome response could have been provided within a week or two of the First RFI.

Causation: On the programming evidence, had Development Consent been obtained by mid-to-late February 2023 — as it could have been but for Reece's delays — the Occupation Certificate could have issued by 23 June. The Court preferred the "aggressive but achievable" program over conservative industry timelines: Article 29 required the urgency necessary to achieve the agreed outcome, and Reece's substantial resources were relevant to achievability. Proposed adjustments were rejected: the asserted 50–70 days to satisfy consent conditions rested on unqualified evidence and was outweighed by analysis showing consultants unnecessary for most conditions; Article 10.02(i)'s 21-day certification step did not apply to fit-out works permitted by Article 28.01, contractual provisions being construed harmoniously (*Australian Broadcasting Commission v Australasian Performing Right Association* (1973) 129 CLR 99 at 109); and overlapping pre-consent preparatory work was consistent with Article 29's commercial purpose notwithstanding wasted-cost risk.

The Fire Safety Order: Reece's contention that Alamdo's non-compliance caused the delay was rejected. Although the non-compliance triggered s 64(2) of the EPA Regulation, the delay was in fact caused by Reece's consultants: Council had granted the neighbouring Dutton DA in about a month despite the same outstanding Order, conditioning the fire safety upgrades into the construction works, and took the same approach with Reece. Significantly, even had Alamdo's breach materially contributed, the dual contribution principle would have barred the termination: where both parties materially contribute to the non-fulfilment, neither may rely on the right (*Sanctuary Investments* at 16,626; *Hunyor* at 15,633).

Inferences: Reece did not call its responsible officer or the BCA consultant; modest *Jones v Dunkel* inferences were drawn, consistent with the documentary record.

Orders

Declaration that the Lease remains on foot. Judgment for unpaid rent and outgoings plus interest. Cross-claim dismissed. Alamdo to receive costs.

Practical Takeaways

The decision is the year's most useful authority on long-stop termination clauses in agreements for lease: procedural obligations within a "Procedure to be Followed" will be construed as genuine expedition requirements informed by the agreed commercial objective, and the implied duty of cooperation reinforces the express scheme. Either side performing at a leisurely pace toward a long-stop date should expect the chronology to be reconstructed against it.

The *New Zealand Shipping* principle is applied in its modern form: material contribution, not but-for causation, disqualifies the terminating party — and the dual contribution corollary is the deceptively important rule: where both parties have materially contributed to the non-fulfilment, neither can terminate. Long-stop negotiations should be conducted with that symmetry in mind.

The programming evidence holding is significant for construction and development disputes generally: where a party has contracted for expedition, the benchmark is the urgency necessary to achieve the agreed outcome, not comfortable industry norms — and the resources available to the party are relevant to what was achievable. “Aggressive but achievable” beat “conservative”.

The Fire Safety Order analysis separates statutory trigger from legal causation: that a regulator’s mandatory consideration was engaged does not mean it caused the delay, and the comparator of the neighbouring DA processed in a month was decisive. Parties blaming regulatory overlays must prove the counterfactual.

Two further points travel: overlapping consent regimes within one instrument are construed harmoniously, so a general consent procedure will not be read to encumber works elsewhere expressly permitted; and Jones v Dunkel inferences are most powerful when paired with objective documents that already support them — they are not a substitute for proof.

Khaihra v Agarwal **[2025] NSWSC 1276**

Hearing dates:	22 – 23 October 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	24 October 2025
Before:	Brereton J

REAL PROPERTY – where the plaintiff seeks an extension of a caveat – where the defendants entered a contract to sell the property – where there is no dispute that there is a seriously arguable case – balance of convenience favours extending caveat for 6 months subject to conditions

Background

The plaintiff sought urgent extension of a caveat over land at Annangrove, due to lapse on the day of hearing. The defendants, the registered proprietors, had contracted to sell for $3.3 million with settlement scheduled for 3 November 2025. The first defendant had been the plaintiff's accountant since 2020. In late 2023, the parties entered a joint endeavour: the plaintiff would contribute approximately $420,000 for a 40 per cent interest (calculated by reference to the purchase price less the Bankwest debt), share holding costs, and the parties would seek development approval with a view to a profitable sale; stamp duty considerations meant no transfer of title was contemplated. The plaintiff paid approximately $500,000 in total. By 2024 the parties were in dispute over expense contributions; the defendants placed the property on the market in late 2024, and text exchanges were ambiguous as to the plaintiff's consent. The anticipated net proceeds at settlement were approximately $192,000 after payout of the Bankwest mortgage (about $2.86 million) and costs.

Approach and Principles

The Court applied *Sutherland v Vale* [2008] NSWSC 759 at [11]: the test on a s 74K extension mirrors the interlocutory injunction test — a seriously arguable case, then the balance of convenience. The seriously arguable case threshold was conceded. The plaintiff advanced three bases for the caveatable interest: a 40 per cent express trust, an equitable charge for all moneys paid, and a constructive trust or proprietary estoppel arising from the joint endeavour.

Disposition

The balance of convenience was assessed against each asserted interest. The 40 per cent trust interest, if made out, would entitle the plaintiff to about $76,800 of net proceeds and could be adequately protected by payment into a trust account or into Court. The equitable charge interest would entitle him to the whole of the expected net proceeds, but would be prejudiced only by sale at an undervalue, which was not specifically contended; the sale was through an independent agent, without undue haste, and the first defendant had no incentive to undersell — this interest did not justify depriving the defendants of the ability to sell. Only the joint endeavour interest, carrying a right to specifically enforce the agreement to make a development application, would be defeated by sale, reducing the plaintiff to a loss of opportunity claim.

Weighing the competing prejudice — the defendants' exposure to contract termination and continuing mortgage payments exceeding rental income, against the plaintiff's near-$500,000 investment, the apparent sale without fully informed consent, and his reduction to a personal claim against the accountant who on his case induced the investment — and applying *Patrick Stevedores Operations No 2 v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 at [65]–[66] and *Lawton v FHMC* [2021] FCA 1165 at [50] on third-party prejudice (relevant but rarely decisive; the asserted purchaser liability "in the millions" was unsupported by evidence), the balance favoured a conditional extension.

The caveat was extended for six months only, on the plaintiff giving the usual undertaking as to damages plus an undertaking to pay 40 per cent of net holding costs, supported by $25,000 security (half the annual expense contribution paid at the commencement of the endeavour), failing which the extension would be automatically revoked. Security was required for the holding costs undertaking but not the undertaking as to damages: the former concerned an inevitable payment necessary for the endeavour to proceed; the latter would be enlivened only on failure in the proceedings.

Orders

Caveat extended to 24 April 2026 under s 74K of the *Real Property Act 1900* (NSW), automatically revoked if $25,000 security not provided by 3 November 2025. Costs reserved. Liberty to apply on one day's notice.

Practical Takeaways

The disaggregated analysis of each asserted caveatable interest against the proposed sale is a useful template: the trust interest could be protected by payment into trust, the equitable charge did not justify preventing sale, and only the joint endeavour interest with its associated right of specific performance genuinely justified extension.

An equitable charge over land does not automatically warrant relief preventing sale where monetary remedies are adequate, and there is no evidence of sale at undervalue — the independent agent, absence of haste and lack of incentive to undersell were decisive.

The conditioning of the extension on security for the holding costs undertaking, as distinct from the usual undertaking as to damages, is a refinement worth filing, with the quantum calibrated to half a year's expenses. Vague assertions of third-party prejudice will rarely be decisive without concrete evidence, and the finite six-month extension reflects the principle that interlocutory relief should not entrench positions where final relief is delayed.

***ALS598 Pty Ltd v Kremetis* [2025] NSWSC 1281**

Hearing Date(s):	16 October 2025
Jurisdiction:	Supreme Court of New South Wales
Decision Date:	17 October 2025
Before:	Brereton J

REAL PROPERTY – where plaintiffs, as mortgagees in possession, seek that caveats be withdrawn – where plaintiffs have entered a contract for sale of the property – where defendant opposes the withdrawal on the basis that the plaintiffs acted in bad faith in conducting the sale process – where defendant offers to provide security – defendant's caveats withdrawn

Background

The defendant was registered proprietor of land at Kurnell, opposite Silver Beach, with a land area of 3,326 square metres and RE2 (private recreation) zoning. The plaintiffs, mortgagees in possession since November 2024, had contracted to sell under the power of sale on 27 June 2025 for $2.5 million. The defendant lodged caveats claiming a mortgagor's equitable right to prevent completion of a voidable sale arising from an improper exercise of the power of sale; the plaintiffs sought withdrawal under s 74MA of the *Real Property Act 1900* (NSW).

The defendant relied on a Property Logic evaluation assessing market value at $3.5 million on a "highest and best use" basis; the plaintiffs relied on a JPM valuation of $2 million on a "standard residential basis only". The sales campaign had run 70 days, generating 146 enquiries, 26 inspections and 6 offers ranging from $1.6 million to $2.35 million, with the contract executed at $2.5 million. The defendant asserted refinance funding to discharge the mortgage and offered $500,000 as security.

Approach and Principles

Applying *Hanson Construction Materials v Roberts* (2016) 93 NSWLR 1 at [77], the defendant bore the onus of showing a serious issue to be tried as to the asserted interest, then the balance of convenience. The mortgagee's duty was as articulated in *Pendlebury v Colonial Mutual Life Assurance Society* (1912) 13 CLR 676 at 694–695: the mortgagee may look first to its own interest but not to that interest alone; the question is whether the mortgagee sacrificed the mortgagor's property by conducting the sale in complete disregard of her interest. There was no allegation of collusion. The defendant relied on *Stone v Farrow Mortgage Services* [1999] NSWCA 435 at [4] (sale at a substantial undervalue may evidence inadequate process) and *Investec Bank v Glodale* (2009) 24 VR 617 and *Webster Investments v Anderson* (2016) 52 VR 610 (engagement of an inappropriate agent goes to the heart of the sale process).

Disposition

No serious question: The contention that the property was advertised as standard residential was contradicted by the listings themselves, which described “a rare offering in a prime coastal setting” with RE2 zoning presenting “a unique opportunity for a range of potential development outcomes (STCA)” and “zoning that opens the door to a wide variety of development opportunities”. The “wrong agent” contention failed for want of any evidence of an alternative campaign that should or could have been undertaken and would or might have yielded a different result: three agents approached in November 2024 had estimated $2 million to $2.75 million, and the campaign achieved $2.5 million, toward the upper end. The $1.5 million valuation differential was largely explicable by the differing bases of assessment — highest and best use against standard residential — and without evidence of a flawed process did not support an inference of bad faith.

Balance of convenience (obiter): Removal would in any event have been ordered. The plaintiffs faced contract termination, delay and a purchaser’s breach claim; the defendant’s $500,000 offer and asserted refinancing were neither immediate nor unconditional; her claim of peculiar value as an animal rescue shelter carried little weight after twelve months out of possession with no such use. Applying Wright v Insert [2022] VSC 1 at [100], maintaining the caveats was equivalent to injuncting completion against a good faith purchaser. Decisively, if the property had truly been sold at undervalue, the defendant retained personal remedies — including potentially under s 111A of the Conveyancing Act 1919 (NSW), which cannot support a caveat but provides compensation — and there was no suggestion the plaintiffs could not meet a judgment. An ambiguity in the notice to complete (appointing a “Tuesday” when the date was a Friday) was answered practically: if the purchaser was not ready, the plaintiffs could terminate, restoring the defendant to the position she sought.

Orders

Caveats to be withdrawn under s 74MA. Defendant restrained from lodging further caveats or otherwise interfering with the sale. Defendant to pay the plaintiffs’ costs on the indemnity basis, an unopposed contractual entitlement.

Practical Takeaways

The decision is a clean modern application of *Pendlebury*: the duty of good faith requires bad-faith conduct of the sale process, not mere undervalue — a price differential alone, without procedural deficiency, will not carry the inference.

The valuation point is the recurring forensic trap: rival valuations on different bases (highest and best use against standard residential) generate differentials more apparent than real, and the basis of each valuation must be scrutinised before the *Stone v Farrow* inference can bite.

Investec-style “wrong agent” challenges require specifics: evidence of the alternative campaign that should have been run and a basis for concluding it would or might have produced a different result. Bare assertion that a commercial agency should have been engaged is insufficient — and where the actual advertising squarely promoted the development potential and zoning, a “residential-only campaign” characterisation fails on the documents. Mortgagees should keep the full advertising record; it won this case.

The s 111A holding is the strategically powerful point: the statutory cause of action for breach of the duty of reasonable care cannot support a caveat but supplies an adequate personal remedy — and the availability of adequate alternative remedies against a solvent mortgagee is close to decisive on the balance of convenience. Paired with the *Wright v Insert* treatment of caveats as the practical equivalent of injuncting an innocent purchaser's completion, the framework strongly favours removal once contracts are exchanged.

Finally, the unopposed indemnity costs order is the standing reminder that properly drawn mortgage documentation continues to be enforced robustly in these proceedings.

***Molloy v Beehag* [2025] NSWSC 1462**

Hearing dates:	20 November 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	5 December 2025
Before:	Williams J

REAL PROPERTY – Old system title – Adverse possession – Extinguishment of documentary owner's title on expiry of limitation period – Identifying documentary owner's legal representative through chain of executors

Background

A 3.352 square metre triangle of old system land lay nestled between the plaintiff's Balmain property and its neighbours, never brought under the *Real Property Act 1900* (NSW). The plaintiff's predecessor in title, the late Mr McCarty, had lived continuously in the dwelling from 1965 until entering palliative care in June 2020, the kitchen having been built partly on the Torrens lot and partly on the Subject Land. His executor sold to the plaintiff in 2023, both parties intending the conveyance to include the Subject Land; the discrepancy emerged only when the plaintiff's surveyor was engaged for redevelopment. His primary application under Part 4 of the Real Property Act drew objections from the neighbours at 66 Smith Street — that mapping showed the land was theirs, that adverse possession could apply only to a whole Torrens parcel, and that the land had been vacant since 2020 — and NSW Land Registry Services held the application in abeyance pending Court determination. The documentary owner's legal representative and the Registrar-General filed submitting appearances; the objectors attended but declined to seek leave to be heard or joined.

Approach and Principles

Documentary title was traced on specialist searching evidence to an 1872 conveyance. The owner's 1893 will gave his wife a life estate contingent on non-remarriage with remainder to surviving children; the rule in *Shelley's Case* (*Wolfe v Shelley* (1581) 1 Co Rep 93b; 76 ER 206) applied, s 17 of the *Conveyancing Act 1919* (NSW) abolishing the rule only from 1 July 1920, so the devise took effect as a devise to the widow and her heirs — a fee simple. On the grant of administration, legal and equitable estates united in her without need for conveyance (*In re Thorne* and *Sherson's Contract* [1920] VLR 50 at 54–55 (Mann J); *Ford v Simes* [2009] NSWCA 351 at [38]–[49]); a purported mortgage and mortgagee sale by two sons was a nullity, they having no interest under the will. The chain of executors then ran to the first defendant via s 13 of the *Imperial Acts Application Act 1969* (NSW) and, from 28 September 2020, s 44A of the *Probate and Administration Act 1898* (NSW). Adverse possession was assessed on the two-element test (*State of New South Wales v Carver* [2023] NSWSC 828 at [56] (Hammerschlag CJ in Eq)): physical control constituting possession, and intention to exclude the world at large — possession open, peaceful and not by consent. On limitation, the transitional provision in s 6(c) of the *Limitation Act 1969* (NSW) preserved the 20-year period under s 2 of the *Real Property Limitation Act 1833* (Imp), applied to New South Wales by the *Real Estate (Limitation of Actions) Act 1837* (NSW), s 34 of the 1833 Act extinguishing the documentary owner's title on expiry (*Allen v Roughley* (1955) 94 CLR 98; *Mulcahy v Curramore* [1974] 2 NSWLR 464 at 475–476 (Bowen CJ in Eq)).

Disposition

Mr McCarty's occupation from 1965, the kitchen straddling the Subject Land, satisfied both elements — open, peaceful, and without consent, the Court inferring he was unaware he was not the owner and had no occasion to seek consent. Twenty years' adverse possession extinguished the documentary owner's title in 1985, from which point Mr McCarty held a fee simple good against all the world; his possession thereafter was not adverse to anyone, so the declaration sought (adverse possession for 12 or 20 years before the proceedings) was reframed as a declaration that title was acquired in 1985 by 20 years' prior adverse possession. The 2023 contract, properly construed, included the Subject Land; the plaintiff held an equitable fee simple founded on his entitlement to specific performance once the land was brought under the Act, the executor supporting the application. The objectors' mapping contention was rejected on the title tracing; the vacancy objection was irrelevant — title crystallised in 1985 could not be unsettled by later vacancy. The Court emphasised it was not reviewing the Registry's decision but determining title originally.

Orders

Declarations that Mr McCarty acquired title in fee simple in 1985 by 20 years' prior adverse possession and that any action of the documentary owner was extinguished in 1985 under s 34 of the 1833 Act. Registrar-General to create a folio under s 17(2) of the *Real Property Act* recording the plaintiff as proprietor within 7 days of a registrable plan of survey. No order as to costs.

Practical Takeaways

The decision is a working manual for old system conversion: the rule in Shelley's Case still governs pre-1 July 1920 testamentary dispositions in title tracing, the merger of legal and equitable estates in a beneficiary-administrator occurs without conveyance (*Thorne* and *Sherson*; *Ford v Simes*), and historic dealings in the General Register of Deeds must be tested for substantive validity — a registered nullity remains a nullity, as the sons' purported mortgage demonstrated.

The transitional limitation point is the frequent trap: adverse possession commencing before the *Limitation Act 1969* attracts the 20-year period of the *1833 Imperial Act*, not the modern 12 years (s 6(c)). Get the period right before pleading.

The temporal logic of crystallised title is the doctrinal core: once the limitation period expires, the documentary title is extinguished and the possessor holds good against the world — possession thereafter is not "adverse" to anyone, post-acquisition vacancy is irrelevant, and declarations should be framed as acquisition at the crystallisation date, not as continuing adverse possession. The Court's reframing of the prayer is the model.

A purchaser whose contract was intended to include the omitted parcel holds an equitable fee simple through the entitlement to specific performance, supporting the conversion application — provided the executor's cooperation is secured, as here.

And the procedural posture is worth filing: primary application proceedings are original determinations of title, not judicial review of the Registrar-General, and objectors who decline joinder forfeit their voice — though the Court will still deal with their objections on the merits where they go to title.

***Tacking Point Holdings Pty Ltd v JTT Enterprises Pty Ltd* [2025] NSWSC 1576**

Hearing dates:	8 December 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	19 December 2025
Before:	Emmett J

LAND LAW – restrictive covenants – non-application of restrictive covenants – where the plaintiff operates a hotel and bottle shop – where neighbouring land is burdened by covenant restricting a business selling alcohol – where defendants lodged a development application to operate a "Liquorland" – where development application approved – whether covenant does not apply by reason of cl 1.9A of Port Macquarie-Hastings Local Environmental Plan 2011 (NSW)

ENVIRONMENT AND PLANNING – jurisdiction of Supreme Court – whether Land and Environment Court has exclusive jurisdiction under ss 20(1)(e), 20(2) and 71 of the Land and Environment Court Act 1979 (NSW)

ENVIRONMENT AND PLANNING – interpretation of development consent – incorporation of documents referred to in development consent – where development consent describes documents as "approved" and requires development to be carried out in accordance with approved plans and documents – consideration of plans and/or statement of environmental effects to understand the nature of the development that is the subject of development consent

Background

The plaintiff operated the Tacking Point Tavern at Port Macquarie, with the benefit of a registered restrictive covenant burdening the neighbouring Lighthouse Plaza shopping centre prohibiting use of the burdened land for any business involved in the sale of alcohol for consumption on or off the property, save for an on-licence (restaurant). Coles lodged a development application in March 2025 for conversion of part of the Plaza to a Liquorland, with plans depicting refrigerated shelving marked "BEER DISTRICT", "SPIRIT TRAIL" and "WINE REGION" and a Statement of Environmental Effects (SEE) describing the proposed business. Council granted Development Consent in June 2025 for "Retail Premises Fit-Out and Associated Signage", expressly requiring the development to be carried out in accordance with the approved plans and the SEE, and a packaged liquor licence was granted in October 2025.

The defendants resisted enforcement of the covenant on the basis of cl 1.9A(1) of the Port Macquarie-Hastings Local Environmental Plan 2011: for the purpose of enabling development to be carried out in accordance with the LEP or a consent, any agreement, covenant or other similar instrument restricting the carrying out of that development does not apply to the extent necessary to serve that purpose.

Approach and Principles

Jurisdiction: The plaintiff did not press a declaratory prayer that could have engaged the exclusive jurisdiction of the Land and Environment Court. The prayers for injunctive relief to enforce the covenant fell outside s 20(2) of the *Land and Environment Court Act 1979* (NSW), being in substance enforcement of a registered covenant rather than enforcement of rights under the LEP: *The Owners – Strata Plan No 4983 v Canny* (2018) 233 LGERA 432 at [37]–[50]; *Minister for Local Government v Blue Mountains City Council* (2018) 97 NSWLR 1132 at [90]. That the defence relied on cl 1.9A did not engage s 20(2).

Clause 1.9A: The Court applied the three-step approach in *Carey-Evans v Wu* (2022) 256 LGERA 1 at [60] (Preston CJ of LEC): identify the interest created; ascertain whether the instrument is an “agreement, covenant or other similar instrument”; and determine whether it “restricts the carrying out of that development”. The third step required analysis of what development had been approved, applying *Allandale Blue Metal Pty Ltd v Roads and Maritime Services* (2013) 195 LGERA 182 at [43], [45] (documents incorporated where the consent so requires expressly or by necessary implication) and *Hunter Industrial Rental Equipment v Dungog Shire Council* (2019) 101 NSWLR 1 at [57]–[80].

Disposition

The consent authorised a business selling alcohol: Condition A001 required the development to be carried out in accordance with the approved plans and the SEE. The SEE was incorporated — it contained operational statements (takeaway only; no on-site consumption) with practical work to do — and clearly disclosed that the business for which consent was granted was one selling alcohol for off-site consumption. The same conclusion followed from the Consent and Plans alone: the hours of operation condition, the refrigerated shelving signage and the identification of the client as “coles liquor” and “Liquorland”.

Level of specificity: The contention that “the operation of a business selling alcohol” was not a land use known to planning law, or was not contemplated at that specificity by the LEP, was rejected. The LEP itself uses inconsistent levels of granularity, and the Council’s consent function operates at the level of the particular development proposed by reference to the Plans and SEE, not the general category of “shop”.

Change of use: The Court was not persuaded a packaged liquor store falls outside “food and drink premises”, which extends to drink for “immediate consumption” away from the premises; in any event, where consent was required and granted, cl 1.9A’s statutory consequences followed.

The Liquor Act: The contention that the *Liquor Act 2007* (NSW) covered the field was rejected. Applying *Commissioner of Police (NSW) v Cottle* (2022) 276 CLR 62 at [22]–[23] and *State of NSW v Ashton* [2025] NSWCA 199 at [36]–[37], the search is for harmonious operation; s

45(3)(c) of the *Liquor Act* evinces a statutory expectation that the planning and licensing regimes operate in parallel.

The "enabling" argument: The contention that cl 1.9A is engaged only where disapplication removes all legal impediments was rejected. The clause disapplies the covenant "to the extent necessary to serve" the enabling purpose; that purpose is served if the covenant impediment is cleared, even if other impediments (such as the s 29(2) *Liquor Act* prohibition on Good Friday and Christmas Day trading) persist.

Injunctive relief (obiter): Had the plaintiff succeeded, the injunctions would have been granted: Coles and Liquorland had actual knowledge of the registered covenant, and damages would not have been adequate given the proprietary nature of the interest.

Orders

Summons dismissed. Plaintiff to pay the defendants' costs, with liberty to seek an alternative costs order within 10 business days.

Practical Takeaways

The decision beds down the Carey-Evans three-step framework for cl 1.9A and its analogues across NSW LEPs, and its central holding will be widely deployed: a development consent for a fit-out, read with its incorporated plans and SEE, can constitute consent to the particular business proposed — here the sale of alcohol — so that a restrictive covenant prohibiting that business is statutorily disapplied. Covenant-protected operators should scrutinise neighbouring development applications and object at the planning stage; once consent issues, the covenant may be spent.

The incorporation holding matters both ways: operational statements in a SEE (takeaway only, no on-site consumption) are not mere context but can bind the developer as conditions of the consent — and equally define the development for cl 1.9A purposes. Applicants should draft SEEs knowing every operational statement may have contractual-equivalent force.

The "enabling" construction is the doctrinally significant point: cl 1.9A disapplies the covenant to the extent necessary to clear the covenant's own impediment, regardless of other persisting legal requirements — answered elegantly by the Good Friday example. Arguments that every impediment must fall before the clause engages will fail on the text.

The covering-the-field rejection is portable to any regulatory-overlap dispute: planning and liquor licensing operate in parallel (s 45(3)(c)), and businesses requiring multiple approvals are the norm, not a construction problem.

The jurisdictional demarcation deserves filing by anyone framing a covenant-enforcement summons touching planning law: injunctive enforcement of a registered covenant sits in the Supreme Court even where cl 1.9A arises by way of defence, but declaratory prayers can stray into s 20(2) exclusivity — and relief cannot be framed simply to circumvent s 71. The plaintiff's decision not to press the declaration was the prudent course.

Finally, the Court's undeveloped observation that a registered covenant restraining the supply of alcohol may raise restraint of trade considerations flags an open question with real significance for covenants operating as anticompetitive instruments in localised markets.

Galatidis v Kallidis [2025] NSWSC 1555

Hearing dates:	17 – 21 November 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	19 December 2025
Before:	Brereton J

ESTOPPEL – proprietary estoppel – common intention constructive trust – where land is in the first defendant's name – whether the first defendant promised to transfer the property back to the plaintiff on the basis that the plaintiff pay all costs associated with the property and pay $10,000 – the first defendant holds the property on trust for the plaintiff – the first defendant to transfer the property to the plaintiff, conditional on the first defendant being indemnified and paid $10,000

Background

The plaintiff, Mr Galatidis, sought a declaration that Mr Kallidis (his partner's son from an earlier relationship) held the Mount Pritchard property — formerly the plaintiff's family home — on trust for him, with orders compelling transfer. Following the breakdown of his marriage, family law orders required him to pay $55,000 to his former wife in exchange for her interest, but his refinance application was declined because she had put the mortgage into arrears. His partner, Ms Kallidis, devised a strategy involving her son. In a brief March 2016 conversation, the parties reached an oral arrangement on the plaintiff's accepted version: Mr Kallidis would take a transfer of the property so he could borrow against it, the plaintiff would cover all expenses ("it won't cost you a cent"), and once the plaintiff got back on his feet the property would be transferred back; Mr Kallidis asked "what's in it for me?" and was promised $10,000. They shook hands.

A contract was made in April 2016 for $680,000 with no deposit. Mr Kallidis, then in his mid-twenties, borrowed $544,000 interest-only and contributed no capital. For about two years, the plaintiff paid amounts calculated to cover all outgoings, with no fixed rent. Mr Kallidis refinanced serially, each time using the property to release equity for other investments. The plaintiff spent between $200,000 and $400,000 of a 2019 inheritance on renovations and a granny flat built by Mr Kallidis's company. The relationship broke down in 2021; the plaintiff defaulted during COVID-19; and he lodged a caveat in September 2022.

Approach and Principles

The Court noted the open question identified in *Bijkerk Investments v Bikic* [2020] NSWSC 1336 at [119] (with reference to *Li v Ye* [2025] NSWCA 227 at [39], *Zekry v Zekry* [2020] VSCA 336 at [76] and *Galati v Deans* [2023] NSWCA 13 at [53]–[60]) whether the common intention constructive trust survives as a separate doctrine, but did not need to resolve it: the plaintiff proceeded on equitable proprietary estoppel principles. The four elements were applied as restated in *Kramer v Stone* [2024] HCA 48 at [37]–[40]: a clear and unequivocal promise; that a reasonable person in the promisor's position must have expected or intended reliance; reliance; and detriment if the promise were not fulfilled (see also *Giumelli v Giumelli* (1999) 196 CLR 101; *Pirrottina v Pirrottina* [2025] NSWCA 55 at [35]–[36]). On "clear and unequivocal", the Court applied *Legione v Hateley* (1983) 152 CLR 406 at 438–439, *Sullivan v Sullivan* [2006] NSWCA 312 at [85] and *Crown Melbourne v Cosmopolitan Hotel* (2016) 260 CLR 1 at [147]: a representation may be implied, need not be clear in its entirety, and a grey area does not deny enforceability if it is reasonable to interpret the representation as extending at least to its lower limit.

Disposition

The promise: The plaintiff's version of the March 2016 conversation was accepted, and Mr Kallidis's contention that he was purchasing outright as an investment rejected: he had not paid 20 per cent of the price, and a gift of $136,000 by the plaintiff made no sense; he made no effort to negotiate price; he knew the transfer was a favour arising from the plaintiff's inability to refinance; and his "disgust" at contract was consistent only with an understanding that he was being "used", not with elation at a discounted investment. The subsequent conduct confirmed the promise: payments calculated to hold Mr Kallidis harmless rather than market rent; substantial improvements making no sense absent a return transfer; and Mr Kallidis's complaints to others about having to hold the property. The plaintiff's consistent account given on oath in 2017 liquidator's examinations, before the dispute, was also probative. Imprecision in the timing of the transfer back ("when I get back on my feet") did not defeat the promise where the plaintiff sought to enforce only its core substance.

Credit: Adverse findings were made against both Mr Kallidis (admissions of dishonesty regarding a "fraudulent loan" and a $25,000 cash envelope for a mortgage broker; rejection of his denial of knowledge of false tax returns) and Ms Kallidis (admitted forgery of signatures on a tenancy agreement; her "cute distinction" that signing her son's name on a builders' warranty form was not forgery was rejected). Neither was relied upon except where corroborated or against interest.

Relief: Expectation, reliance and detriment were readily established. Although the arrangement was improvident for Mr Kallidis and bore an element of exploitation by Ms Kallidis, no defence of unclean hands, undue influence or catching bargain was pressed; the proper response was to ensure Mr Kallidis suffered no loss, not to permit him to profit. The plaintiff's defaults from 2020 did not extinguish his rights; they conditioned the relief. The trust was declared and transfer ordered subject to a prior accounting covering six matters: unpaid holding costs (complicated by the serial refinancing), CGT on the transfer, taxation complications from Mr Kallidis having claimed the plaintiff's capital expenditure, a conceded $100,000 credit for the home warranty insurance loan, usual vendor expenses, and the $10,000. The accounting must be settled before transfer, possibly through a referee, with provision for post-transfer adjustment of estimated amounts.

Orders

Parties to confer and provide proposed orders by 23 January 2026. Provisional costs order in favour of the plaintiff as the substantially successful party.

Practical Takeaways

Kramer v Stone is now firmly bedded into NSW family property litigation, and this decision shows the four-element framework applied with discipline — including the clarity holding: timing imprecision (“when I get back on my feet”) does not defeat a promise whose core substance is clear, particularly where the promisee enforces only that core (*Legione*; *Sullivan; Crown Melbourne*).

The forensic method is the real export: disputed oral promises are proved by objective indicia — payments calculated to hold the title-holder harmless rather than market rent, improvements senseless without an expected re-transfer, the title-holder’s own complaints to third parties about “holding” the property, and a pre-dispute account on oath. Practitioners should assemble exactly this matrix; the conversation itself is rarely won on recollection alone.

The “feeling of disgust” reasoning deserves its own note: human emotion at the time of the transaction is evidence of contemporaneous understanding — a party who believed he was buying at a 20 per cent discount would have been elated, not disgusted. Common-sense inference about motivation can resolve what testimony cannot.

The relief is the template for these cases: the promisee must do equity, and the Court’s six-item accounting — holding costs, CGT, the tax consequences of the title-holder’s own improper claims, conceded credits, vendor expenses, and the promised payment — settled before transfer with referee assistance and post-transfer adjustment, shows how to hold the promisor harmless without letting him profit. Defaults by the promisee condition the relief; they do not extinguish the equity.

Adverse credit findings on collateral dishonesty (fraudulent loan applications, forgeries) will strip a party’s uncorroborated evidence of weight except against interest — a discipline worth invoking expressly in submissions.

And the unresolved doctrinal question flagged through *Bijkerk*, *Li v Ye*, *Zekry* and *Galati* — whether the common intention constructive trust survives as a separate doctrine — remains open for the High Court; pleaders should continue to run proprietary estoppel as the primary or parallel basis.

***Luff v Lyons* [2025] NSWSC 1509**

Hearing dates:	8 December 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	15 December 2025
Before:	Pike J

LAND LAW – Caveats – Extension of operation of caveat – where deed of family arrangement between mother, brother and sister – where brother lodges caveat over sister's land pursuant to deed – where sister seeks to provide security to remove caveat pursuant to deed – whether adequate security provided

LAND LAW – Caveat – Removal of caveat – whether Court should remove caveat pursuant to s 74MA of the Real Property Act 1900 (NSW)

Background

A brother (Stephen) and sister (Karen) disputed the operation of a 2008 Deed of Family Arrangement made with their mother (Connie) to settle Stephen's family provision proceedings against their late father's estate. Under the Deed, "Bonnie Doon" was transferred to Stephen and "Miglen" and "Kagens" to Karen; Connie covenanted to publish a Will granting Stephen a legacy equal to the average value per acre of the three combined properties multiplied by 134, valued at the date of her death; Karen acknowledged liability for any shortfall, charged Miglen and Kagens to secure it, and Stephen was permitted to lodge a caveat. Clause 15 provided that if Karen wished to sell, she could have the caveat withdrawn on providing other security "which in Stephen's reasonable view is of sufficient value to protect the benefit derived by Stephen pursuant to Paragraph 8".

Stephen lodged a caveat in 2014. In 2024 and 2025 Karen sought to sell and offered alternative security, which Stephen did not accept. Karen served a lapsing notice; Stephen sought extension; Karen cross-claimed for removal under cl 15 or s 74MA of the *Real Property Act 1900* (NSW). Connie was 92, in good health and living independently.

Approach and Principles

Construction: The "benefit derived by Stephen pursuant to paragraph 8" was the legacy itself, secured by a charge supported by a caveat — a future obligation crystallising on Connie's death was the critical contextual feature. Karen's contention that the reference was confined to Stephen's rights as a beneficiary under a Will was rejected.

The reasonableness standard: A "reasonable view" means an opinion arrived at reasonably as well as reasonably based on available material: *EFG Australia v Kennedy* [1999] NSWSC 922 at [57]; *Doust v Riveaux Holdings* [2024] NSWSC 1434 at [5]. The Court also drew on the comprehensive restatement of "reasonable withholding" principles by Goodman J in *Qantas Airways v Australian and International Pilots Association (No 2)* [2024] FCA 756 at [105]–[108]: the onus is on the party asserting unreasonableness; the question is one of fact assessed objectively; the contract terms are paramount; and withholding is less likely to be unreasonable where the reasons relate to matters affecting the subject matter of the contract and are honestly held.

Disposition

The lump sum offer: Karen's primary offer — a cash payment at settlement calculated on October 2024 valuations, in return for a deed discharging the cl 8 legacy obligation — was not "other security" within cl 15. It assumed Connie passed away now, required Stephen to accept the legacy on present valuations rather than at the date of death, and imposed a new obligation rather than securing his existing rights. Rejection was reasonable.

The investment account alternative: The offer to invest an equivalent sum with Stephen as co-signatory, with revaluation at Connie's death, also failed: it did not accommodate the possibility of values rising before the legacy crystallises (to prove the rejection unreasonable, Karen needed to demonstrate no real possibility of rising values, which she did not attempt); it did not indicate where or how securely the monies would be invested; and absent a charge, Stephen would be at risk to claims by Karen's creditors. Stephen's solicitor's statements about expected value increases were not unreasonable — the valuer's own reports stated that valuations are current only at the date of valuation and may change significantly and unexpectedly. Stephen's delay in responding to the July 2025 offer did not entitle Karen to serve the lapsing notice: nothing in the Deed suggested delay would forfeit the right to alternative security, and reasonableness is assessed at the time of determination.

Section 74MA: Rejected. Unlike the usual extension application where the underlying interest is in dispute, the Court had determined the underlying question, and the occasion for balancing arguably did not arise. Even if it did, the price for removal would ordinarily be adequate security plus an undertaking as to damages, neither provided. The caveat was not shown to prevent sale: the obligation to provide title free from encumbrances arises on completion, and the properties had not even been marketed.

Orders

Stephen's case succeeds; Karen's fails. Parties to confer on final orders extending the caveat with the cross-summons dismissed. Costs to follow the event subject to a short opportunity to agree.

Practical Takeaways

The construction holding is the anchor: alternative security for a future contingent obligation must protect the future benefit, not substitute a present payment on today's valuations — an offer that assumes the contingency has already occurred imposes a new bargain and is not "security" at all. Where deeds secure legacies crystallising on a death, any substitute must accommodate market movement to that date.

The reasonableness framework is now conveniently collected: EFG Australia's twin requirements (reasonable process and reasonable basis) plus the Qantas restatement — onus on the challenger, objective assessment, contractual terms paramount, honest reasons touching the subject matter rarely unreasonable. The party attacking a "reasonable view" must do more than offer alternatives; here Karen needed to negate any real possibility of values rising, and never tried.

The valuer's own disclaimer — valuations current only at their date, liable to significant and unexpected change — supplied objective support for the rejection; cross-examine on such caveats, or deploy them, in any present-valuation-versus-future-obligation dispute.

The s 74MA holding draws a useful procedural distinction: once the underlying entitlement is judicially determined, the conventional balancing exercise of an urgent extension application loses its footing, and removal will in any event ordinarily be priced at adequate security plus an undertaking as to damages. And the "caveat prevents sale" assumption is debunked — clear title is a completion obligation, so an unmarketed property cannot found urgency.

The drafting lesson completes the picture: family arrangement deeds securing future legacies should specify acceptable substitute security with precision — bank guarantee, registered mortgage over identified property, third-party indemnity — rather than leaving "other security" to a reasonableness contest seventeen years later.

***Bruce v Bruce* [2025] NSWSC 1466**

Hearing dates:	21-23 October; 12 December 2024; 29 April 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	5 December 2025
Before:	Kunc J

EQUITY — Equitable interests in property — Priority disputes — Competing with other interests — Self-dealing executor holds property on institutional constructive trust for estate beneficiaries from moment of breach of fiduciary duty

EQUITY — Fiduciary duties — Breach — Self-dealing by executor

EQUITY — Trusts and trustees — Breaches of trust — Court's power to excuse

Background

The proceedings concerned a Connells Point property held as a tenancy in common between the Estates of the late Mr and Mrs Bruce. The Executors were three daughters: Licia (executor of both Estates, and a solicitor), Jayleen (executor of the Father's Estate) and Colleen (executor of the Mother's Estate). The dispute arose from the sale of the property to Jayleen in September 2017 for $731,945 (31/36ths of an $850,000 valuation), on the advice of Owen Hodge solicitors. The Executors were unaware that ANZ had valued the property at $950,000 for loan purposes (the MVS Valuation); subsequent valuations confirmed substantial undervalue, including one of $1,630,000 in November 2017. It was common ground the sale was a breach of fiduciary duty (the rule against self-dealing).

Jayleen and her then partner Mr Mitchell had occupied the property since 2010. Mr Mitchell was co-applicant on the ANZ loan but the property was transferred to Jayleen alone; he paid all mortgage repayments through his company. They separated in 2019 and he lodged a caveat claiming an interest through contribution. A receiver was appointed in 2024. The outstanding issues were representation of the Estates, exoneration under s 85 of the *Trustee Act 1925* (NSW), Mr Mitchell's interest, priorities, and occupation fees.

Approach and Principles

Representation: Where executors have an interest adverse to the estate, the Court may order the proceedings continue in the absence of a representative of the estate: UCPR r 7.10; *Carrington v Wallace* [2022] NSWSC 1078.

Exoneration: Section 85 permits relief where the trustee acted honestly and reasonably and ought fairly to be excused, "trust" extending to the duties of a legal personal representative (s 5). Conduct after discovering the breach is of little relevance to exoneration, though it may be relevant to costs.

Self-dealing: The rule against self-dealing is one of the most fundamental rules of equity: absent express authority, the informed consent of all beneficiaries or court permission, a transfer by an executor to themselves is voidable ex debito justitiae regardless of fairness (*Carrington* at [191]–[197]). Property acquired by a fiduciary in breach of duty is held on institutional constructive trust for the wronged beneficiaries from the time of breach (*Canehire v Themis Holdings* [2014] QCA 296; the extra-judicial analyses of McPherson J and Edelman J).

Joint endeavour: Where a joint endeavour fails without attributable blame, equity may impose a remedial constructive trust to prevent unconscionable retention of benefit. Mortgage repayments are not contributions to purchase price: *Singh v Singh* [2004] NSWSC 109, quoting *Calverley v Green* (1984) 155 CLR 242 at 257–258.

Disposition

Exoneration: Jayleen (an accounts manager) and Colleen (a doctor) were exonerated: they acted honestly and reasonably in relying on Owen Hodge, who failed to advise on the rule against self-dealing and treated notification of other beneficiaries as a mere option, and they were entitled to rely on Licia, a solicitor, to be astute to conflicts. Licia was not exonerated: as a solicitor — and one whose practice area routinely involved conflict of interest issues — she should have been alive to the fundamental rule against self-dealing, and her reliance on family law preoccupations and remote location was insufficient. The retainer of Owen Hodge did not absolve her from bringing her own professional knowledge to bear.

Mr Mitchell's interest: The pleaded agreement and common intention claims failed for want of satisfactory evidence of any specific conversation, both he and Jayleen being argumentative witnesses accepted only where corroborated. However, on the objective facts (the joint loan application, cohabitation, and mortgage repayments through his company, verified against the loan statements), they were parties to a joint endeavour to acquire the property as their home which failed without attributable blame. Jayleen held the property on a remedial constructive trust for Mr Mitchell to the extent of his contribution, secured by an equitable charge, with judgment against her personally for $295,443.03 as equitable compensation.

Priorities: The Estates prevailed. Jayleen's indefeasible statutory title was acquired subject to the institutional constructive trust in favour of the beneficiaries arising at the moment of breach. Mr Mitchell's interest was necessarily subsequent — arising no earlier than his first mortgage payment, or more probably when Jayleen first unconscientiously denied him an interest. The beneficiaries' equity was prior and better.

Occupation fees: Jayleen, as a defaulting fiduciary, was liable at $600 per week (the MVS Valuation rental figure, based on internal inspection) from the September 2017 transfer until she vacated in May 2019; the property's alleged condition was no answer where she actually occupied it. The claim against Mr Mitchell failed: he was not a defaulting fiduciary, no *Barnes v Addy* (1874) LR 9 Ch App 244 claim was pleaded, the first limb (knowing receipt) was unavailable because Jayleen received the property, and the second limb required a pleaded and proved dishonest and fraudulent design.

Orders

Parties directed to bring in short minutes. Beneficiaries to be given an opportunity to be heard on costs insofar as indemnity from the Estates is sought.

Practical Takeaways

The priority holding is the centrepiece and will be cited for years: an institutional constructive trust over property acquired by a self-dealing fiduciary arises at the moment of breach, without court order, and therefore precedes — and beats — any later equitable interest built on subsequent contributions, including a domestic partner's remedial trust. In any contest of equities, trace each interest to its moment of creation; the institutional/remedial distinction is temporally decisive.

The exoneration analysis sets the differential standard under s 85: lay executors who rely honestly and reasonably on solicitors' advice — even advice that omits the self-dealing rule — will be excused; a legally qualified executor will not, her professional knowledge being assessed against her actual experience, and external retainers affording no absolution. Legally qualified family members accepting executorships should treat this as a personal risk warning.

For advising solicitors the case is starker still: the failure to advise on the rule against self-dealing, and the treatment of beneficiary notification as optional, grounded the firm's $110,000 settlement. The rule must lead any advice on sales of estate assets to persons connected with an executor — express authority, fully informed consent of all beneficiaries, or court approval, and nothing less.

The treatment of the domestic partner's claim is a model of the modern approach: failed agreement and common intention pleadings can still yield a remedial constructive trust on the joint endeavour analysis, quantified by forensically traced contributions — and the cross-check of company bank statements against loan statements is the evidentiary method to emulate. But mortgage repayments remain contributions to the endeavour, not to purchase price (Calverley).

Occupation fee principles divide by status: a defaulting fiduciary pays for her actual occupation at the contemporaneous rental valuation, condition complaints notwithstanding; a non-fiduciary occupant can be reached only through a properly pleaded Barnes v Addy case — receipt or dishonest design — and a late amendment without that architecture will fail.

Finally, the costs posture protects the innocent: defaulting executors should not assume indemnity from estate funds, and the Court's invitation to beneficiaries to be heard on indemnity questions is best practice in conflicted-executor litigation.

The Owners – Strata Plan No 93543 v Zhang (No 3) [2025] NSWSC 571

Hearing dates:	22 to 25 March 2021, 2, 3, and 10 June 2021; 15 and 27 May 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	4 June 2025
Before:	Stevenson J

BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – statutory warranty – proceedings for breach – whether proceedings were commenced by plaintiff owners corporation within the warranty period – whether effect of interim occupation certificate was to cause warranty period to commence – whether interim occupation certificate authorised "the occupation and use of the whole of the building" – whether the two blocks of units should be seen as "separate buildings" that have separate completion dates

ESTOPPEL – promissory estoppel – where parties entered into deed of settlement containing a term allowing plaintiff owners corporation to rescind the deed in particular circumstances – whether plaintiff owners corporation estopped from rescinding deed – alleged representation by conduct inconsistent with express right of rescission – where defendant builder already in breach of contract and exposed to rescission before alleged representation made – no detrimental reliance established

LAND LAW – strata title – owners corporation – whether owners corporation has standing to seek compensation for building defects within strata lots – no standing established

Background

The Owners Corporation of a 20-unit Cabramatta development — two four-storey apartment buildings (Blocks A and B) over a basement carpark — sued Mr Zhang, the developer, for defects in the common property and individual units. An Interim Occupation Certificate issued on 13 May 2016, expressed to exclude Units 1 and 10 and "external works"; a Final Occupation Certificate for the whole development issued on 4 July 2016. Proceedings were commenced on 24 May 2018 — within two years of the Final but not the Interim Certificate. After a six-day hearing in 2021, the matter was stood over for settlement; a deed was executed in May 2023 requiring Mr Zhang to enter a rectification contract within three months, with the Owners Corporation entitled to rescind ab initio if he did not. He did not perform; after three Notices to

Perform, the last giving 42 days, the Owners Corporation rescinded in April 2025. Mr Zhang challenged the rescission.

Approach and Principles

Promissory estoppel was approached through *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387 at 428–429, *Kramer v Stone* [2024] HCA 48 at [37], *Rose v Manno Kingsway* [2025] NSWCA 23 at [79] and *Sidhu v Van Dyke* (2014) 251 CLR 505 at [90] ff: a clear and unequivocal promise (which may derive from sufficiently clear conduct), with reliance and detriment for the promisee to establish, not presumed. Under the *Home Building Act 1989* (NSW), the warranty period runs from completion (ss 18E(1)(b)–(c)); for a new strata building, completion is the date of an occupation certificate authorising occupation and use of the whole of the building (s 3C(2)), with separate buildings having separate completion dates (s 3C(3)) where reasonably capable of being used and occupied separately. Under former s 109H(1)(a) of the *EPA Act*, an interim occupation certificate authorises occupation of a "partially completed" building. Sections 254 and 255 of the *Strata Schemes Management Act 2015* (NSW) govern owners corporation standing, and s 48MA of the *Home Building Act* states the preference for rectification by the responsible party.

Disposition

Rescission: Effective. The post-August 2023 conduct evinced a preference for performance, but the only representation inferentially arising was that the Owners Corporation would not rescind without reasonable notice — and the 42-day notice of 6 March 2025 was reasonable. More fundamentally, no estoppel arose because Mr Zhang, who gave no evidence at all, established neither reliance nor detriment: he was already in breach when the alleged representations were made and remained so throughout. Promissory estoppel normally effects only a temporary change in rights, the promisor reverting on restoration of the promisee's position; there was no change in Mr Zhang's position, consistently in breach and consistently exposed to rescission.

"Two separate buildings": Rejected. Block B could not be used or occupied separately from Block A — its car spaces were accessible only via Block A's lift or the courtyard — and the structure was one edifice forming separate towers.

The Interim Occupation Certificate: The authoritative Council version excluded Units 1 and 10 (both in Block A) and "external works" (meaning all external works), so it authorised occupation of neither block. Even if Block B were a separate building, an interim certificate can only authorise occupation of a partially completed building, and Block B, if separate, was completed: only a Final Occupation Certificate could authorise its occupation (*Dyldam Developments v The Owners Strata Plan 85305* [2020] NSWCA 327). The warranty period therefore began on 4 July 2016 and the proceedings were in time.

Standing: Section 9(2)(b) of the *Strata Schemes Management Act* (administration of the scheme) does not authorise an owners corporation to sue for individual lot defects (The *Owners Strata Plan No 87265 v Saaib* [2021] NSWSC 150 at [385], [396]). The s 255 agency pathway (structural defects affecting support or shelter) was not made out: no evidence that the identified items affected support or shelter, and the s 255(2) conditions precedent were not addressed.

Section 48MA: Given Mr Zhang's repeated failure to engage with rectification and his lack of readiness for hearing, rectification by him was not the preferred outcome. Because his counsel was not ready to make submissions on defects, the questions of the existence of defects, rectification costs and location on common property were referred to a referee, with Mr Zhang to pay the costs of the reference in any event.

Orders

Mr Zhang's motion was dismissed. Owners Corporation was entitled to damages for defective works within the common property only. Balance referred out for inquiry and report. Interest reserved pending the referee's report.

Practical Takeaways

The s 3C analysis is useful authority for resisting developer attempts to fragment projects into separate "buildings" with earlier completion dates: the question is practical interdependence — shared lift access, courtyard access, configuration — not formal separation.

The Interim Occupation Certificate reasoning is important: a certificate excluding units and "external works" authorises occupation of neither block, and an interim certificate can never trigger the warranty period for what would otherwise be a completed separate building, only a final certificate. The precise content of the certificate and state of construction is decisive.

The promissory estoppel analysis is a clean application of *Kramer v Stone*: reliance and detriment are for the promisee to establish, and a party in continuing breach throughout cannot show a relevant change in position. Indulgent post-breach conduct gives rise, at most, to a representation that rescission will not occur without reasonable notice.

The standing holding — that the "administration" power does not extend to individual lot defects, and that s 255 requires specific evidence on support or shelter plus satisfaction of the conditions precedent — and the s 48MA holding that the rectification preference yields to the practical realities of the defaulting party's conduct, are both worth filing, as is the referral of unready defect questions to a referee at the defaulting party's cost

***Ahmau Developments Pty Ltd v Preet* [2025] NSWSC 604**

Hearing dates:	13, 14, 15, 16, 21 May; 7 June; 24 July 2024; 9 May 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	12 June 2025
Before:	Parker J

BUILDING AND CONSTRUCTION — Contract — Specific performance – Where changes to zoning laws altered contractual parameters – Whether contract was frustrated by changes to zoning laws – No issue as to principle

BUILDING AND CONSTRUCTION — Contract — Termination — Frustration – Where changes to zoning laws altered contractual parameters – Whether contract was frustrated by changes to zoning laws – Whether frustration is impacted by statutory scheme – No issue as to principle

LAND LAW — Conveyancing — Contract for sale — Off the plan Contracts — Rescission – Where rescission of an off the plan contract for sale of land was sought – Where the Conveyancing Act 1919 s 66ZS creates requirements for rescission – Where changes to zoning laws altered commercial conditions – Whether developers acted unreasonably

COSTS — Party/Party — Exceptions to general rule that costs follow the event – Orders when proceedings involve multiple parties – How parties liable – Multiple claims in multiple proceedings – Where statutory scheme modifies the general rule that costs follow the event – Whether statutory scheme captures the entirety of the multiple claims – Held: Conveyancing Act 1919 s 66ZS(8) applies only to claims under s 66ZS, not the proceedings as a whole

Background

The proceedings concerned 2017 off-the-plan contracts for lots in a Leppington subdivision, subject to the regime in Part 4 Division 10 (ss 66ZL–66ZU) of the *Conveyancing Act 1919* (NSW), which requires leave for a vendor to exercise a contractual right of rescission absent the purchaser's consent. Both contracts (with the Preets and the Bakshis) provided a 48-

month sunset date for registration of the Presale Plan. When the contracts were made, the land was zoned RU4 and required rezoning before residential subdivision. The sunset dates passed in 2021 without registration; 73 of 93 presale purchasers consented to rescission, but the Preets and Bakshis declined. In July 2021 the land was rezoned R2 under the Growth Areas SEPP, and in September 2021 a maximum dwelling density of 16.5 dwellings per hectare was introduced for the first time, followed by a revised DCP. Ahmau sought leave to rescind under s 66ZS; the purchasers cross-claimed for specific performance; and at a late stage Ahmau amended to contend the contracts were frustrated by the planning changes. The trial took place in 2024.

Disposition

Frustration: The contracts were frustrated, at the latest, by the introduction on 30 September 2021 of cl 4.1B of the Growth Areas SEPP: the rezoning, minimum lot size, maximum density and DCP requirements rendered the Presale Plan in its existing form incapable of registration. The cross-claims for specific performance necessarily failed.

Restitution: The function of restitution following frustration is to deprive a party of windfall benefits received at the other's expense. Mere repayment of the deposit with interest was insufficient: the deposits had provided Ahmau with a commercial benefit (capacity to fund the development) over time, and the lots had appreciated substantially. The Court rejected restitution by reference to the purchasers' contingent obligation to pay the price (no corresponding benefit to Ahmau, no proved cost, arbitrary figure) and rejected deposit-plus-interest-plus-indexation as double counting. It adopted a valuation-based indexation compounding until restitution is actually paid — increase in value to May 2023 (101 per cent) plus 5 per cent per annum compounded thereafter — informed by Ahmau's delay in advancing the frustration claim and its retention of the deposits. Restitution of $74,000 to the Preets and $37,000 to the Bakshis was ordered.

Section 66ZS: Unnecessary given frustration, but leave to rescind would in any event have been granted subject to restitution, the case being one of unavoidable delay followed by a planning change fundamentally altering the economics of the project.

Costs: Section 66ZS(8) — under which the developer is liable for the purchaser's costs of s 66ZS proceedings unless consent was unreasonably withheld — displaces UCPR r 42.1, but governs only the costs solely referable to the s 66ZS application; the cross-claims and frustration claim were separate "events" attracting the ordinary distributive approach. The Calderbank-based unreasonableness argument failed: it is difficult to see how it could be unreasonable to refuse something to which Ahmau was ultimately found not to be entitled, and the multifactorial s 66ZS analysis makes refusals inherently difficult to characterise as unreasonable, particularly where the critical issue (the amount payable beyond the deposit) had not crystallised when the offers were made. The purchasers were ordered to pay Ahmau's costs solely referable to the cross-claims and the frustration claim; Ahmau to pay the purchasers' costs otherwise. Indemnity costs were refused on both sides, the Beoco principle not applying to the late frustration amendment where the underlying evidence was already in play.

Orders

Declarations that each contract was frustrated by 30 September 2021. Restitution of $74,000 to the Preets and $37,000 to the Bakshis. Ahmau's claims otherwise dismissed. Cross-claims dismissed. Distributive costs orders.

Practical Takeaways

The decision is significant on the interaction between common law frustration and statutory rescission under s 66ZS: a planning change rendering the presale plan incapable of registration in its existing form is a frustrating event, eliminating both the need for statutory rescission and any entitlement to specific performance.

The restitution analysis is the most instructive feature: a valuation-based indexation factor — rather than mere refund with interest or loss of bargain damages — reflecting the developer's commercial benefit from holding the deposits and the appreciation of the land, compounding until restitution is actually paid. That continuation past the date of frustration is useful authority where the developer has been slow to advance the frustration claim and has retained the funds.

The s 66ZS(8) costs holding is doctrinally important: the provision displaces the ordinary rule, but only for costs solely referable to the s 66ZS application; other claims litigated in the same proceedings attract the distributive approach. And the treatment of the Calderbank offers — refusal of something the offeror was ultimately found not entitled to cannot readily be unreasonable — is a powerful answer to indemnity costs applications in this context.

***McLennan v Ng* [2025] NSWSC 1429**

Hearing dates:	10 November 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	28 November 2025
Before:	Richmond J

LAND LAW — Conveyancing — rules of construction — Standard form easements — scope of rights conferred by an 'easement to drain water' in standard form

LAND LAW — Easements — Substantial interference with easements — Whether obstructions present on easements constitute substantial interference with rights conferred

LAND LAW — Easements — Substantial interference with easements — Remedies for substantial interference — Whether refusal of consent to development application by dominant owner constitute substantial interference with rights conferred — Whether consent could be compelled by way of injunctive relief

WORDS AND PHRASES — 'easement to drain water'

Background

The plaintiffs, owners of land at Pennant Hills, sought to undertake stormwater drainage works on the defendant's land, burdened by a registered 1.2-metre-wide easement to drain water created under s 88B of the *Conveyancing Act 1919* (NSW) in 1988. Within the easement lay a 90mm clay pipe, over 36 years old, cracked and intruded by tree roots. The defendant had constructed various structures on or above the easement — stone paving, an air-conditioning unit, retaining walls, and a garden bed — and five trees outside the easement had roots that passed through it. The plaintiffs held a deferred commencement consent to subdivide their lot, conditioned on stormwater works including replacement of the pipe with 225mm PVC pipes and a stormwater pit, and removal of the five trees, with conditions to be satisfied by about December 2026.

Approach and Principles

The Court applied the construction principles summarised in *Thomas v Pearson* [2025] NSWSC 1127 at [70]–[76]: the dominant owner enjoys the expressed rights and ancillary rights reasonably necessary for enjoyment; each owner's rights must be accommodated to the other; substantial interference is a common sense judgment on the circumstances; and construction is objective in light of text, context and purpose (*Theunissen v Barter* [2025] NSWCA 50). Section 181A of the *Conveyancing Act* expands "easement to drain water" to confer a full and free right to drain water in any quantities, to use any existing pipes or pipes in replacement or substitution, or to lay and maintain pipes of sufficient internal diameter, with ancillary rights of entry, subject to a proviso requiring reasonable precautions to minimise disturbance and restoration of the surface as nearly as practicable to its original condition. On substantial interference and ancillary rights the Court drew on *GM Amalgamated Investments (Dulwich Hill) v Mills* [2014] NSWCA 202 at [27], [64], *Bland v Levi* [2000] NSWSC 161 at [22], *Simmons v Midford* [1969] 2 Ch 415 at 422, *Sertari v Nirimba Developments* [2007] NSWCA 324 at [10] and *Westfield Management v Perpetual Trustee Co* (2007) 233 CLR 528 at [23], together with the implied term against derogation from grant. Subdivision of the dominant tenement does not extinguish or restrict the easement (*Gallagher v Rainbow* (1994) 179 CLR 624 at 633–634).

Disposition

Replacement and upsizing of the pipe: Permitted. The right to drain water "in any quantities" permits the dominant owner to determine the size of the new pipe provided it is reasonably necessary to serve the drainage purpose; the easement does not preclude a larger pipe. Applying Simmons v Midford, the dominant owner may remove an existing pipe and put in a bigger or better one, making good any damage; per *Bland v Levi*, the dimensions of the work are for the dominant owner alone. The expert evidence supported 225mm as reasonably necessary, and any Council misapprehension about lot numbers did not make the selection unreasonable. An implied ancillary right supported the single stormwater pit.

The obstructions: The retaining walls, paving, air conditioning unit and garden bed over the easement constituted substantial interference, the dominant owner being entitled to require that exercise of the rights not be made "practically impossible or substantially more difficult" (*GM Amalgamated Investments* at [4]; *Abingdon Corporation v James* [1940] 1 Ch 287; *Goodhart v Hyett* (1883) 25 Ch D 182). The plaintiffs' prior failure to object did not preclude relief; they could require removal or remove the obstructions themselves, subject to the proviso — "original condition" meaning the condition immediately before the work, not at the time of grant (*GM Amalgamated Investments* at [31]).

The five trees outside the easement: Removal permitted on the substantial interference basis. The arborist established that 30 to 55 per cent of each tree's root system within the easement would need removal for the works, creating a real risk of instability and of the trees falling on the defendant's land — a risk for which the plaintiffs could be liable in nuisance, and which itself constituted substantial interference (cf *Bockenfield Aerodrome v Clarehugh* [2021] EWHC 848 (Ch)). The Court did not need to decide the ancillary rights or derogation from grant bases.

Consent to the s 68 application: Applying *Sertari* at [10] — the servient owner's refusal of legally necessary consent obstructs the dominant owner just as physical obstruction does —

an injunction was granted requiring the defendant to consent to the s 68 *Local Government Act 1993* (NSW) application, without precluding her planning law rights of objection.

Orders

Plaintiffs entitled to install the new pipe and stormwater pit and to remove or require removal of the obstructions including the five trees. Parties to bring in short minutes including costs within 14 days; liberty to apply.

Practical Takeaways

The careful unpacking of the s 181A expansion into its discrete rights, with the proviso requirements, provides a clean framework for these very common easements — and the holding that the dominant owner alone determines the dimensions of replacement works (subject to reasonable necessity) is useful authority against servient owner attempts to dictate the kind of works, with regulatory compliance generally sufficient to establish reasonable necessity.

Prior failure to object to accumulated encroachments does not extinguish the entitlement to require their removal when the need to exercise the easement arises — and "original condition" in the restoration proviso means the condition immediately before the work, a point drafters of new easements may wish to address with more precise restoration language.

The trees holding is the most innovative feature: interference can be restrained beyond the strict spatial boundaries of the servient tenement, and the risk of destabilised trees falling (with consequent nuisance exposure for the dominant owner) is itself a substantial interference.

The *Sertari* principle that obstruction by legal means — refusal of a legally necessary consent — infringes the easement as much as physical obstruction supports mandatory injunctions compelling consent, while preserving the servient owner's planning objections.

Vaughan Two Pty Ltd v Vaughan One Pty Ltd [2025] NSWSC 1393

Hearing dates:	29 and 30 September and 1 October 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	27 November 2025
Before:	Pike J

LAND LAW – Co-ownership – Statutory trust for sale – Discretion of court – where joint venture and Development Agreement – whether parties agreed to deal with property in a certain way – whether parties should be held to bargain – whether trustees for sale should be appointed – no question of principle

LAND LAW – Co-ownership – Statutory trust for partial partition – Discretion of court – whether Court has power to order partial partition – whether to be the "first judge clever enough to think of that solution" – whether partial partition or sale more appropriate – question of principle

Background

The proceedings concerned a s 66G *Conveyancing Act 1919* (NSW) application for trustees for sale of 63 unsold residential units in a 166-unit Lidcombe strata development, owned by six corporate entities (Vaughan One to Six) associated with members of the Khattar family as tenants in common. In 2020 the owners entered a Development Agreement with BFour Developments Pty Ltd as Development Manager — Tony Khattar its sole director, with each owner entity holding shares. The Agreement gave BFour ultimate control over the project, required it to bring the project to practical completion and pay all project costs, created a waterfall of payments from sale proceeds (cl 12), prohibited the owners from selling, negotiating any sale or otherwise dealing with the Land or interfering with BFour's rights (cl 9.2, subject to cl 12.4 permitting sale of the entire project), required execution of sale contracts within 10 business days at not less than 90 per cent of list price (cl 16), and appointed BFour to negotiate and sell the Lots (cl 22). Construction completed in August 2023; 87 units and 16 shops had sold for around $59 million; the unsold units were worth around $40 million; under $1 million remained owing to the NAB. Relations had broken down. The plaintiff sought sale of all remaining units; defendants holding 57 per cent opposed, alternatively seeking a hybrid: trustees for sale over 25 units to discharge the NAB debt and trustees for partition over the remaining 38.

Approach and Principles

An order under s 66G is almost as of right unless on settled principles it would be inequitable — including where the appointment would be inconsistent with a proprietary right, or the applicant is acting in breach of contract or fiduciary duty, or is estopped; hardship or general unfairness is not sufficient, and the onus lies on the opposing co-owner: *Foundas v Arambatzis* [2020] NSWCA 47 at [63]; *Ambrus v Buchanan* [2022] NSWSC 1628 at [83]. Contractual restrictions on alienation are void as contrary to public policy unless not sufficiently extensive to undermine alienability or imposed for the protection of a valid collateral object (*Forrest v Nix* [2012] NSWSC 493 at [39], [44]; *Bondi Beach Astra Retirement Village v Gora* [2011] NSWCA 396), and a court may decline relief where the parties have agreed to deal with the property in a certain way (*Ngatoa v Ford* (1990) 19 NSWLR 72 at 77; *Chalhoub v Chalhoub* [2005] NSWSC 572; *Tory v Tory* [2007] NSWSC 1078). On partition under s 66G(4), the moving party bears the onus of establishing that partition would be more beneficial in a financial sense (*Segal v Barel* (2013) 84 NSWLR 193 at [25]–[29], [48]–[68]).

Disposition

The s 66G claim: Dismissed. The parties were engaged in a joint venture and owed each other implied obligations to do all things necessary to give each the benefit of it, including compliance with their obligations to BFour. The plaintiff was acting inconsistently with those obligations, and the orders sought would deprive BFour of valuable rights, including control over the sale of the remaining units, fundamentally altering the contractual arrangements and adding costs where no breach of the Development Agreement was suggested. The absence of an agreed Schedule 4 list price did not render cl 16 inoperable — list prices could be agreed from time to time and the implied obligation would fill any gap. Clause 9.2 was not void as a restraint on alienation: it did not effect total inalienability (cl 12.4 permitted sale of the entire project) and protected a valid collateral object (BFour's selling rights).

Failure to join BFour: BFour was clearly a necessary party (*News Ltd v Australian Rugby Football League* (1996) 64 FCR 410 at 523–524), its rights going to the heart of the opposition. The plaintiff's application to join BFour after the conclusion of reply submissions was refused: it had been told at the outset of openings that BFour was a necessary party and took no action.

Partial partition (obiter): The Court inclined to the view that the statute permits the partial partition proposed, each unit being separate property held in co-ownership. But the defendants had not established partition would be more beneficial: tax consequences are only part of the analysis; there was no evidence of any intention at entry into the joint venture to sell only enough units to repay the NAB and retain the rest for rental (the Development Agreement was to the contrary); and the comparison between sale of all units under the waterfall and partial sale plus partition was clouded by uncertainty about rental arrangements, timing and market conditions.

Orders

Amended summons dismissed. Both cross-summonses dismissed. Provisional view that each be dismissed with costs.

Practical Takeaways

The decision is a clean application of *Ngatoa v Ford* and *Forrest v Nix* in the joint venture context: where co-owners have agreed through a development agreement to deal with the property in a certain way, s 66G orders inconsistent with that bargain will be refused. Careful drafting of alienation restrictions can effectively immunise a joint venture from s 66G applications by dissatisfied co-owners — and retaining some pathway to disposal (here, sale of the entire project by unanimity under cl 12.4) may save the broader restrictions from invalidity under the *Bondi Beach Astra* qualifications.

Missing contractual machinery (the unagreed list price schedule) will not readily render a clause inoperable where the contract permits later agreement and the implied duty of cooperation fills the gap.

The joinder point is a forensic warning: where a s 66G application engages the rights of a third party under associated agreements, join it at the outset. Failure to do so may both defeat late joinder on prejudice grounds and itself ground refusal of the orders.

The obiter acceptance that s 66G permits partial partition of a strata development is worth filing for future hybrid solutions — but the “more beneficial” onus under s 66G(4) requires more than asserted tax benefits, and founders where the contemporaneous documents contradict the asserted retention intention. The policy framing is also useful: s 66G provides a mechanism where co-owners cannot agree how to determine the co-ownership; where they have already agreed, the policy basis is significantly weakened.

OAC v Coogee Diggers [2025] NSWSC 1388

Hearing dates:	4 to 7, 11 to 14, 19 to 20 August 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	26 November 2025
Before:	Pike J

CONTRACTS – Remedies – Damages – Mitigation of loss – whether poor maintenance of the property amounts to a failure to mitigate loss – no question of principle

LEASES AND TENANCIES – Default and termination – Repudiation – where upstream transaction of ultimate owner of tenant company – whether transaction amount to change of control of lessee – whether lessee's action amount to repudiation – no question of principle

LEASES AND TENANCIES – Repairs, maintenance and alterations – Damage to premises – whether water ingress into lessor's property caused by lessee – no question of principle

TORTS – Trespass to land – Damages – whether trespass to Lessor's reversionary interest – no question of principle

TORTS – Nuisance – whether lessee's actions caused damage or material interference to lessor's property – application of Wringe v Cohen [1940] 1 KB 229

Background

The landlord (Coogee Diggers) and tenant (Only About Children, OAC) disputed the purported termination of a 30-year lease over a childcare centre built on the club's former bowling green at Coogee, expiring in 2044, together with licences over an adjacent Outdoor Area and the old bowling clubhouse (OBC). Both leased areas were limited in depth to RL 58.20, approximately 20cm below surface. Beneath the centre lay an unwaterproofed 1963 concrete slab over the club's pool and gym, drained by terracotta agricultural drains (the Agg Drains). In June 2022 Coogee Diggers purported to terminate for alleged repudiatory conduct related to a change in control of OAC's ultimate owner; OAC challenged the termination and obtained interlocutory protection. Coogee Diggers cross-claimed approximately $500,000 for water ingress damage, alleging breaches of the lease, trespass and nuisance; OAC had already paid over $106,000 without admissions, to be set off against any award.

Approach and Principles

On nuisance the Court applied *Gales Holdings v Tweed Shire Council* (2013) 85 NSWLR 514 at [131]–[135]: wrongful interference with enjoyment of land; fault of some kind almost always necessary; an occupier liable for continuing a nuisance if, with knowledge or presumed knowledge, it fails to take reasonable steps; in water flow cases the higher proprietor is not liable merely because surface water flows naturally downhill, but may be where waters are caused to flow in a more concentrated form. Where the defendant did not plant the offending tree, liability requires knowledge (or means of knowledge) of the growth and damage and failure to act without undue delay (*Robson v Leischke* at [66]). The *Wringe v Cohen* [1940] 1 KB 229 exception — liability for premises becoming dangerous through failure to repair, without knowledge or negligence — was treated as remaining part of Australian law notwithstanding sustained criticism (*Cartwright v McLaine & Long* (1979) 143 CLR 549 at 556), but applies only where the defendant was responsible for repair of the relevant premises. Trespass to the reversion requires permanent injury necessarily prejudicial to the reversioner (*Jones v Llanrwst Urban District Council* [1911] 1 Ch 393 at 404). On watertight covenants, *AF Textile Printers v Thalut Nominees* (2007) 17 VR 334 at [52]–[55] holds that "ensure" formulations may impose absolute obligations.

Disposition

Termination: OAC established the purported termination was invalid, on the construction of the change of control provisions (cl 16.2).

Credit and inferences: The CEO Mr Gallagher's evidence was approached with great caution: he was prone not to answer simple questions, made statements he thought would assist his side, and admitted his evidence was incorrect in at least two respects, including false statements in a February 2022 email about ongoing water ingress. A *Jones v Dunkel* inference was drawn from the failure to call the former long-term President and a director (also the club's solicitor in the proceedings), where pre-OAC water ingress was central.

Trespass: Rejected. The artificial grass, rubber playground and trees with invasive roots were installed by a related entity before the lease commenced; the plants had been removed in 2021 and replaced with self-contained planter boxes, the roots cleared, and OAC had paid for the remediation — no permanent injury to the reversion remained.

Nuisance: Rejected on the facts. The covering of the pits was not shown to have caused any water ingress; the trees were planted before the lease by another entity; and the *Wringe v Cohen* claim failed because the Agg Drains lay below RL 58.20 and outside the leased area, OAC was neither occupier of the land containing them nor under any repair obligation, no blockage was shown to have caused ingress, and the Building was never shown to be dangerous.

Damages: Largely fell away; $4,745 was allowed for slab overloading, against the $106,084.94 already paid and to be set off. On quantum methodology, small differences between the quantity surveyors were split at mid-points; substantial differences were resolved by engaging with the underlying engineering.

Obiter: Had cl 17.3 (watertight building covenant) arisen, OAC's contentions would likely have been upheld — the "functional watertightness" evidence did not address the OBC, which was far from watertight. Clause 26.1 (no responsibility for overflow), construed with its "i.e." qualifier, excluded liability only for overflow due to incapacity of the pre-existing stormwater system, not overflow howsoever caused. The failure to mitigate argument was conceptually misconceived (mitigation concerns post-wrong conduct); the matters raised went to apportionment, and had apportionment arisen for the OBC doorway nuisance, damages would have been reduced by approximately 40 per cent for Coogee Diggers' poor maintenance.

Orders

OAC succeeded on the validity of the termination; the cross-claim failed on all but one minor item. Parties directed to confer on final orders including costs.

Practical Takeaways

The vertical demarcation of the leased area at RL 58.20 was decisive for the *Wringe v Cohen* analysis: the Agg Drains lay below the leased area, so OAC was neither occupier nor under a repair obligation. Careful vertical demarcation in mixed-use leases has significant consequences for repair obligations and tortious liability.

Wringe v Cohen survives at first instance despite sustained criticism, but its operation is narrow: the defendant must be responsible for repair of the relevant premises and there must be an actual failure to repair causing a dangerous condition.

Post-wrong remediation may defeat a trespass to reversion claim, which requires continuing permanent injury. The credit and *Jones v Dunkel* analyses are also instructive: demonstrably false contemporaneous communications poison the principal witness's evidence, and the inference may be drawn even where an uncalled witness is the party's own solicitor in the proceedings.

The construction of cl 26.1 through its "i.e." qualifier — restating rather than extending what precedes it — is a sound reminder to be precise about the scope of exclusion clauses, and the mitigation/apportionment distinction (pre-wrong maintenance goes to apportionment under the *Civil Liability Act 2002* (NSW), not mitigation) provides a useful pathway, with the Court prepared, obiter, to quantify a 40 per cent reduction.

***Option Funds Management Limited (receivers and managers appointed) as trustee for the Option SIV Real Estate Fund v Wenbo Zhao* [2025] NSWSC 1376**

Hearing dates:	3, 4 & 5 November 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	25 November 2025
Before:	Slattery J

EQUITY — Equitable remedies — Injunctions – interlocutory injunction sought by a claimant (the defendant/cross claimant) to an alleged prior equity to restrain the completion of the sale of certain investment real estate by receivers (the second plaintiffs) appointed by a mortgagee to the property of a mortgagor in default (the first plaintiff) – caveat filed only after the sale entered into by the receivers – caveat invalid and withdrawn – whether there is a serious question to be tried – weighing the strength of the plaintiff's case – what is the balance of convenience in the circumstances – defendant/Cross claimant's undertaking to damages not supported by disclosure as to the defendant/cross claimants assets – whether an interlocutory injunction should be granted and if so on what terms.

Background

The plaintiffs — OFM, the mortgagor and registered proprietor, and the receivers appointed by the first mortgagee (Tung Chit) — sought removal of a caveat filed by Mr Zhao that was impeding settlement of the receivers' sale of property at Magenta on the Central Coast. The dispute was nested in transactions spanning almost a decade: the property had been sold in 2015 by CEG as mortgagee of Rich Sea Pty Ltd to a joint venture of OFM (39 per cent), Tung Chit (51 per cent) and a third entity, for $28.4 million, with only $4 million paid on settlement and the balance left owing to Rich Sea. OFM never paid its share of $7,354,500. Mr Zhao claimed that debt had been assigned to him through two contested deeds — a 2016 Deed from Rich Sea to Mr Zhang and a 2017 Deed from Mr Zhang to Mr Zhao for $3 million in cash.

The development became a financial disaster; Tung Chit appointed receivers in August 2024, who sold to Golden Stone Fund Pty Ltd. Mr Zhao caveated between contract and settlement claiming a "resulting trust"; the caveat was defective in form and conceded indefensible, but he cross-claimed for judgment of $7,354,500 plus interest at 12.5 per cent (a total of about $16.5 million, accruing at $2,553.65 per day) and an interlocutory injunction restraining completion, claiming an equitable mortgage based on cl 45.1(d) of the CEG contract for sale.

Approach and Principles

A caveat claiming an interest fundamentally different from that articulated cannot be cured under s 74L and should be struck out: *Sutherland v Vale* [2008] NSWSC 759 at [10]–[12]; *Woodsman v Jozic* [2018] NSWSC 1311 at [11]–[17]; *Comserv (No 210) v Ristevski* [2022] NSWSC 821 at [65]. On the injunction, the orthodox framework applied (*Beecham Group v Bristol Laboratories* (1968) 118 CLR 618; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [70]–[71]), with the *Kolback Securities v Epoch Mining* (1987) 8 NSWLR 533 refinement: where the interlocutory decision will in a practical sense determine the substance of the matter, the Court should evaluate the strength of the case for final relief in assessing the balance of convenience. Section 43A of the *Real Property Act 1900* (NSW) advances the purchaser's protection against notice to a time earlier than registration (*Taleb v National Australia Bank* (2011) 82 NSWLR 489 at [40]); failure to caveat is relevant to priorities (*J & H Just Holdings v Bank of New South Wales* (1971) 125 CLR 546 at 552); and a mortgagor seeking to restrain a mortgagee's power of sale must ordinarily pay the mortgaged sum into Court (*Inglis v Commonwealth Bank of Australia* (1971) 126 CLR 161; *Harvey v McWatters* (1948) 49 SR (NSW) 173 at 178).

Disposition

Serious question: Found, but the case faced many hurdles and a narrow and difficult path: both deeds named "Zhang" although he had changed his name to Chang effective October 2014, potentially consistent with artificially created documents; neither deed expressly created or recorded the propounded security, the assignment language being not apt to include an equitable mortgage or vendor's lien; the authorities do not support implying that an associated equitable lien is automatically assigned with a debt (*Cosgriff v McAra and Marchesi* [2012] VSC 21 at [30]); the debt may be statute-barred, the 2017 Deed reciting a sum identical to 2016 without intervening interest; proof of notice of assignment to OFM was wanting; Mr Zhang had proved in Rich Sea's liquidation for nearly the identical amount; and s 43A would likely protect Golden Stone once the caveat was removed, with seven years of failures to caveat entering the priorities analysis. (The plaintiffs' argument that a vendor's lien could not bind Rich Sea because CEG executed the contract was rejected: s 58(2) binds the mortgagor to the mortgagee's acts in selling.)

Balance of convenience: Against the injunction: Tung Chit's continuing losses (a six-month delay representing at least $600,000 on inferred cost of capital of 10 per cent, on top of accumulated losses of about $11.5 million); the uncertain quality of Mr Zhao's undertaking as to damages, no evidence of its value having been provided despite repeated invitations, and no offer to pay the delay interest into Court; paralysis of the development; outgoings exceeding $1 million per annum; and the adequacy of Mr Zhao's remaining claims, Tung Chit's improving net asset position suggesting even an unsecured claim would likely be substantially met. The application was dismissed, but on terms protecting Mr Zhao: the plaintiffs to give 14 days' notice of any proposed substantial change to Tung Chit's capital structure, including any reduction of net assets by more than 15 per cent.

Orders

Caveat removed. Interlocutory injunction dismissed subject to the capital structure notice condition. Stay until 1 December 2025 to preserve appeal rights. Costs of the application each party's costs in the proceedings. Liberty to apply.

Practical Takeaways

The s 74L holding is useful authority: a caveat asserting a resulting trust cannot be amended into one asserting an equitable mortgage — the interests are fundamentally different, and the asserted interest must be carefully matched to the caveat's stated grounds at the outset.

The *Kolback* application is instructive: where the interlocutory decision is effectively dispositive (here, halting a receivers' sale), the strength of the underlying case bears directly on the balance of convenience — and the forensic dissection of the contested deeds (name discrepancies, missing security language, unreflected interest, absent notice, the inconsistent proof of debt) is a template for testing contested instruments at the interlocutory stage without a finding of inauthenticity.

Assignment of a debt does not impliedly carry an associated equitable lien: security interests must be expressly included. Prompt caveating matters both to priority and to the credibility of the claim, and s 43A will protect a purchaser once a defective caveat is removed.

The value of an undertaking as to damages must be demonstrable, not merely proffered — failure to evidence capacity despite invitation weighed heavily. And the condition imposed on dismissal (notice of substantial changes to the financier's capital structure) is a creative template for protecting a party whose unsecured claim may be jeopardised by intervening events.

Evans v Smith [2025] NSWCA 102

Hearing dates:	7 April 2025
Jurisdiction:	Supreme Court of New South Wales, Court of Appeal
Decision date:	16 May 2025
Before:	Ward P and Stern JA at [1]; Adamson JA at [117]

LAND LAW – adverse possession – where the first respondent's land borders on land owned by the appellants (Lot 41) – where the first respondent sought a declaration that he was entitled to legal title of part of Lot 41 (the contentious land) by reason of decades of adverse possession – whether the first respondent and his predecessors in title had demonstrated continuous exclusive possession and an intention to possess the contentious land – whether the primary judge erred in concluding that the Lot 41 paper title owners lost title to the contentious land in 1989

LAND LAW – adverse possession – extent of relief – whether the court ought to declare any part of the contentious land beyond which the appellants conceded in an open offer as curtilage

Background

The proceedings concerned neighbouring rural land at Ravensdale. The appellants purchased what is now Lot 41 in June 1989; part of it was the contentious land. The first respondent, Mr Kenneth Smith, was registered proprietor of the adjoining Lots 1 and 2, in his family since his grandfather's 1946 purchase, passing to his uncle Keith Smith in 1963 and to him in 1987. The family operated a sawmill on what they called the "Mill Property" — a description taking in both Lot 1 and the contentious land — and the Smith house, built about 1945, was occupied by successive generations from 1949. The road history mattered: an 1884 gazetted Parish Road (the "Unformed Road") was never built, and an 1889 deviation became Brush Creek Road, close to which the house stood; the bulk of the contentious land lay between Brush Creek Road and the Unformed Road. In June 2022, in the context of Central Coast Council's proposed acquisition for the Maloney's Bridge upgrade, the appellants learned the Smith house stood on their land. Mr Smith caveated, then sued for declaratory relief over both the contentious land and the Paper Road land. Peden J found adverse possession of the contentious land from 1949 to 1989, extinguishing the paper title in 1989. The appellants, who had conceded adverse possession of the house and its curtilage, challenged the findings of continuous exclusive possession and intention over the balance.

Approach and Principles

The orthodox framework requires clear evidence of both factual possession — an appropriate degree of exclusive physical control, not necessarily established solely by enclosure — and an intention to possess, manifesting an intention to exclude the world at large; clear evidence is required because of the drastic consequences of a change of possession (*Powell v McFarlane* (1977) 38 P & CR 452 at 480 (Slade J)). On constructive possession, possession of one part of land does not necessarily found an inference of possession of the whole; the principle is limited to land defined by a physical boundary (*Ben-Pelech v Royle* [2020] WASCA 168; *JNM v Adelaide Banner* [2009] VSC 327 at [36]–[41] (Byrne J)). Curtilage is a garden, yard or piece of ground lying near and used in connection with a dwelling house (*Pilbrow v St Leonard Shoreditch Vestry* [1895] 1 QB 433); what constitutes the curtilage is a question of fact in each case (*Grasso v Stanthorpe Shire Council* (1996) 91 LGERA 429 at 434), the relevant question being whether the land subserves the purpose of the building — whether it contributes to the enjoyment of the building for the fulfilment of its purpose (*Royal Sydney Golf Club v FCT* (1955) 91 CLR 610 at 626; *Milro v Associated Securities* [1970] 2 NSWR 70 at 75; *Stamford Property Services v Mulpha Australia* (2019) 99 NSWLR 730 at [136] (Emmett JA)). Adamson JA also applied *Jones v Dunkel* (1959) 101 CLR 298 at 308, 312, 320–321 and the Ferrcom inference (*Commercial Union Assurance v Ferrcom* (1991) 22 NSWLR 389 at 418–419) — that the most natural inference may be that a party feared to ask a witness about a matter because the answer would not assist its case — and, on joinder of necessary parties, *Victoria v Sutton* (1998) 195 CLR 291 at [77] (McHugh J), approved unanimously in *John Alexander's Clubs v White City Tennis Club* (2010) 241 CLR 1 at [131].

Disposition

Continuous factual possession: The Court (Ward P and Stern JA, Adamson JA agreeing as to outcome) held that the primary judge erred in concluding that exclusive continuous use was established over the requisite period beyond the house, its curtilage, and the area used to access the sawmill and Ravensdale Road. There was little or no evidence of the use of the bulk of the contentious land over the whole period, apart from some repair and maintenance of fences and the construction and removal of a shed. Beyond the presence of two dairy cows and a few horses from time to time, the highest the evidence went was the boundary fences — which as a matter of common sense signify ownership of the enclosed land, but which showed nothing of the actual use made of the land beyond the house and curtilage from which exclusive possession could be inferred.

Intention to possess: Unnecessary to decide; had it been, no error would have been found in the finding that the Smiths manifested an intention to occupy to the exclusion of the world, based on the retention and repair of the boundary fences from 1949 coupled with the acts of possession relating to the house and access between house, mill and Ravensdale Road.

Curtilage (the majority): Mr Smith owned so much of Lot 41 as carried the house and its curtilage, extended to accommodate vehicular and pedestrian access from the house to the Unformed Road. The land permitting access from the house to the mill and Ravensdale Road served the purpose of the house and fell within the expanded curtilage: it was inconsistent with the concept of curtilage as land serving the purpose of the house to confine it to an area not permitting ready access between the house and the Unformed Road on which the mill — Mr Smith's property — stood at all relevant times. The appellants' open offer of 23 May 2024, although not a concession, involved tacit recognition that some right of access from the house to the Unformed Road had existed.

Adamson JA (dissenting as to relief): Mr Smith wholly failed to discharge his onus except as to the residence and its immediate curtilage. It was not for the Court to speculate about access routes; he bore the onus of establishing actual possession and animus possidendi in respect of any access land. A *Ferrcom* inference arose from the failure to ask Keith Smith about access between residence and mill — the most natural inference being that the answer would not have assisted — and an alternative hypothesis was reasonably available: access via Brush Creek, Yarramalong and Ravensdale Roads. Photographic evidence has significant limitations for proof of historical use, being deceptive as to perspective and distance, and conjecture from photographs is insufficient for the purposes of proof (*Goode v Angland* (2017) 96 NSWLR 503 at [84]–[96]; *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361). If a right of way was wanted, the appropriate course was an application under s 88K of the *Conveyancing Act 1919* (NSW); the Court should not bypass s 88K by granting a right of way never sought. Adamson JA also noted with concern the failure to join the owner of the Paper Road: trial judges should ensure proceedings are properly constituted, and orders made without joinder of affected parties are susceptible to being set aside on procedural fairness grounds.

Orders

Appeal allowed. The majority made declarations recognising Mr Smith's title to the house and curtilage as identified in the plan accompanying the appellants' 23 May 2024 offer, extended to accommodate vehicular and pedestrian access to the Unformed Road. Mr Smith to pay the appellants' costs at first instance and on appeal on the ordinary basis. Adamson JA would have confined the declaration to the residence and its immediate curtilage and ordered indemnity costs from 14 days after the open offer.

Practical Takeaways

The decision is doctrinally significant on the limits of constructive possession: possession of one part of land does not found an inference of possession of the whole where the claimed area is not defined by an internal physical boundary, and evidence of factual possession must extend across the whole of the area claimed throughout the whole of the period — not merely to the obvious parts such as a residence and its surrounds.

The fencing analysis is the practical centrepiece. Boundary fences signify ownership of the enclosed land as a matter of common sense, but fencing alone — particularly fencing erected before the claimed possession began — will not carry a claim over land whose actual use is unproved. The *Powell v McFarlane* "clear and cogent evidence" standard, justified by the drastic consequences of a change of possession, remains the touchstone for both sides of these claims.

The curtilage holding is doctrinally important: under the Royal Sydney Golf Club subservience test, curtilage may extend beyond a dwelling's immediate surrounds where functional access to other property is integral to the dwelling's purpose — here, the residence's connection with the family sawmill. But Adamson JA's insistence on positive proof of the access route, supported by the *Ferrcom* inference and scepticism of photographic proof, exposes a genuine tension between common-sense inference and the onus of proof; even where common sense suggests how land must have been used, the Court may divide on whether inference suffices.

The forensic lessons from the dissent stand on their own: the failure to ask an available witness with knowledge about the means by which the claimed possession was exercised may attract a *Jones v Dunkel/Ferrcom* inference; photographs are treacherous proof of historical use; and a claimant who really wants access should plead s 88K rather than ask the Court to achieve a right of way through an expansive adverse possession declaration.

The joinder warning is salutary: proceedings affecting other registered titles (here, the Paper Road owner) must be properly constituted, on pain of the orders being set aside for procedural unfairness.

The open offer repays study for anyone framing Calderbank-style offers in this field: the majority deployed it as tacit recognition of historical access while the dissent refused to let it expand the finding beyond the evidence — and the divergence carried through to the costs orders, ordinary costs from the majority against Adamson JA's indemnity costs from 14 days after the offer. Whether the ultimate result genuinely betters the offer, and how closely the result matches it, will be decisive.

***Dr N Kalokerinos Pty Ltd v Jain* [2025] NSWCA 137**

Hearing dates:	13 June 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	20 June 2025
Before:	Ward P at [1]; Adamson JA at [2]; Price AJA at [72]

APPEALS — leave to appeal — principles governing — where proceedings raise questions of public importance — leave to appeal granted — time limits — extension of time — extension of time granted

CIVIL PROCEDURE — effect of admission in points of defence in NCAT — where applicant admitted lessee was an impacted lessee under COVID-19 regulatory regime — Civil and Administrative Tribunal Act 2013 (NSW), ss 38, 53 — Evidence Act 1995 (NSW), s 191

LEASES AND TENANCIES — retail leases — retail shop lease — termination of retail lease covered by COVID-19 Regulation — whether lessee an impacted lessee under COVID-19 regulatory regime — application of Retail and Other Commercial Leases (COVID-19) Regulation 2021 (NSW), cll 6A, 6B, 6C, 6D

Background

DNK, lessor of restaurant premises at Shellharbour, served a notice of termination in November 2021 and re-entered on 13 December 2021. The lessee, Mr Jain, sued in NCAT alleging the termination was unlawful under the Retail and Other Commercial Leases (COVID-19) Regulation 2021 (NSW), which prohibited a lessor taking “prescribed action” against an impacted lessee for a prescribed breach unless the matter had first been referred to mediation (cl 6C). Clause 6A provided that an impacted lessee “may” give the lessor a statement and evidence of impacted status before or as soon as practicable after a prescribed breach, and “must” give it within a reasonable time after the lessor requests it; cl 6D(5) deemed the lessor compliant with the renegotiation obligations if the lessee did not comply with cl 6A. DNK never requested the information, no mediation occurred, and DNK’s points of defence “generally admit[ted]” the paragraphs of the points of claim pleading that Mr Jain had received the 2021 COVID-19 Business Grant, had turnover under $50 million, and was an impacted lessee — an admission never withdrawn. NCAT dismissed Mr Jain’s claim and awarded DNK $60,025.34; the Appeal Panel held NCAT had misconstrued the Regulation and reduced damages to $18,318.25; Campbell J dismissed DNK’s appeal and reduced damages to $4,134.53. DNK sought leave to appeal.

Disposition

Construction of the Regulation (Ground 1): DNK's submission that the Regulation imposed an absolute obligation on a lessee to provide information in order to qualify for protection was rejected. Where "may" and "must" are used in close proximity, dealing with the same subject matter, the distinction between their ordinary meanings is even more marked (*Coffs Harbour and District Local Aboriginal Land Council v Lynwood* [2017] NSWCA 317 at [8]–[10]). Clause 6A(3) entitled the lessor to request the information at any time if reasonably required; a lessor that fails to request it before taking prescribed action takes the risk that the lessee is an impacted lessee and the action unlawful. Clause 6C makes no mention of cl 6A — a strong textual indication, fortified by the contrast with cl 6D(5)'s express deeming, that the prohibition applies to impacted lessees irrespective of whether information has been provided. The legislative history confirmed it: the predecessor 2020 Regulation imposed a positive information obligation on lessees, and its removal in 2021 was a clear legislative choice to put the onus on lessors.

The admission (Ground 2): "Generally admits" was a real admission that Mr Jain was an impacted lessee — a question of fact capable of being admitted, distinct from any notification obligation. DNK never applied under s 53(1) of the *NCAT Act* to withdraw it. NCAT is not a court of strict pleading, but points of claim and defence serve a similar function to pleadings, identifying the issues and the case to be met (*Dare v Pulham* (1982) 148 CLR 658 at 664). Formal admissions — analogous in effect to agreed facts under s 191 of the *Evidence Act 1995* (NSW), though not identical — cannot be resiled from without leave, in part because of their potent effect on procedural fairness (*Nominal Defendant v Gabriel* (2007) 71 NSWLR 150 at [103]–[113]).

Orders

Extension of time and leave to appeal granted. Appeal dismissed. DNK to pay Mr Jain's costs of the appeal.

Practical Takeaways

The construction holding settles the allocation of risk under the 2021 COVID-19 Regulation: the onus was on lessors to request impacted-lessee information under cl 6A(3), and a lessor that enforced without asking took the risk that the lessee was impacted and the prescribed action unlawful. With COVID-19 lease disputes still working through the courts, this is the governing appellate statement.

The construction method repays filing for use well beyond the Regulation: "may" and "must" in close proximity on the same subject carry their distinct ordinary meanings (Coffs Harbour); the absence of a cross-reference in one provision (cl 6C) where a neighbouring provision contains an express one (cl 6D(5)) is a strong indicator of intent; and where Parliament removes an obligation that existed in a predecessor instrument, it has deliberately altered the allocation of risk — principles developed under the earlier version cannot simply be carried forward.

The Court also declined to parse 2024 Second Reading Speeches to construe words enacted in 2010 — a useful authority against retrospective deployment of later extrinsic material.

The admissions holding is of general importance for NCAT practice: points of claim and defence are not informal documents. They identify the issues and the case to be met, and admissions in them — including a “generally admits” — bind unless leave to withdraw is obtained under s 53(1), with effect analogous to formal admissions in superior court pleadings (*Nominal Defendant v Gabriel*). Draft NCAT pleadings with the same care as Supreme Court pleadings, and move promptly to withdraw any unwanted admission.

The distinction between formal and informal admissions is the doctrinal frame: formal admissions cannot be resiled from without leave; informal admissions are merely evidence to be weighed. An admission once made cannot be undermined by asserting that the admitting party did not know all the facts at the time.

The cautionary arithmetic is worth noting: DNK’s failure to make a simple cl 6A request before re-entry, compounded by its pleading admission, converted a $60,025.34 award at first instance into a $4,134.53 judgment and four adverse costs orders across four levels of decision-making. Procedural care at the moment of enforcement is cheap by comparison.

Orde Mortgage Custodian Pty Limited v Belcastro [2025] NSWSC 4

Hearing dates:	9 January 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	9 January 2025
Before:	Dhanji J

LAND LAW – possession of land – urgent application to stay execution of writ of possession – previous application for temporary stay had been granted and stay then expired – no adequate explanation for lack of action by applicant

Background

The applicant mortgagor contacted the Duty Judge's Associate after hours seeking a stay of execution of a writ of possession the night before his scheduled eviction. The history was protracted: statement of claim April 2024, default judgment June 2024, writ of possession August 2024, a first stay granted by the Registrar and the motion dismissed in November 2024 when no evidence was filed and the applicant did not appear, and a second temporary stay granted by Coleman J in December 2024 which expired when the applicant again failed to attend. Nothing further was done until the eve of eviction. At the 8am urgent hearing the applicant produced no motion or affidavit, explaining his circumstances from the bar table: a contract for sale entered the day before, medical difficulties, nowhere else to live, and two young children (who could reside with his ex-wife).

Disposition

Applying *GE Personal Finance v Smith* [2006] NSWSC 889 — a defendant seeking a stay ought to be in a position to explain his inaction prior to making the application (at [12]), and can have no expectation of an extended stay on hardship grounds alone where the plaintiff is otherwise entitled to possession (at [22]) — the stay was declined. While it was difficult not to be sympathetic to a person facing forced removal from his home, and the Court accepted some medical difficulty, there was no adequate explanation for the inaction since April 2024; the contract for sale entered only the day before the application, against that chronology, made the plaintiff's doubts about the energy of any sale process understandable; further delay had the potential simply to add legal expense and erode any remaining equity; and the children's position, while difficult, was not acute.

Orders

Application for stay declined.

Practical Takeaways

A clean application of *GE Personal Finance v Smith* in the Duty List: unexplained prior inaction is fatal to a stay application, and hardship alone — even significant hardship — is insufficient where the mortgagee is otherwise entitled to possession. A chronology of inaction will usually be decisive against last-minute relief.

A contract for sale entered on the eve of the application, after eight months of default and two lapsed stays, supports rather than undermines the mortgagee's position, and explanations for missed hearings must be substantiated by evidence, not asserted from the bar table.

The equity-erosion point provides the policy frame: the longer enforcement is delayed, the harder further indulgence becomes, because accruing costs and interest consume what remains. Early engagement with the mortgagee — negotiation, refinance or sale — is the real lesson; the Duty Judge system is not a substitute for it.

***Colman v The Owners – Strata Plan 61131* [2025] NSWSC 63**

Hearing dates:	21 August 2024
Jurisdiction:	Supeme Court of New South Wales
Decision date:	20 February 2025
Before:	Kirk J

LAND LAW – Strata title – Construction of poorly drafted by-law – Heading of by-law at least part of context in which terms to be construed whether or not part of by-law and whether or not by-law regarded legislative in character – By-law in question does not encompass approval of relevant works – By-law could not authorise strata committee to approve works that are not minor renovations

LAND LAW – Strata title – No reason why special resolution referred to in s 108(2) authorising change to common property cannot take form of special resolution passing a by-law – Possible challenge of failure to pass such by-law under s 149 does not preclude application under s 126(2) – Tribunal has no power to make order under s 126(2) of the Strata Schemes Management Act 2015 (NSW) to retrospectively approve owner's work on common property unless consent for work has been sought from owners corporation – Refusal of consent may be constructive

LAND LAW – Strata title – Powers and obligations of owners corporation – Owners corporation may undertake repairs to common property without need for resolution at general meeting – Owners corporation may give approval to work already done on common property – Insofar as damages or compensation can be claimed under s 106(5) or other provisions for work by lot owner to repair common property then they cannot be claimed for works not approved in required manner by owners corporation or Tribunal

Background

Mr Colman owned Lot 147 in The Palladium, a 279-lot Pyrmont building — a level 10 apartment with eastern and western terraces above. After a December 2018 storm damaged the pergola roofing and the lot owner below complained of water ingress in early 2019, the owners corporation engaged that owner's own building company, AussieBuild, whose approved scope covered removing a hob, bricks and surrounding tiles, rectifying the expansion joint and fixing a leaking exhaust fan. At the December 2019 AGM the corporation passed by-law 44, headed "Past Works Roofing". When AussieBuild lifted the tiles in December 2019 it reported the tile bed crumbling and the waterproofing wet, delaminated and mouldy, its waterproofer advising that the waterproofing could not be guaranteed unless the whole western terrace was stripped and re-waterproofed. The Colmans instructed AussieBuild to do that work at their expense — the Relevant Works, completed by early March 2020 — without first obtaining the corporation's approval. Their January 2020 building works application, which both informed the corporation of the instructions and sought approval for proposed new work, was considered and not approved by the strata committee in March 2020; a proposed common property rights by-law that would have authorised the Relevant Works failed at the December 2020 AGM. Mr Colman's NCAT application — twelve substantive orders, including approval under s 126 of the *Strata Schemes Management Act 2015* (NSW) and damages under s 106(5) — was dismissed; the Appeal Panel dismissed his internal appeal; and he sought leave to appeal under s 83 of the CAT Act on three issues.

Approach and Principles

Leave under s 83 requires an issue of principle, a question of general public importance, or an injustice reasonably clear in the sense of going beyond the merely arguable (*Targeted Property Investments v Look Up Technologies (No 2)* [2023] NSWSC 416 at [38]; *Ferella v Chief Commissioner of State Revenue* [2024] NSWSC 166 at [25]). Headings form part of the context in which a by-law is construed, whether or not strictly part of it and whether or not the by-law is regarded as legislative in character (*The Queen v A2* [2019] HCA 35 at [40], [155]; *Mondelez Australia* [2020] HCA 29 at [17]; *Owners Corporation SP6534 v Elkhouri* [2024] NSWCA 279 at [118]). A statutory provision which presupposes the existence of a power may be taken impliedly to grant it if no other source is apparent and the presupposition would otherwise be rendered ineffective (*Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 302–303; *Attorney-General (Cth) v Oates* (1999) 198 CLR 162 at [16]; *Independent Liquor and Gaming Authority v Whitebull HTL* [2023] NSWCA 224 at [74]). Constructive failure to exercise jurisdiction requires failure to respond to a substantial, clearly articulated argument relying on established facts (*Dranichnikov* (2003) 77 ALJR 1088 at [24]), with the *Ming v DPP* (2022) 109 NSWLR 604 at [12], [15] warning that such claims can shade into complaints that arguments were resolved incorrectly, tending towards merits review. Relief on a question of law requires materiality — a realistic possibility the error could have made a difference (*Fisher v Nonconformist* (2024) 114 NSWLR 1 at [50]). On s 106(5), the Court traced the line from *Seiwa v Owners SP 35042* (2006) 12 BPR 23,673 at [27]–[28] (Brereton J) through the reversal in *Owners SP 50276 v Thoo* (2013) 17 BPR 33,789 to the legislative restoration recognised in *Vickery v Owners SP 80412* (2020) 103 NSWLR 352, with *Smith v Owners SP 3004* [2022] NSWSC 1599 at [34] and *Owners SP 2661 v Selkirk* [2024] NSWSC 760 at [140] on the continuing relevance of the earlier case law, and *Comcare v Martin* (2016) 258 CLR 467 at [42] on the purposive nature of statutory causation.

Disposition

By-law 44 (Issue 3): The by-law was poorly drafted, "verging on being entirely mysterious". The best contextual reconciliation of the broad chapeau with the narrow subparagraphs limited its scope to works of the same nature as the Schedule 1 roofing works and works ancillary to them — a construction the heading supported. The Relevant Works (re-tiling and re-waterproofing the terrace floor) could not be characterised as roofing works or ancillary to them.

Section 126 (Issue 2): The Court held: a special resolution under s 108(2) may take the form of a special resolution passing a by-law, and a failure to pass such a by-law does not preclude a s 126(2) application merely because s 149 might also be invoked; an owners corporation may undertake repairs to common property, and authorise a lot owner to do so, without a general meeting resolution; the Tribunal may retrospectively approve works already undertaken (and the owners corporation's approval powers likewise extend to work already done); but the Tribunal has no power under s 126(2) unless the relevant type of approval has first been sought from the owners corporation — though refusal may be constructive (for example, failure to convene a meeting within a reasonable time), the Act being construed practically (*Owners SP 2661 v Selkirk* [2024] NSWSC 760 at [166]). Mr Colman failed for three independent reasons: the Tribunal had not adopted the construction imputed to it; by-law 44 did not cover the Relevant Works, so any error was immaterial; and a by-law purporting to let the strata committee approve the works would have been ineffective, s 108 not authorising delegation to the committee (unlike s 110(6) for minor renovations).

Section 106(5) (Issue 1): Both limbs failed. The asserted contradiction in the Tribunal's reasons was a challenge to fact-finding dressed up as constructive failure. On construction, damages cannot be claimed for repair works on common property not approved in the required manner by the owners corporation or the Tribunal, prospectively or retrospectively — the Tribunal would have erred had it required prior approval (retrospective approval being available), but approval of some kind is a precondition. Whether Seiwa abatement reasoning applies to s 106(5), and whether compensation might lie under ss 229 or 232, were left open, though any such claim would equally require approval.

Orders

Leave to appeal granted in part; appeal dismissed to the extent leave was granted; summons otherwise dismissed. Plaintiff to pay the defendant's costs.

Practical Takeaways

The decision now provides the framework for s 126 works approval applications: identify the type of work in issue (cosmetic, minor renovation, alteration, or repair), the corresponding mode of approval (delegated decision, ordinary resolution, special resolution), and ensure approval has been sought from the owners corporation in the proper manner before applying. Failure on this threshold is fatal regardless of merits.

Retrospective approval is available from both the owners corporation and the Tribunal — the implied-powers reasoning from Mayer, Oates and Whitebull HTL doing the work — so the absence of prior approval is not fatal, but the absence of any approval is. Owners who have undertaken self-help works must promptly seek retrospective approval before any damages or compensation claim; the path to recovery under s 106(5) (and any claim under ss 229 or 232) runs through approval.

The constructive refusal holding is the important practical safety valve: a refusal under s 126(2) does not invariably require a vote, and obstruction or inaction effectively denying approval within the time reasonably expected — the leaking roof and the nine-months-away AGM — may enliven the jurisdiction.

Two governance points stand alone: purported delegations of s 108 functions to a strata committee are ineffective (alterations to common property always require a special resolution at a general meeting, the contrast with s 110(6) being decisive), and headings count in construing ambiguous by-laws even if not strictly part of them. Where a proposed special by-law fails at the meeting, both s 126 and s 149 pathways should be considered together (*Endre v Owners SP 17771* [2019] NSWCATAP 93).

For s 83 appeals, the *Fisher v Nonconformist* materiality requirement and the Ming warning — that constructive-failure complaints shade into merits review — are both disciplines to be internalised before grounds are settled. A legally correct point produces no relief if it could not have changed the outcome.

Finally, the Court's endorsement of the criticism of the "prolix, convoluted and confusing" presentation below is a cautionary note for strata litigation generally: precision about which works, which provisions and which orders is essential. The Colmans' understandable in-the-moment decision to follow their builder's advice, without engaging the statutory framework, cost them the claim through three levels and three sets of costs orders; the urgent-application pathway to the Tribunal exists precisely for that situation.

Zheng v The Owners – Strata Plan No 83678 **[2025] NSWSC 1038**

Hearing dates:	8 September 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	8 September 2025
Before:	Hammerschlag CJ in Eq

LAND LAW – Strata title – Owners corporation –Where NCAT authorises a by-law regularising the construction of an awning carried out without a resolution of the Owners Corporation by approving a by-law – Where Owners Corporation appeals to the Appeal Panel of NCAT and appeal has been set down for hearing – Where four lot owners, including the constructor of the contentious awning, requisition an extraordinary general meeting of the Owners Corporation to pass a resolution to discontinue the appeal – Where the resolution is passed by a bare majority of one, including the vote of the said owner – Application of the rule in Foss v Harbottle and an exception to it – HELD – Plaintiff granted leave to conduct NCAT appeal on behalf of Owners Corporation

Background

NCAT had approved a common property rights by-law retrospectively regularising an awning constructed by a lot owner, Mr Khatib, without a special resolution. The Owners Corporation appealed to the Appeal Panel, which listed the appeal for hearing. At an extraordinary general meeting requisitioned by four lot owners including Mr Khatib, a resolution that the Corporation withdraw the appeal passed by eight votes to seven — Mr Khatib voting in favour, his vote decisive. The Appeal Panel refused Mr Khatib's consequent summary dismissal application, the resolution's validity being challenged. Mr Zheng, a lot owner and the Corporation's secretary and chairperson, sought leave to conduct the appeal on the Corporation's behalf. The strata manager, appearing for the Corporation, volunteered that the Corporation was dysfunctional.

Approach and Principles

The rule in *Foss v Harbottle* (1843) 67 ER 189; 2 Hare 461 — the company is the proper plaintiff for a wrong done to it — applies to strata owners corporations, but so does the residual fifth exception, available in any other case where justice requires it: *Carre v Owners Corporation – Strata Plan 53020* (2003) 58 NSWLR 302; *Tan v The Owners Strata Plan 22014 (No 2)* [2015] NSWSC 1920 at [91] ff.

Disposition

Justice required the residual exception to apply. Without Mr Khatib's vote the resolution would have been defeated; to give it effect would mean his own vote brought to an end proceedings concerning his own contentious awning, where a significant proportion of owners had voted to continue. The Appeal Panel had itself refused to dismiss the appeal, which remained on foot. Mr Zheng was given carriage. The question of indemnity for his costs was reserved to await the outcome of the appeal.

Orders

Leave granted to Mr Zheng to conduct the NCAT appeal on behalf of the Owners Corporation to its conclusion or settlement. Indemnity for costs reserved. Liberty to apply on three days' notice. Orders entered forthwith.

Practical Takeaways

A clean application of the Carre residual exception: where the lot owner whose conduct is in issue casts the decisive vote to terminate proceedings against himself, the proper plaintiff rule yields, and a minority owner may be given carriage of the proceedings on the corporation's behalf.

The procedural posture mattered: the Appeal Panel's own refusal to dismiss on the contested resolution supported the Supreme Court's intervention, and the strata manager's frank acknowledgement of dysfunction assisted rather than hindered the application.

Immediate indemnity for the applicant's costs is unlikely — here it was reserved, not denied, pending the appeal's outcome — so minority owners taking carriage should budget accordingly, with liberty to apply preserving flexibility as the appeal develops.

***ZeroBonds Residential Pty Ltd v Commissioner for Fair Trading* [2025] NSWSC 265**

Hearing dates:	19, 20 February 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	26 March 2025
Before:	Brereton J

LEASES AND TENANCIES – Residential Tenancies Act 2010 (NSW) – rights and obligations of landlords and tenants – where the Plaintiff seeks a negative declaration – a Bond Replacement Product – proper construction of s 23 of the Residential Tenancies Act 2010 (NSW) – whether the Bond Replacement Product would contravene s 23 of the Residential Tenancies Act 2010 (NSW) – where there is a prohibition in relation to requiring or receiving payment from a tenant – whether the phrase “before or when” is to be given a temporal construction.

LEASES AND TENANCIES – Residential Tenancies Act 2010 (NSW) – rights and obligations of landlords and tenants – where the Plaintiff seeks a negative declaration – a Bond Reversal Product – whether the Bond Reversal Product contravenes s 32 of the Residential Tenancies Act 2010 (NSW) – kinds of payments a tenant may be required to pay for a residential tenancy agreement – where the section has the express words of connection “for or in relation to”.

Background

ZeroBonds sought negative declarations that two proposed products would not contravene ss 23 or 32 of the *Residential Tenancies Act 2010* (NSW). Under the Bond Replacement Product, instead of a four-week rental bond a tenant would pay ZeroBonds a non-refundable amount equal to 14.5 per cent of four weeks’ rent, plus a $49 non-refundable application assessment fee, with a six-month approval period and a “certificate” issued to prospective landlords; ZeroBonds would be liable to the landlord for up to six weeks’ rent on breach, the tenant liable to ZeroBonds for up to four weeks, the arrangement executed by the tenant as a deed poll for the landlord’s benefit. The Bond Reversal Product would let a tenant who had already given a bond recover it mid-term, the landlord retaining the product’s benefit. In the alternative, ZeroBonds sought narrower declarations that it would not contravene s 23 unless payment was required as a condition of entry into a tenancy agreement, and would not contravene s 32 absent separate conduct for or in relation to the payment. The Commissioner opposed the application, submitting the products would erode the Act’s careful and fundamental protections for tenants — the peace and enjoyment of their homes, the costs and liabilities of the tenancy, and ready access to remedies in NCAT.

Approach and Principles

Orthodox construction principles applied: the meaning of s 23 is ascertained by construing the text with regard to context and purpose (*SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14]), context being regarded in its widest sense at the first stage of inquiry, not only in case of ambiguity (*CIC Insurance v Bankstown Football Club* (1997) 187 CLR 384 at 408), with purposive construction under s 33 of the *Interpretation Act 1987* (NSW) and a strained construction available where the purpose is clear, provided neither unreasonable nor unnatural (*Newcastle City Council v GIO General* (1997) 191 CLR 85 at 113 (McHugh J)). Constructions producing inconvenience, improbability, irrationality or injustice are to be avoided (*CIC Insurance* at 408; *Uelese* (2015) 256 CLR 203 at [45]); strict construction of penal provisions is a last resort in ambiguity (*Aubrey v The Queen* (2017) 260 CLR 305 at [39]); and the presumption against surplusage is a valuable but not inflexible guide, tautology being not uncommon in statutes (*Taheri v Vitek* (2014) 87 NSWLR 403 at [121]; *Parkdale Custom Built Furniture v Puxu* (1982) 149 CLR 191 at 198). On declarations as to proposed conduct: *Australian Gas Light Co v ACCC (No 2)* [2003] FCA 1229 at [39]; *Commonwealth v Sterling Nicholas Duty Free* (1972) 126 CLR 297 at 305; *Bass v Permanent Trustee* (1999) 198 CLR 334 at 356.

Disposition

Section 23: ZeroBonds' conditional construction of "before or when" was rejected; the words bear a temporal meaning, but read with the balance of s 23(1) they serve a more general function: the section is engaged when a payment is required or received because the person is a tenant who desires or proposes to enter a residential tenancy agreement — the proposed agreement must be the occasion for the payment. That construction rested on the natural reading of the words in their immediate context; the anomaly of reading the general prohibition narrowly within an Act making detailed provision for the only permitted payments (holding fees, rent, rental bonds), each subject to legislative control and NCAT jurisdiction; and the consistent temporal use of "before or when" elsewhere in the Act (ss 27–29). The Division heading ("Pre-agreement matters") assisted neither side, and the legislative history — s 37 of the 1987 Act and *Blanning v Clark* (Loveday J, 30 November 1990) — did not resolve the question given the different wording. The submission that the mischief was confined to key money or hidden fees was rejected: key money is a mischief, not the mischief, and *Barbaro v Hayter-Burgess* [2014] NSWCATCD 188 at [29] supplied no reasoned basis for the limitation. Parsing 2024 Second Reading Speeches to construe words enacted in 2010 was unrewarding.

The Bond Replacement Product: Would contravene s 23: the payment would be required and received because the payer is a tenant proposing to enter a residential tenancy agreement. Even on ZeroBonds' own construction it would contravene: once committed, the tenant is legally obliged to pay before or when entering the agreement, without which the tenancy cannot proceed. Nor could it be supposed tenants would always have a free choice — a landlord with bargaining power might insist on the product.

The Bond Reversal Product: Would, or at least could, offend s 32: the payment would have to be made if the tenancy was to continue, a sufficient connection for a payment "for or in relation to" continuing the agreement; and a landlord might insist on the product as the price of renewal or extension.

Declaratory relief: In any event refused as unsuitable: the variety of circumstances in which the products could be issued was so wide, and the alternative declarations drew no clear and definite line between lawful and unlawful deployment.

Orders

Declaratory relief refused. Costs to follow the event.

Practical Takeaways

The construction holding is the significant point: s 23 is engaged whenever the prospect of a residential tenancy agreement is the occasion for a payment being required or received — a reading that gives "before or when" its temporal sense while avoiding the absurdity of catching payments by persons who merely happen to be tenants, without reducing the prohibition to key money, hidden fees or strictly conditional payments.

The structural insight matters for any advice on tenancy-adjacent financial products: the Act protects tenants in a deliberately blunt way, prohibiting all payments except the four tightly regulated permitted types, each with NCAT jurisdiction over disputes. Arguments from tenant choice, mutual benefit or market innovation will not carry constructions that circumvent that scheme — particularly where landlords with bargaining power could insist on the product, converting nominal tenant choice into practical compulsion. The same bargaining-power point did the work under s 32 for mid-term and renewal products.

The refusal of declaratory relief is equally instructive: advance judicial sanction will not be given for a product deployable in widely varying and unknown future circumstances, where no clear and definite line between lawful and unlawful use can be drawn. The AGL/Sterling Nicholas jurisdiction to declare proposed conduct lawful is real but narrow; novel products operating at the edges of protective legislation need legislative reform, not judicial validation, and promoters should expect the Court to test the full range of deployment scenarios, not the sponsor's preferred one.

The treatment of the construction materials repays filing: consistent intra-Act usage of a phrase (ss 27–29) as a guide to meaning; headings of little weight where both constructions fit them; the rejection of tribunal authority (*Barbaro*) advanced without reasoned foundation; and the refusal to construe 2010 words by reference to 2024 Second Reading Speeches.

Finally, the case is a reminder that the presumption against surplusage and the strict-construction rule for penal provisions are subordinate tools: both yielded to the contextual and purposive reading, the penal rule being a last resort in ambiguity that did not arise.

Worship Centre Limited & Anor v O'Meara **[2025] NSWSC 1363**

Hearing dates:	6 November 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	6 November 2025
Before:	Campbell J

LAND LAW – possession of land – application to extend stay of writ of possession – where the applicant has a strong imperative to sell and made genuine attempts to sell – limited stay granted

Background

The mortgagee obtained default judgment in possession after the mortgagor's defence was struck out, and a writ of possession issued. Cavanagh J had granted a 28-day stay to enable a refinance proposal, which did not come to pass. The self-represented mortgagor applied for a further stay, initially on a hybrid basis — an exclusive agency agreement signed and conveyancers engaged for a sale, with an indicative short-term high-interest refinance as fallback. The Court required the application to be put on one basis, the hybrid being too uncertain (especially as to timing) to be workable; the mortgagor elected sale. His earlier statement to Cavanagh J that he would not make another application was held to be neither a binding undertaking nor capable of founding a promissory estoppel — put down to over-optimism about achieving refinance within the stay.

Disposition

Applying *GE Personal Finance v Smith* [2006] NSWSC 889, proof of the defendant's intention to sell the home is one permissible ground for a stay. The Court accepted the mortgagor was genuine: a signed exclusive agency agreement, payments to agent and conveyancer, a thorough market appraisal with comparative listings, and a first open house scheduled. Against the mortgagee's legitimate point that the timing of any sale was uncertain and that it had an objective commercial interest in conducting an early sale itself, the Court identified two differences favouring an owner-in-possession sale: eviction versus voluntary departure, and the market perception (contrary though it is to the mortgagee's legal obligations) that mortgagee sales offer bargains, whereas an energetic owner may achieve a better price. Given no eviction date had been set and the Sheriff's likely Christmas moratorium meant eviction was unlikely before mid-January in any event, and given the mortgagor's own strong imperative to sell quickly to stop high-rate interest eroding his equity, a further stay was granted — but of 28 days only rather than the 10 weeks a sale campaign might suggest, with the matter to return before the end of term so the Court could assess whether the sale was on track or whether the writ should be executed and the sale put in the mortgagee's hands.

Orders

Stay extended until 4 December 2025. Any further extension application by motion and affidavit filed and served by 2 December 2025. Costs reserved.

Practical Takeaways

Genuine intention to sell remains a permissible ground for staying a writ under *GE Personal Finance v Smith*, but it must be evidenced by concrete steps — a signed agency agreement, payments made, an appraisal, a scheduled open house — not mere intention.

The Court will require a single committed course: hybrid sale-or-refinance proposals are too uncertain to ground relief. A prior statement that no further application would be made does not bind or estop the mortgagor, though it should be made with care.

The calibrated 28-day stay with a mandated return date is the template: successive stays will be granted on terms ensuring ongoing accountability, with each application assessed against actual progress, and the practical enforcement window (here, the Sheriff's Christmas moratorium) and the erosion of equity through accruing interest both bearing on the balance.

Willis v Abraham (No 2) [2025] NSWSC 276

Hearing dates: 18-20 March 2025

Jurisdiction: Supreme Court of New South Wales

Decision date: 27 March 2025

Before: Elkaim AJ

LAND LAW — Adverse possession — Documentary owner reclaiming possession —Whether Defendant's possession was adverse — Where Defendant originally used property for storage

LAND LAW — Adverse possession — Documentary owner reclaiming possession —Whether Defendant intended to possess — Where Defendant left the front-facing property in a derelict state to avoid attracting intruders — Where occupancy not apparent

LIMITATION OF ACTIONS — Operation of bar — Defendant pleading the limitation period — ss 27-28 Limitation Act 1969 (NSW) — Whether twelve year limitation period had passed — Where the Defendant's possession was not adverse — Limitation period had not expired

Background

The plaintiff was registered owner of two adjoining Rozelle properties, Nos 5 and 7, inherited from her father in 1999; her estranged brother inherited Nos 9 and 11 in the same street. No 5 had been tenanted until January 2000, when the agent advised that re-letting would require some $60,000 of works the plaintiff could not fund; the agent, CobdenHayson, nonetheless continued to manage the property until 2014, with rates and fees paid to that time. The defendant, who lived at Burradoo with her seven adopted children, said she heard in 2009 of three apparently abandoned Sydney properties, found No 5 "awash with the detritus associated with squatters" but habitable with work, visited monthly over the following two years, cleaned up, repaired locks and stored possessions there — deliberately leaving the broken front window unrepaired so as not to attract intruders. From 2011 she stored furniture there; her daughter deposed to living at Nos 5 and 7 "part-time" from mid-2012 and to moving in by 2015. The plaintiff sued for possession in December 2023; the defendant conceded No 7 but resisted as to No 5, pleading the bar in ss 27 and 28 of the *Limitation Act 1969* (NSW) and cross-claiming for title by adverse possession (necessary to overcome s 45C of the *Real Property Act 1900* (NSW)), the relevant start date being 13 December 2011. The defendant had represented to the plaintiff's brother in 2016, and to the agent in April and May 2023, that she was authorised by the plaintiff to be in the properties; and in May 2024, after proceedings commenced, she telephoned the council pretending to be the plaintiff and paid the outstanding rates. The plaintiff did not give evidence; she withdrew reliance on her affidavits at the close of the defendant's case, whereupon the defendant read them, untested.

Approach and Principles

The Court applied ss 27 (twelve-year limitation period), 28 (accrual on dispossession or discontinuance) and 38 (adverse possession) of the Limitation Act, and the framework stated by Hammerschlag CJ in Eq in *State of New South Wales v Carver* [2023] NSWSC 828 at [56]–[57]: adverse possession requires physical possession — an appropriate degree of physical control, depending on the nature of the land and the manner in which it is commonly used and enjoyed — and an intention to possess; possession must be peaceful (nec vi), open (nec clam), and not by consent of the true owner (nec precario), and seeking the owner's consent is destructive of the necessary intention. The Court adopted the description in *Karnataka Board of Wakf v Government of India* (2004) 10 SCC 779 at [11] — a claimant should show on what date possession commenced, its nature, whether the factum of possession was known to the other party, how long it continued, and whether it was open and undisturbed — together with *Mulcahy v Curramore* [1974] 2 NSWLR 464 at 475, quoting Lord Shaw in *Kirby v Cowderoy* [1912] AC 599, on the character and value of the property and the suitable and natural mode of using it. On openness, *Powell v McFarlane* (1979) 38 P & CR 452 at 472 requires clear and affirmative evidence that the trespasser made the intention to possess clear to the world, and *Bottos v Citylink Melbourne* [2022] VSCA 266 at [47]–[48], citing *McDonell v Giblin* and *Whittlesea City Council v Abbatangelo*, requires possession to be "open and manifest" — apparent to a person reasonably careful of his own interests passing the allotment from time to time.

Disposition

The cross-claim failed for multiple independent reasons.

The contemporaneous record: The Court preferred the evidence of the former tenant of No 7 — who had been inside No 5 once in about 2010 or 2011 and found it derelict — to that of the defendant, her sister, her former partner and her long-term friend, relying on the corroborative effect of "Squatter" subfolder photographs taken in March 2011 and a contemporaneous invoice of 28 March 2011 for gardening, removal of 6m^3 of rubbish and a mattress, and installation of window mesh — work organised by the plaintiff's agent. The submission that the 6m^3 could have been plant rubbish was rejected (the invoice separately itemised slashing, and access was needed for the mattress and mesh). The defendant's witnesses were not untruthful but mistaken as to dates and specifics.

Nature of the possession: No 5 was not used as a residence before 2015 or perhaps 2016. Use as a sometime storage facility and occasional place of study was not the manner in which such a property is commonly used and enjoyed: a residence is classically a place where a person sleeps, eats and ablutes, not a storeroom — and No 5 had no functional bathroom in 2012 and probably not until 2016.

Openness: The possession was not open in the required manner. The defendant deliberately took no action to display her occupation, never mending the front windows and repairing the roof only in the last five years; to the passer-by, occupation was not apparent. The deliberate maintenance of an appearance of dereliction to deter intruders was inconsistent with possession "open and manifest" or "clear to the world".

Holding out of permission: The repeated representations — to the brother in 2016, to the agent in 2023, and in a May 2023 email — that the defendant was authorised by the plaintiff were destructive of animus possidendi (*Carver* at [57]) and themselves inconsistent with openness, being calculated to conceal the true nature of the occupation. The Court rejected her evidence that she regretted the word "authority": she had worked for many years as a solicitor and was endeavouring to pretend she had been authorised; her reliance on "WITHOUT PREJUDICE" to excuse the statements was disingenuous.

Retained control and the 2024 rates: The plaintiff had not abandoned possession, retaining the agent until 2014 and acting through it in March 2011. The defendant's 2024 payment of rates did not assist her: it post-dated commencement, was made with knowledge of the claim, and was effected through the stealth of impersonating the plaintiff — supporting a particularly strong inference that it was made to bolster the claim.

Credit: The defendant was found "not averse to lying" and had probably instructed her daughter how to rebuff inquiries; the daughter's evidence was approached with caution, though a collusion suggestion based on common use of the word "base" was rejected — the expectation that family witnesses would not discuss an upcoming case being "quite unrealistic". The Court noted that despite substantial payments and improvements, the cross-claim made no alternative demand for restitution or equitable compensation.

Orders

Judgment for the plaintiff for possession of No 5; leave for a writ of possession; cross-claim dismissed; defendant to pay the plaintiff's costs.

Practical Takeaways

The decision is doctrinally significant on the openness requirement: it is a substantive element, not a formality, and a deliberate strategy of maintaining the appearance of dereliction to deter intruders is fatally inconsistent with possession that must be "open and manifest" or "clear to the world". The benchmark — apparent to a person reasonably careful of his own interests passing the property from time to time — is the practical test. Low-profile occupation protects against intruders and destroys the claim in the same stroke.

The holding-out analysis is equally important: representing to third parties that occupation is authorised — even where no permission was in fact given — destroys both animus possidendi (the Carver principle that seeking consent negates intention) and openness (such statements being calculated to conceal the occupation's true nature). Any claimed permission framework must be consistent with the adverse character of the possession.

Possession must match the nature of the land: storage and occasional study do not amount to possession of a residence, which is classically a place where one sleeps, eats and ablutes — and practical details such as the absence of a functional bathroom will be examined.

Contemporaneous documents are the forensic touchstone. The March 2011 photographs and removal invoice resolved the conflict without a raw credit contest, the defendant's witnesses being treated as mistaken rather than untruthful. Owners resisting claims should preserve agent records and dated photographs; claimants need contemporaneous evidence of occupation (utility bills, addressed mail, dated photographs), not recollection.

A documentary owner who retains a managing agent preserves possession even of an unused property — the agency relationship and works organised through it answered the abandonment case — and post-commencement conduct (here rates paid by impersonation) will be discounted as claim-bolstering.

Finally, failed claimants who have paid rates and made improvements should plead alternative restitution or equitable compensation claims. Here none was pleaded, and the expenditure was simply lost — a drafting lesson for anyone running an adverse possession cross-claim.

United Petroleum Pty Ltd v Lakiss **[2025] NSWSC 248**

Hearing dates:	7 March 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	24 March 2025
Before:	McGrath J

CONTRACTS – construction – interpretation – proper construction of a written commercial lease agreement for a petrol station – objective theory of contract –emergency repairs clause

CONTRACTS – breach of contract – lease agreement – where alleged breach for non-payment of rent – where no breach for non-payment of rent as lessee entitled to deduct cost of repairs

CONTRACTS – construction – correction of drafting mistakes by construction – where the literal meaning of the words used would result in an absurdity, inconsistency, palpable or obvious mistakes – where absence of a comma between “damage” and “disruption”

LEASES AND TENANCIES – covenants – covenant for quiet enjoyment – disturbance – breach of the covenant by a lessor from acts of omission – where lessor failed to repair potholes

LEASES AND TENANCIES – default and termination – non-payment of rent – invalid notice of default –where lessee entitled to deduct cost of repairs from payment of rent

LEASES AND TENANCIES – repairs, maintenance and alterations – obligation to repair and maintain – obligations under the Roads Act 1993 (NSW) – where potholes outside landlord’s property – where landlord liable to pay costs of repairing the potholes – where lessee entitled to deduct repair costs from rent payable to landlord

Background

United was the longstanding lessee of a Kemps Creek service station on Elizabeth Drive — a major thoroughfare carrying heavy trucks to the M7 and the Western Sydney Airport works — owned by the Lakiss brothers since 1994 together with the neighbouring lot, both benefited and burdened by a registered right of carriageway on the southern boundary. A "Nature Strip" of crushed gravel and bitumen between the kerb and the boundary formed part of a public road under the *Roads Act 1993* (NSW) and was not the brothers' property; the Western and Eastern Driveways likewise lay outside the leased Premises on the Plan annexed to the 2012 Lease (renewed in 2021 to 2027). Serious potholes had plagued the entrance, exit and parking areas for years: customers complained of vehicle damage from 2014, and in 2022 a major fuel account customer purchasing over 100,000 litres a month threatened to take its business elsewhere. Council declined to repair, taking the position that the brothers, as beneficiaries of the structures on the Nature Strip, bore responsibility under s 142 — a position the brothers' own solicitors had effectively invited by writing to Council in June 2022 that the potholes posed "a significant risk of harm to health, safety and property" and amounted to a "tortious nuisance". After demands in February 2023 and February 2024 went unmet, United gave notice in June 2024 that it would repair and deduct under cl 10.4(2); the contractor repaired approximately 24 potholes for $10,937.30. United deducted the sum from October rent, was served a default notice, paid under protest, demanded reimbursement, deducted again from January 2025 rent, received a Second Default Notice, and sued for declarations. A February 2025 survey located fifteen potholes — none on the Premises: three on the easements over the neighbouring lot, six between the Western Driveway and the Property in the easement area, six on the Nature Strip.

Approach and Principles

Ordinary principles of contract law apply to leases (*Progressive Mailing House v Tabali* (1985) 157 CLR 17 at 29 (Mason J)), construed on the objective theory (*Toll (FGCT) v Alphapharm* (2004) 219 CLR 165 at [40]; *Cordon Investments v Lesdor Properties* [2012] NSWCA 184 at [52] (Bathurst CJ)). Clause 10.4 was "replete with drafting mistakes", and the Court applied the *Wilkie v Gordian Runoff* line to read in obvious missing words and correct grammatical errors where the literal meaning would produce absurdity or palpable mistake. The covenant of quiet enjoyment may be breached by acts of omission as well as commission (*Hawkesbury Nominees v Battik* [2000] FCA 185 at [37] (Hill J), citing *Dennett v Atherton* (1872) LR 7 QB 316 and *Robinson v Kilvert* (1889) 41 Ch D 88), the threshold being substantial interference with the use of the premises for the known purpose. Sections 6 (adjoining owners' right of access to a public road) and 142 (maintenance of works and structures on public roads) of the Roads Act supplied the statutory overlay.

Disposition

"Damage disruption" and the scope of cl 10.4(1): The brothers' submission that "damage disruption" was a single expression was rejected; the obvious drafting error required reading "or" between the words. Their narrow construction confining "disruption to the Premises" to physical disruption was also rejected: read in the commercial context of a service station, the phrase is wider than the physical condition of the Premises and is engaged by any occurrence — inside or outside the Premises — preventing the station operating in its normal or usual way, the Court instancing jack-hammering noise, sewer odours and road closures, and contrasting the narrower "disruption to the Tenant's use of the Premises" in cl 13.4(2). The

potholes qualified: large, deep, water-filled in rain, an obvious hazard and a significant barrier to customers entering by the Western Driveway and parking on the Nature Strip. Evidence of complaints in 2023–24 was relevant but not essential — the 2014 complaints and the 2022 account threat illustrated the seriousness, and a landlord can never know how many customers the deterrent effect turned away.

Quiet enjoyment (cl 13.3): The brothers' omission to repair was caught: the inquiry is who has responsibility to repair, not who caused the potholes (United's own customers). There was substantial interference with use for the known purpose. The safe, convenient and usual flow — established by multiple lines of evidence including the pump orientation, the turning bay layout, 2010 signage, a valuation report and Mr Lakiss' own concessions — was entry by the Western Driveway and exit by the Eastern, so the clean Eastern Driveway did not answer the case. The brothers' contention that the potholes pre-dated the Lease was contradicted by the contemporaneous April 2012 inspection report and photographs, and their present minimisation was rendered "particularly hollow" by their own solicitors' 2022 "tortious nuisance" letter to Council.

Section 142 Roads Act: The constructed concrete, bitumen, gravel and dirt across the Western Driveway, Nature Strip and Eastern Driveway comprised a "structure"; both lessor and lessee had its use and benefit and were each obliged to maintain it under s 142(1). The s 142(3) exemption did not protect the brothers, whose use and benefit went beyond mere right of access as adjoining owners — they had leased the Premises contemplating the Nature Strip would serve as customer parking. Requiring repair under cl 13.3 gave the covenant a congruent operation with s 142. United's alternative argument that s 142 was an "Official Requirement" under cl 9.2 failed: that clause is directed at requirements concerning the Premises, the Tenant's Property or the Tenant's use or occupation, not structures on public roads.

Deduction: United reasonably formed the view of immediate need — to the extent the potholes disrupted the Premises, the repairs rendered them "operable"; the costs were reasonable and unchallenged as to quantum; the Letter of Demand had issued and the 14-day period expired. The deduction was authorised under cl 10.4(2) and the Second Default Notice was invalid.

Orders

Declarations that United was entitled to deduct $10,937.30 from rent and that the Second Default Notice was invalid. Defendants to pay costs.

Practical Takeaways

The construction of "disruption to the Premises" is the doctrinal centrepiece: it is wider than physical disruption and extends to anything — including conditions outside the leased premises, such as access barriers on adjoining public road — that prevents the premises operating in their normal or usual way. The Court's contrast with "disruption to the Tenant's use of the Premises" shows that different disruption formulations have different scopes; emergency repair and abatement clauses should be drafted with the distinction in mind.

On quiet enjoyment, three points: omissions can breach the covenant (Hawkesbury Nominees); the question is who bears responsibility to repair, not who caused the condition; and the threshold is substantial interference, a lower bar than practical frustration. Evidence of the premises' normal traffic flow — built from layout, signage, valuation descriptions and concessions in cross-examination — did the work of establishing interference.

The s 142 *Roads Act* holding is significant for any landlord adjoining a public road: surfaced driveways and verges can be a "structure"; the maintenance obligation falls on each person having its use and benefit; and the s 142(3) adjoining-owner exemption is narrow, unavailable where the owner's benefit extends beyond mere access — here, to the parking area serving the leased business. Public ownership of the roadway is illusory comfort where the landlord's commercial interests depend on it, and a contractual repair obligation will be construed congruently with the statutory one.

Prior solicitor correspondence is a loaded weapon: the brothers' own letter to Council asserting the potholes were a dangerous "tortious nuisance" made their litigation position "particularly hollow". Clients should be advised that positions taken in correspondence with third parties will be deployed against them; consistency over time matters.

Courts will correct obvious drafting errors — missing conjunctions, wrong words, grammatical slips — to give a clause its evident commercial operation; attempts to exploit sloppy drafting against the apparent intent will rarely succeed. And specific proof of lost business is not required where the deterrent effect of a physical impediment to access is obvious; the focus is the deterrence, not quantification.

The closing observation belongs in every advice on disputes of this kind: repair costs of just under $11,000 were "completely dwarfed by the legal costs incurred on both sides". Where the parties' continuing relationship is the true stake, mediation deserves serious consideration before proceedings.

***St George Bank – A Division of Westpac Banking Corporation v Clavijo* [2025] NSWSC 1367**

Hearing dates:	4 November 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	4 November 2025
Before:	Campbell J

LAND LAW – possession of land – urgent application to stay execution of writ of possession – previous application for temporary stay previously granted and since expired – no adequate explanation for lack of action by applicant

Background

This was the mortgagor's third stay application: Dhanji J had granted a five-day stay on 24 October 2025 to allow refinancing evidence to be gathered; Faulkner J refused a renewed application on 29 October when that evidence had not been assembled; and eviction was rescheduled for 6 November. The mortgagor had since lodged an online refinance application with NAB, but could not satisfy its requirements (including two recent pay slips) until he had been in his new job — starting that evening — for at least a fortnight. Caveats securing another creditor remained on title. He also hoped to rely on the Commonwealth "Help to Buy" Scheme via a single-parent exception, despite a shared parenting arrangement, and held in the alternative a signed exclusive agency agreement, the agent's "game plan" involving about $100,000 of works by mid-December, marketing in January 2026 and a 12-week settlement.

Disposition

The stay was refused. An acknowledgement of a refinance application is "a long way short of any sort of offer of refinance"; the Court would normally expect an unconditional offer sufficient to discharge the total indebtedness, including other secured creditors whose caveats remained on title. The employment timing meant NAB's requirements could not be met for at least a fortnight, and other requirements would remain. The Help to Buy prospect was speculative — a shared parenting relationship did not seem to meet the grammatical meaning of "single parent", no application had been made, and it was unclear the scheme applied to refinances at all. The bankruptcy of the co-owner former partner, whose trustee would wish to realise her equity, added "contingency upon contingency upon contingency". The sale alternative would take months, compounded by the Christmas slow-down, and was in any event only "Plan B". Neither option was certain and both involved further delay; the bank, as mortgagee in possession, would be obliged to obtain a fair market price in any event.

Orders

Stay refused.

Practical Takeaways

The benchmark for refinance-based stays is an unconditional offer of finance sufficient to discharge the total indebtedness — including subordinate secured creditors — not an acknowledged application. Lender due diligence timelines (pay slips, employment history) are real constraints that must be solved before, not after, the application.

Speculative government scheme eligibility, an uncommitted choice between refinance and sale, and an unconsulted trustee in bankruptcy of a co-owner each compound uncertainty; together they are fatal. Successive applications must build substantively on the last, not repeat it with marginal additions.

St George Bank – A Division of Westpac Banking Corporation v Clavijo (No 2) [2025] NSWSC 1368

Hearing dates:	5 November 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	5 November 2025
Before:	Campbell J

LAND LAW – possession of land – urgent application to stay execution of writ of possession – where the opportunity to sell has passed – no adequate explanation for lack of action by applicant

Background

A fourth stay application, heard urgently at about 5.30pm on the eve of eviction, the Sheriff's office having closed for the afternoon. The new material proposed something "more business-like" for an owner-led sale than the previous day's proposition, and the mortgagor accepted from the bar table that sale was now necessary and that he would, belatedly, recommence mortgage payments. Neither party had any direct evidence — even a letter — from the trustee in bankruptcy of the co-owner former partner as to the trustee's attitude to the proposed sale.

Disposition

The stay was refused, applying the previous day's reasoning. The Court accepted the mortgagor's complete sincerity and that the property was worth significantly more than the debt, but uncertainties remained over the complex conditions for sale and repayment, and the trustee in bankruptcy's rights could not be gainsaid by either party — the Court was not prepared to act on such an important matter on hearsay from either side, noting that a trustee is typically content with a public auction as a means of testing the market. Most fundamentally, the opportunity to sell had passed: the time had come for the legal process to follow its usual course, and the streamlined proposal made no material difference to that central consideration.

Orders

Notice of motion dismissed.

Practical Takeaways

Sincerity is necessary but not sufficient: the Court can simultaneously accept the mortgagor's good faith and a comfortable equity position and still refuse relief — the mortgagee in possession must account for any surplus, so the equity is protected either way.

Where a co-owner is bankrupt, direct evidence of the trustee's attitude (at minimum a letter) is essential; hearsay from either side will not do, and the trustee's interest in market-tested value will usually align with a mortgagee auction rather than an extended private treaty.

Read with the previous day's decision, the pair illustrates the diminishing returns of successive applications: incremental refinement of yesterday's proposal will not move the central consideration once “the opportunity to sell has passed”.

Shapkin v The University of Sydney [2025] NSWCA 100

Hearing dates:	5 May 2025
Jurisdiction:	Supreme Court of New South Wales
Date of decision:	16 May 2025
Before:	Mitchelmore JA; Ball JA

LEASES AND TENANCIES – where Applicant was evicted from student accommodation – whether residence under residential agreement between Applicant and University exempt from Residential Tenancies Act 2010 (NSW) – meaning of "hall of residence" – residential agreement and residential premises excluded from operation of Residential Tenancies Act 2010 (NSW)

APPEALS – application for leave to appeal – no issue of principle, question of public importance or reasonably clear injustice identified – leave refused

Background

The application was the latest chapter in a long-running dispute over whether the University acted lawfully when it evicted Mr Shapkin, then a Master of Laws candidate, from student accommodation on misconduct grounds in September 2022. The accommodation was a room in a terrace house in Darlington Road, adjacent to the main campus, shared with two undergraduates — one of 39 Darlington Road properties owned by the University, which houses some 1,900 students through Student Accommodation Services. The Residential Agreement Acknowledgement granted a licence to reside in a room as a lodger; acknowledged the agreement was not a tenancy and that the *Residential Tenancies Act 2010* (NSW) did not apply by reason of s 8 of the Act and/or cl 31 of the Residential Tenancies Regulation 2019 (NSW) or s 7; restricted added furniture and lock changes; reserved to the University absolute discretion as to room allocation and relocation, broad rights of access, and the right to let rooms casually over summer. Following complaints by two other students, the University terminated the agreement on 23 September 2022 and, after Mr Shapkin declined alternative temporary accommodation, changed the locks on 27 September. NCAT (Senior Member Titterton OAM), hearing the matter urgently, held the RT Act did not apply on two independent bases: the agreement was one under which a person "lodges with another person" within s 8(1)(c), and the premises fell within cl 31 as residential premises used principally as a hall of residence for students. The Appeal Panel rejected his appeal in comprehensive reasons; Campbell J granted leave on the two principal issues and upheld both; Mr Shapkin sought leave to appeal to the Court of Appeal.

Approach and Principles

Leave to appeal generally requires an issue of principle, a question of public importance, or a reasonably clear injustice going beyond the merely arguable (*McEvoy v Wagglens* [2021] NSWCA 104 at [35]; *Jaycar v Lombardo* [2011] NSWCA 284; *Secretary, DFCS v Smith* (2017) 95 NSWLR 597 at [28]; *Gibson v Drumm* [2016] NSWCA 206 at [19]; *Carolan v AMF Bowling* [1995] NSWCA 69 at 3); it is not sufficient that the primary judge was arguably wrong (*Smith* at [28]; *Be Financial v Das* [2012] NSWCA 164 at [32]). On the lodger exclusion, the Court set out without endorsing the Appeal Panel's six-point framework: the owner must remain in possession and retain the quality of "master of the house", reserving general control and dominion over the whole (*Pupuke v Stratford* [2016] NSWCATAP 7 at [23]); labels are not determinative (*CFMMEU v Personnel Contracting* (2022) 275 CLR 165 at [63]–[64]); physical presence is not required, legal possession being what matters (*Swan v Uecker* (2016) 50 VR 74 at [36] (Croft J), quoting *Western Australia v Ward* (2002) 213 CLR 1 at [502]–[504]); and where the parties' rights and duties are comprehensively committed to a written contract, the contract determines the character of the relationship (*Personnel Contracting* at [43]–[44]). The primary judge had also relied on *Commissioner for Fair Trading (WA) v Voulon* [2005] WASC 229 and *The Commonwealth v Bogle* (1953) 89 CLR 229, and on s 8(d) of the Interpretation Act 1987 (NSW) (references to a "person" include corporations). Clause 31 of the Regulation focuses on the use of the premises, not the physical characteristics of the buildings.

Disposition

Clause 31 (hall of residence): None of the three arguments was reasonably arguable. The contention that a three-bedroom terrace could not be a "hall of residence" failed: the terrace was residential premises being used as a hall of residence because it accommodated students while studying at the University, and even if the concept carried a communal aspect, the shared common areas satisfied it — the exclusion is directed at the function the accommodation performs, and the reasons making it appropriate to exclude accommodation of that type applied equally here. The contention that "owned" in cl 31(1)(b) required the premises to lie within the University's boundaries failed on the disjunctive structure: cl 31 applies to premises "located within the institution" or "owned by the institution", and a geographic gloss on "owned" would render paragraph (b) superfluous; reliance on s 3.45 of the Transport and Infrastructure SEPP — a later instrument directed to development consent for accommodation within university boundaries — was misplaced. The contention that the University was not shown to be "registered" failed: the question was whether it was constituted by or under an Act, and it plainly was (University of Sydney Act 1989 (NSW)).

Section 8(1)(c) (lodger): Not decided. Because cl 31 supplied an independent, unassailable basis on which the RT Act did not apply, the lodger issues could not affect the outcome, making the case an unsuitable vehicle — a conclusion reinforced by the fact that the issues had been considered in detail by the Tribunal at two levels and by the primary judge, in each case by reference to well-established principles.

Utility (third ground): Even if the primary judge had erred in finding no utility in further grounds given the agreement's expiry in December 2022, a rehearing would be futile if either principal ground failed. Several of the twelve sub-grounds were "expressed in obscure language and have little to do with the actual language of cl 31".

Orders

Leave to appeal refused. Applicant to pay the respondent's costs.

Practical Takeaways

The cl 31 holding is the significant point for educational institutions: "hall of residence" is a functional concept — the focus is on the use of the premises to accommodate students during their studies, not on physical scale or character — so even a three-bedroom shared terrace qualifies, any communal aspect being satisfied by shared common areas. The exemption is therefore likely to cover a wide range of accommodation types beyond the traditional residential college.

The construction of "owned by the institution" is independently useful: the disjunctive structure of cl 31(1) ("located within" or "owned by") forbids a geographic gloss that would make paragraph (b) superfluous. Disjunctive lists must be construed so each alternative has work to do — and later planning instruments directed to different subject matter will rarely assist in construing earlier regulations.

Although the lodger point was not decided, the collected framework is the best current statement for advisers: legal control reserved by a comprehensive written agreement, not physical presence, determines whether an arrangement is a lodging (*Swan v Uecker; Personnel Contracting*), labels are not determinative, and corporate landlords are not excluded (*Voulon*; *Bogle*; s 8(d) *Interpretation Act*). For institutions and other accommodation providers, the residential agreement's drafting — reserved rights of allocation, relocation, access and control — will largely determine the characterisation.

The procedural holdings matter for appellate strategy: where two independent statutory exclusions exist, leave will be refused on one if the other is unassailable, since the outcome cannot change — effort must therefore be directed at the ground presenting the greatest difficulty, because the weakest link decides the appeal. And the longer the procedural history of consistent findings below (here Tribunal, Appeal Panel, primary judge), the higher the leave threshold climbs.

Finally, the Court's observation that many sub-grounds were obscure and untethered to the language of cl 31 is the perennial lesson: focused, well-articulated grounds tied to the statutory text outperform proliferation.

Peter Geoffrey Edmonds by his tutor Jason Dean Edmonds v Simms [2025] NSWSC 1180

Hearing dates:	8 October 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	8 October 2025
Before:	Elkaim AJ

LAND LAW — possession of land — application by plaintiff as registered proprietor — where plaintiff has prima facie right to possession as registered proprietor — where defendant asserts de facto relationship with plaintiff as a defence — no evidence filed by the defendant

Background

The plaintiff, born in 1943 and living with moderate dementia in a Hunter region aged care home, was registered owner of a Raymond Terrace property purchased in 1987, the mortgage discharged in 2003. Acting through his son as tutor under a 2012 power of attorney — made on his geriatrician's advice while he retained capacity, alongside a 2013 will giving the defendant $30,000, his car, and a two-year right of residence from his death — he sought possession so the property could be sold to fund his residential and medical needs. The defendant had lived with him at the property from about 1993; they never married. In 1995 they had bought another property as tenants in common in equal shares, sold in 2006 with the proceeds divided equally. The relationship had ended by the time the plaintiff entered aged care in September 2018 — his son recalled references to abandonment from about 2015 — and the facilities' records showed no visit from the defendant since 2019; since 2018 his children had paid all outgoings. Four solicitor's letters demanding vacant possession between February 2023 and January 2024 went unanswered. Proceedings were filed in January 2024; the defendant filed a defence asserting shared expenses, non-financial contributions and an intended interest, and a cross-claim. Across nine directions hearings Lonergan J gave her repeated opportunities to file evidence and to commence Federal Circuit and Family Court proceedings by a fixed date; she did neither, and strict cut-off orders were made — evidence after 29 April 2025 not to be relied on without leave. Mediation failed. Days before the October 2025 hearing her solicitor was given leave to withdraw, citing a late-discovered conflict of interest, on the representation that a named solicitor would take over; he had not in fact been retained, and the defendant appeared unrepresented seeking an adjournment.

Approach and Principles

The registered proprietor has a prima facie entitlement to possession (*Brylewski v Maclean* [2022] NSWSC 1654 at [52] (Basten AJA)). Even if a de facto relationship existed and the party in occupation would be entitled to a share of sale proceeds for amounts paid towards the mortgage, that does not constitute an entitlement to possession against the registered proprietor (*Holder v Zeiher* [2014] NSWSC 556 at [42]–[43] (Davies J)).

Disposition

The adjournment was refused: the late-discovered conflict of interest was irrelevant to the evidence never having been filed; the history was one of persistent failures, pre-litigation and procedural; the plaintiff had complied with all orders, had been waiting since January 2024, and needed the funds for his care; and even taking the defence at its highest, a de facto relationship gave little scope to resist possession. On the substance, applying *Brylewski v Maclean* [2022] NSWSC 1654 at [52] (the registered proprietor's prima facie entitlement) and *Holder v Zeiher* [2014] NSWSC 556 at [42]–[43] (entitlement to a share of sale proceeds is not an entitlement to possession), and with no evidence filed by the defendant, possession was ordered. The will provisions did not arise until death, were liable to change, and were in any event not pleaded. The cross-claim, unsupported by any evidence, was dismissed. The Court expressed sympathy — the defendant had lived there many years and was left unrepresented through no fault of her own — but had no choice on the material before it.

Orders

Judgment for possession. Cross-claim dismissed. Defendant to pay the plaintiff's costs.

Practical Takeaways

The important aspect of the case is the Brylewski/Holder pairing: the registered proprietor's prima facie right to possession prevails over a historical de facto relationship absent positive evidence of an equitable interest amounting to occupation rights — an entitlement to a share of eventual sale proceeds is not an entitlement to possess.

Pleadings without evidence achieve nothing: a detailed joint endeavour cross-claim died for want of a single supporting affidavit, and testamentary provisions conferring future rights of residence neither arise before death nor assist if unpleaded. Defendants relying on relational equities must plead them fully and prove them.

Strict evidence cut-off orders mean what they say. A conflict of interest discovered after the deadlines cannot retrospectively excuse non-compliance, representations to the Court about replacement representation must be substantively accurate, and a defendant's pre-litigation silence in the face of repeated demands builds a forensic record of disengagement that will be weighed against later indulgences.

Where the registered proprietor needs the property to fund aged care, delay has direct welfare consequences for a vulnerable plaintiff, and the Court will weigh them — judicial sympathy for the occupant, however genuine, does not displace the legal position. Defendants in this situation should engage early, commence any family law proceedings within the time allowed, and treat case management directions as substantive obligations.

Perpetual Corporate Trust Limited v Youssef and Anor [2025] NSWSC 653

Hearing dates:	17 June 2025
Jusrisdiction:	Supreme Court of New South Wales
Decision date:	23 June 2025
Before:	Lonergan J

LAND LAW – possession of land – urgent application to stay execution of writ of possession – too little to late – no adequate explanation for lack of action by applicant – defence struck out in April 2025 – question mark over legitimacy of alleged contract for sale – stay refused

Background

Perpetual sued in November 2024 for possession of land at Dapto and judgment exceeding $3.1 million on a defaulted loan; the borrower had made no payments since May 2024 and arrears stood at $417,000. His defence — asserting only inability to maintain payments — was struck out by consent in April 2025, default judgment entered, and a writ issued with eviction fixed for 18 June 2025. Days before eviction he sought a stay to September relying on a contract for sale exchanged on 2 May 2025 — nine days after the writ issued — with a 2.5 per cent deposit, a four-month settlement, signature by an attorney, no consent sought from Perpetual (as the loan required), no disclosed consents from the second mortgagee or a caveator on title, and an agent recorded on the contract who told Perpetual's solicitor he had not introduced the purchaser. Perpetual's requests for records showing the sale was unconditional went unanswered, as did a Notice to Produce called on at the hearing.

Disposition

Applying *GE Personal Finance v Smith* [2006] NSWSC 889 and Practice Note SC CL 6 par 20 (genuine defence with merit, evidence of refinance, or evidence the property is being sold — each requiring supporting evidence capable of examination), the stay was refused. A party asking the Court to exercise its discretion must give full and truthful explanations; where reasonable requests for information about a highly relevant transaction are met with silence, consequences follow. The inaction was unexplained, the dilatory approach capable of being seen as an attempt to force an outcome by manufacturing urgency. The sale contract's bona fides were doubtful on the accumulated features above, and the price barely exceeded the debt while arrears continued to accrue. The proposed short stay to gather further material was rejected: it would by default deliver the postponement sought, since the Sheriff could not re-attend for three to four weeks. Hardship, though real, was insufficient, the outcome having been on the table since December 2024 and realistically since the payments stopped.

Orders

Notice of motion dismissed.

Practical Takeaways

The decision is a template for testing the bona fides of asserted sale contracts in stay applications: an attorney signature, a 2.5 per cent deposit, a four-month conditional settlement, missing lender and encumbrancer consents, and a contradicted agent reference — each a red flag, cumulatively fatal. The headline existence of a contract is not enough, and a price barely covering the debt while arrears accrue will not persuade.

Silence in the face of reasonable information requests and Notices to Produce attracts adverse consequences, and a “short stay to gather material” will be refused where its practical effect is the very postponement sought — the Sheriff’s re-attendance lead time is part of the calculus.

Inability to pay is not a defence, lender consent requirements in the loan documents must be honoured before exchanging any contract, and engagement must come early: urgency manufactured by delay will be identified and resisted.

PAR Recycling Services Pty Ltd v Shoebill Pty Ltd; Somersby Aust Pty Ltd v Gallagher [2025] NSWSC 274

Hearing dates:	2, 3, 4, 5, 8, 11 April 2024; 21 March 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	26 March 2025
Before:	Parker J

LEASES AND TENANCIES — tenancies — agreement to grant a lease over a warehouse property — subject property was held on trust — lease was never registered pursuant to the agreement — whether subsequent owners were bound by the agreement — whether agreement gave rise to an equitable lease — whether a legal tenancy arose under s 127 Conveyancing Act 1919 — whether parties to the agreement repudiated — claims for unpaid rent — claims against individual guarantor for indemnity under the agreement

CONTRACTS — parties — privity — privity of estate — where a lease was never registered despite agreement to do so — whether a legal tenancy arose under s 127 Conveyancing Act 1919 — whether s 117 Conveyancing Act 1919 applies to unregistered legal tenancies

COSTS — party/party — orders when proceedings involve multiple parties — how parties liable — multiple claims in multiple matters, with mixed success by plaintiffs and cross-claimants — costs follow the event on a claim-by-claim basis — incidence of general costs

Background

Two proceedings arose from a Settlement Agreement signed on 20 September 2019 at the end of a mediation, concerning a 2.75-hectare Somersby warehouse property with a waste processing plant, where PAR — an indirectly wholly-owned subsidiary of the Stop Waste group, its affairs directed by Mr Gallagher — operated a glass processing business. The registered proprietor was then SIPL, trustee of a holding trust, its sole director Mr Russo, with Westpac as mortgagee; the Agreement was signed for SIPL and Mr Russo by Mr Cassaniti, an accountant who had attended the mediation on their behalf. The Agreement provided (cl 1(a)(i)) for an immediate five-year lease at $35,000 per month with two five-year options; (cl 2(d)) for execution and registration of a formal lease "substantively containing" those terms together with "usual commercial lease terms substantively consistent with" them; (cl 1(c)) a first right of refusal to purchase if the owner received a bona fide offer from a competitor undertaking recycling operations; and Mr Gallagher's guarantee of PAR's obligations under the lease (cl 1(a)(i)(J)). Lease negotiations from October to December 2019 broke down over

SIPL's insistence on unconditional clean-up and remediation obligations and an increased rent. The corporate landscape then shifted rapidly: a Deed of Appointment dated May 2019 but registered in November 2019 purported to replace SIPL with Shoebill (a Russo company) as trustee; SIPL was wound up in January 2020 and its liquidator disclaimed the property; in March 2020 Raphis (a Cassaniti company) bought out the Westpac loan and took transfer of the mortgage; Shoebill became registered proprietor on 27 April 2020; and on 19 May 2020 SAPL (then Cassaniti-controlled) took transfer on a $1.9 million purchase from Raphis as mortgagee in possession — Shoebill having been on title 22 days. On 14 February 2020 Shoebill's solicitor had written that "as the trustee of the [Trust], Shoebill's position is that it is bound by the [Settlement Agreement]". PAR sued Shoebill for specific performance in February 2020, vacated the property on 4 September 2020 leaving some 5,200 tonnes of glass, and the litigation resolved into four claims: PAR against Shoebill for breach of contract; Shoebill's cross-claim for rent and outgoings; SAPL's claim for rent against PAR and against Mr Gallagher on the guarantee; and PAR's ACL cross-claims against Shoebill, SAPL, Raphis, Marginata, Mr Russo and Mr Cassaniti.

Approach and Principles

On agency and the undisclosed principal: *Crabtree-Vickers v Australian Direct Mail Advertising* (1975) 133 CLR 72 at 77–78 on actual authority, and *Maynegrain v Compafina Bank* [1982] 2 NSWLR 141 at 150–151 (Hope JA) — a person cannot ratify as the act of his agent a transaction entered into without his authority by one who purported at the time to be a principal. On trustee replacement: *Lemery v Reliance* (2008) 74 NSWLR 550 at [12]–[50], [52]–[53], and *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at [47]–[49] — the former trustee's right of exoneration over trust property made security for liabilities is not displaced by appointment of a new trustee. On the equitable lease and the s 127 tenancy: *Walsh v Lonsdale* (1882) 21 Ch D 9; *Heggies Bulkhaul v Global Minerals Australia* (2003) 59 NSWLR 312 at [55], [58] (Austin J) on the operation of the rule in the context of CA ss 117 and 118; *Dockrill v Cavanagh* (1944) 45 SR (NSW) 78 at 83–84 on the implied month-to-month tenancy arising from occupation and payment of rent; *Leitz Leeholme Stud v Robinson* [1977] 2 NSWLR 544 at 547 (Glass JA) — the agreement for lease and the s 127 tenancy are independent sources of rights. On guarantees: *Gumland Property Holdings v Duffy Bros* (2008) 234 CLR 237 at [96]–[107] (an assignee may enforce a guarantor's covenant as touching and concerning the land), but *Chan v Cresdon* (1989) 168 CLR 242 at 249 — a guarantee of liabilities "under this lease" is confined to obligations created by a registered lease and does not extend to a common law tenancy under the s 127 equivalent. On repudiation: *DTR Nominees v Mona Homes* (1978) 138 CLR 423 at 432; *Peter Turnbull & Co v Mundus Trading* (1954) 90 CLR 235; *Booker Industries v Wilson Parking* (1982) 149 CLR 600 at 610–612. On ACL claims in negotiations: *Secure Parking v Woollahra Council* [2016] NSWCA 154 at [98] — a party entering a contract does not necessarily represent its subjective understanding of its obligations; *Pacific Carriers v BNP Paribas* (2004) 218 CLR 451 at [22]; *Dovuro v Wilkins* (2003) 215 CLR 317 at [69]. On costs: the two-stage framework in *Akierman Holdings v Akerman* [2019] NSWSC 1486 at [57]–[86], Shun Sheng v Lei (No 6) [2024] NSWSC 1613 at [26] and *Martinus Rail v Qube RE Services (No 2) (No 3)* [2024] NSWSC 1483 at [174]; *Beoco v Alfa Laval* [1995] QB 137 at 154 considered; *Macquarie International Health Clinic (No 2)* [2011] NSWCA 171 at [14] and *NSW v Stevens* (2012) 82 NSWLR 106 at [22] on the requirement of substantial damages for success on the "event".

Disposition

PAR v Shoebill — when Shoebill became bound: The agency case failed at every level: PAR knew nothing of Shoebill's existence at the mediation, no corporate decision by Shoebill to undertake the obligations had been made, ostensible authority could not arise where PAR did not know Shoebill existed, and Maynegrain barred the undisclosed principal route. But Shoebill became contractually bound by 20 February 2020 at the latest: its solicitor's 14 February letter, read with demands for rent and outgoings made on Shoebill's behalf, amounted to an offer to be bound, accepted by PAR's acknowledgement of rent liability by way of set-off and payment of the rent into its solicitor's trust account — creating a parallel set of rights alongside any continuing SIPL relationship — and Shoebill's own defence contained admissions to that effect.

Breach and repudiation: Shoebill breached cl 2(d) from 20 February 2020: it adopted SIPL's negotiating position, whose unconditional clean-up and remediation obligations went beyond the marginal adjustments cl 2(d) contemplated. Its April 2020 offer to enter a lease in PAR's form, subject to Raphis' refusal of consent, did not cure the breach: cl 2(d) obliged Shoebill not only to enter but to register the lease — discharging the mortgage if that was what registration required — and the transfer to SAPL did not end the breach, since Shoebill could in theory have repurchased. The cl 1(c) first-refusal claim failed: the sale was effected by Raphis as mortgagee, not by Shoebill, and the clause contemplated a Shoebill sales process to a recycling competitor. The continuing breach was repudiatory, accepted when PAR vacated on 4 September 2020 (not by its earlier letter, which continued to assert specific performance). Frustration failed — the sale did not make performance impossible, and any frustration would have been self-induced — and the abandonment case failed, the Cassaniti–Gallagher purchase discussions coming nowhere near abandonment while PAR maintained its specific performance claim throughout.

Damages: Nominal only. The rent was not recoverable as a total loss: the parties contemplated a period of rent without exploitation, and the same rent would have been paid in either scenario. The plant removal costs failed evidentially — the invoices were addressed to and paid by a different group company. The glass stockpile claim failed because the glass had value only in the context of ongoing operations, whose expenses would have exceeded its revenue. PAR recovered $1.

Shoebill's cross-claim: Rent for 10 February to 18 May 2020 recovered. The cl 1(a)(i)(D) payments were rent under an immediately enforceable lease, not payments on account; the obligation arose under the legal monthly tenancy under CA s 127, so the *Walsh v Lonsdale* objection (no specific performance available) was beside the point; and indefeasibility was no answer because the s 127 tenancy required no registration. The outgoings claim failed for want of evidence of outgoings actually incurred. Judgment $144,990.11 including interest.

SAPL's claim: Rent for 19 May to 9 September 2020 recovered on the same s 117 reasoning: $164,924.96 including interest. The guarantee claim against Mr Gallagher failed on *Chan v Cresdon*: "under the Lease" was confined to a registered lease and did not reach the s 127 common law tenancy or the equitable lease. The make-good claim was abandoned.

PAR's ACL cross-claims: All failed. PAR's abandonment of any claim based on the mediation meant fresh representations had to be found in later conduct; SIPL's and Shoebill's insistence on clean-up obligations was the opposite of a representation that a lease would be granted without them. Mr Russo undertook no relevant personal obligations. Knowing participation failed without a principal contravention — acting in bad faith in commercial negotiations is not the same as making misrepresentations, and complex corporate structures designed to extricate property from claims do not of themselves establish ACL contraventions; conspiracy must be pleaded and proved as such. Damages would in any event have failed, the lost glass opportunity being unexploitable without continued occupation.

Costs: The two-stage distributive framework applied: costs follow the event claim by claim, with general costs allocated to the party whose successful claim was sufficiently substantial to justify the proceedings. PAR's $1 success did not qualify (*Macquarie International; Stevens*). The *Beoco* argument against Shoebill's pre-amendment costs was rejected — the s 117 contention was already in the case via SAPL and being vigorously opposed. Mr Gallagher's success against SAPL was recognised by an order for his additional costs of that defence, but his peripheral involvement and failed cross-claim did not disturb the general allocation; his ACL claim was substantive, not purely defensive, having failed on its own grounds. PAR's trust-moneys "claim" was an issue within the rent claim, not a separable claim abandoned by SAPL.

Orders

In the first proceedings, judgment for PAR for $1 and for Shoebill on its cross-claim for $144,990.11, PAR to pay Shoebill's costs. In the second, judgment for SAPL against PAR for $164,924.96, SAPL's claim against Mr Gallagher otherwise dismissed, and distributive costs orders: SAPL to pay Mr Gallagher's costs solely referable to its claim against him and PAR's costs solely referable to the abandoned make-good claim; PAR to pay SAPL's costs of the proceedings including the cross-claim.

Practical Takeaways

The decision is the year's most complete treatment of unregistered lease arrangements, and its first lesson is terminological: the parties' "equitable lease" label was misleading. The agreement for lease under cl 2(d), if specifically enforceable, was the true equitable lease; the tenancy arising under CA s 127 from occupation and payment of rent was a legal interest. The two are independent sources of rights (*Leitz Leeholme*) that do not merge, and each must be analysed separately whenever a long-term lease has gone unregistered.

Section 117 annexes the rent to the reversion on the legal s 127 tenancy directly — without resort to the *Heggies* extension of *Walsh v Lonsdale* — and indefeasibility is no answer because nothing required registration. Successive registered proprietors can therefore collect rent under unregistered arrangements, and tenants cannot shelter behind the absence of registration.

Chan v Cresdon remains a trap for landlords and a shield for guarantors: a guarantee of liabilities "under the Lease" is confined to a registered lease and reaches neither the s 127 tenancy nor the equitable lease. Where registration may never occur, the guarantee must be drafted to capture the substitute interests expressly, or it secures nothing — as SAPL discovered.

Solicitors' correspondence can make a contract: a letter stating the client "is bound" by an agreement, coupled with demands for performance, is an offer capable of acceptance by conduct, and statements of legal position in a defence can operate as formal admissions. Both warrant care. Conversely, the agency holdings show that common control, overlapping directorships and even attributed knowledge do not establish authority — and the undisclosed principal doctrine cannot rescue a transaction entered by one who purported to act as principal (*Maynegrain*).

Heads of agreement contemplating a future registered lease should specify which terms are fixed and which negotiable: “usual commercial terms substantively consistent” did not permit fundamental additions like unconditional remediation obligations, and the registration obligation extended to discharging the mortgage. Acceptance of repudiation must also be unequivocal — continued assertion of specific performance is inconsistent with it, and the operative acceptance here was the act of vacating.

The damages discipline is general: each head must integrate into a coherent comparison of hypothetical performance against the actual position; invoices must be in the claimant’s own name; and trading stock has no value divorced from the operations that would have consumed it. The ACL holdings are equally portable — entering a contract is not a representation about one’s subjective understanding of its obligations (*Secure Parking*), bad faith in negotiation is not misrepresentation, and ACL claims are not a catch-all for objectionable restructuring; the true complaint must be pleaded in its proper cause of action.

Finally, the two-stage distributive costs framework — claim-by-claim events, then allocation of general costs to the sufficiently substantial successful claim, with nominal damages not counting as success on the event — is applied in full and repays study for any multi-party, multi-claim commercial proceeding. The timing lesson sits behind all of it: tenants seeking to hold an unregistered bargain must move for specific performance before the property is refinanced and sold beyond reach; mortgagee enforcement moves faster than litigation.

***Musico Corporation Pty Ltd v Master Truck Service Pty Ltd* [2025] NSWSC 1226**

Hearing dates:	29, 30 September; 1 October 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	17 October 2025
Before:	Parker J

LEASES AND TENANCIES — Default and termination — Relief against forfeiture — Relief for breaches other than payment of rent – where lease specified permitted uses of property – where permitted use was disputed – where relationship between lessor and lessee broke down – HELD lease was validly terminated and relief against forfeiture should not be granted

Background

MCPL, controlled by the Musico family, was landlord of a rural-zoned Kemps Creek property; MTS, controlled by Mr Azeez, was tenant under an unregistered December 2024 lease enforceable in equity under *Walsh v Lonsdale* (1882) 21 Ch D 9, with a Permitted Use of tyre fitting. A large shed was constructed without planning approval and used for tyre fitting and truck washing; Penrith Council issued stop-work, prevention and demolition orders. MCPL served two breach notices and a notice of termination in April 2025; MTS remained in occupation. The contempt motion and MTS's estoppel and ACL cross-claim were abandoned at opening.

Disposition

MTS's contention that "use" in cl 10.1(1) meant "commercial or business use" failed the *BP Refinery (Westernport) v Shire of Hastings* (1977) 180 CLR 266 implication test, and the clause was clear in any event; breach was established by the truck washing without consent and the termination was valid. Relief against forfeiture was refused: the focus is unconscionability towards the landlord, not hardship to the tenant (*Shiloh Spinners v Harding* [1973] AC 691; *Mineaplenty v Trek 31* [2006] NSWSC 1203 at [69]–[70]; *Casquash v NSW Squash (No 2)* [2012] NSWSC 522 on poisoned relationships). Strongly adverse credit findings were made against Mr Azeez — including his admission that his solicitors' 1 April letter was knowingly untrue — and the Musicos were entitled to refuse further dealings with him. MCPL's undertaking to demolish the shed, paralleling the Council's order, eliminated any windfall concern.

Orders

Declaration that the lease was validly terminated. Possession after 24 October 2025. Damages claims deferred. Liberty to apply for a stay pending appeal (leave required: *Narellan Franchise v RBME* [2023] NSWCA 139 at [25]–[26]). Costs reserved.

Practical Takeaways

Relief against forfeiture turns on unconscionability towards the landlord, not tenant hardship — and for non-monetary covenants protecting interests not readily compensable in money (here, lawful operations on the land), the case for relief weakens considerably.

A tenant’s admitted dishonesty to its own landlord, through its solicitors, justifies the landlord’s refusal of any continuing relationship; inexperience and cultural explanations carry little weight where competent legal advice was available throughout.

The landlord’s voluntary undertaking to demolish was an elegant evidentiary shortcut: it demonstrated that termination was driven by a legitimate desire to end the relationship, not by appetite for a windfall.

***Morgan v RHS Hotel Investments Pty Ltd t/as (rec and man app) as trustee for the Rushcutters Unit Trust* [2025] NSWSC 1295**

Hearing dates:	21 October 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	5 November 2025
Before:	Pike J

CONTRACTS – Termination – Repudiation of contract – where purchaser chooses style of scheme in off the plan unit – where vendor constructs unit with wrong style scheme – where vendor refuses to change style scheme – where purchaser terminates upon vendors renunciation of contract – whether contract permits vendor to change style scheme – whether vendor renunciates contract – no question of principle

CONTRACTS – Remedies – Specific performance – Contract for sale of land – whether specific performance should be ordered

LAND LAW – Conveyancing – Contract for sale of land – Deposit – whether deposit should be returned pursuant to Conveyancing Act 1919 (NSW), s 55(2A) – no question of principle

Background

The plaintiff (Ms Morgan) contracted on 22 April 2022 to purchase a one-bedroom unit off the plan in the "Nautique" development at 100 Bayswater Road, Rushcutters Bay (the former Vibe Hotel site). The purchase price was $1.2 million; the deposit was $120,000.

Item 15 of the Contract offered a "Style Choice" of either Park Scheme (green) or Harbour Scheme (white), concerning principally the colour of marble used for the kitchen benchtop and a bathroom wall. Ms Morgan chose Harbour Scheme. The unit was built with Park Scheme installed.

On her pre-settlement inspection on 6 September 2024, Ms Morgan discovered the discrepancy. Through her solicitors she raised the issue repeatedly. On 6 March 2025, the Vendors' solicitors acknowledged the wrong colour had been installed but stated that "the vendor regards the difference in colour to be an inconsequential matter in all of the circumstances and will not be undertaking any rectification". Receivers and managers were appointed to the Vendors on 13 December 2024.

On 19 May 2025, Ms Morgan purported to terminate the Contract for the Vendors' repudiation. The Vendors issued a notice to complete on 2 June 2025. On 12 June 2025 Ms Morgan commenced proceedings seeking return of the deposit under s 55(2A) of the *Conveyancing Act 1919* (NSW). The Vendors cross-claimed on 19 September 2025 seeking specific performance. On the morning of the hearing, the Vendors made a conditional open offer to install the Harbour Scheme stone.

Sales in the development had been poor: only 25 of 117 units had completed; 12 were sold but not completed; 80 remained unsold. Late valuation evidence was rejected for lateness and prejudice.

Approach and Principles

Renunciation — the first sense of repudiation — asks whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it (*Koompahtoo Local Aboriginal Land Council v Sanpine* (2007) 233 CLR 115 at [44]). Repudiation is a serious matter not lightly to be found (*Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 633 (Wilson J); *Plumor v Handley* (1996) 41 NSWLR 30 at 38 (McLelland CJ in Eq); *Laurinda v Capalaba Park Shopping Centre* (1989) 166 CLR 623 at 634 (Mason CJ)). The Court distinguished the authorities Ms Morgan relied on — *Gold Coast Oil v Lee Properties* [1985] 1 Qd R 416, *Associated Newspapers v Bancks* (1951) 83 CLR 322 and *Dymocks Franchise Systems v Todd* [2004] 1 NZLR 289 — each involving breaches striking at the agreed commercial return, with *Galafassi v Kelly* (2014) 87 NSWLR 119 at [96]–[104] also referenced. A substantial defect resisting specific performance is governed by *Travinto Nominees v Vlattas* (1973) 129 CLR 1 at 27–28. On s 55(2A), the Court applied its own summaries in *Lewington v Dulyakarn* [2025] NSWSC 635 at [165]–[166] and *Grubisa v Zhou* [2025] NSWSC 942 at [94]–[97], with The *Millstream v Schultz* [1980] 1 NSWLR 547 at 552, *Higgins v Statewide Developments* [2010] NSWSC 183 at [122]–[135] (Barrett J) and *Jin Yi Construction v Romeciti Eastwood* [2022] NSWSC 56 at [102]–[116] (Lindsay J) on when retention would be unjust or inequitable.

Disposition

Construction: The Vendors were permitted under the Contract to alter the Style Scheme. Special Condition 50.1.1 (the style scheme would be as indicated in Item 15) did not forbid alteration; it merely contrasted with 50.1.2 (no Claim where no choice marked). SC 49.1.2 required construction according to the Finishes Schedule “subject to clause 51.1”, and SC 51.1.2 permitted alteration of any manner of finish “if it is a similar manner of finish of at least equivalent quality” — which the Park Scheme was — with SC 51.1.5 precluding any Claim arising from such alteration except as permitted by the cl 51.2 Material Particular Change Notice regime. Ms Morgan was not left without remedy: clauses 6 (error or misdescription) and 7 (claims) of the standard conditions remained available, with compensation disputes determined by an arbitrator under cl 7.2.3.

Renunciation: Even on Ms Morgan’s construction, the Court inclined against renunciation: the conduct related to the colour of one item in a property otherwise being delivered as contracted — quite different from *Gold Coast Oil*, *Bancks* and *Dymocks*, where the breaches struck at the root of the agreed return.

Specific performance and the deposit: On the preferred construction the Vendors were ready, willing and able to complete; even on the alternative, the colour discrepancy was not a substantial defect under *Travinto Nominees*. The morning-of-hearing conditional offer did not of itself cure any ability problem, but none arose. Specific performance was ordered, and with it there was no basis for return of the deposit — though the Court indicated that had specific performance been refused, retention by an unwilling and unable vendor would likely have been unjust.

Orders

Summons dismissed. Specific performance ordered on the Vendors' cross-summons. Ms Morgan to pay the Vendors' costs of the summons and cross-summons. Liberty to apply on three days' notice.

Practical Takeaways

The construction holding is the practical core for off-the-plan work: an apparently absolute commitment to a chosen finish scheme can be qualified by general alteration powers elsewhere in the contract. The interaction of cl 50.1.1 with cl 51.1.2 — alteration to a "similar manner of finish of at least equivalent quality", with cl 51.1.5 excluding Claims and cl 51.2 reserving Material Particular Changes — shows how these contracts balance vendor flexibility against purchaser protection. Purchasers must read the whole framework before electing; reliance on a single special condition invites exactly this outcome.

Renunciation remains a serious matter not lightly found: a single wrong finish item in an otherwise compliant property does not convey to a reasonable person renunciation of the contract or a fundamental obligation, and the contrast with *Gold Coast Oil*, *Bancks* and *Dymocks* — breaches striking at the agreed commercial return — marks the threshold.

Minor finish variations are not "substantial defects" under *Travinto Nominees*, so specific performance remains robust in the off-the-plan context: substantial compliance, with rectification or compensation for minor variations through the contractual claims regime, will generally suffice.

Wrongful termination is itself the serious risk. Ms Morgan's construction was not so clearly right as to make termination safe, and the consequence was specific performance with costs. Where the variation does not go to the root, the prudent course is to complete and pursue the cl 6/cl 7 claims regime — here with arbitration of any compensation dispute.

On s 55(2A), the binary is worth noting: where specific performance is ordered, deposit return does not arise; where the vendor proves unwilling or unable, return is likely. The two questions travel together. And the procedural rulings — late valuation evidence excluded for prejudice, a single table from it rejected as useless without comparative expert evidence — are routine but firm reminders that evidence directions in the Real Property List mean what they say.

Martin v Gill **[2025] NSWSC 385**

Hearing dates:	16 April 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	24 April 2025
Before:	Pike J

PRACTICE AND PROCEDURE – Summary dismissal – self-represented litigant – applicable test for summary dismissal – no question of principle

LAND LAW – Adverse possession – possessory application over Torrens title land --– issue to be determined at final hearing – no question of principle

Background

The self-represented plaintiff claimed entitlement by adverse possession to be registered as proprietor of Lot 5 at Copeland, whose registered proprietor — born in 1852 — had died in 1913, apparently intestate and without children. The family connection ran back generations: the plaintiff's maternal great-grandmother was first cousin to the proprietor's brother-in-law, and the plaintiff's grandfather had been in possession of adjoining Lots 4 and 5 from about 1975 until his death in 1993, when the plaintiff said he took possession of Lot 5 while his grandmother retained Lot 4 — successfully prosecuting her own adverse possession claim over it, the plaintiff and his brother later taking a registered half share on her death. The plaintiff lodged a possessory application with NSW Land Registry Services in December 2019; the Battams — 2011 purchasers of adjoining land — caveated against it in January 2020, and in December 2020 NSW Land determined the dispute would need to be resolved in Court. Lot 5 comprised a southern access way used to reach the Battams' property from Copeland Road and northern grazing land. The Battams contended the access way was their sole means of access, that they had regularly slashed and maintained it, that it had been fenced from the grazing land until 2019, that in late 2011 Mr Battams had asked the grandmother for and been granted permission to depasture sheep on the grazing land, and that after a March 2021 flood washed away the bridge he had installed a gate. The plaintiff said all use of Lot 5 by the Battams and previous owners had been with permission, annexing the Battams' own statutory declarations — Mrs Battams' referring to the grandmother granting permission. The Battams moved for summary dismissal under UCPR r 13.4.

Approach and Principles

The Court adopted the formulation of Faulkner J in *Westwood v Gulliver* [2024] NSWSC 1323 at [70]–[74]: the power is exercised only where the claim is so obviously untenable that it cannot possibly succeed (*General Steel Industries v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129 (Barwick CJ); *Agar v Hyde* (2000) 201 CLR 552 at [57]), the real issue being whether there is an underlying cause of action, demonstration of outcome being required rather than assessment of prospects, and the power exercised with exceptional caution (*O'Brien v Bank of Western Australia* [2013] NSWCA 71 at [3] (Macfarlan JA)). Special care is required for self-represented litigants (*Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 536 (Kirby P)); pleaded facts are assumed true (*Agius v NSW* [2001] NSWCA 371 at [24]); and the Court must not make findings of fact on evidence unless no other evidence might emerge that could add to or qualify them (*Bass v Permanent Trustee* (1999) 198 CLR 334 at [50]). Whether Hammerschlag J posited a lesser test in *Simmons v Protective Commissioner* [2012] NSWSC 455 at [52], [62] — discussed with *Spencer v Commonwealth* (2010) 241 CLR 118 at [25] in *McDonald v Grech* [2012] NSWSC 717 at [26]–[33] (Ward J) — did not need to be determined, the claim surviving on any formulation. On the substantive framework, the Court set out Part 6A (ss 45B–45K) of the *Real Property Act 1900* (NSW), applying *Refina v Binnie* [2010] NSWCA 192 at [83] (Young JA) on ss 45C and 45D(1)(b) and *Australian Retirement Holdings v Higgins* [2021] NSWSC 1158 at [210], [231]–[260] (Robb J) on the relationship between limitation principles and possessory title. Possession must be open, not secret; peaceful, not by force; and adverse, not by consent (*Mulcahy v Curramore* [1974] 2 NSWLR 464 at 475–476 (Bowen CJ in Eq)); *Powell v McFarlane* (1979) 38 P&CR 452 at 470–472 governs factual possession and animus possidendi; use of the land by others is consistent with exclusive possession where it is ostensibly by licence or permission of the adverse possessor (*Petkov v Lucerne Nominees* (1992) 7 WAR 163 at 167 (Murray J)); and once the limitation period has expired, the interest of the adverse possessor cannot be abandoned (*Whittlesea City Council v Abbatangelo* [2009] VSCA 188 at [4]–[6], citing *Bayport Industries v Watson* [2002] VSC 206 at [39]–[40]). An adverse possessor who has been in possession for the full period has a legal interest in the land prior to registration (*Refina*; Butt's Land Law (7th ed) at [16.350]). Possession is a "heavily fact-dependent inquiry" (Dal Pont, Law of Limitation (2nd ed) at [8.25]).

Disposition

Summary dismissal was refused. No authority supported the proposition that the plaintiff had to be in possession at the date of filing — the reference to Baalman & Wells at [397.15] did not squarely address the point. It was at least arguable that the plaintiff acquired title by adverse possession in 2005, on expiry of the twelve-year period running from his alleged 1993 possession and well before the Battams' 2011 purchase: the statute extinguishes the true owner's title on expiry (*Mulcahy* at 476), an accrued possessory title cannot be abandoned (*Bayport*), and the adverse possessor holds a legal interest pending registration (*Refina*; Butt). Whether he made good the requisite possession between 1993 and 2005 was a matter for final hearing. Even focusing on the post-2011 period, there was a triable issue whether the Battams' use was with the plaintiff's permission — including whether the grandmother's permission to graze was given on his behalf — the Battams' own statutory declarations keeping the issue alive; the capacity to receive evidence on a summary dismissal application did not permit that dispute to be resolved summarily. This was not a *Dow Hager Lawrance v Lord Norreys* (1890) 15 App Cas 210 case where the evidence showed the pleaded facts to be a myth, and possession, being heavily fact-dependent, must be considered in every case with reference to its peculiar circumstances.

Orders

Notice of motion dismissed with costs. Proceedings listed for directions in the Real Property List.

Practical Takeaways

Summary dismissal of adverse possession claims faces a near-prohibitive obstacle: possession is a heavily fact-dependent inquiry that must be considered on the peculiar circumstances of each case, and the *General Steel* standard requires the claim to be shown a myth, not merely improbable.

The temporal analysis is the substantive point of value: a possessory title that accrued on expiry of the limitation period — here arguably 2005 — extinguishes the true owner's title, is a legal interest pending registration, cannot be abandoned, and is robust against later purchasers and later physical disturbance (the post-2019 gate and post-flood works could not be determinative). The focus is the period while the limitation clock ran, not subsequent conduct; for registered proprietors who have lost touch with land, the corollary is that prompt action is essential before the clock runs out.

Third-party use does not defeat exclusive possession where it is, or is arguably, by the possessor's permission (*Petkov*) — and where the competing users' own statutory declarations acknowledge a permission framework (here from the claimant's grandmother and co-possessor), the issue will inevitably go to trial. Whether permission given by one family possessor binds or benefits another is itself a triable question.

The procedural protections for self-represented claimants (*Wentworth v Rogers (No 5)*) are real: perceived deficiencies of articulation will not be decisive, and the Court will engage with the substance. Conversely, defendants should weigh whether a r 13.4 motion in this field achieves anything beyond costs — the threshold is at least as exacting as the federal s 31A standard.

The intergenerational pattern — grandfather's possession from 1975, claimant from 1993, grandmother's separate successful claim over the adjoining lot — illustrates the evidentiary architecture these family claims require: a documented chronology of each generation's conduct in relation to the land, and clarity about who granted what permission to whom.

***Lewington v Dulyakarn* [2025] NSWSC 635**

Hearing dates:	5, 6 and 8 May 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	20 June 2025
Before:	Pike J

CONTRACTS – Construction – Interpretation – where no time specified for the completion of the contract for the sale of land – whether contract void for uncertainty – implied reasonable time for completion of contract – no question of principle

CONTRACTS – Termination – whether breach by either party – whether repudiation of contract – whether acceptance of repudiatory conduct – no question of principle

LAND LAW – Conveyancing – Contract for sale – Termination – whether necessary for vendor to show readiness, willingness and ability to perform contract at time of termination – whether vendor ready, willing and able – question of principle

LAND LAW – Conveyancing – Contract for sale – Deposit – relief against forfeiture of deposit – where deposit is 13% – whether deposit is a penalty – whether deposit should be returned pursuant to Conveyancing Act 1919 (NSW), s 55(2A) – question of principle

Background

The parties, cousins living next door to each other in Guildford, executed on 18 March 2022 a one-page agreement in their native Thai — obtained from a website in Thailand — by which the defendant agreed to sell her home to the plaintiff for $1,150,000. The document specified no completion time, attached none of the s 52A documents, and was substantially deficient by NSW conveyancing standards. The defendant had received an unsolicited $1.1 million offer in early 2022 and engaged agents for auction; a Line message supported her evidence that the plaintiff first raised buying the property. The plaintiff paid $80,000 cash on 13 March 2022; the agreement recorded a $150,000 deposit plus a $20,000 "processing fee"; the plaintiff transferred $120,000 from Thailand in late March, and the defendant refunded $30,000 overpaid. The plaintiff's son James was intended as the actual purchaser; finance attempts between April and July 2022, assisted by the defendant's son Oak, failed, and James went overseas. The defendant made a partial recording of a 16 July 2022 conversation in which the plaintiff said “Can’t buy any more. Won’t be buying. This has to be cancelled” and “What’s done is done.” In October 2022 the plaintiff’s lawyers purported to rescind under reg 17(1)(a) of the Conveyancing (Sale of Land) Regulation 2017 (NSW) for failure to attach the prescribed documents; on 6 December 2022 the defendant’s lawyers asserted the July statements were repudiatory and accepted the repudiation. In early 2023 the defendant transferred the property to Oak for $925,000 with 20 per cent gifted back. The plaintiff sued in June 2024 for the return of her money; the defendant’s application at the opening of the hearing to amend her defence to plead the October 2022 letter as itself repudiatory was refused for lateness and prejudice, the dispute being of moderate value.

Approach and Principles

On repudiation: *Shevill* (1982) 149 CLR 620 at 633 (a serious matter not lightly found); *Plumor v Handley* (1996) 41 NSWLR 30 at 38; the objective test in *Australia City Properties Management v Owners–Strata Plan No 65111* [2021] NSWCA 162 at [286]; *Dainford v Smith* (1985) 155 CLR 342 at 366 on onus; *DTR Nominees v Mona Homes* (1978) 138 CLR 423 at 432 on bona fide construction disputes. On acceptance: *Vitol SA v Norelf* [1996] AC 800 at 810–811 (Lord Steyn); *Gubbay v Burnet* [2012] NSWCA 174 at [15]; K*aracominakis v Big Country Developments* [2000] NSWCA 313 at [155]; *Holland v Wiltshire* (1954) 90 CLR 409 at 416; and on timing of election, *Galafassi v Kelly* (2014) 87 NSWLR 119 at [88]. On readiness, willingness and ability: *DTR Nominees* at 433; *Foran v Wight* (1989) 168 CLR 385 at 406–407, 422, 437–438, 452; *Sharjade v Commonwealth* [2009] NSWCA 373 at [61]–[73] (Hodgson JA), [141]–[145] (Young JA), [177] (Sackville AJA); *Upside Property Group v Tekin* [2017] NSWCA 336 at [14]–[15]; *Rawson v Hobbs* (1961) 107 CLR 466 at 481. On validity and implied time: *Tapp v Barnett* [2021] NSWSC 1271 at [130], [139] (Darke J). On deposits: *Workers Trust & Merchant Bank v Dojap Investments* [1993] AC 573 (a 25 per cent “deposit” a penalty); *Havyn v Webster* [2005] NSWCA 182 at [132], [134] (Santow JA); *Luu v Sovereign Developments* [2006] NSWCA 40 at [24]–[25]; *Commissioner of Taxation v Reliance Carpet* (2008) 236 CLR 342 at [22]–[27] on the deposit as earnest of performance; *Kazacos v Shuangling International Development* [2016] NSWSC 1504 at [40]–[53] (White J) on deposits paid in instalments; Carter’s criticism of *Dojap* noted. On s 55(2A): *Akrawe v Culjak* [2023] NSWCA 171 at [100]–[101]; *Stokes v Toyne* [2023] NSWCA 59 at [99]–[106]; *Lucas & Tait (Investments) v Victoria Securities* [1973] 2 NSWLR 268 at 272 (Street CJ in Eq); *Romanos v Pentagold Investments* (2003) 217 CLR 367 at [27]; *Nassif v Caminer* [2009] NSWCA 45 at [67], [91]. Fact-finding in undocumented dealings proceeded on objective material and inherent probabilities (*Watson v Foxman* (1995) 49 NSWLR 315 at 319 on the fallibility of memory).

Disposition

Validity: The agreement contained all essentials — parties, land, price — and the law implies a reasonable time for completion where none is specified; it was not void for uncertainty, and restitution did not arise.

Repudiation and acceptance: The July 2022 statements, corroborated by the recording (admitted over objection; its partial character did not destroy its value), constituted unequivocal renunciation. The defendant accepted by the 6 December 2022 letter — within the pleaded particulars, so reliance on it caused no prejudice — and by the sale to Oak; acceptance was within a reasonable time, there being no affirmation and no prejudice. The plaintiff’s October 2022 rescission letter was clearly erroneous and could not be characterised as bona fide reliance on a mistaken construction within *DTR Nominees*: the repudiatory statements predated the legal advice and were clear and unambiguous.

Readiness, willingness and ability: As at 6 December 2022 the defendant remained ready, willing and able. She sold to her son not to put the property beyond the plaintiff's reach but to free up money to live on after her May 2022 motor vehicle accident, and would have completed at the (higher) contract price had the plaintiff been willing. The *Sharjade* question — whether readiness must be proved to retain the deposit, as distinct from to terminate — therefore did not arise.

Deposit: The $20,000 processing fee, linked to mortgage insurance considerations never incurred, lacked deposit character and was conceded and returned. The $150,000 deposit — approximately 13 per cent — was retained: it was a genuine deposit in the *Reliance Carpet* sense, offered by the plaintiff as security to take the property off the market when the defendant was otherwise headed to auction. The "10 per cent or nothing" reading of *Dojap* was rejected; in any event special circumstances existed — the amount was nominated by the plaintiff, served the defensive purpose against auction, and was neither unreasonable nor excessive. The instalment structure ($80,000 then $120,000, with $30,000 refunded) did not alter its character (*Kazacos*). The plaintiff's allegation of a repudiatory $60,000 stamp duty demand was rejected: nothing in the agreement required the defendant to pay stamp duty, the allegation lacked documentary support, and it was inconsistent with James' evidence that the purchase was proceeding when he went overseas.

Section 55(2A): Refused. The discretion is genuinely limited — not an overall supervision of monetary adjustments; a vendor strictly enforcing her rights is not deprived of the deposit unless retention is unjust and inequitable (*Akrawe; Stokes; Lucas & Tait; Romanos*). The plaintiff nominated the larger deposit, the defendant did not act unconscionably, and the intended role of James as ultimate purchaser was irrelevant.

Orders

Plaintiff to receive return of $20,000 only. Parties directed to confer on final orders and costs, failing which determination on the papers.

Practical Takeaways

The threshold holding has daily utility: a one-page foreign-language document wholly deficient by NSW conveyancing standards is still a binding contract if parties, land and price are present, with a reasonable completion time implied. Family informality does not relieve parties of the consequences of contract law — including deposit forfeiture — and family transactions should be documented with at least basic conveyancing protections.

The repudiation analysis shows how these cases are won: contemporaneous material — Line messages, a partial recording, consistent solicitor correspondence — resolved the credit contest, the Court expressly preferring documentation and inherent probabilities to years-later recollection (*Watson v Foxman*). A party's own recording of a renunciation is admissible and may be decisive; its incompleteness goes to weight, not admissibility.

The *DTR Nominees* bona fide construction defence cannot be constructed retrospectively: clear oral renunciation precedes, and is not cured by, later legal advice — the October 2022 rescission letter was simply erroneous. And unsupported allegations of repudiatory vendor demands (the asserted $60,000 stamp duty demand) will fail against the documentary record.

The deposit holdings are the doctrinal centre, and the case is now the working NSW authority on over-10-per-cent deposits: *Dojap* is not a “10 per cent or nothing” rule; the questions are whether the payment is a genuine earnest of performance in the *Reliance Carpet* sense and whether the amount is reasonable, with special circumstances — purchaser-nominated, securing withdrawal from auction, modest exceedance — supporting 13 per cent. Instalment payment does not destroy deposit character (*Kazacos*), but ancillary payments without genuine deposit character (the “processing fee”) fall outside the forfeiture exception and must be returned; characterise each component of moneys paid at exchange separately.

On readiness, willingness and ability, the safe course for terminating vendors is to prove it affirmatively — as the defendant did, her sale to her son explained by need rather than avoidance — leaving the unresolved *Foran v Wight/Sharjade* debate about whether it is strictly required for deposit retention as a fallback rather than a battleground.

Section 55(2A) remains a genuinely limited discretion focused on whether retention is unjust and inequitable — not general equity between the parties — and a vendor who has terminated for genuine repudiation, without unconscionable conduct, will keep the deposit. The procedural footnote also matters: the refused eve-of-hearing amendment, against the permitted reliance on the December letter within the pleaded case, illustrates the distinction between introducing new allegations and relying on further evidence of pleaded ones.

***Kearney v Tamworth Poly Tanks Pty Ltd* [2025] NSWSC 729**

Hearing dates:	5 - 6 February, 24 - 25 March 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	9 July 2025
Before:	Schmidt AJ

LEASES AND TENANCIES – possession of commercial property – where property leased by mother to son for many years – dispute over terms of undocumented lease and payment of rent – notices to quit served – declaratory relief in respect of lease sought – refused – order for possession made

LOANS – where money loaned by mother to son – dispute about interest and repayment of loans – payment of unpaid interest and repayment of loans ordered

PROCEEDS OF THE SALE OF LAND – son and his parents previously registered proprietors of a farming property – proceeds of sale split between parents – claim for share of proceeds pursued against mother – Pallant v Morgan equity – son not entitled to share of proceeds

Background

The proceedings arose from the breakdown of the relationship between a mother and her son over money. Ms Kearney, a former farmer and businesswoman, sought possession of a Tamworth commercial property she owned and had long leased, undocumented, to her son and his company TPT (of which his wife became sole director in 2019), together with repayment of loans. The family history framed everything: the parents had farmed “Eumbra” in partnership and run a rural merchandise business; the son had been made a registered proprietor of Eumbra as a schoolchild “to secure his inheritance”; on the parents’ 2006 divorce the son bought the business from them, and when Eumbra sold in 2007 for about $4 million the net proceeds were divided equally between the parents, the son receiving no share and raising no claim. The parents had bought the Tamworth property in 2005 and built two industrial sheds; the mother became sole proprietor after the divorce. Rent rose on the contemporaneous records from $40,000 per annum in 2006 to $4,583.33 monthly from 2011 and later $6,000 monthly; after proceedings commenced the son unilaterally reduced payments to $3,400, paid irregularly. The mother had also lent considerable sums — $75,000 to TPT in 2007, $300,000 (repaid), a further $75,000 to TPT in 2008, $600,000 in 2008 for shares, and a contested $200,000 in 2010 — her final claim, after analysis of incomplete bank records, being $653,171.68 plus the TPT loans. She had lived rent-free at properties of the son's from 2014 until the 2023 breakdown. The defence attacked her capacity, attributed her financial position to profligacy and drinking, and asserted 2011 and 2019 agreements fixing rent at $40,000 until 2029; the son cross-claimed for $450,000 as half his asserted share of the Eumbra proceeds. Her evidence included that he had forged her signature on a bank guarantee, used her credit card without authority, and accessed her bank account without consent.

Approach and Principles

In undocumented family transactions, primary emphasis falls on objective surrounding material, inherent probabilities and the documentation (*Effem Foods v Lake Cumbeline* (1999) 161 ALR 599 at [15]; *Watson v Foxman* (1995) 49 NSWLR 315 at 319 on the fallibility of memory), with s 140 of the *Evidence Act 1995* (NSW) and *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 governing grave allegations (*Clancy v Plaintiffs A, B, C and D* [2022] NSWCA 119 at [26]–[30]). Incapacity ordinarily requires medical evidence (*Carey v Carey* [2020] NSWSC 765 at [7]–[8]; *Ferrier v Nationwide News (No 3)* [2015] NSWSC 1806 at [20] where none is led). Proprietary estoppel requires assurance, reliance and detriment (*Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387 at 404; *Doueihi v Construction Technologies Australia* [2016] NSWCA 105 at [131]–[136], [142], including the lower clarity standard in familial contexts; *Galaxidis v Galaxidis* [2004] NSWCA 111 at [93] on clear and unambiguous representations; *Delaforce v Simpson-Cook* [2010] NSWCA 84 at [21]). On the Eumbra claim: *Currie v Hamilton* (1984) 1 NSWLR 687 at 690 on the prima facie position; *Calverley v Green* (1984) 155 CLR 242 at 251, 257–258, 262, 267–268 on the time for finding a resulting trust and mortgage moneys; *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at [55], [65]; *Bosanac v Commissioner of Taxation* [2022] HCA 34 at [14]–[15], [32], [66], [122] on the presumption of advancement and its rebuttal by evidence of actual intention assessed from objective conduct; *Galati v Deans* [2023] NSWCA 13 at [54] on common intention constructive trusts; *Murtagh v Murtagh* [2013] NSWSC 926 at [83], citing *Ryan v Dries* [2002] NSWCA 3, on the procedure where mortgage funds are used. *The Pallant v Morgan* [1953] Ch 43 equity depends on fraud (*White City Tennis Club v John Alexander's Clubs* [2009] NSWCA 114 at [82]; *Chattock v Muller* (1878) 8 Ch D 177).

Disposition

Capacity: The attack failed. No medical evidence was led, and a woman who had pursued university studies after farming life, obtained a Master's degree and taught English, and who rationally pursued her claims — her initial tutor later dispensed with — was not shown incapable; the profligacy and drinking allegations were not established.

Credit and the records: The son's evidence was approached with considerable caution. His attack on the reliability of the bank records — descriptions he or his staff had entered — was rejected; the bank records, the business records of TPT and the merchandise company, the mother's tax returns (prepared by the same accountants who acted for the son's companies) and contemporaneous emails all supported her case, while his late-served analysis was inconsistent with the contemporaneous documents and produced concessions in cross-examination. Neither side called the accountants or any expert. The Court accepted her evidence on the credit card use (supported by his concessions) and on the forged bank guarantee — her evidence of being abroad at the time consistent with forgery — despite a bank employee's contrary evidence.

Lease and possession: The alleged 2011 and 2019 rent-fixing agreements were rejected: the contemporaneous payment records and tax returns contradicted them, and the son's own repeated failures to pay monthly were inconsistent with the agreements he asserted. The proprietary estoppel claim failed — the 2011 conversation depended solely on his evidence; the 2019 conversation post-dated the improvements, and his wife's recollection did not corroborate the critical terms. The alleged waivers of rent and interest during downturns were implausible where the mother depended on the income, and were contradicted by his own emails explaining he could not repay her until another property sold. Valid notices to quit had been served; possession was ordered, the unilateral post-commencement rent reduction unsupported by any agreement.

Loans: TPT was ordered to repay $150,000 with interest; the son $653,171.68, the contested $200,000 found to be a loan, not a gift. The limitation defence failed, ongoing part-payments and acknowledgements extending time.

Eumbra: The cross-claim failed comprehensively. The son contributed nothing to price, mortgage or interest; when he chose not to pursue farming, his parents secured his inheritance off-farm — the business shares, another property, the favourable Tamworth lease; his consent to the sale and distribution without claim, and sixteen years of silence, were inconsistent with any common intention that he share and rebutted the presumption of advancement on the *Bosanac* objective-conduct approach. The *Pallant v Morgan* equity failed because no fraud was pleaded or proved against either parent. He was, however, entitled to the benefit of rent paid by subtenants, given the underlying agreement that he lease the entire premises; his improvements claim failed, no basis for payment being articulated and the works (designed for TPT's particular needs) not enhancing the property's value.

Orders

Foreshadowed orders: possession to Ms Kearney; TPT to repay $150,000 plus interest; the son to pay $653,171.68 subject to set-off for direct subtenant payments; costs to follow the event unless short submissions sought within 14 days; parties to bring in orders.

Practical Takeaways

The fact-finding method is the first lesson and applies to every undocumented family commercial dispute: what the parties actually did over time is the best evidence of what they agreed. Bank records, tax returns and contemporaneous emails defeated decade-old recollections of conversations; a party's attack on the accuracy of records he himself created carried little weight; and the absence of accountant or expert evidence on either side left the contemporaneous documents to do all the work — a gap practitioners should fill in matters of this complexity.

Strategic capacity attacks face a high threshold: medical evidence is ordinarily required (*Carey*), and the target's demonstrated intellectual functioning and rational conduct of the proceedings will answer assertion. Equally, family proprietary estoppel claims still require clearly proved representations — *Doueihi's* relaxed clarity standard in familial contexts does not dispense with corroboration of the critical terms, and assurances allegedly given after the detriment was incurred prove nothing.

On family farm succession, the Eumbra holding is the centrepiece: registration as proprietor without contribution is not enough, and the *Bosanac* objective-conduct approach rebuts the presumption of advancement where the claimant consented to the sale and distribution and stayed silent for sixteen years. Alternative provision made for the claimant — shares, property, a favourable lease — will tell strongly against any common intention to share, and a *Pallant v Morgan* equity cannot run without pleaded and proved fraud.

Alleged informal waivers of rent or interest will be tested against the alleged waivor's circumstances: a financially dependent parent does not plausibly waive the income she lives on, and the claimant's own contemporaneous emails will be decisive. Unilateral reduction of rent after proceedings commence is evidence of nothing but the dispute.

The credit findings illustrate that the surrounding facts can carry a disputed party's account even against apparently contrary direct evidence — the forgery finding standing despite the bank employee — while derivative spouse evidence, reflecting what the principal party has said over the years rather than observation, will rarely move contested matters.

The broader point is the one elderly clients most need to hear: family informality will not be permitted to defeat a parent's substantive rights, and the Court will engage seriously with financial abuse — forged guarantees, credit card use, account access — as part of the overall picture. Orthodox contract, estoppel and trust principles apply with full force inside families.

***Kazar in his capacity as trustee for the Bankrupt Estate of Blue v Blue* [2025] NSWSC 631**

Hearing dates:	12 June 2025
Jurisdiction:	Supreme Court of New South Wales
Date of orders:	12 June 2025
Before:	Pike J

LAND LAW – possession of land – claim by trustee in bankruptcy against bankrupt – where bankrupt has not in engaged in proceedings – judgment for possession

Background

The plaintiffs, trustees of the defendant's bankrupt estate following a July 2024 sequestration order, sought possession of his Gosford home. The property had vested in them under s 58 of the *Bankruptcy Act 1966* (Cth), and they had been recorded as registered proprietors in June 2025 by Bankruptcy Application under s 90 of the *Real Property Act 1900* (NSW). The bankrupt had provided no statement of affairs, ignored requests for vacant possession, and evaded service; orders for substituted service (express post and affixing to the front door) had been obtained, and the Court was satisfied he knew of the proceedings and the hearing. The proceedings had been commenced by summons rather than statement of claim.

Disposition

The trustees were entitled to possession: the property was the bankrupt's at the date of bankruptcy, had vested under s 58, and they were registered proprietors, the trustees being under a duty under s 19(1)(f) to recover property for the estate. The procedural irregularity of commencement by summons was dispensed with under s 14 of the Civil Procedure Act 2005 (NSW), proper service having been effected under the earlier orders. Leave was granted to issue a writ of possession on or after 11 July 2025.

Orders

Requirement to commence by statement of claim dispensed with. Judgment for possession. Sealed orders to be affixed to the front door and placed in the mailbox within seven days. Leave to issue a writ of possession on or after 11 July 2025.

Practical Takeaways

The decision is a clean template for trustee possession claims: s 58 vesting operates from sequestration independently of title, s 90 registration gives it effect on the Register, and the combination delivers possession efficiently where the bankrupt does not engage.

Where the bankrupt is evasive, early orders for substituted service are essential, procedural defects (here, commencement by summons) can be cured under s 14 of the CPA where notice is sound, and notice must be renewed at each stage — including affixing the sealed possession orders themselves.

***Grubisa v Zhou* [2025] NSWSC 942**

Hearing dates:	23 July 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	20 August 2025
Before:	Pike J

CONTRACTS – Rectification – Intention – Common intention – whether the date of the contract is 17 May 2024 or 23 May 2024

LAND LAW – Conveyancing – Contract for sale – Deposit – relief against forfeiture of deposit – whether deposit should be returned pursuant to Conveyancing Act 1919 (NSW), s 55(2A) – no question of principle

Background

The plaintiff, a mortgage broker, agreed to buy a Bella Vista property from the defendant for $3,700,000, with settlement 26 weeks from the contract date; the dispute was whether that date was 17 or 23 May 2024. The property had been listed in February 2024; the plaintiff inspected in April, and by 17 May the parties had agreed price, a 10 per cent deposit by bond, the 26-week settlement and a tenancy of up to 12 months. On 17 May the agent sent both parties, via Docusign, an Authority to Exchange recording those three Special Conditions and counterpart contracts each dated 17 May 2024 — though the counterparts omitted the Special Conditions; both parties signed and returned the documents that day, and the agent exchanged. Between 17 and 23 May the agent chased the plaintiff for the deposit bond and s 66W certificate; on 23 May the defendant's solicitor sought authority to amend the exchanged contract to insert the agreed Special Conditions, and the plaintiff's new solicitor provided the certificate and bond. Settlement fell due on 18 November 2024; an extension was refused; a default notice concerning the bond was served and cured by a replacement bond; a Notice to Complete issued on 20 November requiring completion by 4 December, extended to 11 December; the plaintiff could not raise the funds; and the defendant terminated on 11 December 2024. He sued in January 2025 for specific performance and rectification of the contract date to 23 May, lodging two caveats — the first claiming a mortgage interest, withdrawn in July; the second lodged in June 2025 after the defendant resold for $3.8 million, the resale carrying a purchaser's right to rescind if settlement did not occur by 16 September 2025. Shortly after 4pm the day before the hearing, the plaintiff abandoned specific performance, seeking only return of the deposit including under s 55(2A) — permitted on the basis the defendant could meet the case — and consented to withdrawal of the second caveat; the defendant cross-claimed for caveat removal and compensation under s 74P of the *Real Property Act 1900* (NSW).

Approach and Principles

Construction proceeded on the principles summarised in *1128 CG v MH Affordable Homes on Kelly* [2025] NSWSC 563 at [106]–[111], drawing on *Electricity Generation Corporation v Woodside Energy* (2014) 251 CLR 640 at [35] (meaning as understood by a reasonable businessperson; context and commercial purpose; avoidance of commercial absurdity), *Mount Bruce Mining v Wright Prospecting* (2015) 256 CLR 104 at [48], and *Zhang v ROC Services (NSW)* [2016] NSWCA 370 at [53], [80]–[87]. Rectification requires clear and convincing proof of a common intention, continuing to execution, and a common mistake in recording it (*Simic v NSW Land and Housing Corporation* (2016) 260 CLR 85 at [103]–[104]; *Franklins v Metcash* (2009) 76 NSWLR 603 at [451] (Campbell JA)). The customary method of making a binding contract for sale is the exchange of counterparts (*Allen v Carbone* (1975) 132 CLR 528 at 533). Caution attends arguments from commercial common sense (*The J & P Marlow (No 2) v Hayes and McCabe* (2023) 112 NSWLR 29 at [76]–[80] (Bell CJ)). On s 55(2A): *Akrawe v Culjak* [2023] NSWCA 171 at [100]–[101]; *Stokes v Toyne* [2023] NSWCA 59 at [99]–[106]; *Lucas & Tait (Investments) v Victoria Securities* [1973] 2 NSWLR 268 at 272; *Romanos v Pentagold* (2003) 217 CLR 367 at [27]; *Havyn v Webster* [2005] NSWCA 182 at [137], [150]–[151], [155]; *Nassif v Caminer* [2009] NSWCA 45 at [67], [91]; *Rushcutters Bay Developments v Dragon Asset Investment (No 2)* [2017] NSWSC 866 at [93]. Readiness, willingness and ability was approached per *Lewington v Dulyakarn* [2025] NSWSC 635 at [121]–[138].

Disposition

Contract date: 17 May 2024. The parties contracted by the customary exchange of counterparts, each dated 17 May, the agent exchanging under the executed Authority; the later provision of the deposit bond and s 66W certificate did not displace the date. The unpleaded argument that the parties were not bound until 23 May failed on the same facts — nothing after 17 May suggested they were not bound by the exchange. The commercial-common-sense submission that a vendor would not wish to be bound without the deposit was rejected with the *Marlow* caution: the vendor's protection is the right to terminate for non-payment, not delayed formation.

Rectification: Refused. The communications from 17 to 23 May — the agent chasing the purchaser for outstanding deliverables — were consistent with a binding 17 May agreement, not with a common intention for a 23 May date; an RP Data printout recording the campaign ending 24 May was an entry by an unknown person with no bearing on the contract date (and the contract would in any event have been rectified only to insert the omitted Special Conditions, not to change its date).

Termination and readiness: The 26 weeks ran from 17 May, so the Notice to Complete and the 11 December termination were valid. The plaintiff was willing but neither ready nor able: extensively cross-examined on his capacity to raise the funds, he could not; even his post-termination proposal was for a late-December settlement; and suggested alternative finance sources were unsubstantiated. No attempt was made to prove readiness as at the hearing, specific performance having been abandoned.

Section 55(2A): Refused. The defendant was slightly better off — resale $100,000 higher and rental income of $2,500 per week, against mortgage interest and re-marketing costs — but a modest windfall does not make retention unjust or inequitable, the defendant remained out of pocket on costs, and the deposit's function as an earnest of performance should not be weakened.

Caveats: The first, incorrectly describing the interest as a mortgage, had been withdrawn voluntarily; the second was withdrawn by consent at the hearing, and the s 74P compensation claim was not pressed in that light.

Orders

Statement of claim dismissed. Parties directed to confer on remaining orders, including the cross-claim and costs (the preliminary indication being that the plaintiff pay the defendant's costs absent any application for a special order), failing which competing orders and short submissions to be determined on the papers.

Practical Takeaways

Electronic exchange is exchange: Docusign execution of counterparts and an Authority to Exchange, followed by the agent's exchange under that authority, makes a binding contract on the date the counterparts bear (*Allen v Carbone*). Outstanding deliverables — deposit bond, s 66W certificate, finalisation of ancillary arrangements — do not delay formation, and commercial common sense will not be deployed to postpone it where the vendor's termination rights already supply the protection (*Marlow*).

Rectification of a contract date demands clear and convincing proof of common intention and common mistake (*Simic; Franklins*): agent-chasing correspondence consistent with an existing contract proves neither, and third-party platform entries made by unknown hands have no probative value on the dealings between the parties.

The drafting lesson is the discrepancy between the counterparts and the Authority to Exchange: the agreed Special Conditions belonged in the contracts themselves. Layered documentation through authorised agents invites exactly this dispute, and consistency between the counterparts and the exchange authority should be checked before signing.

On readiness, the purchaser bears the burden: genuine ongoing efforts to raise finance, and unsubstantiated talk of alternative sources, do not satisfy it — the financing must be progressed to the point of imminent settlement, and a vendor's resale during the proceedings (with a rescission deadline) applies strategic pressure that purchasers must be ready to meet or abandon the claim, as occurred here on the eve of hearing.

The s 55(2A) holding extends *Lewington*: a vendor's modest advantage from a higher resale — here $100,000 plus interim rent, offset by holding and re-marketing costs — will not engage the discretion, and the deposit's function as an earnest of performance is not to be weakened. Vendors should preserve evidence of their holding costs to meet any such application.

The caveat sequence is its own caution: a caveat misdescribing the interest, and a second lodged against a resale after the claim had weakened, exposed the caveator to s 74P; voluntary withdrawal once the underlying claim is abandoned is the only sensible course, and here bought off the compensation claim.

***Goulston v Bogasi Pty Ltd; Bogasi Pty Ltd v Sundell; Tamara Jane Goodwin as Administrator of the Estate of James Ralph Sundell v Bogasi Pty Ltd as Trustee for the James Ralph Sundell Trust* [2025] NSWSC 989**

Hearing dates:	8-11,15,18, 22-24, 29, 30 April 2024; 1-2, 6-9, 14 May 2024, 19-20 June 2024
Jurisdiction:	Supreme Court of New South Wales
Decision date:	29 August 2025
Before:	Kunc J

EQUITY — Trusts and trustees — Express trusts — Declaration of trust

ESTOPPEL — Various types — No issue of principle

LAND LAW — Torrens title — Exceptions to indefeasibility

SUCCESSION — Construction — Gifts

Background

Three consolidated proceedings concerned the Sundell family business group following the deaths of Gunnar Sundell (2006) and his brother Jim (2017), who left three children: Kim, Anne-Katrine and Brett. In 1998 the Group had acquired the Elders property holdings through two unit trusts, with Kim taking 10 units in each through his company and holding the remaining 90 (the Elmach units) on an undocumented "warehousing" basis, the ultimate holder deferred indefinitely for stamp duty and CGT reasons. In 2012, consent orders in Kim's Family Court proceedings declared the Elmach units "held by [Kim] on trust for [Jim] and/or his nominee"; Kim claimed Jim verbally nominated him in 2013. The proceedings comprised Anne-Katrine's claim to full beneficial ownership of her Beecroft home (held 80 per cent her, 20 per cent Elmach), Bogasi's claim against Kim for an admitted debt of $13,964,189.36 plus interest, a cross-claim against Jim's estate for breach of trust and fraud on a power, and will construction questions over cl 4 (family debts) and cl 6 ("my farming property").

Disposition

Kim's evidence was accepted only where corroborated; Anne-Katrine and the independent witnesses were accepted. On the proper construction of the 2012 Declarations in their Family Court context, Kim could not be the nominee — only Gunnar or a Sundell Group company qualified, and Elmach was not part of the Group — so the Nomination, though factually made, was invalid, and Kim breached the trust by treating himself as beneficial owner; his conventional estoppel, laches, Anshun and issue estoppel defences all failed, the asserted common assumption of equal sharing between family branches not being established. Anne-Katrine failed to displace Elmach's 20 per cent interest in the Beecroft property, which Elmach holds absolutely, with trustees for sale to be appointed under s 66G if the parties cannot agree. Kim's admitted debt carried pre-judgment interest from commencement, with a set-off through cl 4 to the extent the estate pays Bogasi. On the will, applying *Fell v Fell* (1922) 31 CLR 268 at 273–276 and the orthodox canons: cl 4 was a direction to the administrator — not a set of legacies — to pay family members' debts to Bogasi out of the estate after Jim's strict debts, rateably if insufficient, such third-party obligations not being debts of the estate (*Commissioner of Stamp Duties (NSW) v Bone* (1976) 135 CLR 223 distinguished); and "my farming property" in cl 6 carried only Jim's tenancy-in-common interests in the two lots he owned, the lots held by Bogasi as trustee being incapable of devise.

Orders

Form of orders reserved. Removal of Elmach as trustee reserved. Parties commended to mediation.

Practical Takeaways

Nomination clauses in matrimonial consent orders are construed against their context: the permissible class of nominees here excluded the registered holder himself, and ambiguity will not be resolved in favour of constructions that defeat the substantive purpose of the compromise. Draft the class expressly.

Decades-long "warehousing" of units on undocumented understandings is a litigation engine — and a general family practice of equal sharing between branches creates no enforceable rights without intention to create legal relations.

The will construction holdings are independently useful: a testator cannot convert third parties' debts into debts of the estate; "I direct" payment clauses rank analogously to general legacies and abate rateably; and a devise of "my farming property" cannot carry land the testator held only as appointor of the trustee that owned

***Exceed Education Pty Ltd t/as Young Minds Academy v Sylvester* [2025] NSWSC 1185**

Hearing dates: 2 October 2025

Jurisdiction; Supreme Court of New South Wales

Decision date: 9 October 2025

Before: Pike J

LEASES AND TENANCIES – Assignment and subletting – Consent – Whether unreasonably withheld – no question of principle

LEASES AND TENANCIES – Rent and outgoings – calculation of outstanding rent – fossicking in a sea of documents – no question of principle

Background

Exceed Education operated the Mirrabooka Early Childhood Centre from premises owned by Ms Sylvester, having purchased the business from her company in July 2022 for $675,000 and taken a 10-year lease with two 10-year options. A Deed of Variation of the same date held back $150,000 of the purchase price pending Ms Sylvester arranging a successful DA to increase capacity from 20 to 38 children, with rent then recalculated; the Lease was never amended to reflect the Deed. Water ingress damaged the property between November 2023 and April 2024; Exceed's insurance claim failed while Ms Sylvester recovered about $26,230, and from November 2024 Exceed withheld rent — ultimately about $79,000 — relying on cl 8.2 of the Lease. The Department of Education issued a non-compliance notice over broken retaining walls, uneven soft fall and drainage; conditional development approval was granted in March 2025. In July 2025 Exceed contracted to sell the business to GAD for $1.2 million (including $500,000 vendor finance), conditional on transfer of the Lease, and on 29 August sought consent under cl 10.1, supplying ASIC extracts, GAD's balance sheet (assets $987,313 including $800,000 goodwill; liabilities $538,245), a profit and loss showing first-year net profit of $258,355.82, a transferring provider declaration and a statement of the director's qualifications. Ms Sylvester's solicitors responded conditionally on 5 September: $150,000 into their trust account pending resolution of the Deed of Variation issues; variation of the Lease; and resolution and payment of outstanding rent on completion. With GAD's notice to complete requiring completion by 13 October, Exceed sued on 19 September and the matter was heard urgently.

Approach and Principles

The Court applied *Tamsco v Franklins* [2001] NSWSC 1205 at [49] (Young CJ in Eq), adopting the seven propositions of Balcombe LJ in *International Drilling Fluids v Louisville Investments*

(Uxbridge) [1986] Ch 513 at 519–521: the covenant against assignment without consent protects the lessor from undesirable use or occupation; a landlord cannot refuse consent on grounds unrelated to the landlord–tenant relationship; the tenant bears the onus of showing consent unreasonably withheld; the landlord need not prove its conclusions were justified, only that they were conclusions a reasonable person could reach; refusal may be reasonable on grounds of intended use; the consequences to the tenant may be weighed; and otherwise it is a question of fact in all the circumstances. The question is ultimately contractual (*Cathedral Place v Hyatt of Australia* [2003] VSC 385 at [27] (Nettle J)) and context-specific (*Construction Technologies Australia v Doueihi (No 5)* [2018] NSWSC 294 at [64]–[67] (Kunc J)); abstract thresholds are to be avoided (*Fulham Partners v NAB* [2013] NSWCA 296 at [45], [59] (Basten JA)); and the reason for refusal must affect the subject matter of the contract forming the landlord–tenant relationship (*Secured Income Real Estate v St Martins Investments* (1979) 144 CLR 596 at 610, citing *Colvin v Bowen* (1958) 75 WN (NSW) 262 at 264; *Pimms v Tallow Chandlers Company* [1964] 2 QB 547 at 564, 566–567). Financial resources are assessed practically, not from the standpoint of a "pedantic chartered accountant" (*Re Greater London Properties Ltd's Lease* [1959] 1 WLR 503 at 507). A collateral purpose connected with the Lease is not necessarily bad, but where consent conditions pursue collateral advantage rather than legitimate landlord concerns, they will not stand (*Tamsco* at [53]–[55]). Clause 10.2.1 obligations (no subsisting breach) fall for satisfaction at the time of transfer, not as a precondition to a valid consent request (*Spintar v Ranieri Nominees*, Bryson J, 1 February 1991, unreported). Section 133B of the *Conveyancing Act 1919* (NSW) was considered but added little to the contractual framework.

Disposition

Valid request: Exceed complied with cl 10.3. The 29 August letter and attachments were sufficient; the contemporaneous exchange was the most reliable evidence of what was required, and Ms Sylvester's conditional response raised no insufficiency of financial information — had more been required it would have been requested. The business sale contract had not been required (the letter expressly stated it was not relevant and no further step was taken), and the vendor-finance point was answered by the offsetting asset in the accounts; a later request for GAD's lawyer's details concerned documenting a Lease amendment, not financial checking.

Respectability and resources (cl 10.2.2): Established on a practical and realistic view: GAD was an existing childcare provider with a first-year net profit of $258,355.82. Ms Sylvester's comparative argument — that GAD was less experienced and financially weaker than Exceed — raised a false issue: the test is not comparative; the question is whether the incoming tenant is respectable with sufficient resources.

The $150,000 condition: Unreasonable. Ms Sylvester was seeking a collateral advantage beyond that contemplated by the Lease: the Deed of Variation transaction involved separate entities on her side, the $150,000 was not presently due and payable, and transfer of the Lease did not affect her rights under the Deed. Had she wanted security, she could have negotiated it in 2022; the cost and effort of obtaining the DA did not transform an unreasonable security demand into a reasonable one.

Breach at the time of the request (cl 10.2.1): Her construction — that a lessee in breach could never make a valid consent request — was rejected. The obligation falls for satisfaction at transfer, and a disputed rent claim can be resolved by the Court, with payment of the determined amount made a condition of specific performance (the Spintar approach).

The rent (cl 8.2): Exceed was not entitled to withhold rent in full: cl 8.2.1 applies only where the property cannot be used or is inaccessible; cl 8.2.2 provides proportionate reduction for diminished useability, and the lessee bore the onus of proving the proportion. The evidence supported only some proportionate reduction and supplied no basis to assess it, so none was given. Starting from Ms Sylvester's transparent calculation of $49,360.96 outstanding, deductions were allowed of $4,070 (the approved retaining wall quote) and $26,230.20 (the insurance proceeds she acknowledged would be reinvested in the property), leaving $19,060.76. No deduction was allowed for the $43,000 synthetic grass replacement: approval of a quote did not establish agreement to bear the cost, and the reason for the replacement was not proved.

Credit: Ms Sylvester was an honest witness, but her cross-examination concessions were treated with caution given a hearing impairment that on several occasions caused difficulty hearing or understanding questions — affecting weight, not credit**Orders**

Declaration that consent was unreasonably withheld. Order in the nature of specific performance conditional on payment of $19,060.76 at or before completion of the transfer; Ms Sylvester to do all things necessary to allow it. Costs to be agreed or determined on the papers. Liberty to apply on two hours' written notice.

Practical Takeaways

The decision is a model modern application of the *Tamsco/International Drilling* framework, and its central holding is the collateral advantage point: a landlord cannot use transfer consent as leverage to secure performance under a separate transaction — here a sum not presently due, owed under a deed between different entities on the landlord's side. Interests of that kind must be secured in the underlying agreement when made; the consent gate is not a debt-collection device, and the proper course for genuine arrears is to require their payment as a condition of consent.

The cl 10.2.2 assessment is absolute, not comparative: the question is whether the incoming tenant is respectable with sufficient resources, judged practically (*Re Greater London Properties*), not whether it matches the outgoing tenant. Landlords assessing assignees should resist comparative framing.

Information requirements must be articulated contemporaneously with the consent request — the exchange at the time is the best evidence of what cl 10.3 required, and after-the-event assertions of insufficiency will be discounted. Landlords intending to refuse should put every information demand in writing at once.

A lessee in arrears can still make a valid consent request: breach-free status falls for satisfaction at transfer (*Spintar*), and the Court can quantify disputed rent and make payment a condition of specific performance — a procedural template that rescued a $1.2 million business sale here over a $19,000 rent dispute, on a timetable from commencement to judgment of three weeks.

For tenants, the cl 8.2 analysis is the warning: total rent withholding requires total inability to use, proportionate reduction requires proof of the proportion, and acknowledged impairment without quantification yields nothing. Repair-cost deductions equally require proved agreement on liability — approval of a quote is not acceptance of the bill — though insurance proceeds earmarked for the repairs will be credited.

The witness-management point is worth filing: a hearing impairment disclosed and accommodated affects the weight of apparent concessions, not the witness's credit.

***Espiritu v Espiritu; Espiritu v Espiritu* [2025] NSWSC 1554**

Hearing dates:	5, 8, 11 and 12 December 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	15 December 2025
Before:	Parker J

LEASES AND TENANCIES — Residential Tenancies Act 2010 (NSW) — Sale of premises – Termination by Landlord – Where landlords and tenants both contributed to the purchase of the property – Whether the landlord holds a portion of interest in the property on trust for the tenant

LEASES AND TENANCIES — Residential Tenancies Act 2010 (NSW) — NSW Civil and Administrative Tribunal — Jurisdiction and power – Whether the Supreme Court has jurisdiction to direct NCAT to order the termination of a lease

Background

The litigation concerned a Hurstville property occupied by Amor and Iris Espiritu, its original owners, who in 2009 transferred it by formal contract at $735,000 to their son Rolando and his wife Julie and leased it back. On settlement the parents' $459,000 mortgage was discharged and $145,000 was paid back to the son and daughter-in-law, apparently as the deposit on their own Macquarie Street home; the purchase was funded by loan finance secured on the Hurstville property with the owners as borrowers. Two residential tenancy agreements followed — $350 per week from December 2009, $500 from December 2021, periodic from December 2022. In 2025 the owners, under financial pressure from other property dealings, negotiated through family intermediaries for the tenants to surrender the tenancy, live with them at Macquarie Street after renovations, and receive $270,000 from the sale proceeds; acting on the assumption of agreement, they exchanged a $2,006,000 sale contract on 25 October 2025 with completion fixed for 6 December. The arrangement collapsed; the tenants stopped paying rent on 27 October, their solicitor asserting they were the true "owners" and the tenancy agreements a sham. The owners served a termination notice requiring vacation by 28 November and commenced NCAT proceedings seeking termination and possession; expedition was refused and the matter fixed for January. The tenants caveated, claiming an "equitable fee simple" by an unparticularised "agreement"; after a lapsing notice they filed a Supreme Court summons seeking declarations of constructive trust (proportions to be determined), alternatively an equitable charge, compensation and an account, with interlocutory relief — extension of the caveat, an injunction against dealing, and production of an extensive range of documents. Hmelnitsky J declined to extend the plainly defective caveat and referred the matter to the Expedition Judge; the owners cross-claimed for specific performance of the agreement to vacate; and five hearings followed over eight days, complicated by the tenants' solicitor's unavailability.

Approach and Principles

The principal claim was a failed joint endeavour constructive trust within *Muschinski v Dodds* (1985) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 137, the Court drawing on its own decisions in *Woods v McKinlay (No 2)* [2021] NSWSC 1510 (appeal: *McKinlay v Woods* [2024] NSWCA 122) and the *Makaritis v Makaritis* series ([2022] NSWSC 468; *(No 2)* [2022] NSWSC 1690; *(No 3)* [2023] NSWSC 409, the last at [7]–[57], [158] as an example of properly formulated final relief). *Makaritis* at [40]–[50] supplies the consequence for interlocutory relief: a failed joint endeavour trust obliges the owners to sell the property, discharge the mortgage, reimburse contributions and divide any surplus — relief inconsistent with the claimants retaining occupation. The statutory framework: s 81 of the *Residential Tenancies Act 2010* (NSW) states the exclusive grounds of termination — by notice and vacant possession (s 81(2)), by Tribunal order (s 81(3)), and the automatic grounds including disclaimer (s 81(4)(g)); s 119 prohibits seeking possession orders outside the Tribunal; s 88 governs non-payment of rent and s 87D termination on entry into a contract for sale. Following transfer of Tribunal proceedings, the Court can determine whether a landlord is entitled to a termination order, declare accordingly, and remit to the Tribunal for the order (*Lawrence v Gunner; Gunner v Lawrence* [2015] NSWSC 944 (Stevenson J)).

Disposition

Interlocutory relief refused: Counsel confirmed the claim as a failed joint endeavour constructive trust; on that footing it was within orthodox principle, the endeavour arguably extending through the $145,000 to Macquarie Street as well. But the doctrinal nature of the relief — sale and division — was inconsistent with the tenants retaining occupation, so the alleged equity could not support extension of the caveat, withdrawal of the lapsing notice, or an injunction; counsel ultimately accepted as much, and the interlocutory claims were dismissed. An injunction restraining dissipation of any surplus might be a different matter; an injunction to maintain occupation could not be. Nor did the alleged equity confer any present right to production of documents — discovery would come in the ordinary course.

Pleadings ordered: The prayers for final relief were defective, the Court observing that this is "not an uncommon phenomenon" in such claims: a plaintiff must specify the orders actually sought — identifying the nature and scope of the joint endeavour, the contributions to be reimbursed or an accounting mechanism for calculating them, and the division of any surplus — on the model of *Makaritis (No 3)*. The defective prayers would have been struck out but for the indication that the statement of claim would contain properly formulated replacements.

The cross-claim and termination: The pendency of the equity claim was no answer to the owners' claim for possession, but no possession order could be made while the tenancy subsisted — the Court noting the paradox of tenants clinging to possession under the very agreements they called a sham, while pursuing relief that would require the property to be sold with vacant possession; they were nonetheless entitled to maintain any legal right of possession, however shortsighted. The owners' claims — specific performance of the agreement to vacate, promissory estoppel in the alternative, and termination by acceptance of repudiation (the disclaimer ground in s 81(4)(g) being the statutory peg for the tenants' rent strike and assertions of ownership and sham, accepted by formal letter) — raised factual issues about the intermediaries' authority and the tenants' intent that precluded an expedited hearing before the end of term. The statutory grounds under ss 88 and 87D appeared clearly available — the rent was unpaid and no defence to the contract-for-sale ground was articulated — but an expedited Supreme Court hearing limited to them was not justified: the matter would still have to return to the Tribunal for the making of the order, and any hardship or deferral questions were for the Tribunal. The Tribunal Claim, transferred up by consent, was sent back to NCAT for determination of those grounds, hopefully in January.

Orders

The interlocutory prayers of the tenants' summons dismissed. Proceedings to continue on pleadings: statement of claim by 14 January 2026, defence and cross-claim with evidence by 28 January 2026, cross-defence with evidence by 4 February 2026, directions 6 February 2026. The Tribunal Claim transferred to NCAT.

Practical Takeaways

The central doctrinal point is the *Makaritis* consequence: a *Muschinski/Baumgartner* failed joint endeavour equity is an equity to sale and division of proceeds, not to retention of an interest in land. It will not support a caveat claiming an equitable fee simple, an occupation-preserving injunction, or early production of documents — though an injunction restraining dissipation of the surplus may be available. Characterise the underlying equity before seeking interlocutory relief; the wrong characterisation is fatal.

The pleading guidance is of general application in the Equity Division: prayers seeking "a constructive trust in such proportion as the Court determines" are defective. The relief must identify the joint endeavour's nature and scope, the contributions to be reimbursed or an accounting mechanism, and the division of surplus — *Makaritis (No 3)* at [158] is the Court-endorsed template.

Where family property equities collide with residential tenancy regulation, the statutory framework holds: s 81 states the exclusive termination grounds, s 119 reserves possession to the Tribunal, and even where the Supreme Court could declare entitlement and remit (*Lawrence v Gunner*), it will be slow to conduct an expedited hearing whose product must in any event return to NCAT — with hardship questions for the Tribunal. Landlords should not expect the Court to substitute itself for the Tribunal merely because parallel equity proceedings exist.

The repudiation/disclaimer pathway under s 81(4)(g) deserves attention from landlords facing tenants who assert ownership inconsistent with the tenancy: a rent strike coupled with assertions of sham, met by a formal letter of acceptance, may terminate without any Tribunal order — and the tenants' own paradox (invoking the tenancy's protection while denouncing it as a sham) invites exactly that analysis.

The lease-back structure at the root of the dispute is the transactional warning: where parents transfer the family home to children and remain as tenants, the substantive arrangements — who contributed what, who is to receive what on sale — must be documented at the time. Sixteen years of informality produced three parallel proceedings, a defective caveat, and eight hearing days before pleadings had even closed.

Expedition has practical limits: secured availability of representation throughout is essential, and counsel appearing with limited instructions in a fast-moving list will compound rather than cure the difficulties.

Commonwealth Bank of Australia v Stackman [2025] NSWSC 569

Hearing dates: 3 June 2025

Date of orders: 3 June 2025

Decision date: 03 June 2025

Jurisdiction: Common Law

Before: Davies J

LAND LAW – possession of land – where defendant re-entered land after execution of writ – where writ of restitution sought – where service of judgment with endorsement threatening committal or sequestration authorised

Background

The bank had obtained default judgment for possession of a Walcha property and $248,611.23 in September 2023, and the Sheriff executed the writ of possession in March 2024. Persons connected to the defendant then re-entered and remained in occupation with animals and other property on the land, and the bank was unable to regain possession because of threats of violence. It sought a writ of restitution and an order under UCPR r 40.7 that the judgment be served endorsed with notice that the defendant and named family members were liable to imprisonment or sequestration if they remained or re-entered.

Disposition

Applying *ANS Nominees v Beverly Manufacturing* [1979] 2 NSWLR 875 at 878, r 40.7 operates as an indirect power for the enforcement of judgments rather than punishment for contempt: the threat of committal or sequestration persuades performance of the act required — here, delivery of vacant possession — and operates also against persons connected to the defendant who have re-entered. Satisfied on the agent's detailed affidavit of the re-occupation, the retained property and the threats, the Court granted the writ of restitution and the endorsement naming the defendant and two family members, dispensed with personal service, and ordered substituted service by letterbox, post, email and a text alerting the defendant to the delivery. Failure to remove the animals and other property would entitle the plaintiff to seize and sell them, the defendant having been warned.

Orders

Leave for issue of a writ of restitution. Order under UCPR r 40.7 for service of the sealed judgment endorsed against the defendant and two named family members. Personal service dispensed with; substituted service by letterbox, prepaid post, email and text.

Practical Takeaways

Where occupants re-enter after Sheriff's execution, the layered response is a writ of restitution to recover possession plus a r 40.7 penal endorsement to deter further re-entry — the endorsement extending to named persons who derive their occupation from the judgment debtor, even though not parties.

ANS Nominees supplies the doctrinal frame: r 40.7 enforces, it does not punish, so no contempt proceedings are needed at this stage. A comprehensive affidavit documenting the re-occupation, the connected persons, the threats and the property warnings is the foundation, and substituted service should propose multiple complementary modes.

***Carlingford Montessori Academy Pty Ltd v Thallon HLD Pty Ltd* [2025] NSWSC 630**

Hearing dates:29 May 2025

Date of orders: 20 June 2025

Decision date: 20 June 2025

Before: Pike J

LEASES AND TENANCIES – Default and termination – Relief against forfeiture – where the change of ownership of the shares of the tenant company constitute an assignment of the lease – where consent was not sought for the assignment of the lease – whether to grant relief against forfeiture – no question of principle

EVIDENCE – Standard of proof – Civil cases – where defendant alleges that plaintiff made up evidence of serious wrongful conduct of defendant – application of Briginshaw – application of s 140(2) of Evidence Act 1995 (NSW) – no question of principle

Background

CMA, part of the 60-centre Montessori Academy group, held a 10-year lease (two 10-year options, $216,000 per annum, never registered) of a Carlingford childcare centre approved for 72 children daily, with 92 enrolled, 21 permanent staff and 10 regular casuals. Clause 8.3(1) deemed any change in the persons beneficially owning or controlling a majority of the tenant's voting shares an assignment requiring the lessor's consent. In September 2022, a 25 per cent shareholder in CMA's holding company — CAVS16, the company of Mr Fayad, who was also Thallon's director — sold its shares for $645,175 to MAG, the existing 50 per cent holder; Mr Assaf, the group CEO, negotiated directly with Mr Fayad, and no formal consent was sought. Three days later Mr Fayad signed a Side Deed for Thallon under which CMA paid almost $50,000 of Thallon's overdue strata levies. Negotiations for the group to buy the premises followed, Mr Fayad's asking price falling from $5 million to $3.5 million; Mr Assaf's contemporaneous file note of a 2 April 2024 call recorded Mr Fayad asking him to agree to an artificial $50,000 rent increase to inflate the sale price, repayable to Mr Assaf personally — refused. In June 2024 Mr Fayad sought consent documentation for a "change in ownership of the tenant which took place in 2019"; termination and breach notices followed, the operative Notice of Breach addressing the 2022 change in control. CMA's challenge to the Notice failed before Williams J in February 2025, Thallon's construction of cl 8.3 being upheld, and CMA accepted the breach. Thallon refused consent to a further November 2024 shareholding change (Mr Assaf's interest rising from 44 to 60 per cent), relying on the contested default; served a Notice of Termination effective 31 March 2025; and on 21 May 2025 entered a conditional 10-year lease with LVR Management at $430,000 per annum — nearly double —

conditional on terminating CMA's lease. CMA sought relief against forfeiture and registration of the Lease.

Approach and Principles

Relief under s 129(2) of the *Conveyancing Act 1919* (NSW) attends to the gravity of the breach, whether it was inadvertent or wilful, the damage to the covenantee, and the relative loss to the covenantor against the covenantee's gain (*Ace Property Holdings v Australian Postal Corporation* [2010] QCA 55 at [163] (Keane JA)). Equitable relief proceeds on unconscionability (*Legione v Hateley* (1983) 152 CLR 406 at 444, 449 (Mason and Deane JJ)), the substantive questions being whether the lessor contributed to the breach, whether it was trivial and inadvertent, the damage suffered, and the magnitude of the lessee's loss against the lessor's gain — including the unmerited windfall consideration applied in *Byron Bay Retirement Villages v Zandata* [2008] NSWSC 1123 at [50] (Palmer J) and *Steel Supplies Bega v Shoveller* [2014] NSWSC 1612 at [141] (McDougall J). A breakdown in the relationship of trust and confidence may justify refusal in unusual cases (*Casquash v NSW Squash (No 2)* [2012] NSWSC 522 at [58]–[59] (Pembroke J)), but ordinary commercial animosity will not (*Darzi Group v Nolde* [2021] NSWSC 774 at [275]; *Hookey v Whitelaw* [2020] QSC 63 at [154]). Serious allegations of fabrication attract s 140(2) of the *Evidence Act 1995* (NSW) and *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361–362 (*Singh v AKM Investments Group* [2024] NSWCA 268 at [45]; *Musa v Alzreaiawi* [2021] NSWCA 12 at [41]–[42]). Attribution of a director's knowledge to the company (*Sanpoint v V8 Supercars Holdings* [2019] NSWCA 5 from [58]; *Maurtray v Pillemer* [2022] NSWSC 1181 at [495]–[496]) did not need to be determined. On preclusion: *Tomlinson v Ramsey Food Processing* (2015) 256 CLR 507 at [22]; *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589; *Clayton v Bant* (2020) 272 CLR 1 at [32]–[34].

Disposition

Credit: Mr Assaf's evidence was preferred. His account of the 2 April 2024 conversation was supported by his contemporaneous file note and consistent with inherent probabilities; the Court was "far from comfortably satisfied" of fabrication on the *Briginshaw* standard, and Thallon's two alternative theories — foresight of the dispute in April 2024, or later insertion in the notebook — were "absurd, bordering on fanciful" and at odds with the notebook's flow. The Court did not accept Mr Fayad's evidence that Thallon was genuinely concerned with the change-in-control breach rather than wanting the lease gone for a better tenant and sale price.

Nature of the breach: Inadvertent and trivial. The 2022 change involved Mr Fayad's own 25 per cent company selling to the existing 50 per cent majority holder — no new party entered the relationship; Mr Fayad was the only Thallon director CMA had ever dealt with, and signed the Side Deed alone within days; the alleged breach went unraised for nearly two years; and no plausible reason for refusal existed had consent been sought. (Whether Mr Fayad's knowledge was attributable to Thallon did not need deciding: Mr Assaf was factually entitled to proceed on the basis that Thallon had no issue, and Thallon's other two directors gave no evidence of unawareness or concern.)

Motive: Thallon was driven by the desire to terminate so as to install LVR at $430,000 per annum and achieve a higher sale price on the open market — established by the negotiation chronology, the rapid pivot from the "financier request" justification to termination, the absence of any articulated reason for withholding consent, and Mr Fayad's admission that higher rent meant a higher price. The attack on CMA's solicitors' July 2024 letter failed: the GST point had an objective basis (the trustee registered, the company in its own name not), the rent-inflation allegation was supported by the file note, and the construction case run before Williams J, though it failed, was pursued on legal advice, not for an ulterior purpose.

Trust and confidence: Not established. Only Mr Fayad deposed to the breakdown — Thallon's other directors did not — and the case sat with *Hookey*, not *Casquash*: some personal animosity, more from Mr Fayad's side, was no sufficient basis to deny relief.

Damage and windfall: Thallon accepted no loss flowed from the breach. Against its prospective gain — a lease at almost double the rent and an enhanced sale price — stood CMA's lost profits, approximately 15 jobs, and 92 children and their families displaced with no operational childcare available for about 90 days: "precisely the sort of unmerited windfall" addressed in *Legione v Hateley* and applied in *Zandata* and *Steel Supplies*. Relief was granted for the 2022 transaction and, on the same analysis, the November 2024 change, for which there was no reasonable basis to withhold consent.

The alternative claims: Waiver and election did not need deciding; had they, Thallon's preclusion answer would have succeeded — the validity of the Notice of Breach had been determined by Williams J and merged in the judgment (res judicata or cause of action estoppel per Tomlinson), and alternatively *Anshun* estoppel barred arguments inextricably bound up with the construction case that could and should have been run with it.

Orders

Relief against forfeiture granted. The Lease to be registered. Costs preliminarily to follow the event (Thallon to pay CMA's costs); agreed or competing orders by 27 June 2025, reply submissions by 9 July, remaining issues on the papers.

Practical Takeaways

The decision is the year's clearest application of the *Legione v Hateley* unmerited windfall analysis to commercial leasing: an inadvertent, trivial change-of-control breach causing no loss will not be allowed to deliver the landlord a near-doubling of rent at the cost of the tenant's business, its staff and 92 displaced families. The *Ace Property Holdings* factors structure the inquiry, and the evidence that wins it is concrete: the rent differential under the replacement lease, the landlord's sale ambitions, and the social consequences of termination. Tenants facing technical-breach forfeitures should assemble exactly that record.

The motive analysis matters: while the windfall analysis operates on the objective economics, the genuineness of the landlord's asserted concern is squarely relevant, and the chronology — a two-year-old breach surfaced only after sale negotiations failed, a quickly abandoned "financier request" justification, a conditional replacement lease at double the rent — told its own story.

Allegations that an opponent fabricated a contemporaneous file note carry the full s 140(2)/*Briginshaw* burden, and advancing "absurd" alternative theories of long-range fabrication damages the alleging party. Conversely, the file note won the case: a practitioner's standing advice to commercial clients dealing with counterparties who make improper proposals — document the conversation the same day, in the ordinary notebook, in sequence — is vindicated here.

Where the lessor's sole point of contact was himself a party to (indeed the vendor in) the impugned transaction, formal attribution arguments may never need deciding: the tenant is factually entitled to proceed on the basis the lessor had no issue, and the silence of the other directors will be telling.

The *Casquash* "breakdown of trust and confidence" ground remains confined to unusual cases requiring close ongoing cooperation; uncorroborated animosity from the landlord's side, asserted by one director only, will not defeat relief (*Hookey*).

The preclusion holding is essential reading for sequenced lease litigation: arguments of waiver and election bound up with a construction challenge must be run with it. Once the notice's validity merges in judgment, res judicata and *Anshun* will bar the second proceeding — deploy every available answer to the breach notice at the first hearing.

***Brikcius v Brikcius* [2025] NSWSC 342**

Hearing dates:	16 April 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	22 April 2025
Before:	Davies J

LAND LAW – possession of land – where plaintiff as registered proprietor had permitted son to occupy premises – where attorneys under power of attorney brought proceedings – where challenge to right of attorneys to bring proceedings - where the registered proprietor required possession of the property to meet ongoing expenses – reliance by defendant on promise to leave property to him in plaintiff's will – no defence to claim for possession

Background

The plaintiff, born in 1937 and aged 88, was registered proprietor of a Vaucluse unit occupied since about 2002 by her son Daniel. She brought possession proceedings by her tutors — her other sons, attorneys under a 1997 Enduring Power of Attorney whose cl 6 provided that the power to manage her property and money came into effect "only while I am incapacitated"; Daniel's own appointment as attorney had been revoked in 2013. She lived at her Canberra home requiring care morning and night seven days a week, did not wish to enter a nursing home — an arrangement all her sons, including Daniel, had agreed to — and as a self-funded retiree on a pension of $37,716.60 net faced an annual shortfall of about $34,000 between income and the expenses of maintaining both properties and funding her care, met by the attorney sons, with some $45,000 of disability-accessibility renovations also in prospect. The medical evidence was comprehensive: her treating geriatrician reported Alzheimer's-type dementia and loss of decision-making capacity in 2015; her GP confirmed in 2024 that she had lacked capacity since October 2015; and a 2024 psychological assessment found her "fully incapacitated", with verbal reasoning at the 1st percentile, amnesia, and visual recognition memory six standard deviations below the norm. Daniel's Amended Defence, filed while he was represented, admitted the essential facts but contested her incapacity as "variable", contended he resided at the property at her request from 1993 (initially caring for his grandmother), and asserted the attorneys were exceeding their mandate, not acting in good faith, and ignoring her wishes — including her stated intention to leave him the property in her will. His affidavit accepted the $34,000 shortfall and proposed instead that the property be rented ($700–$750 per week unrenovated on his agent's letter) while he moved to Canberra to live with his mother; it was clear he did not in substance oppose possession. By the hearing he was unrepresented and did not appear, his former solicitor — given leave to withdraw after receiving no instructions since before Christmas — reporting that Daniel had previously suffered a severe reactive depressive episode attributed to the proceedings and inferring a further one; an in-principle settlement reached at a November 2024 conference had gone nowhere after contact ceased.

Approach and Principles

The registered proprietor is entitled to possession subject to any right of the defendant to retain it. Where the donor is incapacitated and the attorneys are empowered to do anything the donor could lawfully do, the defendant cannot challenge the attorneys' decision to bring possession proceedings whether or not the relevant objective could be achieved by other means more favourable to the defendant; the absence of evidence of bad faith is significant. Activation of a capacity-conditional power requires the incapacity to be established, here by medical and psychological evidence.

Disposition

Incapacity was established on the combined evidence of the geriatrician, the GP and the psychologist — continuous since 2015 — and the attorneys had power to bring and maintain the proceedings; the pleaded contention of variable capacity was not made out. The remaining defences failed in substance: where the donor was incapacitated and the attorneys empowered to do anything she could lawfully do, Daniel could not challenge their decision to sue for possession merely because the objective might be achieved by other means (his renting proposal), there was no evidence the attorneys were not acting in good faith, and Daniel himself acknowledged their need to act to meet his mother's expenses. The asserted testamentary intention conferred no present right — the will's provisions (the $30,000, the car, a two-year right of residence) did not arise until death and were always liable to change. Notwithstanding his absence, the Court considered the substantive merits of the pleaded defence and his affidavit; neither established any right to remain. Possession was ordered. The occupation fee sought was refused: the plaintiff led no evidence of reasonable rent (the only rental evidence being Daniel's own agent's letter postdating commencement by six months), she had historically been content for Daniel to occupy rent-free, he had met various outgoings, and the twelve-month delay between demand and commencement was unexplained.

Orders

Judgment for the plaintiff for possession. Leave to issue a writ of execution, not to be executed before 22 May 2025 — six weeks from the orders. Defendant to pay the plaintiff's costs.

Practical Takeaways

The decision is a clean statement of the breadth of attorneys' authority under a capacity-conditional enduring power: once incapacity is established, attorneys empowered to do anything the donor could lawfully do have broad discretion over her property, and a disappointed family member cannot defeat a possession claim by proposing alternatives — renting rather than selling — or by invoking the donor's wishes or testamentary intentions. The donor's lifetime care needs take priority over expected inheritance, and absent evidence of bad faith or breach of duty the attorneys' chosen course stands.

Activation evidence should be comprehensive and current: the combination here — treating geriatrician, GP confirmation, and a recent quantified psychological assessment — is the template, and a decade-old capacity report should be supplemented before litigation is commenced.

Long rent-free family occupation, however longstanding, creates no substantive right to remain absent pleaded and proved detrimental reliance; testamentary expectations arise only on death, in instruments always liable to change.

The occupation fee refusal carries its own lessons: the moving party must prove rental value with its own evidence; historical consent to rent-free occupation, the occupant's payment of outgoings, and unexplained delay in commencement all weigh against the discretion. Attorneys intending to seek mesne profits should brief a valuer and move promptly after demand.

Finally, the procedural handling — substantive consideration of the absent defendant's pleaded case, accommodation of documented mental health difficulties, and a six-week stay of execution — shows the balance the Court will strike between enforcement and humanity; practitioners for plaintiffs should anticipate and propose such accommodations rather than resist them.

***BHG Investment 100 Pty Ltd v Nanevski Developments Pty Ltd* [2025] NSWSC 936**

Hearing dates:	1 August 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	19 August 2025
Before:	Faulkner J

PROPERTY – proceedings by secured creditor for possession of land under registered mortgage – receiver appointed to assets of the corporate mortgagor – directors purport to exercise residual authority to cause corporate mortgagor to defend proceedings and bring cross-claim – directors offer indemnity to compensate mortgagor against costs and adverse costs order – whether directors required to give security for their indemnity

Background

The defendant company was registered proprietor of land on which it had developed an aged care facility, mortgaged under a November 2022 facility agreement with PF 459, whose rights were assigned to the plaintiff in November 2024; a receiver was appointed days later. The directors and only shareholders were an elderly couple who had given no personal guarantees. The facility, leased to a related operator at about 50 per cent occupancy with rent roughly $1 million in arrears, secured a claim of approximately $24 million; a confidential valuation showed a substantial shortfall on any sale. The plaintiff sued for possession in February 2025 on a statement of claim confined to its rights as mortgagee. The company's defence and cross-claim — naming six cross-defendants — raised extensive allegations about a broader 2019 financing arrangement, pleading misleading or deceptive conduct, unconscionability and estoppel, seeking relief under ss 232, 238 and 243 of the Australian Consumer Law and a declaration under s 418A of the *Corporations Act 2001* (Cth) that the receiver's appointment was invalid. The directors had not cooperated with the receiver (no Report on Company Activities and Property), the litigation was funded by a third party rather than from the company's assets, the directors were in financial distress and conceded they had no assets to provide security, and the plaintiff's estimated costs were about $475,000. By the hearing of the plaintiff's interlocutory process the dispute had narrowed: the directors consented to joinder and to indemnifying the company for its costs; the live question was whether the indemnity required security.

Approach and Principles

Where a receiver has been appointed, directors may cause the company to participate in litigation provided they offer a satisfactory indemnity against costs, designed to ensure the debenture holder's interests are not prejudiced (*Deangrove v Commonwealth Bank* (2001) 108 FCR 77 at [40], [42], [47] (Sackville J)); the directors bear the onus of demonstrating the indemnity is satisfactory (*Deangrove* at [47]); and the requirement is mandatory, not discretionary (*Pearsall v NAB* [2024] NSWSC 1493 at [22] (Ball J)). The residual authority of directors is inhibited to the extent its exercise would threaten or imperil the assets subject to the receivership (*Hawkesbury Development Co v Landmark Finance* (1969) 92 WN (NSW) 199 at 209 (Street J); *Newhart Developments v Co-operative Commercial Bank* [1978] QB 814 at 821 (Shaw LJ)) — there being a direct inverse relationship between the scope of the receivership and the directors' residual authority. The purpose of security is to protect the security-holder against diminution of its security, not to improve its position; where the security is already insufficient to discharge the secured debt, there can be no question of diminution by a costs order (*Pearsall* at [24], [27]). *Mainland Property Holdings v Naplend* [2022] FCA 1305 at [35] (McElwaine J) adopts substantively the same approach (stay until indemnity and security provided); the discretionary characterisation in *Aboughattas v Oak Capital Mortgage Fund* [2021] VSC 577 at [36] (Garde J) conflicts with *Pearsall* and *Deangrove* and is difficult to reconcile with *Mainland*. Procedurally, UCPR r 6.26 prohibits joinder for the purpose of making a costs application, and s 98 of the *Civil Procedure Act 2005* (NSW) governs non-party costs orders.

Disposition

Joinder: Granted — the most efficient way to give effect to the agreed position. Rule 6.26 did not preclude it, given the directors' consent and the proper-parties exception engaged by the s 418A claim, a substantive claim entitling the company to relief rather than a procedural device.

The Pearsall distinction: In *Pearsall* the bank held a general security agreement over all the corporate plaintiffs' property and the security was already insufficient, so further costs could not diminish it. Here, the pleaded claim relied only on the mortgage — but on careful examination, cl 17 of the mortgage and the facility agreement gave the plaintiff a security interest over all the company's assets. The directors' authority was therefore inhibited to the extent its exercise would prejudice the plaintiff's interests in any of the company's assets, not just the land.

Funding and the adverse-costs gap: The third-party funding meant the conduct of the proceedings would not itself diminish the company's assets — but an adverse costs order satisfied from those assets would, and given the substantial shortfall on the land, any diminution of other assets prejudiced the plaintiff. An indemnity was therefore necessary; and an indemnity from directors who conceded they had no assets was worth no more than their ability to pay $475,000 if called upon — which they could not. Security was required.

Discretion versus authority: The reference to discretion in *Pearsall* at [22] is to be understood as part of the factual inquiry into prejudice. If, absent an indemnity, the secured creditor may be prejudiced, the directors lack authority to cause the company to take the steps; the Court's response is to dismiss (*Deangrove*) or stay (*Pearsall; Mainland*) the proceedings, not to "remediate" by ordering an indemnity. The defence/commencement distinction was rejected: the issue is always the directors' authority to cause the company to take steps in the proceedings, and if authority is absent, the defence and cross-claim face stay or dismissal. The plaintiff's submissions on the weakness of the underlying claims, being discretionary in character, did not need to be considered.

Orders

Leave to file amended pleadings adding the directors as defendants and cross-claimants. The plaintiff’s interlocutory process stood over to 9 September 2025 to allow the directors to provide an indemnity supported by security from a third party — such as a family member or other funder — failing which the defence and cross-claim face stay or dismissal; if the plaintiff’s interests are no longer prejudiced on the next occasion, the interlocutory process can be dismissed.

Practical Takeaways

The decision settles three points of NSW practice on the *Deangrove* framework. First, the indemnity requirement applies to defensive litigation as fully as to claims: the question is always the directors’ authority to cause the company in receivership to take steps in proceedings, and a defence and cross-claim are steps. Second, the requirement is mandatory, an aspect of authority rather than discretion — the *Aboughattas* discretionary characterisation should not be relied on in NSW — and the consequence of absent authority is stay or dismissal, not court-ordered remediation. Third, the directors bear the onus of showing the indemnity satisfactory, and an indemnity is worth only the covenantor’s capacity to pay: impecunious directors must bring third-party security.

The *Pearsall* escape — that an already-deficient security cannot be further diminished — turns on the full security position, not the pleaded claim. An all-assets charge in the facility documents brought adverse-costs prejudice back into play even though the statement of claim relied only on the mortgage. Secured creditors should prove their complete security package; directors should not assume a narrow pleading confines the analysis.

Third-party litigation funding answers the running-costs prejudice but not the adverse-costs risk: the funded company’s own assets remain exposed to a costs order, and that exposure is the prejudice requiring indemnity and security. Funders and directors should structure for it at the outset.

The joinder route is procedurally instructive: r 6.26 does not preclude joining directors who consent and who are proper parties to a substantive claim — here the s 418A challenge to the receiver’s appointment — and joinder is the efficient vehicle for the indemnity arrangement.

The inverse relationship between receivership scope and residual authority (*Hawkesbury Development; Newhart*) is the organising idea: bare invocation of residual authority is never enough; the analysis runs from the security’s reach, through the proposed corporate conduct, to the prejudice. And the stand-over mechanism — time to procure family or funder security, with dismissal of the creditor’s process if the prejudice is answered — is the practical template both sides should expect.

Belrose RB1 Pty Ltd v Oldfield **[2025] NSWSC 603**

Hearing dates:	28 April 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	12 June 2025
Before:	McGrath J

LAND LAW – conveyancing – contract for sale – notice to complete – where vendor finances portion of purchase price – where purchaser's offer of finance in relation to balance conditional upon vendor executing proposed deed of priority – where vendor rejects terms of proposed deed of priority – where issue of priority was not the subject of prior agreement as between purchaser and vendor – whether completion was dependent on vendor executing proposed deed of priority – whether vendor's conduct prevented issuance of valid notice to complete – whether termination valid based on failure to comply with notice to complete.

CONTRACTS – express terms – construction of express terms – construction of multiple contracts executed contemporaneously – construction of further assurance clause – whether covenant for further assurance obliged vendor to negotiate and execute the proposed deed of priority.

CONTRACTS – implied terms – construction and interpretation – terms implied in law – general rule of construction – implied duty to cooperate – consistency with express terms of contract – whether implied duty to cooperate obliged vendor to negotiate and execute the proposed deed of priority.

Background

Mr Oldfield, sole registered proprietor of a Forest Way, Belrose property, sold it to Belrose RB1 — Mr Bruce's development vehicle — under a contract arising from a put and call option exercised in June 2023, the relationship having originated in 2020 discussions about an over-55s seniors' housing development (post-development value about $60 million; "as is" valuation $8.365 million) and an unsecured interest-free loan of $150,000 from Mr Bruce for Mr Oldfield's Family Court proceedings. The transaction documents — option deed, loan agreement, guarantee, revised in September 2022 after the Family Court orders — included a September 2022 Loan Agreement under which Mr Oldfield would lend the purchaser up to

$2.5 million interest-free to fund the balance of the price, and Special Condition 47 of the Sale Contract gave him a second mortgage as security and the right to elect repayment as two units in the development at a 43 per cent discount. Completion was due 90 days after the 23 June 2023 contract date. The purchaser obtained an offer of about $5.4 million from iPartners, secured by first registered mortgage, whose Indicative Term Sheet contemplated an intercreditor deed with any other lender — but whose solicitors first identified the vendor finance on 25 September 2023, the day scheduled for settlement. The next day they communicated twelve proposed deed-of-priority terms that would have subordinated Mr Oldfield's repayment rights until iPartners was repaid in full, prevented his exercise of the unit election, required release of his second mortgage to enable an enforcement sale, removed his right to assign without consent, and bound him to the same arrangements with unknown future refinanciers. His solicitors rejected the terms on 28 September; invited to propose acceptable ones, he indicated on 29 September that he would agree to a deed of priority in which he had first priority — and at 2pm that day iPartners returned its funds to investors and closed its file. Settlement scheduled on PEXA did not occur; Mr Oldfield served a Notice to Complete on 4 October requiring completion by 19 October, time of the essence, and on non-completion a Notice of Termination on 20 October 2023. The purchaser sued for specific performance; Mr Oldfield cross-claimed for the deposit balance and damages; and a separate question was ordered: whether the contract was validly terminated.

Approach and Principles

The duty to cooperate is implied in law in all contracts and does not depend on the *BP Refinery (Westernport) v Shire of Hastings* (1977) 180 CLR 266 at 283 conditions: each party agrees to do all such things as are necessary on his part to enable the other to have the benefit of the contract (*Mackay v Dick* (1881) 6 App Cas 251 at 263 (Lord Blackburn); *Butt v M'Donald* (1896) 7 QLJ 68 at 70–71 (Griffith CJ); *Secured Income Real Estate v St Martins Investments* (1979) 144 CLR 596 at 607–608 (Mason J); *Commonwealth Bank v Barker* (2014) 253 CLR 169 at [24]–[29], [37]). But its scope is defined by what was promised: it cannot oblige a party to bring about something the contract does not require to happen, nor to act at odds with express terms (*Australis Media Holdings v Telstra* (1998) 43 NSWLR 104 at 123–125; *Peters (WA) v Petersville* (2001) 205 CLR 126 at [36]; *Adaz Nominees v Castleway* [2020] VSCA 201 at [117]–[118]). Further assurance clauses ensure a party obtains what it bargained for, "no less and no more" (*The Checkout v Cordell Jigsaw Productions* [2022] NSWSC 444 at [661] (Stevenson J), citing *Carlton & United Breweries v Tooth & Co* (1986) 7 IPR 581 at 594); the clause cannot operate on a subject matter wider than the deed itself (*Fox Entertainment v Centennial Park and Moore Park Trust* [2004] NSWSC 214 at [195]–[196] (Barrett J); *Handley v Gunner* [2008] NSWCA 113 at [126]). Documents forming part of the same transaction are read together, a boilerplate no-interdependency acknowledgment notwithstanding. The prevention principle (*Spiers Earthworks v Landtec Projects (No 2)* (2012) 287 ALR 360 at [47]; *Probuild Constructions v DDI Group* (2017) 95 NSWLR 82 at [114]; *Bensons Property Group v Key Infrastructure Australia* [2021] VSCA 69 at [102], [111]; *Peter Turnbull & Co v Mundus Trading* (1954) 90 CLR 235 at 246–247) was identified but did not arise.

Disposition

The documents read together: The Sale Contract and the September 2022 Loan Agreement formed part of the same transaction and were construed together; cl 37.1(a)'s acknowledgment of no interdependency did not change the operation of the construction rule.

Read together, the documents inferentially contemplated some form of priority arrangement between an incoming first mortgagee and Mr Oldfield's second mortgage — but the parties had never turned their minds to or agreed the substantive terms of any such arrangement; only "hints or shadows" of mutual intention existed.

The proposed deed: The twelve terms would have required Mr Oldfield to compromise significantly many of the rights he had been given: subordination of his repayment rights until iPartners was repaid in full; prevention of his unit election; release of his second mortgage to enable an enforcement sale; loss of his right to assign without consent; and forced contractual relationships with unknown future refinanciers.

Duty to cooperate and further assurance: The duty to cooperate did not extend to giving up rights he had negotiated: he was being asked to act at odds with the express terms of both documents. Organising funding of the balance beyond the $2.5 million was the purchaser's responsibility; if an external funder required changes to Mr Oldfield's rights, that was a matter for tripartite negotiation — as iPartners' own principal had recognised, the deed of priority would have to be negotiated with Mr Oldfield, "subject to his timing and the level at which he wishes to negotiate it". The further assurance clause (cl 13.4 of the Loan Agreement), construed in context per Fox Entertainment, likewise did not require him to compromise bargained-for rights — its purpose was to deliver the other party its bargain, "no less and no more".

Validity of the notices: Mr Oldfield was perfectly entitled to look after his own interests in the negotiations and was not obliged to subvert them to those of the purchaser or its financier; his first-priority counter-offer was within his rights, and the negotiations ended because iPartners withdrew its funds for its own commercial reasons. He failed no condition precedent, showed no unwillingness to perform any executory obligation, and breached no term; he was ready, willing and able on 4 October (the Notice to Complete) and on 19 October (the date fixed for completion). The purchaser's failure to complete entitled him to terminate on 20 October 2023. The prevention principle and dependency doctrine did not arise.

Orders

Separate question answered: the Sale Contract was validly terminated by Mr Oldfield on 20 October 2023. Parties to confer on short minutes, including an order that the purchaser pay Mr Oldfield's costs of the separate question; proceedings listed for directions in the Real Property List.

Practical Takeaways

The decision is the year's most thorough treatment of the boundaries of the implied duty to cooperate, and the holding is clean: the duty — implied in law in all contracts, free of the *BP Refinery* conditions — secures performance of what was promised. Its scope is defined by the express terms; it cannot oblige a party to bring about something the contract does not require, still less to surrender bargained-for security and repayment rights to accommodate the other party's financier. Arguments invoking the duty must be tied precisely to what was substantively promised.

Further assurance clauses are equally confined: their office is to deliver the bargain, "no less and no more" (*Checkout; Fox Entertainment*). Broadly cast assurance language is not a vehicle for new substantive terms or the variation of rights; parties relying on such clauses should expect them to be read against the deed's own subject matter.

The same-transaction construction rule operates notwithstanding boilerplate: a no-interdependency acknowledgment does not prevent contemporaneous documents being read together to discern intention. But reading together only reveals what the parties actually addressed — here mere "hints or shadows" of a priority arrangement — and implied doctrines will not fill substantive gaps the parties never negotiated.

The transactional lesson is the heart of the case: wherever vendor finance will coexist with external funding, the priority arrangements must be settled expressly at the outset — which rights subordinate, on what terms, and with what consequences for elections and enforcement. Leaving subordination to a tripartite negotiation under settlement-day pressure handed the vendor a legitimate veto and the purchaser a terminated contract.

For incoming financiers, the due diligence failure is stark: identifying the vendor finance only on the day scheduled for settlement left no room to negotiate, and the financier's withdrawal — a decision for its own commercial interests — could not be laid at the vendor's door. All prior security arrangements must be identified early.

A vendor in this position is "perfectly entitled to look after his own interests": refusal to subordinate is not unwillingness to perform, does not destroy readiness, and does not invalidate a notice to complete. The careful documentary chain — notice to complete with time of the essence, then termination on non-completion — operated exactly as the framework intends, and the contemporaneous record of the negotiation positions was decisive on every contested point. Finally, the separate question procedure shows its value: a single well-framed question on the validity of termination substantially resolved both the specific performance claim and the cross-claim

***Airlend Capital Partners Pty Ltd ATF The Picton Security Trust v Hillbilly Transport Buy & Sell Pty Ltd* [2025] NSWSC 1497**

Hearing dates:	10 December 2025
Jurisdiction:	Supreme Court of New South Wales
Decision date:	10 December 2025
Before:	Lonergan J

LAND LAW – possession of land – deed of settlement included short minutes of order for judgment and possession executed by the parties – a payment required 5 December 2025 – no payment made – no basis to set aside settlement deed – possession and judgment ordered

Background

The lender sued the borrower and its guarantor for over $7 million and possession of a Picton property. Negotiations in the Possession List produced a Deed of Settlement in October 2025 under which signed consent orders — judgment for $9,497,166, possession by 8 December 2025 absent payment, and costs — were held in escrow, with the first payment due 5 December 2025. Clause 6.2 obliged the lender and its agents to “endeavour to take all reasonable steps” to remove the property from sale, including ceasing advertising. No payment was made. When the lender sought entry of the consent orders, the defendants asserted breach of cl 6.2, relying on an undated screenshot said to show continued listing, a broker’s letter making vague assertions about investor due diligence with no identifiable purchaser, and bar table suggestions that the lender’s representatives had undermined sale negotiations; their motion sought a declaration that the deed was void.

Disposition

Clause 6.2 imposed an obligation of reasonable endeavours, not a guarantee of outcomes, and the agent’s and solicitor’s affidavits established that all reasonable steps had been taken; the screenshot did not on its face evidence its asserted date, the broker’s letter was unspecific, and the Court could not act on vague, unsupported bar table assertions. Applying *Angius v Salier* [2015] NSWSC 1446 at [56]–[60], significantly more than bare assertion is required before the Court will decline to enter judgment or contemplate setting aside a settlement; and if the defendants genuinely considered the deed breached, the time to say so was when the alleged breach occurred, not after the escrow matured on their own failure to pay. There was no need to resort to s 73 of the *Civil Procedure Act 2005* (NSW): the consent orders were simply entered, with possession by 5pm that day, and an adjournment for further enquiry would serve no useful purpose.

Orders

Judgment for $9,497,166 with interest under the loan agreement or ss 100–101 of the *Civil Procedure Act*. Possession by 5pm on 10 December 2025; leave to issue a writ of possession forthwith. Defendants to pay the plaintiff's costs of the proceedings and its motion; defendants' motion dismissed with costs.

Practical Takeaways

Consent orders held in escrow are a robust enforcement architecture: once the payment condition fails, the orders will be entered, and a challenge requires substantially more than assertion — *Angius v Salier* sets the threshold, and the Court need not even reach s 73.

Reasonable endeavours clauses are judged against the standard agreed, not outcomes; unauthenticated screenshots, unspecific broker letters and bar table assertions will not establish breach, and a complaint first raised only when the escrow matures against the complainant will be treated as tactical.

For lenders, the case endorses escrow-based settlement of possession disputes; for borrowers, it is a warning that the price of settlement structure is strict performance, with same-day possession orders the consequence of default.