SUPREME COURT OF SOUTH AUSTRALIA

(Court of Appeal: Civil)

OLIVER HUME PROPERTY FUNDS (HACKHAM) PTY LTD v YAS PROPERTY AND DEVELOPMENT PTY LTD & ORS

[2026] SASCA 78

Judgment of the Court of Appeal

(The Honourable Justice S Doyle, the Honourable Justice Bleby and the Honourable Justice B Doyle)

3 July 2026

APPEAL AND NEW TRIAL - PROCEDURE - SOUTH AUSTRALIA - WHEN APPEAL LIES - FROM SUPREME COURT - BY LEAVE OF COURT - INTERLOCUTORY ORDERS AND JUDGMENTS

EQUITY - EQUITABLE REMEDIES - INJUNCTIONS - INJUNCTIONS FOR PARTICULAR PURPOSES - TO RESTRAIN BREACH OF CONTRACT - NEGATIVE STIPULATIONS

EQUITY - EQUITABLE REMEDIES - INJUNCTIONS - INTERLOCUTORY INJUNCTIONS - SERIOUS QUESTION TO BE TRIED - GENERALLY

EQUITY - EQUITABLE REMEDIES - INJUNCTIONS - INTERLOCUTORY INJUNCTIONS - RELEVANT CONSIDERATIONS - BALANCE OF CONVENIENCE GENERALLY

On Appeal from SUPREME COURT OF SOUTH AUSTRALIA (THE HONOURABLE JUSTICE GRAY) [2026] SASC 95; [2026] SASC 103

Appellant: OLIVER HUME PROPERTY FUNDS (HACKHAM) PTY LTD Counsel: MR P ZAPPIA KC WITH MR L WICKS AND MR N DAY - Solicitor: JOHNSON WINTER SLATTERY

Respondents: YAS PROPERTY AND DEVELOPMENT PTY LTD, YAS (ONKAPARINGA HEIGHTS) AFS 1 PTY LTD, O.V. AFS PTY LTD, YAS (ONKAPARINGA HEIGHTS) AFS 2 PTY LTD, YAS (ONKAPARINGA HEIGHTS) AFS 3 PTY LTD, YAS (ONKAPARINGA HEIGHTS) 22-24 HEPENSTAL RD PTY LTD, YAS (ONKAPARINGA HEIGHTS) 26-30 HEPENSTAL RD PTY LTD, YAS (ONKAPARINGA HEIGHTS) 32-40 HEPENSTAL RD PTY LTD, YAS (ONKAPARINGA HEIGHTS) 1250 PIGGOTT RANGE RD PTY LTD, YAS (ONKAPARINGA HEIGHTS) 38 RIVER HEIGHTS RISE PTY LTD, YAS (ONKAPARINGA HEIGHTS) 1332 PIGGOTT RANGE RD PTY LTD, YAS (ONKAPARINGA HEIGHTS) 89 GATES RD PTY LTD, YAS (ONKAPARINGA HEIGHTS) 4-6 HEPENSTAL RD PTY LTD, YAS (ONKAPARINGA HEIGHTS) 8-14 HEPENSTAL RD PTY LTD Counsel: MR T DUGGAN KC WITH MS E KEYNES - Solicitor: COWELL CLARKE

Hearing Date/s: 01/07/2026, 03/07/2026

File No/s: CIV-26-008075; CIV-26-008452

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EQUITY - EQUITABLE REMEDIES - INJUNCTIONS - MATTERS AFFECTING GRANT - DAMAGES AFFORDING ADEQUATE REMEDY

EQUITY - EQUITABLE REMEDIES - INJUNCTIONS - INTERLOCUTORY INJUNCTIONS - RELEVANT CONSIDERATIONS - FINAL DETERMINATION OF RIGHTS OF PARTIES

REAL PROPERTY - TORRENS TITLE - CAVEATS AGAINST DEALINGS - FORM AND CONTENT OF CAVEAT - NATURE OF ESTATE OR INTEREST CLAIMED

REAL PROPERTY - TORRENS TITLE - MORTGAGES, CHARGES AND ENCUMBRANCES - RIGHTS, LIABILITIES AND REMEDIES OF MORTGAGOR - DISCHARGE - OTHER MATTERS

This is the determination of two appeals, filed and heard in circumstances of urgency, arising out of a large-scale land acquisition, subdivision and sale project at Onkaparinga Heights, formerly part of Hackham, in the southern suburbs of Adelaide.

The appellant in both appeals ('Oliver Hume') is the developer, and the first respondent ('YAS') is the owner, under a development management agreement ('DMA') dated 31 August 2021. The other respondents were created, owned and controlled by YAS for the purpose of holding various parcels of land acquired for the development.

On 29 April 2026, following a period of years during which the relationship had deteriorated, YAS served a notice of termination of the DMA on Oliver Hume, invoking cl 12.1(a)(ii) of the DMA, which permitted immediate termination in the case of fraud. Then on 7 May 2026, the financer of the project, Metrics, wrote to the parties advising that where there was a material dispute between the parties, it had no appetite to consider an extension of the finance facility. It indicated that it required repayment of the outstanding $38.25m by 19 May 2026. YAS remains in default on that facility.

On 18 May 2026, Oliver Hume commenced proceedings in the Supreme Court of South Australia, seeking interlocutory relief restraining the respondents from acting on YAS' purported termination, and final relief seeking a declaration that the purported termination was invalid, or in the alternative, damages. On 2 June 2026, after Oliver Hume commenced the proceedings, YAS served a further termination notice on Oliver Hume, invoking cl 2.5(a)(iii) of the DMA, which entitled either party to terminate the DMA in the event that certain conditions precedent were not satisfied within three years of the date of the DMA. YAS alleged that the condition precedent of 'the Developer being satisfied as to the Project Budget and the Feasibility Study' had not been satisfied within three years of the DMA.

On 22 June 2026, a judge refused Oliver Hume's application for interlocutory relief. The judge found that Oliver Hume had a strong *prima facie* case but held that the balance of convenience did not favour the grant of interlocutory injunctive relief.

On 25 June 2026, Oliver Hume filed a Notice of Appeal, together with an Interlocutory Application seeking an urgent directions hearing, an expedited appeal, the joinder of some additional parties and urgent injunctive relief pending hearing and determination of the appeal. YAS filed a Notice of Alternative Contention. The Court set an abbreviated timetable in order to hear the appeal on 1 July 2026.

Meanwhile, and by the time the judge had decided the injunction application, Oliver Hume had lodged caveats against dealing and had registered a mortgage against or in respect of the titles to various properties associated with the development project. Then, after the judge determined the injunction application, YAS and its associated entities applied for the discharge of the mortgage and removal of the caveats. On the morning of 1 July 2026, prior to the hearing of the first appeal, the primary judge gave reasons for granting those applications. At the hearing of the first appeal, Oliver Hume indicated its intention to appeal against this second decision.

It was apparent that there was a degree of overlap in the issues the subject of each decision.

At the end of the hearing of the first appeal, the parties agreed to submit to a highly abbreviated timetable to enable an urgent hearing of the foreshadowed second appeal. On 2 July 2026, the judge made orders giving effect to her reasons published the previous day. On the same day, the parties filed written submissions directed to the foreshadowed appeal against those orders and Oliver Hume filed a Notice of Appeal. The Court heard brief oral submissions on 3 July 2026.

The issues arising on each appeal are encapsulated in the following summary of the Court's disposition of each:

Held (by the Court) dismissing the first appeal:

1. It is necessary that Oliver Hume establish error of the kind associated with *House v The King* (1936) 55 CLR 499 at 504-505. However, developments between the determination of the injunction application and the mortgage and caveat proceedings established a revised factual and legal landscape which, the parties accepted, informed the considerations of convenience presented by the injunction application. It is appropriate to consider the matters bearing on the grant of an interlocutory application with reference to the most recently established factual and legal landscape.

2. Relief in the form of a declaration alone may be of doubtful utility. Appropriate final relief may require a permanent negative injunction, enjoining YAS from asserting or relying on the termination notices. That may not require confronting the full range of discretionary considerations that would attend a comprehensive order for specific performance, but it would attract consideration of whether damages are an adequate remedy. The adequacy of damages is relevant in the context of the present application to the strength of a claim to that kind of final relief (if only of a negative kind) as well as the balance of convenience.

3. Oliver Hume has strong *prima facie* case for contending that the first notice of termination was invalid.

4. The judge found there was a strong *prima facie* case that the second notice of termination, relying on the failure to satisfy the condition precedent relating to the Project Budget and the Feasibility Study, was invalid. On the appeal, YAS should be permitted to rely on further material obtained in the context of the second proceedings, albeit that this material should be considered with caution.

5. While there are not strong *prima facie* grounds for the invalidity of the second notice of termination, there is a serious question to be tried as to the invalidity of both notices.

6. Substantial questions remain as to whether, assuming the notices of termination were invalid, it would be appropriate to grant final relief restraining YAS from acting on its termination or requiring it to adhere to particular obligations under the DMA.

7. In weighing the balance of convenience, it is a significant consideration that the practical effect of withholding injunctive relief will be that irrespective of the outcome at trial, it will be difficult to restore Oliver Hume to the position of Developer under the DMA. Against that:

   (i) the Tranche 3 land, which is an important component of the project, is now the subject of a first registered mortgage security in favour of a different financier (Labassa Capital). This represents a material departure from the DMA, under which Oliver Hume was to arrange finance, and did so with Metric;

   (ii) the DMA cannot be characterised as having, as its primary object, the enjoyment by Oliver Hume of proprietary rights;

   (iii) this is not a case where the inherent difficulty in assessing damages speaks strongly in favour of injunctive relief. While it cannot be excluded that a significant award of damages may exceed the substituted security (the subject of the second appeal) or the equity aimed to be preserved in the other properties, this is not a case where it is obvious that any award of damages will be irrecoverable.

8. Where the parties are at loggerheads about aspects of the Project, the powers and authorities conferred on Oliver Hume under the DMA may expose YAS to significant obligations to support the progression of a project they consider will be unprofitable. Further, YAS' objections may cause the Project to stagnate. Where the funding by Metric is in default, that is an undesirable outcome. While the Court cannot be certain about the preparedness of Labassa Capital to fund the Project if the DMA is at an end, the orders the subject of the second appeal remove a barrier to that end. The position is now different from that before the primary judge.

9. If the Court were to consider the matter afresh by reference to circumstances as they presently stand, it would not be disposed to reach a different decision.

10. As to the grounds of appeal, recognising that they addressed the status quo at the time the judge published her reasons:

    (i) The judge's observation, that a grant of injunctive relief would not maintain the integrity of the rights of the parties pending final adjudication, cannot be said to have been unreasonable when understood as an assessment of the practical likelihood of what would occur in light of the history.

    (ii) It was not necessary, in order to refuse the injunction application, for the judge to find that to grant it would cause irreparable harm, or irreversible prejudice, to YAS. In a case like the present, it is necessary also to consider the short-term practical implications of the grant or refusal of relief, and to seek to avoid outcomes which carry a special risk of detriment to both parties.

    (iii) The judge did not depart from the approach indicated in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1. Her emphasis on the likely disputation that would flow from a grant of injunctive relief was not founded in an outdated concern about 'constant supervision'. It involved a practical assessment about the commercial and legal consequences likely to attend the alternatives.

    (iv) The judge did not err in concluding that while the assessment of damages may be complex, Oliver Hume had not shown that damages would not be an adequate remedy for financial loss. Neither did the judge err by necessarily assuming that recovery would be facilitated by the caveats and mortgages then in place.

    (v) The structure of the DMA was to confer primary responsibility post the re-zoning of the land on Oliver Hume. The DMA catered for disputes arising in the performance by Oliver Hume of that responsibility. The importance of those matters did not render irrelevant the potential for disputation to thwart the progress of the Project.

    (vi) While it is appropriate to be mindful of the risk of a party profiting from its own wrong in a case such as this, there is little alternative but to take the current facts and circumstances as they exist and to examine the consequences attendant on granting or refusing an injunction.

    (vii) Oliver Hume has not identified any matter that the judge failed to consider.

    (viii) No ground for appellate intervention under House v The King has been established.

Held (by the Court) dismissing the second appeal:

1. While the application was framed in terms of an application to 'discharge' the mortgages, what was actually sought, and ordered, was that the registered mortgages be removed from the property titles. Oliver Hume retained its rights under the mortgages and its rights in relation to the charges said to support the caveats in the event of their removal.

2. The judge had power to make an interlocutory injunction for the removal of the mortgage from the titles in accordance with ordinary principles. She was not prohibited from doing so on the basis that this was in substance an application for redemption without adhering to the strictures applicable to such an application.

3. The judge did not err by misstating or misapplying the test adopted in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 for establishing a serious question to be tried. The judge's reference to a 'low threshold', in context, was merely an expression of contrast with her observation that neither 'proof of probable success nor a final determination of rights' was required.

4. It was appropriate to approach the matter on the basis that the status quo was to be assessed as at the commencement of the proceedings, when there was no security registered on the titles.

5. The orders for removal of the mortgages and caveats from the title were not, in substance, orders for final relief.

6. On the question of the adequacy of damages as a remedy, both parties were entitled to expect that the law would afford some significance to their legitimate interests in the performance of the contract. However, it is not clear that this extended to enabling them to exercise their rights of termination so as to trigger their potential entitlement to certain rights and advantages.

7. The judge accurately stated and applied the approach to be taken in determining the adequacy of substituted security. The ultimate issue was where the interests of justice lay. Given that context, it was appropriate to frame the issue in terms of a proper or reasonable estimate of the amount claimed to be owing and to ensure that the substituted security represented adequate or reasonable protection having regard to that estimate. The estimates provided by Oliver Hume were of little assistance. In any event, the judge attached little weight to Oliver Hume's failure to adduce detailed evidence in their support. She nonetheless attempted an assessment on the information available to her. Oliver Hume has not identified any error in the approach taken by the judge to her assessment of its claim or the adequacy of the substituted security.

8. The judge did not make any relevant error in being satisfied as to the adequacy of the substituted security or in the exercise of her broad discretion to fashion orders so as to achieve adequate protection and an appropriate balance.

9. The judge did not err in addressing, in an appropriately summary way, the potential strength and quantum of the interests asserted by Oliver Hume.

There was an adequate basis for the judge to be satisfied as to the likelihood of the availability of alternative finance in the event the mortgages and caveats were removed. There was no relevant inconsistency with her approach in her reasons for dismissing the injunction application.

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57; *Bingham v 7-Eleven Stores Pty Ltd* [2003] QCA 402; *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1; *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460; *Equus Financial Services Ltd v RMBL Investments Pty Ltd* (1996) 22 ACSR 744; *Goater v Commonwealth Bank of Australia* [2014] NSWCA 265; *House v The King* (1936) 55 CLR 499; *JC Williamson Ltd v Lukey* (1931) 45 CLR 282; *Liberty Funding Pty Ltd v Steele-Smith* [2004] NSWSC 1100; *North Sydney Leagues' Club Ltd v Synergy Protection Agency Pty Ltd* (2012) 83 NSWLR 710; *Oliver Hume Property Funds (Hackham) Pty Ltd v YAS Property and Development Pty Ltd* [2026] SASC 95; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1; *Samsung Electronics Company Ltd v Apple Inc* (2011) 217 FCR 238; *Temwood Holdings Pty Ltd v Asean Australian Assets Pty Ltd* [2000] WASC 84; *YAS Property and Development Pty Ltd v Oliver Hume Property Funds (Hackham) Pty Ltd [2026] SASC 103 14. Zhu v Treasurer of New South Wales* (2004) 218 CLR 530; *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530; *Piroshenko v Grojsman* (2010) 27 VR

489; *Re Caveat No 773; Ex parte Hodgson* (1873) 3 QSCR 158 ; *Eng Mee Yong v Letchumanan* [1980] AC 331, considered.

OLIVER HUME PROPERTY FUNDS (HACKHAM) PTY LTD v YAS PROPERTY AND DEVELOPMENT PTY LTD & ORS
[2026] SASCA 78

Court of Appeal – Civil: S Doyle, Bleby and B Doyle JJA

1 **THE COURT:** In circumstances to be explained, the Court has heard two urgent appeals arising out of a land development project.

2 In both appeals, the appellant (Oliver Hume Property Funds (Hackham) Pty Ltd (**Oliver Hume**)) is the Developer, and the first respondent (YAS Property and Development Pty Ltd (**YAS**)) is the Owner, under a development management agreement (**DMA**) between those parties dated 31 August 2021. The DMA provides for a large-scale property development in the southern suburbs of Adelaide. The other respondents are entities created, owned and controlled by YAS (or at least are under common control with YAS) for the purpose of holding various parcels of land acquired for the purpose of the contemplated development.

3 On 29 April 2026, YAS served a notice of termination of the DMA upon Oliver Hume (**the first termination notice**). Oliver Hume commenced proceedings in the Supreme Court, seeking interlocutory relief restraining the respondents from acting on YAS' purported termination of the DMA, and final relief seeking a declaration that the purported termination was invalid, or in the alternative damages. After the commencement of these proceedings, on 2 June 2026, YAS served a further notice of termination of the DMA upon Oliver Hume (**the second termination notice**).

4 On 22 June 2026, the primary judge refused Oliver Hume's application for interlocutory relief.[1] In short, her Honour found that Oliver Hume had a strong *prima facie* case for the declaratory relief sought. However, the balance of convenience did not favour the grant of interlocutory injunctive relief.

5 On 25 June 2026, Oliver Hume filed an appeal to the Court of Appeal (**the first appeal**), with its notice of appeal alleging several errors in the primary judge's approach. YAS filed a notice of alternative contention. Oliver Hume's notice of appeal was accompanied by an application seeking an urgent directions hearing, an expedited appeal, the joinder of some additional parties and urgent injunctive relief pending the hearing and determination of the appeal. The Court set an abbreviated timetable in order to accommodate a hearing of the appeal on 1 July 2026. The parties complied with that timetable, which included providing the Court with written submissions. The Court heard oral argument on 1 July 2026.

6 By the time the primary judge decided the injunction application, Oliver Hume had procured the lodgement of caveats and had registered mortgages against

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[1] *Oliver Hume Property Funds (Hackham) Pty Ltd v YAS Property and Development Pty Ltd* [2026] SASC 95 (**Reasons**).

or in respect of the titles to various properties associated with the project. However, after the injunction application was decided, YAS (and its associated entities) applied for the discharge of the mortgages and the removal of the caveats. On the morning of the hearing of the first appeal on 1 July 2026, the parties were provided with the primary judge's reasons for ordering the discharge of the mortgages and the removal of the caveats.[2]

7 During the course of the oral hearing of the first appeal, Oliver Hume announced its intention to appeal the judge's second decision in relation to the caveats and mortgages. There is a degree of overlap between the issues addressed in the primary judge's first and second decisions.

8 At the end of the hearing of the first appeal, and conscious of the overlapping issues, the parties agreed to submit to a very abbreviated timetable to enable the urgent hearing of Oliver Hume's foreshadowed appeal (**the second appeal**). Oliver Hume was required to file a notice of appeal and submissions by the middle of the following day, with YAS to file responding submissions by the end of that same day. This was in anticipation of the Court attempting to reach a decision on both appeals by the middle of the following day, 3 July 2026. The alternative, which was to await the next available hearing before the Court of Appeal in three weeks' time, was unsatisfactory to the parties given the nature and urgency of the matters in issue.

9 The Court heard brief oral submissions from the parties on the second appeal on 3 July 2026.

10 In addition to the parties' submissions, the Court has had the benefit of detailed reasons from the primary judge in both matters. The material placed before this Court was voluminous, including all of the affidavit evidence from below and comprising over three thousand pages. However, the appeal was conducted on the basis that it was in the interests of both parties that the matter be heard and determined as expeditiously as possible. With that in mind, these reasons do not address all of the detail covered in the evidence and submissions. After setting out the key aspects of the factual background and the primary judge's reasons, we propose merely to address the central contentions of the parties. Whilst we have had regard to the detail of the material placed before this Court, it has not been possible in the circumstances we have outlined to attempt any comprehensive analysis of the more detailed issues that have arisen between the parties.

11 For the reasons which follow, we dismiss both appeals.

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[2] *YAS Property and Development Pty Ltd v Oliver Hume Property Funds (Hackham) Pty Ltd* [2026] SASC 103 (**Second Reasons**).

BACKGROUND

12 From 2014, Hatem (Tim) Shahin, the sole director of YAS, began the process of acquiring land in the suburb formerly known as Hackham (now Onkaparinga Heights) for the purpose of developing the land into residential allotments. This included entering into call options for sale contracts over numerous parcels of land.

13 On 31 August 2021, YAS and Oliver Hume entered into the DMA for the development of the land (referred to as **the Project**).

14 Broadly speaking, the DMA provided for YAS, as Owner, to procure and hold the development land through the use of nominee entities, to use its reasonable endeavours to achieve the rezoning of the land, to manage relationships with counterparties under the contracts to acquire the land, and to act as the principal proponent of the Project for the purposes of any public law regulatory interface. The DMA provided for Oliver Hume, as Developer, to manage and deliver the Project, including having responsibility for legal and planning matters, procuring debt funding, monitoring and managing the progress of the Project, attending to all accounting and financial matters, and marketing and selling the subdivided allotments.

15 The DMA established the Project Control Group (**PCG**) to monitor the progress of the Project, including monitoring the performance of Oliver Hume, and monitoring the actual gross project costs and income against the Feasibility Study, the Project Budget and the Development Objectives. The DMA provided for the PCG to meet regularly, and to comprise two representatives of Oliver Hume (Michael Duster and David Rogers) and one representative of YAS (Mr Shahin). Decisions were to be made by majority, with a representative of each of Oliver Hume and YAS to having one vote, and the other representative of Oliver Hume (referred to as the chairperson) having a casting vote in the case of disagreement.

16 Other relevant clauses in the DMA addressed matters including: satisfaction of certain conditions precedent (cl 2.5); the preparation and approval of a Feasibility Study and Project Budget (cl 6.1); the distribution of Project Income (cl 6.3); dispute resolution procedures (cl 11); and termination rights (cl 12).

17 The DMA contemplated entry into a number of other related contractual documents which were included as schedules to the DMA. These included: a Power of Attorney (schedule 5), providing representatives of Oliver Hume with the ability to execute and deliver documents on behalf of YAS; and an Owner Security Deed (schedule 6) and Mortgage (schedule 7), providing Oliver Hume with security for its entitlements under the DMA.

18 The distribution of Project Income is addressed in cl 6.3 of the DMA. It provides for income to be distributed: firstly, to pay GST and other taxes; secondly, to pay monies due under the Finance Facilities; thirdly, to reimburse the parties for, or otherwise pay, all Gross Project Costs (which are defined to include the Development Management Fee payable to Oliver Hume of 5 per cent of Gross

Sales Revenue); fourthly, to retain appropriate working capital for the next stages of the Project; and lastly, to pay 50 per cent of the balance to each of YAS and Oliver Hume.

19 Whilst Oliver Hume thus had a 50 per cent interest in what might be described as the profit or equity of the Project, cl 15.10 of the DMA provided that its interest under the DMA was in contract only, and that it did not acquire any estate or interest in the Land. That clause also provided that the Oliver Hume did not have a caveatable interest in the Land.

20 By 7 April 2023, the contemplated rezoning had been achieved. Upon this occurring, the land that had been acquired for the Project appreciated in value, and was estimated to be valued at approximately $112 million.

21 Under the DMA, YAS was required to fund the Project. It did so through a finance facility entered into on 25 May 2023, in the name of OV AFS Pty Ltd, the holding company of the nominee entities holding the land. Pursuant to this facility, MCH Agency Services Pty Ltd (**Metrics**) provided $17,730,000 in finance. This facility provided a termination date of 19 May 2026, by which OV AFS was required to repay all outstanding amounts. The facility was varied twice. In November 2024 it was increased to $32,674,950, and then in December 2025 it was increased by approximately $5 million to $38,250,000.

22 It is fair to say that in the years leading up to the first notice of termination in late April 2026, the relationship between Oliver Hume and YAS was difficult and appears to have been deteriorating. By early 2026, the parties were in dispute about various aspects of the project strategy, financial modelling and the progress of the Project. Some of these disputes related to the terms of the Feasibility Study and Budget that had been prepared by Oliver Hume, and considered at various PCG meetings.

23 On 29 April 2026, YAS purported to terminate the DMA pursuant to its first termination notice. YAS alleged that by reason of the matters alleged in Schedule A to the notice, Oliver Hume had engaged in conduct which was fraudulent, a material breach of the DMA, and not capable of being remedied. YAS purported to terminate pursuant to cl 12.1(a)(ii) of the DMA, which permitted immediate termination in the case of fraud.

24 In Schedule A to the notice, YAS identified four general complaints or allegations. The first was an allegation of fraudulent misrepresentation by Oliver Hume in relation to the draft Budget and Feasibility Study which had been presented for approval at the PCG meeting in December 2025. The second was an allegation of a dishonest misrepresentation by Oliver Hume in relation to the purpose of the approximately $5 million increase in the Metrics facility. The third involved further allegations of misrepresentation in relation to the Feasibility Study. The fourth involved an allegation of a fraud on the power associated with Oliver Hume's use of its casting vote as chairperson of the PCG.

25 In short, Oliver Hume disputes these allegations. It also argues that, to the extent that there is any merit in the complaints made by YAS, they are in the nature of ordinary commercial disagreements that one might expect in a project of this nature. It argues that none of the matters raised are properly characterised as involving fraud, and that they are matters that ought to have been addressed through the ordinary dispute resolution procedures in the DMA.

26 On 7 May 2026, Metrics wrote to YAS and Oliver Hume informing them that, in circumstances where there was a 'material dispute' between the parties to the DMA, it had 'no appetite to consider an extension' of the Metrics facility. Metrics indicated that it required repayment of the $38.25 million that was outstanding by 19 May 2026.

27 On 18 May 2026, and so the day before the Metrics loan facility was due to expire, Oliver Hume commenced proceedings in the Supreme Court seeking interlocutory and final relief to restrain YAS from acting upon its purported termination of the DMA.

28 At the time these proceedings were issued, settlement on the final tranche (**Tranche 3**) of land acquisitions was imminent. Given the unavailability of finance from Metrics, YAS sought and obtained in excess of $7.5 million in funding for the acquisition of the Tranche 3 land from another financier, Labassa Capital. Settlement on the three parcels of land comprising the Tranche 3 land occurred between 26 and 29 May 2026. Consistently with its view that the DMA had been terminated, YAS arranged for that land to be acquired by nominee entities which were not nominee entities under the DMA.

29 The Metrics facility was not repaid and, on 1 June 2026, Metrics sent a notice of default and demand, which was expressed as a final notice. YAS's subsequent request for forbearance was met with silence. YAS remains in default on the Metrics facility, and is being charged penalty interest at the rate of $4,000 per day.

30 On 2 June 2026, and so after commencement of the proceedings in this Court, YAS sent Oliver Hume its second termination notice. In this second notice, YAS claimed an entitlement to terminate the DMA by reason of a failure to achieve satisfaction of the condition precedent in cl 2.5(a)(iii) of the DMA within the required time frame. That subclause contemplated 'the Developer being satisfied as to the Project Budget and the Feasibility Study', with cl 2.5(c) entitling either party to terminate the DMA with immediate effect in the event the conditions precedent were not satisfied within three years from the date of the DMA. YAS contends that this condition precedent was to be construed in the context of the cl 6.1 provision contemplating the preparation and approval of the Budget and Feasibility Study with the assistance of YAS. It contends that the cl 2.5(a)(iii) condition precedent was never satisfied, with the attempt to obtain approval at a December 2025 meeting of the PCG (which it had alleged in the first notice involved a fraud on Oliver Hume's casting vote power) not being sufficient for this purpose.

THE FIRST APPEAL

31 The primary judge considered that although there was a strong *prima facie* case that the notices of termination were invalid, the balance of convenience weighed against the grant of injunctive relief.

32 As part of considering where the balance of convenience lies, it is relevant to consider the adverse consequences that would flow from withholding interlocutory relief should it ultimately be determined that the applicant was or would have been entitled to final relief of a relevant kind, and the adverse consequences that would flow from a grant of interlocutory relief should it later be determined that such relief was unjustified.

33 In respect of the former, the primary judge considered that:

- Oliver Hume had not established that damages were not an adequate remedy for financial loss,[3] nor that there were insufficient prospects of financial recovery of damages if it were successful at trial;[4] and

- Oliver Hume had not established that damages are not an adequate remedy to protect its interest outside of any interest it may have in the land[5] and, to the extent that the applicant has a caveatable interest in land, that interest would be protected by the caveats and any relevant mortgage.[6]

34 In respect of the latter, the primary judge considered that:

- to grant the injunction and require the parties to continue under the DMA would be 'to require them to continue in an agreement which currently has no engaged financier to fund the project the DMA'.[7] This was in a context where the Oliver Hume is to act 'in some ways as an agent for the Owner concerning the relevant land';[8] and

- to require the parties to work together when their relationship had broken down was a strong discretionary factor against not only the injunction but 'also against the grant of any remedy of specific performance at the end of a trial in the event Oliver Hume were to be successful'.[9]

35 The primary judge recognised that there might be complications arising from the refusal of an interlocutory injunction, in that there was likely to be difficulty in YAS obtaining finance given the caveats that had recently been lodged over the relevant land other than the Tranche 3 land.[10] Her Honour also recognised that

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3 Reasons [109].
4 Reasons [109].
5 Reasons [128], [141].
6 Reasons [146].
7 Reasons [113].
8 Reasons [123].
9 Reasons [145].
10 Reasons [139].

refusing the injunction would, in practical terms, make it difficult for Oliver Hume to be restored to its position as Developer under the DMA by way of final relief.[11] However, she considered that the grant of injunctive relief would not maintain the integrity of the rights of the parties pending final adjudication – it would just result in further litigation and disputes.[12] In circumstances where she considered that Oliver Hume had not established the inadequacy of damages, it was appropriate to refuse relief.[13]

36 Oliver Hume's grounds and written submissions identify various criticisms of the primary judge's reasons. However, by way of distillation of the essential error contended for, Oliver Hume submitted orally that in circumstances where the primary judge found that there a strong *prima facie* case and acknowledged that the refusal of interlocutory relief was likely to mean that, even if successful on the merits of the termination at trial, Oliver Hume was unlikely to be restored to the position that it held under the DMA prior to its purported termination,[14] the primary judge erred by:

- finding that an injunction would not maintain the integrity of the parties' rights pending final adjudication and would instead result in further litigation and disputes;[15] and
- failing to inquire whether YAS would suffer irreversible prejudice if the injunction were granted.

37 As to the latter, it was Oliver Hume's contention that YAS would not suffer irreversible prejudice if the injunction were granted because the undertaking as to damages had not been shown to be insufficient.[16]

38 Oliver Hume contends that on proper analysis this is a case where either damages are inadequate or where, because the question of adequacy is difficult to resolve at this stage, the balance of convenience strongly favoured keeping the parties to their bargain pending a trial. To the extent that there was a risk, if not likelihood, of future disputes, the parties had anticipated and catered for this through the dispute resolution procedures in the DMA,[17] Oliver Hume's PCG casting vote and other powers under the DMA to compel YAS to take various steps and, ultimately, the commercial leverage supplied by its own termination rights under the DMA (coupled with its capacity to exercise a Call Option and acquire the properties in that eventuality).

39 YAS contended that Oliver Hume's various arguments do not identify error of the relevant kind. YAS emphasised that whilst the Project involved property,

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11 Reasons [128], [141].
12 Reasons [141].
13 Reasons [141], [144]-[145].
14 Reasons [128], [141].
15 Reasons [141].
16 Reasons [68].
17 Which included provision for urgent expert determinations.

this was not a contract in which either party was ultimately to acquire and keep property other than with a view to prompt sale. It was not a contract to confer a proprietary interest, where damages are presumptively inadequate. It was a 'money contract'. Oliver Hume was to be seen as providing development services for a financial reward. Whilst there might be debate about the quantification of damages, assessment was not an especially difficult task, and there was no sufficient reason to doubt that any likely award of damages would be recoverable.

40 YAS contended that the primary judge was right to be concerned about the consequences of granting injunctive relief having regard to the financier's stated lack of appetite to continue funding and the parties' fundamental disagreement about how the Project should progress. It submitted that the fact that Oliver Hume might have rights under the DMA to make decisions that would progress the project including by way of procuring additional finance, and that dispute resolutions could assist in resolving differences of opinion about that, was not to be seen as a panacea in circumstances where:

- on Oliver Hume's own projections, it would be necessary to increase the total level of debt funding, ultimately to the extent of over $83 million, with YAS (or its privies) liable as borrower; and

- on Oliver Hume's own projections, which were themselves said to assume land sales sooner than was realistically achievable, the Project under its stewardship had a negative NPV (assuming a 15% discount or hurdle rate).

41 In YAS' submission, it was the measure of control given by the DMA to Oliver Hume that made it especially undesirable for the Court to grant interlocutory or final relief that would 'yoke' the parties together notwithstanding their demonstrated lack of trust and confidence in each other and their different views about how the Project should be progressed.

42 YAS also advanced a notice of contention (accompanied by an application to rely on fresh evidence concerning whether the condition precedent in cl 2.5(a)(iii) was satisfied in February 2022) by which it contended that the primary judge should not have considered that Oliver Hume had a strong *prima facie* case on the invalidity of the termination notices.

Approach to the first appeal

43 Oliver Hume's written submissions proceeded upon the basis that the decision of the primary judge involved the exercise of a discretion and that, in accordance with the principles in *House v The King*,[18] it was necessary for it to establish that the primary judge acted upon a wrong principle, was guided by extraneous or irrelevant matters, failed to take into account some material

[18] (1936) 55 CLR 499.

consideration, or reached a result that was unreasonable or plainly unjust such that it could be inferred that the exercise of the discretion miscarried.

44 There are, however, some features of the present appeal that might warrant this Court considering for itself, at least at the high level which the nature and urgency of the proceeding permits and demands, whether the refusal of interlocutory relief is appropriate. They are that:

- whereas the application concerning the mortgages and caveats lodged in respect of portions of the Project land was unresolved when the injunction application was decided, that application has now been determined. Subject to the outcome of the second appeal, the factual substratum in which the grant or refusal of the interlocutory injunction would take effect now differs from the position as it stood at the time the injunction application was refused. Both parties accepted that, at the least, these developments alter the factual and legal landscape in which the considerations of convenience presented by the injunction application require to be considered; and

- whereas the primary judge considered the balance of convenience with reference to a conclusion that there was a strong *prima facie* case as to the availability of declaratory relief as to the invalidity of the termination notices, as has been noted, by its notice of contention, YAS contends that this overstates the strength of the *prima facie* case.

45 Further, whilst on one view it would only be necessary to consider the notice of contention if Oliver Hume otherwise succeeds in establishing grounds for intervention in accordance with *House v The King*, it may be artificial, when considering the errors of principle contended for by Oliver Hume,[19] to avoid consideration of a related question as to the appropriate focus of the assessment of the strength of the *prima facie* case (or, to put it in the language used in *Australian Broadcasting Corporation v O'Neill,*[20] the sufficiency of the likelihood of success to justify the preservation of the status quo). The question is whether it is appropriate, in this case, to confine attention to the likelihood of Oliver Hume succeeding in obtaining a grant of declaratory relief.

46 As to that question, it is important to remember that an interlocutory injunction serves the purpose of preserving the subject matter of a claim for relief, so as to protect the Court's processes from frustration.[21] If the party seeking interlocutory relief cannot show a sufficient colour of right of the kind sought to be vindicated by final relief,[22] the efficacy of which the interlocutory relief is calculated to preserve, the foundation for the claim to interlocutory relief is

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19 In particular, Grounds 1-3.
20 (2006) 227 CLR 57 at [65] (Gummow and Hayne JJ).
21 *Samsung Electronics Company Ltd v Apple Inc* (2011) 217 FCR 238 at [44]-[51] (Dowsett, Foster and Yates JJ).
22 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [15] (Gleeson CJ).

jeopardised. That is not to say that the party must necessarily show it is more likely than not that they will achieve final relief of the posited kind. Bearing in mind that the strength of the case and the balance of convenience are related inquiries forming part of an overall evaluative assessment, the question is whether there is a sufficient likelihood of achieving that relief such as to justify the interlocutory measures sought and, critically, the consequences they are likely to produce.

47 In the present case, a declaration that the notices of termination were invalid and that the DMA remains on foot may, without more, be of doubtful utility.[23] To declare that an agreement remains on foot may not connote that in all the circumstances it will be appropriate to grant relief requiring the parties to act accordingly, as distinct from recognising that they will be liable to one another for the consequences of having failed to do so. On the hearing of the appeal, Oliver Hume appeared to accept that, in order for the relief to have the practical significance hoped for, it might be necessary at least to seek permanent negative injunctive relief, enjoining YAS from asserting or relying on the termination notices.[24] Relief in that form may not require confronting the full range of discretionary or other considerations that would attend a more elaborate or comprehensive order for specific performance, but it would undoubtedly attract consideration of whether damages are an adequate remedy.[25]

48 It seems to us that for the purposes of calibrating the strength of the claim to relief, regard should be had not merely to the merits of the lawfulness of the termination notices, but the merits of a claim to permanent relief, even if only of the negative kind postulated.

49 In this way, the adequacy of damages (as it may arise in that context) is relevant to both aspects of the interrelated inquiry required on this application, albeit in subtly different ways. When considering the apparent strength of the claim to relevant final relief, an impressionistic assessment of whether damages would ultimately be an adequate remedy may be required. In some cases, the difficulty in forming a clear view about that question may not stand in the way of the grant of interlocutory relief on the basis that there is a ‘triable issue’[26] – much will depend on the nature of the interests in play and the balance of convenience. When considering the balance of convenience, the adequacy of damages inquiry concerns an important part of an examination of the consequences of granting or withholding relief pending determination of the question of final relief at trial. In some cases a refusal of an interlocutory injunction may not materially diminish the prospects of a grant of final injunctive relief, so that the adequacy of an award of damages is a more temporally confined inquiry.

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[23] If so, it might be argued that, as a matter of discretion, such a declaration should not be made, but it is not necessary to consider much less express any view as to the strength of the argument.

[24] Appeal transcript, p 7.16-19.

[25] Appeal transcript, p 9.4-14.

[26] *Bingham v 7-Eleven Stores Pty Ltd* [2003] QCA 402 at [112] (Muir J).

50 These observations are not intended to suggest that an overly refined analysis is required, or that the headings under which relevant considerations are addressed is necessarily determinative. In the present case, as will be seen, although, reflecting the way the case was argued before her, the strength of the *prima facie* case was expressed with reference to the claim for declaratory relief, the primary judge was, on our reading of her reasons, alive to the difficulties that might attend compulsive relief in aid of contractual performance.[27]

51 In these circumstances, before addressing the grounds of appeal, which seek to identify error by the primary judge by reference to the circumstances prevailing when that decision was made, we briefly summarise how we would assess the matters bearing upon the grant of an interlocutory application with reference to the framework just discussed and the factual and legal landscape as it now stands, subject to any success that Oliver Hume may have in respect of the second appeal. Undertaking that assessment is also appropriate in circumstances where, if relevant error were to be demonstrated, it would be necessary to consider the exercise of discretion afresh. It is hard to see why, if the Court were to embark on that assessment, it would not do so in the light of the material relied upon in connection with the orders made on 2 July 2026 which are the subject of the Second Appeal.

Strength of the prima facie case

52 The primary judge found, and we agree, that on the available material, Oliver Hume has a strong *prima facie* case for contending that insofar as the first notice of termination relied on fraudulent conduct as a ground for immediate termination pursuant to cl 12.1(a)(ii), it was invalid.[28] The judge found that it is doubtful that that provision will be construed as extending to equitable conceptions of fraud on a power.[29] In summary, YAS did not contest on appeal, and we accept, that Oliver Hume may be said to have strong grounds for contending that the first termination notice was invalid.

53 However, on appeal, Oliver Hume accepted (consistently with the provisional view expressed by the primary judge[30]) that the right to terminate conferred by cl 2.5 stands separately from the termination regime in cl 12.[31]

54 The second notice of termination relied upon Oliver Hume not having been satisfied that the Project Budget and the Feasibility Study was of a kind that had been prepared and approved in compliance with the other relevant provisions of the DMA, including cl 6.1(a). Oliver Hume contends that that condition precedent was satisfied either in February 2022 or in December 2025. Alternatively, it contends that in view of the steps that were taken after February 2022, and indeed

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[27] Reasons [59]-[62], [145].
[28] Reasons [84].
[29] Reasons [88].
[30] Reasons [92].
[31] Appeal transcript, p 59.28-32.

after December 2025, but before the notices of termination, there are strong grounds for an affirmation case.

55 The primary judge considered that in view of the express or implied obligations attending the preparation and approval of the Feasibility Study and Project Budget in cl 6, it was reasonably arguable that Oliver Hume was subject to relevant constraints in being satisfied for the purposes of the condition precedent in cl 2.5(a)(iii). Implicitly, the judge appears to have accepted that YAS' complaints about the process leading to the approval of a Project Budget and Feasibility Study on 2 December 2025 were reasonably arguable in this context. However, as concerned the alleged satisfaction of the condition precedent in February 2022, because YAS had not provided 'significant evidence' concerning Mr Rogers' more recent evidence about those events, the judge was persuaded that there was also a strong *prima facie* case that the second notice of termination, relying upon the failure to satisfy the condition precedent in cl 2.5(a)(iii), was invalid.[32]

56 In the context of the proceedings concerning the removal of the mortgages and caveats, YAS has adduced additional evidence relevant to the question whether the condition precent was satisfied in February 2022. The judge accepted that, having regard to the different complexion produced by this further evidence, the argument that the second notice of termination was invalid was 'not as strong' as had previously been assessed.[33]

57 Oliver Hume opposes the receipt of this material on appeal, contending that it could have been relied upon before the primary judge and would not, on the judge's approach, have been decisive in any case. For its part, YAS contends that it sought to rely on the material before the primary judge and it was the lateness of the material to which YAS was seeking to respond that led to the judge's refusal to receive it. Oliver Hume counters that the issues relevant to the satisfaction of the condition precedent arose for the first time only upon the service of the second termination notice. In the unusual circumstances of this appeal, it is not productive to analyse the procedural history or apportion blame in respect of it. The relevant material was relied upon in the context of the applications concerning the mortgages and caveats. Whilst it should be received and considered with appropriate caution, it is artificial in this case to exclude the material from consideration. We therefore permit YAS to rely on the material.

58 As the primary judge observed in the Second Reasons, that additional material places a somewhat different complexion on events. That said, Oliver Hume raises contentions of substance concerning affirmation.

59 On our assessment of the rival contentions concerning satisfaction of the condition precedent, whilst we would not go as far as to say there are strong *prima*

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32 Reasons [93], [143].
33 Second Reasons [34].

facie grounds for the invalidity of the second notice of termination, we would accept that there is a serious question to be tried as to the invalidity of both notices. That question may be assessed as being more than barely arguable. That said, and for reasons which include the observations we make below about the character of the parties' obligations under the DMA, substantial questions remain as to whether, assuming the notices of termination were invalid, it would be appropriate to grant final relief restraining YAS from acting on that termination (or requiring it positively to adhere to particular obligations under the DMA).

60 Having calibrated the strength of the relevant claims for relief in that way, we briefly turn to the considerations bearing on the balance of convenience.

Matters bearing on the balance of convenience in view of the current landscape

61 The matters bearing on the balance of convenience have been conveniently summarised by the Full Federal Court in these terms:[34]

> The assessment of harm to the plaintiff, if there is no injunction, and the assessment of prejudice or harm to the defendant, if an injunction is granted, is at the heart of the basket of discretionary considerations which must be assessed and weighed as part of the Court's consideration of the balance of convenience and justice. The question of whether damages will be an adequate remedy for the alleged infringement of the plaintiff's rights will always need to be considered when the Court has an application for interlocutory injunctive relief before it. It may or may not be determinative in any given case. …
>
> The interaction between the Court's assessment of the likely harm to the plaintiff, if no injunction is granted, and its assessment of the adequacy of damages as a remedy, will always be an important factor in the Court's determination of where the balance of convenience and justice lies. To elevate these matters into a separate and antecedent inquiry as part of a requirement in every case that the plaintiff establish 'irreparable injury' is, in our judgment, to adopt too rigid approach. These matters are best left to be considered as part of the Court's assessment of the balance of convenience and justice even though they will inevitably fall to be considered in most cases and will almost always be important considerations to be taken into account. …
>
> The resolution of the question where the balance of convenience lies requires the Court to exercise a discretion.
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> In exercising that discretion, the Court is required to assess and compare the prejudice and hardship likely to be suffered by the plaintiff if no injunction is granted. In determining this question, the Court must make an assessment of the likelihood that the final relief (if granted) will adequately compensate the plaintiff for the continuing breaches which will have occurred between the date of the interlocutory hearing and the date when final relief might be expected to be granted.

Consequences of withholding interlocutory relief

62 We commence by considering the prejudice to Oliver Hume if an interlocutory injunction is not granted.

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[34] *Samsung Electronics Company Ltd v Apple Inc* (2011) 217 FCR 238 at [62]-[63], [65]-[66] (Dowsett, Foster and Yates JJ).

63 The primary judge accepted, and we agree, that the practical effect of withholding interlocutory injunctive relief will be that, irrespective of the Court's ultimate assessment at trial of the underlying merits of the notices of termination, it will be difficult to restore Oliver Hume to the position of Developer under the DMA prior to the purported termination of the DMA.[35] Whilst that proposition may appear to militate strongly in favour of injunctive relief, the weight to be given to it is affected by at least the following further interrelated considerations:

(1) whether and to what extent it is reasonable that Oliver Hume may be confined to a case in damages;

(2) whether, even had YAS been temporarily restrained from acting on the first notice of termination when it was issued, Oliver Hume would have had substantial prospects of achieving non-monetary relief on a final basis; and

(3) whether in view of the steps that have already been taken in respect of the Tranche 3 land, Oliver Hume would have substantial prospects of achieving non-monetary relief on a final basis, or would otherwise be in a materially superior position than it will be if the injunction is refused and it is for practical purposes confined to a claim in damages.

64 Starting with the third of these matters, as has been noted, the fact is that Tranche 3, an important component of the Project, is now the subject of first registered mortgage security in favour of a financier (Labassa Capital). This represents a material departure from what was contemplated by the DMA, pursuant to which Oliver Hume would arrange, facilitate and procure the required debt finance, with one of its directors guaranteeing the debt if required up to a specified aggregate limit (cll 3.2(b) and 7.1).[36] Whilst it is of course possible that, if an interlocutory injunction is granted, Oliver Hume may, in continued performance of its duty to obtain finance, and in the continued exercise of its powers and authorities under the DMA to bind YAS and its related entities, obtain finance that will see Labassa Capital's securities redeemed, this development undoubtedly complicates the prospect of Oliver Hume resuming its position as Developer and progressing the Project in the period pending trial so as to effectively preserve the subject matter of its claim for final relief.

65 Notwithstanding the evidence to which Oliver Hume drew attention about conversations between Oliver Hume's solicitor and representatives of Metrics, the objective evidence before the Court is that:

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35 Reasons [128], [141].

36 We accept that when considering claims of prejudice advanced by YAS, it is necessary to bear in mind the possibility that it will ultimately be found to have been the author of its own misfortune in respect of steps taken after what may emerge to have been an invalid termination. At this juncture, however, we are considering what might realistically be achieved if an injunction is granted in light of steps that have been taken and which involve third party rights.

- by email dated 7 May 2026, Metrics' representative Mr Donnelly confirmed that the facility's termination date would occur on the Maturity Date of 19 May 2026 and stated as follows:

  > It is apparent to us, from the Notice of Termination and communications we have had from both parties in relation to it, that there is a material dispute between the parties to the Development Agreement. We do not comment on the merit of either side's position in respect of that dispute nor do we wish to engage in any further communication in respect of it. Our position is that, in light of the dispute, we have no appetite to consider an extension of the Maturity Date, or any period of forbearance and, as such, we require repayment of the Secured Money in full by no later than 19 May 2026. …

- Mr Shahin's request made of Metrics on 19 May 2026 for forbearance for a period of four weeks pending refinancing discussions did not receive a response;

- Metrics issued a formal default notice and demand dated 1 June 2026; and

- Penalty interest is presently accruing in respect of the Metrics facility in an amount of approximately $4,000 per day.

66 Metrics' position as described in the email of 7 May 2026 might, of course, be affected by the grant of an injunction which restrains YAS from acting on the notices of termination, but injunctive relief of that kind would not and could not resolve a number of other matters about which the parties appear to be in fundamental dispute and which are likely to jeopardise the next steps in the Project.

67 It is true, as Oliver Hume emphasises, that the structure of the DMA is not one which requires agreement or cooperation before matters respecting the Project may be advanced; instead, the DMA confers a number of powers upon Oliver Hume as Developer. Although, those powers are subject to various contractual restraints, there are dispute resolution provisions which may be invoked with a view to achieving an expeditious resolution of any disputes about whether the steps proposed by Oliver Hume, or objections mounted by YAS, are appropriate.

68 The practical reality, however, is that there are likely to be disputes. Indeed, there are likely to be disputes about how comprehensively the dispute resolution regime governs the range of disputes that might arise. These considerations bear upon the prospect that, if an interlocutory injunction is granted, Oliver Hume will be in a position promptly and effectively to refinance the Tranche 3 secured debt and progress the Project pending a trial in this matter.

69 On the appeal, Oliver Hume contended that even if it is likely that the parties will remain in heated disagreement, a consequence of denying it interlocutory relief (and temporarily requiring YAS to act on the basis that the DMA has not been terminated) is that Oliver Hume will lose its capacity to exercise rights that may be available to it in the event that YAS commits (or persists in an extant) material breach of its obligations under the DMA. Oliver Hume points to cl

12.1(b)(iii) of the DMA, which in the circumstances there described permits it to exercise a Call Option so as to acquire the Land.

70 Oliver Hume relied upon this provision in support of a broader submission, relevant as well to the first and second of the three considerations identified above, that the DMA is a contract that has 'proprietary connotations' in respect of which damages may be seen as presumptively inadequate.[37] We accept that in many cases where a contract confers proprietary rights or interests, damages will be seen as inadequate. We do not consider that that proposition applies in any unqualified way to the DMA. Plainly, the DMA involves and concerns property. Necessarily, it makes provision for the ownership interests in respect of the property following its acquisition and during its subdivision and development pending sale (cll 3.6, 4.6 and 15.10). As well, it contemplates the potential exercise of rights by Oliver Hume to acquire the property in the event of a termination for YAS' material breach (cl 12.1(b)(iii), Schedule 8). Whilst that possibility exists, and the value of the contractual rights is not to be overlooked, the DMA cannot be characterised as one which has the enjoyment by Oliver Hume of proprietary rights as its primary object. The primary object and purpose of the DMA is to see the development and sale of property for profit.

71 Whilst it remains necessary to consider whether, in the circumstances of the case, damages may not be adequate to satisfy the demands of justice,[38] we would not accept that the DMA is a contract in respect of which, by reason of its proprietary connotations alone, damages cannot be an adequate remedy.

72 A more general assessment of the demands of justice in this case invites consideration of the difficulty in assessing damages and any difficulties that are likely to be encountered in recovering them.

73 As to the first matter, whilst we accept that the assessment of damages in this case for a wrongful termination or exclusion from the Project will require a counter-factual assessment of a number of matters bearing upon the ways in which Oliver Hume was entitled to derive payment under the DMA, each of which may involve contention and intricacy, we do not consider that the damages assessment which would be required is likely to be especially or exceedingly difficult. Oliver Hume contends that because, absent an injunction, it would lose practical control over the future direction of the project, the results that are achieved (for example, by way of property sales) will not be a proxy for the relevant counter-factual. That may be accepted, but it is not unusual that a commercial court is required to assess a counter-factual without such a proxy. As was submitted by YAS, and whilst it would by no means be conclusive or binding upon Oliver Hume, its own profit projections are likely to provide some framework for a formulation of a claim in

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[37] Relying upon the observation of Ward JA in *Goater v Commonwealth Bank of Australia* [2014] NSWCA 265 at [57].

[38] *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at [128] (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ), referring to the observations of Windeyer J in *Coulls v Bagot's Executor and Trustee Co Ltd* (1976) 119 CLR 460 at 503-504.

damages. Assessing lost profit may pose challenges of the usual kind, but by dint of its role and function under the DMA, Oliver Hume will have already made some assessment of these matters. In our view, this is not a case where the inherent difficulty in assessing damages speaks strongly in favour of injunctive relief.

74 In respect of any difficulties likely to be encountered in recovering any award of damages, this question might now be considered in light of the regime which, subject to the second appeal succeeding, establishes a suite of substitute security interests which may assist in recovering any award that might be made. For the reasons to be given in relation to the second appeal, whilst it is impossible to be precise, and whilst it may be accepted that an award of damages may exceed the range of \$9.5 million to \$10 million referred to in the judge's second reasons, the much higher estimates made by Oliver Hume in its submissions on that appeal are not, in our view, of particular assistance. They do not seem to take account of the timing and risk associated with projected cash flows. We do not treat the negative NPV assessment by which YAS referred as an assessment of expectation profits available to Oliver Hume (plainly it is directed to a different question), but the discount rates used in that analysis reinforce the simplicity of the higher estimates to which we have referred. There is also the question of deductions necessary to reflect saved expenditure.

75 Having regard to the nature and extent of the substitute security, whilst we cannot exclude that a significant award of damages may exceed that which will be available either pursuant to the substitute securities or from the equity aimed to be preserved in the other properties, this is not a case where it is obvious that any award of damages will be irrecoverable. The risks and potential difficulties associated with recovery are not to be ignored, but they are not themselves decisive in our view.

Consequences of granting interlocutory relief

76 YAS emphasises that if an injunction is granted, effectively restraining YAS from treating itself as entitled to have terminated the DMA, a number of adverse consequences are likely, and that that is so both if final relief is granted and if interlocutory relief is granted.

77 Central to that contention is that not only is it necessary to address the fact that the Metrics facility is presently in default, but also, on the projections that have been prepared for the purposes of the Project, a very substantial increase in debt funding will be required to progress the Project. Whilst the need for that extra debt funding will occur over time, even if a trial in this matter could be heard and determined within, say, three to four months, it seems likely that significant additional debt funding will need to be arranged (even if not fully drawn) and decisions made about the progress of the Project in circumstances where it appears the parties are now at loggerheads about significiant aspects of the Project. In that context, YAS contends that the powers and authorities conferred upon Oliver Hume under the DMA, far from being a panacea that may avoid a stalemate, will

potentially expose YAS to significant obligations to support the progression of a Project which they consider will, under Oliver Hume's stewardship, be unprofitable or marginal at best. That is to say, they emphasise the measure of control and authority given to Oliver Hume as a consideration militating against the temporary preservation of Oliver Hume's contractual rights and powers, because it has the potential, even pending trial, to expose YAS and its related entities to increased obligations from which it will be difficult or impossible to be extracted.

78 In our view, there is force in these contentions. We do not overlook that the evidence suggests that Oliver Hume has substantial means and that the primary judge did not consider its undertaking as to damages was insufficient for that reason. However, the grant of an injunction even for a period of months is likely to lead to one of two broad outcomes. First, Oliver Hume may exercise its contractual powers to progress the Project and its funding in a way that will commit YAS to increased external liabilities in circumstances where it wishes to extract itself from the Project. Secondly, YAS' likely objections to decisions proposed to be made by Oliver Hume may cause the funding and progress of the Project to stagnate. In circumstances where the funding arrangements are in default, that is a highly undesirable outcome.

79 Of course, if an injunction is refused, in order to avoid the consequences of default, YAS will need to arrange to redeem Metrics' securities so as to remove Oliver Hume and its privies from any ongoing guarantee obligations. YAS contends that given Labassa Capital's preparedness to fund Tranche 3, and the evidence upon which it relies as to Labassa Capital's preparedness to fund the Project if the DMA is at an end, it will be in a position promptly to do so. Whilst the Court cannot be certain that this will be achieved, the orders which are the subject of the second appeal would appear to remove a significant obstacle that might otherwise have stood in the way of progressing those arrangements. In this respect, the position is now different to that considered by the primary judge when deciding the injunction application. At that time, it was necessary for her Honour to bear in mind that the financial arrangements proposed by YAS might be affected by the caveats and mortgages then held by Oliver Hume.[39]

The merits of interlocutory injunctive relief

80 Ultimately, it is necessary to consider the strength of the *prima facie* claim for relevant relief and the competing arguments with respect to the consequences of granting or withholding interlocutory relief. Weighing and synthesising these considerations is not straightforward.

81 However, were we to consider the matter afresh by reference to the circumstances as they presently stand (and assuming the orders made on 2 July

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[39] Reasons [112].

2026 are not disturbed), we would not be disposed to reach a different decision to that ultimately reached by the primary judge.

82 Whilst there is a serious question to be tried as to the invalidity of both notices of termination, and, indeed, one which may be assessed as being more than barely arguable, substantial questions remain as to whether, on a final basis, non-monetary relief would be granted.

83 In the period of some few months (at least) that might be required before the question of final relief could be determined, both parties' interests are at risk of being prejudiced by reason that the existing facilities are in default, with no forbearance granted. Granting an interlocutory injunction may permit Oliver Hume to progress a refinancing of the Metrics facility, but its prospects of success in doing so are at best uncertain given that the underlying dispute will remain. If it succeeds in doing so, by hypothesis, it is likely to have committed an unwilling contractual partner to significant primary indebtedness, and on the basis that the Project is to be progressed in a manner with which it disagrees. Refusing the interlocutory injunction may practically confine Oliver Hume to a claim in damages. The substitute securities and the undertakings required to be proffered in connection with the orders made on 2 July 2026 provide a measure of protection in relation to its prospects of recovery in relation to such a claim. Those orders are likely to more readily facilitate YAS procuring alternative finance that will see Metrics' securities redeemed (and the guarantor obligations procured by Oliver Hume released). The scope for disputation between the parties will be much reduced.

84 Synthesising these considerations in light of the strength of the ultimate claims to relief, we would not be disposed to find that the balance of convenience requires the grant of injunctive relief.

85 Whilst what we have said to this point addresses much of the territory covered by Oliver Hume's grounds of appeal, we now turn to address those grounds, recognising that, understandably, they addressed the status quo at the time the Reasons were published.

Consideration of the grounds of appeal

86 Oliver Hume's grounds of appeal are as follows:

> 1. The primary judge having found that Oliver Hume had established a strong prima facie case for final relief at J[84] and J[93], and having further found that the failure to grant the interlocutory injunction would effectively amount to granting final relief in favour of the Respondents at J[128], erred in finding that the balance of convenience did not favour the grant of the injunction.
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> 2. The primary judge erred in approaching the application for the grant of the injunction on the basis that because it was a form of mandatory injunction the Court was required to exercise caution before granting the relief sought, citing *JC Williamson Ltd v Lukey* (1931) 45 CLR 282 (at J[60]).

3. The primary judge acted upon a wrong principle at J[60] and J[145] in equating Oliver Hume's case to a case for specific performance of a contract in circumstances where no such final relief was sought and, in substance, Oliver Hume was merely seeking to restrain a breach of a negative stipulation in cl 12 of the DMA that the First Respondent was not entitled to terminate the DMA without recourse to cl 11 unless fraud could be shown.

4. The primary judge acted upon a wrong principle at J[123] and J[145] by finding, contrary to *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, that ongoing disputes and continued litigation was a strong discretionary factor against a grant of relief.

5. The primary judge erred at J[127] in finding that balance of convenience did not favour the grant of the injunction because Oliver Hume had failed to establish that damages were not an adequate remedy.

6. The primary judge erred in finding that the balance of convenience did not favour the grant of the injunction by having regard to irrelevant and/or erroneous considerations, namely:

   (a) matters extraneous to the contractual rights and obligations of the parties including unreliable predictions as to the future financial arrangements and viability of the development as asserted by the Respondents (J[110], J[112], J[122]);

   (b) steps taken by the First Respondent in contravention of the DMA to progress the development on its own (J[108]-[111], J[133]);

   (c) Oliver Hume's prima facie right and entitlement to performance of the contract and the preference of courts to hold parties to their bargain;

   (d) the terms of the DMA and the securities granted thereunder as to how the parties' relationship would be governed in the event of a dispute between them;

   (e) the extent financial difficulties on the project were self-inflicted by the First Respondent's prima facie invalid termination of the DMA;

   (f) the inability at the time of the hearing to make a reasonable estimate of the damages to which Oliver Hume might be found entitled at trial given the nature of the contract and its subject matter;

   (g) the failure by the Respondents to demonstrate that they would suffer irreparable damage if the injunction was granted pending the trial of the action;

   (h) the undertaking as to damages given by Oliver Hume and its parent entity.

7. The primary judge erred in weighing the balance of convenience by failing to bring to account appropriately relevant matters in the dispositive reasoning, namely:

   (a) the strength of Oliver Hume's prima facie case to final relief;

(b) the fact that the failure to grant the injunction would effectively amount to Oliver Hume permanently losing its contractual rights and being denied its claim to final relief;

(c) Oliver Hume's prima facie right and entitlement to performance of the contract and the preference of courts to hold parties to their bargain;

(d) the terms of the DMA and the securities granted thereunder as to how the parties' relationship would be governed in the event of a dispute between them;

(e) the extant financial difficulties on the project were self-inflicted by the First Respondent's prima facie invalid termination of the DMA;

(f) the inability at the time of the hearing to make a reasonable estimate of the damages to which Oliver Hume might be found entitled at trial given the nature of the contract and its subject matter;

(g) the failure by the Respondents to demonstrate that they would suffer irreparable damage if the injunction was granted pending the trial of the action;

(h) the undertaking as to damages given by Oliver Hume and its parent entity.

Ground 1

87 This ground of appeal asserts an error in the ultimate outcome on the premises that there was a strong *prima facie* case for final relief and that the withholding of interlocutory relief would effectively jeopardise that final relief. Two general observations may be made. First, as framed, it may be doubted whether the ground raises a *House v The King* error.[40] Secondly, there is a question as to whether the premises can properly be sustained once the focus moves from the strength of the *prima facie* case for declaratory relief to a permanent restraint upon reliance on the notices of termination.

88 That being said, in written and oral submissions referable to this ground, Oliver Hume made a more particular attack on the primary judge's observation that the grant of injunctive relief would not maintain the integrity of the rights of the parties pending final adjudication,[41] and upon the judge's failure to inquire into whether the refusal of relief would cause any irreversible prejudice to YAS.

89 In our view, the primary judge's observation that the grant of interlocutory relief would not maintain the integrity of the rights of the parties pending final adjudication is to be understood not as proposition of law but as a reflection upon the likely practical outcome of withholding relief. That appears from the judge's immediately following observation that granting an injunction would simply result in further litigation and dispute between the parties.

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[40] Unless the ground is intended to contend that the result was so unreasonable or plainly unjust as to warrant an inference that the exercise of discretion miscarried.

[41] Reasons [141].

90 It is correct, as Oliver Hume submitted, that the dispute resolution provisions, together with commercial leverage attendant upon the parties' termination rights, might provide the means and an incentive for the parties to work through their difficulties. But as an assessment of the practical likelihood of what will occur in light of the history, the judge's assessment cannot be said to be an unreasonable one.

91 It must be remembered in this context that apart from the issues concerning finance, the parties are now at loggerheads about whether the condition precedent in cl 2.5(a)(iii) has been satisfied and how the Project should be progressed. An order temporarily restraining YAS from acting on its notices of termination would not, without more, resolve the underlying differences that feed that question. In circumstances where the dispute resolution provision cannot be said to provide an entirely comprehensive regime for the resolution of disputes of all kinds, and may itself be productive of disputation, it is on the cards that disputes of a kind that are likely to hold up the substantive progress of the Project, and, relatedly, funding arrangements, will quickly manifest. This may be contrasted with a case where, putting to one side a dispute about whether a contract remains on foot or has been terminated, the parties' ongoing obligations and their capacity temporarily to perform them, are tolerably clear

92 We do not consider the judge's observation was erroneous, and, in any case, we do not accept that it amounts to an error itself warranting appellate intervention.

93 Turning to the second aspect of Oliver Hume's contentions, it may be correct to say that the judge did not find that to grant the injunction would cause irreparable harm, or irreversible prejudice, to YAS. We disagree, however, that such a finding was necessary, if the injunction was to be refused. Just as irreparable injury to the claimant is not an invariable requirement of the grant of an interlocutory injunction,[42] injury of that kind to the respondent is not an invariable requirement of the refusal of relief. In any event, there is at least a prospect of practically irreversible consequences for YAS if interlocutory injunctive relief is granted. That is because, as explained earlier, it is highly likely that new and more extensive financing arrangements would need to be pursued including in the period before a determination of any trial, and decisions are likely to be required in relation to the substantive progress of the development. If successfully progressed by Oliver Hume, such arrangements will involve third parties and will not easily be reversed if it should later be found that YAS was indeed entitled to terminate. And if they are not progressed, there must be a substantial prospect of prejudicial steps being taken in relation to the presently expired Metrics facility.

94 Oliver Hume points to the undertaking it has given as to damages. It may be that YAS could, with no greater difficulty than Oliver Hume will face in relation to any claim for damages it may have, recover any loss caused by the grant of an interlocutory injunction. In our view, this serves to highlight that what is called

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[42] *Samsung Electronics Company Ltd v Apple Inc* (2011) 217 FCR 238 at [63] (extracted earlier).

for is not a binary assessment of whether one or other party will suffer consequences that could never be compensated for in monetary terms. In a case like the present, it is relevant and important also to consider the short term practical implications of the grant or refusal of relief, and to seek to avoid outcomes which carry a special risk of being detrimental to *both* parties. This, in effect, is what the primary judge did when she focused attention upon the likelihood that the grant of an injunction would be more likely to exacerbate the parties' existing difficulties than would the refusal of that relief.

Grounds 2, 3 and 4

95 Oliver Hume's written submissions deal with these grounds together. Oliver Hume submitted that neither the interlocutory nor final relief sought by it was a form of mandatory injunction akin to specific performance and that the judge erred by recognising the need for caution in relation to such cases.[43]

96 Dealing first with the question of final relief, as has earlier been explained, whilst the originating application may only seek declaratory and monetary relief, it seemed to be accepted in oral submissions that to justify interlocutory relief of the kind sought it will be necessary at least to pursue permanent negative relief of a similar kind.

97 The question then arises as to whether, looking at the position on an interlocutory or final basis, the judge erred in observing that relief of the kind in question required caution to be exercised. In that regard, Oliver Hume submits that the primary judge's reference to Dixon J's observations about 'continued supervision' in *JC Williamson Ltd v Lukey*[44] indicate an error of principle.

98 In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* ('*Patrick*'),[45] the plurality said that questions of degree rather than absolute restrictions upon the scope of curial relief were involved.[46] Referring to the decision in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*,[47] the plurality endorsed the proposition that the concept of 'constant supervision by the court' by itself is no longer an effective or useful criterion for refusing a decree of specific performance.[48] The continued involvement or the availability of ongoing recourse to the courts is not itself an objection to the grant of relief which is otherwise appropriate. However, that did not detract from two other propositions that had been stressed by Lord Hoffmann in that case: first, that a person who is subject to a mandatory order attended by contempt sanction ought to know with precision what is required; and secondly, the possibility of repeated applications for rulings on compliance with orders requiring a party 'to carry on

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[43] Reasons [60].
[44] (1931) 45 CLR 282 at 297-299; Reasons [60]-[61].
[45] (1998) 195 CLR 1.
[46] (1998) 195 CLR 1 at [78] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).
[47] [1998] AC 1.
[48] (1998) 195 CLR 1 at [79].

an activity, such as running a business over a more or less extended period of time' should be discouraged.[49]

99 In our view, the primary judge's reference to the observations in *JC Williamson Ltd v Lukey* did not involve an error of principle. The judge expressly noted that the requirement of judicial supervision may no longer be as significant a barrier to relief as it was when that case was decided.[50] It is not apparent to us that the approach adopted by the judge departed from the approach indicated by the plurality in *Patrick*. The judge's later emphasis upon the likely disputation that would flow from a grant of injunctive relief was not founded in any outdated concern about 'constant supervision'. Instead, it involved a practical assessment about the commercial and legal consequences likely to attend the alternatives between which she was required to decide.

Ground 5

100 In contending that the judge erred by concluding that it had not been established that damages were not an adequate remedy, Oliver Hume emphasised that a consideration of the 'demands of justice' may be broader than an inquiry into whether damages are capable of assessment.

101 We accept that proposition, and we accept that the nature and character of the contract bears upon the emphasis that that may be given to the performance interest. In the case of a contract to confer a proprietary interest, an award of damages may rarely meet the demands of justice, and in the case of a contract to render personal services, the undesirability of an order of the court requiring parties in conflict to work with or for one another may mean that damages, though hard to assess, best suit the justice of the case.

102 However, for reasons touched upon earlier, we would not view the DMA as a contract in respect of which damages are presumptively inadequate. That is not to say that the performance interest was irrelevant, but we do not accept that the primary judge overlooked it. Indeed, the judge accepted that there was force in the submission that parties should not readily be released from obligations to which they have agreed due to a breakdown in a relationship. Her Honour said that that was a consideration to be weighed in the balance along with other matters.[51]

103 We have not discerned any error of principle in the judge's conclusion that whilst the assessment of damages may be complex, Oliver Hume had not shown that damages would be an inadequate remedy for financial loss.[52] Nor do we consider that the judge erred by assuming, in that context, that recovery would inevitably be facilitated by the caveats and mortgages then in place. Moreover, were we satisfied that the judge had proceeded on that basis, it would be relevant to consider whether the position has materially altered following the orders made

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[49] (1998) 195 CLR 1 at [79].
[50] Reasons [62].
[51] Reasons [120].
[52] Reasons [127].

on 2 July 2026. For reasons explained in the context of the second appeal, we are not satisfied that the making of those orders has substantially prejudiced Oliver Hume's prospects of financial recovery.

Grounds 6 and 7

104 Ground 6 contends that the primary judge had regard to irrelevant or erroneous considerations and Ground 7 contends that the judge failed appropriately to bring to account various relevant considerations.

105 As developed in written and oral submissions, the focus of Ground 6 was the prominence the judge gave to the likely disputation that would continue or increase upon the grant of an interlocutory injunction, given the breakdown in the parties' relationship and their loss of trust and confidence in one another. In this context, Oliver Hume stressed two matters in particular: first, that the structure of the DMA was such as to confer primary responsibility following the re-zoning of the land (which has occurred) upon Oliver Hume; and, secondly, that the dispute resolution provisions of the DMA catered for any disputes that might arise in the performance by Oliver Hume of that responsibility.

106 In our view, whilst those matters are important, they did not render irrelevant the potential for disputation nevertheless to thwart the progress of the Project, in a way that would have adverse consequences for one or both parties. In our view, a complaint that the judge's assessment was overly pessimistic, or a complaint that too much emphasis was given to that assessment (in circumstances where it could be known where the blame would lie in that eventuality), is not one which would justify appellate intervention consistently with the principles in *House v The King*.

107 Oliver Hume also submitted that the judge erred by having regard to the likely difficulties that would now attend the grant of an interlocutory injunction to the extent that they are the product of YAS' conduct in wrongfully terminating the DMA and, in relation to the Tranche 3 land, dealing with it so as to take it 'outside' the framework of the DMA. We accept that, in principle, any prejudice to YAS that is attributable to its own breach of contract ought not advance its cause in an assessment of the balance of convenience. The difficulty, of course, is that it is not possible at this stage reliably to apportion blame. Whilst it is appropriate to be alert to the risk that a party may profit from its own wrong in a case such as this, and whilst an impressionistic assessment of the merits forms part of the assessment of the sufficiency of the *prima facie* case, there is little alternative but to take the current facts and circumstances as they exist and to examine the consequences that attend granting or refusing an injunction with reference to those realities. We do not consider that the judge erred in the manner contended.

108 Turning to ground 7, we are not persuaded that Oliver Hume has identified a relevant matter which the judge failed to consider. Even as framed, the ground complains that the judge did not bring various matters to account 'appropriately'. Having reviewed the written submissions of the parties directed to this ground, we are not satisfied that relevant error has been demonstrated.

Disposition

109 Whilst we have not addressed in these reasons every aspect of Oliver Hume's written and oral submissions in support of the first appeal, we are not persuaded that a ground for appellate intervention of the kind described in *House v The King* has been made out.

110 We accept, however, that to some extent the factual and legal landscape relevant to the exercise of discretion has, subject to any success that Oliver Hume may have on the second appeal, changed.

111 For that reason, and to allow for the possibility that we are wrong in our conclusion that the exercise of discretion was not vitiated by relevant error, we have considered the matter more generally. As we have said, the matter is not straightforward. Oliver Hume has advanced arguments of substance. Ultimately, however, we are not persuaded that when considered in the light of the prospects of Oliver Hume being granted final relief of a relevant kind, the balance of convenience demands that an interlocutory injunction be granted.

THE SECOND APPEAL

112 As noted earlier, on 17 June 2026, the respondents on these appeals (that is, YAS and its associated entities, but generally referred to as YAS for convenience) brought proceedings seeking declarations that they had performed all obligations and paid all monies owing under the DMA, and covered by the mortgages and charges provided pursuant to that agreement. They also sought interlocutory relief in the form of orders, upon the provision of substituted security, discharging the mortgages, and removing the caveats, that Oliver Hume had placed on the titles of the various parcels of land.

113 It is useful to observe at the outset that, although the parties and judge generally framed the first of the issues on the interlocutory application in terms of an application to 'discharge' the mortgages, it is apparent that what was in fact sought – and certainly what her Honour ultimately ordered – was merely that the mortgages be removed from the titles of the various properties. It was intended that Oliver Hume would otherwise retain the rights it has as mortgagee under the mortgages, just as it would retain its rights under the charges said to support the caveats in the event of the removal of those caveats.

114 In support of the interlocutory relief it sought, YAS argued that because (on its case) the DMA had been validly terminated, there were no secured obligations or monies under the relevant security documents (that is the mortgage documents, and the owner / nominee security deeds giving rise to the charges in respect of which the caveats had been lodged). The YAS entities also argued that insofar as Oliver Hume claimed an entitlement to damages for wrongful termination of the DMA, its claim for unliquidated damages did not fall within the definitions of the secured obligations or monies in the security documents.

115 YAS argued that the mortgages and caveats were operating to prevent it refinancing the Metrics facility, exposing it to ongoing default, mounting penalty interest, and a real risk of enforcement action or receivership which would likely destroy the development and significantly diminish the value of the land.

116 On its evidence, YAS had been arranging the entry into a new facility with Labassa Capital which it was anticipated would enable the continuation of the development. As mentioned earlier in these reasons, Labassa had already provided finance as part of that new facility for approximately $7.5 million for the settlement of the Tranche 3 contracts between 26 and 29 May 2026. On YAS' evidence, Labassa was prepared to lend on the basis of YAS' proposed development, but was not willing to complete the refinance while the mortgages and caveats remain on the relevant titles. Whilst the mortgages and caveats had thus delayed the refinancing of the Metrics facility, YAS' evidence was that its new financier has funds available and is ready, willing and able to advance the funds necessary to achieve that refinancing once the mortgages and caveats are removed.

117 YAS further argued that Oliver Hume would suffer no comparable prejudice upon the removal of its mortgages and caveats in circumstances where YAS was offering substituted security comprising the following:

1. Oliver Hume having first ranking security over approximately $10 million worth of land (referred to as the Southern Land).

2. The payment of $1 million into Court by way of security.

3. An undertaking to the Court by the YAS entities to the effect that they will not:

   (a) sell or transfer the land other than in the ordinary course of the first applicant's business (being sales expressly contemplated by the security documents); and

   (b) encumber any of the land held by the YAS entities beyond the amount of $83 million.

118 In resisting the relief sought, Oliver Hume argued that the mortgages conferred valid and indefeasible proprietary security which secured existing and future obligations, including an award of damages. It argued that YAS had not satisfied the high threshold required to justify the interlocutory removal of the mortgages, noting the sanctity of registration (in the absence of fraud). It challenged the existence of a *prima facie* case in favour of removal in circumstances where, in her reasons for refusing injunctive relief, the judge had held that there was a strong *prima facie* case for challenging the validity of YAS' termination of the DMA. Oliver Hume emphasised the need for any discharge of the mortgages to be based upon a proper estimate of the liability, submitting that the proposed substituted security was inadequate.

119 In her reasons dated 30 June 2026, but published on the morning of 1 July 2026, the primary judge indicated that she would make orders, upon the provision of the substituted security, for the discharge of the appellant's mortgages and the removal of their caveats. After hearing further submissions about the terms of the orders, the judge made orders during the afternoon of 2 July 2026. It is not necessary to set out the detail of those orders. They reflect the contemplated substituted security, although it is perhaps noteworthy to observe: that the owners of the Tranche 3 land were included within the YAS entities giving undertakings in the terms contemplated; and that the orders required the cancellation of the entries registering the mortgages on the various certificates of title, but included express declarations confirming that Oliver Hume nevertheless continued to have its rights under those mortgages.

120 Before addressing Oliver Hume's challenges to her Honour's reasons and decision, it is convenient to outline her Honour's reasoning.

The primary judge's reasons

121 In addressing the application to discharge the mortgages, the judge acknowledged that YAS was required to establish that there was a *prima face* case for the discharge of the mortgages, and that the balance of convenience favoured their discharge.[53] On the application to discharge the mortgages in reliance upon the equitable principles of redemption, the issue was whether it was fair and just to discharge the mortgages having regard to the substituted security offered.[54]

122 The primary judge rejected Oliver Hume's submission to the effect that her finding that it had a strong *prima facie* case in the context of its injunction application meant that YAS could not establish a *prima facie* case in favour of the discharge of the mortgages. As a *prima facie* case, or even a strong *prima facie* case, did not imply a conclusion on the balance of probabilities, there was no logical difficulty, or necessary inconsistency, in finding that YAS had made out a *prima facie* case. Her Honour also pointed out that she had received some additional evidence on the application to remove the mortgages and caveats, and that this evidence tended to reduce the strength of Oliver Hume's challenge to the validity of YAS' termination pursuant to the second termination notice.[55]

123 The judge found that YAS had established a *prima facie* case for the discharge of the mortgages. In so finding, her Honour emphasised that, on the updated evidence, there was a *prima facie* case both: (i) that the DMA was validly terminated by YAS by reason of Oliver Hume's failure to satisfy the condition precedent in cl 2.5(a)(iii); and (ii) that the scope of the interest protected by the mortgages did not extend to Oliver Hume's unliquidated claim for damages.[56] As to the latter, whilst acknowledging that a mortgage or charge might secure an

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53 Second Reasons [15].
54 Second Reasons [16].
55 Second Reasons [33]-[36].
56 Second Reasons [37].

unliquidated claim for damages, her Honour had 'some doubts' about whether the wording of the security documents in this case extended that far.[57]

124 Turning to the balance of convenience, the primary judge accepted in Oliver Hume's favour that it was relevant that it, and Mr Duster personally, had guaranteed the Metrics facility. It was also relevant that the relief sought by YAS would likely result in the discharge of the finance facility which, under the DMA, Oliver Hume had been given responsibility to arrange, and YAS had been obliged to enter into.[58]

125 The primary judge acknowledged that discharging a mortgage securing a contingent liability would ordinarily require paying the full amount, or at least a proper estimate, of the total liability.[59] Her Honour later referred to adopting a 'strict and conservative approach' so as to avoid exposing the mortgagee to risk.[60] At the same time, her Honour explained that this did not always require payment or security representing, for example, the full amount of the damages claimed by the mortgagee.[61] A 'reasonable estimate', or 'commercial assessment', of the claimed amount and the value of the substituted security may be appropriate.[62]

126 The primary judge considered the evidence, such as it was, in relation to Oliver Hume's claimed entitlement to payments or damages.[63] Oliver Hume pointed to its entitlement to claim, or to recover damages to compensate it for, its reimbursement of costs, a Development Management Fee and a share in the Project profits. Oliver Hume emphasised the uncapped value of its security, and suggested that the potential size and difficulty in calculating the amount to which it was entitled (particularly in the absence of expert evidence) was a matter in its favour. It also proffered a rough calculation, suggesting a claim in excess of $30 million. This included a calculation based upon an assessment of 50 per cent of the equity in the Project. Starting from the current value of the land of $112 million, and after deducting about $500,000 paid by Oliver Hume to third parties, $37 million owed to Metrics, and $7.5 million owed to the financier of Tranche 3, that left total equity of about $68 million. Oliver Hume claimed a 50 per cent stake in this equity, being just over $34 million.

127 The judge rejected this approach as not reflecting the approach that would be taken to assessing any entitlement Oliver Hume might have to recover damages for its expectation loss.[64] In considering how that entitlement might be assessed, the judge considered that it would need to reflect the fact that some of the amounts Oliver Hume might expect to be paid under the DMA would represent payment

57 Second Reasons [38]-[40].
58 Second Reasons [41].
59 Second Reasons [42].
60 Second Reasons [55].
61 Second Reasons [42].
62 Second Reasons [54]-[55].
63 Second Reasons [43]-[45].
64 Second Reasons [46]-[47].

for work or services that, by reason of the termination of the DMA, it would no longer be required to perform.[65]

128 The judge noted YAS' submission that, in considering the amount of any damages that might be recoverable, it was instructive to have regard to the draft Budget and Feasibility Study prepared by Oliver Hume in December 2025. It was suggested that based upon a projected profit in those documents of $19 million, an appropriate figure for Oliver Hume's loss might be about 50 per cent of this, or about $9.5 million to $10 million.[66]

129 The judge was ultimately satisfied that the substituted security proffered by YAS was sufficient to meet a 'reasonable estimate' of any claim for damages by Oliver Hume, including costs and interest.[67] In so concluding, the judge noted that the parties appeared to accept that the value of the land was about $112 million, and that with a land value ratio of 65 per cent, and an undertaking not to encumber the land beyond $83 million, there remained significant equity in the land.[68] This was in addition to the first ranking mortgage to the value of $10 million over the Southern Land and the payment into Court of $1 million.

130 The judge contrasted the lack of prejudice to Oliver Hume if the mortgages were discharged with the prejudice to YAS if they remained registered. Her Honour accepted that the registration of the mortgages prevented the refinancing of the Metrics facility, and exposed YAS to ongoing default, mounting penalty interest and a real risk of enforcement action or receivership. She accepted that these matters would impact the development and significantly diminish the value of the land.[69] The judge acknowledged that the undertaking provided by Oliver Hume provided some protection for YAS, but observed that it did not address the risk of a receiver being appointed. The appointment of a receiver would diminish the value of the land, and potentially adversely affect both parties.[70]

131 The judge also considered that it was relevant that Oliver Hume had declined to particularise any secured amount payable to it, or to provide a reasonable estimate of the damages to which it contends it would be entitled.[71]

132 The judge concluded that the comparative prejudice was 'asymmetric', such that refusing the relief sought by YAS created a greater risk than granting it. If the securities remained on the titles, the development would be at risk through enforcement action, whereas if the securities were removed, Oliver Hume would retain the protection of the substituted security and undertakings.[72]

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65 Second Reasons [49]-[51].
66 Second Reasons [52].
67 Second Reasons [57], [61].
68 Second Reasons [56].
69 Second Reasons [58].
70 Second Reasons [60].
71 Second Reasons [59].
72 Second Reasons [61].

133 For these reasons, the judge was satisfied that it was appropriate to order that, upon the provision of the substituted security and undertakings proffered by the YAS entities, the mortgages should be discharged.[73] It was therefore not necessary to consider whether the same outcome might also have been achieved in equity through the redemption of the mortgages.[74]

134 Turning to the application to remove the caveats lodged by Oliver Hume, the judge recognised that the onus lay on Oliver Hume to establish a serious question to be tried as to the asserted caveatable interest, and that the balance of convenience favours the maintenance of the caveats.[75]

135 Whilst acknowledging 'some doubt' about whether the amounts claimed by Oliver Hume were secured by the charge under the owner / nominee security deeds, and that its case in favour of such an interest was 'not strong', the primary judge accepted that Oliver Hume had nevertheless established a serious question to be tried as to the asserted caveatable interest.[76]

136 The judge accepted that, having established a serious question to be tried, the balance of convenience will often favour the caveator. However, her Honour considered that in assessing the potential prejudice to each side, it was appropriate to have regard to essentially the same considerations as those which her Honour had addressed in the context of the application to discharge the mortgages. Her Honour considered that the same 'asymmetry' in prejudice existed, such that refusing removal created a greater risk than ordering removal.[77]

137 It followed that her Honour was also prepared to order that, upon the provision of the substituted security and undertakings proffered by the YAS entities, the caveats be removed from the titles of the relevant parcels of land.

The appeal

138 In its notice of appeal, Oliver Hume relies upon seven grounds contending variously that the primary judge either did not have power, or erred in the exercise of her discretion, to grant interlocutory relief requiring the removal of the mortgages and caveats.

139 Putting to one side the challenge to the judge's power, the balance of Oliver Hume's complaints involve a challenge to a discretionary decision and so fall to be determined by reference to the principles in *House v The King*.[78]

140 Before addressing the individual grounds of complaint relied upon by Oliver Hume, it is convenient to note YAS' overarching submissions as to what it

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[73] Second Reasons [62].
[74] Second Reasons [63].
[75] Second Reasons [77].
[76] Second Reasons [78].
[77] Second Reasons [79]-[83].
[78] *House v The King* (1936) 55 CLR 499.

contends is the appropriateness of the orders made, and the balance struck, by the primary judge.

141 YAS contends that the orders made by the primary judge are modest and balanced, and the result of multiple hearings as to the detail of the orders to be made. Indeed, they arguably place Oliver Hume in a better position than prior to the making of the orders. Whereas immediately prior to the orders, Oliver Hume had a second ranking mortgage over some of the land (not including the Tranche 3 land), following the orders, it has a first ranking registered mortgage over the Southern Land valued at approximately $10.5 million. Prior to the orders, Oliver Hume did not have any security interest or undertaking in relation to the Tranche 3 land, whereas now it has an undertaking given by the owners of that land.

142 YAS also emphasises that the orders are structured in a way that the underlying mortgages and charges in respect of the balance of the land (that is, apart from the Southern Land) are not forfeited. They still exist as unregistered mortgages and charges (to the extent that they are enforceable), and notice may be given on 14 days (in which case liberty to apply must be exercised). This served to underscore the holding nature of the orders.

143 From YAS' perspective, the commercial benefit of the orders was that it could now finance with its new financier, which would pay out the Metrics facility and remove the risk of receivership. It contends that given Metrics' letter of 7 May 2026, the subsequent notice of demand expressed to be a final notice, and Metrics' failure to respond to a request for forbearance, the judge was right to accept that there was a real risk of receivership in the event that the mortgages and caveats were not removed.

144 YAS contends that the judge has proceeded in a manner which is commendable for a commercial matter, fashioning orders which are sensible, proportionate and will stave off receivership, while at the same time providing adequate protection for Oliver Hume.

Ground 1: no basis for interlocutory relief outside of a redemption application

145 The first ground of appeal involves a challenge to the judge's power to make the orders made. It involves a contention that the primary judge erred because she proceeded purportedly on the basis of an interlocutory application to discharge the mortgages. Oliver Hume contends that there was no authority for such an approach, and that in substance the judge permitted an application for redemption without adhering to the strictures applicable to such an application. Indeed, the judge upheld the application without having in evidence the finance documents, or even proposed finance documents, relied upon by YAS in support of its substituted security. Oliver Hume noted the judge's reliance upon the decision in *Equus Financial Services Ltd v RMBL Investments Pty Ltd*[79] and *Liberty Funding Pty Ltd*

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[79] *Equus Financial Services Ltd v RMBL Investments Pty Ltd* (1996) 22 ACSR 744 at 746-749 (Bryson J).

v Steele-Smith,[80] but contended that neither provided authority for the course adopted by the primary judge in the present case.

146 In our view, these decisions do provide authority for the course adopted by the judge. In the former, the position was conveniently summarised by Bryson J in the following terms:[81]

> In my view it has been established that the court has power by an interlocutory order to require the mortgagee to give up the security while the accounts have not been settled, the amount payable to the mortgagee has not been ascertained and there is still a difficult course to follow before these things happen. It should be clear before the court does so that reasonable protection is available and that a fund of money sufficient to pay any amount likely to be found to be due is under the control of the court. What the court is asked to do is to require an unwilling mortgagee to accept a sort of security, namely a fund of money, different to the security which it has bargained for and wishes to have, and while the court does have that power, it should only do so where it is satisfied that the interests of justice require an interlocutory order to that effect.

147 To these authorities should be added reference to the reasons of Steytler J in *Temwood Holdings Pty Ltd v Asean Australian Assets Pty Ltd*,[82] a decision also referred to by the primary judge. His Honour characterised an application to discharge a mortgage as one seeking a mandatory injunction, holding also that the ordinary principles governing the availability of interlocutory injunction were to be applied. We do not accept Oliver Hume's submissions that this decision can be dismissed as a 'quasi redemption case'. It is authority for the approach adopted by the primary judge.

148 In our view, the contention that the primary judge did not have power to make an interlocutory injunction for the discharge of the mortgages in accordance with ordinary principles has not been made out.

149 We would also observe that it is significant that, although the judge and parties generally referred to the application in terms of one to 'discharge' the mortgages, it is apparent that what was sought – and certainly what was ultimately granted – was merely the removal of the registration of the mortgages. The terms of the orders make plain that the removal of the mortgages (and caveats) from the titles of the relevant land does not operate to affect the underlying security interests. Just as it seems uncontroversial that a court might, if approached in a timely way, grant an injunction restraining the registration of an equitable mortgage, we see no conceptual or legal difficulty with a court, in an appropriate case, granting an injunction to remove a mortgage from the register.

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80 *Liberty Funding Pty Ltd v Steele-Smith* [2004] NSWSC 1100 at [29] (Palmer J).
81 *Equus Financial Services Ltd v RMBL Investments Pty Ltd* (1996) 22 ACSR 744 at 747-748.
82 *Temwood Holdings Pty Ltd v Asean Australian Assets Pty Ltd* [2000] WASC 84 at [20]-[23] (Steytler J).

Ground 2: misapplication of the test for interlocutory injunction

150 Oliver Hume contends that the primary judge misstated and misapplied the *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (‘Beecham’)[83] test adopted by the majority of the High Court in *Australian Broadcasting Corporation v O’Neill*.[84] It contends that her Honour erred in referring to a ‘low threshold’ in establishing a serious issue to be tried, whereas the *Beecham* test adopted by the High Court contemplates that the requisite strength of the case will depend upon the nature of the rights asserted and the practical consequences likely to flow from the orders sought.

151 We do not consider that the primary judge’s reasons reveal any error in approach. Read in context, her Honour’s reference to a ‘low threshold’ was intended merely by way of contrast with what was not required, namely ‘proof of probable success nor a final determination of rights’.[85]

152 Our satisfaction that her Honour applied the appropriate principles is reinforced by her Honour’s reference, in the immediately preceding paragraph, to the statement in the reasons of Gummow and Hayne JJ in *Australian Broadcasting Corporation v O’Neill* that the applicant must demonstrate ‘a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial’.[86]

153 We would also reject Oliver Hume’s complaint that the judge erred in approaching the matter on the basis that relief was being sought to preserve the status quo, whereas the reality was that removal of the mortgages and caveats would be to alter the status quo rather than preserve it. In our view, it was appropriate for the judge to characterise the relief sought in the manner she did. It was appropriate to approach the matter on the basis that the status quo was to be assessed as at the commencement of the proceedings, when there were no securities registered on the titles. Alternatively, and in any event, regardless of precisely how one characterises the status quo, there is no basis for suggesting the judge misunderstood the nature and significance of what was being sought.

154 As for Oliver Hume’s challenge to the judge’s approach in finding a *prima facie* case in favour of discharge of the securities in circumstances where she had, in the injunction proceedings, found a strong *prima facie* case to challenge the validity of YAS’ purported termination of the DMA, we do not think there is any merit in this contention. We agree with the judge’s reasons for rejecting it, as summarised earlier.

155 We also reject the suggestion that the orders sought and made were in truth and substance orders for final relief. Particularly in circumstances where the

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[83] (1968) 118 CLR 618.
[84] *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57.
[85] Second Reasons [31].
[86] *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 at [65] (Gummow and Hayne JJ, with whom Gleeson CJ and Crennan J concurred on this point).

orders merely remove the mortgages and caveats from the title, rather than discharge or otherwise affect the underlying securities, we do not consider that the orders made were, as a matter of truth or substance, orders for final relief.

Ground 3: inadequacy of damages

156 Under this ground of appeal, Oliver Hume contends that, in her assessment of the balance of convenience, the judge focussed too narrowly and simplistically on Oliver Hume's pecuniary rights under the DMA without regard to the broader and true operation of the DMA. In particular, it contends that the judge erred in not appreciating the inadequacy of damages in compensating Oliver Hume for what it contends were its rights with 'proprietary connotations' under the DMA. It relies in this respect upon its right, in the event of a material breach by YAS, to terminate under cl 12 and exercise its consequential powers to acquire the properties and complete the Project itself.

157 It seems to us that this is a matter more directed to the injunction application the subject of the first appeal, rather than the application to remove the mortgages and caveats. A similar contention has already been addressed in that context earlier in these reasons.

158 In any event, we do not consider that the submissions made in this respect advance Oliver Hume's second appeal.

159 In circumstances where the submissions relate to matters which do not appear to have been relied upon below in the context of the present application, it is not clear to us how they could be said to sound in an error in the sense required by *House v The King*.

160 More fundamentally, however, we do not accept the premise of the submissions made. We accept that, in considering the balance of convenience, and, in particular, the adequacy of damages, it was important not to overlook the nature of the parties' contractual rights. Both parties were entitled to expect that the law would attach some real significance to their legitimate interest in the performance of the contract, and hence in the achievement of the objective purposes of the contract. However, it is not clear to us that this extends to the parties having a legitimate interest in the performance of a contract for the purpose of enabling them to exercise their rights of termination so as to trigger their potential entitlement to certain rights and advantages. Whilst an understanding of the nature and extent of Oliver Hume's contractual rights was an important aspect of the context in which the balance of convenience fell to be assessed, we do not consider that Oliver Hume has established any error in her Honour failing to attach any particular weight to Oliver Hume's potential ability, if it were to be restored to its contractual rights under the DMA, to later terminate that contract and itself take control over the Project.

Ground 4: adequacy of the substituted security

161 Ground 4 involves a complaint that, whilst the judge correctly directed herself to take a 'strict and conservative' approach in favour of the mortgagee, and against exposing the mortgagee to risk, her Honour nevertheless failed to adhere to that approach.

162 Oliver Hume contends that the judge ought not to have been critical of its failure to adduce further or better evidence in support of the quantum of its claim for damages, given the circumstances and urgency in which the proceedings unfolded. It further contends that her Honour erred in any event in underestimating the likely quantum of its claim, and hence in assessing the likely adequacy of the substituted security proffered by YAS.

163 Using the figures in the Feasibility Studies dated December 2025 and March 2026, Oliver Hume presented two calculations, assessing its potential damages at approximately $44 million and $52 million respectively:

December 2025		**March 2026**	
Management Fee:	[redacted]	Management Fee:	[redacted]
50% Profit Share:	[redacted]	50% Profit Share:	[redacted]
Real Estate Commissions:	[redacted]	Real Estate Commissions:	[redacted]
Total:	$44.87m	Total:	$52.93m

164 Oliver Hume contends that the judge erred in departing from an assessment along these lines, and suggesting a lower figure. In particular, it contends that the judge erred in proceeding on a basis that assumed that Oliver Hume has saved a significant level of costs. It relies in this respect upon the reasoning of Beazley JA in *North Sydney Leagues' Club Ltd v Synergy Protection Agency Pty Ltd*[87] to the effect that care must be taken in determining which costs may be saved (and hence deducted from any assessment of loss) and which costs may be incurred in any event (and hence which should not be deducted).

165 In our view, the primary judge accurately stated and applied the approach to be taken in determining the adequacy of substituted security. Her Honour's reference to a 'strict and conservative' approach was an appropriate description of the caution required by reason of the undesirability of exposing the mortgagee to risk. However, consistently with the authorities we have mentioned earlier, her Honour was right to acknowledge that the ultimate issue involves an assessment of where the interests of justice lie. Given that context, it was appropriate for her Honour to also observe that the issue is one which may be framed in terms of a proper or reasonable estimate of the amount claimed to be owing, and ensuring

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[87] *North Sydney Leagues' Club Ltd v Synergy Protection Agency Pty Ltd* (2012) 83 NSWLR 710.

that the substituted security represents adequate or reasonable protection having regard to that estimate.

166 We also consider that it was appropriate for the judge to take into account Oliver Hume's failure to attempt any meaningful quantification of its claimed entitlement under the mortgages and charges. It is true that there would have been a limit to its ability to be precise, or to obtain useful expert evidence, given the nature of its claim and the urgency with which these proceedings progressed. However, it is also fair to observe that more could have been done.

167 That said, it does not appear that the judge attached much weight to Oliver Hume's failure to adduce any detailed evidence in support of her claim. The judge did not suggest that this absolved her from attempting an assessment on the information available to her. To the contrary, this is precisely what the judge did.

168 As for the estimates provided in the table above, whilst they were based upon matters in evidence, they were not advanced other than by way of submission by counsel as to the potential scale of an award of damages. In any event, we are not persuaded that these estimates are of much assistance. They do not seem to take any account of the timing and risk associated with the projected cash flows. As Oliver Hume's own Budget and Feasibility Study calculations suggest, such cash flows would ordinarily be heavily discounted to reflect these matters.

169 We also consider it likely that there would need to be a significant reduction to reflect amounts claimed for costs no longer to be incurred. We accept Oliver Hume's submission that care is required in this regard; it is not appropriate to assume that all costs will be saved and hence need to be deducted. But there are likely to be significant cost savings from Oliver Hume not having to undertake the significant work under the Project that it would otherwise have undertaken.

170 Whilst Oliver Hume's calculations suggest that there is potential for any damages award to be higher than the $9.5 million to $10 million estimate mentioned by the judge, it important to appreciate that this was not the judge's estimate of Oliver Hume's potential loss. Her Honour referred to these figures as suggested by YAS, based upon the profit expected in the December 2025 Feasibility Study prepared by Oliver Hume. Whilst the judge appears to have been assisted by these figures, her Honour did not elevate them to an estimate which she adopted as her own. Rather, the judge proceeded on a basis which acknowledged that it was not possible at this point in the proceedings to be precise, but which also acknowledged that the claim may be greater than the estimate suggested on behalf of YAS. Her Honour was satisfied that, whatever the precise figure, the proffered substituted security was adequate.

171 In the circumstances, we are not satisfied that the submissions made by Oliver Hume have identified any error in the approach taken by the judge to her assessment of the likely quantum of Oliver Hume's claim or the adequacy of the substituted security.

172 Finally, Oliver Hume contends that the judge erred in comparing the value of the land ($112 million) with YAS' undertaking not to encumber the land beyond $83 million, and suggesting that there remained 'significant equity'. It contends that the judge erred in failing to deduct $10 million for the Southern Land and $23 million for the Tranche 3 land, and that had the judge done so, the value of the land would have been reduced to $79 million and hence have left no equity. Given the inclusion of the Tranche 3 land in the orders ultimately made, there does not seem to be any basis for deducting this land from the calculation. As mentioned below, the judge was mindful of the significance of the LVR of 65 per cent. Again, we do not consider that any error has been identified in the judge's reasoning or conclusion.

Ground 5: adequacy of the substituted security

173 In Ground 5, Oliver Hume challenges the judge's finding to the effect that substituted security would provide it with sufficient or adequate protection. In support of this challenge, it relies upon several matters.

174 It points out that even accepting that the combination of the net present value of $112 million for the land, and an undertaking not to secure that land to more than $83 million, the potential security of $29 million takes no account of a potential default, interest including penalty interest and the costs occasioned by default, and the prospect of a mortgagee sale. It points out that even under the undertakings given in support of the substituted security, YAS would be entitled to sell parcels of the land in the ordinary course of its business; that is, it would be entitled to develop, subdivide and sell allotments, thereby denuding the value of the substituted security. It also points out the limited utility of the unregistered security that the judge contemplated that Oliver Hume would retain, bearing in mind the ability of YAS to mortgage that land to a financier (under first and subsequent mortgages), and to enter into sale contracts with third parties which might result in them obtaining a proprietary interest over the relevant parcel with priority over Oliver Hume's under its securities.

175 In response, YAS contends that the first matter mentioned above overlooks the significance of the fact, mentioned by the judge,[88] that the undertakings must be considered in a context of an LVR of 65 per cent. The practical effect of this would be to ensure that the peak indebtedness would not reach the cap of $83 million. It contends that Oliver Hume can hardly complain about the likelihood of a potential default, including interest, costs and a potential mortgagee sale, when these were not matters relied upon, or the subject of any evidence, before the primary judge. YAS also contends that Oliver Hume's challenge to the adequacy of its security overlooks the value of what it has now (pursuant to the substituted security) relative to what it previously had by way of security. As outlined earlier, YAS contends that Oliver Hume is in a better position now (particularly in relation

[88] Second Reasons [56].

to the Southern land and the Tranche 3 land) than it was immediately prior to the orders made by the judge.

176 Whilst accepting the relevance of the matters raised by Oliver Hume, we consider that there is force in the matters advanced in response. Significantly for present purposes, we do not consider that Oliver Hume has identified any error of the type required by *House v The King* in either the judge's approach or conclusion as to the adequacy of the substituted security proffered by YAS. Given the judge's broad discretion to mould the orders so as to achieve – so far as was possible on the information available to the Court – adequate protection and an appropriate balance, we are not satisfied that relevant error has been identified.

Ground 6: sufficiency of prima facie case to maintain caveats

177 Oliver Hume contends that the primary judge erred as a matter of principle in her approach to an application for the removal of its caveats. It argues that it is sufficient to establish a *prima facie* case in this context that the caveator recites in authentic terms that they have an estate or interest in the relevant land.

178 We do not accept that this is a complete statement of the law, or that the primary judge erred in addressing – in an appropriately summary way – the potential strength and quantum of the interests asserted by Oliver Hume.[89] Her Honour was not required to accept and act upon the mere recitation of the asserted interests.

179 We reject the appellant's complaint about the judge's reasoning in paragraph [79] for the reasons set out in YAS' submissions.

Ground 7: risk of receivership and availability of new finance

180 Through Ground 7, and in the context of its challenge to the judge's removal of the caveats, Oliver Hume argues that the judge erred in accepting that leaving the caveats in place would present a risk of receivership. In particular, it challenges the assumption that this finding carries, namely that if the caveats are removed, YAS will have finance available that avoids that risk.

181 In our view, whilst the evidence could have been clearer, there was an adequate basis for the judge to be satisfied as to the likelihood of the availability of alternative finance in the event the mortgages and caveats are removed. Whilst Mr Shahin expressed confidence in this regard, more significant support for the availability of finance can be drawn from the letter of 23 June 2026 from the Managing Directors of Labassa Capital and Trilogy Funds.

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[89] See, for example, *Piroshenko v Grojsman* (2010) 27 VR 489 at [34]-[36], [39]-[40] (Warren CJ), referring to *Re Caveat No 773; Ex parte Hodgson* (1873) 3 QSCR 158 at 160 (Cockle CJ) and *Eng Mee Yong v Letchumanan* [1980] AC 331 at 337 (Lord Diplock).

182 Even if the judge was more cautious about the prospects of this new finance in the context of her injunction reasons,[90] there is no relevant inconsistency in her Honour's approach.

Disposition

183 For the reasons set out, we are not satisfied that any error has been identified in the reasons or decision of the primary judge. We are satisfied that the judge had power to make the orders she made, and that no error of the requisite type has been identified in her exercise of her discretion to make the orders she did. Indeed, we would embrace the overarching submission made by YAS, and outlined earlier, as to the appropriately careful and balanced approach taken to the terms of the relief. It seems to us that her Honour has moulded relief which ensures an adequate measure of protection for Oliver Hume, whilst reflecting an appropriate balancing of the parties' respective interests under the DMA.

CONCLUSION AND ORDERS

184 It is appropriate to conclude by reiterating the urgent circumstances in which these appeals have been heard and determined. Whilst this was an approach supported, indeed urged, by the parties, we are grateful for the parties' assistance in ensuring that the Court has been in a position to give appropriate consideration to the detail of the range of issues presented by the two applications and appeals. Whilst these reasons do not address every issue in detail, we consider that they adequately address the substance of the matters that were the focus of the parties' contentions.

185 For the reasons given, we are not satisfied that error has been established in either appeal. Both the first and second appeals must therefore be dismissed.

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[90] Reasons [109]-[112].