SUPREME COURT OF QUEENSLAND

CITATION:	*Hemant Investments Pty Ltd v Trilogy Private Pty Ltd & others* [2026] QSC 216
PARTIES:	**HEMANT INVESTMENTS PTY LTD** **ACN 626 501 157** (plaintiff) **v** **TRILOGY PRIVATE PTY LTD** **ACN 160 481 032** (first defendant) **and** **TRILOGY FUNDS MANAGEMENT LTD** **ACN 080 383 679** (second defendant) **and** **THE TRUST COMPANY (AUSTRALIA) LTD** **ACN 000 000 993** (third defendant)
FILE NO/S:	BS 16556 of 2024, BS 1056 of 2026
DIVISION:	Trial
PROCEEDING:	Civil – Application for declaration
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 September 2026
DELIVERED AT:	Brisbane
HEARING DATE:	13, 14 and 20 May 2026
JUDGE:	Ryan J
ORDER:	**1. The plaintiff's application is refused.** **2. As to costs: If a party wishes to contend for an order *other than* an order that the plaintiff is to pay the defendants' costs of the application, that party is to email my associate, within 7 days, copying in the other parties. I will then set a timetable for written submissions. *Otherwise,* my order will be that the plaintiff pay the defendants' costs of the application.**
CATCHWORDS:	INTERPRETATION – GENERAL RULES OF CONSTRUCTION OF INSTRUMENTS – GENERAL MATTERS – interpretation of *inter partes* undertaking TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR

DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – MISLEADING OR DECEPTIVE CONDUCT GENERALLY – MISLEADING OR DECEPTIVE – WHAT CONSTITUTES – whether silence can constitute misleading or deceptive conduct – where relationship between commercial parties had broken down

Competition and Consumer Act 2001 (Cth) Sch 2 ss 18, 43, 237
Corporations Act 2001 (Cth) s 9, 427(1B)
Planning Act 2016 (Qld) ss 46, 73, 119, 121, 122, 129, 123, 144, 176, 180, Ch 4
Property Law Act 2023 (Qld) s 116, 188

Al-Freah v Thompson [2023] QCA 175
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337
Davis v Perry O'Brien Engineering Pty Ltd [2023] QSC 243
Jones v Dunkel (1959) 101 CLR 298
Larson v Dudney [2018] QCA 250
Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited [2010] HCA 31
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104
Nelson v BHP Coal [2000] QCA 505
ProLend Solutions No 50 Pty Ltd v Monaco Solicitors Pty Ltd [2026] QCA 68
Yue v CN-AU Capital Pty Ltd & Anor [2021] QSC 248

COUNSEL: A Morris KC with I Erskine for the plaintiff
D Keane KC with A Schriffer for the first and second defendants
No appearance for the third defendant

SOLICITORS: Berardone Adamson Legal for the plaintiff until 5 June 2026
Redchip Lawyers for the plaintiff from 5 June 2026
McCarthy Durie Lawyers for the first and second defendants
No appearance for the third defendant

Overview

[1] The context for this application for a declaration is complicated.

[2] The plaintiff property developer purchased land in the Ipswich City Council local government area. The land included “Lots 701 and 702”. The defendants provided loan facilities to the plaintiff, secured by mortgages over Lots 701 and 702, to fund the plaintiff’s development of the land. At the plaintiff’s direction, the first defendant paid directly to Council, out of the loan facility, the infrastructure charges and

stormwater contribution offset (the **Infrastructure Charges**) which the plaintiff was required to pay for the purposes of the development.

[3] Later, the first defendant asserted that the plaintiff was in default under the loan facility/mortgage agreement and gave the plaintiff notice of its intention to exercise its power of sale as mortgagee to sell Lot 702. The plaintiff obtained an injunction restraining the first defendant from selling Lot 702. Notwithstanding the injunction, the defendants found a buyer for Lot 702 and applied to have the injunction discharged.

[4] The plaintiff told the defendants that it would consent to the discharge of the injunction if both defendants gave an undertaking which included their promise "…not to assert any control over … any refunds … of or for the benefit of…" the plaintiff.

[5] The defendants agreed to the proposal and gave the undertakings. At the time, the defendants did not know that the plaintiff had been pursuing Ipswich City Council for a refund of the Infrastructure Charges.

[6] This application concerned the meaning of the phrase "any refunds" in the undertakings. The plaintiff sought a declaration that "any refunds" included the refunds from Council which it had been pursuing. Relying on the *Planning Act 2016* (Qld), the defendants submitted that the infrastructure charges "attached" to the land and were not captured by the phrase "any refunds". However, if I were to find that they were captured, then the defendants raised a counter claim, relying on the *Australian Consumer Law* and the *Competition and Consumer Act 2010* (Cth), that they ought not to be held to the undertakings because the plaintiff engaged in misleading and deceptive conduct in not telling the defendants that it was pursuing the refunds before it invited them to give the undertakings.

[7] I was not persuaded by the plaintiff's arguments about how the phrase "any refunds" ought to be interpreted. I therefore refused the plaintiff's application. My reasons follow.

The infrastructure charges regime under the *Planning Act 2016* (Qld)

[8] Infrastructure charges are levied by local government area councils to fund the supply to a development of local government trunk infrastructure – things like sewerage, water, transport, public parks – because the development places extra demands on that infrastructure. Infrastructure charges for a development are calculated by the relevant council and then *levied* by the issue of an *infrastructure charge notice* when a development approval is issued. The requirements of an infrastructure charge notice are contained in section 121 of the *Planning Act 2016* (Qld) (the **Act**). The notice must state *when* the charge is payable under section 122. Council issues an infrastructure charge *invoice* when an infrastructure charge is approaching its "payable" date.[1]

[9] Section 119 is headed "When charge may be levied and recovered". By section 119(12), a *levied* infrastructure charge –

(a) is subject to sections 120 (*Limitation of levied charge*) and 129 (*Offset or refund requirements*);

(b) is payable by the applicant;

(c) attaches to the premises;[2]

(d) becomes payable as provided for under subdivision 4 (which includes sections 122 and 123); and

(e) is subject to an agreement under section 123(1) (*Agreements about payment or provision instead of payment*).

[10] The phrase "attaches to the premises" in 119(12)(c) appears in other sections of the Act as follows:

(a) <u>Section 46</u> provides that a development approval is not required for assessable development on premises if there is an exemption certificate for the development. Under section 46(7), the exemption certificate "attaches to the

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1 If a developer is concerned that Council might not issue an invoice in time (that is, in time for the charges to be paid on the payable date) then the developer may request one.

2 "Premises" are defined in Schedule 2 of the Act to mean a building or other structure, or land, whether or not a building or other structure is on it.

premises and benefits each of the owners, the owners' successors in title and any occupiers of the premises".

(b) Section 73 is in Division 1 of Part 5 of the Act. Part 5 is concerned with development approvals. Division 1 is concerned with the effect of development approvals. Section 73 provides that, while a development approval is in effect, it "attaches to the premises", even if a later development is approved for the premises or the premises are reconfigured, and it binds the owner, the owner's successors in title and any occupier of the premises.

(c) Section 176 provides for enforcement orders made by Magistrates Courts and provides that, unless a court orders otherwise, an enforcement order, other than an order to apply for a development permit, "attaches to the premises" and bind the owner, the owner's successors in title and any occupier of the premises.

(d) Section 180 provides for enforcement orders made by the Planning and Environment Court in the same terms.

[11] Section 122 (*Payment triggers generally*) sets out *when* a *levied* charge becomes *payable*. The triggers for payment depend on the type of development and include *inter alia* the time at which a subdivision plan is approved; or when there is a material change in use.

[12] If an infrastructure charge is not paid within the time stated in the invoice, then the levied charge is taken to be rates for the purposes of its recovery under section 144 of the Act.

[13] The material tendered on this application did *not* include the infrastructure charge *notice* for the infrastructure charges the subject of this proceeding, but it did include the *invoice* for them dated 15 July 2022.[3] The invoice stated that it was "payable within 30 days".[4] It was paid in November 2022 however correspondence from the Ipswich City Council dated 19 January 2026 and 11 March 2026 stated that the

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3 *An* infrastructure charges notice was included in the exhibits to the second affidavit of Kent Lange at page 47. It is dated 13 December 2018, and it does not concern the charge the subject of these proceedings.

4 Because the infrastructure charges notice for these charges was not before me, I did not know what trigger was said to have rendered them payable within 30 days of the date of the invoice

"timing trigger for payment had not been reached" and that the infrastructure charges were "paid ahead of the timing trigger".

[14] The stormwater offset contribution was paid early as well.

Background

[15] The plaintiff (**Hemant)** is a company in the business of property development. Kent Lange is its sole director.

[16] The first defendant company (**Trilogy Private**) is in the business of moneylending. The second defendant company (**Trilogy Funds Management**) is the responsible entity for a registered managed investment scheme known as 'TMIT'. A company called The Trust Company (Australia) (the **Trust Company**) is the custodian of TMIT and holds TMIT's assets in its own name.[5]

[17] In 2018, Hemant purchased land, including Lot 701 and Lot 702, at Collingwood Park, with development approval from the Ipswich City Council.

[18] In 2019, for the purposes of re-financing and to complete the development of the land, Hemant entered into a loan facility agreement, secured by way of mortgage over Lot 701 and Lot 702, with the Trust Company; and *inter alia* a loan agreement and a mortgage over Lots 701 and 702 to secure the loan agreement with Trilogy Private. The Trust Company held the first registered mortgage over Lot 702 and Trilogy Private held the second.[6]

[19] On 15 July 2022, Council issued an invoice to Hemant for Lot 702's infrastructure charges in the amount of $682,547.37, *payable within 30 days*.

[20] On 19 August 2022, Hemant informed Council that, as permitted by the development approval, it would pay a monetary offset contribution in the amount of $127,732.56 in lieu of constructing a stormwater quality treatment device for Lot 702.

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5 Although the application listed three defendants: Trilogy Private (1st); The Trust Company (2nd); and Trilogy Funds Management (3rd) – only Trilogy Private and Trilogy Funds Management responded to the application as first and second defendant respectively.

6 Allegedly in breach of its loan facility agreement with TMIT and its loan agreement with Trilogy Private, Hemant granted a third and fourth mortgage to Print Management Facilities Australia Pty Ltd.

[21] On 19 August 2022, Hemant directed Trilogy Funds Management, by way of a "Borrowers Request for Advancement of Funds", to pay more than $2 million to a variety of contractors, consultants and authorities, including payments to Council for the infrastructure charges and the stormwater offset contribution.

[22] In accordance with the request, those payments were made to Council out of the loan facility provided by TMIT on 11 November 2022.

[23] On 22 November 2022, Council wrote to Trilogy Funds Management, noting that it had received the money and asking for a remittance advice from the appropriate payee, so that the funds could be allocated accordingly. Trilogy Funds Management's reply to Council conveyed that the money was paid by it in relation to development applications in Hemant's name.[7]

[24] On 24 November 2022, Council confirmed that it had been able to reconcile its accounts and determined that a refund of $9.60 was due which was repaid *to Hemant* on 30 November 2022 (not to Trilogy Funds Management or TMIT).

[25] According to Mr Lange, by this time "an issue had already arisen concerning the potential refund by [Council] to Hemant of the Infrastructure Charges" – that is, in full.[8]

[26] On 15 April 2024, Hemant entered into a contract to sell Lot 701.

[27] On 8 October 2024, Trilogy Private gave Hemant a "Notice of Exercise of Power of Sale" asserting a default under the Trilogy Private loan and stating that unless the default was remedied, it "may proceed to sell the land and exercise all or any or the other powers conferred by the mortgage and the *Property Law Act* 1974".

[28] The contract for the sale of Lot 701 settled on 15 November 2024. The bulk of the sale proceeds (about $17.4 million) were applied to the loan balance of the TMIT loan facility (TMIT being the first registered mortgagee). An outstanding balance of about $83,000 remained. There were no leftover sale proceeds to apply to the Trilogy Private loan.

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[7] Page 173 of the exhibits to the affidavit of Kent Lange, affirmed 8 March 2026.

[8] The $682,547.37 charge plus the $127,732.56 contribution.

[29] On the same day as Lot 701 settled, Trilogy Private appointed itself controller over Lot 702 under section 427(1B) of the *Corporations Act* 2001 (Cth) (the **CA**), "by Instrument" – that is, by registered mortgage 719490754. The relevant notice to ASIC was signed on 31 January 2025 and filed on 10 February 2025.

[30] A "controller" is defined in section 9 of the CA to include anyone in possession of, or has control of, the property of a corporation for the purpose of enforcing a security interest. Among their powers, a controller may inspect the books of the corporation which owns the property and require reports from its officers about specific matters concerning the affairs of the corporation. As to their liabilities and duties: controllers are liable for debts incurred whilst they are in control of the property and, when exercising a power of sale, are under a duty to take all reasonable care to sell the property for not less than its market value, or at the best price.

[31] Further, clause 18 of the instrument of mortgage permitted Trilogy Private to (among many other things): (i) enter upon and take possession of the lot; (ii) sell or concur in selling the lot; (iii) carry on or concur in carrying on any business of Hemant's conducted on or from the lot; (iv) use all plant, equipment, machinery, vehicles, implements and other chattels and stock on the lot; and (v) operate on any bank account of Hemant.

[32] On 17 December 2024, Hemant brought an action against the **Trilogy Parties** (Trilogy Private, the Trust Company and Trilogy Funds Management) by way of originating application: BS 16556/24.

[33] On 20 December 2024, Justice Bradley made an order restraining Trilogy Private from "exercising any power of sale, or otherwise selling, transferring, or dealing with Lot 702" until the final determination of the BS 16556/24 proceedings or further order of the court.

[34] On 15 September 2025, after the "new" *Property Law Act* 2023 (Qld) came into effect, Trilogy Private served on Hemant a further Notice of Exercise of Power of Sale, utilising the new form 3. It told Hemant that it would comply with the injunction but would rely on the notice once the injunction was discharged.

[35] On 9 October 2025, Mr Lange, for Hemant, wrote to Council and asked for a refund of the infrastructure charges (but not the stormwater offset contribution) paid "back

in August 2022"[9] explaining that, "Due to unforeseen details we are not progressing any further with this Stage and have made the decision to sell the asset in as is state". He continued: "The Survey Plan sealing process will be by the new owner and I therefore request that Ipswich City Council refund these charges paid back in 2022 …". He asked for the funds to be paid into "BA Legal Trust Account" (his solicitor's trust account). He did not tell Council that Trilogy Private had served a default notice on Hemant nor that Trilogy Private was the Controller of Lot 702.

[36] On 10 October 2025, Council told Mr Lange that it would investigate the request. Council also told Mr Lange that it was "worth mentioning" that if the charges were refunded, "a new invoice will need to be created and paid. Given the invoice was paid in 2022, there will be quite a bit of indexation applied. Potentially around $50,000".

[37] On 13 October 2025, Council sent Mr Lange a "courtesy email" to let him know that he would receive a response to his request within 10 business days. On 20 October 2025, Council told Mr Lange that it was still working on his request and required a remittance advice to support the original payment from 2022.

[38] The exhibits to Mr Lange's affidavit include an email from him to Council dated 20 October 2025 stating, "Please see attached for your reference the remittances sent (email attachment) and communication from Emily (ICC)". The attachments include the email from the Portfolio Processing Officer at Trilogy Funds Management which implies that the money paid by Trilogy Funds Management was to be allocated to Hemant's development application.[10]

[39] On 27 October 2025, Council wrote to Mr Lange in these terms:

> "We have reviewed your request further and based on our findings as Hemant Investments is currently under External Administration, the refund would need to be returned to the External Administrator (Controller) – Trilogy Private Pty Ltd, which is different to the details you have provided.
>
> Do you have a letter from the Controller to support the request for refund and bank account details for the account specific to Hemant Investments?"

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9 The charges were in fact not paid until November 2022.

10 Exhibited to the affidavit of Kent Lange, affirmed 8 March 2026, at page 196. See also [22] of these reasons.

[40] Mr Lange then handed the matter of the refund over to his then lawyer, Mr Adamson of BA Legal.

[41] On 28 October 2025, Mr Adamson wrote to the Council, arguing (for various reasons) that the refund could and should be made to Hemant.

[42] On 18 November 2025, the defendants applied for the discharge of the injunction made by Justice Bradley. The application was returnable on 12 December 2025.

[43] On 21 November 2025, Council replied to Mr Adamson in a letter which (among other things) described the request for a refund as "novel" and –

(a) asked him to identify with precision the legal basis upon which the infrastructure charges should be refunded to Hemant;

(b) indicated that its preliminary view was that the early payment of the infrastructure charges was a matter more appropriately resolved between Hemant and any incoming purchaser;

(c) noted that Council records indicated that the charges were not paid by Hemant, but by an account in the name of "The Trust Company (Australia) Limited ACF Trilogy Monthly In" and that the "starting point" was that the refund would be paid into the account from which the charges were originally paid; and

(d) concluded with: "Upon clarification of the above points, if Council is satisfied that the Infrastructure Charges can and should be refunded, it will seek confirmation from the account holder associated with the payee … that it agrees to the payment being refunded to your firm's trust account as representative of Hemant Investments, or, whether it says the refund should be made to the account from which it was paid. To facilitate this outcome, you are welcome to provide evidence of such an agreement from "The Trust Company (Australia) Ltd ACF Trilogy Monthly In".

[44] I note that at paragraph 53 of his affidavit, Mr Lange acknowledged that infrastructure charges "typically run with the land under planning legislation, thereby benefiting any incoming purchaser by offsetting future obligations tied to the development approval".

[45] On 26 November 2025, Mr Adamson responded to Council's letter of 21 November 2025, suggesting that: it would be "capricious" for Council to repay the funds to a private lender; and that TMIT's views/consent was irrelevant because Hemant was the legal and beneficial owner of the funds. He threatened legal proceedings. He also sought the repayment to Hemant of the "Voluntary Stormwater Contribution" (which had not, until that point, been requested). He concluded his letter with the following:

> "If payment is not attended to within the next five (5) business days we anticipate receiving instructions to institute proceedings to recover those monies.

[46] On 28 November 2025, Council wrote back to Mr Adamson asserting that "as a simple commercial principle, if a refund was to be appropriate then any refund should be returned to the account from which it was paid". Council invited Hemant to obtain "from the Trust Company … as Custodian for [TMIT] a written acknowledgement that it does not have a claim to the funds and that it agrees that [Hemant] is entitled to be paid the refund if Council considers it appropriate to do so". Council said it would consider separately the issue of the refund of the stormwater offset contribution.

[47] Mr Lange said in his affidavit that he was concerned that, "if the injunction were discharged and any monies were paid out by [Council] to an account controlled by any of the Trilogy entities – including any refund of the Infrastructure Charges – those monies might be retained or dealt with by those entities to the prejudice of Hemant". He said he therefore instructed his solicitors to offer to resolve the application only if (among other things) each relevant Trilogy entity confirmed that it would not assert control over any refunds.

[48] On 4 December 2025, by letter to the defendants, Hemant referred to its unmet request that Trilogy Private remove itself as *controller of Hemant's company records*, which it said was causing significant issues for Hemant in its *day-to-day operations*. It offered to resolve Trilogy Private's application by way of: (a) the discharge of the injunction "by consent" and (b) "your clients (each of the First, Second and Third Defendants) [the **Trilogy Parties**] confirm[ing] by return correspondence that they will only strictly deal with Lot 702 following the discharge of the injunction, and that same not assert any control over the day-to-day operations of Hemant …, any

machinery or equipment, any refunds, any accounts, and any monies of, or for the benefit of Hemant …"

[49] The Trilogy Parties' reply, on 5 December 2025, included the following (emphasis in original):

> "We are instructed that our clients accept your proposal on the strict condition that … it is agreed by the parties that the proceeds of sale are **not** "monies for the benefit of Hemant …". If that condition is accepted by your client, then we are instructed to confirm that our clients … will only strictly deal with Lot 702 following the discharge of the Injunction, and that our clients do not assert any control over the day-to-day operations of Hemant …, any machinery or equipment, any refunds, any accounts and any monies of, or for the benefit of Hemant …"

[50] On 9 December 2025, by letter, Hemant agreed in principle, noting that regardless of any arrangement between the parties, the proceeds of sale would be dealt with in accordance with section 118 of the *Property Law Act* 2023 (Qld), and seeking other confirmations and undertakings.

[51] On 9 December 2025, Muir J made an order, by consent, discharging the injunction.

[52] Ultimately, on 15 December 2025, undertakings signed by Mr Smart, as a director of Trilogy Private and Trilogy Funds Management, were given in the following terms (my emphasis):[11]

> 1 We confirm that [Trilogy Private/Trilogy Funds Management as responsible entity for TMIT] **will only strictly deal with Lot 702** following the discharge of the injunction, and, that **we do not assert any control over** the day-to-day operations of Hemant …, any machinery or equipment, any refunds, any accounts and any monies of, or for, the benefit of Hemant …
>
> 2 We undertake to repay to Hemant … any amount we receive from the proceeds of sale of Lot 702 if the Court orders that any such amount be repaid to Hemant … by [Trilogy Funds Management as responsible entity for TMIT/Trilogy Private].

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[11] Mr Smart was one of the two directors who provided the undertaking on behalf of Trilogy Private and one of the two directors who provided the undertaking on behalf of Trilogy Funds Management.

[53] Meanwhile, a Marketing Proposal for Stage 11 (Lot 702) had been prepared by Ray White. In this proposal, Ray White stated that it had *assumed* that the infrastructure charges had been paid in full and that there were no outstanding bonds.[12]

[54] On 17 December 2025, Council told Mr Adamson that it had not reached a view as to whether the Infrastructure Charges should be refunded. Council said, "before it finalises its position in that respect, Council is requiring steps be taken by your client to establish who would be entitled to that refund if it were to be given". Council indicated that once it had that information, it would "proceed to determine its position as to whether the refund should be given and the precise quantum of that refund".

[55] On 18 December 2025, Mr Adamson sent the undertakings to Council and asked for the Infrastructure Charges to be refunded directly to Hemant. Mr Adamson's correspondence included the following (my emphasis):

> "[A]s to your officer's request for confirmation from the lending entity holds no lien or interest in those monies (sic). **TMIT (as defined by our prior correspondence) has since confirmed for our client that it does not hold any interest in those funds** – please see the attached undertaking provided by same (TMIT) to our client."

[56] In my view, the suggestion in bold above was a deliberately misleading overstatement; although Council was astute and not misled. On 19 December 2025, Council told Mr Adamson that it considered the undertakings too general and insufficient for its purposes. It required:

> "… a document from Trilogy, signed by its registered directors as per the Corporations Act 2001 that:
>
> - Specifically refers to the Infrastructure Charges it paid to Council in 2022
> - It being aware that your client is seeking a refund of those charges
> - Trilogy's acknowledgment that if Council considers a refund is warranted, then it is content for that refund to be made to Hemant."

[57] On 22 December 2025, Mr Adamson wrote to Council –

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12 Exhibited to the affidavit of Kent Lange, affirmed 8 March 2026, at page 216.

(a) asserting that Council's desire for something more from Trilogy was not a reason for Council to "fail, refuse or neglect" to refund the Infrastructure Charges to an account controlled by Hemant;

(b) offering to indemnify Council "should TMIT seek any recourse for funds refunded to our client, which for the reasons set out in this letter we are instructed it will not"; and

(c) indicating that, if Council did not refund the Infrastructure Charges to Hemant, it would commence proceedings against Council for the refund.

[58] On 5 January 2026, Trilogy Private appointed Ray White as its agent for the sale of Lot 702.

[59] On 15 January 2025, Hemant wrote to Council and informed it that Mr Lange had been in discussions with "Brett Davey (GM of Planning)" who confirmed that the funds requested would be "released" upon provision of "further, specific, written correspondence from TMIT". Hemant asked Council to provide written confirmation that it was "agreeable to the release of the funds upon our client obtaining further, written, correspondence from TMIT".

[60] On 19 January 2026, Council wrote to Hemant and stated that it agreed in principle to refund the Infrastructure Charges. It suggested a tripartite deed, as per a draft attached, as an effective mechanism to address the matter. The draft deed contained the following (at paragraph F): "Trilogy agrees that the refund of the Stage 11 infrastructure charges and the Voluntary Stormwater Contribution can be made to the Hemant Account". Council said that, upon execution of the deed by all parties, it would arrange for the refund to be paid.

[61] It concluded its letter with the following:

> "We also note for completeness that in November 2023 a planning and development certificate was given by Council under section 265 of the *Planning Act 2016* in respect of the subject land and that certificate confirmed that the Stage 11 [that is, Lot 702] infrastructure charges were as at the date of the certificate paid. Once any refund is given, Council intends to notify the applicant for the certificate of the change in status of the payment."

[62] It surprised me that none of the parties – especially the defendants – referred to the fact of the issue of this planning and development certificate. It seemed to me a critical circumstance, which ought to have been taken as known to all parties, relevant to the interpretation of the undertakings and the meaning to be given to the phrase "any refunds". However, in the absence of any reference by the parties to the certificate (including in the pleadings) I put it to one side.

[63] On 23 January 2026, by letter, Mr Adamson informed Mr Schefe (Trilogy's lawyer) that Hemant had applied for a refund of the charges/contribution and made arguments as to why the refund was payable to Hemant, including by reference to the undertaking. He enclosed the draft deed and requested that it be executed by TMIT or that TMIT provide correspondence to Council to the effect that it agreed to Hemant receiving the refund. This was when the defendants first learnt that Hemant had been communicating with Council about the refunds.

[64] Mr Smart said in his affidavit that, had he known that Hemant was taking active steps to obtain the refund he would not have provided the undertakings. However, his affidavit evidence must be viewed in the light of his oral testimony – as Mr Keane KC conceded during his closing submissions.[13]

[65] Mr Schefe replied to Mr Adamson on 6 February 2026, referring to the usual position that the infrastructure charges and stormwater offset contribution pass for the benefit of the incoming purchaser and asserting that the agent engaged to sell the property considered that any refund of the infrastructure charges and stormwater offset contribution would have a "material impact on pricing and potentially the terms offered by prospective purchasers through the Expressions of Interest process, which is likely to result in the sale price of the property being reduced by the amount of the Charges, if not more". He stated that, given Trilogy Private's obligation to all parties with an interest in the property to ensure that the maximum sale price is achieved, it would not agree to a refund of the infrastructure charges or the stormwater offset contribution to Hemant.

[66] On the same day, Mr Adamson invited Trilogy to reconsider its position and indicated that if it would not do so, an application would be filed.

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13 Page 3-16, line 30 and page 3-17, line 20 of the transcript of Day 4 of the trial.

[67] On 12 March 2026, Trilogy Private entered into a contract to sell Lot 702 to SKF Developments for $15.05 million + GST.

[68] Hemant's application for a declaration – that is the present application – was filed on 16 March 2026.

[69] For reasons I need not go into, on 14 April 2026, Council determined that it would no longer be appropriate for it to refund the infrastructure charges or stormwater offset contribution to anyone. Nevertheless, this matter proceeds *as if* the funds were still held by Council: see the undertakings in Schedule A of the order made by Justice Muir on 25 March 2026.

The oral evidence

Credit and evidential issues generally

[70] I was not impressed by the oral evidence of either of the plaintiff's witnesses – its director Mr Lange or its solicitor Mr Adamson. It seemed to me that Mr Lange was often undesirous of giving a straight answer to a question for fear that he might thereby jeopardise the plaintiff's claim. And several of Mr Adamson's answers seemed to me to be deliberately brief and incomplete.

[71] I was more impressed with the oral testimony of Mr Smart, one of the defendants' directors. Mr Smart appeared frank and unguarded in his evidence although, as it turned out, it was of limited relevance. Although Mr Smart signed, and in that sense, "gave", the undertakings for each of the defendants, he did so after consulting with Trilogy "stakeholders" – none of whom was called – who assured him that it was appropriate to do so.

[72] Because there was no evidence from those who decided that it was appropriate to give the undertakings and advised Mr Smart accordingly, there was no persuasive evidence before me of the defendants' *reliance* on the plaintiff's allegedly misleading silence – an element of the defensive counter claim.

[73] The plaintiff invited me to draw a "*Jones v Dunkel* inference" against the defendants for their failure to call all or any of those responsible for the defendants agreeing to the undertaking. I did not do so.

[74] In not doing so, I took into account that the defendants were on notice *before* they closed their case that the plaintiff was likely to seek a *Jones v Dunkel* inference yet still did not call a relevant stakeholder witness. However, I formed the view that it was likely that the defendants' failure to call a relevant witness was either: the product of oversight on the defendants' lawyers' part and/or a failure on their part to properly proof Mr Smart and/or (misplaced) confidence in their case on reliance, based on Mr Smart's affidavit evidence, without appreciating the significance of the impact of his oral evidence upon it. I considered it less likely that the defendants failed to call a relevant witness because they knew the witness would not assist their case.

[75] I will discuss the oral evidence in more detail now.

Mr Adamson

[76] Under cross-examination, Mr Adamson confirmed (as was obvious) that he did not let the defendants or their lawyers know that Hemant was seeking a refund of the infrastructure charges and stormwater offset contribution until Council made it clear that Hemant would not receive the refunds unless the defendants provided something more explicit than the undertaking which confirmed that they consented to Hemant receiving the refund.

[77] I found that he was evasive when it came to the source of the wording of the undertaking and what he had been instructed it was to achieve. He attempted to minimise his role in the drafting of the letter of 4 December 2025 (which proposed the terms of the undertakings) – suggesting that he composed it on the basis of his instructions.

[78] He agreed that he knew that Council would only pay the refund to Hemant if it received written acknowledgement from the relevant Trilogy entity that it did not claim that the refund should be made to it. But he said that he did not hold instructions ("not express instructions – no") at the time he proposed the undertaking that it "operate" as the acknowledgement requested by Council. Yet, just two weeks later, he was instructed to provide the undertaking to Council as the acknowledgement it required.

[79] In re-examination he said that he could not remember whether he or Mr Lange caused the undertaking to include the phrase "any machinery or equipment". He said

(contrary to his earlier attempts to distance himself from the language) that *he* proposed the inclusion of “any refunds, any accounts and any monies of, or for, the benefit of Hemant”. He said he could not recall whether anything said by Mr Lange prompted him to use those words. He also said that he included those words on Mr Lange’s instructions that he wanted Hemant to have control “over its destiny … save for the lifting of the injunction and what might follow”.

[80] Since October 2025, Mr Adamson had been engaged by Hemant to engage with Council over the refunds. Whoever came up with the language, I rejected any suggestion from Mr Adamdson that he did not understand that the phrase “*any* refunds” was specifically intended to capture the refund of the Infrastructure Charges without alerting the defendants to the matter.

Mr Lange

[81] Under cross-examination, Mr Lange agreed that he was concerned that, if Trilogy sold Lot 702, as it signalled it intended to in September 2025, the “entitlement to” the Infrastructure Charges would pass to the purchaser. He confirmed that he then requested their refund to Hemant on 9 October 2025.

[82] He agreed that he did not advise, or instruct his lawyers to advise, Trilogy that he sought the refund. Nor did he advise Trilogy, or instruct his lawyers to advise Trilogy, about any of his correspondence with Council about the refund until January 2026.

[83] He conceded that the refund of the Infrastructure Charges would “potentially” reduce the market value of the lot; but said that it might not make a difference to the incoming buyer.

[84] He agreed that at the time he instructed his lawyers to make an offer to Trilogy about discharging the injunction that he was “quite concerned” to obtain the refund of the Infrastructure Charges.

[85] Mr Lange was asked about the inclusion of the word “refunds” in the undertaking and whether it (the undertaking) was intended to act as the confirmation required by Council before it would refund the Infrastructure Charges to Hemant. He was evasive but ultimately agreed that the phrase “any refunds” was included in the undertaking

so that Hemant could provide the undertaking to Council as the confirmation it required.

[86] Interestingly, he said that Hemant had been receiving refunds from the Ipswich City Council since 2019, as "evidenced on Trilogy's bank statements – of which they've had seven refunds, not just only from Ipswich City Council but multiple entities". I will discuss Trilogy's bank statements a little later.

[87] He said that he instructed Mr Adamson to discuss the refund with Trilogy once Council agreed that it would be made with their consent.

[88] Re-examination was directed to the counter-claim and when Hemant ceased to be "in trade or commerce".

[89] Under further cross-examination, required by me because I was concerned that Mr Keane KC had not put the defendants' counter claim case to Mr Lange, he maintained that Hemant had refunds coming in from multiple sources that he intended the phrase "any refunds" to capture. He stated several times that he was under "no obligation" to tell the defendants that he was seeking the refund.

[90] It was put to him that he was concerned that, if the wording of the undertaking included a reference to the Infrastructure Charges refund, then the defendants would not have given it. He said, "No. That is not correct. Simply let me rephrase again. I put the word "refunds" in there. We have multiple refunds, and was I obligated to give Trilogy a three-page list of every single refund that was coming into Hemant Investments? No, I was not obligated. Your client deals in developments. They are well aware of how developments work". This reply did not answer the question.

[91] He said he was not "concerned to ensure" that Trilogy would not become aware of Hemant seeking the refund. He said he had not hoped to receive the refund without Trilogy becoming aware of it. He denied that he deliberately acted so as to ensure Trilogy did not become aware that Hemant was seeking the refund. He denied that he behaved in a clandestine way. He claimed that he was acting consistently with commercial practice. He claimed he did not instruct Mr Adamson to threaten Council. He agreed that he instructed Mr Adamson to make it clear that Council should not contact Trilogy but later said that it was "incorrect" that he had specifically asked Council not to inform Trilogy. He was evasive and unconvincing when it came

to his responses to questions about reasonable commercial expectations (Trilogy's or other developer's) when it came to the Infrastructure Charges travelling with the land or whether he understood that Trilogy had such an expectation that he would volunteer information to it.

[92] I found Mr Lange an unimpressive and unconvincing witness. It was as plain as day that he was hoping to obtain the refunds from Council without the defendants finding out that he was seeking them. I considered it more likely than not that Mr Lange saw an opportunity to leverage the first defendant's desire to sell the property as mortgagee by seeking, in exchange for his consent to the discharge of the injunction, not only the defendants relinquishing control of his company's records, but also something he could present to Council as the defendants' written acknowledgement that Hemant was entitled to the refund of the Infrastructure Charges. It was as plain as day that his focus was on the refund of the Infrastructure Charges when he, in effect, instructed Mr Adamson to include the phrase "any refunds" in the undertaking. It was as plain as day that his hope was to have the charge refunded to Hemant before the defendants found out about it.

Mr Smart

[93] Mr Smart is the co-managing director of Trilogy Funds. He agreed that funding for construction and development was "a larger slice" of Trilogy's moneylending business.

[94] Mr Smart was an accountant by trade and did not have a lot of personal experience in dealing with property developers. Nor was he the one "intimately involved in the decisions at the credit level". Other people in the organisation had that experience.

[95] He believed that councils arrived at a lump sum for infrastructure charges, stormwater offset and other expenses at the time at which they granted development approval. It seemed that he was aware that the money paid was held on account of a particular project until triggering events allowed council to "transfer the money into its own books as having been paid" but he was unsure about what events would trigger the transfer". Other people in the organisation had experience in/knowledge about that. And it was typically those people who "regularly monitor[ed] [the] developer

borrowers to see what's happening in respect of their particular developments," including knowing the funding required to bring it to completion.[14]

[96] Mr Smart knew very little about when a developer might be entitled to a refund – although he thought there "should" be people in the organisation who would know.

[97] He was aware of the injunction and, "at high level", that the Trilogy companies had instructed their lawyers to apply to have it set aside/removed but he was not involved in that decision.

[98] He gave the following explanation as to how he came to give the undertakings (my emphasis):

> "… So a group of stakeholders which were – incorporated members from the lending committee and executive directors of Trilogy were discussing the matter at hand, because they were the, for want of a better word, resident experts in relation to the matter. So it was put forward to the directors as to who signed off on these undertakings, and **we made inquiry of that group and came to a reasonable conclusion that it was accurate to enter into this agreement** (sic)."

[99] His evidence was to the effect that he was not involved in deciding whether the wording of the undertaking proposed by Hemant was acceptable to Trilogy but he made reasonable inquiries of the stakeholders before signing the undertakings.

[100] He was asked whether he had a recollection of the discussions he'd had with the stakeholders. He said:

> " … It was considered whether the definition of – of the reference to refunds included infrastructure charges. It was the group's view that it did not. That … it actually attached to the land. So was a – was a key decision that came out of that stakeholder group".

[101] He said he believed the group contemplated the very question whether or not the word "refunds" extended to refunds of infrastructure charges.

[102] He said he did not know at the time that the (potential) refund was of $800,000. He was asked whether it would have made any difference to his decision to sign the document if he'd known. He said:

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14 Albeit informed by an external quantity surveyor who was responsible for managing the costs of the job.

> "The stakeholders in that group are experienced in property development, and it was their solid view that it attached to the land and did not form part of a refund that was due back to the developer."

[103] He believed the decision would have been made on principle, irrespective of the amount involved.

[104] When questioned about his expectation about Hemant revealing to Trilogy that it had been seeking a refund of the Infrastructure Charges (relevant to the counter claim), his evidence reinforced the point that the decision about giving the undertaking was made by others, whom he called in the following extract "the shareholder group": (my emphasis and formatting):

> MR MORRIS: Your evidence, to this point, is that when refunds were discussed, one of the issues within the minds of the decision making group was whether or not those refunds included refunds of funds paid to the Ipswich City Council, by way of – what do they call them – yes, infrastructure charges or stormwater contributions?
>
> MR SMART: Yes.
>
> MR MORRIS: All right. When you signed this document, did you have any expectation that Hemant would tell you of any plans it had in respect of infrastructure charges or stormwater contributions?
>
> MR SMART: In my opinion, I believe so.
>
> MR MORRIS: Sorry, you expect them to tell you?
>
> MR SMART: Yes.
>
> MR MORRIS: And why would you expect them to tell you?
>
> MR SMART: **Because, I guess, that with our view as to what refunds constituted, we'd sort of come to the conclusion it related to refunds from suppliers, the Australia Taxation Office** –
>
> MR MORRIS: I see?
>
> MR SMART: – **in BAS returns, income tax returns, et cetera, and we had considered that. <u>Or it wasn't – when I say "we", it was the stakeholder group had considered whether it did include the infrastructure charges</u>, and it was decided no, so – um – I personally feel that – uh – yes, I would've thought that they should've told us.**

[105] I accepted Mr Smart's evidence. Critically, and to the detriment of the defendants' counter claim, I understood the effect of his evidence to be that in fact he (and the second director who also signed the undertakings) relied on the advice of the

stakeholders in signing the undertakings – not on anything Hemant said or did not say to them – regardless of what he had stated in his affidavit (see [63] above).

Mr Schefe

[106] Relevant to the *Jones v Dunkel* point, Mr Schefe was unable to offer an explanation as to why there was no witness called for the defendants who could give direct, personal evidence as to why they chose to accept the undertaking proposed by Hemant. His evidence otherwise did not take matters very far.

Trilogy Funds' bank statements

[107] Mr Lange referred to the refunds "to Hemant" which appeared on Trilogy's bank statements. More than once in his evidence, Mr Lange asserted that Hemant – as the developer – received refunds from Ipswich City Council. For example, he gave evidence that he had advised Mr Adamson that Hemant had been "receiving refunds from Ipswich City Council … since 2019, and we will continued to receive refunds – **of which is evidence on Trilogy's bank statements** – of which they've had **seven refunds**, not just from Ipswich City Council but multiple entities. And therefore, that was the reason why that clause was put in there: to capture the words "refunds"".

[108] Two sets of bank statements from 28 June 2019 until 28 February 2026 were exhibited to Mr Smart's affidavit of 20 March 2026.

[109] The first statement concerned the loan from TMIT. The second concerned the loan from Trilogy Private.

[110] As at 28 February 2026, the balance of the TMIT loan was $327,120.28. It will be recalled that the sale proceeds of Lot 701 had been applied to the TMIT loan on 15 November 2024.

[111] As at 28 February 2026, the balance of the Trilogy Private loan was $18,698,774.99.

[112] The TMIT bank statements show the advance to Council of the infrastructure charges and the stormwater offset contribution, requested by Mr Lange on 19 August 2022, as "Council fees".

[113] The following refunds were credited to the TMIT loan (which also showed credits from other sources including interest repayments; the sale proceeds of Lot 701 and the sale proceeds of other lots sold by Hemant Investments). I inferred that these refunds were the refunds "to Hemant" to which Mr Lange referred:

Table 1

Date	Transaction description	Amount ($)
18/09/2019	GST Refund	22,464.00
18/09/2019	GST Refund	9,955.00
16/10/2019	GST Refund	64,626.00
18/10/2021	Refund from MDL	5,857.50
26/06/2022	Return Bank Chq – Queensland Urban Utilities	16,370.58 (This amount was paid out of the account to Queensland Urban Utilities on 8 March 2022.)
6/12/2023	Refund of Inv 24535 from Gray, Robinson and Cottrell	4,400 (Paid and refunded the same day.)
22/02/2024	Refund of Bond – Ipswich City Council	9,590.00
26/02/2024	Refund of Bond – Ipswich City Council	2,960.00

[114] No amounts were credited to the loan by Trilogy Private.

[115] I did not review the bank statements in detail (I was not invited to) but a quick glance at the TMIT statement revealed that (as noted in Table 1) Queensland Urban Utilities and Gray, Robinson and Cottrell had been paid *from the TMIT account* the money they refunded to TMIT. On my quick glance at the statements, I could not tell whether TMIT had originally advanced the other refunds.

[116] Mr Lange was not questioned about the original source of the moneys refunded to the bank account nor why the refunds were made. Nor was he asked about Hemant's role in obtaining the refunds. Nor was he questioned as to why he considered Hemant entitled to the money refunded to TMIT.

Submissions – on the application for the declaration (and associated orders)

[117] The primary submissions of each party, and my preliminary response to some of them, were as follows:

[118] Hemant pleaded in paragraph 35 of its Statement of Claim that the word "refunds" was "unambiguous, univocal, unequivocal and holophrastic"[15] and that, according to its ordinary and natural meaning, it applied to the refund, repayment or reimbursement of the Infrastructure Charges. It submitted *inter alia*:

(a) The language of the undertaking was deliberately expansive and broad enough to encompass any repayment or reimbursement which accrued for Hemant's benefit, *even it if had been paid by Trilogy Funds*, at Hemant's direction, for Hemant's benefit.

(b) The objective context for the consideration of the meaning of "any refunds" included Mr Lange's correspondence with Council and his desire to receive the refunds for Hemant's purposes/insistence that he was entitled to.

The defendants made the point that this was not known to them and therefore, in accordance with the authorities, not something which was part of the objective context for the purposes of interpretation of the phrase "any refunds".

The defendants are correct.

(c) "The undertakings were the *quid pro quo* for Hemant's consent to the discharge of the injunction granted by Bradley J. In that context, the parties must be taken to have intended the broad language of "*any refunds*" to encompass the very repayments then under active discussion… The prospect of the refunds was known to both parties and the subject of active consideration during the negotiations of the terms of the undertaking."

I am not sure what the plaintiff intended by that submission. The parties "negotiated" the terms of the undertaking by correspondence only. The refunds were not mentioned in that correspondence. It is false to assert that the refunds were "the subject of active consideration *during the negotiations of the terms of the undertaking*".

If the plaintiff was intending to suggest that there was some relevance *to the interpretation of the phrase* in the fact that, apparently, the stakeholders contemplated whether "any refunds" included refunds of the Infrastructure Charges and concluded that it did not, then the plaintiff is wrong. What the

15 With respect, it seemed to me that "holophrastic" was the odd adjective out in that list.

plaintiff *intended* the phrase "any refunds" to include, and what the defendants *thought* it included or did not include is *irrelevant* to the question of its objective construction by a reasonable business person – which is the test I have to apply.

(d) The parties were dealing with practical control not formal, statutory controllership. "Properly construed, the *inter partes* undertakings bind the Trilogy parties to refrain from asserting any control over any assets (current or future) of Hemant, including the Infrastructure Charges [refund], and impliedly to assist in their timely payment to Hemant (including by providing the joint directions or executing the tripartite deed required by the Council). Any other reading would permit the Defendants to retain the benefit of having the injunction discharged while resiling from the corresponding restraint they voluntarily assumed – an outcome equity will not countenance."

(e) In response to the defendants' arguments (below) that because there had been no refund at the time at which the undertakings were given, any future refund of the Infrastructure Charges was not captured by the phrase "any refunds" – the undertaking was future looking/forward looking, from the point at which the injunction was discharged.

[119] The defendants submitted *inter alia*:

(a) Infrastructure charges attached to the land.

(b) On the issue of whether the infrastructure charges formed part of Lot 702, the gap between the parties was smaller than I might think.

The defendants pleaded at [55] that "An infrastructure charge attaches to the land and a subsequent purchaser enjoys the benefit of the infrastructure charge".

Paragraph [57] of Hemant's reply and answer denied that proposition for reasons which included contentions that an infrastructure charge attached to the land only until it was refunded and a subsequent purchaser could enjoy the benefit of such a charge, only if it acquired the land before the charge was refunded (referring to provisions of Chapter 4 of the *Planning Act 2016* (Qld)).

The infrastructure charge had not been refunded by 4 December 2025, nor had it been refunded by the time the undertaking was given. Thus, at the time the undertaking was given, the infrastructure charges were attached to Lot 702.

It was pleaded that Council was *willing* to refund the infrastructure charges payment. But it was not pleaded that it had determined to give a refund or that the refund entitlement had been crystallised. The "high water mark" was the letter of 19 January 2026 – in which Council indicated that it was considering it, subject to the plaintiff and the defendants entering into the deed it proposed.

(c) The undertaking confirmed that Trilogy Private and Trilogy Funds Management could exercise rights in respect of their mortgages over Lot 702, which included the Infrastructure Charges.

(d) The stormwater contribution was "sufficiently connected" to Lot 702 to be part of the lot.

(e) A reasonable business person would expect the language to be clearer if "any refunds" was intended to capture a refund of the Infrastructure Charges because –

  (i) it had the effect of altering the contractual rights of the defendants as the secured creditors of Lot 702 and all of the assets and after acquired property;

  (ii) it released Hemant from its obligation to develop the land in accordance with the mortgage covenants;

  (iii) Trilogy Private was taking steps to sell Lot 702 and it was material to the price;

  (iv) Trilogy Private had a statutory duty to take reasonable care to ensure the property was sold at market value (section 116 of the *Property Law Act* 2023 (Qld)).

  (v) it was in the interests of both Hemant and Trilogy Private to obtain the highest price for the sale of Lot 702; and

(vi) it had the potential to affect third party interests by reducing the likelihood of any surplus proceeds from the sale of Lot 702 which may then have been payable to the third and fourth mortgagees.

Further, and in reply to Hemant's submissions:

(f) Hemant pleaded that the language of the undertaking was *unambiguous* and to suggest that they were ambiguous, warranting reference to extrinsic material, was inconsistent with its pleaded case.

(g) Hemant did not plead that a term ought to be implied into the undertaking to require the defendants to facilitate the payment of the refund to Hemant. Hemant said it was not seeking the implication of a term in fact, of the *BP Refinery (Westernport) Pty Ltd v Shire of Hasting* (1977) 180 CLR 266 kind, but rather it asserted that the law required the defendants to do whatever was necessary to give effect to the undertaking – but the defendants still wished to take the point, relying on *Nelson v BHP Coal* [2000] QCA 505. Even if it were a matter of law, it should have been pleaded.

(h) Hemant pleaded that the refund of the Infrastructure Charges was caught by the phrase "any refunds". It did not plead the case they advanced that the refunds were captured by the phrase "any moneys of, or for, the benefit of Hemant". In any event, at the time of the undertaking, the Infrastructure Charges were attached to the land, and they were not "any monies …for the benefit of Hemant".

[120] The defendants relied on *ProLend Solutions No 50 Pty Ltd v Monaco Solicitors Pty Ltd* [2026] QCA 068 at [66] for their argument that infrastructure charges attach to the land and thus ought to be considered as part of Lot 702.

[121] I did not find support for that argument in *ProLend* at [66]. In that paragraph, Doyle JA was considering whether infrastructure charges were covered by one or both of the following phrases: "all rates levied or charges for or in respect of the property" and/or "Taxes relating to the property".

[122] His Honour, with whom Bond JA and Henry J agreed, decided that they did (my emphasis):

> "Given the view I have reached as to the construction of the Deed of Priority it is strictly unnecessary to deal with this. However, the ProLend Mortgage obliged Aushome to pay **all rates levied or charges <u>for or in respect of the property</u>**: cl 9.1(a); and to pay **all Taxes <u>relating to the property</u>**: cl 9.1(b). The *Planning Act 2016* (Qld) provides that any infrastructure charge levied "attaches to the premises". The infrastructure charges accordingly are at least **charges for or in respect of the land**. Further the term Tax and Taxes are expansively defined as set out above and arguably capture the infrastructure charges. The ProLend Mortgage provides that Aushome indemnifies ProLend for all such taxes and charges. Accordingly, in my view the infrastructure charges would satisfy Monaco's construction so as to fall in the scope of the expression (as it urged) of being an amount which may be debited to the account under the terms of the First Mortgagee's Mortgage."

[123] At [66], his Honour equated the notion of the charges being "attached" to the land with the notion of their being charges "for or in respect of" the land, or "relating to" the land for the purposes of the construction of a particular deed.

Submissions – in relation to the counter claim

[124] I was only to consider the counter claim if the I rejected the defendants' construction of the undertakings.

[125] The defendants submitted *inter* alia:

(a) Section 18(1) of the *Australian Consumer Law* provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(b) Silence may amount to misleading or deceptive conduct where the circumstances of a particular case would give rise to the reasonable expectation that, if a fact existed, it would be disclosed; and a failure to disclose would give rise to an inference that the fact did not exist.

(c) The defendants were misled into providing the undertakings because Hemant chose to use ambiguous language in the undertaking without informing the defendants that it was seeking a refund of the Infrastructure Charges and with the intention of capturing that refund.

(d) Hemant's silence was misleading conduct in trade or business.

(e) Hemant's silence was *a cause of the of the entry into the undertakings*: referring to *Davis v Perry O'Brien Engineering Pty Ltd* [2023] QSC 243 at [218]-[219] per Applegarth J, thus satisfying the requirements for contravention of the ACL and warranting the orders sought by the defendant.

[126] With respect to the defendants' last argument, the only evidence relied upon by the defendants as reliance were paragraphs from Mr Smart's second affidavit which they submitted, in writing, that I ought to accept as unchallenged. Those paragraphs stated:

> 5 The first time I became aware that Hemant was communicating with the Ipswich City Council to have the infrastructure charge and stormwater contributions paid to Hemant was after receiving the letter from BA Legal dated 23 January 2026 …
>
> 6 I did not know that Hemant had contacted the Ipswich City Council before that date.
>
> 7 I did not know that Hemant were (sic) taking active steps to have the infrastructure charge and stormwater contributions paid to them and that they believed that they were entitled to those amounts under the terms of the undertaking before that date.
>
> 8 Had I known of any of the matters before providing the undertakings, I would not have provided the undertakings.

[127] However, as Mr Smart explained in his oral evidence, he *relied* on the *stakeholders' advice* when it came to giving the undertakings – and no stakeholder was called to give evidence of their reliance (or otherwise) on Hemant's silence. As Mr Morris KC submitted, it cannot be said that the defendants were not on notice about this evidential issue before they closed their case – yet they chose not to call a relevant stakeholder.

[128] Hemant submitted *inter alia*:

(a) The law does not ordinarily impose upon parties engaged in commercial negotiations a positive obligation to volunteer information for the assistance of a counterparty. Mere non-disclosure, absent conduct which is deliberately misleading or otherwise calculated to make a false impression, does not of itself constitute actionable misleading or deceptive conduct: *Miller & Associates*

Insurance Broking Pty Ltd v BMW Australia Finance Limited [2010] HCA 31; *Larson v Dudney* [2018] QCA 250 at [76]-[77].

(b) A reasonable commercial expectation is to be determined objectively, having regard to that which was known by the person said to have the expectation. It was known to the defendant that they parties were at "daggers drawn" and involved in litigation, which had included an injunction which the defendants wished to be relieved of: the notion that there would be voluntary disclosure of information by the plaintiff to the defendant "had long since ceased to exist".

(c) The conduct was not "in trade or commerce". Hemant was "at death's door", involved in fairly high-level litigation against its primary lender, and had no land, nor the means to develop land or carry on the business of development.

(d) The evidence does not support any suggestion that Trilogy gave the undertakings on a mistaken assumption <u>induced by Hemant</u> that no infrastructure refund existed or was not being pursued by Hemant.

Consideration

[129] Construing the phrase in the undertakings required me to ascertain the meaning a reasonable business person, in the position of the parties, would understand the phrase to bear, having regard to (a) the text as a whole, (b) the surrounding circumstances *known to both sides at the time*, and (c) the evident commercial purpose of the transaction. Evidence of the parties' statements and actions reflecting their own intentions and expectations were inadmissible. I was to strive for an interpretation which made commercial sense.

[130] As it was put by Kelly J in *Yue v CN-AU Capital Pty Ltd & Anor* [2021] QSC 248 at [36] – [37], adapted for the present context, footnotes omitted (my emphasis):

> "… This question [what a reasonable business person would have understood the undertakings to mean] directs the Court to considering "the language used by the partes in the [undertakings], the circumstances addressed by the [undertakings] and the commercial purpose or objects to be secured by the [undertakings]" The whole of the [undertakings] has to be considered as the meaning of one part may be revealed by other parts. **Literal interpretations which lack commercial efficacy or common sense are, where possible, to be avoided**.

> In cases where the meaning of [the undertakings'] language is ambiguous, recourse may be had to objective events, circumstances and things external to the contract for the purpose of identifying the commercial purpose or objects of the contract."

[131] His Honour then referred to paragraph [50] of *Mount Bruce Mining Pty Ltd v Wright Prospecting* (2015) 256 CLR 104 (per French CJ, Nettle and Gordon JJ).

[132] I found it helpful to consider paragraph [50] of *Mount Bruce Mining* in its broader context as follows (my emphasis):

> [47] "… [Asking what a reasonable business person would have understood the contract to mean] will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.
>
> [48] Ordinarily, this process of construction is possible by reference to the contract alone. **Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.**
>
> [49] **However, sometimes, recourse to events, circumstances and things external to the contract is necessary**. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contact may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.
>
> [50] Each of the events, circumstances and things external to the contract with which recourse may be had is objective. **What may be referred to are events, circumstances and things external to the contract which are known to the parties or which may assist in identifying the purpose of object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.**"

[133] Among other authorities, their Honours cited *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 352 per Mason J (as his

Honour then was), with Stephen and Wilson JJ agreeing, for the principles set out above (my emphasis):

> "The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning**.** But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking **facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties**, although, as we have seen, **if the facts are notorious knowledge of them will be presumed**."[16]

[134] As mentioned above, the defendants complained that the plaintiff pleaded that the language ("any refunds") was unambiguous but asked me to take into account surrounding circumstances in its interpretation, including the circumstance of Hemant's pursuit of the refund of the Infrastructure Charges.

[135] It is well established that I could only use *mutually known facts* to provide context for my interpretation of the undertaking. As Dalton JA said in *Al-Freah v Thompson* [2023] QCA 175 at [54] and [53]: "… [T]hat only mutually known facts can be used as part of the commercial context is a substantive rule of law … There is not some separate rule which allows facts not mutually known to the contracting parties to be used to interpret a contract between the parties on the basis that that it shows the commercial context in which the parties contracted".

Considerations relevant to the construction of the phrase "any refunds"

<u>Surrounding circumstances known to both sides: legislative and mortgage context</u>

[136] Bearing in mind that the plaintiff was a property developer and the defendants were lenders to property developers, I considered the provisions of the *Planning Act*, especially those concerning infrastructure charges, to be relevantly "notorious" circumstances to be treated as known to both sides and thus providing a reasonable business person with context for the interpretation of the undertaking.

[137] I considered the powers, duties and responsibilities of the first defendant as a controller under the CA and under the mortgage to be in the same category.

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16 All members of the court in *Mount Bruce Mining* observed that the question of whether ambiguity must be shown before a court interpreting a written contract can have regard to background circumstances was not raised in that case (see [50] and [110] – [111] and [118] – [120]).

<u>Other surrounding circumstances known to both sides</u>

[138] I considered the following surrounding circumstances, mutually known to the parties, to be relevant to the construction of the undertakings in the sense that they assisted in understanding the purpose and the context in which they were given:

(a) Lot 702 was the subject of a development application.

(b) Hemant acquired a loan facility from TMIT, secured by mortgages including a mortgage over Lot 702, to fund the development.

(c) Hemant "requested" the defendants advance more than $2 million for payments to "Contractors, Consultants as per spreadsheet" with the "Reason" stated to be "Claims for the Forest View Development as per Funding".

(d) Hemant knew, and the defendants would infer from the spreadsheet, that Council sought payment from Hemant of Lot 702's infrastructure charges and a stormwater offset contribution.

(e) The funds were advanced by TMIT to Council as per the plaintiff's request.

(f) Trilogy Private alleged that Hemant was in default and served notice of its intention to exercise its power of sale of Lot 702 as mortgagee.

(g) Trilogy Private entered into control of Lot 702 under the instrument of mortgage for the purpose of enforcing the security.

(h) As the controller/mortgagee in possession, Trilogy Private's powers included not only a right to sell Lot 702, but also broader control over Hemant, especially as per clause 18 of the mortgage, which permitted it to carry on any business of Hemant's conducted on or from the lot; use all plant, equipment, machinery, vehicles, implements and other chattels and stock on the lot; and operate on any bank account of Hemant's.

(i) Trilogy Private was under a duty to use reasonable care to achieve the best price for Lot 702. The pre-payment of the Infrastructure Charges rendered Lot 702 more valuable.

(j) The plaintiff obtained an injunction prohibiting the defendants from selling Lot 702.

(k) Hemant wanted Trilogy Private to (at least) remove itself as the controller of the plaintiff's "company records".

(l) The defendants found a buyer for the land and applied to have the injunction set aside.

(m) Hemant offered to consent to the discharge of the injunction *if* the defendants signed undertakings in the terms it proposed.

(n) On their face, the undertakings benefitted Hemant because they limited the control the defendants could exercise over Hemant's business and the incidents of its business, including its day-to-day operations.

(o) The giving of the undertaking by the defendants achieved, for them, the benefit of a consent order discharging the injunction and did not get in the way of their selling Lot 702 to realise their security.

[139] The defendants did not know that Hemant was seeking the refunds. Nor were the defendants aware that the Council was contemplating a refund because the trigger for the payment of the Infrastructure Charges had not in fact occurred. Nor was there evidence to support a finding that it was either usual, or at least not unusual, for a developer to seek the return of levied, invoiced and paid infrastructure charges if they decided not to proceed with the development before the trigger. In fact, Mr Lange gave evidence to the effect that, typically, the infrastructure charges would "run with the land" and that he was concerned that if Trilogy sold Lot 702, the benefit of the Infrastructure Charges would pass to the purchaser. I considered it reasonable to proceed on the basis that a reasonable business person would understand that Hemant seeking the refund was not a usual or typical incident of a failed or ceased development.

<u>The evident commercial purpose of the undertakings</u>

[140] The commercial context in which the undertakings were given, *known to both sides*, included: Hemant's desire to be free of Trilogy Private's "control", as controller, of anything other than Lot 702; and Trilogy Private's desire to sell Lot 702.

[141] Objectively, the commercial purpose of the undertakings was to secure Hemant's agreement to the lifting of the injunction which it had obtained, permitting Trilogy

Private to sell Lot 702. Thus, they had to provide a benefit to Hemant – which was, objectively ascertained, in the context of the circumstances *known to both parties*, returning to Hemant, from Trilogy Private's control under the CA and the mortgage, control of its day-to-day operations, its machinery and equipment and its financial assets – that is, its refunds, accounts and monies of or for Hemant's benefit).

<u>The language of the undertakings</u>

[142] The undertakings stated (my emphasis):

> "We confirm that [Trilogy Private/Trilogy Funds Management] will **<u>only</u> <u>strictly</u> deal with Lot 702** following the discharge of the injunction, and that we **<u>do not assert any control over</u> the day-to-day operations of [Hemant], any machinery or equipment, any refunds, any accounts and any monies of, or for, the benefit of [Hemant].**
>
> We undertake to repay to [Hemant] any amount we receive from the sale proceeds of Lot 702 if the Court orders that any such amount be repaid to [Hemant] by [Trilogy Private]."

[143] Although the grammar/punctuation was not perfect, a reasonable business person would consider the phrase "any refunds" in the context of the longer phrase "any refunds …for the benefit of Hemant".

[144] In my view, the ordinary and natural meaning of the phrase captures only funds paid by Hemant and returned to Hemant. It did not ordinarily or naturally capture the refund *to Hemant's lender* of moneys paid *by Hemant's lender* to third parties in the context of the loan facility agreement – especially when the moneys did not ever pass through Hemant's "hands", as it were, to the third party.

[145] In my view, while the crediting of the refunds to the TMIT account was to Hemant's benefit, in that it reduced Hemant's indebtedness, it was contrary to commercial efficacy or common sense to suggest that the phrase ordinarily or naturally extended to refunds from Council (or elsewhere) which were credited to Hemant's loan facility. Indeed, if the refunds were forwarded from the TMIT account to Hemant, then Hemant would lose the benefit of the initial reduction in its indebtedness, to Hemant's detriment – which makes no commercial sense.

[146] Also, in my view, a reasonable business person, aware of the provisions of the *Planning Act*, including the sections set out at [11] above, would understand the notion of the levied (and *invoiced and pre-paid*) infrastructure charges as something “attaching” to Lot 702 in the same way as they would understand a development approval “attaching” to Lot 702[17] – that is, as an incident or characteristic of Lot 702, which endured for the benefit of any subsequent purchaser. There is force in an argument that the reasonable business person would not have even contemplated the possibility of a *refund* of the Infrastructure Charges because they attached to and ordinarily travelled with Lot 702. The request for the refund was novel.

<u>Whether a reasonable person would understand “any refund”/”any refund for the benefit of Hemant” to include a refund of the Infrastructure Charges or the stormwater offset contribution</u>

[147] The plaintiff did not persuade me that it was more probable than not that a reasonable business person would understand the phrase “any refunds/any refunds for the benefit of Hemant” to capture the future return by Council of monies originally paid to it by TMIT, at Hemant’s request, for Infrastructure Charges which, when levied, attached to Lot 702, or the stormwater offset contribution paid in respect of Lot 702.

[148] In other words, my answer to the question is “no” having regard to the following:

(a) The reasonable business person was to be taken as *unaware* that Hemant was seeking the refunds of the Infrastructure Charges or that Council had resolved in principle to make the refunds.

(b) It was irrelevant to the interpretation of the phrase that:

(i) Hemant deliberately intended the phrase to include the refund of the Infrastructure Charges it was pursuing;

and

(ii) the stakeholders determined that the phrase did not encompass a refund of the Infrastructure Charges.

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17 See section 73 of the Act.

(c) The ordinary and natural meaning of the phrase did *not* extend to refunds of monies not paid initially by Hemant but instead by its lender, at its direction, under a loan facility agreement.

(d) The Infrastructure Charges were an incident or characteristic of Lot 702 which, once levied and paid, attached to the lot. The stormwater offset contribution was paid in relation to Lot 702 and was similarly "attached" to it.

(e) The fact that the Infrastructure Charges had been pre-paid increased the value of Lot 702. If they were refunded by Council the lot's value would reduce not insubstantially and likely by a greater amount than that paid in 2022, because of indexation. Their refund was novel.

(f) The first defendant wished to sell Lot 702 and the injunction obtained by the plaintiff prevented it from doing so.

(g) The way in which the first defendant was exercising its control over Lot 702 was interfering with Hemant's day-to-day operations, to Hemant's dislike and Hemant wished to be free of the first defendant's control of anything other than Lot 702.

(h) The undertaking was a condition of Hemant's consent to the discharge of the injunction, to allow the first defendant to sell Lot 702.

(i) The first defendant was under a duty as controller to take all reasonable care to sell the property for not less than its market value, or at the best price.

(j) Bearing in mind (d), (e), (f) and (h): the interpretation of the undertaking as a whole, which gave it commercial sense and achieved the objects of the parties, was one which differentiated between: Lot 702 *and all incidents of it including the pre-paid Infrastructure Charges which increased its value* on the one hand, and the day-to-day operations of Hemant and Hemant's *other* property on the other.

(k) Consistently with that interpretation, "any refunds" did not capture a future refund of the Infrastructure Charges because they fell within the scope or concept of "Lot 702", over which the first defendant retained control after the undertaking.

(l) The suggestion that Hemant was entitled to the benefit of a refund of money paid not by it but by its lender to a third party under a loan facility agreement did not make commercial sense and was an affront to common sense. Hemant had not been burdened with the initial payment. I could conceive of no basis upon which it would make commercial or common sense to allow it the benefit of the refund, or to deny the lender the benefit of the refund.

[149] Having not been persuaded to the relevant standard of the plaintiff's case, there was no need for me to consider the defendants' counter claim although, as discussed above, there appeared to be insufficient evidence of *reliance*.

Conclusion and costs

[150] The plaintiff's application is refused.

[151] If either party wishes to contend for an order *other than* an order that the plaintiff is to pay the defendants' costs of the application, then that party is to email my associate, within 7 days, copying in the other parties, and I will set a timetable for written submissions. Otherwise, my order will be that the plaintiff is to pay the defendants' costs of the application.