MALLESONS

# Formwork

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# Content





# Welcome note

## Welcome to the first edition of Mallesons' real estate disputes newsletter, *Formwork*.

We are delighted to be able to bring you this publication. We are happy to come and present to you on any of the cases or legal issues raised. The concept of the publication is to have short, pithy, summaries of points of law which matter for our clients. The cases we will analyse will not always be high-profile, but the legal issues will be relevant. In this edition, we have content on five cases, dealing with:

1. Specific performance
2. Construction of oral contracts
3. Joint ventures
4. Commercial leasing issues such as assignments and make good

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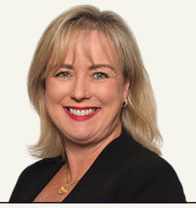

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Keep a lookout for our upcoming podcast in which we dive a little deeper into the issues.

# Can you be more specific? The Court's supervision of specific performance

## *Baeg v Wink Singh Pty Ltd (No 2) [2025] NSWSC 873*

Keywords: specific performance for the sale of land, failure to comply with order, repudiation

### 1 OVERVIEW

Specific performance is an equitable remedy by which a Court directs a party to perform their obligations under a contract. There are obvious uses for an order for specific performance in requiring a counter party to complete a transaction. Less obvious is what a party can do, or should do, if an order for specific performance is not complied with. That party retains all of the common law rights it would otherwise have had, but does require the leave of the Court to vacate the prior order for specific performance.

The practical takeaway for clients is that if an order for specific performance is made, but not completed, and alternative relief is desired (including termination), you need to return to Court.

### 2 FACTS

The Proceedings concerned a contract (**Contract**) for the sale and purchase of land in Sydney entered in 2021 (**Property**).[1]

The transaction was plagued with issues from the beginning with instalments of the deposit payable by the purchaser either being late or not made. The time for completion (initially September 2022) was extended twice by agreement between the parties. This was in circumstances where the purchaser failed to complete the Contract on several occasions before and after the extensions.[2]

The vendor commenced proceedings, and amongst other things, the Supreme Court of NSW made an order[3] for specific performance requiring the purchaser to complete the purchase of the Property by 23 May 2024 in accordance with the Contract (**Specific Performance Order**). Given the transaction history recorded in this decision, this would not have been a difficult order to obtain.

The purchaser failed to comply with the Specific Performance Order.

Eventually, but without the leave of the Supreme Court of NSW, a Notice of Termination (Notice of Termination) was served on by the vendor which detailed acceptance of its repudiation of the Contract and elected to terminate it.[4] Some 7 months after the Notice of Termination was served, the purchaser wrote to the vendor asserting that:

(a) as the Contract was subject to the Specific Performance Order, the vendor was not "lawfully permitted to terminate [the Contract] without leave of the Court";

(b) the Notice of Termination amounted to repudiation of the Contract; and

(c) the purchaser accepted the vendor's repudiation with the effect being that the Contract is terminated.

The vendor then filed a notice of motion seeking orders vacating the Specific Performance Order and damages in lieu of performance of the Contract.

The practical outcome of the purchaser's argument was that it would not be liable for damages for its previous breaches of contract.



### 3 THE ISSUES FOR THE COURT TO DECIDE

On the vendor's application, three key issues[5] arose for the Court's determination:

(a) the legal effect of the Notice;

(b) whether the Specific Performance Order ought to be vacated; and

(c) what damages, if any, should be awarded.

Notwithstanding that the Court concluded that the Notice of Termination was invalid, the decision was a resounding success for the plaintiff vendor.

#### 3.1 Issue 1: the legal effect of the Notice of Termination

The issue concerning the Notice of Termination had two aspects: first, whether it had the effect of validly terminating the contract and secondly, if not, whether the serving of the notice was repudiatory conduct on behalf of the vendor.[6]

The parties agreed that by reason of the Specific Performance Order, the vendor was not entitled to determine the Contract without leave of the Court.[7] Nevertheless, the Court canvassed the legal principles of specific performance (in some detail), providing that following the granting of an order:

> *"a party elects for a continuance of the contract under the control of the court and that control involves the power, in certain events, to terminate it."*[8]

Whilst contractual rights remain on foot, the *"future exercise of rights and performance of obligations fall under the control of the court."*[9] The Court observed that:

(a) an award of specific performance does not disentitle a party of their right to seek damages for breach of contract; and

(b) it is reflective of the law in Australia that *"a contractual right of termination can only be exercised with leave of the court or, more accurately, an order vacating the order for specific performance."*[10]

Both parties agreed as to the principles above but disagreed as to the status of the effect of the Notice of Termination. The vendor's position was that the Notice is null or void (and conceded issuing it was "a mistake").[11] In other words, it was not repudiatory but ineffective or of no use. The purchaser's position was that seeking to unilaterally terminate was repudiatory in circumstances where the attempt itself was inconsistent with Specific Performance Order and leave from the court had not been granted.[12]

His Honour, having considered relevant authorities on the issue (principally *Despot v Registrar General of NSW*)[13] agreed with the vendor that Notice of Termination was invalid for the purpose of terminating the Contract and had no legal effect.[14] Yet, as service of the Notice of Termination was neither an "unlawful termination" or repudiatory, and to otherwise accept the purchaser's argument (that the contract could be terminated because of the repudiation by the vendor in issuing the Notice of Termination) would:

> *"make a mockery of this court's supervisory jurisdiction and, in its essence, seeks to do the very thing the authorities weigh heavily against, which is to merge the rights and obligations arising under a contract with those arising pursuant to an order for specific performance…"*[15]

In short, for the Court:

(a) service of the Notice was no more than a purported termination and did not rise to a threshold amounting to repudiation; and

(b) the Specific Performance Order remained in force until the Court considered a motion to have it vacated.[16]

#### 3.2 Issue 2: vacating the Specific Performance Order

Proceeding on the basis that the Court's finding as to the effect of the Notice of Termination would determine this issue, neither the vendor or purchaser made any submissions as to vacating the Specific Performance Order.

The Court considered its jurisdiction in circumstances of prolonged non-compliance with an order:[17] *"It is clear that this court may, upon application, vacate an unfulfilled order for specific performance, determine the subject contract and substitute alternative relief."*[18]

Given extended non-compliance with the Specific Performance Order, and no indication that the purchaser expected to follow through with the transaction,[19] the Court was satisfied that the order should be vacated, the contract terminated,[20] and the vendor was entitled to damages *"in lieu of performance."*[21]

The Court then went on to mechanically calculate damages.

### 4 COURT'S ORDERS

The Court:

(a) ordered the Specific Performance Order be vacated; and

(b) declared that the Contract was repudiated by the purchaser;

(c) granted leave for the vendor to accept the purchaser's repudiation; and

(d) ordered the purchaser to pay damages in the amount of $1,743,878.71 (with costs).[22]

# Make good or good enough?

## *Allied Pinnacle Pty Ltd v G R Mailman & Associates Pty Ltd [2026] NSWSC 87*

Keywords: make good, condition, lease, referee on quantum issues

The perfect 'make good' storm starts with an unsigned lease, missing annexures to the lease, includes an expensive fit out by the tenant (for at least a ten year term), has a new owner and landlord at some point who wants a new tenant, a dispute about quantum of make good costs between landlord and tenant, and two arguable and reasonable constructions of the make good clause in the Lease. To add into the mix, one party accuses the other of unconscionable conduct and a failure to comply with the implied duty to co-operate. These facts closely mirror the factual scenario in a recent decision from the Supreme Court of NSW.

In this case the principle issue regarding the construction of the make good clause was determined by orthodox principles, including a judicial reading of the lease 'as a whole!'

### 1 OVERVIEW

This decision considers the proper construction of make good obligations under a commercial lease over industrial premises in Western Sydney.[23]

The plaintiff lessee, Allied Pinnacle Pty Ltd (**Allied**), sought declarations that the lease did not require it to remove a substantial internal fit-out undertaken at the commencement of its tenancy in 2015 (**the 2015 fit-out**) nor to repaint the exterior of the premises upon the conclusion of the lease. The defendant lessor, G R Mailman & Associates Pty Ltd (**GR Mailman**), cross-claimed for damages, claiming that Allied was obliged to restore the premises to their pre fit-out condition and repaint the exterior.[24]

The Court held that the lease did not impose such an obligation, construing the word "condition" in the yield-up clause as referring to the standard of the premises rather than their physical configuration.[25]

### 2 KEY DATES & INFORMATION

The lease was entered into on or about 15 August 2015 between Allied and Liberty Drive Pty Ltd for an initial term of 10 years, with options for two further five-year terms (**Lease**)[26]. GR Mailman purchased the premises from Liberty Drive in late 2017 and therefore assumed the lessor's obligations under the Lease.[27]

Allied did not exercise its option to extend the Lease and vacated the premises by 14 August 2025, leaving the 2015 fit-out in situ.[28] Allied accepted that it had not completed certain outstanding redecoration works, including removal of loose furniture, repainting of interior surfaces, and carpet cleaning or replacement (together, the **Outstanding Redecoration Works**).[29]

The parties moved quickly to have a hearing in December 2025.

### 3 ISSUES BEFORE THE COURT

The central issues before the Court were as follows:

(a) Whether, properly construed, the Lease required Allied to remove the 2015 fit-out upon vacating the premises.[30]

(b) Whether the Lease required Allied to repaint the exteriors of the premises.[31]

(c) Whether Allied was relieved of liability for the Outstanding Redecoration Works on any of the following grounds:

   (i) failure by GR Mailman to have mitigated its loss;[32]

   (ii) repudiation, estoppel, waiver and/or breach of good faith;[33] and

   (iii) statutory unconscionable conduct under section 21 of the *Competition and Consumer Act 2010 (Cth)*, Sch 2 – Australian Consumer Law (**ACL**).[34]





### 4 DECISION

#### (a) Removal of the 2015 Fit-Out

Allied vacated the premises without removing the 2015 fit-out.

The question of whether the Lease required Allied to have removed the 2015 fit-out when it vacated the premises turned primarily on the meaning given to the following words contained at the end of clause A2.1:

> "the Lessee shall…on expiry or termination of this Lease yield up the demised premises to the Lessor in the state of repair and condition as is specified in this clause and consistent with the condition of the demised premises at the commencement of this Lease" (emphasis added)

GR Mailman argued the word "condition" referred to the physical state or configuration of the premises, such that the premises had to be restored to its pre fit-out configuration.[35] This was important. Allied argued that "condition" referred to the standard or quality of the premises, not their layout.[36]

Applying uncontroversial and established authority on the construction of contracts, the Court preferred Allied's construction of the term "condition" for three reasons:

1 The word "condition" as used elsewhere in the Lease (the Court referred specifically to clauses A2.2(c) and A24.5) clearly referred to the standard of the premises.[37]

2 The clause A24, which set out in greater detail the lessee's make good obligations, contained nothing requiring the lessee to return the premises to the same state or configuration it was in prior to any works.[38]

3 The Court applied the principle that specific provisions (i.e A24) are given greater weight than general provisions (i.e. A2.1), and that any inconsistency is to be resolved in favour of the specific provision.[39]

Further, clause B1(22) gave Allied a discretionary right to remove its tenant's fixtures. In what we consider was the most persuasive arguments, the Court reasoned that this right would be wholly unnecessary if clause A2.1 already required removal of all tenant's fixtures as part of the make good obligations.[40]

The Court concluded that clause A2.1 of the Lease did not require Allied to remove the 2015 fit-out.

#### (b) Exterior Painting

The Court concluded that clause A24.3(b) required Allied to repaint all painted surfaces of the premises, including exterior surfaces, and that Allied's failure to do so was a breach of the Lease.

The Court rejected Allied's argument that the clause was limited to internal painted surfaces. The text of the clause drew a clear distinction between "all painted surfaces" and "all internal surfaces", with the latter qualifying only the obligation to wallpaper, stain, varnish and polish.[41]

#### (c) Outstanding redecoration works

The Court rejected each of Allied's arguments for relief from liability for the Outstanding Redecoration Works at listed above at [3].

**Failure to mitigate:** Allied argued that GR Mailman failed to mitigate its loss by not issuing a notice under the Lease requiring Allied to commence the works within 30 days.[42] The Court held that Allied had not discharged its onus.[43] GR Mailman had communicated what it believed to be the full scope of the make good obligations, and the evidence showed that Allied had no intention of completing the works while the dispute persisted, regardless of any notice.

**Repudiation, waiver, estoppel and good faith:** The Court concluded that GR Mailman's maintenance of its position regarding the 2015 fit-out did not amount to a repudiation or breach of any implied duty of good faith and cooperation. GR Mailman's understanding was genuinely held and it did not evince an unwillingness or inability to perform its own obligations, nor did it prevent Allied from performing its uncontentious obligations.[44] Allied Pinnacle's decision not to complete the works was unilateral and not communicated to GR Mailman.[45]

**Unconscionable conduct:** The unconscionability case under section 21 of the ACL arose only if the Court found clause A2.1 required removal of the 2015 fit-out, which it did not. Nevertheless, the Court provided some commentary on this issue.

#### (d) Decision

The Court directed the parties to confer on the form of orders required to facilitate the assessment of damages by a referee for Allied's breach in respect of the exterior painting and outstanding redecoration works, with submissions to be filed by 23 February 2026.[46]

### 5 PRACTICAL TAKEAWAYS

Amongst other things, this decision serves as an important reminder of a few key principles of document and contract interpretation:

- Where a contract contains both general provisions and specific provisions, the specific provisions will be given greater weight where both address the same subject matter.
- A document and any treatment of a phase or word must be read in the context of the entire document.
- The greater context and purpose of a clause must always be considered.

# When the trust goes, the trustee comes

## *Russo v Russo [2026] NSWSC 4*

Keywords: oral contract, section 66G of *Conveyancing Act 1919* (NSW), trustee appointed for sale

### 1 OVERVIEW

In *Russo v Russo* [2026] NSWSC 4,[47] the Supreme Court of NSW was tasked with resolving a dispute between an uncle (**Paul**) and his nephew (**Daniel**) arising from the purchase and development of land in suburban Sydney.

In issue was the interpretation of an oral contract between Paul and Daniel by which it had been agreed to subdivide and develop two identical dwellings on the purchased land.[48]

After a falling out between relatives , Paul (the uncle) sought an order under s66G of the *Conveyancing Act 1919* (NSW) (**Conveyancing Act**) for the appointment of trustees to sell the properties.[49] Daniel cross-claimed alleging failure by Paul to contribute his share of development costs.[50] Ultimately, the Court:

- **Granted Paul's s66G application for the appointment of trustees to sell the properties** – given the properties were not constructed identically, the term of the oral contract entitling Paul and Daniel to one lot each did not stop the appointment of trustees to sell them.[51]
- **Dismissed Daniel's cross-claim** due to insufficient evidence of the contractual terms he relied on.[52]

### 2 BACKGROUND & FACTS

In May 2015, Paul and Daniel purchased land in Revesby, NSW for $950,000 as tenants in common in equal shares.[53] The intention was to subdivide and develop the land into two detached dwellings, both with a swimming pool (**Development**).[54] Paul and Daniel would take one each to live.[55]

Prior to purchasing the property, Paul and Daniel had a conversation about the Development (**Oral Contract**) which the pair recollect as follows:

(a) **Paul** - Daniel proposed to build two houses that would be "the same", using his construction company Touchstone Building (NSW) Pty Ltd (**Touchstone**), with costs funded via a construction loan and Daniel personally.[56]

(b) **Daniel** – Paul and Daniel agreed that all costs would be shared *"50/50 all the way"*, Touchstone would be the builder and, at the end of construction, each would own one lot.[57]

The Court noted the two versions were not inconsistent, but Daniel's version omitted any reference to what would actually be built.[58]

A loan was obtained from ANZ and the purchase settled.[59] Construction finished in May 2022[60] and a subdivision[61] registered in September 2022.[62] To fund the Development, Paul and Daniel had refinanced their ANZ loan with Westpac and obtained a facility to cover Development costs.[63]

Throughout the Development:

- Professional documents (quotes, architectural plans, structural drawings and building contracts with Touchstone) assumed the Development of the properties would be identical.[64] This is despite the use of a more expensive Ritek wall panelling system on the lot intended to be Daniel's following subdivision.[65]
- The Westpac construction facility, and another loan to Touchstone from Savoy Investments, were supposedly used to pay Touchstone's progress claims.[66]

Discussions between Paul and Daniel between 2022-2024 unsuccessfully attempted to resolve what Paul was required to pay to reflect a 50/50 sharing of expenses.[67]

### 3 PAUL'S CLAIM UNDER S66G OF THE *CONVEYANCING ACT 1919 NO 6* (NSW)

#### 3.1 Paul's s66G Claim & Submissions of the Parties

Paul commenced proceedings under s66G of the Conveyancing Act seeking the appointment of a trustee to sell the properties.[68]

In his judgment, Richmond J outlined the key principles with respect to s66G applications:

- Co-owners are entitled to a s66G order *"almost as of right"* unless it would be inequitable.[69]
- General notions of hardship and/or unfairness are not proper grounds to refuse relief.[70]
- A s66G order will be refused where **the order would be inconsistent with a proprietary/contractual right**,[71] with consideration to whether the arrangement between the parties intended to apply after their relationship broke down.[72]

Paul submitted that there was no basis on which the Court could refuse making a s66G order and that the Oral Contract (under which Paul and Daniel would become the registered proprietor of one subdivided lot) was not intended to apply following a breakdown of relations.[73]

In response, Daniel submitted that a sale of the properties pursuant to s66G would be inconsistent with his contractual right to become a registered proprietor of one subdivided lot under the Oral Contract.[74]

#### 3.2 Analysis & Conclusions of the Court

#### (a) Oral Contract terms

To determine the terms of the Oral Contract, the Court relied on the following key principles:

- The objective intention of the parties, as opposed to their unspoken subjective intention, is relevant,[75] and most reliable.[76]
- All relevant circumstances, including factual pre and post contractual conduct, must be considered.[77]
- The plaintiff must establish facts in issue to the civil standard of proof.[78]
- The task for the Court is to fact-find what the parties agreed.[79]

Using the above principles, the Court came to a conclusion about the six terms of the Oral Contract.[80] Crucially, agreeing with Paul, term (3) was '*to build on each parcel a detached house and a swimming pool which would be the same*'.[81] This was consistent with Daniel's own evidence, including:

- instructions given to an architect to assume the duplexes would be *"exactly the same"*;[82]
- his statement that costs would be shared *"50/50 all the way"*;[83]
- an email he sent to a mortgage broker, noting that the properties would be *"identical in cost"*.[84]

The Court also rejected Daniel's contention that the Oral Contract included an implied term that the parties would share costs except where one desired "additional features" - it was not necessary to imply such a term for the contract to operate reasonably and effectively.[85]

#### (b) Appointment of trustee for sale

The Court identified no term of the Oral Contract preventing relief under s66G of the Conveyancing Act, including term (6) on which Daniel relied, namely that 'at the end of the build', Paul and Daniel *'would become the registered proprietor of one of the two parcels'.* [86]

The Court concluded that term (6) only made commercial sense if Paul and Daniel shared the costs of the Development 50/50, and if the Development was complete in accordance with the building contract (i.e. the properties were constructed identically).[87] Given the Ritek system was used on Daniel's parcel, this was not the case.[88] Term (6) of the Oral Contract was therefore not enlivened and did not preclude a s66G order.[89]

Following subsequent hearings in 2026, the Court ordered the appointment of two trustees to sell the properties pursuant to s66G.[90] The Court followed the default position with respect to costs - the costs of all parties are to be paid using proceeds of the sale.[91]

### 4 DANIEL'S CROSS CLAIM FOR PAUL'S CONTRIBUTION TO DEVELOPMENT COSTS

#### 4.1 Daniel's Cross Claim & Submissions of the Parties

Daniel also commenced a cross claim alleging a failure by Paul to contribute his share of the Development costs to a quantum of $335,392.12.[92] Paul denied any liability to contribute this amount on the basis that Daniel failed to illustrate these funds went towards the Development.[93]

#### 4.2 Analysis & Conclusions of the Court

The Court ultimately concluded that Daniel failed to establish his entitlement to the amounts he sought.[94] Among other reasons, the Court was not satisfied with the documentary evidence advanced by Daniel supporting his cross claim, characterising it as *'self-serving'* and *'not corroborated'*.[95] It was clear to the Court that significant portions of the sum Daniel claimed were unrelated to the Development, instead used to repay Touchstone's loans from third parties and for Daniel's personal expenditure.[96]

The Court dismissed Daniel's cross claim entirely.[97] Daniel was ordered to pay Paul's costs.[98]

# Profit-Share or Proprietary Right? Equitable Interests in Development Ventures

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

Keywords: equitable interests in land, joint venture dispute, lack of proper documentation

In *Khaihra v Agarwal* [2025] NSWSC 1276, the Supreme Court of NSW considered an urgent application to extend a caveat to prevent the sale of a property. The plaintiff's interest in the property arose following a property development arrangement between the parties. The case illustrates the **equitable interests** in **land which may arise in the context of a joint venture agreement**, and the importance of **properly framing those interests in claims for urgent injunctive relief**. The Court extended the caveat for six months, subject to conditions.[99]

This case was heard on an urgent basis, with limited evidence, and with proposed completion dates just days away. The real lesson from this decision is that attempts to sell without the documented, fully informed consent of co-developers risks exposure to caveats, injunctions, and damages claimed on a lost opportunity basis.

### 1 FACTS

#### 1.1 Commercial venture

The defendants were the registered proprietors of 167 Annangrove Road, Annangrove.[100] In late 2023, the plaintiff and their accountant (the first defendant) agreed to develop the property. In broad terms, the commercial venture contemplated that:

(a) the plaintiff would make contributions in respect of an interest in the property (either 40% or 50%) and expenses (although there was some debate about what those expenses were to be), and

(b) the parties would submit a development application and secure development approval.[101]

The documented arrangements did not articulate the precise nature of the venture, including how income (rent) would be treated.[102] The plaintiff paid approximately $500,000, including $420,000 for a 40% share in the property (less amounts outstanding under a mortgage).[103]

#### 1.2 Breakdown of commercial venture

Over a period of time, the relationship between the parties soured. The defendants alleged that the plaintiff failed to pay his share of expenses, while the plaintiff contended that the first defendant had made excessive demands for advance payments.[104]

In late 2024, the defendant took steps to sell the Annangrove property.[105] The Court summarised text message exchanges (available to the Court) between the parties about the sale. The messages involved *'some antagonism'*.[106]

On 2 May 2025, the defendant entered a contract to sell the property, scheduled to complete on 3 November 2025.[107] On 6 May 2025, the plaintiff lodged a caveat to prevent the sale. On 20 June 2025, the caveat was withdrawn and a fresh caveat was lodged.[108]

This decision concerned an urgent application by the plaintiff to extend the caveat.[109]

### 2 KEY ISSUES

The plaintiff's position was that it had an interest in the property on three bases:

(a) **Express trust:** The defendants held a 40% interest in the property on express trust for the plaintiff.

(b) **Equitable charge:** The plaintiff had an equitable charge over the property for moneys paid to the first defendant.

(c) **Joint endeavour:** The parties held the property pursuant to a joint endeavour involving pooling financial resources to obtain development approval, with a view to selling the property and sharing profits. The plaintiff contended the interest arose through proprietary estoppel, constructive trust or another equitable doctrine.[110]

### 3 LEGAL PRINCIPLES

The principles governing an application to extend a caveat are the same as for an interlocutory injunction. Namely, there must be a serious question to be tried, and the balance of convenience must favour extending the caveat.[111] The defendants accepted there was a serious question to be tried. The only issue for the Court was balance of convenience.[112]

### 4 APPLICATION – BALANCE OF CONVENIENCE

The defendants offered to pay 40% of the net proceeds of sale into Court while the proceedings were determined.[113] The plaintiff offered the usual undertaking as to damages (to compensate the defendants for any losses if a later Court found the caveat was wrongly extended).[114]

#### 4.1 Outcome for each interest

The Court considered whether the balance of convenience favoured extending the caveat for each potential interest:

(a) **Express trust:** This would entitle the plaintiff to 40% of the net sale proceeds. This was adequately protected by the defendants' offer to pay this amount into Court.[115]

(b) **Equitable charge:** This would entitle the plaintiff to the whole of the net sale proceeds (because the plaintiff had paid $500,000). The plaintiff's interest would be prejudiced if the property was sold at an undervalue.[116] The plaintiff's loss could, however, be compensated by monetary relief, so the balance of convenience did not justify extending the caveat.[117]

(c) **Joint endeavour:** This is an asserted right to specifically enforce the joint venture agreement and submit a development application. This interest would be prejudiced by selling the property and cannot be adequately compensated by monetary relief. The balance of convenience favoured extending the caveat based on this interest.[118]

#### 4.2 Other considerations

Justice Brereton noted there was no evidence:

(a) of prejudice to third-party purchasers;[119] or

(b) that extending the caveat would cause the defendants to suffer irreparable financial hardship.[120]

Justice Brereton concluded that the balance of convenience favoured extending the caveat.[121] The extension was subject to the following conditions:

(a) the extension must be for a finite time (six months);

(b) the plaintiff must not delay in prosecuting the proceedings; and

(c) the plaintiff must give the undertakings promised.[122]

# No Vacancy for Unreasonable Refusals on assignment

## *Watski Pty Ltd v Roughstone Pty Ltd [2026] NSWSC 614*

Keywords: assignment of lease, section 133B of Conveyancing Act 1919 (NSW), landlord's consent unreasonably withheld, section 94 of Civil Procedure Act 2005 (NSW)

### 1 OVERVIEW

In *Watski Pty Ltd v Roughstone Py Ltd* [2026] NSWSC 614,[123] the Supreme Court of NSW was required to determine whether a landlord had unreasonably withheld consent to the assignment of a lease and to the mortgage of that lease, in circumstances where the tenant sought to sell its caravan park business.

The first plaintiff, Watski Pty Ltd (**Watski**), operated a caravan park on land owned by the defendant, Roughstone Pty Ltd (**Roughstone**), and had entered into a Sale of Business Agreement with the second plaintiff, Camp Crusty Operations Pty Ltd (**Camp Crusty**).[124] Settlement of the sale was contingent upon Roughstone consenting to both the transfer of the lease and the mortgage of the lease.[125] Roughstone failed to engage with the proceeding and did not appear at the hearing.[126]

Ultimately, the Court:

- Declared that **Roughstone had unreasonably withheld its consent to the transfer of the lease**, in contravention of section 133B of the *Conveyancing Act 1919* (NSW) (**Conveyancing Act**). The intended assignee was an experienced caravan park operator with the support of a reputable lender, and Roughstone disclosed no proper basis for refusal.[127]
- Ordered Roughstone to execute a deed of covenant and all documents necessary to affect the transfer and mortgage of the lease.[128]
- Made orders pursuant to section 94(1) of the Civil Procedure Act 2005 (NSW) (**CPA**) empowering the Registrar in Equity to execute the necessary documents in the name of, and on behalf of, Roughstone if it failed to comply within 14 days.[129]

### 2 BACKGROUND & FACTS

Watski is the owner and operator of a caravan park business at Barham, near the Murray River in the Western Riverina region of New South Wales.[130] The business, named "Big4Barnham" is conducted on land owned by Roughstone (**Land**).[131]

Watski occupied the Land pursuant to a Lease. The original lease between Watski and Roughstone began on 19 February 2020 and expired on 18 September 2024. Watski sought to exercise its option to renew, and a dispute arose with Roughstone over the validity of the renewal. In earlier proceedings, on 29 July 2025, Faulkner J declared that Watski had validly exercised the first option to renew and was entitled to a new lease.[132] Roughstone failed to execute the required documents, and those documents were subsequently executed by the Registrar in Equity. The renewed lease was registered on 27 October 2025 (**Lease**).[133]

In about late 2024, Watski decided to sell its caravan park business and offered Roughstone the first right of refusal. Roughstone did not engage, and the offer lapsed. On 20 March 2025, Watski signed a Sale of Business Agreement with Camp Crusty, pursuant to which Watski agreed to sell the business and transfer the Lease to Camp Crusty.[134]

Roughstone's consent to the transfer of the Lease was sought but never given.[135] Camp Crusty, an experienced caravan park operator in Victoria, was borrowing funds from the National Australia Bank (**NAB**) to purchase the business. NAB required a mortgage of the Lease as security, which itself required Roughstone's consent. Despite correspondence seeking consent, no consent was forthcoming from Roughstone.[136]





### 3 WATSKI'S CLAIM: UNREASONABLE WITHHOLDING OF CONSENT TO TRANSFER

#### 3.1 Legal Framework

Section 133B of the Conveyancing Act stipulates that a landlord's consent to the assignment of a lease is not to be unreasonably withheld. In applications of this type, the onus lies upon the tenant to provide that consent has been unreasonably refused.[137]

When considering reasonableness of a refusal, courts will sometimes measure reasonableness against the seven propositions put forward by Balcombe LJ in *International Drilling Fluids v Louiseville Investments (Uxbridge) Ltd* (1986) Ch 513, which, may be summarised as follows:[138]

1. **(Purpose of the covenant):** The purpose of a covenant against assignment without consent is to protect the lessor from having premises used or occupied in an undesirable way, or by an undesirable tenant or assignee.
2. **(Nexus with the landlord-tenant relationship):** As a corollary to the first proposition, a landlord is not entitled to refuse consent to an assignment on grounds which have nothing whatsoever to do with the relationship of landlord and tenant in regard to the subject matter of the lease.
3. **(Onus on the tenant):** The onus of providing that consent has been unreasonably withheld rests on the tenant.
4. **(Reasonableness of conclusion):** It is not necessary for the landlord to prove that the conclusions which led to the refusal were justified, if they were conclusions which might be reached by a reasonable person in the circumstances.
5. **(Purpose of proposed use):** It may be reasonable for the landlord to refuse consent on the ground of the purpose for which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease.
6. **(Consequences to the tenant):** There may be cases where there is such a disproportion between the benefit to the landlord and the detriment to the tenant that it is unreasonable for the landlord to refuse consent.
7. **(Question of fact):** Subject to the above, it is in each case a question of fact, depending upon all the circumstances, whether consent is being unreasonably withheld.

The propositions above have been positively cited and relied upon by NSW Courts on numerous occasions, some of which bear similar factual matrixes to the case of *Watski v Roughstone*.[140] By way of illustration, in Exceed Education Pty Ltd v Sylvester, Justice Pike treated International Drilling Fluids as a foundational statement of the principles governing the reasonableness inquiry.[141]

#### 3.2 Analysis & Conclusions of the Court

Justice Pike applied section 133B in a fairly straightforward fashion and was satisfied that consent had been withheld unreasonably. The evidence disclosed that the intended assignee, Camp Crusty, was an established caravan park operator with the support of a reputable lender. Whilst the evidence disclosed some dealings between both Watski or Camp Crusty and the director of Roughstone, it was difficult to discern from those communications any proper basis for Roughstone's refusal to agree to the assignment of the Lease.[142]

The Court accordingly declared that Roughstone had unreasonably withheld its consent to the transfer of the Lease.

### 4 SECTION 94(1) RELIEF AND ORDERS

Having regard to Roughstone's approach in the earlier proceedings (where it also failed to comply with court orders, necessitating execution by the Registrar in Equity) and its failure to participate in the present proceedings, Justice Pike considered it quite likely that Roughstone would not execute the necessary documents.

Accordingly, orders were made pursuant to section 94(1) of the CPA empowering the Registrar in Equity to execute the necessary documents in the event that Roughstone failed to do so within 14 days of the making of orders.[143]

His Honour preferred the more direct form of order made by Faulkner J in the earlier proceedings, rather than the precise formulation put forward by the plaintiffs in the amended summons.[144]

# Endnotes

1 [2025] NSWSC 873 (McGrath J) (**Baeg**).
2 Baeg [5].
3 See *Baeg v Wink Singh Pty Ltd* [2024] NSWSC 589 (**Baeg v Wink**).
4 Baeg [8].
5 The Court was also required to, and did, assess the damages ultimately payable to the vendor.
6 Baeg [60].
7 Baeg [85].
8 Baeg [67].
9 Baeg [67].
10 Baeg [73].
11 Baeg [86].
12 Baeg [100].
13 [2014] NSWSC 1002 at [62] (Ball J).
14 Baeg [102].
15 Baeg [103] referring to *Fu v Bucasia Pty Ltd* [2014] NSWSC 325, Stevenson J at [52]; *Johnson v Agnew* [1980] AC 367, Wilberforce LJ at 393-4; *JAG Investment* [1981] 2 NSWLR 600, Hope JA (Glass and Mahoney JJA agreeing) at 603; *Ogle v Comboyyuro Investments Pty Ltd* (1976) 136 CLR 444, Gibbs, Mason and Jacobs JJ at 461, as quoted in *Sunbird Plaza v Maloney* (1988) 166 CLR 245, by Mason CJ (Deane, Dawson and Toohey JJ agreeing) at 259-60; Gaudron J at 273.
16 Baeg [104].
17 Baeg [106]-[108].
18 Baeg [110].
19 Baeg [111].
20 Baeg [112].
21 Baeg [112].
22 Baeg [190].
23 *Allied Pinnacle Pty Ltd v G R Mailman & Associates Pty Ltd* [2026] NSWSC 87 (***Allied Pinnacle***) at [1].
24 *Allied Pinnacle* at [79].
25 *Allied Pinnacle* at [82].
26 *Allied Pinnacle* [4], [29].
27 *Allied Pinnacle* at [3]-[4].
28 *Allied Pinnacle* at [4]-[5].
29 *Allied Pinnacle* at [12].
30 *Allied Pinnacle* at [6]-[7]
31 *Allied Pinnacle* at [6]-[7].
32 *Allied Pinnacle* at [14](1).
33 *Allied Pinnacle* at [14](2)-(4).
34 *Allied Pinnacle* at [14]-[16].
35 *Allied Pinnacle* at [79]
36 *Allied Pinnacle* at [80].
37 *Allied Pinnacle* at [82].
38 *Allied Pinnacle* at [85].
39 *Allied Pinnacle* at [86].
40 *Allied Pinnacle* at [91].
41 *Allied Pinnacle* at [110].
42 *Allied Pinnacle* at [112]-[113].
43 *Allied Pinnacle* at [116]-[123].
44 *Allied Pinnacle* at [127].
45 *Allied Pinnacle* at [128].
46 *Allied Pinnacle* at [141]-[142]. We note the further judgment of *Allied Pinnacle Pty Ltd v G R Mailman & Associates Pty Ltd (No 2)* [2026] NSWSC 504 in which this is seen to have occurred.
47 *Russo v Russo* [2026] NSWSC 4 (*Russo*); also see *Russo v Russo (No 2)* [2026] NSWSC 311 (**Russo *(No 2)***).
48 *Russo* at [11].
49 *Russo* at [1].
50 *Russo* at [2].
51 *Russo* at [100]; *Russo* (No 2) at [29].
52 *Russo* at [128].
53 *Russo* at [1] and [10].
54 *Russo* at [11].
55 *Russo* at [11].
56 *Russo* at [12] and [23].
57 *Russo* at [12] and [14].
58 *Russo* at [16].
59 *Russo* at [20].
60 *Russo* at [48].
61 The subdivision resulted in the original single lot being divided into two lots. Paul and Daniel were registered as tenants in common in equal shares of each lot of the two lots. Plans for a partition never eventuated (see *Russo* at [51]). A partition would have resulted in Paul being the sole registered proprietor of one lot and Daniel being the sole registered proprietor of the other.
62 *Russo* at [50].
63 *Russo* at [36].
64 *Russo* at [22], [27] and [38].
65 *Russo* at [35].
66 *Russo* at [44]-[45].
67 *Russo* at [49] and [52].
68 *Russo* at [1] and [52].
69 *Russo* at [56]; *Tory v Tory* [2007] NSWSC 1078 at [42]; *Ferella v Official Trustee in Bankruptcy* [2015] NSWCA 411 at [36]; *Myers v Clark* [2018] NSWSC 1029 at [84].
70 *Russo* at [56]; *Ngatoa v Ford* (1990) 19 NSWLR at 77; *Hogan v Baseden* (1997) 8 BPR 15,723 (***Hogan***).
71 *Russo* at [57]; *Cain v Cain* [2007] NSWSC 623; 13 BPR 24,963 at [10]; *Williams v Legg* (1993) 29 NSWLR 687 at 693; *Grizonic v Suttor* [2004] NSWSC 137; (2004) 12 BPR 22,797 at [8]; also see *Woodson (Sales) Pty Ltd v Woodson (Australia) Pty Ltd* (1996) 7 BPR 14,865 at 14,71814,719 and *Stephens v Debney* (1959) 60 SR (NSW) 468.
72 *Russo* at [58]; Hogan at 15,723.
73 *Russo* at [59] "_" [62].
74 *Russo* at [63] "_" [66].
75 *Russo* at [70]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40].
76 *Russo* at [70]; *Turner v Richards* [2025] NSWCA 83 at [58]-[60]; *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451 at [94].
77 *Russo* at [70]; *County Securities Pty Ltd v Challenger Group Holdings Pty Ltd* [2008] NSWCA 193 at [7]–[8], [17]–[27]; *Lawrence v Ciantar* [2020] NSWCA 89 at [114]; *Gerrard Toltz Pty Ltd v City Garden Australia Pty Ltd (in liq) (No 2)* [2024] NSWCA 232 at [35].
78 *Russo* at [70]; *Singh v AKM Investments Group Pty Ltd* [2024] NSWCA 268 at [44]-[47].
79 *Russo* at [72]; *Lym International Pty Ltd v Marcolongo* [2011] NSWCA 303; (2011) 15 BPR 29,465 at [141]-[143].
80 *Russo* at [73].
81 *Russo* at [73].
82 *Russo* at [22] and [78].
83 *Russo* at [14] and [78].
84 *Russo* at [32] and [79].
85 *Russo* at [87]-[88]; *Hawkins v Clayton* (1988) 164 CLR 539; [1998] HCA 15 at 572-573; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 422 and 442; *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588; [2000] HCA 25 at [46]-[47].
86 *Russo* at [73] and [92]-[94].
87 *Russo* at [93]; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 at [35].
88 *Russo* at [94]-[95].
89 *Russo* at [94].
90 *Russo* (No 2) at [29].
91 *Russo* at [46]; *Kardos v Sarbutt (No 2)* [2006] NSWCA 206 at [28]; *Chow v Chow (No 2)* [2015] NSWSC 1348; (2015) BPR 35,385 at [8]; *Chetwynd v Rose* [2021] NSWCA 193 at [120].
92 *Russo* at [2], [9] and [108].
93 *Russo* at [2] and [43].
94 *Russo* at [104] and [109].
95 *Russo* at [116]; Re *Wetherill Park Holdings* [2021] NSWSC 282 at [21].
96 *Russo* at [118]-[119] and [122]-[123].
97 *Russo* at [128].
98 *Russo* at [133].
99 *Khaihra v Agarwal* [2025] NSWSC 1276 (*Khaihra*), [43].
100 *Khaihra*, [1].
101 *Khaihra*, [8].
102 *Khaihra*, [9].
103 *Khaihra*, [8].
104 *Khaihra*, [10].
105 *Khaihra*, [11].
106 *Khaihra*, [12]-[14].
107 *Khaihra*, [3], [16].
108 *Khaihra*, [16].
109 *Khaihra*, [1].
110 *Khaihra*, [19].
111 *Khaihra*, [4]; *Real Property Act 1900* (NSW) s 74K; Sutherland v Vale [2008] NSWSC 759, [11] (Brereton J).
112 *Khaihra*, [20]-[21].
113 *Khaihra*, [22]-[23].
114 *Khaihra*, [24].
115 *Khaihra*, [25].
116 *Khaihra*, [26]-[27].
117 *Khaihra*, [28].
118 *Khaihra*, [29]-[30].
119 *Khaihra*, [32], *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1, [65]-[66]; *Lawton Pty Ltd v FHMC Pty Ltd* [2021] FCA 1165, [50].
120 *Khaihra*, [33]-[35].
121 *Khaihra*, [37].
122 *Khaihra*, [38]-[43].
123 *Watski Pty Ltd v Roughstone Py Ltd* [2026] NSWSC 614 (***Watski v Roughstone***).
124 *Watski v Roughstone* at [10], [12], [19].
125 *Watski v Roughstone* at [21].
126 *Watski v Roughstone* at [5].
127 *Watski v Roughstone* at [27].
128 *Watski v Roughstone* at [38].
129 *Watski v Roughstone* at [36].
130 *Watski v Roughstone* at [10].
131 *Watski v Roughstone* at [11].
132 *Watski v Roughstone* at [16].
133 *Watski v Roughstone* at [17].
134 *Watski v Roughstone* at [18]-[19].
135 *Watski v Roughstone* at [20].
136 *Watski v Roughstone* at [21]-[24].
137 *Watski v Roughstone* at [27]-[28].
138 *International Drilling Fluids v Louiseville Investments (Uxbridge) Ltd* (1986) Ch 513, 519 "_" 521 (***"International Drilling Fluids"***).
139 See for example *Exceed Education Pty Ltd t/as Young Minds Academy v Sylvester* [2025] NSWSC 1185; *White Rock Wind Farm Pty Ltd v Dulhunty* [2023] NSWSC 1464; *B32 Investments Pty Ltd v The Owners – Strata Plan 81539* [2026] NSWSC 160.
140 *Exceed Education Pty Ltd t/as Young Minds Academy v Sylvester* [2025] NSWSC 1185 ("***Exceed Education v Sylvester***").
141 *Exceed Education v Sylvester at [74]-[75] citing Tamsco Ltd v Franklins Ltd* [2011] NSWSC 1205 which in turn cites *International Drilling Fluids* at [49].
142 *Watski v Roughstone* at [28]-[30].
143 *Watski v Roughstone* at [36].
144 *Watski v Roughstone* at [37].
145 *Watski v Roughstone* at [35].

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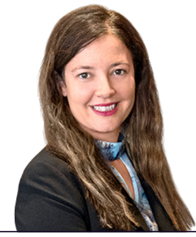

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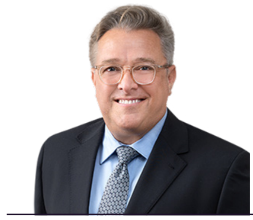

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