

AUSTRALIA / JUDGMENT

Agency Settlements Pty Ltd v Zak

[2026] NSWSC 950**COURT**

Supreme Court

DECIDED

07 August 2026

BEFORE

Hmelnitsky J

CASE / FILE NUMBER

2026/00308478

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Supreme Court

New South Wales

Amendment notes

Medium Neutral Citation: Agency Settlements Pty Ltd v Zak [2026] NSWSC 950**Hearing dates:** 31 July 2026**Date of orders:** 07 August 2026**Decision date:** 07 August 2026**Jurisdiction:** Equity - Commercial List**Before:** Hmelnitsky J

Decision: (1) The plaintiff's application for interim relief pursuant to paragraph 7 of the summons is dismissed with costs.
(2) The proceedings are listed for directions before the Commercial List Judge on 21 August 2026.

Catchwords: EQUITY — Equitable remedies — Injunctions — Interlocutory injunction — Where plaintiff seeks interlocutory injunction against defendant to restrain the making of representations about the impropriety of plaintiff's business model — Where plaintiff claims for misleading or deceptive conduct and injurious falsehood in respect of representations alleged to have been made by defendant — Whether there is a serious question to be tried in respect of each of plaintiff's claims — Whether balance of convenience favours grant of interlocutory injunction

Legislation Cited: Competition and Consumer Act 2010 (Cth), Sch 2 – Australian Consumer Law, s 18
Property and Stock Agents Act 2002 (NSW), s 86

Cases Cited:	Ireland v WG Riverview Pty Ltd (2019) 101 NSWLR 658; [2019] NSWCA 307 Judo Bank Pty Ltd trading as Judo Bank Pty Ltd v Elali [2026] NSWSC 48 Palmer Bruyn & Parker Pty Ltd v Parsons (2001) 208 CLR 388; [2001] HCA 69 Self Care IP Holdings Pty Ltd v Allergan Australian Pty Ltd (2023) 277 CLR 186; [2023] HCA 8 Soyo Investment Holding Pty Ltd v AL Brands Management Group Pty Ltd [2025] NSWSC 246
Texts Cited:	Gatley on Libel and Slander (13th ed, 2022, Thomson Reuters), [13-009]
Category:	Procedural rulings
Parties:	Agency Settlements Pty Ltd (Plaintiff) Jared Zak (Defendant)
Representation:	
Counsel:	M Hall (Plaintiff) S Fitzpatrick SC / E Miers (Defendant)
Solicitors:	Gilbert + Tobin (Plaintiff) HWL Ebsworth Lawyers (Defendant)
File Number(s):	2026/00308478
Publication restriction:	Nil

JUDGMENT

The plaintiff (Agency Settlements) is a newly established law firm that acts for real estate agents in property transactions. It commenced operations in about February this year.

Agency Settlements' basic business model is to assist real estate agents in complying with their obligations arising from anti-money laundering legislation. It does this by advising its real estate agent clients to encourage vendors and purchasers to include a special condition in the standard form contract of sale of land which has the effect that the plaintiff – and not its real estate agent client – is nominated as the deposit holder and stakeholder under the contract. In that way, it is the plaintiff and not its real estate agent client who receives the deposit and it is the plaintiff, so the theory goes, who is required to comply with the newly introduced Anti-Money Laundering and Counter-Terrorism Financing Rules 2025 made under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth). This it does for a modest fee.

The defendant, Mr Jared Zak, is a solicitor and the founder of the conveyancing firm Dott & Crossitt. Mr Zak has been openly sceptical about the propriety of the Agency Settlements business model. He has expressed firm opinions about whether the practice of causing deposits to be paid to Agency Settlements is lawful in the light of s 86 of the Property and Stock Agents Act 2002 (NSW) (the Act). Section 86 relevantly provides:

86 Trust money to be paid into trust account

- (1) Money received for or on behalf of any person by a licensee in connection with the licensee's business as a licensee—
 - (a) is to be held by the licensee or (if the licensee is employed by a corporation) by the corporation, exclusively for that person, and
 - (b) is to be paid to the person or disbursed as the person directs, and
 - (c) until so paid or disbursed is to be paid into and retained in a trust account (whether general or separate) at an authorised deposit-taking institution in New South Wales and approved by the Secretary for the purposes of this Part.
- (2) If the licence is held by a corporation, the trust account is to be in the name of the corporation and in any other case is to be in the name of the licensee or of the firm of licensees of which the licensee is a member.

Mr Zak has expressed his opinions to his own clients in the course of advising them as to whether they should agree to include the Agency Settlements special condition in contracts of sale, as well as to employees of Agency Settlements itself. He has also expressed these opinions more widely, including by launching an online petition to gather the support of fellow conveyancing practitioners for his views about the matter.

Agency Settlements has commenced these proceedings in order to obtain a declaration that its business model is lawful. The principal substantive relief sought in its summons is as follows:

“Declaration that the Plaintiff’s business model and/or method of receiving deposits as part of real property sales is lawful and does not contravene section 86 of the Property and Stock Agents Act 2002 (NSW).”

It also seeks final relief against Mr Zak in the way of declarations and orders under the Competition and Consumer Act 2010 (Cth), Sch 2 – Australian Consumer Law (Australian Consumer Law), including a declaration that he has engaged in misleading or deceptive conduct in contravention of s 18 and an order that he cause a corrective notice to be issued to all of those, including his own clients, to whom he has made a representation that the Agency Settlements business model is unlawful. I was informed that Agency Settlements intends to amend its summons to add a claim for damages in injurious falsehood in respect of the same representations.

The basic premise of Agency Settlements’ case is that Mr Zak has not only been expressing his opinions about the lawfulness of its business model to third parties but that he has been making false representations of fact about that matter. It contends that to the extent he has done so he has caused it to suffer loss.

By paragraph 7 of its summons, Agency Settlements seeks an order for interim relief, namely that:

“Until further order of the Court, the Defendant is not to represent to any person that the Plaintiff’s:

- a. business model; and/or
 - b. method of receiving deposits as part of real property sales,
- is:
- c. unlawful; or
 - d. in contravention of section 86 of the Property and Stock Agents Act 2002 (NSW)."

What follows are my reasons for declining to make that order.

The factual background

Agency Settlements is an incorporated law firm. It was incorporated on 29 April 2025 and commenced operations in February 2026. Its directors are Mr Lucas McEntee, Ms Vanessa Nakhil and Mr Chun Wei Wong. Ms Nakhil is Agency Settlements' principal solicitor and chief legal officer.

Agency Settlements' clients are real estate agents and agencies. It does not act for vendors or purchasers. It offers the service I described above, namely a service whereby it holds the deposit funds paid by purchasers, with their written consent, in its regulated solicitor trust account as stakeholder pending completion.

Mr Zak is the principal solicitor and founder of Dott & Crossitt, a conveyancing law firm. Dott & Crossitt was established in 2014 and was acquired by LocalAgentFinder Pty Ltd, an online real estate agent comparison website, in 2024. Dott & Crossitt is held by Property Legal Pty Ltd, which is a subsidiary of LocalAgentFinder Pty Ltd and of which Mr Zak is a director.

Dott & Crossitt has eight offices across Australia and employs approximately 80 staff, including licensed conveyancers and solicitors.

Agency Settlements' business model

The Agency Settlements basic business model involves the following:

Agency Settlements is engaged by a client, being a real estate agent or real estate agency (the client).

Agency Settlements advises the client to include a term in its agency agreement with vendors which, among other things, provides for the appointment of Agency Settlements as the client's legal representative and gives Agency Settlements authority to hold the deposit and participate in the PEXA workspace. In some cases, however, such as where Agency Settlements is only engaged after an agency agreement has been entered into, Agency Settlements' client and the vendor agree to the inclusion of this term through a variation to the agency agreement.

Following execution of the agency agreement (or variation to the agency agreement), the vendor's agent notifies the vendor's solicitor or conveyancer that Agency Settlements has been appointed to act on the agent's behalf and requests that a special condition be included in the contract for sale appointing Agency Settlements as the deposit holder and stakeholder under the contract (the Special Condition).

The vendor's solicitor inserts the Special Condition into the standard form contract for the sale and purchase of land (2026 edition).

Prior to entering into the contract for sale, the purchaser is informed that Agency Settlements has been appointed by the client to act as stakeholder for the transaction. The purchaser is asked, via an online request, to provide written consent to the deposit being held by Agency Settlements in a regulated trust account and applied at settlement in accordance with the contract for sale.

Having provided the written consent described above, and upon entering into the contract for sale, the purchaser pays the deposit directly into Agency Settlements' trust account. Agency Settlements holds the deposit in its trust account pending settlement of the property transaction. Its real estate agent client never receives or handles the deposit funds directly.

At settlement, the vendor's solicitor or conveyancer and the purchaser invite Agency Settlements into the PEXA workspace in the 'To Deal with an Interest' role. Agency Settlements' role is to make the net deposit balance (that is, the deposit less the agent's commission) available as the source funds or to collect any additional funds to cover the agent's commission when the deposit does not adequately cover the amount of the commission. Agency Settlements does not direct the distribution of the funds.

The Special Condition that is inserted into the contract for sale is as follows:

"Deposit Holder

- a) Clause 1.1 of the Contract for Sale and Purchase of Land definition of deposit holder is amended by adding the words 'or their solicitor' after 'vendor's agent'.
- b) The Agent's Solicitor is authorised to act in connection with the sale of the Property for the purpose of:
 - (i) holding deposit monies in its trust account as stakeholder pending completion;
 - (ii) conducting identity verification (KYC) and source of funds enquiries in respect of the purchaser;
 - (iii) participating in the electronic conveyancing workspace as a source funds contributor at settlement by making available the balance of the deposit moneys held in trust, being the deposit less any amount owing to the vendor's agent, for direction by the Vendor's solicitor within the Electronic Workspace; and
 - (iv) issuing remittance confirmations in respect of deposit moneys held in trust.

- c) The Agent's Solicitor acknowledges that in holding the deposit, it does so as stakeholder for the benefit of both the Vendor and the Buyer in accordance with the terms of this Contract, and that its obligations as depositholder are owed to both parties and not solely to the Agent.
- d) The Agent's Solicitor will not release deposit moneys except in accordance with:
- (v) [sic] the joint written direction of the Vendor and Buyer;
- (vi) a court or tribunal order; or
- (vii) the terms of this Contract upon completion or lawful termination.
- e) The parties acknowledge and agree that the use of the Agent's Solicitor as depositholder, provided the Agent's Solicitor complies with its obligations under this Special Condition, shall not constitute a breach of this Contract nor be grounds for any party to object, requisition, delay, rescind or terminate this Contract."

Agency Settlements does not however become a party to the contract under which it is the depositholder and stakeholder.

Representations by Mr Zak

By 31 March 2026, Agency Settlements claims that Mr Zak had commenced making representations in relation to Agency Settlements' business model. On that date, Ms Nakhil, on behalf of Agency Settlements, sent an email to Mr Zak to introduce herself and advise him that Agency Settlements had been engaged to act on behalf of Sophie Carter Exclusive Properties, a real estate agency. Mr Zak responded to that email stating:

"Please never contact me again.

You have no role in this transaction and we are reporting you to the Law Society should you continue to purport otherwise."

On 21 May 2026, Mr McEntee received a call from Ms Jody Kessler of Pello Realty, one of Agency Settlements' clients. He says that she advised him that she had been contacted by Mr Zak. Later that day, Mr McEntee sent Mr Zak an email asking to discuss the issues that Mr Zak had with Agency Settlements' business model. Mr Zak sent an email in reply that relevantly stated the following:

"We are not changing our special conditions to facilitate your business model. This is a view shared by the entire conveyancing industry as well as the [Australian Institute of Conveyancers].

Without a contractual basis for you to hold the deposit, what you are proposing is illegal. That is a fact."

On or around 10 July 2026, the Australian Institute of Conveyancers (AIC) issued a bulletin in relation to a practice termed 'deposit flicking' (the AIC Bulletin). The AIC Bulletin described deposit flicking as follows:

“Where the real estate agent, being the nominated stakeholder under a property contract, transfers or directs the deposit to be paid by the purchaser to another entity (such as the agent’s lawyers) to hold on the agent’s behalf until settlement.”

The AIC Bulletin outlined some issues associated with so-called deposit flicking, including the risk of an agent breaching its obligations under s 86 of the Act.

The AIC Bulletin prompted immediate reactions from Agency Settlements. On 10 July 2026, Ms Nakhil and Mr McEntee wrote separate emails to the AIC regarding the AIC Bulletin, disputing that their business model involved deposit flicking. The email from Mr McEntee to Mr Chris Tyler (CEO of the AIC) copied in a number of journalists from various news outlets including the Australian Broadcasting Corporation and Sydney Morning Herald.

Mr McEntee received a call from Mr Zak on the afternoon of 10 July. Mr McEntee took a file note of their telephone conversation, which recorded that Mr Zak made the following statements:

‘Your business model creates more risk for me and my firm having 100% of the funds in PEXA, we are the biggest firm in NSW and are not supporting you.’

‘[W]hat you’re doing is wrong and creates more risk.’

‘Do you want me to run a poll? No one in the industry supports you, 100% of people do not like you or this model, doing this won’t make you any friends.’

Shortly after receiving Mr McEntee’s email referred to at paragraph [21] above, Mr Tyler forwarded the email to Mr Zak. On 11 July at 9:59am, Mr McEntee received a lengthy email from Mr Zak referring to the email chain that Mr Tyler had forwarded to him and also his phone call with Mr McEntee the previous day. The email stated, inter alia:

“Chris [Tyler, CEO of AIC] passed me your note and, as NSW’s largest employer of conveyancers, I wanted to also respond in writing following my phone call to you yesterday.

Firstly, we 100% support the AIC’s position including their comments on the potential illegality of your scheme.

Secondly, we are not alone on this. Yesterday, we conducted a poll following the AIC’s briefing of over 100 NSW conveyancers, and 100% of them confirmed that they do not support your proposal to become a mega-deposit holder in NSW. A more formal poll will follow in due course.

Far from making it more safe for consumers, your model would create an extraordinary amount of systemic risk for the property market as well as making it a ‘honey pot’ for cyber scammers.

...

In fact, we will now redouble our efforts here to oppose your platform by making formal submissions to PEXA, the Law Society, REA and our local members of parliament.” (emphasis in original)

This email from Mr Zak was apparently also sent to the journalists who had been earlier copied into the email chain.

Ms Nakhl replied to Mr Zak at 10:33am on 11 July. Her email explained how Agency Settlements' business operated and pointed out alleged inaccuracies in what Mr Zak had been saying about it.

Mr Zak replied to Ms Nakhl at 5:10pm that evening. He did not engage with the substance of her email. He pointed out that at least part of her email very much appeared to have been written by generative artificial intelligence.

While the above correspondence was occurring, Mr Zak was contacted by Raine & Horne Mosman (R&H Mosman) to inform him that it had engaged Agency Settlements to act on its behalf. On 11 July, Mr Zak wrote to R&H Mosman as follows:

"We won't be inserting that clause in our contracts, nor will we advising [sic] to our client that their deposit be held by a third party not involved with the transaction. This is a very dangerous and ill-thought out idea.

The AIC has recently published an article questioning the validity of these schemes – and we agree with their position.

The industry has also filed several complaints with the Department of Fair Trading, The Law Society, REI NSW and will shortly be making further submissions to local parliament and PEXA.

I've recently conducted a poll among 100 NSW Conveyancers and 100% of them oppose working with this company, so you may want to consider your broader strategy here."

A similar email was sent to another of Agency Settlements' clients, River Realty, on 13 July. In that email, Mr Zak said:

"We don't agree to let 'Agency Settlements' hold the deposit (and I doubt the purchaser will either) for the reasons set out in the attached AIC bulletin.

As the AIC states, deposit-flicking is quite possibly illegal and in any case is a dangerous proposition that we will not subject our clients to."

Mr Zak apparently called Mr Andy Brownhill, general manager of River Realty, on 13 July. An account of that telephone conversation is provided in an email from Mr Brownhill to Ms Nakhl of 27 July. Mr Brownhill relevantly stated the following in his email:

"The substance of Jared's comments was that River Realty's use of Agency Settlements was, in his view, illegal. He repeatedly used the words 'illegal' or 'illegal activities' when describing the arrangement. He objected strongly to River Realty providing his firm with a proposed special condition and said, in substance, that he would under no circumstances include such a condition in his firm's contracts. He also asked, in confrontational terms, who we thought we were to be providing his firm with special conditions of that nature.

Jared alleged that River Realty was moving money from its own trust account into an external or third-party trust account operated by Agency Settlements. That description was incorrect. River Realty has not transferred funds from its trust account to Agency Settlements, nor have we attempted to do so in connection with any property. The Agency Settlements arrangement is a separate process under which the deposit is paid directly into the relevant regulated trust account.

Jared also said, in substance, that the AIC had identified or designated the company and/or the arrangement as involving illegal activity. He further alleged that River Realty was in breach of the legislation governing real estate agents, which he referred to as the Property, Stock and Business Agents Act. He threatened to report River Realty and/or me to the NSW Office of Fair Trading.”

There is a real question about the weight that can be placed on this email, which I deal with below: see paragraph [61] below.

Also on 13 July, a petition was lodged with Change.org and published on its website (the Petition). The Petition was titled ‘Stop Agency Settlement’s [sic] Deposit-Flicking Proposals’ and was started by Mr Zak. It read as follows:

“The issue

We are licensed conveyancers and solicitors practising in property law across NSW, and we call on NSW Fair Trading, PEXA, the Law Society of NSW and the AIC (NSW) to act on the practice of ‘deposit flicking’ – where real estate agents redirect deposits to a private company, Agency Settlements, which by its own description serves agents and acts for neither vendor nor purchaser.

We object because:

1. It appears unlawful. Section 86 of the Property and Stock Agents Act requires stakeholder agents to retain deposits in their trust account. Agents cannot redirect deposits or amend the contract to appoint a substitute stakeholder.
2. It has no place on PEXA. Agency Settlements represents no party and holds no interest in the land, yet proposes to join every affected workspace ...
4. We endorse the formal submissions made by Dott & Crossitt to NSW Fair Trading, PEXA and the Law Society, and call on those bodies to confirm that deposits must be held as the law and contract require, and that no third-party deposit-holder may be added to a transaction or workspace without both parties’ express agreement.”

The Petition was signed by over 150 people, each of whom endorsed a description of themselves on the Change.org website as ‘licensed conveyancers and solicitors practising in property law in NSW’.

On 14 July, Mr Lachlan Moschella, a solicitor at Dott & Crossitt, contacted Agency Settlements in relation to the upcoming settlement of a property in Maidenwell, Queensland. Agency Settlements was engaged to act for '1 Property Centre', the vendor's real estate agent. Mr Moschella requested that Agency Settlements remove itself from the PEXA workspace.

Ms Nakhl responded to Mr Moschella refusing to remove Agency Settlements from the workspace. She asserted that Agency Settlements was participating in the settlement in accordance with the sale contract.

Mr Zak then had an email exchange with Ms Nakhl insisting that Agency Settlements remove itself from the workspace and stating:

"Our client never gave informed consent to this arrangement which as we say, is likely to be illegal."

There are presently submissions supported by over 100 practitioners before PEXA, NSW Department of Fair Trading, the Minister for Fair Trading and the Law Society of NSW."

In the interests of allowing the property transaction to complete, Agency Settlements subsequently withdrew its involvement in relation to the Maidenwell property and transferred the deposit to Dott & Crossitt's trust account. Mr Zak then forwarded the AIC Bulletin to the real estate agent.

On 17 July, Mr Shann Warner, a real estate agent from R&H Mosman, sent an email on behalf of his firm to Mr Zak in relation to Mr Zak's allegations against Agency Settlements' business model. This email summarised a conversation that Mr Zak appears to have had with Mr Warner, further to the previous email exchange that Mr Zak had with R&H Mosman described at paragraph [27] above. Mr Warner's email was lengthy. In it, he responded to certain statements supposedly made by Mr Zak that:

"– Agency Settlements' model is illegal;

- numerous organisations and regulatory bodies, including PEXA, NSW Fair Trading, the Law Society of New South Wales and others, have effectively ruled against the model;*
- those bodies are presently working towards shutting down the model; and*
- We should immediately cease using the platform because it has no future in the near term."*

Mr Warner's email emphasised the need for those allegations to be substantiated and stated that R&H Mosman had obtained copies of independent legal advice from Agency Settlements that did not support the proposition that the business model was unlawful.

On 17 July, Mr Zak replied to Mr Warner as follows:

"All I can say at this stage, is 'watch this space'."

You will see some significant developments in the next few weeks.

In the meantime, I can confirm that my standing advice to all of my clients is to not consent to Agency Settlements acting as depositholder on their transactions.”

Financial loss suffered by Agency Settlements

As a result of its withdrawal from the Maidenwell property transaction, Agency Settlements did not receive the fees that it would have earned under the terms of its engagement with 1 Property Centre.

Agency Settlements has also withdrawn from about 15 other transactions in which Mr Zak and Dott & Crossitt have acted for the vendor or purchaser and have refused to engage with Agency Settlements. In some of these transactions, Dott & Crossitt has contacted the conveyancer or solicitor for the other party (vendor or purchaser) and requested that they issue a joint direction effectively removing Agency Settlements as depositholder. In other transactions, conveyancers who have been contacted by Dott & Crossitt regarding the AIC Bulletin have refused to allow Agency Settlements to be involved.

Two prospective clients have advised Agency Settlements that they are unable to engage the firm due to concerns about Agency Settlements’ ability to deliver its services without interruption caused by Dott & Crossitt’s conduct. Mr McEntee says that Agency Settlements’ new client engagements have declined by 82% month on month from June to July 2026.

The commencement of proceedings

On 15 July, Mr McEntee caused a letter to be sent by Gilbert + Tobin, solicitors for Agency Settlements, to Mr Zak. The letter requested that Mr Zak ‘immediately cease and desist interfering with [Agency Settlements’] business and business interests’. It also demanded an undertaking from Mr Zak that he would, in summary, stop contacting Agency Settlements’ clients to assert that Agency Settlements was operating illegally, stop sharing the AIC Bulletin and stop asserting that the AIC Bulletin described Agency Settlements’ business. The letter also demanded that the online Petition be taken down.

On 18 July, HWLE Lawyers, solicitors for Mr Zak, responded to Gilbert + Tobin stating that Mr Zak would not be providing the requested undertaking.

On 23 July, Gilbert + Tobin again requested that Mr Zak provide an undertaking, this time in the same form as set out in paragraph 7 of the summons, failing which they would seek urgent interlocutory relief. HWLE Lawyers responded on the same day advising that Mr Zak refused to give the undertaking sought.

On 27 July, these proceedings were commenced on an urgent basis before the Commercial List Duty Judge, Peden J. The matter returned to Court the next day, at which time the application for interim relief sought in paragraph 7 of the summons was listed for hearing before me on 31 July. Her Honour also ordered the plaintiff to comply with a notice to produce served by the defendant. The notice to produce sought production of the following categories of documents:

“1 All Communications between Mr McEntee (or any other person on behalf of the Plaintiff) and Mr Shann Warner (or any other person on behalf of Raine & Horne Mosman) between 10 July 2026 and 17 July 2026.

2 The ‘independent legal advice from three separate law firms’ referred to in the email from Vanessa Nakhl to Jared Zak sent on 11 July 2026 at 10:33AM and exhibited at page 93 of Exhibit LXM-1 to the affidavit of Lucas McEntee dated 27 July 2026.

3 All bank statements, balance sheets, income statements and cash flow statements for the period 1 January 2026 to date.”

The plaintiff failed to produce the documents at the hearing. There was however no application to set aside the order for production. During the course of the hearing before me, the plaintiff selectively produced some of the documents it had been ordered to produce. For example, in relation to category 3 it produced part of a bank statement for what I was told was an operating account of the plaintiff.

Interlocutory injunctions – applicable principles

There was no dispute about the legal principles applicable to the grant of an interlocutory injunction. They were helpfully summarised by Peden J in *Soyo Investment Holding Pty Ltd v AL Brands Management Group Pty Ltd* [2025] NSWSC 246 at [24]-[28] as follows:

“[24] In deciding whether to grant an interlocutory injunction, the Court must consider whether there is a serious question to be tried. The inquiry then turns to whether the balance of convenience, and questions of hardship and related factors, warrant the grant of an interlocutory injunction: see eg Bayblu Holdings Pty Ltd v Capital Finance Australia Ltd [2011] NSWCA 39 at [20] (Campbell JA, Tobias and Macfarlan JJA agreeing).

[25] The plaintiff must prove a serious, not a speculative case which has a real possibility of ultimate success, and that property or other interests might be jeopardised if no interlocutory relief is granted.

[26] The plaintiff must show a sufficient likelihood of success to justify the preservation of the status quo pending a trial: see eg *Harjai v Fraser* [2015] NSWCA 415 at [28] (Beazley P), citing *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 at [65] (Gummow and Hayne JJ).

[27] It becomes a matter of analysing if, in all the circumstances before the Court, considering the balance of convenience and issues of hardship, the Court should exercise its discretion to grant an interlocutory injunction: see eg *Minister for Immigration and Multicultural Affairs v MZAPC* [2025] HCA 5 at [23]-[24] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

[28] Factors to which the Court will have regard include the adequacy of damages, the possibilities of alternative remedies, whether there has been any delay, the strength of the grounds of defence, and what, if any, undertakings a defendant is prepared to give.”

Issues

The identification of the issues in dispute has been somewhat stymied by the speed at which this application was brought on and the absence of any pleading or particulars. The plaintiff's case will in due course need to proceed on pleadings which, among other things, will need to identify the particular representations alleged to have been made by Mr Zak and the respects in which those representations are alleged to be misleading or deceptive. Agency Settlements will also need to plead its claim in injurious falsehood including by particularising the facts, matters and circumstances which form the basis of its allegations that Mr Zak acted with malice and that he has caused actual damage.

As matters stand, none of these things have been done. However, before me the parties proceeded on the basis that the offending 'representation' alleged to have been made by Mr Zak was as follows:

"The plaintiff's business model and/or method of receiving deposits as part of real property sales is unlawful or in contravention of s 86 of the Property and Stock Agents Act 2002 (NSW)."

I will refer to this as the Representation. Leaving aside what he may have said to representatives of the plaintiff, the occasions on which Mr Zak is alleged to have made the Representation to third parties, as I understand the evidence, are as follows:

The email to Mr McEntee and others regarding the AIC Bulletin: paragraphs [23] and [24] above.

The phone call with Mr Warner of R&H Mosman that was described in Mr Warner's email dated 17 July: paragraph [37] above.

The phone call with Mr Brownhill of River Realty that was described in Mr Brownhill's email dated 27 July: paragraph [29] above.

The Petition: paragraphs [31] and [32] above.

So far as falsity is concerned, Mr Zak did not seriously dispute that Agency Settlements has an arguable case that its business model does not contravene s 86. There was therefore no real argument before me about that matter. At a final hearing, Agency Settlements will undoubtedly contend that where vendor and purchaser include the Special Condition in a contract of sale and where the purchaser consents to the payment of the deposit to Agency Settlements, the vendor's agent does not contravene s 86 because the deposit is not 'money received for or on behalf of any person by a licensee' within the meaning of the Act. I consider this proposition to be sufficiently arguable to make good this aspect of Agency Settlements' case at a final hearing.

The Representation refers to general unlawfulness, not just a contravention of s 86. As my recitation of the facts shows, there is limited evidence that Mr Zak has made any allegation of general unlawfulness on the occasions when he is said to have made the Representation. His concern has overwhelmingly been with the application of s 86. In recognition of this fact and although they reserve their position in relation to how they may put their case at a final hearing, Agency Settlements only seeks interim relief in relation to the making of the Representation

insofar as it concerns s 86. That is, they only seek interim relief to restrain Mr Zak from making the following version of the Representation:

“The plaintiff’s business model and/or method of receiving deposits as part of real property sales is in contravention of s 86 of the Property and Stock Agents Act 2002 (NSW).”

As a practical matter, therefore, the issues for me to decide are as follows.

Has Agency Settlements established a serious question to be tried in relation to its Australian Consumer Law claim? To succeed on such a claim, it must establish each of the four matters identified in *Self Care IP Holdings Pty Ltd v Allergan Australian Pty Ltd* (2023) 277 CLR 186; [2023] HCA 8 at [80]-[84] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ). Of these, the only matter that was really in dispute before me was the question of whether the Representation was made. In particular, did Mr Zak make the Representation as a statement of fact as opposed to an expression of his legal opinion?

Has Agency Settlements established a serious question to be tried in relation to its case based on injurious falsehood? The matters to be proved on this front were identified in *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388; [2001] HCA 69 at [52] (Gummow J). Of these, the matters in real dispute before me were:

Whether Mr Zak made the Representation as a statement of fact as opposed to an expression of opinion. This is essentially the same issue as arises in relation to the Australian Consumer Law claim.

Whether there is a serious case on malice.

Whether there is a serious case in relation to actual damage.

If Agency Settlements has a good arguable case for final relief, does the balance of convenience favour the grant of interim relief of the kind sought? Included in this issue are the questions of whether there is any real utility in the relief sought and whether the plaintiff is able to give a meaningful undertaking as to damages.

Serious question to be tried

In my view, the evidence as it stands reveals a serious question to be tried in relation to the claim under the Australian Consumer Law but not in relation to the tort of injurious falsehood.

Australian Consumer Law

It is first necessary to determine whether there is a seriously arguable case that Mr Zak has ever actually made the Representation.

A real difficulty in this respect is that Agency Settlements’ case is confined to an allegation that the Representation was a statement of fact as opposed to an expression of opinion. It put this distinction at the very forefront of its case. It contends that Mr Zak has a liability for publishing the Representation only to the extent the Representation was conveyed as a statement of fact. It

contends that he has no liability to the extent he published his opinion that the Agency Settlements business model is contrary to s 86. Its case is that in his communications with clients and third parties such as the Law Society of NSW, Mr Zak has crossed a clear and meaningful line between expressing his legal opinion about the way s 86 operates and stating how s 86 operates as a matter of fact.

I will say more below about the distinction between a statement of fact and the expression of an opinion.

On the evidence currently available, I do not consider that there is a seriously arguable case that Mr Zak's 11 July email to Mr McEntee and the journalists (paragraphs [23] and [24] above) included the Representation. I consider it to be fairly clear that Mr Zak was doing no more than expressing his agreement with the opinion expressed by the AIC as to the 'potential' illegality of the Agency Settlements model.

I am also not prepared to find on the evidence currently before me that there is a seriously arguable case that Mr Zak made the Representation to either Mr Warner (paragraphs [37] to [39] above) or to Mr Brownhill (paragraph [29] above). In the case of Mr Warner, the plaintiff's refusal to comply with the order for production, which specifically sought correspondence that may have shed light on the reliability of the evidence about what Mr Warner attributes to Mr Zak, means that I view this evidence with a high level of scepticism. This is especially so in circumstances where so much turns on the subtle question of whether the words attributed to Mr Zak were conveyed as fact or opinion.

In the case of Mr Brownhill, as I indicated at paragraph [30] above, there is a question about the weight that can be placed on his account of his discussion with Mr Zak. His email is not a contemporaneous record of his discussion. It is not a business record. It was prepared weeks later for the purpose of the litigation and was obviously written with a keen appreciation of the issues in dispute on this application. A sworn statement from Mr Brownhill could have been obtained but was not. It may be that Mr Brownhill is willing to give evidence at a final hearing to the same effect as what he says in his email but I am not today prepared to find that there is a seriously arguable case that that evidence will be accepted.

Finally, I accept that there is a seriously arguable case on the evidence currently before me that in causing the Petition to be placed online and read by users, Mr Zak published the Representation. I consider this conclusion (that is, on whether the point is seriously arguable) to be fairly finely balanced. Minds often differ about whether a statement conveys a representation of fact or opinion and there are aspects of the Petition that are capable of supporting both conclusions.

On the question of whether the Representation was misleading or deceptive, I repeat what I said at paragraph [52] above. There is a good arguable case that a vendor's agent does not contravene s 86 of the Act if the vendor and purchaser agree to the Special Condition and cause Agency Settlements to be the depositholder and stakeholder under their contract for sale of residential land in New South Wales. Because of the way the interim relief was framed (as to which see

paragraph [53] above) it is not necessary for me to form a view as to whether it is seriously arguable that the Agency Settlements business model is unlawful because of the way anti-money laundering legislation applies to the vendor's agent or to Agency Settlements.

In my view, Agency Settlements' case in relation to its Australian Consumer Law claim is sufficiently strong to support the grant of interim relief, subject to the question of the balance of convenience and the ability to give an undertaking as to damages.

Injurious falsehood

I am not at this point persuaded that Agency Settlements' case in relation to the tort of injurious falsehood is sufficiently strong to support the grant of the interim relief sought.

My hesitation stems from two particular concerns, each of which is heightened by the fact that this aspect of the case has not yet been pleaded and is articulated only in a very broad-brush way.

First and foremost, the case on malice is weak. Agency Settlements submitted that Mr Zak could not have had an honest belief in publishing the Representation because he continued to hold the view that the Agency Settlements business model was unlawful even after he should have understood that where a contract includes the Special Condition, the deposit is paid to it as stakeholder and depositholder under the contract with the consent of the parties. In such a case, its receipt of the deposit does not involve 'deposit flicking' if that expression means that a deposit is paid to a third party without the parties' agreement.

Agency Settlements also submitted that Mr Zak was motivated to take this stance because of his supposed financial interest in Dott & Crossitt and his supposed concern to stamp out competition from Agency Settlements.

The evidence as a whole, however, shows that Mr Zak has a firm view about the operation of s 86 that differs from that taken by Agency Settlements. He is not bound to accept the Agency Settlements view. He has not been shown the legal opinions said to support it, although Agency Settlements has been willing to share them with others. The operation of s 86 in the context of the Special Condition is untested and involves a fairly novel fact pattern.

Mr Zak's view about the legislation is undoubtedly informed by his very extensive experience in practising in the area. He is very likely to have long-held views about how the Act is to be construed, including by reference to questions of statutory context and legislative purpose. He is also not bound to accept all of Agency Settlements' arguments as to the overall propriety of its model. It is true that where a contract includes the Special Condition, the deposit is held in a solicitor's trust account with all of the protections that that entails. But those protections are different from the particular consumer-focused protections that come with placing a deposit in the hands of a licensee under the Act. Mr Zak is quite entitled to have a view about which regime better protects the interests of his clients and of vendors and purchasers generally.

It is also important to appreciate that the present debate about Agency Settlements has taken place in the wider context of debate concerning 'deposit flicking' generally. As Agency Settlements is at pains to emphasise, the expression 'deposit flicking' often suggests the unilateral diversion of a deposit by an agent to a third party. That is however not what occurs under a contract that includes the Special Condition. Be that as it may, the AIC Bulletin could well have been understood as referring to Agency Settlements. It seems that that is exactly how Mr Zak understood it, rightly or wrongly.

On the basis of the limited evidence before me, I think it unlikely that Mr Zak's views would easily be shaken simply by being told that the Special Condition makes the arrangement consensual. Although, as I have said, it is more than arguable that the arrangement does not fall foul of s 86, the question is one that has not at this stage been ruled upon by a court.

So far as Mr Zak's supposed financial interest is concerned, it is important to recognise that although he founded the practice, he is no longer the owner of Dott & Crossitt and has no shareholding in it. He is employed as its principal solicitor and is the only executive member of the board of Property Legal Pty Ltd, the entity which holds Dott & Crossitt. Dott & Crossitt is a conveyancing practice. It ordinarily represents the parties to contracts for sale, not agents. It does not have a business of holding deposits, which seems to be the core offering of Agency Settlements. The two firms do not seem to me to be in direct competition.

In all of these circumstances, the proposition that Mr Zak did not have an honest belief in the Representation at the time he made it seems to me to be fairly weak.

Secondly, I do not consider that the evidence as it stands demonstrates a seriously arguable case that Agency Settlements has suffered actual damage attributable to the Representation. Its case is that new client engagements declined by 82% between June and July and that this is due to the Representation by Mr Zak.

The evidence before me does not come close to making this proposition good. The business is new, having commenced operations in February. The proposition that there was a meaningful month-on-month decline between June and July supposes a vastly more detailed understanding of the market for its services and the factors affecting its growth or decline than appears in the evidence. Apart from anything else, the AIC Bulletin was published on 10 July and will have been widely disseminated among conveyancers. As I have mentioned, that document is highly likely to have been understood to refer to Agency Settlements, rightly or wrongly. It is bound to have affected the market for its services.

I do accept that the Petition may in theory have affected the appetite for the plaintiff's services. The difficulty, however, is that Agency Settlements has been completely unwilling to divulge any meaningful financial information such as to allow me to form my own view about its financial position. This is despite the issue being raised by its own application and despite even being ordered to do so. To the extent there is any financial information about Agency Settlements before me it is a single bank statement for one account. I am not willing in these circumstances to place any weight on Mr McEntee's assertion that his business has suffered an 82% decline in

new client engagements due to the Representation.

I would therefore not have been willing to grant interim relief in relation to this aspect of the claim regardless of where the balance of convenience lay.

Balance of Convenience

My conclusion that there is a sufficiently arguable case in relation to the Australian Consumer Law means that it is appropriate to consider whether the balance of convenience favours the grant of interim relief of the kind sought.

In my view, it does not.

Agency Settlements' case is deliberately confined only to the Representation as a statement of fact, no doubt to avoid the kinds of difficulties that can arise in trying to falsify statements of opinion: as to which see *Judo Bank Pty Ltd trading as Judo Bank Pty Ltd v Elali* [2026] NSWSC 48 at [47]-[50] in the context of injurious falsehood and *Ireland v WG Riverview Pty Ltd* (2019) 101 NSWLR 658; [2019] NSWCA 307 at [18]-[34] (Macfarlan JA, Bell ACJ and Barrett AJA agreeing) in the context of the Australian Consumer Law.

But the ease with which the distinction between fact and opinion can be stated as a legal proposition belies just how difficult it can be to know whether a particular statement is an expression of opinion or a statement of fact. This is especially so when the disputed statement is a legal conclusion expressed by a practising lawyer. A good illustration is to be found in the debate concerning the meaning of the Petition. Mr Zak published that 'the practice of "deposit flicking" – where real estate agents redirect deposits to a private company, Agency Settlements, which by its own description serves agents and acts for neither vendor nor purchaser ... appears unlawful'. Leaving aside the fact that the Special Condition promoted by Agency Settlements does not involve the unilateral redirection of funds by an agent, the question of whether Mr Zak was expressing his opinion about the application of s 86 or whether he was stating a fact about that matter was the subject of real debate before me.

I concluded that there was a seriously arguable case that the statement was one of fact, not opinion. But whether it is one or the other is contestable. Minds very often differ about whether a statement is to be understood as an expression of opinion or an allegation of fact. This inherent uncertainty creates a serious difficulty with the interim relief sought by Agency Settlements. If I were to make such an order, it would as a practical matter be almost impossible for Mr Zak to know whether he was contravening the injunction when, for example, he attempts to explain to a client that they should decline to incorporate Agency Settlements' Special Condition into their contract. It would be almost impossible for him to know whether a particular statement puts him in breach of the injunction, notwithstanding the use of rote formulae such as 'it appears unlawful' or 'it may be unlawful'.

Agency Settlements submitted that, properly understood, the injunction would cause Mr Zak no difficulty whatsoever because he need only preface his opinions about s 86 with an expression such as ‘in my view’ or ‘in my opinion’.

I disagree. The debate about how the words in the Petition should be understood shows that verbal formulae such as these will not necessarily be decisive. Even the words ‘in my opinion’ do not necessarily insulate a statement against the charge that it was conveyed as an allegation of fact: *Gatley on Libel and Slander* (13th ed, 2022, Thomson Reuters), [13-009].

If I were to make the injunction as sought, it is inevitable that Mr Zak would be significantly hampered in his ability to express his views about s 86, even to his own clients, for fear of falling foul of the order. This, in my view, is reason enough to refuse the relief. I recognise that the plaintiff is seeking to narrow its case in such a way as to respect Mr Zak’s right to express his opinions and to continue to give advice about s 86, but I do not consider that this can sensibly be achieved by the injunction it asks me to make.

There are also other good reasons to refuse the relief.

Mr Zak is a solicitor with a significant practice in the area of conveyancing. As principal solicitor of Dott & Crossitt he is also likely to have a role within the firm that involves a great many interactions with colleagues, including very junior colleagues, about matters of interest to the practice generally. Even allowing for the fact that the interim relief only seeks to restrain him from communicating statements of fact as opposed to honest opinions, there would need to be a very strong case indeed before I would be willing to make an order that has the practical effect of limiting the way in which Mr Zak discharges his duties to the Court and his clients in his day-to-day practice, as well as the way he communicates with his colleagues.

It is also apparent that there are many voices in the debate about the propriety of the Agency Settlements business model. Those voices have been and will continue to be heard, including on the question of whether the model may be unlawful in the light of s 86 of the Act. Very little is to be gained by silencing just one of those voices. This is especially so when it is remembered that Mr Zak would in any event not be restrained from expressing, as publicly and prominently as he likes, that he holds the honest opinion that the business model is unlawful. In these circumstances, interim relief would not be very useful.

I am also not prepared to accept that the plaintiff is in a position to offer a meaningful undertaking as to damages at this point. As sometimes happens, Mr Zak challenged the plaintiff on its ability to give an undertaking. Agency Settlements did not respond to this challenge in a way that gives me any confidence that it would be able to make good on even a modest claim for damages. In saying this, I am particularly mindful of its refusal to produce financial information, as ordered by Peden J.

I note that the bank statement produced by Agency Settlements showed a balance as at 31 July 2026 of \$153,240.20. Agency Settlements offered to undertake to maintain a balance of not less than \$150,000 in this account for the duration of the hearing. I place no weight on this offer. Without knowing what its other assets and liabilities are, the bank statement tells me nothing about the plaintiff's ability to meet a claim for damages or even the costs of the proceedings.

ORDERS

My conclusion is that although Agency Settlements has demonstrated a good arguable case that Mr Zak has contravened the Australian Consumer Law in making some of his communications about Agency Settlements, I do not consider that the balance of convenience favours the grant of interim relief.

The orders of the Court will be:

The plaintiff's application for interim relief pursuant to paragraph 7 of the summons is dismissed with costs.

The proceedings are listed for directions before the Commercial List Judge on 21 August 2026.

Amendments

10 August 2026

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Coversheet: correction to name of counsel

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