

AUSTRALIA / JUDGMENT

Talevski v Perpetual Corporate Trust Limited

[2026] NSWCA 187**COURT**

Court of Appeal

DECIDED

08 September 2026

BEFORE

Mitchelmore JA

CASE / FILE NUMBER

2026/00350125

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Source record**Court of Appeal
Supreme Court
New South Wales****Medium Neutral Citation:** Talevski v Perpetual Corporate Trust Limited [2026] NSWCA 187**Hearing dates:** 07 September 2026**Date of orders:** 08 September 2026**Decision date:** 08 September 2026**Before:** Mitchelmore JA**Decision:** The applicants' notice of motion dated 2 September 2026 is dismissed with costs.**Catchwords:** APPEALS — application for leave to appeal — interlocutory injunction pending appeal — where primary judge dismissed application to set aside default judgment — where mortgagee seeks to exercise power of sale pursuant to default judgment — whether arguable case on appeal — balance of convenience — undertaking as to damages of little value — application dismissed**Legislation Cited:** Civil Procedure Act 2005 (NSW), ss 56, 57, 58
Contracts Review Act 1980 (NSW), s 7
Uniform Civil Procedure Rules 2005 (NSW), r 36.16

Cases Cited:	Alexander v Cambridge Credit Corporation Ltd (1985) 2 NSWLR 685 Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57; [2006] HCA 46 Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das [2012] NSWCA 164 Elkofairi v Permanent Trustee Co Ltd [2002] NSWCA 413; 11 BPR 20,841 Goater v Commonwealth Bank of Australia [2014] NSWCA 265 House v The King (1936) 55 CLR 499; [1936] HCA 40 J & M McNamee Holdings Pty Ltd v Mungerie Vale Pty Ltd trading as Greenwood Group Realtors [2019] NSWCA 283 Kalifair Pty Ltd v Digi-Tech (Australia) Ltd (2002) 55 NSWLR 737; [2002] NSWCA 383 Nguyen v Taylor (1992) 27 NSWLR 48 Northey v Bega Valley Shire Council [2012] NSWCA 28 Perpetual Corporate Trust Limited v Colevski [2025] NSWSC 387 Pham v Gall (2020) 102 NSWLR 269; [2020] NSWCA 116 Piety Developments Pty Ltd v Cumberland City Council [2024] NSWCA 18 Vacuum Oil Co Pty Ltd v Stockdale (1942) 42 SR (NSW) 239
Texts Cited:	Nil.
Category:	Principal judgment
Parties:	Goce Talevski (first applicant) Keti Talevski (second applicant) David Dragi Trifunovski (third applicant) Lena Trifunovska (fourth applicant) Boka Colevska (fifth applicant) Krstevski (sixth applicant) Valentina Colevski (seventh applicant) Perpetual Corporate Trust Limited (first respondent) Matthews Folbigg Pty Ltd (second respondent)
Representation:	
Counsel:	M Young SC (applicants) M Collins (first respondent)
Solicitors:	DPL Lawyers & Advisory (applicants) Dentons Australia (first respondent) Moray & Agnew (second respondent)
File Number(s):	2026/00350125
Publication restriction:	Nil. Decision under appeal
Court or tribunal:	Supreme Court
Jurisdiction:	Common Law Division
Citation:	Perpetual Corporate Trust Limited v Colevski Pty Ltd (No 2) [2026] NSWSC 970
Date of Decision:	13 August 2026
Before:	Faulkner J

File Number(s): 2023/00182505
[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

By notice of motion dated 2 September 2026, the applicants seek urgent injunctive relief to prevent the first respondent, Perpetual Corporate Trust Limited (Perpetual), from dealing with three properties pending the determination of the applicants' summons for leave to appeal and, if leave is granted, determination of the appeal:

533 Hume Highway, Casula (the Casula property), which is owned by the first and second applicants;

37 Ryman Avenue, Edmondson Park (the Edmondson Park property), which is owned by the third and fourth applicants; and

28 Wattle Grove Drive, Wattle Grove (the Wattle Grove property), which is owned by the fifth, sixth and seventh applicants.

The application for leave to appeal concerns a decision of Faulkner J, on 13 August 2026, to dismiss an amended notice of motion by which the applicants sought to set aside default judgments for possession of the three properties: Perpetual Corporate Trust Limited v Colevski Pty Ltd (No 2) [2026] NSWSC 970.

Each of the applicants, who are related either directly or by marriage, was a guarantor of a loan of \$2,533,434 that Perpetual advanced to a company, Colevski Pty Ltd (CPL) (now deregistered), of which the seventh applicant was the sole director. The loan, which Perpetual advanced in October 2022, was secured by a registered first ranking mortgage over each of the above three properties, which were the residences of the various applicants and, in the case of the Casula property, the first applicant's place of business.

The primary judge noted in the first paragraph of his Honour's reasons that at the time of the application before him, two of the three properties were the subject of a sale campaign being conducted by way of expressions of interest. Evidence on the present application appears to indicate that in fact all three properties were the subject of such a campaign at the time. Perpetual has received acceptable offers on the Wattle Grove and Edmondson Park properties and, subject to the outcome of the present application, it intends to exchange contracts for sale on those two properties imminently (I was informed that for the purposes of the determination of the present application an inter partes undertaking has been given not to enter into any contract before close of business on 9 September 2026). No offers have been received for the Casula property.

Background to the application

The proceeds of the Perpetual loan were used to pay out an earlier loan of \$2,546,920 that CPL had obtained in June 2022 from a company called Charub Pty Ltd (Charub). Each of the applicants guaranteed the Charub loan, which was also secured by mortgages over the three properties. The proceeds of that loan, which was for a term of six months and required the payment of a “high” interest rate, were used:

to discharge a mortgage on the Wattle Grove property which secured a loan of about \$212,000;

to discharge caveats on the title of the Edmondson Park property in respect of creditors who were collectively owed about \$120,000;

to discharge a mortgage on the Casula property securing loans of about \$400,000.

In addition, about \$1,600,000 was paid to CPL.

The Perpetual loan subsequently went into default. In June 2023, Perpetual commenced proceedings in the Supreme Court seeking recovery of the indebtedness arising under the loan and guarantees, together with possession of the three properties pursuant to its mortgages. At that time, the judgment debt was said to be \$3,488,839.14.

The history of the proceedings is lengthy. The following is a brief summary taken from the reasons of the primary judge.

Initially, the applicants did not respond to the proceedings. On 21 July 2023, default judgments were entered against each of them for the debt claimed and orders were made for possession of the three properties. Writs for possession were issued on 28 July 2023: at [17].

Following entry of the default judgments, the seventh applicant’s son, Christopher Colevski, who was then employed as a solicitor by the second respondent, Matthews Folbigg Pty Ltd, applied for stays of execution of the writs for possession. Those orders were made on 14 September 2023 and subsequently extended: at [18].

On 17 May 2024, some eight months later, the applicants filed a notice of motion seeking to set aside the default judgments. On 21 May 2024, Lonergan J dismissed the motion, observing that no valid grounds of defence to Perpetual’s statement of claim had been identified and no satisfactory explanation had been provided for the delay in seeking relief: at [24]. Between May and July 2024, the first, second, fifth, sixth and seventh applicants were evicted from the Casula property and the Wattle Grove property respectively: at [59].

The applicants then retained Axe Legal to act on their behalf in seeking to have the default judgments set aside and, on 26 June 2024, a second notice of motion was filed seeking that relief in respect of all applicants other than the seventh applicant, whom the primary judge referred to as Valentina. Valentina gave evidence on the motion below that Axe Legal did not act for her because there may have been a conflict of interest between CPL and the remaining applicants. Valentina was advised by Mr Stojkovic of Axe Legal to obtain her own legal advice and

representation. She did not do so: at [26], [53].

On 8 July 2024, by consent, the default judgments against the six applicants the subject of the motion were set aside and possession of the properties restored to them: at [26]. Valentina did not seek the same relief and gave evidence on the motion below that she believed the default judgment against her would also be set aside automatically: at [53].

On 12 July 2024, the individual applicants (other than Valentina) and CPL filed a defence alleging that the transaction documents relating to both the Charub and Perpetual loans were unjust for the purposes of the Contracts Review Act 1980 (NSW) and had been procured by unconscionable conduct: at [27]. They sought orders setting aside both loans. On 22 August 2024, Perpetual amended its statement of claim, seeking subrogation of Charub's mortgage rights in the event that relief was granted in respect of the Perpetual loan: at [28].

On 10 October 2024, the individual applicants (other than Valentina) filed a cross-claim joining the second respondent and alleging that the firm had been negligent in advising them: at [29]. Also in October 2024, Axe Legal ceased to act for want of payment of their fees: at [49].

The proceedings were listed for directions on two occasions in late 2024, at both of which the applicants failed to appear. Both respondents were granted leave to file applications to strike out the applicants' defence and cross-claim: at [32]-[35]. After numerous attempts to notify the applicants of the applications, and further directions hearings at which they did not appear, Faulkner J heard the strike-out applications on 16 April 2025 without any appearance by the applicants. His Honour struck out both the defence and the cross-claim, observing that the applicants were the moving party in the vast majority of issues raised in the pleadings and that they therefore had an obligation under s 56(3) of the Civil Procedure Act 2005 (NSW) to assist the Court, to participate in its processes and to comply with its directions and orders: *Perpetual Corporate Trust Limited v Colevski* [2025] NSWSC 387 at [46].

Between May 2024 and January 2026, the applicants lodged various complaints with the Australian Financial Complaints Authority (AFCA), all of which were ultimately closed: at [25], [33], [38]. Valentina gave evidence on the motion below that Axe Legal advised the applicants that, given their financial circumstances, they should pursue a complaint with AFCA rather than attend Court: at [49]. She further stated that the complaints lodged between April 2025 and January 2026 were made by Christopher on behalf of her and the other applicants: at [53].

On 3 February 2026, Perpetual again sought default judgments against the applicants. Default judgments were entered on 4 March 2026 against all applicants other than Valentina (because the default judgment entered against her in 2023 had not been set aside). Writs for possession were issued on 20 March and 1 April 2026 and, on 15 April 2026, notices of eviction were served: at [39].

Following receipt of the notices of eviction, the applicants applied on 22 May 2026 for a stay of the writs for possession. This was the first action the applicants had taken in the proceedings since they filed the cross-claim in October 2024. The proceedings were listed for directions on 29 May 2026 and 5 June 2026 and, following the applicants' failure to appear, the application was dismissed. On 22 June 2026, the applicants were each evicted from the three properties: at [40]-[43].

On 1 July 2026, the applicants filed the notice of motion leading to the primary judge's decision which is the subject of the application for leave to appeal. It was first listed before his Honour on 13 July 2026, when Saso Colevski, the husband of Valentina, sought to represent the applicants. The application was twice adjourned and, by 7 August 2026, the applicants were represented by a solicitor and counsel: at [44]. There was evidence before the primary judge that the applicants had deposited \$92,000 into the solicitor's trust account for the future conduct of the proceedings: at [58].

The primary judgment

The primary judge noted that the power to set aside a default judgment under r 36.16 of the Uniform Civil Procedure Rules 2005 (NSW) is discretionary, in the exercise of which regard must be had to the overriding purpose in s 56 of the Civil Procedure Act as well as the objects of case management in s 57 and the need to act in accordance with the dictates of justice, as required by s 58: at [74]-[78]. His Honour observed that the Court was to consider whether setting aside the judgments would serve a useful purpose and whether there was an adequate explanation for the circumstances in which the default judgment was obtained: at [79], citing *Vacuum Oil Co Pty Ltd v Stockdale* (1942) 42 SR (NSW) 239 at 243. The central question was whether the Court was satisfied that it would be unjust to allow the default judgment to stand, noting the importance of finality: at [79], citing *Pham v Gall* (2020) 102 NSWLR 269; [2020] NSWCA 116 at [108]; *Northey v Bega Valley Shire Council* [2012] NSWCA 28 at [14].

The applicants focused their arguments on the claims they made pursuant to the Contracts Review Act, by which they sought orders under s 7 relieving them of the obligation to pay Perpetual the money loaned in October 2022. The primary judge accepted that the Contracts Review Act offered the applicants the best prospect for success given the width of the statutory concept of a contract being "unjust": at [80]. However, his Honour found that the applicants had not demonstrated that they had a reasonably arguable case on either or both of the two stages that the authorities have determined the cause of action under s 7 of the Act entails: at [84].

The first stage of the inquiry required the applicants to establish an arguable case that their guarantees might be found to have been unjust in the circumstances relating to them at the time they were granted to Perpetual: at [81]. The applicants relied, inter alia, on threats made to Christopher and Saso Colevski by the family of Christopher's then-girlfriend concerning the provision of funds for a property development, as well as the particular vulnerability of Saso Colevski by reason of his incarceration at the time. The applicants gave evidence that these circumstances induced them to give the guarantees, to raise the money: at [81]. They also relied

on their impecuniosity, their inability to pay the loan from their own resources, the lack of advice received, and the limited education and proficiency in English of the third to sixth applicants: at [81]. The primary judge found that those matters related not to the circumstances in which the applicants gave guarantees to Perpetual, but to the circumstances in which the applicants guaranteed the Charub loan in June 2022, pursuant to which the funds were obtained to advance to the property developer, allegedly in response to threats to Christopher and Saso Colevski: at [84].

In the (struck out) defence, the applicants did seek relief in respect of the Charub loan, and his Honour assumed in their favour that they had an arguable case in relation to the Charub guarantees: at [85]. However, his Honour considered that the applicants could not succeed in defending Perpetual's claims unless the Court found that both the Charub guarantees and the Perpetual guarantees were unjust in the circumstances in which they were made: at [85]-[86]. The applicants had not demonstrated an arguable case in relation to the guarantees given to Perpetual: at [85]-[86].

The second stage of the inquiry for the purposes of s 7 of the Contracts Review Act involved consideration of whether it was just for the Court to exercise its discretion to grant relief. The applicants accepted, consistently with authority, that the Court was unlikely to grant relief under s 7 where there was ignorance or innocence on the part of Perpetual: *Nguyen v Taylor* (1992) 27 NSWLR 48 at 71. However, they submitted that any fault on the part of the lender would not ordinarily emerge until evidence had been adduced by the lender: at [82]-[83]. In finding that the applicants had not demonstrated a basis on which it could be said that it would be just for the Court to exercise its discretion to grant relief, his Honour advanced two reasons:

Perpetual took the guarantees in circumstances where there was no change to the applicants' position apart from lowering the interest rate. There was no allegation that Perpetual had "any inkling" about the Charub guarantees being amenable to relief under s 7 or the circumstances later relied on for such a claim: at [86].

Apart from asserting generally that Perpetual had failed to make inquiries, the applicants had not identified a single matter to support the allegation that it was just for the Court to grant relief against Perpetual: at [87].

His Honour emphasised that the applicants bore the onus of pleading and proving the matters relied upon for relief: at [88]. His Honour considered that the applicants were not yet aware of any basis on which they could contend for a grant of relief against Perpetual or make the submission that Perpetual's repayment of the Charub loan was not an incontrovertible benefit to them. The primary judge stated that their claim was "fairly characterised as speculative": at [90]. Accordingly, the applicants had not demonstrated any useful purpose to be served by setting aside the default judgments: at [91].

As to the explanation for the delay that gave rise to the default judgments, the primary judge was prepared to assume in the applicants' favour that until the first evictions on 20 May 2024, they had relied on Christopher to take care of the matter for them, and that this explained their failure to

engage with the proceedings. His Honour further assumed, without deciding, that such reliance may have been reasonable: at [93]. However, his Honour found that there could have been no doubt after that time that Perpetual was seeking possession and sale of their homes and noted that the first evictions warranted special attention to the proceedings in the future: at [101]. The applicants (other than Valentina) were also represented by Axe Legal between May and October 2024 and were aware of steps in the proceedings during that time: at [95]. No adequate explanation was provided for the applicants' failure to engage after October 2024: at [92]-[94], [96], [101].

In respect of Valentina specifically, his Honour noted that she had not sought to set aside a default judgment entered in 2023 despite having been advised in May 2024 by Mr Stojkovic to obtain independent legal advice, which she did not do: at [103]. There was no reasonable basis for her belief that the judgment against her would be automatically set aside with those against the other applicants. Her reliance on complaints to AFCA to explain her failure to engage in proceedings was not an adequate explanation for her inactivity after the end of 2024, when her complaint was closed: at [103].

The primary judge emphasised that the applicants' defence and cross-claim raised almost all of the issues in the proceedings and that facilitating the just, quick and cheap resolution of those issues was the overriding purpose of the Court: at [101]. The explanation for the defaults which had occurred over the course of the proceedings fell well short of what was required: at [102].

Finally, on the issue of prejudice, the primary judge observed that the application raised issues of prejudice to all parties. In respect of the applicants, his Honour accepted that dismissing the application would give rise to a risk that they would lose their homes. However, if the default judgments were set aside and the applicants ultimately failed at the final hearing, their homes would be lost in any event: at [104]. Accordingly, their failure to demonstrate material prospects in the case was relevant to their risk of prejudice.

In respect of Perpetual, his Honour considered that setting aside the default judgments would give rise to a real risk of prejudice if Perpetual were then to ultimately succeed at the final hearing. In that event, the proceeds of the sale of the properties may be insufficient to satisfy the debt, accrued interest and costs incurred as a result of the delayed sales, and the applicants had no additional assets from which any further shortfall might be recovered: at [63], [105].

As to the second respondent, his Honour observed that the firm's costs since the strike-out of the applicants' cross-claim against it was approximately \$70,000 and remained unpaid. Reopening the proceedings would result in further costs as well as the stress of defending negligence claims the second respondent might have considered to be concluded: at [108].

His Honour also did not accept that the matter could be prepared quickly for hearing, noting that the applicants had: (i) recently retained new solicitors; (ii) foreshadowed a need for disclosure by Perpetual; and (iii) seemingly carried out no material preparation of the cross-claim against the second respondent, which they submitted ought to be heard at the same time: at [106]. Although the consequences of prejudice to the applicants were more significant in nature, there was at

least as much prejudice on the side of the respondents and the risk of prejudice was far greater for Perpetual than for the applicants: at [105], [107]-[108].

His Honour considered that dismissing the application served the overriding purpose in s 56 of the Civil Procedure Act because it preserved the default judgments and ensured efficient use of resources and timely disposal of proceedings: at [111]. In circumstances where the applicants had already had two full opportunities to have the matter heard, just resolution did not require the Court to afford a third opportunity in the circumstances: at [112].

The application for leave to appeal and injunctive relief

On 1 September 2026, the applicants filed an application for leave to appeal. On 2 September 2026, the applicants filed the present application, supported by an affidavit of Domenic Portolesi, solicitor, sworn 2 September 2026 and exhibit DP-1.

Perpetual relies on the affidavit of Dean Asher, sworn 4 September 2026 and exhibit DA-1. Mr Asher is employed by La Trobe Financial Services Pty Ltd (La Trobe) as a Manager, Mortgage Help – Mortgagee in Possession & Loss Recovery. La Trobe manages the loan that is the subject of the proceedings on behalf of Perpetual.

I note that a solicitor from the firm representing the second respondent, Ms Byrne, appeared at the commencement of the hearing on the notice of motion and sought to be (and was) excused as the relief sought did not concern the second respondent.

The evidence on the application indicates that the three properties are the sole substantial assets for each of the respective applicants. Following execution of the writs for possession for the three properties, Perpetual arranged for the properties to be marketed for sale by way of expressions of interest, the results of which may be summarised as follows:

The expression of interest campaign for the Wattle Grove property ran from about 22 July 2026 to 21 August 2026. As at 4 September 2026, the highest offer was \$2,052,000, which Perpetual intend to accept, subject to confirmation from the real estate agent about whether any further offers may be forthcoming.

The marketing campaign for the Edmondson Park property ran from about 22 July 2026 to 21 August 2026. Four offers were received, the highest being \$1,100,000 (as at 4 September 2026). Perpetual has sought an updated valuation and, subject to any update and further advice from the real estate agent, it intends to accept the highest available offer.

The marketing campaign for the Casula property closed on 28 August 2026. As at 4 September 2026, no offers had been received.

On 31 August 2026, the applicants' solicitor received notice from Perpetual's solicitors that the above offers had been received for the Wattle Grove and Edmondson Park properties, and that Perpetual intended to enter into contracts for sale after 2 September 2026. I was informed at the hearing that this notice was given in accordance with a direction of the primary judge, made when his Honour reserved judgment on 7 August 2026, that Perpetual's solicitors give two business days' notice before entering any contract for the sale of any of the three properties.

The applicants accepted that in order to obtain the relief sought, it was necessary for them to show an arguable case and that the balance of convenience favoured the grant of relief:

Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57; [2006] HCA 46 at [65]. They further submitted that although the present application was not, strictly speaking, a case of staying orders so as to preserve the subject matter of the appeal, the situation was closely analogous. A stay entails consideration of whether the appeal raises a serious question to be tried, in the sense of arguable grounds, and if so, where the balance of convenience lies: *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685 at 694-695; *Kalifair Pty Ltd v Digi-Tech (Australia) Ltd* (2002) 55 NSWLR 737; [2002] NSWCA 383 ("Kalifair") at [17]-[20].

The applicants' draft notice of appeal contains 12 proposed grounds of appeal. Proposed grounds 1 to 5 take issue with the primary judge's conclusions on the first and second stages of the inquiry under the Contracts Review Act and his Honour's conclusion that the applicants had failed to demonstrate a useful purpose to be served by setting aside the default judgments. Grounds 6 and 7 take issue with his Honour's conclusion that the applicants' explanation for the defaults that had occurred was inadequate. The applicants also challenge his Honour's findings on prejudice (grounds 8 to 10) and his Honour's ultimate conclusion (grounds 11 to 12).

The applicants submitted that the application for leave to appeal is arguable for the following reasons:

The Charub loan was "forced" upon the applicants by reason of threats made against Christopher and Saso Colevski.

If the Charub loan had the potential to be set aside (noting his Honour's assumption of an arguable case in that regard), then the debt that the Perpetual loan refinanced was not one that needed to be discharged in order to remove the Charub mortgages over the properties. The applicants have submitted in the summary of argument in support of the application for leave to appeal that it followed that the Perpetual loan was also improvident from their perspective.

In respect of Perpetual specifically, the applicants submitted that they also pleaded as against it (and not just against Charub) that Perpetual had acted unjustly, insofar as it ought to have known of their various disabilities and inability to pay the loan. They also submitted that evidence had been filed to support injustice.

In respect of the second respondent, the applicants submitted that it was in a position of conflict as Christopher was working for the firm at the time that the firm was advising the applicants on the Perpetual loan, and that it was thus unable to provide the applicants with independent

advice.

The applicants submitted that these matters pointed to “the strong likelihood that the Applicants would have been able to mount at a final hearing a serious defence and cross-claim with a very real chance of success”. It followed, they submitted, that the trial judge’s statement at [87] that they had not “identified a single matter to support the allegation that it is just for the Court to grant the relief against Perpetual” was “in error”. They also alleged error in respect of “the determination that there was no utility in setting aside the orders, that there was little prejudice to the Applicants by reason of their poor prospects, and the dismissal of the Motion Below”.

Perpetual submitted that there was not an arguable case. It emphasised that in addition to evidence that adequately explained their extensive delay (which was lacking), the applicants needed to provide evidence to the primary judge (not just a pleading) which demonstrated a good defence to Perpetual’s claims. Perpetual submitted that the applicants had not advanced any evidence to support that Perpetual was on notice of any concerns in respect of the circumstances in which the Charub loan was entered into, noting that the Perpetual loan did not change the applicants’ position other than to lower the interest rate. These matters provided a clear basis, Perpetual submitted, for the primary judge’s conclusion that the applicants were not yet aware of a basis on which they could contend for relief against Perpetual or that Perpetual’s repayment of the Charub loan was not an incontrovertible benefit to them.

It is not for me on this application to make anything other than a preliminary assessment about whether the applicants have an arguable case: *Piety Developments Pty Ltd v Cumberland City Council* [2024] NSWCA 18 at [6], citing *Kalifair* at [18]-[19]. In their summary of argument in support of the application for leave to appeal, the applicants accept that in order to succeed on the appeal, they would need to establish that:

the primary judge erred in a manner which would permit this Court to re-exercise his Honour’s discretion, in the manner set out in *House v The King* (1936) 55 CLR 499; [1936] HCA 40; and the Court would then re-exercise the discretion in a manner favourably to the applicants.

As to the first of these inquiries, the applicants would need to establish that the primary judge made an error of legal principle, a material error of fact, took into account an irrelevant matter, failed to take into account, or give sufficient weight, to a relevant matter, or arrived at a result so unreasonable or unjust as to suggest one of the foregoing categories of error: *House v The King* at 504-505. These principles apply with stringency in appeals from a discretionary decision in a matter of practice and procedure: *J & M McNamee Holdings Pty Ltd v Mungerie Vale Pty Ltd trading as Greenwood Group Realtors* [2019] NSWCA 283 at [47] (Gleeson JA, Basten JA and Simpson AJA agreeing).

Despite acknowledging the need to establish *House v The King* error, the errors on which the applicants rely in the summary of argument are not expressed by reference to those types of error. At the hearing of the application, Mr Young SC, who appeared for the applicants, submitted that the “cardinal error” made by the primary judge was to conclude that there was no real

prospect of the Contracts Review Act defence succeeding in terms of either the first stage or the second stage. Mr Young submitted that it was manifestly incorrect that the claims could have no reasonable prospect. This submission was likely directed at the catch-all category of error in *House v The King*, namely, a result so unreasonable or unjust as to suggest error. It appeared to relate to proposed grounds 1 to 5, although Mr Young further submitted that his Honour's conclusion on this issue tainted his Honour's other findings, particularly those concerning prejudice.

Noting the requirements for leave to appeal (as to which see eg *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164 at [32]-[38]), the matter does not appear to be one that raises a point of principle or general importance but rather is put on the basis that it involves a reasonably clear injustice going beyond what is merely arguable. It is sufficient for present purposes to say that I consider that the applicants may satisfy the arguable case threshold on the basis of what Mr Young advanced as the "cardinal error", but I do not consider it to be strongly arguable having regard to the manner in which his Honour reasoned, which I have summarised above. Further, assuming leave to appeal were granted, I note that even if *House v The King* error were established as to this aspect of his Honour's reasons, the applicants would also need to establish that the Court should exercise the discretion differently to his Honour, having regard to all of the circumstances.

I accept the force of the applicants' submission on the balance of convenience that should a sale of any of the properties occur, the practical utility of their application for leave to appeal would be diminished, although it would not render the application entirely futile. The applicants submitted that a sale of the properties would render it unlikely that the applicants would ever recover the properties, even if they were ultimately successful in setting aside the mortgages, as there would in that event be innocent third parties with interests in the properties which would need to be considered. As Ward JA observed in *Goater v Commonwealth Bank of Australia* [2014] NSWCA 265 at [57], damages will not "ordinarily" be an adequate remedy where land is involved.

Perpetual's evidence indicates that as at 4 September 2026, the debt outstanding was \$5,699,041.29. Interest is continuing to accrue at a rate of 13.69% per annum (including a 5% per annum late payment fee), in the amount of \$2,137.42 each day. The valuations in evidence indicate that the total value of the three properties is \$4,705,000. Accordingly, at this stage, the amount of the debt exceeds the value of the properties by some \$1,000,000.

Perpetual relied on the fact that some of the proceeds of the Charub loan were used to repay creditors which previously held security over each of the three properties (see [5] above). It submitted that even if the appeal were successful and all of the applicants' arguments were accepted at a subsequent trial, with the consequence that both loans were set aside, "the Court would inevitably impose a condition on such relief that the applicants first repay \$732,000 to Perpetual plus interest on that sum at commercial rates since at least October 2022, representing the unwarranted benefit of those loans to the applicants": see *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413; 11 BPR 20,841 ("Elkofairi") at [80]-[86] (Beazley JA), [98]-[100] (Santow JA). Where the applicants are unable to make such a payment, Perpetual submitted that it was

“inevitable” that the properties would be sold. It was therefore in the interests of all parties that they are sold now, without further delay.

I do not accept that it would be “inevitable” that all three properties would need to be sold in this circumstance. The applicants accepted the force of Perpetual’s submissions, relying on Elkofairi, that the amount of money that may fall for repayment, assuming the applicants were to succeed, is significant and, like the current debt, continues to increase. However, as they submitted, given the combined value of the homes, there may be options for refinance or, alternatively, sale of one of the homes to meet such a payment obligation.

That said, it is relevant that the applicants were evicted from the properties in June 2026, after failing to appear at a number of listings of an application they had made to stay the execution of the writs for possession. Perpetual is in possession of the three properties and has been marketing them for sale for some time, as the primary judge noted at the outset of his Honour’s reasons. As a result of those efforts, Perpetual has present offers for two of the properties which are in the range (for the Wattle Grove property) or just outside the range (for the Edmondson Park property) of the valuations that are in evidence.

The current state of the market is of some significance in this context. A letter from the real estate agent to Mr Asher dated 4 September 2026 stated that property values in the area of the subject properties have declined in the past three months by an average of 2.5% to 4.5%. Perpetual submitted that in circumstances where the proceeds of the sales will already be insufficient to repay the debt owing, further delays would likely risk increasing the shortfall. True it is, as Mr Young submitted responsively, that anything could happen in the next few months, but on the evidence before me, the trend for the last three months has been downward. The risk to which Perpetual referred is clearly not far-fetched or fanciful.

The applicants have proffered the usual undertaking as to damages. Mr Young accepted that this undertaking was of little value in circumstances where the properties are the only substantial assets of the applicants.

The applicants resisted Perpetual’s submission that if an injunction were granted, it should be conditional upon requiring them to give security in support of the undertaking and to make regular payments of the interest accruing on the debt. They accepted that there was evidence before the primary judge that they had paid \$92,000 into their solicitor’s trust account, but submitted that this was for legal fees and maintained that they did not otherwise have substantial assets. As Mr Collins, counsel for Perpetual, submitted at the hearing, the amount that has been paid into the solicitor’s trust account is some evidence of capacity on the part of one or more of the applicants to raise funds. In those circumstances, the absence of any offer to pay any amount, by way of security for the undertaking or otherwise, and to resist conditional injunctive relief, serves further to emphasise Perpetual’s prejudice. It is relevant in this context that the applicants accepted Perpetual’s submission that the applicants did receive a benefit from the loan proceeds that were used to discharge the mortgages and caveats over their respective properties, and that they would need to repay those amounts (with interest) if relief were granted under the Contracts

Review Act.

At the hearing of the application, I raised the possibility of expedition of the application for leave to appeal, which the applicants have submitted, in the summary of argument, should be heard concurrently with the appeal. Mr Young submitted that there would be little, if anything, that the applicants would seek to supplement the White Folder with in the event of a concurrent hearing. Mr Collins, counsel for Perpetual, did not have instructions at the hearing as to expedition generally, but he was instructed that Perpetual would require the full 28 day period to prepare its response to the applicants' summary of argument, submitting that the time allocated to it should not be "squeezed".

Perpetual accepted that if the application for leave to appeal and/or the appeal could be heard in the next month or two, that would be relevant to my evaluation of the relative prejudice to the parties. Nonetheless, it submitted that prejudice still arose in circumstances where Perpetual would likely lose the current offers. Mr Asher gave evidence that in his experience, potential buyers who have made an offer are unlikely to wait over two weeks for a vendor to accept the offer and the buyers who have currently made offers would likely lose interest and move onto new properties. In addition to losing the offers, Perpetual would in that event have wasted the cost of listing the properties (some \$17,892), and would likely incur similar costs in listing the properties again at a later time should the applicants not succeed in the current proceedings. However, the marketing costs are not as significant as the likely loss of the sales of which Mr Asher gave evidence.

Perpetual submitted that the considerations on which it relied weighed heavily against the making of the orders sought in the motion. Notwithstanding that I have not accepted all of the matters it relied upon, I am satisfied that the balance of convenience in the present case is substantially in Perpetual's favour, having regard to all of the circumstances.

Conclusion

In light of my preliminary assessment of the proposed grounds of appeal, where the balance of convenience lies and the limited value of the applicants' undertaking as to damages, I decline to make the orders sought in the notice of motion. No submission was made that the ordinary rule as to costs should not apply.

Accordingly, I make the following order:

The applicants' notice of motion dated 2 September 2026 is dismissed with costs.

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Decision last updated:

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