

this and the following

11 pages are the second to fourth respondents' written submissions for publication pursuant to paragraph 27 of Practice Note No SC CA 1



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Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00021338

TITLE OF PROCEEDINGS

First Appellant	Michael Birch
First Respondent	Luke Bunbury
Second Respondent	St Jean CF Pty Ltd
Number of Respondents	4

FILING DETAILS

Filed for	St Jean CF Pty Ltd, Respondent 2 1DERFUL PTY LTD, Respondent 3 THE 1DERFUL GROUP PTY LTD, Respondent 4
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ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Birch v Bunbury - 2nd to 4th Respondents - Outline of Submissions - 15.08.25.pdf)

[attach.]

Supreme Court of New South Wales
Court of Appeal

Case No. 2025/00021338

Michael Birch
Appellant

Luke Bunbury and others
Respondents

**SECOND TO FOURTH RESPONDENTS’
OUTLINE OF SUBMISSIONS**

A. OVERVIEW

1. In the primary judgment below, delivered on 8 November 2024 (**PJ**), the primary judge made the following findings and observations which are not challenged in this appeal:
 - a. the Appellant (**Mr Birch**) engaged in statutory unconscionable conduct (**PJ** [288]);
 - b. Mr Birch, along with Mr Craig Seymour (**Mr Seymour**), developed a plan for Fletch Capital Pty Ltd (**Fletch**) to acquire the business operated by 1derful Pty Ltd (**1derful**) and The 1derful Group Pty Ltd (the **Companies**) (**PJ** [193]). The primary judge used the term “**Scheme**” to describe the steps in the plan, and found (**PJ** [193]) that each of Fletch, Mr Birch and Mr Seymour took part in the Scheme;
 - c. any purchaser of the Companies’ business would likely purchase it only if the purchaser had sufficient confidence that issues between the Companies and Mastercard could be resolved, commencing with payment of the amount due to Mastercard, which was the approach taken by Fletch when it acquired that business (**PJ** [18]). The most critical factor for Mastercard was funding, and Mastercard required the repayment of the balance owing to them (**PJ** [19]).
2. This appeal is confined to the primary judge’s assessment (**PJ** [298], [322]-[325]) that the market value of the Companies’ business at the time of the Scheme was not less than \$2 million. The primary judge’s assessment was based in part on contemporaneous statements made by Mr Seymour, and the primary judge’s assessment formed part of a relief decision delivered on 23 December 2024 (**J**¹ [36]-[45]), resulting in an order to the effect that Mr Birch was jointly and severally liable (with Fletch and Mr Seymour) to the Companies for \$2 million (**\$2M Damages Assessment**).

¹ Red Book, pages 60-88.

3. For reasons including those outlined below, the \$2M Damages Assessment was sufficiently reliable and supported by raw material available to the primary judge, including the following:
- a. one of the steps in the Scheme involved taking an assignment of debt owed by the Companies to their first secured creditor for a discounted sum of \$700,000 (PJ [194]);
 - b. Mastercard's outstanding settlement balance was US\$802,816.16² before the Scheme was implemented and, according to Mastercard, the amount it was owed was not static and 'will increase ... as a result of non-payment';³
 - c. it must be assumed that those who took part in the Scheme, including Mr Seymour and Mr Birch, did so for financial gain. The total cost of taking the assignment of the debt owed to the first secured creditor (\$700,000) and paying Mastercard's outstanding settlement balance (not less than US\$802,816.16) was approximately \$2,000,000, having regard to exchange rates in the relevant period. The Scheme was therefore uncommercial unless the Companies' business was worth at least \$2,000,000;
 - d. unchallenged evidence summarised by the primary judge (PJ [117]) was that Mr Seymour said that he knew "details about the 1derful business" and was "across the financial position of 1derful" and knew about their creditors. Having regard to these statements, the above assumption and the fact that the Scheme was uncommercial unless the Companies' business was worth at least \$2,000,000, Mr Seymour's contemporaneous statements to the effect that the value of the Companies' business was not less than \$2 million were sufficiently reliable;
 - e. Axiom Properties Ltd (**Axiom**), who on Mr Seymour's affidavit evidence had by 12 September 2023 agreed to invest in and establish Fletch (PJ [186]), did so by way of an initial loan facility of up to \$2 million (PJ [202]-[203]). It must be assumed that Axiom, an ASX listed company, considered its own financial interests and the value of the Companies' business before making a \$2 million facility available; and
 - f. expert evidence of the value of the Companies' business was adduced by the parties, considered by the primary judge but ultimately rejected. Accordingly, this was not a case where the parties failed to adduce expert evidence of value where it was expected – it was a case where the primary judge, despite the availability of that evidence, considered that contemporaneous market-based evidence of value was more realistic.

² Blue Book, volume 5, page 2267, L-M.

³ Blue Book, volume 5, page 2271, L-M.

4. It follows that the raw material available to the primary judge supported a sufficiently reliable assessment that the Companies' business was worth at least \$2 million.

B. CONTEXT OF THE \$2M DAMAGES ASSESSMENT

5. The PJ and J (at [36]-[45]) contains relevant context and findings which led to the \$2M Damages Assessment. A brief overview follows.

The Companies' business and the importance of the Mastercard arrangement

6. The Companies' business involved proprietary technology and a licensing arrangement with Mastercard and other partners which, subject to regulatory approval, would permit the provision of branded debit and credit products for businesses that allowed clients to use branded debit and credit cards to provide instalment and hybrid payment options (PJ [3]).
7. Mastercard and 1derful agreed a licensing arrangement on 25 January 2023 (**Mastercard Agreement**) (PJ [3] and [71]).
8. By letter dated 25 May 2023, Mastercard advised the director of the Companies, Mr Luke Bunbury (**Mr Bunbury**), that 1derful was operating in breach of the Mastercard rules and obligations of a Principal Member and that entitled Mastercard to act, including termination of membership. Mastercard demanded payment of an outstanding amount of \$871,000 (PJ [88]).
9. On 31 July 2023, Mastercard suspended the Mastercard Agreement and outlined a 'pathway' for 1derful to resume its Principal Membership Activity with Mastercard (PJ [132]).
10. As the primary judge observed (PJ [18]), any purchaser of the Companies' business would likely purchase it only the purchaser had sufficient confidence that issues between the Companies and Mastercard could be resolved, commencing with payment of the amount due to Mastercard, which was the approach taken by Fletch Capital Pty Ltd when it acquired the Companies' business. The primary judge accepted (PJ [19]) Mr Bunbury's evidence that the most critical factor for Mastercard was funding, and that Mastercard required the repayment of the balance owing to them.

The Companies' first secured creditor

11. On 31 January 2023, 1derful entered a 'Facility Agreement and General Security Deed' (**Facility Agreement**) with PI Lorica Pty Ltd (**PIL**) by which, relevantly, 1derful borrowed \$322,000 from PIL and the Companies granted PIL a security interest in all their present and

after-acquired property as security for all money owing by them to PIL from time to time (PJ [72]).

12. On 2 March 2023, the Companies, Mr Bunbury and PIL executed a 'First Deed of Amendment and Restatement' of the Facility Agreement in respect of the PIL facility, and the Companies borrowed an additional \$261,000 from PIL (PJ [74]).
13. The primary judge accepted (PJ [20]) Mr Bunbury's evidence that he understood that Mr Birch and Mr Seymour were working to refinance the PIL facility on the basis that a new financier would acquire PIL's debt.

Evidence of the Companies' value

14. Fletch executed a 'Business Sale Agreement', in both its capacity as controller of the Companies and purchaser, which contemplated a valuation of the Companies' business to be completed after the business transferred to Fletch (PJ [24]). Fletch did not complete the valuation contemplated by the agreement (PJ [24]). Accordingly, the Scheme deprived the Court of contemporaneous evidence of an arm's length market price for the Companies' business. As the primary judge held (PJ [24]), it was no answer that Fletch did not complete a valuation because Mr Bunbury asserted a lien over critical assets to prevent Fletch's acquisition of those assets where it had not in fact paid their fair value.
15. The primary judge considered (PJ [40]-[60]) the expert and other valuation evidence which was relevant to the Plaintiffs' causes of action and claim for damages or compensation. The plaintiffs relied upon expert valuation evidence given by Mr Davies, which relevantly estimated fair enterprise value of the Companies as of 31 August 2023 to be \$29.7 million. The primary judge did not accept (PJ [44]) that valuation or any figure of that magnitude, and the primary judge could not adjust that figure in any way that would allow it any reasonable basis.
16. The Defendants relied upon expert valuation evidence given by Mr Kompos, which relevantly assessed the going concern valuation of the Companies' business as \$533,072, which Mr Kompos discounted 80% on a liquidation basis to reach a value of \$107,000. The primary judge found (PJ [55]) that Mr Kompos's valuation did not sufficiently regard the prospective character of the business, and the insolvency discount to the value of the Companies' business that Mr Kompos adopted did not have any substantial basis. The primary judge concluded (PJ [57]) that Mr Kompos's reports provided little assistance in valuing the Companies' business and were likely a less realistic valuation of that business than Mr Seymour's contemporaneous assessment of the value of the Companies' business before the Scheme was implemented.

17. In the financial year ending 30 June 2023, a Research and Development Tax Incentive Schedule was prepared, estimating 1derful's 'Refundable R&D tax offset' to be \$573,586.22 (PJ [62]).

Mr Seymour's contemporaneous assessment of the value of the Companies' business

18. The primary judge noted (PJ [39]) that Mr Kopp, who was a director of the Companies' second secured creditor (**FIFO Capital**), was not cross-examined to contest the truth of his evidence. Mr Kopp's evidence was supported by notes of conversations with Mr Seymour which were unchallenged. Mr Kopp's uncontested evidence was that Mr Seymour made several statements to him prior to October 2023 that 1derful was worth at least \$2 million and FIFO Capital would be repaid in respect of the transaction. The primary judge summarised (PJ [59]) and set out (PJ [179]-[181]) the unchallenged evidence of Mr Seymour's statements:
- a. on 28 August 2023, and after a meeting with Mastercard to discuss the proposed acquisition of the Companies' business and potential reinstatement of the Mastercard Agreement, Mr Seymour advised Mr Kopp of FIFO Capital that, if the valuation of the Companies "comes back at \$2 million, then there would be enough money to pay FIFO Capital" and that "[i]f or when Mastercard turns the agreement back on, *then the value of the assets is still significantly higher*";
 - b. on the same day, Mr Seymour again advised Mr Kopp and another director of FIFO Capital of his assessment that the Companies' assets "are worth at least \$2 million every day of the week" and that he could not see the assets "being worth less than \$2 million", comprising value for the customers, the strategy, the credit licence, the agreements and the code;
 - c. Mr Seymour made several statements to Mr Kopp during the months prior to October 2023 that "1derful was worth at least \$2 million"; and
 - d. in an email dated 6 October 2023, Mr Kopp reminded Mr Seymour that Mr Seymour had several times expressed the view that 1derful was worth at least \$2 million and Mr Seymour did not deny doing so in his email in response.
19. The primary judge treated (PJ [60]) Mr Seymour's assessment of the value of the Companies' business as evidence of the minimum value of that business 'by a sophisticated participant in the transaction who had a real incentive to reach an accurate commercial valuation'.

Mr Birch, Mr Seymour and Axiom's commercial incentives and involvement in assessing the commercial viability of the Scheme (and therefore the Companies' value)

20. Mr Birch's company, Handy Payments Pty Ltd (**Handy Payments**), entered into a non-binding Heads of Agreement with 1derful on 9 May 2023 (PJ [80]). Mr Birch submitted, and the primary judge accepted (PJ [83]), that Mr Birch had an interest in 1derful's survival so that it could develop the technology and provide it commercially, including to Handy Payments.
21. The primary judge found (PJ [87]) that correspondence around May 2023 was consistent with Mr Birch working on a capital raising for the Companies.
22. Mr Birch introduced 1derful as a potential provider of card services through Handy Payments in June and July 2023 (PJ [89]).
23. In about June 2023, Mr Seymour emailed a third party seeking short term borrowing (PJ [103]). The email noted that '[t]he Company' was 'in the middle of a capital raising of \$2.5m...[and would have] enterprise valuation circa \$30m'. Mr Birch noted that the proposal 'looks pretty robust'.
24. The primary judge found (PJ [115]) that by mid-July 2023, Mr Seymour wished to advance his interest in acquiring the 1derful business, without disclosure of that intent to the Companies.
25. The unchallenged evidence summarised by the primary judge (PJ [117]) was that Mr Seymour said that he knew "details about the 1derful business" and was "across the financial position of 1derful" and knew about their creditors.
26. On 10 August 2023, Mr Birch advised Mr Wang of PIL that he was a member of a team working with Mr Bunbury and 1derful on the refinance and a new facility and attached a draft deed of assignment (PJ [140]).
27. On 16 August 2023, Mr Kopp was advised by Mr Seymour (PJ [146]-[149]), in a conversation which was recorded in a note broadly consistent with Mr Kopp's account, that:
 - a. Mr Birch had set up a special purpose vehicle;
 - b. a deed of assignment was ready to go and that the special purpose would purchase the debt of PIL;
 - c. \$2 million would go into the special purpose vehicle;
 - d. Mastercard would receive its payment of \$1 million;
 - e. a financier would finance 80% of a \$1.2 million R&D claim;
 - f. \$2 million would be left in the special purpose vehicle;
 - g. the process was subject to Mastercard's willingness to engage with the proposed deal, but Mr Seymour was 'pretty confident that Mastercard would come through'.

28. On 22 August 2023, Mr Birch sent by email to Mr Lawrence of Axiom a “road map” which had been sent to him the previous day by Mr Seymour (PJ [152]). The email stated ‘[r]ecap timetable to take assets out and rebirth 1derful. Craig Semo[u]r the architect of this plan attached...[s]till a meeting with Mastercard requiring to step through process there’. The primary judge rejected (PJ [154]) Mr Birch’s evidence that he did not have the purpose of Axiom taking up that plan. The primary judge also found (PJ [155]) that it was highly implausible that Mr Birch would not have carefully reviewed the document given his real commercial interest in the proposal, at least through Handy Payments’ interest in obtaining services from the Companies or a third party which acquired their business. The primary judge found (PJ [155]) that Mr Birch was at least aware of the substance of the plan.
29. By an email dated 23 August 2023, Mr Seymour provided Mr Birch with a spreadsheet setting out the balance sheets for 1derful and Mr Bunbury (PJ [159]). Mr Birch acknowledged in cross-examination (PJ [160]) that he was likely to have read the spreadsheet and formed the view that the cost for a new company to recreate the Companies’ technology stack would be about \$3 million. Mr Birch’s evidence (PJ [160]) was also that whether it would be advantageous to a special purpose vehicle to acquire the asset which it had cost \$3 million to create for less than that amount depended on the value of the asset.
30. On 25 August 2023, Mr Birch:
- a. sent to Mr Wang of PIL an email titled ‘1derful debt assignment’ attaching a letter from Gibraltar Capital (PJ [163]). The letter sought confirmation of PIL’s willingness to complete the transaction and identified Mr Birch as the contact person (PJ [164]). Mr Seymour accepted in cross-examination that he was likely to have drafted the letter (PJ [165]). The primary judge rejected (PJ [165]) Mr Birch’s denial that he had carefully read that letter; and
 - b. forwarded a letter from Mr Wallace of Gibraltar Capital to Mastercard (PJ [166]), describing it as a ‘proposal from the Group looking to work through a proposed recapitalisation of 1derful Group’. The letter pointed out the virtues of, and the difficulties facing, the Companies, including the ‘enormous potential’ of the business and noted that ‘we have firm commitments for capital sufficient to restructure and recapitalise the 1derful business, wholly subject to some form of ongoing commercial relationship with Mastercard’ (PJ [168]). The letter solicited Mastercard’s involvement with the proposal (PJ [169]). Mr Seymour accepted in cross-examination that he likely drafted this letter (PJ [170]), and the primary judge rejected (PJ [170]) Mr Birch’s evidence in cross-examination that he forwarded that letter without reading it.

31. Mr Seymour's evidence (PJ [172]) was that on 25 August 2023, 'Mr Birch had approached Axiom to discuss Axiom's interest in financial services for the property industry, including real estate. Mr Birch and I outlined the 1derful...business model and the potential to acquire business assets of 1derful...' The primary judge found (PJ [172]) that by this point Mr Seymour and Mr Birch were advancing their own proposal for the acquisition of PIL's debt and the forced acquisition of the Companies' business in their own interests, without disclosure to the Companies.
32. On 28 August 2023, Mr Wormald of Mastercard emailed Mr Birch with a copy to Mr Seymour, advising that Mastercard 'appreciate the thoughtful proposal and constructive way forward...hopefully we can find a way forward to relaunch together' (PJ [176]).
33. On the same date, Mr Seymour emailed Mr Kopp of FIFO Capital (PJ [177]) outlining his recommended approach and assessment of the situation. Mr Seymour dealt with the possibility that Mastercard would reinstate the Mastercard Agreement on the basis that \$1 million was paid to Mastercard, and the primary judge found (PJ [178]) that by this point Mr Seymour was plainly in direct communication with Mastercard and developing a proposal which would lead to the Companies' loss of their businesses.
34. On 29 August 2023, Mr Birch followed up with Mr Martin of Mastercard, with a copy to Mr Seymour, stating that he was 'very keen to get in front of you and run through our vision for 1derful' (PJ [182]). Mr Martin of Mastercard responded on the same day (PJ [183]) indicating that he would call later that day and 'share initial thoughts on the path forward'.
35. Mr Kopp of FIFO Capital gave evidence (PJ [186]) of a further telephone conversation with Mr Seymour on 7 September 2023 where Mr Seymour advised him that Axiom was buying the PIL debt. Mr Seymour's affidavit evidence was that, by 12 September 2023, Axiom had agreed to invest and establish Fletch (PJ [186]).
36. On 13 September 2023, Mr Seymour:
 - a. sent an email to Mr Ben Laurence of Axiom and Mr Birch (PJ [187]) advising of the structure, referring to Mastercard's involvement and terminating 'from a valuation perspective' Handy Payments, which the primary judge found (PJ [188]) was intended to depress the value of the Companies, so far as it was proposed that Fletch exercise the security rights and sell the Companies' business to itself; and
 - b. sent another email to Mr Laurence of Axiom and Mr Birch with an updated version of the 'road map' (PJ [189]).
37. By at least 18 September 2023, Mr Birch and Handy Payments committed themselves to participation in Fletch's forced acquisition of the Companies' business (PJ [191]).

38. On 22 September 2023, Fletch was incorporated with Mr Seymour as its sole director and secretary (PJ [192]). Mr Seymour's company and Mr Birch's company each held 5 of its 80 shares, and Axiom held the remaining 70 of its 80 shares (PJ [192]).
39. On 3 October 2023, Fletch, in its capacity as controller, purportedly sold to Fletch the assets of the Companies, including their business, for the sum of \$757,273 excluding GST (PJ [199]).

Summary of context

40. Any purchaser of the Companies' business would likely purchase it only if the purchaser had sufficient confidence that issues between the Companies and Mastercard could be resolved, commencing with payment of the amount due to Mastercard, which was the approach taken by Fletch when it acquired that business. The most critical factor for Mastercard was funding, and that Mastercard required the repayment of the balance owing to them. Prior to the Scheme, Mastercard's outstanding settlement balance was approximately US\$802,816.16, or approximately \$1,250,000 having regard to exchange rates around the relevant time. According to Mastercard, the amount it was owed was not static and 'will increase as more fees and non-compliance are levied towards 1derful as a result of non-payment.'⁴
41. A necessary part of the Scheme and getting control of the Companies' business was acquiring PIL's interest as first secured creditor of the Companies. Mr Birch and Mr Seymour were working to refinance the PIL facility on the basis that a new financier would acquire PIL's debt. As part of the scheme, Fletch paid \$700,000 to take the assignment of the debt the Companies owed to PIL.
42. The parties adduced expert evidence of the value of the Companies' business. The evidence was assessed by the primary judge but ultimately rejected as the market-based assessment of a participant in the Scheme (Mr Seymour) was considered by the primary judge to be more realistic.
43. Mr Seymour, Mr Birch and Axiom all had commercial incentives to make the Scheme viable. They each held shares in the company (Fletch) that took control of the Companies' business and Axiom funded the Scheme. They each knew what was required to implement the Scheme.
44. The unchallenged evidence of Mr Seymour's contemporaneous statements, to the effect that the value of the Companies' business was not less than \$2 million, were sufficiently reliable in all the circumstances.

⁴ Blue Book, volume 5, page 2271, L-M.

C. PROVISIONS AND PRINCIPLES

45. Mr Birch was found (PJ [288]) to have engaged in statutory unconscionable conduct. The statutory concept of unconscionable conduct is more broad-ranging than the equitable principles; it does something more: see *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6; (2022) 276 CLR 1 at 26 [56]; *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; (2019) 267 CLR 1 at 37 [83], 38-39 [87]-[89], 56 [144], 102 [295]. The primary judge's \$2M Damages Assessment occurred in that context.
46. In *Carbone v Fowler Homes Pty Ltd* [2024] NSWCA 192, Leeming JA (with whom Ward P and Mitchelmore JA agreed) adopted and applied (at [94]-[96]) an earlier summary by Black J in *Sabouni v Revelop Building and Developments Pty Ltd* [2021] NSWSC 31 at [41]-[42] of some of the common law principles concerning the obligation of a court to do the best it can to make a reliable assessment of damages.
47. As Leeming JA observed (at [96]) in *Carbone*, the law draws a distinction between cases of mere difficulty in proving damages, and cases where damages are refused because the position is too speculative.
48. The primary judge below had regard to those principles (PJ [298], [320]-[325]) when making the \$2M Damages Assessment.

D. THE GROUNDS OF APPEAL AND MR BIRCH'S SUBMISSIONS

49. Mr Birch's original Notice of Appeal filed 21 March 2025⁵ relied on 6 grounds of appeal. By Amended Notice of Appeal filed 24 July 2025, Mr Birch now relies on 8 grounds of appeal.
50. Mr Birch's Outline of Submissions filed 21 July 2025 (AS) do not separately address each ground of appeal but broadly address some of the issues raised by the grounds of appeal. This outline of submissions adopts the same approach.
51. Mr Birch makes submissions (AS [13]-[19]) directed to the primary judge's observation that Mr Seymour had a 'real incentive to reach an accurate commercial valuation'. Those submissions do not address the fact that Mr Seymour participated in the Scheme and it must be assumed that he did so for commercial reasons; that he was the sole director and secretary of Fletch, and had a shareholding interest in Fletch, the entity that acquired the Companies' assets; and that he knew what was required to make the Scheme viable, including paying to take the assignment of the debt owed to PIL and paying Mastercard to resume its relationship. Those

⁵ Red Book, pages 89-95.

facts underpin the primary judge's observation that Mr Seymour had 'a real incentive to reach an accurate commercial valuation'.

52. Mr Birch makes submissions (AS [20]-[40]) to the effect that Mr Seymour was not an expert valuer and points to the difficulties and uncertainties in valuing the Companies' business. Mr Seymour did not need to be an expert to understand what made the Scheme commercially viable which, as the primary judge's unchallenged findings and the evidence before the court below demonstrate, he did. Mr Seymour knew that the Scheme would only be commercially viable if PIL's debt was acquired and the Mastercard arrangement continued; he was 'pretty confident' that Mastercard would come through (PJ [149]). Those matters required an investment of approximately \$2 million. Mr Seymour's contemporaneous statements to the effect that the value of the Companies' business was not less than \$2 million were sufficiently reliable in that context (cf PJ [323]). Mr Seymour's commercial experience, and not any special valuation expertise, was all that was required for him to make that assessment.

E. CONCLUSION

53. The primary judge was 'left with a lingering unease that I should have been more robust and adopted a higher value [than the \$2M Damages Assessment]' (PJ [323]). His Honour observed that an 'appellate court may have the opportunity to address that question' (PJ [323]).
54. Rather than assessing damages by reference to opinion or speculation about the potential increase in value of the Companies' business in the future, the primary judge assessed value by reference to a figure which reflected the minimum amount necessary to make the Scheme commercially viable. That approach reflected what those who participated in the Scheme in fact were prepared to pay for the Companies' business. It was an orthodox market valuation.
55. The appeal should be dismissed with costs.

Date: 15 August 2025



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