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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	Michael Birch,Appellant 1
Legal representative	Stefan Briggs
Legal representative reference	
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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 (06.Appellant's submissions.pdf)

[attach.]

This and the following 11 pages are the appellants written submissions for publication pursuant to paragraph 27 of Practice Note No. SC CA 1

STEFAN BRIGGS
Solicitor for Appellant.

IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
Case No. 2023/00353008

MICHAEL BIRCH

-and-

LUKE BUNBURY
& ors

OUTLINE OF SUBMISSIONS
ON BEHALF OF THE APPELLANT

Background

1. The First Respondent (Mr Bunbury) (together with his corporate vehicle the Second Respondent) set up a business to provide a financial services system using technology and a licensing arrangement through which customer businesses would be able to provide branded credit and debit cards to customers with instalment and hybrid payment options. The corporate vehicles for this venture were the Third and Fourth Respondents ("the Companies").

2. As part of the set-up funding, the Companies had incurred significant debts, including a secured debt to PI Lorica Pty Ltd ("PI Lorica"). Mr Seymour (the Second Defendant below) is a corporate advisor and had discussions with Mr Bunbury about refinancing the Companies. The primary judge found (at J[231]) that Mr Seymour had undertaken to act in the interests of the Companies in respect of their refinancing and dealing with their creditors; and that he thereby owed fiduciary duties to the Companies.

3. Fletch Capital Pty Ltd (the First Defendant below) ("Fletch") was incorporated on 22 September 2023 with Mr Seymour as its sole director. On 25 September 2023, PI Lorica assigned to Fletch all of its rights in respect of the debt owed by the Companies, including its security, for a price of $700,000 in respect of a stated loan balance of $942,326. On 27 September 2023, Fletch gave notice of the assignment to the Companies, demanded payment of the loan balance and, in default of payment, took control of the Companies' assets. On 3 October 2023, Fletch as controller purported to sell (by a Business Sale

Agreement) the assets of the Companies to Fletch for $757,273 (which took account of interest and costs) with the sale price to be adjusted following a valuation (which did not occur) to the extent to which the value of the assets exceeded that figure.[1]

4. The primary judge found that by his involvement in these events, Mr Seymour breached his fiduciary duties to the Companies (J[232]); and that, essentially on the same basis he contravened the statutory unconscionability provision in section 12CB of the ASIC Act or section 21 of the Australian Consumer Law (J[278]).

5. Mr Birch is a director of a company that is a shareholder in Fletch (J[4]). Although Mr Birch had worked on some refinancing proposals for the Companies, the primary judge held that he did not owe any fiduciary duties to the Companies (J[238]), but that his knowledge and involvement in the matters described above was sufficient to contravene section 12CB of the ASIC Act or section 21 of the Australian Consumer Law (J[288]).

The appeal

6. The primary judge made orders, which relevantly included declaring that the Business Sale Agreement was void such that the business was returned to the Companies; and entering judgment for the Companies against Fletch, Mr Seymour and Mr Birch for $2 million plus interest. By this appeal Mr Birch seeks to set aside the primary judge's assessment of damages and, consequentially, the costs order that was made against him (being orders 7 and 9).

7. As the primary judge noted, on the issue of quantum, the Companies relied upon expert valuation evidence from Mr Davies. The Companies had served a report exhibited to an affidavit from him dated 17 March 2024. Included in Mr Birch's outline of opening submissions, dated 19 September 2024, were detailed objections to the entirety of that report. This led to the Companies serving a further affidavit from Mr Davies, dated 23 September 2024.

8. On the second day of the hearing (25 September 2024) and on the objection of Mr Birch (and Mr Seymour), the primary judge rejected Mr Davies' evidence. This led to the service of a third affidavit from Mr Davies, dated 26 September 2024, with a further report attached.

9. The primary judge assessed Mr Davies' evidence (at J[40]-[44]) and concluded:

> These matters are sufficient, without more, to have the result that I could not accept Mr Davies estimated fair enterprise value of the Companies as at 31

[1] J[192]-[199]

> August 2023 in the amount of $29.7 million, or any figure of that magnitude, and I could not adjust that figure in any way that would allow it any reasonable basis.

10. Mr Birch relied upon expert valuation evidence from Mr Kompos in the form of an affidavit from him dated 3 June 2024, with a report of the same date; and a second affidavit from him, dated 30 September 2024, which responded to an affidavit from Mr Bunbury dated 18 September 2024 (which challenged certain of his assumptions) and to Mr Davies' further reports of 23 and 26 September 2024.[2]

11. The primary judge assessed Mr Kompos' evidence at J[45]-[57]:

> I have concluded that Mr Kompos' reports provide little assistance in valuing the Companies' business and are likely a less realistic valuation of that business than Mr Seymour's contemporaneous assessment of the value of the business before the transaction was implemented.

12. The primary judge then assessed damages only by reference to certain statements made by Mr Seymour that the value of the business was at least $2 million (at J[59]-[60]). It is this assessment that Mr Birch challenges.

Analysis

13. Whilst it might be said that Mr Seymour "had a real incentive to reach an accurate commercial valuation" (as the Judge found at J[60]), the same could be said of any investor or anyone attempting to raise refinance or investment funds. However, many transactions or investments are made not on the basis of an accurate commercial assessment, but rather based upon commercial risk by reference to potential up-sides. However, although current value may include some assessment of potential future up-sides, the two cannot be equated.

14. Further, whatever the incentive for forming a view as to a commercial valuation, the motive for expressing any view on value to a third party may be different.

15. In the instant case, the only statements of Mr Seymour in respect of the business value were made to CK Advisory Group Pty Ltd trading as Fifo Capital Northern Beaches ("FIFO Capital"). As the primary judge noted (at J[22] and [60]), FIFO Capital was the second ranking secured creditor of the Companies (behind PI Lorica).

16. The primary judge found that although Mr Seymour was engaged (through his company Jigsaw Works Pty Ltd) by FIFO Capital on 18 July 2023, apparently to be its investigating accountant and to keep FIFO informed of the progress of a proposed capital raising for

[2] J[54]

the Companies and to "keep [FIFO Capital] at bay whilst we complete the refinance of [PI Lorica]":[3]

> ...he had engineered such a retainer in order to promote his own and Mr Birch's interests to the disadvantage of FIFO Capital and the Companies.[4]

17. In the context of a proposed refinance of the Companies' debts or the scheme to assign the debt to Fletch, it would be important to ensure that the secured creditors did not take any enforcement action. There was therefore a real incentive to ensure that FIFO Capital was given comfort that there was sufficient value in the business such that new investors would be willing to pay sufficient to pay out at least the secured creditors. As is clear from Mr Kopp's evidence, Mr Seymour's statements as to value were made in the context of reassurances that FIFO Capital would get paid from a refinance.[5]

18. Mr Seymour's statements to Mr Kopp as to a figure of $2 million made sense in circumstances where Mr Seymour's own estimate of the secured debts at the time was $1.8 million, being $1 million to PI Lorica and $800,000 to FIFO Capital;[6] and he was outlining to Mr Kopp the plan for taking control of the Companies' assets, which included the assignment to a new vehicle (which became Fletch) and investment of $2 million into that vehicle, which would be used to pay out the existing secured creditors.[7] Indeed, it was put to Mr Seymour in cross examination:[8]

> Q. Did you tell [Mr Kopp], "The debt owing to Pi Lorica was $912,000. If the valuation comes back at two million, then there would be enough money to pay Fifo Capital."?
>
> A. That would be correct, yes.

19. Thus, whilst Mr Seymour had an incentive for talking-up the value or potential value of the business, that did not mean that his statements had to be accurate, reasonable, based upon a reasonable (or indeed any) methodology, based upon any figures, documents or calculations or even genuinely held by him. All he needed to do was reassure the second ranking secured creditor that there was sufficient value in the business to have confidence that under the transaction proposed by Mr Seymour, FIFO Capital's secured debt would be repaid after PI Lorica had been repaid.

20. Whilst Mr Seymour gave the following evidence:

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[3] J[113], [116], [226]
[4] J[29] and see also J[116], [120], [276]
[5] CB 5,915 (Blue Book, Vol1, pages 167-177) and see also J[129]
[6] CB 2,642 at 2,643 (Blue Book, Vol 2, Pages 601 - 604)
[7] J[146]-[148]
[8] T317/41-44 (Black Book, Vol 1, Page 337)

> Q. And did you tell [FIFO Capital] "Have done a back of the envelope valuation exercise and let me tell you that it is not far off what happens in the insolvency world anyway and I can't see this being worth less than two million"?
>
> A. At that point in time I thought it would be worth two million, but I'm not a valuer, but yes I did think that.[9]

he was not asked how he had made that calculation, his experience and expertise for doing so, the information and figures relied upon and his assumptions.

21. To give one example, Mr Seymour's evidence was that he understood the output that would come from the business' technology stack, but that he did not understand any of the IT behind it:[10]

> Q. You had discussions with Mr Bunbury about the way in which the technology stack worked?
>
> A. No.
>
> Q. You never discussed
>
> A. Not once.
>
> Q. So just let me understand this, you were going to get your business, Australian - the name of your business?
>
> A. Sports Finance.
>
> Q. Australian Sports Finance involved with 1derful, was that to use the technology stack?
>
> A. It was to use the outputs of the technology stack. I, I don't, I'm not an IT guy, I don't know anything about IT. So no, I don't know anything about IT; I wouldn't have had the conversation because I don't - it means nothing to me.

22. Further, whilst Mr Seymour's affidavit records experience as a management consultant and corporate advisor,[11] there is no relevant valuation expertise (either through qualification or experience and let alone in respect of start-up technology businesses) and none was suggested to him in cross examination.[12] A conclusion that Mr Seymour was "a sophisticated participant in the transaction" was insufficient to establish his expertise in valuation (let alone of a start-up technology business); and even the conclusion that he "had a real incentive to reach an accurate commercial valuation" (addressed above on its merits) did not mean that he had the expertise to do so or that he had in fact done so.[13]

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[9] T318/21-25 (Black Book, Vol 1, Page 338)
[10] T322/31-46 (Black books, Vol 1, Page 342
[11] CB 1,646 at [13] (Blue Book, Vol 1, Page 68 at 72)
[12] Cf for instance T321/45 322/14 (Black Book, Vol 1, Page 341-342)
[13] Cf J[60]

23. Whilst any valuation raises potentially difficult issues for even qualified valuers (as indicated by the fact that the primary judge rejected the evidence of both expert valuers), here there were the added complexities arising from this being a start-up venture (as the primary judge recognised at J[58]).

24. Further, in addition to the complexities of a start-up business and one in the technology space with little in the way of physical assets that can be valued, there were particular issues in relation to these Companies.

25. First, as was apparent from the Companies' marketing material,[14] the services provided by Mastercard were at the core of the product to be offered by the Companies.[15] As was apparent from the objective documentary evidence, in particular the Mastercard breach notice,[16] the Companies had been operating in breach of their obligations to Mastercard for some time (and at least from February 2023); Mastercard had made numerous attempts and engaged in numerous discussions with the Companies to resolve the situation, but they had failed to rectify the situation (and indeed had given reassurances that payment would be met, which had not been kept);[17] and on 25 May 2023, at which time $871,000 was owing by the Companies, Mastercard served a breach notice, noting its right to terminate 1derful's membership immediately.

26. By that notice, Mastercard required an urgent resolution of outstanding payment and a written response by 26 May 2023. It is clear, however, that this was not forthcoming and hence on 31 July 2023, Mastercard issued a suspension notice.[18] This required an immediate payment, but also set out further requirements in an attachment ("Attachment") to be met in timeframes varying between immediate and 60 days. Apart from a formal acknowledgement from the Companies[19] and confirmation that the Mastercard service was not available during the suspension,[20] it is clear that there was no response from the Companies for the next 6 weeks, which Mr Martin at Mastercard was clearly unhappy about;[21] and there had been no payment or addressing of the other issues in the Attachment by the time Fletch took control of the business[22] (see also as discussed at J[18]-[19]).

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[14] CB 468, 509, 744 (Blue Book, Vol 3, Page 1151 - 1174, 1175 - 1191 and 1215 - 1257)
[15] See also T114/20-28, T118/31-33, T130/48 (Black Book, Vol 1, Pages 134, 138 and 150
[16] Ex 3D/1
[17] T128/16-129/14 (Black Book, Vol 1, Page 148)
[18] CB 5,692-5,697
[19] Ex 3D/3 p.8
[20] Ex 3D/2
[21] Ex 3D/3 p.6
[22] CB 2,797

27. Secondly, PI Lorica had served a breach notice on 4 May 2023[23] and appointed an independent accountant on 5 June 2023[24] to protect its interests, but it was still pressing for payment as late as 23 August 2023 in the light of the Companies' default.[25]

28. Thirdly, applications had been made to wind up 1derful Pty Ltd on 7 December 2022 and again on 24 April 2023.[26] The winding up proceedings commenced by ThinkGrow Pty Ltd in April 2023 required first payment of about $138,000 to ThinkGrow Pty Ltd and $48,000 to a supporting creditor, QuadIQ Pty Ltd.[27] This was achieved by the refinance of Mr Bunbury's Porsche and an assignment to Hennessy Capital Partners Pty Ltd of at least the debt to ThinkGrow.[28] That left payment or an arrangement to be made with Techwondoe Ltd, which had also served a statutory demand.[29] The winding up proceedings remained on foot at the time of the assignment of PI Lorica's debt to Fletch and were not dismissed until 27 September 2023, by which time Techwondoe Ltd had become the applicant seeking the winding up.[30] On any view, the Companies' financial position was precarious.[31]

29. Whilst the primary judge concluded that "[Mr Seymour's] $2 million figure likely reflected an implicit assessment of the prospect that the renewal of the MasterCard Agreement could be achieved, and recognised that value would be increased (as the conversation with Mr Kopp indicated) when and if that was achieved":

    a. that had not been put to Mr Seymour;

    b. there was no evidence that Mr Seymour had made any assessment of the prospect of the MasterCard agreement being reinstated, let alone the facts, information and assumptions upon which that assessment was based and whether it was in fact accurate;

    c. there was no evidence as to whether Mr Seymour's figure took into account the parlous position of the Companies, including the position of PI Lorica and the other creditors and the then current winding up proceedings; and, if so, the facts, information and assumptions upon which that assessment was based and whether it was in fact accurate.

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[23] CB 1,706 (Blue Book, Vol 6, Page 2963 - 2964)
[24] CB 1,708 (Blue Book, Vol 6, Page 2965- 2966)
[25] T202/43 (Black Book, Vol1 Page 222) and CB 2,617 [26] CB 109 and Ex 3D/6 [27] T192/1-6 (Black Book, Vol1 Page 212) and CB 48 [28] CB 2,078
[29] T194/9 (Black Book, Vol 1, Page 214)
[30] Ex 3D/6
[31] CB 2,643

30. For instance, although Mr Seymour accepted the self-evident proposition that the value of the business would increase if Mastercard "turns the agreement back on",[32] he had no knowledge of the conditions that needed to be met for that to occur and therefore could not even begin to form any assessment (let alone an accurate assessment) of the prospect of that occurring:[33]

> Q. I'll break that down. Did you say to [Mr Kopp] that the Mastercard agreement, if it assists, had been suspended, was still worth something in effect?
>
> A. The ability to talk to Mastercard was worth something, but it wasn't just paying the money to turn Mastercard back on, there were a whole series of conditions.
>
> Q. Did you understand those conditions?
>
> A. No, I didn't have any knowledge of them until Mr Bunbury produced documents for this proceeding I think earlier this week, or last week.

31. This was in circumstances where Mr Davies accepted that in assessing the value of the Companies, it would be relevant to consider:

    a. the circumstances of the suspension of the Mastercard agreement, including in particular the duration of the suspension and the fact that there were other requirements to be met for it to be reinstated beyond the simple payment of money;[34]

    b. that there were winding up proceedings that had been on foot since April 2023 which were still current as at the valuation date;[35]

    c. that 1derful was in breach of its finance facility;[36]

    d. the debt position of 1derful and in particular its ability to raise capital, the attitude of the creditors and the possibility that it might not be able to survive.[37]

32. Thus, the position was that:

    a. there was no evidence that Mr Seymour had any relevant expertise in valuation, let alone in valuing start-up technology businesses;

    b. there was no evidence of any facts, information or assumptions relied upon by Mr Seymour;

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[32] T317/47-49 (Black Book, Vol1 Page 337)
[33] T319/3-11 (Black Book, Vol1 Page 339)
[34] T440/15-21, T441/1-4, T441/32-442/3, T456/24-29
Black Book, Vol 2 Page 480,481 and 496)
[35] T443/7-13 (Black Book, Vol1 2 Page 483)
[36] T443/15-21 (Black Book, Vol1 2 Page 483)
[37] T443/23-444/36 (Black Book, Vol1 2 Page 483)

c. whilst there was evidence that Mr Seymour had performed a "back of the envelope" calculation, there was no evidence as to what he meant by that and this was not explored further;

d. there were factual matters relevant to any valuation of the Companies and it was not established whether these had been taken into account by Mr Seymour; and if so, to what extent and whether this was factually correct;

e. the statements were made to the second ranking of two secured creditors in the context where the secured debts totalled about $1.75 million and Mr Seymour wanted to reassure FIFO Capital (the second ranking) that there would be sufficient money from the proposed transaction to pay out those creditors;

f. the experts who gave evidence as to value were both rejected;

g. there was no evidence as to the appropriate valuation methodology for the Companies and whether this had been adopted by Mr Seymour;

h. the Plaintiffs had served evidence from Mr Davies and had not suggested that they intended to rely upon Mr Seymour's statements in order to establish their quantum case (and they did not open on that basis);

i. the Plaintiffs in fact led evidence from Mr Davies and cross examined Mr Kompos on his evidence;

j. Fletch's purchase price for the business was subject to adjustment following a formal valuation.

33. The primary judge noted (at J[321]) that mere difficulty or uncertainty in the assessment of damages does not relieve the Court from the responsibility of attempting to assess those damages as best it can (see for instance *Commonwealth v Amann Aviation Pty Ltd*[38] and *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd).*[39]

34. However, damages must be proved with a degree of precision which reflects the proof reasonably available to the parties: *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd.*[40] The primary judge at J[322] cited *Troulis v Vamvoukakis*, in which the relevant passage is as follows (in the context of the valuation of the goodwill of a business but of general application):[41]

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[38] (1991) 174 CLR 64 at 83 (per Mason CJ and Dawson J)
[39] (1938) 61 CLR 286 at 301 (per Latham CJ)
[40] (2003) 77 ALJR 768 at [38] (per Hayne J, Gleeson CJ, McHugh and Kirby JJ agreeing).
[41] [1998] NSWCA 237 at [14] (per Gleeson CJ, Mason P and Stein JA agreeing).

> Where, however, what is involved is the valuation of the goodwill of a business, and the plaintiff fails to adduce either reliable evidence of the trading results of the business, or evidence as to how one goes about valuing such a business, then there is an absence of the raw material to which good sense may be applied. Justice does not dictate that, in such a case, a figure should be plucked out of the air.

35. Further:

> All evidence is to be weighed according to the proof which was in the power of one side to have produced, and in the power of the other to have contradicted.[42]

36. In the instant case, the Companies adduced insufficient (and indeed no) reliable evidence as to:

    a. the raw material from which a reliable valuation could be derived;

    b. the appropriate valuation methodology;

    c. any value calculated by applying the methodology in (b) to the material in (a).

37. Given these deficiencies and contrary to the finding of the primary judge,[43] there was no rational basis for assessing damages by reference to Mr Seymour's statements.

38. Although any start-up faces a difficulty in predicting accurately its future performance (as noted by the primary judge at [323]), the Companies had been active in the start-up phase for some time and indeed had made some sales. There was therefore some information available to the Companies and to anyone carrying out a valuation (although it was not established the extent to which, if at all, it was made available or relied upon by Mr Seymour) and Mr Davies purported to carry out a valuation and did not suggest any difficulty in doing so.

39. Further, as the primary judge recorded at J[58], there is literature in relation to the valuation of start-up businesses, but the Companies' evidence did not seek to apply any such methodology.

40. The real difficulty for the Companies was that any evidence of value rested upon the opinion of Mr Davies (or whatever they could make out of Mr Kompos' evidence), but neither expert was accepted. It was then not appropriate simply to accept statements made by Mr Seymour (made in the context set out above) as being a reliable estimate of the value of these Companies.

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[42] *Blatch v Archer* (1774) 1 Cowp 63 at 65
[43] At J[322]

41. Finally, it should be noted that the statements upon which the primary judge relied were made by Mr Seymour and applied in entering judgment against Mr Birch. Not only the could such statements not be taken as admissions by Mr Birch (as the primary judge recognised at J[60]), but to the extent to which there may be a more flexible approach to cases involving a defaulting fiduciary, that cannot apply here in respect of Mr Birch since the primary judge accepted that he did not owe fiduciary duties.

42. As the primary judge himself noted in *Pages Property Investments Pty Ltd v Boros* [2020] NSWSC 1270 at [196]:

> In *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275 at 319, Pincus J noted that "if the evidence called on behalf of [the plaintiff] fails to provide any rational foundation for a proper estimate of damages, the Court should simply decline to make one".

43. That ought to have been the result here and the appeal must succeed on that basis.

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11 July 2025