Court of Appeal
Supreme Court

New South Wales

Case Name:	Fayad v B & G Properties Pty Ltd
Medium Neutral Citation:	[2022] NSWCA 129
Hearing Date(s):	18 July 2022
Decision Date:	22 July 2022
Before:	Bell CJ at [1]; Leeming JA at [2]; Basten AJA at [41].
Decision:	Appeal dismissed with costs.
Catchwords:	CONTRACTS – construction – loan agreement – construction of clause imposing default interest – whether interest accrued only on outstanding principal, or entire indebtedness – whether default interest unenforceable as penalty
Cases Cited:	A F C Holdings Pty Ltd v Shiprock Holdings Pty Ltd [2010] NSWSC 985 Andrews v Australia and New Zealand Banking Group Ltd (2012) 247 CLR 205; [2012] HCA 30 Ankar Pty Ltd v National Westminster Finance (Australia) Ltd (1987) 162 CLR 549; [1987] HCA 15 Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd [1999] 1 AC 266 Central Coast Council v Norcross Pictorial Calendars Pty Ltd [2021] NSWCA 75 Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79 Kay v Playup Australia Pty Ltd [2020] NSWCA 33 Vauxhall Motors Ltd (formerly General Motors UK Ltd) v Manchester Ship Canal Co Ltd [2020] AC 1161; [2019] UKSC 46 XL Insurance Co SE v BNY Trust Company of Australia

	Ltd [2019] NSWCA 215
Texts Cited:	D McLauchlan, “The lingering confusion and uncertainty in the law of contract interpretation” [2015] LMCLQ 406
Category:	Principal judgment
Parties:	Sam Fayad (Appellant) B & G Properties Pty Ltd (Respondent)
Representation:	Counsel: S J Stanton (Appellant) S Mirzabegian SC; D T Wong (Respondent) Solicitors: Madison Marcus Law Firm (Appellant) Gilbert + Tobin (Respondent)
File Number(s):	2021/337207
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity – Commercial List
Citation:	[2021] NSWSC 1382
Date of Decision:	01 November 2021
Before:	Ball J
File Number(s):	2021/102379

[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.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The appellant, Mr Sam Fayad, was the guarantor of a $4 million loan by the respondent, B & G Properties Pty Ltd, to his company, NR Developers Pty Ltd. The money was advanced pursuant to a written agreement dated 16 February 2015 which provided for repayment of the principal after 6 months, plus interest at a rate of 25% pa. The interest component was to be paid in two instalments of $250,000. Clause 4 provided in part that “Default fees and charges will be at the rate of thirty (30%) per centum of the advance per annum or part thereof.”

It was common ground that no repayment of the principal sum was made. Payments of some interest were made. By Deed of Variation in July 2018 and Deed of Further Variation in November 2018, the Final Repayment Date was amended to 15 November then 15 December 2018. The outstanding “fees and charges” were ultimately specified at $1,483,333. Clause 4 was not amended.

The issues on appeal were (i) whether the default rate of interest applied only to unpaid amounts of principal, or extended to unpaid amounts of interest; and (ii) whether the default rate of interest was an unenforceable penalty.

The Court held, dismissing the appeal:

As to issue (i), per Leeming JA (Bell CJ and Basten AJA agreeing):

1. There is no textual basis for reading the balance of cl 4 as confined to the obligation to repay principal, as opposed to the obligation to pay other amounts under the agreement: at [26]. In circumstances where Mr Fayad accepted that the ordinary 25% rate applied to amounts owing other than unrepaid principal, there is no sound commercial reason for applying different rates of interest on the same debt from the same lender to the same borrower which is in default: at [27]-[28]. The default rate of 30% applied to the whole of the sum outstanding at 15 December 2018, until paid: at [1], [29]-[31], [44].

As to issue (ii), per Leeming JA (Bell CJ and Basten AJA agreeing):

2. In circumstances where no challenge was made to the 25% per annum rate for short term lending for the purposes of property development, the increase from 25% to 30% was a modest increase; the default rate was not penal: at [1], [36]-[37], [45].

JUDGMENT

1 **BELL CJ**: For the reasons given with customary clarity by Leeming JA, I agree that this appeal must be dismissed with costs.

2 **LEEMING JA**: Mr Sam Fayad appeals from a judgment in the amount of $9,978,620.39 entered in favour of B & G Properties Pty Ltd. Mr Fayad was the sole director and shareholder of NR Developers Pty Ltd. That company borrowed $4,000,000 from B & G Properties pursuant to a written agreement. It is common ground that it failed to repay all that it owed. Mr Fayad was sued as the guarantor of the borrower's obligations.

3 Although there was a two day hearing in the Commercial List involving cross-examination of Mr Fayad and Mr Michael Simon Peter Barakat, the principal of B & G Properties, the issues on appeal are much narrower. The first is a question of construction as to the calculation of interest, which was payable at the rate of 25% per annum with a default rate of 30% per annum. The issue is whether the default rate of interest applies only to unpaid amounts of principal, or extends to unpaid amounts of interest. The second is whether the default rate of interest is an unenforceable penalty.

Factual background

4 By a so-called "Deed of Agreement" dated 16 February 2015 between B & G Properties, NR Developers and Mr Fayad, B & G Properties agreed to advance $4 million to NR Developers, the repayment of which was guaranteed by Mr Fayad. Apart from its title, the document is otherwise styled an "agreement", and was executed as a simple contract. Nothing turns on this save to illustrate that the drafting is replete with imprecision.

5 The recital to the Deed of Agreement provides (the underlining below and in subsequent quotations is in the original document):

> "WHEREAS B & G has at the request of NR Developers advanced to NR Developers the sum of four million dollars ($4,000,000.00), hereinafter referred to as 'the advance', repayable together with interest, fees, charges and other amounts in the manner hereinafter provided AND WHEREAS the parties wish to acknowledge the loan and record in writing the terms and conditions thereof."

6 Clause 1 of the Deed of Agreement stated:

> "The parties hereby acknowledge that B & G did on the date of this Agreement agree to provide to NR Developers the advance repayable by NR Developers to B & G at the place and in the manner set forth in the First Schedule hereto. B & G has the right to change, by notice in writing to NR Developers, the place and manner of repayment."

7 The First Schedule was in these terms:

> "*Place and Manner of Repayment of Loan*
>
> **Place & Manner of repayment**: As directed B & G
>
> **Loan repayment amount**: Four million dollars ($4,000,000.00) plus any due fees and charges payable at the end of the term of the advance
>
> **Term of the Advance**: Six (6) months from the date of this Deed of Agreement"

8 Clauses 2 and 3 were in the following terms:

> "2. NR Developers shall be liable to pay B & G fees and charges at the rate of twenty-five (25%) per centum of the advance per annum or part thereof to be paid in two instalments as stipulated and in the manner set forth in the Second Schedule hereto.
>
> 3. That whilst all or any of the monies comprising the advance are outstanding to B & G NR Developers will pay fees and charges thereon in the manner set forth in the Second Schedule hereto."

9 The references in cll 2 and 3 to the "Second Schedule" were obvious mistakes and should have been references to the Third Schedule which provided as follows:

> "*Fees & Charges, Calculations and Payments*
>
> **Fes** [sic] **& Charges rate**: Twenty-five (25%) per centum per annum
>
> **Frequency and timing**: In two (2) instalments as follows:-
>
> (a) The sum of $250,000.00 on or before the 1 May 2015; and
>
> (b) The sum of $250,000.00 on or before 1 August 2015."

10 It will be seen that the interest rate of 25% on a principal of $4 million equated to $1 million per annum, which for the six month term of the loan was treated as amounting to two payments of $250,000 to be made on 1 May and 1 August 2015.

11 The critical clause for the issue of construction is cl 4:

> "4. Default fees and charges applies to any payment pursuant to this agreement that NR Developers has not made by the due date for that payment and applies from that due date until that payment is made. The Default fee and charges also applies to any and all sums owing at the time of any other default by NR Developers and applies from the date of that default. The Default fees

> and charges will be at the rate of thirty (30%) per centum of the advance per annum or part thereof."

12 The clause fell to be construed in light of a history of default and two deeds entered into by the parties which varied other provisions but not cl 4.

13 A payment of $250,000 was made on 18 May 2015 and another payment of $100,000 on 15 August 2015. No other payments of interest or principal were made in the six month period which was the original term of the loan.

14 Further payments of $2 million were made in 2016 and (so it seems) 2017. The pleading alleged that payments totalling $500,000 were made in June and September 2016, with a further payment of $1,500,000 on 20 December 2016. Although that was admitted, Mr Barakat's affidavit stated that the latter payment was made in November 2017. The hearing in this Court proceeded on the basis that the entirety of the payments represented repayments of interest, which would be the case if the latter payment were made in 2017, but it problematic if it were made in 2016. But in light of the deeds subsequently entered into in 2018, nothing turns on this and it is unnecessary to take the point any further.

15 On or around 19 July 2018, the parties entered into a Deed of Variation which amended the First Schedule so that the Final Repayment Date became 15 November 2018. It also amended the Third Schedule so that it provided:

> "*Fees & Charges, Calculations and Payments*
>
> **Fees & Charges rate**: Twenty-five (25%) per centum per annum in the total amount of $3,750,000.00 for the period from 16 February 2015 to the Final Repayment Date.
>
> **Payment of fees and charges**: B & G acknowledges receipt of the amount of $2,350,000.00 on account of the above fees and charges.
>
> On the Final Repayment Date, NR Developers must pay the amount of $1,400,000.00 in payment of the outstanding fees and charges."

16 On 14 November, the day before the amended obligation to repay principal of $4,000,000 plus $1,400,000 in outstanding fees and charges fell due, the parties entered into a Deed of Further Variation. That Deed amended the Final Repayment Date so that it became 15 December 2018, and amended the Third Schedule so as to read as follows:

> "*Fees & Charges, Calculations and Payments*

> **Fees & Charges rate**: Twenty-five (25%) per centum per annum in the total amount of [$]3,833,333.00 for the period from 16 February 2015 to the Final Repayment Date.
>
> **Payment of fees and charges**: B & G acknowledges receipt of the amount of $2,350,000.00 on account of the above fees and charges.
>
> On the Final Repayment Date, NR Developers must pay the amount of $1,483,333.00 in payment of the outstanding fees and charges."

17 No subsequent amounts were repaid, save for $300,000 in around December 2019. Demands were made on the borrower and upon the guarantor. B & G Properties sued Mr Fayad in debt in 2021.

18 It will be seen that the amendments in the Deed of Variation and Deed of Further Variation proceeded on the basis that interest was accruing on the unpaid principal at an amount of $250,000 per quarter (or $83,333 per month).

(1) The obligation to pay $1.4 million on 15 November 2018 (being the extended "Final Repayment Date" as provided by the first Deed of Variation) reflected 3.75 years of interest on $4 million at 25%, allowing for $2.35 million of repayments.

(2) The obligation to repay $1,483,333 on 15 December 2018 (being the further extended "Final Repayment Date" brought about by the Deed of Further Variation), reflected an additional $83,333 of interest ($4 million x 25% x 1/12).

Reasons of the primary judge

19 After 15 December 2018, NR Developers was in breach. It was obliged to repay the $4,000,000 principal and $1,483,333 in "outstanding fees and charges". The issue raised at trial was how cl 4 applied to those obligations. B & G Properties submitted that the default rate of 30% per annum applied to the entire indebtedness of $5,483,333, with interest compounding annually. Mr Fayad submitted that the default rate was an unenforceable penalty, and that if it were not, it only applied to the outstanding principal of $4,000,000.

20 The primary judge held that cl 4 imposed the default rate of 30% upon all outstanding indebtedness, not merely the $4,000,000 unpaid principal, but that the contract did not impose compound interest. His Honour also held that the default interest rate was not a penalty.

21 Each conclusion adverse to Mr Fayad is challenged, and while there were four grounds of appeal, grounds 1 and 3 as formulated were scarcely pressed and the substance of the appeal amounts to a challenge to each of the propositions

identified above. It will be convenient to summarise aspects of his Honour's reasoning when addressing Mr Fayad's submissions in support of the appeal.

The construction of cl 4

22 As the primary judge stated, and as was common ground both at first instance in this Court, cl 4 is inelegantly drafted, as is much of the balance of the document. That does not absolve courts from identifying its legal meaning.

23 There was no dispute as to the applicable principles. The primary judge noted what Bathurst CJ had said, by reference to High Court authority, in *Central Coast Council v Norcross Pictorial Calendars Pty Ltd* [2021] NSWCA 75 at [55]:

> "The contract is to be construed by what a reasonable business person would understand it to mean. That requires consideration of the language used by the parties, the surrounding circumstances known to them, and the commercial purpose or objects to be secured by the contract."

24 The primary judge added that contracts are to be construed to avoid absurdity and will generally seek to give all the words of a contract some operation. Each principle is qualified and subject to limitations, making them no different from most other principles of contractual construction. Although advocates not infrequently invoke absurdity, it is important not to conflate what is merely unexpected or disadvantageous with what is absurd. Professor McLauchlan has said that "distinguishing between an unduly favourable bargain and a commercially absurd bargain that was not intended is no easy task": D McLauchlan, "The lingering confusion and uncertainty in the law of contract interpretation" [2015] *LMCLQ* 406 at 436.

25 Secondly, as Lord Hoffmann observed in this context in *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 at 274, "people often use superfluous words", such that "the argument from redundancy is seldom an entirely secure one". The primary judge's careful use of the word "generally" picks up the nuance and qualifications in his Honour's statement of principle in *A F C Holdings Pty Ltd v Shiprock Holdings Pty Ltd* [2010] NSWSC 985 at [13], itself endorsed in this Court in *XL Insurance Co SE v BNY Trust Company of Australia Ltd* [2019] NSWCA 215 at [72]:

> "The general principle is that the words of a contract should be interpreted in a way which gives them an effect rather than a way in which makes them redundant: *North v Marina* [2003] NSWSC 64 at [45]; *Davuro Pty Ltd v Wilkins* [2000] FCA 1902, (2000) 105 FCR 476 at [152], [230]. That principle does not operate as an invariable rule. In some cases, it may be appropriate to interpret words in a way that makes them redundant. That may be appropriate where the alternative construction of the words is inconsistent with other provisions of the contract or where the alternative construction is inconsistent with the commercial purpose of the contract or where it appears that the words have been included out of abundant caution: see *Re Strand Music Hall Co Ltd; Ex parte European and American Finance Co Ltd* (1865) 35 Beav 153 at 159; 55 ER 853 at 856 per Sir John Romilly MR; *Dryden Construction Co Ltd v New Zealand Insurance Co Ltd* [1959] NZLR 1336; *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1998] UKHL 19; [1999] 1 AC 266 at 273-4 per Lord Hoffmann."

26 Mr Fayad emphasised the third sentence of cl 4 and the definition of "the advance" in the recital and cl 1 and submitted that the default interest rate only applied to the $4 million, and not the other fees and charges. The difficulty with that submission, which was well appreciated by the primary judge, is its inconsistency with the emphatically general language in the first and second sentences. The first sentence states the default fees and charges apply to "any" payment which the borrower has not made by the due date. The second sentence provides that default fees and charges also apply to "any and all sums" owing at the time of any other default. There is no textual basis for reading either of those sentences as confined to the obligation to repay principal, as opposed to the obligation to pay other amounts under the Deed of Agreement.

27 Mr Fayad also accepted that the ordinary interest rate of 25% per annum applied to amounts owing other than unrepaid principal. The submission prima facie amounts to an acknowledgment that the unpaid amounts fell within the meaning of the word "the advance" in cl 2, inconsistently with the restricted meaning sought to be given to that term in the third sentence of cl 4.

28 That acceptance carries with it another unlikely consequence. On Mr Fayad's construction, interest accrued after 15 December 2018 on the outstanding principal of $4,000,000 at the rate of 30%, and on the outstanding fees and charges of $3,833,333 at 25%. There is no sound commercial reason for applying different rates of interest on the same debt from the same lender to the same borrower which is in default. Another possibility, mentioned in

argument, is that no interest accrued on the $3,833,333 while the default rate of 30% accrued on the $4,000,000. Once again, there is no sound commercial reason for such an outcome.

29 Thus text and commercial purpose point in the same direction, contrary to the construction for which Mr Fayad contends.

30 I do not accept Mr Fayad's submission that merely because the clause is poorly drafted, all ambiguities must be resolved in his favour. True it is that the terms of a guarantee will be construed strictly with ambiguities resolved in favour of the guarantor: *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 561; [1987] HCA 15. But that principle has no application to the construction of cl 4. The parties agreed upon two rates of interests, 25% and 30%, the latter applicable in cases of default. How the rate is applied to outstanding indebtedness is merely a matter of construction.

31 The foregoing amounts in substance to the reasoning of the primary judge, save that I have been unable to be as concise as his Honour. As has been noted, the primary judge also held that cl 4 did not impliedly require interest to be compounded annually. His Honour explained why at [24]-[27], to which no challenge was made.

32 Grounds 3 and 4 are not made out.

Is the interest rate a penalty?

33 There was no challenge to the statement of principle by the primary judge at [28]-[29]:

> "A contractual stipulation the essence of which is to punish the other party for a breach of contract will be unenforceable as a penalty: see *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 (*Paciocco*); *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* (2016) 93 NSWLR 231 (Arab Bank). The impugned stipulation must solely (*Paciocco* at para [166] per Gageler J) or predominantly (ibid at para [221] per Keane J) be punitive in nature. The question whether a contractual stipulation is penal in nature directs attention to whether the sum stipulated is extravagant and unconscionable (see *Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd* [1915] AC 79 at 87 per Lord Dunedin; *Paciocco* at para [29] per Kiefel J; *Arab Bank* at para [74] per McDougall J (citations omitted)). The party who impugns a contractual stipulation as a penalty bears the evidentiary and persuasive onus of proving that that stipulation meets the

> relevant requirements: see *Paciocco* at para [167] per Gageler J; Arab Bank at para [75] per McDougall J). Whether a contractual stipulation for the payment of a sum of money on breach of contract is so extravagant and unconscionable as to amount to a penalty is to be judged by reference to the circumstances that existed at the time the contract was made: see *Paciocco* at para [62] per Kiefel J, para [169] per Gageler J; *Arab Bank* at para [74] per McDougall J. See also *Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd; Guan v Linfield Developments Pty Ltd* [2017] NSWCA 99 at [329]–[330] per Ward JA).
>
> The penalty doctrine operates as an exception to freedom of contract: see *Arab Bank* at [105] per McDougall J). Accordingly, when applying the doctrine, 'courts will not lightly invalidate a contractual provision for an agreed payment on the ground that it has the character of a punishment' (*Paciocco* at para [220] per Keane J)."

34 No challenge was made to the 25% per annum rate. Mr Fayad maintained that the default rate, of 30% per annum, was a penalty. He said that it was imposed "in terrorem" in the sense deployed in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 and explained in *Kay v Playup Australia Pty Ltd* [2020] NSWCA 33 at [94]. He was pressed to articulate precisely why that was so:

> "BELL CJ: But in relation to what aspect of the principles do you say his Honour has erred?
>
> STANTON: That it was, on its face, for a sum, in the quantum sought, unconscionable and that, as it applied in terms of how it was compounded, it was equally and further unconscionable in terms of being derived and, more importantly, applied in terrorem of the amount sought to be secured. That's effectively what we say and we say that--
>
> BELL CJ: Does that boil down to you saying it was unconscionable?
>
> STANTON: Correct, yes.
>
> BELL CJ: What made the modest increase of 5%--
>
> STANTON: In terms of how it was compounded, your Honour, that's how we say. That's effectively our argument."

35 Counsel's inability to articulate any details to support the conclusion that the default rate was a penalty reflects the fact that this is a clear case. Although mention was made of the effect of compound interest, the primary judge held that interest was *not* calculated on interest accruing after 15 December 2018, and there is no cross-appeal.

36 What matters as a matter of substance – and the Australian law of penalties after *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; [2012] HCA 30 is unquestionably concerned with substance, not

form – is the extent of an increase in interest rate in the event of default. The mere fact that the increase is 5% per annum is not of itself especially informative. Residential borrowers whose interest rate increases from 3% per annum to 8% per annum are apt to find that their repayments in the early stages of a loan will more than double. On the other hand, as B & G Properties pointed out, the increase from 25% to 30% per annum was a relative increase of one fifth. That is a modest increase.

37 There was evidence that Mr Barakat had in 2014 (shortly before causing his company to lend to Mr Fayad's company) "realised a return of approximately 110% on an investment in respect of a property development in Brisbane over the life of that investment, being approximately four years". Mr Barakat said that he was seeking to reinvest those funds at the time. There was also evidence that both Messrs Fayad and Barakat were experienced property developers. No issue was taken about the 25% per annum rate for short term (6 months) lending for the purposes of property development. All of these considerations support the primary judge's conclusion that the default rate was not penal.

38 At various points in oral submissions Mr Fayad contended in the alternative that the interest rate amounted to a forfeiture. This submission appeared to rely on the relaxation seen in *Vauxhall Motors Ltd (formerly General Motors UK Ltd) v Manchester Ship Canal Co Ltd* [2020] AC 1161; [2019] UKSC 46, but even so, Mr Fayad was unable to point to any contractual right which was forfeited. It may be added that this submission is outside the scope of the appeal and had not been pleaded at trial.

39 These grounds are not made out.

Orders

40 For those reasons the appeal should be dismissed. There is no reason for costs not to follow the event.

41 **BASTEN AJA**: I agree with Leeming JA that the appeal in this matter should be dismissed with costs.

42 As explained by Leeming JA, the original Deed of Agreement entered into on 16 February 2015 was for a loan of $4 million (the advance) to a company, for a period of six months. Interest was payable at the rate of 25% of the advance per annum, in two instalments. The appellant is responsible under a guarantee of the company's obligations.

43 On 19 July 2018, a Deed of Variation was executed which extended the date of repayment to 15 November 2018. On 14 November 2018, a further Deed of Agreement was executed which extended the final repayment date by a further month to 15 December 2018. The second Deed of Variation identified the amount payable by way of "fees and charges", calculated at 25% of the advance, as an amount of $3,833,333. The Deed acknowledged a payment of $2,350,000, so that the amount due on the final repayment date by way of fees and charges was the outstanding amount of $1,483,333. It was common ground that none of the advance of $4 million had been repaid.

44 The first question concerned the calculation of interest payable on the amount due on 15 December 2018 which remained unpaid thereafter. There were competing constructions of cl 4 of the Deed (set out at [11 _Ref109221308] above), namely that interest ran at the rate of 30% on the whole of the amount outstanding (the respondent's case) or that it ran at 30% on the amount of the advance and at 25% on the outstanding fees and charges (the appellant's case). The trial judge, Ball J, concluded that there was no provision for the compounding of interest from the final payment date: the calculation was limited to simple interest. As between the competing rates, the proper construction of cl 4 was, as concluded by Ball J and affirmed by Leeming JA, that the default rate of 30% applied to the whole of the sum outstanding at 15 December 2018, until paid.

45 The second question was whether that default rate of payment constituted a penalty. For the reasons given by Ball J and Leeming JA, it patently did not.

ADDENDUM

THE COURT: By motion filed within the period specified by UCPR r 36.16, the respondent applied to vary the order by adding the words ", such costs to be assessed on an indemnity basis". There was no opposition to that order, which

reflected the terms of the parties' agreement. A similar order had been made at first instance and was not subject of any appeal. Accordingly, on 2 September 2022 this Court varied the order made on 22 July 2022 so that it provides "Appeal dismissed with costs, such costs to be assessed on an indemnity basis."

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Amendments

02 September 2022 - Addendum added