

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : LOVE -v- BRIEN [2013] WASCA 280

CORAM : BUSS JA
NEWNES JA
MURPHY JA

HEARD : 3 SEPTEMBER 2013

DELIVERED : 5 DECEMBER 2013

FILE NO/S : CACV 142 of 2012

BETWEEN : ROSS MAITLAND LOVE
Appellant

AND

DANNY LLOYD BRIEN
Respondent

ON APPEAL FROM:

Jurisdiction : SUPREME COURT OF WESTERN AUSTRALIA

Coram : BEECH J

Citation : LOVE -v- BRIEN [2012] WASC 457

File No : CIV 2026 of 2012

Catchwords:

Contract - Illegality - Whether contract was illegal and void by reason of

contravention of s 136(1)(c) of the *Planning and Development Act 2005* (WA) - Penalty - Whether provision for payment of a sum in the event that a lot was not retransferred to the seller was void as a penalty - Turns on own facts

Legislation:

Planning and Development Act 2005 (WA), s 136(1)(c), s 136(2), s 140(1)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant : Mr A Metaxas
Respondent : Mr J C Yeldon

Solicitors:

Appellant : Metaxas & Hager
Respondent : Cullen Babington Macleod

Case(s) referred to in judgment(s):

Love v Brien [2012] WASC 457

O'Keefe v Williams [1910] HCA 40; (1910) 11 CLR 171

Peters (WA) Ltd v Petersville Ltd [2001] HCA 45; (2001) 205 CLR 126

1 **BUSS JA:** In June 2007, the appellant as purchaser and the respondent as
vendor executed an option agreement by which the respondent granted the
appellant an option to purchase about 40,000 sqm of land, zoned rural, in
Wangara.

2 On 5 July 2007, the appellant exercised the option to purchase the land.

3 In 2012, the appellant brought an action in the Supreme Court claiming
declaratory and other relief against the respondent; in particular, declarations
that various provisions of the contract for the sale and purchase of the land
were void for illegality, uncertainty or as a penalty. The respondent
counterclaimed payment of the sum of \$500,000.

4 The primary judge, Beech J, dismissed the appellant's action and
entered judgment for the respondent on its counterclaim. See *Love v Brien*
[2012] WASC 457.

5 I agree with Murphy JA that the appellant's appeal from the primary
judge's judgment should be dismissed.

6 By its grounds of appeal, the appellant seeks in substance to reargue
before this court the contentions it made unsuccessfully at trial. None of the
grounds has any merit. The primary judge did not misconstrue the contract.
His Honour was correct, for the reasons he gave, to dismiss the appellant's
action and enter judgment for the respondent on its counterclaim.

7 **NEWNES JA:** I agree with Murphy JA.

MURPHY JA:

Introduction

8 This is an appeal from a decision of Beech J concerning the proper
construction and operation of a contract for the sale of land pursuant to the
exercise of an option. The appellant (the buyer) was the buyer under the
contract for sale and the respondent (the seller) was the vendor.

The terms of the contract

9 The relevant background is set out in the primary judge's reasons for
judgment: *Love v Brien* [2012] WASC 457 at [6] - [16]. (All subsequent

references in these reasons to paragraph numbers are references to paragraph numbers in the primary judge's reasons unless otherwise indicated. These reasons also adopt the defined terms used by the primary judge in his reasons.)

10 The relevant terms of the Contract were outlined at [9] - [11] of his Honour's reasons:

The terms of the contract (the Contract) included the following:

- (1) the property to be purchased was the Land, namely Lot 4 on Diagram 30763, being the whole of the land in certificate of title volume 329 folio 117A, subject as provided in special condition 8;
- (2) the purchase price is stated as \$3.5 million, with the manner of payment to be as provided in special condition 6;
- (3) special condition 6 provided that the balance of the purchase price of \$3.45 million (after deduction of the \$50,000 option fee) would be paid as follows:
 - (a) on the settlement date (31 July 2007), \$950,000;
 - (b) on 30 October 2007, \$1 million; and
 - (c) on 15 November 2008, \$1.5 million.

Special conditions 8 and 9 are what give rise to these proceedings. Those conditions are in the following terms:

8. Seller's Lot

Notwithstanding anything to the contrary herein contained or implied:

- (a) subject as provided in paragraphs (g) of this Special Condition 8, the Buyer acknowledges and agrees that it does not purchase the Seller's Lot and that it shall hold the Seller's Lot as bare trustee for and on behalf of the Seller;
- (b) as soon as is reasonably practicable after settlement occurs, the Buyer shall use all reasonable endeavours to rezone and subdivide the [Land] so as to create separate lots zoned 'Industrial and Commercial' (or other similar use), including at least one Complying Lot;
- (c) at all times the Buyer shall keep the Seller informed as to its progress towards such rezoning and subdivision;
- (d) the Buyer shall pay all costs of and incidental to such rezoning and

subdivision;

- (e) as soon as is reasonably practicable the Buyer shall give to the Seller a plan indicating the location on the [Land], area and dimensions of the Complying Lots proposed to be created by the subdivision of the [Land]. If there is more than one proposed Complying Lot, the Buyer may designate not more than the Reserved Number of Complying Lots for the Buyer's use, and the Seller may select any other Complying Lot as the Seller's Lot for the purposes of this Contract;
- (f) as soon as is reasonably practicable after the Seller's Lot is made a separate lot, the Buyer at no cost to the Seller (whether as to stamp duty or otherwise) shall retransfer the Seller's Lot to the Seller free of all encumbrances (save for Permitted Encumbrances) and the Seller shall accept the Seller's Lot in satisfaction of the balance of the Purchase Price;
- (g) the obligations of the parties under this Special Condition 8 are in all respects subject to and conditional upon, and have no effect unless and until the Western Australian Planning Commission approves the terms of this Special Condition 8 on or before 30 June 2010;
- (h) the Buyer shall apply for the approval of the Western Australian Planning Commission to this Special Condition 8 on or before 11 September 2007, and at all times the Buyer shall keep the Seller informed as to its progress towards such rezoning and subdivision.

9. Non-approval of Special Condition 8

Notwithstanding anything to the contrary herein contained or implied, if as a result of failure of the condition contained in paragraphs (g) of Special Condition 8, or for any reason whatsoever, the Seller's Lot is not transferred to the Seller on or before 30 June 2010 (or within such longer period as the Seller from time to time in writing agrees) on 1 July 2010 (or on such later date as the Seller and the Buyer from time to time in writing agree) the Buyer shall pay to the Seller the sum of \$500,000.00 by way of further consideration for the sale of the [Land].

Clause 12 contained definitions of some of the terms used in special condition 8, as follows:

'Complying Lot' means a lot of not less than 2,000 square metres lots zoned 'Industrial and Commercial' (or other similar use);

'Permitted Encumbrances' means any encumbrance on or affecting the Seller's Lot (or any part thereof) imposed or required by any relevant authority as a condition of approval of any subdivision to create the Seller's Lot as a separate lot;

...

'Seller's Lot' means the Complying Lot selected by the Seller as contemplated in Special Condition 8(e).

The principal issues before the primary judge

11 The principal issue of construction for determination by the primary judge was whether the Contract was:

- (a) an agreement to sell the Land remaining after the Seller's Lot is removed from the land; or
- (b) an agreement to sell the Land:
 - (i) for a consideration comprising \$3.5 million plus the Seller's Lot, if Western Australian Planning Commission (WAPC) approval was granted for the creation of the Seller's Lot; or
 - (ii) for a total consideration of \$4 million if such WAPC approval was not obtained.

12 At trial, the buyer contended for the former construction and alleged that the Contract was thereby illegal and void by reason of it contravening s 136(1)(c) of the *Planning and Development Act 2005* (WA) (the Act).

13 The buyer also contended, in the alternative, that the \$500,000 sum referred to in special condition 9 was void as a penalty.

14 The buyer's primary argument (which I will refer to as the buyer's 'illegality argument') was, as noted by the judge, in the following terms:

- (a) on a proper construction, the Contract was a contract to purchase land that was not a lot, namely the Land remaining after the Seller's Lot was removed from the Land. In this respect, the buyer relies heavily on special condition 8(a);
- (b) the sale of the Land less the Seller's Lot was not made subject to the WAPC's approval, and no application for approval was contemplated or made;
- (c) the WAPC could never have approved the retransfer of the Seller's Lot because there was no agreement to sell it, as it was always the property of the seller;

- (d) in any event, no application for approval of any transaction was made within three months, with the consequence that s 140(1) of the Act did not operate to save the Contract; and
- (e) thus, the Contract is illegal by force of s 136(1)(c) and is not saved by s 140 [21].

The primary judge's findings on the Contract

15 The primary judge found:

The Contract identifies the property to be purchased as being (the whole of) the Land, subject as provided in special condition 8.

The Contract states that the purchase price is \$3.5 million. The buyer emphasises this provision, pointing out that the purchase price is not said to be \$3.5 million plus the Seller's Lot or, failing that, \$4 million.

The Contract provides for the title of the Land to be transferred to the buyer at settlement on 31 July 2007.

Special condition 8(a) states that the buyer acknowledges that he does not purchase the Seller's Lot and holds the Seller's Lot as bare trustee for the seller. That provision is the central plank of the buyer's construction argument. The buyer submits that the effect of special condition 8(a) is that the buyer 'never gets to be the owner of the whole land' or 'never acquired a beneficial interest in the whole of the Land' (ts 46), so that the subject matter of the sale under the Contract is not the Land, but rather, the land that is left after the Seller's Lot is removed from the Land. However, for reasons to be developed, when special conditions 8 and 9 are read as a whole, and read in the context of the Contract as a whole, I do not accept this construction of special condition 8 generally, and special condition 8(a) in particular.

Special condition 8(b) imposes an obligation on the buyer to use reasonable endeavours to rezone and subdivide the Land to create lots that are zoned industrial and commercial. The buyer's obligation is to use reasonable endeavours to create at least one Complying Lot, namely a lot of not less than 2,000 sq m zoned industrial and commercial.

It should be noticed that the buyer's obligations under special condition 8(b) arise after settlement.

Paragraph (e) of special condition 8 requires the buyer to give the seller a plan indicating the location on the Land of one or more proposed Complying Lots, namely lots of not less than 2,000 sq m to be zoned industrial and commercial. On a proper construction of this clause, the buyer had the power to determine where on the Land any Complying Lot would be located. The seller would have no basis to

complain about the choice made by the buyer in this respect. If, and only if, the buyer chose to include more than one Complying Lot, would the provision in the last sentence of par (e) be engaged and would the seller be able to exercise some choice in respect of the Seller's Lot.

In my view, two features of par (f) of special condition 8 should be noticed. The first is that the obligation of the buyer to retransfer the Seller's Lot to the seller arises only after the Seller's Lot has been made a separate lot. Consistently with par (g) of special condition 8, if the Seller's Lot is not made a separate lot, no obligation is imposed on the buyer to transfer the Seller's Lot to the seller. In my opinion, special condition 8(a) should be read in this light.

Secondly, par (f) of special condition 8 provides that the seller accepts the Seller's Lot in satisfaction of the balance of the purchase price. The buyer did not make any submissions about how that aspect of special condition 8(f) was to be construed. In my view, this element of par (f) supports the seller's construction.

Paragraph (g) of special condition 8 is not, to my mind, happily worded, but I consider the substance of the intention it reveals to be clear. In its express terms it states that the obligations of the parties under special condition 8 are subject to and conditional on WAPC approval by a stipulated date. It is clear from par (g) of special condition 8, as well as from special condition 9, that the parties contemplated the prospect that WAPC approval may not be given.

Given the scheme revealed by special condition 8 as a whole, prior to the creation of the Seller's Lot as a separate lot, the buyer cannot be said to be a bare trustee of the Seller's Lot, in the conventional legal sense of a bare trustee. Like a discretionary trust, the term bare trust does not have a fixed legal meaning. Conventionally a bare trustee refers to a trustee who holds property on trust for another on terms that the trustee has no or substantially no active duties and is obliged to transfer the property to the beneficiary if so directed: *Jacobs' Law of Trusts* (7th ed, 2006) [315].

Paragraph (a) of special condition 8 is expressly made subject to par (g), which makes all of the parties' obligations in special condition 8 subject to WAPC approval. Thus, the buyer's stated obligation to hold the Seller's Lot on trust for the seller is expressly subject to the requirement for WAPC approval of a subdivision creating the Seller's Lot as a separate lot.

I construe the statement in special condition 8(a) that the buyer holds the Seller's Lot as bare trustee for the seller as commensurate with the obligation of the buyer under special condition 8 to transfer the Seller's Lot to the seller. Unless and until the Seller's Lot is created, it is not held as trustee in a technical legal sense, but the buyer could not, in the meantime, act inconsistently with the seller's conditional rights under special condition 8.

Several aspects of special condition 9 may be noticed. First, it reveals the

contemplation by the parties that WAPC approval may not be given, so that the condition in par (g) of special condition 8 may fail. Secondly, its opening words are emphatically designed to ensure its primacy. It is to be applied notwithstanding anything to the contrary in the agreement, express or implied. Thirdly, it applies if 'for any reason whatsoever' the Seller's Lot is not transferred by the relevant date. Finally, the \$500,000 to be paid by the buyer to the seller is paid 'by way of further consideration for the sale of the [Land]'.

The following considerations lead me to adopt the seller's construction:

- (a) under the Contract, the (whole of) the Land is to be transferred to the buyer at settlement; the buyer then has obligations, after settlement, to apply for and progress WAPC approval of rezoning and subdivision necessary for the creation of the Seller's Lot;
- (b) the Contract expressly contemplates that approval by the WAPC is necessary for the Seller's Lot to be made a separate lot, and that approval may or may not be given: special conditions 8(f), 8(g), 9;
- (c) special condition 8 is expressly made conditional on WAPC approval: special condition 8(g). Further, special condition 8(a) is expressly made subject to special condition 8(g);
- (d) consistently with that, the central substantive obligation of the buyer, to retransfer the Seller's Lot to the seller, arises only when and if the Seller's Lot is made a separate lot;
- (e) the statement in special condition 8(a) that the buyer holds the Seller's Lot as bare trustee for the seller is to be construed congruently with the obligation of the buyer under special condition 8(f) to retransfer the Seller's Lot;
- (f) in addition to the \$3.5 million paid to the seller at settlement, the Contract provides for the seller to receive either the Seller's Lot (if approval is obtained in the specified time) or the sum of \$500,000 if, for any reason, the Seller's Lot is not transferred. Thus the evident intention is that the seller will receive one or the other of those; and
- (g) the transfer of the Seller's Lot and the payment of \$500,000 are part of the price to be paid by the buyer and the consideration to be received by the seller for the Land: special conditions 8(f), 9. That is so, in my opinion, notwithstanding that, on the first page of the Contract, the purchase price is stated as \$3.5 million.

Where the language of a contract is open to two meanings, one of which is lawful and the other unlawful, the former construction should be preferred: Lewison K and Hughes D, *The Interpretation of Contracts in Australia* (2012) [7.10]. I have not found it necessary to invoke this presumption, as I have construed the Contract

as explained above, without resort to it, and, as I will now explain, on that construction there is no illegality [31] - [46].

The primary judge's findings on illegality

16 The primary judge's findings on the illegality argument were as follows:

Section 136(1)(c) of the *Planning and Development Act* prohibits a person, relevantly, from agreeing to sell land without the approval of the WAPC unless the land is dealt with as a lot or lots. In my opinion, on a proper construction, the land the subject of the Contract is dealt with as a lot or lots, so the section is not infringed.

If, on a proper construction of an agreement, it is an agreement to sell a subdivided lot only when and if that subdivided lot has come into existence as a separate lot, then the agreement involves a sale of the land as a lot. See, for example, *Development Underwriting (WA) Pty Ltd v Lombardo* [1971] WAR 169, 174; and on appeal *Lombardo v Development Underwriting (WA) Pty Ltd* [1971] WAR 188, 190, 199 - 200 (Hale J took a different view, 196); *Landall Construction & Development Co Pty Ltd v Bogaers* [1980] WAR 33, 37 - 38, 45 - 46.

Some of the history was recently outlined by Martin CJ (Newnes & Murphy JJA agreeing) in *Walker v Clough Property Claremont Pty Ltd* [2010] WASCA 232; (2010) 41 WAR 477 [30] - [33]. Martin CJ explained that following the decision in *Landall Construction v Bogaers* there has not been any doubt that the controls on subdivision of land for the purposes of town planning do not constrain entry into contracts for the sale of portions of land that are yet to be subdivided, provided that the contract is conditional upon the necessary approvals to the subdivision being obtained, and the creation of the lot or lots to be conveyed, prior to their conveyance [31].

For the reasons explained in the previous section of these reasons, in my opinion, on a proper construction, the Contract was not an agreement to sell so much of the Land as remained after the removal from it of the Seller's Lot. Rather, it was an agreement to sell the Land, coupled with a conditional obligation on the part of the buyer to transfer the Seller's Lot to the seller, if and only if WAPC approval to the creation of the Seller's Lot as a separate lot was granted [47] - [50].

The grounds of appeal

17 The buyer's grounds of appeal raise essentially the same arguments referred to earlier which were put to the primary judge. They are, broadly, to the following effect:

1. The primary judge erred in law in finding that the Contract did not breach s 136(1)(c) of the Act in that special condition 8(a) was a declaration of trust, the effect of which was that the buyer did not purchase the seller's beneficial interest in the Seller's Lot, and there was consequently a sale of land whereby the seller retained an interest in that part of the Land in contravention of s 136(1)(c) of the Act.
2. The primary judge erred in failing to find that the Contract was entered into in contravention of pt 10 div 2 of the Act and unenforceable in that having been entered into in breach of s 136(1)(c) of the Act, there was no application for approval to the WAPC within three months after the date of the Contract for the purposes of s 140(1) of the Act.
3. Having found (at [43]) that the Contract gave rise to an obligation by the buyer not to act inconsistently with the seller's conditional right under special condition 8, the primary judge erred in law in failing to find that the seller's conditional rights were an 'interest' in land as defined in s 4 of the Act such that the sale of the Land had been otherwise than as a lot.
4. The primary judge erred in failing to find that the obligation to pay the seller the sum of \$500,000 was a penalty.

Disposition - the illegality argument

18 Grounds 1, 2 and 3 may be dealt with together. Each, in effect, challenges the primary judge's construction of the Contract and his finding that the Contract was not, as a result, illegal by reason of the operation of s 136(1)(c) and s 136(2) of the Act. Counsel for the buyer accepted that unless he could establish that the judge's construction of the Contract was wrong, grounds 1, 2 and 3 could not succeed.

19 Generally for the reasons given by the primary judge, there is no error in the judge's construction of the Contract. By way of elaboration of that observation, the features of the Contract which, to my mind, are particularly important in relation to its construction, are as follows.

20 First, although the 'Purchase Price' was defined in the schedule to the Contract to mean the sum of \$3.5 million, the opening words of the Contract

referred to the offer to purchase being 'on the terms set out in the Schedule, ... and the Special Conditions'. Secondly, special condition 8 states at the outset that it applies '[n]otwithstanding anything to the contrary herein contained or implied'. Thirdly, the 'Seller's Lot' is a 'Complying Lot': see definition of 'Seller's Lot' and special condition 8(e). Fourthly, a 'Complying Lot' is one of the 'separate lots' which the buyer agrees to use reasonable endeavours to 'create' after settlement of the Contract: special condition 8(b). Fifthly, the buyer's obligation under special condition 8(f) to 'retransfer' the Seller's Lot connotes that the land which ultimately becomes the 'Seller's Lot' has been previously transferred to the buyer under the Contract. Sixthly, the retransfer is subject to 'Permitted Encumbrances'. A 'Permitted Encumbrance' is defined as an encumbrance imposed 'as a condition of approval of any subdivision to create the Seller's Lot as a separate lot'.

21 Seventhly, the subject matter of special condition 8(a) is the 'Seller's Lot'. As the 'Seller's Lot' did not then exist, where the buyer 'acknowledges and agrees' in special condition 8(a) that he does not purchase the 'Seller's Lot', his acknowledgement and agreement must be taken to mean that he will not withhold the retransfer of the Seller's Lot upon its creation (to the extent that his use of reasonable endeavours leads to the creation of Complying Lots and the selection of the Seller's Lot). Similarly, insofar as the buyer in special condition 8(a) acknowledges and agrees that he 'shall hold' the 'Seller's Lot' as bare trustee for the seller, his acknowledgement and agreement concerns, evidently, contingent future property, ie, a lot selected by the seller from any Complying Lots other than those Complying Lots designated for the buyer's use if and when such lots have been created by rezoning and subdivision of the Land after settlement of the Contract. Eighthly, that construction of cl 8(a) is confirmed by special condition 9. Special condition 9 provides for the payment of \$500,000 by way of 'further consideration' if 'for any reason whatsoever' the Seller's Lot is not 'transferred' to the seller on or before 30 June 2010 (or such later date as the parties may agree). Consistently with the buyer's obligation only to use 'reasonable endeavours' in special condition 8(b), special condition 9 contemplates, amongst other things, that Complying Lots, and thereby the Seller's Lot, may not be created after settlement, and thus there may be no lot brought into existence capable of being the subject of the trust referred to in special condition 8(a).

22 Ninthly, special condition 8(g) (to which special condition 8(a) is

expressly subject) and special condition 8(h) both address a requirement for WAPC approval. In the case of special condition 8(h), the contemplated approval is coupled with a promise by the buyer to keep the seller informed as to the buyer's 'progress towards such rezoning and subdivision'. In the case of special condition 8(g), the latest date for WAPC approval is 30 June 2010, which is also the latest date for transferring the Seller's Lot under special condition 9. The parties 'obligations' to which special condition 8(g) refers are the primary obligations of the buyer to retransfer the Seller's Lot in accordance with special condition 8(f) and the seller's obligation to accept the retransfer in satisfaction of the balance of the Purchase Price, and all express and implied obligations incidental to those primary obligations. The primary judge's reference at [43] of his reasons to an obligation on the part of the buyer not to act inconsistently with the seller's rights under special condition 8 is, as I would understand it, a reference to an implied term of the kind referred to in *O'Keefe v Williams* [1910] HCA 40; (1910) 11 CLR 171, 191, 197 - 210 and *Peters (WA) Ltd v Petersville Ltd* [2001] HCA 45; (2001) 205 CLR 126 [36].

23 As the primary judge observed, special condition 8(g) is awkwardly worded. However, read with special condition 8(h) and in the context of special conditions 8 and 9 read as a whole, special condition 8(g) is to the effect that the buyer's obligation to retransfer the Seller's Lot and the seller's obligation to accept the retransfer is subject to the WAPC approving rezoning and subdivision, and the consequential creation of the Seller's Lot, on or before 30 June 2010.

24 Accordingly, the primary judge was correct to find that the parties agreed to sell the Land as one lot, on the basis that in consideration for the transfer of that one undivided lot, the seller would receive \$3.5 million plus either the Seller's Lot if the buyer's use of reasonable endeavours led to the creation of separate Complying Lots from which the seller then selected the Seller's Lot or, if that did not occur within the agreed time, an additional lump sum payment of \$500,000.

Disposition - the penalty issue

25 The primary judge dismissed the appellant's claim as to penalty on three separate bases. The appellant in this appeal only challenges one of them, so that even if its argument in respect of that basis was correct, the result would be no different. Moreover, on the basis under challenge, no error is

disclosed in any event.

26 The buyer simply contended that:

The objective facts are that the [buyer] agreed to pay \$3.5 million for 39,886 sqm or \$87.8 psqm. Clause 9 required the plaintiff to pay the defendant \$250 psqm. The amount was extravagant and unconscionable (TAB 14 [38]).

27 In relation to that matter, the primary judge found, relevantly:

The buyer did not lead any evidence as to the value of the Seller's Lot. Rather, the buyer pointed to the difference in the per square metre rate for the \$500,000 applied to the buyer's lot, as compared to the \$3.5 million for the whole of the Land, or \$4 million for the whole of the Land. The first figure was up to two and a half or three times the latter figures. In my view, that does not sustain a conclusion that the obligation to pay \$500,000 meets the test for being a penalty. The Land is up to 20 times the size of the Seller's Lot. It cannot be assumed, without evidence, that it would be appropriate to apply the same or similar per square metre rate to value lots of such different scale. Such an approach overlooks the possibility that a substantially higher rate might be applied to a substantially smaller lot. Further, the Land was zoned rural. The Seller's Lot was, by definition, to be zoned industrial. There was no evidence as to what, if any, difference existed in the value of industrial zoned land as against rural zoned land [67].

28 There is no error in the primary judge's reasoning on this point. It is unnecessary to consider the other bases upon which the primary judge found against the appellant on the question of penalty.

Conclusion

29 The appeal should be dismissed.