

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CIVIL

**CITATION** : LOVE -v- BRIEN [2012] WASC 457

**CORAM** : BEECH J

**HEARD** : 19 NOVEMBER 2012

**DELIVERED** : 29 NOVEMBER 2012

**FILE NO/S** : CIV 2026 of 2012

**BETWEEN** : ROSS MAITLAND LOVE  
Plaintiff

AND

DANNY LLOYD BRIEN  
Defendant

*Catchwords:*

Contract - Illegality - Whether contract for sale of land other than as a lot -  
Whether void for uncertainty - Whether provision for payment of sum if property  
not retransferred to seller void as a penalty - Turns on own facts

*Legislation:*

*Planning and Development Act 2005 (WA), s 136*

*Result:*

Plaintiff's application for declarations dismissed  
Judgment for the defendant on the counterclaim

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*Category:* B

**Representation:**

*Counsel:*

Plaintiff : Mr A Metaxas  
Defendant : Mr J C Yeldon

*Solicitors:*

Plaintiff : Metaxas & Hager  
Defendant : Cullen Babington Macleod

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

AMEV-UDC Finance Ltd v Austin [1986] HCA 63; (1986) 162 CLR 170  
Andrews v Australia and New Zealand Banking Group Ltd [2012] HCA 30; (2012) 290 ALR 595  
Australian Broadcasting Commission v Australasian Performing Right Association Ltd [1973] HCA 36; (1973) 129 CLR 99  
Bakranich v Robertson [2005] WASC 12  
Byrnes v Kendle [2011] HCA 26; (2011) 243 CLR 253  
Development Underwriting (WA) Pty Ltd v Lombardo [1971] WAR 169  
Integral Home Loans Pty Ltd v Interstar Wholesale Finance Pty Ltd [2007] NSWSC 406; [2007] Aust Contract Reports 90-261  
Landall Construction & Development Co Pty Ltd v Bogaers [1980] WAR 33  
Lombardo v Development Underwriting (WA) Pty Ltd [1971] WAR 188  
Malago Pty Ltd v AW Ellis Engineering Pty Ltd [2012] NSWCA 227  
Pacific Carriers Ltd v BNP Paribas [2004] HCA 35; (2004) 218 CLR 451  
Permanent Building Society (in liq) v Wheeler (1992) 10 WAR 109  
Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Corporation Pty Ltd (No 1) [1993] HCA 40; (1993) 178 CLR 379  
Ringrow Pty Ltd v BP Australia Pty Ltd [2005] HCA 71; (2005) 224 CLR 656  
Spiers Earthworks Pty Ltd v Landtec Projects Corporation Pty Ltd [No 2] [2012] WASC 53; (2012) 287 ALR 360

Thorby v Goldberg [1964] HCA 41; (1964) 112 CLR 597

Timmerman v Nervina Industries (International) Pty Ltd [1983] 2 Qd R 261

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165

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Walker v Clough Property Claremont Pty Ltd [2010] WASCA 232; (2010) 41  
WAR 477

Wilkie v Gordian Runoff Ltd [2005] HCA 17; (2005) 221 CLR 522

## **BEECH J:**

### **Introduction**

1           In June 2007, the plaintiff as buyer and the defendant as seller entered into a written option agreement by which the seller granted the buyer an option to purchase approximately 40,000 sq m of land, zoned rural, in Wangara (the Land). The option agreement attached a contract of sale. The contract:

- (a)       made provision for the buyer to retransfer to the seller a lot of land not less than 2,000 sq m zoned industrial or commercial (Seller's Lot);
- (b)       stated that the buyer would apply for subdivision approval, and that the parties' obligations under the relevant clauses were conditional on approval by a specified date; and
- (c)       stated that if the Seller's Lot was not transferred by a stipulated date, the buyer was to pay the seller \$500,000 as further consideration for the purchase price for the Land.

2           The Seller's Lot has not been transferred.

3           The central issue in this action is whether the buyer is obliged to pay the seller the sum of \$500,000. The buyer seeks a declaration that the relevant provisions of the Contract are void for illegality, uncertainty or as a penalty. The seller counterclaims for payment of the sum of \$500,000.

4           For the reasons that follow, I find that the relevant provisions are valid, and the seller succeeds.

### **The facts**

5           The facts are not in dispute.

6           On 12 June 2007, the buyer and the seller made a written option agreement by which the seller granted the buyer an option to purchase the Land for \$3.5 million on terms including that:

- (a)       the purchase price for the Land was \$3.5 million;

(b) the purchase price would be paid as follows:

(i) the option fee \$50,000 would be credited;

- (ii) \$950,000 on settlement; and
  - (iii) the balance as specified in the contract attached to the option agreement;
- (c) if the option was exercised, the sale and purchase of the Land would take place in accordance with the option agreement with settlement to be effected on 15 July 2007; and
- (d) attached to the option agreement was a proposed contract of sale of land.

7 On 5 July 2007, the buyer exercised the option to purchase the Land.

8 On or about 5 July 2007, the buyer and seller executed a contract of sale of land in the terms contemplated under the attached contract to the option agreement, except that they agreed to amend the settlement date from 15 July 2007 to 31 July 2007.

9 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.

10 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].

11 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;

'Reserved Number' means the number calculated in accordance with the formula:

$$RN = \frac{(NCL)}{(2)} - 1$$

Where:

RN means the Reserved Number (and if the RN as calculated in accordance with the formula is not an integer, RN shall be rounded down to the next whole number);

NCL means the number of Complying Lots on the plan provided by the Buyer to the Seller pursuant to Special Condition 8(e);

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

12 Settlement of the sale occurred on 31 July 2007.

13 By a deed dated 28 May 2010 made between the buyer and the seller, the parties agreed that:

- (a) references in special conditions 8(g) and 9 to 30 June 2010 were varied to 30 June 2011;



- (b) the reference in special condition 8(h) to 11 September 2007 was varied to three months after the date of the deed; and
- (c) the reference in special condition 9 to 1 July 2010 was varied to 1 July 2011.

14 The parties entered into a further deed of variation in June 2011. By a deed dated 28 June 2011, the parties agreed that:

- (a) references in special conditions 8(g) and 9 to 30 June 2010 were varied to 31 December 2011;
- (b) the reference in special condition 8(h) to 11 September 2007 was varied to three months after the date of the deed; and
- (c) the reference in special condition 9 to 1 July 2010 was varied to 31 December 2011.

15 On 23 September 2011, the buyer made a submission to the Western Australian Planning Commission (WAPC) in support of a proposed amendment to the Metropolitan Region Scheme which, if approved, would have changed the regional zoning applicable to the Land from rural to industrial. That submission was made in response to a letter to the buyer from the WAPC dated 29 August 2011 that, in effect, invited a submission.

16 The WAPC's approval of the subdivision and rezoning of the Land was not obtained by 31 December 2011.

### **The buyer's contentions**

17 In summary, the buyer contends that:

- (1) special conditions 8 and 9 of the Contract are contrary to the *Planning and Development Act 2005* (WA) and thereby unenforceable;
- (2) alternatively, those special conditions are void for uncertainty;
- (3) alternatively, special condition 9 is a penalty and is thereby unenforceable.

I will deal with these contentions in turn. It is convenient to begin by setting out the relevant provisions of the *Planning and Development Act* before explaining the buyer's contentions in more detail.

**The legislative scheme of the *Planning and Development Act***

19           Section 135(1), s 135(2), s 136(1) and s 136(2) provide, relevantly, as follows:

**135. No subdivision etc. without approval**

- (1) A person is not to -
  - (a) subdivide any lot; or
  - (b) amalgamate any lot with any other lot, whether within the same district or otherwise; or
  - (c) lay out, grant or convey a road,without the approval of the Commission.
- (2) A person who contravenes subsection (1) commits an offence.

...

**136. Approval required for some dealings as to land not dealt with as a lot or lots**

- (1) Subject to sections 139 and 140 a person is not to -
  - (a) lease or grant a licence to use or occupy land for any term exceeding 20 years, including any option to extend or renew the term or period; or
  - (b) lease and grant a licence to use or occupy land for terms in the aggregate exceeding 20 years, including any option to renew or extend the terms or periods; or
  - (c) sell or agree to sell land; or
  - (d) grant any option of purchase of land,without the approval of the Commission unless the land is dealt with by way of such lease, licence, agreement or option of purchase as a lot or lots.
- (2) A person who contravenes subsection (1) commits an offence.

20           Section 140 and s 141 provide as follows:



**140. Saving of some agreements entered into without approval under s 136**

- (1) Where an agreement to sell or grant an option to purchase, or to lease or grant or lease and grant a licence to use or occupy any portion of a lot has been entered into without the approval of the Commission having been first obtained as required under this Division, that agreement is to be taken not to have been entered into in contravention of this Division if -
  - (a) the agreement is entered into subject to the approval of the Commission being obtained; and
  - (b) an application for the approval of the Commission is made within a period of 3 months after the date of the agreement.
- (2) Nothing in this Division renders the agreement illegal or void by reason only that the agreement was entered into before the approval of the Commission was obtained.
- (3) Without prejudice to the operation of section 141, the agreement referred to in subsection (1) has no effect, unless and until the Commission gives its approval -
  - (a) within a period of 6 months after the date of the agreement or within such further period as is stipulated in that agreement; or
  - (b) within such further period as is stipulated in a subsequent agreement in writing made -
    - (i) by all the parties to the first-mentioned agreement; or
    - (ii) when the subsequent agreement is made after the death of any of those parties, by the surviving party or parties and the legal personal representative of any deceased party.

**141. Refund where transaction cannot be completed**

Where, after payment of consideration for any transaction relating to any land, it is found that the transaction cannot be completed -

- (a) within a period of 6 months after the date of entering into the transaction or within such further period as is stipulated in the transaction; or
- (b) within such further period as is stipulated in a subsequent agreement in writing made -





- (i) by all the parties to the transaction; or
- (ii) when the subsequent agreement is made after the death of any of those parties, by the surviving party or parties and the legal personal representative of any deceased party,

because the land cannot be dealt with as a lot or lots, the person who paid the consideration is entitled to a refund of the consideration from the person to whom it was paid.

**Illegality: the parties' submissions**

21 The buyer submits that:

- (1) 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);
- (2) 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;
- (3) 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;
- (4) in any event, no application for approval of any transaction was made within three months, with the consequence that s 140(1) did not operate to save the Contract; and
- (5) thus, the Contract is illegal by force of s 136(1)(c) and is not saved by s 140.

22 The seller submits, in summary, that:

- (1) in substance, the Contract was for the sale of the whole of the Land but, subject to WAPC approval, the parties agreed that the Seller's Lot would be subsequently retransferred by the buyer to the seller and, if not, \$500,000 would be paid to the seller as further consideration; and

- (2) this contractual scheme regarding the Seller's Lot does not engage s 136(1)(c). Further or alternatively, it is consistent with and preserved by s 140(1).

23 These submissions reveal an issue about the proper construction of the Contract. Is it, as the buyer submits, an agreement to sell the land remaining after the Seller's Lot (being a block of not less than 2,000 sq m, zoned industrial, to be ascertained under special condition 8) is removed from the Land? Or is the Contract an agreement to sell the Land for:

- (a) a consideration comprising \$3.5 million plus the Seller's Lot, if the WAPC's approval is granted to the creation of the Seller's Lot; or
- (b) if WAPC approval is not obtained, for a total consideration of \$4 million?

24 For reasons to be explained, in my opinion:

- (1) the seller's construction of the Contract is to be preferred; and
- (2) on that construction, the Contract is not illegal under the *Planning and Development Act*.

25 I turn to the principles relevant to the construction of a contract in writing.

### **Illegality; the proper construction of the Contract: legal principles**

26 The primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] HCA 36; (1973) 129 CLR 99, 109 - 110; *Permanent Building Society (in liq) v Wheeler* (1992) 10 WAR 109, 118 - 119.

27 It is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters, not the parties' subjective intentions. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood the terms to mean: *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [40]; *Byrnes v Kendle* [2011] HCA 26; (2011) 243 CLR 253 [98].

An instrument must be construed as a whole. Where different parts of a contract appear to be inconsistent, the court should attempt to construe the contract in a way that avoids any inconsistency and renders those parts harmonious: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (109 - 110). As

Gleeson CJ, McHugh, Gummow and Kirby JJ said in *Wilkie v Gordian Runoff Ltd* [2005] HCA 17; (2005) 221 CLR 522 [16], preference is given to a construction that provides a congruent operation to the various components of the instrument as a whole. A conflict involving apparently inconsistent provisions within an instrument should be resolved, if possible, on the basis that one provision qualifies the other, so that both have meaning and effect: *Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Corporation Pty Ltd (No 1)* [1993] HCA 40; (1993) 178 CLR 379, 386 - 387.

29 In my view, for reasons to be explained, these principles are to be applied in resolving apparent tensions within different paragraphs of special condition 8, and between provisions of special condition 8 and other parts of the Contract.

30 In this case, no party adduced any evidence of background facts or other context said to be relevant to the proper construction of the Contract. Consequently, there is no need to say anything about the principles relevant to the use of such evidence in construing an instrument.

### **Illegality; the proper construction of the Contract: analysis and conclusions**

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

32 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.

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

34 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.

35 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.

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

37 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.

38 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.

39 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.

40 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.

41           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].

42           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.

43           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.

44           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]'.

45           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.

46 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.

### **The Contract does not infringe s 136(1)(c)**

47 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.

48 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.

49 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].

50 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.

51 For these reasons, I find that the Contract did not infringe the prohibition in s 136(1)(c) of the *Planning and Development Act*. Accordingly, the buyer's illegality contention fails.

### **Uncertainty**

52 The buyer contends that the trust purportedly created by special condition 8(a) fails for uncertainty of the subject matter of the trust.

53 In my view, the proper starting point is not to ask whether special condition (8)(a) meets the requirements of certainty of subject matter for the creation of a valid trust. Rather, the starting point is to construe the Contract

as a whole, including special condition 8(a). The question is whether that clause, or special condition 8 as a whole, is so uncertain as to render the agreement void for uncertainty.

54 I have explained my construction of special conditions 8 and 9. On that construction, I see no unacceptable uncertainty in special condition 8(a) in particular, or special condition 8 as a whole.

55 It is true that, at the time of the Contract, the identification and location of that part of the Land that would constitute the Seller's Lot was not ascertained. However, special condition 8 provides a mechanism for its ascertainment. In substance, it would be a matter for the decision of the buyer, although if the buyer chose to produce a plan with more than one Complying Lot, the parties' respective rights would be governed by the last sentence of special condition 8(e). An agreement is not void for uncertainty because it leaves to one party a latitude of choice as to the manner in which the agreed stipulation is to be carried into effect: *Thorby v Goldberg* [1964] HCA 41; (1964) 112 CLR 597, 613; *Timmerman v Nervina Industries (International) Pty Ltd* [1983] 2 Qd R 261, 262; *Malago Pty Ltd v AW Ellis Engineering Pty Ltd* [2012] NSWCA 227 [27].

56 In *Malago v AW Ellis*, a provision in an agreement required one party to transfer a stipulated percentage of the surface water area of a larger area without identifying more precisely which area was to be transferred. The New South Wales Court of Appeal rejected the submission that that rendered the clause or the agreement void for uncertainty. Macfarlan JA held (Bathurst CJ & Meagher JA agreeing) that although it was not spelled out, the party on whom the obligation of transfer rested could choose to transfer any part of the total surface area that constituted 21.6% of the whole.

57 In *Lombardo v Development Underwriting*, the plaintiff agreed to sell 20 blocks contained within land that was proposed to be subdivided into 26 blocks. The agreement was silent on which 20 blocks were to be sold. Jackson CJ stated that the vendor's obligation could have been performed by the vendor selecting any 20 of the 26 blocks as those that were to be the subject of the sale (190).

58 The buyer's uncertainty contention is primarily founded on the decision of Master Newnes (as his Honour then was) in *Bakranich v Robertson* [2005] WASC 12. In that case, the testator owned land that was a single lot, but on which there were two residences. By his will, the testator bequeathed the residence to be held on trust for one grandson, and the granny flat and the 'lot on which it stands' to be held on trust for another grandson. The



court held that these provisions were void for uncertainty as there never existed two lots as specified in the will [28] (as

well as being contrary to the predecessor provision of the *Town Planning and Development Act 1928* (WA) to s 136 of the *Planning and Development Act*). In this case, unlike in that case, the relevant instrument contains machinery governing the identification of what part of the lot is to be the subject of the Seller's Lot.

59 For these reasons, I reject the buyer's uncertainty contention.

**Is special condition 9 a penalty?**

60 Special condition 9 creates an obligation for the buyer to pay the seller the sum of \$500,000 if for any reason the Seller's Lot is not transferred to the seller by the specified date. Thus, it is not a sum payable upon breach. In itself, that does not exclude the operation of the doctrine of penalties.

61 The conventional application of the doctrine of penalties arises when a sum is made payable by A to B upon breach by A of his or her contract with B. Recently, the High Court has held that the doctrine is not restricted to payments consequent upon breach: *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30; (2012) 290 ALR 595 [31] - [32], [46] - [50], [78].

62 In *Andrews*, the court described the doctrine of penalties as applying when an instrument imposes a collateral liability upon the non-observance or failure of a primary contractual stipulation: [9] - [10]. The court approved [67] what was said by Brereton J in *Integral Home Loans Pty Ltd v Interstar Wholesale Finance Pty Ltd* [2007] NSWSC 406; [2007] Aust Contract Reports 90-261, 90,037. Brereton J said that relief may be granted in cases of penalties for non-performance of a condition, despite the absence of an express contractual promise to perform the condition, on the basis that a penalty conditioned on failure of a condition is in substance equivalent to a promise that the condition will be satisfied.

63 Whether special condition 9 is a penalty invites attention to the proper construction of that clause, and the contract as a whole, but it is not solely a matter of contractual construction. The court is not limited to considering the terms of the contract and any background factual matrix evidence that would be admissible for the purposes of contractual construction: *Spiers Earthworks Pty Ltd v Landtec Projects Corporation Pty Ltd [No 2]* [2012]

WASCA 53; (2012) 287 ALR 360 [25] - [26]. However, in this case, no party led any evidence beyond the terms of the Contract.

64 In my opinion, for each of the following three reasons, special  
condition 9 is not a penalty.

65 First, on my construction of the Contract, I am not persuaded that  
special condition 9 engages the doctrine of penalties. I do not consider that  
it imposes a collateral liability upon the non-observance or failure of a  
primary contractual stipulation in the form of special condition 8. Rather, as  
I have explained, special conditions 8 and 9 are part of a contractual scheme  
by which the consideration payable by the buyer for the Land is in two  
alternatives: either \$3.5 million plus the Seller's Lot, or, if for any reason the  
Seller's Lot is not transferred by the specified date, then \$4 million. Special  
condition 9 is part of the definition of the consideration payable by the buyer  
in exchange for his receipt of the Land.

66 Secondly, the party resisting enforcement of a provision on grounds  
that it is a penalty has the onus of proving that it is a penalty: *Spiers  
Earthworks* [23], [86]. In my view, assuming I am wrong in relation to my  
first reason, the buyer has not discharged that onus. A sum payable will be a  
penalty if the amount stipulated is extravagant and unconscionable in  
amount in comparison with the greatest loss that could conceivably be  
proved to have followed. It is not enough that it should be lacking in  
proportion; it must be 'out of all proportion': *Ringrow Pty Ltd v BP  
Australia Pty Ltd* [2005] HCA 71; (2005) 224 CLR 656 [32] and  
'extravagant and unconscionable in amount': *Ringrow* [32]; *Spiers  
Earthworks* [21], [88] - [89]. The requirement that the stipulated sum be  
extravagant and unconscionable in amount stems from a policy emphasis on  
freedom of contract: *Ringrow* [31] - [32]; *Spiers Earthworks* [21], [89].

67 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.

68 Thirdly, and in any event, the buyer led no evidence of the seller's actual damage suffered through not receiving the Seller's Lot. Relief on the grounds of penalties will not be given unless compensation is made for the prejudice suffered by the party seeking to enforce the provision alleged to be a penalty by the failure of the primary stipulation: *Andrews v ANZ* [10], [11], [65]; *AMEV-UDC Finance Ltd v Austin* [1986] HCA 63; (1986) 162 CLR 170, 186 - 187, 190. I do not accept the buyer's submission that it was for the seller to counterclaim for his actual loss. In my view, where the existence of prejudice to the party relying on the alleged penalty is clear, it is for the party seeking to be relieved from an alleged penalty to lead some evidence to enable the court to compensate the other party for the prejudice suffered by failure of the primary stipulation. Compensation for that prejudice is a condition of relief from a penalty.

69 For these reasons, I find that special condition 9 is not a penalty.

### **Conclusion**

70 For these reasons, I reject the buyer's contentions. I find that special condition 9 is valid and enforceable. That being so, in the events that have happened, the seller is entitled to judgment on his counterclaim in the sum of \$500,000.

71 I will hear further from the parties as to the precise form of orders, and as to costs.