IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S115 of 2013

BETWEEN

JOHN DALY
Appellant

AND

ALEXANDER THIERING
First Respondent

ROSE MATILDA THIERING
Second Respondent

LIFETIME CARE AND SUPPORT AUTHORITY OF NEW SOUTH WALES
Third Respondent

THIRD RESPONDENT'S SUBMISSIONS

Part I

1. This submission is in a form suitable for publication on the internet.

Part II: Issues presented by the appeal

2. The central issue in the appeal is whether the first and second respondents are entitled to claim for damages, pursuant to the principles in *Griffiths v Kerkemeyer* (1977) 139 CLR 161, *Van Gervan v Fenton* (1992) 175 CLR 327 and s 128 of the *Motor Accidents Compensation Act 1999* (NSW) (the **MAC Act**), as against the appellant or whether such entitlement was effectively removed by s 130A of the MAC Act when the first respondent (**Mr Thiering**) became a participant in the Lifetime Care and Support Scheme (the **Scheme**) pursuant to the *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW) (the **LCS Act**).

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3. This issue is to be determined in relation to the care provided to Mr Thiering by the second respondent (**Mrs Thiering**, his mother) on a gratuitous basis in circumstances where:

a) Mr Thiering is a participant in Scheme;

b) by virtue of (a), Mr Thiering benefits from the obligation on the third respondent (the **Authority**) to pay reasonable expenses incurred in providing for such of his "treatment and care needs" (as defined by s 6 of the LCS Act) as relate to the relevant motor accident and as are reasonable and necessary in the circumstances;

c) the Authority has in fact paid reasonable expenses incurred for Mr Thiering's "treatment and care needs" in accordance with the Scheme; and

d) as they were entitled to do, Mr Thiering and Mrs Thiering chose to have Mrs Thiering provide certain care for Mr Thiering (rather than accept that care by commercial providers, which the Authority would otherwise have paid for);

e) the Authority has not paid Mrs Thiering for any care she has provided and does not propose to pay for and has not agreed to pay for such care.

4. In order to address the issue stated above, it will be necessary to determine the proper construction of s 130A of the MAC Act, as in force until 24 June 2012.

Part III

5. The Authority considers that a notice under s 78B of the *Judiciary Act 1903* (Cth) is not required for this appeal.

Part IV: Material facts contested by Authority

6. The Authority generally agrees with the factual narrative stated by the appellant, with the following exceptions.

7. In relation to paragraphs [9]-[12] of the appellant's submissions, the Authority refutes any implication that it engaged Mrs Thiering to

undertake the provision of care to Mr Thiering. The care plans were prepared in a context where Mr Thiering and his mother chose for her to undertake the provision of part of his treatment and care needs (being needs that the Authority would have provided for but for those needs having been fulfilled by Mrs Thiering).

8. Further, the Authority is of the view that the appellant's submissions (at paragraph [17]) do not accurately capture the views of Garling J at first instance. At [149] of his Honour's reasons for judgment, Garling J held that Mr Thiering's right to recover "*G v K* damages" from the appellant would cease to exist if the Authority had either paid for the services or had an obligation to pay for the services. In any event, on the Authority's submissions, this point does not arise as the Authority did not pay for the services and had no obligation to do so.

Part V: Relevant provisions

9. The Authority agrees that the provisions identified by the appellant are the key provisions. However, in order that these provisions might be understood in their full context, the following parts of the MAC Act and the LCS Act, as each stood immediately before the *Motor Accidents and Lifetime Care and Support Schemes Legislation Amendment Act 2012* (NSW) (**the 2012 Amending Act**) commenced on 25 June 2012, are provided in the Authority's bundle of legislation:

   a) MAC Act, Pt 1.1;

   b) MAC Act, Pt 5.2;

   c) LCS Act, Pt 1;

   d) LCS Act, Pt 2; and

   e) LCS Act, Pt 7.

10. The only relevant differences between those parts as they were before 25 June 2012 and as they were at the date of the subject motor accident (28 October 2007) are as follows:

   a) MAC Act, Pt 5.2: s 128 was amended in 2008, but in such a way that the amended version applies to the instant case;

b) LCS Act, Pt 2: s 7A was inserted in 2009 and the structure of s 9 was changed in a manner which does not affect the statutory construction arguments in this appeal; and

c) LCS Act, Pt 7: ss 51A and 54(11) were inserted in 2009.

11. As a point of reference, the following parts of the MAC Act and the LCS Act (as currently in force)[1] are provided in the Authority's bundle of legislation:

a) MAC Act, s 3 (the remainder of Pt 1.1 is unchanged);

b) MAC Act, Pt 5.4;

c) LCS Act, Pt 1;

d) LCS Act, Pt 2;

e) LCS Act, Pt 2A; and

f) LCS Act, Pt 7.

12. In addition, the second reading speech for the LCS Act[2] is provided in the Authority's bundle of legislation.

Part VI: Authority's statement of argument

13. The Authority's position differs both from the construction favoured by the court below and from that advanced by the appellant.

14. In summary, for the reasons which follow, the Authority submits that the proper construction of s 130A of the MAC Act is as follows:

a) there can be no award of damages for economic loss in relation to treatment and care needs (including pursuant to s 128 of the MAC Act) against an insurer or defendant in the appellant's position where:

i) the injured person is a participant in the Scheme;

ii) the injured person has treatment and care needs; and

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[1] Both Acts have been amended by the 2012 Amending Act and the *Safety, Return to Work and Support Board Act 2012* (NSW).

[2] NSW, Legislative Assembly, Parliamentary Debates (Hansard), 9 March 2006, 21400.

iii) those treatment and care needs are provided for during the period in which the injured person is a participant in the Scheme, whether by the Authority or by some other person.

15. The effect of this construction is that the Authority generally agrees that the orders sought by the appellant are appropriate, although the Authority would propose a slightly different answer to the fifth question considered by Garling J at first instance (appellant's order 3).

16. However, the construction outlined above is different from that advanced by the appellant. In particular, the appellant's construction effectively reads the words "which are provided for or are to be provided for" in s 130A of the MAC Act as "which could be provided for by the Authority" (see, for example, at [57]). This is not an apt interpretation of that provision.

17. In the Authority's submission, the proper construction of s 130A of the MAC Act can only be reached on a proper understanding of the context of the MAC Act as a whole, and of the LCS Act.[3]

18. Except where otherwise stated, the arguments which follow refer to the MAC Act and the LCS Act as each was in force before the 2012 Amending Act commenced on 25 June 2012.

The MAC Act

19. Broadly, the MAC Act regulates the damages available to a person who is injured in a "motor accident" (defined in s 3 of the MAC Act). Of particular relevance is Pt 5.2, which regulates damages available in respect of economic loss. (The MAC Act also deals with matters relating to third-party insurance (Ch 2) and insurers (Ch 7) and establishes the Motor Accidents Authority (s 198) to administer the regime (Ch 8).)

20. Sections 128 and 130A of the MAC Act were both located in Pt 5.2.

21. Section 128(1) of the MAC Act explicitly provides for an award of damages to compensate "for the value of attendant care services" which are provided gratuitously. The balance of s 128 modifies the position

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3 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

under the common law as established by the court in *Griffiths v Kerkemeyer* and *Van Gervan v Fenton*, but the basic principle - that compensation can be awarded for such care, on the basis that it is for the loss of the injured person - remains unchanged.

22. Damages pursuant to s 128 of the MAC Act are, implicitly, damages for economic loss, as they do not fall within the definition of "non-economic loss" in s 3 of the MAC Act.

23. Section 130A of the MAC Act governed the interaction between damages which could be awarded pursuant to s 128 of the MAC Act and the provision of "treatment and care needs" of injured persons who are participants in the Scheme.

24. The key words of s 130A are (emphasis added):

> *No damages may be awarded to a person who is a participant in the Scheme ... for economic loss in respect of [his or her] treatment and care needs ... that relate to the motor accident injury... and that are provided for or are to be provided for* ***while the person is a participant in [the] Scheme.***

25. The construction of this provision favoured by the courts below was that it prevented an award of damages in respect of treatment and care needs that had been or would be *paid for*. On this view, a person in the position of Mr Thiering was not prevented from seeking an award of damages under s 128, because it would cover loss in relation to treatment and care needs provided gratuitously (that is not *paid for*).[4] (The courts below imposed a further limitation that damages could not be sought in respect of such loss suffered after the time of judgment because of the operation of s 7(3) of the LCS Act.[5])

26. The appellant contends that the focus upon "paid for" reveals error. The appellant contends for the following construction: the words "provided for ... while the person is a participant in [the] Scheme" imply "provided for ... by the Authority". This would result in an award of damages being excluded only where:

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4 *Thiering v Daly* [2011] NSWSC 1345 [110], [145], [149]; *Daly v Thiering* [2013] NSWCA 25 [72]-[74] (Hoeben JA).

5 *Thiering v Daly* [2011] NSWSC 1345 [109]-[110], [124], [143(k)], [150]; apparently accepted by the Court of Appeal: *Daly v Thiering* [2013] NSWCA 25 [14], [50]-[52] (Hoeben JA).

a) a person is a participant in the Scheme;

b) the person has treatment and care needs;

c) the Authority provides for some or all of those treatment and care needs.

27. Connected with this construction is the notion that the Authority can *provide for* Mr Thiering's treatment and care needs (and has done so) by allocating work to Mrs Thiering. In this way, it is said that s 130A excludes an award of damages in respect of Mr Thiering's loss that is met by his mother's services because they are provided for under the Scheme. A slightly different way of understanding the appellant's case is that s 130A excludes an award of damages in respect of a person's treatment and care needs that could and would be provided for by the Authority (but for their provision for free by a relative or friend).

28. The Authority contends that the appellant's construction is wrong insofar as it inserts the words "by the Authority" or "under the Scheme" into the provision, where it does not appear. Further, the Authority contends that the courts below erred in equating "provided for" with "paid for". Paying for something is not the only way treatment and care needs can be provided for: they can be provided for by a mother (for example) by agreeing to do the acts that need to be done (and then doing them). That said, paying for services is the only way in which the Authority provides for such needs.

29. The Authority submits that the words "while the person is a participant in [the] Scheme" take their literal meaning, in which case the clause has only a temporal element. This would result in an award of damages in respect of treatment and care needs being excluded in circumstances where:

a) a person is a participant in the Scheme;

b) the person has treatment and care needs; and

c) those treatment and care needs are provided for during the period in which the person is a participant in the Scheme, whether by the Authority or by some other person.

30. On this analysis, an award of damages for treatment and care needs while the plaintiff is a participant in the Scheme is excluded irrespective of the

identity of the person providing for those needs. If the treatment and care needs are provided for by someone (including by the injured person), no damages may be awarded.

31. Before advancing arguments as to why this construction should be preferred, it is necessary to have in mind how the LCS Act operates and the way that treatment and care needs can be provided by the Authority.

The LCS Act

32. The LCS Act was enacted in 2006 as part of a "legislative framework for implementing significant improvements in the assistance provided to people injured in motor vehicle accidents."[6] In particular, the LCS Act was designed to "establish[] a [S]cheme to provide lifetime care and support for persons who suffer catastrophic injuries in motor vehicle accidents covered by the [MAC Act]."[7] The Scheme was to "provide for all the reasonable treatment and care expenses of participants."[8]

33. Part 2 of the LCS Act is entitled "Care and support for Scheme participants".

34. The principal obligation on the Authority in respect of the provision of treatment and care needs is set out in s 6, being an obligation to make payments in specified circumstances. In particular s 6(1) provides (emphasis added):

> *The Authority is to pay the* ***reasonable expenses incurred*** *by or on behalf of a person while a participant in the Scheme in providing for such of the treatment and care needs of the participant as relate to the motor accident injury in respect of which the person is a participant and* ***as are reasonable and necessary in the circumstances.***

35. Section 6(2) defines treatment and care needs as being a "participant's needs for or in connection with" specified treatment, equipment, care, assistance and services.

36. Section 6(4) provides:

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6 NSW, Legislative Assembly, Parliamentary Debates (Hansard), 9 March 2006, 21400 at 21400.

7 NSW, Legislative Assembly, Parliamentary Debates (Hansard), 9 March 2006, 21400 at 21401.

8 NSW, Legislative Assembly, Parliamentary Debates (Hansard), 9 March 2006, 21400 at 21402 (emphasis added).

The LTCS Guidelines may make provision for or with respect to determining which treatment and care needs of a participant in the Scheme are reasonable and necessary in the circumstances.

37. Accordingly, it is apparent from s 6 of the LCS Act that the Scheme is not designed "to provide for all treatment and care ... required by participants",[9] but rather to cover the reasonable expenses of a participant in the Scheme in relation to that participant's treatment and care needs that are reasonable and necessary in the circumstances.

38. First, the subject matter of the Authority's liability is not "treatment and care" but "treatment and care *needs*". In other words, if a participant's parents do all of their housework when the participant is capable of doing some or all of it themselves, that housework might be considered to be care, and it is carried out for or in connection with domestic assistance (see s 6(2)(g)), but it cannot be said to be a *need*. Accordingly, it falls outside the definition of "treatment and care *needs*".

39. Secondly, the word "reasonable" constrains the Authority's obligation to pay "expenses incurred by or on behalf of" a Scheme participant by reference to criteria such as the different costs that might be payable in various circumstances in respect of the same, or the same type of, treatment and care (for example, two different doctors might charge differential amounts for the same service).

40. Thirdly, as the Authority's obligation is to pay expenses in relation to "such treatment of and care needs ... as are reasonable and necessary in the circumstances", the words "reasonable and necessary in the circumstances" must be given some work to do beyond simple necessity. This can be done by taking the words "in the circumstances" to refer to all of the subjective circumstances of the person.

41. By way of example, a person might have a need for a particular aid, such as a walking stick. That would be a "treatment and care need" by reason of s 6(2)(h). However, if the person already has a walking stick, it is unlikely to be "reasonable and necessary in the circumstances" to pay for another walking stick.

42. Part 2 also makes provision for eligibility for participation in the Scheme. There a medical criteria for entry (s 7(1)). A person "is not

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9 Contra appellant's written submissions at [3], [46], [60], [63], [65].

eligible to be a participant in the Scheme" if the person has been awarded damages, pursuant to a final judgment entered by a court or a binding settlement, for future economic loss in respect of the treatment and care needs of the participant that relate to the injury (s 7(3)). This restriction on eligibility operates to preclude a person becoming a participant by reason of s 9(1). However, once a person is accepted as a lifetime participant in the Scheme, the person remains a participant for life (s 9(4)). Contrary to the reasoning of the courts below,[10] a person does not cease to be a participant if the person gets an award under s 7(3); rather, once the person becomes a participant, s 130A will operate to reduce the person's entitlement to an award of damages. This is the way in which double recovery is to be avoided.

43. It should also be noted that participation in the Scheme need not be voluntary. That is, an insurer can make an application for a person to be a participant even without that person's consent (s 8(1) and (2)). An insurer has a strong incentive to make such applications because the insurer then ceases to be liable for treatment and care costs to the extent of the operation of s 130A of the MAC Act.

44. While a person may become a participant without their consent, the Authority has no power to compel the participant to accept the financial assistance that it offers. The participant may be financially independent and, for example, choose not to have services provided by the persons approved by the Authority. It is thus not a feature of the Scheme that treatment and care needs must be provided for *by the Authority*.

45. The financial nature of the Authority's role is made clearer from Part 7 of the LCS Act. Section 48 relevantly provides for:

a) the establishment of the Lifetime Care and Support Authority Fund (the **Fund**): sub-s (1);

b) the payment of certain monies into the Fund, including but not limited to levies on third-party policies: sub-s (2); and

c) the payment of certain monies from the Fund, including "all payments required to be made by the Authority under Part 2", the

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[10] *Thiering v Daly* [2011] NSWSC 1345 [109]-[110], [124], [143(k)], [150]; apparently accepted by the Court of Appeal: *Daly v Thiering* [2013] NSWCA 25 [14], [50]-[52] (Hoeben JA).

operating costs of the Authority and "all other money required by or under this or any other Act to be paid from the Fund": sub-s (3).

46. One effect of s 48 is to limit the monies which can be paid from the Fund, other than in respect of the Authority's operating costs, to monies which are *required* to be paid. Accordingly, the Authority has no capacity to make discretionary payments.

47. Section 49 requires the Authority to determine the amount to be contributed to the Fund "to fully fund the present and likely future liabilities of the Authority under Part 2". That is, the levy is to be set with a view of covering the payments required to be made under s 6(1).

48. Section 54 provides for a right in the Authority "to recover from the appropriate person ... the present value of its treatment and care liabilities ... [relating to] a participant in the Scheme" where a motor vehicle involved in an accident was either uninsured or insured in another jurisdiction. This present value is to be calculated by reference to the "amounts already paid by the Authority under Part 2" and "the present value of the amounts the Authority estimates will become payable by the Authority in the future under Part 2".

49. These provisions are designed to operate to ensure that the Scheme is fully funded by the levy and other sources specified in the Act (including s 54) and is therefore not a drain on other State revenues.

50. The above review serves to emphasise that the principal function of the Authority is to *pay* for reasonable expenses incurred in providing for such treatment and care needs as are reasonable and necessary in the circumstances. However, the Scheme does not require participants to accept all of the assistance that may be offered. Given that the Authority has power to specify that services may be provided only by approved providers (s 10) and that, in such a case, the Authority is not required to pay any expenses by non-approved providers (and, as noted above, the Authority has no power to draw from the Fund to pay persons except where payment is required), the Scheme implicitly envisages instances where treatment and care needs may be provided by a person who need not or cannot be paid by the Authority. That is, the legislation envisages that there may be instances where not all treatment and care needs will be provided for by the Authority.

51. It is against this background that s 130A needs to be construed.

Interpretation of "provided for" in s 130A of the MAC Act

52. The appellant contends that his construction gives effect to the literal meaning of the words "provided for".[11] Nonetheless, the appellant does not identify any particular definition in support of this submission.

53. The *Macquarie Dictionary*[12] includes the following relevant definitions for "provide":

> 5. *to take measures with due foresight (usu. fol. by for or against).*
> 6. *to make arrangements for supplying means of support, money, etc. (usu. fol. by for).*
> 7. *to supply means of support, etc. (oft. fol. by for).*

54. The Authority contends that the definitions numbered 6 and 7 are substantially the same in the present context and are applicable here. In a practicable sense, as the review of the LCS Act above shows, the Authority provides for treatment and care needs by making arrangements for and paying selected service providers to meet those needs. That is, the Authority provides for needs by paying for services. Mrs Thiering provides for some of her sons needs by voluntarily providing her own labour.

55. No provision is made in the LCS Act for the payment of a person who provides care unless the conditions set out above are met, including that such provision of care is an "expense" and, where relevant, that the provider of the care is an approved provider.[13] On the other hand, where those conditions are met, the Authority is bound, and legally authorised, to make the relevant payments.

56. The Authority does not itself provide for treatment and care needs by merely acknowledging that some care is to be provided for by a person other than the Authority (perhaps making provision for that care by the Authority not "reasonable and necessary in the circumstances").

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[11] Appellant's written submissions at [34], see also the reference at [31] to the "ordinary and natural meaning" of the words.

[12] *Macquarie Dictionary* (rev ed, 1985) at 1367.

[13] Contrast the *Workers Compensation Act 1987* (NSW), s 60AA, which sets out an explicit regime for payment of care provided (otherwise) gratuitously.

Construction of s 130A of the MAC Act

57. The Authority contends that the courts below erred by equating "provide for" with "pay for". The matter is merely one method of doing the former.

58. That said, the Authority contends that the appellant's proposed construction is also flawed because it seeks to insert words and concepts into the legislation that are not there. Section 130A is not constrained by reference to the provision of services "under the Scheme" or "by the Authority". It does not require that the Authority be deemed to have provided for care by accepting that Mrs Thiering will provide for some of it.

59. The construction outlined above at paragraphs 29-30 is consistent with the ordinary and natural meaning of all the language used and with the purpose of the legislation. This Court should adopt that construction.

60. Because the Authority's obligation relates only to the payment of "reasonable expenses" in respect of "treatment and care needs ... [which] are reasonable and necessary in the circumstances", this allows a Scheme participant some choice (for example, paying extra to see the doctor of their choice if that doctor charges more than a "reasonable expense", or deciding to obtain care from a person other than a person whom the Authority is willing to pay and capable of paying, even if that care must be provided gratuitously).

61. In doing so, it does not place a further obligation on the Authority above and beyond the Authority's obligations pursuant to the LCS Act, and it provides certainty to insurers and other defendants with regard to the damages for which they will be liable.

62. In addition, and importantly, the Authority's construction does not leave an injured person in the invidious position of an impecunious plaintiff before the court's decision in *Griffiths v Kerkemeyer*. Such a plaintiff could have been reliant on gratuitous care. Conversely, a Scheme participant need only rely on gratuitous care if he or she chooses to do so.

63. In the Authority's submission, on this construction, the words of s 130A of the MAC Act are sufficiently "clear and unambiguous" so as to

remove the common law right for a person in Mr Thiering's position to claim *Griffiths v Kerkemeyer* damages.[14]

Answer to question 5 before Garling J

64. Order 3 as proposed by the appellant in his Notice of Appeal filed 19 June 2013 proposes an answer to question 5 of the questions before Garling J at first instance.

65. That question was:[15]

> *Whether on proper construction of s 130A of the* [MAC Act], [Mr Thiering] *has any entitlement as against the* [appellant] *other than damages for non-economic loss and loss of earning capacity.*

66. On the basis of the construction advanced by the Authority, the answer to that question should be:

> *In respect of the period during which Mr Thiering has been a participant of the Scheme (since 6 December 2007 when he was accepted as an interim participant), Mr Thiering has no entitlement as against the appellant for economic loss in respect of his treatment and care needs, including but not limited to any treatment and care needs provided for by Mrs Thiering.*

Response to appellant's submissions

67. While the Authority's final position effectively supports the appellant's final position, the Authority has followed different reasoning. Accordingly, it is necessary to make some limited submissions in response to the appellant's written submissions.

68. The appellant's repeated use of the word "all"[16] in relation to the treatment and care to be provided for pursuant to the Scheme might erroneously give the impression that this word is used in the LCS Act, when it is not. It is not a word used in the LCS Act.

69. The appellant fails to appreciate the critical nature of the ambit of the Authority's obligations pursuant to the LCS Act, which are discussed above. Those obligations are such that, having regard to the fact that

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[14] *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2011) 234 CLR 558, 571-572 [37] (French CJ, Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

[15] *Thiering v Daly* [2011] NSWSC 1345 [169].

[16] Appellant's written submissions at [3], [46], [60], [63], [65].

Mrs Thiering was providing care to Mr Thiering, the Authority assessed Mr Thiering's "treatment and care needs ... [which were] reasonable and necessary in the circumstances", and for which it was required to pay reasonable expenses incurred, as not including the care provided by Mrs Thiering.[17] This did not leave it under any obligation to pay Mrs Thiering.[18] Indeed, on any construction discussed above, the Authority has no such obligation.

Part VII: Not applicable

Part VIII: Estimate of time required for oral argument

10 70. We estimate that no more than 1 hour will be required for the presentation of the Authority's oral argument.

Dated: 18 July 2013

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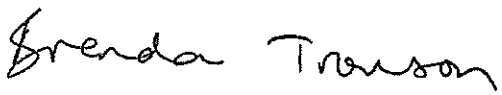

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17 Contra appellant's written submissions at [42].
18 Contra appellant's written submissions at [35].