SUPREME COURT OF QUEENSLAND

CITATION:	*Coombs v Qld Cotton* [2000] QCA 476
PARTIES:	**JOHN FRANCIS COOMBS** (plaintiff/respondent) v **QUEENSLAND COTTON CORPORATION LTD** ACN 010 944 591 (defendant/appellant)
FILE NO/S:	Appeal No 10041 of 1999 SC No 5214 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 November 2000
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2000
JUDGES:	Pincus and Thomas JJA, Jones J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	WORKERS' COMPENSATION – ASSESSMENT AND AMOUNT OF COMPENSATION – ASSESSMENT BY AGREEMENT WORKERS' COMPENSATION – ALTERNATIVE RIGHTS AGAINST EMPLOYER AND THIRD PARTIES – ALTERNATIVE RIGHTS AGAINST EMPLOYER FOR DAMAGES AT COMMON LAW OR BY STATUTE – RIGHT TO PROCEED FOR DAMAGES – respondent worker received "Notice of Assessment" from WorkCover containing WorkCover's assessment of degree of permanent impairment and offer of lump sum compensation – legislation required both board and worker to accept degree of permanent impairment – notice allowed worker both to accept degree of permanent impairment and to accept, reject or defer offer of lump sum compensation – whether worker's acceptance of degree of permanent impairment required to be notified to board – whether offer of compensation made before acceptance by board and worker of degree of permanent impairment still an offer for purpose of s 182D

Workers' Compensation Act 1990, allowing worker to seek damages at law

WorkCover Queensland Act 1996 (Qld) s 542, s 551
Workers' Compensation Act 1990 (Qld) s 130, s 131, s 132, s 135, s 182B, s 182C, s 182D

Australian Broadcasting Corporation v Redmore Pty Ltd (1989) 166 CLR 454, considered
Coco v The Queen (1994) 179 CLR 427, cited
Hibberd v South Blackwater Coal Ltd SC No 47 of 1997, 28 August 1998, followed
Raymond v Honey [1983] 1 AC 1 cited

COUNSEL: R J Douglas SC for the appellant
D B Fraser QC with M P Kent for the respondent

SOLICITORS: Bowdens Lawyers for the appellant
Clewett Corser & Drummond for the respondent

[1] **PINCUS JA:** This is an appeal from Helman J who dismissed an application to strike out the respondent's claim. Although not so identified in the writ, which was issued on 4 June 1999, the claim is for damages for personal injury said to have been suffered on 7 June 1996 in the course of the respondent's employment with the appellant. The question in the case is the effect of certain provisions of the *Workers Compensation Act* 1990 ("the Act"); it is the Act which applies, because the injury is alleged to have been sustained before the commencement of the *WorkCover Queensland Act* 1996: see s 551 of the 1996 Act.

[2] Although I am in general agreement with the reasons given by the learned primary judge, the approach I take to the matter differs a little from his Honour's. The relevant provisions of the Act are as follows:

> "132.(1) The board may make an offer of lump sum compensation to or on account of a worker who has suffered an injury prescribed under the table of injuries that has resulted in the worker sustaining a permanent impairment.
>
> (2) An offer may be made only if-
>
> (a) the board and the worker both accept the worker's degree of permanent impairment is the degree assessed by a registered medical practitioner or under section 95(9); or
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> (b) a medical assessment tribunal has decided on a reference under part 10 that the worker has sustained a degree of permanent impairment.
>
> ...
>
> (5) An offer may be accepted or rejected, or a decision about the offer may be deferred, within 28 days after a written offer is made by the board (the 'decision period').
>
> (6) If, within the decision period, the worker does not advise the board that the offer is accepted or rejected or that the worker wishes to defer the decision, the worker is taken to have deferred the decision.

> (7) If the offer is accepted, the board must pay the lump sum compensation entitlement to or on account of the worker."
>
> "182D.(1) A worker who has not received an offer of lump sum compensation under section 132 may seek damages at law for an injury suffered after the commencement only if the board gives the worker a certificate under this section.".

[3] The "board" mentioned in these provisions has been replaced by WorkCover: s 542 of the 1996 Act. Section 132 entitles the board (now WorkCover) to make an offer of lump sum compensation. The result of acceptance of the offer is stated in s 132(7): the board must pay the lump sum. The question whether or not an offer has been made is of present importance, because the respondent has not received a certificate under s 182D(1). So, unless he has received an offer of lump sum compensation under s 132, he may not recover damages and the action he has brought must fail. The question before the judge, then, was whether within the meaning of s 132(1) the board made an offer of lump sum compensation, which was "received" by the worker within the meaning of s 182D(1).

[4] Although the arguments advanced tended to run together the question of the effect of the offer's terms and the question of the effect of s 132(2), those two questions are distinct. One contention for the appellant amounts to this: that no offer was made to the worker or received by him, because the document relied on by the worker was not an offer. The reasoning behind the appellant's contention is a little complex. There is nothing in either s 132 or s 182D to suggest that the board may make an offer which is merely conditional, but the appellant argues that a conditional offer was made and, because of lack of certain action on the part of the respondent, viz. acceptance of the degree of impairment referred to in s 132(2)(a), the condition was never satisfied. So, it is apparently contended, there never was an offer; the condition is treated as one which is precedent, not subsequent, a view whose correctness I do not discuss. If the appellant's argument is sound, then the respondent's failure to fulfil the condition imposed in the offer meant that no offer within the meaning of s 132(1) ever came into existence.

[5] It is not clear that a conditional offer may be made under s 132(1), but neither party contends to the contrary. Demack J in *Hibberd v South Blackwater Coal Ltd*, SC No 47 of 1997, 28 August 1998, was prepared to adopt the view that such a conditional offer as was made here is permitted by the Act and it is my opinion that this Court should proceed on that basis.

[6] The offer document is headed "Notice of Assessment". It sets out what the board says is the respondent's degree of permanent impairment and adds "You must make a decision about the degree of permanent impairment". There is nothing in s 132 of the Act expressly requiring a worker to do so. The document has boxes A and B, the former to be signed if the worker agrees with the degree of permanent impairment asserted by the board (which I shall call "the degree of impairment" for brevity) and the latter to be signed if he does not. The respondent signed neither. The form contemplates that if box A is signed, the worker will indicate in "Step 2" his acceptance of, or rejection of, or decision to defer, the offer of lump sum compensation, the amount of which is stated to be $3,315. The respondent indicated his rejection of the offer of lump sum payment by signature, but did not

return the signed form or otherwise inform WorkCover of his rejection of that offer. Because the respondent proceeded to Step 2, he implicitly accepted, in my view, the degree of impairment; but that implicit acceptance was not communicated to WorkCover. It is the lack of communication of acceptance which is the core of the appellant's argument.

[7] The form requests, but does not demand, that a worker who has indicated his choice between the three possible ways of dealing with the offer of payment return the notice to WorkCover. Insofar as the form asks the worker to return it when signed to WorkCover, it does not conflict with the Act; that is because it does not demand that the signed form be returned. If it did so demand, that would conflict with the scheme of ss 132(5) and (6). Under those two subsections, the only effect of a worker's not accepting or rejecting an offer of lump sum compensation within the stated time, 28 days, is that he is taken to have deferred a decision; it is open to him to deal with the offer after the 28 days, having by inaction caused the offer to be deferred.

[8] The appellant says, to put it broadly, that the condition of the offer was acceptance by the respondent of the degree of impairment. But what, under the terms of the offer, was to constitute acceptance? Obviously, says the appellant, the condition imposed included the worker's giving notice of his acceptance of the degree of impairment, if he did accept it. If one considers the form solely against the background of the law of contract, the conclusion might be one favourable to the appellant: a contractual offer does not affect rights until acceptance is communicated. The weakness of the appellant's argument is that the form does not, as it could have done, ask for, let alone require, notification of acceptance of the degree of impairment. That omission is significant, particularly because the form asks the respondent, if he disagrees with the degree of impairment, to sign and return the notice. In contrast, if he agrees with the degree of impairment, he is to sign and continue on to Step 2; there is no mention of separately indicating acceptance of the degree of impairment by returning the signed form.

[9] But the appellant can fall back on Step 2 and say that, at least at that stage, when the respondent is indicating his attitude towards the offer of lump sum compensation, the offer becomes conditional upon notification of that attitude to WorkCover. There are two answers: first, the form requests but does not require return of the signed form by those who proceed to Step 2; secondly, the Act permits a worker to refrain from making any decision about the lump sum offer, thereby deferring the decision. So the request to make and notify the decision about the offer should not be read as a condition of the offer.

[10] The scheme of the form used by WorkCover is that, by one notification, a worker in the position of the respondent can convey to WorkCover two choices: first, acceptance of the degree of impairment; secondly, acceptance, rejection or deferment of the offer. It is clear that the form does not require any separate response on the former point and, in my view, it should not be read as imposing a condition, by the **request** to return the form to indicate a decision, as to the second point. As I have said, I will not deal with the question whether the condition, if it existed, was a condition precedent to the existence of the offer, or a condition subsequent.

[11] In summary, the respondent's offer does not, properly read, impose any condition of notification by the respondent of acceptance of the degree of impairment.

[12] The remaining question is whether the offer is bad as having been made in breach of s 132(2). The natural reading of s 132(2) is that it requires that, at the time of making of the offer, one of the two conditions mentioned in the subsection has been satisfied. But as I have explained, the parties assume, and in my view the assumption should be accepted, that s 132(2) is complied with if an offer is made at a time when neither para (a) or para (b) has been satisfied, but is made conditionally on satisfaction of para (a). For the reasons set out above, I reject the contention that the offer is by its terms conditional upon notification of acceptance of the degree of impairment. It is a separate question whether the Act, as opposed to the form, requires such notification.

[13] As I have pointed out, by proceeding to Step 2, and signing one of the three options set out there, the respondent must be taken to have accepted the degree of impairment; if he had not done so then his completion of Step 2 would have been inappropriate. A reason for thinking that acceptance of the degree of impairment, to be effective for the purpose of para (2)(a) of s 132, need not be notified to the board is that s 132(6) and s 182B (the latter not being quoted above) expressly contemplate that in other, closely related, situations the board will be notified of the worker's decision. One would perhaps have expected that, if acceptance of the degree of impairment by the board and by the worker were intended to be ineffective in the absence of mutual notification, s 132 would provide for those steps. It is unnecessary, however, to reach a final conclusion on this point.

[14] That is because I agree with the respondent's contention that an offer made under s 132(1), without compliance with s 132(2), is nevertheless such an offer as is mentioned in s 182D(1). That is, such an offer has legal effect for the purpose of s 182D(1). Counsel for the respondent sought to illustrate what he said was the error of the opposite view by referring to the possibility that, by an administrative error, an offer might be made by the board in a situation where it did not in truth accept the degree of impairment. Another example is the case where there have been oral communications between the board and the worker, which have left the parties holding different opinions as to whether or not the degree of impairment has been accepted.

[15] The question whether attachment of a statutory precondition avoids a step taken without complying with the condition admits of no general answer. An example of a decision on that point is *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454, where a statute said: "The Corporation shall not, without the approval of the Minister", enter into a contract of a certain sort. The Court held a contract entered into in breach of that requirement to be enforceable, a conclusion which was reached after a study of the context in which the section requiring approval appeared. Here, the Act does not say whether an offer made by the board in breach of s 132(2) is void or not. But it is difficult to see why one should impute to the legislature an intention to make such an offer invalid so as to defeat the worker's rights under s 182D(1). It is the board, not the worker, which exercises the power to make an offer and it is the board which, if the offer is made in breach of s 132(2), has acted unlawfully; those who have contravened the statute might be criminally liable under s 204 of the *Criminal Code*. The better view appears to be

that the right of a worker, having received an offer of lump sum compensation, to sue for damages, would not be destroyed by proof on the part of the board that in making the offer it acted in breach of s 132(2).

[16] **In summary**

(a) It was not a condition imposed by the terms of WorkCover's offer that the respondent worker must notify WorkCover of his acceptance of the degree of permanent impairment mentioned in s 132(2)(a) of the *Workers Compensation Act* 1990;

(b) An offer of lump sum compensation made by WorkCover is good for the purposes of s 182D(1) of that Act, although made in breach of s 132(2).

[17] In my opinion the appeal should be dismissed with costs.

[18] **THOMAS JA:** I have the advantage of having read the reasons of Pincus JA and Jones J. I agree with those reasons and express my particular concurrence with Jones J's practical analysis of the somewhat complex system contemplated by the *Workers' Compensation Act* 1990.

[19] In recent years technical procedural requirements in this and other Acts have turned litigation of this kind into a veritable minefield. The difficulties that arise in the present case are to some extent the product of the use of a form by WorkCover which sought to obtain responses from the claimant on two quite separate matters. One of these was acceptance by the claimant of the Board's nominated degree of impairment which is a topic generally dealt with under s 132 of the Act. The other was acceptance, rejection or deferment of the Board's offer of lump sum compensation, which is generally dealt with in part 11 "Entitlement to Damages Independently of the Act", and in particular by s 182B.

[20] The claimant was sent a letter, a notice and offer, and four pages of "Important Information" which was provided "as a guide to help you understand the notice and the offer". Although the Board may approve forms for use under the Act[1], the Act does not delegate legislative power to the Board or its agents. The Board has not been given power to impose conditions not required by the legislation. The difficulty that ordinary persons have in dealing with forms is perhaps not as well understood as it should be.[2] I do not suggest any sinister intent on the part of those responsible for the forms in question here, but observe that it would be beyond the capacity of a large part of the community to understand and deal adequately with them. A system that proceeds upon the use of such forms is prone to create confusion and to give rise to technical points such as those which the Board now claims have destroyed any right to claim damages.

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1 Section 206A of the Act, which was inserted as a "minor amendment" in the schedule to the *Workers' Compensation Amendment (No 2) Act* 1995.

2 "Survey of Aspects of Literacy" conducted in 1996 by Australian Bureau of Statistics. The report suggests that 47.2% of Australians aged between 15 and 74 could be expected to experience some difficulties in using many of the printed prose materials that may be encountered in daily life. Other extracts from the report are referred to in *Cox v Robinson* [2000] QCA 454, 7 November 2000.

[21] The position of the claimant is to be judged not upon the basis of the requirements of the forms, but upon whether the necessary statutory requirements have been fulfilled.

[22] I do not read s 132 as requiring any notification of acceptance by the claimant of the degree of permanent impairment proposed by the Board, or as empowering the Board to require the sending by the claimant of such a notification. So far as acceptance, rejection or deferment of the lump sum offer is concerned, s 132(5) should be read along with s 182B(4). The former provision is in my view merely facultative. The lack of a response within 28 days in no way affects the claimant's right to elect in due course to seek damages at law for the injury. If there is any tension between s 132 and 182B, the construction should be against destruction of the common law remedy.

[23] I cannot usefully add to what has been written by the other members of the court for concluding that the Board made an offer of lump sum compensation under s 132 and that notification to the Board of acceptance of it was not necessary. I agree with the orders which have been proposed.

[24] **JONES J:** The respondent in this appeal suffered a work related injury on 4 June, 1996. He applied for and received Workers' Compensation benefits pursuant to the *Workers' Compensation Act* 1990 ("the Act"). This act has since been repealed by the *WorkCover Queensland Act* which came into effect on 1 February, 1997. The respondent commenced an action for damages resulting from this injury on 4 June, 1999. His right to maintain this action is to be determined by reference to the provisions of the 1990 Act [3]. The respondent's injury was a non-certificate injury (i.e. a less than 20% entitlement of the statutory maximum) for the purposes of the Act.

[25] The appellant forwarded to the respondent a document dated 10 June, 1998 signed by the manager wherein it offered to pay lump sum compensation in the amount of $3,315.00 [4]. This offer was set out in a document headed **Notice of Assessment** which detailed a medical assessment of 4% permanent partial incapacity. The document was accompanied by a further document entitled **Important Information**. The respondent executed the form of offer of lump sum compensation by ticking the rejection box and signing the form but he took no further steps, he did not communicate to the Board the fact that he had dealt in this way with the form of offer.

[26] The appellant argues that at the time of the commencement of his action, the respondent had not received a valid offer of lump sum compensation pursuant to s 132 of the Act because there was no prior acceptance of the assessed degree of permanent impairment referred to in sub-section (2). Nor had he received from the Board a certificate pursuant to s 182A of the Act.

[27] I agree with Pincus JA, for the reasons he states, that there was no requirement that a worker had to notify acceptance of the degree of permanent impairment before considering an offer of lump sum compensation made pursuant to s 132 of the

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3 See s 551(1) and (2) of the *WorkCover Act*

4 Exhibit JFC-01 "Appeal Record p.45"

Workers' Compensation Act 1990. I agree also that the offer of lump sum compensation dated 10 June 1998 was an offer for the purposes of s 182D of the Act. I do however wish to express a view about the scheme of these particular sections of the Act – an Act which is both remedial in the sense of providing a benefit for an injured worker and restricted in the sense of limiting access to common law damages.

The statutory provisions

[28] The Act provided for a scheme for the payment of workers' compensation benefits to an injured worker in two forms – weekly benefits (Part 8 and Part 9 Division 1) and a lump sum benefit for permanent impairment (Part 9 Division 2). The assessment of permanent impairment of a compensable injury is dealt with in ss 130-131 of the Act. Section 130A makes a specific provision for the assessment of hearing loss and provides that psychiatric/psychological injury will be determined by a medical assessment Tribunal for other injuries by a medical practitioner or in the event of disagreement by a tribunal. Section 132 is concerned with the offer to pay lump sum compensation. It sets out the requirements for the offer, the procedure for acceptance, rejection or deferral and the Board's obligation to pay on acceptance. The relevant terms of s 132 are set out in the judgment of Pincus JA and will not be repeated here.

[29] The Act also recognises the right of an injured worker to receive damages at law independently of the Act for which the Workers' Compensation Board will indemnify the employer.

[30] By s 182B, the Act provides that a worker is not entitled to both lump sum compensation and damages at law. It provides relevantly as follows: -

> (1) A worker to whom lump sum compensation is payable under Part 9, Division 2 for an injury is not entitled to both –
> (a) lump sum compensation for injuries; and
> (b) damages at law for the injury.
> (2) A worker must choose between accepting lump sum compensation offered under this Act and seeking damages at law.
> (3) The worker must give the board notice of the worker's choice in the approved form.
> (4) If the worker fails to give the board notice of the worker's choice before the worker seeks damages at law, the worker is taken to have made a choice to reject lump sum compensation for the injury.
> (5) ...
> (6) The worker is taken to seek damages at law for the injury when the worker –
> (a) seeks to negotiate a damages settlement with the board; or
> (b) starts proceedings at law for damages.

[31] A worker who chooses to seek damages at law suffers a number of consequences which are set out in s 182C. These do not need to be considered for the purpose of this appeal.

[32] By s 182D, "a worker who has not received an offer of a lump sum compensation pursuant to s 132 , may seek damages at law.... only if the Board gives a certificate under this section".

[33] In this case the respondent did not seek a certificate pursuant to s 182D as he relied on the form of offer of 10 June 1998 being an offer for the purposes of that section. As mentioned above his response to that offer was to reject it but he did not communicate that rejection to the Board. His conduct in commencing this action for damages indicated finally, and forever, his choice not to seek any further workers' compensation benefits.

Discussion

[34] The evident purpose of s 132 is to make provision for the finalising of workers' compensation benefits from an injury. There is no entitlement to further compensation or payment of expenses for the injury after the 28 day decision period has elapsed. This is so whether the lump sum is accepted, rejected or deferred (s 135(2)). All that remains is the right to exercise the choice between the offered lump sum and the seeking of damages.

[35] In my view, there is no warrant for refined examination of the documents in terms of their compliance with contractual notions of offer and acceptance. The role of s 132(2) is simply to require that the offer is linked to, and based upon, an assessment of permanent impairment made in accordance with s 130A - i.e. the assessment of a medical practitioner which is acceptable to both parties or the assessment of a medical tribunal. It precludes the making of an offer on any random basis which does not have a medical determination of impairment. The need for such a determination is the fact that in the event of any subsequent injury to that part of the anatomy the lump sum compensation must be reduced by the amount of the previous lump sum payment (s 131(3)).

[36] The offer to the respondent was based on a medical assessment acceptable to the Board and by implication acceptable to the respondent.

[37] Acceptance of an assessment of permanent impairment for the purpose of calculation of lump sum compensation is meaningless to a worker who is intent upon pursuing damages at law and who is thereby prepared to forego lump sum compensation.

[38] In *Hibberd v South Blackwater Coal Limited* [5] Demack J dealt with the questions that arise here. The only factual difference in the circumstances of that case was that in the appropriate box on the composite assessment/offer document, Mr. Hibberd recorded his election to defer his decision on the offer. In his reasons, Demack J concluded that this election meant that Mr. Hibberd, for the purpose of the offer, accepted the assessment of impairment. In my view that placed Mr. Hibberd in no different position to the plaintiff who, by the force of s 132(6) is, "deemed to have deferred the decision".

[39] More importantly Demack J commented upon the proper construction of the statutory provisions. He said:-

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[5] Unreported decision of Demack J – SC No 47 of 1997, 28 August 1998

> "A worker to whom lump sum compensation is payable under division of Pt 9 of the Act is not entitled to both lump sum compensation for the injury and damages at law for the injury (s 182B(1)). If the worker fails to give the board notice of the worker's choice before the worker seeks damages at law, the worker is taken to have made a choice to reject lump sum compensation for the injury (s 182B(4). There is a requirement in s 182B(3) that the worker *must* give the board notice of the worker's choice in the approved form. The plain words of s 182B(4) make it clear that the provision in s 182B(3), which appears to be mandatory, does not need to be complied with. The worker may reject the offer by commencing proceedings.
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> The argument addressed by WorkCover turns on the words of s 132(2) that an offer of lump sum compensation "may be made only if the board and the worker both accept the worker's degree of permanent impairment...assessed by a registered medical practitioner". The argument assumes that there must be some kind of formal acceptance by the worker. The Act does not say that, and the plain effect of s 182B(3) and s 182B(4) which was introduced into the Act in 1995 with the present s 132 shows that, while Parliament expected that the worker should follow an orderly course, it should not be reduced to some mindless ritual."

I am in respectful agreement with these remarks.

[40] The document dated 10 June, 1998 sent by the Board to the respondent contained all the details required by s 132(3). It was accompanied by the information and documents required by s 132(4). In its form and its content, the document had the appearance of an offer. The accompanying information referred to ss 182A, 182B, 182C which relate to a lump sum offer but did not include a reference to s 182D which applies when there is no such offer. The failure to respond to the Board's document becomes, on the seeking of damages at law, a rejection of the offer.

[41] The argument advanced by the appellant would place a restriction on a right of a worker to seek damages at law if the worker failed to take the step of notifying acceptance of an assessment of permanent impairment – a step which might have no significance either to the worker or the Board.

[42] It is well recognised that "a citizen's right to unimpeded access to the courts can only be taken away by express enactment" : *Raymond v Honey*, [6] *Coco v The Queen*[7]. The respondent's right of access to the courts is limited by s 182D whose scope depends upon the proper construction of s 132(2). In principle, the proper construction begins with the presumption, that with competing interpretations, the one should be chosen which involves least alteration to the existing law. [8] That being so, a construction of s 132(2) which meets the objects of the Act as discussed above and which does not unnecessarily restrict access to the courts is to be preferred.

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6 (1983) 1AC 1 at 14

7 (1993-4) 179 CLR 427 at 437-8.

8 *Potter v Minahan* (1908) 7 CLR 277 at 304

[43] In my view, s 132(2) should be construed as having the restricted function of being the basis for the calculation of lump sum compensation. To that extent it conditions the offer, but such a condition does not require any action on the part of the worker to bring about its validity or its effectiveness as an offer

[44] I regard the board's document of 10 June, 1998 as an unconditional offer to pay lump sum compensation pursuant to s 132 and as such an offer for the purpose of s 182D.

[45] I would therefore dismiss the appeal with costs against the appellant.