JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE D FRASER JA

APPLICATION NO COA2024APP00120

BETWEEN	**PATRICK FLETCHER**	**APPLICANT**
AND	**WENDY LEE (Administratrix of the estate of Thomas Chambers, deceased)**	**RESPONDENT**

Maurice McCurdy for the applicant

Ms Jacqueline Cummings instructed by Archer, Cummings & Co for the respondent

24, 28 March and 4 April 2025

Civil practice and procedure – Application for extension of time to file notice of appeal – Application for stay of execution of judgment – Application to adduce fresh evidence in the form of a report from a handwriting expert – Whether applicant provided good reasons for the delay – Written judgment outstanding beyond 42 days after judgment delivery – New counsel retained for appeal – Whether applicant demonstrated an appeal having merit – Whether trial judge erred in excluding agreement for sale from evidence – Sufficiency of evidence that applicant was a purchaser in possession – Whether the trial judge erred in rejecting claim for adverse possession – Stamp Duty Act, s 36 – Court of Appeal Rules, 2002, rules 1.7(2)(b), 1.11(c), 1.15

STRAW JA

Introduction

[1] The applicant, Patrick Fletcher, was the defendant in the court below in a claim by the respondent, Ms Wendy Lee (in her capacity as administratrix of the estate of her deceased father, Thomas Chambers). By this claim, Ms Lee sought damages for trespass

to two parcels of land and an injunction to restrain the applicant from committing further acts of trespass.

[2] The applicant asserted that he is entitled to possession of the two parcels of land and contended that in or around 2008, he had entered into an agreement for sale with Mr Chambers to purchase both parcels for $35,000,000.00. He stated that he paid a deposit of $1,500,000.00, along with other payments totalling $28,000,000.00 and that the balance was to be paid on completion of the sale, in exchange for the duplicate certificate of title, with his name or that of his nominee, endorsed thereon.

[3] The applicant also brought an ancillary claim by which he sought specific performance of the agreement for sale, a declaration as to his right of possession, damages in lieu of specific performance, and, in the alternative, a declaration that the respondent's interest in the lands was extinguished by operation of the Limitation of Actions Act.

[4] A trial was held on divers days between 20 June 2022 and 17 March 2023 before Nembhard J ('the learned judge'), and, on 22 March 2024, the learned judge gave judgment in favour of the respondent and dismissed the applicant's ancillary claim. He sought permission from this court to file notice and grounds of appeal out of time, a stay of execution of the orders of the learned judge and to adduce fresh evidence. After hearing arguments, on 28 March 2024, the court made the following orders:

> "1. The relisted notice of application filed on 15 October 2024 for extension of time to file notice and grounds of appeal and for a stay of the execution of the judgment of Nembhard J delivered on 22 March 2024, is refused.
>
> 2. Cost of the application to the respondent to be agreed or taxed."

[5] We now provide our reasons for the above orders.

The application

[6] By way of a relisted application filed on 15 October 2024 (the initial application having been filed on 21 May 2024), the applicant sought the following:

> "1. That the Applicant be permitted to file the Notice of Appeal and Grounds of Appeal out of time.
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> 2. That the execution of the judgment of [the learned judge] in the court below and in the matter of Claim No. 2017 HCV 04013 be stayed until the determination of this appeal.
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> 3. That [the Applicant] be permitted to adduce fresh evidence as evidence in the appeal being the expert report of Deputy Superintentend [sic] of Police George Dixon relating to the execution of the agreement for sale dated the 16th day of May 2024. …"

[7] By his affidavit in support, sworn 17 May 2024, the applicant explained that at the trial of the matter, Mrs Symone Mayhew KC represented him, and that, upon delivery of the judgment, the learned judge granted a stay of its execution for 42 days in light of his indication that he intended to appeal. Further, the learned judge indicated that she would circulate the judgment by 2 April 2024, in light of that intention. He was advised and believed that in the circumstances, it was necessary to obtain the circulated judgment to properly instruct his new attorney, Mr Maurice McCurdy, retained to pursue the appeal, before lodging a notice of appeal. It was not until 7 May 2024, that he received the circulated judgment from Mrs Mayhew, who indicated that she had received it from the court on the same date. Mr McCurdy was then able to assess the prospects of success on appeal and advised the applicant that his case would have benefitted from a handwriting expert relevant to the agreement for sale. The services of Mr George Dixon were engaged and a preliminary report was prepared, which was exhibited to the applicant's affidavit. The applicant expressed that he wished to be heard on appeal, as his new attorney had raised several issues as to the reliability of the findings of facts and law of the learned judge.

[8] The proposed grounds of appeal were as follows:

"a) The Learned Trial Judge … erred in her interpretation of section 36 of the Stamp Duty Act in that;

- Section 36 of the Stamp Duty Act states that "*No instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceedings for the enforcement thereof.*"

- The Learned Trial Judge erred in refusing the agreement for sale which was submitted by [the applicant] was submitted [sic] for two reasons, the 1st being as evidence that he is a [sic] appellant [sic] is a purchaser in possession and thereby entitled to remove the top soil [sic]. This point disqualifies the prohibition of section 36 as the admissibility was in respect of evidence of an agreement proving on a balance of probabilities that he is a purchaser in possession and not necessarily for the enforcement thereof. The 2nd reason the agreement for sale was submitted was for the enforcement thereof, on this issue, the matter concerning the admissibility of the offending document and the section 36 point becomes applicable. In the matter of Vinayaka Management Limited vs. Genesis Distribution Network Limited case … their lordships did affirm that;

    - An agreement for sale ought not to be admitted into evidence for the purpose of ***enforcement thereof*** *unless it has been stamped.*

    - *It is not unusual for the court to adjourn the hearing of a matter to allow the stamping of an agreement for sale or such similar direction under section 43 of the Stamp Duty Act.*

    - *It is not unusual for the court to accept an undertaking from counsel to stamp the agreement for sale and the matter to proceed.*

- *Consideration*

  - The learned trial judge erred in law in the law [sic] and fact in the exclusion of the agreement for sale between Thomas Chambers and [the applicant] which does establish that [the applicant] was to be placed in possession immediately after execution, which if admitted, on a balance of probabilities, the Learned Trial Judge would be in no doubt finding as to fact that [the applicant] was indeed a purchaser in possession, which would have affected her judgment.

  - The misdirection by the Learned Trial Judge was fatal to the dismissal of the Ancillary Claim.

  - If this court were to accept that the Agreement for Sale ought not to be excluded by the Learned Trial Judge on the basis of establishing evidence of an agreement between the parties respecting the issue of [the applicant] being a purchaser in possession, it is unavoidable that it ought to conclude that the dismissal of the Ancillary Claim ought to be set aside.

  - If it were accepted that [the applicant] is an [sic] purchaser in possession, he ought not to be regarded as a trespasser and the complexion of the substantive claim would not have applied to him. The acceptance of [the applicant] as a purchaser in possession is established in the Agreement for Sale which should not have been excluded for the purposes from reliance for any reason outside of the order sought for specific performance.

  - If the point is to be accepted, then an order for recovery of possession would have been necessary to have the purchaser deliver up vacant possession which was not prayed in the claim form. Further, the Learned Trial Judge in her misdirection, found that [the applicant] was a trespasser which would not have been her finding as to fact if the Agreement for sale was admitted for evidence of the material facts and not just an order for specific performance.

b) Section 4 of the Limitation of Actions Act creates an avenue for those let into lawful possession to inherit the right to

dispossess the lawful owner of the said parcel on the last date when payment was received. Being that there has never been a claim against the purchaser to recover the premises, [the applicant] would have been in physical and intentional custody of the premises and the Respondent's rights to paper title would already have extinguished. The Learned Trial Judge failed to take this into consideration.

The Learned Trial Judge erred in law which was fatal to the trial when as Rule 29.1 of the Civil Procedure Rules of 2002 ... gives her the jurisdiction to control the evidence to be given and she could have rightfully directed that the agreement for sale won't be considered on the point of part performance given that it is not stamped.

d) The Learned Trial Judge erred when she found that [the applicant] did not have compelling evidence to suggest that he had physical custody and an intention to dispossess the Respondent.

e) The Learned Trial Judge erred in fact in ruling that the receipt drawn do not support the assertions of [the applicant] in that there was a live and valid agreement for sale between himself and Thomas Chambers.

- The parole evidence rule would have allowed [the applicant], if the agreement for sale was admitted, to make his matter more intelligible being that the receipts do not contradict what was in writing between the parties.

- The dates of the receipts, contents of the Agreement for sale and sworn evidence by [the applicant] would make it irresistible to the Learned Trial Judge to form the opinion, on a balance of probabilities, that [the applicant] was a purchaser in possession." (Italics and emphasis as in the original)

[9] A second affidavit was filed by the applicant, on 24 March 2025, by which he exhibited the agreement for sale and other documents that were put before the court below in proof of payment toward the purchase price.

Submissions

On behalf of the applicant

[10] In asserting that the court should grant the application, Mr McCurdy, for the applicant, submitted that (1) the applicant had a serious and continuous intention to prosecute the appeal; (2) the appeal had merit; and (3) the court was provided with an understandable and excusable reason for the delay.

[11] On the issue of merit, counsel candidly admitted that there is no basis to challenge the learned judge's determination as to the inadmissibility of the unstamped agreement for sale in the claim for specific performance. His major contention was that the learned judge erred in her refusal to consider other relevant evidence that flowed from the existence of the unstamped agreement for sale, which is a separate issue from any claim for specific performance. It was the evidential weight of the unstamped agreement for sale that ought to have been considered. He contended that she should have accepted the agreement for sale to establish that the applicant was a purchaser in possession. This error, he said, affected her findings that (1) he was a trespasser; and (2) that he did not establish sufficient physical control of the property. She was required to fully consider all the evidence as part of her fact-finding duty. The fact that the agreement for sale was undated would also not have been a bar to her consideration of the unstamped agreement for sale as the receipts tendered in proof of payment for the land were all dated. Reliance was placed on the cases of **Lookahead Investors Limited v Mid Island Feeds (2008) Limited and others** [2012] JMCA App 11, **Vinayaka Management Limited v Genesis Distribution Network Limited and others** [2022] JMCA App 32, and **Lloyd Bent v Maurice Fong** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 98/1994, judgment delivered on 27 February 1995.

[12] On the application for the stay of execution, in oral submissions, counsel indicated that a stay was being sought only in respect of orders two and five of the judgment which required the applicant to pay damages of $390,000.00 plus interest and costs. Counsel conceded, however, that there was no evidence that the applicant had a difficulty in

paying the sums awarded and also no evidence that the respondent would have had a difficulty to repay, if the judgment was overturned.

[13] With respect to fresh evidence, Mr McCurdy conceded that the potential evidence could have been obtained previously. He, however, asked that the court consider its weight, going to the question of merit. He posited that the fresh evidence was intended to establish that the agreement for sale was signed by the deceased, Mr Chambers, which, if established, would have bolstered the applicant's evidence that there was an agreement.

On behalf of the respondent

[14] Ms Cummings, in opposing the application for an extension of time, contended that although the delay was not inordinate, the applicant had not proferred a good reason for the delay, as he had sufficient information to enable him to file a notice of appeal which could have been amended upon receipt of the written judgment. On the issue of merit, counsel asserted that the learned judge was correct to exclude the agreement for sale based on section 36 of the Stamp Duty Act. She also pointed to other flaws in the agreement for sale, which she said prevented the applicant from relying on it, namely the fact that it was undated and the description of the property in the agreement for sale did not match the description in the certificate of title.

[15] Learned counsel also stated that the application for a stay of execution and to adduce fresh evidence should be refused as the applicant had not satisfied the requirements for either relief. The court was, therefore, asked to refuse the application in its entirety.

Discussion

[16] In determining whether an extension of time should be granted to file and serve a notice of appeal, regard is had to rule 1.7(2)(b) of the Court of Appeal Rules, 2002 ('CAR'). This rule enables the court to extend or shorten the time for compliance with any

rule, practice direction, order or direction of the court, even if the application for an extension is made after the time for compliance has passed.

[17] It is undisputed that the applicant was required to file and serve his notice of appeal within 42 days of the date of the judgment that was handed down on 22 March 2024 (see rules 1.11(c) and 1.15 of the CAR). The deadline for filing and serving the notice and grounds of appeal was 6 May 2024. Notice and grounds of appeal having not been filed or served by that date, an application for extension of time was made on 21 May 2024. This application was only served on the respondent's attorneys on 10 June 2024.

[18] Several cases emanating from this court have adumbrated the considerations in determining whether to grant a litigant an extension of time for compliance with the rules of the court. These considerations are:

(i) the length of the delay;

(ii) the reason for the delay;

(iii) whether there is an arguable case for appeal; and

(iv) any prejudice that may be suffered as a result of the grant of the extension of time.

(See the cases of **Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Motion No 12/ 1999, judgment delivered 6 December 1999, and **Commissioner of Lands v Homeway Foods Limited and Stephanie Muir** [2016] JMCA Civ 21.)

[19] There was an approximate two-week delay in making the application for extension of time and a further delay of almost three weeks in serving it on the respondent's attorneys. Although it may be said that the application could have been made earlier,

since the decision of the learned judge was transmitted to the applicant's attorney by 8 May 2024, these time frames could not be considered inordinate.

[20] As previously stated, the applicant indicated that the delay in filing the notice of appeal arose from a compendium of factors, including the fact that he retained a new attorney for the appeal, who needed an opportunity to review the written judgment in order to assess the merits of an appeal. The applicant also made reference to what he classified as an "undertaking" by the learned judge to provide the written judgment by 2 April 2024. Also noteworthy is the evidence that upon receipt of the written judgment, steps were taken to engage the services of a handwriting expert, George Dixon, Deputy Superintendent of Police, who provided a preliminary report dated 14 May 2024.

[21] Although understandable, it is doubtful that these constitute good reasons for the delay. The minute of order exhibited indicates that at the time of delivery of the judgment, the court proceedings commenced at 10:45 am and were concluded at 12:30 pm and that the court delivered its judgment orally. Some notations of the reasons for judgment should have been available, in order to facilitate the possible filing of a notice of appeal. Indeed, the applicant stated that he had expressed such an intention to the court below. The notice of appeal, once filed within time, could have also been amended upon receipt of the written judgment.

[22] Nevertheless, it is borne in mind that the court is not bound to reject an application for an extension of time due to the absence of a good reason for the delay. The overriding principle is that justice must be done (see **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23, per Morrison JA (as he then was) as well as **Ralford Gordon v Angene Russell** [2012] JMCA App 6). Furthermore, the court is unwilling to punish a litigant for the defaults or mistakes of their attorney (see **Mendez and another v Patrick-Gardner** [2023] JMCA App 14 at paras. [30] to [33]). In the present case, counsel for the applicant candidly admitted to the error in his approach to the prospective appeal.

[23] This brings us to the question of the merits of the proposed appeal. A review of the draft notice and grounds of appeal shows that the applicant wished for this court to address the following issues on appeal:

> (i) Whether the learned judge erred in excluding the agreement for sale from the evidence, thereby resulting in an erroneous finding that the applicant was a trespasser and the dismissal of the ancillary claim;
>
> (ii) Whether the learned judge failed to consider that as the applicant was in physical and intentional custody of the property and no claim was brought for recovery of possession, the respondent's title had been extinguished by operation of the Limitation of Actions Act;
>
> (iii) Whether the learned judge erred in finding that the applicant did not adduce compelling evidence of physical custody and an intention to dispossess the respondent; and
>
> (iv) Whether the learned judge erred in her factual findings regarding the receipts that were tendered in evidence by the applicant to support that he was a purchaser in possession.

[24] In arriving at her decision, the learned judge identified three issues for her determination (see para. [5] of the judgment):

> "I. Whether [the respondent] has sufficiently proven that [the applicant's] removal of the topsoil of the subject property constitutes an unlawful or unjustifiable physical interference with the subject property amounting to the tort of trespass.

> II. Whether [the applicant] has a valid and enforceable agreement for the sale of the subject property from Thomas Chambers, deceased, demonstrating sufficient acts of part performance to enable him to obtain the remedy of specific performance.
>
> III. Alternatively, has [the applicant] adduced sufficient evidence to demonstrate that he has dispossessed the estate of Thomas Chambers, by his actual and intentional possession of the subject property for a minimum period of twelve (12) continuous years."

[25] The learned judge found that the respondent, being the administratrix of her father's estate and Thomas Chambers being the registered proprietor to the property at the time of his death, meant that the respondent *prima facie* had the immediate right to possession of the property. The learned judge then considered whether this right was defeated by the applicant in his capacity as a purchaser in possession or by way of adverse possession. In this regard, the learned judge examined the agreement for sale and noted that it was "both unstamped and undated" and that no original was produced, with no satisfactory account given for failing to produce same.

[26] She then cited section 36 of the Stamp Duty Act as follows:

> "No instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof."

[27] The learned judge concluded on the point by stating, "[i]n the present instance, the purported Agreement for Sale does not form part of the evidence which is before the Court". It is this finding that Mr McCurdy argued was wrong in law as the applicant did not only rely on the agreement for sale for its enforcement, but rather as part of the evidence that the applicant was a purchaser in possession.

[28] This court was not provided with copies of the pleadings that were filed in the claim or the ancillary claim. Neither were we provided with copies of the witness statements or notes of evidence. These documents would have assisted in assessing the bases, if more than one, on which the agreement for sale was being relied upon. The

judgment, also, does not give any impression that arguments were put before the learned judge that the agreement for sale was being used as evidence that the applicant was a purchaser in possession *simpliciter*. Of further note, however, the orders sought in the applicant's ancillary claim (as set out at para. [17] of the judgment) all related to specific performance (orders one to five) and alternatively, to adverse possession (order 6). Mr McCurdy has accepted that the learned judge could not have been faulted in rejecting the claim for specific performance in light of the non-stamping of the agreement for sale.

[29] It is true that a document which is subject to stamp duty, and not duly stamped, may be used by the court for purposes other than for its enforcement and as evidence of an agreement. This was discussed in the case of **Atherton and another v Levy and another** [2020] JMCA Civ 62, where Brooks JA (as he then was) stated:

> "[34] It is also to be noted that the document in **Garth Dyche v Juliet Richards** was still used for other purposes by the court, despite the absence of stamping as a promissory note within the stipulated time (it bore evidence of later stamping). The court, at paragraph [57] indicated that the improperly stamped document in that case, could be used as corroborative of evidence of an agreement. The court said, in part, at paragraph [57]:
>
> > '…The document is capable of providing corroborative evidence of his contention that he loaned money to the deceased and that the amount that was owed represents the monies that he deducted from the deceased's accounts, which are reflected on the promissory note. That is an entirely different matter from saying that the document comprises the agreement between the parties.'"

[30] Based on the foregoing, it is possible that the agreement for sale could have supported the applicant's contention that a valid agreement existed. However, the learned judge did note that there were other deficiencies in respect of the agreement for sale, particularly that it was undated, and the court was not provided with the original. Therefore, contrary to Mr McCurdy's submissions, this demonstrates that the learned

judge considered the agreement for sale to some extent and rejected it for reasons outside of section 36.

[31] The agreement for sale exhibited is, indeed, undated and is not an original document. No explanation has been offered for the fact that the original was not made available to the court. There also appears to be some content missing between the first page and what is purported to be the second page as there is a reference to some clauses on the second page numbered two to six, but a full reference to what is number one is not included. This court has not seen the certificate of title; however, it is observed that para. [4] of the judgment describes the property as "ALL THOSE parcels" and speaks to sections one and two, whereas the agreement for sale exhibited describes one parcel of land.

[32] The applicant also had to show, at least, proof of payment of the deposit as was required by the agreement for sale in order to obtain possession, which he failed to do as the learned judge determined. The learned judge examined the receipts and cheques that were provided by the applicant (see footnotes 13 and 14 of the judgment), in support of the agreement for sale. She found that, "these receipts do not indicate the purpose for which the payments were made nor do the amounts reflected on them amount to the sum of money which [the applicant] contends he paid". We have examined the documents exhibited to the applicant's second affidavit, which were said to be tendered in evidence in the court below. The receipts for $1,500,000.00 as well as US$20,000.00 (referenced by the learned judge) were not exhibited to the affidavit. The learned judge also referred to Bank of Nova Scotia cheque for $2,968,005.00 "allegedly transferred to Thomas Chambers during the period of February to April 2008". This has not been made available to this court.

[33] Five of the exhibits are cheques made payable to Thomas Chambers with varying dates between 12 February 2008 and 10 April 2008. These are the National Commercial Bank ('NCB') cheques from Reading Holding Limited (which is a business that the applicant operates) and a Bank of Nova Scotia cheque for $500,000.00 dated 7 April

2008. The latter cheque does not have the name of the person or entity on whose account it was drawn. These cheques were all referred to by the learned judge as documents relied on by the applicant as part of his assertion that he paid a deposit and additional sums to purchase the properties. A further exhibit placed before this court is a page from a NCB bank statement showing various transactions, including cheques drawn but none with any of the cheque numbers in respect to the NCB cheques made out to Mr Chambers. The statement is dated 31 March 2008, whereas the NCB cheques, excepting one (dated 12 February 2008), have April dates, and therefore could not constitute proof that the cheques were encashed.

[34] In these circumstances, it is not difficult to see why the learned judge concluded that the applicant failed to demonstrate on a preponderance of the evidence that he was a purchaser in possession. The agreement for sale, even if it had been accepted as proof that a valid agreement existed, could not stand on its own. As the learned judge concluded, there was no evidence that the cheques tendered were encashed or that the receipts bore any relationship to the agreement for sale.

[35] The evidence of a handwriting expert would not take the matter any further. Neither the learned judge nor the respondent questioned the signatures on the document in the court below. The learned judge was concerned with it being unstamped, undated and there being no explanation as to the absence of the original. Before this court, counsel for the respondent pointed to the fact that the signature page of the agreement for sale is separate from the rest of the document, thereby intimating a query as to the veracity of the document. This accords with the learned judge's concern about the absence of the original document. The original would be particularly important as it was not denied by the applicant that he had previously bought one acre of unregistered land, in the same area, from Mr Chambers in or around 1986.

[36] It is well known that this court will not lightly interfere with a decision of a judge at first instance unless it can be demonstrated that she was "plainly wrong" in concluding as she did (**Beacon Insurance Company Limited v Maharaj Bookstore Limited**

[2014] UKPC 21 and **Thomas v Thomas** [1947] 1 All ER 582). The above analysis has demonstrated that there is no basis to conclude that, the learned judge erred and was plainly wrong in excluding the agreement for sale from the evidence considered.

[37] With respect to adverse possession, it is clear that the learned judge gave an accurate outline of the applicable law on this issue as seen at paras. [31] to [38] of the judgment. It is not suggested that she made any error in this regard. The challenge is to her application of the law to the facts. The judgment did not detail the alleged acts of possession. However, in light of the applicant's position that he entered into an agreement for sale with the deceased in 2008 and the cause of action having commenced in 2017 (nine years later), the 12-year time period would not have been met to dispossess either the deceased or those claiming through him, under the Limitation of Actions Act. It was represented to this court that the applicant's evidence was that he entered into possession of the property in the 1990s. However, in asserting that he entered into an agreement for sale with the deceased in 2008, the applicant was acknowledging the deceased's claim to ownership and, therefore, could not have been occupying the property adverse to the deceased's interest, as of 2008. The learned judge cannot, therefore, be faulted in rejecting a claim for adverse possession, and the applicant has not demonstrated that the learned judge erred.

[38] In these circumstances, the applicant failed to demonstrate an appeal with any prospect of success.

[39] On the issue of prejudice, save for being unable to challenge that court's findings on appeal, the applicant has not set out any evidence of prejudice if he is not granted an extension of time. Conversely, the prejudice to the respondent is apparent if an extension were to be granted, as she has refrained from enforcing the judgment given in her favour, for over a year in light of the applicant's desire to appeal.

[40] It was for these reasons that the court made the orders set out at para. [4] above, to refuse the relisted application.

FOSTER-PUSEY JA

[41] I have read, in draft, the reasons for judgment of Straw JA and I agree.

D FRASER JA

[42] I, too, have read, in draft, the reasons for judgment of Straw JA and I agree and have nothing else to add.