SUPREME COURT OF QUEENSLAND

CITATION:	*Veitch v State of Qld* [2003] QCA 144
PARTIES:	**JANETTE MARGARET VEITCH** (plaintiff/appellant) **v** **STATE OF QUEENSLAND** (defendant/respondent)
FILE NO/S:	Appeal No 5095 of 2002 DC No 4778 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury – Liability
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	4 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	13 February 2003
JUDGES:	McMurdo P, Williams JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	NEGLIGENCE – STANDARD OF CARE – PARTICULAR PERSONS AND SITUATIONS - where appellant alighted from her vehicle, slipped on gravel and sustained injuries - where trial judge dismissed the appellant's action for damages in negligence - whether learned primary judge erred by deciding the case, not on the standard of the reasonable person but rather on the standard of a reasonable person who had earlier notice that similar gravel was slippery - whether there was a breach of duty by the respondent or only with contributory negligence on behalf of the appellant NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIP AND DUTIES - where the appellant slipped on pea gravel – where incident occurred at a National Park - where trial judge found that it was not the respondent's duty to use some other type of gravel or gravel mix because of economic and practical difficulties - whether trial judge erred in concluding that the respondent was not required to use more suitable gravel other than pea gravel in constructing and maintaining the road

Attorney-General v Kehoe [2001] 2 QdR 350, applied
Brodie v Singleton Shire Council (2001) 180 ALR 145, applied
Romeo v The Conservation Commission of Northern Territory (1998) 192 CLR 431, applied

COUNSEL: B A Laurie for the appellant
A M Daubney SC, with G W Diehm, for the respondent

SOLICITORS: O'Reilly Lillicrap for the appellant
Crown Solicitor for the respondent

[1] **McMURDO P:** On Friday, 11 September 1992, the 51 year old appellant was injured in the Blackdown Tablelands National Park, near Blackwater in Central Queensland. As she alighted from the front passenger side of her 4 wheel drive vehicle onto the side of the road to admire a flowering grass tree covered in butterflies, she slipped on pea gravel and fell. She sustained fractures of the jaw, abrasions, bruising and shock. The learned primary judge dismissed the appellant's action for damages in negligence finding that she failed to exercise reasonable care for her own safety in the manner in which she alighted from her vehicle.

The issues

[2] The appellant appeals from that decision. Her barrister, Mr Laurie, has two main contentions. The first is that the learned primary judge decided the case, not on the standard of the reasonable person but rather on the standard of a reasonable person who had earlier noticed that similar gravel was slippery; that she was on notice is a matter only relevant to contributory negligence, not breach of duty. Mr Laurie's second contention is that her Honour erred in finding that the respondent's duty to the appellant did not require the use of gravel other than the pea gravel on the area where the appellant fell.

[3] It was common ground the respondent owed the appellant a duty of care. The appellant's ultimate case was that the respondent breached that duty of care first, in failing to warn the appellant that the gravel used at the side of the road was pea gravel which was particularly slippery and was dangerous underfoot; second, using pea gravel when constructing and maintaining the hard shoulder at the edge of the road; and, third, failing to provide a notice on the only road into the national park warning persons that the road, the side of the road and/or the hard shoulder of the road was slippery underfoot. The appellant claimed, relevant to the first and third contentions, that had the respondent warned her that the gravel at the side of the road was slippery underfoot she would not have attempted to alight from the vehicle and she would not have fallen and been injured.

The facts

[4] The Blackdown Tableland is a sandstone plateau about 600 metres above the surrounding Central Queensland plains and at the relevant time comprised both national park and state forest. Access is by a dead-end gravel road, much of which was pea gravel. Pea gravel is found in abundance on the Blackdown Tableland and is used there in road construction. As its name suggests, it is spherical like a pea in shape and size and therefore larger than standard gravel. A yellow warning sign at the entrance to the national park indicated "CAUTION. SLIPPERY GRAVEL SURFACE" and depicted an angled car and skid marks; the yellow warning sign

depicting the angled car and skid marks without the cautionary words was repeated twice on the road into the park. There were no signs warning of dangers to pedestrians.

[5] As Mr Geoff McDonald ME BSc explained in his evidence for the appellant, pea gravel comprises circular stones like imperfect ball bearings; they have a relatively low rolling resistance when between two hard surfaces and are particularly slippery. Mr McDonald opined that the probability of someone slipping and falling on pea gravel could be reduced, preferably by avoiding its use in areas where pedestrians could foreseeably alight from vehicles or walk. An alternative is to warn people of the possibility of falling as a result of stepping onto pea gravel; such a warning should be repeated in a number of locations throughout the national park. Mr McDonald did not give any evidence as to the practicality and cost of using some gravel other than pea gravel in the construction and maintenance of the road and verges where the appellant fell.

[6] Other evidence established that suitable signs could be made and installed for a modest cost.

[7] The appellant and her husband explored the national park as day visitors on Friday, 11 September 1992. On a walk to the toilet from the car park, they noticed and commented that the pea gravel surface was extremely slippery and dangerous. They walked to the Rainbow Falls and returned to their Land Cruiser before driving around the Stoney Creek track to admire some climbing orchids. She alighted without difficulty from the vehicle to have a closer look at the orchids in the bush off the side of the road. They drove to one lookout without getting out of their vehicle and later picnicked at Charlevue Lookout where they again alighted without difficulty. As they were driving out of the national park to return to Blackwater the appellant saw a grass tree in full flower covered in butterflies; she asked her husband to stop for a closer look. She was not thinking about the slipperiness of the gravel she had encountered earlier in the day. The appellant initially said the gravel in both the car park and the area where she fell "just looked like gravel"; later she said the gravel in the car park "had leaves and things on it. It didn't look the same as what was in – on the road". She alighted from the front passenger side of the vehicle in the following way. She looked down and did not see anything wrong with the gravel road; her right hand was on the door which she had opened; she stood on the running board whilst still half seated; her left hand was on the side of the vehicle; she did not remember which foot made contact with the ground but she put the ball of her foot down on the road; it immediately went from under her and she fell face forwards onto the road, unable to put out her hands to stop the fall.

[8] The appellant said that if she had seen a sign indicating the road was slippery for pedestrians she would not have got out and would have admired the grass tree from inside the vehicle. In re-examination she said such a sign would have caused her to be very careful.

[9] On 24 September 1992, the appellant wrote to the Manager, Queensland National Parks & Wildlife Service informing them of her accident and suggesting that suitable warning signs be displayed to the effect that walking is dangerous and great care should be exercised.

[10] The dangers of driving on the gravel in the national park were well documented at the time of the accident in pamphlets available from the respondent and in an article in a local newspaper, Central Queensland News.

[11] Mrs Fay Perry wrote to the respondent on 24 September 1992, after the accident, complaining of the slippery gravel in the car park.[1] Mr Don Cook, the Capricorn District Manager of the Department of Environment & Heritage wrote in response:

> "…
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> The safety of visitors to National Parks is a high priority of the Department. I will be looking into the matter of erecting warning signs at the car parks, regarding walking, pending a long term solution to the problem."

This signage was subsequently erected.

[12] Mr James Van Der Werff, a forest ranger with the Department of Primary Industries, was, at the time of the accident, responsible for maintenance of the road, its signage and safety issues. The responsibility for the 17 kilometres of road from the highway to the boundary of the forestry and national park area was shared. The first five kilometres of the road were maintained by the Shire Council; the remainder was the responsibility of the Forestry and National Parks Services. There were a further seven or eight kilometres of road from the boundary to the ranger station in the national park. The roads in the national park were constructed with pea gravel. The pea gravel used at the accident site was available in ample quantities at the top of the plateau from a gravel pit four kilometres from the accident site; this was the best gravel conveniently available. This pea gravel is rounder than the gravel obtained from a pit at the bottom of the range, seven or eight kilometres from the accident site. It was a little more irregular in shape and in that sense more suitable than the pea gravel at the top of the range. He did not consider using the alternate gravel because suitable pea gravel was available closer to the site; the alternate gravel at the bottom of the range was needed in other areas and was exhausted in upgrading the road leading to the foot and the commencement of the ascent of the tableland in early 1994.

[13] Mr Van Der Werff accepted pedestrians may occasionally use the road where the appellant slipped. He did not give consideration as to whether signage warning pedestrians of the slippery gravel road was necessary. Many thousands of people visit the park each year and he realised some of them would alight from their vehicles at the side of the access road. Although his department did consider mixing stringy bark with the pea gravel in the car park area to reduce the risk of pedestrians slipping, there was no plan to use the stringy bark on the roads or verges. The road currently remains constructed from pea gravel much as it did at the time of the accident. There is still no signage warning pedestrians of the danger of slipping on the road or verges outside the car park.

[14] Mr Ian Lynch, a civil engineer in the Department of Primary Industries since 1978, has visited the Blackdown Tableland area, which comprises both national park and forestry areas, to look at the difficulty in obtaining suitable gravel for the road between the highway and the tableland. His principal interest was to ensure the

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[1] Mrs Perry was not called and this letter was not tendered on the basis of the truth of its contents.

road was suitable for logging trucks; this surface would equally provide an adequate pavement for light vehicles. The material available at the base of the tableland was "rather rough, water worn, sandstone gravels with lots of plastic fines, … not very hard material and not greatly suitable natural gravel." The material naturally available at the top of the range was pea gravel, which provided a reasonably stable road surface to carry the forestry log trucks and like vehicles. He made extensive enquiries but these were the only gravels available. The forestry section of DPI had used pea gravel on many kilometres of roads elsewhere, despite its poor grading and binding properties. The natural pea gravel at the top of the range was the only viable resource; any alternative would involve bringing in and perhaps buying gravel. It would have been almost untenable to carry gravel up the steep range, because it is difficult and dangerous for gravel trucks to ascend and descend, with increased wear and tear on the truck brakes and axle tramps. The cost of purchasing and transporting alternate gravel could be about $30 per cubic metre. The cost in the early 1990s of using the local pea gravel was about $3 per cubic metre. Natural gravel from another pit on the flat at the bottom of the range would cost about $10 per cubic metre to transport to the top of the range. Six hundred and fifty to seven hundred and fifty cubic metres of gravel is needed to form one kilometre of gravel road. A gravel truck carries about 10 or 11 cubic metres. Although Mr Lynch was cross-examined on these issues, the cross-examination was confusing and in the end did not clearly undermine his evidence in chief as to the approximate cost of and practical difficulties in using alternative gravels.

The primary judge's findings

[15] Her Honour found it was reasonably foreseeable that the appellant would stop by the side of the gravel road and alight from her vehicle to look at the striking flora and fauna. The primary judge referred to a number of authorities and, in more detail, to passages in *Romeo v The Conservation Commission of Northern Territory*[2] emphasising that the respondent need only take reasonable precautions;[3] that public resources are limited and the allocation of resources is a matter for bodies accorded that function by law;[4] and the scope of the duty involved a consideration of what was a reasonable response by the respondent to foreseeable risks of injury to members of the public generally coming on to any part of the land under its control, which presented similar risks arising out of like conduct.[5] Her Honour found that the appellant, in visiting a national park, could expect to encounter similar or greater risks than slippery pea gravel and a visitor like the appellant must take reasonable care for her own safety: see *Brodie v Singleton Shire Council*.[6] Her Honour determined that the respondent cannot reasonably be obliged to remove all such hazards. Although her Honour found the particular slipperiness of pea gravel was not obvious by looking at it, a reasonably prudent person attempting to alight from a vehicle on the side of the road in a remote area ought to realise and anticipate that stepping onto loose gravel involves a risk of slipping, especially as the appellant had experienced slippery gravel in the carpark earlier in the day. Her Honour found that a reasonable person exercising reasonable care for her own safety would have appreciated the potential danger of slipping while stepping from a vehicle onto the gravel road; the appellant alighted inappropriately and failed to exercise reasonable

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2 (1998) 192 CLR 431.
3 At 480.
4 Ibid.
5 At 478-479.
6 (2001) 180 ALR 145, 192.

care for her own safety; her injuries were caused, not by the respondent, but by her own lack of reasonable care.

[16] Her Honour also concluded that had the respondent erected a sign directing pedestrians to take care, the appellant would have read it but still alighted from the vehicle, even if with greater care. The appellant's case as pleaded, that if there had been appropriate signage she would not have alighted from the vehicle, was therefore not made out.

[17] In dealing with the appellant's contention that the respondent should not have used pea gravel in construction of the road and shoulder, her Honour very briefly referred to the evidence of Mr McDonald that the probability of a fall could be avoided by using alternative gravel in areas where pedestrians could foreseeably alight from vehicles and walk; to the evidence of Mr Van der Werff as to the alternative irregularly shaped gravel and the evidence of Mr Lynch as to the availability of pea gravel and the practical difficulties and cost of using it. Her Honour concluded that she was not satisfied the respondent should have used some other type of gravel, having considered the likely cost and practical difficulties; the respondent did not breach its duty.

Were her Honour's findings consistent with a breach of duty by the respondent or only with contributory negligence on behalf of the appellant?

[18] Mr Laurie contends that because the slipperiness of the pea gravel was not obvious the respondent breached its duty in neither alleviating the slipperiness by using alternate gravel nor warning people of it, because a reasonable person taking care for their own safety would not take precautions against unseen slipperiness; considerations as to whether she was on notice because she knew the car park gravel was slippery are only relevant to contributory negligence.

[19] The duty owed by the respondent to the appellant is that set out in *Brodie v Singleton Shire Council,* namely:

> "… to take reasonable care that [the] exercise of or failure to exercise [the power to construct roads] does not create a foreseeable risk of harm to a class of persons (road users) which includes [the appellant]. Where the state of roadway, whether from design, construction, works or non-repair, poses a risk to that class of persons, then, to discharge its duty of care, an authority with power to remedy the risk is obliged to take reasonable steps by the exercise of its powers within a reasonable time to address the risk. …
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> The perception of the response by the authority calls for, to adapt the statement by Mason J in *Wyong Shire Council v Shirt* ((1980) 146 CLR 40 at 47-48), a consideration of various matters; in particular, the magnitude of the risk and the degree of probability that it will occur, the expense, difficulty and convenience to the authority in taking the steps described above to alleviate the danger, and any other competing or conflicting responsibility or commitments of the authority. The duty does not extend to ensuring the safety of road users in all circumstances. In the application of principle, much thus

> will turn upon the facts and circumstances disclosed by the evidence in each particular case." [7]

And

> "In dealing with questions of breach of duty, … a proper starting point may be the proposition that the persons using the road will themselves take ordinary care.[8]
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> …
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> (iii) *Pedestrians*
> The formulation of the duty in terms which require that a road be safe not in all circumstances but for users exercising reasonable care for their own safety is even more important where, as in *Ghantous*, the plaintiff was a pedestrian. In general, such persons are more able to see and avoid imperfections in a road surface. It is the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other surfaces. As Callinan J points out in his reasons in *Ghantous*, persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes. Of course, some allowance must be made for inadvertence. Certain dangers may not readily be perceived because of inadequate lighting or the nature of the danger (as in *Webb v South Australia* ((1982) 56 ALJR 912; 43 ALR 465), or the surrounding area (as in *Buckle* ((1936) 57 CLR 259, 266), where the hole was concealed by grass). In such circumstances there may be a foreseeable risk of harm even to persons taking reasonable care for their own safety."[9]

[20] These passages demonstrate that the obligation of the appellant to take care for her own safety is not something which arises merely by way of contributory negligence but is at the essence of determining whether the respondent has breached its duty of care to the appellant. Her Honour found that the appellant in her method of alighting from the vehicle on to a gravel road verge in a national park, did not take ordinary care for her own safety; reasonable people would appreciate the risk of slipping on a loose unpredictable gravel surface and would take considerable care to ensure they did not slip; this is so whether the gravel was pea gravel or a more common gravel. This was not a case where the hidden danger of the especially slippery pea gravel caused the fall but rather the appellant's imprudent method of getting out of her vehicle. No doubt in reaching this conclusion, her Honour relied on the appellant's evidence, from which the most probable inference is that the appellant was not supporting her body weight adequately with her hands when alighting from the vehicle to accommodate the real likelihood of her foot slipping on the gravel, whether pea gravel or another less slippery type. Her Honour's further findings, that the particular slipperiness of pea gravel was not obvious by looking at it and that the appellant had notice of pea gravel's particular slipperiness

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7 Gaudron, McHugh and Gummow JJ at 577-578.
8 At 580.
9 At 581.

because of her experience earlier in the day, are unessential findings of fact in the reasoning process determining this aspect of the alleged breach of duty.

[21] The appellant also takes issue with her Honour's finding that the appellant would have alighted from the vehicle even if she had read a warning sign. The appellant's evidence on this point, as her Honour noted, was ambiguous and perhaps contradictory.[10] Her Honour was not obliged to accept the appellant's initial evidence on that matter. The finding was open on the evidence and had the consequence that the appellant did not establish her pleaded case, namely, that she would not have alighted at all had there been warning signs (not that she would have alighted with more care). On the facts found, her Honour was entitled to conclude that the respondent did not, on the case pleaded, breach its duty to the appellant in failing to warn her or to provide warning signs of the danger to pedestrians of slipping on gravel. It was not the appellant's case that had there been warning signs, she would have alighted with more care.

Did her Honour err in concluding that the respondent was not required to use a more suitable gravel than pea gravel in constructing and maintaining the road?

[22] Mr Laurie contends that there was conflicting evidence as to the additional cost of more suitable gravel and her Honour made no findings to resolve that conflict.

[23] The only evidence on this matter came from Mr Van Der Werff and Mr Lynch. Although Mr Lynch was cross-examined on this issue, his cross-examination, which seemed to confuse rather than clarify, did not destroy or significantly weaken his evidence in chief as to the significant additional cost of using alternative gravel sources. There was no evidence that an alternative source of gravel was economically and practically available. Mr Lynch said the pea gravel was the only viable resource and Mr Van Der Werff said the pea gravel was the best gravel conveniently available. The use of any alternative source of gravel would have necessitated at least 65 dangerous and very slow truck trips on gravel roads up and down this steep range for each kilometre of road on top of and descending the range. This would have resulted in substantial additional labour and transport costs and perhaps also the costs of purchasing the alternate gravel, raising the cost from $3 per cubic metre for the local pea gravel to $10-$30 per cubic metre. The most conveniently located alternate gravel at the foot of the range, which cost $10 per cubic metre to transport to the accident site, was exhausted on the lower roads closer to that pit by early 1994. Her Honour inferentially accepted the evidence of Mr Lynch and Mr Van Der Werff and was not persuaded the respondent's duty required it to have used some other type of gravel or gravel mix because of economic and practical difficulties, relying on the principles she quoted earlier from *Romeo* and *Brodie*. Her Honour was not required to determine precisely the additional costs of using alternative gravel; the evidence as to the cost was imprecise but did establish that it would have added very significantly to the cost, convenience and safety of road construction, sufficient to justify her Honour's findings. Her Honour's reasons and the evidence supported her conclusion that economic and practical considerations did not justify the use of alternative gravel in the road construction.

[24] Her Honour's reasons for reaching key conclusions could have been more fulsomely explained, but when read as a whole, the legal principles relied on, and the fact

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[10] See these Reasons, [8].

finding, which was supported by the evidence, are sufficiently explained to justify the conclusions reached: see *Attorney-General v Kehoe.*[11]

[25] I would dismiss the appeal with costs to be assessed.

[26] **WILLIAMS JA:** One of the great attractions of Australia is its vastness. Remote areas attract visitors because of the unique scenery and the diversity of flora and fauna available for enjoyment. Indeed it is often the solitude derived from the remote location that makes a trip to such places even more appealing. To facilitate the enjoyment of such natural phenomena by both residents of Australia and overseas tourists governments and other bodies have taken steps to make these areas more readily accessible. Many national parks have been created and maintained as near as possible in their natural state. Such development, even at a minimum level, has created problems. Many citizens concerned with the preservation of our natural environment see the construction of even the most basic road as a threat to the ecology of the district. The great distances involved, and the sparse numbers in overall terms using the infrastructure, have placed governments in a dilemma. Access must be made available, but it must have minimal impact on the environment, and the cost of constructing and maintaining roads and associated infrastructure must be kept to a realistic level. It is therefore not surprising to find that roads and walkways in and leading to national parks are constructed from materials locally available and maintained at a minimum level.

[27] All of those considerations provide the background against which the appellant's claim for damages in the circumstances outlined in the reasons for judgment of the President must be evaluated.

[28] In speaking of a roughly made footpath outside a school in a New South Wales country town Heydon JA (with the concurrence of Handley and Sheller JJA) said it understandably was "radically different from the condition of the stairways and concourses in the underground railway system of the city of Sydney . . .[which] . . . are commonly thronged with busy pedestrians moving with speed and determination to and from their places of employment or about their affairs." (*Richmond Valley Council v Standing* [2002] NSW CA 359 Para 47). The appellant's fall in this case occurred on the shoulder of a road made of local gravel in a remote national park in central Queensland. It was, in my view, a situation where a reasonable visitor to the area could not expect the road shoulder to be firm and flat. It is notorious that the shoulders of gravel roads in remote rural areas are likely to be sloping, uneven or comprised of loose gravel. Because of factors such as water run-off and the like the condition of such a shoulder could vary greatly over a short distance. In consequence persons using such areas, including those alighting from motor vehicles must exercise a greater deal of caution than if they were using a kerbside in a major city. The situation confronting the appellant was vastly different to that confronting a person alighting from a vehicle in central Brisbane or Sydney.

[29] Issues relating to the duty of care which may be owed by a road authority or owner of a national park, including the question whether the risk of injury is so small that a reasonable person would think it right to neglect it, and whether or not there was a breach of any duty owed, have to be considered in the light of authorities such as *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431,

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[11] [2001] 2 QdR 350, 365.

Brodie v Singleton Shire Council; *Ghantaus of the Hawkesbury City Council* (2001) 206 CLR 512, *Richmond Valley Council v Standing* [2002] NSW CA 359, *Lanyon v Noosa District Junior Rugby League Football Club* [2002] QCA 163 and *Percy v Noosa Shire Council* [2002] QCA 245. In a case such as this the expense, difficulty and inconvenience of taking any alleviating action, and the desirability of keeping the road structure as environmentally friendly as possible, are relevant considerations; if the road in question was not constructed as it was the butterflies may not have been there for the appellant to enjoy. Further, persons using the road shoulder, whether walking on it or alighting from a vehicle on it will ordinarily be expected to exercise such care as would prevent damage from likely hazards such as uneven ground, loose gravel, holes or roots of trees.

[30] The road in question, and its shoulder, were constructed of pea gravel, material readily available from the surrounding countryside. The appellant was not unfamiliar with the material; she had walked across at least one reasonably extensive area of it earlier in the day. In the circumstances it could not be said that there was any concealment of the risks associated with alighting from a vehicle onto such a surface. As has been noted in the authorities referred to above, it is part and parcel of walking in the outdoors that the ground being traversed may not be even, flat or smooth. Because of that persons ordinarily will exercise sufficient care by looking where they are going, determining the nature of the surface over which they are walking, and thereby avoid obvious hazards. Walking on uneven surfaces is something people are regularly required to do and the means of avoiding or minimising risks thereby created are readily available.

[31] I can discern no error of reasoning in the judgment of the learned trial judge such as would warrant this court arriving at a different conclusion. For the above reasons, and those of the President, the appeal should be dismissed with costs.

[32] **MULLINS J:** For the reasons of the President and Williams JA, I agree that the appeal should be dismissed with costs.