SUPREME COURT OF QUEENSLAND

CITATION:	*R v Taylor* [2012] QCA 32
PARTIES:	**R** **v** **TAYLOR, Willie Michael** (appellant)
FILE NO/S:	CA No 258 of 2011 DC No 919 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2012
JUDGES:	Margaret McMurdo P and Muir and Fraser JJA Separate reasons for judgment of each member of the Court, Muir and Fraser JJA concurring as to the orders made, Margaret McMurdo P dissenting
ORDERS:	**1. Appeal allowed.** **2. The conviction in respect of count 1 is set aside and an acquittal entered.**
CATCHWORDS:	APPEAL – CRIMINAL LAW – GROUNDS FOR INTERFERENCE – INCONSISTENCY BETWEEN FINDINGS OF JURY – INCONSISTENCY BETWEEN VERDICTS – GENERALLY – where the appellant was convicted of one count of indecent treatment of a child under 16 under 12 (count 1) and acquitted of two counts of rape (counts 2 and 3) – where the evidence of the complainant with respect to count 1 was uncorroborated – where the evidence of the complainant with respect to counts 2 and 3 was supported by preliminary complaint evidence – whether the verdict with respect to count 1 was compromised – whether findings of the complainant's credit in relation to counts 2 and 3 could be isolated from the jury's consideration of count 1 *Evidence Act* 1977 (Qld), s 93A *Jones v The Queen* (1997) 191 CLR 439; [1997] HCA 12, considered *MacKenzie v The Queen* (1996) 190 CLR 348; [1996] HCA 35, considered

COUNSEL: D C Shepherd for the appellant
V A Loury for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I would dismiss this appeal. Muir JA has helpfully set out the relevant evidence, issues and legal principles so that I can concisely state my reasons for reaching a different conclusion from my colleagues.

[2] The appellant was convicted by a jury of the relatively minor offence of indecent treatment of a child under 12 by kissing using a tongue (count 1). He was found not guilty of the much more serious offences of oral penile rape (count 2) and vaginal penile rape (count 3).

[3] The complainant gave evidence of an improper sexual relationship with the appellant which began when she was about seven and he was about 15 or 16. The appellant would regularly have oral sex with her during which she did not think he ejaculated. The three counts were particularised events which she recalled during this period. Count 1 was, the complainant said, the first time the appellant kissed her using his tongue. The complainant's evidence relating to count 1 was not undermined during cross-examination or by other evidence. The jury convicted on this charge.

[4] Count 2 was an incident when, the complainant said, the appellant made her perform oral sex on him after they watched the movie "Once Were Warriors" in his bedroom. Dr Stevenson gave evidence of preliminary complaint from the complainant. She told him that ejaculation had occurred on multiple occasions as a result of frequent oral sex. This was inconsistent with the complainant's evidence that she did not think he ejaculated during oral sex. In acquitting the appellant, the jury may have considered that this inconsistency raised a doubt about the complainant's reliability in respect of count 2, the only charge concerning oral sex.

[5] Count 3, the complainant said, was the only incident where the appellant effected penile penetration and it may have been the last occasion when anything happened between them. Her evidence on this count was vague and lacking in detail. Dr Sander gave evidence and was cross-examined about her notes which recorded an allegation that there had been attempted penetration of the complainant a couple of times. Dr Sander was unclear from where she obtained that information but it did undermine the accuracy of the complainant's evidence on count 3. In light of Dr Sander's notes and the imprecision of the appellant's evidence on count 3, the jury may have acquitted the appellant as they were not prepared to accept the complainant's evidence beyond reasonable doubt on this count.

[6] I do not consider there was such an integral connection between counts 2 and 3 on which the jury acquitted and count 1 on which they convicted that the jury's doubts in respect of counts 2 and 3 must also have applied to count 1. In light of the aspects of the evidence of Dr Stevens and Dr Sander to which I have referred, it seems likely that the jury were not satisfied beyond reasonable doubt of the reliability of the complainant's evidence as to the particularised episodes charged in counts 2 and 3. But this did not mean they had to find her an unreliable witness

generally. They may have been satisfied beyond reasonable doubt about her general evidence of the appellant's improper sexual conduct with her. The jury were entitled to find her evidence on count 1 was truthful and reliable as, unlike her evidence on counts 2 and 3, it was not undermined by other evidence.

[7] In my view, the guilty verdict on count 1 is logically reconcilable with the not guilty verdicts on counts 2 and 3 and does not amount to a compromise in the performance of the jury's duty. For the reasons given, I would dismiss the appeal against conviction.

[8] **MUIR JA**: **Introduction** The appellant was convicted after a trial in the District Court of unlawfully and indecently dealing with a child under the age of 16 years with the aggravating circumstance that she was under the age of 12 years (count 1). He was acquitted of two counts of rape (counts 2 and 3). He appeals against his conviction on the grounds that the verdict on count 1 was inconsistent with the acquittals on counts 2 and 3 and that the verdict is unsafe and unsatisfactory.

[9] The record of the complainant's interview by police on 22 January 2010 was admitted into evidence pursuant to s 93A of the *Evidence Act* 1977. A video of the complainant's evidence was recorded pursuant to Div 4 of that act before a District Court Judge on 25 July 2011 and admitted into evidence; as was the evidence of a child, Ms W, who gave preliminary complaint evidence.

The complainant's evidence

[10] The evidence of the complainant was to the following effect. Her parents were separated and every second weekend she visited her father who lived with his mother in a house in Elimbah and later in Wamuran. The appellant resided in the same house. At relevant times, he was either 15 or 16. When visiting her father, the complainant would play with the appellant and with her younger brother. After a while, the appellant suggested to her that he could teach her how to kiss. The appellant first kissed her when she was in Grade 3 and aged seven or eight. At the time, she and the appellant were in his bedroom building a cubby. They had a conversation about a boy she was seeing. The appellant asked if she had kissed the boy and offered to teach her how to kiss. He then kissed her with his lips applied to hers and his tongue inside her mouth. The use of the tongue was described in the complainant's pre-recorded evidence-in-chief, but was not mentioned in her earlier police interview.

[11] After a few months, the appellant began to lick the complainant's genitals and have her suck his penis on a regular basis, but not to the point of ejaculation. She felt "grossed out" after each of these incidents.

[12] On one such occasion the complainant sucked the appellant's penis during the day after watching a DVD in his bedroom and after the appellant had kissed her and taken down his pants (count 2).

[13] On another occasion in the same house and after the complainant had given the appellant oral sex, the appellant, who was lying on top of her, inserted his penis in her vagina (count 3). She said in her police interview, "Like it went in, like his penis went in but it didn't, like I just sort of pushed him away". She said that he did not try to do such a thing again. Later in the interview, she said that it hurt and that she informed the appellant of this. At the time, the complainant was probably at the end of Grade 5 and perhaps nine or 10 years of age.

[14] In evidence-in-chief, the complainant was asked a number of questions about kissing, but nothing about the sexual conduct involved in counts 2 and 3. Apart from it being put to her that the alleged offending conduct had not taken place, the complainant was not cross-examined on her evidence in respect of counts 1 and 2.

[15] The complainant had a very unhappy relationship with her grandmother who was offensive to her and referred to her mother in an insulting and abusive manner. In 2009, she drafted a letter to her father which she showed to a friend, Ms W, before posting. The letter did not go into evidence, but in the course of the complainant's evidence-in-chief she accepted that the letter contained the following:

> "For about two to three years I was being abused by [the appellant] but I would still continue to see you because I loved you [the complainant's father] so much and wanted to see you…
>
> [The appellant] has hurt me over these years and screwed me up…
>
> I thought you would have wanted your daughter to find a boyfriend one day and be happy with them for a long time before experimenting, not getting her virginity taken by some fuckhead in her childhood."

[16] The complainant said that she told her mother in February or March 2009 that she had been sexually abused by the appellant. She said in cross-examination that she had never gone into detail about the offending conduct with her mother because she thought her mother would "feel hurt hearing it" and that she did not feel comfortable discussing it.

The evidence of medical practitioners

[17] The complainant was taken by her mother to see Dr Stevenson, a general medical practitioner, in January 2010. His evidence was that the complainant told him about the appellant's sexual conduct with her and, specifically, that there was one attempted penetration of her vagina, as well as acts of fellatio and cunnilingus. In cross-examination the complainant accepted that the information of the attempted vaginal penetration must have come from her because she had not told her mother. Dr Stevenson said that he was careful to ensure that the information he recorded came from the complainant and not her mother and that he had made his notes after the consultation. He also said that he was told by the complainant that the appellant had ejaculated during the frequent episodes of oral sex.

[18] On a referral by Dr Stevenson, the complainant was taken by her mother on 15 January 2010 to see another general medical practitioner, Dr Sander. Dr Sander said that she had taken a history in the course of the consultation, but was not sure which parts of it were provided by the complainant, her mother, or Dr Stevenson. Her notes recorded, "A couple of times attempted penetration, digital penetrations. No bleeding, no pain". She said that she had no recollection of any conversation with the complainant about oral sex having occurred. However, she said that this was not something she would have asked about as it was not relevant to her role. She said that as she was not the first medical practitioner consulted she had no interest in obtaining more information than was required to determine whether a physical examination was necessary. In a letter to police, the doctor wrote, "[the complainant] disclosed a period of sexual abuse from the age of about eight to 11 years including digital penetration and attempted penile penetration".

Other evidence

[19] The complainant's mother gave evidence to the following effect. The complainant came to her at home in February or March 2008 and said that the appellant had "done things to her". She questioned the complainant about what sort of things and the complainant responded, "Like, he made me do things to him and he did things to me". She could not remember exactly what was said. The complainant told her not to say anything to anybody about what she had said. Asked, "What did she tell you?" the complainant's mother responded, "She just told me that – just oral – like, I just sort of threw questions at her a little bit and I just sort of said you know, 'What sort of things?'".

[20] Ms W told the police officer in her interview that the complainant was her "best friend". She said that the complainant had given her a letter to her father and asked her to read it, which she did. Ms W gave pre-recorded evidence. Under cross-examination she accepted that, at or about the time she was given the letter to read, she said to the complainant, "It sounds like something has happened to you, like you got raped" and that the complainant responded, "It's nothing like that. I just want you to read the letter".

[21] The appellant did not give or call evidence.

The appellant's contentions

[22] The substance of the appellant's argument was that the complainant's evidence was inconsistent and unreliable in that:

(a) the complainant told police that the appellant did not ejaculate at any stage, but told Dr Stevenson that he did;

(b) the complainant told police that she told her mother about the appellant's conduct because of issues surrounding another boyfriend, whereas her mother gave evidence that the disclosure came about as a result of concern about a possible visit by the appellant;

(c) the complainant failed to tell her mother about the attempted intercourse, notwithstanding that she complained about oral sex: she seemed selective about what she told her mother;

(d) there was a reluctance to involve the authorities;

(e) the inference was open that she told Dr Sander that there had also been digital penetration, although no allegation about digital penetration had been made to the police or in her oral evidence and she told the doctor that there was more than one attempted penile penetration;

(f) it was inherently unlikely that, had there been cause for complaint, a complaint would not have been made, there being no allegation of force or threat and having regard to her continued return to the houses in which the abuse was alleged to be taking place;

(g) the complainant had a motive to make a false complaint against the appellant who was under the care of her grandmother. Her grandmother treated her very badly and she was jealous of the attention given by the grandmother to her young brother; and

(h) no specific complaint about the kissing was made until the police interview and the use of the tongue was first mentioned in her pre-recorded evidence-in-chief.

[23] The events the subject of counts 2 and 3 were the subject of preliminary complaint, in general terms, to the complainant's mother, her friend and, more specifically, to Dr Stevenson. There was no preliminary complaint about the count 1 conduct. Consequently, the acquittals were in respect of matters of which it could be argued that there was some basis to support the complainant's credibility, whereas the count 1 verdict was sustained solely by the complainant's evidence. The verdict on count 1 is an affront to logic and commonsense and strongly suggests a compromise verdict.

The respondent's contentions

[24] Counsel for the respondent submitted as follows. Although the complainant first made mention of tongue kissing in her oral evidence-in-chief, she was not asked by the police officer who interviewed her earlier to describe the manner in which she was kissed. Nor was she cross-examined concerning any alleged inconsistency. There were no internal inconsistencies in her evidence in this regard, but there were inconsistencies in her evidence in relation to counts 2 and 3, which may have led the jury to consider the complainant's recollection in respect of those counts unreliable.

[25] In relation to count 2, the complainant informed the interviewing police officer that she did not think the appellant ejaculated, saying that she had "never seen that" in relation to the performance of oral sex. However, Dr Stevenson said that he was informed that ejaculation had occurred on multiple occasions as a result of the oral sex.

[26] Although the complainant told the police officer and Dr Stevenson, and maintained in her oral evidence, that there had been only one incident of penile penetration, there was some confusion arising from Dr Sander's evidence that penile penetration had been attempted a couple of times and that there had been digital penetration. Her note of "no pain" was also inconsistent with her statement to police that the penile penetration hurt and that she had pushed the appellant off.

[27] The inconsistencies revealed by Dr Sander's notes may have arisen from information provided by the complainant's mother or Dr Stevenson. Consequently, the acquittal on these charges does not necessarily impact on the complainant's honesty. That was particularly so as the complainant, although clear that there had been only one incident of penetration, was sketchy about the surrounding details. She was even unsure of her age at the time. She thought that this may have been the last occasion on which anything had happened, but was not certain.

[28] The jury were directed that they had to consider each charge separately and that their verdicts did not need to be the same. They were directed that the credibility and reliability of the complainant was central to the prosecution case, that they needed to scrutinise the complainant's evidence carefully and that it would be dangerous to convict upon the complainant's evidence alone. They were further directed that a doubt concerning one or more counts should be taken into account when assessing the complainant's truthfulness and reliability generally.

[29] The verdict was not an affront to logic and commonsense. There was no cross-examination on count 1 and no inconsistencies with any other evidence with respect

to that count. The acquittals on counts 2 and 3 suggest that the jury followed and carefully applied the trial judge's directions. The significant inconsistencies arose from Dr Sander's evidence, but the inconsistencies she recorded could not be attributed definitely to the complainant. The benefit of the doubt may have been afforded to the appellant even though the complainant was not rejected as a truthful witness.

Consideration

[30] It is convenient to commence a consideration of the party's competing contentions by addressing the appellant's submissions that the complainant's evidence was inconsistent and unreliable in the order in which matters were raised by counsel for the appellant.

(a) The respondent made the point that Dr Stevenson said in his evidence-in-chief that the complainant was distressed and shaking during the consultation which lasted for approximately one hour. He said that the complainant was very ill at ease and that it was difficult to extract precise details from her. He also said, in connection with his evidence that he had been told that ejaculation occurred, that it was "difficult to extract specifics" from the complainant. She was not cross-examined on this point, although she was cross-examined on whether she had told Dr Sander that there had been "a couple of times of attempted penetration". This seeming inconsistency is thus not as telling against the complainant's credibility as might appear at first glance.

(b) and (c) It would not be remarkable if there was a difference in perception and recollection of the complainant and her mother concerning the cause of the complainant's disclosure. Nor can much, if anything, be drawn from the complainant's failure to tell her mother about the attempted penile penetration although, implicitly, complaining about oral sex. What the complainant told her mother was not merely vague, but compendious. She referred to being made to do "everything". The complainant explained, credibly enough, her reason for not wanting to provide details of the subject conduct to her mother.

(d) A reluctance to complain to appropriate authorities, even though no force or threats were made, did little, if anything, to undermine the complainant's credibility. It is frequently the case that, for a great variety of reasons, sexual offending is not disclosed for lengthy periods. The complainant gave a plausible reason for not complaining. She said she did not think she would be able to see her father anymore and she also did not realise the seriousness of the offending conduct. The complainant's evidence was to the effect that although she was treated appallingly by her grandmother, she continued to return to the house in which the maltreatment occurred because she wanted to maintain her relationship with her father. Counsel for the respondent submitted, correctly in my view, that her explanation was consistent with her conduct. By the time the complainant made her complaint, the appellant was no longer living with her father.

(e) The complainant was not cross-examined as to whether she had told Dr Sander that there had been digital penetration. In re-examination, Dr Sander was asked how she came to make the note "a couple of times attempted penetration, digital penetration". She responded, "That is simply to clarify what kinds of things I would need to look for on the physical examination". The doctor added that her role was to assess whether there was a need for a physical examination and to carry out that examination if necessary. However, in response to a further question by the prosecutor, Dr Sander said that her note referred, "to the fact that events of that nature took place", but that she could not be certain who had told her those things. Again, the evidence was not as close as it might have been, but it was open to the jury to conclude that what the complainant had told Dr Sander departed from her earlier statements in significant respects.

(f) The complainant rejected the assertion that she had complained as a result of her dislike and hatred of her grandmother and other family members. She said, "… if it was based on my grandmother, I would try and find something on her, don't you think?". The allegations concerning an alleged motive were hardly compelling.

(g) There is no substance in this contention. It has been addressed earlier.

[31] The principles applicable to a challenge to a verdict on the grounds of inconsistency are not in doubt. In *MacKenzie v The Queen*,[1] Gaudron, Gummow and Kirby JJ said:

> "… the respect for the function which the law assigns to juries (and the general satisfaction with their performance) have led courts to express repeatedly, in the context both of criminal and civil trials, reluctance to accept a submission that verdicts are inconsistent in the relevant sense. Thus, if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury. In a criminal appeal, the view may be taken that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt. Alternatively, the appellate court may conclude that the jury took a 'merciful' view of the facts upon one count: a function which has always been open to, and often exercised by, juries.
>
> ...
>
> Nevertheless, a residue of cases will remain where the different verdicts returned by the jury represent, on the public record, an affront to logic and commonsense which is unacceptable and

1 (1996) 190 CLR 348.

> strongly suggests a compromise of the performance of the jury's duty. More commonly, it may suggest confusion in the minds of the jury or a misunderstanding of their function, uncertainty about the legal differentiation between the offences or lack of clarity in the judicial instruction on the applicable law. It is only where the inconsistency rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice that the relevant conviction will be set aside. It is impossible to state hard and fast rules. "It all depends upon the facts of the case."[2] (citations omitted)

[32] In *Jones v The Queen*,[3] a case in which the appellant was convicted on two counts of rape and acquitted on a third, Gaudron, McHugh and Gummow JJ said:

> "The jury's finding of not guilty on the second count damaged the credibility of the complainant with respect to all counts in the indictment. Implicit in the appellant's acquittal on the second count was a rejection of the complainant's account of the events which were said to give rise to that count. …. Whatever the explanation may be, however, the jury's rejection of the complainant's account on the second count diminished her overall credibility. The only reasonable conclusion is that the jury were not satisfied beyond reasonable doubt of the truth of her evidence concerning the incident the subject of the second count. …
>
> It is difficult then to see how it was open to the jury to be convinced beyond a reasonable doubt of the guilt of the appellant with respect to the first and third counts. There is nothing in the complainant's evidence or the surrounding circumstances which gives any ground for supposing that her evidence was more reliable in relation to those counts than it was in relation to the second count.
>
> Moreover, two other factors made it necessary for a reasonable jury to scrutinise the complainant's evidence with considerable care – (1) her delay in making the complaint; and (2) the lack of any corroborative evidence, in particular, the absence of any medical evidence." [4] (citations omitted)

[33] The complainant had been asked in her police interview, "Um what about [indistinct] ejaculate?" and had answered, "No". Later in the interview, the complainant said that she had "never seen that" referring to ejaculation in conjunction with fellatio. When Dr Stevenson was asked what he had been told about ejaculation, he said, "…it was difficult to extract specifics from her". When asked, "To your mind, how many times did this ejaculation occur every time there was fellatio by her?", he responded, "Again, I do not have that level of detail. Only that it occurred on multiple occasions…".

[34] The respondent relies on this discrepancy in the evidence for the contention that it cannot be inferred from the verdict on count 2 that the complainant's credibility was found wanting. I have difficulty in accepting that contention, particularly when counts 2 and 3 are considered together.

---

2 At 367-368.
3 (1997) 191 CLR 439.
4 At 453.

[35] The complainant made statements in support of counts 2 and 3 that were brief but clear. In relation to count 2, she explained that the subject act of fellatio was one incident in a course of such conduct. She identified the house in which it occurred, the room in which it occurred and the DVD film which she and the appellant had watched immediately prior. There was nothing implausible about her account.

[36] The complainant's accounts of the subject act of penile penetration were also consistent and clear. Dr Stevenson spoke of the complainant's vivid recollection "of one episode" of attempted penile penetration. Dr Stevenson's evidence in this and other regards was consistent with that of the complainant except for his recollection of being told that ejaculation had occurred in relation to episodes of oral sex.

[37] Dr Sander's evidence was also consistent with the complainant's account in relation to the attempted penile penetration, except that she recorded it as happening "a couple of times", that there was "no pain" and that there had been "digital penetration".

[38] With respect to count 1, the complainant was eight years old at most. She was 10 years old at most with respect to counts 2 and 3. She made her general complaint to her mother early in 2008 when she was almost 13. She was almost 15 when she gave her police interview and saw the two medical practitioners. Having regard to the complainant's age and the passage of time, some discrepancies in her account of events were to be expected. The discrepancies identified by counsel for the appellant and respondent, and discussed above, need not have been accepted by the jury as reflecting so adversely on the reliability of the complainant's evidence that they could not be satisfied beyond reasonable doubt in relation to counts 2 and 3. However, the jury was persuaded by the discrepancies, perhaps in conjunction with other matters such as demeanour, to return not guilty verdicts on these counts.

[39] The jury thus was unable to accept the clear evidence of the complainant in respect of these counts: evidence of acts which, had they occurred, could be expected to have remained clearly fixed in the complainant's mind. The discrepancies under discussion were not inconsistent with the core of the complainant's accounts of the offending acts constituting counts 2 and 3. The difficulty with the evidence of ejaculation was that the complainant having said that ejaculation had not occurred, later told Dr Stevenson it had. Similarly, Dr Sander's evidence that there was digital penetration, at least one other attempted act of penile penetration and the notation of "no pain" contradicted one aspect of the complainant's earlier evidence concerning the act of penetration and mentioned other matters which could have been expected to surface in the complainant's police interview or her oral evidence.

[40] The evidentiary problems under discussion are thus likely to have been perceived by the jury as going to the reliability of the evidence of the complainant in respect of both counts 2 and 3. There is no logical reason why the jury would have regarded the evidence of digital penetration as relevant to count 3, but not count 2 or, for that matter, to count 1. It will be recalled that the complainant spoke of a course of conduct which commenced with kissing and escalated to oral sex and then attempted intercourse. The same observation applies to the noting by Dr Sander of more than one attempt of penile penetration.

[41] If the complainant's credibility had been so weakened that her clear and cogent evidence in respect of counts 2 and 3 had to be rejected, it followed that the jury,

acting responsibly and rationally, could not have been satisfied of the appellant's guilt in respect of count 1 beyond a reasonable doubt. The evidence of the complainant in respect of count 1 was not corroborated. The complainant's credibility in respect of the kissing allegations received less support from the complaint to her mother than did her evidence in respect of counts 2 and 3. Moreover, one would think that if the complainant had a clear recollection of any of the alleged sexual misconduct it would be of the oral sex and attempted penile penetration. She said of the former that she felt "grossed out" after such incidents and her recollection of the latter incident struck Dr Stevenson as "vivid". It is also relevant that the complainant could have been as young as seven at the time of the offending conduct in respect of count 1, whereas the events the subject of count 2 and 3 are alleged to have occurred subsequently, possibly up until the age of 10.

[42] In my view, the guilty verdict in respect of count 1 is strongly suggestive of a compromise verdict or a failure to appreciate how findings of credit in relation to counts 2 and 3 could not be isolated from the jury's consideration of count 1, despite an appropriate direction in that regard. In my respectful opinion, no reasonable jury which gave due consideration to the facts could have arrived at the subject verdicts. I would allow the appeal, set aside the conviction in respect of count 1 and order an acquittal on that count.

[43] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with those reasons and with the orders proposed by his Honour.