IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2010-485-001147

IN THE MATTER OF	The Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004
BETWEEN	WILLIAM MCLEOD WILSON Plaintiff
AND	ATTORNEY-GENERAL First Defendant
AND	JUDICIAL CONDUCT COMMISSIONER Second Defendant
AND	JUDICIAL CONDUCT PANEL Third Defendant

Hearing: 1, 2, 3 September 2010

Court: Wild J
Miller J
Lang J

Appearances: C R Carruthers QC, G J Harley and K J Dobbs for the Plaintiff
D B Collins QC and T J Warburton for the First Defendant
D J Goddard QC and U R Jagose for the Second Defendant
L M Ritchie for Saxmere Company Ltd and The Escorial Company Ltd as Interested Parties
Sir Edmund Thomas in person, as an Interested Party

Judgment: 28 September 2010

JUDGMENT OF THE COURT

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Introduction

[1] The plaintiff is a Judge of the Supreme Court. In 2007, when a Judge of the Court of Appeal, he sat on an appeal in which Mr A R Galbraith QC, a close friend and business associate of the Judge, was senior counsel for one of the parties. That relationship formed the basis, first, of an unsuccessful appeal to the Supreme Court and, subsequently, of a successful application to the Court to recall its earlier judgment.

[2] At the invitation of the Supreme Court, and at different stages of the proceedings before it, the Judge made three personal statements to the Court in which he described the nature of his relationship with counsel at the time of the hearing in the Court of Appeal. The adequacy of the information that the Judge provided to the Supreme Court during this period lies at the heart of the events that have given rise to this proceeding.

[3] Those events involve three complaints to the Judicial Conduct Commissioner, Sir David Gascoigne, about the Judge's compliance with his disclosure obligations to the Supreme Court. The complaints were by Saxmere Company Limited and The Escorial Company Limited ("Saxmere"), by a Mr C J O'Neill and by Sir Edmund Thomas, a retired Judge, ultimately an acting Judge of the Supreme Court.

[4] After conducting a preliminary examination into the complaints, the Commissioner recommended to the Acting Attorney-General that a Judicial Conduct Panel be appointed to inquire into, and report to the Acting Attorney on, the issue of whether the Judge's conduct might justify consideration of his removal from office. The Panel has not yet begun its inquiry, because in this proceeding the Judge seeks judicial review of both decisions that led to its appointment.

[5] The Judge alleges that the Commissioner's recommendation to the Acting Attorney is vitiated by four errors of law and should be quashed. He says that the Acting Attorney's decision to act upon the Commissioner's recommendation and appoint a Panel is affected by the same four alleged errors. For that reason, the Judge seeks to have the Acting Attorney's decision quashed as well. The Judge's position is that matters should be taken no further, thereby effectively terminating the process of investigating his conduct.

[6] The four alleged errors of law require us to answer these questions:

a) *The standard:*

Did the Commissioner fail to identify correctly the standard of misconduct warranting removal from office?

b) *Application of the standard:*

Did the Commissioner fail to apply the standard to identified conduct?

c) *Fair process:*

Did procedural impropriety, in particular breach of natural justice, mar the Commissioner's investigation?

d) *Privileged information:*

Did the Commissioner err in taking account of information that was hearsay, confidential and subject to legal privilege?

[7] If any of these errors is made out, we will need also to decide what, if any, relief is appropriate. In particular, we will need to decide whether the appropriate relief is simply to quash both the Commissioner's recommendation and the Acting Attorney's acceptance of it, as the Judge contends, or whether the matter should be left to the Panel or, alternatively, referred back to the Commissioner.

[8] Before turning to the issues it is necessary to set out the factual background in greater detail.

Factual background

[9] In early April 2007 the Judge was assigned to a three-member panel of the Court of Appeal that was to hear an appeal to which Saxmere was the respondent. Mr Galbraith was to appear as senior counsel for the appellant. After the Judge learned of Mr Galbraith's involvement in the appeal and prior to the hearing taking place, he telephoned Saxmere's senior counsel and advised him of his friendship with Mr Galbraith and also of the fact that he and Mr Galbraith had an interest in a horse stud together. After taking instructions, Saxmere's counsel advised the Registrar that his clients had no objection to the Judge sitting. In August 2007, for reasons given by William Young P, the Court of Appeal allowed the appeal, a judgment adverse to Saxmere.[1]

[10] In November 2007, the Supreme Court dismissed a merits-based application by Saxmere for leave to appeal to that Court.

[1] *Wool Board Disestablishment Company Ltd v Saxmere Company Ltd* [2007] NZCA 349.

[11] Having gathered some information about the nature and extent of the business interests that the Judge shared with Mr Galbraith, Saxmere made its first complaint to the Commissioner (then Mr I L Haynes) in May 2008. The gist of this complaint was that the Judge should have recused himself from sitting on the appeal in the Court of Appeal.

[12] In August 2008 Saxmere applied to the Supreme Court for special leave to appeal, this time on the ground of apparent bias. Saxmere contended that the Judge ought to have recused himself from the panel that heard the appeal in the Court of Appeal because of his close personal and business association with Mr Galbraith. In part, the application relied upon the alleged inadequacy of the Judge's disclosure to Saxmere's counsel prior to the hearing in the Court of Appeal. Saxmere contended that the Judge had not made adequate disclosure to its counsel of the nature and extent of the business interests that he shared with Mr Galbraith. The Supreme Court granted the application for leave on 7 November 2008.[2]

[13] On 19 December 2008, after obtaining leave from the Supreme Court to do so, the Judge made his first personal statement to that Court in which he provided information about the nature and extent of his business relationship with Mr Galbraith. In a judgment delivered on 3 July 2009 ("*Saxmere No 1*"), the Supreme Court dismissed Saxmere's appeal.[3] It held there was no evidence that would indicate to an objective observer that at the time of the hearing in the Court of Appeal the business relationship between the Judge and Mr Galbraith had led to the Judge being indebted to Mr Galbraith, or being beholden to Mr Galbraith in some other way. Thus, apparent bias was not made out.

[14] In the meantime, Saxmere had gathered further information about the business interests that the Judge shared with Mr Galbraith. Based on that information, Saxmere applied to the Supreme Court on 28 July 2009 for an order recalling its *Saxmere No 1* judgment.

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[2] *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2008] NZSC 94.

[3] *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72; [2010] 1 NZLR 35.

[15] On 28 August 2009 the Judge made his second personal statement to the Supreme Court. Following a minute by the Court seeking additional details, the Judge made his third personal statement to the Court on 22 October 2009.

[16] On 27 November 2009, the Supreme Court delivered its next judgment ("*Saxmere No 2*").[4] It considered that the additional material that the Judge had supplied in his second and third personal statements required the Court to alter its view regarding Saxmere's argument based on apparent bias. It was of the view that the new material might lead an objective observer to conclude that the Judge was disqualified from sitting on the panel that heard the case in the Court of Appeal because he was indirectly indebted or beholden to Mr Galbraith at that time. The Supreme Court therefore recalled its *Saxmere No 1* judgment, allowed Saxmere's appeal and remitted the case to the Court of Appeal for re-hearing.

[17] On 5 December 2009 Mr C J O'Neill lodged his complaint about the Judge's conduct with the Commissioner. On 9 and 10 December, Saxmere re-stated its earlier (May 2008) complaint to the Commissioner. Sir Edmund Thomas lodged his complaint on 21 December. All three complaints were directed at least in part to the inadequacy of the Judge's disclosure to his own Court.

[18] The Commissioner carried out a preliminary examination over the next six months. He read and took into account the Supreme Court's two *Saxmere* judgments, together with the documentation filed in relation to the appeal and application that the judgments determined. He also took into account the written material that the three complainants had provided in support of their complaints.

[19] In addition, and with the assistance of the Hon A M Gleeson AC, formerly the Chief Justice of Australia, the Commissioner interviewed several people. These included Mr Peter Radford on behalf of the Saxmere interests, and Mr Galbraith. He also held a lengthy interview with the Judge and his two legal advisers, Mr C R Carruthers QC and Mr G H Harley. We have been provided with a transcript of that

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4 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122; [2010] 1 NZLR 76.

interview, together with excerpts of a transcript of an interview that the Commissioner had conducted with Mr Galbraith the previous day.

[20] The Commissioner also took into account a letter that he had received from Mr J A Farmer QC, who had provided Mr Galbraith with advice regarding the issues that the appeal and application to the Supreme Court had raised. Mr Farmer had also discussed these with Sir Edmund. The Commissioner's reliance on material provided by Sir Edmund about the substance of his discussions with Mr Farmer is the basis for the fourth alleged error.

[21] Before he made his recommendation to the Acting Attorney, the Commissioner received and considered further written submissions from Messrs Carruthers and Harley on behalf of the Judge.

[22] The Commissioner wrote to the Acting Attorney on 7 May 2010 enclosing a copy of his Decision on the complaints. He recommended to the Acting Attorney that she appoint a Judicial Conduct Panel to inquire into the Judge's "conduct that is relevant to Complaints 1, 2 and 3".

[23] On 8 July 2010, having invited and received submissions from the Judge about the Commissioner's recommendation, the Acting Attorney formally referred to the Panel, for inquiry and report:

> ... all matters concerning the conduct of Justice Wilson that are the subject of the recommendation of the Judicial Conduct Commissioner, in his report dated 7 May 2010, that a Judicial Conduct Panel be appointed.

[24] In order to understand the issues that the four causes of action raise, it is necessary to understand the manner in which the relevant Act is structured.

Scheme of the Act

[25] The Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 ("the Act") created a regime for investigating complaints against judges and dealing with them according to their seriousness. Its purpose is to "enhance public

confidence in, and to protect the impartiality and integrity of, the judicial system”.[5] It does so by:

> (a) providing a robust investigation process to enable informed decisions to be made about the removal of Judges from office:
>
> (b) establishing an office for the receipt and assessment of complaints about the conduct of Judges:
>
> (c) providing a fair process that recognises and protects the requirements of judicial independence and natural justice.

[26] The Act established the office of the Judicial Conduct Commissioner, who is appointed by the Governor-General on the recommendation of the House of Representatives after consultation with the Chief Justice.[6] His functions are to receive complaints about judges and deal with them as the Act requires, to conduct preliminary examinations of complaints, and in appropriate cases to recommend that a Panel be appointed to inquire into any matter or matters about the conduct of a judge.[7] He has all the powers necessary to carry out those functions.[8] He must act independently.[9]

[27] Any person may complain about a judge’s conduct.[10] The complaint must be in writing and must state the subject matter of the complaint against the judge concerned. The complainant may be required to complete a statutory declaration setting out the details.[11]

[28] Section 15(1) establishes what the Commissioner must do about a complaint. He must conduct a preliminary examination, making any inquiries into the complaint that he thinks appropriate. He may obtain any relevant court documents and consult the judge’s Head of Bench, but he cannot order that documents be produced or insist that witnesses give evidence before him. Under the legislation as it stood at the time of these complaints, he must then “form an opinion as to whether”:[12]

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5 Section 4.
6 Section 7.
7 Section 8(1). We use the masculine gender because the office is presently held by a man.
8 Section 8(5).
9 Section 9.
10 Section 12(1).
11 Section 13.
12 Section 15(1).

> (a) the subject matter of the complaint, if substantiated, could warrant consideration of the removal of the Judge from office; or
>
> (b) there are any grounds for dismissing the complaint under section 16(1).

Having "formed the opinion required", the Commissioner must take one of three steps:[13]

> (a) dismiss the complaint (section 16); or
>
> (b) refer the complaint to the Head of Bench (section 17); or
>
> (c) recommend that the Attorney-General appoint a Judicial Conduct Panel to inquire into any matter or matters concerning the conduct of a Judge (section 18).

[29] We observe that s 15(1) was amended from 23 March 2010, although the amendment does not apply to this case.[14] It now requires that the Commissioner form an opinion as to whether, in addition, the subject matter of the complaint could warrant referral to the Head of Bench under s 17 and whether there are any grounds to exercise his power to take no further action under a new s 15A. That section gives the Commissioner power to take no further action over the complaint if satisfied that its further consideration would in all the circumstances be unjustified. One of the grounds on which the Commissioner might form that view is that, having started the preliminary examination required by s 15, he has concluded there is no reasonable prospect of there being available to him information that would allow him to form the necessary opinion.

[30] Dismissal is addressed in s 16, which provides that the Commissioner must dismiss a complaint if he considers that, for example, it has no bearing on judicial functions or judicial duties, or is trivial, or is about a judicial decision that is or was subject to a right of appeal or right to seek judicial review. It is common ground that s 16 does not apply in this case.

[31] The circumstances in which the Commissioner may recommend that a Panel be appointed are prescribed in s 18, which provides:

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[13] Section 15(5).

[14] Section 36.

> (1) The Commissioner may recommend to the Attorney-General that he or she appoint a Judicial Conduct Panel to inquire into any matter or matters concerning the alleged conduct of a Judge if the Commissioner is of the opinion that—
>
> (a) an inquiry into the alleged conduct is necessary or justified; and
>
> (b) if established, the conduct may warrant consideration of removal of the Judge.
>
> (2) The Commissioner must give reasons with his or her recommendation under subsection (1).
>
> (3) The Commissioner must give the complainant and the Judge who is the subject of the complaint written notification of any action taken under subsection (1).

[32] The Attorney-General may appoint a Panel "to inquire into, and report on, any matter or matters concerning the conduct of a judge that have been the subject of a recommendation by the Commissioner under section 18".[15] To that end, the Attorney may require that the Commissioner make the relevant files available.[16]

[33] A Panel is appointed after consultation with the Chief Justice about its membership.[17] Two members must be serving judges, or a serving and a retired judge, or a serving or retired judge and a barrister or solicitor who is qualified for judicial office. The third member must be a layperson, not being a judge, retired judge or lawyer.[18] The functions of the Panel are prescribed in s 24:

> (1) A Judicial Conduct Panel must inquire into, and report on, the matter or matters of judicial conduct referred to it by the Attorney-General on the recommendation of the Commissioner.
>
> (2) The Panel must conduct a hearing into the matter or matters referred to it by the Attorney-General.
>
> (3) The Panel may also inquire into, and report on, any other matters concerning the conduct of the Judge that arise in the course of its dealing with the referral from the Attorney-General.
>
> (4) The Panel must give the Attorney-General a report in accordance with

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15 Section 21.
16 Section 20(1).
17 Section 21(2).
18 Section 22.

section 32.

[34] At a hearing before a Panel "the allegations" about the judge's conduct are presented by a special counsel appointed by the Attorney.[19] In this case Mr W Sofronoff QC, Solicitor-General for Queensland, has been appointed. Although appointed by the Attorney, he is to act independently; the legislation requires that he is to perform his duties impartially and in accordance with the public interest.[20]

[35] The Commissioner and every person employed in his office must keep confidential all matters that come to their knowledge in the performance of their functions, and must not communicate any of those matters to anyone else except for the purpose of carrying out their functions under, or giving effect, to the Act.[21] Every hearing of a Panel must be held in public unless the Panel orders otherwise. The legislation thus envisages that a complaint will not become public until a Panel holds its first hearing into the matters of judicial conduct referred to it by the Attorney.

[36] An appeal lies to the Court of Appeal against certain procedural rulings of a Panel,[22] but there is no provision for an appeal to any Court on the merits.

[37] The Panel must report to the Attorney-General at the end of its inquiry.[23] The report must set out:

(a) the Panel's findings of fact; and

(b) the Panel's opinion as to whether consideration of removal of the Judge is justified; and

(c) the reasons for the Panel's conclusion.

The Panel differs from the Commissioner in that it is not required to dismiss allegations that lack merit or refer such allegations to the Head of Bench.

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19 Section 28(2).
20 Section 28(3).
21 Section 19.
22 Section 31.
23 Section 32.

[38] A Panel report recommending consideration of removal is a prerequisite to removal (unless the judge has been convicted of a serious criminal offence, in which case the Attorney may act independently of the Act). On receipt of such a report the Attorney must determine "at his or her absolute discretion" whether to take steps to initiate the removal of the judge from office.[24] Removal of a judge of the High Court, as all Superior Court Judges are, takes place under s 23 of the Constitution Act 1986, which provides that judges may be removed from office only by the House of Representatives and only on grounds of misbehaviour or incapacity:[25]

> A Judge of the High Court shall not be removed from office except by the Sovereign or the Governor-General, acting upon an address of the House of Representatives, which address may be moved only on the grounds of that Judge's misbehaviour or of that Judge's incapacity to discharge the functions of that Judge's office.

[39] This survey of the legislation leads us to make several points of relevance to the Judge's circumstances. We begin by observing that Parliament evidently sought to increase the accountability of judges by establishing procedures for removing them from office and by establishing an office for dealing with complaints about them. At the same time, it sought to establish a fair process that protects the requirements of judicial independence and natural justice. These objectives are designed collectively to enhance public confidence in the judicial system; that is, the legislation presumes that public confidence results not merely from increased accountability but also from protecting judicial independence and treating individual judges fairly.

[40] On assuming office, all judges take the judicial oath, undertaking to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will".[26] That commitment to impartiality, a quality of mind, supplies the rationale for judicial independence, which refers to the status of judges and their relationship to others, particularly the executive.[27] In a community governed by the rule of law, judicial impartiality is of constitutional importance. To

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[24] Section 33.

[25] District Court judges may be removed by the Governor-General on the same grounds: Districts Courts Act 1947, s 7.

[26] Oaths and Declarations Act 1957, s 18.

[27] *Valente v R* [1985] 2 SCR 673 at [15].

guarantee it, judges are given independence; they enjoy security of tenure and salary, they attract immunity from liability for their work, they are held accountable for their decisions only by appellate courts, and they may be removed only by the House of Representatives and then only on grounds of misbehaviour or incapacity. The Act itself supports judicial independence in various ways: for example, the Chief Justice must be consulted about the appointment of a Commissioner; complaints about judicial decisions must be dismissed; removal may be prosecuted only via the Commissioner's opinion, the Attorney's reference and the Panel's recommendation; and to ensure that a Panel is independent of the executive, the Chief Justice must again be consulted about its membership, which must include at least one judge.

[41] The corollary of judicial independence is that when an individual judge does behave in a manner sufficiently incompatible with the judicial oath, it may be necessary that he or she be removed from office to ensure that the public retains confidence in the judicial system as a whole. The power of removal creates tension between accountability and independence, which the Act aims to address through processes and standards designed to ensure that judges are not lightly removed.

[42] Under the Act the Commissioner is not a mere conduit for complaints but a decisionmaker. He decides which complaints are dismissed and which are referred to the Attorney with a recommendation that a Panel be appointed. He must form an opinion whether the complaint, if substantiated, could warrant consideration of the judge's removal or whether there are any grounds for dismissing it. If his opinion is that neither the appointment of a Panel nor dismissal of the complaint is appropriate, under the legislation at the time he must refer the complaint to the relevant Head of Bench. So referral to the Head of Bench was the "default option", as counsel put it.

[43] The opinion that the Commissioner must form before he recommends that a Panel be appointed is highly provisional; it is that an inquiry into "alleged" conduct is "necessary or justified" and "if established" the conduct "may" warrant "consideration of" removal of the Judge. The Commissioner does not find the facts; that is one of the prescribed functions of a Panel, if the Attorney chooses to appoint one. Nor does the Commissioner fix the standard by which the judge's conduct or capacity will be assessed, initially by the Panel, and ultimately by the House of

Representatives. Nonetheless, the Commissioner must form an opinion on the information that he has available to him following his preliminary examination. That opinion may result in the complaint being dismissed.

[44] An opinion must be honestly held, reasonably open on the facts available, and based on the correct legal standard.[28] In this case the opinion must be that there is sufficient substance to the complaint to warrant the appointment of a Panel; the Commissioner must believe both that the facts alleged in the complaint are sufficiently plausible to justify further investigation and that the conduct, if established, may be serious enough to warrant consideration of removal rather than referral to Head of Bench. It is a low threshold, as Mr Goddard emphasised, but a definite one. To acknowledge that the Commissioner's decisions are provisional is not to accept that he can recommend a Panel where he is unable to form the opinion required by s 15(1). In that case he must (under the legislation at the time) refer the complaint to the Head of Bench.

[45] The Act says nothing about the standard for removal, although it recognises that removal is a serious matter and that some misconduct may merit the lesser sanction of referral to the Head of Bench for appropriate action.

[46] Under s 15(5)(c) and s 18(1) the Commissioner does not recommend that the Attorney appoint a Panel to inquire into an entire complaint. Rather, the Commissioner recommends that the Attorney appoint a Panel to inquire into "any matter or matters concerning the alleged conduct of a Judge", those being matters alleged in the complaint or arising during the Commissioner's preliminary examination of it. Importantly, it is the Commissioner who must identify the matter or matters concerning the judge's conduct that warrant a Panel inquiry.

[47] The matters about conduct that are thought to warrant further inquiry must be identified in the Commissioner's recommendation, which determines the initial scope of the Panel inquiry. That is so because the recommendation is carried into s 21, which authorises the Attorney to appoint a Panel to inquire into and report on

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28 *Auckland Institute of Studies Ltd v Commissioner of Inland Revenue* (2002) 20 NZTC 17,685 at [102] per Rodney Hansen J; *Rees v Crane* [1994] 2 AC 173 (PC) at 193.

"any matter or matters concerning the conduct of a Judge that have been the subject of a recommendation by the Commissioner under section 18." The Acting Attorney (in this case) is to make her own decision and for that purpose may call for the Commissioner's files. She cannot add new matters to the Commissioner's recommendation but the word "any" indicates that neither must she refer all matters in the recommendation to the Panel. The Panel in turn is to inquire into and report on "the matter or matters of judicial conduct referred to it by the (Acting) Attorney", and the special prosecutor is to "present the allegations" about the judge's conduct. The details of the original complaint may supply context and the Panel may consider them to the extent that it thinks them relevant, but its inquiry is "into" the matters about the judge's conduct identified by the Commissioner and referred to it by the Attorney.

[48] However, the eventual scope of the Panel inquiry may differ from the Attorney's referral in two respects. First, the special counsel is to bring independent judgment to bear when presenting the allegations and must act in the public interest; it follows that although he is constrained by the referral he need not present every allegation contained in it.[29] Second, the Panel may also inquire into "any other matters concerning the Judge that arise in the course of its dealing with the referral from the Attorney".[30] Mr Collins accepted, we think correctly, that any additional matters which the Panel might inquire into under s 24(3) must be related to matters that have been referred by the Attorney; any new matters must be the subject of a fresh complaint to the Commissioner.

[49] The legislation recognises that the appointment of a Panel is a serious matter for the judge concerned. A Panel is a special tribunal, complete with prosecutor, established to conduct a public hearing into the judge's conduct. The legislation nonetheless envisages that a judge may survive the Panel process, in that the judge may remain in office unless the Panel inquiry leads in due course to his or her removal by the House. We acknowledge Mr Carruthers' submission that the Judge has been the subject of inaccurate publicity apparently designed to hound him from office. Indeed, in his Decision the Commissioner recognised that the publicity has

[29] *Polynesian Spa v Osborne* [2005] NZAR 408 (HC) at [62].
[30] Section 24(3).

been "often inaccurate". It is unfortunate that the complaints have not remained confidential as envisaged by the Act. However, that cannot alter the test to be applied by the Commissioner under the Act.

[50] Lastly, it is not in dispute that the Commissioner's decisions under the Act are susceptible to judicial review. Although the Panel rather than the Commissioner finds the facts and recommends that removal be considered, the Commissioner's decision to recommend a Panel is the exercise of a statutory power of decision, in that it affects the judge's "rights, powers, privileges [and] ... duties" in terms of s 4(2) of the Judicature Amendment Act 1972. It may lead not only to a public inquiry into the judge's conduct but also to the House of Representatives considering removal of the judge.

[51] Mr Collins and Mr Goddard argued that, in judicial review proceedings which seek to challenge an opinion formed by the Commissioner, the Court must be extremely circumspect. In *Bruce v Cole*,[31] a case under the comparable New South Wales legislation, Bruce J challenged a threshold opinion that he may be so incapacitated as to justify consideration of his removal from office. Spigelman CJ emphasised that the application for judicial review challenged an opinion, the threshold for the formation of which was very low. He held that to decide the case on the merits under the guise of judicial review would be to transgress the proper limits of judicial intervention, a particularly important consideration in a case directly involving the independence of the judiciary.[32]

[52] The question in that case, however, was whether there was sufficient evidence of incapacity to sustain the opinion. What was challenged was the "finding of fact that Justice Bruce's unquestioned prior incapacity, continues to exist".[33] We readily accept that the Court should not substitute its own assessment on the merits, particularly when the decision under review may result in the House of Representatives deciding whether to remove a judge from office. Further, the Court may refuse judicial review on the ground that the decision is part of a process that is

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31 *Bruce v Cole* (1998) 45 NSWLR 163.
32 At 183-185.

33 At 184.

not yet complete. It is another matter to suggest, as Mr Goddard did, that the Court should stay its hand for fear of public criticism even if the Commissioner has committed a reviewable error. The legislation itself requires that the Judge be treated fairly according to law. If that has not happened, the Court must be prepared to intervene as necessary, expecting that the informed observer will assess the Court's intervention on its merits.

First and second alleged errors of law: the standard of misbehaviour warranting removal from office and application of it

[53] These first two alleged errors of law are best dealt with together. That is because the nub of Mr Carruthers' argument was that the Commissioner did not adequately identify the conduct that, in his opinion, met the threshold or standard for him to recommend that the Attorney appoint a Panel.

Did the Commissioner identify the appropriate standard?

[54] Whether or not the conduct of a Judge falls within the category of misbehaviour that justifies the removal of the Judge is the issue that the House will need to determine in the event that it is ultimately required to consider whether removal is justified. Similarly, whether or not the conduct of the Judge is sufficiently serious that consideration should be given to his or her removal is a matter that the Panel will need to determine if it proceeds with its inquiry. For the reasons we have already given, however, it was still necessary for the Commissioner to identify an appropriate standard against which the Judge's conduct fell to be considered. He could not properly carry out his function without undertaking that task.

[55] The Commissioner addressed this issue in the last sentence of [30] of his Decision:

> For reasons associated with the constitutional importance of judicial independence, a Judge may be removed only by the Governor-General acting upon an address of Parliament on grounds of misbehaviour or incapacity. There is, in this case, no question of incapacity. **Misbehaviour**

> **could include conduct that, although not dishonest, fell so far short of accepted standards of judicial behaviour as to warrant the ultimate sanction of removal**. (Citations removed.) (Emphasis added.)

[56] Mr Carruthers did not cavil with that last sentence, so far as it goes. He invited us to hold, however, that in New Zealand the standard also requires moral turpitude before the grounds for removal will be made out. He based that submission on the written advice given to the Government by the then Solicitor-General, Mr J J McGrath QC, in September 1997 in respect of the conduct of Judge Beattie. In the course of that advice the Solicitor-General stated:

> ... I conclude that in this context misbehaviour means conduct that is so morally wrong and improper that it demonstrates a judge lacks the integrity to continue to exercise judicial office. It is not confined to conduct that has been or could appropriately be subject of a criminal conviction. But moral turpitude, in my opinion, is a necessary element of misbehaviour.

Later, he added:

> [Misbehaviour] includes any conduct that is so morally wrong and improper that it demonstrates a judge lacks the integrity to continue to hold judicial office. The purpose of providing by statute for removal for misbehaviour is to ensure that the value of judicial independence is balanced against that of ensuring there is public confidence in the judiciary. But the term misbehaviour is not intended to import a subjective public confidence test as such.

[57] Mr Goddard and Mr Collins invited us to take a wider approach. They pointed out that in the years that have passed since the Solicitor-General gave his advice in relation to Judge Beattie, courts and tribunals in several comparable jurisdictions have given decisions describing features of conduct that may warrant consideration of removal of a judge from office. They submitted that these decisions have not made moral turpitude an essential element of such conduct.

[58] We agree that several recent decisions of overseas courts and tribunals provide a valuable pointer to the standard of misbehaviour that will be required for a judge to be removed from office under s 23 of the Constitution Act 1986. In Canada, these include *Valente v R*,[34] *Therrien v Canada (Minister of Justice)*,[35] *R v*

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[34] *Valente v R* [1985] 2 SCR 673.

[35] *Therrien v Canada (Minister of Justice)* [2001] 2 SCR 3.

Moreau-Bérubé[36] and the Canadian Judicial Council's report on the conduct of Matlow J of the Ontario Superior Court of Justice.[37] In Australia, they include the Parliamentary Commission of Inquiry into the conduct of Murphy J[38] and *Bruce v Cole*.[39] Amongst the English decisions are the advice given by the Privy Council in *Rees v Crane,*[40] *Hearing on the Report to the Governor of The Cayman Islands – Madam Justice Levers (Judge of the Grand Court of the Cayman Islands)*[41] and *Hearing on the Report of the Chief Justice of Gibraltar.*[42]

[59] The Parliamentary Commission of Inquiry into the conduct of Murphy J was required to deliver a ruling on the meaning of "misbehaviour" as that term is used in s 72 of the Commonwealth Constitution. In his opinion, Commissioner the Hon Andrew Wells QC emphasised that it is neither possible nor wise to attempt a rigid definition of conduct that will constitute misbehaviour in this context. He said:[43]

> The issue raised by s 72 would thus appear to pose questions of fact and degree. Somewhere in the gamut of judicial misconduct or impropriety, a High Court judge's conduct, outside the exercise of his judicial function, that displays unfitness to discharge the duties of his high office can no longer be condoned, and becomes misbehaviour so clear and serious that the Judge guilty of it can no longer be trusted to do his duty. What he has done then will have destroyed public confidence in his judicial character, and hence in the guarantee that that character should give that he will do the duty expected of him by the Constitution. At that point, s 72 operates.
>
> It is neither possible nor wise to be more specific. To force misbehaviour into the mould of a rigid definition might preclude the word from extending to conduct that clearly calls for condemnation under s 72, but was not – could not have been – foreseen when the mould was cast.
>
> In my view, the construction of s 72 should be governed by the foregoing principles. Accordingly, the word "misbehaviour" must be held to extend to conduct of the Judge in or beyond the execution of his judicial office, that represents so serious a departure from standards of proper behaviour by such a judge that it must be found to have destroyed public confidence that he will continue to do his duty under and pursuant to the Constitution.

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36 *R v Moreau-Bérubé* [2002] 1 SCR 249.

37 Canadian Judicial Council *Majority Reasons of the Canadian Judicial Council in the matter of an inquiry into the conduct of the Honourable P. Theodore Matlow* (3 December 2008).

38 *Parliamentary Commission of Inquiry Re The Honourable Mr Justice Murphy: Ruling on Meaning of "Misbehaviour"* (1986) 2 Aust Bar Rev 203.

39 *Bruce v Cole* (1998) 45 NSWLR 163.

40 *Rees v Crane* [1994] 2 AC 173 (PC).

41 *Hearing on the Report of the Tribunal to the Governor of the Cayman Islands – Madam Justice Levers* (*Judge of the Grand Court of The Cayman Islands*) [2010] UKPC 24.

42 *Hearing on the Report of the Chief Justice of Gibraltar, Re* [2009] UKPC 43.

43 At 230.

> It is evident from this formulation that it raises questions of fact and degree. That is a feature of the British system of law that is frequently to be found, both in written and in unwritten law. A principle or rule of law cannot be condemned as so uncertain or imprecise as to be unworkable simply because its application is likely to raise difficult questions of fact and degree. In my judgement, while it may be impossible, by an act of professional draftsmanship, to describe, precisely and in general terms, where the dividing line runs between behaviour that attracts, and behaviour that does not attract, the sanctions of s 72, there should be no difficulty in determining on which side of the line a body of proven facts will fall.

[60] In *Hearing on the Report of the of the Tribunal to the Governor of The Cayman Islands – Madam Justice Levers (Judge of The Grand Court of The Cayman Islands)*, the Privy Council as recently as 29 July 2010 provided advice to Her Majesty the Queen as to whether Levers J should be removed from her office as a Judge of the Grand Court of the Cayman Islands on the ground of misbehaviour. It said:[44]

> The public rightly expects the highest standard of behaviour from a judge, but the protection of judicial independence demands that a judge shall not be removed for misbehaviour unless the judge has fallen so far short of that standard of behaviour as to demonstrate that he or she is not fit to remain in office. The test is whether the confidence in the justice system of those appearing before the judge or the public in general, with knowledge of the material circumstances, will be undermined if the judge continues to sit – see *Therrien v Canada (Minister for Justice)* [2001] 2 SCR 3. If a judge, by a course of conduct, demonstrates an inability to behave with due propriety misbehaviour can merge into incapacity.

[61] The Tribunal that investigated the conduct of Levers J categorised different incidents according to whether or not in its opinion each incident amounted to misbehaviour justifying removal from office. The Privy Council confirmed that there could be no objection to that.[45] The level of misconduct that may result in removal can be gauged from the following passage of the Privy Council's opinion:[46]

> … The Tribunal used the description "misbehaviour" to describe misconduct, whether individual or cumulative, of such seriousness as to warrant removal. The description "serious misconduct" was used to describe seriously bad behaviour that fell short of misbehaviour. No single epithet was used to describe bad behaviour that did not amount to serious misconduct. Quite often the Tribunal described behaviour in critical terms but commented that it fell short of serious misconduct.

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44 At [50].
45 At [47].
46 At [39].

[62] Eight months earlier, in its *Hearing on the Report of the Chief Justice of Gibraltar*, the Privy Council said:[47]

> While the highest standards are expected of a judge, failure to meet those standards will not of itself be enough to justify removal of a judge. So important is judicial independence that removal of a judge can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function. As Gonthier J put it at paragraph 147 [*Therrien v Canada (Ministry of Justice)* [2001] 2 SCR 3]:
>
>> "… before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office."

[63] The discussion in each of the cases referred to above was necessarily oriented to the facts of the case. The Solicitor-General's advice was similarly tailored to Judge Beattie's conduct. That advice was given in circumstances where the Judge had been acquitted by a jury on serious criminal charges involving allegations of dishonesty. A question remained, however, as to whether the Judge's conduct was nevertheless such that removal should be considered.

[64] We consider, for the reasons given by Commissioner the Hon Andrew Wells QC in *Murphy,* that it is not appropriate to attempt a rigid categorisation or definition of the types of conduct that will amount to misbehaviour for the purposes of s 23 of the Constitution Act 1986. As always, context is everything, and the point where conduct crosses the line between misconduct and misbehaviour justifying removal will be a matter of fact and degree. We have already observed that it is not for the Commissioner to reach a final conclusion regarding the standard to be applied, if only because he will not know the full facts. Enunciation of the standard is a matter for the Panel and, ultimately, the House.

[65] In some cases it will be relatively easy to determine that moral turpitude is involved. An obvious example is a case involving actual dishonesty. In other cases the answer will be far from clear. The *Madam Justice Levers* case provides a good

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[47] At [31].

example of this. The Privy Council accepted that she was a sound lawyer and an industrious judge who set high standards for herself and those with whom she worked. The Board described the conduct that led to her removal as "fatal flaws in a judicial career that has had many admirable features".[48] Her misconduct included disparaging her Chief Justice and other judicial colleagues. Of most concern to the Privy Council was "completely inexcusable conduct that [gave] the appearance of racism, bias against foreigners and bias in favour of the defence in criminal cases".[49] The Board did not assess that conduct in terms of moral turpitude. Rather, it focussed upon the cumulative effect of the Judge's conduct, ultimately holding that the Judge, by her misconduct, had shown that she was not fit to serve as a Judge of the Grand Court of the Cayman Islands.

[66] The Board may not necessarily have reached the same conclusion if it had determined that moral turpitude was an essential element of misbehaviour justifying removal. In marginal cases such an approach also runs the risk of shifting the focus from the conduct in question to an inquiry into what may constitute moral turpitude. We see no need to add a gloss to the words of the statute. We consider that the approach that the Privy Council took in *Madam Justice Levers* is appropriate in the New Zealand context. We therefore do not accept that misbehaviour in terms of s 23 of the Constitution Act 1986 necessarily involves moral turpitude. It may or may not. For reasons we give at [90] we do not need to decide whether moral turpitude was an essential element of misbehaviour in the circumstances of this case.

[67] We have also derived considerable assistance from the decision of the Privy Council in *Rees v Crane*.[50] In that case the Board considered an appeal from the Court of Appeal of Trinidad and Tobago. One of the issues that the Board was required to consider was the function of the Judicial and Legal Service Commission appointed under the Constitution of Trinidad and Tobago. The Commission was empowered under the Constitution to make a representation to the President of Trinidad and Tobago that the question of removing a High Court Judge from office for (among other things) misbehaviour ought to be investigated. If the President

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48 At [134].
49 Also at [134].
50 *Rees v Crane* [1994] 2 AC 173 (PC).

accepted the Commission's representation, he was required to appoint a tribunal to inquire into the matter and report of the facts thereof to the President. The tribunal would also be required to recommend to the President whether he should refer the question of removal of the judge from office to the Privy Council. Once the President received the tribunal's representation, he or she could refer the matter to the Privy Council. The Privy Council would then advise the President whether the judge ought to be removed from office. We therefore view the function of the Commission in Trinidad and Tobago as being broadly analogous to that of the Judicial Conduct Commissioner in New Zealand.

[68] In describing the Commission's function, the Board referred to the standard that the Commission must apply when considering a complaint. The Board said:[51]

> It is also in their Lordships' view clear that the commission is not intended simply to be a conduit pipe by which complaints are passed on by way of representation. The commission may receive isolated complaints of a purely administrative nature which they consider can be dealt with adequately through administrative action by the Chief Justice. Then they would no doubt not make a representation that the question of removal be considered. Indeed it may well in the public interest be desirable that such matters be dealt with quickly by the Chief Justice rather than that the full panoply of representation, tribunal and the Judicial Committee be set in motion. **The commission before it represents must, thus, be satisfied that the complaint has prima facie sufficient basis in fact and must be sufficiently serious** to warrant representation to the President, effectively the equivalent of impeachment proceedings. (Emphasis added)

[69] As will be evident from our comments at [44], we consider that the Judicial Conduct Commissioner in New Zealand must apply a similar standard. Before recommending to the Attorney that a Panel be appointed to inquire, the Commissioner must be satisfied that the matters that are to be the subject of the inquiry have prima facie sufficient basis in fact and are sufficiently serious to warrant that step being taken.

[70] In the present context, we consider the key issue for the House (if matters reach that stage) will be whether, in making disclosure to the Supreme Court, the Judge's conduct as finally established calls into question his candour, and thus his integrity, to such an extent that removal is justified. Those matters will necessarily

[51] At 193.

be determined as matters of fact and degree. The same factors will no doubt inform any determination by the Acting Attorney as to whether or not to take steps to initiate the removal process before the House, based on the Panel's recommendation.

[71] The Commissioner did not have the benefit of any authoritative decision of New Zealand's higher courts to assist him in determining the standard that he was required to apply. In stating that misbehaviour could include conduct falling short of dishonesty but which "fell so far short of accepted standards of judicial behaviour as to warrant the ultimate sanction of removal", the Commissioner enunciated a test that was in line with the principles to be drawn from the overseas authorities we have referred to. We consider that those principles apply with equal force to the concept of misbehaviour for the purposes of s 23 of the Constitution Act 1986. Importantly, the Commissioner recognised that the conduct must be very serious, going to the Judge's fitness for office. We have therefore concluded that the standard that the Commissioner identified at [30] of his Decision was sufficient for his purposes.

[72] The next issue is whether the Commissioner applied that standard to identified conduct.

Did the Commissioner apply the standard to identified conduct?

[73] For the reasons we have already outlined, it was necessary for the Commissioner to form an opinion as to how each complaint was to be dealt with. This meant that he needed to determine whether to dismiss each complaint or to recommend that a Panel be appointed to investigate matters arising from it. The "default" position, as recorded earlier, was to refer the complaint to the Head of Bench. A complicating factor in the present case was that the complaints by Saxmere and Sir Edmund contained numerous allegations. The Commissioner treated Mr O'Neill's allegations as being subsumed within the complaints by Saxmere and Sir Edmund. We consider that that was appropriate, and adopt the same approach.

[74] In determining how to deal with the complaints, the Commissioner needed to consider all of the material issues they raised. The complaints can be divided into

three broad categories: complaints that can fairly be described as peripheral to the central issue of disclosure; complaints that related to the Judge's conduct leading up to the delivery of the *Saxmere No 1* judgment; complaints regarding the Judge's conduct during the period between the delivery of *Saxmere No 1* and the hearing of *Saxmere No 2*.

Complaints about matters peripheral to the central issue of disclosure

[75] There can be no doubt that the Commissioner carried out an appropriate evaluative exercise in relation to these complaints. For the reasons he gave in [86]-[109] of his Decision, he concluded, in [132] in Section 5, that seven separate aspects of Saxmere's complaint, whether viewed individually or collectively, did not warrant a recommendation that a Panel be appointed.

[76] Notwithstanding this determination, the Commissioner indicated (at [135(a)] of his Decision) that he would recommend to the Acting Attorney that "an inquiry into the alleged conduct is justified".[52] The "alleged conduct" included those allegations that the Commissioner had determined did not warrant further inquiry. As a result of his recommendation, which the Acting Attorney adopted, those aspects of Saxmere's complaint remain as live issues for the Panel. That result is contrary to the Commissioner's own assessment and is wrong. We conclude that the Commissioner erred in law in recommending that all the Judge's alleged conduct be the subject of an inquiry by the Panel. The Commissioner should have framed his recommendation so that it excluded those matters he had found to have no substance.

Complaints regarding the Judge's conduct during the period leading up to the delivery of Saxmere No 1

[77] The Commissioner analysed these complaints in Sections 2 and 3 of the Decision, stating (in [86] and [125]) he would give his conclusions regarding the Judge's conduct in Section 5 of his Decision.

[52] His formal recommendation (contained in a letter to the Acting Attorney dated 7 May 2010) was that she "appoint a Judicial Conduct Panel to inquire into any matter or matters concerning the alleged conduct or Justice Wilson".

[78] Those conclusions are of critical importance to the present issue. We set them out in full:

> 133. Turning to a consideration of Justice Wilson's conduct in relation to the hearing of the Saxmere case in the Court of Appeal, I make this point: if the only subject of the complaints made about Justice Wilson's conduct was his acts and omissions prior to and during the Court of Appeal hearing, then it would have been open to me to conclude that the matter should be dealt with by a reference to the Head of Bench (under section 17 of the Act) rather than by a recommendation that a Judicial Conduct Panel should be appointed (under section 18).
>
> 134. I cannot, however, say the same when there are added aspects of the complaints made, insofar as they concern the conduct of Justice Wilson in the period leading to the delivery of the *Saxmere No 1* decision. In that respect I note these points:
>
> (a) as a Judge making disclosure to a Court (his own Court) Justice Wilson's obligations were strict and were to disclose promptly whatever might be relevant;
>
> (b) there are questions, in that regard, about the adequacy of the Judge's disclosure; about the relative importance of his duty to the Court and his wish to preserve the confidentiality of others; and about whether a continuing change in circumstances after a defined point in time should be disclosed;
>
> (c) Justice Wilson's own views on his obligations as to disclosure to the Court, formed in good faith, are important. But there are unresolved questions of fact about the advice and encouragement that the Judge received from different quarters as to the disclosure that he should make. Specifically, there is some difference in the recollections of Mr Galbraith and the Judge. There are also differences about what Mr Farmer said to Sir Edmund and on what basis he said it;
>
> (d) the terms of the judgments in the *Saxmere No 1* decision (notably paragraph [25] of the judgment of Justice Blanchard) and the terms of the Court's Media Release show that the Court was under a significant misapprehension about the nature, scale and finances of the jointly owned company, Rich Hill Ltd. To what extent this misapprehension was the fault of the Judge, and to what extent his offer to answer questions on oath excuses him from blame, are contestable matters of judgment.
>
> It is hard to see how a preliminary examination can take these issues further. On further inquiry, and in the exercise of its judgment about Justice Wilson's conduct and the context in which it occurred, a Judicial Conduct Panel may well form a view which is favourable to the Judge, but a different view is possible.

> 135. Applying the provisions of section 18(1) of the Act to the conclusions that I have set out in paragraphs 133 and 134 above, it is my opinion that:
>
> (a) An inquiry into the alleged conduct is justified; and
>
> (b) If established, the conduct may warrant consideration of the removal of the Judge.
>
> I will now recommend to the Attorney-General that a Judicial Conduct Panel be appointed to inquire into the conduct that is relevant to Complaints 1, 2 and 3. (Citations omitted)

[79] It is clear from [133] that the Commissioner did not consider that the complaints about the Judge's disclosure conduct during the period leading up to, and including, the hearing in the Court of Appeal gave rise to issues sufficiently serious to justify recommending that a Panel inquiry be instituted. Standing alone, he considered those aspects of the complaints would have warranted their referral under s 17 of the Act to the Judge's Head of Bench. However, the Commissioner took the view that that potential outcome was affected by the events that occurred between the hearing in the Court of Appeal and the delivery of the Supreme Court's *Saxmere No 1*. When those matters were added to the mix, he considered the recommendation of an inquiry was justified.

[80] The Judge argued that this conclusion was marred by the Commissioner's failure to identify the alleged conduct he considered to be of sufficient seriousness to warrant the recommendation that a Panel inquiry be held.

[81] By the time the Commissioner came to state his conclusions he had already set out the salient facts. Many of these were matters of public record, and are set out in *Saxmere No 1* and *Saxmere No 2*.

[82] In *Saxmere No 2* the Supreme Court expressed concern regarding the level of disclosure by the Judge in his first statement to the Supreme Court, before the hearing of *Saxmere No 1*. The Court said:

> [13] There is, however, cause for concern in relation to some matters not contained in the disclosure made by Wilson J before the earlier hearing. It may be that because reported decisions on apparent bias relating to the relationship between judges and counsel are quite rare – there appear to have been none in New Zealand – that the Judge had

> not anticipated the view which we would form of the applicable principles in that connection.

[14] In his reasons [in *Saxmere No 1*] Blanchard J said:

> "[25] The objective observer might then turn attention to whether the Judge might in some way be beholden to Mr Galbraith because of the business dimension of their relationship and might unconsciously favour the side represented by Mr Galbraith because of some fear of disadvantage to himself (the Judge) if Mr Galbraith's client were to lose the case. Such a situation might theoretically exist if, for example, the Judge had been lent money by counsel or was dependent on counsel in order to meet some liability. However, the materials placed before the Court reveal nothing of this kind. There is nothing to indicate any indebtedness by the Judge to Mr Galbraith, nor any indication of any inability of their joint company, Rich Hill Ltd, to meet its obligations."

And McGrath J observed:

> "[115] Aspects of the business relationship are relied on as having the effect, objectively, of potentially influencing the Judge to be more receptive to Mr Galbraith's arguments in Court, so that there is a reasonable apprehension the Judge would subconsciously favour them in order to maintain the closeness of the association. I am satisfied that the feature of mutual trust and confidence and mutual financial interest cannot be perceived to have such an influence over a judge in the circumstances of Wilson J. Objectively these aspects add nothing to what is present in ties of friendship and personal association. In particular, there is nothing which indicates that the financial aspect could make the Judge beholden to Mr Galbraith. A fair-minded and informed observer would accept that the Judge's professional obligations are more than sufficient to keep aspects of the business association from diverting the Judge and that their presence does not alter the position in respect of the personal friendship and professional association aspects. This is not, of course, a case in which the Judge has any financial interest in the outcome of the litigation."

[15] The further disclosure made by Wilson J refers to two matters which require to be examined to see whether a reasonable observer might consider that the Judge was disqualified from sitting on the case because of the appearance that he was beholden to Mr Galbraith. The impression that the Court had following the earlier hearing was that Rich Hill Ltd was very largely a passive land-holding company jointly owned by Wilson J and Mr Galbraith. There was nothing in the material then before the Court to suggest other than that equal contributions had been made by the shareholders to the share capital and any loan capital of the company. It now transpires, from the further disclosure, that substantial advances made by Mr Galbraith and the Judge to the company to finance in part the acquisition and development of its land were not on an equal basis. The Judge says that as a general principle they have attempted to achieve approximate equality of contribution but that imbalances in the level of their shareholders'

> accounts did develop from time to time because of differing payments made to or on behalf of the company. When they became aware of a significant imbalance, usually from reading the annual financial statements when these became available, they discussed and agreed on how they should return to a position of approximate equality.
>
> [16] It has emerged that as at 31 March 2007, shortly before the hearing in the Court of Appeal, the position was that the Judge had advanced $984,176 to the company and, by informal arrangement with Mr Galbraith, had assumed exclusive responsibility for paying interest and principal on an amount of $168,555 of bank debt owed by the company. The total of those sums was $1,152,731. On the other hand, Mr Galbraith had advanced to the company the sum of $1,226,980. The difference between those figures, that is, the imbalance in shareholders' accounts, was $74,249 or, if notice is taken of the fact that the Judge had not actually made any payment of the bank debt of $168,555, an aggregate sum of $242,804.

[83] These paragraphs place on record the Supreme Court's view that the Judge had not included in his first statement information that the Court ultimately found to be determinative of Saxmere's recall application on the ground of apparent bias.

[84] These are the comments that underpin the Commissioner's observation at [134(b)] that there are questions about the adequacy of the Judge's disclosure and the relative importance of his duty to the Court and his wish to preserve the confidentiality of others. They also underlie the Commissioner's comment in [134(d)] that the Supreme Court in *Saxmere No 1* was under "a significant misapprehension about the nature, scale and finances" of Rich Hill Ltd.

[85] Mr Carruthers contended that the Commissioner made his recommendation to the Acting Attorney notwithstanding a positive finding that the Judge had formed his own views as to his disclosure obligations in good faith. That finding, Mr Carruthers submitted, effectively precluded the Commissioner from recommending that an inquiry be instituted, because no decision that the Judge made in good faith could constitute misbehaviour in terms of s 23. He also submitted in the alternative that the Commissioner failed to form the opinion required of him.

[86] We accept that the Commissioner's impression was that the Judge had formed his own views about his obligations of disclosure to the Court in good faith. That follows from the words the Commissioner used in [134(c)] of his Decision and from [50] of his Amended Statement of Defence, in which he admits that was his

view. But the Commissioner expressly qualified his view in his observations following the reference to good faith in [134(c)], stating that there remain unresolved questions of fact about the advice and encouragement the Judge received from others as to the disclosure he should make in his first statement to the Supreme Court before it heard *Saxmere No 1*.

[87] The Commissioner was aware, as a result of the interviews he had conducted, that both Mr Galbraith and Mr Carruthers had discussed with the Judge the level of disclosure that he should make in his first personal statement to the Supreme Court. Ultimately the Judge did not refer in his first statement to the fact that the contributions that he and Mr Galbraith made to Rich Hill Ltd were not equal, or to the dollar value of their respective contributions. Instead, he concluded his statement by expressing a willingness to be cross-examined about any aspect of the information contained in it.

[88] Read as a whole, [134(c)] amounts to an observation that any final decision regarding the issue of whether or not the Judge formed his views in good faith needed to take into account the advice and encouragement others gave him about the level of disclosure that he should make. The Commissioner clearly saw this as potentially a very important issue. It becomes relevant when the range of possible factual outcomes is considered. As the Commissioner pointed out at the end of [134], the Panel might form a view that is favourable to the Judge but a different view is possible.

[89] The Commissioner worded [134] carefully. There are three potential reasons for this. Firstly, he was not required to reach any final conclusions regarding factual issues that had come to light during his preliminary examination. Secondly, he was relying at least in part on material that the Judge and his legal advisers had provided to him in confidence. Thirdly, the Commissioner was releasing his Decision publicly when it would normally have been confidential to the Acting Attorney and to the Judge.

[90] Implicit in [134] is the proposition that any assessment of the culpability and seriousness of the Judge's non-disclosure will necessarily depend upon where that

conduct sits on a broad factual spectrum. At one end of the spectrum is a decision regarding disclosure that is made in good faith and for genuine reasons so as to amount to conduct that could not possibly be categorised as misbehaviour in terms of s 23. There is then a range of conduct that might be open to criticism and might possibly be categorised as misconduct, but which likewise could not amount to misbehaviour in terms of s 23. At the other end of the spectrum, however, lies conduct that could cross the line and amount to misbehaviour in terms of s 23. That could occur, for example, if the Panel concluded that the Judge, for his own purposes, had deliberately decided to withhold information from his own Court when he knew that the information might be relevant to the Court's decision, and when others were advising and encouraging him to disclose it. Precisely where the Judge's conduct sits on the spectrum is a matter for the Panel and not the Commissioner.

[91] The important point is that the Commissioner considered that deliberate non-disclosure was a sufficiently plausible possibility to warrant further inquiry being made. We agree with the Commissioner's conclusion that conduct of that type, if established, might warrant consideration of the removal of the Judge. We also accept Mr Goddard's submission that in reaching that view the Commissioner formed the opinion that s 15(1) required of him.

[92] The Judge does not challenge the Commissioner's decision on the basis that there was no evidence to support it, or on the basis that no tribunal could reasonably have reached that decision based on the material before it. His challenge under this head rests squarely on the proposition that the Commissioner failed to identify conduct that was to form the subject of an inquiry by the Panel. We do not accept that. When [134] is read as a whole and in context, we consider that the Commissioner did measure specific aspects of the Judge's conduct against the standard he had earlier identified.

[93] We conclude that this aspect of the Judge's claim cannot succeed. We consider that in [133] and [134] of his Decision the Commissioner undertook, in a careful and sensitive way, the evaluative exercise required by the Act.

[94] It was not, however, sufficient for the Commissioner to recommend to the Acting Attorney that a Judicial Conduct Panel be appointed "to inquire into any matter or matters concerning the alleged conduct of Justice Wilson". He needed to go further and identify those aspects of the Judge's conduct that constituted the matters that were to be the subject of the Panel's inquiry. He could have done that very simply by, for example, recommending to the Acting Attorney that a Judicial Conduct Panel be appointed to inquire into the Judge's failure to disclose to the Supreme Court the full extent of his business relationship with Mr Galbraith prior to the delivery of *Saxmere No 1*. The Commissioner's failure to do that was an error of law.

Complaints regarding conduct that occurred after the delivery of Saxmere No 1

[95] The complaints by Saxmere and Sir Edmund also encompassed conduct that allegedly occurred after the delivery of *Saxmere No 1*. Again, the Commissioner explained and analysed these complaints in Sections 2 and 3 of his Decision, stating (at [86] and [125]) that he would set out his conclusions in relation to these issues in Section 5 of the Decision.

[96] Unfortunately, the Commissioner did not do that. Section 5 is silent in relation to the Judge's conduct during the period after the delivery of *Saxmere No 1*, as is the balance of the Decision. In respect of this period there is no equivalent to [133] and [134], in which the Commissioner set out his conclusions in relation to the Judge's conduct during the period leading up to the delivery of *Saxmere No 1.*

[97] It is impossible to know whether this omission occurred by way of oversight, as Mr Goddard speculated, or whether the Commissioner took the view that the conclusions he had reached in relation to the earlier period obviated the need to evaluate the complaints any further. If the Commissioner thought it unnecessary to go further than he did, then he certainly did not say so or explain why.

[98] Regardless of the reason for the omission, the fact that it has occurred means that there is an obvious error on the face of the Decision. If the Commissioner was influenced in his ultimate conclusion by the Judge's conduct during the period

between the delivery of *Saxmere No 1* and the hearing in *Saxmere No 2,* then he did not identify what that conduct was. Such influence is a distinct possibility because, in [124] of his Decision, the Commissioner described Sir Edmund's allegations relating to the Judge's conduct in that period as being "the most serious".

[99] Alternatively, if the Judge's conduct did not influence the Commissioner in reaching his conclusion, then he has failed to reach an opinion in relation to conduct about which Saxmere and Sir Edmund had complained. Either way, an error of law has occurred.

[100] We summarise. For the peripheral conduct, the Commissioner's error lay in sending it forward for inquiry by a Panel. For the pre-*Saxmere No 1* conduct, the Commissioner's error was in not specifying the aspects of the Judge's conduct that warranted inquiry by a Panel. For the post-*Saxmere No 1* conduct, the Commissioner's error was that he did not evaluate the conduct and form the opinion required.

Third alleged error of law: breach of natural justice

[101] The allegation here is that the Commissioner failed to put to the Judge a matter about which he subsequently made adverse comment in his Decision.

[102] As this alleged error hinges on [134(d)] of the Commissioner's Decision, we set it out again:

> (d) the terms of the judgments in the *Saxmere No 1* decision (notably paragraph [25] of the judgment of Justice Blanchard) and the terms of the Court's Media Release show that the Court was under a significant misapprehension about the nature, scale and finances of the jointly owned company, Rich Hill Ltd. To what extent this misapprehension was the fault of the Judge, and to what extent his offer to answer questions on oath excuses him from blame, are contestable matters of judgment.

[103] In [25] of his judgment in *Saxmere No 1*, Blanchard J had said this:

> The objective observer might then turn attention to whether the Judge might in some way be beholden to Mr Galbraith because of the business dimension of their relationship and might unconsciously favour the side represented by

> Mr Galbraith because of some fear of disadvantage to himself (the Judge) if Mr Galbraith's client were to lose the case. Such a situation might theoretically exist if, for example, the Judge had been lent money by counsel or was dependent on counsel in order to meet some liability. However, the materials placed before the Court reveal nothing of this kind. There is nothing to indicate any indebtedness by the Judge to Mr Galbraith, nor any indication of any inability of their joint company, Rich Hill Ltd, to meet its obligations. It is in fact, save for a breeding operation confined to one or two horses per year, a passive land-holding vehicle and does not appear to have any significant indebtedness. The three broodmare partnerships would appear to any observer to be small in scale and quite unremarkable.

[104] Mr Carruthers submitted that [134(d)] is critical of the Judge. He argues the Commissioner's process breached natural justice, because the Commissioner did not put to the Judge the matters that form the basis of [134(d)].

[105] Mr Carruthers maintained the criticism of the Judge in [134(d)] is important, because it stems from earlier references in the Commissioner's Decision (at [34(n)] and [71]) which, in turn, reflect [15]-[19] of the Supreme Court's *Saxmere No 2* judgment. Those five paragraphs concern the dynamic nature of the business relationship between the Judge and Mr Galbraith, and in particular their differing contributions to the horse stud venture, and the purchase of a share of an adjoining block of land in December 2006.

[106] Paragraph 34(n) of the Commissioner's Decision details the land purchase transaction in a way the Judge accepts is accurate and complete. Paragraph 71 is as follows:

> 71. There is another consideration which I should mention. This aspect of this complaint assumes that it was the very size of the venture between the Judge and counsel which, in itself, gave rise to a perception of apparent bias. That view finds a reflection in a passage in the Supreme Court No 2 decision. The Court refers [at [18]] to the purchase by Rich Hill Ltd of a one-third interest in an adjoining property. The purchase was agreed in late 2006 and the price payable by the company was to be funded in full by borrowing from the company's bank upon the security of the existing mortgage – supported by the existing guarantee from both shareholders. The Court notes [at [18]] that:
>
> > The Judge and Mr Galbraith must have been reliant upon one another, during the very time when the Saxmere judgment was reserved in the Court of Appeal, for mutual cooperation to enable the funding and completion of the purchase of the additional land.

> The Court regards that as an additional reason for raising an issue of perception about the Judge's impartiality.

[107] Although not referred to by Mr Carruthers, the Commissioner also refers to the land purchase in two later paragraphs of his decision, in which he records the respective views of the Judge and Mr Galbraith as to the relevance and/or significance of the purchase:

> 77. To back-track a little, after the hearing in the Court of Appeal, there were some developments in relation to Rich Hill Ltd which should be mentioned.
>
> 78. First, settlement of the purchase of the one-third interest in the adjoining block of land was settled on 1 June 2007. That was prior to the delivery of the Court of Appeal's judgment on 15 August 2007. Neither Justice Wilson nor Mr Galbraith attaches any particular significance to this. The purchase was fully funded by an interest-only loan; it did not therefore create any imbalance in the shareholders' account; the company's resources were sufficient to meet the financial obligations in respect of the loan.

[108] Mr Carruthers told us that the Judge's understanding is "that paragraph 71 is the genesis of the criticism implicit in 134(d)". Had the Commissioner put the particular point to the Judge as being potentially adverse to him, Mr Carruthers explained to us that the Judge would have responded by referring the Commissioner to the passage in McGrath J's judgment in *Saxmere No 1* at [108]-[109], and also to the transcript of oral argument before the Supreme Court on 3 March 2009.

[109] Mr Carruthers relied on the decisions of the Privy Council in *Re Erebus Royal Commission* and *Rees v Crane*.[53] Referring to *Erebus*, Mr Carruthers focused on the Board's exposition of the second rule of natural justice concerning the exercise of an investigative jurisdiction. This is the way Lord Diplock, for the Board, explained it:[54]

> The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, *might* have deterred him from

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[53] *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662 (JC); *Rees v Crane* [1994] 2 AC 173 (PC).

[54] At 671.

> making the finding even though it cannot be predicated that it would inevitably have had that result.

[110] Mr Carruthers also relied on *Rees v Crane,* which concerned a process akin to the Commissioner's here. But the fact situation in *Rees v Crane* was in striking contrast to that here. Complaints against Crane J, a senior Judge of the High Court of Trinidad and Tobago, were referred to the Judicial and Legal Service Commission for investigation before they were put to the Judge, who thus had no opportunity to respond to them. Indeed the Judge learnt of the referral from a television report.

[111] These authorities do no more than hold what s 15(3) mandates; that the Commissioner must act fairly in accordance with natural justice. Here, the Commissioner needed to ensure both that the Judge was alert to aspects of his conduct into which the Commissioner might recommend further inquiry, and that he had an opportunity to respond or explain.

[112] Insofar as it involved the Judge, the Commissioner's process involved the following main steps:

a) The Commissioner provided the Judge with copies of all three complaints.

b) An interview took place as arranged on 20 January 2010. The Commissioner was assisted by Mr Gleeson, who did most of the questioning of the Judge. The Judge, in turn, had the assistance of his legal counsel, Messrs Carruthers and Harley. (We think, but are unsure, that the Judge, on or about 22 December 2009, had provided the Commissioner with notes he had prepared as a basis for this interview.)

c) On 23 February 2010 the Judge lodged written submissions with the Commissioner.

[113] The Judge's submissions were preceded by a letter Mr Harley sent to the Commissioner on 28 January 2010. That letter referred to a telephone conversation

between Mr Harley and the Commissioner the previous day concerning the matters to be addressed in writing by the Judge following the interview on 20 January. The letter then listed those matters adding:

> If there is any other matter, or if I have not correctly understood what was sought, please let me know.

The purchase by Rich Hill Ltd of a share in the adjoining block of land was not one of the matters listed in this letter.

[114] Apparent from this sequence, and accepted by Mr Carruthers, is that the Commissioner's process was an open, iterative one.

[115] This process needs to be viewed in context. The Supreme Court had delivered its *Saxmere Nos 1* and *2* judgments. The three complaints the Commissioner was dealing with had ensued. Everybody involved when the Commissioner and Mr Gleeson interviewed the Judge and his two legal advisers on 20 January this year was keenly aware of what the Supreme Court had held. In particular, they knew what the Supreme Court had said in [18] of *Saxmere No 2* about the timing of the settlement of the purchase of the additional land. Everybody also knew that the gravamen of those complaints was the adequacy of the Judge's disclosure to the Supreme Court.

[116] During the interview on 20 January, Mr Gleeson asked the Judge specifically about the settlement of the additional land purchase. Those questions were put in the context of Mr Gleeson methodically going through each aspect of the business relationship between the Judge and Mr Galbraith at the time of the Court of Appeal hearing. Counsel for the Judge also addressed the additional land purchase in their submissions to the Commissioner on 23 February 2010.

[117] The Commissioner's concern in [134(d)] is the extent to which the Supreme Court's "significant misapprehension" in *Saxmere No 1* was the fault of the Judge. The circumstances surrounding the land purchase were just one aspect of that concern, and not the main one. The details of the land purchase were, anyway, covered with the Judge in the interview on 20 January and were referred to again in

the submissions of counsel for the Judge on 23 February. To suggest that [134(d)] is based solely, or even substantially, on a point not put to the Judge, is simply not correct. More broadly, there is an air of unreality about seizing upon the settlement of the additional land purchase, and contending that it was unfair of the Commissioner not specifically to put it to the Judge for comment, to the extent that the Commissioner's whole process was marred.

[118] We read [134] as providing the basis for the Commissioner's broad opinion (expressed in [135] of his Decision) that the Supreme Court's "significant misapprehension" following the Judge's disclosure to the Supreme Court prior to the *Saxmere No 1* judgment, and the extent to which the Judge may have contributed to it, were matters warranting further inquiry. Paragraph 134(d) is the fourth in a series of points, all of which concern the adequacy of the Judge's disclosure to the Supreme Court leading up to *Saxmere No 1*.

[119] We hold that the Commissioner's process was not unfair to the Judge. In particular, we hold that the Judge had a proper opportunity to put his viewpoint on the matters that underlay the "significant misapprehension" referred to in [134(d)] of the Decision, and including settlement of the additional land purchase by Rich Hill Ltd.

Fourth error of law: taking into account information that was hearsay or obtained in breach of confidence and legal privilege

[120] The Judge's claim under this head relates to information that Sir Edmund provided to the Commissioner in support of the complaint that he lodged on 21 December 2009. In his complaint Sir Edmund referred to discussions he had had with Mr Farmer, who had been advising Mr Galbraith, about the issues raised by Saxmere's applications to the Supreme Court. In particular, those discussions related to issues that arose following delivery of the *Saxmere No 1* judgment. At the Commissioner's request, Sir Edmund also provided the Commissioner with copies of emails that had passed between he and Mr Farmer regarding those issues.

[121] The Commissioner referred to this information in the body of his Decision (at [112]-[125]) when he set out the basis of Sir Edmund's complaint. He also referred to it again in Section 5 of his Decision, when setting out his conclusions in relation to the Judge's conduct during the period leading to the delivery of *Saxmere No 1*. The final sentence of [134(c)] reads "[there] are also differences about what Mr Farmer said to Sir Edmund and on what basis he said it".

[122] It is difficult to discern from the Decision whether the information that Sir Edmund supplied added anything of significance to the body of information that the Commissioner gathered from primary sources during his preliminary examination. The Commissioner's final sentence in [134(c)] clearly flows from [115] of his Decision, where the Commissioner noted specific issues in respect of which the Judge, Mr Carruthers and Mr Galbraith challenged the correctness of Sir Edmund's information.

[123] Whatever the significance of the additional information provided by Sir Edmund to the Commissioner, the Judge contends it was hearsay and that Sir Edmund supplied it to the Commissioner in breach of both legal privilege and an obligation of confidence that Sir Edmund owed to Mr Farmer.[55] For that reason the Judge contends that the Commissioner erred in law in taking the information into account in reaching his recommendation.

Hearsay

[124] There is nothing in the hearsay point. The Commissioner is not required to conduct an investigation in respect of which the rules of evidence apply. He is empowered under s 15(4) of the Act to make any inquiries into the complaint that he thinks appropriate. The legislation proceeds on the basis that he may have regard to any information that comes into his hands in this way.

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[55] We take the claim for legal privilege in this context to relate to the privilege held by a person in respect of communications between that person and a legal adviser from whom he or she has obtained professional legal services: Evidence Act 2006, s 54(1).

[125] Mr Carruthers' point under this head reduced to a submission, acknowledged by the Commissioner in [111] and [114], that Sir Edmund's information was gathered from second or third hand sources. It was therefore inherently unreliable. In addition, the primary sources of that information (the Judge, Mr Carruthers and Mr Galbraith) had confirmed in their interviews with the Commissioner that they disagreed with Sir Edmund's understanding of material factual matters. Mr Carruthers submitted that the information that Sir Edmund provided to the Commissioner therefore had no probative value, and the Commissioner was not entitled to give it any weight.

[126] It needs to be remembered, however, that the Commissioner did not attempt to resolve the differences that he identified. He merely noted that they existed. We do not consider that the Commissioner can be criticised for doing that.

Breach of legal privilege

[127] Similarly, we are satisfied that there is no basis to the argument based on legal privilege. There is some question as to whether the information was actually subject to legal privilege at all. In a letter that Mr Farmer sent the Commissioner on 11 January 2010, he said that Sir Edmund had obtained the information in circumstances that were "akin to legal professional privilege". This suggests that Mr Farmer did not consider that the information was subject to legal privilege in the strict sense.

[128] It is not necessary for us to determine that particular issue. Assuming for present purposes that the information was subject to legal privilege, the person who was entitled to assert that privilege was Mr Galbraith. During his interview with the Commissioner on 19 January, Mr Galbraith waived any legal privilege that attached to material in the possession of the Commissioner. He clearly preferred to deal with the issues on their merits. We consider that this waiver was expressed in sufficiently unequivocal terms that it extended also to the communications between Mr Farmer and Sir Edmund.

[129] In any event, Mr Galbraith has never asserted legal privilege, and the Judge cannot claim it on his behalf.

Breach of confidence

[130] Sir Edmund accepts Mr Farmer confided in him, although he asserts "the implied confidentiality was always subject to certain conditions or qualifications", one of which was that "the integrity of the Court and Judiciary must come first". The Judge contends that Sir Edmund had no right to break that confidence and that the Commissioner erred in law when he took the material that Sir Edmund supplied into account.

[131] We see no material distinction between this argument and that based on legal privilege. Any relationship of confidence between Mr Farmer and Sir Edmund arose out of the fact that Mr Farmer was advising Mr Galbraith. Once Mr Galbraith told the Commissioner that he did not wish to assert a claim for legal privilege, he also effectively waived any objection to the Commissioner taking into account information that had been obtained in breach of Mr Galbraith's confidence.

[132] Mr Carruthers also submitted that, independently of any obligation of confidence he owed to Mr Galbraith, Sir Edmund also owed an obligation of confidence to Mr Farmer. He contended that Mr Farmer never released Sir Edmund from that obligation. Sir Edmund was in breach of it when he provided the material to the Commissioner.

[133] The answer to this submission lies in the letter that Mr Farmer sent the Commissioner on 11 January 2010. In that letter Mr Farmer told the Commissioner that Sir Edmund had disclosed the information in breach of his obligations of confidence. Mr Farmer did not go on to tell the Commissioner that he was not entitled to take the information into account for that reason. Rather, he asked that the Commissioner not "give credit" to Sir Edmund's information, and went on to explain why.

[134] We therefore take Mr Farmer's position to be that he did not object to the Commissioner taking the material that Sir Edmund had supplied into account, but asserted that the Commissioner should give it no weight. As a result, the Commissioner did not err in law when he referred to that material in his Decision.

[135] The fourth alleged error of law accordingly fails on the facts.

Relief

[136] It is now necessary for us to consider what, if any, relief, we should grant in respect of the errors that we have identified.

[137] Advancing two arguments, Mr Carruthers urged us to put an end to the investigation process at this point. First, he contended that the factual conclusions set out in the Decision did not provide a legal basis upon which the Commissioner could recommend that an inquiry by a Panel was necessary or justified. Secondly, he submitted that the process undertaken by the Commissioner has been so flawed to date that the Judge "cannot have any confidence or faith in the Commissioner", particularly given the adversarial stance that the Commissioner has taken in this proceeding.

[138] The first submission is effectively answered by the conclusions that we expressed at [71] and [92] in relation to the first and second alleged errors of law. In short, we have concluded that the Commissioner applied the correct standard to identified conduct that might, if established, warrant consideration of removal of the Judge. This means that there is a legal basis upon which at least some aspects of the Judge's conduct might properly be the subject of inquiry by a Panel.

[139] The second submission does not amount to a valid reason for ending the investigative process at this point. First, the alternative to referral back to the Commissioner is to grant no relief, freeing the Panel to proceed with its inquiry in terms of the Acting Attorney's referral. Secondly, if the matter is remitted to the Commissioner he will need to apply the same evaluative approach to the Judge's alleged conduct after the delivery of *Saxmere No 1* that he applied to the allegations

relating to the period leading up to that point. If he fails to do so, or if he acts in breach of the requirements of natural justice, he will again be vulnerable to review by this Court. The Judge's asserted lack of confidence or faith in the Commissioner is not a relevant consideration. Thirdly, we consider that the asserted lack of confidence or faith is unfounded. Although the Commissioner's Decision is incomplete, it is a careful, thoughtful and sensitive piece of work.

[140] In his submissions in reply Mr Carruthers submitted, as a fallback position, that we could direct the Commissioner to refer the complaints to the Judge's Head of Bench pursuant to s 17(1). Two reasons preclude that being appropriate. First, as we have held in [92], the Commissioner did identify, against an appropriate standard, conduct warranting inquiry by a Panel. Second, for the reasons we have explained in [95] to [99], the Commissioner's process and Decision are incomplete. They fail to deal with the complaints relating to the Judge's conduct between the delivery of the Supreme Court's judgments in *Saxmere Nos 1* and *2*.

[141] This means that we need to determine whether we should refer the matter back to the Commissioner so that the errors can be remedied or, alternatively, allow the investigative process to continue before the Panel.

[142] Mr Carruthers made it clear during the hearing that, notwithstanding the wide terms in which the Acting Attorney referred the matter to the Panel, the Judge takes the view that the scope of the Panel's inquiry is restricted to those aspects of his conduct that relate to the period up to the delivery of the Supreme Court's judgment in *Saxmere No 1*. That being the case, it is virtually certain that the Panel's work will commence with a significant legal argument about the scope of the inquiry. That could lead to further litigation in this Court, either before or after the Panel has completed its inquiry, inevitably and undesirably delaying the final resolution of this matter.

[143] We conclude that it would be counter-productive at this stage to allow the matter to proceed directly to an inquiry before the Panel. Instead, the matter should be remitted to the Commissioner so that he can re-form his opinion and any resulting

recommendation, this time in a complete manner, in accordance with the requirements of the Act we have identified in this judgment.

The Acting Attorney's position

[144] We can deal with the position of the Acting Attorney shortly, for we did not understand Mr Collins to argue that her decision to appoint the Panel could survive the setting aside of the Commissioner's recommendation. As we have noted, the Acting Attorney referred the entire recommendation to the Panel, including matters in respect of which the Commissioner had formed the opinion that no inquiry was warranted. The wording of the referral is also arguably sufficiently broad to encompass the Judge's conduct after the delivery of *Saxmere No 1*. That, too, is a problem given the fact that the Commissioner did not evaluate or form any opinion in relation to that aspect of the Judge's conduct.

Orders

[145] The Commissioner's recommendation of 7 May 2010 to the Acting Attorney that she appoint a Judicial Conduct Panel is set aside.

[146] The Acting Attorney's decision of 8 July 2010 accepting the Commissioner's recommendation and referring matters concerning the conduct of the Judge to a Judicial Conduct Panel for inquiry and report, is also set aside, as is the appointment of the Panel.

[147] The Commissioner is directed in the following terms:

a) He is to conduct any further preliminary examination of the three complaints that he considers necessary, in the light of this judgment.

b) He is to form the opinion required by s 15(1) of the Act in relation to all the Judge's conduct complained of, including that in the period between the delivery of the Supreme Court's *Saxmere Nos 1* and *2* judgments.

c) If, pursuant to s 18(1), the Commissioner recommends to the Acting Attorney that she appoint a Judicial Conduct Panel, then he is to identify the matter or matters concerning the Judge's alleged conduct that, in his opinion, meet the requirements of s 18(1)(a) and (b). The Commissioner is to do that with sufficient particularity to enable Special Counsel assisting a Panel to present the allegations about the Judge's conduct in terms of s 28(2).

Costs

[148] As requested by counsel, costs are reserved. Failing agreement, counsel may file memoranda.

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