1 September 1997

Minister of Justice

Judge M J Beattie: Section 7 District Courts Act 1947

Introduction

1. In August 1997 the above District Court judge was found not guilty by a jury on 45 charges of fraud in relation to travel allowance claims. The charges were laid under s 229A Crimes Act which required proof that:

    1.1 The claim forms were used by the judge for the purpose of obtaining a pecuniary benefit or advantage; and

    1.2 They were so used dishonestly (with intent to defraud).

2. The judge's defence was that he was acting honestly, that is in the genuine (if mistaken) belief he was entitled to make the claims. He gave evidence at the trial of that belief and his basis for it and he was cross-examined on it. The verdict indicates the jury at least had a reasonable doubt about him having a dishonest intent. In my opinion, it must be assumed the jury's conclusion was based on his testimony about the honesty of his belief.

3. You have asked for my advice concerning what action can properly now be taken in relation to the judge's position as a judge, he having signalled his wish to resume judicial work. You have, in particular, asked for my view on whether removal proceedings under s 7 of the District Courts Act 1947 would be tenable in law and, if so, appropriate. For completeness, I also set out my views on the nature of the removal process itself.

Summary of Opinion

4. Section 7 of the District Courts Act 1947 permits removal of a District Court judge for "misbehaviour". 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".

5. The Act confers the power of dismissal on the Governor-General who will be advised by the Minister of Justice. It is implicit, however, absent a conviction for an offence

amounting to misbehaviour, that there be a sound process formally proving it has occurred, as the basis on which the Minister gives advice. A tribunal that makes an inquiry into the facts is necessary, a majority of members of which should have judicial experience. The tribunal's function would be to make recommendations on whether grounds for removal exist. If it is concluded they do, it is then open to the Minister to advise removal.

6. In the present case, a crucial question is the impact of the acquittal of the judge. He was acquitted, it must be assumed, on the basis of his own testimony of his honest belief he was acting properly in making the travel allowance claims. While in some cases acquittal on a criminal charge may leave open questions in relation to the conduct in issue that might, on their resolution, establish misbehaviour, that is not so in the present case.

7. It would not, in my opinion here be possible sufficiently to distinguish "misbehaviour" conduct in relation to the travel allowance claims from the criminal conduct allegations that were in issue at the trial. In this area, each situation will turn on its own facts. In the present case, the process of criminal trial was adopted, the judge responded by taking the stand and presenting his explanation. A subsequent inquiry into the same conduct, albeit with an arguably different focus, would be regarded in law as oppressive and in a general sense an abuse of process.

Section 7 of the District Courts Act 1947

8. As you know, s 7 permits removal by the Governor-General of a District Court Judge for "inability or misbehaviour". The meaning of the term "misbehaviour" is, of course, critical to the exercise of that power.

9. The statutory context is the constitutional principle of judicial independence. That judges should have tenure in office has long been recognised as a necessary condition in a democratic state for there to an independent judiciary. For judges of the Court of Appeal and High Court the principle is given effect in s23 of the Constitution Act 1986. The concept of holding office during good behaviour goes back to s3 par 7 of the Act of Settlement of 1700. For the District Court, s7 applies the principle. The term "misbehaviour" is accordingly to be read in the context of circumstances that are the exception to the general rule that an independent judiciary in our society is to be preserved by protecting the judicial process from removal of its members by the executive or forces acting on behalf of the executive.

10. This context, in my opinion, militates against interpreting the word "misbehaviour" in an expansive way, such as to allow the executive a broad and subjective discretion as to circumstances justifying removal. For example, the mere failure of a judicial officer to be above suspicion, of itself, would be unlikely ever to constitute proper grounds for removal from office for "misbehaviour" in this context. Accordingly, the ordinary meaning of the word, especially in the context referred to, suggests a meaning reflecting a high level of impropriety and conduct that is clearly morally wrong.

The Australian Experience

11. The ambit of "misbehaviour" by a judge has been formally considered in Australia, most notably and relevantly in relation to allegations made against Mr Justice Murphy, a judge of the High Court of Australia, in the early 1980's. Section 72 of the Australian Constitution provides that Federal judges can only be removed from office for "proved misbehaviour or incapacity". While removal is to be by Parliament, the Australian Constitution's test is similarly expressed to that of s7. For that reason, and for the reason that the Murphy case has a number of parallels to that with which you are now concerned, I attach as an appendix to this opinion a brief summary of the various views expressed by the Commissioners, the federal Solicitor-General and the federal Director of Public Prosecutions.

12. None of the various views expressed at and by the Australian Commission of Inquiry, as summarised in the appendix, have the force of legal precedent. I have, however, found them helpful to determining the meaning of the terms in the New Zealand context. Also of value to me have been the views of commentators on the Australian experience, and, in particular, Sir Anthony Mason's recent article on "The Appointment and Removal of Judges" and that of Professor P H Lane: "Constitutional Aspects of Judicial Independence".[1] Professor Lane, in particular, cautions against enlarging the term "misbehaviour" beyond what is seen as its traditional content (page 63).

Opinion on Meaning of "Misbehaviour"

13. I conclude that "misbehaviour" under s7 of the District Courts Act is not confined to conduct that is so culpable that it has been, or if proved in a Court would appropriately be, the subject of a criminal conviction. It 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.

The nature of the removal process

14. Notwithstanding the fact that no specific process is set down in the Act, in my opinion, the constitutional importance of an independent judiciary makes it implicit that a decision to remove a judge can only properly be made on the basis of facts that have been formally proven. Absent a conviction, such a pre-requisite indicates the need to establish a formal tribunal to conduct a thorough factual inquiry with a view to determining whether misbehaviour warranting removal from office has occurred. The decision whether to remove then is open to the Minister.

15. In my view, the protection of judicial independence makes it desirable that any such tribunal should comprise at least a majority of members who have judicial experience. The nature of the inquiry is one that inherently involves the exercise of functions of a

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[1] Both published in "*Fragile Bastion: Judicial Independence in the Nineties and Beyond*" (1997) Judicial Commission of New South Wales.

judicial kind. The ultimate composition of the tribunal should be a matter to be decided by the Minister, but desirably in consultation with the Chief Justice. My own view is that it would be preferable if the conduct of a District Court judge is to be considered, for the tribunal to include members from both the District and High Court benches.

16. It seems to me that such a tribunal would most appropriately be constituted under s 2 of the Commissions of Inquiry Act 1908. While there may be an issue about whether an inquiry of the sort contemplated here would be authorised by s 2(d) of the Act - which permits inquiries into the conduct of any "officer in the service of the Crown" - I consider there can be no doubt that s 2(f) (which refers to any other matters of public importance) would provide sufficient statutory authority. In this respect I mention that notwithstanding the latitude seemingly permitted by the terms of s 2(f), the terms of reference of any such inquiry should nevertheless be tightly drawn.

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17. As far as the Commission's procedure is concerned there can be no doubt that the serious nature of the allegations and consequences in this case would require strict adherence to the principles of natural justice by the tribunal in question. The terms of s 4A of the Commissions of Inquiry Act give persons likely to be affected by an inquiry the right to be heard and to be represented by counsel, but in my view natural justice should in this instance extend further and include, for example, the right to cross-examine witnesses.

18. Relevant case-law makes it clear that the Commission's findings of fact should be based on an application of the "civil" standard of proof (balance of probabilities). However, it is also clear by analogy with case law on professional disciplinary bodies processes, that the scale of proof is a sliding one, with the result that, in inquiries involving serious allegations of a quasi-criminal nature, the required standard would in fact closely approximate to the criminal standard of "beyond reasonable doubt".

19. I would anticipate that the Commission's terms of reference would require that its final findings include a non-binding recommendation to the Minister of Justice, on whether or not grounds for removal exist. Advice to the Governor-General could follow a positive finding on that question if considered appropriate by the Minister.

The Legal Effect of the Acquittal on Removal Proceedings

20. When considering the possibility of initiating proceedings for the removal of Judge Beattie for misbehaviour pursuant to s 7 of the District Courts Act, careful regard needs to be had to whether his acquittal provides any legal impediment to such action. This is because, as I understand the position, any contentions of misbehaviour warranting removal would be based on the same factual circumstances as those which were the subject of his jury trial.

21. The areas of the law involving the legal principles known as double jeopardy, autrefois acquit, autrefois convict, issue estoppel and res judicata bring with them a number of technical issues. In the present circumstances it is appropriate to address the principles which underlie all these areas. They have as their focus the concept of finality between the parties, the avoidance of repetitive litigation and the avoidance of oppression.

22. In the present case the starting point is that a particular process was chosen in relation to the travel allowance claims. Criminal charges were brought and did not succeed. If an inquiry into misbehaviour were brought, the parties would be the same. It could be justified only if it were clear that the inquiry had as its focus different issues from those involved in the trial.

23. In *Sambasiuam v The Public Prosecutor of Malaya* [1950] AC 458, 479 the Privy Council observed:

> "The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "Res judicata pro veritate accipitur" is no less applicable to criminal than to civil proceedings."

The context of that passage was in effect an instruction that on a second criminal trial, the prosecution could not be conducted, nor could evidence be used, in a way that undermined a verdict of acquittal on an earlier charge.

24. In the present case on application of the principle, in my opinion, it would not be open on a subsequent inquiry to consider the issue of honesty in relation to the travel allowance forms. This being the case, there is on these facts, insufficient other content to the question of misbehaviour to support a further inquiry with a view to removal of the judge.

25. In the Australian case, the inquiry was into facts other than those the subject of the charge, implicitly accepting that to proceed on those facts was prevented by the double jeopardy rule. And this was so even though the judge, in that case, had not given evidence in his own defence.

26. A contrast can usefully be drawn with the present case and other professional disciplinary proceedings which often are not prevented by a prior criminal prosecution and acquittal. The true issues in such proceedings often materially differ. For example, on a charge of sexual violation made against a doctor by a patient, the doctor might escape conviction at trial due to some doubt about the absence of the patient's consent. Nonetheless, the remaining facts could form a sufficient basis for a finding of professional misbehaviour by a statutory body where absence of consent may not be a defence.

27. My conclusion, however, is that the present case is not analogous. Rather, it appears that the allegations central to both the criminal and any s7 "disciplinary" proceedings would be substantially the same. Specifically the elements of the criminal charges that the Crown was required to prove, as mentioned in para 1 above, included the judge's dishonesty in the use of the travel allowance forms. It can be said the judge was careless, indeed extremely so, but if his honesty must be conceded his conduct does not amount to misbehaviour as I have defined it above.

Conclusion

28. I am not insensitive to the fact that the issue of whether Judge Beattie should return to judicial duties is one of considerable concern to the general public, the government and the judiciary. However, in considering whether there might have been

misbehaviour justifying his removal from office, the consequences of the jury's finding must be accepted. The ultimate consequence is that moral turpitude cannot be established in the particular circumstances. If the judge asserts his right to return to judicial duties he cannot be prevented from doing so. It will be a matter for the Chief District Court Judge, rather than the Government, to decide which of the Court's various jurisdictions he should sit in (s9 District Courts Act).

J J McGrath
Solicitor-General

APPENDIX

The Inquiry into the Conduct of Mr Justice Murphy

29. When the allegations against Mr Justice Murphy first surfaced (prior to any criminal charges being laid against him) opinions were sought on the meaning of "misbehaviour" under s 72 of the Constitution from the Federal Government's Solicitor-General, Dr Gavan Griffith QC and the Director of Public Prosecutions, Mr Ian Temby QC. (I note in passing that both opinions were released to the press in addition to being tabled in Parliament).

30. Both Dr Griffith and Mr Temby considered that the term "misbehaviour" should be narrowly construed in the context of s 72. The Solicitor-General reached the conclusion that in considering whether misbehaviour existed, Parliament was necessarily confined to the established traditional meaning of the term. He said:

> "Inasmuch as Parliament considers the matter, the question is whether there is proved an offence against the general law "of such a nature as to warrant the conclusion that the incumbent is unfit to exercise the office". Parliament is not at large to define proved misbehaviour by reference to its own standards or views of suitability for office or moral or social character or conduct. The parliamentary inquiry is whether commission of an offence of the requisite quality and seriousness is proved. Parliament would act beyond power if it sought to apply wider definition or criteria for misbehaviour than the recognised meaning of misbehaviour not pertaining to office."

31. The Solicitor-General's final conclusions were that:

> "Misbehaviour is limited in meaning in section 72 to the Constitution to matters pertaining to - (1) judicial office, including non-attendance, neglect of or refusal to perform duties; and (2) The commission of offence against the general law of such a quality as to indicate that the incumbent is unfit to exercise the office. Misbehaviour is defined as breach of a condition to hold office during good behaviour. It is not limited to conviction in a court of law. A matter pertaining to office or a breach of the general law of the requisite seriousness in a matter not pertaining to office may be found by proof, in appropriate manner, to the Parliament in proceedings where the offender has been given proper notice and opportunity to defend himself."

32. Subsequently, following preliminary inquiries including two by Parliamentary (Senate) Committees, Mr Justice Murphy was formally charged with the offence of attempting to pervert the course of justice. There were two criminal trials. At the first there was a conviction which was reversed on appeal: *R v Murphy* [1985] 4 NSWLR 46 The retrial resulted in an acquittal. The judge was in the end accordingly acquitted of all the charges against him.

33. At that point Mr Justice Murphy expressed his intention to resume his seat on the High Court. However evidence had come to light during the trials which had led prosecuting counsel to recommend further prosecutions on charges of bribery and conspiracy. In addition, after the second trial, the report of a separate Royal Commission into the telephone transcripts and tapes which had given rise to the original prosecution was released. Up until that point, much of the judge's defence and his grounds for resisting an inquiry into his conduct, had been based on the unauthenticated nature of the tapes and transcripts. However, the report of the Royal Commission effectively authenticated the tapes.

34. For those reasons in particular, there was general disquiet about the judge resuming his seat, and instead a further Commission of Inquiry was set up:

    34.1 to consider all outstanding allegations against the judge,

    34.2 to formulate those it considered worthy of investigation in precise terms and conduct a hearing of the evidence in closed session, and then -

    34.3 to report to each House its findings of facts and its advice as to whether the judge had been guilty of misbehaviour within the meaning of the Constitution.

    Notably, the Commission was expressly precluded from examining the issues dealt with in the trials of Mr Justice Murphy, except for the purpose of examining other issues.

35. Predictably, Mr Justice Murphy immediately challenged in the Courts the power of Parliament to set up the Inquiry and refused to participate in it. His proceeding was abandoned in August 1986. It was, therefore, his illness and death which ultimately prevented the Inquiry from proceeding.

36. Prior to the judge's demise, the three retired State Supreme Court judges who comprised the Commission did complete, and, on 19 August 1986, present a report of their general findings on the meaning of "misbehaviour" in s 72. The Commissioners, who delivered separate reasons in a special report to Parliament, took a wider approach to the issue than had the Solicitor-General. Each gave the term a different meaning.

37. Sir George Lush simply equated misbehaviour with conduct undermining the standing of the court or the authority of the judge.[1]

38. In Sir Richard Blackburn's opinion the issue was whether the conduct alleged could be said to be so "morally wrong", that it demonstrates the judge's fitness for office.[2]

39. And the Honorable Mr Wells focused on whether the alleged conduct could be said to be so serious a departure from standards of proper behaviour that it would destroy the public confidence in the judge's ability to do his job.[3]

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1 "The word "misbehaviour" in s 72 is used in its ordinary meaning and not in the restricted sense of "misconduct in office". It is not confined, either, to conduct of a criminal nature. ...

> If their [judges'] conduct, even in matters remote from their work, is such that it would be judged by the standards of the time to throw doubt on their own suitability to continue in office, or to undermine their authority as judges or the standing of their courts, it may be appropriate to remove them."

2 ""Proved misbehaviour" means such misconduct, whether criminal or not, and whether or not displayed in the actual exercise of judicial functions, as, being morally wrong, demonstrates the unfitness for office of the judge in question."

3 "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."