

*Privy Council Appeal No 14 of 2005*

**Julia Lawrence**

*Appellant*

v.

**The Attorney General**

*Respondent*

FROM

**THE COURT OF APPEAL OF  
GRENADA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 26<sup>th</sup> March 2007

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*Present at the hearing:-*

Lord Bingham of Cornhill  
Lord Scott of Foscote  
Lord Rodger of Earlsferry  
Lord Carswell  
Lord Mance

*[Majority Judgment delivered by Lord Scott of Foscote]*

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The background

1. Julie Lawrence, the appellant before the Board, held the office of Director of Audit of Grenada, a highly important office for which specific provision is made in the Granada Constitution (see section 82). It is the duty of the Director of Audit to audit and report on the public accounts of Grenada and on the accounts of all officers and authorities of the Government of Grenada (s.82(2)). The Director of Audit has a statutory right of access to “all books, records, returns, reports and other documents which in his [or her] opinion relate to any of the accounts

referred to in sub-section (2) ...” (s.82(3)). Sub-section (4) of section 82 requires the Director of Audit to submit to the Minister of Finance every report he or she makes and requires the Minister, “not later than seven days after the House of Representatives first meets after he has received the report”, to lay the report before the House.

2. The content of these sub-sections of section 82 makes clear the constitutional importance of the office of Director of Audit. The Director must act as a watchdog on behalf of the public to guard against any impropriety in the conduct of the public finances of Grenada. This constitutional importance of the office is reflected in sub-section (6) of section 82 which says that in exercise of his functions under sub-sections (2), (3) and (4) the Director of Audit “... shall not be subject ...” to the direction or control of any other person or authority” and in sub-section (6) of section 87 which says that

“A person holding the office of Director of Audit may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with the provisions of this section”.

3. The prescribed procedure for removal of a Director of Audit is set out in sub-sections (7) and (8) and must be complied with whether the removal is to be on the ground of incapacity or on the ground of misbehaviour

“(7) The Director of Audit shall be removed from office by the Governor-General if the question of the removal from office has been referred to a tribunal appointed under subsection (8) of this section and the tribunal has recommended to the Governor-General that he ought to be removed for inability as aforesaid or for misbehaviour.

(8) If the Prime Minister or the Chairman of the Public Service Commission represents to the Governor-General that the question of removing the Director of Audit under this section ought to be investigated –

a. the Governor-General shall appoint a tribunal which shall consist of a Chairman and not less than two other members, selected by the Chief Justice from

among persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from such a court; and

b. the tribunal shall enquire into the matter and report on the facts thereof to the Governor-General and recommend to him whether the Director of Audit ought to be removed under this section.”

Identical provisions apply to the removal from office of the Director of Public Prosecutions (see section 86(6) to (8)). The protection against arbitrary or unjustified removal from office that these provisions provide underlines the undoubted constitutional importance that the Director of Public Prosecutions and the Director of Audit, in their discharge of their respective functions, should be independent of the executive. No doubt similar protection is, for the same reasons, provided to judges under the Courts Order (see section 39(2) and (9) of the Constitution).

4. On 11 August 1999 the appellant, the Director of Audit, wrote to Dr Keith Mitchell, who was at the time both the Minister of Finance and Prime Minister of Grenada, an intemperate and abusive letter. She sent copies to the Clerk of Parliament and the Speaker of the House of Representatives. The Minister was so incensed by this behaviour that he put in train the section 87 removal procedure by writing to the chairman of the Public Service Commission a letter dated 14 September 1999 enclosing the appellant’s 11 August 1999 letter, and requesting the chairman to ask the Governor-General “to set up a tribunal to inquire into the conduct of Ms Lawrence to determine whether she ought not to be removed from office for misbehaviour”.

5. Their Lordships will refer more fully to the content of the relevant correspondence later in this judgment and it suffices for the moment to say that by letter dated 25 November 1999 the chairman of the Public Services Commission represented to the Governor-General that “the question of removing the Director of Audit from office ought to be investigated” and that on 15 December 1999 the Governor-General appointed a tribunal to inquire into

“an allegation of misbehaviour by the [appellant] consisting of conduct unbecoming of a public officer and holder of the post of Director of Audit and prejudicial to the reputation and good order of the Public Service of Grenada in that the

[appellant] recklessly and improperly made unwarranted and unsubstantiated accusations of impropriety against a Minister of the Crown that the said Minister tampered with or improperly altered a Report of the Director of Audit prior to its being laid in the Parliament pursuant to section 82(4) of the Constitution the said accusations being contained in a letter dated 11 August 1999 and addressed to the Hon. Keith C. Mitchell, Minister of Finance and Prime Minister.”

6. The Tribunal conducted its inquiry over the period 8 to 10 February 2000 and on 29 February 2000 issued its report. The report, a document of just under 100 pages, concluded its survey of the facts with the following paragraph:

“We are satisfied that on the evidence before us Julie G. Lawrence misbehaved. She acted recklessly; and she wrongly and improperly made unsubstantiated and unjustified accusations that the Minister of Finance improperly interfered with, by altering or amending or mutilating (with scratches and insertions) her Reports Nos 1 and 2 of 1999 prior to their being laid in Parliament. We are in no doubt that such conduct was unbecoming of anyone holding the position of Director of Audit.”

Finally, under the heading “Recommendation”, the Tribunal advised the Governor-General that it was their unanimous opinion that the appellant ought to be removed from office. Accordingly, by letter to the appellant dated 10 March 1999, the Governor-General informed her that she would, with effect from 31 March 2000, be removed from office for misbehaviour.

7. The appellant then commenced proceedings to have the recommendation of the Tribunal and her removal from office by the Governor-General set aside. At first instance Alleyne J, in a judgment of 5 October 2000, found in her favour. He disagreed with the view the Tribunal had taken of the import of the appellant’s 11 August 1999 letter. He thought the tribunal had based its findings not on what the letter said, but on what the Prime Minister had interpreted the letter as saying (see paras. 82 and 83 of his judgment). And he regarded as a procedural irregularity the fact that the Tribunal had not called for the reports in order to inspect their condition. He set aside her removal from office.

8. The Attorney-General appealed. The Court of Appeal allowed the appeal and re-instated the recommendation of the Tribunal and the

Governor-General's consequent removal of the appellant from office. The appellant now appeals to the Board. It is somewhat of an oddity that although the appellant is pursuing with determination her application for a declaration that her removal from the office of Director of Audit was unlawful, she is seeking neither re-instatement in that office nor arrears of remuneration nor any compensation for loss of that office. Their Lordships were told that she had obtained alternative employment shortly after her removal from office in March 2000 and that her purpose in prosecuting this appeal is to clear away the finding of section 87(6) "misbehaviour" made against her by the Tribunal and confirmed by the Court of Appeal.

The letter of 11 August 1999

9. The Tribunal's finding of "misbehaviour" warranting a recommendation for removal from office was based upon the content of the appellant's letter of 11 August 1999. It is necessary to set out the letter in full but, first, the circumstances that led the appellant to write an undeniably intemperate letter must be described. On 30 March 1999 the appellant had submitted to Dr Mitchell two audit reports which, pursuant to her duty under section 82(2) of the Constitution, she had prepared. Both reports related to the 1994 public accounts of Grenada. It was the Minister's duty to lay the two reports before the House of Representatives not later than seven days after he had received them (s.82(2)). The Minister did not do so and on 23 June 1999 the appellant wrote him a letter expressing her concern about this. When she wrote her 11 August 1999 letter the reports had still not been laid before the House of Representatives. There had been previous delays in the laying of the appellant's audit reports before the House. On 31 December 1997 she had submitted to the Minister an audit report on the 1993 public accounts and on 2 April 1998 she had a meeting with him, at her request, as the report had not yet been laid before the House. At this meeting the Minister indicated that he had some concerns about criticisms made in the report of the Accountant General (a senior civil servant in the Finance Department with responsibility for the preparation of Grenada's public accounts). By August 1999 neither the appellant's 1993 audit report nor her 1994 audit reports had been laid before the House. She had a conversation with the Clerk of Parliament about this and was told by him that he had received copies of the 1994 reports but had had to return them because they had not been submitted by a member of Parliament. He went on to tell her that the copies he had received were not clean copies but had "lines" drawn through them and "side marks" on them. This was the background to the appellant's letter of 11 August 1999.

10. The letter was in the following terms:

“11 August 1999

The Hon. Minister for Finance  
Ministry of Finance  
Financial Complex  
St George's

Dear Sir,

**Audit Reports Nos. 1 and 2 of 1999**

With reference to the above reports which deal with the audit of the Statements of Account of the Government of Grenada for 1994 and the audit of the Ministry of Works, Communications and Public Utilities and the awarding of contracting for Works, I have been informed by the Clerk of Parliament that the reports submitted to him for laying were mutilated: they contained a number of scratches and insertions. **IN EFFECT THE REPORTS OF THE DIRECTOR OF AUDIT HAVE BEEN DOCTORED!** This is **UNCONSTITUTIONAL!** It is **UNETHICAL** and is a **TRAVESTY**. You also provided comments from the Accountant General to lay therewith.

What is your authority for amending my reports? The Constitution envisages you to act merely as a conduit for getting my reports to Parliament. In section 82 (4) it is clearly stated that

the Director of Audit shall submit every report made by him in pursuance of Subsection (2) of this section to the Minister for the time being responsible for Finance who shall, not later than seven days after the House of Representatives first meets after he has received the report, lay it before the House.

Nowhere does it make any provision for you to amend my reports, or obtain comments from the Accountant General to lay therewith. The Constitution makes provision for a Director of Audit to provide Parliament with an independent opinion on the accounts. That role is for the Director of Audit and **NO OTHER**.

Already you are in breach of the Constitution for not laying the reports within the stipulated time. Those reports were delivered to you on 30 March 1999.

During our meeting Mitchell/Lawrence on 2 April 1998 which I requested out of concern over the delay in the laying of my reports on the 1993 accounts and on various ministries and non ministerial departments, you stated then that you were concerned about the contents of the report on the 1993 accounts and that you felt some of its contents should not have been included. You further stated that you had obtained the comments of the Accountant General to lay therewith. I reminded you then of your role as a conduit and the functions of the Public Accounts Committee. I am therefore deeply disturbed by your latest actions.

In the name of good governance, accountability and transparency, I hereby request the immediate return of the two documents so that I can replace them with clean copies for transmission to Parliament.

Meanwhile by copy of this letter the Clerk of Parliament is requested to contact my office henceforth to verify any document submitted to Parliament on behalf of the Director of Audit. This has become necessary in light of the foregoing.”

The appellant sent copies of her letter to the Clerk of Parliament and the Speaker of the House of Representatives.

11. The appellant delivered her letter to the Minister by hand. It was in a sealed envelope. They had a short conversation in the course of which she said that her 1994 audit reports had been tampered with and interfered with by the Accountant-General (see p.50 of the Tribunal’s report). She did not, in this conversation, accuse the Minister of having personally interfered with her reports. The Minister did not immediately open and read the letter but did so later and, on reading it, became aware that the accusations of interference with the reports were made against him personally. However the first response to the letter came not from the Minister but from the Clerk of Parliament to whom a copy had been sent. In a letter of 16 August 1999 the Clerk to Parliament denied the appellant’s assertion that he had informed her that the reports had been “mutilated” or that there were “a number of scratches and insertions”. He called for a withdrawal of the attribution to him of those assertions and an apology. He received neither. The appellant responded to the Clerk of

Parliament's letter by a letter of 24 August 1999 in which she neither withdrew the attribution to him of the assertions she had made about the reports in her 11 August 1999 letter nor apologised.

12. The Minister's response came in a letter of 20 August 1999. He was plainly highly indignant. He said the appellant's letter contained "very serious false allegations" against him and was "tantamount to gross misbehaviour". He said he would "pursue this matter further".

13. The appellant did not respond to the Minister's letter until 8 October 1999. She made no apology for having accused him of tampering with her reports. She insisted that the important issue was that unauthorised alterations to or tampering with her reports had taken place and that an inquiry should be instituted to discover who was responsible, with appropriate disciplinary action to follow.

14. It is now common ground that the Minister had not in any way altered or defaced or tampered with the appellant's reports. It seems likely that the markings, lines or scratchings on the report to which the Clerk of Parliament had referred had been placed on the documents by the Accountant General but no finding about this has been made and none is necessary for the purposes of these proceedings. The only issue is whether the appellant's letter of 11 August 1999 to the Minister could properly have been held to constitute "misbehaviour" sufficient to justify her removal from the office of Director of Audit.

#### The Tribunal's report

15. In their report the Tribunal reviewed in impressive detail the evidence that had been given regarding the circumstances in which the 11 August 1999 letter had been written and in some four pages of "Findings of Fact" expressed their conclusion. The point has been made on behalf of the appellant that nowhere in the Findings of Fact is there a finding that the appellant intended in her 11 August letter to make charges that the Minister had been personally responsible for defacing, altering or amending her reports. In her evidence to the Tribunal she had said that her intention was to charge him, as the Minister in charge of the Finance Department, with constitutional responsibility, not personal responsibility. The Tribunal did not express disbelief of this evidence. In their Lordships' opinion, however, the 11 August letter speaks for itself. It refers to the reports having been "mutilated", containing a number of "insertions" and having been "DOCTORED". It goes on to ask "what is your authority for amending my reports?" and, after citing section 82(4) of the Constitution, to say "nowhere does [the Constitution] make any provision for you to amend my reports." This is plain English. It cannot

be read as other than an accusation against the Minister of serious personal impropriety consisting of the defacing and amending of her reports. The plea that the appellant did not intend her letter to be so read is, whether intended as a defence to the charge of misbehaviour or as a plea in mitigation, a broken reed. The holder of the office of Director of Audit, whose important functions may often require her to write reports containing measured criticism where criticism is due, cannot expect to avoid the consequences of the writing of an intemperate letter containing false accusations by claiming that she did not intend the letter to mean what it said. The Tribunal's conclusion on the facts was that the appellant

“... wrongly and improperly made unsubstantiated and unjustified accusations that the Minister of Finance improperly interfered with, by altering or amending and mutilating (with scratches and insertions) [her 1994 audit reports] prior to them being laid before Parliament.”

This conclusion is, in their Lordships' opinion, unchallengeable. The 11 August letter speaks for itself.

16. Having come to the conclusion referred to the Tribunal went on to say that they were “left in no doubt that such conduct was unbecoming of anyone holding the position of Director of Audit” and recommended to the Governor-General that the appellant should be removed from office. This gives rise to an issue, to which their Lordships will return, whether by, in effect, equating “unbecoming” conduct with section 87(6) “misbehaviour”, the Tribunal were misdirecting themselves.

17. There are several passages in the Tribunal's report which suggest that the Tribunal regarded the appellant's indignation and remonstrations about the delay in the placing of her reports before the House of Representatives as an impertinence on her part, an officious meddling in something that was none of her business. Their Lordships are clear that that view of the matter was not justified. The Minister had a duty, under section 82(6) of the Constitution, to lay the appellants' reports before the House within the prescribed period. By the summer of 1999 he had been for some considerable time in breach of this duty. The appellant would have been well entitled, if she had been minded to do so, to have applied to the High Court under section 101(1) of the Constitution for an appropriate declaration and relief. The relevance of the Tribunal's unjustified criticism of the appellant in this respect is whether it sufficiently influenced their recommendation that she be removed from office as to invalidate that recommendation.

### Alleyne J

18. Alleyne J took the view that the Tribunal had based its findings not on what the appellant's letter of 11 August 1999 had said but on what the Minister had interpreted the letter as saying (paragraph 82 of the judgment). This, the judge held, was a "serious procedural irregularity" which vitiated the process by which the Tribunal had arrived at its recommendation. He held, also, that the Tribunal, in declining to call for and examine the condition of the defaced reports, had committed a further procedural irregularity, with the same result.

19. Their Lordships are unable to agree with Alleyne J on either of these points. As to the first point, the learned judge, in paragraph 15 of his judgment, said that the "assumption" that the appellant intended to accuse the Minister personally was no more than an "inference" which the Tribunal had drawn from the letter and concluded (in paragraph 16) that the Tribunal had adopted the Minister's subjective interpretation of the letter rather than themselves objectively assessing its meaning and import. But whether the Tribunal did or did not adopt the Minister's interpretation of the letter, their Lordships' opinion, as has already been stated, is that the letter speaks for itself and cannot reasonably be read otherwise than as containing an accusation that the Minister had altered the appellant's reports. As to the second point, the appellant wrote her 11 August letter without herself having seen the reports in their defaced state. It is accepted that the reports had been defaced. It is accepted that the Minister was not personally responsible for this. The Tribunal, in their Lordships' opinion, was right to regard the production for inspection of the actual defaced reports as unnecessary.

### The Court of Appeal

20. On the question whether the reports should have been produced for inspection by the Tribunal, the Court of Appeal made the same points as are made in the foregoing paragraph and disagreed with Alleyne J. Their Lordships agree.

21. On the question whether the 11 August letter contained an accusation against the Minister in his personal capacity, the Court of Appeal held that it did. They said the letter "was open to one interpretation only". Their Lordships agree.

22. The Court of Appeal did not, however, go on to consider whether the Tribunal, in referring to the appellant's conduct as "unbecoming", had misdirected itself in its approach to the meaning of "misbehaviour" in

section 87(6) and (7) of the Constitution or whether the Tribunal's disapproval of the appellant's endeavours to have her reports placed before the House of Representatives invalidated their recommendation for her removal from office. To these two issues their Lordships now turn.

“Misbehaviour”

23. “Misbehaviour” is a word which draws its meaning from the context in which it is used. One may speak of a child, Mary Jane in the poem, who throws her nice rice pudding to the floor as misbehaving. One may speak of a dog that chews the cushions on the drawing room sofa as misbehaving. In these contexts “misbehaviour” describes conduct that the perpetrator has been told or taught not to do. These examples demonstrate the need for a context. Judges are appointed to the High Court to hold office during “good behaviour”. According to Halsbury's Laws of England, 4th Ed.Reissue, Vol.8(2) “behaviour” in this context means

“... behaviour in matters concerning the office, except in the case of conviction upon an indictment for any infamous offence of such a nature as to render the person unfit to exercise the office, which amounts legally to misbehaviour although not committed in connection with the office.”

The appellant, in writing her 11 August 1999 letter, was writing about a matter concerning her office. She was writing about reports which, as Director of Audit, she had submitted to the Minister (see s.82(4)). The writing of the letter was relevant behaviour for section 87 purposes.

24. The meaning of “misbehaviour”, in a context similar to that in which the word is used in the Grenada Constitution, was considered in *Clark v Vanstone* [2004] FCA 1105, in the Federal Court of Australia. The applicant, Clark, was the chairperson of the Aboriginal and Torres Strait Islander Commission (‘ATSIC’). The Minister for Immigration and Multicultural and Indigenous Affairs had power to suspend an ATSIC commissioner on the ground of misbehaviour and purported to exercise this power against the applicant. The applicant brought judicial review proceedings to challenge his suspension and the judge, Gray J, embarked upon a careful examination of the meaning of “misbehaviour”. Their Lordships have found his analysis of great assistance. Having referred to a number of authorities he said, in paragraph 78 of his judgment, this:

“One proposition can be gleaned from these limited authorities. It is that the meaning to be given to the word ‘misbehaviour’ will depend entirely upon the context of the legislative provision in which the term is used. There is no universal meaning of misbehaviour when it is used in a statute or other legislative instrument. When a statute provides for removal from office of a statutory officer on the ground of misbehaviour, it takes its meaning from the statutory context.”

Their Lordships are in agreement. Gray J went on, in paragraph 83, to warn against the adoption of a rigid definition. He said:

“... to force misbehaviour into the mould of a rigid definition might preclude the word from extending to conduct that clearly calls for condemnation ... but was not ... could not have been foreseen when the mould was cast.”  
 [this is a quote from Andrew Wells QC’s reasons in the Parliamentary Commission of Inquiry on Mr Justice K Murphy, Ruling on the Meaning of Misbehaviour, Canberra, 19 August 1986 and not Gray J’s own words]

Here, too, their Lordships concur.

25. Paragraph 85 of Gray J’s judgment is worth citing in full. The judge said this:

“It is clear from these expressions of opinion that, in order to constitute misbehaviour by the holder of an office, the conduct concerned need not be criminal conduct and need not occur in the course of the performance of the duties of the office. For present purposes, the important proposition to be drawn from these expressions of opinion is that, in a case in which the term ‘misbehaviour’ is used with reference to the holder of an office, the content of its meaning is to be determined by reference to the effect of the conduct on the capacity of the person to continue to hold the office. In turn, the capacity to continue to hold an office has two aspects. The conduct of the person concerned might be such that it affects directly the person’s ability to carry out the office. Alternatively, or in addition, it may affect the perceptions of others in relation to the office, so that any purported performance of the duties of the office will be perceived widely as corrupt, improper or inimical to the interests of the

persons, or the organisation, for whose benefit the functions of the office are performed. In either case, the danger is that the office itself will be brought into disrepute as a result of the conduct of its holder. If that is likely to be the case, then the conduct is properly characterised as misbehaviour for the purposes of the relevant legislation.”

Subject to the warning already given by Gray J that a rigid definition should be avoided, their Lordships consider that the passage above cited identifies the ingredients in the conduct under review that would usually need to be present if the conduct is to be characterised as “misbehaviour” for the purposes of removal from office.

26. For the purposes of section 87 of the Grenada Constitution and the present case, the questions that, in their Lordships’ opinion, need to be asked are, first, whether the appellant’s conduct, in writing the 11 August 1999 letter to the Minister and sending copies to the Speaker of the House of Representatives and to the Clerk of Parliament, is conduct that affects directly her ability to carry out the duties and discharge the functions of the office of Director of Audit; secondly, whether that conduct may affect the perceptions of others as to her ability to carry out those duties and discharge those functions; thirdly, whether to allow her to continue in office and continue to perform her duties would be perceived as inimical to the interests of good governance of Grenada; fourthly, whether the important office of Director of Audit would be brought into disrepute as a result of that conduct.

27. It is a matter of regret that the assistance their Lordships have derived from Gray J’s illuminating analysis in *Clark v Vanstone* was not available at the time of the Tribunal’s inquiry or the hearings in the courts below. The questions referred to in the preceding paragraph were not therefore addressed, at least directly. The Tribunal referred to the appellant’s conduct as “unbecoming of anyone holding the position of Director of Audit”; from which it would appear that, if asked, the Tribunal would have answered the fourth question adversely to the appellant. Alleyne J did not need to consider whether the appellant’s conduct constituted “misbehaviour” because he disagreed, wrongly in their Lordships’ opinion, with the factual findings of the Tribunal. And the Court of Appeal simply disagreed with Alleyne J and restored the Tribunal’s recommendation.

28. In these circumstances their Lordships think they should address the four questions themselves. As to the first question, the evidence before the Tribunal, given by Mr Norman Stalker, the appellant’s predecessor as Director of Audit, was that she was “very capable as a

Director of Audit”. Their Lordships think the first question should be answered in the appellant’s favour.

29. As to the second question, it seems highly likely that the appellant’s letter would have affected the perceptions of the Minister and, probably, also of the Clerk of Parliament and Speaker of the House of Representatives, as to her ability to discharge the functions of her office. Her duties must surely require a dispassionate and objective mind to be brought to bear. The content and tone of her letter of 11 August 1999 would, in their Lordships’ opinion, be apt to raise doubts in the minds of those who read the letter as to whether she possessed that quality.

30. The importance of the role of Director of Audit and of the role of Minister of Finance make it highly desirable in the interests of good governance of Grenada that the holders of these two offices should have a due respect for one another. A lack of respect by the Director of Audit for the Minister of Finance and the senior civil servants in his department might endanger the objectivity that should inform the Director’s audit reports. A lack of respect by the Minister for the Director might tend to diminish the respect paid by the Minister to the Director’s reports. It seems to their Lordships plain that a mutual lack of respect between the holders of the two offices would be inimical to the good governance of Grenada. The appellant’s letter of 11 August 1999, with its unfounded, and until very late in the day unwithdrawn, accusations against the Minister of mutilating and, in effect, falsifying her reports indicates a lack of respect by her for him and can hardly have done other than produce a lack of respect by him for her. The third question, in their Lordships’ opinion, should be answered adversely to the appellant.

31. As to the fourth question, their Lordships consider that the writing by a Director of Audit of such an intemperate letter as that of 11 August 1999, coupled with the sending of copies to the Speaker of the House of Representatives and the Clerk of Parliament, and aggravated by the failure of the appellant promptly to withdraw her unfounded accusations against the Minister and to apologise for making them, would be well apt to bring the office of Director of Audit into disrepute. The description by the Tribunal of the appellant’s conduct as “unbecoming a Director of Audit” was, in their Lordships’ opinion, an accurate assessment and by no means a misdirection.

32. An answer unfavourable to the appellant to three of the four questions not only justifies categorising the appellant’s conduct as “misbehaviour” for section 87 purposes but, in their Lordships’ opinion, validates also the Tribunal’s recommendation that the misbehaviour warranted her removal from office. Their Lordships bear in mind, also,

that none of the three members of the Court of Appeal regarded that recommendation as an excessive reaction by the Tribunal to the appellant's misbehaviour. Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed with costs.

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*Dissenting judgment by Lord Mance*

33. I regret that I am unable to concur in the opinion of the majority on this appeal.

Introduction

34. I am grateful to Lord Scott of Foscote, who has prepared the opinion of the majority of the Board, for his introduction to the facts and issues. He accepts that the Tribunal established under section 87(8) of the Constitution did not, at least directly, address the relevant questions (paragraph 27) and that, at least in some measure, it misdirected itself (paragraph 17). But he considers that the Board can and should form its own judgment on the matters remitted to the Tribunal, and that the appeal should fail on this basis (paragraphs 28-32). I respectfully disagree. In my view, the Tribunal misdirected itself in significant additional respects, and the relevant question is whether a properly directed Tribunal would necessarily have reached the same conclusion and it is not possible to conclude that it would have done.

35. The appellant has a legitimate interest in the outcome of this appeal (although she now seeks neither reinstatement nor financial relief) and the matter raises a point of general importance regarding the proper approach to misbehaviour in a context such as the present.

36. The first paragraph of the appellant's letter dated 11<sup>th</sup> August 1999 and the allegation (which it is now accepted that the letter objectively contained) that the Minister of Finance himself had tampered with the appellant's 1994 audit report were without question unbecoming of the appellant's office. It was intemperate, unbecoming and stupid of the appellant to write a letter in such terms to the Minister of Finance, who happened also to be Prime Minister, and to copy it to the Clerk of the Parliament and the Speaker of the House of Representatives. Her subsequent conduct, though not the subject-matter of any charge, did not help her before the Tribunal. Her letter to the Clerk of Parliament dated 24<sup>th</sup> August 1999, in answer to his letters of 16<sup>th</sup> August, was also inappropriately phrased, although it was in response to two letters from

the Clerk, one of them not before the Board, which the Tribunal regarded as “confrontational in style and show[ing] a measure of sarcasm – unnecessary and ill becoming ...” (Tribunal decision p.17). The delay before the appellant on 8<sup>th</sup> October 1999 finally answered the Minister of Finance’s complaint about her letter of 11<sup>th</sup> August 1999 was inadequately explained, but her response when made was in unexceptional terms; it made clear in writing that she was not accusing the Minister of Finance personally of tampering with the reports, but holding him constitutionally responsible for their integrity and expecting him to lodge an inquiry into the tampering which had occurred.

37. It is common ground that the letter of 11<sup>th</sup> August was delivered to the Minister of Finance at a meeting on the same day, though the Minister only later opened and read it. It is also common ground that during the meeting the appellant “clearly indicated that she [had] heard that it was the Accountant General that was then acting P.S. [Permanent Secretary in the Ministry of Finance] [who] was the one who had tampered with ... that Report” (Tribunal decision p.50). (Her evidence was that in the meeting she had also held the Minister “constitutionally responsible” for the Accountant General’s tampering.) It is further common ground that, after the meeting and before opening the letter, the Minister of Finance spoke to the Accountant General, Mr Louison, and ascertained from him, first, that he had indeed marked up and annotated the audit report (the Clerk in his evidence described what appeared as “side-marks, pen marks, underlining words, highlighted words and writing in the margin”), secondly, that the report had still not been put before Parliament, and, thirdly, that the single attempt three months before to do this had been rejected by the Clerk because the report was not properly laid by a member.

38. So, by the time he read the letter, the Minister of Finance knew, first, that there had in fact been interference with the report and serious non-compliance with the constitutional duty to lay it and, secondly, that the appellant as Director of Audit had not been making any personal allegation orally, though the letter in terms constituted such an allegation. Nine days after reading the letter of 11<sup>th</sup> August 1999, Mr Mitchell, writing and signing himself only as Prime Minister, wrote on 20<sup>th</sup> August expressing shock and dismay “beyond belief” and stated that the letter contained “very serious allegations against me as Prime Minister, which, in my opinion, are tantamount to gross misbehaviour on your part” and that the letter “effectively relay[ed] a strong feeling of hostility on your part towards me as Prime Minister”. In his written statement before the Tribunal, the Minister said that “the first thing that struck him” about the contents of the letter of 11<sup>th</sup> August “was that when she delivered the letter to me she had said that it was the “Accountant General” and not I

who had tampered with her reports”. The Prime Ministerial letter of 20<sup>th</sup> August did not point this out or ask the appellant whether she really intended to make personal allegations against him, whether as Prime Minister or Minister of Finance, in the light of her oral complaint. Nor did it ask for an unequivocal withdrawal of any such allegations, or indeed acknowledge that there might be any cause for any concern on anyone’s part regarding the delay in lodging or condition of the audit report. It indicated that he intended to pursue the matter further against the appellant, which he did by writing to the Public Services Commission on 14<sup>th</sup> September 1999 inviting it to set in motion procedures to determine whether the appellant should be removed.

39. In these circumstances and after inviting and receiving comments from those involved, the Public Services Commission represented to the Governor-General on 25<sup>th</sup> November 1999 under s.87(8) of the Constitution that “the question of removing the Director of Audit ought to be investigated”, and the Governor-General on 18<sup>th</sup> December 1999 established the Tribunal under s.87(8).

#### The constitutional protection of the Director of Audit

40. The Constitution gives the Director of Audit, along with the Director of Public Prosecutions, a high level of protection in the performance of their respective offices. Under s.87:

“(6) A person holding the office of Director of Audit may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with the provisions of this section.

(7) The Director of Audit shall be removed from office by the Governor-General if the question of his removal from office has been referred to a tribunal appointed under subsection (8) of this section and the tribunal has recommended to the Governor-General that he ought to be removed for inability as aforesaid or for misbehaviour.”

S.86(6) and (7) contain parallel provisions relating to the Director of Public Prosecutions.

41. These provisions are intended to buttress the independence of these officers and their ability to perform their vital roles without fear or favour. In the particular case of the Director of Audit, her role is likely to

bring her into direct conflict with government - and especially with ministers of the governing party responsible for accounting for the financial stewardship of the nation during any period on which she is reporting. In the present case, while Mr Louison was the Accountant General at all material times, Mr Mitchell was not in any office in 1993-94, but was in office from 1995 and his administration was responsible for the preparation of the accounts for both the accounting years 1993 and 1994.

42. There should in such a context be close scrutiny of any complaint from the side of government about misbehaviour and unsuitability for office of the Director of Audit. The constitutional question for that Tribunal was not whether the letter of 11<sup>th</sup> August 1999 was intemperate, unbecoming or stupid. It was whether there had been such serious misbehaviour as should cause the Tribunal to recommend to the Governor-General that the appellant ought to be removed for misbehaviour. In the event of such a recommendation, the Governor-General has no further discretion in the matter: s.87(7) requires him to remove the Director of Audit. Even a substantial breakdown of relations vented on one side in unbecoming terms is thus no justification for such a recommendation, unless there is misbehaviour making this necessary. It may be regarded as unfortunate that the Constitution contains no express alternative sanction, such as a reprimand, for misconduct which falls short of misbehaviour calling for a recommendation for removal. But it would be open to a tribunal constituted under s.87(8) to achieve such an effect by expressing in strong terms a conclusion that there had been misconduct falling short of misbehaviour calling for removal.

#### The concept of misbehaviour

43. The concept of misbehaviour was much debated before the Board. Reference was made below and before the Board to a passage in Halsbury's Laws of England (4<sup>th</sup> Ed. Reissue, 1996) Vol. 8(2), considering the statutory provisions whereby Lords of Appeal in Ordinary and judges of the English High Court and Court of Appeal hold their offices "during good behaviour". Halsbury suggests in that connection that

"Behaviour means behaviour in matters concerning the office, except in the case of conviction upon an indictment for any infamous offence of such a nature as to render the person unfit to exercise the office, which amounts legally to misbehaviour although not committed in connection with the office".

In support of the qualified exception in this passage, Halsbury cites Lord Mansfield's judgment in *R v. Richardson* (1758) 5 Burr. 517, where pages 536-540 are relevant. Neither *R v. Richardson* nor Halsbury lends any support to Mr Fitzgerald's proposition that misbehaviour always requires the commission of a criminal offence. On the contrary, Lord Mansfield was distinguishing between misconduct "such as [has] no immediate relation to his office" and other conduct, and it was only in relation to the latter that he was suggesting that a prior conviction was necessary. Whether that remains the position and, if so, in what context it is unnecessary to consider further, since the misbehaviour asserted in the present case bore an immediate relation to the office.

44. Much greater assistance is, I agree, to be obtained from the impressively reasoned judgment of Gray J in the Federal Court of Australia in *Clark v. Vanstone* [2004] FCA 1105. The office of a commissioner serving (in fact as chairperson) on the Aboriginal and Torres Strait Islander Commission ("ATSIC") was entrenched (though less elaborately than that of the Director of Audit) by the ATSIC Act. Section 40(1) provided that the Minister for Immigration and Multicultural and Indigenous Affairs "may suspend a Commissioner from office because of misbehaviour or physical or mental incapacity", after giving him or her 7 days notice to show cause why there should not be such a suspension. Within 7 days after any such suspension, the minister had also to lay a statement concerning it before Parliament, whereupon Parliament could within a further 15 days declare by resolution that the commissioner ought to be restored to office. The minister had statutory power to specify misbehaviour to be taken to be misbehaviour for the purposes of the Act, and purported to exercise this so as to make conviction of any offence for which there was a penalty of imprisonment misbehaviour for such purposes. The chairperson was convicted of an offence of obstructing the police in the course of an incident in a public house, an offence for which imprisonment was a penalty, although in the event the chairperson was fined \$750. The minister suspended him both on the ground that his conduct in obstructing the police constituted misbehaviour within the general words of section 40 and on the ground that his conviction for such obstruction constituted misbehaviour under the minister's specification.

45. Gray J held that the meaning to be given to the word misbehaviour depended on the context of the legislative provision in which it was used (paragraph 78). He found guidance in the context before him in the analogy of the constitutional power of removal of a judge for "proved misbehaviour or incapacity", which had been considered in the *Ruling on Meaning of 'Misbehaviour'* of the Parliamentary Commission of Inquiry re The Honourable Mr Justice L K Murphy of 19 August 1986

(paragraphs 79-83) as well as in the *First Report of the Parliamentary Commission of Enquiry* appointed by the Queensland Parliament to address allegations against Mr Justice Vasta in 1989 (paragraph 84). He concluded that:

“For present purposes, the important proposition to be drawn from these expressions of opinion is that, in a case where the term ‘misbehaviour’ is used with reference to the holder of an office, the content of its meaning is to be determined by reference to the effect of the conduct on the capacity of the person to continue to hold the office. In turn, the capacity to continue to hold the office has two aspects. The conduct of the person concerned might be such that it affects directly the person’s ability to carry out the office. Alternatively, or in addition, it may affect the perceptions of others in relation to the office, so that any purported performance of the duties of the office will be perceived widely as corrupt, improper or inimical to the interests of the persons, or the organisation, for whose benefit the functions of the office are performed. In either case, the danger is that the office itself will be brought into disrepute as a result of the conduct of its holder. If that is likely to be the case, then the conduct is properly characterised as misbehaviour for the purposes of the legislation.” (paragraph 85)

46. Gray J continued (in paragraph 86) by identifying two important consequences of this conclusion, one that:

“when the minister considered the question whether the applicant was guilty of misbehaviour in the general sense, it was necessary for her to consider the nature of the office of Commissioner and the duties attached to that office (there being no separate power to suspend the applicant in his capacity as chairperson)”.

The other was that, in specifying conduct as constituting misbehaviour for the purposes of section 40, the minister had to observe the limitations of the meaning of ‘misbehaviour’ identified in paragraph 85 of Gray J’s judgment. Turning in that light to the specific statutory context, Gray J undertook a careful and sensitive analysis of the office and duties of an ATSIIC commissioner and of background factors which, in the case before him, bore on the question whether a finding of misbehaviour should be made: in particular, it was, he observed, necessary to bear in mind that the impact of the concept of ‘misbehaviour’ would to a large extent be on

indigenous people elected and appointed to represent the interests of indigenous people, and criminal statistics demonstrated a huge over-representation of indigenous compared with non-indigenous people in criminal proceedings, including a 15 times greater probability of being prosecuted for offensive language and conduct - the most fundamental causes of the imbalance as regards custodial sentences being (according to a Royal Commission report of 1991) “the disadvantaged and unequal position in which Aboriginal people find themselves in society” (paragraphs 90-97). Gray J concluded that in construing the word ‘misbehaviour’ this was “a factor which must be taken into consideration, lest indigenous people, significant numbers of whom will have had experiences with the criminal justice system, be deprived of representation by those who have also had such experiences” (paragraph 97).

47. In considering the validity of the minister’s specification of any conviction for an offence liable to imprisonment, Gray J noted at paragraphs 118 and 119 the existence of the minister’s discretion whether or not to suspend for misbehaviour, and of the Parliamentary power to disallow a suspension, but he held that such safeguards as these afforded could not validate an interpretation of the conduct specified by the minister as misbehaviour which extended on its face to conduct “not capable of having any rational connection with the continued holding” of the relevant offices in ATSIC to which such specification related (paragraph 120). The minister’s specification had thus to be “read down” under the Constitution, so as to apply only to a conviction which “impaired [a person] in continuing to hold the relevant office” or “renders it inappropriate that the person continue to hold the office which he or she holds in ATSIC” (paragraph 130).

48. On this basis, he held that the minister had misdirected herself in applying her own specification of the meaning of misbehaviour:

“It is plain that she did not consider the necessity to read down the words. ..., so that they would include only those offences bearing upon the capacity of the applicant to continue to hold the office of Commissioner. In this respect, it is plain that the minister not only misdirected herself in law. She failed to take into account a relevant consideration, namely the impact of the conviction on the capacity of the applicant to continue to hold the office of Commissioner.” (paragraph 134)

As to the minister’s finding that the obstruction itself constituted misbehaviour, Gray J said (paragraphs 135-6):

“... the position is less clear. The minister’s reasons contain no discussion of the relationship between the concept of ‘misbehaviour’ and the duties and requirements of the holder of the office of Commissioner, in the light of the protective function of the power given by s.40 of the ATSIC Act and the need for the maintenance of the integrity of the commission. Nowhere in the ministers’ reasons are there expressed any findings of fact on these questions. From the structure of the reasons, it seems clear that the minister did not take the view that she was required to consider issues of this kind before deciding whether to make a finding of misbehaviour. Rather, the minister appears to have assumed that it was only necessary to consider issues of that kind once she had made a finding of misbehaviour, and then only in relation to the question whether that misbehaviour warranted suspension of the applicant. Even then, the minister made no positive findings about matters such as capacity for office or the significance of the unanimous expression by the board of ATSIC of support for the applicant as someone who should continue in the office of chairperson. All that the minister did was to summarise the submissions made on behalf of the applicant and to reject them.

136. There is nothing that indicates any awareness on the part of the minister of the need to consider whether a finding of misbehaviour .... could be made on any basis other than that she was entitled to disprove [sic] of the applicant’s conduct. I am therefore of the view that, in deciding whether to suspend the applicant on the ground of the ‘general concept of misbehaviour’, the minister’s reasons demonstrate that she failed to take into account the same relevant considerations as in the case of misbehaviour as defined by [her specification]. In each case, for the reasons I have given, s.40(1) of the ATSIC Act required that the minister take into account as misbehaviour only such behaviour as bore upon the capacity of the applicant to continue to hold the office of Commissioner. By failing to take this into account, the minister failed to take into account a relevant consideration.”

On that basis, Gray J set aside the suspension.

The correct approach to misbehaviour

49. I find the approach to the law adopted by Gray J persuasive in the present context. The statutory provisions under consideration in the present case required the appointed Tribunal to consider, first, whether there was misbehaviour and, secondly, if there was, whether a recommendation should be made (which would bind the Governor-General) for the removal of the Director of Audit. Paraphrasing paragraph 85 of Gray J's judgment, it was essential that the Tribunal should consider whether the misbehaviour was such as directly to affect the appellant's ability to carry out the office of Director of Audit, and whether, alternatively or in addition, it was such as so to affect the perceptions of others in relation to that office, so that any further performance by the appellant of the duties of the office would be perceived widely as so corrupt, improper or inimical to the interests of the persons, or the organisation, for whose benefit the functions of the office are performed as to require her removal. More shortly, it was essential that the Tribunal consider the nature of the office of Director of Audit and the duties attached to that office, and to make findings as to whether the appellant's conduct so bore on or impaired her capacity to continue to hold the office of Director of Audit as to require her removal (paragraphs 130 and 135-6).

#### The Tribunal's general approach

50. The Tribunal's lengthy and painstaking report, much of it consisting of simple recital of correspondence and evidence, contains no indication that it recognised or applied such an approach, or, more particularly, that it differentiated in any way between conduct unbecoming of the office on an isolated occasion and conduct impairing the Director of Audit's general capability to continue to hold the office to the extent requiring her removal. Alleyne J at first instance recognised that it was essential for the Tribunal to consider whether the misconduct was such as to justify a recommendation for removal, and whether the letter of 11<sup>th</sup> August, even if "intemperate, arrogant or officious" in attitude, amounted to misbehaviour of such a nature. He was prepared to give the Tribunal the benefit of the doubt on this point, saying in paragraph 78:

"I have come to the conclusion that although it did not explicitly state in its Report, the tribunal must have considered the matter and come to the conclusion that the conduct of the applicant was such as to amount to misbehaviour within the definition, such as to justify its recommendation."

On appeal to the Court of Appeal, the same point was raised squarely by the appellant's skeleton, paragraph 11 (bundle p.805), pointing out that the Tribunal did not define misbehaviour and that not every act of misbehaviour warrants removal. The Court of Appeal in its short judgment did not address the point at all. I address it further in paragraphs 52-53 (and, so far as it arises, paragraph 57) below.

51. I also consider that the Tribunal clearly and significantly misdirected itself, that it failed to take into account relevant contextual background to the letter of 11<sup>th</sup> August 1999 and that it took into account as an aggravating feature of that letter a consideration which was either neutral or, as I consider, mitigating in effect. I address these points in paragraphs 54-56 and 58-63 below.

### Detailed Analysis

#### *(a) The Tribunal's mandate and findings, and its approach*

52. The Tribunal started its 97 page report by setting out the terms of its appointment, viz:

“to enquire into an allegation of misbehaviour .... consisting of conduct unbecoming of a public officer and holder of the post of Director of Audit and prejudicial to the reputation and good order of the Public Service of Grenada in that the said Julia Lawrence recklessly and improperly made unwarranted and unsubstantiated accusations of impropriety against a Minister of the Crown that the said Minister tampered with or improperly altered a Report of the Director of Audit prior to the same being laid in the Parliament pursuant to section 84(2) of the Constitution the said accusations being contained in a letter dated 11<sup>th</sup> August 1999 and addressed to the Hon. Dr Keith C. Mitchell, Minister of Finance and Prime Minister .... and to report the facts thereof to me and recommend whether the said Ms Julia Lawrence, Director of Audit ought to be removed from office under section 87(7) of the Constitution”.

The terms of appointment give, as particulars of misbehaviour, conduct unbecoming and, as particulars of conduct unbecoming, the reckless and improper making of unwarranted and unsubstantiated allegations in the letter. But it was for the Tribunal to consider whether these allegations were justified, and whether, above all, any misconduct (if any) which was established so seriously impaired the Director of Audit's capability to

fulfil her functions as to necessitate and call for a recommendation for removal. I see no indication that the Tribunal at any point appreciated the need to consider this, or that it identified the relevant factual considerations and did actually consider this.

53. The Tribunal concluded the five to six pages of findings of fact at the end of its 97 page report by saying:

“Taken as a whole, the facts and circumstances showed that the attitude of Julia G. Lawrence in this episode was not one born of the qualities which she admitted should be demonstrated by a Director of Audit. Rather they revealed not only an annoyance but more particularly a recklessness that manifested itself in her making allegations against the Minister of Finance, who was also a Minister of the Crown, of mutilating, of doctoring and of amending her Reports prior to their being laid in Parliament. Her accusations were clearly unfounded and unwarranted, and as was indicated earlier unsubstantiated by any cogent evidence.

We are satisfied that on the evidence before us Julia G. Lawrence misbehaved. She acted recklessly; and she wrongly and improperly made unsubstantiated and unjustified accusations that the Minister of Finance improperly interfered with, by altering or amending and mutilating (with scratches and insertions) her Reports Nos. 1 and 2 of 1999 prior to their being laid in Parliament. We are left in no doubt that such conduct was unbecoming of anyone holding the position of Director of Audit.”

The Tribunal did not at any point in this passage or anywhere else in its report either identify or apply the correct approach to determining, by reference to the appellant’s capacity to perform her office, whether there was misbehaviour so serious as to justify a recommendation for removal.

*(b)(i) The context - the general background of the Appellant’s past performance*

54. The appellant in cross-examination agreed that a Director of Audit should have certain qualities which were (a) calm temperament, (b) a certain degree of objectivity, (c) the ability to forget personalities, (d) not to make reckless or unwarranted accusations against people and (e) to be careful to express him/herself with precision. She gave these answers in response to a series of leading questions all expressed to refer to the

position of “the” [or “an”] “auditor”. The answers were natural in the context of questions relating to the auditing functions of the Director of Audit, and there can be few who would not accept them as standards of behaviour to apply in life’s activities generally, though equally few who cannot often have fallen short. But, while the letter dated 11<sup>th</sup> August 1999 was written as Director of Audit, it is relevant to note that it was not written as part of any auditing function or activity. The criticism it made of the Minister of Finance was not an auditing criticism; it was a criticism by the Director of Audit of the ministerial handling of her completed audit report. While the appellant fell below her own acknowledged standards in writing the letter, and her conduct was, as the Tribunal said “unbecoming”, this occurred in a matter tangential to her key auditing activity and capability. All the indications are that it was also a one-off occurrence.

55. The Tribunal did not put the letter of 11<sup>th</sup> August 1999 in any sort of context. It did not give the appellant credit for the fact that she had, as all the indications are, performed her duties of Director of Audit correctly and competently for over six and a half years since 1<sup>st</sup> January 1993. Prior thereto she had (from 1988 to 1992) served as understudy of Mr Norman Stalker, the previous Director of Audit (and Audit Adviser from 1992 to 1994), who testified to the Tribunal that “she is very capable as an auditor, she is very capable as a Director of Audit”. He also said that she had received very favourable comments at international conferences to which she had accompanied Mr Stalker and that she had never, so far as he was concerned, displayed any signs of recklessness, lack of impartiality or over-emotionalism. In cross-examination about the tenor of the letter dated 11<sup>th</sup> August 1999, Mr Stalker drew attention to a general background of very problematic accounting, of delays in accounting and of late submission to Parliament of audit reports. The Tribunal effectively dismissed all of Mr Stalker’s evidence, saying that his “lengthy explanation of the ‘bad state of the accounts of the Government of Grenada’ ....was really of no concern to the Tribunal’s mandate” (Tribunal decision p.90) and that his evidence,

“.... bearing in mind the specific terms of the mandate, [his evidence] did not render specific assistance. It amounted, in our view, to informing us of the capability of Ms. Lawrence to perform the function of Director of Audit and it showed that he seemed to regard his role in this matter as offering circumstances and facts that would amount to mitigation if the complaint were established.” (Tribunal decision p.91)

56. In my view, these passages involved a misdirection. While it was entirely understandable that the Tribunal should not go into the actual state of Grenada's accounts, the concerns of both the former and the current Director of Audit about their state were relevant background to the appellant's over-reaction in her letter dated 11<sup>th</sup> August. More importantly, the implication of the passage cited from page 91 is that the Tribunal regarded her capability as irrelevant to its role in determining whether there was misbehaviour within section 87(6), and as amounting only to mitigation "if the complaint were established". This was an important misdirection. Both Mr Stalker's evidence about the appellant's capability and (though less important) the background of concern to which he attested regarding the state of Grenada's accounting were matters relevant to the core issue before the Tribunal, which was whether misbehaviour was established.

57. I add that, even if the Tribunal had been correct to regard them only as matters of "mitigation if the complaint is established", there is (as I have said in paragraphs 50 and 52-53 above) no sign of any evaluation of such matters by the Tribunal at any later stage. If the Tribunal took the view (incorrect though that view would in my opinion be) that matters such as capability only arose for consideration at a later stage when, after having found misbehaviour, the Tribunal had to decide whether a recommendation ought to be made for the removal, then one would have expected some assessment of such matters and their weight at that later stage. Here, no such appears. The recommendation at page 97 consists of an entirely general statement that "it is our unanimous opinion that we must recommend" removal, without any further reference to such matters or any further assessment or reasoning at all.

*(b)(ii) The context – the immediate background in the Minister of Finance's failure to perform his constitutional duty*

58. The Tribunal also failed to put the appellant's letter of 11<sup>th</sup> August 1999 fairly in the context of its immediate background. The Minister was under section 82(4) of the Constitution expressly required to lay any audit report before the House of Representatives "not later than seven days after the House of Representatives first meets after he has received the report". The appellant's audit report on the 1993 accounts had been delivered to the Minister of Finance in December 1997 but had only been laid before Parliament in late August 1998. It is common ground that at a meeting on 2<sup>nd</sup> April 1998, the appellant questioned the delay. According to her, the Minister of Finance said that he disagreed with some of the report's contents and was obtaining comments of the Accountant General to lay with it. Mr Mitchell thought that this was said in relation to the 1994, rather than 1993 accounts, but the only explanation he could give

for the delay of over eight months was that it was “very important that I had the opportunity to read the report properly before laying it” (Transcript 9<sup>th</sup> February 2000 pp.28-30). The audit report on the 1994 accounts had been delivered to the Minister on 30<sup>th</sup> March 1999, but had again not been laid before the House, despite the appellant’s polite expression of her concern in a letter to the Minister dated 23<sup>rd</sup> June 1999, in which she observed that she understood that the House had met four times since 30<sup>th</sup> March 1999 (as it in fact had on 16<sup>th</sup> and 30<sup>th</sup> April, on 14<sup>th</sup> May and again on 23<sup>rd</sup> June 1999). So far as appears, this letter went unanswered. The Accountant General was on any view asked for his comments on the 1994 audit report, and was, it appears, responsible for the markings, comments and notes on the audit report proposed to be laid before the House. Had the Minister of Finance performed his constitutional obligation, there would have been no, or very little, opportunity for any tampering by anyone. His failure to do so, and such excuse as he tendered for not doing so, were cause for concern. Indeed, the 1994 report had not even been laid by the time the Tribunal sat in February 2000.

59. The appellant had a legitimate interest, both as Director of Audit and as a citizen of Grenada, in the performance and manner of performance by the Minister of Finance of his duty to lay her audit report, unaltered, before the House within the seven day period prescribed by the Constitution. Section 101 of the Constitution expressly provides in this context that “any person who alleges that any provision of this Constitution ..... has been or is being contravened may, if he has a relevant interest, apply to the High Court for a declaration and for relief under this section”. If the Director of Audit is not a person with a relevant interest, for the purpose of raising and if necessary pursuing concerns about the Minister of Finance’s performance of his statutory duty under section 82(4) of the Constitution, it is difficult to see who is. Even counsel for the Attorney General said that he could “understand the Director being uptight” about the failure to lay in accordance with the Constitution (Transcript 9<sup>th</sup> February 2000, p.32). The Tribunal failed to appreciate her legitimate interest in this connection. On the contrary, it repeatedly treated the appellant’s comments regarding the Minister’s repeated failures to comply with his constitutional duty as “[no] business of hers”, as an impertinent aggravation of any offence involved in writing and sending the letter and as a demonstration of “dictatorial” self-importance. Thus, it said at pages 12-13:

“Throughout the remainder of the letter it seemed that she was castigating the Minister of Finance in a manner that seemed to us to reflect her view of her importance as Director of Audit. The tone of the letter, in part, was

dictatorial and demonstrative of her conception of her omnipotence under the provisions of the Constitution of Grenada - to the point where she seemed to consider it to be a part of her role to advise the Minister of Finance of his duty in laying the Reports in the House of Representatives. Indeed she asserted that he had – before 11th August, 1999 – offended the Constitution by not complying with the Constitutional provision that required the Reports to be laid within a certain time. The Director of Audit did not stop there. She continued her castigation of the Minister of Finance by referring to a meeting with him in 1998, held at her request, and in which she alleged that she expressed her concern over the delay in the laying of the 1993 Reports. She recalled that the Minister of Finance told her at that meeting that he was concerned about the contents of the 1993 Reports; that he felt that “some of its contents should not have been included”. It is probably worthy of note that the Director of Audit did not assert then and there that the Minister had conceded that he or someone else in his Ministry had altered or otherwise amended the 1993 Reports. According to her, he indicated only how he felt about those Reports, and in the absence of any claim or admission of amendment it is not easy to understand why, other than to castigate the Minister of Finance, the Director of Audit considered it necessary to refer to that occasion in 1998 or to mention that she was concerned over the delay in laying those Reports – a matter which, if she was anxious to see that she carried out only her duty, was not a matter for her under the Constitution to which she had referred, and on which she had relied in her letter. In brief, she was going beyond her constitutional duty to tell the Minister of Finance that unlike her, he was not performing his duty under the Constitution; and further he was seeking to usurp her role as the Director of Audit; it was his role in 1998, as in 1999 simply to act “as a conduit” between her and the House of Representatives. The word “conduit” is not one that would, under normal circumstances be readily used in such a context, but we are not satisfied so that we can say with confidence that it was used derogatorily of the Minister of Finance.”

60. The Tribunal returned to this theme in trenchant terms near the end of its report at page 80:

“Having described in clear terms and correctly what the duties of a Director of Audit are under the Constitution of Grenada, Julia Lawrence conceded that she was not given thereunder, as Director of Audit, the responsibility to ensure that her reports were laid in Parliament. She agreed with the attorney at law, that under the Constitution it was the responsibility of the Minister of Finance to lay the audit reports in Parliament and that it was for Parliament, and not the Director of Audit, “to deal with the Minister if he did not do so.” In the face of this agreement, it springs to mind immediately, what business of hers was it therefore to write, on the 11th August 1999, to the Minister of Finance, that he was already in breach of the Constitution for not laying the reports within the stipulated time, and to persist in referring to late laying in 1998 of the 1993 reports”, if, as she would have us believe, she was speaking constitutionally? In our view, having castigated the Minister of Finance as she did in her letter, she went beyond the scope of her role as Director of Audit, in several respects.”

61. These very adverse comments on the appellant by the Tribunal involved a material misdirection and meant that the Tribunal took into account, as aggravating the offending nature of the letter, factors which were at the very least neutral, and in my opinion clearly constituted a degree of mitigation which could affect both whether misbehaviour was established, and whether it was such as to call for a recommendation for removal. A background of acute concern about Grenada’s accounts and about the Minister of Finance’s evident breaches of his constitutional duty to lay before Parliament her audit report is material to assist to explain the state of mind in which the appellant wrote, even though it cannot fully excuse, the first part of her letter of 11<sup>th</sup> August 1999. The Tribunal’s misdirection of itself and its erroneous treatment of the latter part of the letter as aggravating any offence are by themselves sufficient to mean that the Tribunal’s conclusion cannot stand.

*(c) The appellant’s state of mind*

62. The matter goes further. The Tribunal recounted the evidence given about the prior conversation between Mr Mitchell as Minister of Finance and the appellant on 11<sup>th</sup> August 1999, but did not in my opinion recognise its potential significance. This links with a more general wider point, relating to the state of mind in which the letter was written. The Tribunal concentrated on the question whether the letter read objectively contained (as it is now accepted that it did) an allegation that Mr Mitchell

himself had in any capacity personally tampered with the audit report. The Tribunal found that it was reckless of the appellant to write a letter making a personal allegation of this nature. But the other side of the coin is that the appellant did not intend in composing the letter to make any such personal allegation. She had made clear just before delivering the letter that she was not making any allegation against Mr Mitchell personally. Her letter of 8<sup>th</sup> October 1999 confirmed that she was not pursuing any such allegation. She stated repeatedly in evidence that she had had no such intention (and apologised both to the Tribunal and Mr Mitchell for any contrary impression given by her letter). Her evidence about her intention was not challenged in cross-examination (when counsel concentrated on the objective “meaning” of the letter: see e.g. Transcript of 10<sup>th</sup> February 2000 pages 33-36), and in any event, in the light of the prior conversation, it seems inconceivable that she can have intended in the letter to make an allegation which she had already said she believed to be false against Mr Mitchell personally. Alleyne J recognised this point when he said in paragraph 75 that:

“.... a mental element must be taken into account. The tribunal must give consideration to the motive, purpose or intention behind the action of the officer, and determine, taking that into account, whether, in all the circumstances, removal from office is the appropriate remedy.”

There is one passage in the Tribunal’s report which might be read as addressing intention, rather than objective interpretation. That is at pages 76-77, but its gist and reasoning are highly obscure. Point (a) in the reasoning relies simply on the objective meaning of the letter, but people sometimes write things the objective meaning of which they do not intend. Point (b) in the reasoning refers to the Prime Minister’s pursuit of the complaint; in so far the Tribunal relied on that as justifying any conclusion of fact (whether as to the objective meaning of the letter or the appellant’s intention in writing it) the Tribunal clearly erred. Point (c) refers to the letter of 8<sup>th</sup> October 1999, which is consistent with what the appellant said in the meeting on 11<sup>th</sup> August and in no way inconsistent with her evidence about her intention.

63. The Court of Appeal did not address the appellant’s state of mind. It treated the only relevant issue as being what the letter objectively meant (paragraphs 29-32). In my view (and contrary to the view of the majority of the Board expressed by Lord Scott), it was relevant, in determining whether there was misconduct justifying a recommendation for dismissal, to consider all aspects of the state of mind in which the letter was written and delivered. In this context, I also consider unjustified the Tribunal’s criticisms to the effect that the appellant was

“changing her tune” between her letters dated 11<sup>th</sup> August, 8<sup>th</sup> October and 16<sup>th</sup> November 1999 (see e.g. Tribunal decision pp. 42 and 77). On the basis that the letter dated 11<sup>th</sup> August 1999 was inappropriately phrased so as to appear, unintentionally, to make a personal allegation against Mr Mitchell which the appellant had expressly disclaimed in her oral complaint to Mr Mitchell in his constitutional position as Minister of Finance, there was nothing contradictory about her letters dated 8<sup>th</sup> October (when she asked him to investigate who was responsible for the tampering) and 16<sup>th</sup> November (when she observed that the office of the Minister was “associated with the said unauthorised alterations or amendments”).

### Conclusion

64. For the reasons I have given, I consider that the Tribunal’s report was flawed in its approach in relation both to the law and to the considerations relevant to its application. There were failures or misdirections in four separate respects: see paragraphs 52-53 above (failure to apply the right test), paragraphs 54-57 (failure to put the conduct in the context of the appellant’s general performance of her duties), paragraphs 58-61 (repeated, unjustified and highly prejudicial criticisms of very legitimate concerns of the appellant which should have counted in her favour) and paragraphs 61-63 (failure to focus on the appellant’s state of mind). Any one of these errors by the Tribunal is sufficient to undermine the conclusions about misbehaviour and the recommendation in its report.

65. I am unable to say that the same conclusions would or should have followed even if there had been no such errors; on the contrary. The relevant question is not whether the Tribunal “could properly” hold the letter of 11<sup>th</sup> August 1999 to be misbehaviour or whether the appellant has shown that the Tribunal’s errors in approach “sufficiently influenced their recommendation” (see paragraphs 14 and 17 of the opinion of the majority of the Board). It is whether the Tribunal would, if its members had properly directed themselves by reference to the relevant factors, undoubtedly have arrived at the same decision as they did. Lewis in *Judicial Remedies in Public Law* (2004), paras. 11-026 to 11-029 reviews the relevant authorities and points to “the danger that the court might substitute its own view of the merits of the case for that of the decision-maker”; with the support of Feldman in *English Public Law* (2004) para. 18.67 (cf also Fordham’s *Judicial Review Handbook*, 4<sup>th</sup> Ed., para.4.4) Lewis concludes that:

“For these reasons, the courts should not refuse relief unless the same decision would undoubtedly be reached

irrespective of the error, and there is a clear countervailing public interest in not quashing the decision”.

Among the authorities illustrating this principle are *R v. Inner London Coroner, ex p Dallaglio* [1994] 4 AER 129, 155e (where Simon Brown LJ was “not prepared to say that a fresh coroner would be bound to” reach the same decision), *Simplex GE (Holdings) Ltd. v. Secretary of State for the Environment* [1988] 3 PLR 25, 42 (where Purchas LJ said: “It is not necessary for [the claimant] to show that the minister would, or even probably would, have come to a different conclusion. He has to exclude only the contrary contention, namely that the minister necessarily would still have made the same decision”) and *Raji v. General Medical Council* [2003] 1 WLR 1052 (PC), para. 17 (where the Privy Council said that “the possibility cannot entirely be excluded that Dr Raji was disadvantaged by the flawed procedure”); cf also *R (Amin) v. Secretary of State for the Home Department* [2004] 1 AC 653, paras. 39 per Lord Bingham of Cornhill and 52, per Lord Steyn.

66. Under the Constitution, the Director of Audit was entitled to the properly directed decision of a local Tribunal on the questions to be determined under section 86. She did not have this, and in my judgment this Board should not, on the present challenge to the constitutionality of her removal, substitute its own opinion on those questions, and should be very cautious about concluding that the Tribunal would, if properly directed, necessarily have decided against the appellant. Normally, I would expect it to be for the respondent to show this, but where the onus lies is in my view presently immaterial. I find it impossible on the present facts, and bearing in mind the various factors which I have identified which could and should have been born in mind and have counted in the appellant’s favour, to conclude that a properly directed Tribunal would undoubtedly have reached the same decision. I am satisfied on the present facts that it cannot be said that it would undoubtedly have done so.

67. The advice which I would have humbly tendered to Her Majesty would, therefore, have been that the appeal should be allowed, that the order of the Court of Appeal dated 14<sup>th</sup> and entered 29<sup>th</sup> January 2002 should be set aside and that the declarations made in paragraphs 1 and 2 and the order made in paragraph 3 of the first part of the Order in Court of Alleyne J dated 5<sup>th</sup> and entered 6<sup>th</sup> October 2000 be restored, but that, since the appellant has found alternative employment and no longer seeks reinstatement or any financial relief, no further order should be made in terms of the next part of Alleyne J’s said Order in Court. I would also have considered that the appellant should have her costs here and below.