

‘AIN’T MISBEHAVIN’: JUDICIAL CONDUCT AND MISCONDUCT

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Abstract

This article looks at recent cases of judicial misconduct and alleged judicial misconduct. These include examples of judicial bias, or the appearance thereof, in relation to parties and to lawyers and failure to recuse oneself, judicial reaction to press criticism, judges using their court computers to watch pornography, a judge responding to a defendant’s bad language by using bad language herself, a judge with outdated views about rape and whether another judge’s comments about rape in passing sentence were validly criticized. The way in which the Judicial Conduct Investigations Office and other judges have dealt with complaints of judicial misconduct is discussed and in some cases found wanting.

Keywords: judicial misconduct, judicial discipline, bias, recusal, pornography, rape

[A] INTRODUCTION

Judges in the UK have a high and well-deserved reputation for probity and integrity. Of course, there are some judges who are pompous and arrogant, some who occasionally display partiality and an overbearing manner and some who are less than competent. Judges corrupted by bribery, however, are almost unknown. That is one of the reasons why the Commercial Court is so popular with foreign litigants.

In recent years there have been some examples of traditional judicial misconduct, but there have also been some novel situations where judicial misconduct has been alleged or found; these have raised questions of what behaviour is expected of judges. This article examines some of these cases and the way in which allegations of misconduct have been handled.

In particular it raises questions about the effectiveness of the Judicial Conduct Investigations Office (JCIO).

[B] SIR PETER SMITH: MISBEHAVIN' WITH HONOURS

Peter Smith practised as a barrister on the Northern Circuit from 1979 to 2002 when he was appointed a High Court Judge. He was assigned to the Chancery Division and received a knighthood by virtue of his appointment.

The Da Vinci Code

Smith first came to public notice when he tried the case of *Baigent v Random House Group Ltd* (2006). The case involved a claim by two authors that their copyright had been infringed by the defendants, who were the publishers of the best-selling book, *The Da Vinci Code*. As its name indicates, much of the book's plot turns on a code. In writing his judgment Peter Smith J amused himself by inserting a coded message of his own into the judgment. The Court of Appeal were not amused. Although they upheld Smith's judgment for the defendant, they were heavily critical of its drafting.

There is nothing wrong in itself with a judge, in appropriate circumstances, inserting a little humour into his or her judgment. For example, in *Re Shaw* (1958), a dispute concerning the will of the famous author, playwright and critic, George Bernard Shaw, Harman J's judgment was a parody of Shaw's style. What is important is that the wit or whimsy should not detract from the clarity of the judgment. Smith's judgment was so confusing that Mummery LJ said:

On the appeal there was a dispute about what findings the judge had actually made. Each side argued that key findings of the judge on the allegations of copying were in their favour (*Baigent v Random House Group Ltd* 2007: 110).

While giving credit for the speed at which Smith turned out a lengthy judgment, Lloyd LJ refers to Smith's code and comments:

The judgment is not easy to read or to understand. It might have been preferable for [Peter Smith J.] to have allowed himself more time for the preparation, checking and revision of the judgment (*Baigent v Random House Group Ltd* 2007: 3).

Indeed, a not insubstantial part of the judgments in the Court of Appeal is taken up with analysing the meaning of sections of Smith's judgment. Mummery LJ said:

It is fair to say that, if the judgment [of Peter Smith J] had presented the findings, together with supporting reasoning, in better order and with greater clarity, the scope for the parties to engage in ... arguments [in the Court of Appeal] would have been reduced (*Baigent v Random House Group Ltd* 2007: 115).

The conclusion to the leading judgment of Lloyd LJ is basically a list of statements of what Smith's judgment meant.

Addleshaw Goddard

In November 2006 Smith entered into negotiations with Addleshaw Goddard (AG), a large firm of solicitors, to join the firm. Some details of those negotiations appear from the Court of Appeal decision in *Howell and Ors v Lees-Millais and Ors* (2007). The partner at AG dealing with the negotiations was a Mr Simon Twigden. On 25 May 2007 Twigden emailed Smith saying that for financial reasons AG could not take the matter any further. There then followed an exchange of emails in which Smith expressed his displeasure at AG's decision. His final email of 31 May 2007 included the following:

I found your first email insulting and your second one condescending. I do not think the response should have been from you by such emails. You really should have had the courtesy to speak to me.

He then again reverted to the financial position and said of the figures which had been referred to in AG's earlier email:

They are just artificial figures. It is galling that these are used to knock down a proposal that emanated from you, which was never discussed with me and I would never have agreed it with you if presented in this way. We all agreed it [*sic*] there ought to be substantial benefits if properly sold but at this stage they would be difficult to assess.

He then made some further observations on the figures and concluded:

I feel you have wasted my time for several months. I am extremely disappointed because contrary to your fine words you have allowed the bean counters to prevail. I am not very impressed with you or your firm at the moment and I do not think the tone of your emails enhances the position (*Howell and Ors v Lees-Millais and Ors* 2007: 11,12).

The case of *Howell* involved a Beddoe application. Such applications are usually non-contentious; they consist of trustees seeking directions from

the court about the conduct of litigation on behalf of the trust. The costs are usually borne by the trust fund rather than any of the parties. In *Howell*, however, the application was an acrimonious one and the defendants had made it clear that, if they won, they would seek an order for costs against the trustees.

Not only were AG acting as solicitors on behalf of the claimants; the first claimant, Mr Howell, was a partner in AG. The application was scheduled to begin on Friday 29 June 2007, less than a month after the final embittered email from Peter Smith J. On Wednesday 27 June 2007 AG learned that the application had been assigned to Smith. On Thursday 28 June 2007 Peter Crampin QC, lead counsel for the claimants, wrote to the judge asking him to recuse himself. The judge replied the same day refusing to recuse himself and saying that, if Mr Crampin wished to renew the recusal application, he should do so the next day and support the application with evidence.

Accordingly, Crampin did renew the application on the Friday and in support called Mr Twigden, the partner who had been dealing with Smith. Mr Howell had not been involved in that. Some of the exchanges between the judge and counsel are set out in a transcript in the Court of Appeal judgment, which, as Sir Anthony Clarke MR commented with heavy understatement, ‘does not make entirely happy reading’. A flavour of what went on may be gleaned from the following passage:

MR CRAMPIN: Having had an unsuccessful discussion or negotiation with Addleshaws, your lordship expressed yourself in strong — intemperate, almost — anguish.

MR JUSTICE PETER SMITH: Nonsense. I don’t know what part of the country you come from, Mr Crampin, but it’s about time you grew up. If you think that’s intemperate, then you are on another planet from me. If you thought it was intemperate, then you should have seen the correspondence which didn’t trouble Mr Twigden.

MR CRAMPIN: I’m endeavouring to make a submission, not to engage with your Lordship in badinage of that kind (*Howell and Ors v Lees-Millais and Ors* 2007: 22).

The Court of Appeal gave Smith J’s judgment short shrift. Sir Anthony Clarke MR characterized the judge’s behaviour in the court below as intemperate, and the court unanimously held that the recusal application was properly made and should have been granted. The main points were summarized in the judgment of Sir Igor Judge, then President of the Queen’s Bench Division:

It is the conduct of the hearing which underlines that the judge had become too personally involved in the decision he was being asked to

make to guarantee the necessary judicial objectivity which would be required in the trustee proceedings. I identify three particular features. First, the witness who supported the application was in effect cross-examined by the judge in something of the style of an advocate instructed to oppose the application. Second, the submission by counsel for the applicant that the judge had given evidence was in the circumstances unsurprising, and the concerns he expressed on this topic were validly made. Finally, the judge impugned the good faith of the application, a conclusion repeated in the strongest terms of his judgment when there is no shred of evidence to suggest some ulterior or improper motive behind the application (*Howell and Ors v Lees-Millais and Ors* 2007: 34).

The Court of Appeal decision was delivered on 4 July 2007. On 16 July 2007 it was announced that Lord Phillips LCJ had referred Smith's conduct to the JCIO (Wikipedia 2020). There was then a very long delay until 18 April 2008 when the JCIO announced:

Following investigation under the Judicial Discipline Regulations 2006, the Lord Chancellor and the Lord Chief Justice have carefully considered the Court of Appeal's comments on the conduct of Mr Justice Peter Smith in the case of *Howell and others v Lees-Millais and others* and have concluded that the conduct in question amounted to misconduct.

As a result, the Lord Chief Justice has issued a reprimand to the judge.

The Lord Chief Justice has said: 'I consider that a firm line has now been drawn under this matter. Both I and the Lord Chancellor value the services of Mr Justice Peter Smith and he has my full confidence' (Wikipedia 2020).¹

It is strange that Lord Phillips expressed full confidence in a judge whom he had just found guilty of misconduct, a rare finding for any judge, let alone a High Court judge. A reprimand was the most severe form of discipline under the Constitutional Reform Act 2005, section 108(3), short of removal from office on an address to Parliament. It is perhaps noteworthy that Lord Phillips said that *both he and the Lord Chancellor* valued the services of the judge, but only said that the judge has '*my*' full confidence, not '*our*' full confidence. That confidence was to prove misplaced.

In the AG affair it was plain to everyone, apart from Smith himself, that he harboured negative bias against AG because of the firm's ending of the negotiations. What is interesting is what would have been the position if he had held positive bias in favour of AG. The negotiations between him and AG were held in confidence. The defendants would have known

¹ It might be noted here that JCIO statements about sanctions below removal from office are deleted after one year.

nothing about them had they not been raised by AG. What would have been the position if he and AG had reached agreement, or even more important, if the negotiations had still been continuing?

It is not clear who started the negotiations. At one point in the hearing at first instance counsel for the claimants, Mr Peter Crampin, referred to the judge's job application. This drew an angry interruption from the judge: 'I made no job application. They invited me.' (*Howell and Ors v Lees-Millais and Ors* 2007: 20) Also, in an email from the judge to AG on 31 May 2007, Smith referred to 'a proposal that emanated from you' (*Howell and Ors v Lees-Millais and Ors* 2007: 12). Yet on 26 May 2007 Smith had complained in an email that the senior management of AG had not given a fair appraisal to 'my proposal' (*Howell and Ors v Lees-Millais and Ors* 2007: 11).

The whole transaction is strange, but it seems highly unlikely that a firm of solicitors would have approached a sitting judge with a proposal to join them for a fee unless, at the least, the judge had indicated his interest in such a scheme. Moreover, in his email of 26 May 2007 Smith had said that, if AG were not going ahead with the proposal, 'would Mr Twigden let [the judge] know and he would go elsewhere' (*Howell and Ors v Lees-Millais and Ors* 2007: 11) Thus, even if the proposal had not emanated from the judge, he was certainly prepared to initiate it with another firm or firms. On the balance of probabilities, it seems likely that it was Smith who approached AG and not *vice versa*.

In November 2006 when negotiations had started Smith had been a full-time High Court judge for just over 4.5 years. He was born on 1 May 1952. He would have the option to retire, if he wished, with a full judicial pension at age 65 (1 May 2017). Under the Judicial Pensions and Retirement Act 1993 he would have had to retire at the age of 70 (1 May 2022). Thus, he had a potential further 15.5 years of judicial service ahead. It is clear that he was not planning for his arrangement with AG to commence after he reached retirement age. On 21 May, Smith had emailed Twigden as follows:

I thought I might have heard further from you as you said. I am a little concerned over the time frame. There are some decisions that I have to make by the end of June which will be affected by our discussions so I do need to progress the matter as soon as possible so I can see where we are going (*Howell and Ors v Lees-Millais and Ors* 2007: 10).

Also, as a selling point, Smith in his email of 26 May 2007 had referred to the fact that a recent judgment of his had been 'a landmark decision

on corruption' and had had 'an impact on Banking and Corporate [sic]' (*Howell and Ors v Lees-Millais and Ors* 2007: 11). This would not be much of a selling point in 15 years' time.

It would seem, therefore, that Smith was contemplating retirement from the bench. It used to be and apparently still is the rule that judges do not return to private practice after retirement. At one time it was the convention that judges did not accept any other employment after their retirement. In 1970 Fisher J, the son of the Archbishop of Canterbury, created something of a sensation when he retired after only two years on the High Court bench and took up a job with merchant bankers. He did so because he found judicial work dull. He received both criticism and support from legal journals. In a debate in the House of Lords on the Courts Bill in November 1970 Viscount Dilhorne said that it was inexcusable for any judge to resign in order to pursue a career in business: 'Having embarked on a judicial career, one is under a moral obligation to do the job and not to give it up in favour of one that appears more attractive.' (Goldman 2013: 373)

At that time there was no fixed retirement age for judges. Lord Reid and Lord Denning both continued sitting into their eighties. The Judicial Pensions and Retirement Act 1993 now requires judges to retire at 70, or in exceptional circumstances 75. High Court judges are of high intellect. Many of them are still very active at the age of 70 and have no wish to retire. Furthermore, nearly all of them will have accepted a drop in income upon their appointment and are still capable of earning a high income. It has become quite common for judges on their retirement to take up posts as arbitrators, mediators or consultants.

There was nothing wrong in Peter Smith J's considering this. It is not known what remuneration he would have received. References have been made to a figure of £750,000, possibly including money for an assistant (Rozenberg 2007; Buckley 2016); the accuracy of these sources is not clear. It is reasonable to assume that the remuneration would have been substantial and higher than a High Court judge's salary. The fact that AG, a very large firm with 178 partners and 400 fee earners, decided that it could not afford the expense indicates that the reward would have been substantial.

In those circumstances what would have happened if negotiations had been continuing or an agreement had been concluded when the Beddoe application came on for hearing? There would surely have been a conflict between Smith's duty to be impartial and his interest in not upsetting AG. This was not merely a hearing of an application which might have gone

against a client or clients of AG. It was a hearing at which a partner of AG was a party, as one of the trustees. His honesty was not in question, but his conduct was, and the defendants would be seeking costs against him personally (*Howell and Ors v Lees-Millais and Ors* 2007: 14).

The partner, Mr Howell, had apparently not been involved in the negotiations with Smith. Nevertheless, an adverse finding against him might well have an adverse effect on the negotiations.

The Court of Appeal set out the law relating to recusal in some detail. Possibly the most important part which would have applied if the negotiations had reached a successful conclusion, or were continuing, is the Guide to Judicial Conduct issued by the Judges' Council, First Supplement, June 2006, paragraph 7.2.3, which provides:

A current or recent business association with a party will usually mean that a judge should not sit on a case.

The negotiations were confidential. The defendants did not know about them. The claimants would probably have felt bound not to reveal them. In those circumstances it is submitted that the judge would have been under a duty either to recuse himself without stating the reason, or to reveal the negotiations or agreement and ask the defendants whether they had any objection to his sitting. It is not known what Peter Smith J would have done in this hypothetical situation. His conduct at the claimants' application to recuse is not encouraging.

The Solicitors and the Expert Witness

The next occasion when Smith was in the spotlight was a case where he again had refused to recuse himself (*Mengiste and Another v Endowment Fund for the Rehabilitation of Tigray and Ors* 2013). The case involved a dispute over jurisdiction concerning a contract in Ethiopia. The judgment of the Ethiopian court had gone against the claimants, but they later discovered evidence which, they alleged, proved that the judgment was wrong. They sued the defendants in the UK. The defendants argued that Ethiopia was the proper forum for the case and applied for a stay of proceedings.

The application was heard by Peter Smith J. During the hearing of the application the claimants called a *soi-disant* expert on Ethiopian law. The expert had never given expert evidence before, was completely unaware of his duties under the Civil Procedure Rules 1999, and was destroyed in cross-examination. Despite this, Smith thought that the expert was honest and stressed this in his judgment. He held that the blame rested

with the claimants' solicitors who had given the expert no training or explanation of his duties. In the Court of Appeal Arden LJ thought that Smith had expressed this view to forestall an application for a wasted costs order against the expert (*Mengiste and Another v Endowment Fund for the Rehabilitation of Tigray and Ors* 2013: 59(i)).

A wasted costs order is an order for someone other than a party to the proceedings to pay costs that have been wasted because of their negligence or incompetence. The application proceeds in two stages. The first is to decide whether there is a *prima facie* case to answer in support of the application. If there is a *prima facie* case, the second stage is to decide whether such an order should be made.

Smith found in favour of the defendants that Ethiopia was the proper forum for the case and ordered a stay of proceedings. The defendants then applied for a wasted costs order against the claimants' solicitors, Rylatt Chubb (RC), on the grounds that they were responsible for the time wasted by their reliance on the expert. During his judgment on the stay application Smith had strongly criticized RC. RC therefore asked the judge to recuse himself from hearing the wasted costs application. He refused to do so, heard the first stage of the application and gave an initial finding against RC.

RC appealed. It is very unusual for a judge who has heard an application or a trial to recuse himself from a wasted costs application. The reason is that the judge who has heard the case is in the best position to hear the wasted costs application. He has heard all the evidence and arguments. If another judge takes over the wasted costs application, he will have to familiarise himself with all of the details. The mere fact that a judge has made findings against a respondent does not disqualify the judge from hearing the wasted costs application. It is only in exceptional circumstances that recusal is appropriate. The Court of Appeal found that there were exceptional circumstances (*Mengiste and Another v Endowment Fund for the Rehabilitation of Tigray and Ors* 2013: 59).

During his judgment on the application for a stay, Smith had strongly criticized RC for failing to prepare the expert to give evidence in court and for numerous defects in the four reports he had prepared for the court. The criticism had been repeated six times. At least twice the judge had said that the fault for the expert's evidence lay entirely with the claimants' solicitors. The Court of Appeal held that criticism of the claimants' solicitors was not relevant to the issues before the judge on the stay application. He had to evaluate the evidence of the expert and either

accept or reject it. If the solicitors were at fault for defects in that evidence, that was a matter for costs, not for deciding whether to grant a stay or not.

The Court of Appeal further held that the criticisms were expressed in absolute terms. Arden LJ, giving the judgment of the court, said:

The judge's failure to leave the door open for the possibility of some explanation when he had not heard evidence or explanation from the [claimants'] solicitors gives rise to an impression of bias because it suggests that no explanation will be considered. The impression of bias is further confirmed by the making of findings of this nature when it can be foreseen that an application for a costs order, with serious consequences for the solicitors, may result (*Mengiste and Another v Endowment Fund for the Rehabilitation of Tigray and Ors* 2013: 59).

Arden LJ emphasized that the argument for recusal was fortified by the judge's repetitions of his criticisms. She held that the judge should certainly have recused himself (*Mengiste and Another v Endowment Fund for the Rehabilitation and Ors* 2013: 62). The stage 1 wasted costs order was set aside, although it was left open to the defendants' solicitors to renew the application before another judge.

British Airways and the Lost Luggage

The next affair involving Smith was another recusal application. In 2008 a party called Emerald Supplies Ltd and many other claimants brought proceedings against British Airways (BA). The proceedings were very complicated and were linked with at least one other action. The proceedings involved competition law, and there were allegations against BA in relation to the carriage of cargo. Peter Smith J came into the action in March 2014 and was appointed the nominated judge in November 2014. Thereafter he apparently dealt with numerous interlocutory applications (*Emerald Supplies Ltd and Ors v BA* 2015: 1-5).

On 30 April 2015 Smith booked a return flight to Florence on BA for himself and his wife. On 6 July they went to Florence and on 10 July they returned. For some reason not explained to the passengers none of the passengers' baggage was loaded on the return flight. Smith was understandably very annoyed at this and entered into email correspondence with BA. He signed his emails in his judicial capacity.

In his judgment on the recusal application, Smith accepted that in the absence of a satisfactory explanation BA's conduct in relation to his baggage might be something which was 'strikingly similar' to some of the

allegations in the case before him (*Emerald Supplies Ltd and Ors v BA* 2015: 12).

In those circumstances it is hardly surprising that on 22 July 2015 BA made an application for the judge to recuse himself. What is surprising was the judge's reaction to hearing the application. He viewed it as an opportunity to pursue his complaint about his delayed luggage. The argument on the application is not law-reported, but a full transcript has appeared online (Transcript 2015) and was referred to in *The Independent* (Green 2015). The following exchange, which took place very early on in the application, gives the flavour of the judge's attitude: Jon Turner QC was lead counsel for the applicants, BA.

MR JUSTICE PETER SMITH: Right, Mr Turner, here is a question for you. What happened to [the] luggage?

MR TURNER: My Lord, the position remains that set out in the letter from Slaughter and May of 15 July, that we are not dealing with that as parties in these proceedings.

MR JUSTICE PETER SMITH: I am asking you: what has happened to the luggage?

MR TURNER: My Lord, so far as the parties to these proceedings, including Slaughter and May as the representative of British Airways for these proceedings, are concerned, we have said, and we maintain, that we are not getting involved because we trust that that will be dealt with expeditiously, in the ordinary course of events.

MR JUSTICE PETER SMITH: In that case, do you want me to order your chief executive to appear before me today?

MR TURNER: I do not wish your Lordship to do that; and I would say, if your Lordship will permit me to develop my submissions, that that would be an inappropriate mixture of a personal dispute --

MR JUSTICE PETER SMITH: What is inappropriate is the continued failure of your clients to explain a simple question, namely, what happened to the luggage? It has been two weeks since that happened now.

Exactly what power the judge would have had to order the chief executive of BA to attend court is not clear. Smith persisted in demanding an explanation for what had happened to the luggage. He appeared to think that, if a satisfactory explanation had been forthcoming, it would have been perfectly proper for his continuing as the judge in the case.

His behaviour was quite extraordinary. *The Independent* reported the reaction of a journalist who was present:

Will Gant, a reporter for the specialist legal magazine PaRR, witnessed the judge’s outburst. ‘I’ve been a court journalist for several years, and must have seen thousands of hearings, but frankly I was absolutely blown away by the unprofessional attitude that Mr Justice Peter Smith displayed at this one,’ he told *The Independent*.

‘The room was packed with dozens of lawyers, and two or three reporters from specialist legal publications, and as this unfolded, we all silently exchanged looks of complete amazement. I’ve never seen a judge allow their personal life to affect their work like this, and it was sad to watch. It was an embarrassment to British justice’ (Green 2015).

Smith’s reaction seemed in part almost paranoid. He thought that BA had been waiting for an excuse to get rid of him (*Emerald Supplies Ltd and Ors v BA* 2015: 32). In his judgment he said:

I would remind the parties that even before the case was allocated to me, Mr Turner expressed a view in open court spontaneously that his clients did not think I was capable of dealing with the CMC in this case because it represented difficult issues of competition law, of which it was alleged I had no experience.

The judge then resorted to sarcasm:

BA’s major difficulty was that I had been an allocated judge for four years in the Competition Appeals Tribunal ...

So, it was wrong to say that the judge had no experience of competition law? He continued:

... although I had not actually sat on any cases.

Not so wrong then.

During the course of the legal argument Smith took the opportunity to justify his conduct in the Addleshaw Goddard case and to criticize the Court of Appeal’s decision.

In the event, Smith did recuse himself for once. He used his lengthy judgment to repeat his criticisms of BA and did not accept any of BA’s arguments about apparent bias. His reasoning for recusing himself is not easy to follow. He referred to an intimation by BA’s solicitors that, if he did not recuse himself, they would make an urgent appeal to the Court of Appeal. He commented: ‘This litigation is complex enough, without those distractions.’

He then went on:

It would not be appropriate for a recusal application to be acceded to as a result of an exchange of private correspondence.

This would lead to a waste of a lot of judicial resource time in addition to the parties [sic] it will also slow progress of the case which I have been attempting to progress. I am afraid BA are not in my view really interested in progressing the matter expeditiously for obvious reasons.

I however cannot allow my presence in the case and its difficulties to distract the parties from this case. And therefore, regretfully, I feel that I have no choice, whatever my feelings about it, but to recuse myself from the case, and that is what my decision is; not for the reasons put forward by BA, but for the reasons that I have said (*Emerald Supplies Ltd and Ors v BA* 2015: 39-41).

It appears therefore that Smith recused himself not because of his correspondence with the defendants or any actual or apparent bias, but because his presence was a distraction to the case.

The Letter (not of the Law)

By now it was fairly apparent that Smith J was unfit to hold judicial office. Legal journalist, Joshua Rozenberg, had called for his resignation as far back as 2007 (Rozenberg 2007). Lord Pannick, a very eminent member of the bar and a regular columnist for *The Times*, took up the cudgels in his column of 3 September 2015. The article was headed ‘A Case about Luggage that Carries a Great Deal of Judicial Baggage’ (Pannick 2015). Lord Pannick referred to the BA case and said that ‘it raises serious issues about judicial conduct that need urgent consideration by the Lord Chief Justice’.

He picked out three troubling features.

First, the transcript repeatedly confirms what the judge refused to acknowledge: that his personal irritation (perhaps justified) was affecting his judicial responsibilities and made it impossible for him fairly to hear the BA proceedings ...

Second, there is the inexcusably bullying manner and threats: ‘What has happened to the luggage? ... I will rise until 12.45 and you can find out ... Do I have to order you to do it, then? ... I shouldn’t make any preparations for lunch because you are going to be sitting through.’

Third, there are the judge’s arrogant comments concerning the decision of the Court of Appeal in 2007 to remove him from an earlier case in which he had been unable to recognise that his personal interests made it inappropriate for him to sit in judgment. Mr Turner, QC, referred to the case for the legal principles. Mr Justice Peter Smith responded that he had ‘no regret’ about his decision, but ‘plenty of regrets about the way in which the Court of Appeal went about their decision’, but he was ‘no longer surprised by what happens in the Court of Appeal ...’.

Lord Pannick concluded:

Litigants are entitled to a better service than this. The reputation of our legal system is damaged by such behaviour. The Lord Chief Justice should consider whether action to address Mr Justice Peter Smith’s injudicious conduct has, like his luggage, been delayed for too long. (*Harb v Prince Abdul Aziz* 2016: 52)

Unsurprisingly, Smith took great exception to this article. He contacted Mr Anthony Peto QC by phone. Peto was joint head of Blackstone Chambers, of which Lord Pannick was a member. This was apparently in about mid-November 2015. On 1 December the judge wrote an extraordinary letter to Peto. He said the ‘quite outrageous’ article had caused him great difficulties in challenging it. (What else he had done to challenge it since the article had been published three months earlier is not known.) He said that Pannick’s article was worthless because Pannick had never appeared before him. (Thus, when a judge’s behaviour is reported in a law report no barrister’s opinion of the judge has any value unless he or she has personally appeared before that judge.) He said that the article had been extremely damaging to Blackstone Chambers within the Chancery Division. (Why the article should have caused damage to Blackstone Chambers or even Lord Pannick is not explained.) Smith stated that he had strongly supported the chambers, especially in applications to take silk, and concluded as follows:

I will no longer support your Chambers please make that clear to members of your Chambers. I do not wish to be associated with Chambers that have people like Pannick in it (*Harb v Prince Abdul Aziz* 2016: 53).

It is now necessary to refer to the case of *Harb v Prince Abdul Aziz* (2016). The case was heard over several days before Smith J in July 2015 and centred in essence on whether an oral contract had been made between the claimant and the defendant, and if so, whether the defendant had been acting in a personal capacity or as an agent. The case turned on the credibility of the parties and their witnesses. At the trial the defendant had been represented by two barristers from Blackstone Chambers. The judge found against the defendant on every issue.

The defendant appealed to the Court of Appeal. There were five grounds of appeal. In essence the Court of Appeal held that the judge had failed to analyse the issues properly or to explain his findings on disputed evidence adequately. The defendant prince had filed witness statements but had not attended to be cross-examined. This clearly affected the weight of his evidence. Nevertheless, there were serious shortcomings in the evidence of the claimant and her main witness. The judge took a shortcut, basically

saying that wherever there was a conflict between the evidence for the claimant and the evidence for the defendant, he preferred the evidence of the claimant. He should have dealt with the criticisms of her evidence in each instance and explained why he preferred it. The result may have been the same, but a litigant is entitled to know why his or her criticisms have been rejected. Lord Dyson MR, delivering the judgment of the court, said:

Our system of civil justice has developed a tradition of delivering judgments that describe the evidence and explain the findings in much greater detail than is to be found in the judgments of most civil law jurisdictions. This requires that a judgment demonstrates that the essential issues that have been raised by the parties have been addressed by the court and how they have been resolved. In a case (such as this) which largely turns on oral evidence and where the credibility of the evidence of a main witness is challenged on a number of grounds, it is necessary for the court to address at least the principal grounds. A failure to do so is likely to undermine the fairness of the trial. The party who has raised the grounds of challenge can have no confidence that the court has considered them at all; and he will have no idea why, despite his grounds of challenge, the evidence has been accepted. That is unfair and is not an acceptable way of deciding cases (*Harb v Prince Abdul Aziz* 2016: 39).

The Court of Appeal upheld the appeal on the first four grounds. The fifth ground was that there was an appearance of bias by the judge against the defendant's barristers, since they were from Blackstone Chambers, and consequently against the defendant himself. There had not been an application for the judge to recuse himself because he had not sent his letter about Blackstone Chambers until after the evidence and concluding submissions had finished.

The Court of Appeal said that its findings on the first four grounds made it unnecessary for them to determine the fifth ground. However, in view of the importance of the allegation, they thought it right to express their conclusions on it (*Harb v Prince Abdul Aziz* 2016: 49). They then proceeded to make possibly the most scathing criticisms of a High Court judge that had ever been made by the Court of Appeal, criticisms that were all the more trenchant in that the court had said expressly they were unnecessary to decide the appeal. Moreover, the criticisms were made despite the fact that the court rejected the ground that the judge was or appeared to be biased.

It was held, *inter alia*, that, although a litigant might perceive the judge to be biased against an advocate, it did not follow that he would be biased against a party, and although the judgment was delivered after

publication of the article, there was nothing to show that the judge had materially altered his judgment in reaction to the article.

Lord Dyson MR referred in detail to the BA recusal application and to Lord Pannick's article. Then he said:

In his letter to the claimant's solicitors dated 12th February 2016, the judge accepted that he should not have written the Letter. It is difficult to believe that any judge, still less a High Court Judge, could have done so. It was a shocking and, we regret to say, disgraceful letter to write. It shows a deeply worrying and fundamental lack of understanding of the proper role of a judge. What makes it worse is that it comes on the heels of the BAA baggage affair. In our view, the comments of Lord Pannick, far from being 'outrageous' as the judge said in the Letter, were justified. We greatly regret having to criticise a judge in these strong terms, but our duty requires us to do so. But it does not follow from the fact that he acted in this deplorable way that the allegation of apparent bias must succeed (*Harb v Prince Abdul Aziz* 2016: 68).

Discipline (lack of) and retirement

The only way to remove a High Court judge is by an address to the Queen by both Houses of Parliament. This has never been done. It is hard, however, to see how Peter Smith J could have continued sitting after the remarks of the Court of Appeal both in regard to the instant appeal and in justifying the remarks of Lord Pannick in his article. In fact, Smith's conduct in the BA case had been referred to the JCIO in July 2015 (Rozenberg 2017a). Apparently in May 2016 Smith had agreed to refrain from sitting (Rozenberg 2017b), and he never sat as a judge again. Indeed, it appears that even before that the listing office had been very careful about which cases were listed before him (Buckley 2016).

Lord Pannick in his article touched upon Smith's reputation:

On hearing about this latest episode, no one at the bar or on the bench would have said, 'What, Mr Justice Peter Smith? Surely not?' (*Harb v Prince Abdul Aziz* 2016: 52).

Nevertheless, in his letter to Peto, Smith had said:

I have letters of support from no less than 24 Silks, 4 High Court Judges and 1 Court of Appeal Judge all of whom appeared in front of me and do not share his views of my abilities and the way I perform in Court. Some of the letters have been extremely critical of Pannick's article. Others have commented adversely in terms I would not wish to print (*Harb v Prince Abdul Aziz* 2016: 53).

It is hard to believe that the judge would have made up such precise figures, yet it is also hard to believe that so many members of the bench and bar would have expressed such support and commented so adversely on an article which the Court of Appeal held to have been justified. On 5 August 2016 a Mr Michael Richards wrote to the JCIO requesting copies of all letters received by Mr Justice Peter Smith in the period from 3 September 2015 to 1 December 2015 which mention Lord Pannick, Lord Pannick's article or Blackstone Chambers. The request was refused under the Freedom of Information Act 2000 (Richards 2016).

With such serious allegations against a High Court Judge one would have expected the JCIO to carry out its investigation with dispatch. All the necessary evidence was readily available in the Court of Appeal decision and the transcript of the recusal application. If need be, presumably the tape-recording from which the transcript was prepared could also have been accessed. Yet the investigation dragged on and on. No reason was given for this. In an article in *The Times* on 2 August 2016, the paper's legal correspondent, Frances Gibb, said that Smith had been signed off sick and was mentally unfit to defend himself in a disciplinary hearing. The JCIO would neither deny nor confirm this. At that time a separate investigation into the *Harb* appeal had begun.

Eventually a hearing was fixed for March 2017, nearly two years after the investigation had begun. That date was then postponed for over six months until Monday 30 October 2017, over two years since the investigation had begun. No reason was given for this and the JCIO declined to give any details of what stage the investigation had reached. Joshua Rozenberg speculated that a deal had been reached between Smith and the JCIO. Smith would retire with a full pension when he reached the age of 65 on 1 May 2017 and the investigation would automatically come to an end (Rozenberg 2017a). May 1 came and went. Smith did not retire; he carried on drawing his full judicial salary. Then on Friday 28 October 2017, two days before the disciplinary hearing, Smith finally retired (Croft 2017).

If he had been mentally unfit to defend himself previously, it would have been of some importance to know when he had first suffered from mental illness and whether this could have affected any of his decisions. It would be reassuring to know that all instances of misconduct by Smith had been rectified. Unfortunately, not every litigant who suffers judicial misconduct has the money or the will to take their case to the Court of Appeal. Whatever the truth about Smith's mental state, it appears that he has recovered. At the time of writing this, Smith has returned to the bar and

become a member of Goldsmith Chambers in London and Fountain Chambers in Middlesborough.

On Fountain Chambers’ website he is listed as one of the barristers, Sir Peter Smith QC. It is normal to stop using the title QC after appointment to the High Court bench. On the Goldsmith Chambers’ website he is named simply as Sir Peter Smith and is listed with others as a Chambers Associate. The meaning of this is not explained. His CV on both websites is the same. It says that he sat exclusively in London until he retired in October 2017. In fact he did not sit in London or anywhere else after mid-2016. The CV also lists ‘Cases Decided on the Bench’, the last one of which is *Emerald Supplies v BA*. As has been seen above, he did not decide this case. The only decision he made was to reject an application to recuse himself, which was overruled by the Court of Appeal.

On both websites it is stated that ‘Peter has a reputation of being robust but fair’. Considering that he was twice overruled for refusing to recuse himself for bias, actual and apparent; that he received a judicial reprimand; that his behaviour has variously been categorized as intemperate, bullying, threatening, arrogant and that, in the *Harb* case, his judgment was expressly held to be unfair, it is not easy to see where his reputation for fairness comes from.

In the application to Smith in *Emerald Supplies* to recuse himself, counsel for BA objected at one point to the fact that Smith had signed a personal letter to BA making reference to his title as a judge. Smith replied as follows:

If I put Sir Peter Smith, I always get letters ‘Dear Sir Smith’ which doesn’t actually give confidence in the other party (Transcript).

Clients wishing to employ Sir Peter at Goldsmith Chambers might not get confidence from the fact that on the website the box they are invited to fill in is headed ‘Interested in instructing Sir Smith?’

[C] JUDGES AND PORNOGRAPHY

Judges at a lower level than the High Court do not have the same security of tenure. They can be dismissed by the Lord Chancellor and Lord Chief Justice jointly. On 17 March 2015 the JCIO issued a statement that three judges had been dismissed and a fourth had retired, but would have been dismissed had he not retired. The dismissals made headlines all over the world. It was unprecedented for three judges to be dismissed on the same day. The judges were District Judge Timothy Bowles, Immigration Judge

Warren Grant and Deputy District Judge and Recorder Peter Bullock. The fourth judge was Recorder Andrew Maw. The reason for the dismissals was that the judges had been watching pornography on their court computers. It was not explained how this had been discovered. It was plainly imprudent for the judges to have used their court computers, which can be monitored, for this purpose. It would be interesting to know whether their browsing had been discovered by monitoring or whether the judges had been so silly as to have been seen by court staff while watching pornography or whatever.

The JCIO said in a statement that Lord Thomas, the Lord Chief Justice, and Chris Grayling, the Lord Chancellor, had investigated allegations against the judges. They concluded that it was an ‘inexcusable’ use of court equipment and condemned the judges’ conduct as ‘wholly unacceptable’. Most people would probably agree that the judges’ behaviour was inappropriate and improper, but it is not so clear why it was inexcusable and unacceptable.

The statement raises more questions than it answers. It was stated that the pornography watched by the judges was not illegal. When did the judges watch the pornography – during a hearing, during court hours, outside court hours? Was it the use of court equipment that was so heinous? Would it have been alright if they had watched the pornography on their own laptops? Would they have faced the same result if they had been reading pornographic magazines? Would it have been acceptable if they had used court computers to do their shopping, book their holidays or just surf the internet? How often and for how long had they watched? Did it affect their ability to hear cases impartially and attentively?

Take the hypothetical case of a judge who has been sitting for 20 years, whose decisions have never been successfully appealed and who has a high reputation for fairness, courtesy and efficiency. Suppose it were found that on one occasion he had watched legal pornography on a court computer for ten minutes. Would that justify his dismissal? Something is known about the extent of use by two of the judges, but not from the JCIO. The Solicitors Regulation Authority took disciplinary proceedings against Mr Bullock and Mr Maw. In mitigation, Bullock said that the material had only been accessed in his private chambers, did not impinge on his judicial work and that he had only accessed the material on two occasions for a limited time (Taylor 2016). Mr Grant’s access to the material was on a different scale. He appealed his dismissal to the Employment Appeals Tribunal. At the hearing counsel for the Ministry of Justice said: ‘This wasn’t a case of watching pornography one or two

times, or even ten or 20 times, but was persistent – several times a day – over 14 months or so.’ (Reilly 2016)

Grant, the father of five children, said that he had been suffering severe and undiagnosed depression (BBC News 2015) resulting from marital problems and that his work had not been affected (Reilly 2016). The Ministry of Justice said that his misuse of the computer broke strict judicial guidelines (Connelly 2016; Reilly 2016). The guidelines would appear to be the Guide to Judicial Conduct, of which the 2013 edition applied at that time. Paragraph 5 provided that:

- (1) A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.
- (2) As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

Grant’s claim was dismissed (Connelly 2016).

There is little detail about whether the cases that the judges tried involved pornography. Two of the judges are known to have overseen cases in which the charges related to pornography or sex-offending. One of the four judges jailed a teacher for downloading child pornography and another sentenced a Peeping Tom for using a mobile phone to film women in swimming-pool changing rooms (Doughty & Ors 2015). It does not appear that the judges’ predilection for legal pornography affected their sentencing of illegal pornography.

Although the cases were unprecedented in England, they were not unprecedented in the common law world. In or about 2002 it was found that Robert Fisher, a High Court judge in New Zealand, had been watching pornography on a court computer. An investigation was carried out under the aegis of the Attorney-General, Margaret Wilson, to see whether he had done anything illegal. On 19 February 2002 Ms Wilson confirmed that Justice Fisher had done nothing unlawful in watching any of the internet sex sites. As in England, the only way a High Court judge in New Zealand could be removed was by a motion in Parliament; there were no grounds for that. It was handed back to the Chief Justice, Dame Sian Elias, for the judiciary to decide what to do. Dame Sian said that she did not believe Justice Fisher should resign and that his internet use was a ‘lapse’ in a distinguished career. Justice Fisher had looked at ‘adult movies’ on Department for Courts computers for about 90 minutes over two weeks 15 months previously. He had apologized and promised not to

do it again (Small 2002). It does not appear that any other form of discipline was considered.

There was considerable pressure on Fisher to resign.

The Prime Minister, Helen Clark, said it was a matter of public interest that people in judicial office be seen to uphold the highest standards. 'That is not to say that people have to be saints, but there are areas where people should not lightly tread if they wish to retain the highest public esteem and regard' (Small 2002).

The author has been unable to discover whether Fisher did in fact resign at that time. Since 2004 he has been in full-time practice as an arbitrator, mediator and South Pacific judge (New Zealand Dispute Resolution Centre).

In addition to Justice Fisher, in 2002 investigations into five New Zealand District Court judges who had also accessed internet sex sites cleared them of any wrongdoing. They had given their explanations to the Chief District Judge. In four of the cases, the access was work related. In the other case, the access was of extremely short duration and was accidental (Small 2002). Thus, there were apparently no grounds for disciplining them.

[D] JUDICIAL LANGUAGE²

Sometimes in the criminal courts a defendant swears at a judge. It is much more unusual for a judge to swear at a defendant. That is what happened in Chelmsford Crown Court in August 2016 when HH Judge Patricia Lynch sentenced John Hennigan, a man with a long criminal record, for breach of an ASBO (antisocial behaviour order). During the sentencing Hennigan interrupted her, saying: 'It's obvious, isn't it? Because you're a cunt and I'm not.' The judge then responded: 'Well, you're a bit of a cunt yourself. Being offensive to me doesn't make things better at all.' When Lynch confirmed the defendant's sentence, Hennigan, 50, said: 'Go fuck yourself'. Lynch retorted: 'You too. Take him down.' (Bowcott 2017)

The Guardian reported as follows on the aftermath:

After the hearing on 11 August, the Judicial Conduct Investigations Office (JCIO) received about 10 complaints about the judge's behaviour and her use of the word 'cunt'. Lynch told the investigators

² Readers of this section of the article are warned that reference is made to strong language used by a judge and that this may offend some readers. It has been quoted as in the original, nevertheless, in the interests of accuracy.

that she deeply regretted the incident and that her remarks were a momentary lapse of judgment that should have never happened. She apologised ‘unreservedly’ for her remarks, according to a JCIO statement sent to one of the complainants, Robert Hackett.

A report on the incident was referred to the Lord Chief Justice, Lord Thomas ... and the Lord Chancellor, ... Liz Truss. The JCIO statement said: ‘Although the Lord Chancellor and the Lord Chief Justice considered HHJ Lynch’s remarks to be inappropriate, they did not find that they amounted to misconduct or warranted any disciplinary sanction. [They] were of the view that the matter should be dealt with by informal advice.’

Lynch had now been advised to ‘ensure that she responded appropriately to parties in court at all times’.

Responding to the JCIO statement, one of the complainants, Robert Hackett, said: ‘I do feel this has taken an extraordinary amount of time and that the judge has been let off very lightly. Her behaviour was inexcusable’ (Bowcott 2017).

Mr Hackett’s complaint had presumably been made shortly after the incident on 11 August 2016; the JC10 statement was made on or about 9 January 2017.

Judge Lynch fared better than HH Judge Jinder Singh Boora. In January 2020 the Lord Chancellor and the Lord Chief Justice issued him with a formal warning for using inappropriate language. The JCIO statement does not specify what the inappropriate language was. It is unlikely to have been threatening or abusive; that might have exposed him to criminal charges. It may well have been swearing. The significant difference from Judge Lynch’s behaviour is that Judge Boora used the language ‘at an event attended in a private capacity’. It seems that the JCIO takes a more serious view of bad language in private than on the bench. The statement said that the Lord Chancellor and Lord Chief Justice concluded that Judge Boora’s conduct had the potential to undermine the reputation of the judiciary. From the complaints made about Judge Lynch’s conduct it appears that she had in fact undermined the reputation of the judiciary.

[E] JUDGES AND RAPE

Over the last 30 or 40 years there have been great changes in the attitudes of the courts towards rape. Until *R v R* (1992) the law was that a husband could not be guilty of raping his wife while the marriage subsisted. It is also well settled law that even if sexual intercourse begins consensually the man must withdraw once the woman withdraws her consent, or he

will be guilty of rape. However, it appears that some of the changes have not reached all of the judges. In August 2019 HH Judge Tolson, a family judge, heard a case in which a husband was seeking contact with his child. The wife resisted on the grounds, *inter alia*, that the husband had been violent towards her and had raped her while the child was present in the home. The judge found against the wife on this issue, holding that she had done nothing physically to resist the intercourse.

The wife appealed successfully to the High Court. The judge, Alison Russell J, stated that Tolson's judgment was so flawed as to require a retrial; his decision was unjust because of serious procedural irregularity and multiple errors of law (*JH v MF* 2020: 58). She gave a very detailed and critical judgment, in which she said:

This is a senior judge, a Designated Family Judge, a leadership judge in the Family Court, expressing a view that, in his judgment, it is not only permissible but also acceptable for penetration to continue after the complainant has said no (by asking the perpetrator to stop) but also that a complainant must and should physically resist penetration, in order to establish a lack of consent. This would place the responsibility for establishing consent or lack thereof firmly and solely with the complainant or potential victim the judge should have been fully aware that the issue of consent is one which has developed jurisprudentially, particularly within the criminal jurisdiction, over the past 15 years (*JH v MF* 2020: 37).

The judge in the instant case should have considered the likelihood that the Appellant had submitted to sexual intercourse [as opposed to consenting to it]; he singularly and comprehensively failed to do so instead employing obsolescent concepts concerning the issue of consent (*JH v MF* 2020: 54).

Russell J went on to recommend further training for family judges.³

An interesting rape case in which the female judge, HH Judge Lindsey Kushner, made comments during sentencing that proved controversial was the trial of Rodrigues Gomes in March 2017. Gomes was convicted and sentenced to six years' imprisonment. In order to ensure that the judge's remarks are seen in context it is necessary to set them out *in extenso*:

Kushner J told Manchester Crown Court that women should be free to do whatever they wanted without the risk of being attacked. But, she said, they should still be aware that some people are likely to see them as easier targets when they are drunk.

³ Russell J was herself no stranger to criticism. She had been criticised by the Court of Appeal in *LL v Lord Chancellor* (2017) in which she had sent a man to prison for breach of an order which she had never made. Longmore LJ categorized some of her errors collectively as gross and obvious irregularity.

‘We judges who see one sexual offence trial after another, have often been criticised for suggesting and putting more emphasis on what girls should and shouldn’t do than on the act and the blame to be apportioned to rapists,’ she said, while sentencing a man to six years for raping a girl who was drunk.

‘There is absolutely no excuse and a woman can do with her body what she wants and a man will have to adjust his behaviour accordingly. But, as a woman judge, I think it would be remiss of me if I didn’t mention one or two things.

‘I don’t think it’s wrong for a judge to beg women to take actions to protect themselves. That must not put responsibility on them rather than the perpetrator. How I see it is burglars are out there and nobody says burglars are OK but we do say: ‘Please don’t leave your back door open at night, take steps to protect yourselves’.

‘It should not be like that but it does happen and we see it time and time again.’

She added: ‘They are entitled to do what they like but please be aware there are men out there who gravitate towards a woman who might be more vulnerable than others. That’s my final line, in my final criminal trial, and my final sentence’ (Rawlinson 2017).

It was indeed the judge’s last case before she retired. The remarks she made might seem innocuous to many observers. She said expressly that she was not putting responsibility on the victims rather than the rapists. She was offering the sensible advice that if you have too much to drink you are rendering yourself vulnerable: take care. Within hours, however, the judge came in for heavy criticism.

The campaign group End Violence Against Women condemned the comments. ‘When judges basically blame victims for rape – by suggesting how much alcohol a woman drinks or what she wears is part of what causes rape – we remove the responsibility from the man who did it. That is really alarming’ (Rawlinson 2017).

The judge did not say that the amount of alcohol consumed or the way she dressed was in any way part of the cause of the rape. Notwithstanding that, Northumbria Police and Crime Commissioner, Dame Vera Baird, and Alison Saunders, Director of Public Prosecutions, also characterized Judge Kushner’s comments as victim-blaming. It was further alleged that her comments would make victims think they would not be believed and would deter them from reporting the rape (Rawlinson 2017).

In the circumstances she received support from an unexpected quarter. The victim in the trial, Megan Clark, waived her right to anonymity and appeared on television in the BBC’s Victoria Derbyshire show. She said:

I think [*the judge*] was absolutely right in what she said, but it was taken out of context. She put the blame massively on rapists, not victims. She just simply said to be careful basically, which is smart advice. I know it wasn't my fault. It's never the victim's fault; they aren't the problem, regardless of what I was doing. I felt I put myself in that situation. I need to be more careful (Harrison & Hatchard 2017).

This suggests that it is a very precarious tightrope that judges may have to walk in the days of #Me Too. In a perhaps highly unusual sequel the judge and the victim later became friends (Epstein 2017).

[F] CONCLUSION

The standard and reputation of English judges is still high. There will always be occasional bad appointments and bad decisions. This article deals with a smattering of such situations. A brief surf of the internet reveals others both in the UK and in other common law jurisdictions. Sometimes judicial misconduct can be put right on appeal, but that is an expensive and uncertain remedy. The whole purpose of the JCIO is to deal with complaints of misconduct. It is an independent statutory body which supports the Lord Chancellor and Lord Chief Justice in their joint responsibility for judicial discipline. Its activities in relation to the cases considered in this article give rise to some concern, in particular about its efficiency, fairness and consistency.

It seems to take an unconscionably long time to reach its decisions. One of the complainants about Judge Lynch's language said that it had taken an extraordinary amount of time to reach a decision. It had taken about five months, which is quite quick for the JCIO. Why it should have taken five months to decide when there was no dispute about the language used and the judge had apologized is not explained. It took the JCIO nine months to rule on the complaint about Smith J on the Addleshaw Goddard matter. As to the complaint about his conduct in the BA case, the JCIO still had not heard the complaint when he retired some two years and three months after the complaint had been made. Of course, the JCIO has many complaints to consider; many of these are about judicial decisions not judicial conduct and therefore outside the remit of the JCIO. From the statements on the JCIO website it is clear that the majority of complaints which are upheld are about justices of the peace, and many of these relate simply to the JP failing to sit for the required number of days. Nevertheless, in the absence of any explanation, the record for expedition is not impressive.

It is interesting to compare the treatment of Peter Smith J with the treatment of the judges dismissed for watching pornography, although the allegations of misconduct are vastly different.

Smith was allowed to continue drawing his full judicial salary from summer 2016, when he agreed to cease sitting, until the end of October 2017, when he retired. Judicial salaries at that time for puisne High Court judges were £179,768 (Ministry of Justice). Thus, he received somewhere in the region of £220,000 from public funds for doing nothing. He then retired on a full judicial pension.

He was guilty of incompetence. Although his judgment in the Da Vinci case was upheld, it was so badly drafted that much of the time on the appeal was spent in deciding what he meant. In the *Harb* case his shortcuts in deciding credibility meant that the whole case had to be reheard. Normally the Court of Appeal will not interfere with a judge's findings of fact, unless there was no evidence on which to base the findings. The justices would say that the judge had the advantage of seeing the witnesses. The appeal will turn on the law, and the Court of Appeal will either uphold or overrule the judge's decision. It is highly unusual to order the case to be reheard by a different judge.

The costs incurred by Smith's incompetence, the various applications to recuse and the various appeals must run into at least tens of thousands of pounds, and very probably hundreds of thousands.

The criticisms of him made by the Court of Appeal and Lord Pannick's article, endorsed by the Court of Appeal, show him to have been biased, unreasonable, bullying and arrogant. His behaviour was said to have damaged the reputation of the legal system. After sitting as a judge for over a dozen years he had a fundamental lack of understanding of the proper role of a judge.

Now compare the pornography judges. They were not incompetent, biased, unreasonable, bullying or arrogant. Did their behaviour damage the reputation of the legal system? Certainly not before the announcement by the JCIO. Their misbehaviour consisted of legal activity conducted in private. Did their misbehaviour call for discipline? The Chief Justice of New Zealand thought there was no need for discipline in the case of Justice Fisher, a High Court Judge. He had looked at 'adult movies' on court computers for about 90 minutes over two weeks. District Judge Bullock's misuse of his computer was very similar. He had accessed the material on two occasions for a limited time.

Assuming that the misbehaviour did call for discipline, what were the options open to the JCIO? The remedies open to the Lord Chancellor and Lord Chief Justice under the Constitutional Reform Act 2005, section 108(3), are, in order of severity, formal advice, formal warning, reprimand and removal from office. Surely a reprimand would have been sufficient. As to the effect on the reputation of the legal system, a lot would depend on the manner in which the JCIO statement was phrased. Their statements are usually very vague. In the case of Judge Boora, it was merely stated that he had used inappropriate language in a private capacity. Since Judge Lynch had not been disciplined for using one of the worst swear words in the English language and adopting another in open court, the mind boggles at what inappropriate language Judge Boora used in private. In the same vein the JCIO could have issued a statement that the judges had been reprimanded for inappropriate use of court computers. That would hardly have damaged the reputation of the legal system.

It may be objected that that would have been too vague, but the JCIO has not exactly been sedulous in giving information in its public statements. In the case of the reprimand to Peter Smith J no direct information was given at all. The statement merely upheld the criticisms of the Court of Appeal without specifying them, and referring to the AG case, but not giving any citation for it. A layman, or even a lawyer unfamiliar with the case, would have had no idea from the JCIO statement what constituted Smith's misconduct. If they had wanted to know, they would have had to access the law report to find out that Smith had descended into the arena and cross-examined a witness as if he, the judge, were counsel acting for the other side; had given unsworn evidence from the bench in an application that he had to decide; and had made totally baseless allegations of bad faith in the making of the application.

The fact that the JCIO made the statement about the judges on the same day is strange. The judges were from four different courts, at different levels and with different jurisdictions. It seems a highly unlikely coincidence that complaints about them had all been made at the same time, or that the JCIO had dealt with all of them with equal expedition. The announcement of all four simultaneously seems designed to achieve maximum publicity and, more worryingly, to cause maximum embarrassment and humiliation to the judges.

Moreover, it is strange that the statement said that District Judge Maw would have been removed from office had he not retired. He had retired in September 2014, some six months before the statement was issued

(Courts and Tribunals Judiciary 2014). It is not clear what stage the disciplinary proceedings had reached before he retired. A spokesman for the Lord Chancellor and Lord Chief Justice said that he had resigned before the conclusion of the disciplinary process (Barrett 2015). That means that the disciplinary process continued after he had resigned. One wonders on what basis this was done and why it could not have been done for Smith J. He too resigned before the conclusion of the disciplinary process, yet in his case the JCIO said that in accordance with its rules, all conduct investigations automatically cease when a judge retires. It is not the only time the JCIO has criticized a judge after he has retired (See JCIO statement re Andrew Campbell 2016). It seems rather like kicking a man when he is down.

The lack of transparency in the JCIO's decision about the four judges drew widespread criticism from MPs and the press, to no avail. The contrast between the treatment of the four judges and Smith J is stark. Two of the judges who were full time were deprived of their livelihood, apart from being publicly embarrassed and humiliated. It is not clear what effect the dismissal would have had on their pensions. It must have at least reduced their entitlement. Smith suffered no loss for a catalogue of misconduct. A blogger pointed out that judges who had fallen asleep during cases had not been dismissed (Barrister Blogger 2015).

In the absence of any explanation from the JCIO for the delay in hearing the complaint against Smith, one can only speculate. Joshua Rozenberg speculated that the JCIO had done a deal with Smith so that, provided he ceased sitting, it would delay a hearing until after the date he could retire with a full pension (Rozenberg 2017a). This speculation has a lot of force. If Smith was mentally unfit to defend himself, he was mentally unfit to sit and should have resigned. A better deal would have been that he should either resign or the hearing would continue.

It may be that there was good justification for the decisions and delays of the JCIO, but the lack of transparency means that a question mark hangs over its ability and fitness for purpose to deal with cases expeditiously, fairly and consistently.

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