LCRO 124/2010

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| **CONCERNING** | An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006 |
| **AND** | |
| **CONCERNING** | a determination of the Auckland Standards Committee 3 |
| **BETWEEN** | **BM**<br>of Auckland<br>Applicant |
| **AND** | **YI**<br>of Auckland<br>Respondent |

**The names and identifying details of the parties in this decision have been changed.**

## DECISION

### Background

[1] In 1992, the Applicant was convicted of two charges of obtaining credit by false pretences.

[2] The Applicant had amassed a wealth of evidence which he considers showed that he was not guilty of the offences. However that evidence was not put before the Court.

[3] In 2007, Mr S, a barrister, was retained by the Legal Services Agency (LSA) for an opinion as to whether legal aid should be granted to enable the Applicant to pursue an application for leave to appeal. Following receipt of that opinion, legal aid was granted. Subsequently, the Court made an order granting the Applicant leave to appeal.

[4] The Respondent agreed to conduct the appeal on a pro bono basis. He determined that the grounds for appeal centred on the fact that the Applicant did not have the necessary intent required to support a conviction.

[5] The appeal hearing was brief. The appeal failed due to the fact that the Judge took a view that was at odds with the Respondent's view as to what the necessary elements of the crime were.

[6] The evidence amassed by the Applicant had still not been considered by a Court and grounds for an appeal based on this evidence, which he refers to as "the three planks for an appeal" were not incorporated in any way into the case before the Court.

**The complaint**

[7] The Applicant lodged a complaint with the Complaints Service of the New Zealand Law Society on 11 January 2010. Attached to his complaint was a 65-page affidavit which he had prepared to support his appeal. He also provided an abbreviated version which had been sworn to support an application to stay or suspend the judgment.

[8] The Applicant alleges that the Respondent engaged in deliberate conduct to ensure not only that the appeal failed, but that there was no further opportunity to present the evidence which the Applicant has and which he wishes to be placed before the Court.

[9] He asserts that he has always been able to prove that his actions were neither criminal or dishonest, but that the actions of the Respondent meant that his appeal failed.

[10] The Applicant seeks the full cost of getting the appeal back before the High Court. He states that legal aid will not cover the cost, although in an affidavit in support of the stay application, he states that legal aid has been suspended pending clarification of income details, rather than declined

[11] In addition, the Applicant made a general claim for compensation for such matters as the effect on his health, his income earning opportunities, and employment prospects.

**Standards Committee decision**

[12] The Standards Committee resolved pursuant to s138(2) of the Lawyers and Conveyancers Act 2006 to take no further action in respect of the complaint.

[13] The Committee noted that the Applicant may not have appreciated the duties owed by all counsel to the Court and the related restrictions on what the Respondent was able to present to the Court by way of evidence and legal submissions.

Based on the documentation and the explanations provided to the Committee, it appeared to the Committee that the Respondent had properly discharged his obligations to the Applicant

**Review**

[14] The review proceeded in a somewhat unusual manner. The Applicant advised that he wished to be heard in support of his application and a date was scheduled for both parties to attend the hearing on Thursday 17 March 2011, being a date which both parties had indicated was acceptable to them.

[15] The Respondent advised that he would be represented by counsel, as he had a High Court hearing at the same time. However, he was advised by this Office that he was required to attend in person. He subsequently re-scheduled his Court hearings to be in a position to do this.

[16] On 15 March, the Applicant advised that his mother had been admitted to [X] Hospital and that he was required to be in [North Island] to make various arrangements for her.

[17] The Respondent was advised of this, but as he had already re-scheduled his Court appearances to attend, the matter proceeded with the Respondent attending as scheduled. The Applicant attended on Thursday 24 March 2011.

[18] At the hearing attended by the Applicant, I referred to the outcomes sought by him. These were recorded in the application for review as being –

(i) Reinstatement of the appeal in the High Court;
(ii) that the Respondent be penalised for serious misconduct.

[19] Neither the Standards Committee nor the LCRO has any ability to order reinstatement of the appeal. However, the Applicant explained that a finding of misconduct would assist the process which he is in the course of undertaking to achieve that. This is referred to in paragraph 57 of his affidavit in support of his application to stay or suspend judgment dated 1 September 2009. In that paragraph the Applicant states:

> "Mr [S] believes that on the basis of [the Respondent's] alleged professional misconduct as described above, the High Court can be persuaded to rehear the appeal".

[20] I have some concern that the complaints process is being used for this purpose, rather than for genuinely held reasons. A complaint against a practitioner, even if not upheld, is time-consuming and the cause of some concern to most practitioners. It

should not be used for an ulterior motive. However, I take that no further, other than to express disquiet that the Applicant pursues allegations of deliberate conduct on the part of the Respondent such as would support a finding of misconduct, when, if anything, the alleged shortcomings would at most support a finding of unsatisfactory conduct. I suspect that this may be because a finding of unsatisfactory conduct may not support an application for a re-hearing in the way that the Applicant seeks.

**Misconduct**

[21] Neither the Standards Committee nor the LCRO has jurisdiction to make a finding of misconduct. This is a finding that can only be made by the Lawyers and Conveyancers Disciplinary Tribunal following the hearing of charges laid before it by the Standards Committee. Before a Standards Committee would make a decision to lay such charges, it is necessary to have some evidence that the conduct of the appeal by the Respondent was such that it fell within the definition of misconduct in Section 7 of the Act.

[22] The allegation of the Applicant is that the Respondent's conduct is such "that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable". However, there has been nothing provided in support of this contention other than conjecture.

[23] After the hearing which the Applicant attended, he forwarded an email to this Office in which he summarised his allegations. He contends that the Respondent's conduct of the appeal constituted a "wilful, reckless failure deliberately and with full and deliberate knowledge and planning that this would cause the appeal to fail". He contends that "deliberate misconduct of this magnitude fairly takes [the Respondent] well beyond what the Act describes as "unsatisfactory conduct'."

[24] The Respondent says that there is absolutely no reason why he would adopt this approach. Although the appeal was undertaken on a pro bono basis, all work undertaken, whether pro bono or otherwise, is undertaken by him seriously. In his response to the Complaints Service, he advised that he had been in practice for 35 years and would never "betray" a client. He notes that if he considered the appeal had no merit, then he would have simply declined the brief unless a proper fee was to be paid.

[25] The Applicant alleges ulterior motives which he can neither explain or provide evidence of. In his email to this Office on 26 September 2010, he suggests that "in

order to answer the question [as to why the Respondent would do that] clearly I would have to be sitting in on [the Respondent's] meetings and discussions with third parties, and equally clearly that would never have happened".

[26] His position is further elaborated in that email as follows:

> "The fact that I cannot possibly know what was transacted behind my back and behind closed doors does not diminish the complete certainty, that the sheer volume of compelling information (supported by compelling corroborating evidence) that I provided senior barrister [Respondent], coupled with:
>
> - His access to extensive courts and other files.
> - Access to discussion with [Mr S] and myself to clarify any item.
> - His exceptional legal mind, knowledge of Statutes, case law and so on.
> - Access to other, equally exceptional, learned council [sic]
> - His exceptional professional background and experience in the courts over decades.
>
> …and so on **– does not add up to the resulting appallingly deficient:**
>
> - Inadequate appeal documentation.
> - Unrelated "supporting" case law.
> - Deliberately faulty and negligent 5 minute presentation to Harrison J.
>
> …all of which are completely out of kilter with even the lowest "professional standards" of a junior lawyer fresh out of university.
>
> Couple that with the way in which the final form for [the Respondent's] courtroom presentation AND all of the appeal documentation were all craftily withheld from me until after the failed appeal and substance of my complaint is strengthened. [The Respondent] has – for reasons clear to himself – used his extensive professional knowledge and experience to engineer the failure of my High Court appeal and has extinguished my right to present the compelling and corroborated central planks of my appeal to a higher court.
>
> He is simply:
>
> - Too experienced.
> - Too knowledgeable.
> - Too well connected.
>
> …and so on to have made such a long list of wholly deficient actions in such well organized and orchestrated order, "accidentally".

[27] He therefore submits that the findings of the Standards Committee are "grossly out of step with the facts and the verifiable content of my complaint relating to this ongoing historical injustice."

[28] The evidence and verifiable content that the Applicant refers to is the evidence he wishes to have put before the Court, all of which he considers proves that he is not guilty of the crime.

[29] This is not evidence that supports his claim of professional misconduct on the part of the Respondent. In that regard the Applicant readily acknowledges that there is nothing that he can produce to support his view of the Respondent's conduct.

[30] Neither do negligence or errors of judgment amount to misconduct. As noted by Duncan Webb in his text *Ethics, Professional Responsibility and the Lawyer* (2nd Edition) at page 128, the author notes:

> "Conduct which amounts to mere negligence[1] or an error of judgment[2] will not be misconduct. The basis for such a view is that such negligence or errors do not reflect on the practitioner's integrity or the practitioner's ability to continue to practise law, so do not show that he or she is not conducting the practice in a proper manner."

[31] In summary therefore, there is simply nothing that the Applicant puts forward that supports his allegation that the Respondent deliberately ensured that the Appeal would fail, and fail in a way that meant that the evidence he has can not be put before the Court.

**Unsatisfactory conduct**

[32] Having determined that the Respondent's conduct cannot be considered misconduct, it is necessary for me to consider whether or not the conduct complained of constitutes unsatisfactory conduct. That term is defined in Section 12(a) of the Lawyers and Conveyancers Act as being "conduct of the lawyer that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer."

[33] The vast majority of the information provided to the Standards Committee and this Office by the Applicant comprises the evidence and other information that the Applicant says would have supported his defence and subsequently his appeal.

[34] It is not the role of the Standards Committee or the LCRO to assess the merits of the appeal but to consider whether the appeal was presented in a competent and diligent way.

[35] The Applicant has frequently acknowledged the Respondent's calibre and seniority. Leaving aside the allegation of deliberate behaviour, it is difficult to accept that a lawyer with the reputation and standing that the Applicant acknowledges the

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[1] See *Myers v Elman* [1940] AC 282, 288 per Viscount Maugham; *Re Four Solicitors* (1901) 7 TLR 672, applied in *Re Moore* (1909) 11 GLR 678.
[2] *Y v M i[1994] 3 NZLR 581.*

Respondent enjoys, would prosecute an appeal with anything less than competence and diligence. He formed the view that the grounds of appeal rested on an earlier decision in which intent was a necessary element of the crime with which the Respondent was charged. The Judge did not see it that way and the appeal failed. Nevertheless, that in itself does not provide any evidence that the Respondent failed to pursue the appeal with diligence and competence.

[36] The Applicant says that the vast array of evidence which supports his case was not put before the Court. Mr S says in his letter to the LSA, "where a District Court Judge has heard evidence from both the prosecution and defence and finds there is sufficient prosecution evidence to prove the charge beyond a reasonable doubt and the defence evidence does not do enough to raise even a reasonable doubt, it will be extremely difficult to convince a Judge on appeal that the District Court Judge got it wrong".

[37] In its decision, the Standards Committee refers to the restrictions on what the Respondent was able to present to the Court by way of evidence and legal submissions. The Respondent has also noted that any appeal must be based on the transcript, i.e., the evidence as produced to the lower Court. It is not simply a matter of being able to introduce all of the evidence that the Applicant wishes to be considered by the Court.

[38] The Respondent advised that he had not considered lack of competence of counsel as a ground of appeal in this case. In this regard, Mr S has noted that "the fact that [the Applicant] chose to have represent him a lawyer who was not as highly skilled in this area as others will not of itself be grounds for granting an appeal". I also take note of the fact that the Standards Committee includes practitioners who are proficient in this area of the law and no adverse comment was made by them as to the way in which the appeal was conducted.

[39] There is therefore nothing to suggest a lack of competence or diligence on the part of the Respondent in the conduct of this appeal, and consequently there is nothing to support a finding of unsatisfactory conduct.

**Conclusion**

[40] The Applicant has pursued a campaign over a long period of time to clear his name. Over that time he considers that he has been let down by various people, including lawyers instructed to represent him. I pass no comment on that. However, I can find nothing at all to support his view that the Respondent, having agreed to represent the Applicant in this matter on appeal, has deliberately sabotaged the appeal

so that it would fail and in the course of doing so ensure that any further appeal could not succeed either. Indeed, the Respondent remains of the view that the High Court decision was wrong and should be appealed.

[41] In short, I concur with the decision of the Standards Committee that no further action is warranted in respect of this complaint.

**Decision**

Pursuant to Section 211(1)(a), of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is confirmed.

**DATED** this 7th day of April 2011

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Owen Vaughan
**Legal Complaints Review Officer**

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr BM as the Applicant
Mr YI as the Respondent
The Auckland Standards Committee 3
The New Zealand Law Society