

**CONCERNING**

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of the [North Island] Standards Committee

**BETWEEN**

**BG**

Applicant

**AND**

**TC**

Respondent

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

**DECISION**

**Introduction**

[1] This is an application for review of a decision of the [North Island] Standards Committee which considered a complaint by Mr BG against Mr TC. The Standards Committee determined the complaint under the Lawyers and Conveyancers Act 2006 (the Act), on the bases that Mr BG had an alternative, more appropriate remedy (s 138(1)(f)), and that further action on Mr BG's complaint was unnecessary or inappropriate (s 138(2)).<sup>1</sup> Mr BG disagrees. He is dissatisfied with the treatment he has received from the justice system in general, and from his lawyer in particular, and has applied for a review.

**Background**

[2] Mr TC acted for Mr BG in a criminal proceeding before the District Court in 2011 and 2012. Mr BG was convicted, but was partially successfully on appeal, and laid a

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<sup>1</sup> Standards Committee decision (25 June 2013).

complaint to the New Zealand Law Society (NZLS) saying that Mr TC is not a fit and proper person to practice law. He says Mr TC has problems with alcohol, that he did not have a fair trial, and wants a retrial where he is represented by a “sober – honest lawyer”.<sup>2</sup>

[3] In his review application Mr BG says Mr TC failed to meet his professional obligations, tried to bribe him into pleading guilty when he was not, put fabricated evidence to him and unlawfully discriminated against him. He says his “life has been trashed, from every angle”, his relationships with friends and family ruined, and he wants to clear his name, recover his firearms licence and be paid compensation by Mr TC.<sup>3</sup>

### **Standards Committee Process**

[4] Mr BG’s complaint was referred directly to the Standards Committee, without a response from Mr TC having been sought, and was dealt with on the basis set out in the decision. The Committee noted in its decision that “the matters which are the subject of Mr BG’s complaint about Mr TC in his District Court trial, that he was inebriated and therefore incompetent to conduct his defence, did not form any part of his grounds of appeal to the High Court”.<sup>4</sup>

[5] The Committee considered Mr BG’s complaint was an improper challenge to the decision of the District Court, and that if he considered the subject matter of his complaint had substance, he should have pursued those concerns on appeal to the High Court. The Committee’s view was that if it considered those matters in the complaints process, “then the complaints process would be acting as a substitute for court proceedings”.<sup>5</sup> On that basis the Committee considered Mr BG had an alternative and more appropriate remedy, which was to pursue his concerns through the Court, and that further action on his complaint was unnecessary or inappropriate.

[6] Mr BG disagrees with the Committee’s decision, and seeks a review.

### **Role of the LCRO on Review**

[7] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before

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<sup>2</sup> Complaint BG to NZLS (5 June 2013).

<sup>3</sup> Application for review (5 July 2013).

<sup>4</sup> Above n 1, at [4].

<sup>5</sup> At [6].

substituting her own judgement for that of the Standards Committee, without good reason.

### **Scope of Review**

[8] The LCRO has broad powers to conduct her own investigations, including the power to exercise for that purpose all the powers of a Standards Committee or an investigator, and seek and receive evidence. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

### **Review issue**

[9] The question on review is whether there is good reason to depart from the decision of the Standards Committee. The answer to that question is no, for the reasons discussed below.

### **Review Process**

[10] In the course of this review, Mr TC was invited to comment on Mr BG's complaint. He forwarded a copy of a brief letter he had sent to the Standards Committee after he had received a copy of the decision.<sup>6</sup> Mr TC referred to the decision, which appears to have been the first notice he received of the complaint having been made against him, and says "that the allegations made by Mr BG are completely denied".

[11] Mr BG then provided further submissions,<sup>7</sup> which were forwarded to Mr TC, but on which he did not comment. Mr BG also provided further submissions dated 20 November 2013, 1 January 2014 and 10 July 2014 further elaborating on his concerns. As those materials largely duplicated materials he had supplied in support of his complaint, and added nothing of substance to his complaint about Mr TC, this Office did not provide them to Mr TC for his comment.

[12] Mr BG commented at various times about the delays in progressing his review application. Initially he was serving a prison term that he considers he could have avoided if Mr TC had done his job properly. By the time of the review hearing Mr BG had completed his term of imprisonment and been released.

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<sup>6</sup> Letter TC to NZLS (27 June 2013).

<sup>7</sup> Letter BG to LCRO (23 August 2013).

### **Review Hearing**

[13] Mr BG attended a review hearing with a support person by videoconference link in Auckland on 20 January 2015. Mr TC was not required to attend, and the review hearing proceeded in his absence.

### **Discussion**

[14] At the heart of Mr BG's complaint is his fervent belief that he was wrongly convicted, and Mr TC should have done more to prevent that outcome. It is clear from his evidence that he considers he should not have been jailed, or subjected to the stigma or other consequences his criminal conviction had that, and continue to have, on his life.

[15] In his complaint, review application and at the review hearing Mr BG made reference to numerous examples of conduct by Mr TC that he says warrant disciplinary intervention, including the following matters.

#### *In support of his complaint*

[16] Mr BG says Mr TC did not advise him that he could apply for some of the charges to be severed and tried separately. He challenges Mr TC's conduct of his defence overall. He refers to Mr TC having failed to robustly challenge prosecution witnesses in cross examination, including expert forensic evidence adduced by the Crown. He says Mr TC did not try hard enough in representing him. He says Police fabricated evidence, increased the number of charges against him from three to seven, and that he was convicted on propensity evidence put forward by the Crown even though the complainants had not identified him in respect of three of the offences alleged, and offences occurred at different times and locations. Mr BG invites the inference that if the various charges had been severed, the Crown could not have secured as many convictions based on Mr BG having a propensity to commit the types of criminal act alleged against him.

[17] Mr BG provided a copy of a letter Mr TC had written to him indicating his view that a severance application was unlikely to succeed, that "all the charges will be heard together", and that key evidence against him was "extremely prejudicial" and tended to

support the evidence of prosecution witnesses.<sup>8</sup> That advice is consistent with the other material Mr BG has provided in the course of this complaint, and on review, and that aspect of his complaint gives rise to no conduct concerns.

[18] Mr BG is critical of Mr TC's interaction with the judge at sentencing, and implies that he was humiliated when the judge read out sensitive material at his sentencing in the presence of "around thirty" of his family and friends.<sup>9</sup>

[19] The matters Mr BG relies on do not evidence professional impropriety by Mr TC, nor is there any reason to believe he could have done anything to prevent the material referred to by the judge from being read out in open court. There is no evidence of any improper conduct by Mr TC in either regard.

[20] Mr BG says he received advice from the lawyer who conducted his appeal that he would not get a retrial, and that his "first lawyer should have done more" in his defence.<sup>10</sup> Despite that advice, on appeal his lawyer was able to secure a retrial on two of the counts, those two convictions were quashed and his sentence was accordingly reduced for the five remaining convictions, all without any reference being made to Mr TC's conduct of the first trial.

[21] In a criminal trial, the Crown has an obligation to prove every element of the offences alleged beyond reasonable doubt. It is part of the role of defence counsel to test the prosecution's case. The excerpts of the transcript of the trial that Mr BG provided record Mr TC meeting his obligations to Mr BG in that regard.

[22] Although Mr BG says Mr TC did not press the witnesses hard enough, or put to them that they were lying, counsel walk a fine line in cross examination. The point at which to stop a line of questioning is a matter of judgement for the lawyer, who must carefully select the point at which the witnesses' responses enable an inference to be drawn, without overstepping the line. Asking one question too many carries the risk that a witness' response under cross examination will be unhelpful to the lawyer's client.

[23] Mr BG says he gave Mr TC an exhaustive list of points on which to challenge the witnesses, but Mr TC did not take every point.

[24] Mr TC's cross examination shows he tested witnesses' memory of events, and extracted evidence so that he could highlight what he considered to be relevant

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<sup>8</sup> Letter TC to BG (24 June 2011).

<sup>9</sup> Above n 2, attachment 6.

<sup>10</sup> At attachment 8.

inconsistencies in witnesses' evidence. For example, Mr TC's cross examination of the teenage girls confirmed they were laughing and giggling when they saw Mr BG. That evidence could later be contrasted with the victim impact reports in which they explained how traumatised they had been when they saw Mr BG.

[25] Mr TC's proposition to the same witnesses that they may be unable to clearly recall events, saying "if you don't remember that's okay", is also an example of him undermining the witnesses' recollection of events, as is his questioning of the Police witness who took samples and photographs.

[26] Defence counsel routinely test evidence given by prosecution witnesses by highlighting uncertainties and inconsistencies in their evidence. There is no evidence of any inappropriate conduct by Mr TC in any of the material Mr BG has provided to support his allegations, nor does Mr BG's evidence support a finding being made that Mr TC fell short of an appropriate professional standard in his cross-examination. It was part of his role as a lawyer to select which aspects of the prosecution's evidence required testing. There is no evidence of any concern being expressed by the District or High Court, and it is not appropriate to second-guess Mr TC's decisions in this review process.

[27] Mr BG also provided copies of written advice he had received from Mr TC referring to expert forensic evidence he had obtained to test the Crown's forensic evidence. Mr TC expressed the view that the evidence of the defence expert did not displace the Crown's evidence, which Mr TC described as "damning".<sup>11</sup> As a consequence, it appears no expert forensic evidence was, or could helpfully be, put before the Court, without further undermining Mr BG's position. Again, there is nothing inappropriate in Mr TC's conduct in this regard.

#### *Review Application*

[28] Mr BG provided further information in support of his review application, including a copy of a newspaper article reporting his trial.<sup>12</sup> He again referred to the Police having adduced "fabricated and misleading evidence" that he had previously provided to the NZLS to support his complaint. At the review hearing he again highlighted the effects the convictions have had on his life.

[29] Although he had repeated his allegation about smelling Mr TC breath in his application for review, at the review hearing he covered every other aspect of his

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<sup>11</sup> Letter TC to BG (2 May 2012).

<sup>12</sup> FX (22 May 2012).

concerns comprehensively, but made absolutely no mention of alcohol. There is no evidence to support Mr BG's assertion, and I therefore disregard it.

[30] Mr BG says he found Mr TC "the most awkward person to try and reason with", and that he refused to accept his instructions that he did not commit the offences alleged, advising him to enter guilty pleas to three charges on the basis that the Police might discontinue others. He repeats his view that Mr TC is not a fit and proper person to be a lawyer, and if he had been able to choose (rather than allocated a lawyer by Legal Aid), he would not have chosen Mr TC, who he said was simply "clipping the ticket"

[31] Mr TC was under no obligation to agree with Mr BG's version of events. As mentioned above, as defence counsel, he was obliged to test the prosecution's case. Mr TC's options were limited by the absence of credible plausible evidence by which he could contest the prosecution's case. In the circumstances, the sample of Mr TC's cross examination that Mr BG provided confirms that Mr TC did the best he reasonably could for Mr BG on the basis of the evidence available.

[32] Mr BG is also critical of the Police, the Crown, the Judge who convicted and sentenced him, the lawyer who conducted his appeal, and the Legal Services Agency for wanting him to repay the cost of his representation by Mr TC. This Office has no jurisdiction to consider those concerns.

[33] Mr BG wants a retrial, to have his firearms licence back, and to be paid compensation by Mr TC for putting him in this position. He says he has taken other steps to try and recover his position, including laying a complaint to the Human Rights Commission alleging unlawful discrimination.

[34] Other than his request for compensation, none of Mr BG's concerns about the Police, the Crown or the Judge, or his requests for remedies, fall within the jurisdiction of this Office. It is only possible for an LCRO to order a lawyer to pay compensation if the lawyer is first the subject of a finding of unsatisfactory conduct. No such finding has been made by the Committee, nor is there any evidence that would support such a finding being made on review.

[35] I have carefully considered all of the information available on review, including the comprehensive evidence given by Mr BG of the review hearing. Although it is clear that Mr BG remains adamant that he did not commit the offences for which he was convicted and sentenced, the outcome of the appeals supports the view that the High Court considered the findings were open to the jury.

[36] Despite Mr BG's disenchantment with the criminal justice system, there is no evidence to support a finding that Mr TC failed in his professional obligations to Mr BG. In the circumstances, there is no reason to depart from the Standards Committee's decision, which is confirmed on review.

### **Costs**

[37] The LCRO has discretion to make costs orders under s 210 of the Act, and the LCRO's Costs Orders Guidelines. There is no reason to order Mr BG to contribute to the costs of this review, he was entitled to apply for a review and did so.

[38] Mr TC did not dispute the Committee's orders and has done nothing to add to the costs of this review.

[39] In all the circumstances, no costs orders are made on review.

### **Decision**

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

**DATED** this 22<sup>nd</sup> day of January 2015.

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**D Thresher**

**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:

BG as the Applicant  
TC as the Respondent  
OT as a Related Person  
Secretary for Justice  
[North Island] Standards Committee  
New Zealand Law Society