

## **SCHEDULE 2: NOTES OF THE MEETING AND DATES OF WRITTEN SUBMISSIONS**

### **Dates of written submissions**

Crown's overview: 31 March 2015

Applicant's overview: 12 May 2015

Applicant's statement of claim and submissions: 25 May 2015

Crown's response to Applicant's claim: 8 June 2015

Applicant's submissions in reply: 16 June 2015

## David Bain Compensation Claim for Wrongful Conviction and Imprisonment

Summary of meeting held before Hon Ian Callinan AC QC between 10am and 11:30am on Monday 4 May 2015, Auckland Environment Court

### Attendees:

For Mr Bain: Michael Reed QC and Joe Karam

For Crown: Michael Heron QC, Solicitor-General, John Pike QC and Annabel Markham

Ministry of Justice: Jeff Orr

**Hon Ian Callinan:** Identified materials he has reviewed including much of the notes of evidence, the report of the Police Complaints Authority, all court judgments, and Mr Karam's book *Trial by Ambush*.

Mr Callinan explained that the onus lies upon Mr Bain, and that the role of the Crown as contradictor is an important and a necessary one.

### *Role of the Crown*

**Mr Reed:** Expressed concern at role of its Crown, in particular, the participation of Mr Pike and Ms Markham who were long term adversaries, who were completely convinced of Mr Bain's guilt and would therefore not be of assistance to the inquirer. Mr Reed himself said that he was personally convinced that David Bain was innocent.

Mr Reed also said that at the end of the process Cabinet has a discretion, and the Solicitor-General might be advising Cabinet at that point.

**Mr Heron:** Explained that he is a Junior Law Officer and reports to the Attorney-General who is the Senior Law Officer. The Solicitor-General's role includes supervision of Crown prosecutions. The Crown takes its role in participating in compensation claims seriously and he is here to assist Mr Callinan. The Solicitor-General is available to address any issue of concern to the inquirer, but Mr Callinan's appointment and report are matters for the Ministry and Minister.

**Hon Ian Callinan:** The fact that people were involved in the prosecution does not exclude them from assisting with Executive action, whether it be a pardon or compensation claim. It is not the inquirer's role to dictate who represents the Crown's interests.

### *Change of Crown position*

**Mr Reed:** Crown's summary submission (page 31, para 81.14) raises an issue that the Crown previously decided not to pursue at the second trial (ie, Robin's "full bladder").

**Hon Ian Callinan:** Whatever was said at trial is not binding if it was a matter of submission. If what Crown states in its submission is not accurate he would expect Mr Bain's representatives to correct any misstatements.

### *Mr Bain's case*

**Mr Reed:** There are 5 knockout points. If any one of them is established, Mr Bain's case for innocence is made, regardless of how many circumstantial points the Crown raises.

**Hon Ian Callinan:** Not concerned with how Mr Bain goes about establishing his case and carrying his burden. Not a question of raising a reasonable doubt/possibilities, but proving innocence on the balance of probabilities.

**Mr Reed:** New evidence has emerged as the result of a member of the public reviewing post-mortem photographs of Robin. In particular he claimed there were soot marks on Robin's thumb were consistent with those obtained by loading cartridges into a magazine, which strongly suggests Robin loaded the rifle/was the murderer. We conducted an investigation which was reported on TV3. The investigation showed there were two soot marks on Robin's thumb and since his body wasn't wrapped as it should have been, they were gone when the pathologist examined him at the mortuary.

**Hon Ian Callinan:** Declined offer of a presentation on the soot marks as preferred first to read the materials provided.

**Mr Reed:** Understands Mr Callinan instructed not to read Binnie report, but wanted to make clear that Mr Bain had no role in undermining Mr Binnie's report, which he accepted. Mr Bain was prepared to accept the result of the Binnie inquiry from the outset.

**Hon Ian Callinan:** I have to perform my task to the best of my abilities and will not be influenced by any reaction to a previous undertaking by anyone else.

**Mr Karam:** Offered Mr Callinan an annotated version of his book *Trial by Ambush*, cross-referenced to trial evidence.

**Hon Ian Callinan:** Suggested it might be received in due course as part of submissions, but not at present.

**Mr Karam:** At trial the Crown relied on 300 or so of 2500 photos taken by Police. Defence now relies on additional photos that are not part of the record provided to Mr Callinan. Police have a book of all photos that is numbered differently from the 300 Police exhibits.

**Mr Orr:** Agreed to work out the logistics of locating and referencing additional Police photos with Mr Karam.

#### *Interviews*

**Mr Reed:** Raised issue of interviews.

**Hon Ian Callinan:** Did not want to conduct another trial and preferred not to conduct interviews unless the parties thought otherwise.

**Mr Reed and Mr Heron:** Did not see the need for interviews.

**Mr Reed:** Raised issue of waiver of privilege for Mr Guest.

**Mr Reed:** Mr Bain would likely waive privilege if Mr Guest were a counsel of repute, but he is not. Bain team does not accept his truthfulness.

**Hon Ian Callinan:** Stated that Mr Guest was not present to defend himself and he did not intend to inquire into any alleged failings, which he did not see as relevant.

**Hon Ian Callinan:** Bain team can't be forced to waive privilege so that is the end of the matter.

**Hon Ian Callinan:** Identified topics of interest that he would like the parties to address:

1. Size of green jersey and whom it would fit.
2. Any information about the 2 pairs of socks in washing machine
3. Was it common ground that the rifle misfired? Any evidence of when the relatively new rifle began to misfire? Did Robin know or could have known about misfiring?
4. Fingerprints on rifle, any summary of parties' case on that would be helpful.
5. Evidence of Robin's despair/depression and Mr David Bain's mental state. Are chapters 21 and 22 of Mr Karam's book *Trial by Ambush* fair and complete summaries of the evidence?
6. Evidence of molestation of Laniet – hearsay only?
7. Evidence of pregnancy of Laniet in New Guinea. What age was Laniet while in New Guinea?
8. Identification of persons doing reconstructions and the nature of them as presented to jury at second trial with reference to notes of evidence.

**Mr Karam and Mr Reed:** TV3 filmed all of trial and film might be available.

#### *Timetabling*

**13 May:** Mr Bain to provide bullet points in opposition to Crown's initial submission.

**20 May:** Mr Bain's document in the nature of a "statement of claim", including new evidence. Mr Bain to advise of any experts required as a result of Crown disclosure relating to rifle testing.

**3 June:** Crown response

**17 June:** Mr Bain's reply

Judge noted that he might be away for a few weeks in July and wanted all submissions by mid-June.

#### *Evidence availability*

**Mr Karam:** Noted criticism of Police regarding the destruction or losing of evidence.

**Hon Ian Callinan:** Evidence needs to be evaluated in accordance with the parties' ability to adduce it. (*Blatch v Archer* [1774] 1 Cowp 63: 'It is certainly a maxim that all evidence is to be weighed according to proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.') If evidence could not be adduced by Mr Bain due to Police conduct of investigation, that will be kept in mind.

**Mr Karam:** Assumes he can advance his contention that 7 or 8 bloodstains on Robin's hand had to come from some source other than his own death. Police tested 2 and destroyed the rest.

**Hon Ian Callinan:** Not necessarily an invalid proposition that blood on Robin's hand could not have got there from his own death. It will be considered.