IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 44/2019
[2019] NZSC Trans 20

JEFFREY ROBERT BUNTING
Appellant

v

THE QUEEN
Respondent

Hearing: 29 August 2019

Coram: Winkelmann CJ
O'Regan J
Ellen France J

Appearances: L A Andersen for the Appellant
K S Grau for the Respondent

CRIMINAL ORAL LEAVE HEARING

MR ANDERSEN:
Yes, may it please the Court, counsel's name is Andersen and I appear for the applicant.

WINKELMANN CJ:
Tēnā koe Mr Andersen.

MS GRAU:

Tēnā koutou, E ngā Kaiwhakawā ko Ms Grau ahau, e tū nei mō te Karauna.

WINKELMANN CJ:

Tēnā koe Ms Grau. So Mr Andersen, about 20 minutes you think is adequate for you?

MR ANDERSEN:

Yes.

WINKELMANN CJ:

Good.

MR ANDERSEN:

If it pleases the Court. The argument in the Court of Appeal insofar as the conduct of counsel was concerned focussed on the competency of counsel because really there was no proper basis for doing otherwise despite the fact that the applicant had in his affidavit made quite different claims to counsel in terms of the level of representation and the discussions they'd had and whether counsel was prepared, and so the decision, of course, was unsuccessful and then like a thunderbolt, we get the disciplinary decision which is remarkable in a number of respects, but the two that are of real significance here is that case after case listed in the disciplinary decision shows that this lawyer really had no interest in representation of his clients. There's claim after claim of a failure to take any notice of what the client said to advance the defence exactly the things that the applicant was complaining about and then worse, we have the fact that as shown in disciplinary decision that the only reason that the lawyer was able to continue to practice was because he had lied in his declaration because if he had disclosed that he was not complying with the conditions that the Standards Committee imposed, then the issue of his practicing certificate would have been considered and the matter would have been referred to the Practice Approval Committee for decisions to be made as to whether he was, in fact, fit to practice.

WINKELMANN CJ:

Can you just expand on that last point because I found that difficult to pick up from material, “He had lied in his declaration as to whether he was complying with the previous disciplinary orders imposed.”

MR ANDERSEN:

Yes. When you renew your practicing certificate, you have to, one of the things that you're asked for, you know, any convictions, things like that, also whether you've complied with any conditions imposed by a Standards Committee and if the answer is “no”, then instead of just the routine approval of the practising certificate, the matter gets referred on and looked at to see if, in fact, this person is a fit and proper – normally it arises because of failure to make payment of costs or whatever but, in this case, it’s much more significant because of the fact that quite clearly the Standards Committee had considered that oversight was required which is why they required a mentoring programme to be put in place because you could see that there was concern as to what was happening to clients and then so we have both the issue of the mentoring programme and also the issue of the requirement to attend the litigation skills course, and the complete ignoring of those is really symptomatic, in my submission, of what’s happened here that it’s really the same disregard that is shown of the Law Society’s directions as there is to the client’s interests.

WINKELMANN CJ:

It’s interesting that they didn't find the, the disciplinary committee, didn't find him guilty of deliberate dishonesty?

MR ANDERSEN:

Yes, it is and it seems that it was as a result of his guilty plea and the medical evidence that was provided but, yes, I find that difficult to understand because I don’t see how with respect to the disciplinary that you can answer that question “yes” when you know you haven't complied with it and so it is and, you know, I mean, I would anticipate that even though he has just been

suspended, I would anticipate that he would face a real difficulty getting practising certificate in the future because he would have to satisfy the appropriate committee that, in fact, he is a fit and proper person and he would have these real hurdles to undergo.

What's also significant in this case is that it was a case where there were a number of inconsistencies in the evidence, but also it seems, certainly from what he says, and supported to some extent by the evidence that there was at least an arguable defence. This matter occurred nine years, I think it was, before. The children were young and there were two electricians and one matter which I suggest is of significance and should have been, note should've been taken of, is the fact that only one of them had the prominent Adam's apple and that wasn't the defendant and one of the complainants refers to the person assaulting her as having a prominent Adam's apple.

WINKELMANN CJ:
So can I just stop you there, Mr Andersen, because what is striking is that this wasn't an issue raised at the Court of Appeal level?

MR ANDERSEN:
No, it wasn't. Well, "yes" and "no". It was raised in terms of the issue of identification. I mean when you say it wasn't raised in the Court of Appeal, there was discussion of it in terms of the Court of Appeal and the fact that the – the way it was argued in the Court of Appeal was that there was no coherent theory of the case advanced and that was part of the complaint in terms of what was said that there wasn't a coherent theory of the case and –

WINKELMANN CJ:
Well, what I mean is that the affidavit filed by your client in the Court of Appeal level did not raise that he had put to his lawyer that this was an issue he wanted pursued and the lawyer had failed to take it up and, in fact, this other electrician gave evidence for him didn't he?

MR ANDERSEN:

Yes, well, that's fair comment, that is fair comment and I think the, well, I submit that the real issue that has to be seen here is here is somebody who is completely unfamiliar with the Court processes and you can see that he's raising these issues, he's providing this information and he's relying upon the lawyer to do the right things in relation to it?

ELLEN FRANCE J:

Well, you might be able to say that in relation to the trial, but you can't say that presumably in relation to what happened in the Court of Appeal and he –

MR ANDERSEN:

Because?

ELLEN FRANCE J:

Well, because then, I mean, he is represented.

MR ANDERSEN:

Yes, he is represented, yes.

O'REGAN J:

But would also the new evidence about the disciplinary committee doesn't change this point, this point that's being raised now. Not knowing that he was subject to disciplinary proceedings isn't a reason for not raising this in the Court of Appeal is it?

MR ANDERSEN:

No, but the way that it was raised in the Court of Appeal was in terms of the failure of the lawyer to advance a coherent, it was raised in a more general way, I mean, it was referred to but it was raised in a more general way because it was raised in the sense of saying to the Court of Appeal that there should have been consideration given to the issue of – see it was raised that he, "Failed to properly consider and follow a theory of the case meeting his client's instructions…" He failed to identify the shortcomings in the

identification evidence and what was said was that his instructions were that the claimed abuse didn't happen. This meant either that the complainants were lying or mistaken. There was no theory of the case raised in respect of that and that he didn't raise an effective defence.

WINKELMANN CJ:

Yes, but the problem is with raising this at the Supreme Court level, it's a second bite of the cherry and Mr Bunting did not, he did not say in his affidavit in the Court of Appeal that he'd put this to his lawyer and asked him to run it as a defence and you didn't argue that, by the sounds of things, you didn't say and it wasn't put to the lawyer, so you've got some difficulty with this here. I must say, Mr Andersen, what strikes me is that effectively what you're arguing now is that, Mr Claver isn't it, was so lacking in the basic skills of a lawyer that your client had no representation at all –

MR ANDERSEN:

That's right.

WINKELMANN CJ:

– and that, as I understand it, you're saying it's a fundamental right and it therefore doesn't fall upon him to point to particular deficiencies. The reality is he was deprived of legal representation at that trial and you can point to the Disciplinary Tribunal hearing which adds weight to the point you were making before, the Court of Appeal, in relation to his fundamental misunderstanding of process around propensity.

MR ANDERSEN:

Yes.

WINKELMANN CJ:

The question I have in my mind though is whether you should be seeking leave to bring a second appeal in the Court of Appeal since this is new evidential material and it's difficult for this Court to deal with hit.

MR ANDERSEN:

I think that, well, that was considered but certainly there doesn't seem to be any basis for bringing a second appeal to the Court of Appeal unless where there has been something said that has misled the Court of Appeal or there has been some issue in terms of it. Because this is essentially new, it seemed that the only way that it could be dealt with was by way of this Court because this Court after all has overall responsibility in terms of the issues of miscarriage of justice and isn't limited as to what it can hear.

ELLEN FRANCE J:

Well, why is it you say new evidential material isn't a basis for going, seeking a second appeal in the Court of Appeal?

MR ANDERSEN:

Well, there isn't any statutory basis for going to the Court of Appeal more than once as I understand it.

ELLEN FRANCE J:

But in terms of *Smith*, why can't you argue that applies?

MR ANDERSEN:

I mean if we can go back to the Court of Appeal then that would certainly have been the preferred option, but certainly rightly or wrongly that was the assessment that was made that this was something quite different to what was argued in the Court of Appeal and therefore it wasn't possible to go back, but –

WINKELMANN CJ:

It seems to me it's quite an important issue that you are raising; this notion that someone is actually truly so lacking in the basic skills that it's not legal representation and a different approach should be taken, so it's not really *Sungsuwan* approach. Well, no, it's not the *Sungsuwan v R* [2005] NZSC 57, [2006] 1 NZLR 730, (2005) 21 CRNZ 977 (SC) approach. It's almost like

there's a presumption you're saying. You don't point to particular things. You say this person hasn't been properly represented and you can see it carried out in this way in terms of the failure to really come up with anything that's coherent, et cetera.

MR ANDERSEN:
Yes.

WINKELMANN CJ:
But that's an important point and if it were to come to this Court, it's useful if the final Court of Appeal has an opportunity to see it dealt with in a lower Court.

MR ANDERSEN:
Well, I appreciate that. It doesn't mean that this Court doesn't have jurisdiction, of course, because it does and that, rightly or wrongly, that was the assessment that was made was that the Court of Appeal was very limited in what it could deal with but, certainly, if it was possible to have a second appeal to the Court of Appeal, then I don't argue that there's certainly advantages in that and, certainly, that's what I would have liked to have done if I thought I could.

O'REGAN J:
But I think the Court of Appeal, as I think we would, would be saying we're interested in things that arise from the new evidence ie, the disciplinary process not giving you a second crack at a point that you could've raised earlier and decided not to or just didn't – I mean, I don't know what the reason is for that, so the focus really has to be on this more systemic point I think that if somebody is just completing incapable of doing the job if that's actually true and it's not really representation at all.

MR ANDERSEN:
Well, of course, we have the assertion by him before the Disciplinary Tribunal that both because of ability and work, as I understand what he was saying, he

wasn't capable of doing it. And I think there is a broader problem generally in terms of because of the way in which legal aid grading is done the indecent assaults, unlike sexual violation, which is category 3, indecent assaults fall within category 2 and way back in the days of *R v Ellis* [1993] 3 NZLR 317 we had the problem that the legal aid would not appoint a senior lawyer, despite the fact that the request was made to them in those days because it was only a category 2 offence and it seems to have been an issue that has been completely ongoing, so we have the, I mean, the category 2 are the least experienced jury trial lawyers basically and certainly there is a real argument I believe that they should not be doing any cases to do with any form of sexual attack but anyway that's sort of a side issue associated with it.

Well there is of course, quite apart from that point and that significance, there is of course the issue of the propensity evidence and in my submission this is an important on it so I am justifying the consideration of this Court because what happened is that there's, what is meant by the interest in young people, because the Court of Appeal seemed to have regarded it as somebody who was under age whereas in my respective submission there's an enormous difference between sexual activity with prepubescent children and those who are more mature, irrespective of their age. And here the Court of Appeal focused on the difference in age between the defendant and the 15 year old for whom the propensity evidence was called and didn't really, in my respectful submission, give proper consideration to the entirely different approach, entirely different fact circumstance, with the 15 year old that was the matter of touching the shoulders, kissing the neck, and talking about sexual matters, whereas with the complainants in this case it was very much touching of private parts and quite different sort of sexual activity. And in my respectful submission this issue of propensity evidence has gone far too far if you're just going to say there it is, if it's a young person then that is sufficient. There needs to be, in my respectful submission, some more analysis to ensure that there is in fact some legitimate link and simply an interest in young persons, I would suggest, does not satisfy that.

O'REGAN J:
Well you wouldn't be saying that if the propensity evidence had been seven or eight though would you?

MR ANDERSEN:
Absolutely, absolutely, because –

O'REGAN J:
So the fact, the real issue here is just the application to the facts isn't it, that can you really classify a 15 year old as a young person when you're talking about prepubescent girls in the instant case.

MR ANDERSEN:
Well the question is whether there is a difference between pre and post-pubescent children in terms of it because if we're going to treat an interest in children – and I accept that an interest in children is a legitimate issue in terms of propensity evidence and if the propensity evidence here had been seven or eight, I would accept that it's entirely appropriate because that is not something that you would expect. But my submission is that it's not an age issue, it should be a development issue, so that there is a world of difference between a person who is 15 and is therefore post-pubescence, and someone who is prepubescent, and that's really the issue that arises in respect of it. So that it's, if we just categorise everybody as young persons and get it in then we have this completely different scenario.

And the reason that it would be important, if this girl had been seven or eight, is that the conversation that was had with the 15 year old would have been even more inappropriate with a seven or eight year old and it would have been – you know, about future sexual experience and those sorts of things, it would have been absolutely creepy if it had been with a seven or eight year old and so there couldn't have been any argument that the evidence was going to be admissible.

WINKELMANN CJ:

What form did evidence come in in, it was an agreed statement of facts?

MR ANDERSEN:

It was an agreed statement of facts, yes, yes.

WINKELMANN CJ:

And how detailed was it?

MR ANDERSEN:

It basically just set out what, it just set out the fact that what happened and it was little more than what I've said to you really, that he, he touched her shoulder, pulled her over, touched her shoulder after having conversations with her about younger women having relationships with older men, touched her shoulder, kissed her neck from behind and he said that he had got too friendly with her. He pleaded guilty to that, admitted that he got too friendly.

WINKELMANN CJ:

So it included the conversation?

MR ANDERSEN:

It included the conversation, yes it did.

WINKELMANN CJ:

What's his custodial status Mr Andersen?

MR ANDERSEN:

He's about to be released. There are issues in terms of his release. The Parole Board has actually been quite understanding to him because he says that he is not, as he said in his affidavit, he doesn't see why he should be on the sexual offenders register and certainly the Parole Board has not required him to wear an ankle bracelet on release and has not opposed –

WINKELMANN CJ:

He's about to be released?

MR ANDERSEN:

Yes, he's about to be released.

ELLEN FRANCE J:

So he has been paroled?

MR ANDERSEN:

He's been granted it but he hasn't been released yet. Yes, he had his parole hearing earlier this month and he gets released, I think, towards the end of September or the first few days in October, in that sort of region anyway. He's served the whole of his term of course because he has denied his offending.

WINKELMANN CJ:

So he's being released on his statutory release date then?

MR ANDERSEN:

Yes, yes, but he has post-release conditions and issues associated with the Sex Offenders Register, reporting and various things, and that of course was one other reason why he didn't get parole because he would have had to have complied with those things as conditions of parole and he said no, I'm not going to. And that's the difficulty. And the difficulty from a lawyer's point of view is that people like him, who absolutely deny it and say they didn't do it, it's difficult to know, in terms of whether that is in fact a denial of what he did or whether he really is innocent and it makes it –

WINKELMANN CJ:

Yes, but that's a bigger philosophical question to answer than what we've got today.

MR ANDERSEN:

It is indeed but it does, it means you have to look carefully, I suggest, at the issues associated with his representation and the questions of – because the difficulty with this case is that it can be seen, the identification was very, very

limited, and the difficulty with the case is that you just look at it and think if it had been run differently, and in my submission properly, there could well have been a different outcome. I don't think anybody can say whether it's likely or not because that's a bit unfair but it does raise it and then you get to the question of he's not – we're back to the question that we've already discussed, in terms of no proper representation equals a lack of the Bill of Rights obligations.

WINKELMANN CJ:
Those are your submissions Mr Andersen?

MR ANDERSEN:
No, I think that was all I really want to say, thank you.

WINKELMANN CJ:
Ms Grau.

MS GRAU:
Thank you, Your Honours. I'm just going to start by picking up on that last point that Mr Andersen made, and he says, if the trial had been run differently it could have been a different outcome but so too the appeal, and that's one of the problems in this case, is that many of the matters being raised now were either matters, such as the election, that were initially raised then abandoned on appeal or never raised at all.

WINKELMANN CJ:
I think we appreciate those points and as you heard in our exchange with Mr Andersen what we're really interested in is the impact of the Disciplinary Tribunal because, from my perspective, it does seem to add a level of concern because there was a level of concern apparent just from reading Mr Claver's affidavit, where he said that he was, his attitude to propensity was that if he opposed it they'd make a big deal about it at trial, which –

MS GRAU:

I take that point and that is so but on the appeal the issue was whether introduction of the propensity had caused a miscarriage of justice and the Court of Appeal found it was properly admissible anyway so that whether he was mistaken about what the Crown could do with it, it was going in anyway. And the Judge summed up on it correctly, and Mr Andersen has made a bit about difference in ages and that sort of thing, but on appeal the Crown argument was that yes there was a difference in age here but when you actually unpack the facts, the offending was superficially different, but it was a lot more similar when you went into it.

So what we had was, for both the propensity witness and these two young girls, he would position himself behind the target and whisper to them, for both the propensity witness and at least one of the young sisters, he would be whispering, and in both cases it involved an element of really sexual education, or instruction, and that was in terms of what he'd like to do with these girls in future. So with one of the girls, she said he'd whisper really dirty stuff in her ear. She thought that he was behind her and she said, "Ever since then I've had a thing with people getting close to my neck." She didn't like whispers or people getting into her neck.

And with the propensity witness yes, she's older, but we've got him coming up behind her, whispering and kissing into the back of her neck. She had her shoulders held from behind, her back rubbed, and kissing on the neck. And one of the young girls also said that he was saying things like, "I can't wait to…" She's made to touch his penis. He's saying, "Do you know what this is?" and he's explaining to her what it means. And with the propensity witness he's saying when she's got a boyfriend tell him to do this to you, and in my submission that displays a great deal more similarity than just saying well, one's 15 and one's seven to eight.

And the young girl also described Mr Bunting talking or whispering to the older sister, when she said she saw him touch her inappropriately.

WINKELMANN CJ:

Well, but if you're doing something in a house won't you inevitably whisper, where the father is just in the other room? Is that really a distinguishing factor?

MS GRAU:

Well it was him coming up behind them, getting close to them and whispering, with some element of sexual instruction to them that was the similar thing. And you've got all of the offending taking place in the context of his work, where he's a presumably trusted trades person, using that opportunity to sexually offend against young people. And yes, there is an age difference, but you also had evidence of the younger sister describing her older sister, at the time of one of the incidents, as saying, in quotation marks, "She did have like boobs, she wasn't flat chested." So we've got suggestions there of pubescence.

WINKELMANN CJ:

At age eight?

MS GRAU:

I think she was nine. The ages weren't particularly clear, they weren't specific, so probably if she was eight, unlikely, but she, that was her evidence of the development of her sister.

So in my submission there were some real similarities between both the conduct and the age was thus less important. And there is the fact that either at 15 or at seven to eight, these are young female persons who are sexually unavailable to this mature, adult man, but he nevertheless can transcend that boundary to engage in inappropriate conduct with them.

WINKELMANN CJ:

Well, be that as it may, so that's a propensity point, but the other point is whether Mr Claver, when you view a situation around whether having him as your counsel really could be seen to fulfil the requirements of section 26 of

BORA and therefore, if it doesn't, whether the fair trial presumption, operates because if that analysis operates, if he wasn't given the right to legal representation, he didn't decline it, then he doesn't actually have to show any harm does he? That's the law isn't it in relation to section 26?

MS GRAU:
Yes, but the way that the appeal was argued was to say well, he was incompetent because he didn't object to this evidence but the evidence was admissible. And the other major plank of the appeal was run on a basis that the Court of Appeal –

WINKELMANN CJ:
Yes, but we've moved on to some extent, because we now have this new evidence.

MS GRAU:
Yes.

WINKELMANN CJ:
And as you heard I asked Mr Andersen, so what I'm wanting to hear from you is your response to this, that new evidence actually gives foundation to a different type of argument than was run by Mr Andersen in the Court of Appeal, which is that he really had no legal representation at all effectively, because this man really didn't have the knowledge and ability to run a jury trial, something he later admits to a disciplinary tribunal, and there is, when you connect that to the evidence that was in the Court of Appeal hearing it presents quite a different picture. So the question is, is that something that would either go back to the Court of Appeal for a second hearing, or is it something we should consider, and that's what we're thinking about, so I want your response on that.

MS GRAU:
So two responses to what the Disciplinary Tribunal decision means. At most it's a general propensity, it's in none of the matters that he's been criticised is

he actually running a jury trial. That's the first thing I would say. And the second point is that a supposedly incompetent lawyer's view of his own incompetence is one thing but in the Court of Appeal he was extensively cross-examined and the Court of Appeal has reviewed the evidence, had Mr Claver cross-examined, and they have said that it passed muster.

WINKELMANN CJ:

So you're saying that he's incompetent so we shouldn't think much of his assessment of his own competence.

MS GRAU:

Well we've got, yes, so, yes, it's interesting but we have an incompetent lawyer's assessment of his own incompetence as opposed –

WINKELMANN CJ:

So he admits that he wasn't competent to run jury trials?

MS GRAU:

Well yes, but the context he's making that admission is in a plea and mitigation after a guilty plea and in my submission it doesn't stack up against the permanent Court of the Court of Appeal, who have reviewed everything and listened to him and questioned him themselves and heard him under cross-examination. And the issue on appeal was how did this trial go? Did he put the case, was his closing address adequate, and I accept they said "just" but they found that it passed muster so here, what is the cogency of this decision except either to say that Mr Claver was a liar in the Court of Appeal. But that doesn't follow either, because the Disciplinary Tribunal seemed to find him quite genuine. And so that's another difficulty with it. So the Crown position is that this is not cogent when the Court of Appeal has reviewed his specific performance in this specific trial and found that it passed muster and that's the problem with relying on this decision. Is it propensity evidence, is it voracity evidence, and in my submission it's not cogent.

O'REGAN J:

Are you saying it would have made no difference to the Court of Appeal decision?

MS GRAU:

I can't advance that submission because I'm sure it would have been a matter that received quite a bit of air time if it had been there so it truly is a matter of fresh evidence.

WINKELMANN CJ:

Do you accept that it's very hard for an appellant to show the impact incompetent counsel has on the conduct of their defence post fact?

MS GRAU:

Well, no, because you've got the transcript and that was the inquiry undertaken here. Look at the closing address, did it meet the base requirements for what need to be in a closing address. Look at the cross-examination, was the case put. Was there a coherent theory, and it was a simple case. Of course now with all these new matters raised that's what makes it difficult here is that Mr Bunting's saying well, it's the other electrician, he's got an Adam's apple, and there was this other, the girl who had apparently said –

WINKELMANN CJ:

If we take it back to that legal framework I've put to you at the beginning, which is if he wasn't really a competent lawyer, he didn't have the fundamental attributes for competent lawyer, for instance, understanding the basic procedures of a trial, then that's not legal representation and it's presumptively an unfair trial. That's a different legal analysis than the Court of Appeal was undertaking wasn't it?

MS GRAU:

Yes, but to make that work you'd have to accept the disciplinary decision as conclusive proof that he was incompetent in this particular case.

WINKELMANN CJ:

Well to decide the appeal in Mr Bunting's favour you would.

MS GRAU:

Yes and it can't be because it doesn't relate to this appeal. I mean, it's his general –

WINKELMANN CJ:

No, but my point is it's additional evidence which wasn't available to the Court of Appeal when they decided the last…

MS GRAU:

Yes, I accept that, that the Court may have taken that into account, and of course what's in that decision are things that could have been put to Mr Claver obviously to say well, look, all of these other people say you didn't, on a propensity basis really, all of these people say you didn't take proper instructions, isn't that the case with Mr Bunting, and so I accept that.

Which moves onto, I think, Your Honours questions about whether this is a better matter for going back to the Court of Appeal. The difficulty with that is the very recent decision in *Lyon v R* [2019] NZCA 311, which is from July, and that involved second appeals, which the Court have said they are not second appeals, it's an application to re-call the decision and the Court was –

WINKELMANN CJ:

Yes, although that's, as I read that, that's because you have to have some sort of technical description for what you're doing because there's no statutory jurisdiction so you're simply saying it proceeds by way of a re-call.

MS GRAU:

Yes.

WINKELMANN CJ:

I don’t think that alters, I didn't read that as altering the substance of what's being talked about.

MS GRAU:

But it’s, I could be wrong, but it seemed to me that the Court was saying that’s a procedure for when something’s misfired in the Court of Appeal and thinking of cases such as banks, where the Crown didn't disclose something that was material to the appeal. That required the Court to have another look at the appeal whereas this is a situation of truly fresh evidence.

ELLEN FRANCE J:

Well I agree that they make the point that the scope of the power of recall described in *Smith* is a narrow one et cetera, but they do expressly leave open that question of the first pre-condition a fundamental error in procedure has been the subject of some controversy et cetera, and they, as I read it, they don’t finally resolve that.

WINKELMANN CJ:

I mean in a fundamental sense something has misfired, hasn’t it, if very material evidence is not available to the Court of Appeal, which is one of the old traditional concepts of *Nakhla*, the re-call right, if very material evidence is not brought to bear in the Court’s decision it can ground a re-call.

MS GRAU:

Yes and my submission would be that would be a better place to determine the issues in this case because there's no question that the Disciplinary Tribunal decision is very material to Mr Bunting’s appeal and I suppose the other thing is a reference under section 406, which would enable an investigation in a more general sense into what's gone on.

O'REGAN J:

It’s a pretty complicated process though isn't it and time consuming, I mean, it usually takes a very long time with section 406 reference.

MS GRAU:

Well that's so but this isn't a case where he's going to be sitting in prison while that happens and that's why I put that forward.

O'REGAN J:

It leaves the complainant dangling though a bit doesn't it, potential for another trial?

MS GRAU:

Yes, I accept that.

O'REGAN J:

So you're saying ideally the Court of Appeal would be the better venue but there's a real issue as to whether they'll accept it under the…

MS GRAU:

Yes.

O'REGAN J:

I mean they did seem to lower the bar a bit there for a while but I read *Lyon* as basically raising it.

MS GRAU:

Raising it again. But given that this all really concerns the appeal it may be a matter that's more likely to be viewed favourably in that forum.

O'REGAN J:

Should we adjourn and just put this on hold and let them try out the Court of Appeal?

WINKELMANN CJ:

That's what we've been wondering, whether we should just either decline but reserve leave to reapply or just adjourn this leave application to enable the Court of Appeal to consider an application for leave to bring a second appeal or re-call.

MS GRAU:

I don't think I can –

WINKELMANN CJ:

Assist.

MS GRAU:

– make a submission or assist Your Honours on that, but I suppose the problem with the leave application, as it currently stands, is that we've got the Disciplinary Tribunal issue, but we've got all of these other issues and…

O'REGAN J:

Well, again, that would indicate it's probably better for the Court of Appeal knowing the basis of which the appeal was previously brought.

MS GRAU:

And I think that that's something that needs to be borne in mind as well, which might be more easily done if the leave application was dismissed because those reasons could be put in such an application whereas I suppose if it's just adjourned then the Court of Appeal don't get any particular guidance on really what this Court is thinking. Unless I can help Your Honours any further, those are my submissions.

WINKELMANN CJ:

Thank you Ms Grau. Mr Andersen, do you have anything by way of reply? Don't feel you need to, there's no obligation.

MR ANDERSEN:

If it pleases the Court, just in terms of the discussion that you were having as to what you might do, I mean, obviously the applicant's preferred option is for leave to be granted, but there isn't really, as I hope I made clear in my opening submissions, if we could have gone to, if we felt we could have gone to the Court of Appeal we would have done so, so there isn't really, I don't have, and I wouldn't try and dissuade you from an option whereby you adjourn

the leave and give an opportunity to see if the matter could go to the Court of Appeal because certainly it is seen that the disciplinary issue is the big issue and that in fact the decision may well have been different if all of those facts had been before the Court of Appeal so from the applicant's point of view that's not seen as a bad option, or an unsatisfactory option, particularly if he is able to come back here if what is feared happens and he can't get a hearing in the Court of Appeal. But certainly it would be on the basis that if he got a hearing in the Court of Appeal then the application for leave would be withdrawn because whilst the propensity issue is one that's submitted it's worth arguing, it really was not initially proposed to appeal on that basis and it was really because of the, what was seen as the main issue, that this matter is now before this Court so that's really where the applicant's position is. Thank you.

WINKELMANN CJ:

Thank you Mr Andersen. Thank you counsel, we'll take some time to consider this and then let you have our decision in due course, thank you.

COURT ADJOURNS: 10.45 AM