

**IN THE BARRISTERS DISCIPLINARY TRIBUNAL
OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION**

BETWEEN

THE BAR COUNCIL

Applicant

and

MARK SUTHERLAND

Respondent

HONG KONG BAR ASSOCIATION
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REASONS FOR SENTENCE

Pursuant to section 37A of the Legal Practitioners' Ordinance (Cap.159)

Before: Mr. Selwyn Yu SC, Ms. Queenie Ng and Mr. William Chan
Dates of Hearing: 22 June 2019
Date of Decision: 18 July 2019

Representation: The Applicant was represented by Mr. Tony Ko, instructed by Messrs. Kwok, Ng & Chan
The Respondent was represented by Mr. Richard Todd QC (England and Wales), Mr. Graham Harris SC, Mr. Benson Tsoi, Mr. Johnathan Ah-Weng and Ms. Joyce Lai, instructed by Messrs. Morley, Chow & Seto

Introduction

1. By Statement of Findings dated 2 April 2019, this Tribunal found the Respondent guilty of 5 complaints laid by the Applicant. In summary, the complaints were:-
 - (1) Complaint 1 alleged that the Respondent asked questions and made statements during the Trial, which were intended to insult and/or annoy the witness or any other person or otherwise were an abuse of

Counsel's function, contrary to paragraph 131 of the Bar Code.

- (2) Complaint 2 alleged that the Respondent failed to use his best endeavours during the Trial to avoid unnecessary expense and wasting the Court's time by his questioning of witnesses, contrary to paragraph 133 of the Bar Code.
 - (3) Complaint 3 alleged that the Respondent knowingly misled the Court in relation to various procedural matters which arose during the Trial and engaged in conduct in the pursuit of his profession, which is dishonest or which may otherwise bring the profession of barrister into disrepute, contrary to paragraphs 130 and 6(b) of the Bar Code.
 - (4) Complaint 4 alleged that the Respondent engaged in conduct during the Trial which was discourteous to the Court, and/or which may bring the profession of barrister into disrepute and/or failing to observe the ethics and etiquette of his profession, contrary to paragraphs 133, 6(b) and (c) of the Bar Code.
 - (5) Complaint 5 alleged that the Respondent had engaged in conduct in court during the Trial which may bring the profession of barrister into disrepute and which was prejudicial to the administration of justice by failing to defend his client competently in accordance with his instructions, contrary to paragraphs 6(b) and (d) of the Bar Code.
2. The evidence relating to each of these complaints and our analysis and conclusions about the same are set out in the Tribunal's Statement of Findings, and the same will not be repeated herein.
 3. On 8 May 2019, Bar Disciplinary Tribunal's Convictions and Sentences, a list of previous cases involving similar and/or same breaches of the Bar Code, was submitted by the Applicant.
 4. On 18 May 2019, by way of submissions on mitigation, the Respondent submitted 10 character references from various practitioners, judges, and retirees in Hong Kong and United Kingdom.
 5. Further submissions on penalty were made in writing, pursuant to the Tribunal's direction on 30 May 2019, by Counsel for the Applicant on 6 June 2019, and Counsel for the Respondent on 15 June 2019.

6. On 22 June 2019, the Tribunal convened for the purposes of considering the appropriate penalties to be imposed upon the Respondent in respect of the complaints of which he had been found guilty. Both the Applicant and the Respondent made oral submissions.

Submissions on Sentence

7. Referring to *A Solicitor v Law Society of Hong Kong (20/2014)* [2015] 2 HKLRD 802, Mr. Ko for the Applicant submitted that:-
 - (1) An order that the barrister be struck off the Roll is not limited to cases where dishonesty is involved. There is “room for flexibility” to order a striking-off where a barrister has been found to have fallen below the required standards of integrity, probity and trustworthiness.
 - (2) Where a barrister has been found to have fallen below the required standards of integrity, probity and trustworthiness, it is only in the most exceptional cases that an order other than suspension is imposed.
 - (3) The rationale for the heavy sentences is four-fold: (1) to punish the barrister; (2) to deter others from acting in the same way; (3) to ensure that the offender will not have the opportunity to repeat the offence; (4) to maintain the reputation of the profession and to sustain public confidence in the integrity of the profession – the last one being the factor that should be given most emphasis.
 - (4) If suspension is the appropriate remedy, then it will not be an objection to impose it even though the barrister may be unable to re-establish his practice when the period of suspension is past.
8. In addition to the penalty and sanction, Mr. Ko suggests that, *inter alia*, (a) the Respondent to bear the costs of the present proceedings on an indemnity basis, and (b) the complaints, the conviction, and the sentence be published by a Bar Circular and on the Bar Website which is accessible by the public, and (c) the Statement of Findings and the Reasons for Sentence be sent to the Complainant, the Registrar of the High Court, and the Registrar of the District Court.

Submissions in Mitigation

9. Counsel for the Respondent invited the Tribunal to consider, *inter alia*, the following mitigating factors:-
 - (1) There is no suggestion the Respondent gained personally or ever planned to gain from the findings of dishonesty.
 - (2) In relation to Complaint 4, the Respondent produced an apology to the Court of Appeal for certain inappropriate language exchanged in the heat of the moment.
 - (3) The Respondent has a previously unblemished character.
 - (4) The Respondent's actions were an isolated act and he is highly unlikely to re-offend.
 - (5) The Respondent adopted a cooperative and responsible attitude throughout the current disciplinary proceedings.
 - (6) The Respondent treated the Tribunal with candour by keeping it informed of his application for leave to appeal the Court of Appeal judgment dated 15 May 2015 to the Court of Final Appeal.
 - (7) The Respondent has suffered public humiliation and severe loss of reputation, with personal attacks and criticisms posted on public forums.
 - (8) The Respondent provided character references, painting him as a "*dedicated family man, who had a keen sense of righteousness and morality*".
10. Referring to a number of Australian cases, Counsel for the Respondent, Mr. Todd, submitted that despite the seriousness of this case, disbarment is not called for. Mr. Todd also frankly accepted that he was unable to locate any similar precedent of parallel gravity in England and Wales.
11. It was submitted on behalf of the Respondent that even if a period of suspension is necessary, the agony, stress, publicity, humiliation he had suffered was a sufficient penalty by itself and extenuating circumstances

existed not to impose a suspension. Instead, it was submitted, the appropriate penalty would be (a) further reputational damage by way of a censure; (b) a fine; (c) further publicity, and (d) an order for costs on an indemnity basis.¹

12. At the hearing, Mr. Todd emphasised that the Respondent has already suffered from public humiliation and permanent reputational damage for the adverse findings on the Respondent by the Tribunal once published online would never be erased or forgotten.
13. Furthermore, Mr. Todd suggested that the financial penalty already or would be inflicted on the Respondent, in the estimated amount of HK\$1.2 million, would be a sufficient penalty. This amount includes costs of these proceedings which is said to be exceeding an amount of HK\$800,000, and other costs involving sums of HK\$400,000 incurred in respect of previous court proceedings.

Analysis

14. Section 37 of the Legal Practitioners Ordinance (Cap. 159) sets out the range of penalty options available to the Tribunal.
15. In approaching sentence for the Complaints, we remind ourselves and readily acknowledge that the Respondent has been hitherto a professional man working in the legal profession first as a solicitor for 13 years before turning to practise as a member of the Bar for 8 years since 2005. The references from reputed members of the judiciary and the legal profession is a solid reference to his good character.
16. However, the fact that the Respondent was previously of “good character” and has a good reputation may be of less significance where the breach of the Code was serious. The emphasis should be on the nature of the breach of the Code and the circumstances in which the breach occurred. This is amply illustrated in the observation of Lord Bingham in *Bolton v Law Society* [1994] 1 WLR 512, which is elaborated in paragraph 23 hereinbelow.
17. It has been urged upon the Tribunal on the Respondent’s behalf that the incident arose out of his misguided zealousness to act fearlessly in the best interest of his client. We are however not convinced that it was as simple as

¹ Paragraph 21 of the Respondent’s submissions on Sentencing and Mitigation dated 15 June 2019

it was put. The overall conduct clearly illustrates the fundamental misconception as to the duty as a defending counsel and the standard of conduct expected of a barrister. His conduct plainly fell far below the standard of a reasonable competent barrister by any scale. They no doubt bring the profession of barrister into disrepute and were prejudicial to the administration of justice.

18. It was submitted that the Tribunal had to take into account the devastating personal, reputational and financial damage to the Respondent as a result of the incident. We are prepared to accept that the Respondent had undergone serious financial sufferings and under a lot of personal pressure and stress, in terms of home and professional life. We cannot lose sight of the fact that by his conduct, the reputation of the Bar equally suffered, not to mention the serious damage done to public confidence in the profession.
19. It was submitted that there is no motive in terms of financial gains, but it is not a matter of gain but a matter of professional conduct. So far as gain is concerned, it may be arguable that the misconduct was not driven by financial gain, but the fact is as a result of the unnecessary and unwarranted prolonged Trial, the Respondent did receive financial gain in terms of his daily refresher. And if one looks at it from the other point of view, there was a potential loss because the client (and the public) could have avoided all the unnecessary costs of proceedings.
20. The seriousness of the breaches lie from abusing the witness, escalating into protracted arguments over the Court's accommodation of his intended holiday which was clearly for his personal benefit, and for which he was prepared to mislead the Court as well as advancing applications and entering into arguments in an attempt to frustrate the proceedings and hence the administration of justice.
21. In assessing the appropriate penalty, we take into account of all the mitigating circumstances urged on the Respondent's behalf. However, the whole point of professionalism as a barrister is that the public must not be placed at risk and the standard and reputation of the Bar must be preserved.
22. We observe that the principle in dealing with penalty in professional misconduct set out in *A Solicitor v Law Society of Hong Kong (20/2014)* (*supra*) is not disputed by the Respondent and accordingly we find ourselves so guided.

23. We remind ourselves that the main objectives of professional sanctions are to protect the public from further harm, and to maintain the standards imposed by the Bar Code in the interests both of the public and the profession. The observation of Lord Bingham in *Bolton v Law Society* (*supra*) at p.519B-E was accepted by the Court of Appeal to be the correct principles in *A Solicitor v Law Society of Hong Kong (20/2014)* (*supra*) at paragraph 70:-

“Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. ... All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears to be likely, to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.” (underline added)

24. With these in mind, even though the principles were emanated in a case dealing with solicitor’s professional misconduct, it applies *mutatis mandamus* to the Bar. We approach the penalty for each individual complaint as follows.

Complaint 1

25. In respect of Complaint 1, the Tribunal concluded² that the Respondent had persistently asked questions and made statements at Trial, with no perceivable value despite protests and warnings, with the intention to insult and/or annoy the witness, and plainly abused counsel’s function.
26. In his mitigation, Mr. Todd referred to *20/2007 (W.H.M)*, where the barrister

² Paragraph 90 of the Tribunal’s Statement of Findings

was found to have made allegations against a High Court Master and against Counsel for the opposite side without any proper foundation or justification which went beyond what was necessary for him to present his case fairly and properly. He was also found to have engaged in conduct which might be prejudicial to the administration of justice by failing to exercise proper judgment of a competent barrister. The Tribunal imposed a suspension of 6 months for each complaint to be served concurrently. Counsel submitted that there is nothing to suggest that the barrister faced the additional excoriation that the Respondent has endured, and that a suspension of up to 6 months would be harsh.

27. Despite the lack of particulars of the findings and reason for penalty, *20/2007 (W.H.M)* shows that the starting point of 6 months suspension for such kind of misconduct against a High Court Master and against Counsel for the opposite side is reasonable.
28. The Respondent's intentional insult and/or annoyance to the witness were persistent despite warnings from the Magistrate. The Respondent readily brushed off the warnings of the Magistrate. The witness was kept in the witness box for over 4 days; and there was total lack of remorse on the part of the Respondent.
29. The Tribunal concludes that, in respect of Complaint 1, the Respondent be suspended from practicing as a barrister for a period of **6 months**.

Complaint 2

30. The Respondent was found by the Tribunal³ to have failed to use his best endeavours to avoid unnecessary expense and wasted the Court's time, despite the Magistrate's reminders.
31. In view of the Respondent's serious failure to comply with his duties and his complete disregard to the Magistrate's reminders, the Tribunal does not accept that a censure and/or a fine, as suggested by Counsel for the Respondent, is appropriate. The suitable sentence would be an order of suspension.
32. Complaint 2 is interrelated with Complaint 1, the Tribunal concludes that, the

³ Paragraphs 186 to 188 of the Tribunal's Statement of Findings

Respondent be suspended from practice as a barrister for **6 months** to run **concurrently** with the penalty in Complaint 1.

Complaint 3

33. In Complaint 3, the Respondent is found to have committed a serious professional misconduct by knowingly and dishonestly misleading the Court⁴.
34. In mitigation, Counsel for the Respondent referred to *28/2004 (R.G.M.)* in which the barrister who had appeared in a criminal trial, having consumed alcohol to an extent as to significantly impaired his ability to discharge his professional duties, failed to act with due courtesy to the Court and breached his duties not to engage in conduct which may bring the professional into disrepute. The Tribunal imposed a 6 months suspension which was to run with other imposed penalties. Counsel submitted that concurrence is the correct approach here, and a 6 months suspension would be too harsh in this case, and mitigating factors should be considered.
35. The Tribunal is of the view that *28/2004 (R.G.M.)* does not assist the Respondent where no element of dishonesty nor misleading the Court was involved.
36. The conduct of the Respondent involved dishonesty in professional life. This is clear from the Tribunal's findings. We consider that given the seriousness of professional misconduct involved, the starting point for any decision, as far as sentence is concerned, must be suspension.
37. Furthermore, the Respondent's misconduct was not committed singly nor isolated. When the attempt failed, the Respondent persisted by way of making applications in the absence of instructions with the view to frustrate the Trial. And when he was caught out, he chose to lie to cover for himself. The seriousness of the professional misconduct is unprecedented, involving not only dishonesty but persistent and repeated abuse of court process as well as abuse of his duty as a barrister, undermining the administration of justice. A very serious view must be taken, and we fail to see any material mitigating circumstances.
38. In respect of Complaint 3, the Tribunal concludes that a lengthy period of

⁴ Paragraph 281 of the Tribunal's Statement of Findings

suspension is warranted, and the Respondent be suspended from practice as a barrister for **24 months** to run **consecutively** with Complaints 1 and 2 as this is a separate and distinct professional misconduct.

Complaint 4

39. Counsel for the Respondent referred the Tribunal to *13/2002 (E.L.M.)*, where the barrister (i) discourteously challenged the Court's ruling and argued in disrespectful and discourteous terms (ii) discourteously and continuously interrupted and talked over the Judge's attempt to address him (iii) discourteously disrupted the right of the Court to stop him from asking repetitious questions. The Tribunal imposed a 3 months suspension to run concurrently.
40. In *20/2007 (W.H.M.)*, the Tribunal imposed a 6 months suspension to run concurrently on the barrister, for making allegations a Master of the High Court without any proper foundation or justification and/or which went beyond what was necessary for him to present his case fairly and properly by way of written and oral submissions in support of an appeal against the master's refusal to discharge himself from continuing to hear a Summons of a High Court action.
41. We however take the view that these past penalties are of limited assistance since the factual particulars as well as individual mitigating circumstances are lacking. Instead of being precedents, Mr. Todd fairly accepted that these past penalties show the range of penalties imposed where professional misconduct involving disrespectful and discourteous behaviour was involved.
42. In the present case, the discourteous and disparaging behaviour by the Respondent was persistent and lasted for several days. By the Tribunal's findings⁵, it is blatantly clear that the Respondent's failure to treat the Magistrate and the prosecution with respect and courtesy was very serious and was on the verge of contempt of the court, where the Respondent used insulting, offensive, abusive, and ridiculing language.
43. We consider that the appropriate penalty is 6 months suspension. We have given consideration to the Respondent's apology to the Court of Appeal over his discourteous behaviour. In view of the findings of the Tribunal in respect

⁵ Paragraphs 340 and 341 of the Tribunal's Statement of Findings

of Complaint 4⁶, the severity of the misconduct went far beyond his apology to the Court of Appeal of his disrespectful conduct at the Trial. We therefore decided against meriting any reduction in penalty by his apology to the Court of Appeal.

44. The Tribunal concludes that, in respect of Complaint 4, the Respondent be suspended from practice as a barrister for **6 months** to run **consecutively** with Complaints 1 to 3.

Complaint 5

45. The Tribunal maintains a strong view as to the seriousness of Complaint 5.⁷ Not only did the Respondent fail to take all reasonable and practicable steps to ensure that his professional engagement in the Trial was fulfilled, the Respondent's actions plainly demonstrated that he fell far short from the high standards of behaviour and performance for the Bar, and had acted dishonestly and deliberately manipulated the court process to suit his own personal needs. His misconduct was very serious, strikes at the heart of proper administration of justice, and had seriously damaged public confidence in the services of the Bar.
46. The Tribunal considers that the gravity of the Respondent's conduct has to be taken seriously, and a censure, as submitted by Counsel for the Respondent, is wholly inadequate to reflect the gravity of such conduct. By his actions, the course of the Trial and administration of justice was seriously and adversely affected. To maintain the reputation of the profession, to protect the public, and to sustain public confidence in the integrity of the profession, a lengthy period of suspension is appropriate.
47. The Tribunal concludes that, in respect of Complaint 5, the Respondent be suspended from practice as a barrister for **36 months** concurrently with Complaints 1 to 4.

Costs

48. As for costs, we are grateful to both parties in agreeing that the Respondent would pay the Applicant's costs on an indemnity basis for the current

⁶ Paragraphs 311-312, 319, 328 to 340 of the Tribunal's Statement of Findings

⁷ Paragraphs 358 to 364 of the Tribunal's Statement of Findings

disciplinary proceedings.

The Tribunal's Order

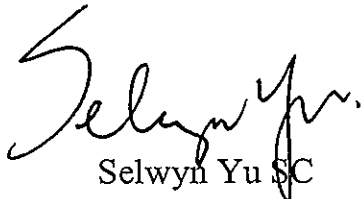
49. The Tribunal makes the following Orders:-

- (1) The Respondent be suspended from practicing as a barrister for a total of **36 months**:-
 - (i) Complaint 1 – The Respondent be suspended from practicing as a barrister for a period of 6 months;
 - (ii) Complaint 2 – The Respondent be suspended from practicing as a barrister for a period of 6 months, to run concurrently with Complaint 1;
 - (iii) Complaint 3 – The Respondent be suspended from practicing as a barrister for a period of 24 months, consecutive to Complaints 1 and 2;
 - (iv) Complaint 4 – The Respondent be suspended from practicing as a barrister for a period of 6 months, consecutive to Complaints 1 to 3; and
 - (v) Complaint 5 – The Respondent be suspended from practicing as a barrister for a period of 36 months, concurrent to Complaints 1 to 4.
- (2) The Respondent do pay to the Applicant the costs of and incidental to the proceedings of the Tribunal and the costs of any prior inquiry or investigations in relation to matters before the Tribunal, to be taxed (if not agreed) by a Master of the High Court on a full indemnity basis;
- (3) The Statement of Findings and Reasons for Sentence be published by way of a Bar Circular and also published on the part of the Bar Website accessible by the public generally for the period of suspension;
- (4) The Statement of Findings and Reasons for Sentence be sent to the Complainant, the Registrar of the High Court, and the Registrar of the District Court. Additionally, the Statement of Findings and Reasons for Sentence should also be sent to the Chief Judge of the High Court and the Chief District Judge, the Chief Magistrate, all Members of the Bar Disciplinary Tribunal Panel, the Department of Justice (the Secretary for Justice, the Civil Litigation Unit and the Director of


Public Prosecutions), the President of the Law Society, the Director of Legal Aid, the Administrator of the Duty Lawyer Service, and the Official Receiver's Office;

- (5) A copy of the Statement of Findings and Reasons for Sentence be kept in the Bar Secretariat and copies of the same should be made available to the public upon request; and
- (6) There be liberty to apply in respect of the orders made herein.

Dated this 18th day of July 2019


Selwyn Yu SC
Chairman


Queenie Ng
Member


William Chan
Member