

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

BETWEEN

THE BAR COUNCIL

APPLICANT

and

CHAN, SIU FUNG JULIAN

RESPONDENT

Before : Mr Ambrose Ho, SC, Mr Lawrence KF Ng and Ms Tam Chi-wah, Angelique

Date of Hearing: 17 December 2024

Date of Written Submissions: 14 January 2025

Date of Decision: 27 February 2025

DECISION ON LIABILITY

A. The Complaints

1. The Respondent (referred to as **Mr Chan** herein) is a practising barrister. He was called to the Bar in Hong Kong on 5 July 2008.
2. On 29 November 2023, two complaints of misconduct were laid by the Bar Council against Mr Chan. The Complaints arose from Mr Chan's conduct as counsel acting for the Applicants ("**the LT Applicants**") in the Lands Tribunal proceedings in LDCS 25000/2018, being an application for a compulsory sale of

a property under the Land (Compulsory Sale for Redevelopment) Ordinance, Cap 545 (“**the LT Proceedings**” or “**LDCS Application**”, as the case may be). The LT Applicants, together, were the majority owners of the undivided shares in the subject property.

3. Full Particulars of the Complaints are annexed to this Decision at **Annex 1**. The allegations can be summarised as follows:

3.1 **Compliant 1:**

- (a) That in the LT Proceedings, Mr Chan has made misleading statements in the written Opening Submissions dated 30 December 2020 (“**Written Opening**”); and/or
- (b) That Mr Chan has given a misleading impression of the facts by providing incomplete information or by omitting reference to the full facts in §33 of the Written Opening, and/or during his oral opening submissions (“**Oral Opening**”) on the first day of the trial on 11 January 2021; and/or
- (c) That Mr Chan has failed to correct the misleading statements in the Written Opening prior to the Land Tribunal’s Leave Decision (as defined below).

3.2 **Compliant 2:**

- (a) That Mr Chan has made misleading statements in the written Closing Submissions dated 5 February 2021 (“**Written Closing**”); and/or
- (b) That Mr Chan has given a misleading impression of the facts by providing incomplete information or by omitting reference to the full facts in the Written Closing, and/or in the Reply Affirmation (as defined below); and/or
- (c) That Mr Chan has failed to correct the misleading statements in the Written Closing prior to the Lands Tribunal’s Leave Decision.

4. It is the Bar Council’s case that in relation to each of the Complaints, Mr Chan has:

- (a) Knowingly deceived or misled the Lands Tribunal contrary to **§10.30** of the Code of Conduct of the Bar of the Hong Kong SAR then in force (“**the Bar Code**”);
- (b) Recklessly failed to act with candour and independence in the interests of justice contrary to the Bar Code **§10.29**;
- (c) Engaged in conduct discreditable to a barrister, prejudicial to the administration of justice and/or likely to diminish public confidence in the administration of justice contrary to the Bar Code **§4.1(b)(i) and /or (iii)**.

B.1 Background – The LDCS Application and the Parties

- 5. The background giving rise to the two Complaints are largely undisputed. The following narrative of the background is largely adopted from the Agreed Statement of Facts submitted for this Inquiry.
- 6. As noted above, Mr Chan was counsel acting for the LT Applicants in the LT Proceedings. In those proceedings, one of the issues concerned whether the LT Applicants had complied with the statutory requirement of taking reasonable steps to acquire the minority owners’ undivided shares in the subject property on terms that were fair and reasonable.
- 7. The LT Applicants were unsuccessful in the LDCS Application. They later sought leave to appeal but their application for leave was also refused by the Lands Tribunal. The Lands Tribunal’s Decision in the LDCS Application and the subsequent Leave Decision were handed down respectively on 30 April 2021 (“**the LDCS Decision**”) and 4 April 2023 (“**the Leave Decision**”).
- 8. At the time of the trial of the LDCS Application, four respondents remained in the proceedings. They were each a minority owner of undivided shares in the subject property. (The respondents will be individually referred to as “**R1(LT)**”, “**R2(LT)**”, “**R3(LT)**”, and “**R4(LT)**”, or collectively as “**the LT Respondents**”). Among LT Respondents, only R1(LT) and R2(LT) were present at the hearing, both of whom were legally represented. R3(LT), who was himself a senior counsel, did not appear, and neither did R4(LT). As will become apparent later, the communication shortly before the commencement of the trial between R3(LT) and Mr Chan was pertinent to these Complaints.

9. As regards R3(LT), what happened was that the LT Applicants had made a written offer to acquire his unit in the property by letter dated 27 August 2018. The offer was open for acceptance within 14 days, after which the offer would lapse automatically.
10. On 10 September 2018, R3(LT) wrote to the LT Applicants stating his *acceptance* of the offer. However, the LT Applicants did not consider it a valid acceptance because they took the view that R3(LT)'s acceptance was out of time. For present purpose, it suffices to note that the validity of the acceptance was a disputed issue between the parties.
11. The LDCS Application commenced on 28 September 2018. R3(LT) filed his Grounds for Opposition on 23 October 2018. The thrust of R3(LT)'s allegation was that the LT Applicants were not in a financial position to acquire the units of the LT Respondents. It was alleged that the offers were a sham to give the impression of having complied with the statutory requirement when in fact the LT Applicants had no genuine intention nor ability to honour the offers if they were accepted by the offerees. It was alleged that the grounds put forward by the LT Applicants to reject R3(LT)'s acceptance were bogus, unsound and unreasonable.
12. Subsequently, the LT Applicants and R3(LT) reached a settlement. R3(LT) agreed to withdraw his opposition in return for a promise that in the event of an order for sale by public auction, he would receive a stated percentage of the total sale proceeds for his undivided shares in the property.
13. Leave was granted on 18 January 2019 for R3(LT) (as well as R4(LT)) to withdraw their opposition to the LDCS Application.

B.2 The Written Opening and the Oral Opening

14. Mr Chan's Written Opening for the LDCS Application was lodged on 30 December 2020. The Written Opening contained a Section E which was headed "Reasonable Steps". After reciting the provision in the Ordinance requiring the majority owners to take reasonable steps to acquire all the undivided shares in the property, the Written Opening referred to the offers made by the LT Applicants to the LT Respondents in August 2018. The Written Opening then contained §§32 to 34 in the following terms:

“32. *As to be explained by the Applicants’ factual witness, the written offers were made relying on the advice of their valuation expert,, on the basis of a proportionate share of the redevelopment value of the Lots.*
[see etc.]

33. *None of the respondents accepted the respective offers made by the Applicants to purchase their undivided shares.*

34. *In the present case, there is no evidence to suggest that the advice of [the valuation expert] was not properly made based on professional valuation. In the premises, the Applicants have taken reasonable steps to acquire the undivided shares of the respondents.”*

(emphasis added above)

The impugned §33 will be referred to as “§33 (Opening)”.

15. R3(LT) received the Written Opening and took objection to the impugned statement in §33 (Opening). He considered that he had actually accepted the offer from the LT Applicants but his acceptance was wrongly treated as ineffective. R3(LT) therefore contacted the LT Applicants’ solicitors and Mr Chan, telling them that unless they agreed to rectify the Written Opening orally at the hearing, R3(LT) would feel constrained to put in a written opening himself to draw attention to the inaccuracy in §33 (Opening).

16. According to R3(LT), which is not disputed by Mr Chan, the response from Mr Chan was that:

“I am happy to qualify paragraph 33 of the Opening accordingly as it related to you. The [LT Applicants] will rely simply upon the fact that no binding contract was concluded rather than saying ‘the offer was not accepted’ and I will mention this orally in opening.”

17. When the trial commenced on 11 January 2021, at the outset Mr Chan addressed the Lands Tribunal as follows:

“..... Just to be clear about the position of [R3(LT) and R4(LT)], after the [LT Applicants] made the offers, there were amicable negotiations

and, although no sale was concluded, the parties trying to sue [sic] reach a settlement whereby [R3(LT) and R4(LT)] agreed not to oppose the application. Now, [R3(LT)] has contacted us to ask us to convey the message that he wishes to be excused from the attendance of the trial

At that point apparently the Tribunal had some difficulty hearing Mr Chan's submission, Mr Chan therefore repeated:

..... Yes, so, just to clarify the position of [R3(LT) and R4(LT)], after the [LT Applicants] made the offers, [R3(LT) and R4(LT)] and the parties engaged in negotiations and, although no sale could be concluded, the parties managed to reach settlement where [LTR-3 and R4(LT)] agreed not to oppose the [LDCS Application]"

(emphasis added above)

18. Mr Chan did not, at any time during the Oral Opening, refer to §33 (Opening), or qualify or clarify the impugned statement.

B3. The Written Closing and the Reply Affirmation

19. Throughout the LT Proceedings, the question whether the LT Applicants had taken reasonable steps to fulfil the statutory requirement remained a live issue. It was one of the matters that R1(LT)'s counsel had explored in cross-examination with LT Applicants' witness, Mr Barrett. It was also one of the arguments in the written closing submissions of R1(LT) where counsel submitted that the LT Applicants had no intention of honouring the offers, making reference to the allegations in R3(LT)'s Grounds of Opposition.
20. Mr Chan lodged the Written Closing on 5 February 2021. The Written Closing contained the following statements:

Under Section C1, headed "*Reasonable Steps: Factual Background – reasonable steps*":

"66. *As stated in oral opening and also confirmed by Mr. Barrett in oral evidence in response to cross-examination by [R1(LT)'s] counsel:*
(a) *It was known that [R2(LT) and R4(LT)] would not accept the*

offers made; (b) No response was made by [R1(LT)]; and (c) There was a dispute at the time with [R3(LT)] over whether he had accepted on time the offer made to him.

67. *However, this dispute with [R3(LT)] over the timing of acceptance is no longer an issue. After amicable negotiations, [R3(LT)] reach a settlement agreement with the [LT Applicants] whereby [R3(LT)] does not oppose [the LDCS Application].”*

.....

Under Section C2, headed “Reasonable Steps: Applicable Law & Analysis”:

“76. [The] fact that [R2(LT) to R4(LT)] do not argue the issue of reasonable steps and also that the offers made were based upon expert valuation, there is no doubt that reasonable steps were taken by the [LT Applicants] in relation to [R2(LT) to R4(LT)].

77. *It is recognised that [R2(LT) to R4(LT)] do not oppose a compulsory sale order being made. **Ultimately, they have decided that rather than selling their properties they would prefer to receive a share of the sale proceeds upon a successful auction of the lots.** [R2(LT) to R4(LT)] are perfectly entitled to take that position and indeed a successful auction may end up with a sale price higher than any reserve price set.*

78. *As such, R1(LT) is the only one opposing a compulsory sale order and arguing on the issue of reasonable steps.*

.....

109. *As noted above, [R3(LT)] ultimately decided to share in the sale proceeds of a successful auction rather than selling his flat. It is neither here nor there for [R1(LT)] to point to arguments which were previously raised but subsequently abandoned by [R3(LT)].”*

(emphases added above)

The above paragraphs will be referred to as “§§66, 67, 76, 77, 78 and 109 (Closing)” respectively.

21. There was no oral hearing for closing submissions in the LT Proceedings.
22. On 30 April 2021, the Lands Tribunal handed down the LDCS Decision. The Lands Tribunal found that the LT Applicants had satisfied the requirement of taking reasonable steps to acquire the LT Respondents' undivided shares. The LDCS Application was however dismissed on other grounds. The Lands Tribunal noted in the LDCS Decision that:

“79. Afterwards, [R3(LT) and [R4(LT)] respectively reached settlement with the [LT Applicants] and they no longer oppose the application. With leave of the tribunal, their oppositions were withdrawn. According to Mr Julian Chan, [R2(LT) to R4(LT)] have decided that instead of selling their properties to the applicants, they would prefer to receive a share of the sale proceeds upon a successful auction of the Lots. [R2(LT)] also does not argue that reasonable steps have not been taken by the [LT Applicants]. In other words, [R1(LT)] is the only one who genuinely opposes a compulsory sale order and argues on the issue of reasonable step.”

(emphasis added)

23. On 28 May 2021, the LT Applicants applied for leave to appeal the LDCS Decision. The leave application was dealt with on paper.
24. Upon seeing the LDCS Decision, R3(LT) considered §79 to be an inaccurate statement concerning his position. He accordingly provided a statement to the Lands Tribunal in June 2021 (“**R3’s Statement**”). In particular, with respect to §79, R3(LT) wrote:

“9. That was both inaccurate and not in accordance with my previous correspondence. On the contrary I preferred to sell my property to the applicants and that is why I accepted their offer, but they then claimed it was ‘too late’ and that I had ‘impliedly rejected’ it.

10. I was concerned about this further misstatement which had found its way into the Lands Tribunal’s Decision because it might give the false impression to anyone reading the Decision that I preferred to take my chances of receiving a higher sum under Cap.545 in a public auction rather than the sum offered to me by the applicants. That was untrue. On the contrary I preferred to accept the offer and not be a party to the Cap.545 proceedings

which I thought had a real risk of failing on the ground that no or insufficient ground had been shown to justify an order for sale

11. *What the Lands Tribunal was told by the Applicants, erroneously, and which the Tribunal then recited in Para 79 of its Decision, suggests that I was in favour of the Cap.545 proceedings (which I was not) and that I had been guilty of a serious error of judgment in rejecting the offer to me of HKD [x]. The truth is I did accept it but to no avail.*
12. *I raised this with the Applicants' counsel and I promptly received an entirely honourable recognition of the error in what was told to the Tribunal in my absence and a wholly appropriate apology which I accepted. I hoped that would be an end of the matter.*
13. *But in the light of the Applicants' present application seeking leave to appeal to the Court of Appeal against the Lands Tribunal's Decision, I feel constrained to put right this inaccuracy which might otherwise receive further publicity as the case goes through the appellate process.*
14. *By reason of the terms of my settlement with the Applicants, it would not be appropriate for me to say anything in opposition to the Applicants' present application.*
15. *My concern is merely to correct a clear error which I do not want to see perpetuated."*

(original emphases)

25. After receiving R3's Statement, the Lands Tribunal gave the LT Applicants an opportunity to file an affirmation to reply to R3's Statement. It is not disputed that Mr Chan had advised in the drafting and settling of the affirmation of Mr Barrett dated 27 August 2021 ("**the Reply Affirmation**").

26. Part of Complaint 2 herein concerns the Reply Affirmation. The material parts of it are as follows:

- "4. [R3(LT)] is concerned that there may be a false impression given that he supported or was in favour of the compulsory sale proceedings. Although it is irrelevant to the issues in the application, for the avoidance of any confusion, the Applicants will briefly confirm the following.

5. *As confirmed in paragraphs 1 and 2 of [R3's Statement], there was initially a dispute between the [LT Applicants] and [R3(LT)] inter alia as to whether the offer made was 'accepted in time'. Subsequently, as also confirmed in [R3's Statement], the dispute was formally settled whereby it was agreed that [R3(LT)] would not oppose the compulsory sale proceedings and in return would receive a specified share of the sale proceeds insofar as there was an order for sale by public auction.*
 6. *Pursuant to the settlement, [R3(LT)] was duly granted leave to withdraw his opposition to the compulsory sale proceedings by Order dated 18 January 2019. The Tribunal was made aware of the dispute and subsequent settlement with [R3(LT)] and during trial had been referred to the Notice of Opposition of [R3(LT)] and the Order dated 18 January 2019.*
 7. *In order to avoid any confusion, the [LT Applicants] hereby confirm again that the agreed position of R3(LT) is one of 'non-opposition' to the compulsory sale proceedings and not one of 'support.' ”*
27. The Bar Council's case is that, having regard to the wrong impression created by §§77 and 109 (Closing), namely: – **(i)** the impression that R3(LT) would prefer to receive a share of the auction sale proceeds rather than accepting the offer to sell his flat to the LT Applicants, when R3(LT)'s actual preference was in fact the opposite (“**the False Preference**”); and **(ii)** the impression that it was R3(LT)'s own choice to decide whether to receive a share of the auction sale proceeds or accept the offer to sell his unit, when in fact the LT Applicants had refused to purchase R3(LT)'s unit despite R3(LT)'s acceptance of their offer (“**False Choice**”) – the Reply Affirmation had failed to correct the reference to the False Preference and/or the False Choice. Instead, the Reply Affirmation simply shifted the focus to their irrelevance for the purpose of the leave application.
28. On 4 April 2023, the Leave Decision was delivered. There was a 14-page “*Post-Script*” which was highly critical of Mr Chan's conduct. In it, the Lands Tribunal remarked that:

- “75. Mr Julian Chan told the tribunal that [R3(LT)] had decided that rather than selling his undivided shares to the applicants, he would prefer to receive a share of the sale proceeds upon a successful auction of the Lots, fully knowing that such was his own fabrication, was a distortion of the fact and was totally at odds with [R3(LT)’s] position. We could not think of any motive behind such behaviour other than to deliberately throw dust in the tribunal’s eyes so that doubt would not be casted on the applicants’ sincerity and capability to acquire undivided shares. This tribunal verily believes that the misstatements, its repetition and the elaboration thereof by Mr Julian Chan in his opening and closing submissions were all calculated to mislead the court in order to unfairly undermine [R1(LT)’s] case and to advance his client’s case.
76. With the benefit of hindsight, [R3(LT)’s] clarification seems to suggest that [R1(LT)’s] complaints about the [LT Applicants’] failure to make genuine offer and lacking the sincerity and financial capability to honour the offer was not entirely speculative but may have some substances. Had such information come to light and considered at trial, the line of questioning of the factual witnesses about the previous attempts to acquire/sell the undivided shares could have been different. Chances are the tribunal may have come to a different conclusion on the issue of whether the [LT Applicants] had taken reasonable steps to acquire all undivided shares from the minority owners, which was determinative of the question of whether an order for sale shall be made.”

29. A copy of the Leave Decision was forwarded to the Bar Council for its attention.

B.4 Laying of the Complaints and Mr Chan’s Initial Response

30. On 10 May 2023, the Chairman of the Bar’s Standing Committee of Discipline wrote to Mr Chan for his explanation on the comments in the Post-Script of the Leave Decision. Mr Chan responded to the Standing Committee on 30 May 2023 (“**the Explanation Letter**”). Among other things, Mr Chan stated:

- “21. As to paragraph 33 of the [Written Opening], whilst the [LT Applicants’] position was that [R3(LT)’s] attempt to accept the offer was out of time and ineffective, **I accept that that paragraph was not completely accurate.** The fuller and more accurate picture was that [R3(LT)] attempted to accept the offer but there

was a dispute between the [LT Applicants] and [R3(LT)] over whether the acceptance was in time and effective.

22. *Having been contacted by [R3(LT)] regarding that paragraph, I did agree to qualify that paragraph in oral opening submissions and only rely upon the fact that no binding contract was concluded.*
23. *At the time of oral opening submissions, I thought that I did deal with the issue. However, having seen the transcript cited in the [Leave Decision], I accept that I did not deal with the issue properly and should have specifically referred to the paragraph in the [Written Opening] to qualify it in relation to [R3(LT)]. I accept that that this was a careless mistake.”*

(emphasis added)

Making reference to §§66 and 67 (Closing), Mr Chan went on to explain:

- “26. *Thus, it was specifically explicitly mentioned in the [Written Closing] that there was initially a dispute between the [LT Applicants] and [R3(LT)] regarding the timing of his acceptance of the offer. The Lands Tribunal was certainly made aware of this dispute.”*

.....

29. *As noted in the same paragraphs of the [Written Closing], this was the oral evidence of [Mr Barrett] during cross-examination by [R1(LT)'s counsel].”*

31. On 29 November 2023, the two Complaints were laid against Mr Chan. On 22 December 2023 Mr Chan submitted a letter to the Bar Council pursuant to rule 5 of the Barristers Disciplinary Rules (“**the Rule 5 Letter**”). Among other things, Mr Chan agreed that §33 (Opening) was not specifically referred to in the Written Closing. He repeated §§66 and 67 (Closing) and stated (at §18) that “[viewed] in the context of the Trial as a whole, [he] thought that the relevant material facts had been disclosed and did not think that the Lands Tribunal would be misled”. Regarding §§77 and 109 (Closing), Mr Chan further stated:

- “21. *I accepted that paragraphs 77 and 109 of the [Written Closing] were poorly worded. The intention of the argument was as to the effect of the ultimate decision made by [R3(LT)] i.e. entering into the Settlement Agreement.”*

(emphasis added)

32. At this Inquiry, the Bar Council is represented by Mr Jason Yu. The Bar Council has not called any witnesses. Mr Chan defends himself in person and he has given *viva voce* evidence. No other witness was called.

C. The Bar Code – Relevant Legal Principles

33. Paragraphs 10.30, 10.29 and 4.1(b)(i) and (iii) of the Bar Code invoked by the Bar Council are in the following terms:

“10.30 A practising barrister must not knowingly deceive or mislead the Court.”

“10.29 A practising barrister has an overriding duty to the Court to act with candour and independence in the interests of justice.”

“4.1 It is the duty of every barrister (whether or not he is in practice and whether or not he is admitted to practise generally or on an ad hoc basis for the purposes of a specific case or cases) and every pupil (whether called to the Bar or not): -

(a)

(b) not to engage in conduct (whether in pursuit of his profession or otherwise) which is:-

(i) dishonest or otherwise discreditable to a barrister;

(ii)

(iii) prejudicial to the administration of justice or otherwise likely to diminish public confidence in the administration of justice; etc”

34. In relation to §10.30, there is no dispute that a barrister would be liable for “knowingly deceive or mislead” the Court or Tribunal if he:

34.1 knowingly asserts a fact for which there is no reasonable basis in evidence: *The Professional Conduct of Lawyers in Hong Kong*, Division XXIII [603] (p.204);

- 34.2 puts forward an assertion which he knows to be false or omits reference to a fact and thereby creating an erroneous impression:
The Professional Conduct of Lawyers in Hong Kong, Division XXIII [604] (p.205B);
- 34.3 consciously furnishes to the court erroneous or incomplete information that may subvert the true facts:
Public Trustee v By Products Traders Pte Ltd [2005] 3 LSR(R) 449, §35, per VK Rajah J (as he then was);
- 34.4 having led the court to believe a fact to be true, fails to correct it when it is discovered to be false and to do so at the earliest date:
Vernon v Bosley (No 2) [1999] QB 18 at 37D, and
Forster v Legal Services Board (2013) 40 VR 587, at §§161, 163.
35. It is also not disputed that to satisfy the element of “*knowingly*” deceive or mislead, recklessness or mere inadvertence is insufficient.
36. On the other hand, actual knowledge includes wilful blindness, that is, where one deliberately shuts his eyes and refrains from making inquiries the results of which he might not care to have: *HKSAR v Harjani Haresh Murlidhar* (2019) 22 HKCFAR 446, §66.
37. The Bar Council’s contention is that the provision under §10.30 for “*knowingly deceive or mislead the court*” is worded in disjunctive terms. The provision is satisfied if the barrister misleads the court with knowledge that an asserted fact is untrue. It is unnecessary for the barrister to have the intention to deceive the court. Likewise, deceit is to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. Deceit itself is not concerned with dishonesty, the two being distinct concepts: *HKSAR v Chan Kam Ching* (2022) HKCFAR 48, §§147 - 150.
38. What has given rise to disagreement between the Bar Council and Mr Chan arises from the observations of the English Divisional Court in *Brett v The Solicitors Regulation Authority* [2014] EWHC 2974. In that case, Wilkie J (with the concurrence of the Lord Chief Justice), remarked that :
- “98. In my judgment, the [Solicitors’ Disciplinary Tribunal] having disavowed making any finding of dishonesty could not properly then proceed to make a finding that Mr Brett ‘knowingly’ allowed

the court to be misled in the circumstances of this case which was, without more, in effect a finding of dishonesty. If it intended not to make a finding of dishonesty whilst finding the charge of knowingly misleading proved, it would have to have spelt out its analysis of how it came about that he acted knowingly though not dishonestly.”

39. The above passage is relevant for the purpose of this Inquiry because Mr Yu has expressly indicated that it is not the Bar Council’s allegation in the Complaints that Mr Chan was dishonest. Mr Chan, accordingly, submits that it is not open to this Tribunal to find him liable for “knowingly misleading the court” when no dishonesty is alleged.
40. This Tribunal notes that, theoretically, there may be the rare cases of an advocate knowingly misleading the court but found not to be deceiving the court – and in that sense, not acting “dishonestly” (see *Brett*, §96). Such must be very exceptional situations. In general, if the circumstances do not warrant a finding of the advocate having an intention to deceive, it would be difficult to enter a verdict of knowingly misleading the court. Indeed, as pointed out by the Divisional Court in *Brett*, such distinction is “*extremely difficult to draw in its general application*”: *ibid*, §96.
41. Therefore, in light of the Bar Council’s acceptance that the allegation against Mr Chan does not involve dishonesty, if the Bar Council maintains the complaint under §10.30 of the Bar Code, the Bar Council must articulate how, consistently with such concession, the impugned conduct of Mr Chan in the present case justifies a finding of “*knowingly misleading the court*”.
42. At this point, it may be convenient to turn to §10.29 regarding a barrister’s duty to the court “*to act with candour*” in the interest of justice. As noted, §10.29 does not specifically require proof of knowledge or intent. In *Forster v Legal Services Board*, *supra*, at §§78-79, it was held that a barrister’s “*reckless disregard*” of his duty of honesty and candour to the tribunal amounts to misconduct, even where the conduct falls short of a deliberate attempt to mislead.
43. Mr Chan does not dispute the above proposition.
44. As to recklessness, there is no dispute that the criminal law definition is apt to be adopted in disciplinary proceedings: *Brett*, §78. Recklessness will be proven if the barrister (1) is aware of a risk that his conduct breaches the rules and it is

unreasonable for him to take that risk; or (2) takes a blinkered approach to his professional duties: *Disciplinary and Regulatory Proceeding*, 10th edition, §2.57.

45. As to §4.1(b)(i) regarding conduct which is “*discreditable to a barrister*”, there is no dispute as to the following propositions:

45.1 conduct may be “discreditable” without being dishonest;

45.2 “*discreditable*” means “bringing discredit to, shameful, disgraceful” which is to be judged objectively: *Disciplinary and Regulatory Proceeding, supra*, §§2.32, 2.33;

45.3 where the making of a statement by a barrister is alleged to be “discreditable”, the statement must be untrue and made without reasonable belief at the time of its truth: *Shrimpton v General Council of the Bar* [2005] EWHC 844, at §15.

46. As to §4.1(b)(iii), again there is no dispute to the proposition that a barrister may have acted in a manner “*prejudicial to the administration of justice*” without having any intentional or reckless misconduct: *Raggatt v Bar Standards Board* [2023] EWHC 1198, §§153, 154.

47. There is no dispute that the Bar Council bears the burden of establishing that Mr Chan was in breach of the Bar Code as set out in the Complaints. There is also no dispute that the civil standard of proof on a balance of probabilities is the applicable standard. This Tribunal bears in mind that the more serious the act or omission alleged, the more compelling will be the evidence needed to prove it on a preponderance of probability.

D. Discussion and Findings

D1. Complaint 1 -

Written Opening and the Oral Opening

48. Complaint 1 centres upon §33 (Opening):

“33. *None of the respondents accepted the respective offers made by the Applicants to purchase their undivided shares.*”

49. The Bar Council contends that the above statement is misleading as it was factually inaccurate because, as is not disputed, R3(LT) did write to *accept* the offer made by the majority owners. Not only is the statement inaccurate factually, the omission of any reference to the dispute regarding the validity of R3(LT)'s acceptance has further given rise to a misleading impression that the LT Applicants had already fulfilled the reasonable-steps requirement but it was R3(LT) who did not accept their offer.
50. The Bar Council further contends that the inaccuracy and misleading impression has been perpetuated because Mr Chan, despite his promise to R3(LT), failed to rectify the inaccuracy or the misleading impression in his oral opening. Furthermore, at no time before the Lands Tribunal delivered the Leave Decision has Mr Chan drawn attention to the inaccuracy or the misleading impression so created.
51. To begin with, there is no dispute that when Mr Chan drafted the Written Opening, he knew that R3(LT) had written to accept the offer. What Mr Chan disputes is the meaning of §33 (Opening). He contends that the reference to non-acceptance by the LT Respondents is not solely a factual statement, but a statement embodying the legal invalidity of the acceptance by R3(LT). Mr Chan argues that because R3(LT)'s acceptance was out of time, the resulting conclusion must be that the offer was not accepted.
52. At the hearing of the Inquiry, Mr Chan's evidence is that following his communication with R3(LT) before the trial, he appreciated that there might be a risk of §33 (Opening) being taken as a factual statement. That was why he agreed to qualify the impugned statement in his oral opening to make clear that the LT Applicants would only rely on there being no binding contract with R3(LT) rather than no acceptance of the offer from R3(LT). In response to a question from this Tribunal, Mr Chan acknowledges that §33 (Opening) is “*vague*” but stops short of accepting that it is inaccurate.
53. It may also be noted that Mr Chan's position previously set out in the Explanation Letter (quoted in §30 above) was that “*that paragraph was not completely accurate*”.

54. This Tribunal does not accept Mr Chan's contention that §33 (Opening) is merely "vague" but not "inaccurate". The impugned statement must be considered in context objectively. This Tribunal notes that the two paragraphs preceding §33 (Opening) are clearly factual statements. They specifically mention the making of the offers and their price, and that the offers were made in reliance on valuer's advice. §33 (Opening) follows immediately, and it is a simple and *unqualified* statement. Reading the sentence in context, §33 (Opening) can only reasonably be understood as a factual statement, namely, that the LT Respondents did not accept the offers at the price offered. There is not the slightest hint from the context or the sentence itself that §33 (Opening) imports the notion of legal invalidity about the acceptance.
55. This Tribunal finds that §33 (Opening), when read in context, further conveys the impression that despite the LT Applicants having taken reasonable steps to make the offers, it was the LT Respondents (including R3(LT)) *who did not accept them*. Such impression is indeed misleading in relation to R3(LT) as it clearly does not accord with R3(LT)'s acceptance of the offer – albeit not recognised by the LT Applicants.
56. It is not disputed that §33 (Opening) was not corrected or clarified at the Oral Opening despite Mr Chan's agreement with R3(LT) that he would do so. Mr Chan's evidence is that at the time of making his opening submissions, he believed he had addressed the issue concerning the dispute as to the validity of R3(LT)'s acceptance, but in fact he did not. His explanation is that he was nervous and was quite bad at public speaking. The fact remains that throughout the evidence stage of the LT Proceedings, the inaccurate and misleading statement was not clarified or corrected.
57. The Bar Council contends that the impugned statement at §33 (Opening) was made by Mr Chan knowingly to mislead the Lands Tribunal. Mr Yu invites this Tribunal to reject Mr Chan's explanation that §33 (Opening) entails a legal argument on the validity of the acceptance, as a mere afterthought and recent fabrication. Mr Yu draws attention to the fact that this explanation does not appear in either the Explanation Letter or the Rule 5 Letter.
58. The Bar Council contends that in any event, Mr Chan has accepted that by the time of the Oral Opening, he appreciated the risk that §33 (Opening) could be inaccurate and misleading and that the Lands Tribunal could be misled. Mr Yu invites this Tribunal to reject Mr Chan's evidence that he believed that he had addressed the Lands Tribunal on the issue but only realised his omission to do

so when the transcript of the LT Proceedings was available to him after the Complaints were laid against him.

59. This Tribunal takes note of the transcript (quoted at §17 above), where Mr Chan specifically mentioned the fact of R3(LT) reaching out to him. But surprisingly the only message relayed to the Lands Tribunal was that R3(LT) and his clients had reached settlement and that R3(LT) wished to be excused from attending the trial. There is a glaring omission of his discussion with R3(LT) about §33 (Opening) and his promise to make oral rectification or clarification. It was indeed a surprising omission because the promise was the very reason why R3(LT) had refrained from putting in an opening himself and was content to leave the clarification to Mr Chan. It was not solely because of the settlement.
60. The submissions presented by Mr Chan in the Oral Opening can only be described as misleading half-truths. This Tribunal finds it hard to believe that the omissions identified in the preceding paragraph were due to Mr Chan's nervousness. This Tribunal does not accept that these serious omissions can simply be "*careless mistake[s]*" or "*oversight*" (Mr Chan's words in his Explanation Letter and his Witness Statement).
61. The result is that the inaccuracy and misleading nature of the impugned statement at §33 (Opening) perpetuated throughout the evidence stage of the trial.
62. That having been said, this Tribunal notes that the Bar Council has stated that it does not allege dishonesty on the part of Mr Chan. For the reasons discussed in §§38 to 41 above, if Mr Chan's conduct in the present case is not alleged to be dishonest, it would be incompatible for this Tribunal to find him liable for "*knowingly misleading the court*". In other words, there are no special circumstances to justify a distinction discussed in §§40 and 41 above.
63. However, this Tribunal takes note of the fact that Mr Chan clearly knew the importance of the reasonable-steps issue in the LDCS Application. He well knew that it would advance his clients' case if the Lands Tribunal was to believe that his clients had *made genuine offers* and that it was the LT Respondents who *rejected and did not accept* those offers.
64. All matters being considered, this Tribunal finds that when making the submission in §33 (Opening), Mr Chan must have appreciated the risk that the statement, when read as an *unqualified* factual statement, would convey the impression that it was the LT Respondents who had acted unreasonably in not

accepting his clients' genuine offers. It would unjustifiably undermine R3(LT) on the question of reasonableness when it omits any mention of R3(LT)'s acceptance of the offer. Mr Chan must have known that such an *unqualified* statement would not convey the notion of legal invalidity of the acceptance. Such risks were obvious, and it is this Tribunal's finding that Mr Chan did appreciate such risks.

65. Further, this Tribunal finds that, despite appreciating the risks of §33 (Opening) being factually inaccurate and giving the misleading impression – especially after his communication with R3(LT) – Mr Chan has failed to address the issue at the Oral Opening. He has allowed the factual inaccuracy and the misleading impression to remain unrectified.
66. Adopting *Forster v Legal Services Board* discussed at §42 above, Mr Chan's conduct in advancing the submission in §33 (Opening) and allowing the inaccurate statement and the misleading impression to perpetuate by way of half-truths in his Oral Opening, certainly amounts to "*reckless disregard*" of his duty of candour to the Lands Tribunal.
67. For the same reason, this Tribunal finds Mr Chan's conduct "*discreditable to a barrister*" and "*prejudicial to the administration of justice.*"

Written Closing

68. It is Mr Chan's duty, at the soonest opportunity, to *correct* the unqualified statement about the LT Respondents' non-acceptance of the offers, and the misleading impression created by such an unqualified statement. Mr Chan claims that he has made the correction in §66 (Closing) (as quoted in §20 above) where he mentioned the dispute with R3(LT) over whether the offer was accepted in time.
69. This Tribunal notes that §66 (Closing) appears in Section C1 as part of the factual narrative. The analysis and submissions appear in Section C2, which makes no mention of any correction needing to be made to any previous submissions. Nowhere in the Written Closing draws attention to the impugned statement in §33 (Opening) or the incomplete information conveyed at the Oral Opening at all.

70. Instead, the thrust of the submissions in Section C2 is evidently to persuade the Lands Tribunal that reasonable steps had been taken by the LT Applicants to acquire the LT Respondents' units and that R1(LT) was the only one holding out against a compulsory sale. Objectively, this Tribunal considers that the Written Closing as a whole falls short of being a *correction* of a previous inaccurate submission or a misleading impression.
71. However, this Tribunal notes that the Written Closing was in response to the Closing Submissions of R1(LT), where counsel for R1(LT) has referred to the Notice of Opposition from R3(LT) and the issue about the genuineness of the LT Applicants' offers. It is perhaps understandable that the focus of Mr Chan's Written Closing would concentrate on responding to R1(LT)'s submissions. Mr Chan did not hide the fact that there was a dispute at the time over whether R3(LT) had accepted the offer in time (§66 (Closing)).
72. In this context, this Tribunal is unable to conclude, on a preponderance of probabilities, that Mr Chan has appreciated the risk of perpetuating an inaccurate factual statement or a misleading impression by not expressly making a correction of the previous submissions. Accordingly, our view is that the Bar Council has failed to establish that Mr Chan was in reckless disregard of his duty of candour by failing to correct the error when the Written Closing was submitted. For the same reason, this Tribunal did not find Mr Chan's conduct discreditable in relation to his failure to correct the error in the Written Closing.

Conclusion on Complaint 1

73. This Tribunal finds Mr Chan liable for misconduct under §10.29 of the Bar Code in failing to comply with his "*overriding duty to the Court to act with candour in the interests of justice*", but only in respect of the submission made in §33 (Opening), and in allowing the factual inaccuracy and the misleading impression to remain unrectified in his Oral Opening.
74. For the above reasons, this Tribunal also finds Mr Chan liable for misconduct under §4.1(b)(i) and (iii) for having engaged in conduct which is "*discreditable to a barrister*" and "*prejudicial to the administration of justice.*"

D2. Complaint 2 -

Written Closing

75. Complaint 2 centres upon the impugned statements in §§77 and 109 (Closing):

*“77. It is recognised that [R2(LT) to R4(LT)] do not oppose a compulsory sale order being made. **Ultimately, they have decided that rather than selling their properties they would prefer to receive a share of the sale proceeds upon a successful auction of the lots.** R2(LT) to R4(LT)] are perfectly entitled to take that position and indeed a successful auction may end up with a sale price higher than any reserve price set.*

.....

*109. As noted above, [R3(LT)] **ultimately decided to share in the sale proceeds of a successful auction rather than selling his flat.** It is neither here nor there for [R1(LT)] to point to arguments which were previously raised but subsequently abandoned by [R3(LT)].”*

76. The Bar Council’s case is that (i) the above highlighted statement in §77 is misleading in that it expressly asserts as a positive fact that R3(LT) would prefer to receive a share of the auction sale proceeds rather than accepting the private offer from the LT Applicants, when R3(LT)’s actual preference was the opposite, namely, that he in fact preferred to, and did, accept the offer from the LT Applicants to sell his unit; (ii) further or alternatively, the Bar Council’s case is that the meaning impliedly conveyed by the highlighted statements in §77 and 109 is that it was R3(LT)’s own choice to take a share in the sale proceeds from the auction rather than to accept the LT Applicants’ offer, when in fact such choice was not open to R3(LT) because the LT Applicants had rejected R3(LT)’s acceptance.

77. At the Inquiry, Mr Chan accepts that the impugned statements at §§77 and 109 (Closing) are either inaccurate or misleading. Mr Chan accepts that he knew it was not R3(LT)’s position to take a chance of obtaining a higher price at the auction (if granted by the Lands Tribunal). Mr Chan acknowledges that he knew R3(LT) *did not* want to “gamble”.

78. Mr Chan also accepts at the Inquiry that §77 (Closing) is not a “*proper way to put it*”.
79. What Mr Chan contends is that §77 (Closing) is “*poorly worded*” and should not have mentioned a preference at all. It was a “*bad idea*” for §77 (Closing) to “*lump*” R3(LT) together with R2(LT) and R4(LT).
80. This Tribunal considers that the impugned statements in §77 and 109 are indeed inaccurate and misleading in relation to R3(LT)’s position as contended by the Bar Council in §76 above.
81. It should be noted that the entire passage from §§72 to 76 (Closing) concerns the offers made by LT Applicants and the reasonableness of such offers. §77 (Closing) follows immediately. The reference in the impugned statement to “*selling their properties*” can only be understood as a reference to selling the properties in pursuance of the offers. Hence, when the entire §77 (Closing) is read in context, it clearly conveys the impression that (among the respondents therein mentioned) R3(LT) would *prefer to opt* for the auction sale *rather than* accepting the offer to sell his unit to the LT Applicants. The last sentence in §77 (Closing) seeks further to strengthen the *preference* by implying that the prospect of receiving a higher price could be the reason for it.
82. In the view of this Tribunal, the impugned statement in §77 (Closing) is indeed misleading and is also inaccurate.
83. However, for the reasons set out in §62 above, absent any allegation of dishonesty in respect of Mr Chan’s conduct, this Tribunal does not consider a breach of §10.30 of the Bar Code for “*knowingly misleading the Lands Tribunal*” to have been made out under Complaint 2.
84. That said, this Tribunal considers that Mr Chan must have appreciated, especially after the communication with R3(LT) before trial, that R3(LT) was concerned that his position should not be misrepresented by giving any impression that he had not accepted the offer from the LT Applicants. Mr Chan must have appreciated that it would be misleading to imply that R3(LT) preferred to opt for the auction sale *rather than accepting the offer*. Likewise, he must have appreciated that it would be misleading to imply that there were two options freely open to R3(LT) and that R3(LT) had preferred the option of an auction sale over the other. Mr Chan must have appreciated the risk of §§79 and 109 (Closing) being understood by the Lands Tribunal in their misleading implications.

85. This Tribunal does not accept that §77 (Closing) is merely “*poorly worded*” or that lumping R2(LT) to R4(LT) together is just a “*bad idea*”. Contrasting §109 with §77 (Closing), Mr Chan clearly appreciated the need to distinguish between the different LT Respondents. All matters considered, it is this Tribunal’s finding that Mr Chan did appreciate the risk of §§79 and 109 (Closing) being misleading. The impugned statement in §§77 and 109 (Closing) were made by Mr Chan in “reckless disregard” of his duty of candour to the Lands Tribunal.
86. For the same reason, this Tribunal finds Mr Chan’s conduct “*discreditable to a barrister*” and “*prejudicial to the administration of justice.*”

Reply Affirmation

87. It is not disputed that Mr Chan has advised on the Reply Affirmation and settled it. It is the Bar Council’s complaint that by the time of the filing of the Reply Affirmation, Mr Chan has still failed to correct the inaccurate and misleading statements in §§77 and 109 (Closing): see §§2.9 and 2.11(2) of the Particulars of Complaint.
88. As is apparent from the passages quoted in §26 above, the LT Applicants do not specifically mention in the Reply Affirmation about correcting the reference to the False Preference and/or the False Choice. However, this Tribunal takes note that the perceived falsity arising from §§77 and 109 (Closing) has been highlighted in R3’s Statement (see §§9 to 11, and 13 thereof), and accordingly, it is not improbable that Mr Chan may think it unnecessary for the LT Applicants specifically to mention that there was a need for §§79 and 109 (Closing) to be corrected.
89. In the circumstances, this Tribunal does not find that the failure of any mention in the Reply Affirmation of a correction to be made to §§77 and 109 constitutes an act of “reckless disregard” or misconduct itself.

Conclusion on Complaint 2

90. This Tribunal finds Mr Chan liable for misconduct under §10.29 of the Bar Code in failing to comply with his “*overriding duty to the Court to act with candour*”

in the interest of justice” in respect of the submission made in §§77 and 109 (Closing).

91. For the above reasons, this Tribunal also finds Mr Chan liable for misconduct under §4.1(b)(i) and (iii) for having engaged in conduct which is “*discreditable to a barrister*” and “*prejudicial to the administration of justice.*”

Way Forward

92. This Tribunal will invite submissions on the penalty to be imposed in light of this Decision, and on the issue of costs.
93. The Tribunal will invite the parties to submit joint proposed directions in relation to submissions on penalty and costs within 21 days of this Decision. If no agreement can be reached, the parties shall file and serve their respective proposed directions within 21 days of this Decision.

(Signed)

(Signed)

(Signed)

Mr Ambrose Ho, SC

Mr Lawrence KF Ng

M^s Tam Chi-wah, Angelique

Chairman of the
Barristers Disciplinary
Tribunal

Member of the
Barristers Disciplinary
Tribunal

Member of the
Barristers Disciplinary
Tribunal

Representation:

Mr Jason Yu, instructed by Messrs. Kwok, Ng & Chan, for the Applicant

The Respondent appears in person

Annex 1

Complaint 1

Knowingly deceiving or misleading the Lands Tribunal comprising Deputy District Judge Michelle Soong as Presiding Officer and Mr. Alex Ng as Member (the “**Lands Tribunal**”) contrary to paragraph 10.30 of the Code of Conduct of the Bar of the Hong Kong Special Administrative Region then in force (the “**Bar Code**”) and/or recklessly failing to act with candour and independence in the interests of justice contrary to paragraph 10.29 of the Bar Code; and/or engaging in conduct which was discreditable to a barrister and/or prejudicial to the administration of justice and/or likely to diminish public confidence in the administration of justice contrary to paragraph 4.1(b)(i) and/or (iii) of the Bar Code, by (a) making misleading statements in the Opening Skeleton Submissions for the Applicants dated 30 December 2020 (the “**Opening**”) in LDCS 2500 / 2018; and/or (b) creating a misleading impression through the provision of incomplete information or omission of reference to the full facts in paragraph 33 of the Opening and/or the oral opening submissions (the “**Oral Opening**”) made on the first day of the trial on 11 January 2021 (the “**Trial**”); and/or (c) failing to correct the misleading statements in the Opening prior to the Lands Tribunal’s decision dated 4 April 2023 in LDCS 25000 / 2018 (the “**Leave to Appeal Decision**”).

Complaint 2

Knowingly deceiving or misleading the Lands Tribunal contrary to paragraph 10.30 of the Bar Code; and/or recklessly failing to act with candour and independence in the interests of justice contrary to paragraph 10.29 of the Bar Code; and/or engaging in conduct which was discreditable to a barrister and/or prejudicial to the administration of justice and/or likely to diminish public confidence in the administration of justice contrary to paragraph 4.1(b)(i) and/or (iii) of the Bar Code, by (a) making misleading statements in the Closing; and/or (b) creating a misleading impression through the provision of incomplete information or omission of reference to the full facts in the Closing and/or the Affirmation in Reply to 3rd Respondent’s Statement, dated 26 August 2021 (the “**Reply Affirmation**”) in LDCS 25000 / 2018; and/or (c) failing to correct the misleading statements in the Closing prior to the Leave to Appeal Decision.