IN THE BARRISTERS DISCIPLINARY TRIBUNAL

BETWEEN

THE BAR COUNCIL Applicant

and

Cheng Ming Bun Francis Respondent

STATEMENT OF FINDINGS

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

I. General Background

1. The Respondent, Mr. Cheng Min Bun, Francis, was admitted as a barrister of the High Court of Hong Kong in 1995. He holds a practising certificate[1] issued by the Hong Kong Bar Association at all material times.

2. He was instructed by the Legal Aid Department to represent Ms. Tsim Hiu Yee ("**Ms. Tsim**") in her trial for the offence of trafficking in a dangerous drug (HCCC 423/2016) ("the **Criminal Proceedings" or "the Criminal Trial**"). She pleaded not guilty. After a trial before Zervos J with a jury, Ms. Tsim was convicted, and sentenced to 11 years and 9 months of imprisonment on 23 May 2017[2].

3. On 26 May 2017, Ms. Tsim's new legal team ("the **New Legal Team**") filed a Notice

[1] [B2/401]
[2] [B2/408]

of Application for Leave to Appeal[3] against her conviction. One of the grounds of appeal alleged flagrant incompetence[4] on the part of the Trial Solicitors ("the **Trial Solicitors"** or "**Ms. Wong**") and the Respondent (collectively "the **Trial Lawyers**"). On 6 September 2019, Ms. Tsim was admitted to bail[5] as the prosecution indicated that it would concede the appeal. On 3 October 2019, her unopposed appeal[6] was allowed by the Court of Appeal (CACC154/2017)[7] ("the **Appeal**"). Ms. Wong and the Respondent, therefore, were not called nor cross-examined. The prosecution did not apply for a re-trial[8].

A: Complaints of Professional Misconduct against the Respondent

4. On 24 February 2022, the Bar Council ("the **Applicant**") laid 3 complaints of misconduct against the Respondent ("the **Original Complaints**"), which were subsequently amended on 28 October 2022[9] ("the **Amended Complaints**") (See Annex 1).

5. On 28 March 2022, the Barristers Disciplinary Tribunal Convenor constituted the present Barristers Disciplinary Tribunal (the "**Tribunal**") pursuant to section 35 of the Legal Practitioners Ordinance (Cap 159) (the "**LPO**") to inquire into the complaints.

B: Replacement of Counsel for the Applicant

6. On 27 June 2022, solicitors acting for the Applicant informed the Tribunal that Mr. Lewis Law has replaced Mr. Giles Surman as counsel for the Applicant.

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[3] [B2/410/§3]
[4] [B2/423/§6]
[5] [B2/671]
[6] [B2/415/§19]
[7] [B2/419]
[8] [B2/416/§23]
[9] [B1/1]

C: Adjournment and Amendment of the Complaints

7. On 21 July 2022, Mr. Law applied for an adjournment to 14 September 2022, because the Applicant wished to explore and obtain additional evidence, and to consider whether to amend the Original Complaints. On 10 August 2022, having considered the comments of the Respondent and all the circumstances, the Tribunal granted the application.

8. On 16 September 2022, the Applicant informed the Tribunal, among other things, that it intended to withdraw the 1st Complaint in the Original Complaints and amend the 2nd and 3rd Complaints. On 30 September 2022, the amendment application and an application to adduce two additional witness statements were made. In view of the stance of the Respondent by letter dated 25 October 2022, the Tribunal granted both applications on 28 October 2022. The Original Complaints were therefore amended on 28 October 2022.

D: Reconstitution of the Tribunal

9. On 6 October 2022, for procedural reasons (through no fault of the parties) the Convenor reconstituted the Tribunal, replacing Ms. Jolie Chao with Mr. Anthony HK Chan.

E: Second reconstitution of the Tribunal

10. On 16 May 2023, again for procedural reasons (through no fault of the parties) the Convenor reconstituted the Tribunal, replacing Mr. Anthony HK Chan with Mr. Patrick Chong. The parties have not raised any objections regarding the reconstitution of the Tribunal.

F: The Tribunal Hearing

11. The substantive hearing of this inquiry took place on 12 July, 13 July and 13 September 2023 ("the **Hearing**"). The parties filed their opening submissions. At the Hearing:

    (1) Mr. Lewis Law appeared on behalf of the Applicant.
    (2) Ms. Juliana Chow appeared on behalf of the Respondent.
    (3) Ms. Tsim and her brother, Mr. Tsim Hiu Bun ("**Brother**"), gave evidence for the Applicant.
    (4) After the conclusion of the Applicant's case, Ms. Chow did not make a submission of no case to answer. The Tribunal ruled that there was a case to answer.
    (5) The Respondent elected to give evidence.

12. The parties filed their respective closing submissions. Upon the request of the Tribunal, the Respondent also filed a written Supplemental Submissions dated 23 September 2023 ("**R's Supplemental Closing Submissions**").

II. <u>The Background Facts</u>

13. To understand the Amended Complaints laid against the Respondent, it is essential to set out the brief background leading to the criminal charge laid against Ms. Tsim, the Criminal Trial, and the Appeal.

14. The following facts are largely taken from (a) Ms. Tsim's witness statements filed for the purpose of this inquiry[10]; (b) the affidavits[11] filed by her (which were adopted in her witness statements) for the purpose of the Appeal; (c) her video-recorded interview ("the **Interview**") conducted by the Customs and Excise officers on 17 May 2016[12];

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[10] [B1/6] & [B2/508]
[11] [B1/10]; [B1/361]&[B1/396]
[12] [B3/104+]

(d) Mr. Justice Zervos' Reasons for Sentence dated 23 May 2017[13]; and (e) the Court of Appeal's Reasons for Judgment dated 3 October 2019[14] ("the **CA Decision**").

A: WhatsApp Communications with "Go Abroad"; Trip to the Mainland, and the Arrest

15. Ms. Tsim revealed in her written instructions ("**Written Instructions**") given to the Trial Lawyers that she was in debt, and was desperate to earn some "quick money"[15]. She searched on Facebook using the keyword "quick money" and found a post about recruiting someone to go abroad[16]. She then contacted that person via WhatsApp. Ms. Tsim saved that person's phone number in her phone as "出國" (Go Abroad) ("**GA**").

16. Ms. Tsim began communicating with GA through WhatsApp about a week before[17] her arrest on 16 May 2016 by Customs Officers at the Customs Arrival Hall, Lok Ma Chau Control Point. Initially, GA offered Ms. Tsim $50,000 for making two trips to Japan to deliver some "stuff"[18]. When she asked GA what the "stuff" was, GA told her that it was "DD"[19]. Ms. Tsim further inquired about what "DD" meant, and GA replied that it was ivory powder[20]. Ms. Tsim also asked whether ivory powder could clear Customs, to which GA assured her that "*we have made facilitation payments to all the Customs officers, in fact, the Customs officers are our people*"[21] ("the **WhatsApp Messages**"). Despite this, Ms. Tsim continued to trust GA.

17. During the week before her arrest, Ms. Tsim communicated with GA every day[22]. According to her Witten Instructions given to the Trial Lawyers[23]:

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[13] [B2/402]
[14] [B2/409]
[15] [B1/34]
[16] ibid
[17] [B1/37]
[18] [B2/410/§5]
[19] [B1/12]
[20] ibid
[21] [B1/34]
[22] [B1/37]
[23] [B1/34+]

(1) she did an internet search on Yahoo using the keywords "D.D = ivory powder?", but did not find any words or expressions indicating that D.D stood for ivory powder[24]. For reasons unknown to us, Ms. Tsim did not do a simple and direct search using the keyword "D.D." alone to find out its meaning.

(2) she also searched "ivory powder" on Yahoo and came across a webpage from a pharmaceutical factory[25]. This webpage indicated that ivory powder was one of the ingredients used in the production of cosmetic facial masks. Based on this information, she concluded that taking ivory powder to Japan was for the purpose of manufacturing beauty products. According to her, that dispelled her doubts[26].

(3) she also looked into the website of Hong Kong's Customs and Excise Department ("**C&E**") to check whether ivory powder was allowed for import and export. While she discovered that there were limits on the quantity of ivory *products* that could be brought in or taken out of Hong Kong, it did not mention anything about ivory *powder*[27].

(Collectively "the **Internet Search**" or "**Browing History**").

18. Whilst Ms. Tsim was initially asked to do deliveries to Japan, on the evening of 16 May 2016, GA asked her whether she was interested in making a quick trip to take a delivery from the Mainland[28]. She was told that she only had to go to the other side of the checkpoint at Lo Wu and return immediately. As stated in the Written Instructions, she would be paid $3,000 for the delivery [29].

19. She accepted the courier job and made the trip right away. Upon her return, she

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[24] [B1/37]
[25] ibid
[26] ibid
[27] ibid
[28] ibid
[29] ibid

was intercepted by the Hong Kong Customs at the Customs Arrival Hall. It was found that the packet she couriered contained 864.70 grammes of ketamine[30].

20. After her arrest, Ms. Tsim agreed to participate in a controlled delivery[31] ("the **Controlled Delivery**"). She was given back her phone (an Apple iPhone) for that purpose. Whilst in possession of her phone, Ms. Tsim sent a WhatsApp message to tell her friend, Tin Wing, "Don't look for me, I've been arrested. They said after testing that I have K Chai". The reason for sending those messages, as explained in the video-recorded interview, was because she wanted tell Ting Wing she was safe, nothing happened in the Mainland but she was arrested upon returning to Hong Kong.

21. She then deleted all the WhatsApp Messages with GA, which, in the words of the Court of Appeal, "*would have supported her exculpatory explanation*"[32] that she believed she was transporting ivory powder.

22. During a video-recorded interview, she explained that that those messages were deleted because she feared that the Customs and Excise officers might misunderstand the reference "delivering stuff" to mean dangerous drugs[33].

23. Separately, Ms. Tsim was also questioned by C&E in the video-recorded interview about the screenshots of her messages exchanged with "Tin Wing" (which were not permanently deleted).

24. Under caution, she denied knowledge of the nature of the substance she carried. In the video recorded interview, she also told C&E about the WhatsApp Messages that she had with GA and that she had done the Internet Search, as support of her innocence[34]. In other words, Ms. Tsim expressly mentioned the WhatsApp Messages and the Internet Search, which were exculpatory, in the video recorded interview that she

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[30] [B2/403/§2]
[31] [B1/55]
[32] [B2/411/§6]
[33] [B3/131-134, 175, 178-181, 193]
[34] [B3/126, 131-134, 179, 181]

thought she was carrying ivory powder.

25. She was charged with trafficking in a dangerous drug, which of course was a very serious charge. Sentencing tariffs suggested that, if convicted, it would attract a sentence of more than 10 years. She was remanded in custody pending trial.

B: Legal Visits and Instructions

26. Upon the instructions of the Director of Legal Aid, on 3 January 2017, the Trial Lawyers were instructed to represent Ms. Tsim. The Respondent relied on the committal bundle for his trial preparation[35].

27. On 9 February 2017, Ms. Wong of the Trial Solicitors held a meeting with Ms. Tsim at Tai Lam Centre for Women before the Pre-Trial Review ("the **PTR**"). The Respondent did not attend this meeting.

28. Before the PTR, the Respondent had met with Ms. Tsim on 20 February 2017 ("the **Feb Meeting**")[36].

29. After the Feb Meeting, Ms. Tsim sent a 10 - page written instructions (ie the Written Instructions) to her legal team. In these written instructions, she recounted, inter alia, the relevant events as mentioned above and the following:

    (1) Ms. Tsim asked her legal team whether the deleted messages with Tin Wing and the browsing history could be recovered:

    "1) When Go Abroad said she wanted me to take ivory powder (...) to Japan for her, I checked online to see whether it was against the law in relation to ivory powder. If the browsing history can be retrieved, will it be of help?" ...

[35] [B2/435/§13]
[36] [B2/669/§8]

"4) Can (my) conversation with (my) friend Tin Wing be restored? Is it of help? If that sentence can be explained."[37]

(2) Ms. Tsim mentioned that she had sent an incriminatory WhatsApp message to GA during the Controlled Delivery, informing GA that:

"*I was arrested. Don't [WhatsApp] me*" [38] ("the **Inculpatory Message**").

However, having reviewed the C&E Expert Report and another expert report commissioned by the New Legal Team, it is evident that no such Inculpatory Message had in fact been sent to GA after her arrest[39]. This was mistaken memory on her part. However, as mentioned above, Ms. Tsim did send a similar message to her friend, "Tin Wing"[40].

(3) she said in her Written Instructions that she deleted that message because "*[She] did not want the customs (officers) to disbelieve that [she] didn't know it was dangerous drug inside after seeing my conversation with Go Abroad.*"[41]

30. Even though it was not mentioned in the Written Instructions, the Respondent confirmed that Ms. Tsim had asked the legal team whether her WhatsApp messages with GA could be retrieved in the next meeting held in April 2017.

31. After the PTR, the Respondent had two further meetings with Ms. Tsim on 12 April ("the **April Meeting**") and 11 May 2017 ("the **May Meeting**")[42].

32. There is a dispute as to what instructions had been given by Ms. Tsim and what advice

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[37] [B1/64]

[38] [B1/58]
[39] [B1/255, 257, 258, 331-333]
[40] [B1/260]
[41] [B1 /59-60]

[42] [B2/669/§8]

had been given by the Trial Solicitors and the Respondent. We will come back to these three meetings (collectively "the **pre-trial meetings**") later.

C: Additional Evidence

33. According to the Respondent, the prosecution had provided the first batch of Additional Evidence ("the **1st Batch**") to the Trial Solicitors[43]. They were paginated as page "AE1" to page "AE100". The last page of the 1st Batch was therefore page 100. It is not disputed that the Respondent had been given the 1st Batch before the trial.

34. On 28 March 2017, the prosecution served the second batch of Additional Evidence ("the **2nd Batch**") on the Trial Solicitors [44]. Ms. Wong stated in her affirmation, filed on 11 July 2019 before the Court of Appeal, that she did not have any recollection of receiving the 2nd Batch[45]. Upon the enquiry of the New Legal Team, the prosecution provided a copy of an "Acknowledgment of Receipt of Copies of Documents" dated 28 March 2017 which showed that the Trial Solicitors did affix their firm's stamp acknowledging receipt of the 2nd Batch[46]. Though described as "Additional Evidence," the 2nd Batch had not been adduced as evidence by the prosecution during the trial.

35. Unbeknown to the Trial Solicitors, the Respondent and Ms. Tsim, the 2nd Batch was paginated from "AE101" to "AE369"[47]. The 2nd Batch included, inter alia, an expert forensic report prepared by the C&E[48] ("the **C&E Expert Report**") that managed to retrieve the deleted WhatsApp text Messages (as opposed to voice messages). Those retrieved text messages ("the **Retrieved WhatsApp Messages**") were consistent with, and corroborated Ms. Tsim's instructions to the Trial Lawyers that she had indeed asked GA what she was expected to carry, what "DD" meant and that she had been told that it was ivory powder[49]. The Retrieved WhatsApp Messages were very likely exculpatory.

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[43] Transcript, 2nd day, pp.98-99
[44] [B1/113]
[45] [B2/445/§13]
[46] [B1/113]
[47] [B1/117]
[48] [B1/119+]
[49] [B1/207, 209]

D: The Nature of the Retrieved WhatsApp Messages

36. However, those retrieved messages appearing in the C&E Expert Report were written in Chinese and no translation was provided to the prosecuting counsel on fiat who could not read Chinese. Incidentally, contrary to Ms. Chow's submissions, not all messages sent by GA were voice messages. The following crucial text messages were retrieved by C&E:

(1) Ms. Tsim asked GA by text message: "*I wonder what I am to take there*"[50];
(2) GA's deleted answer could not be retrieved[51];
(3) Ms. Tsim asked GA again by text message: "*What's DD*"[52];
(4) GA answered Ms. Tsim by text message, "*Ivory Powder*"[53];
(5) Ms. Tsim said to GA by text message, "*OK*"[54].

37. On 24 April 2017, the prosecution served the third batch of Additional Evidence ("the **3rd Batch**") on the Trial Solicitors [55] The Trial Solicitors initially denied they had received it. Again, upon the enquiry of the New Legal Team, the prosecution provided a copy of an "Acknowledgment of Receipt of Copies of Documents" dated 21 April 2017 which showed that the Trial Solicitors did affix their firm's stamp acknowledging receipt of the 3rd Batch, which started from page AD370 to AD379.

38. It is the Respondent's evidence that he did not receive the 2nd and 3rd Batch from the Trial Solicitors. His evidence in this regard was not challenged by the Applicant. However, the Applicant contends that, despite the fact that those documents were not provided to the Respondent, he should have discovered the omission had he properly followed the documents (and the pagination) and conducted the necessary inquiries. This contention is relevant to the 2nd Complaint.

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[50] [B1/206&208]
[51] [B1/206&208]
[52] [B1/206&208]
[53] [B1/209&210]
[54] [B1/209&210]
[55] [B1/115]

E: Preliminary Findings

39. In short, we find that:

(1) on 3 January 2017, the Respondent was provided with the committal bundle when he was first instructed by the Director of Legal Aid to represent Ms. Tsim.

(2) the Respondent had made three legal visits and took instructions from Ms. Tsim in the Feb Meeting, April Meeting and May Meeting.

(3) Ms. Tsim had provided the Written Instructions to the Trial Solicitors and the Respondent before the April Meeting.

(4) the prosecution had served the 1st, 2nd and 3rd Batches of Additional Evidence on the Trial Solicitors

(5) only the 1st Batch was given to the Respondent by the Trial Solicitors before the Criminal Trial.

(6) the 2nd Batch and the 3rd Batch were never given to the Respondent by the Trial Solicitors.

III. The Criminal Proceedings

40. The Criminal Trial commenced on 16 May 2017 and lasted for four days (excluding the sentencing hearing).

A: The High Court Trial

41. According to the Respondent's oral evidence given in this Hearing[56], the Jury Bundle was provided to the Respondent on the first day of the Criminal Trial. It consisted of 8 items only[57]. Some of the items in the Jury Bundle were extracted from the 2nd Batch

[56] Transcript, Day 2, p.27
[57] [B3/10]

as the same paginations could be seen in the Jury Bundle. The C&E Expert Report, however, was not in the Jury Bundle.

42. Going back to the Criminal Trial, the sole issue was whether Ms. Tsim knew she was bringing into Hong Kong dangerous drugs. Her defence was that she thought she was bringing in ivory powder.

43. In the trial, the prosecuting counsel on fiat could not read Chinese. Therefore, he was not aware of the contents of the Retrieved WhatsApp Messages in the C&E Expert Report as no English translations were provided to him by C&E. On the other hand, due to the failure of the Trial Solicitors, Ms. Tsim and the Respondent did not know the C&E Expert Report existed and that the WhatsApp Messages had been retrieved.

44. Ms. Tsim elected to give evidence and was cross-examined by prosecuting counsel. During the cross-examination, Ms. Tsim maintained that she was told by GA that the "stuff" was ivory powder[58]. Another part of the cross-examination focused on her deletion of the WhatsApp messages. The prosecuting counsel put to her that she deleted the WhatsApp Messages because "*she knew their contents would incriminate her*" (see paragraph 10 of the CA Judgment[59]). Given that he was unaware of the exculpatory WhatsApp messages, prosecution naturally attacked her credibility.

45. In the closing address, the prosecuting counsel said:

> "*You might think in those circumstances, members of the jury, that the only sensible inference that you can draw from that behaviour was that* ***the messages, firstly, said absolutely nothing about ivory powder,*** *and secondly, you might think, mentioned dangerous drugs because why else delete them?* ***Why delete them? Why not let the Customs officers see them if they were either exculpatory****, in other words said ivory powder, or meant nothing because they said nothing?* ***The only reason you would want to delete them****, members of the*

[58] [B2/411/§§8-9]
[59] [B2/412]

jury, is this, isn't it, ***because they would have confirmed that she knew what she was doing and she knew what she was bringing back into Hong Kong?***"[60] (emphasis added)

46. If the C&E Expert Report had been drawn to the attention of the prosecuting counsel and/or the jury by the Respondent, the result might have been different. At any rate, given the line of cross-examination of the prosecuting counsel, Ms. Tsim did not have a fair trial since the C&E Expert Report and the Retrieved Whatsapp Messages were not brought to the attention of the jury. That was effectively the basis of the Court of Appeal in allowing the appeal.

47. Ms. Tsim was convicted by the jury as charged, and was sentenced to 11 years and 9 months' imprisonment. As stated above, she lodged an appeal to the Court of Appeal alleging, inter alia, that she did not have a fair trial on the ground of flagrant incompetence on the part of the Trial Lawyers. At that time, Ms. Tsim made wide-ranging complaints against her lawyers including the complaint that they failed to arrange for the retrieval of the Deleted Whatsapp Messages.

48. Upon request, the Respondent wrote to the Legal Aid Department to explain his position,[61] and also provided an affirmation to the Court of Appeal, in response to the perfected grounds of appeal.[62]

B: The Court of Appeal

49. The Court of Appeal found that there was a "*catalogue of errors and failures that occurred in this case, by all concerned*"[63] such that Ms. Tsim had not received a fair trial and that her conviction was unsafe. The Court of Appeal held that (emphasis

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[60] [B2/411/§7]

[61] [B1/94-99]

[62] [B2/433-440]

[63] [B2/416/§24]

added):

(1) *"The gross negligence, by persons unknown, that led to this report not being brought to the attention of the appellant's trial counsel was compounded by the* ***failure of both the trial solicitor and trial counsel to make any effort to engage a defence expert to examine the appellant's phone****"* (paragraph 25 of the CA Judgment[64]).

(2) *"At the very least* ***the legal representatives could have inquired of the Director of Legal Aid or, indeed even of colleagues within their respective professions, of the availability of techniques for recovering deleted data and of experts that could be engaged for this purpose****. If all else failed, they could have written to the Department of Justice and enquired what could be done with the phone since it was in their custody. Had such an approach be made, they would have been notified by the Department of Justice of the existence of the customs forensic report well before the trial commenced"* (paragraph 27 of the CA Judgment[65]).

(3) *"We* ***cannot understand how they could sit back and do nothing*** *in respect of a matter that* ***on her instructions was so vitally important to their client's case****. It seems to us that* ***their inaction was a complete abdication by both of them of their professional duty****"* (paragraph 28 of the CA Judgment[66]).

(4) *"Suffice it to say,* ***for the purpose of the present appeal****, their* ***inaction amounts to flagrant incompetence*** *on their part"* (paragraph 29 of the CA Judgment[67]).

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[64] [B2/416]

[65] [B2/417]

[66] ibid

[67] ibid

50. We must emphasize that, according to the authorities (see below), this Tribunal is not bound by the findings, conclusions or comments made by the Court of Appeal. The question in the Appeal was whether Ms. Tsim had been denied a fair trial which rendered the conviction unsafe. Whereas in this case, we need to determine whether the Respondent's conduct had brought the Bar into disrepute, or was prejudicial to the administration of justice. Further, Ms. Tsim and the Respondent were not cross-examined on their respective affirmations filed before the Court of Appeal. For these reasons, we must independently determine the issues at hand based on the evidence presented in the Hearing.

IV. The Amended Complaints

51. Unsurprisingly, Ms. Tsim lodged a complaint to the Bar Council against the Respondent and to the Law Society against Ms. Wong. Ms. Tsim has also commenced a civil claim against them[68].

52. As stated above, the 1st Complaint under the Original Complaints has been withdrawn. We therefore formally dismiss the 1st Complaint against the Respondent.

53. The 2nd and 3rd Complaints are as follows:

(1) The 2nd Complaint alleges that the Respondent failed to discover the existence of the C&E Expert Report:

Failing to check, enquire or otherwise make any enquiries from around 20th February 2017 to around 22nd May 2017 in respect of evidential material in the 2nd Additional Evidence Bundle of the Prosecutions, which existence ought to be known to the Respondent or could reasonably be discovered if the respondent had diligently followed up Miss Jim's instructions; should the Respondent had ever checked or conducted such enquiries, the existence of the Examination

[68] Transcript, Day 1, p.82

Report ... which was material to defence that Ms. Tsim had instructed him to put forward on her behalf, would have been revealed.

(2) In this 2nd Complaint, the Applicant is effectively suggesting that when the jury bundle was served at the beginning of the trial, had the Respondent done his job properly and professionally, he should have spotted there were missing documents since the last page of the 1st Batch (which was given to the Respondent) was page AD100 and the Notebook (in the Jury Bundle) started at page AE194 – there was a big gap between AD100 and AD194. This mishap or oversight relates to the 2nd Complaint as the missing pages unfortunately consisted of the C&E Expert Report which was paginated as pages AE101 to AE180 in the 2nd Batch.

(3) The 3rd Complaint alleges that the Respondent failed to make any effort to retrieve the deleted WhatsApp Messages in accordance with Ms Tsim's instructions:

Failing to make any or sufficient effort from around 20th February 2017 to around 22nd May 2017 to retrieve deleted messages from Ms. Tsim's mobile phone which had been seized by the Customs and Excise Department in accordance with her instructions which would, had he done so, have confirmed or tended to confirm Ms. Tsim's defence and provided the material evidential support thereto.

V. <u>The Applicable Legal Principles</u>

54. Rule 7 of the *Barristers' Disciplinary Tribunal Rules*, Cap.159P mandates that the burden of proof shall be upon the Applicant.

55. The standard of proof required in disciplinary proceedings for barristers is the civil standard of preponderance of probability: ***A Solicitor v Law Society of Hong Kong*** (2008) 11 HKCFAR 117.

56. However, given the seriousness of the allegations, the Tribunal must bear in mind that the more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it: ***Re H & Others (Minors)*** *[1996] AC 563,* applied in ***A Solicitor v Law Society of Hong Kong*** *(above)*. Such an approach, in the words of Mr Justice Bokhary PJ in ***A Solicitor v Law Society of Hong Kong*** at §116, *"will be duly conducive to serving the public interest by maintaining standards within the professions and the services while, at the same time, protecting their members from unjust condemnation*".

57. The relevant provisions of the Code of Conduct of the Hong Kong Bar ("the **Bar Code**") in force at the relevant dates were as follows:

> *6. It is the duty of every barrister*
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> *(a) to comply with the provisions of this code and with the undertakings (if any) which he made on his call to the Bar;*
>
> *(b) not to engage in conduct (whether in pursuit of his profession or otherwise) which is dishonest or which may otherwise bring the profession of barrister into disrepute, or which is prejudicial to the administration of justice;*
>
> *(c) to observe the ethics and etiquette of his profession;*
>
> *(d) if a practicing barrister, or an employed barristers acting under paragraph 183 of this Code, to be competent in all his professional activities.*

58. The 2nd and 3rd Complaints are charged under paragraph 6(b) of the Bar Code, that the Respondent's alleged misconducts may bring the Bar into disrepute or are prejudicial to the administration of justice.

59. Mere negligence, error of judgment or incompetence is not sufficient. As stated in another Bar Disciplinary Tribunal in ***The Bar Council v Sio Chan In, Devin*** (2 August

2022):

> *62. We also reminded ourselves that the Courts have held that professional misconduct requires* ***a more serious departure from the accepted standard than mere incompetence, or an error of judgment as to which practitioners may reasonably differ without any failure properly to exercise that judgment****. We found assistance in the statement of the High Court of New Zealand in Re A Barrister and Solicitor of Auckland [2002] NZAR 452, to which both parties referred us:*
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> > *"Professional misconduct does not arise where there is mere professional incompetence nor deficiencies in the practice of the profession by a practitioner.* ***More is required****. Such misconduct includes deliberate departure from accepted standard* ***or such serious negligence as, although not deliberate, would portray indifference and the abuse of the privileges*** *which accompanies registration as a medical practitioner ..."*

60. At paragraph 63 of the above decision, the tribunal referred to ***The Bar Council v Mark Sutherland*** (2 April 2019), another Bar Disciplinary Tribunal decision, which stated that:

> *18. The Tribunal also bears in mind that* ***mere negligence or incompetence is not the touchstone,*** *and that in the* ***benefit of hindsight should not intrude into the Tribunal's decision-making process*** *and its consideration of whether or not there has been professional misconduct. Per Stock J (as he then was) in Foshan Hua Da Industrial Co. v JSM [1999] 1 HKLRD 418: -*
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> > *"The standard of care to be expected of a professional man must be based on events as they occur in prospect and not in retrospect ... In this world there are few things that could not have been better done if done with hindsight. The advantages of hindsight include the benefit of having a sufficient indication of which of the many factors present are important and which are unimportant.*

But hindsight is not a touchstone of negligence ...

The onus of proving professional negligence over and above errors of judgment is a heavy one ..."

61. This Tribunal is not bound by the Court of Appeal decision or the views expressed by the Court of Appeal against the Respondent. We must decide the Amended Complaints based on the evidence and submissions presented by the Applicant and the Respondent in this Hearing. In ***General Medical Council v Sackman*** [1943] AC 627 to 638:

> *The responsibility, therefore, thrown on the General Medical Council in such cases is grave. Now, it is plain that the statute throws on the council and on the council alone the duty of holding due inquiry and of judging guilt. They cannot, therefore, rely on inquiry by another tribunal or a judgment of guilt by another tribunal. The practitioner charged is entitled to a judgment the result of the considered deliberation of his fellow practitioners. They must, therefore, hear him and all relevant witnesses and other evidence that he may wish to adduce before them. It is not disputed that where there has been a trial, at least before a High Court judge, the notes of the evidence at such trial and the judgment of the judge may afford prima facie evidence in support of the charge, for the council are not obliged to hear evidence on oath, but the very conception of prima facie evidence involves the opportunity of controverting it, and I entertain no doubt that the council are bound, if requested, to hear all the evidence that the practitioner charged brings before them to refute the prima facie case made from the previous trial. If this is inconvenient it cannot be helped. It is much more inconvenient that a medical practitioner should be judged guilty of an infamous offence by any other than the statutory body. Convenience and justice are often not on speaking terms. Nor do I accept the view put forward on behalf of the council that they are ill qualified to form an opinion on such a charge as the present compared with a High Court judge.*

62. Indeed, in ***Re A Barrister*** [2015] HKLRD 150, the Barrister Disciplinary Tribunal

dismissed a complaint against a barrister (who did not call a particular witness) despite he had been found by the Court of Appeal to be "flagrantly incompetent" depriving his client of a fair trial. Zervos J granted leave to the Bar Council to judicially review the tribunal's decision in dismissing the disciplinary complaint. Subsequently, the Bar Council withdrew the application for judicial review (see [2015] 5 HKLRD 632). Therefore, even if a barrister is found by the Court of Appeal to be flagrantly incompetent, it does not necessarily follow that he must be found guilty of a disciplinary complaint.

63. We also have to bear in mind that the Bar, like the Law Society, is a self-regulatory profession. Professional self-regulation for the Barristers profession is a privilege and as such must be accompanied by a duty on the part of every barrister to conduct himself or herself in a committed, professional, and responsible manner. In the words of Lord Collins JSC in ***R (Coke-Wallis) v Institute of Chartered Accountants*** [2011] 2 AC 146, applied by the Court of Appeal in ***A Solicitor (60/12) v Law Society of Hong Kong*** [2013] 4 HKC 198 at §34:

> *'The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain public confidence in the integrity of the profession, and to uphold proper standards of behaviour".*

64. Finally, as noted in ***The Bar Council v Mark Sutherland*** (above), the benefit of hindsight should not intrude into the Tribunal's decision-making process.

65. The parties do not have any disputes over the applicable legal principles outlined above. Bearing in mind the above principles, we now consider the 2nd and 3rd Complaints. We will deal with the 3rd Complaint first.

VI. <u>The 3rd Complaint – Failing to Recover The Deleted WhatsApp Messages</u>

66. The gist of the 3rd Complaint is that the Respondent failed to make any or sufficient effort to retrieve the Deleted WhatsApp messages in accordance with Ms. Tsim's instructions. Incidentally, the Applicant confirmed with the Tribunal that they would

not rely on the failure to retrieve the Browsing History.

67. The 3rd Complaint requires the Tribunal to make a finding of fact as to what instructions had been given by Ms. Tsim to the Trial Lawyers and what advices the Respondent had given to Ms. Tsim, if any. There are factual disputes on these issues. The key issues for the 3rd Complaint include:

A) what relevant instructions have been conveyed to the Respondent?

B) how *significant* were those instructions to the defence of the criminal charge against Ms. Tsim?

C) what has the Respondent done, or not done, in relation to those instructions in his preparation for the Criminal Trial for Ms. Tsim, and in his conduct of the defence during trial? And Why? and

D) based on findings in A), B), and C) above, whether what the Respondent had done, or not done, amounted to not just an error of judgment or mere negligence, but a serious failure in satisfying the professional standards demanded of him, and which failure *may bring* the profession into disrepute, or which is prejudicial to the administration of justice?

A) <u>Ms. Tsim's Instructions to the Respondent</u>

68. There is no dispute that Ms. Tsim did ask both the Trial Solicitors and the Respondent whether it was possible to retrieve the WhatsApp Messages exchanged between her and GA. (See Part II B above, and below)

69. During the Hearing, the Respondent gave the following oral evidence as to what happened in the meetings:

(1) in the February Meeting, Ms. Tsim told the Respondent that the WhatsApp Messages exchanged with GA were all voice messages (see Transcript of Day 2, pages 41-42). ("the **Voice Messages Instructions**"). Ms. Tsim also asked the legal team whether it was possible to retrieve the WhatsApp Messages exchanged with "Tin Wing". It seems that the Respondent had already advised

Ms. Tsim in this meeting that it was not possible to retrieve voice messages (see Transcript of Day 2, page 43).

(2) after the February Meeting, the Respondent was provided with the Written Instructions, in which (a) Ms. Tsim mentioned, inter alia, the possible Inculpatory Message sent to GA after her arrest; and (b) Ms. Tsim asked whether it was possible to retrieve the WhatsApp messages with "Tin Wing".

(3) in the April Meeting:

(a) Ms. Tsim asked whether it was possible to retrieve the Deleted WhatsApp Messages exchanged with GA (see Transcript of Day 2, pages 43 and 60). As Ms. Tsim had previously told the legal team in the February Meeting that the WhatsApp messages were all voice messages, the Respondent advised that according to his understanding ("**Relevant Experience & Understanding**"), it was impossible to retrieve them ("the **Advice**").

(b) he then had a discussion with the legal executive of the Trial Solicitors firm (one Mr. Chan) who attended the meeting. In the end, their common consensus in that meeting was that it was not possible to do so (see Transcript of Day 2, pages 43-44).

(c) the Respondent asked Ms. Tsim to think carefully whether the Inculpatory Message had been sent to GA, which Message would be very damaging (see Transcript of Day 2, page 62, 83). Even though the Respondent had concerns that the Inculpatory Message could be highly damaging if they are also retrieved, he did not explain or give Ms. Tsim a "pros and cons" analysis (see Transcript of Day 2, page 63). ("the **Backfire Concern**") This was one of the reasons why the Respondent did not proactively take further action in retrieving the Deleted WhatsApp Messages (see Transcript of Day 2, page 39). However, he

later changed his evidence, suggesting that he had had analysed the matter with Ms. Tsim (see Transcript of Day 2, page 83).

(d) finally, the Respondent also asked Ms. Tsim to tell his brother to check whether he could retrieve the Browing History from the computer at home (see Transcript of Day 2, page 44).

(4) in the May Meeting, Ms. Tsim told the Respondent that her Brother could not retrieve the Browing History. Further, there was little, if any, discussion concerning the retrieval of the Deleted WhatsApp Messages in this meeting (see Transcript of Day 2, page 65).

B) <u>How significant were those instructions to the defence of the criminal charge against Ms. Tsim?</u>

70. It is not disputed that the WhatsApp Messages, if retrieved, could be crucial to Ms. Tsim's defence in the Criminal Trial, that she thought the packet she carried contained ivory powder. The significance of the messages about ivory powder in Ms. Tsim' s defence was confirmed by Ms. Chow. (Day 1 of the hearing, p.87).

C) <u>What has the Respondent done, or not done, in relation to those instructions in his preparation for the Criminal Trial for Ms. Tsim, and in his conduct of the defence during trial, and Why?</u>

I. <u>The Respondent acted as he did on two bases: (1) his Relevant Experience and Knowledge; (2) his Backfire Concern</u>

71. According to the Respondent, he has advised Ms. Tsim that he had not heard of any technology to recover the deleted WhatsApp voice messages, otherwise the police would have done that a long time ago ([B2/520]; Transcript of Day 2, pages 43 and 60):

(a) before the Criminal Trial, the Respondent did not advise Ms. Tsim to obtain expert advice for retrieving the information in her phone in any of the meetings

(see Transcript of Day2, page 69).

(b) further, he had never asked the Trial Solicitors to follow up or make further efforts to retrieve the Deleted WhatsApp Messages or the Browsing History (see Transcript of Day 2, page 66).

72. Why has the Respondent done so? As explained above, the Respondent said that he acted as he did for two reasons: (a) The main one was that he had the **Relevant Experience & Knowledge** (that he knew / believed that there was no technology to recover deleted voice WhatsApp messages from GA); and (b) a subsidiary one was that he had a "**Backfire Concern**" (that the messages between Ms. Tsim and GA were mixed, comprising possible Inculpatory Message which might well outweigh the benefits of the possible Exculpatory Messages, if recovered) (See Transcript of Day 2, pages 39 and 85) (collectively, "the **Two Assertions**").

73. The Tribunal is of the view that, given Ms. Tsim's Voice Messages Instructions (that all messages exchanged with GA were voice messages), if the Respondent indeed had **(a)** the Relevant Experience & Knowledge; and/or **(b)** the Backfire Concern in mind, he could not be criticized for not taking further steps to recover the Deleted WhatsApp Messages.

II. <u>Did he possess Relevant Experience & Knowledge</u>

74. After carefully considering all the documentary and oral evidence along with the parties' submissions[69], we are not satisfied that he had the Relevant Experience & knowledge.

A: Respondent's letter to LAD and affidavit to CA made no reference to his Relevant Experience & knowledge.

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69 The deliberations of the Tribunal took place on 27 March, 6 May, 4 July, 31 July and 30 August 2024.

75. First. It is puzzling that he has never mentioned the Relevant Experience & Knowledge previously. He only raised them for the first time when he gave evidence during the Hearing:

(a) following the filing of the Application for Leave to Appeal Against Conviction, the Legal Aid Department requested the Respondent to respond to Ms. Tsim's allegations levelled against him. In his reply letter to the Director of Legal Aid dated 26 October 2018 ("the **Legal Aid Reply Letter**"), the Respondent did not mention the Two Assertions at all[70].

(b) further, after Ms. Tsim had filed her Affidavit on 10 May 2019 in support of her Leave to Appeal application, the Respondent filed his affidavit on 11 July 2019[71] ("**R's Affidavit**") in response to Ms. Tsim' allegations made against them. Again, he did not mention the Two Assertions in his affidavit.

(c) incidentally, the Respondent has adopted the Legal Aid Reply Letter and R's Affidavit as part of his evidence for the purpose of this Hearing (see Transcript of Day 2, page 24).

76. When the Respondent was preparing those two documents, he knew well that some very serious allegations were being levelled against him. His reputation was also at stake. It does not make sense to us that, being an experienced barrister of his standing, the Relevant Experience & Knowledge Assertion was not mentioned at all, especially in R's Affidavit considering he could be cross-examined by the New Legal Team before the Court of Appeal.

B: His admission to the CA: *we did not know if such retrieval can be done.*

77. Second. While his failure to mention the Two Assertions may not be fatal, in his R's

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[70] [B1/94+]

[71] [B2/433+]

Aff, the Respondent has in fact said something totally inconsistent with the assertion that he had the Relevant Experience & Knowledge and that he had rendered the Advice to Ms. Tsim. In paragraph 16 of R's Aff[72], he deposed that:

> *"16. The Applicant did ask if some more messages can be retrieved, to that I had a discussion with the representative of the Trial Solicitors and* ***we did not know if such retrieval can be done.*** *The Applicant then informed us that she was using an i-phone at the time and she wondered if those WhatsApp messages could have been backed-up automatically in the i-cloud. She then suggested that her elder brother might be able to assist in retrieving those WhatsApp messages for her."* (emphasis added)

78. The Respondent confirmed that he was referring to the WhatsApp Messages exchanged with GA (rather than with "Tin Wing") in the above paragraph (Day 2, p. 85, see below). Given the apparent inconsistency, the Tribunal gave the Respondent an opportunity to explain himself in this regard. When asked whether he had mentioned in the Legal Aid Reply Letter and the R's Affidavit regarding his alleged Relevant Experience and Knowledge (see Transcript of Day 2, pages 83 to 87), the Respondent responded that he had not done so in great detail:

A: 咁細緻冇，不過喺我 affidavit 度係有談及過呢一個範疇嘅。如果冇記得...(Day2, 85)

… … …

A: 或者委員我去番 436 頁喇，436，第 16 段，第 15 段嗰度呢就講緊係話想搵番天永嘅 WhatsApp 嘅 messages 喇，WhatsApp records 喇天永嘅，喺第 15 段嗰部分。咁然之後第 16 段我開始講嘅呢就係， 'The applicant did ask if some more messages can be retrieved. To that, I had a discussion with the representative of the trial solicitor, and we did not know how if such retrieval can

[72] [B2/436]

be done.' **呢一度嗰個 'some more messages' 呢，我想表達嘅呢就係嗰啲出國嘅嗰啲，所以係 'some more messages'** 。當然，我冇列明係嘞，呀。(our emphasis)

79. It is important to note from the above answer that the Respondent has confirmed he was referring to the WhatsApp Messages exchanged with GA (as opposed to "Tin Wing") in paragraph 16 of R's Aff.

80. The Respondent was then asked to clarify why he did not make it clear in R's Aff about his alleged Relevant Experience & Knowledge given his reputation was at stake. He replied that the then focus was on the recovery of Tin Wing's messages:

A: 因為嗰陣時係嗰個焦點，詹小姐係要攞番天永嘅 messages 吖嘛。你或者睇一睇--委員睇番佢原本個指示書嘅時候呢，書寫只係話搵番天永嘅 messages。咁嗰個一路嗰個焦點係咁樣去，而嗰個出國嗰個，我所理解係冇得 recover。

81. We find the answer perplexing. Firstly, as pointed out above, the Respondent has already accepted that in paragraph 16 of R's Aff he was referring to the WhatsApp messages with GA, not "Tin Wing". Secondly, at the time when he was preparing R's Aff, "Tin Wing's" messages could not be the focus before the Court of Appeal. He was then being criticized before the Court of Appeal for his failure to recover the messages with GA (not "Tin Wing").

82. This admission in paragraph16 of R's Aff is crucial, and directly contradicts the Respondent's own evidence that he had the Relevant Experience and Knowledge.

83. Incidentally, we should also mention that in paragraph 15 of R's Aff, the Respondent claimed that he had advised Ms. Tsim that C&E had managed to use "*their special*

technology" in retrieving "*some of those WhatsApp messages*" with "Tin Wing" [73]. As explained above, C&E recovered a screenshot of the WhatsApp messages with "Tin Wing", not the actual deleted messages. Further, there was no "special technology" involved at all. The said screenshot was found by C&E in her iPhone's "Recently Deleted" folder in the photo album (ie "Recycle Bin" folder, which had not been permanently emptied).

C: The Cart cannot come before the Horse

84. In her written and oral closing submissions, Ms. Chow helpfully summarized the Respondent's defence. She submitted that given Ms. Tsim had specifically told the Respondent that the WhatsApp Messages exchanged with GA were all voice messages ("the "**Voice Messages**") (as opposed to text messages), there was nothing to further investigate or revisit the issue as he knew from his past experience that Voice Messages were irretrievable.

85. She further submitted that Ms. Tsim's evidence given under cross-examination corroborates the Respondent's case. Ms. Tsim was cross-examined on the following instructions given to the New Legal Team when they were preparing for the appeal ("the **Appeal Instructions**")[74]. Ms. Tsim stated that:

> 我曾向鄭大律師表示復原與"出國"之對話，因他每次都是以語音訊息回覆我，證明真有其人向我說大象牙粉．
>
> 鄭: 復原？沒聽過這技術，若有，警察一早已做了！
>
> 坐於鄭大律師身後的女士聽到後向鄭表示確有此技術．
>
> 而鄭: 嗯

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[73] [B2/435]

[74] [B2/520]

The Respondent said the first two conversations above were in fact mentioned but he denied the last two conversations were uttered.

86. In cross-examination, Ms. Chow asked Ms. Tsim the following questions concerning the Appeal Instructions:

Q: 即係話你好清楚記得你曾經同鄭大律師講,關於兩個 WhatsApp,第一個 WhatsApp 就同"出國"呢一個就會每一次"出國"都用語音覆你嘅,你呢度咁寫㗎嘛?

A: 冇錯.

...

Q: 呢個就係俾大律師嘅指示嘞.

A: 冇錯.

Q: "出國"每一次覆你 WhatsApp 都系語音嚟嘅,係咪?

A: 冇錯

...

Q: 而家你有晒啲報告嘞,兩份專家報告,你都睇過嘅我諗?

A; 睇過.

Q: 語音既 WhatsApp 係復原唔到嘅,你同意呀嘛?

A: 同意.

Q. 所以鄭大律師當日就同你講,佢話「冇咁嘅技術」,佢並非說謊,同意嗎?

A. 同意。

(see Transcript of Day 2 pages 78 to 79)

87. These answers cannot assist the Respondent if "[he] *did not know if such retrieval can be done"* (as admitted in paragraph 16 of R's Aff). This is reinforced by the context of the questions and the totality of the evidence.

88. Firstly, we need to consider Ms. Tsim's clarifications in re-examination and the evidence of the Respondent as well: In the re-examination, Ms Tsim clarified that:

(1) in the pre-trial meetings, she did not know that voice messages and text messages differed in terms of their recoverability (see Transcript of Day 1, page 98).

(2) as to why she answered under cross-examination that all the messages sent to GA were voice messages, she thought she was asked whether it was so written on the Appeal Instructions.

(3) when she gave the instructions to the Respondent, all she was saying was that the voice of GA alone could prove that there was a real person giving her instructions to transport the ivory powder (see Transcript of Day 1, page 99). This was also expressed in the Appeal Instructions ("證明真有其人向我說大象牙粉")[75]. Therefore, she did not make up the story.

(4) her messages to GA consisted of both text and voice messages (see Transcript of Day 1, page 98).

(5) even the Respondent himself confirmed under cross-examination that:

(a) It was not discussed in the meetings whether the WhatsApp messages sent by GA were all voice messages.

(b) Ms. Tsim had never suggested that there were no text messages exchanged.

(see Transcript of Day 2, pages 49 to 50)

(6) Ms Tsim's opinion on the Respondent's state of mind cannot carry real weight. In any event, any "advice" purportedly given by the Respondent for which he

[75] [B2/520]

had no relevant Experience & Knowledge must at least be negligent, even if it *happened to be* "correct".

89. It is also evident to us that:

(a) if he possessed the Relevant Experience & Knowledge, he would not have said, "*We did not know if such retrieval can be done*" in R's Aff. Hence, his own statement clearly suggests that he did not have the Relevant Experience & Knowledge. He certainly depicted a very different picture in R's Aff.

(b) it is also remarkable that he did not explicitly tell the Court of Appeal in R's Aff that (**a**) Ms. Tsim had given him the Voice Messages Instruction; and (**b**) there was a distinction between voice messages and text messages. Those matters could have potentially exonerated him before the Court of Appeal. The fact that he made no such distinction in R's Aff suggests that he was unaware that Voice Messages were irrecoverable.

(c) if he had no Relevant Experience & Knowledge, he could not have rendered the Advice (that it was impossible to retrieve Voice Messages) to Ms. Tsim.

90. There are other materials and evidence may potentially support our findings, but we did not take them into account. For instance, in Ms. Wong's Affirmation dated 11 July 2019[76] filed before the Court of Appeal, she stated that "*[a]s we were not certain about the relevant retrieval techniques and their chances of success, I suggested to [Ms. Tsim] that she should consider hiring an expert witness to attempt retrieving these records*"[77]. Since Ms. Wong was not called as a witness in this Hearing, it would not be fair to the Respondent if we relied on such hearsay evidence.

91. Despite the Respondent's own admission in paragraph 16 of R's Aff, Ms. Chow argued

[76] [B2/441]
[77] [B2/444/§11]

that there is no evidence indicating that the Respondent was not equipped with the knowledge that Voice Messages were not recoverable. After she was reminded of what the Respondent said in R's Aff, namely "*We did not know if such retrieval can be done*", she argued that "one of the interpretations" of that statement could be against the Respondent but "it is not the only interpretation". Despite her best efforts, the Tribunal was unable to extract from her oral submissions what the other interpretation could be.

92. Given the importance of this matter, the Tribunal therefore gave another opportunity to Ms. Chow to file a written supplemental submission to explain what the other meaning would be. Ms. Chow duly filed R's Supplemental Closing Submissions on 23 September 2023 in which she submitted, inter alia, that the Respondent must be referring to the voice messages with "Tin Wing" in paragraph 16 of R's Aff. However, her submission is contrary to the evidence given by the Respondent in the Hearing, that he was referring to the messages exchanged with GA (not "Tin Wing") in paragraph 16 of R's Aff (see above). We therefore cannot accept Ms. Chow's submissions.

D: Findings on the Relevant Experience and Knowledge

93. Having considered all the evidence and submissions, we find the following facts:

(1) in the April Meeting, Ms. Tsim asked the Trial Lawyers whether the Whatsapp Messages with GA could be recovered.

(2) when the Respondent had the pre-trial meetings with Ms. Tsim, he did not know that there was a distinction between Voice Messages and Text Messages in terms of their recoverability or irrecoverability, and he also did not have the specific knowledge that Voice Messages were irrecoverable.

(3) the Respondent's own statement stated in paragraph 16 of R's Aff admitting his lack of knowledge in this regard *represented his true position*. The Respondent did not have the Relevant Experience and Knowledge.

(4) despite Ms. Tsim's request, the Respondent (and the Trial Solicitors) left the matter unresolved. He did not take any further action. He did not advise Ms. Tsim or the Trial Solicitors to seek expert advice or seek instructions from the Director of Legal Aid.

(5) the Respondent did not follow up when the Trial Solicitors had done nothing.

94. Had the Respondent obtained relevant expert advice on the recoverability of deleted voice and text messages -- *which he should* -- the mislaid C&E Expert Report would have been brought to his notice. The vital contents of the C&E Expert Report could have been deployed by the Respondent to ensure that Ms. Tsim had a fair trial.

95. We should also mention that the Respondent has sought to challenge the credibility of Ms. Tsim and her brother regarding their evidence on the Browsing History. For the purpose of this Hearing, as stated above, the Applicant would not rely on the fact that the Browsing History was also not retrieved. Therefore, we do not need to resolve the relevant factual dispute. In any event having considered the parties' evidence and the submissions on this issue, we do not think that the internal inconsistencies in Ms. Tsim's evidence and the inconsistencies of the evidence between Ms. Tsim and her brother regarding the Browing History would impact on our decision on the Respondent's alleged Relevant Experience & Knowledge, which was within the Respondent's sole knowledge.

E. Finding on Backfire Concern

96. We have set out the relevant background facts in Part II, and para 69 (3) (c) above. For the following reasons, we find that the Respondent did not harbour the Backfire Concern:

(a) if he had genuinely held the Backfire Concern, it would have been only natural for him to have mentioned it in his letter to the Legal Aid Department and in R's Aff. Once again, this could have assisted in exonerating him before the Court of Appeal.

(b) secondly, his testimony was inconsistent regarding whether he had discussed the Backfire Concern with Ms. Tsim (see paragraph 69(3)(c) above).

(c) thirdly, as mentioned in paragraph 69(3)(c) above, it is the Respondent's evidence that he asked Ms. Tsim to think carefully whether the Inculpatory Message had been sent to GA, but there is no evidence suggesting that Ms. Tsim had replied to him or there was follow-up by the Respondent. The Respondent therefore had not even taken full instructions in this regard. Incidentally, the C&E Expert Report shows that no messages were sent to GA after her arrest. Hence, it would appear that no Inculpatory Message was sent to GA.

(d) fourthly, if he really had the Backfire Concern in mind, fuller and more accurate instructions would have been obtained from Ms. Tsim, and the implications of recovering the inculpatory and the exculpatory WhatsApp Messages would have been fully weighed and discussed with her. Such discussions did not occur.

(e) finally, the Respondent claimed that the main or the ultimate reason why he did not take proactive steps in retrieving the Deleted WhatsApp Messages was due to his Relevant Experience and Knowledge that Voice Messages were irretrievable (Transcript of Day 2, page 84). So even on his own case, the so-called Backfire Concern had no more than marginal relevance. Given we have found that he did not have the Relevant Experience and Knowledge, and the circumstances discussed above, we cannot accept this part of his evidence as well.

97. Given our findings in paragraphs 93 and 96 above, we are of the view that the Respondent was negligent, to say the least.

D) Based on the circumstances set out in subsections A) to E) above, whether what the

Respondent had done, or not done, amounted to not just an error of judgment or mere negligence, but a serious failure in satisfying the professional standards demanded of him, and which failure has brought the profession into disrepute or which is prejudicial to the administration of justice?

98. The next question we need to determine is whether the Respondent's negligence is so serious that it amounts to bringing the profession into disrepute or is prejudicial to the administration of justice. As stated above, mere negligence is not enough. We bear in mind the standard of proof is that stated in ***A Solicitor v Law Society of Hong Kong*** (2008) 11 HKCFAR 117.

99. Given the circumstances of this case, we are of the view that the Respondent's conduct falls under the serious category, rather than just a case of mere negligence or an error of judgment:

(1) the case involves explicit instructions from Ms. Tsim, a lay-client facing a serious charge, bearing in mind that she was in remand. Despite her clear request for assistance in retrieving crucial evidence for her defence, namely the WhatsApp Messages, the Respondent-failed to act on her express instructions.

(2) given that the matter was crucial to lay-client's defence and especially when there was an express query or request directly raised by the lay-client, the Respondent, as the barrister leading the defence, should have properly advised the instructing solicitors and the lay-client to seek expert advice in areas beyond his expertise.

(3) while the primary responsibility to find an expert or take instructions from the Director of Legal Aid lay with the Trial Solicitors, the Respondent was nonetheless responsible for ensuring that these actions were taken. His failure to follow up with the instructing solicitors to secure expert advice fell far short of his professional duties.

(4) in legal aid cases, the assigned barrister may directly contact or seek instructions from the Director of Legal Aid if necessary. All barristers are expected to act responsibly and competently, regardless of whether the lay-client is on legal aid or not.

(5) leaving a crucial matter unresolved or in abeyance, which might deny the lay-client a fair trial in respect of a serious charge is, in our view, a serious or significant departure from the standard of care required of a legal professional. Such neglect, in our view, not only brings the profession into disrepute but is also prejudicial to the administration of justice.

100. For the above reasons, we find the 3rd Complaint has been proven.

2nd Complaint

101. The 2nd Complaint relates to the Respondent's failure to uncover the 2nd Batch of the Additional Evidence, which contained the C&E Expert Report and material to Ms. Tsim's defence (see paragraphs 33 to 39 above).

102. As stated above, we have made a finding that the Trial Solicitors firm had never provided the Respondent the 2nd Batch and the 3rd Batch of the Additional Evidence. We accept that the Respondent could not have envisaged such negligence on the part of his instructing solicitors, resulting in failing to convey these crucial pieces of evidence.

103. In his written opening submissions, the Respondent accepted that if he had counted the page numbers he would be "in a position to discover that there were no AE101-193" and "*such discovery would alert me to make enquiries from the prosecution in order to ascertain what they are*" (see paragraphs 17(c) and (d) of the Respondent's written opening).

104. Ms. Chow submitted that:

> "... *the present case was a series of unfortunate events. Had the instructing solicitor seen and read the AE2, had the contents of the expert report been translated or brought to the attention of the Counsel on fiat; had the C&E officers assisting counsel on fiat alerted counsel that he could not and should not cross-examine on the line that he did, R would not find himself where he is today*".

105. We cannot accept her submissions in entirety. It is the responsibility of a barrister to vigilantly safeguard the interest of his lay-client and shield her from those "unfortunate events" caused by others.

106. However, in the unusual circumstances of this case, we are not satisfied that the omission on the part of the Respondent would amount to a *serious* departure from the accepted standard bringing the profession into disrepute or is prejudicial to the administration of justice:

(1) as pointed out by Ms. Chow, even the prosecution acknowledged that the circumstances of this case were unusual. The prosecution in their skeleton submissions filed before the Court of Appeal[78] admitted that:

> *"It is worthy to note that the Report was served as additional evidence instead of unused materials.* ***In usual circumstances, the Prosecution would have produced it as evidence of the prosecution case so that it should have been brought to the Defence Counsel' attention*** *at the time of the trial although his instructing solicitor did not receive it or even lost it."* (emphasis added)

(2) at the time, the Respondent would not have known that the missing pages of the Additional Materials contained the C&E Expert Report.

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[78] [B2/489/§14]

(3) further, the PTR Form indicated that the prosecution would only call experts from "*Government chemist and value of drugs, hopefully by agreement*". There was no indication that the prosecution would adduce or rely on the C&E Expert Report.

107. For the above reasons, we dismiss the 2nd Complaint.

Conclusion

108. In conclusion, the Tribunal unanimously finds the Respondent guilty of the 3rd Complaint and dismisses the 1st and 2nd Complaints.

Further Directions

109. On 13 September 2023, we adjourned the Hearing to a date to be fixed when the Statement of Findings would be ready. In the light of our decision, we hereby direct that:

(1) the Applicant shall provide to the Tribunal and the Respondent (a) written submissions with regard to the penalty to be imposed on the Respondent by the Tribunal and costs of this inquiry together with (b) a summary table of past sentences imposed for similar cases within 14 days.

(2) the Respondent shall provide to the Tribunal and the Applicant written submissions on mitigation and in reply to the Applicant's submissions on the penalty and costs within 14 days thereafter.

(3) unless a party requests for an oral hearing, the Tribunal shall determine the penalties or sanctions to be imposed on the Respondent in respect of the 3rd Complaint and costs on paper.

Dated the 16th day of September 2024.

(Signed)

Mr. Robert SK Lee SC
Chairman of the Barristers Disciplinary Tribunal

(Signed)

Mr. Patrick Chong
Member of the Barristers Disciplinary Tribunal

(Signed)

Ms. Susanna Shen
Member of the Barristers Disciplinary Tribunal