

IN THE BARRISTERS DISCIPLINARY TRIBUNAL

BETWEEN

THE BAR COUNCIL

Applicant

and

Cheng Ming Bun Francis

Respondent

REASONS FOR SENTENCE AND COSTS

I. General Background

1. By the Tribunal's Statement of Findings dated 16 September 2024 ("the **Findings**"), the Tribunal found the Respondent guilty of the 3rd Complaint laid by the Applicant but dismissed the 2nd Complaint¹. The essence of the underlying case has been set out under Part II, "The Background Facts", and the Tribunal's analysis and conclusions, under Part VI of the Findings. In this decision, we shall adopt the same definitions and abbreviations used in the Findings.
2. Following the Findings, the Tribunal directed the parties to file written submissions in relation to sentence and costs. The parties have complied with this direction. The Tribunal further directed that matters of sentence and costs are to be determined on

¹ The 1st Complainant in the Original Complaints was withdrawn by the Applicant long before the Hearing (see §8 of the Findings).

papers, to which the parties have raised no objection.

3. In summary, the Tribunal found the Respondent guilty of the 3rd Complaint, which concerned his failure to make any or sufficient effort from around 20 February to around 22 May 2017 to retrieve Whatsapp messages deleted from Ms. Tsim's mobile phone in accordance with her instructions. The Tribunal's key finding included:

- (a) The Respondent's assertion that he had learnt from his past experience that Whatsapp voice messages were irretrievable was rejected. This claim was notably contradicted by his own affirmation filed before the Court of Appeal wherein he stated that both he and the instructing solicitors did not know if Whatsapp messages could be retrieved.
- (b) The Respondent left Ms. Tsim's crucial instructions unresolved and took no further action and remained passive thereafter. He should have provided proper advice to both the instructing solicitors and Ms. Tsim regarding the need to obtain expert advice. Moreover, he had a duty to follow up with the instructing solicitors to ensure such expert advice was actually obtained. Instead, he proceeded to conduct the trial without seeking or having the benefit of expert advice or opinion.
- (c) His negligence was of such gravity as to bring the profession into disrepute and was prejudicial to the administration of justice.

II. Respondent's Submissions in Mitigation

4. In his written submissions dated 27 November 2024, the Respondent advanced three grounds in mitigation:
 - (a) He has been in active practice, predominantly in the criminal field, since he was called to the Bar in 1995.
 - (b) He has no previous disciplinary record.

- (c) He regularly deputized as Deputy District Judge: two months in 2009, three months in 2019, one month in 2020, two months in 2021, four months in 2022, one month in 2023 and five months in 2024.

III. Applicant's Submissions on Sentencing

5. The Applicant has compiled a table of sentences imposed in similar cases. The most relevant decision is a 2019 decision ("the **2019 Case**") concerning a barrister who failed to fully explain the contents of the Summary of Facts to his client. Specifically, the barrister failed to explain that the prosecution's acceptance of the plea bargain was conditional upon an admission that all drugs found were for trafficking purposes. This failure deprived the client of the opportunity to advance a well-founded ground in mitigation, specifically that the dangerous drugs in question were intended for self-use, a submission that would have been supported by the available evidence.
6. The barrister pleaded guilty to the charge for failing to competently advise on and heed the client's evidentially well-founded instruction in conducting her mitigation and hence deprived the client of a reasonable chance to have the self-use point considered by the Court, which led to a heavier sentence than otherwise would have been.
7. A differently constituted tribunal adopted three months as the starting point. After taking into account matters in mitigation, six weeks' suspension was imposed. The tribunal noted that:
13. *The first Complaint is serious: the prosecution's summary of facts was unequivocal to the effect that the Complainant was required to admit that all of the drugs the subject of the relevant charge were possessed for the purposes of sale. This was in direct contrast to the instructions of the Complainant to the effect that some of the drugs were for self-use. These instructions were supported by a medical report which indicated that the Complainant was a user of the drugs in question: "ice".*
14. *Furthermore, the consequences of the Respondent's behaviour were serious: the Complainant was required to lodge an appeal to the Court of Appeal resulting in a reduction in her sentence. **This resulted in adverse publicity not just for the Respondent, but also for the Bar as a whole.***

15. *The Tribunal is of the view that a suspension from practice is necessary to reflect such seriousness and that a starting period of three months is appropriate.*

IV. Applicable Principles

16. Under section 37 of the *Legal Practitioners Ordinance*, Cap.159, on completion of its inquiry, the Tribunal may exercise the following powers, inter alia, impose a censure, order suspension from practice, impose a penalty not exceeding \$500,000, order costs against the barrister and make any other order it thinks fit.
17. We also bear in mind that 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*”: ***R (Coke-Wallis) v Institute of Chartered Accountants*** [2001] 2 AC 146 at §60; applied by the Court of Appeal in ***A Solicitor (60/12) v Law Society of Hong Kong*** [2013] 4 HKC 198 at §34.

V. Discussion

18. The Tribunal takes the view that this case is more serious than the 2019 Case in that:
- (a) The Respondent completely failed to act on express instructions or make any effort to retrieve potentially crucial evidence, which is more serious than inadequate explanation as in the 2019 Case.
 - (b) The consequences of the Respondent’s inaction were far more severe. His failure to retrieve potentially exculpatory evidence could have resulted in a miscarriage of justice and prejudicial to the administration of justice. This is markedly more serious than the 2019 Case, where the barrister’s failure prevented a convicted client from advancing a mitigating factor about self-use.
19. Given the seriousness of 3rd Complaint, and the need to maintain public confidence in the profession and uphold proper standards of conduct, particularly in criminal cases

where liberty is at stake, the Tribunal takes the view that a suspension from practice is necessary. The facts of this case are more serious than the 2019 Case.

20. In the circumstances, we consider a starting point of five months is appropriate given this case is more serious than the 2019 Case.
21. There are however mitigating factors:
 - (a) Before the Original Complaints were laid, the Respondent had never previously been the subject of complaint in his 27 years of practice.
 - (b) The Respondent has demonstrated a significant commitment to public service through his regular appointments as Deputy District Judge in 2009 and from 2019 to 2024.
 - (c) There were substantial delays in bringing the complaints against the Respondent. As stated in the Findings, the Court of Appeal quashed the conviction in October 2019 and it was not until February 2022 when the Applicant laid the Original Complaints against the Respondent – a delay of over two years. We are conscious of the fact that it could be due to the outbreak of the Covid-19 pandemic. Nonetheless, there was a delay.
 - (d) There were further delays due to procedural matters not caused by the Respondent. The Applicant's application for an adjournment due to change of counsel. Further, the Tribunal was reconstituted on two occasions due to administrative reasons (see §§9 and 10 of the Findings).
22. Taking into account the mitigating factors, particularly the significant delays not attributable to the Respondent, the Tribunal sees fit to reduce the period of suspension by two months.
23. Accordingly, the Tribunal orders that the Respondent is to be suspended from practice for a period of three months for the 3rd Complaint, to take effect upon the expiry of the

21 day appeal period provided under section 37B of the Legal Practitioners Ordinance, Cap.159.

VI. Costs

24. Notwithstanding the 1st Complaint was withdrawn by the Applicant on 30 September 2022 and the 2nd Complaint was dismissed by the Tribunal, the Applicant submits it is reasonable to order the Respondent to bear “all the costs” of the Applicant on an indemnity basis to be taxed by a Master of the High Court if not agreed. Alternatively, the Applicant suggested that the Respondent should bear at least 80% of the costs. It appears that the Applicant is asking for “all the costs” pursuant to section 37(c) of the Legal Practitioners Ordinance, Cap.159 which would include “*the costs of and incidental to the proceedings of the Tribunal and the costs of any prior inquiry or investigation*”.
25. The Tribunal takes the view that the Respondent should bear 65% of the costs of and incidental to the proceedings of the Tribunal and the costs of any prior inquiry or investigation to be taxed on party-and-party basis by a Master of the High Court if not agreed, for the following reasons:
 - (a) The Tribunal accepts the Respondent’s submission that the Applicant proceeded with the 2nd Complaint in full swing throughout, requiring the Respondent to prepare evidence and the related issues were fully argued in the Hearing.
 - (b) The Applicant submitted that the 3rd Complaint was primarily the reason for Ms. Tsim’s complaint while the 2nd Complaint can be regarded as the by-product. This submission is against the Applicant. If that were the case, the Applicant ought to have considered whether to pursue the 2nd Complaint at all in the first place.
 - (c) Further, the Applicant sought to justify pursuing the 2nd Complaint by submitted that “*In the light of the importance of the materials in the 2nd*

Additional Evidence Bundle and the awkward “AE” pagination in the Jury Bundle, there were good reasons to pursue this specific complaint in the first place”. We cannot accept the submission. The very “awkward “AE” pagination”, to borrow the Applicant’s language, demonstrates why this was an exceptional case. The unfortunate situation arose from a catalogue of errors. Even the prosecution conceded that, as stated in §106 of the Findings, “in usual circumstances” the prosecution would have produced the C&E Expert Report as evidence of the prosecution case given the said report was served as additional evidence instead of unused material “so that it should have been brought to the Defence Counsel’s attention at the time of the trial although his instructing solicitor did not receive it or even lost it”. The Respondent had no reason to anticipate the prosecution had already prepared the C&E Expert Report. In those circumstances, the Tribunal takes the view that it is not reasonable to pursue the 2nd Complaint in the first place given the unusual circumstances of this case.

- (d) The Tribunal declines to make an indemnity costs order as the Applicant has not identified any specific features of this case warranting departure from the standard party-and-party basis.

- 26. Taking into account of the time involved in the 2nd Complaint, the Tribunal orders that the Respondent should bear 65% of the costs of and incidental to the proceedings of the Tribunal and the costs of any prior inquiry or investigation to be taxed on party-and-party basis by a Master of the High Court if not agreed.

VII. Ancillary Orders

- 27. Finally, the Applicant invites the Tribunal to make the usual ancillary orders regarding publication of the decisions made by this Tribunal. The Respondent has no objection to the orders sought. The Tribunal therefore also makes the following orders:

- (a) The Amended Complaints dated 28 October 2022, the Statement of Findings

dated 16 September 2024 and the Reasons for Sentence and Costs shall be published **(a)** by way of a Bar Circular and **(b)** on the Bar's website (in the part which is accessible by the public generally) for the duration of the suspension period (three months) imposed in paragraph 23 above, but the commencement of such period is subject to the appeal-related stay stated in subparagraph (d) below.

- (b) The Tribunal's Statement of Findings dated 16 September 2024 and Reasons for Sentence and Costs shall be sent to the complainant (Ms. Tsim) and the Registrars of the High Court and District Court, the Chief Judge of the High Court, the Chief District Judge, the Chief Magistrate, all members of the Barristers Disciplinary Tribunal Panel, the Department of Justice (the Secretary for Justice, the Civil Litigation Unit and the Director of Public Prosecutions), the President of the Law Society, the Director of Legal Aid, the Administrator of the Duty Lawyer Service and the Official Receiver's Office.
- (c) A copy of the Statement of Findings and Reasons for Sentence and Costs should be kept in the Bar Secretariat and copies of the same should be made available to the public upon request.
- (d) The orders in subparagraphs (a) to (c) above be stayed until the expiration of the period for lodging an appeal to the Court of Appeal prescribed in section 37B of the Legal Practitioners Ordinance. If the Respondent lodges an appeal within the prescribed period, such stay be further extended until the final determination of the appeal.

Dated the 8th day of January 2025.

(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