

IN THE BARRISTERS DISCIPLINARY TRIBUNAL

BETWEEN

THE BAR COUNCIL

Applicant

and

LAI, ODY MORALES APOSTOL

Respondent

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

Background

1. The Bar Council (“**the Applicant**”) has laid 10 complaints against Ms Lai, Ody Morales Apostol (“**the Respondent**”), based on complaints made by a Mr Francois Berner (“**the Complainant**”).
2. These 10 complaints cover the period from October 2012 to April 2013.
3. During the period of October 2012 to August 2013, the Respondent was a practising barrister, holding a Practising Certificate issued by the Applicant under section 3 of the Legal Practitioners Ordinance (Cap 159).
4. The Respondent filed a notice of motion dated 10 November 2014 and made an affirmation filed on 11 November 2014 in support of an application for the removal of her name from the Roll of Barristers under section 29(4) of the Legal Practitioners Ordinance (Cap 159).
5. Upon the intervention of the Bar Council in HCMP 2903/2014, the Respondent’s application was adjourned sine die by consent on 8 December 2015.

6. The Respondent ceased to practise with effect from 1 December 2014.

Constitution of the Tribunal

7. On 4 September 2014 the Bar Council having considered the Applicant's written explanations as to her conduct complained of, resolved that the Respondent's conduct should be inquired into and the Respondent was informed of the same on 25 September 2014. Pursuant to section 35 of the Legal Practitioners Ordinance the Bar Council submitted a notice to the Convenor of the Barristers Disciplinary Tribunal, that it considered the conduct of the Respondent should be inquired into. In consequence of this the Tribunal Convenor constituted the following Tribunal to inquire into the Respondent's conduct:-

Chairman of the Tribunal :	Mr Robert Whitehead, SC
Members of the Tribunal :	Ms Lisa D'Almada Remedios Dr Alex Chan Siu Kun

By notice of 5 November 2014 the Respondent was informed of the constitution of the said Tribunal.

Attempts by the Tribunal to Communicate with the Respondent

8. By letter dated 27 November 2014 and sent to the Respondent's Chambers by registered post, the Tribunal inquired of the Respondent whether she admitted or disputed the conduct alleged against her, and if she admitted the same, whether she wished to call any evidence in mitigation. There was no response to this letter. This letter was followed up by a reminder dated 15 December 2014, again by registered post. There was no response to this reminder.
9. By letter dated 2 February 2015 to the Applicant, copied to the Respondent and sent by registered post, the Tribunal directed that all further correspondence relating to these proceedings should be served upon the Respondent both at her last known residential address, and her last known professional address.
10. All correspondence between the Tribunal and the Respondent has been sent to the Respondent by registered post. Save for the said letter dated 27 November 2014, the correspondence has been returned to the Tribunal by the Post Office.

11. We note in this context that prior to the Tribunal's correspondence to the Respondent, the Respondent had been in correspondence about the complaints made against her with the Chairman of the Bar's Special Committee on Discipline, and with the Convenor of the Bar Disciplinary Tribunal. Indeed by her letter of 13 June 2014 to the Chairman of the Special Committee on Discipline, the Respondent sought to address the complaints (or at least some of them) made against her.
12. On 10 November 2014 the Respondent was served pursuant to section 4(b) of the Barristers Disciplinary Proceedings Rules with the documents in this matter including the Statement of Complaint, and the Applicant's Complaints which contained the particulars of misconduct. This service was confirmed on affirmation.
13. By notice of 5 November 2014 the Respondent was informed of the constitution of this Tribunal. On 18 November 2014, the Tribunal Convenor reminded the Applicant that this Tribunal had been constituted, and suggested to the Respondent that she consider taking legal advice.
14. In all these circumstances we have no doubt that the Respondent was fully aware of the Complaints made against her, and that this Tribunal had been constituted to hear the same. It is plain to us that the Respondent then made a conscious decision not to engage in these proceedings, and has in effect deliberately ignored them. Proper service was made upon the Respondent of notice of this hearing at both her professional and personal addresses. In our view the fact that the Respondent has chosen to ignore the same should not in any way cause these proceedings to be thwarted. As such we determined to proceed with this inquiry in the absence of the Respondent.

Application to Admit the Complainant's Complaints and Documents

15. The Complainant's written complaint to the Bar Council was prepared together with the assistance of his solicitors, Wilkinson & Grist, and forms part of the Complaint dated 15 January 2014, together with the exhibits attached to that document. The Complainant is a Swiss national and does not reside in Hong Kong. He is presently not in Hong Kong and has indicated to the Applicant that he would not attend these proceedings.
16. At the hearing of this matter on 3 February 2016, the Applicant applied to admit into evidence the written Statement of Complaint of Mr Francois Berner, and the enclosures thereto in the absence of Mr Berner.

17. The Tribunal, having given the matter due consideration, granted this application.

18. By an email dated 30 April 2015, the Complainant said this to the solicitors for the Applicant:

“Thank you for your proposal to give evidence as a witness via television connection.

“This case has been bothering me for a long time now, costing me a lot of energy, apart from financial loss and the fees I have invested in order to have the complaint prepared by my lawyer in Hong Kong.

“Since then I might have forgotten some details and a direct confrontation could turn to my disadvantage or be used against me. Furthermore, as there is probably no financial compensation to expect I renounce to testify and kindly ask the tribunal to base its decision on the complaint filed with the Bar Council.”

19. As to Mr Berner’s absence and in support of its application, the Applicant submitted first that Mr Berner had declined to come and attend the proceedings because he was in fear of coming, having been placed in fear by threats made allegedly by the Respondent. It is true that the Respondent sent an email dated 7 February 2014, and copied to Mr Berner, in which she suggested that if he returned to Hong Kong, he may face problems with the Police and the Immigration Department, resulting possibly in a term of imprisonment.

20. Whether or not that was a threat, this Tribunal was satisfied that there was no evidence that Mr Berner had declined to come to Hong Kong because he was in fear of his safety. The content of the email to which we have referred makes it clear that Mr Berner did not want to come to Hong Kong because he may have forgotten some details; he didn’t want a direct confrontation presumably in this Tribunal hearing; that he had been bothered by this matter for a long time, and expended a lot of energy; and, there was probably no financial compensation to expect.

21. The Applicant submitted secondly that this evidence should be admitted in order to have a fair hearing, and that this Tribunal should exercise its undoubted discretion to admit this evidence. What constitutes a fair hearing, in the Tribunal’s view, varies with the facts and circumstance of each particular case. In this case we bore in mind that the Applicant is the Bar Council, and that the Applicant, through no fault of its own, had a problem securing the attendance of Mr Berner in these proceedings.

22. The Tribunal also bore in mind its view that the Respondent had taken a conscious and deliberate decision to absent herself from the hearing, and indeed from any participation in these proceedings. As such, she had relinquished her right to cross-examine witnesses called by the Applicant.
23. The Tribunal also bore in mind that the allegations in this case are serious. The Tribunal directed itself that, if this material is admitted, great caution will be exercised in dealing with such hearsay evidence, and the weight to be attached to the same.
24. Mr Kwan of Counsel who appears on behalf of the Applicant reminded the Tribunal that it is not bound by the strict rules of evidence in these proceedings. The Tribunal concluded that, in all the circumstances, no unfairness will be caused to the Respondent in admitting this evidence in these proceedings, and therefore granted the Applicant's application. In the event no oral evidence was called in these proceedings.

Summary of the Complaints

25. Complaints 1 and 6 allege that the Respondent acted in a professional capacity without instructions from or intervention of a solicitor, contrary to the Bar Code paragraph 50(a)¹.
26. Complaints 2 and 7 allege that the Respondent issued fee notes in respect of professional work that she had performed for her lay client directly, contrary to the Bar Code paragraph 73F(1)².
27. Complaints 3 and 8 allege that the Respondent received her professional fees directly from her lay client, contrary to the Bar Code paragraph 73F(2)³.

¹ "Subject to such exceptions as may be authorised by custom or the Bar Council as set out in Annex 20, a barrister may not act in a professional capacity except upon the instructions of a solicitor or the Director of Legal Aid or the Government. Notwithstanding that he does so for no fee, a barrister who appears in or drafts a formal document for the purpose of a contentious matter is acting in a professional capacity. There is, however, no objection to a barrister giving advice free on legal matters to a friend or relative or on a charitable basis."

² "A barrister shall issue a written fee note in respect of all professional work done to the company, firm or other body upon whose instructions such work was done, marked for the attention of the person instructing him."

³ "Except when appearing on behalf of the Government or the Duty Lawyer Service or with the prior written permission of the Bar Council, a barrister shall in any case only accept payment of his professional fees by cheque either drawn on the account of the company, firm or other body instructing him or sent directly by such company, firm or other body in

28. Complaints 4 and 9 allege that the Respondent failed to issue any receipt of payment for her fee notes and to send the same to a solicitor upon receiving payment directly from her lay client, contrary to the Bar Code paragraph 73F(3)⁴.
29. Complaint 5 alleges that the Respondent acted in a professional capacity for two parties with potentially conflicting interests, contrary to the Bar Code paragraph 57⁵.
30. Complaint 10 alleges that the Respondent engaged in conduct that may bring the Bar into disrepute, namely handling her lay clients' monies, contrary to the Bar Code paragraph 6(b)⁶.

Applicant's Submissions

The Applicant submits that the evidence establishes the following facts:

31. By October 2012, Ms Lai had been admitted as a barrister for over 7 years. She practised from Baskerville Chambers.

satisfaction of his fees by reference to his fee note and in no circumstances may he accept payment of his professional fees in cash.”

⁴ “Upon receipt of payment in respect of his fee note, the barrister shall issue a written receipt in respect thereof and send the same to the firm instructing, marked for the attention of the instructing solicitor.”

⁵ “No barrister is obliged to accept a brief if he has previously advised or drawn pleadings or appeared for another person on or in connection with the same matter; and he ought not to accept a brief or advise or draft pleadings if he would be embarrassed in the discharge of his duties and, if he has received any such brief or instructions inadvertently, he should return the same. A barrister will be so embarrassed if, for example, he has material information which was entrusted to him in confidence by or on behalf of his previous client.

If, after the delivery of a brief or instructions on behalf of more than one client, there appears to be a conflict of interest between them, a barrister may not continue to act for any such client unless all such clients consent to his so acting and he is able to do so without embarrassment.

Even if there be no conflict of interest, when a barrister has held a brief for any party in any proceeding he shall not accept a brief on an appeal or further stage in such proceeding for any other party without giving the original client the opportunity of delivering a brief to him for such appeal or further stage.”

⁶ “It is the duty of every barrister 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.”

32. In October 2012, Mr Francois Berner came to know the Respondent and agreed to engage her directly (and without the intervention of a solicitor) to provide legal services to him in relation to an investment via a corporate vehicle, F & B Investment (HK) Ltd (“F&B”) in Dining Vision Services Ltd (“DVS”), a company controlled by Mr Massimo Gavina.
33. As a businessman from Switzerland, Mr Berner had no idea that generally a barrister could not be engaged by a client directly to provide legal services without the intervention of a solicitor.
34. On her name card provided to Mr Berner, the Respondent described herself as “Barrister-at-Law” only and did not described herself as practising also as an accountant. Throughout her practice, the Respondent had never sought the Bar Council’s permission to engage in any other occupation.
35. On 27 October 2012, the Respondent sent Mr Berner an email enclosing (1) a draft commitment letter from F&B to DVS setting out the terms of the intended investment in DVS including the terms of the loan and security and the representations, warranties and covenants given by DVS and (2) her fee note dated 27 October 2012 bearing the title “Legal Invoice”.
36. In the email the Respondent said:
- “Attached is the Fee Note that covers *legal costs* for the whole course of work and the loan amount ... See you all tonight 8pm at Nicholinis ... then I will bring you all to Sugar.”
37. The Respondent’s legal invoice dated 27 October 2012 bears her title “Barrister-at-law”, and the name and address of Baskerville Chambers. She described the nature of the work carried out by her as including:
- “*Legal Conference* for taking instructions
Legal Advice”
38. The Respondent charged F&B for 20 hours of work at the hourly rate of HK\$5,000, ie HK\$100,000. After giving a 40% discount, her fee was reduced to HK\$60,000. The Respondent also demanded F&B to pay her HK\$1 million as the “Loan Amount for DVS”.
39. By an email dated 1 November 2012, the Respondent sent Mr Berner the revised letter of commitment and a professionally prepared loan

agreement in draft. In the email, the Respondent gave directions for the execution of the documents and continued:-

“I want the originals in my office.”

40. The letter of commitment finally executed on behalf of F&B and DVS bears the date of 27 October 2012.
41. On 1 November 2012 Mr Berner transferred HK\$1,060,000 (ie HK\$1 million loan to DVS and HK\$60,000 as the Respondent’s legal fees) to the Respondent’s personal account with HSBC.
42. On 6 November 2012, the Respondent transferred a sum of HK\$400,000 from her personal account with HSBC to DVS by way of a cheque pursuant to the terms of paragraph 1.1 of the loan agreement which had not yet been executed.
43. By an email dated 13 November 2012, the Respondent informed Mr Berner that she had received 24 posted-dated cheques from DVS. This was done presumably pursuant to paragraph 2.1.1 of the loan agreement which had not yet been executed. Ms Lai further said:-

“Next time, I will arrange a more profitable deal for Mr Berner. I know many clients with profitable operations and wanted to expand
They do not have cash flow problems like Massimo.
I should know because *I have details of all their confidential info.*”
44. By an email dated 21 November 2014 the Respondent sent Mr Berner and Mr Gavina a draft security agreement and requested them to deliver the originals to her secretary after signing. She also stated that she had already received a total of 36 post-dated cheques from Mr Gavina.
45. The loan agreement was executed on behalf of F&B and DVS on 21 November and 24 November 2012 respectively.
46. Pursuant to paragraph 1.1 of the loan agreement, the Respondent deposited two further sums of HK\$300,000 each into the account of DVS on 5 December 2012 and 5 January 2013 respectively.
47. Three post-dated cheques of HK\$41,667 each in the possession of the Respondent were deposited into the account of F&B on 7 February, 5 March and 12 April 2013 respectively.

48. In May 2013, an Italian restaurant called Piadina was opened by Mr Gavina and/or DVS in the Western District. At the same time, DVS started to default in repaying the loan to F&B.
49. By an email dated 8 June 2013, the Respondent gave Mr Berner legal advice on the various options open to him. In relation to one of the options the Respondent said:
- “I will ask M to come to my office and start renegotiation ... I will threaten him with many things if I have to. But I hope he will be more sensible.”
50. Upon the Respondent’s advice, Mr Berner decided to purchase the restaurant business from Mr Gavina. By an email dated 10 August 2013, the Respondent advised Mr Berner of the further steps to be taken to take over the business and said:
- “Accountant fee and lawyer fees normally paid equally by both parties ... Estimated total professional costs around 100,000 at discounted rate which is around 50,000 for each side ... Lawyer at 50K and Accountant at 50K ... The amount you are in fact paying as follows: ... 1,000,000 loan ... 575,000 additional payment to get 100 ownership ... 50,000 your professional fee to me.”
51. By a further email dated 10 August 2013 to Mr Berner, the Respondent said:
- “I will make draft contract to facilitate the bank transfer the money from you to my account ... I will inform Accountant that we accept the 575,000 and 75,000 to be paid directly to Landlord when I receive the money from You.”
52. By an email dated 12 August 2013, the Respondent sent Mr Berner a draft letter of commitment and her invoice CI/-027-13 which was misdated 12 August 2012.
53. The invoice bears the description of the Respondent’s occupation as “Barrister-at-law”, and the name and address of Baskerville Chambers. The client was stated to be F&B. The nature of the work done was described as including negotiation between the buyer and the seller of the restaurant, letter of commitment, contract of sale and purchase, trust contract and overseeing “Accountant’ [sic] Inventory”.
54. By the invoice, the Respondent demanded F&B to transfer a total sum of HK\$625,000 to her personal account with HSBC. The sum consisted of the additional purchase price of HK\$575,000 and Ms Lai’s *professional fees* of HK\$50,000.

55. On 12 August 2013, F&B transferred HK\$625,000 to the Respondent's personal account with HSBC.

56. The letter of commitment and sale and purchase agreement was executed by F&B on an unknown date in August 2013. It is Mr Berner's evidence that the Respondent represented both F&B and DVS in the negotiation.

57. The letter of commitment dated 12 August 2013 and the sale and purchase agreement dated August 2013 contained the following provisions:-

"7. The actions to be taken by the parties hereto to close the transaction as provided shall take place on or before 17 August 2013 ("Closing Date") at the office of Ody Barrister at Law, located at 11 Baskerville House, 13 Duddell Street Central Hong Kong."

"16. The actions to be taken by the parties hereto to close the transaction as provided shall take place at the office of Ody Barrister at Law, located at 11 Baskerville House, 13 Duddell Street Central Hong Kong."

58. As to the sum of HK\$575,000 already transferred by F&B to the Respondent on 12 August 2013, the sale and purchase agreement dated August 2013 provided as follows:

'4. [F&B] shall transfer the whole amounts to the *legal representative* of [F&B] in Hong Kong, in Trust Account without delay.

5. The moneys in the Trust Account shall be disbursed as follows and subject to the terms and conditions of this contract being complied with:

HK\$75,000	On signing of this Letter of Agreement paid directly to the landlord and within 3 days of receiving the moneys in trust;
HK\$200,000	On signing the Contract of Sale;
HK\$200,000	On signing of "Trust Contract for Lease of 301 Queens Road West Hong Kong" and "Accountant's Inventory of Assets" and others;
HK\$100,000	On transfer of papers for licenses from [DVS] to [F&B's] appointed licensee and Restaurant licensing papers, together with utility, telephone, internet, readings, insurances and other reconciliations.'

59. It is not clear what steps the Respondent had taken in relation to Mr Gavina. However, on 6 October 2013, Mr Gavina forwarded his previous email correspondence with the landlord of the place where the restaurant was situated to the Respondent.

60. From 30 October to 4 November 2013, the Respondent entered into email correspondence with the landlord and Mr Gavina in which she described herself as “Legal Counsel for F & B”.
61. The tenor of the email correspondence is that, despite the transfer of the business under the sale and purchase agreement in August 2013 (to which the landlord was not a party), the Respondent had failed to ensure that there was a novation of the tenancy existing between DVS and the landlord. DVS remained bound under the original tenancy agreement.
62. In particular, the assertion made by the Respondent in her email dated 1 November 2013 to the landlord that Mr Gavina was supposed to assign the tenancy to F&B is plainly wrong as a matter of law: a contracting party cannot assign its liability to a third party without the consent of the other contracting party.
63. Further, the transfer of the food and liquor licences was not effected.
64. There was then a meeting between Mr Berner and the Respondent in her chambers on 13 November 2013 which ended unpleasantly.
65. Mr Berner therefore decided to close down the restaurant business.
66. By an email dated 4 December 2013, Mr Berner requested the Respondent to transfer the sum of HK\$100,000 still held by her back to F&B because he considered that the transaction never took place due to irregularities and delay.
67. Despite the evidence that the Respondent acted in a professional capacity as a barrister for the parties, in her email dated 9 December 2013 to Mr Gavina and Mr Berner, she for the first time suggested that she was not acting in a professional capacity as a barrister for the parties but was only a trustee of the remaining sum of HK\$100,000 not yet transferred to DVS:

‘8) This lawyer is not in a position to agree to the withdrawal of the last 100K. I only keep it in trust to both DVS and F&B ...

Gentlemen, the above is friendly advice as I am not “officially” the lawyer of either 1 of you, save for keeping in trust this 100K.

You both need independent legal advice.’

68. On 22 January 2014, Mr Berner through his new solicitors, Wilkinson & Grist, made a complaint against the Respondent to the Bar Council.
69. On 7 February 2014 (Friday), ie 16 days after Mr Berner had lodged his complaint, the Respondent sent a menacing email to Mr Frank Eggman (the representative of Mr Berner) with copies to Mr Berner and Mr Gavina in the following terms:

“Dear Everyone,
I received your messages. The Swiss people finally came to their senses. This is excellent news.

Mr Eggman

...

5. Mr Eggmann, I will hold you responsible for the *service fees* dispensed by me for Mr Berner that remains unpaid.

Mr Gavina,

1. I would like to know that with this HK\$ 100,000, what will happen to your police reports? Will you withdraw them?

It is very clear that Mr Berner breached the contract and conspired with Ellie Lai and Mr Eggmann in making allegations of irregularity, then behind your back, they continued the licence transfers, and also the transfer of the tenancy to Ellie Lai, then demanded that this HK\$ 100,000 be transferred back to them. This possible conspiracy to defraud between Mr Berner, Mr Eggmann, and Ellie Lai *if convicted will warrant 2 to 4 years of imprisonment for these 3 people*. ARE [sic] you going to withdraw this? What they did are all in the email and fully documented. So please confirm that you will withdraw.

2. How about the defamation to your person. When due to their conspiracy, your name was posted at the entrance of 301 for the public to see that due to non-payment, you were to be evicted. If this is proved to be true, you are entitled to damages from Mr Berner, Mr Eggmann, and Ellie Lai. Please confirm that you will withdraw this.

3. How about your report to the HK Immigration of the illegal work of Mr Berner for those times that he entered HK territory? Mr Berner if he enters HK, *will be arrested at the airport, put into custody, and if convicted might be imprisoned [sic] for 18 months and or with financial penalty*. Will you withdraw this as well?

...

To everyone:

Please come to my office Next Monday, 10 February at 2pm, address: 11 Floor, Baskerville House, 13 Duddell Street, Central Hong Kong.

...

I will draft the agreement on Monday morning, to be signed by Mr Eggman [sic] and Mr Gavina in my office on Monday at 2pm.”

70. On 10 February 2014 (Monday), DVS and F&B entered into a full and final settlement agreement (apparently drafted by the Respondent) in relation to the issues arising from the August 2013 sale and purchase agreement including the transfer of the sum of HK\$100,000 held by the Respondent to Mr Gavina.
71. Paragraph 1(c) of the agreement dated 10 February 2014 was relied on by the Respondent:

“That Mr Berner will withdraw allegations of irregularities against Mr Gavina and other people, offices directly or indirectly related to the above.”
72. On 12 February 2014, Wilkinson & Grist for Mr Berner informed the Bar Council of the existence of the agreement dated 10 February 2014 but stated:-

“However, we do not believe the release of the said HK\$100,000 should alleviate the concern over the other misconduct on the part of Ms Lai and our client maintains his complaint against Ms Lai.”
73. On 28 February 2014, the Bar Council invited the Respondent to give an explanation.
74. On 17 March 2014, the Respondent responded by *inter alia* asking the Bar Council to assure that “nobody would be breaching any professional code of conduct”. She asserted that Mr Berner, in maintaining his complaint against her, was in breach of the agreement dated February 2014 drafted by her.
75. In the penultimate paragraph of her letter dated 17 March 2014, the Respondent asserted that she together with “Centennial Consultancy Services and Wong & Co, would endeavour to locate files in storage/warehouse and in cyberspace.”
76. The names of Centennial Consultancy Services and Wong & Co had never featured in the contemporaneous documentation from 2012 until they were first mentioned in the Respondent’s letter dated 17 March 2014.

77. Following two further letters from the Bar Council dated 22 April 2014 and 10 June 2014, the Respondent finally gave a full response to the complaint on 13 June 2014 (ie more than 3 months after she had been invited to explain).

78. The Respondent claimed, inter alia :-

‘Sometimes in October 2012, Centennial Consultancy in behalf of its client, F&B, with Wong & Co, Mr Starky Man, Senior Litigation Clerk (instructing), that F&B be given Financial Analysis and Business Advice on matters of investment with [DVS]; Legal advice if necessary and Drafting of Letters and Contracts.

Documents were perused from which a Written Financial Analysis and Business Advice dated 15 October 2012 was provided. I am a Member of the Association of Chartered Certified Accountants since 1995 and became Fellow of the same in 2002.

...

This is a 1st in my career where “non-contentious matters” escalated to the extent that F&B made me a casualty in its desperate attempt to “dishonor” its agreement to put in mildly ...

I truly believe that the Bar is there to protect its members from the harassments and traps of this profession.’

79. Other than naming a clerk from a solicitors’ firm, the Respondent was unable to name her instructing solicitor (if any).

Applicant’s Further Submissions

80. Based upon the facts which the Applicant has submitted are established by the evidence outlined above, the Applicant then submitted the following :-

81. In relation to complaints 1 and 6, the Respondent was plainly acting in a professional capacity without instructions from a solicitor:

81.1 Mr Berner was never introduced to any lawyer other than Ms Lai during the transactions in 2012–2013.

81.2 Ms Lai was providing legal services to the parties by giving legal advice and drafting legal documents. See the various draft legal documents sent to the parties directly, her legal invoice dated 27 October 2012 sent to F&B directly and her description of her own

fees as *legal costs*, her own description as “Legal Counsel” in her emails to the landlord.

- 81.3 Ms Lai never sought any permission from the Bar Council to engage in any other occupation. The fact she is also qualified as an accountant is a red herring.
- 81.4 The late assertion made by her during the investigation stage and by Mr Gavina after the commencement of these proceedings that she had instructions from a solicitor, whose identity has never been disclosed, is plainly a subsequent fabrication.
- 81.5 The fact that she sent her legal invoices directly to F&B and Mr Berner and that she received payments for the invoices directly from F&B corroborates complaints 1 and 6. If she had received proper instructions from a solicitor, one would expect that the invoices or fee notes would be sent to the solicitor and that the payments would be made to her through the solicitor.
- 81.6 The suggestion that she was only engaged in “non-contentious” matters and therefore no intervention of a solicitor was required is misconceived. In his book *Conduct and Etiquette at the Bar* (1971), Mr Boulton said:
- “... it is wrong for a barrister to do non-contentious legal work for clients in the course of his profession for fees without instructions ...”(p 10)
82. In relation to complaints 2 and 7, the evidence is compelling. The Respondent sent her legal invoice dated 27 October 2012 directly to F&B and her invoice dated 12 August 2012 directly to Mr Berner.
83. Although given the opportunity to do so, the Respondent has provided no reply to the matters contained in complaints 2 and 7.
84. In relation to complaint 3 and 8, the evidence again is compelling. The Respondent received the payments of her professional fees in the sum of HK\$60,000 on 1 November 2012 and in the sum of HK\$50,000 on 12 August 2013 from F&B directly.
85. Although given the opportunity to do so, the Respondent has provided no reply to the matters contained in complaints 3 and 8.

86. In relation to complaints 4 and 9, it follows from the fact that there was no solicitor involved, the fact that the invoices were sent directly to F&B and Mr Berner, and the fact that the payments were made to her directly by F&B, that she could not have sent her receipts for payment of her fees to her instructing solicitor.
87. In relation to complaint 5, upon the default by DVS, the Respondent must have realised that there were serious conflicts of interest between the parties. She continued to act for both parties leading to the settlement agreement dated 10 February 2014 and in the process threatened Mr Berner with criminal complaints in order to coerce him into settling the dispute.
88. In relation to complaint 10, the evidence that she handled her client's money while acting in a professional capacity is compelling. She received HK\$1 million on 1 November 2012 from F&B as a loan to DVS. She received HK\$575,000 from F&B on 12 August 2013 as additional price for the purchase of the business pursuant to paragraph 4 of the sale and purchase agreement dated August 2013 drafted by her.
89. It is not the business of a barrister to handle his client's monies. Solicitors are permitted to handle clients' monies but such handling is subject strict professional regulations. To handle client's monies in circumstances where no solicitor is involved is conduct that may bring the profession into disrepute.

Standard and Burden of Proof

90. The Tribunal is mindful that the burden of proof is on the Applicant to establish that the Respondent was in breach of paragraphs 50(a), 73F(1), 73F(2), 73F(3), 57 and 6(b) of the Bar Code in the circumstances as particularised in the complaints, and that the Respondent has no burden or duty to prove otherwise. Reference is made to Rule 7 of the Barristers Disciplinary Tribunal Practice Rules.
91. The standard of proof in a matter which is of a disciplinary nature is no different from other civil proceedings, which is on a balance of probabilities. However, the Tribunal bears in mind that the more serious the act(s) alleged, the more inherently improbable must it be regarded, and the more compelling the evidence is needed to prove the same on a preponderance of probabilities⁷.

⁷ *A Solicitor v The Law Society of Hong Kong* [2008] 2 HKLRD 576 at 623, paragraph 116

Findings

92. As noted, Mr Berner did not attend before the Tribunal to give evidence. Instead the Tribunal acceded to an application by the Applicant to admit Mr Berner's written evidence together with the documentary exhibits attached thereto.
93. In these circumstances the Tribunal has approached the complaints made against the Respondent on the basis that it must look for corroboration of the main aspects of Mr Berner's written evidence, and that absent such corroboration it would be undesirable to proceed upon Mr Berner's untested evidence alone. As noted the Tribunal has reminded itself that as the complaints here are all of a serious nature, compelling evidence is needed to prove these complaints on a preponderance of probabilities.
94. The Tribunal has concluded that all of the main aspects of Mr Berner's evidence are supported by independent evidence. This evidence in summary are the Respondent's own emails, advices, draft agreements, invoices, bank documents and correspondences, identified by Counsel for the Applicant in his submissions, set out in paragraphs 31 to 79 above.
95. Having carefully considered the matters advanced by the Applicant, and in particular having considered the explanations contained in the Respondent's letter dated 13 June 2014 to Robert Pang SC, Chairman of the Special Committee on Discipline, we find the facts alleged by the Applicant and set out in paragraphs 31 to 79 above to be proven.
96. We now proceed to apply the proven facts to the complaints that are now before us.

Complaint 1

97. Complaint 1 alleges that the Respondent acted in a professional capacity without instructions from or intervention of a solicitor contrary to the Bar Code paragraph 50(a).
98. Having considered the evidence and the facts that we find to have been proven by that evidence, we find that the particulars of misconduct alleged in this complaint, namely that:
 - a. In or about October 2012 the Respondent had a meeting at her Chambers with Mr Berner who sought legal advice from her

relating to a loan agreement to be entered into between F&B Investment (HK) Ltd. (“F&B”) and Dining Vision Services Ltd. (“DVS”) without the presence of a solicitor, trainee solicitor or other qualified representative of a solicitors firm;

- b. At the time of the said meeting, the Respondent took instructions from and gave advice to Mr Berner on the essential terms of the said loan agreement;
- c. Subsequently, the Respondent drafted and sent directly to Mr Berner a letter of commitment, a loan agreement that was to be signed by F&B and DVS, and a security agreement which was to be signed by F&B and DVS,

to have been established.

99. In the circumstances, the Tribunal finds Complaint 1 to be proven.

Complaint 2

100. Complaint 2 alleges that the Respondent issued fee notes in respect of professional work that she had performed for the lay client, namely, F&B directly, contrary to the Bar Code paragraph 73F(1).

101. Having considered the evidence and the facts that we have found to be proven by that evidence, we find that the particulars alleged in this complaint, namely that:

- a. The Respondent issued a fee note with her Chambers address and her title as Barrister-at-Law printed at the letterhead, and with a heading of “Legal Invoice” directly to Mr Berner, for payment of a total sum of HK\$1,060,000 which was to be paid directly into the Respondent’s personal bank account with HSBC;
- b. The said fee note set out the detail of the legal work the Respondent had undertaken upon behalf of her client and having made deductions for loan monies of HK\$1,000,000, demand was made for \$60,000 as the Respondent’s professional fees,

to have been established.

102. In the circumstances, the Tribunal finds Complaint 2 is proven.

Complaint 3

103. Complaint 3 alleges that the Respondent received her professional fees directly from the lay client contrary to paragraph 73F(2) of the Bar Code.

104. Having considered the evidence and the facts that we have found to be proven by that evidence, we find the particulars of misconduct alleged in this complaint, namely that:

- a. On 27 October 2012 the Respondent issued her fee note of that date (Fee Note No.1) directly to her client F&B demanding that F&B pay her professional fees of \$60,000 together with the loan of \$1,000,000 under the said loan agreement into her personal bank account with HSBC;
- b. On 1 November 2012 F&B made an transfer of the sum of \$1,060,000 into the aforesaid bank account of which \$60,000 was for the Respondent's professional fees pursuant to the said fee note,

to have been established.

105. In the circumstances, the Tribunal finds Complaint 3 to be proven.

Complaint 4

106. Complaint 4 alleges that the Respondent failed to issue any receipts of payment for her Fee Note No.1 and to send the same to a solicitor upon receiving payments directly from lay client, contrary to paragraph 73F(3) of the Bar Code.

107. Having considered the evidence and the facts we find to have been proven by that evidence, the Tribunal finds that the particulars alleged under Complaint 4 that the Respondent did not issue any written receipt for the payment that she received in respect of Fee Note No.1 to the firm instructing her (there being no firm) and marked for the attention of the Instructing Solicitor,

to be established.

108. In the circumstances, the Tribunal finds Complaint 4 to be proven.

Complaints 5 and 6

109. Complaint 5 alleges that the Respondent being a practicing barrister acted in a professional capacity for both the buyer, namely F&B and the seller namely DVS, in the transfer of the business of a restaurant called Piadina, when it was apparent to her and/or ought to have been known to her that there was potentially a conflict of interest between F&B and DVS in this transaction, contrary to paragraph 57 of the Bar Code.
110. Complaint 6 alleges that in or about August 2013, the Respondent acted in a professional capacity without instructions from or intervention of a solicitor, contrary to paragraph 50(a) of the Bar Code.
111. In our view, the evidence establishes the following:
 112. On 6 November 2012, the Respondent transferred HK\$400,000 from her personal bank account with HSBC to DVS by way of a cheque pursuant to the Loan Agreement which had not yet been executed.
 113. By an email dated 13 November 2012, the Respondent informed Mr Berner that she had received 24 post-dated cheques from DVS, and that 12 were still pending.
 114. By an email dated 21 November 2012, the Respondent sent Mr Berner and Mr Massimo Gavina (guarantor of Piadina) a draft security agreement and requested them to deliver the originals to her secretary after it had been signed. She also stated that she had already received a total of 36 post-dated cheques from Mr Gavina.
 115. The Loan Agreement was executed on behalf of F&B and DVS on 21 November 2012 and 24 November 2012 respectively.
 116. Pursuant to the Loan Agreement, the Respondent deposited 2 further sums of HK\$300,000 each into the bank account of DVS on 5 December 2012 and 5 January 2013 respectively.
 117. Three post-dated cheques of HK\$41,667 each in the possession of the Respondent were deposited into the account of F&B on 7 February 2013, 5 March 2013, 12 April 2013 respectively.

118. In May 2013, Piadina was opened by Mr Gavina and/or DVS. At the same time, DVS started to default in its Loan Agreement to F&B.
119. By an email dated 8 June 2013, the Respondent gave legal advice to Mr Berner on the options open to him. The Respondent's email stated:
- “I will deposit the 2 cheques on Monday, April and June. It will definitely bounce as there is no funds. I will not tell this to M. Purpose is for M to fail in his duty to pay. In July, I will again deposit the cheque. Total 3 failures and it will trigger the other options of payment that I put in the contract. Can try to collect money from his credit card sales if any. Can open other possibility of buying him out and then managing Piadina. I will ask M to come to my office and start renegotiation. Tell him that at this moment we are not accepting his new terms. We must put our terms on the table and M must compromise. I will threaten him with many things if I have to. But I hope he will be more sensible. ...So I know how to play him. Do not contact M yet. Silence will make him nervous.”
120. Upon the Respondent's advice, Mr Berner decided to purchase the restaurant business from Mr Gavina.
121. By emails dated 10 August 2013, the Respondent gave further advice to Mr Berner.
122. On 12 August 2013 (erroneously dated 12 August 2012), the Respondent sent another email to Mr Berner containing a draft Letter of Commitment and her invoice CI/-027-13 (Fee Note No.2). The nature of the work done was described as including inter alia: Negotiations between the Buyer and Seller of the restaurant, Letter of Commitment, Contract of Sale and Purchase, Trust Contract.
123. It is Mr Berner's evidence that the Respondent represented both F&B and DVS in the negotiations.
124. In the circumstances outlined above, the Tribunal is satisfied that the Applicant has established the particulars of Complaint 5. The potential conflict between the buyer and the seller must have been apparent to the Respondent. Indeed by June 2013 the parties were in open conflict with each other, yet the Respondent continued her involvement.
125. All matters outlined above were done by the Respondent in her professional capacity without instructions from or intervention of a solicitor. As such the Tribunal is satisfied that the Applicant has established the particulars of Complaint 6.

126. In the circumstances, the Tribunal finds Complaints 5 & 6 to be proven.

Complaint 7

127. Complaint 7 alleges that on 12 August 2013, the Respondent being a practising barrister issued a written fee note (Fee Note No.2) in respect of professional work that she performed and sent the same to her client F&B directly, contrary to paragraph 75F(1) of the Bar Code.

128. Having considered the evidence and the facts that we find have been proven by the evidence, we find that the particulars of misconduct alleged, namely :- that the Respondent issued a fee note dated 12 August 2013 (erroneously dated 12 August 2012) with her Chambers address and her title as Barrister-at-Law printed at the letterhead with a heading "Invoice", directly to Mr Berner in his capacity as director of F&B, demanding payment of a total of HK\$625,000 which was to be paid directly into her bank account with HSBC. The said sum consisted of the additional purchase price of the HK\$575,000 and the Respondent's "professional fees" of HK\$50,000,

to be established.

129. In the circumstances, the Tribunal finds Complaint 7 to be proven.

Complaint 8

130. Complaint 8 alleges that on or about 12 August 2013, the Respondent, being a practising barrister, received her professional fees directly from her client F&B⁸ contrary to paragraph 73F(2) of the Bar Code.

131. Having considered the evidence and the facts we find have been proven by that evidence, we find the particulars of misconduct that subsequent to issuing Fee Note No.2 directly to her client F&B, demanding payment of her professional fees, F&B transferred into the Respondent's account a sum of \$625,000 of which \$50,000 was the Respondent's professional fees,

to be established.

132. In the circumstances, the Tribunal finds Complaint 8 to be proven.

⁸ [122]

Complaint 9

133. Complaint 9 alleges that on or about 12 August 2013, the Respondent being a practising barrister did not issue any receipt of payment of her Fee Note No.2 and send the same to a solicitors firm marked for the attention of the Instructing Solicitor, contrary to paragraph 75(F)(3) of the Bar Code.
134. The Tribunal having found that the Respondent issued Fee Note No.2 directly to her client F&B and that F&B made a transfer of a sum which included \$50,000 as her “Professional fees” to the Respondent’s bank account, the Tribunal further finds that the Respondent did not issue any receipt for the payment that she received in respect of Fee Note No.2 to a firm instructing marked for the attention of the Instructing Solicitors of the same.
135. In the circumstances, the Tribunal finds Complaint 9 to be proven.

Complaint 10

136. Complaint 10 alleges that between November 2012 and February 2014 the Respondent, being a practising barrister, engaged in conduct that may bring the profession of a barrister into disrepute, contrary to paragraph 6(b) of the Bar Code.
137. Having considered the evidence and the facts found to be established by that evidence, the Tribunal finds that the following particulars, namely:
- a. That the Respondent received and handled her client’s money, namely the loan of HK\$1,000,000 that was transferred by her client F&B into her personal bank account with HSBC on 1 November 2012;
 - b. She received and handled her client’s money, namely a sum of HK\$575,000 representing part of the purchase price of the said transaction that was transferred by her client F&B into her aforesaid bank account on 12 August 2013,
- to have been established.
138. The Applicant has informed the Tribunal that it is not relying on the particulars as described in paragraph (c) of Complaint 10.

139. Barristers are not permitted to deal directly with clients or to receive monies without instructions from or the intervention of a solicitor. The safe custody of a client's monies is entrusted to a solicitors' firm which must place the same in a trust account and not mix such monies with the firm's monies. It is thus self-evident that in handling client's money and placing the same in her personal bank account without in any way involving a solicitor, the Respondent was jeopardising the safeguards a lay client would otherwise enjoy (being the safe custody of client's monies through the control and supervision of a solicitors' firm). Such conduct in our view is conduct which brings the profession of a Barrister into disrepute.

140. In the circumstances, the Tribunal finds Complaint 10 to be proven.

Conclusion

141. To conclude, the Tribunal has found that the Applicant has proven each of the complaints against the Respondent to the requisite standard. The Tribunal unanimously finds the Respondent guilty of all of the complaints.


Further Directions

142. At the end of the inquiry hearing on 3 February 2016, we adjourned the hearing to a date to be fixed when the Statement of Findings would be ready. Now that the Statement of Findings is ready, we hereby direct that:-

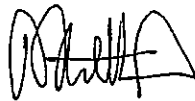
- a. The inquiry hearing be resumed on a date to be fixed in consultation with diaries of the Tribunal members and Counsel for the Applicant, to consider any mitigation and to determine the penalties to be imposed upon the Respondent;
- b. Counsel for the Applicant will provide to the Tribunal written submissions with regard to the question of any penalty to be imposed on the Respondent by the Tribunal at least 14 days prior to the date of the resumed hearing;
- c. This Statement of Findings together with the Applicant's said written submissions and notice of the resumed hearing be served upon the Respondent by registered post at

- i. her last known residential address being 105, Block B, Mt. Parker Lodge, Quarry Bay, Hong Kong, and
 - ii. the Respondent's last known professional address being 11/F Baskerville House, 13 Duddell Street, Hong Kong.
- d. An affirmation of service be filed with the Tribunal in any event 10 days prior to the date of the resumed hearing.

Dated this 7th day of April 2016.



Ms Lisa D'Almada Remedios
Member of the Tribunal



Robert Whitehead SC
Chairman of the Tribunal



Dr Alex Chan Siu Kun
Members of the Tribunal