

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2023] NZLCDT 24

LCDT 003/23

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**CENTRAL STANDARDS
COMMITTEE (No 3)**

Applicant

AND

BENJAMIN BAN CHONG BONG

Respondent

CHAIR

Ms D Clarkson

MEMBERS OF TRIBUNAL

Ms K King

Ms N McMahon

Prof D Scott

Ms S Stuart

HEARING 4 May 2023

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 8 June 2023

COUNSEL

Mr J Schwarcz for the Standards Committee

No appearance by or for the Respondent

**DECISION OF TRIBUNAL ON PENALTY
AND PROVIDING REASONS FOR LEVEL OF LIABILITY FOUND**

What this decision addresses

[1] Mr Bong was charged with misconduct.¹ Alternatives pleaded were negligence² or unsatisfactory conduct. The latter was admitted by Mr Bong.

[2] This decision gives our reasons for finding liability at the level of unsatisfactory conduct and makes penalty orders consequential on that finding.

Brief factual background

[3] Mr Bong acted for Ms W on the sale of a business which she told him she was operating on her own.³ Ms W also owned the property from which the business was operated in her sole name. Mr Bong did not make enquires to ensure his client was giving him accurate information about the business ownership, despite there being circumstances which should have alerted him to further enquiry.

[4] The business was, in fact, jointly owned by Ms W and her estranged husband, Mr W. When Mr W found out it had been sold, and the proceeds paid to Ms W only, he approached Mr Bong for an explanation. Being provided with none, he complained to the New Zealand Law Society Complaints Service.

What issues are to be resolved?

1. At what level of culpability do Mr Bong's professional failures fall?
2. Having established the level of culpability, what is a proportionate penalty?

¹ Section 7(1)(a)(i) and (ii), Lawyers and Conveyancers Act 2006 (the LCA).

² Section 241(c), LCA.

³ She had a GST number and gave a bank account for the business in her name.

Evidence available

[5] Mr Bong did not appear at the hearing. He filed a formal response to the charge, but no supporting affidavit. However, the Standards Committee evidence contained statements from Mr Bong and his law firm partner, made earlier in the complaints process.

[6] Evidence from the complainant was not challenged by Mr Bong, who was unrepresented at the (formal proof) hearing.

Discussion of issues

Issue 1 - culpability

- (a) For misconduct to be found, the Standards Committee must establish, on the balance of probabilities, that the conduct of the practitioner would be viewed as disgraceful or dishonourable by lawyers of good standing. Alternatively, the Standards Committee must establish a wilful or reckless breach of the LCA or the Rules, in this case, a breach of r 11.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
- (b) The alternative of negligence or incompetence requires that the negligence or incompetence must be of such a degree as to reflect on the practitioner's fitness to practice, or as to bring the profession into disrepute.
- (c) For unsatisfactory conduct to be established, the Standards Committee must prove that the conduct:
 - (i) "falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer",⁴ or

⁴ Section 12(a), LCA.

(ii) was “unacceptable”,⁵ or

(iii) consisted of a bare contravention of the Rules (r 11.4).⁶

[7] As stated, the conduct under scrutiny related to Mr Bong’s acting on the sale of a business. The attendances were carried out partly by Mr Bong and partly by his legal executive.

[8] The business had been purchased by Mr and Ms W in 2008, but Mr Bong did not act on the purchase. In 2015, the relationship between Mr and Ms W deteriorated and they were subsequently involved in Family Court proceedings.

[9] On 10 November 2016, Mr Y emailed Mr Bong saying that he acted for the purchaser of the business and that he understood Mr Bong acted for the vendor. Then on 23 November, after Mr Bong had asked Mr Y to provide him with details of the proposed sale, Mr Y sent an amended sale and purchase agreement to Mr Bong and asked him to confirm that Ms W “has sole authority to sell the business”. Mr Bong’s response to that was, “I think we should not think too far ahead. Let me have the draft and I will take instructions”. Further, when he was asked to clarify Ms W’s first name on 23 November, he supplied that to Mr Y.

[10] Mr Bong did not at any stage confirm to Mr Y Ms W’s authority to sell the business. It is unclear whether this was an oversight on the part of both practitioners.

[11] Mr Bong also drafted a lease on behalf of his client for the purchaser to lease the business premises from Ms W, given that she was the sole registered proprietor of the land. A search of the title had confirmed to Mr Bong that the land was in her sole name, and he did not think to enquire further.

[12] It was not until 2019 that Mr W visited the business and discovered it had been sold. When the documents were disclosed by Ms W in the Family Court proceedings, Mr W became aware of Mr Bong’s role. Mr W’s view was that the business had been sold for an undervalued sum.

⁵ Section 12(b), LCA

⁶ Section 12(c), LCA.

[13] The Standards Committee rightly state that Mr Y's enquiry about authority to sell the business ought to have put Mr Bong on notice that there might be another potential owner.

[14] There was a second occasion when a "red flag" ought to have gone up for Mr Bong and that was when his legal executive was required to discharge the financing statement relating to the business. That statement was in the name of both Mr and Ms W. Unfortunately, Mr Bong was away on leave at this time and therefore this was not referred to him. But Mr Bong does not seek to blame his employee and acknowledges that, as the person with formal oversight, he must take responsibility for her actions.

[15] As pointed out by counsel for the Standards Committee, it was unfortunate that the work was split in this way because Mr Bong was the person who had received the query about Ms W's authority to sell and therefore was best placed to make the connection between that enquiry and the financing statement. Due to the circumstances, this connection was not made, and the error continued unnoticed.

[16] Although this failure was one with serious consequences for the complainant, Mr W, we consider it to have been an honest mistake on the part of this practitioner. We do not regard it as amounting to "disgraceful or dishonourable" conduct. Nor do we consider that Mr Bong recklessly breached the rule pleaded in the charge.

[17] We do not consider that this error on the part of the practitioner satisfies the test of negligence in either limb in that we do not regard it as negligence or incompetence "of such a degree or so frequent as to reflect on his ... fitness to practice or as to bring his ... profession into disrepute".

[18] Further, there are two factors which reduce Mr Bong's level of culpability, because they explain his failure:

1. His client owned the land in her sole name and therefore when he searched the title to prepare a lease for the business to be purchased, there was nothing to put him on notice that his client might not be the sole owner of the business.

2. Mr Bong was away when the financing statement was revealed, immediately before the settlement. In this way he was deprived of the opportunity of reinvestigating the situation. We note that in the current AML⁷ environment, this could not as easily happen.

[19] We find Mr Bong's conduct to be unsatisfactory conduct, falling under s 12(a), namely, "...conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer ...".

Issue 2 – penalty

[20] The Standards Committee seek a composite penalty of censure, a fine in the region of \$5,000 (it would have sought \$5,000 – \$12,000 had we found misconduct) and compensation for emotional harm of \$5,000.

[21] We recorded the principles and processes relating to assessment of penalty in our decision in *Collins*,⁸ as follows:

[2] The principles underlying imposition of penalty in professional disciplinary cases are now well understood. Overarching the consideration of penalty are the purposes of the legislation¹ which must be implemented by the Tribunal, namely the public protective role and the upholding of professional standards, as set out in s 3(1) of the Act.²

[3] In addition, the cases have referred to the rehabilitative functions of penalty, principles of general and specific deterrence, and the need for the public to observe that a profession's disciplinary body is providing a significant response to conduct which has fallen well below expected and prescribed standards.

[4] However, the Tribunal is also mindful that any penalty imposed must represent the least restrictive intervention necessary to reflect the seriousness of the offending.³

[5] The exercise in establishing a proportionate response begins with the assessment of the seriousness of the conduct. There is then a consideration of aggravating and mitigating factors. Finally, there is a need to consider penalties imposed in previous comparable cases, in order to achieve consistency to the extent possible, having regard to the many different context in which offending occurs.

¹ Lawyers and Conveyancers Act 2006.

² The purposes of this Act are—

⁷ Anti-Money Laundering regulations.

⁸ *Wellington Standards Committee 2 v Collins* [2023] NZLCDT 3.

- (a) to maintain public confidence in the provision of legal services and conveyancing services:
- (b) to protect the consumers of legal services and conveyancing services:
- (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.

³ *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC).

[22] We have found this conduct to be unsatisfactory conduct but not at a similar level to the *Austin*⁹ decision referred to in submissions by Mr Schwarcz. In that case, the penalty was censure, a fine of \$3,000 and a costs order. No compensation was sought. In the other cases discussed by counsel, they were found at more serious levels or were accompanied by previous relevant offending. For those reasons, we put them to one side.

[23] We do not find there to be any aggravating circumstances in this case.

[24] As to mitigating circumstances, it is somewhat unfortunate that following the filing of a response and participation in a case management conference, Mr Bong chose to take no further part in the proceedings. That deprived him, and the Tribunal of the opportunity of exploring mitigating factors. Mr Bong is not currently practising as a lawyer.

[25] We are, however, taking note of his very long period in practice without having any adverse disciplinary findings against him previously. In his response, Mr Bong describes himself as having worked in the legal profession both in New Zealand and overseas for his “whole life”. It is unfortunate that this admitted failure has occurred at the very end of his career.

[26] In terms of the compensation sought for the complainant, Mr Schwarcz relies on the decisions of *Hong*¹⁰ and *Downing and Reith*.¹¹ Although in this case we do not have a great deal of evidence to support the compensation award, we do consider that a small award is justified, given the fact that when Mr W visited what he thought was his jointly owned business, he was removed by the Police as a trespasser. That must have been extremely humiliating for him. In addition, when Mr Bong failed to respond to any of his questions, Mr W had to go to the trouble of seeking assistance from the Privacy Commissioner although we accept that Mr Bong was bound by client

⁹ *Wellington Standards Committee 2 v Austin* [2016] NZLCDT 33.

¹⁰ *Hong v Auckland Standards Committee No 5* [2020] NZHC 1599 at [200]–[208] Gordon J.

¹¹ *Nelson Standards Committee v Downing and Reith* [2022] NZLCDT 21.

confidentiality and was not in a position to release information to Mr W. For all of these reasons we consider that a modest award of \$3,000 is proper.

Orders

1. Mr Bong is fined the sum of \$5,000.
2. An award of compensation under s 156(1)(d) and s 242 is made in the sum of \$3,000 to be paid to the complainant.
3. The practitioner is to meet \$15,000 of the Standards Committee costs which totalled \$23,214.80. We have reduced this amount because we have made a finding of unsatisfactory conduct but not at the higher end.
4. Pursuant to s 257, the costs of the Tribunal are ordered against the New Zealand Law Society. These are certified in the sum of \$2,120.
5. The practitioner, Mr Bong, is to reimburse the New Zealand Law Society for all of the s 257 costs.

DATED at AUCKLAND this 8th day of June 2023

D F Clarkson
Chair