
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : FULL BENCH

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE -v- TANG [2022] WASC 204

CORAM : SMITH J
HILL J
STRK J

HEARD : 8 JUNE 2022

DELIVERED : 8 JUNE 2022

PUBLISHED : 17 JUNE 2022

FILE NO/S : LPD 3 of 2021

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

KELVIN KA CHUEN TANG
Respondent

Catchwords:

Legal practitioners - Disciplinary proceedings - Removal from roll of practitioners - Professional misconduct by improperly soliciting a payment of a commission - Professional misconduct by misleading the Legal Profession Complaints Committee - Practitioner not a fit and proper person to remain a legal practitioner

Legislation:

Legal Profession Act 2008 (WA)

Legal Profession Conduct Rules 2010 (WA)

Result:

Order that the practitioner's name be removed from the roll of practitioners

Category: B

Representation:

Counsel:

Applicant : M D Cuerden SC

Respondent : In Person

Solicitors:

Applicant : Legal Profession Complaints Committee

Respondent : In Person

Cases referred to in decision:

Law Society (New South Wales) v Foreman (1994) 34 NSWLR 408

Legal Profession Complaints Committee and Tang [2021] WASAT 117

Legal Profession Complaints Committee v Brennan [2010] WASC 198

Legal Profession Complaints Committee v Brickhill [2013] WASC 369

Legal Profession Complaints Committee v Chang [2022] WASC 145

Legal Profession Complaints Committee v Oud [2019] WASC 287

Re Maraj (a practitioner) (1995) 15 WAR 12

JUDGMENT OF THE COURT:

Introduction

1 On 8 June 2022, the court ordered that the respondent's name, Kelvin Ka Chuen Tang, be removed from the roll of legal practitioners. These are our reasons for making this order.

2 On 26 November 2021, the Legal Profession Complaints Committee (the Committee) applied by motion for orders that Mr Tang be removed from the roll.

3 On 3 September 2021, the State Administrative Tribunal (the Tribunal) made orders that it make and transmit a report to this court in relation to findings of unsatisfactory professional conduct and professional misconduct it made in relation to Mr Tang.

4 The report comprises its reasons for decision,¹ with the exhibits, transcript and the parties' written submissions. In its report, the Tribunal made a recommendation that Mr Tang's name be removed from the roll of legal practitioners.

5 Pursuant to s 444(1) of the *Legal Profession Act 2008* (WA), the report is to be taken as conclusive as to all facts and findings mentioned or contained in the report.

6 Prior to the hearing, Mr Tang caused to have filed by the Committee a notice of intention which he had signed stating that he did not intend to be heard on the hearing of the motion and did not oppose the removal of his name from the roll. Mr Tang did, however, appear at the hearing, did not make any submissions, but offered an apology and informed the court that he did not oppose the application.²

The findings made against the practitioner

7 Mr Tang was admitted to legal practice in Western Australia on 4 September 2001. From 1 October 2002, he was the sole principal of a law firm, Tang Legal.

8 The Tribunal found Mr Tang engaged in professional misconduct, within the meaning of s 403 and s 438 of the *Legal Profession Act*, in two respects.

¹ *Legal Profession Complaints Committee and Tang* [2021] WASAT 117.

² ts 6.

9 First, the Tribunal found, between about 27 February 2015 and about 4 March 2015, at the time of providing legal services to TFC in respect of a property development (Development), Mr Tang engaged in professional misconduct, in that his conduct would be reasonably regarded as disgraceful or dishonourable by legal practitioners of good repute and competence and/or would justify a finding that Mr Tang is not a fit and proper person to engage in legal practice within the meaning of s 403(1)(b) of the *Legal Profession Act*.

10 The Tribunal made the following findings of fact.

11 Mr Tang engaged in professional misconduct by soliciting from Mr B, the proprietor of a consulting engineering business trading as 5R and engaged by TFC in respect of the Development (and in respect of which engagement Mr Tang acted on behalf of TFC), a payment in the sum of \$12,500 in cash (Cash Payment) for the benefit of a company controlled by his father as trustee for F Trust, the project manager for the Development. Mr Tang owed fiduciary obligations to TFC. Mr Tang caused the Cash Payment to be received through an employee of his legal practice, Ms K. This conduct was:

- (a) to Mr Tang's knowledge, engaged in without the knowledge or authority of TFC;
- (b) dishonest;
- (c) in breach of the fiduciary duties owed by Mr Tang to TFC by reason of his position with F Trust; and
- (d) understood by Mr Tang to be in connection with Mr B's engagement by TFC in respect of the Development and/or future work which Mr B may receive.

12 The Committee asserted the following facts constituted the professional misconduct, which facts were made as findings in respect of the first ground by the Tribunal:³

1. On or about 27 February 2015 the practitioner met with Mr B at Mr B's business premises to discuss the Development. Towards the end of the meeting the practitioner requested from Mr B a payment in the sum of \$12,500 in cash (Cash Payment) as a

³*Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [16]. Mr Tang declined to agree to the assertion of facts by asserting his privilege against self-incrimination. Mr Tang, however, did not contest the assertion of facts and did not oppose findings being made by the Tribunal in terms of the asserted facts: *Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [14].

commission for (at least) F Trust's referral of Mr B to TFC and for Mr B to be favourably considered by F Trust for future projects.

2. On Tuesday 3 March 2015 and while the practitioner was in Kuala Lumpur [(KL)] in Malaysia, the practitioner and Mr B had the following text message exchange:

Practitioner: *Hey mate, can you please draw \$12,500 in cash? I will ask [Ms K] to collect from you tomorrow. Thanks, buddy.*

Mr B: *Are u in Northbridge now?*

Practitioner: *I am in KL man.*

Mr B: *Oh.*

Practitioner: *Wait, call my Malaysia number.*

Mr B: *What's the 12500 for? Do you have viber. I can call that"*

Practitioner: *Yes, I can download it. Hold on.*

3. Shortly following the above text message exchange, Mr B and the practitioner spoke by telephone, using the mobile phone application "Viber", at which time the practitioner said to Mr B words to the effect that the Cash Payment requested by the practitioner was by way of a "kickback" or "commission", and conveyed the impression to Mr B that if he did not pay the Cash Payment the practitioner would not refer Mr B to any of his or trust's⁴ clients again and/or would not consider Mr B for any future projects being managed by F Trust on behalf of its clients.
4. On 3 or 4 March 2015 the practitioner instructed an administrative assistant employed by the firm, Ms K, that Mr B would be delivering \$12,500 in cash to the firm and asked her to receive the cash from Mr B, as the practitioner was not in Perth.
5. On Wednesday, 4 March 2015 Mr B attended the premises of the firm and paid the Cash Payment by paying \$12,500 in cash to Ms K. Following Mr B's request for a receipt Ms K typed and signed a document entitled "Acknowledgement of Receipt" dated 4 March 2015 (Acknowledgement of Receipt) in which she confirmed that she received "\$12,500 (cash) from [Mr B]". The Acknowledgement of Receipt was not on the firm's letterhead.

⁴ At the hearing on 8 June 2022, senior counsel for the Committee informed the court that there was a typographical error in par 3 in that the word 'trust's' in second last line should read 'F Trust's': ts 6 - 7.

6. After delivering the Cash Payment to Ms K, Mr B on 4 March 2015 sent a text message to the practitioner in which he stated:

"Just dropped off the cash with [Ms K] and also got her to count and receipt (sic) the total".

7. The practitioner did not disclose to TFC (or Mr S) the fact of the Cash Payment or the communications between the practitioner and Mr B regarding the Cash Payment, and to the practitioner's knowledge neither TFC nor Mr S consented to the practitioner receiving the Cash Payment.

13 The second ground of professional misconduct found by the Tribunal is that between about 1 November 2016 and about 7 August 2017, Mr Tang engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act*, in that his conduct:

- (a) fell short to a substantial degree of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence; and/or
- (b) would be reasonably regarded as disgraceful or dishonourable by legal practitioners of good repute and competence; and/or
- (c) would justify a finding that Mr Tang is not a fit and proper person to engage in legal practice within the meaning of s 403(1)(b) of the *Legal Profession Act*.

14 The second ground of professional misconduct arose out of Mr Tang's response to the Committee in the course of its investigation of the conduct comprising the first ground of professional misconduct, following a complaint by Mr B.

15 By a letter dated 30 September 2016, the Committee sought an explanation as to the circumstances in which Ms K signed the Acknowledgement of Receipt for an amount of the \$12,500 Cash Payment, and whether the Cash Payment was in fact received by the firm and, if so, to explain into which account the sum was deposited and against which matter it was credited. In response to the Committee's letter, Mr Tang stated in a letter dated 1 November 2016 to the Committee:⁵

- 18.1 *"I confirm that both myself and Tang Law did not receive the "kickback" referred to by [Mr B]"; and*

⁵ *Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [15].

18.2 that the Acknowledgement of Receipt [""] (*if it is in fact signed by [Ms K]*) would be a personal matter between [Mr B] and [Ms K].

(together, the Statements)

16 The Tribunal found the Statements, together with the following circumstances, constituted professional misconduct:

- (1) Mr B had paid the Cash Payment at Mr Tang's direction and Ms K, who was an employee of Mr Tang's legal practice, had received the Cash Payment at Mr Tang's direction at the office of the legal practice and the Cash Payment did not relate to a personal matter between Mr B and Ms K, but to the arrangement as to payment of the Cash Payment made between Mr Tang and Mr B;
- (2) Mr Tang well knew that the Statements were false and misleading and had the potential to mislead the Committee and Mr Tang intended that the Committee rely on and be misled by the Statements and that the Committee thereby be obstructed in its investigation into his conduct;
- (3) Mr Tang failed to correct the Statements until his further letter of 7 August 2017, which Mr Tang wrote in response to the Committee's further letter of 22 June 2017 in which the Committee provided Mr Tang with copies of photographs of text messages from Mr Tang's phone of 3 and 4 March 2015 evidencing the solicitation by Mr Tang of the Cash Payment; and
- (4) Mr Tang was not open and candid in his dealings with the Committee, and failed until 7 August 2017 to provide a full and accurate account of his conduct in relation to matters covered by requests by the Committee to provide comments or information in relation to Mr Tang's conduct or professional behaviour contrary to r 50(2) and r 50(3) of the *Legal Profession Conduct Rules 2010* (WA).

Relevant legal principles

17 The principles to be applied in an application such as this are well established. They have been summarised by the court in a number of

recent decisions. In *Legal Profession Complaints Committee v Oud*, the court pointed out that the principles include the following matters:⁶

- (a) The court's jurisdiction with respect to the regulation of the legal profession is not to be exercised for the purpose of punishing the practitioner concerned, but for the protection of the public and the maintenance of the reputation and standards of the legal profession;
- (b) Where the motion is to remove a practitioner from the roll, the critical question for the court is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner;
- (c) Fitness to practice law requires that the practitioner must command the personal confidence of his or her clients, fellow practitioners and judges;
- (d) Removal from the roll is an order reserved for very serious cases, where the character and conduct of the practitioner is seen to be inconsistent with the privileges of further practice; and
- (e) Integrity and honesty are essential characteristics expected of a practitioner, and therefore, the court has generally taken a very serious approach when dealing with dishonesty by a practitioner.

In relation to findings of dishonesty, the courts have repeatedly recognised the particular significance of a finding that a practitioner has intentionally misled a court.

18 An important object of the disciplinary function is to maintain and protect the reputation of the legal profession.⁷ Account must also be taken by the court of the effect which its order will have on the understanding by the profession and the public of the standard of behaviour required of legal practitioners.⁸

19 In the *Legal Profession Complaints Committee v Brickhill*, the Full Court pointed out:⁹

Fitness to practice law requires that the practitioner must command the personal confidence of his or her clients, fellow practitioners and judges: *In re Davis* (1947) 75 CLR 409, 420 (Dixon J); *Legal*

⁶ *Legal Profession Complaints Committee v Oud* [2019] WASC 287 [17] - [18].

⁷ *Re Maraj (a practitioner)* (1995) 15 WAR 12, 24 - 25 (Malcolm CJ); *Legal Profession Complaints Committee v Brennan* [2010] WASC 198 [10] (Martin CJ); applied *Legal Profession Complaints Committee v Chang* [2022] WASC 145 [55].

⁸ *Law Society (New South Wales) v Foreman* (1994) 34 NSWLR 408, 444F (Mahoney JA); applied *Legal Profession Complaints Committee v Chang* [2022] WASC 145 [55].

⁹ *Legal Profession Complaints Committee v Brickhill* [2013] WASC 369 [19], [21] (Martin CJ, McKechnie & EM Heenan JJ).

Practitioners Complaints Committee v Thorpe [43] (Steytler P, Wheeler JA and Newnes J); *Legal Profession Complaints Committee v Brennan* [11] (Martin CJ, Murray and Hall JJ agreeing).

...

Integrity and honesty are essential characteristics expected of a practitioner, and therefore, the court has generally taken a very serious approach when dealing with dishonesty by a practitioner: *Brennan* [15]; *Legal Profession Complaints Committee v Bachmann* [2011] WASC 309 [47] (Martin CJ, EM Heenan and Jenkins JJ); *Legal Practitioners Complaints Committee v Palumbo* [2005] WASCA 129 [22] - [23] (Steytler P, Wheeler and McLure JJA agreeing); *Kyle v Legal Practitioners Complaints Committee* [1999] WASCA 115; (1999) 21 WAR 56 [69] (Parker J); *Re Maraj* (25) (Malcolm CJ, Kennedy and Franklyn JJ agreeing). In *Barristers' Board v Darveniza*, Thomas JA observed that:

[T]he quality most likely to result in striking off is conduct which undermines the trustworthiness of the practitioner, or which suggests a lack of integrity or that the practitioner cannot be trusted to deal fairly within the system which he or she practices [33].

Application of the principles to the present case

20 As to the Tribunal's first ground of professional misconduct, the Tribunal correctly found that the facts show that Mr Tang solicited a secret profit or secret commission, colloquially known as a 'kickback' or a bribe from an engineering business, in circumstances which involved a serious breach of his fiduciary obligations or duties to TFC.¹⁰

21 F Trust provided project management services for the development of land owned by a Mr S and TFC.¹¹ Mr Tang undertook all communications and correspondence with Mr B in relation to the contract between TFC and Mr B for the Development on behalf of TFC and F Trust.

22 At the time Mr Tang solicited the secret profit or secret commission of \$12,500 (being an amount equivalent to one quarter of the contract price charged by 5R), Mr Tang acted on behalf of TFC in negotiating the terms of the contract between 5R and TFC, including the fee of \$50,000 to be paid by TFC to Mr B.

¹⁰ *Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [18].

¹¹ *Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [15(5)] (agreed facts).

23 Mr Tang owed fiduciary obligations or duties to TFC in respect of the Development, which arose from his role in the F Trust and the F Trust's relationship with TFC (not by reason of his provision of legal services to TFC).¹²

24 In respect of this conduct, the Tribunal correctly found that:

- (a) Mr Tang's conduct involved a serious breach of his fiduciary obligations or duties to TFC, and involved serious dishonesty and thus serious impropriety affecting his character, which is indicative of a failure either to understand or to practice the precepts of honesty and fair dealing that are essential to the privilege and responsibilities of practising as a legal practitioner;¹³ and
- (b) to solicit and then accept a secret commission in breach of one's fiduciary duties is conduct which goes to the heart of a person's character, honesty and integrity, and is conduct which of its nature, demonstrates that Mr Tang does not have the character, honesty and integrity to be a legal practitioner.¹⁴

25 Of importance, the Tribunal found that, had Mr Tang recognised and owned up to his dishonesty regarding the secret commission when he received notification by the Committee of Mr B's complaint and was asked to explain the circumstances in which Ms K signed the receipt for the Cash Payment, and if the funds were received by his firm, the Tribunal may have come to the view that, notwithstanding Mr Tang's serious dishonesty, he is not permanently or indefinitely unfit to practice law, and will be a fit and proper person to engage in legal practice after lengthy period of suspension of his practising certificate.¹⁵

26 The Tribunal went on to correctly find that, not only was Mr Tang not open and candid with the Committee in breach of r 50(2) and r 50(3) of the *Legal Profession Conduct Rules 2010* (WA), he actively lied when he wrote to the Committee, in relation to the circumstances in which the secret commission was received and the involvement of Ms K.¹⁶ This lie was of the most blatant and serious kind.

¹² *Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [18].

¹³ *Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [20].

¹⁴ *Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [57].

¹⁵ *Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [58]; see also [59].

¹⁶ *Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [58].

27 The second ground of professional misconduct does not involve any allegation of intentionally misleading a court, but it does involve a finding of intentionally misleading the Committee, by the provision of a false and misleading statement which could only be read as a positive denial that the Cash Payment was a matter that Mr Tang had no involvement in, and a false and misleading allegation that it was an administrative assistant employed by his firm who was the person involved in the receipt of the Cash Payment.

28 As to penalty, the Tribunal found there were three mitigating factors and other matters personal to Mr Tang that were factors they took into account.

29 The first mitigating factor was Mr Tang's genuine remorse for his misconduct, and genuine insight into his wrongdoing. The Tribunal gave little weight to this factor because Mr Tang made no admissions until he was presented with irrefutable documentary evidence, and even then his first genuine expression of remorse and contrition was not shown until two years and five months after he was first notified of the allegation that he had solicited a kickback.¹⁷

30 The second mitigating factor was Mr Tang's record of pro bono and community work of holding several committee positions in community organisations, sponsoring community events and providing and facilitating pro bono work by other lawyers in the firm. The Tribunal found this work to be to his credit.¹⁸

31 The third mitigating factor was that Mr Tang's character referees indicated that Mr Tang is competent, and that his legal services are valued by his clients. In particular, his ability to speak Cantonese and Mandarin has been of assistance to Chinese speaking clients and clients wishing to do business in China.¹⁹

32 The Tribunal took into consideration Mr Tang's personal circumstances, including his acrimonious relationship and breakup with his first wife in 2012, the ongoing conflict over the next seven years, and the financial stress that he was under during the period of 2015 to 2018. The Tribunal found that none of these circumstances provided a

¹⁷ *Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [63].

¹⁸ *Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [64].

¹⁹ *Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [65].

reasonable explanation, much less an excuse, for Mr Tang's professional misconduct.²⁰

33 After having regard to Mr Tang's mitigating factors and personal circumstances, the Tribunal properly found that in light of Mr Tang's dishonesty, not only in soliciting the kickback, but also in seeking to cover it up and obstruct the Committee's investigation into it, and then failing to tell the Committee the truth for nine months, it rejected the character referees' opinions that the professional misconduct was out of character.²¹

34 The Tribunal rejected the submission made on behalf of Mr Tang that his personal factors indicate that there is a low likelihood of any repetition of the conduct because of Mr Tang's serious and repeated dishonesty disclosed by the conduct findings, including his dishonest effort to cover up the first instance of dishonesty.²²

35 Having regard to all of these matters, the Tribunal correctly found that notwithstanding the mitigating factors (and other matters), Mr Tang's serious dishonesty reflected in each of the grounds of professional misconduct, when viewed together, demonstrated that he lacks the character, honesty and integrity necessary to discharge the responsibilities of legal practice, and that he is permanently or indefinitely unfit to practice law.²³

36 While Mr Tang's appearance before the court and his direct and unqualified apology are to his credit, in the present case, we are satisfied that the conduct constituting the two grounds of professional misconduct as found by the Tribunal was such that Mr Tang's name should be struck from the roll of practitioners in order to protect the public and maintain the reputation and standards of the legal profession.

Costs

37 In its notice of originating motion, the Committee sought its costs of the application. In circumstances in which Mr Tang did not oppose the orders sought by the Committee, senior counsel for the Committee informed the court that it did not press an application for costs, and regarded the cost of the proceedings as part of the costs of regulating the profession.

²⁰ *Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [66].

²¹ *Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [61].

²² *Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [68].

²³ *Legal Profession Complaints Committee and Tang* [2021] WASAT 117 [61].

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

VV

Associate to the Honourable Justice Smith

17 JUNE 2022