COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 52 of 2023

IN THE MATTER OF THE LEGAL PROFESSION ACT, 1992
AND
IN THE MATTER OF A COMPLAINT AGAINST COUNSEL AND ATTORNEY BY THE ESTATE OF SCOTT H. DEAL

BETWEEN

DOMEK D. ROLLE

Appellant

AND

DISCIPLINARY TRIBUNAL OF THE BAHAMAS BAR COUNCIL

Respondent

BEFORE: **The Honourable Sir Michael Barnett, President**
The Honourable Mr. Justice Smith, JA
The Honourable Mr. Justice Turner, JA

APPEARANCES: **Ms. Romona Farquharson, with Mr. Samuel Taylor, Counsel for the Appellant**
Mr. Sean Moree, KC with Ms. Peteche Mitchell, Counsel for the Respondent

DATES: **12 December 2023, 31 January 2024, 6 February 2024, 25 April 2024**

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Disciplinary Tribunal of The Bahamas Bar Council - Sections 29, 30(1)(b), and 54 of the Legal Profession Act – Conduct of Legal Practitioner - Rules I, II, and VII of the Code of Professional Conduct of the Bahamas Bar Association - Struck from the Roll - Breach of Rules of Natural Justice

The Appellant failed to give the Complainant $167,722.23, which were the proceeds of the sale of a property. The Complainant then commenced legal action in the Supreme Court; the judge ordered the Appellant to pay the Complainant $167,722.23 plus interest. The Judge found the Appellant's defence as to why he had not paid the Complainant to be untenable.

Following this, the Complainant made a complaint to the Ethics Committee of the Bar Council in 2019. The Ethics Committee notified the Appellant of the Complaint.

Meanwhile, a receiver was appointed over the assets of the Appellant and the sum ordered to be paid by the trial judge was eventually paid over to the Complainant.

While the complaint was being heard by the Respondent, and despite several requests, the Appellant did not provide a witness statement. On 17 November 2021, he gave oral evidence and was cross-examined on the same. Although the parties were due to exchange closing submissions, only the Respondent provided them.

In 2023, the Tribunal found the Appellant guilty of professional misconduct and ordered him to be struck from the Roll. The Appellant was dissatisfied and appealed.

Held: Appeal allowed in part. The finding by the Tribunal that the Appellant was guilty of improper conduct is affirmed. The appeal against the decision of the Tribunal to strike the Appellant's name from the Roll is allowed. Matter referred back to the Tribunal for consideration and the appropriate penalty/sanction to impose upon the Appellant. Each side bears their own costs.

The Appellant's contention that he failed to get a ruling from the Ethics Committee of the Bar Council ("the Ethics Committee") giving their reasons for referring the complaint to the Tribunal is dismissed. There is no appeal from a decision of the Ethics Committee except where (unlike the case in this appeal) the Ethics Committee decides to reprimand an attorney-at-law as a penalty.

The Supreme Court trial dealt with the civil liability of the Appellant while professional misconduct is, by statute, reserved for the Tribunal under the provisions of the Act. Therefore, the failure of the trial judge to deal with any ethical breaches, is irrelevant to this appeal.

The provisions of the Act and Rules I, II and VII of the Code of Professional Conduct do not require a finding of falsehood to ground a complaint of professional misconduct. Therefore, the Appellant's contention of a purported failure of the Tribunal to identify any falsehood in the Appellant's statement is unmeritorious.

The Appellant's contention that the Tribunal wrongly relied on authorities dealing with findings of dishonesty whereas his matter was not one where dishonesty was found is also without merit. Rather, the Tribunal cited the authorities to reinforce its duty to deal with acts of professional misconduct. The Tribunal was dealing with the improper conduct of the Appellant and the quotation was relevant to this case.

Various exchanges between members of the Tribunal and the Appellant were legitimate requests to ascertain the Appellant's case and the oral evidence he was presenting. The interactions were not hostile and do not provide any basis for an appeal.

Even if the prosecutor, (the Marshall) had an agenda in securing a conviction, this does not mean that the Tribunal was in some way influenced by this. In any event, a Marshall, like a prosecutor, must entertain a genuine belief in the Appellant's guilt so as to properly pursue a case against him.

There was no apparent bias on the part of the Chairman of the Tribunal.

Where an attorney is in jeopardy of a punishment which may adversely affect him professionally, it is a fundamental breach of natural justice to impose a punishment on him without giving an opportunity to make representations as to what punishment should be imposed upon him. The Tribunal did not hear nor entertain any submissions from the Appellant with respect to the mitigation of the penalty to be imposed upon him and thus breached natural justice.

The Appellant's contention that the actions of the Tribunal in finding him guilty of professional misconduct and striking his name from the Roll without hearing any arguments on mitigation is allowed.

Even though the Appellant might have had the opportunity to do so in written submissions, the Tribunal did not in fact hear any submissions on the penalty to be imposed before doing so.

The duty to hear or entertain submissions on mitigation is on the decision-maker and not the defendant. Even if the Appellant's inaction may have created the situation, this did not cure the defect of the Tribunal whose duty it was to hear or entertain submissions on mitigation in this case.

The principles of natural justice are so broad that there must be flexibility in their application. However, this is no excuse to fail to have any hearing in mitigation or some procedure to satisfy the requirements of such a hearing. The failure of the Tribunal to hear or entertain any submissions on mitigation at any stage before deciding on a penalty to impose was a breach of the rules of natural justice.

There may be cases where even if the duty is breached there would not necessarily be a breach of the rules of natural justice. It may be the case that no submissions on mitigation would make any difference to the sanction to be imposed.

Every exception from the duty to entertain submissions in mitigation would depend upon the specific facts before a court or tribunal. It may be the case that a criminal conviction of an attorney for dishonesty or a finding of serious dishonesty by the Tribunal may cause the only appropriate sanction to be to strike the attorney from the Roll. In such cases, it may be that a failure to entertain submissions in mitigation would not make a difference to the outcome of the sanction imposed. However, this is not the case here.

The Tribunal have not 'fettered' their discretion to make a decision in conformity with the requirements of procedural fairness. Accordingly, this matter will be remitted to the Tribunal for reconsideration.

Bolton v Law Society [1994] 1 WLR 512; mentioned
Dominique Moss v The Queen 2013 UKPC 32; applied
Mariaddan v Solicitors Regulation Authority (Admin.) [2023] EWHC 207; considered
Rodger Watson v R [2023] UKPC 32; mentioned
Scott Alexander Paul Deal (as Executor of the Estate of Scott Henderson Deal, Deceased) v Domek D. Rolle 2018/CLE/gen/00786; mentioned
Troy Kellman v The Bahamas Bar Council SCCiv App. No. 53 of 2023; applied
Wayne Munroe Q.C. and Donovan Gibson v Bahamas Bar Council SCCiv. App. 162 of 2019; mentioned

INTRODUCTION

1. Domek Rolle (the Appellant), had been found guilty of improper conduct by a Disciplinary Tribunal of the Bahamas Bar Council (the Tribunal). As a result, the Tribunal ordered that the Appellant's name shall be stuck from the Roll forthwith.

2. The Appellant now appeals the decision of the Tribunal.

3. This appeal came on for hearing on three (3) occasions, but could only proceed on the 3rd occasion because of obvious shortcomings on the part of the Appellant. As a result, we had four sets of submissions from the Appellant and two (2) sets of submissions from the Tribunal.

4. Nothing has been conceded. The first two sets of the submissions of the Appellant raised and repeated three (3) issues. The second two sets of the submissions of the Appellant raised and repeated four (4) issues. However, 12 grounds of appeal were advanced and some of the issues raised straddled several grounds. As a result, I will deal with this appeal on the grounds advanced.

5. After considering both the written and oral submissions of the parties, I am of the view that:

(a)There is no reason to overturn the findings by the Tribunal that the Appellant was guilty of improper conduct in contravention of the provision of the Legal Profession Act (the Act).

(b) The decision of the Tribunal to strike the Appellant's name from the Roll forthwith, was made in breach of the principles of natural justice.

(c) The matter is referred back to the Tribunal for their proper consideration and assessment of the penalty/sanction to impose upon the Appellant.

THE FACTS

6. On or about 29 March 2019, a complaint was lodged against the Appellant with The Bahamas Bar Association (the "Bar"). That complaint was made by Scott Deal (the Complainant) for misappropriation of client funds in the amount of $167,722.23, which were to be held in trust following the sale of a property. The Affidavit in Support of the complaint was dated 19 September 2019.

7. The said property sale concerned Chante Clear Hill in Dunmore Town, Harbour Island, for which the Complainant had entered into an agreement for sale in April, 2017 in the amount of $595,000.00 net. On 31 May 2017, the deposit of $59,000.00 was paid to the Appellant's firm and the balance of $538,483.86 was then paid to the Appellant's firm on 29 September 2017.

8. This transaction was dealt with by a former associate of the Appellant's firm. There was no communication between the Complainant and the Appellant until May 2018 when the Complainant sought to recover the proceeds of sale. Upon deducting legal fees and disbursements, $547,722.33 was due to be paid to the Complainant. However, the Complainant was only paid $380,000.00. The Appellant continually made excuses as to why the balance could not be paid, primarily blaming it on banking problems.

9. In attempts to retrieve the balance due to him, the Complainant commenced the action of **Scott Alexander Paul Deal (as Executor of the Estate of Scott Henderson Deal, Deceased) v Domek D. Rolle** 2018/CLE/gen/00786 by Originating Summons. On 12 September 2018, Justice Winder (as he then was) handed down a ruling in the Action.

10. In his ruling, Winder J. noted the following:-

> **"9 At the morning of the trial, the Defendant's (Appellant's) position shifted from banking challenges and the issue morphed to one of outstanding fees…**
> **10. I found the defence (of the Appellant) which had been advanced to be <u>untenable</u> on the evidence." (Emphasis added)**

At paragraph 12 Winder J. described the deduction of VAT, by the Appellant from the money due to the Complainant, as **"suspicious"** as this was a net transaction where the Purchaser, and not the Complainant, was to pay these charges.

11. Winder J. therefore ordered the Appellant to pay the sum of $167,723.23 to the Complainant with interest at the statutory rate and costs to be taxed.

12. The Complainant then made a complaint to the Ethics Committee of the Bar Council by letter dated 24 March 2019. The Ethics Committee issued a Notice of Complaint to the Appellant on 2 May 2019. On 27 August 2019, the Ethics Committee notified the Appellant that the complaint had been referred to the Tribunal pursuant to section 30(1) (b) of the Act.

13. During the complaint to the Bar Council, and following upon the Ruling of Winder J., there followed a process of execution upon the judgment of Winder J. A receiver was appointed in respect of the Appellant's firm and the receiver embarked upon a sale of the property to satisfy the judgment debt and costs. The judgment debt was eventually paid over to the Complainant and by order of the Court dated 22 February 2021, the Appellant was released from the receivership.

14. A subsequent Notice of Hearing was issued by the Tribunal on 29 March 2021 and served on the Appellant on 12 April, 2021. The complaint was set to be heard on 5 May 2021 but the Appellant failed to appear. The matter was consequently adjourned to 9 June 2021, with a new Notice of Hearing being issued on 5 May 2021 and served on the Appellant on 27 May 2021.

15. At the Directions Hearing on 9 June 2021 there were no preliminary issues raised, since the funds, interest and costs were eventually settled and paid to the Complainant following the Court-ordered appointment of the receiver. The Tribunal was to consider the Appellant's conduct as a legal practitioner preceding the Action and following the Ruling of Winder J.

16. The substantive trial of the complaint was heard on 4 August 2021, 25 August 2021, 8 September 2021 and 17 November 2021. Despite several requests, the Appellant did not provide a Witness Statement. On 17 November 2021, he gave oral evidence and he was then examined on the same. The Bar provided written closing submissions on 10 December, 2021. Although the parties were due to exchange submissions on the same day, no closing submissions were provided on behalf of the Appellant.

17. The Tribunal's Ruling was delivered on 8 February 2023. The Appellant was found in breach of his duties of integrity, competence and preservation and safekeeping of property and was ordered to be struck from the Roll forthwith.

18. In coming to its decision, the Tribunal referred to section 29 of the Act which provides that it shall be improper conduct if an attorney **"(iv) contravenes any regulation under this Act as to the professional practice, conduct or etiquette of counsel and attorneys or the keeping of accounts by them" "(vii) is otherwise guilty of conduct unbefitting a counsel and attorney."** Further, the Tribunal made specific reference to Rules I, II, and VII (wrongly cited as III) of the Code of Professional Conduct of the Bahamas Bar Association which they thought as relevant to the conduct of the Appellant.

These Rules provide as follows:

> **"Rule I**
> **The attorney must discharge his duties to the Court, his client, members of the public and his fellow members of the profession with integrity.**
>
> **Rule II**

The attorney must perform all the work which he undertakes on behalf of his client in a competent manner, providing a quality of service at least equal to that which attorneys generally would expect of a competent attorney in a like situation.

Rule VII
The attorney owes a duty to his client to observe all laws and rules regarding the preservation and safekeeping of the property of the client entrusted to him and in the absence of such laws and rules or where the attorney is in doubt he should take the same care of such property as a careful and prudent man would take of his own similar property."

19. The Tribunal decided that the conduct of the Appellant in relation to this complaint revealed *"a serious and egregious breach of the Code of Professional Conduct expected of Attorneys."*

20. The Appellant now challenges the decision of the Tribunal on the 12 grounds in the Appellant's Supplemental Notice of Appeal.

ANALYSIS

21. I will now proceed to deal with all 12 grounds that the Appellant set out, but not necessarily in the order they were presented.

GROUND 1

22. Ground 1 provides as follows:-

"The learned Tribunal admitted its breach of Natural Justice at paragraph 3 of its ruling that the Ethics Committee determined that grounds existed for the complaint and moved the matter to the Disciplinary Tribunal. The Respondent never received a ruling from the Ethics Committee regarding the reasons for their ruling <u>Wayne Munroe QC and Donovan Gibson v Bahamas Bar Council SCCivApp No. 162 of 2019</u>."

23. The Appellant alleges that he failed to get a ruling from the Ethics Committee of the Bar Council ("the Ethics Committee") giving their reasons for referring the complaint to the Tribunal. In oral submissions, the Appellant went on to allege that this failure to get a reasoned ruling from the Ethics Committee was a breach of natural justice.

24. There is no merit in this allegation, as there is no appeal from a decision of the Ethics Committee save where (unlike the case in this appeal) the Ethics Committee decides to reprimand an attorney-at-law as a penalty.

25. This is the result of the Court of Appeal's interpretation and application of section 30(1) and 54(1) of the Act.

26. The relevant portions of section 30 of the Act provides that: -

> **"30. (1) There is hereby established a committee to be known as the Ethics Committee of the Bar Council the functions of which shall be —**
> **(a) to receive complaints made in respect of the conduct of counsel and attorneys, registered associates and legal executives;**
> **(b) to determine whether there exists reasonable grounds for the making of a complaint and if so to refer it to the Disciplinary Tribunal where the Committee considers that should the complaint be established before the Tribunal the facts of the complaint would warrant a penalty or order other than a reprimand;**
> **(c) to reprimand counsel and attorneys, registered associates and legal executives where the Committee considers that though the allegations of a complaint have been made out a reprimand is the adequate penalty."**
> **(d) generally to uphold standards of professional conduct for counsel and attorneys, registered associates and legal executives.** [Emphasis added]

27. Section 54 (1) of the Act provides that:-

> **"54. (1) Any person aggrieved by —**
> **(a) the failure or refusal of the Bar Council to make a determination in his favour under subsection (2) of section 12;**
> **(b) an order made by the Ethics Committee under paragraph (c) of subsection 2 of section 30;**
> **(c) an order made by the Disciplinary Tribunal under section 38 in relation to a complaint made by or against him; or**
> **(d) the discharge by the Council of his articles, or by the terms on which his articles are discharged by the Council, under subsection (5) of section 44 or under section 45, may appeal on that account to the Court of Appeal; and in relation to every such appeal section 9 of the Court of Appeal Act shall mutatis mutandis apply as if the matter in respect of which the appeal is brought were a judgment or order of the Court**." [Emphasis added]

28. In the case of **Troy Kellman v The Bahamas Bar Council** SCCiv App. No. 53 of 2023, Sir Michael Barnett (P) stated that:-

> **"18… section 54 (1) (c) only gives this Court jurisdiction to hear an appeal from the Disciplinary Tribunal and not from the Ethics Committee… an appeal from the Ethics Committee only lies where there is an appeal against a decision of the Ethics Committee under section 31 (1) (c) "to reprimand" a person. Although section 54 (1)**

(b) of the Act refers to section 30 (2) (c), this is clearly a scrivener's error as section 30 (2) (c) does not exist.

19. As the Ethics Committee did not issue a reprimand to the appellant, there can be no appeal to the Court of Appeal regarding the decision of the Ethics Committee.

20. If a person wishes to challenge a decision of the Ethics Committee, he must do by way of an application for Judicial Review to the Supreme Court and not by an appeal to this Court."
(See also **Wayne Munroe and Another v Bahamas Bar Council** SCCiv App No. 162 of 2019 at paragraphs 30 and 31)

29. In the present matter, the Ethics Committee did not issue a reprimand to the Appellant but merely referred the complaint to the Tribunal. On the authorities cited above, there is no appeal from that decision to the Court of Appeal. The Appellant's challenge on his ground must fail.

30. Counsel for the Appellant made a feeble and unmeritorious contention that the present panel of the Court of Appeal should not follow the previous Court of Appeal decisions in the **Troy Kellman** and **Wayne Munroe**, cited above. This contention goes contrary to the fundamental principle of stare decisis and needs only be stated to be rejected.

Grounds 2 and 4

31. Grounds 2 and 4 are as follows:-

> **"2. That the Learned Tribunal at paragraph 5 admitted that it is bound by the Ruling of the Honorable Justice Ian Winder (as he then was). At no point of the said Ruling did Justice Winder or accuse the Respondent of misconduct."**
>
> **"4. That the Learned Tribunal stated repeatedly that it needs not to go beyond the Decision of His Lordship. In his Lordship's Ruling the Learned Justice expressed his disagreement with the Appellant's calculation of legal fees. The Learned Judge in his ruling made no finding of misconduct nor accused the Defendant of any breach under the Legal Profession Act, The Code of Professional Conduct or any other code of conduct."**

32. These grounds are misconceived. The matter before Winder C.J. dealt with the civil liability of the Appellant to provide an account to the complainant and to make payment to the complainant as result of that account. That civil matter was never an action to consider any question of professional misconduct. The issue of professional misconduct is, by statute, reserved for the Tribunal under the provisions of the Act.

33. Therefore, the failure of Winder C.J. to deal with or consider any purported misconduct or breach of the Act, or any code of conduct, is irrelevant to both the complaint of Mr. Deal and to this appeal.

Ground 3

34. Ground 3 is as follows:-

> **"3. That the Learned Tribunal at paragraph 8 in its Ruling refers to section 29 (1) (a) of the Legal Profession Act but does not specify any of the grounds listed therein. The Learned Tribunal failed to identify the falsehood in the Appellant's statements made before the Tribunal or before the Learned Justice."**

35. This ground is wholly unmeritorious. As I stated at paragraph 18 above, the Tribunal made specific references to sections 29 (iv) of the Act and Rules I, II and VII of the Code of Professional Conduct. The Appellant's breaches of these provisions were the relevant grounds upon which the Appellant was found guilty of professional misconduct by the Tribunal.

36. Further, these provisions do not mandate or even require a finding of falsehood to ground a complaint of professional misconduct. Therefore, the Appellant's contention of a purported failure of the Tribunal to identify any falsehood in the Appellant's statement is misconceived and unmeritorious.

Ground 5

37. Ground 5 is as follows:-

> **"5. The Learned Tribunal at paragraph 12 referred to Re Fields [2016] 3 LRC 1 where Gibson CJ spoke with regard to money that was dishonestly appropriated. This case is distinguishable from the Appellant's case before Justice Winder as there was never any ruling made with regard to the Respondent acting dishonestly."**

38. This ground is without merit. Part of the quotation from the case of **Re Fields** is as follows:

> **"In any climate and in the present climate of public opinion it seems to me that the Bar Association, which is granted self-regulatory powers by statute, cannot appear to condone or be indifferent towards any perceived act of professional misconduct by any one of its members."**

39. As this quote illustrates, the Tribunal must be aware of its role with respect to professional misconduct of the members of the legal profession. It is not limited to findings of dishonesty. As such, the quote is very relevant and applicable to the present matter.

Ground 6

40. Ground 6 is as follows:-

> **"6. That the Learned Tribunal was hostile and one sided against the Appellant until the appearance of Mr. Damien Gomez QC. The Tribunal constantly interrupted the Appellant presenting the evidence."**

41. The Appellant cited certain exchanges between members of the Tribunal and himself in support of this ground. No useful purpose would be achieved by setting them out. I merely observe that these exchanges reveal legitimate requests from the members of the Tribunal to ascertain and/or probe the Appellant's case and the oral evidence he was presenting. The interactions of the members of the Tribunal cannot, in my view, be viewed as hostile or one sided, nor do they provide any basis for an appeal.

Ground 7

42. Ground 7 is as follows:-

> **"The Learned Tribunal nor the Complainant was aware that the sum Ordered to be paid by the Appellant was paid prior to the Hearing before the Tribunal notwithstanding the Order of Justice Winder made on the 22nd day of February 2021 evidencing that the aforementioned Ruling was satisfied."**

43. This ground is wholly unmeritorious. In paragraph 6 of its Ruling the Tribunal expressly stated that *"By the time this matter came before the Tribunal, the judgment debt had been paid."*

Ground 8

44. Ground 8 is as follows:-

> **"8.That the Complainant stated on record that he did not want to participate in the Tribunal Hearings but the Prosecutor was adamant. This is a breach of the duty of a Prosecutor. The Prosecutor exhibited that he had an agenda in a conviction as the Complainant seemed forced to participate in the proceedings."**

45. This ground is wholly misconceived and irrelevant. Even if the prosecutor, (the Marshall) had an agenda in securing a conviction, this does not mean that the Tribunal was in some way influenced by this. In fact, no allegation of this nature was made against the Tribunal.
In any event, even if the Marshall purported to have an agenda to secure a conviction against the Appellant (which has not been established), this adds nothing to the appeal for, the Marshall, like a prosecutor must entertain a genuine belief in the Appellant's guilt so as to properly pursue a case against him.

Ground 11

46. Ground 11 is as follows:-

> **"11. That the Chairman was not fit to sit on the Tribunal as there was an apparent and actual bias against the Appellant."**

The Appellant provided no details of this allegation of bias on the part of the Chairman of the Tribunal. This is an unsubstantiated ground that must be dismissed.

Grounds 9, 10, and 12

47. I will deal with these grounds together because they deal with the main objection of the Appellant, which relates to the failure of the Tribunal to allow him to present a plea in mitigation.

48. Grounds 9, 10, and 12 are as follows:-

> **"9. That the Learned Tribunal gave no attention to the extensive steps that the Respondent took to satisfy the Ruling of Justice Winder. The Respondent provided the Tribunal with Affidavit evidence that he retained the services of V. Alfred Gray & Co. who had an open dialogue with the Complainant's Attorney until the funds were paid in full."**
>
> **"10. That the learned Tribunal did not give the Respondent an opportunity to present any mitigating factors before deciding to recommend that he be stricken from the list."**
>
> **"12. That any Tribunal acting fair, reasonable and lawful would not have given such a harsh Ruling regarding the aforementioned."**

49. A summary of the facts which apply to those grounds is already provided at paragraphs 11-19 above, and I will now expand on them.

50. The Tribunal scheduled several hearings for this complaint. The Appellant failed to appear on 5 May 2021 the first scheduled date for hearing. Thereafter, it again came on for hearing on 9 June 2021, by which time the judgment debt, interest and costs in the matter before Winder C.J. had been paid. However, the Tribunal was of the view that they would proceed to hear the complaint of professional misconduct.

51. The Complaint was heard in 2021 on 4 August, 25 August, 8 September and 17 November. The Appellant had indicated that he would either give a witness statement or swear to an affidavit in his defence, but he failed to do either. Finally, on 17 November 2021, the Appellant decided to give oral evidence.

52. At the close of the proceedings on 17 November 2021, Counsel for the Appellant and the Respondent both agreed to provide written submissions to the Tribunal for its consideration. The Respondent provided their submissions but neither the Appellant nor his counsel ever provided any written submissions to the Tribunal.

53. Eventually, nearly 14 months later, the Tribunal delivered its decision. As stated before, the Tribunal found that the Appellant was guilty of improper conduct in contravention of the Act and struck his name from the Roll of practicing attorneys forthwith.

54. The Appellant contends that the actions of the Tribunal in this case were in breach of natural justice. This is because the Tribunal found him guilty of professional misconduct and, at the same time, imposed the penalty of striking his name for the Roll without hearing any arguments he may have had with respect to the mitigation of the penalty to be imposed upon him.

55. The law with respect to the duty of the Tribunal to entertain a plea in mitigation before any penalty is to be imposed has been authoritatively stated by Sir Michael Barnett (P) in the **Wayne Munroe** case (cited above) and it is as follows:-

> **"32…it is a fundamental breach of natural justice to impose a punishment on an attorney without giving an opportunity to make representation as to what if any punishment should be imposed upon him. This certainly is the case in criminal proceedings. In Moss v R [2013] 1 WLR 3884 the Privy Council said at paragraph 5:**
>
> **'…An omission to hear a defendant before passing sentence is a serious breach of procedural fairness. That simple proposition does not need the citation of authority."**
>
> **33. Although said in the context of criminal proceedings, the principle in our judgment applies equally to disciplinary proceedings where an attorney is in jeopardy of a punishment which may adversely affect him professionally."**

56. In the present matter, the Tribunal did not hear nor entertain any submissions from the Appellant with respect to the mitigation of the penalty to be imposed upon him. This was a breach of natural justice.

57. The Respondent contends that the Appellant was given the opportunity to make written submissions at the close of the hearings before it on 17 November 2021. In those submissions, he could have advanced any arguments he had with respect to the mitigation of any sentence to be imposed upon him in the event that he was to be found guilty of professional misconduct.

58. I disagree with this contention for the following two (2) reasons:-
First, as was stated in the citation from **Moss v R** above, it is the omission to "hear" or to entertain submissions from "a defendant before passing sentence" that was held to be a fundamental breach of procedural fairness or natural justice. Even though the Appellant might have had the opportunity to do so in written submission, the fact remains that the Tribunal did not hear any submissions on the penalty to be imposed before doing so, and therefore ran afoul of the requirements of natural justice.
Second, the duty to hear or entertain submissions on mitigation is on the decision-maker and not the defendant. Even if the Appellant's inaction may have created the situation, this did not cure the defect of the Tribunal whose duty it was to hear or entertain submissions on mitigation in this case.

59. The Respondent also went on to contend that as a matter of principle, in the proceedings of specialist tribunals like this one, fairness only requires that the procedures adopted be fair on the whole, not perfect. A court ought not to be overly critical of the procedures adopted by such a specialist tribunal.
In the present matter, the Appellant was the author of his own misfortune since he passed on the opportunity to make submissions in mitigation. An appellate court should not be overly critical of the procedure the Tribunal adopted to give the Appellant the opportunity to make submissions and his failure so to do. In other words, the procedure of the specialist tribunal was fair on the whole, and complied with the requirements of procedural fairness or natural justice.

60. In support of these principles, the Respondent referred us to the decision in the case **Marriadan v Solicitors Regulation Authority Ltd.** [2023] EWHC 207 at paragraph 26 when several authorities were analyzed and the following is stated at paragraph 26:

> **"The effect of these authorities in the context of an appeal against the decision of the Solicitor's Disciplinary Tribunal … was summarised in SRA v Day [2018] EWHC 2726 where, in addition to what we have said above, a number of additional considerations specific to appeals from decisions of the SDT were identified. First the SDT is a specialist tribunal particularly equipped to appraise what is required of a solicitor in terms of professional judgment, and an appellate court will be cautious in interfering with such an**

> **appraisal. Secondly, decisions of specialist tribunals are not to be expected to be the product of elaborate legal drafting. Their judgments should be read as a whole; and, in addressing the reasons given, unless there is a compelling reason to the contrary, it is appropriate to take it that the tribunal's fully taken into account all the evidence and submissions. That does not mean that a decision which has failed in its basic task to cover the correct ground and answer the right questions will be upheld. A patently defective decision cannot be converted by argument into an unacceptable one."** [Emphasis added]

61. This is indeed an impressive submission, but I disagree with it.

62. Before I give my reasons for disagreeing with the submission just stated above, I must state that I accept the proposition that the principles of natural justice are so broad that there must be flexibility in their application. This was succinctly stated by Lord Hughes in the Privy Council appeal from The Bahamas **Dominique Moss v The Queen** [2013] UKPC 32 at paragraph 7, as follows:-

> **"The procedure which may be adopted in order to satisfy this duty** (of hearing a defendant before passing sentence) **will no doubt vary from case to case, but need not involve delay or further expense. If judgment on the conviction appeal is given orally at the conclusion of the hearing, and in the presence of counsel, then no doubt submissions on sentence can immediately be taken. If judgment is to be reserved, then either the court can invite submissions at the oral hearing on the provisional basis that they will be operative if the appeal succeeds or, if necessary, submissions can be invited, either orally or in writing, after the reserved judgment is handed down. In all cases, counsel mounting an appeal against conviction should be prepared to deal with the point at the oral hearing. In the event that the court overlooks the need to deal with it, counsel ought to raise it, either at the oral hearing or immediately on receipt of a reserved judgment."** [Emphasis added]

63. However, even if there is flexibility in the application of the procedures to satisfy natural justice, this is no excuse to ignore or fail to have any hearing in mitigation or some procedure to satisfy the requirements of such a hearing. In other words, even if the Tribunal had heard or entertained the submissions on mitigation at some earlier stage and then ruled on both the allegations of professional misconduct and imposed the sentence at the same time (as it did in SCCiv Appeal No. 51 of 2023, **Domek Rolle v The Bahamas Bar Council**), that may have satisfied the provisions of procedural fairness. However, the failure of the Tribunal to hear or entertain any submissions on mitigation at any stage before deciding on a penalty to impose was a breach of the procedural fairness or the rules of natural justice.

64. Before moving on from this issue of the duty to entertain a plea in mitigation, I must mention that there may be cases where even if the duty is breached there would not necessarily be a breach

of the rules of natural justice. So for instance, it may be the case that no submissions on mitigation would make any difference to the sentence/sanction to be imposed. This was recognized in the **Moss v R.** decision cited above where Lord Hughes stated at paragraph 8:-

> **"…there may be cases in which, despite a breach of this duty by the court, a reviewing court can be confident that no injury can have been done to the defendant because no submissions that might have been made on his behalf could have reduced the sentence below that passed. There might also be cases in which the question is academic, for example because the sentence has been served."**

(See also **Rodger Watson v R** [2023] UKPC 32 where the above principle was repeated by Lord Lloyd-Jones at paragraph 20)

65. Every exception from the duty to entertain submissions in mitigation would depend upon the specific facts before a court or tribunal. More specifically, and without laying down any hard and fast rule or precedent, it may be the case that a criminal conviction of an attorney for dishonesty or a finding of serious dishonesty by the Tribunal may cause the only appropriate sanction to be to strike the attorney from the roll. In such cases, it may be that a failure to entertain submissions in mitigation would not make a difference to the outcome of the sanction/penalty imposed. This point was made by Lord Bingham in the case of **Bolton v Law Society** [1994] 1 WLR 512 at 518 B-E where he said:-

> **"Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors. Only infrequently, particularly in recent years, has it been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation. If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the tribunal as an informed and expert body on all the facts of the case."**

66. In the present matter, the Appellant has not been found guilty of dishonesty but instead he has been found to have breached the code of professional conduct. This is not a case where an automatic striking out from the Roll of attorneys was the inevitable result of a finding of a breach of professional misconduct. Therefore, as I stated before, this was a case where submissions in mitigation ought to have been entertained.

67. The Respondent argued that it would be too onerous on the Tribunal to have a separate hearing of mitigation in every case that comes before it. However, this argument is without merit. There is no suggestion that there must be a separate or distinct hearing of mitigation before the Tribunal in every case. However, an attorney should normally be given a distinct opportunity to be heard or to make representations before a penalty is imposed.

68. The Appellant raised an issue with respect to the future progress of the complaint. The Appellant suggested that since the Tribunal had already ruled on the penalty of striking him from the Roll, their "discretion will be fettered." Therefore, his complaint ought to be dismissed. Alternatively, the Court of Appeal should make the decision on the penalty to be imposed on the Appellant. I disagree with these suggestions.

69. With respect to the dismissal of the complaint, it would be contrary to good administration, and indeed the tenets of the Act, to allow such egregious professional misconduct that the Tribunal properly decided occurred here to go unpunished or unsanctioned.

70. Regarding the contention that the complaint ought not to be sent back to the Tribunal because their "discretion will be fettered" and that we should make the decision on the penalty to be imposed on the Appellant, I disagree for the following reasons.

71. First, the Tribunal did not hear or entertain any submissions on mitigation and they have not therefore 'fettered' their discretion to hear or entertain such submissions and thereafter to make a decision in conformity with the requirements of procedural fairness.

72. Second, it is not an uncommon feature for an appellate court to refer matters back to lower courts or tribunals for their proper consideration. In fact, the chairman of the Tribunal is a sitting Supreme Court judge; the presumption must be in favour of the Supreme Court judge, and the Tribunal being able to make a proper decision upon a reconsideration of the matter.

73. Third, it would be more fitting for this specialist tribunal to develop its own jurisprudence and precedents in respect of the penalties it may impose on errant attorneys based upon standards and principles that they wish to develop, and in so doing fulfill the mandate entrusted to them under the Act.

Conclusion

74. For the reasons stated above, the appeal is dismissed in part and allowed in part and I would make the following orders:

1. The decision of the Respondent that the Appellant was guilty of improper conduct in contravention of the provisions of the Legal Profession Act is affirmed.
2. The decision of the Respondent to strike the Appellant's name from the Roll is set aside.
3. The matter is referred back to the Respondent for their reconsideration of the appropriate sanction/ penalty to impose on the Appellant after hearing submissions from the Appellant and the Marshall.
4. Each side is to bear their own costs of the Appeal.

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THE HONOURABLE MR. JUSCTICE SMITH, JA

75. I agree.

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THE HONOURABLE SIR MICHAEL BARNETT, P

76. I also agree.

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THE HONOURABLE MR. JUSCTICE TURNER, JA