COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 51 of 2023

IN THE MATTER OF THE LEGAL PROFESSION ACT, 1992
AND
IN THE MATTER OF A COMPLAINT AGAINST COUNSEL AND ATTORNEY BY JEAN W. PHEPLS

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, MB, 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(iv), 30(1)(b) of the Legal Profession Act - Conduct of Legal Practitioner - Rules I and II of the Code of Professional Conduct of the Bahamas Bar Association - Breach of Natural Justice

In July 2016, the Complainant paid $5,500.00 to the Appellant as a retainer. The Appellant was hired to probate the estate of her deceased husband. The Complainant alleged that, after paying the retainer, the Appellant failed to update her on the matter. Later, she discovered that probating the estate was unnecessary, but yet the Appellant had charged her for the probate.

In 2018, the Complainant lodged a complaint with the Respondent against the Appellant. The Appellant, after being questioned, admitted that he made a mistake in charging the Complainant and agreed to reimburse her within 21 days. The Appellant purportedly sent a bank draft representing partial payment, but this cheque could not be processed in the U.S.A. The Appellant finally reimbursed the Complainant in 2021, during the course of a hearing before the Respondent.

Although the Appellant promised to provide a written statement, he did not but gave evidence at the hearing.

In February 2023, the Respondent found that the Appellant's failure to properly advise the Complainant, the failure to correct that error, and the failed attempt to reimburse her constituted professional misconduct. The Appellant was suspended for 6 months and ordered to pay fixed costs of $1,000.00 within 30 days to The Bahamas Bar Association. The Appellant was dissatisfied and appealed.

Held: Appeal dismissed. The Appellant is ordered to pay the costs of this appeal, to be taxed if not agreed.

The Appellant's contention that the Respondent found the Appellant guilty of professional misconduct but did not identify which provision of the Legal Profession Act ("the Act") was applicable is without merit. The Respondent in fact highlighted the applicable section.

The Appellant's contention that the Respondent 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 Respondent cited the authorities to reinforce its duty to deal with acts of professional misconduct. The Respondent was dealing with the professional misconduct of the Appellant and the quotation was relevant to this case.

The Appellant's allegations of bias were unsubstantiated and/or without any merit.

Although the Appellant contends that his punishment is excessive when compared with former rulings of tribunals, he cited no other rulings or cases. Therefore, he failed to make out this contention.

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. However, the procedure to be adopted to satisfy the duty of fairness will vary from case to case, and there is nothing inherently wrong in making oral submissions on sentencing, on the provisional basis that they will be operative if the appeal succeeds. The Appellant's allegation that he was never given an opportunity to offer a plea in mitigation is dismissed, as he was allowed to make his plea in mitigation orally and on a provisional basis in case the complaint against him was made out.

The Appellant's contention that no reasons were provided for the sentence that the Tribunal imposed on him is without merit. The Tribunal considered the range of orders or punishments open to it and heard submissions from the Marshall and the Appellant on the appropriate penalty to be imposed.

Dominique Moss v The Queen 2013 UKPC 32; applied
Mariaddan v Solicitors Regulation Authority (Admin.) [2023] EWHC 207; considered
Re Fields [2016] 3 LRC 110; considered
Wayne Munroe Q.C. and Donovan Gibson v Bahamas Bar Council SCCiv. App. 162 of 2019; considered

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JUDGMENT

Judgment delivered by the Honourable Mr. Justice Smith, JA:

1. Domek Rolle ("the Appellant") had been found guilty of improper conduct by a Disciplinary Tribunal of The Bahamas Bar Council ("the Tribunal").

2. The Appellant now appeals the decision of the Tribunal. By his Supplemental Notice of Appeal, the Appeal raised 12 grounds of Appeal. However, in his written submissions, the Appellant raised four (4) issues for the decision of this appeal and, in his oral submissions, he raised a further issue with respect to the mitigation of his sentence.

3. I find no merit in any of the issues raised and I would dismiss this appeal and order the Appellant to pay the costs of the appeal to be taxed by the Registrar in default of agreement.

FACTS

4. One Jean Phelps (the Complainant) had paid $5,500.00 to the Appellant in July 2016 as a retainer. The Appellant was hired to reseal a grant of probate, advertise, and prepare a Deed of Assent in favour of the Complainant with respect to the estate of her deceased husband. The only property that the deceased husband had in The Bahamas was a parcel of land in Exuma.

5. The Complainant alleged that, after payment of the retainer, the Appellant failed to communicate with her with respect to the progress of the services he was supposed to perform.

6. The Complainant then contacted U.S. attorneys and discovered some two (2) years later that there was no need for any grant of probate or Deed of Assent; since she was a joint tenant of the property in Exuma and, by the law of survivorship, she automatically became the de facto

owner of the property in question. Therefore, the Appellant had charged her for services which were unnecessary.

7. The Complainant then lodged a complaint with the Respondent against the Appellant in September 2018.

8. Pursuant to the Legal Profession Act (Ch. 64), the Ethics Committee of the Bar Council sent a letter to the Appellant on 10 October 2018. That letter forwarded the complaint to the Appellant and he was summoned to appear before the Committee on 5 July 2019. At that hearing, the Appellant acknowledged that he made what he termed as "a rookie mistake". He also accepted that he only realized his mistake when the Ethics Committee pointed this out to him.

   Of note is a quote from that hearing where he was asked by one Mr. Maillis:- "*so when the client brought it to your attention you had made a mistake. You just left it.*"

   The Appellant responded:- "*No, when I looked at the file I still believed I did the right thing until it was pointed out to me*."

9. The Appellant then promised to reimburse the Complainant $5,000.00 within 21 days but failed to do so. As a result, on 10 August 2019, the Ethics Committee determined that the complaint should be referred to the Tribunal for further action.

10. In September 2019, the Appellant purported to send a Bank Draft of B$3,000.00 to the Complainant's U.S. attorney but this cheque could not be processed by the attorney in the U.S.

11. The Tribunal then heard the complaint on 2 June 2021, 4 August 2021 and 25 August, 2021.

12. The Appellant did not reimburse the Complainant the agreed sum of US$5,000.00 until August 2021, during the course of the Tribunal's hearing.

13. It should be noted that although the Appellant had undertaken to provide a written statement to the Tribunal, he failed to do so but chose to give evidence at the hearing on 25 August 2021.

14. The Tribunal delivered its decision in respect of the complaint on 8 February 2023.

15. In its decision, the Tribunal considered section 29 (iv) of the Legal Professional Act which states that it shall be improper conduct if an attorney *"contravenes any regulation under this Act as to professional practice, conduct or etiquette of counsel and attorneys, or the keeping of accounts by them."*

Further, of specific relevance to this matter, the Tribunal examined Rules I and II of the Code of Professional Conduct of the Bahamas Bar Association, which provide:-

> **"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 and services 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."**

16. The Tribunal found that the failure of the Appellant to properly advise the Complainant of the law and effect of the joint tenancy and the failure to correct that error, coupled with the failed attempt to make good his obligations to the Complainant by payment of a Bahamian Dollar manager's cheque constituted **"breaches of Rules I and II of the Code of Professional Conduct expected of attorneys <u>of the most serious and egregious sort</u>."** (Emphasis added)

17. Specifically, the Tribunal made the following observations:-

> **"In taking money and expending effort towards a wholly unnecessary purpose the attorney demonstrated <u>a level of incompetence that cannot be ignored</u>."** (Emphasis added)
>
> **… Nothing short of full and immediate refund and written apology would have sufficed in the current circumstances for what is <u>negligence at an alarming scale.</u>"** (Emphasis added)
>
> **"It is mystifying as to why funds wired to a client in US Dollars would be paid by way of a Bahamian Dollar Manager's Cheque. If it is a legitimate error, it points to <u>a further level of negligence and incompetence</u> that goes to the very heart of this complaint."** (Emphasis added)

18. The Tribunal then made reference to its disciplinary powers under section 38 of the Legal Profession Act and ordered that the Appellant be suspended for 6 months and pay the fixed costs of the proceedings in the sum of $1,000.00 within 30 days to The Bahamas Bar Association.

19. The issues which the Appellant identified in his written submissions for the decision of this Court were stated as follows:-

    1. Whether or not the Tribunal satisfied the grounds to find the Appellant guilty of improper conduct?

2. Whether or not the Tribunal's proceedings were impressed with bias and breached the rules of natural justice?
3. Whether or not the punishment by the Tribunal was overly excessive?
4. Whether or not the Tribunal erred in law in relying on the authority of **Re Fields** [2016] 3 LRC 110?

20. I will deal with these issues in the following order, issues 1, 4, 2, and finally 3. I will then examine an expansion on issue 3 that was raised in oral submissions.

ANALYSIS

Issue 1. *Re: The Finding of Improper Conduct by the Tribunal*

21. The Appellant contends that *"The Tribunal in its Ruling found the Appellant guilty of Improper Conduct but has not identified which provision of section 29 of the Legal Profession Act was applicable to its ruling."*

22. This argument is without merit. At paragraph 15 of the ruling, the Tribunal highlighted that it considered section 29 (a) (iv) of the Act which, as stated before, provided that it shall be improper conduct if an attorney *"contravenes any regulation under this Act as to professional practice, conduct or etiquette of counsel and attorneys, or the keeping of accounts by them."* More specifically, as stated at paragraph 15 above, in paragraph 16 of its ruling, the Tribunal referred to the relevant rules of the Code of Professional Conduct which they considered were breached by the Appellant and which thus amounted to professional misconduct on his part.

Issue 4: *Reliance on **Re Fields** and **Re Alleyne***

23. The Appellant contends that the Tribunal wrongly relied on the authorities cited by the Tribunal since those authorities can be distinguished. The Appellant goes on to contend that those authorities deal with findings of dishonesty whereas his matter was not one where dishonesty was found.

24. This argument is without merit and proceeds on an erroneous understanding of the authorities referred to by the Tribunal.

25. At paragraph 23 of its ruling, the Tribunal referred to the following quotation:-

> **"It is against this very kind conduct that Gibson CJ spoke in the case of Re Fields [2016] 3 LRC 1 at paragraph 64 where he said:**

'As to the amount of money, we agree with Mr. Gale QC that whether the amount is 5 cents or $1m, the dishonesty of any attorney brings opprobrium to the entire profession against which the Bar Association must react. In Re Alleyne (11 February 1994, unreported; Carilaw BB 1994 CCA 9) Husbands JA (as he then was) stated:
'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." (Emphasis added)

26. As the emphasized part of the quote shows, the Tribunal cited the authorities to reinforce the duty of the Bar Council to deal with acts of professional misconduct.
In this case, the Tribunal was dealing with the improper conduct of the Appellant; as such, the quotation is very relevant to this case.

Issue 2: *Bias in the Tribunal Proceedings*

27. This is a very diffuse and unsubstantiated allegation that the Appellant attempts to advance. There are 3 limbs of alleged bias in the written submissions.

28. First, the Appellant alleges that the Marshall, Mr. Moree, who presented the complaint on behalf of the Bar Council to the Tribunal, had a **"vendetta"** against him and appeared to be speaking as a decision-maker.
This allegation is wholly unmeritorious because:
(a) The duty of the Marshall is to present the case to the Tribunal. He is not a part of the Tribunal. Further, there is no allegation that he was in any way involved in the deliberations of the Tribunal. Therefore, there is no case made out that the decision maker, the Tribunal, was biased or that Mr. Moree was in any way a decision maker in respect of this complaint.

(b) In any event, it is the duty of the Marshall to present the complaint to the Tribunal. In this regard, he is like a prosecutor who must have a genuine belief in the complaint being presented, and a duty to present the best case. Any alleged "vendetta" on his part is irrelevant to the decision and deliberations of the Tribunal and cannot constitute a case of bias.

29. Second, there is an allegation that the Tribunal members kept interrupting and badgering him. However, the instances of alleged interruptions and badgering that the Appellant cites, were genuine requests for clarification of his evidence which he chose to present orally.

30. Third, and this is related to the allegation of badgering, the appellant alleges that the Tribunal denied him an adjournment to present his case. This too is an unsubstantiated allegation. The Tribunal had granted the Appellant an adjournment to file a witness statement or an affidavit, and he failed to do either. Eventually they asked him to proceed with oral evidence in support of his case. In any event, the Appellant expressly agreed to proceed with his oral evidence on 25 August 2021. In fact, when asked by the Tribunal about his readiness to proceed, the following exchange was noted:

> **"McKay: Mr. Moree has indicated that the Bar is prepared to proceed today.**
> **Mr. Rolle: <u>I'm fine with that</u>, My Lady…**
> **Mr. Unwala: Are you going to give sworn evidence**
> **Mr. Rolle: I can give sworn evidence… <u>I don't want to make an excuse to the panel I will just give evidence</u>**." (Emphasis added)

31. The allegations of bias in the Tribunal are without merit.

Issue 3. Whether the Punishment by the Tribunal was Overly Excessive

32. The Tribunal found that the Appellant was guilty of improper conduct and ordered that he be suspended for six (6) months and pay the fixed costs of the proceedings in the sum of $1,000.00 to the Bahamas Bar Association within thirty (30) days.
The Appellant contends that this punishment is excessive when compared with former rulings of Tribunals. However, the Appellant cited no other rulings or cases. Therefore, he failed to make out this contention.

33. The Appellant then went on to allege that he was never given an opportunity to offer a plea in mitigation. But again, this was certainly not the case.
An examination of the transcript of the proceedings before the Tribunal of 25 August 2021 shows that Mr. Moree (the Marshall) on page 32 suggested that this was a serious case of improper conduct that merited a suspension.
Thereafter, from pages 32 to 39 of that same transcript, the Appellant addressed the Tribunal as to the penalty to be imposed (if any). He expressly mentioned that this was a case of a mistake on his part that did not show a lack of integrity; further, that he was truly apologetic and had made compensation to the Complainant. He also, on several occasions, urged the Tribunal to consider a fine rather than a suspension.
The Appellant did in fact make a plea in mitigation.

34. The law on this issue has been succinctly stated in the case of **Wayne Munroe Q.C. and Donovan Gibson v Bahamas Bar Council** SCCiv. App. 162 of 2019 where, at paragraphs and 33, Sir. Michael Barnett, P stated;

> **"32. In our judgment, 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 is certainly 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."**

As stated before, the Appellant was given and availed himself of the ample *"opportunity to make representation as to what if any punishment should be imposed upon him."*

35. Further, as the Privy Council noted in the case of **Dominique Moss v The Queen** UKPC 32**,** the procedure to be adopted to satisfy the duty of fairness will vary from case to case, and there is nothing inherently wrong in making oral submissions on sentencing on the provisional basis that they will be operative if the appeal succeeds. Lord Hughes stated at paragraph 7:

> **"7. The procedure which may be adopted in order to satisfy this duty will no doubt vary from case to case, but need not involve delay or further expense. If judgment on the** (sic) **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. <u>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</u> or, if necessary, submissions can be invited, either orally or in writing, after the reserved judgment is handed down. <u>In all cases, counsel mounting an appeal against conviction should be prepared to deal with the point at the oral hearing.</u> 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)

36. As stated before, the Appellant was allowed to make his plea in mitigation orally, and on a provisional basis, in case the complaint against him was made out. There was no fault in the procedure adopted by the Tribunal in this case.

37. In oral submissions, the Appellant went on to contend that no reasons were provided for the sentence that the Tribunal imposed on him. This contention is without merit.

38. As stated before, the Tribunal had determined at paragraphs 19 to 22 of its decision that the action of the Appellant demonstrated *"a level of incompetence that cannot be ignored",*

"negligence at an alarming rate" and breaches of the Code of Conduct *"of the most serious and egregious sort."*

The Tribunal, at paragraph 25 of its ruling, then considered the range of orders or punishments open to it. Further, they had ample submissions from the Marshall and the Appellant on the appropriate penalty to be imposed; at paragraph 26, they set out the penalty.

39. Given the above, it could hardly be contended that the decision was somehow devoid of reasons.

40. When one considers the proceedings and ruling of the Tribunal, as a whole, there is little doubt that the Tribunal as a specialist body, took into account all the evidence and submissions. This decision should not be set aside, even if we would have made a different decision.

The citation by counsel for the Respondent of the case of **Mariaddan v Solicitors Regulation Authority (Admin.)** [2023] EWHC 207 at paragraph 26 is appropriate here:

> **" … The well-established approach is that an appellate court should not interfere with the finding of fact unless satisfied that the conclusion is "plainly wrong": see McGraddie v McGraddie [2013] UKSC 58 and Henderson v Foxworth Investments Ltd [2014] UKSC 41 that means it must either be possible to identify "a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence" per Lord Reed in Henderson at [67]; or if there is no such identifiable error and the question is one of judgment about the weight to be given to the relevant evidence, the appellate court must be satisfied the judge's conclusion "cannot reasonably be explained or justified" [67]). Lord Reed made clear that in determining whether a decision cannot reasonably be explained or justified, "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge would have reached." Again, we emphasise, that is a high threshold: see to this effect, Perry v Rayleys [2019] UKSC 5 at [63] Lord Briggs).**
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> **33. 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."

41. I am therefore of the view that, on the present facts, the contention that the Tribunal gave no reasons for imposing the penalty it did was not made out on the facts. Alternatively, I am of the view that the decision of the Tribunal as to the penalty imposed was properly made and ought not be set aside.

Conclusion

42. Having regard to the foregoing, I would dismiss this appeal and order the Appellant to pay the costs of this appeal to the Respondent, to be taxed by the Registrar in default of agreement.

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THE HONOURABLE MR. JUSTICE SMITH, JA

43. I agree.

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THE HONOURABLE SIR MICHAEL BARNETT, P

44. I also agree.

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THE HONOURABLE MR. JUSTICE TURNER, JA