

**COMMONWEALTH OF THE BAHAMAS  
IN THE COURT OF APPEAL  
SCCivApp. No. 53 of 2023**

**B E T W E E N**

**TROY LEVAN KELLMAN**

**Appellant**

**AND**

**THE BAR COUNCIL**

**Respondent**

**BEFORE:**           **The Honourable Sir Michael Barnett, P  
The Honourable Mr. Justice Evans, JA  
The Honourable Mr. Justice Turner, JA**

**APPEARANCES:**   **Mr. Maurice Ginton, KC, with Ms. Meryl Ginton Counsel for the  
Appellant**

**Mr. Sean Moree, KC, with Ms. Peteche Mitchell, Counsel for the  
Respondent**

**DATE:**             **1 November 2023; 5 December 2023; 23 January 2024**

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*Civil appeal – Improper Conduct – Bar Council - Ethics Committee - Disciplinary Tribunal - Struck off the Roll – Due Process – Publication of Judgment - Whether the Ethics Committee was properly constituted - Whether a retired Judge can serve on the Ethics Committee - Sections 3,20,30,36 & 54 of the Legal Profession Act – Regulation 4 of the Legal Profession (General) Regulations*

Two complaints were made to the Bar Council against the conduct of Troy Kellman, the appellant. The complaints were made by the Bahamas Mortgage Corporation and Colina Mortgage Corporation Limited. The complaints relate to the appellant's conduct whilst acting as an attorney on both sides of a real estate transaction. The Bahamas Bar Council referred both complaints to the Ethics Committee, chaired by Justice Rhonda Bain, a retired Justice of the Supreme Court.

Having received both complaints, the Ethics Committee informed the appellant via letters and requested his response by a specified date. The appellant failed to respond by the date specified in the first letters which resulted in additional letters being sent seeking his response. After the appellant repeatedly failed to respond to both complaints, the Ethics Committee referred the matters to the Disciplinary Tribunal for a hearing.

Following a hearing, the Disciplinary Tribunal published its decision which ordered that the appellant be struck off the Roll forthwith. The appellant now appeals the decision of the Ethics Committee to refer the matter to the Disciplinary Tribunal on the basis of jurisdiction, due process and his right to appeal.

*Held:* appeal dismissed.

The appellant challenges the constitution of the Ethics Committee on the basis that a retired Supreme Court Judge is a member and Chairman. There is nothing in the Legal Profession Act (“LPA”) that prevents a retired Judge from serving on the Ethics Committee. That Judge is still a Counsel and Attorney of the Supreme Court and thus by section 3, a member of the Bar.

There is no substance regarding the complaint that relates to due process as the appellant was given ample opportunity to make representation to the Ethics Committee. He could have made his case before the Ethics Committee, but simply ignored the Ethics Committee’s letters. Further, the appellant participated in the proceedings before the Disciplinary Tribunal and did not challenge the Tribunal’s jurisdiction to investigate the complaints.

Regarding the appellant’s claim that he has been effectively denied the effectiveness of his right to appeal by the publication of the decision by the Disciplinary Tribunal, section 36(5) of the LPA, which is a statutory requirement, requires that the decision of the Tribunal shall be given in public.

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## J U D G M E N T

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### **Judgment delivered by The Honourable Sir Michael Barnett, P:**

1. This appeal arises out of disciplinary proceedings under the Legal Profession Act (“the LPA”), which resulted in the appellant, a Counsel and Attorney of the Supreme Court, being struck off the Roll.

### **The Background Facts**

2. Two complaints were made to the Bar Council against the conduct of the appellant. The complaints were made by the Bahamas Mortgage Corporation (“BMC”) and Colina Mortgage Corporation Limited (“Colina”). The complaints related to the conduct of the appellant whilst acting as an attorney on both sides of a real estate transaction. With respect to Colina, that company agreed, as mortgagee, to sell a parcel of land to Ricardo Rolle or a company beneficially owned by him. With respect to BMC, the dispute related to a mortgage loan by BMC to a purchaser of the land from Rolle or a company beneficially

owned by him. The appellant acted as Counsel for BMC in that mortgage transactions. The merits of the complaint are not the subject matter of this appeal.

3. The complaints were referred to an Ethics Committee (“the Ethics Committee”) of the Bar Association. That Ethics Committee was chaired by Miss Rhonda Bain, a retired Justice of the Supreme Court. Justice Bain retired because she had attained the constitutional age for demitting office under Article 96 of The Constitution.
4. On 22 November 2019, the Ethics Committee wrote the appellant a letter with respect to the complaint by BMC. The letter was in the following terms:

**“Dear Mr. Kellman**

**Re: Notice of Complaint**

**The Ethics Committee of The Bahamas Bar Association was established under section 30 of the Legal Profession Act, Chapter 64, Revised Laws of The Bahamas. The functions of the Ethics Committee are, inter alia, to receive complaints in respect of the conduct of counsel and attorneys; and to determine whether there exists reasonable grounds for the making 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.**

**The Ethics Committee has received a complaint against you from The Bahamas Mortgage Corporation. The basis of the complaint is that in 2013 you were instructed by The Bahamas Mortgage Corporation to prepare a mortgage for Caleb Dorsett and Shamene Bain. That you submitted an opinion on title advising The Bahamas Mortgage Corporation that the title was good and marketable. That you were negligent by not advising The Bahamas Mortgage Corporation that you acted for Lion Management Company Limited, the company selling the property to Caleb Dorsett and Shamene Bain. Further, you failed to complete the application for exemption from stamp duty for new purchasers and did not stamp and record the conveyance or the mortgage even though you received the funds from the Bahamas Mortgage Corporation. That you were aware that Lion Management Limited did not pay the balance of the**

**purchase price for the property to Colina Insurance Limited.**

**A copy of the complaint is attached for your information.**

**Regulation 14 of the Legal Profession (General) Regulations provides —**

**‘14. (1) The Ethics Committee shall consider complaints against attorneys made in writing and shall notify the attorney concerned in writing who shall respond in writing within fourteen days.**

**(2) Failure by the Attorney to respond within the specified time may result in the Committee making a determination without further reference to the Attorney.**

**(3) The Ethics Committee may after receiving the attorney’s response either**

**(a) hear parties in the matter;**

**(b) request further representations.**

**(4) The Ethics Committee shall advise the complainant of the decision of the Committee.’**

**You are requested to respond to the Ethics Committee on or before Monday 16<sup>th</sup> December 2019. If the Ethics Committee does not receive your response by the date specified, the Ethics Committee shall make a determination of the complaint without further reference to you pursuant to regulation 14 of the Legal Profession (General) Regulations.**

**Please acknowledge receipt of this letter by signing and returning the enclosed copy letter.**

**Yours sincerely,”**

- 5. The appellant did not reply to that letter.**
- 6. On 1 June 2020, the Ethics Committee sent a further letter to the appellant. The letter stated:**

**“Dear Mr. Kellman**

**Re: Complaint lodged by Shirl Deveaux of The Bahamas Mortgage Corporation**

**We refer to the complaint lodged against you dated November 20<sup>th</sup> 2019 by Shirl Deveaux of The Bahamas Mortgage Corporation.**

**A copy of the complaint was forwarded to you on November 22<sup>nd</sup>, 2019. To date you have not responded to the complaint.**

**The Ethics Committee has determined that there exists reasonable grounds for the making of the complaint against you and has referred the matter to the Disciplinary Tribunal.**

**You will be advised by the Disciplinary Tribunal of the date of hearing.**

**Yours sincerely,” [Emphasis added]**

7. With respect to the complaint by Colina, on 9 October 2020, the Ethics Committee wrote a letter to the appellant in the following terms:

**“Dear Mr. Kellman**

**Re: Notice of Complaint**

**The Ethics Committee of The Bahamas Bar Association was established under section 30 of the Legal Profession Act, Chapter 64, Revised Laws of The Bahamas. The functions of the Ethics Committee are, inter alia, to receive complaints in respect of the conduct of counsel and attorneys; and to determine whether there exists reasonable grounds for the making 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.**

**The Ethics Committee has received a complaint against you from Colina Mortgage Corporation Ltd. The basis of the complaint is that you represented the complainant as vendor and Ricardo Rolle as purchaser in a transaction in 2012. That you have failed to complete the transaction on behalf of the complainant. That subsequently it was discovered that you recorded the conveyance to the Purchaser and failed to ensure that Colina was paid the Purchase price.**

**A copy of the complaint is attached for your information.**

**Regulation 14 of the Legal Profession (General) Regulations provides —**

**‘14. (1) The Ethics Committee shall consider complaints against attorneys made in writing and shall notify the attorney concerned in writing who shall respond in writing within fourteen days.**

**(2) Failure by the Attorney to respond within the specified time may result in the Committee making a determination without further reference to the Attorney.**

**(3) The Ethics Committee may after receiving the attorney’s response either**

**(a) hear parties in the matter;**

**(b) request further representations.**

**(4) The Ethics Committee shall advise the complainant of the decision of the Committee.’**

**You are requested to respond to the Ethics Committee on or before Friday October 23<sup>rd</sup>, 2020. If the Ethics Committee does not receive your response by the date specified, the Ethics Committee shall make a determination of the complaint without further reference to you pursuant to regulation 14 of the Legal Profession (General) Regulations.**

**Please acknowledge receipt of this letter by signing and returning the enclosed copy letter.**

**Yours sincerely,”[Emphasis added]**

- 8. The appellant did not respond to that letter either. The Ethics Committee sent another letter dated 24 November 2020 to the appellant in the following terms:**

**“Dear Mr. Kellman**

**Re: Complaint lodged by Colina Mortgage Corporation Ltd.**

**We refer to the complaint against you dated May 22<sup>nd</sup> 2019, by Colina Mortgage Corporation Ltd.**

**The complaint was forwarded to you on October 9<sup>th</sup>, 2020. You have not responded to the complaint.**

**Please be advised that if you fail to respond to the complaint by November 30<sup>th</sup> 2020 the Ethics Committee would make a determination of the complaint without further reference to you.**

**Yours sincerely,”**

9. Again, the Ethics Committee received no response and wrote to the appellant by letter dated 22 December 2020. That letter was in the following terms:

**“Dear Mr. Kellman**

**Re: Complaint lodged by Colina Mortgage Corporation Ltd.**

**A copy of the complaint was forwarded to you on October 9<sup>th</sup>, 2020. You have not responded to the complaint. On November 24<sup>th</sup> 2020, we wrote to you again by letter with respect to the complaint. You have failed to respond to any communication from the Ethics Committee.**

**The Ethics Committee has determined that the complaint be referred to the Disciplinary Tribunal pursuant to section 30(1)(a) of the Legal Profession Act.**

**You will be advised by the Disciplinary Tribunal of the date of hearing.**

**Yours sincerely,”[Emphasis added]**

10. Hearings before a Disciplinary Tribunal, which was constituted by Justice Renae Mackay, Stephanie Unwala, Alexander Maillis and James Bain, began in May 2021. At times, the appellant appeared before the Disciplinary Tribunal acting on his own behalf and at other times, he appeared with Counsel Carlson Shurland.
11. At no time during the hearing did the appellant challenge the jurisdiction of the Disciplinary Tribunal to investigate the complaint. The appellant agreed that the two complaints from BMC and Colina could be heard together.
12. The Tribunal received evidence from representatives of both Colina and BMC as well as from the appellant.

13. On 8 February 2023, the Disciplinary Tribunal published a judgment whereby it ordered that the appellant be struck from the Roll forthwith.
14. On 22 March 2023, the appellant filed a Notice of Appeal. The Notice is in the following terms:

**“TAKE NOTICE that the Court of Appeal will be moved on the 10th day of , A. D., 2023, at 10:00 a.m. o’clock, or so soon as Counsel can be heard, by Counsel on behalf of the above-named Appellant on appeal in virtue of section 54(1)(c) of The Legal Profession Act (the “Act”) from the decisions of the Ethics Committee of Bar Council established pursuant to the provisions of the Act, and the Disciplinary Tribunal (Madam Justice Renae McKay, Mrs. Stephanie Unwala, Mr. Alexander Maillis, and Mr. James Bain) dated 8th February 2023, for an Order that the said decisions may be set aside or varied or remitted to Bar Council or to the Disciplinary Tribunal (differently constituted) as the case may be”.**[Emphasis added]

15. The Notice then sets out a number of grounds. They are:

**“1. In fraud of the Act, The Respondent (“Bar Council”) breached paragraphs 1 and 4 of the Fifth Schedule in constituting the Ethics Committee of the Bar Council (the “Committee”) appointing a former (retired) Supreme Court Judge a member and Chairman. It is submitted, a former (retired) Judge who, whilst “not less than five years standing at the Bar” and not otherwise disqualified, nonetheless on a proper interpretation of the Act, is no longer (or ceases to qualify) as a “member of the Bar” for purposes and within the meaning of paragraph 1 of the Fifth Schedule and other provisions of the Act.**

**2. The Act in making it exclusively the Committee’s function to determine whether reasonable grounds exist for making the complaint respecting the conduct of a counsel and attorney and, if so, to refer that complaint to the Disciplinary Tribunal (the “Tribunal”) if it 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” also provides that sects. 36(2), (3), (4), (5), (6), (7) and (8), and 37(1), (4)**



and (5) thereof are to govern its proceedings. The Committee misconceived its function as not strict as to prohibit it ignoring provisions of the Act designed to ensure fairness of procedure in determining whether a complaint is competent; instead it saw the right to fairness of procedure (including having a reasonable opportunity to be heard) as not violated if counsel and attorney whose conduct is being impugned (as is the Appellant's) is afforded opportunity to provide requested information timely as seen from letters of 22nd November 2019 and 16th January 2020 citing Reg. 14 of The Legal Profession (General) Regulations, 2004.

3. The Appellant submits that reference in the Committee's letter invoking Reg. 14. signed "Justice Rhonda P. Bain (Retired), Chairman, Ethics Committee", shows the Committee at an early stage in its function, non compliant with provisions of the Act as to hearing of matters and a counsel and attorney's right to protection of the law and due process; but also knowingly or negligently abusing legal procedure in derogation of that right. Whilst sect. 36(6) of the Act provides that a hearing, whether by the Committee or the Tribunal, may be adjourned at any time, nowhere is there power to altogether dispense with the hearing of a complaint. Sect. 36(3) is very clear on rights of counsel and attorneys and the Committee's ancillary powers.

4. The Appellant submits that inasmuch as the Act prescribes a hearing in relation to a complaint if and before the Committee determines whether reasonable grounds exist for making one; if so, to consider and determine the level of severity of penalty to be imposed, if any, he did not have a right of representation. In mandating hearings of complaints in private, sect. 36(4) of the Act recognised value in a counsel and attorney's personal integrity and a legal right to defend a professional reputation.

5. The Appellant received no notification from the Committee of a hearing of the complaints lodged against him, that resulted in their determination and referred to the Tribunal. The Appellant had a legal right to be represented (if he wished to be) and was entitled to

transcripts of the Committee's proceedings. Thus, he cannot have failed to appear on a hearing of a complaint if the Committee failed to issue a required notice of a hearing that it did not hold or intend to hold, and which, as a function the Act imposes upon it, cannot be dispensed with or waived. It is submitted, Reg. 14 did not otherwise empower the Committee to disregard its duty in that regard.

6. If, properly construed, the Act assigned the Committee alone to determine a complaint's suitability and to (if so warranted) refer it to the Tribunal (within the terms of sect. 2 of the Act) to determine whether alleged conduct constitutes improper and/or "unbefitting a counsel and attorney" for sect. 29 purposes, the Committee, to the Appellant's irrecoverable prejudice was preempted of its function as a result of an errant ad hominem statements contained in the decision of the trial Judge, dated 23rd day of February, A. D. 2021 made in civil Supreme Court action 2013/CLE/gen.01915, that his "behavior appears to be a criminal offence involving possible fraud. I therefore further order that a copy of the decision be forwarded by the Registrar to (i) The Bahamas Bar Association; (ii) The Director of Public Prosecutions for investigations concerning any breach of the Penal Code with the hope that the matter is in fact given the attention it ought to receive."

7. The Committee In fact, it appears, not only had its function and duty to determine the sufficiency of a complaint in respect of conduct of a counsel and attorney and severity of penalty such conduct should attract beyond that of reprimand morphed into the trial Judge's findings, but it also assumed the complaints lodged against the Appellant, if proved, warrant such penalty.

8. However inadvertent an error it was on Bar Council's part to constituted a former (retired) Judge of the Supreme Court a member of the Committee of which she was also Chairman, or the trial Judge's comment on the Appellant's conduct being of a criminal nature possibly involving fraud, the imprimatur of both on the Committee's determination whether it constituted improper and/or "unbefitting a counsel and attorney"

only served to undermine and prejudice his case in the Committee's eyes, as the Appellant submits, respectfully, that it in fact did.

9. It follows from grounds 2, 3, and 4 the Committee did not summon and examine the Bahamas Mortgage Corporation and Colina Mortgage Corporation Ltd. (the "Complainants") feeling no need to determine whether reasonable grounds existed, as sect. 30(1)(b) of the Act requires; rather, without the hearing prescribed by the Act explicitly and implicitly, the Committee (to the Appellant's detriment and prejudice) proceeded to refer the complaints without any longer having to consider (given the trial Judge's finding) that should the complaints be established before the Tribunal the facts would warrant a penalty or order other than a reprimand.

10. The Committee misinterpreted and/or misapplied provisions of the Act prescribing its duty to carry out its particular function of initially determining whether in respect of the conduct of a counsel and attorney, there exists reasonable grounds for making it, including a duty to require that the complaint be substantiated under oath; otherwise, "no disciplinary action on a complaint by or on behalf of a client or former client of a counsel and attorney shall be taken by the ..Tribunal," The Appellant submits that as a result of the Committee's failure and/or error and/or abdication of duty in that regard, he was deprived of protection of the law and due process.

11. The Tribunal wrongly adopted as applying to a hearing of the referred complaints the approach which Bar Council's attorney marshaling evidence before the Tribunal noted on the record (pg. 4 of the 16th June 2021 transcript), ignoring entirely sects. 36(2), (3), (4), (5), (6), (7) and (8), and 37(1), (4) and (5) of the Act and contents of the Appellant's sworn Affidavit, namely that: "the evidence in this matter would not be extensive because it has always been the a practice of this Tribunal where the dispute has been ventilated by the Supreme Court, or the Court of Appeal, or the Privy Council it would only deviate from those findings in the most exceptional

circumstance.” the complaints’ sufficiency having not yet been determined by the Committee to be referred to it, in adopting the approach that it did, the Tribunal abdicated its function and in breach of duty fairness of procedure mandated by the Act and as a result they both made and acted upon decision they were not lawfully entitled to make or could make in the circumstances of material presented them, in particular: the Committee’s decision to refer the complaints to the Tribunal and the Tribunal’s decision finding that the Appellant was guilty of conduct in contravention of provisions of the Act, and to order that his name be struck from the Roll forthwith.

12. In the premises, the Committee and the Tribunal both failed to carry out their respective functions under provisions of the Act depriving the Appellant protection of the law and due process.

14. Bar Council has failed to institute and enforce the necessary effective measures as would, consistent with the objective for which sect. 36(4) and sect. 40 of the Act were enacted for safeguarding the personal integrity and professional reputation of a counsel and attorney from any undue premature publicity following decision that is subject to being appealed in exercise of a right of appeal conferred, pursuant to sect. 54 of the Act. As a consequence of Bar Council’s failure in that regard, any utility to be had and reasonably expected from the moratorium period within which the Appellant had to exercise his right of appeal following the Committee’s and the Tribunal’s decisions and having this Court’s jurisdiction to review them on appeal, is lost imperiling this appeal as being from foregone conclusions.”

16. There was no ground numbered 13.

#### **Discussion**

17. Section 54(1) of the LPA provides:

“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.”**

18. Although the Notice of Appeal purports to be **“on appeal from....the decisions of the Ethics Committee and the Disciplinary Tribunal”**, section 54 (1)(c) (which is the section referred to in the Notice of Appeal) only gives this Court jurisdiction to hear an appeal from the Disciplinary Tribunal and not from the Ethics Committee. In my view, an appeal from a decision of the Ethics Committee only lies where there is an appeal against a decision of the Ethics Committee under section 30 (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 so by way of an application for judicial review to the Supreme Court and not by an appeal to this Court.
21. Although there are fourteen grounds of appeal, many of them are duplicative and reformulations of another ground. Helpfully, Counsel for the appellant grouped the grounds under three headings. They are (1) the threshold issue, (2) the due process issue and (3) the ancillary issue. I will consider the appeal under those headings.
22. Before dealing with those grounds, it is important to note that at the beginning of the appeal, Counsel for the appellant made it clear that in this appeal, they are not challenging the merits of the decision of the Disciplinary Tribunal. He said:

**“Let me begin this way. My Lordship would note that this appeal does not in any way take issues with the alleged conduct**

or misconduct of the appellant which would have supported the complaints. And that is not because we accept them as being true or as being verified in the way that lawyers use those words. And that is because we do not think that those matters are rightly before this court at this stage in light of the issues which this appeal focuses on. And there are three issues, two of them we suspect -- we submit, are dispositive -- or potentially dispositive of the appeal. The third is a little bit more nuanced and yet it is probably an issue of first impression. I will say more about that at a later date. But for our purposes we say this: That we are not here to determine whether the substance of the so-called allegations against Mr. Kellman were properly laid out because we say there was no hearing, certainly not at the initial stage. And that is where we begin our analysis, which is at the threshold” [Emphasis added]

#### **Threshold issue**

23. The appellant challenges the decision of the Disciplinary Tribunal on the basis that it had no jurisdiction to determine any complaint referred to it by an Ethics Committee which was improperly constituted.
24. The thrust of the appellant’s argument is that the Ethics Committee was not properly constituted as a retired justice of the Supreme Court cannot be a member of the Ethics Committee.
25. Section 30 of the LPA provides:

**“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.**

**(2) The provisions of the Fifth Schedule shall have effect as to the constitution of the Ethics Committee and otherwise in relation thereto.”**

**26.** The Fifth Schedule of the LPA provides:

**“1. The Bar Council shall at its first meeting or no later than the month of February following upon the election of its members, which ever is the earlier, proceed to constitute the Ethics Committee by appointing to the Committee five members of the Bar Association of not less than five years standing at the Bar.”**

**27.** Section 3 of the LPA provides:

**“3. (1) All persons admitted to practice other than persons specially admitted shall form and be members of The Bahamas Bar Association.**

**(2) Notwithstanding subsection (1), a counsel and attorney may at any time by notice in writing to the Bar Council cease to be a member of the Bar Association.**

**(3) A counsel and attorney who has ceased to be a member of the Bar Association under subsection (2) is eligible for readmission in the Association subject to compliance with such conditions as the Bar Council may prescribe.**

**(4) The Bar Association shall in accordance with section 6 elect from among its members a President, Vice President, Secretary and Treasurer, hereinafter referred to as the “officers of the Bar Association” to hold office for a term of two years each.”**

**28.** In my judgment, on its plain and unambiguous meaning, all persons admitted to practice for more than five years are eligible to serve on the Ethics Committee. They are all

members of the Bar unless they have only been persons specially admitted under section 11 of the Act.

29. It is common ground that Retired Justice Bain had been admitted to practice under section 10 of the Act and had been admitted for more than ten years prior to her appointment as a Justice of The Supreme Court.
30. The thrust of the appellant's argument is found at paragraphs 2.01 to 2.03 of his written submissions. He asserts:

**“2.01. With regard to this Issue, paragraph 1 under the grounds of appeal is repeated as if it were formally made part of the appellant's argument. That said, it is submitted as uncontroversial and not open to debate, that jurisdiction, in respect of disciplinary hearings of complaints of “improper conduct” or “conduct unbecoming a counsel and attorney” if alleged against members of the Bar, vests in Bar Council as enacted by Parliament, and prescribed and/or regulated by Part IV of the Act. The question is whether a retired former Supreme Court Judge is (or ever ceased being) a member of the Bar, within the meaning and for the purposes of paragraphs 1 and 4 of the Fifth Schedule of the Act.**

**2.02. It is submitted by parity of reasoning, that a member of the Bar who, being a counsel and attorney, upon his or her appointment to the Office of Supreme Court Justice, ceases to be a member of the Bar and subject to the disciplinary jurisdiction of Bar Council exercised on its behalf by The Ethics Committee (The “Committee”) conjointly with The Disciplinary Tribunal (The “Tribunal”). Indeed, section 29 of the Act confines the functions of The Committee to receiving complaints “made in respect of the conduct of counsel and attorneys, registered associates and legal representatives”, explicitly excluding Supreme Court Justices: *expressio unius est exclusio alterius*.**

**2.03. It must follow, that counsel and attorneys, being members of the Bar (which, for sake of argument, retired former Supreme Court Justice Rhonda Bain was, in good standing') upon their appointment to the Office of Supreme Court Justice, cease to be members of the Bar within the meaning and for the purposes of paragraphs**



**1 and 4 of the Fifth Schedule of the Act. As such her, appointment as Chairman of The Committee is invalid and The Committee is illegally constituted to take up its functions as to receiving or determining if there exists reasonable grounds for the complaints alleged against the appellant.”**

31. In my judgment, a Counsel and Attorney of the Supreme Court does not cease to be a Counsel and Attorney of the Supreme Court upon that person’s appointment as a Justice of the Supreme Court, whether substantively under Article 94 or in an acting capacity under Article 95. There is nothing in the Act, the Supreme Court Act or the Constitution that warrants such a holding.
32. Indeed, Counsel submitted that a Judge could no longer be a member of the Bar as he or she would not be subject to the disciplinary oversight of the Bar Council. I do not agree. Even a Judge, whilst serving as a Judge, is subject to disciplinary proceedings by the Bar Council in his capacity as a Counsel and Attorney of the Supreme Court. For example, if procedures for the removal of a Judge for misbehaviour are instituted under Article 95, there is nothing in the Act which prevents the Bar Council from conducting disciplinary proceedings, which may result in him being struck off the Roll for misconduct. Being a judge does not immunize a person who is a Counsel and Attorney of the Supreme Court from being disciplined by the Bar Council for improper conduct.
33. In my judgment, there is simply nothing in the Act which prevents a retired Judge from serving on the Ethics Committee. That Judge is still a Counsel and Attorney of the Supreme Court and thus, by section 3, a member of the Bar. This is so whether or not the retired Judge practices by appearing before the court.
34. As a corollary to this, it is to be noted that there is no legal prohibition against a retired judge appearing as an advocate in the court. Neither is there any prohibition against a person practising as a Counsel and Attorney whose primary work is that specified in section 27 of the Act. There is nothing in the Act which prevents a retired judge from acting as a consultant in a law firm.
35. Counsel for the appellant suggested that retired Justice Bain was an unqualified person under section 20 of the Act. This was because, upon her appointment, her practice as a Counsel and Attorney was “suspended”. Section 20(1) of the LPA provides:

**“20. (1) Save where expressly permitted by this or any other Act, no unqualified person shall act as a counsel and attorney, or as such sue out any writ or process, or commence, carry on or defend any action, suit or other proceeding, in the name of any other person or in his own name, in any court, or act as counsel and attorney in any**

**case, civil or criminal, to be heard or determined in any court.”**

36. In my judgment, this argument has no merit. An unqualified person is defined in section 2 of the Act as a person whose name does not for the time being appear on the Roll or Counsel and Attorney whose name is on the Roll but who is for the time being suspended from practice. The reference to “suspended from practice” is a reference to a person to whom an order under section 38(1)(b) of the Act has been made. That does not apply to retired Justice Bain.

37. In my judgment, the challenge to the constitution of the Ethics Committee must fail.

#### **Due process**

38. The appellant argues that he was denied due process by the Ethics Committee as it failed to notify him of the hearing at which a decision would be made whether to reprimand him or refer the matter to the Disciplinary Tribunal. He insists that it is a statutory requirement that he be notified of that hearing and that due process requires that he be notified in order to make representations.

39. Section 36 of the LPA is in the following terms:

**“36. (1) No disciplinary action on a complaint by or on behalf of a client or former client of a counsel and attorney shall be taken by the Disciplinary Tribunal against that counsel and attorney or any registered associate or legal executive employed by the counsel and attorney unless the complaint is substantiated under oath by or on behalf of the complainant.**

**(2) In the carrying out of their respective functions the Disciplinary Tribunal and the Ethics Committee shall have those powers exercisable by a judge of the Court in relation to the summoning and examination of witnesses and of parties and the production of books and documents.**

**(3) If the person whose conduct is being investigated fails to appear in answer to a notice issued by the Disciplinary Tribunal or the Ethics Committee in respect of the time and place for the hearing of a complaint or at the time and place of an adjournment thereof, the Disciplinary Tribunal or the Ethics Committee, as the case may be, if it is satisfied that there is no reasonable excuse for the**

**failure to appear, may proceed with the hearing of the complaint in the absence of that person.**

**(4) A hearing of a complaint and every application relating to a complaint by the Disciplinary Tribunal or the Ethics Committee shall be heard in private, but if the person whose conduct is being investigated requests otherwise by a notice in writing delivered to the Secretary to the Tribunal or the Ethics Committee, as the case may be, before the day fixed for the hearing, the Disciplinary Tribunal or the Committee shall conduct the hearing in public.**

**(5) After the hearing of a complaint the decision of the Disciplinary Tribunal shall be pronounced in public.**

**(6) A hearing of a complaint may be adjourned at any time.**

**(7) A person whose conduct is being investigated, if present in person at the hearing, has the right to be represented by counsel, to adduce evidence and to make submissions, and any such person may be compelled to attend and give evidence but the person shall be advised of his right to object to answer any question or produce any document by reason that the answer to the question or the production of the document would tend to be self-incriminating in respect of a criminal offence.**

**(8) The Disciplinary Tribunal or the Ethics Committee may proceed with the hearing of a complaint notwithstanding that the complainant is absent or is no longer desirous of proceeding where the Tribunal or the Committee, as the case may be, considers the improper conduct alleged in the complaint is of such a nature or frequency that it is in the interest of the legal profession to do so.” [Emphasis added]**

**40.** The appellant’s complaint is that he was entitled to be notified of a hearing where consideration was being made of the complaint against him by the Ethics Committee. This, he says, is a requirement under section 36(3). He asserts that he was never notified of a date for a hearing and that there is no evidence that a hearing was actually conducted prior to the decision to refer the complaint to the Disciplinary Tribunal. He submits there are no transcripts or minutes of any hearing where the decision was made that, if proved, the complaints would warrant more than a reprimand and was sufficiently set out to justify a referral to the Disciplinary Tribunal. The fact that he did not respond to the letters from the

Ethics Committee did not eliminate or obviate the need for the Ethics Committee to have a hearing for which he was entitled to notice before making any determination on the complaint against him.

41. The appellant relies on the decision of this court in **Munroe and Gibson v Bar Council** SCCivApp. No 162 of 2019. In that case, a complaint was made against attorney Wayne Munroe, and the Ethics Committee issued a reprimand against attorney Donovan Gibson, against whom no complaint had been made. Gibson appealed the decision of the Ethics Committee to issue a reprimand against him. The court allowed the appeal.
42. In discussing the duties of the Ethics Committee, I said:

**“30. It must be recalled that the primary purpose of the Ethics Committee is to determine whether there was a reasonable basis for making the complaint. That could be done simply by asking questions of the persons involved. It is not a hearing before the Disciplinary Tribunal. The only risk to the attorney is that it may be referred to the Tribunal where there will be a full hearing on the complaint or that the Ethics Committee may find that even if the matters complained of had been made out it would only warrant a reprimand and no other disciplinary action.**

**31. The attorney, however, does have a right to be heard if the Ethics Committee was minded to make a reprimand on the basis that the complaint had been made out. If that was the case the Committee would be obliged to give the attorney an opportunity to be heard on this issue before making the reprimand.**

**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 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.”**

43. The complaint by the appellant is a bit hollow. The appellant never replied to any of the letters from the Ethics Committee indicating that it was his desire to contest or be heard on the subject of the complaints. Moreover, at the hearing before the Disciplinary Tribunal, he had an opportunity to respond to the complaints and he did so. He put in a witness statement and had the opportunity to cross-examine the witnesses for the complainants. He never challenged the jurisdiction of the Disciplinary Tribunal to investigate the complaints. The appellant has not in any way been prejudiced as he had an opportunity to make representations to the Ethics Committee and he refused to respond to the Ethics Committee’s letters.
44. Finally, given the decision by Thompson J in **Colina Insurance Management Limited v Lion Management Co. Ltd** CLE/gen/01915 of 2013 delivered in February 2021 and the contents of his witness statement, even if there had been a hearing as he suggests he must have been notified, there would have been no basis for the Ethics Committee to have refused to make the referral to the Disciplinary Tribunal.
45. I do not agree with Counsel for the appellant that section 36(3) imposes an obligation on the Ethics Committee to have a hearing to determine what decision it will make under section 30 of the Act and to advise the attorney of the date of that hearing. Section 36(3) is only an empowering provision. The section imposes no obligation on the Ethics Committee. It simply provides that if the lawyer whose conduct is being investigated fails to appear in answer to a notice issued by the Ethics Committee in respect of the time and place for the hearing of a complaint, the Ethics Committee may proceed with the hearing of the complaint in the absence of that lawyer. The section is an enabling section. It enables the Ethics Committee to exercise its powers under section 30 of the Act after it has given the lawyer an opportunity to respond.
46. The letters by the Ethics Committee to the appellant advising him of the complaints and requesting his response by a specified date do, in my judgment, satisfy the requirement of section 36(3). In my judgment, section 36(3) read in conjunction with the Ethics Committee’s obligation under section 30 simply means that an attorney against whom a complaint has been made must be given a hearing before the Ethics Committee exercises its powers adverse to the attorney. The hearing does not have to be an oral hearing or a hearing in person, it can be done on papers or remotely, given modern technology. Notice of a hearing means that an attorney must be given an opportunity to present his case before a decision is made adverse to him. There would be no purpose in having a hearing if the Ethics Committee regards the complaint on its face to be a meritless one.

47. In the circumstances of this case, the appellant was given ample opportunity to make representation to the Ethics Committee. There is no substance to the complaint that he did not have a hearing before the Ethics Committee as he was given ample opportunity to do so. He could have made his case before the Ethics Committee, but simply ignored the Ethics Committee's letters.

48. As part of this due process argument, the appellant complains that the Disciplinary Tribunal placed too much reliance on the judgment of Thompson J referred to earlier and did not carry out its own independent adjudication on the merits of the complaints. For this, they rely upon paragraphs 10, 11 and 15 of the Disciplinary Tribunal's decision. Those paragraphs said:

**“10. The evidence of both the first and second complainants are laid out in detail in the Supporting Affidavit for each which served as the evidence in chief in the hearing of this matter.**

**11. The said ruling sets out the facts and arguments presented by the parties. The Tribunal has had regard to the decision and finds itself bound by the same. Accordingly we deem it necessary to include the following paragraphs of the judge's ruling here: (The Disciplinary Tribunal then sets out the relevant parts of the judgment of Thompson J).**

...

**15. This matter is not one where the Tribunal needs to go beyond the decision of His Lordship. The Court found in the said Ruling certain things as a matter of fact and are set out in the relevant portion of the Ruling cited above, and which the Tribunal does not need to revisit. Clearly there was a very serious and egregious breach of the Code of Professional Conduct expected of Attorneys and both of the Complaints have merit.”[Emphasis added]**

49. At first blush, it may appear that the Disciplinary Tribunal did not apply its own mind to the merits of the complaints but simply relied upon the judgment of Thompson J.

50. However, this is not factually correct. In paragraph 16 of its Ruling, the Disciplinary Tribunal said:

**“16. The Attorney filed an affidavit in Response to the Complaint and laid the same over before the Tribunal on 9<sup>th</sup> February, 2022. The Tribunal has considered the content of the Affidavit and finds that the same does not**

**assist the Attorney and the Tribunal is satisfied that the  
Attorney did not file an Appeal of the Ruling”**

51. There can be no doubt that the Disciplinary Tribunal considered both the evidence on behalf of the complainants as well as the evidence of the appellant himself. It also took into account the findings of fact that Thompson J made in the Supreme Court action.
52. This is an investigation. The proceedings are inquisitorial in nature. They were entitled to take into account the findings of fact the court in an action in which all of the persons involved were parties. However, I accept that the Judge's views as to the appellant's dishonesty and lack of integrity were not admissible to prove the complaint against this appellant in these disciplinary proceedings. See **Constantinides v Law Society** [2006] EWHC 725 Admin at para 28.
53. A tribunal must make it clear that it has addressed its mind to the allegations made and make its own independent judgment as to whether the matters complained of and proved warranted the order that it proposed to make.
54. The appellant participated in the proceedings before the Disciplinary Tribunal. The due process argument has no substance. It must also fail. There is no basis for setting aside the decision of the Disciplinary Tribunal on the ground of due process.

**Ancillary Ground**

55. This is a short ground. In a nutshell, the appellant claims that he has been effectively denied the effectiveness of his right to appeal by the publication of the decision by the Disciplinary Tribunal, notwithstanding that the appellant had not exhausted his right of appeal. It is contained in ground fourteen. It says:

**“14. Bar Council has failed to institute and enforce the necessary effective measures as would, consistent with the objective for which sect. 36(4) and sect. 40 of the Act were enacted for safeguarding the personal integrity and professional reputation of a counsel and attorney from any undue premature publicity following decision that is subject to being appealed in exercise of a right of appeal conferred, pursuant to sect. 54 of the Act. As a consequence of Bar Council’s failure in that regard, any utility to be had and reasonably expected from the moratorium period within which the Appellant had to exercise his right of appeal following the Committee’s and the Tribunal’s decisions and having this Court’s jurisdiction to review them on appeal, is lost imperiling this appeal as being from foregone conclusions.”**

56. The short answer is the provision of section 36(5) of the LPA, which is a statutory requirement that the decision of the Tribunal shall be given in public. Although disciplinary proceedings are held in private, the Act requires that the decisions of the Disciplinary Tribunal be given in public. It should be noted that there are jurisdictions where disciplinary proceedings involving lawyers are themselves held in public. See, for example, Rule 35 of The Solicitors (Disciplinary Proceedings) Rules 2019. The publication of an adverse judgment cannot be a basis for setting it aside.

57. This appeal must be dismissed.

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**The Honourable Sir Michael Barnett, P**

58. I agree.

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**The Honourable Mr. Justice Evans, JA**

59. I also agree.

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**The Honourable Mr. Justice Turner, JA**