

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVP2019/0004

BETWEEN:

STUART A. LOCKHART

Appellant

and

[1] VALENTINA NONINI AND MAURIZIO PANDINI
[2] THE DISCIPLINARY COMMITTEE

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Mario Michel

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Leslie Thomas, QC, with him, Dr. David Dorsett for the Appellant
No appearance for the First Respondents

2020: May 27;
October 14.

Civil appeal — Disciplinary hearing — Principles of natural justice — Whether the appellant was denied the right to be heard — Whether the appellant was denied the right to a fair hearing — Bias — Whether there was apparent bias on the part of the disciplinary committee — Whether the disciplinary committee failed to give sufficient reasons for its decision

In or about May 2012, the first respondents entered into an oral agreement to purchase a restaurant in Antigua for the sum of US\$350,000.00. The appellant, Mr. Stuart Lockhart

(“Mr. Lockhart”), who is an attorney at law, was approached by the first respondents with a view to engaging him in his professional capacity to complete the purchase.

Mr. Lockhart requested that the first respondents pay a deposit of US\$50,000.00 towards the purchase price and a deposit of US\$5,000.00 in respect of legal fees. Both sums were paid by the first respondents. There was however no retainer agreement, no consultation fee, nor any discussion as to Mr. Lockhart’s hourly rate or billing method.

Subsequently, in early 2013, the first respondents wired to Mr. Lockhart a portion of the balance of the purchase price in the sum of US\$196,400.00. They also met Mr. Andrew Young (“Mr. Young”), a barrister-at-law qualified to practise in the United Kingdom, who Mr. Lockhart indicated would assist in the completion of the sale. The first respondents contended before the Disciplinary Committee that there was no discussion as to either Mr. Young being retained by them or as to fees to be paid to Mr. Young.

The sale, however, was not completed. The first respondents contended that, after negotiations broke down and the purchase was aborted, they instructed Mr. Lockhart to return the deposit as well as the further funds paid by them towards the purchase price of the business which together would have totalled US\$246,400.00. However, by June 2013, only US\$228,757.66 was refunded by Mr. Lockhart.

When questioned about the shortfall, Mr. Lockhart then provided an invoice claiming an outstanding balance due to him of US\$28,294.22. The first respondents disputed the billing, contending that they were being overcharged as the purchase of the restaurant’s assets had not been completed and also because certain amounts were charged for legal work for which they had not given instructions. Further, they also disputed the amounts claimed for the legal services of Mr. Young on the basis that he had not been retained by them.

The matter remaining unresolved, on 3rd March 2015, the first respondents filed a complaint with the Disciplinary Committee (or ‘the Committee’) established under the Legal Profession Act against Mr. Lockhart. The complaint alleged conduct unbecoming of an attorney-at-law and in particular that Mr. Lockhart had: (i) charged fees which were excessive and unreasonable; (ii) grossly overcharged in excess of the value of the services rendered and; (iii) engaged the services of a foreign colleague, Mr. Young, but billed separately for those services despite no express agreement to that effect and no need to do so.

The complaint against Mr. Lockhart was heard by the Disciplinary Committee on 3rd May 2017. One of the members of the Disciplinary Committee, was Ms. C. Debra Burnette, an attorney-at-law who had objected to the admission of Mr. Young to the Antiguan Bar in an unrelated matter. Ms. Burnette’s firm had also acted for Mr. Nicholas Fuller, the transactional attorney who held the first respondents’ escrow account in the transaction which formed part of the background facts relevant to the subject-matter of the disciplinary proceedings.

During the taking of Mr. Lockhart's evidence, his counsel requested that Mr. Young be interposed to give evidence. This was due to Mr. Young's imminent return to the United Kingdom and the desire for his evidence to be taken before then. Mr. Lockhart was directed by the Disciplinary Committee to remain outside the room while Mr. Young gave his evidence, during which an allegation that Mr. Young's actions had breached the Legal Profession Act 2008 of Antigua and Barbuda ("the Act") arose as he was not qualified to practise law in Antigua and Barbuda. That allegation of Mr. Young's unlawful practice of law, however, had not formed part of the complaint before the Disciplinary Committee.

The Disciplinary Committee found that Mr. Lockhart had charged fees which were excessive and had unlawfully engaged and billed for the services of Mr. Young, a person who was not qualified to practise law in Antigua and Barbuda. The Disciplinary Committee also found that Mr. Lockhart had facilitated Mr. Young's breach of the laws of Antigua and Barbuda. The Committee therefore ordered Mr. Lockhart to: (i) repay the first respondents the sum of US\$17,289.35, along with interest; (ii) pay the legal fees of the first respondents in the sum of EC\$5,000.00 and (iii) pay a fine of EC\$7,500.00 to the Bar Association of Antigua and Barbuda for breaching Part B, section 3 of the Mandatory Provisions and Specific Prohibitions of the Code of Ethics as contained in Schedule 4 of the Act. Specifically, the Disciplinary Committee, found as it relates to Mr. Lockhart's facilitation in the breach of the law by Mr. Young that its decision be forwarded to the Director of Public Prosecutions for his further investigation of the matter.

Mr. Lockhart appealed. However just prior to the hearing of the appeal, the first respondents filed a notice of non-participation in the appeal and the appellant discontinued the appeal against the 2nd respondent. At the hearing of the appeal, counsel for Mr. Lockhart explained that all sums ordered to be paid to the first respondents had been settled and undertook not to take any recovery action against them if this Court found in favour of the appellant.

The appeal therefore proceeded on narrow grounds. It sought to challenge the finding of the Committee which suggests that Mr. Lockhart facilitated criminal conduct and the manner in which the Committee arrived at this finding. To wit: (i) whether there has been a breach of natural justice in the conduct of the disciplinary hearing against Mr. Lockhart by the Disciplinary Committee; (ii) whether the Disciplinary Committee was infected with bias; (iii) whether it failed to give adequate reasons for its decision; and (iv) whether the length of time taken by the Disciplinary Committee to give its decision amounts to inordinate delay.

Held: allowing the appeal in part; setting aside the decision of the Disciplinary Committee; remitting the disciplinary complaint filed on 3rd March 2015 against Stuart A. Lockhart for rehearing by a differently constituted panel of the Disciplinary Committee; and making no order as to costs, that:

1. The general rule is that a party is entitled to be present throughout the hearing of a civil trial as he has a right to know the case against him and the evidence on which it is based. The party must also have an opportunity to respond to any evidence and to any submissions made by the other side. Although there are

cases where a departure from the general rule may be justified for special reasons in the interest of justice, the instant case is not one where such a departure can be justified as the prejudice to Mr. Lockhart, albeit the interposing of Mr. Young's evidence was done at his request, outweighed the necessity to exclude him from the hearing room during the taking of Mr. Young's evidence.

Al Rawi and others v Security Service and others (JUSTICE and others intervening) [2012] 1 AC 531 applied; **B Surinder Singh Kanda v Government of the Federation of Malaya** [1962] AC 322 applied; **Da Costa and Another v Sargaco and Another** [2016] EWCA Civ 764 applied; **Attorney General of Zambia v Meer Care and Desai (a firm) and others** [2006] EWCA Civ 390 applied.

2. The principles of natural justice require that allegations made against a party should be put to that party by way of formal charge or complaint so that the party would be forewarned and have an opportunity to respond to the charge by contradicting it or giving an explanation. As such, the Disciplinary Committee, by arriving at a conclusion that Mr. Lockhart was engaging in criminal conduct when such a complaint had not been formally put to him, and without affording him a proper opportunity to address such a complaint, breached Mr. Lockhart's right to be heard and the principles of natural justice.

B Surinder Singh Kanda v Government of the Federation of Malaya [1962] AC 322 applied; **Browne v Dunn** (1893) 6 R 67 applied; **Chen v Ng** [2017] UKPC 27 applied.

3. Whereas the test for apparent bias is whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased, an appellate court is required to look at the whole spectrum of decision-making, as long as it is borne fully in mind that such a test has to be applied in very different circumstances and that those circumstances must have an important and possibly decisive bearing on the outcome. In the instant case, there does not appear to be any sufficient nexus between Ms. Burnette's objecting to Mr. Young's admission to the Antiguan Bar in respect of a matter unrelated to this case and the subject matter of the disciplinary complaint against Mr. Lockhart in which Mr. Young gave evidence. Further, the mere fact that another attorney-at-law in Ms. Burnette's firm had acted for the transactional attorney who held the first respondents' escrow account in the transaction, which formed part of the substratum of facts relevant to the subject-matter of the disciplinary proceedings, is not indicative of bias on the part of Ms. Burnette.

Porter v Magill [2002] 2 AC 357 applied; **In re Medicaments and Related Classes of Goods (No 2)** [2001] 1 WLR 700 considered; **R (Lewis) v Redcar and Cleveland Borough Council** [2008] EWCA Civ 746 applied; **In the Matter of the Constitution of St. Kitts and Nevis and another v Thomas Sharpe, QC and others** [2012] ECSCJ No. 234 applied.

4. The appellant's argument that the Committee ought to have elaborated its determination on the hours and fees that should have been allowed for the work done by Mr. Lockhart fails as the Committee appears to have made its determination on the basis of a restructured schedule of fees provided by Mr. Lockhart himself. Furthermore, there is also nothing contained in the Committee's decision which suggests that it had misdirected itself on the applicable burden and standard of proof at the disciplinary hearing.

JUDGMENT

- [1] **PEREIRA CJ:** This is an appeal by the appellant, Stuart A. Lockhart ("Mr. Lockhart"), against the decision of a Panel of the Disciplinary Committee of the Bar Association of Antigua and Barbuda ("the Disciplinary Committee" or "the Committee") dated 18th December 2018 on a complaint made against him, by the first respondents (Ms. Nonini and Mr. Pandini), in his professional capacity as an attorney-at-law.

Background

- [2] Mr. Lockhart is an attorney-at-law practising in Antigua and Barbuda.
- [3] In or about May 2012, the first respondents orally agreed with third parties for the purchase of the assets of the restaurant 'Al Porto' situated at Jolly Harbour in Antigua for the sum of US\$350,000.00. The first respondents approached Mr. Lockhart to engage his legal services in completing the purchase. Mr. Lockhart requested that the first respondents provide a deposit of US\$50,000.00 towards the purchase price and a deposit of US\$5,000.00 in respect of legal fees. There was no retainer agreement between Mr. Lockhart and the first respondents, no consultation fee was ever stipulated by Mr. Lockhart nor was any discussion had as to Mr. Lockhart's hourly rate or billing method. The first respondents were of the impression that the services Mr. Lockhart was required to provide related to the formation of a company and the review of a bill of sale over the restaurant's assets.
- [4] On 25th May 2012, the first respondents received a document entitled 'Purchase of Assets of the Restaurant Al Porto' ('the Initial Fee Note') which disclosed legal fees

totalling US\$10,486.05. The fees were expressly stated as being '1.25% legal services on the total value of US\$350,000.00, processing of non-citizen licence...fees, incorporation of a local company and use of chambers as registered offices...'. Upon return to their native Italy, the first respondents furnished the deposit on the legal fees as well as the US\$50,000.00 deposit on account of the purchase price to Mr. Lockhart.

- [5] There was little communication between the parties after their return to Italy. In January and February 2013, the first respondents returned to Antigua to attend to completion of the sale and wired a portion of the balance of funds in the sum of US\$196,400.00 to Mr. Lockhart. During this time, they were introduced to Mr. Andrew Young ("Mr. Young"), a barrister-at-law qualified to practise in the United Kingdom, who Mr. Lockhart indicated would lend his assistance in the completion of the sale. The sale turned out to be not so straightforward. The first respondents contended that there was no discussion as to Mr. Young's fees.
- [6] Subsequently, negotiations for the purchase of the assets of the restaurant broke down. The first respondents contended that, after negotiations broke down and the purchase was aborted, they instructed Mr. Lockhart to return the deposit as well as the funds paid by them which together would have totalled US\$246,400.00. By June 2013, a combined sum of US\$228,757.66, only, was refunded by Mr. Lockhart. This sum was less than the total sum paid over to Mr. Lockhart by the first respondents on account of the purchase price. Accordingly, the first respondents sought an explanation from Mr. Lockhart for the short payment.
- [7] Mr. Lockhart then provided an invoice detailing various amounts claimed for his legal services, and an outstanding balance of US\$28,294.22 due to him, presumably as explaining the basis for the shortfall in the refund of all the purchase monies which had been forwarded to Mr. Lockhart. This became a vexed issue between the first respondents and their lawyer, Mr. Lockhart. The first respondents contended that they were being overcharged as the purchase of the restaurant's

assets had not been completed and also because certain amounts were charged for legal work for which they had not given instructions. The first respondents also disputed the amounts claimed for the legal services of Mr. Young on the basis that he had not been retained by them.

- [8] As a consequence, on 3rd March 2015, the first respondents filed a complaint against Mr. Lockhart to the Disciplinary Committee in respect of the legal work undertaken by him. The complaint alleged conduct unbecoming on the part of an attorney-at-law; in particular, that Mr. Lockhart: (i) had charged fees which were excessive and unreasonable in light of the legal services he was retained to do and subsequently rendered; (ii) had grossly overcharged in excess of the value of the services rendered and; (iii) had engaged the services of a foreign colleague, Mr. Young, but billed separately for those services despite no express agreement to that effect and no need to do so.
- [9] On 3rd May 2017, the complaint against Mr. Lockhart came on for hearing before the Disciplinary Committee. One of the members of the Disciplinary Committee, was Ms. C. Debra Burnette, an attorney-at-law who had objected to the admission of Mr. Young to the Antiguan Bar in an unrelated matter. Of note also is the fact that Ms Burnette's firm had acted for a Mr. Nicholas Fuller, the transactional attorney who held the first respondents' escrow account in the transaction which formed part of the background facts relevant to the subject-matter of the disciplinary proceedings.
- [10] During the hearing of the complaint, and while Mr. Lockhart was giving evidence, his counsel requested that Mr. Young be interposed to give evidence, before he (Mr. Lockhart) finished giving his evidence. This was to accommodate Mr. Young as a witness in the matter while he was present in Antigua and before his return to the United Kingdom. Mr. Lockhart was then directed by the Disciplinary Committee to remain outside the room while Mr. Young gave his evidence, during which an

allegation that Mr. Young's actions had breached the **Legal Profession Act 2008**¹ ("the Act") arose. It is of note that the allegation of Mr. Young's unlawful practice of law had not formed part of the complaint before the Disciplinary Committee.

Decision of the Disciplinary Committee

- [11] Having considered submissions made on behalf of both Mr. Lockhart and the first respondents, the Disciplinary Committee found, among other matters, that Mr. Lockhart had charged fees which were excessive in the circumstances and had unlawfully engaged and billed for the services of Mr. Young, a person who was not qualified to practise law in Antigua and Barbuda. The Disciplinary Committee therefore ordered Mr. Lockhart to: (i) repay the first respondents the sum of US\$17,289.35, being monies held or previously retained as the sum in excess of legal fees reasonably owed to him, along with interest; (ii) pay the legal fees of the first respondents in the sum of EC\$5,000.00 and (iii) pay a fine of EC\$7,500.00 to the Bar Association of Antigua and Barbuda for breaching Part B, section 3 of the Mandatory Provisions and Specific Prohibitions of the Code of Ethics as contained in Schedule 4 of the Act. Specifically, the Disciplinary Committee, at paragraph 96 of its decision, found that Mr. Lockhart had facilitated Mr. Young in breaching the Act to wit engaging in the practice of law in Antigua and Barbuda when not duly licensed to do so. The unlawful practice of law attracts a criminal sanction under the Act. The Disciplinary Committee also stated in its decision that it would recommend to the Registrar of the High Court that a copy of the Panel's decision be forwarded to the Director of Public Prosecutions for his further investigation of the matter.

The Appeal

- [12] Mr. Lockhart, being dissatisfied with the decision of the Disciplinary Committee, appealed advancing some three grounds. Strangely, just prior to the appeal coming on for hearing, the first respondents on 30th April, 2020 filed a "Notice of Non Participation" in the appeal. Further, on 30th April, 2020, Mr. Lockhart discontinued his appeal against the Disciplinary Committee, which was the only

¹ Act No. 22 of 2008, Laws of Antigua and Barbuda.

other named party to the appeal. The result was that, at the hearing of the appeal, the only side to be heard was Mr. Lockhart's, all respondents having no further interest in the outcome of the appeal. Learned Queen's Counsel on behalf of Mr. Lockhart, Mr. Leslie Thomas, also informed the Court at the hearing that Mr. Lockhart had reached a settlement with the first respondents and had paid over to the first respondents all monies found to be due to them by the Committee. Mr. Thomas, QC further advised the Court that irrespective of the outcome of the appeal no adverse effect would follow on the part of the first respondents as Mr. Lockhart had undertaken not to seek to recover from them.

[13] This turn of events begged the question as to why the Court, in the circumstances, should entertain the appeal at all and which, at the very least, gives cause for pause. The objective in pursuing the appeal in this one-sided manner (if it may be termed that way) became clear when Mr. Thomas, QC, in oral submissions before this Court, explained that what Mr. Lockhart seeks to challenge is the procedure adopted by the Disciplinary Committee in arriving at its decision. More specifically, Mr. Thomas, QC expressed Mr. Lockhart's concern with the finding of the Committee suggesting his facilitation of criminal conduct and the manner in which the Committee arrived at this finding. The gravamen of Mr. Lockhart's complaint may therefore be summarised as follows:

- (i) whether there has been a breach of natural justice in the conduct of the disciplinary hearing against Mr. Lockhart by the Disciplinary Committee (the "Natural Justice Issue");
- (ii) whether the Disciplinary Committee failed to give adequate reasons for its decision (the "Adequacy of Reasons Issue"); and
- (iii) whether the length of time taken by the Disciplinary Committee to give its decision amounts to inordinate delay (the "Delay Issue").

[14] I propose to discuss each of these in turn.

Discussion
Issue 1 – Natural Justice Issue

- [15] Mr. Thomas, QC, in his written submissions, contended that the procedural unfairness and bias on the part of the Disciplinary Committee constituted a breach of Mr. Lockhart's constitutional right to a fair hearing under section 15(8) of Schedule 1 to the **Constitution of Antigua and Barbuda**² ("the Constitution"). However, it became apparent during the hearing before this Court that the focus of his submission was in relation to procedural fairness or natural justice as opposed to the infringement of the constitutional right to a fair hearing. I shall therefore treat with the first issue as relating solely to an allegation of breach of natural justice.
- [16] Mr. Thomas, QC, first submitted that Mr. Lockhart's exclusion from the hearing room while Mr. Young gave evidence was unfair and in breach of the rules of natural justice. Learned Queen's Counsel stated that Mr. Lockhart was directed by the Disciplinary Committee to remain outside the room while Mr. Young gave his evidence – during which an allegation that Mr. Young's actions had breached the Act, which was not part of the disciplinary complaint, arose. He argued that Mr. Lockhart was given no warning of the allegation of Mr. Young's unlawful practice of law, which had not formed part of the complaint against him, and only became aware of the allegation when it was raised in his own cross-examination.
- [17] Mr. Thomas, QC, contended that while Mr. Young was being cross-examined and while Mr. Lockhart was outside the room, an allegation was further raised that Mr. Lockhart himself was personally guilty of a criminal conspiracy along with Mr. Young for the unlawful practice of law. He stated that one of the specific allegations concerning the alleged criminal conspiracy was that Mr. Lockhart had improperly sponsored Mr. Young, who was not called to the Bar in Antigua and Barbuda, for a work permit. Mr. Thomas, QC argued that this was procedurally unfair as Mr. Lockhart had no opportunity to respond to the new allegation of criminal conspiracy belatedly raised against him, since Mr. Young's evidence was

² Antigua and Barbuda Constitution Order 1981, Cap. 23 of the Laws of Antigua and Barbuda.

interposed in the middle of his evidence and it would have been inappropriate for Mr. Lockhart's counsel to discuss with him what Mr. Young had been asked or to give him prior warning that such an allegation was going to arise. In support of his submissions, Mr. Thomas, QC relied on the English decisions of **Da Costa and Another v Sargaco and Another**,³ **Attorney General of Zambia v Meer Care and Desai (a firm) and others**⁴ and **Browne v Dunn**.⁵

- [18] The principle of natural justice has been aptly stated by Lord Denning in the decision of the Privy Council in **B Surinder Singh Kanda v Government of the Federation of Malaya**⁶ thus:

"The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: Nemo iudex in causa sua: and Audi alteram partem. They have recently been put in the two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations."

Right to be Heard

- [19] It is a fundamental aspect of natural justice that a party has a right to know the case against him and the evidence on which it is based. It follows that the other side may not advance contentions or adduce evidence of which the party is kept in ignorance. A party must also have an opportunity to respond to any such evidence and to any submissions made by the other side. Therefore, as a general rule, a party is entitled to be present throughout the hearing. As much has been settled by the decision of the Supreme Court of the United Kingdom in **Al Rawi and others v Security Service and others (JUSTICE and others intervening)**.⁷ At paragraph 22 of **Al Rawi**, Lord Dyson explained thus:

"...The basic rule is that (subject to certain established and limited exceptions) the court cannot exercise its power to regulate its own procedures in such a way as will deny parties their fundamental common

³ [2016] EWCA Civ 764.

⁴ [2006] EWCA Civ 390.

⁵ (1893) 6 R 67.

⁶ [1962] AC 322 at p. 337.

⁷ [2012] 1 AC 531.

law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice. To put the same point in a different way, the court must exercise the power to regulate its procedure in a way which respects these two important principles which are integral to the common law right to a fair trial.”

- [20] In accordance with the principles of natural justice, tribunals should refrain from regulating their procedures in such a manner likely to deny parties their right to participate in the proceedings. As Lord Denning stated in **Kanda**:⁸

“If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”

- [21] More recently the English Court of Appeal in **Da Costa**, referring to the decisions of **Al Rawi** and **Attorney General of Zambia**, reinforced that, although there are cases where a departure from the norm may be justified for special reasons in the interest of justice, the starting point is that a party is entitled to be present throughout the hearing of a civil trial. At paragraphs 59 and 60 of the judgment, Black LJ explained as follows:

“59. I do not read *Al Rawi* as authority for the proposition that in order for a party to have a fair trial, there is an absolute requirement that he or she has the opportunity to be present personally throughout the entirety of the hearing. In so far as anything said in *Al Rawi* does suggest that, it must be remembered that the context was a very particular one, involving a process which would have restricted the participation of a party to a far greater extent than occurred in the present case. Moreover, an absolute rule would be difficult to square with Lord Dyson’s express acknowledgment that there are classes of case where a departure from the norm may be justified for special reasons in the interest of justice. **It is of note also that in the two examples that Lord Dyson gave of such cases (see my paragraph 48 above), a party was being wholly excluded from access to some of the evidence, not just excluded from the court room whilst a certain limited portion of the evidence was given but with an entitlement to be told of the evidence thereafter and, of course, to have his representative present while the evidence in question was given. Nevertheless, whilst there may not be an absolute rule, it is clear from both *Al Rawi* and the *Zambia***

⁸ [1962] AC 322 at p. 337.

case that the starting point must always be that a party is entitled to be present throughout the hearing of a civil trial.

60. It is not difficult to contemplate situations in which it might possibly be necessary and permissible to proceed with a hearing without a party being present in court. I do not wish to attempt a catalogue of them. A not uncommon example is where a party is refused an adjournment and then simply fails to attend the hearing. Other examples may range from the litigant who disrupts the hearing by unruly behaviour and has to be excluded to allow any progress to be made, to the sort of practical problem that arises where a party has to leave for personal reasons just before the end of the evidence of a witness whose evidence cannot be held over to another time. Having said that, Judge Baucher's order excluding the first claimant from part of the hearing in this case was, in my view, an order that should not have been made." (emphasis mine)

[22] Having regard to the principles stated in **Al Rawi** and **Da Costa**, I do not consider this to be a suitable case where a departure from the norm or general rule can be justified for special reasons in the interest of justice. While the normal practice, for obvious reasons, would be that a party is required to give and complete his evidence before the evidence of a party's witness or witnesses are taken, these are disciplinary proceedings with the potential of adverse consequences against Mr. Lockhart . In my view, the prejudice to Mr. Lockhart, albeit that the interposing of Mr Young's evidence was at his request, outweighed the necessity to exclude him from the hearing room during Mr. Young's evidence.

[23] As the event unfolded, an allegation of unlawful practice of law on the part of Mr. Young, which had not formed part of the disciplinary complaint, was raised for the first time during the cross-examination of Mr. Young. Mr. Lockhart, in the circumstances, was deprived of the opportunity to know precisely what allegation had been put to Mr. Young in cross-examination and what Mr. Young had said in response, until the allegation had been raised in his own cross-examination. He was therefore prevented from offering any proper or sufficient explanation to contradict the suggestion that Mr. Young had been engaged in the unlawful practice of law, which, again, in no way featured in the complaint against him. As the matter was raised with Mr. Lockhart belatedly during his cross-examination, he also had no opportunity to obtain legal advice from his counsel at the hearing

in relation to that allegation. In so far as this allegation formed the basis on which the Disciplinary Committee fined Mr. Lockhart for breach of the Act, there is no doubt that he ought to have been made aware of the allegation from the very outset. In this regard, I consider the following statement of Sir Anthony Clarke MR in **Attorney General of Zambia** to be apposite: '[t]he key point is that each party must know what the case against him is and be able fully and properly to answer it'.

[24] Additionally, natural justice required that the specific allegation of criminal conspiracy made against Mr. Lockhart personally, that he had improperly sponsored Mr. Young for a work permit, be put to him formally by way of formal charge or complaint rather than being apprised for the first time in the decision of the Committee of their finding of the likely commission by him of criminal conduct. In my view, the Disciplinary Committee ought to have informed Mr. Lockhart that a considerably more serious allegation of a criminal nature than those made in the disciplinary complaint had been raised against him and by failing to do so, did not provide Mr. Lockhart with an opportunity to contradict it or provide an explanation upon taking advice from his counsel. In the circumstances, the Committee also deprived Mr. Lockhart of the opportunity to avail himself of his privilege against self-incrimination.⁹ This much has been expressed in **Browne v Dunn**¹⁰ which has been applied by the Privy Council in **Chen v Ng**.¹¹ In **Browne**, Lord Halsbury stated thus:

“...To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.”

As Mr. Thomas, QC argued, had the allegation been put to Mr. Lockhart, he would have had the opportunity to advance an explanation which may have had

⁹ Rank Film Distributors (a firm) v Video Information Centre and Others [1982] AC 380.

¹⁰ (1893) 6 R 67.

¹¹ [2017] UKPC 27.

an impact on the Committee's decision to recommend to the Registrar of the High Court that a copy of the Panel's decision be forwarded to the Director of Public Prosecutions for his further investigation of the matter.

- [25] In light of the above, I am therefore of the considered view that Mr. Lockhart's exclusion from the hearing room during the evidence of Mr. Young was procedurally unfair. Further, by arriving at a conclusion that Mr. Lockhart was engaging in criminal conduct when such a complaint had not been formally put to him, and without affording him a proper opportunity to address such a complaint, the Disciplinary Committee breached his right to be heard and therefore, breached the principles of natural justice.

Bias

- [26] Mr. Thomas, QC also submitted that there was an appearance of bias by a member of the Disciplinary Committee, Ms. C. Debra Burnette, which had an effect on the other members of the Committee. This was for two reasons: first, that Ms. Burnette had objected to the admission of Mr. Young to the Antiguan Bar in an unrelated matter, and second, that her firm (through her partner Ms. E. Ann Henry QC) had acted for Mr. Nicholas Fuller, the transactional attorney who held the first respondents' escrow account in the transaction which was the subject-matter of the disciplinary proceedings. This appearance of bias, Mr. Thomas, QC argued, was exacerbated by Ms. Burnette's refusal to accept service of Mr. Lockhart's skeleton submissions in the disciplinary proceedings. In light of the cumulative effect of the unfair procedure adopted by the Panel, he contended that her participation in the delivery of the Committee's decision gives rise to a real perception that the proceedings were tainted with bias and further that Ms. Burnette's bias contaminated the other members of the Disciplinary Committee thereby causing Mr. Lockhart's rights under section 15 of the Constitution to be contravened. Mr. Thomas, QC referred the Court to the decisions of **Porter v**

Magill¹² and **In re Medicaments and Related Classes of Goods (No 2)**¹³ in support of his submission.

[27] It was also contended by Mr. Thomas, QC that the Committee displayed partisanship in the manner in which it heard the evidence of the parties. He stated that the Chairman of the panel repeatedly required Mr. Lockhart to answer questions with a “yes” or “no” and prevented him from expanding on his answers. Mr. Thomas, QC further stated that, conversely, the Chairman allowed for collusion between the first respondents while Mr. Lockhart gave evidence.

[28] It is worth stating at the outset that the issue of bias on the part of Ms. Burnette was never raised by Mr. Lockhart during the proceedings before the Disciplinary Committee. The crux of Mr. Thomas’ submission seems to be that a fair minded and informed observer would conclude that such direct connections on the part of Ms. Burnette to the subject matter of the disciplinary proceedings, could lead to her having prior knowledge of the relevant transaction and therefore preconceived notions about it.

[29] It is well-settled that the test of apparent judicial bias is that stated by Lord Hope in **Porter v Magill** namely, ‘whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased’. Further, as Rix LJ explained in **R (Lewis) v Redcar and Cleveland Borough Council**,¹⁴ the test must be applied:

“to the whole spectrum of decision-making, as long as it is borne fully in mind that such a test has to be applied in very different circumstances and that those circumstances must have an important and possibly decisive bearing on the outcome.”

¹² [2002] 2 AC 357.

¹³ [2001] 1 WLR 700.

¹⁴ [2008] EWCA Civ 746.

[30] The test in **Porter v Magill** has been applied by this Court in **In the Matter of the Constitution of St. Kitts and Nevis and another v Thomas Sharpe, QC and others**.¹⁵ At paragraph 17 of the judgment, Baptiste JA explained that:

“Having ascertained all the circumstances bearing on the suggestion that the [tribunal] was or could be biased, the Court has to decide whether those circumstances would lead the fair-minded and informed observer to conclude that there was a real possibility of bias. An appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of all the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias.”

[31] From the authorities, the question here is then whether, having considered the facts, a fair minded and informed observer would conclude that there was a real possibility of bias on the part of Ms. Burnette for the reason that she objected to the admission of Mr. Young to the Antiguan Bar in an unrelated matter, and also because her firm (through another attorney-at-law) had acted for the transactional attorney who held the first respondents’ escrow account in the transaction which was the subject-matter of the disciplinary proceedings.

[32] In applying the **Porter v Magill** test to Mr. Thomas’ submission, first, it is apparent that the complaint before the Disciplinary Committee concerned Mr. Lockhart as opposed to Mr. Young. In my view, there does not appear to be any sufficient nexus between Ms. Burnette’s objecting to Mr. Young’s admission to the Antiguan Bar in respect of a matter unrelated to this case and the subject matter of the disciplinary complaint against Mr. Lockhart in which Mr. Young gave evidence. Second, I do not consider the mere fact that another attorney-at-law in Ms. Burnette’s firm had acted for the transactional attorney who held the first respondents’ escrow account in the transaction, which was the subject-matter of the disciplinary proceedings, to be indicative of bias on the part of Ms. Burnette. This, in my view, is speculative and does not rise to the level of a real possibility. Indeed, there is nothing before this Court which even suggests that Ms. Burnette could have been aware of any of the details of the subject matter of the

¹⁵ [2012] ECSCJ No. 234.

disciplinary complaint prior to becoming a member of the Committee. I therefore do not consider that there was a real possibility of bias on the part of Ms. Burnette. It follows that the issue of the effect of apparent bias on the other members of the Committee does not arise for consideration.

- [33] Having regard to my conclusion that Mr. Lockhart's exclusion from the hearing room constituted a breach of his right to be heard, and as a consequence, a breach of the principles natural justice, fairness requires that the complaint be remitted to the Disciplinary Committee for rehearing. In this regard, I adopt the words of Byron CJ in **In the Matter of Section 84 of the Commonwealth of Dominica Constitution Order and another v The Secretary, PSC**:¹⁶

"An essential element of any judicial process by any body established to perform adjudicative functions is attention to procedural fairness. This is an intrinsic duty irrespective of the manner in which its rules are detailed. It is well settled that no judicial process could be acceptable if the rules of natural justice were not observed."

I must reiterate that the Court is cognisant of the fact that the first respondents have been paid in settlement of the complaint and that Mr. Lockhart has provided an undertaking not to seek repayment of the sums paid. In these circumstances it is unlikely that the matter will go any further as there will be no incentive for the first respondents, who brought the complaints, to prosecute them, their interest therein having been wholly satisfied. While Mr. Thomas, QC sought to persuade this Court at the outset that there is no purpose in remitting the matter to a differently constituted Committee, in my view, the principles of natural justice leave no room for the Court's discretion in this case as to whether to remit the matter for rehearing where natural justice was not observed.

- [34] Furthermore, in light of the fact that the complaint will be remitted for rehearing, it is unnecessary for this Court to consider Mr. Thomas' submission that the Disciplinary Committee failed to properly record Mr. Lockhart's evidence and

¹⁶ [2000] ECSCJ No. 40.

erred in determining that Mr. Young had drafted particulars of claim and thereby committed the unlawful practice of law, contrary to the Act.

Issues 2 and 3 - Adequacy of Reasons and Delay

[35] Mr. Thomas, QC further contended that the Disciplinary Committee failed to give sufficient reasons for its decision. Specifically, he argued that the Committee ought to have elaborated its determination on the hours and fees that should have been allowed for the work done by Mr. Lockhart. Mr. Thomas, QC complained that the Committee failed to direct itself as to the appropriate burden and standard of proof at the disciplinary hearing and as a result the question arises as to whether the Committee properly directed itself on the standard to which the allegations levied against Mr. Lockhart had to be proved. Learned Queen's Counsel further complained that the Committee delayed for an inordinate period of time in delivering its decision.

[36] This is a short point. Suffice it to say that the second issue need not be determined in light of the proposed disposition of this appeal. At any rate, it is passing strange that Mr. Thomas, QC contended that the Committee should have elaborated its determination on the hours and fees that should have been allowed for the work done by Mr. Lockhart when the Committee seems to have made its determination on the basis of a restructured schedule of fees provided by Mr. Lockhart himself. There is also nothing contained in the Committee's decision which suggests that it had misdirected itself on the applicable burden and standard of proof at the disciplinary hearing. The third issue relating to delay, similarly, need not be considered in view of the proposed disposition.

Conclusion

[37] In all the circumstances, I would allow the appeal in part to the extent that the Disciplinary Committee in excluding Mr. Lockhart from the hearing room failed to observe the rules of natural justice. Accordingly, I would therefore remit the complaint to the Disciplinary Committee for rehearing by a differently constituted

panel. As the first respondents have not participated in this appeal and as Mr. Lockhart has not sought costs against the first respondents, there is no order as to costs.

[38] I would therefore make the following orders:

- (1) The appeal is allowed in part.
- (2) The decision of the Disciplinary Committee is set aside.
- (3) The disciplinary complaint filed on 3rd March 2015 against Mr. Lockhart is remitted to the Disciplinary Committee for rehearing by a differently constituted panel; and
- (4) There is no order as to costs.

[39] I am grateful to learned counsel for the appellant for their written and oral submissions.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar