In The Supreme Court of Bermuda

APPELLATE JURISDICTION
No. 3 of 2020

BETWEEN:

KEIVA MARONIE-DURHAM

Appellant

And

BERMUDA BAR COUNCIL

Respondent

JUDGMENT

Date of Hearings:	Friday 4 June 2021
Deadline for Supplemental Submissions:	Friday 11 June 2021
Date of Ruling:	Wednesday 30 June 2021
Appellant:	Mr. Jaymo Durham (Amicus Law Chambers)
Respondent:	Ms. Sara Tucker (Trott & Duncan Limited)

Appeal against Decision of Bermuda Bar Council / Refusal of Application for a Fit and Proper Certificate and a renewal of Practising Certificate / Section 10E of the Bermuda Bar Act 1974 / Appeal by Rehearing under RSC O.55/(2)-(7)

JUDGMENT of Shade Subair Williams J

Introduction

1. This appeal is made under section 13 of the Bermuda Bar Act 1974 ("the 1974 Act").

2. The Appellant, Mrs. Keiva Maronie-Durham ("the Appellant" / "KMD"), was first called to the Bermuda Bar on 17 October 2008. Since which, she has been a practicing member of the Bermuda Bar Association. However, on 9 December 2019 the Bermuda Bar Council ("the Bar Council") denied KMD's application for renewal of her practising certificate ("the Decision") on the grounds that she did not satisfy the requirements for certification as a fit and proper person under section 10E of the 1974 Act.

3. Aggrieved by the Respondent's refusal to reissue her a practising certificate, the Appellant appealed to this Court, under section 10G of the 1974 Act and in accordance with the procedural provisions under Order 55 of the Rules of the Supreme Court 1981 ("RSC"). By way of relief the Appellant seeks for this Court to set aside the Decision and to remit her application to the Bar Council for their reconsideration.

4. Pursuant to RSC O.55, this appeal was heard by way of a rehearing on the documents originally considered by the Bar Council. Additionally, affidavit evidence from both the Appellant and the President of the Bar Council, Ms. Elizabeth Christopher, was filed. The Court was also ably assisted by Counsel's oral and written submissions.

5. At the close of the hearing I reserved judgment which I now provide with the reasons outlined herein.

The Decision of the Bar Council

6. The Decision was given in the form of a letter dated 9 December 2019 which is signed under the name of the Vice President of the Bar Council, Ms. Cindy Clarke. The refusal to issue a Fit and Proper Person Certificate ("FPP Certificate") is expressly based on the Bar Council's conclusion that the "*Appellant's previous conduct and activities in business and or financial matters*" disqualified her from approval.

7. The factual basis relied on by the Bar Council in reaching the Decision consists of:

   (i) evidence underlying complaints of professional misconduct pending adjudication; and

   (ii) evidence underlying an admonishment made against the Appellant on 23 November 2015.

8. The Decision provides:

   "…*We would like to remind you that Bar Council are* [sic] *responsible for protecting the integrity and reputation of the Bar as a whole, as well as, if not more importantly so, to protect the interests of clients, potential clients and the public.*

As you are aware, Bar Council have [sic] *a statutory obligation to determine whether an applicant is a fit and proper person. As such, your application was considered fairly and in good faith. Taking into account all relevant factors.*

Fit and Proper Person Determination S.10E of the 1974 Act
In making its determination, Bar Council considered your previous conduct and activities in business and or financial matters. In particular, Bar Council had regard to the following:

Section 10E(4)(c)(iv)

- *You have demonstrated that you cannot be relied upon to discharge your financial duties as a Barrister, as you have 3 pending PCC tribunal matters that are all in relation to financial complaints.*

  [Complainant E]
  [Complainant L]
  [Complainant J]

Section 10E(4)(d)(vi)

- *You have within the preceding 5 years been admonished in relation to your conduct.*

  [Complainant M]

The decision

We have considered the severity of all of the relevant circumstances. However, in reviewing your previous conduct and activities in business and/or financial matters, Bar Council must deny your application for a Fit and Proper Person certificate and therefore will declined [sic] *to issue you a Practising Certificate at this time.*

Kindly refer to Section 10G of the Act in relation to any appellate rights."

<u>The Bar Council's Findings of Non-Disclosure against the Appellant</u>

9. Further to the grounds stated in the Decision, the Respondent also asserts that the Appellant's failure to properly disclose her regulatory history on the FPP Certificate application form gives added cause for the refusal. This is explained in Ms. Christopher's first affidavit [5-7] and [9-11]:

"*5. Firstly, it is the Appellant's position (with which we disagree) that the Respondent ought to have been delivered her Fit & Proper Person Certificate ("FPPC") following consideration of her application submitted on 4 December 2020 for the 2019/2020 practicing year. Upon receipt of her application the Respondent convened to deliberate this application along with others which were submitted. It became instantly apparent to the Respondent that there was a lack of disclosure as it relates to matters which detail the regulatory history of the Appellant*

in that she failed to disclose five active Professional Conduct Committee (hereinafter referred to as "the PCC") matters contrary to Section 10E 4(d) of the Bermuda Bar Act 1974, which will be discussed below.

6. Further and upon review of the matters which were not disclosed it was duly noted that the Respondent failed to respond to [a] reasonable request to provide comments to the complaints raised on at least two of those matters from the point of allegation to the point of charge and at the time of consideration of her FPP application she had still not responded. This is again contrary to Section 10E 4(d) of the Bermuda Bar Act 1974 Act, as the PCC, a part of a regulatory body put forward such requests to assist with their investigations into complaints.

7. Additionally and most egregiously as a result of the partial disclosure submitted by the Appellant which lacked particulars including names of the parties the Respondent has since become aware of two additional findings against the Appellant, one was before the Supreme Court of Bermuda and resulted in the Appellant being ordered to pay $225,000.00 in damages to the Plaintiff plus costs. She failed to disclose this action by the court in her original application…

…

9. On 4 December 2019 the Appellant submitted her Fit and Proper Person Application Form ("the Application") at "AR-pages 1-2" On page 2 under the Bermuda Bar 1974 section 4 (d) the Appellant was required to provide disclosure of her regulatory history, in particular inter alia whether she had been made the subject of a serious disciplinary finding, sanction or action by a regulatory, court or other body hearing appeals in relation to disciplinary or regulatory findings. Under this section the Appellant comments that "In 2016 I was fined by the Bermuda Bar Council for the failure to pay stamp duty on a conveyance".

10. With respect to this disclosure the Appellant failed to provide a full and proper description of parties or the findings of the Bar Disciplinary Tribunal which in that instance both admonished and fined the Appellant for inappropriate conduct regarding a financial transaction. Due to the lack of full and proper disclosure the Council believed the matter described in the application was that of [MB] v Keiva Maronie-Durham PCC 359 addressed this point. It has since been discovered that this disclosure was not in reference to Myron Binns in which she received an admonishment at PCC level "AR-Pages 99-100". In fact there were two complaints found against the Appellant within the period.

11. The Complainants in the actual matter partially disclosed were the Bar Council and [HK]. *The Chairman's Report on this matter can be found at "AR-pages 3-6" with the sanctions imposed listed at paragraph 9. Due to the Respondent's failure to fulfill her disclosure obligation the Respondent for all intents and purposes only considered one admonishment…and not the second lot of sanctions in the matter of* [HK] *which it was also bound to consider. Had there been full disclosure then the Respondent would have also cited the matter of* [HK] *in its denial letter to the Respondent. The Respondent has accordingly felt misled by this lack of disclosure and the confusion it has caused."*

10. In Ms. Christopher's second affidavit she deposed [8]:

"*Furthermore the findings actually made against the Appellant would have stood alone as reasons for the Respondent to reject her application and had it not considered the evidence on the complaints or the volume of the complaints in queue the Appellant* [sic] [Respondent] *would have continued to remain firm on its view. If we had discovered the Appellant failed to provide full disclosure before advising the Appellant of our decision, which we note that she fails to address in her Affidavit, I am certain we would have also considered and cited the non-disclosure and circumstances of those case*[s] *and cited them in her refusal letter.*"

11. A copy of the Appellant's application form dated 7 November 2019 was placed before this Court. Where the KMD was questioned about her regulatory history covering the preceding five years, she replied:

"*In 2016 I was fined by the Bar Council for the failure to pay stamp duty on a conveyance document*."

12. On the Respondent's case, KMD's above response was misleading. Counsel for the Bar Council, Ms. Sara Tucker, characterised the Appellant's response as a 'partial non-disclosure'. Outlining the fuller picture of KMD's regulatory history, Ms. Tucker pointed to a reprimand ordered by the tribunal on 11 March 2016 in proceedings where the Appellant was charged, *inter alia*, with improperly paying money out of her trust account, contrary to Rule 34 of the Barristers' Code of Professional Conduct 1981 and Rule 3(5) of the Barristers' (Accounts and Records) Rules 1976. The tribunal in these proceedings was chaired by Mr. Justice Stephen Hellman who provided the following factual summary in the Chairman's Report [3]:

"*3. The underlying factual allegations against Mrs. Durham, which arose in relation to the purchase of a property…where she was instructed by the purchasers, were that;*

(1) She completed the transaction before she had received all the purchase monies from her clients, contrary to rules 6(ii) and 6(iv) of the Code;

(2) She failed to establish that all the purchase monies had been received before completing, contrary to rules 6(ii) and 6(iv) of the Code;

(3) She prepared a misleading completion statement which represented that after payment of the purchase price she had retained sufficient monies to pay the vendors' share of Stamp Duty on the transaction whereas in fact she had not, contrary to rules 6(ii) and 6(iv) of the Code;

(4) Following completion, she withdrew from her trust account purchase monies held back from the vendors and improperly used them for the payment of Stamp Duty due on her clients' mortgage, contrary to rules 6(ii) and 6(iv) of the Code and rule 3(5) of the Accounts Rules; and

(5) She drew a cheque to pay the Stamp Duty due in relation to the conveyance on her client account when there were insufficient funds belonging to her clients in the account to support the cheque, contrary to rules 6(ii) and 6(iv) of the Code and rule 3(5) of the Accounts Rules; and

(6) *She represented to the Bar Council that the Stamp Duty due in relation to the conveyance had been paid in June 2012 when in fact it had not. This misrepresentation was contrary to rule 6(ii) of the Code*."

13. It is stated in the Chairman's Report [6] that the prosecution's evidence was unchallenged and that KMD gave oral evidence before the tribunal received closing submissions from both sides. In the end, the tribunal was unanimous in upholding the complaint and it found that KMD had breached the provisions as charged. In reprimanding KMD, the tribunal made the following sentencing remarks:

"…

(1) Mrs. Durham had been called to the Bar for 7 ½ years, and had been called for 4 years at the date of relevant misconduct. She was experienced enough to know that she should not have completed until she had all the completion monies, and the Tribunal were satisfied that at the material time she did know this.

(2) The Tribunal appreciated that she wanted to do her best for her clients, who found themselves in a difficult position in that they were short of the full amount of the purchase monies. She may have been under pressure from her clients, and she had an economic interest in completion taking place. But that was no excuse for breaching the Code.

(3) The Tribunal stressed the importance of an attorney always acting in accordance with her professional obligations. The public were entitled to have confidence in the competence and reliability of attorneys with whom they came into contact in the attorney's professional capacity, whether or not they were the attorneys' clients.

(4) Mrs Durham had let the vendors down. She had exposed them to the risk of a criminal penalty for late payment of Stamp Duty. The vendors had suffered the considerable embarrassment and inconvenience of being chased for some months by the Tax Commissioner for Stamp Duty post completion.

(5) *The Tribunal had given serious consideration to the question of suspension. By a majority, the Tribunal had decided that a reprimand was sufficient. Mrs. Durham should consider herself reprimanded. It was* [sic] [is] *unlikely that any future breaches of a similar nature would be dealt with so leniently*."

14. The Respondent also highlighted the Appellant's failure to disclose the fact of a written warning to her by the PCC in the form of letter, dated 23 November 2015. This was an informal warning which arose out of the Appellant's tardiness in returning a file to her former client. In the final paragraphs of the PCC's letter, it wrote:

"*The Committee hereby advises you of your future conduct as it relates to what would be considered a reasonable time to hand over a file to a client. In Bermuda, for attorneys, we would consider it normal and appropriate business practice to return files within 5 days of request. Taking from February until September fell far below the standard and has brought the profession into disrepute. Additionally, and to add to the client's frustrations, you repeatedly neglected to return his calls and failed to respond to the client's enquiries via email correspondence. This understandably resulted in the client losing confidence in your ability to provide legal services. We would advise that such failure to return calls and emails is unacceptable conduct for a member of our professional* [sic].

We would advise that if any future complaints referred to the Committee in relation to your conduct in this regard and if the Committee determines there is a prima facie case of misconduct with regards to that future complaint, then this letter of advice will be relevant as to how that matter will be dealt with."

15. A complaint is also made by the Respondent that KMD should have disclosed the findings of Hellman J in his 10 April 2015 judgment in *Frederick Matthews v Amy Trott* et al [2015] Bda LR 40. In that case a civil action was brought against KMD for breach of duty on account of her legal representation of both parties to a conveyancing transaction. Hellman J found against KMD stating [36] and [66]:

"*36. I am satisfied that the Fifth Defendant was acting as attorney for all three parties to the Conveyance or that, put another way, they were all three of them her clients. That was her evidence, and it accords with the two letters dated 14th December 2009, one of which refers to instructions from Mr Matthews, and the other one to instructions from 20 the First and Second Defendants. I do not consider that the attorney/client relationship between the Fifth Defendant and Mr Matthews was negatived by the fact that the transaction proceeded on the basis that it was the First and Second Defendants and not Mr Matthews who would be responsible for payment of the Fifth Defendant's fees.*

…

66. I accept that the Fifth Defendant started out with the intention of acting in the best interests of all three parties to the Conveyance. However in trying to do that she ended up breaching her contractual duties to act for Mr Matthews with reasonable care and skill and with single-minded loyalty. I am satisfied that her breach of those duties caused him loss. The amount of the loss was the value of his interest in the Property as at the date of the Conveyance, namely $225,000. I order that the Fifth Defendant pay damages to the Plaintiff in that sum."

The Statutory Process applicable to Professional Misconduct Complaints

Referral of Initial Complaint from the Bar Council to the Professional Conduct Committee

16. Complaints of improper conduct are initially made in writing and lodged directly with the Bar Council as envisaged by section 21 of the 1974 Act. Subsection (2) requires the Bar Council to refer any such complaint to the Professional Conduct Committee ("the PCC").

17. Pursuant to section 18(2) the PCC shall consist of one member of the Bar Council and six other members of the Bermuda Bar Association ("the Bar Association") who have been selected by the Bar Council. Under subsection (3) the members of the PCC are appointed annually to hold office for a period not exceeding one year, subject to reappointment in accordance with subsection (4). The PCC is required to elect one of its members to be the Chairman. That is the constitution of the PCC.

18. On any occasion that the PCC meets, there must be a quorum of three of its members to satisfy the requirements of subsection (8). However, in the event that the PCC is unable to achieve that quorum, the Chairman is empowered to appoint one or more other members of the Bar Association as a temporary substitution.

19. The powers of the PCC are outlined under section 18A of the 1974 Act:

General powers of Professional Conduct Committee

18A The powers and functions of the Committee shall be to—

(a) conduct inquiries into and investigations of complaints of improper conduct made against a barrister, professional company or registered associate in accordance with the Rules, to determine whether a prima facie case of improper conduct has been made out against the person complained against;

(b) take such measures prescribed by the Rules after such inquiry or investigation, or both such inquiry and investigation, if no prima facie case of improper conduct has been made out against a person complained against;

(c) take such informal or formal measures in accordance with the Rules after investigating such a complaint, where the Committee determines that a prima facie case has been made out against a person complained against;

(d) make any necessary administrative arrangements, in accordance with the Rules, for the presentation of a case before a disciplinary tribunal, where formal measures are taken by the Committee in respect of a complaint;

(e) make an order that a trust fund or funds shall, until a disciplinary tribunal determines otherwise, be operated by an accountant or a bank if the complaint of improper conduct contains an allegation of misuse of trust funds;

(f) authorize a committee representative to make arrangements for counsel, and any assistant counsel appointed by him, to be remunerated in accordance with the Rules for work done on behalf of the Committee;

(g) make a ruling in respect of what constitutes a matter of improper conduct where the Committee considers it appropriate so to do or when a barrister, professional company or registered associate asks the Committee so to do, and such a ruling may involve a question of conflict of interest; and

(h) make recommendations on matters of improper conduct to the Bar Council as it may think appropriate.

Referral of a Professional Misconduct Complaint to a Disciplinary Tribunal

20. Section 19 provides the pathway for a complaint to be referred to a disciplinary tribunal ("tribunal") which shall consist of two other members of the Bar Association on the recommendation of the Bar Council (save where the Bar Council is the Complainant) and which shall be presided over by the Chief Justice or another Judge of the Supreme Court. A complaint shall be referred to a tribunal where the Committee determines (i) that there is a *prima facie* case of improper conduct has been made out and (ii) that formal measures are appropriate.

21. Under section 19(5) the standard of proof required in proceedings before a tribunal "*shall be the same as that required in criminal proceedings*" i.e. beyond reasonable doubt and a tribunal shall have all of the powers of a Court of summary jurisdiction in accordance with section 19(6). This means that a tribunal, whose final decision may be reached by a majority count, has the power to summons witnesses for examination on oath and to compel the production of relevant documents.

22. The tribunal has a duty under sections 19A(1)(a)-(b) to conduct a preliminary hearing for the purpose of giving case-management directions and to thereafter hold the final hearing to determine whether or not a complaint of improper conduct has been made out against the person whose conduct is impugned.

The Relevant Disciplinary Rules

23. Section 9 of the 1974 Act empowers the Bar Council to make rules ("rules") subject to confirmation by the Chief Justice. Section 9(1)(b) specifically refers to, *inter alia*, the responsibility of a barrister/law firm in the opening and keeping of accounts holding client-money and the manner in which a barrister/law firm shall deal with money held by them in a fiduciary capacity.

24. Of particular note, rules made pursuant to section 9(1)(b)(ii) would apply to the Bar Council taking "*such action as may be necessary to enable them* [sic] [it] *to ascertain whether or not such rules are being complied with*".

25. Section 18(9) states that the practice and procedure prescribed by rules made under section 9 shall be followed by the PCC:

"*The practice and procedure to be followed by the Committee shall be as prescribed by Rules and, subject to this Act and those Rules, the Committee may make its own rules of procedure*."

26. Similarly, section 19(8) requires that the practice and procedure for tribunal proceedings shall also be as prescribed by any rules made under section 9:

"*The practice and procedure to be followed in relation to the proceedings of a disciplinary tribunal shall be as prescribed by the Rules and, subject to this Act and those Rules, a disciplinary tribunal may make its own rules of procedure*."

27. The Bar Professional Conduct Committee Rules 1997 ("the PCC Rules") and the Bar Disciplinary Tribunal Rules 1997 ("the Tribunal Rules") govern accordingly.

28. There is a detailed procedural regime in place for determining the merits of a professional misconduct complaint. Piloting the exercise of the PCC's powers under section 18A(a) of the 1974 Act, rule 3 of PCC Rules requires the PCC to give a respondent written notice of any complaint it receives of improper conduct. The PCC is duty-bound to make initial inquiries and both sides (i.e. the complainant and the respondent) shall be party to any inquiry or investigation of a complaint of improper conduct.

29. In the first instance, it is for the PCC to decide whether the complaint is trivial, frivolous or lacking in merit or whether the complaint has some merit. In the case of the latter, the complaint will be investigated in accordance with rule 5 so that the respondent is first afforded a 14-day opportunity to comment on the merits of the complaint prior to any assessment as to whether there is a *prima facie* case of misconduct. Where the PCC determines that a *prima facie* case has been established and that the complaint is to be treated formally, rule 8 is triggered enabling the PCC to charge the respondent before a tribunal chaired by a judge of the Supreme Court.

30. A tribunal hearing is conducted as a formal adversarial hearing by which evidence may be called and both parties may present their opposing cases. The standard of proof is the same as that required for criminal proceedings i.e. beyond all reasonable doubt. Rule 11 of the Tribunal Rules expressly states that any such disciplinary proceedings shall be governed by the rules of natural justice:

"***The hearing***

11 (1) The proceedings of a disciplinary tribunal shall be governed by the rules of natural justice.

(2) In the conduct of the hearing of any complaint, a disciplinary tribunal shall direct its clerk to ensure that—

(a) adequate notice of the proceedings is given to a complainant and respondent and that the parties have complied with any direction or order made by a tribunal under section 19A of the Act; and

(b) any party to the proceedings may, if he so requires, be heard by the tribunal either in person or by counsel."

31. Rule 17 of the Tribunal Rules states that a tribunal shall pronounce its finding and/or sentence in respect of the charge(s) before it. The sentencing options available to a tribunal are listed under rule 18(3):

"*(3) A disciplinary tribunal may impose any of the following sentences upon a respondent—*

(a) admonition or reprimand;

(b) disbarment;

(c) striking off the Roll or removal from the Register of Associates;

(ca) restriction in every aspect of the practice of the respondent, or part only of the respondent's practice;

(d) suspension

(e) suspension or revocation of a professional company's certificate of revocation; or

(f) a fine.

(4) The Chairman of a disciplinary tribunal shall pronounce its decision as to sentence to the Committee."

32. Rule 17(3) states in clear terms that where any such charge is not proved, the charge shall be dismissed and no action shall be taken:

"*(3) In any case where a charge of improper conduct has not been found proved against a respondent at the conclusion of the hearing, no action shall be taken against him and the charge shall be dismissed.*"

The Statutory Process applicable to the issuance of Practising Certificates

33. In issuing a practicing certificate to a barrister for a one-year period, section 10(1) requires the Bar Council to be "*satisfied that the person to whom the application relates is qualified to practise as a barrister*".

34. Section 10(3) sets out various grounds giving rise to an entitlement to a practising certificate. For present purposes, I am concerned with the requirement of an FPP Certificate under section 10(3)(fa):

"*the Council has issued to him a fit and proper person certificate within the period of ninety days immediately preceding the date on which he applies for a practising certificate*"

35. Section 10A empowers the Bar Council to issue a practising certificate subject to limitations regarding trust accounts and the practice of real estate law. Those limitations, however, will become obsolete under section 10A(2) where the holder of the certificate has been either discharged from bankruptcy or has produced evidence that any conviction disclosed in the applicant's FPP Certificate has been expunged or has elapsed by operation of time.

36. The relevant provision by which the Bar Council is to be guided in issuing an FPP Certificate is section 10E which, effective 31 January 2019, provides:

"***Fit and proper persons***

10E (1) Every Barrister and registered associate, and every shareholder, controller, director and senior executive who exercises control of a professional company, must be a fit and proper person to engage in the practice of law.

(2) On an application to the Council for a fit and proper person certificate by a person who wishes to engage in the practice of law, the Council shall determine whether that person is a fit and proper person, and in making that determination, the Council shall act fairly and in good faith in respect of each person.

(3) In determining whether a person is a fit and proper person, the Council shall, with a view to protecting the interests of clients, potential clients and the public, and in the interest of protecting the integrity of the profession as a whole, shall have regard to the matters set out in subsections (4), (5) and (6).

(4) The Council shall consider the previous conduct and activities in business or financial matters of the person, and shall have regard in particular to—

(a) evidence that the person has been convicted by a court of a criminal offence—

(i) for which the person received a custodial or suspended sentence;

(ii) involving dishonesty, fraud, perjury or bribery;

(iii) associated with obstructing the course of justice; associated with money-laundering or terrorism;

(b) evidence that the person has been convicted by a court of more than one criminal offence;

(c) material evidence that the person has been responsible for behaviour which—

(i) is dishonest or violent;

(ii) involves a misuse of any position to obtain a pecuniary advantage;

(iii) involves a misuse of any position of trust;

(iv) demonstrates that the person cannot be relied upon to discharge his financial duties as a barrister;

(d) the regulatory history of the person, in particular whether the person—

(i) has been made the subject of a serious disciplinary finding, sanction or action by any regulatory body, court or other body hearing appeals in relation to disciplinary or regulatory findings;

(ii) has failed to disclose information to a regulatory body when required to do so, or has provided false or misleading information;

(iii) has significantly breached the requirements of a regulatory body;

(iv) has been refused registration by a regulatory body;

(v) has failed to comply with reasonable requests of a regulatory body;

(vi) has, within the preceding five years, been rebuked, reprimanded or received a warning about his conduct by a regulatory body; and

(e) matters relating to the operation of companies, trusts, and legal arrangements, in particular whether the person—

(i) has been removed or disqualified as a company director or trustee;

(ii) is or was a shareholder, controller, director or senior executive of a body corporate which has been the subject of a winding up order or receivership order, or has otherwise been wound up or put into receivership or administration in circumstances of default on any debt or insolvency.

(5) A person shall disclose if he has received a police caution for any of the matters referred to in subsection (4) and, to the extent such caution amounts to an admission of guilt, the Council shall consider the caution in like manner as a conviction for the purposes of that subsection.

(6) Notwithstanding that the Council shall have regard to the evidence and matters set out in subsections (4) and (5), it shall also have regard to any relevant exceptional circumstances when making a determination under this section.

(7) For the purposes of making its determinations, the Council shall be empowered to commission the production of research and reports from any third party appearing to the Council to be properly qualified to do so, and to rely upon such research and reports for the purpose of issuing a fit and proper person certificate.

(8) The Council may make a determination upon an application for enrolment being made under section 52 of the Supreme Court Act 1905, or upon the application of any person who proposes the candidacy of any such applicant for enrolment at the Supreme Court.

(9) The Council shall make its determination within a period of not more than thirty days from the date of an application made by the person under this section.

(10) Where it has determined that a person is a fit and proper person to engage in the practice of law, the Council shall not more than five days thereafter issue to the person a fit and proper person certificate in such form as it shall determine.

(11) For the avoidance of doubt, in making a determination under this section the Council shall not have regard to any criminal conviction that has been spent in accordance with the Rehabilitation of Offenders Act 1977."

37. In the Schedule of the Bermuda Bar (Practising Certificate) Rules 1984, Form 1 sets out the application form for a practising certificate. Item 9 on Form 1 requires the applicant to declare, *inter alia*, as follows:

"*9. I was issued with a fit and proper person certificate by the Bar Council within the period of 90 days immediately preceding the date of this application*."

The Relevant Statutory Provision for an Appeal to this Court and the Grounds of Appeal

38. Section 13 of the 1974 Act enables a person aggrieved by a decision of the Bar Council made under Part III (Practicing Certificates) to appeal directly to the Supreme Court:

"***Appeals***

13 (1) Any barrister aggrieved by a decision of the Council refusing an application made under this Part may appeal to the Supreme Court against that decision within one month of being notified of it.

(2) Upon hearing any appeal under subsection (1), the Supreme Court may make such order, including an order for costs, as it thinks just.

(3) The practice and procedure to be followed in relation to applications and appeals under this section shall be as prescribed by rules of court."

39. However, where an appeal is made by a person aggrieved under section 10E the appeal provision under section 10G applies:

Appeals

10G (1) A person who is aggrieved by the determination of the Council under section 10E may appeal to the Supreme Court against such determination within one month of being notified by the Council.

(2) Section 13, and any rules referred to in that section that apply to an appeal by a barrister in relation to a practising certificate, apply, with any necessary modifications, to an appeal under this section by a person in relation to a fit and proper person certificate.

(3) The determination of the Supreme Court is final.

40. The Appellant in this case relies on the following grounds of appeal which are pleaded in an Amended Notice of Appeal filed on 3 November 2020:

"*That the Bar Council's decision was unfair in that at the time of consideration, the Bar Council failed to provide the Appellant any or any adequate opportunity to address matters that might have lead it to conclude that it was not satisfied about her being a fit and proper person to practice law.*

Furthermore, the existence of the complaints, of which the Appellant is innocent of until proven guilty, have been used to adjudicate her fitness to practice, in violation of her right to natural justice.

That the determination of the Bar Council was unduly harsh in all circumstances...

Analysis and Findings

41. Before I examine the competing issues clouding KMD's application for an FPP Certificate, I shall first consider the subject of an FPP Certificate in the context of an application for initial admission to the Bar.

42. Affidavit evidence of good character is required in all cases for an application to the Supreme Court for admission to the Bermuda Bar under section 52(c)(1) of the Supreme Court Act 1905. In my earlier judgment in *A.Qamar v Bermuda Medical Council* [2021] SC (Bda) 9 (2 February 2021), I cited the majority decision of the Privy Council in *Layne v Attorney General of Grenada* [2019] UKPC 11 where the meaning of good character in the context of section 17(1) of the Legal Profession Act 2011 in Grenada was settled. "Good character", like section 52(c)(1) of the Supreme Court Act 1905, is a condition admittance to the Bar in Grenada. In the leading judgment of Lady Arden (with whom Lord Wilson agreed) she stated [36-38]:

"*36. For understandable reasons, a wide range of professions, and not just the legal profession, have good character and competence conditions for entry into the profession. Those professions include those in which members of the public may place great trust, such as the medical and legal professions. Members of these professions, once admitted, have to observe high standards of behaviour in both their private and professional lives. They may face disciplinary charges if they fail to do so.*

37. The content of a good character condition may vary according to the profession. The person or body which has to be satisfied about conditions of entry may be given powers to investigate or obtain evidence. Or limits may be placed on the type of conduct to be examined

and so on. In the context of admission to the Bar of Grenada, satisfaction of the entry conditions is a matter not for the Bar Council but for the Supreme Court. It is for the Supreme Court to determine the procedure. There are no limits placed on the way the Supreme Court fulfils its role and no specific powers are given to it for this purpose. By implication it is authorised to determine whether the entry conditions are met in accordance with its practice and the limits of the judicial function.

38.The good character condition must clearly refer to good character appropriate for being an attorney-at-law in Grenada. It must clearly be satisfied at the date of the Supreme Court's decision, rather than on a historical basis."

43. Having come into force on 31 January 2019, section 52(c)(ia) requires an application for admission to the Bermuda Bar to also include an FPP Certificate. However, the question of admission to the Bar remains under the ultimate determination of the Court and not the Bar Council. That being said, a Court finding of good character at the admission stage establishes an applicant's starting point or the *status quo* when applying for a renewal of a practising certificate.

44. So, in the case of an applicant who had been issued a practising certificate for the preceding 12 months, the issuance of an FPP Certificate for the upcoming 12 months is a practical certainty where it is shown that the applicant:

- has not been cautioned or convicted of a criminal offence;
- has not been found responsible for violent or dishonest behavior;
- has not been found to have misused a position of trust or misused any other position for pecuniary advantage;
- has not demonstrated cause for finding that he/she cannot be relied upon to discharge his/her financial duties as a barrister;
- has been shown to have an unblemished regulatory history;
- has not been shown to have misled or omitted any information required of a regulatory body;
- has not been disqualified or removed as a director of a company or a trustee; and
- has not held an executive position in a company which has been wound up or placed into receivership or administration on the grounds of debt or insolvency.

45. However, in the present case the Bar Council found that the Appellant had demonstrated that she could not be relied on to discharge her financial duties as a barrister. In doing so, the Bar Council relied on its assessment of the merits of several professional misconduct complaints

pending adjudication before a tribunal. It did so on the view that section 10E(6) permitted it to assess such evidence, regardless of the pending status of the trial of those complaints.

46. The Bar Council also relied on the fact of an admonishment which was made against the Appellant within 5 years preceding her application.

47. Additionally, the Bar Council contend that the Appellant did not adequately disclose the details of her regulatory history.

Analysis and Findings on the Bar Council's Reliance on Complaints Pending Adjudication

48. The procedural rules are clearly designed to construct a system of even-handed adjudication by which every complaint of professional misconduct is to be resolved before an independent and impartial tribunal. It follows that no respondent should be penalized or judged on the mere fact that one or more complaints have been made against him or her. Each respondent, in accordance with the constitutional principles of natural justice, has an inalienable right to a fair hearing and to present his or her defence before an impartial tribunal. These principles are enshrined in the Bermuda Constitution Order 1968 ("the Constitution"). Section 6(8) (of Schedule 2) provides:

"*Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time*."

49. Section 6(8) thus protects one of the key doctrines of natural justice: *nemo judex in causa sua* (no one should be a judge in their own cause). This was recognised by Kawaley J (as he then was) in *Fay and Payne v The Governor and the Bermuda Dental Board* [2006] Bda L.R. 65 where the applicants challenged the constitutionality of the statutory regime for misconduct complaints under the Dental Practitioners Act 1950 and the Dental Hygienists Regulations 1950 which empowered the Bermuda Dental Board to commence and investigate complaints and to also determine the final outcome of such complaints. Considering the origins and applicability of section 6(8), Kawaley J said [30-33]:

"*30. This provision is substantially based on Article 6(1) of the European Convention on Human Rights ("ECHR"), which provides as regards both civil and criminal proceedings in relevant part as follows:*

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal."

31.It is settled law that Article 6(1) applies to professional disciplinary tribunals, as the Applicants submitted in reliance on Preiss v General Dental Council [2001] 1 WLR 1926. In that case the Privy Council held:

"This part of the argument for the appellant is founded on natural justice and article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, scheduled to the Human Rights Act 1998. Article 6(1) begins with the declaration that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Since the decision of a majority of the European Court of Human Rights in Le Compte, Van Leuven and De Meyere v Belgium(1981) 4 EHRR 1 it has been accepted that a decision of a professional tribunal affecting the right to practise the profession is a determination of civil rights and obligations."

32.The disciplinary offence with which the Applicants were formally charged carried with it a discretionary penalty which could have deprived them of the right to practise their profession. Any disciplinary proceeding under the 1950 Act and Regulations affects the right to practise the profession of the persons concerned, and may accordingly be said to affect their "civil rights and obligations" under section 6(8) of the Bermuda Constitution.

33.I find, following the Privy Council decision in Preiss, which I regard as highly persuasive rather than strictly binding for present purposes, that section 6(8) of the Bermuda Constitution applies to the proceedings instituted against the Applicants in March 2004 by the Dental Board under the Dental Practitioner's Act 1950 and Regulations."

50. Clearly, it would be inappropriate for this Court to form or to express a view on the merits of any complaint which is the subject of pending adjudication before a tribunal. For that same reason, it would serve no real purpose for me to examine the particulars of these disciplinary matters which await proper adjudication. Further, I note that section 25 of the 1974 Act contains a confidentiality provision which would render it improper to outline the details of those complaints in a public judgment arising out of these proceedings. Section 25 provides:

"*Confidentiality*

Subject to section 24B of this Act, every disciplinary proceeding under this Part of the Act shall be treated as confidential by every person having access thereto."

51. (Section 24B outlines the circumstances under which the Registrar may publish in the Gazette a charge, finding and/or sentence of the tribunal.) Of further note, rule 13 of the Tribunal Rules provides:

"Hearing in private or in public

13 A hearing before a disciplinary tribunal shall be in private unless—

(a) a respondent has made an application that the hearing shall be in public; and

(b) the public interest does not require the hearing to be in private."

52. In determining whether an applicant is entitled to an FPP Certificate, the Bar Council is required under section 10E(2) to "*act fairly and in good faith in respect of each person*." The statutory duty of the Bar Council to keep in view the interests of the clients, potential clients, the public and the integrity of the profession as a whole neither requires nor permits the Bar Council to impose its own pre-trial views on the merits of complaints pending trial before an independent and impartial tribunal. Otherwise, this would be tantamount to contaminating an adjudicator's neutrality with the opinions of an investigator and prosecutor. So the Bar Council plainly erred in its attempt to usurp the function of a tribunal by making findings of fact (see Ms. Christopher's second affidavit [8]) on evidence which could only be judged in accordance with the statutory regime for disciplinary complaints.

53. The Bar Council's exercise of evaluation in deciding whether to issue an FPP Certificate is limited to an assessment on the matters raised under subsections (4), (5) and (6) of section 10E. Under subsection (4)(a)-(b) the Bar Council is duty-bound to consider the applicant's previous conduct and activities in business or financial matters by having particular regard to an applicant's history of criminal convictions. Under subsection 4(c) the Bar Council must also look at "material evidence" that the applicant has been responsible for behavior which:

    (i) is dishonest or violent;

    (ii) involves a misuse of any position to obtain a pecuniary advantage;

    (iii) involves a misuse of any position of trust;

    (iv) demonstrates that the person cannot be relied upon to discharge his financial duties as a barrister;

54. The Bar Council's power to consider "material evidence" of the above does not necessarily restrict the Bar Council to looking at criminal convictions or formal findings of professional misconduct only. For example, it is arguable that the Bar Council would be within its statutory remit to rely on an applicant's admission of misuse of his or her position of trust in a matter settled outside of a Court; or compelling video footage of unreported domestic violence or a civil judgment evidencing personal dishonesty or a civil fraud. However, where there are contentious allegations of misconduct or a criminal offence and the statutory regime for adjudicating those complaints is engaged, the Bar Council is not entitled to trespass on the constitutional rights of that applicant to due process and natural justice.

55. In my judgment, any assessment and final determination of the professional misconduct complaints against KMD should be made only by a properly constituted independent and impartial tribunal before whom the complaints are to be tried at the criminal standard of proof. Until such time, it ought not to be presumed or surmised that KMD is responsible for the misconduct as alleged.

56. For these reasons this ground of appeal succeeds.

Analysis and Findings on the Relevance of the Admonishment against the Appellant

57. Section 10E(4)(d) of the 1974 Act requires the Bar Council to look at the regulatory history of an applicant. Subsection (i) specifically refers to disciplinary findings. However, the Respondent relies on section 10E(4)(d)(vi) which refers to an applicant who "*has, within the preceding five years, been rebuked, reprimanded or received a warning about his conduct by a regulatory body*".

58. The PCC's informal treatment of the complaint of misconduct outlined in its letter of 23 November 2015 was done pursuant to Rule 7 of the PCC Rules which provides:

"***Informal treatment of complaint disclosing prima facie case***

7 (1) Where a prima facie case of improper conduct is disclosed by the complaint but, in the opinion of the Committee, the complaint requires informal treatment the Committee may—

(a) advise a respondent in writing or orally in respect of his future conduct; or

(b) direct that a respondent shall appear before the Chairman of the Committee or some other person nominated by the Committee for that purpose, to provide an explanation for his conduct; and

(c) where the respondent consents, admonish him in writing or orally if the Committee is not satisfied with his explanation.

(2) If a respondent does not consent to an admonishment under sub-paragraph (c) of paragraph (1) of this rule, the Committee may deal with the complaint on a formal basis in accordance with rule 8."

59. The Bar Council was statutorily obliged to consider this admonishment as part of their deliberations on the issuance of an FPP Certificate under 10E(4)(d)(vi). However, the real question is whether it would be fair to attach any significant weight to the fact of the single admonishment. This is because an admonishment, by its very nature, implicitly suggests that the underlying infraction was not sufficiently grave, standing on its own, to warrant any of the penalties open to a tribunal to make under rules 18(3)(b)-(f) of the Tribunal Rules. Thus, the admonishment alone would not likely support a refusal to issue an FPP Certificate, particularly given that it was made approximately four years prior to the Decision. That being said, it is obviously the case that an admonishment in company with other more recent and similar infractions would warrant more serious treatment.

Analysis and Findings on the Non-Disclosure

60. Section 10E(4)(d)(ii) requires the Bar Council to consider whether an applicant "*has failed to disclose information to a regulatory body when required to do so, or has provided false or misleading information*".

61. I have reviewed the Appellant's 7 December 2019 application form, particularly where she was questioned about her regulatory history and where she replied:

"*In 2016 I was fined by the Bar Council for the failure to pay stamp duty on a conveyance document*."

62. This response was given in answer to the following text[1] lifted from section 10E(4)(d) of the 1974 Act:

> *(d)* "*the regulatory history of the person, in particular whether the person—*
>
> *(i) has been made the subject of a serious disciplinary finding, sanction or action by any regulatory body, court or other body hearing appeals in relation to disciplinary or regulatory findings;*
>
> *(ii) has failed to disclose information to a regulatory body when required to do so, or has provided false or misleading information;*
>
> *(iii) has significantly breached the requirements of a regulatory body;*
>
> *(iv) has been refused registration by a regulatory body;*
>
> *(v) has failed to comply with reasonable requests of a regulatory body;*
>
> *(vi) has, within the preceding five years, been rebuked, reprimanded or received a warning about his conduct by a regulatory body; and*

63. I will begin with the complaint made by the Respondent that KMD should have disclosed Hellman J's findings against her in his judgment in *Frederick Matthews v Amy Trott.* The merits of this contention from the Respondent are not necessarily obvious as the application form for an FPP Certificate does not expressly require an applicant attorney to disclose any findings of civil wrong-doing against them.

64. In the *Frederick Matthews v Amy Trott* case, the Court found that KMD had breached her duty of care to her client in respect of her fiduciary duties to advise the Plaintiff to seek independent legal advice in the course of a conveyance transaction. The Court expressly found that the

[1] There appears to be an inadvertent misnumbering on this portion of the application form.

Appellant was well-intentioned but nonetheless liable in tort. This was the background to the order of damages and costs made against her.

65. It was open to the Plaintiff and/or the Bar Council to refer this matter to the PCC for formal disciplinary action. However, no suggestion has been made to this Court that that in fact occurred. Fair to say, this matter never expanded into a disciplinary conviction by a regulatory body or by a Court sitting in appeal of a regulatory body. Nevertheless, the judgment ought to have been disclosed if the findings therein evidence any of the categories of behavior listed under 10E4(c). Arguably, it does. Consistent with the factors listed under subsections 4(c)(ii)-(iii) KMD was required to disclose any information which involved either her misuse of a position of trust or her misuse of a position to obtain a pecuniary advantage.

66. The duty of an applicant member of the Bar Association to make full and frank disclosure to the Bar Council during the course of the application process for a practising certificate should be considered high. This means that where ambiguity arises as to whether information or material is disclosable and required under section 10(4) the applicant in question should err conservatively by making reasonable inquiries with the Bar Council or by simply disclosing the matter in question. This approach is essential as it supports the Bar Council in its statutory duty to seek the protection of public interest and the integrity of the profession as a whole.

67. For that reason, I find that Mrs. Maronie-Durham ought to have disclosed this civil judgment of the Court. That being the case, I also accept that it may not have been obvious to her that she ought to have done so.

68. I now move on to the other and more serious non-disclosures. The Appellant's mention in her application form to being fined for non-payment of stamp duty was woefully lacking in conveying the full picture of her regulatory history. At the very least, her response was misleading as it omitted the following aspects of her regulatory history:

    (i) The PCC's warning letter to her of 23 November 2015; and

    (ii) The reprimand ordered by the tribunal on 11 March 2016 in the proceedings in which Mr. HK was a Complainant and the Appellant was charged, *inter alia*, with improperly paying money out of her trust account, contrary to Rule 34 of the Barristers' Code of Professional Conduct 1981 and Rule 3(5) of the Barristers' (Accounts and Records) Rules 1976.

69. Beyond the clear wording of section 10E(4)(d)(vi) ("…*within the preceding five years*…") KMD's 2019 one-line reference to a 2016 fine for late payment of stamp duty strongly implies that she understood that she was expected to disclose her regulatory history for the preceding 5 years. Notwithstanding, she omitted any mention of the formal reprimand ordered in the March 2016 tribunal proceedings in which she was found responsible for the charge of improper payment of money out of her trust account.

70. In the absence of an explanation from the Appellant, this non-disclosure does not appear on its face to be an innocent oversight. The undisclosed tribunal proceedings developed into a full trial proceeding in which KMD gave oral evidence before Hellman J and two other practising

members of the Bar Association. The evidence of KMD's failure to disclose to the Bar Council even the fact of these proceedings is capable of supporting a strong inference of dishonesty, absent any explanation from KMD.

Decision as to whether to remit the application for a FPP Certificate

71. An appeal made under the 1974 Act is procedurally governed by RSC O.55.

72. Under RSC O.55/7 the Court has very broad powers in the manner of conduct of an appeal. The Court may receive further oral and/or written factual evidence and the Court is entitled to draw any inference of fact from that evidence which could have properly been drawn by the tribunal of first instance.

55/7 Powers of Court hearing appeal

7 (1) In addition to the power conferred by rule 6(3), the Court when hearing an appeal to which this Order applies shall have the powers conferred by the following provisions of this rule.

(2) The Court shall have power to receive further evidence on questions of fact, and the evidence may be given in such manner as the Court may direct either by oral examination in court, by affidavit, by deposition taken before an examiner or in some other manner.

(3) The Court shall have power to draw any inferences of fact which might have been drawn in the proceedings out of which the appeal arose.

(4) It shall be the duty of the appellant to apply to the magistrate or other person presiding at the proceedings in which the decision appealed against was given for a signed copy of any note made by him of the proceedings and to furnish that copy for the use of the Court; and in default of production of such note, or, if such note is incomplete, in addition to such note, the Court may hear and determine the appeal on any other evidence or statement of what occurred in those proceedings as appears to the Court to be sufficient.

Except where the Court otherwise directs, an affidavit or note by a person present at the proceedings shall not be used in evidence under this paragraph unless it was previously submitted to the person presiding at the proceedings for his comments.

(5) The Court may give any judgment or decision or make any order which ought to have been given or made by the court, tribunal or person and make such further or other order as the case may require or may remit the matter with the opinion of the Court for rehearing and determination by it or him.

(6) The Court may, in special circumstances, order that such security shall be given for the costs of the appeal as may be just.

(7) The Court shall not be bound to allow the appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned."

73. Having considered the binding effect of the Privy Council's decision in *Ghosh v The General Medical Council* [2001] UKPC 29 and the judgment of the fully constituted Supreme Court of South Australia (being the Court of highest jurisdiction) in *Papps v Medical Board of South Australia* [2006] SASC 234 [32-34] together with the relevant provisions under RSC Order 55 in the context of section 7 of the Medical Practitioners Act 1950, I made the following statement in *A. Qamar v Bermuda Medical Council* [70-72]:

"*70. However, in reality, the form of "rehearing" will not only be determined by a judicial construction of the provisions under RSC O.55/2-7 but on the circumstances of each case. There will be cases where the tribunal of first instance settled their decision on a record of documents which contain uncontested facts which need not be supplemented by new evidence for the purpose of the appeal proceedings. In such cases, the parties would likely be in pursuit of nothing more than a fresh analysis of the original record which would be firmly tied to an assessment as to whether the original tribunal erred.*

71. In other cases, like the present case, a Court of this jurisdiction may receive newly filed evidence introducing fresh facts which were not before the tribunal of first instance. Such evidence would also be subject to testing through the process of cross-examination, as did occur in the present case. In this latter type of appeal, the appeal process takes on the appearance of a new trial for fresh adjudication and is more comparable to an appeal de novo.

72. In both of the above examples of a rehearing under RSC O.55 the Court is primarily concerned with formulating its own assessment of the case, as if it was appropriating all of the seats of the decision makers whose decision is being appealed. It thus follows for cases where new evidence is heard, that the Court will be less concerned with the wrongness of the decisions of the original tribunal than with the merits of the case presented before it, so long as the appellate Court does not, in doing so, exercise any powers or apply any rules which would not have been open to the original tribunal to make. After all, the Court is tasked to find what the tribunal should have found. This is consistent with the Privy Council's recognition that the Board's jurisdiction in the Ghosh case was appellate as opposed to supervisory."

74. In this case, I have found that the Bar Council erred in relying on their assessment of the evidence filed in support of unadjudicated complaints of professional misconduct. Additionally, I determined that it would be unfair of the Bar Council to attach any significant weight to the underlying facts of the Appellant's 23 November 2015 admonishment if considered as a stand-alone factor. However, I have also found that the Bar Council is entitled

to consider the Appellant's non-disclosure of her regulatory history. As the fact of the non-disclosures has been proved, an assessment as to whether this constituted a dishonest act must now be carried out.

75. In the first instance, this exercise should be performed by the Bar Council. Under section 10E(4)(d)(ii) the Bar Council is obliged to pay particular regard to whether an applicant failed to disclose any information or provided false or misleading information to a regulatory body. In this case, the Appellant did in fact fail to disclose information statutorily required by the Bar Council in the course of the application process itself. In considering whether to issue an FPP Certificate under section 10E, the Bar Council is thus bound to assess whether such a failure to disclose occurred as a result of an innocent and minor oversight, or whether it was done as a result of lack of sufficient care for detail, if not as a dishonest attempt to mislead the Bar Council.

76. Both Mr. Durham and Ms. Tucker cited the judgment of Mr. John Howell QC sitting as a Deputy High Court Judge in *Rizwana Yussouf v The Solicitors Regulation Authority* [2018] EWHC 211 (Admin). In that case the English High Court was sitting in appeal from a decision of the Adjudication Panel of the Solicitors Regulation Authority ("SRA Panel") refusing Ms. Rizwana Yussouf's application for admission as a solicitor. The refusal to admit was decided by the SRA on grounds of non-disclosure. A summary of the facts is provided in the introductory portion of the judgment [3-7]:

"3.*On April 29th 2014 she submitted her first application to the SRA for admission as a solicitor and for a practising certificate. In her application form, in response to the question whether she had "had a County Court Judgment (CCJ) issued against" her, Ms Yussouf's answer was: "No". In fact, as she then knew, she had had such a judgment issued against her by the Woolwich County Court in the sum of £4,891 on October 30th 2009 ("the 2009 Judgment"). In the event Ms Yussouf ultimately withdrew her first application on January 12th 2015.*

4.Ms Yussouf submitted a second application for admission as a solicitor and for a practising certificate on March 8th 2016. It was dismissed by an Adjudicator, who also cancelled her existing student enrolment, on February 27th 2017. He found that she had acted dishonestly when making her first application by failing to disclose the 2009 judgment and also that, during the consideration of that application, she had provided misleading information to the SRA in relation to its existence, and to her knowledge, of it. The Adjudicator based his decision on the documents he had without affording Ms Yussouf an oral hearing.

5.Ms Yussouf applied for a review of that decision by the SRA's Adjudication Panel. In her lengthy grounds of appeal her current solicitors, RadcliffesLeBrasseur ("Radcliffes"), contended that, when she had completed the first application form, Ms Yussouf had believed, genuinely but mistakenly, that a county court judgment was a judgment debt that had not been satisfied; that one that had been satisfied (as the 2009 judgment had been by that date) was extinguished; and that the 2009 judgment did not have to be disclosed as it had been discharged. They stated that she had read the questions quickly and

without the care and attention to detail required but that she had not been dishonest. They further contended that Ms Yussouf had had no reason to conceal the judgment as she knew that the SRA would carry out a credit check. Radcliffes also contended that Ms Yussouf had not supplied misleading information to the SRA during its consideration of her first application for the reasons they gave. They further contended that, if the Adjudication Panel was minded to refuse her application having considered the written representations, Ms Yussouf should be given the opportunity to be heard in person.

6.The Adjudication Panel considered the matter afresh and issued its decision on May 30th 2017. They refused the application for Ms Yussouf to be given the opportunity to be heard in person. They found that her explanation of why she did not disclose the 2009 judgment was inconsistent with her previous explanations and was not credible, and that her failure to disclose it was dishonest. The Panel also found that she had provided misleading information to the SRA during its consideration of her first application in relation to the existence, and her knowledge of, the 2009 judgment. It considered that there were no exceptional circumstances relating to their findings both that Ms Yussouf was dishonest and that she had provided misleading information and, therefore, that she did not have the necessary character and suitability to be admitted to the Roll. Accordingly they considered that she did not have the necessary character and suitability to be admitted to the Roll. They refused her application for admission and cancelled her student enrolment.

7.Ms Yussouf's appeal to this court is against the finding of dishonesty by the Adjudication Panel. She seeks an order quashing the Panel's decision and requiring her to be admitted as a solicitor. In summary her grounds of appeal are that (i) the Panel acted unfairly in not providing her with an oral hearing before making a finding of dishonesty against her; (ii) that the Panel had adopted the wrong test for what constituted dishonesty; (iii) that the Panel was wrong to conclude that there were such inconsistencies in her statements as to justify a finding of dishonesty against her; and (iv) that the Panel acted unfairly in making that finding by relying upon her delay in completing the online screening process in relation to her first application which they also thought, wrongly, had not been explained."

77. Under Part 1 of the SRA (Solicitors Regulation Authority) Suitability Test 2011 ("the SRA Suitability Test") an applicant is required to disclose all material information related to the application. A failure to do so is treated as a *prima facie* case of dishonest behavior. More stringently worded than section 10E(4)(d)(ii), the effect of rule 6.1 of the SRA Suitability Test is that absent exceptional circumstances, the application will be refused for failure to disclose information (or providing false or misleading information) to a regulatory body when required to do so.

78. In *Yussouf v SRA* the High Court approved the SRA Panel's application of both an objective and subjective approach to the issue of dishonesty in accordance with *Twinsectra Ltd v Yardley* [2002] 2 AC 164. The Deputy High Court Judge said in *Yussouf v SRA* [69]:

"*69. If the Adjudication Panel had applied the "objective" element without reference to the actual state of mind as to the facts of the individual concerned, then in my judgment they would have erred in law, notwithstanding what HHJ Sycamore appears to have said in General Medical Council v Krishnan supra at [25]10. As Lord Hughes stated in Ivey at [60]11, "in order to determine the honesty or otherwise of a person's conduct, one must ask what he knew or believed about the facts affecting the area of activity in which he was engaging.... "dishonestly", where it appears, is indeed intended to characterise what the defendant did, but in characterising it one must first ascertain his actual state of mind as to the facts in which he did it. It was not correct to postulate that the conventional objective test of dishonesty involves judging only the actions and not the state of knowledge or belief as to the facts in which they were performed. What is objectively judged is the standard of behaviour, given any known actual state of mind of the actor as to the facts.*"

79. In deciding the question of dishonesty, the Bar Council is bound by principles of fairness which require it to give KMD the opportunity to defend or explain her failure to properly disclose her regulatory history. In *Yussouf v The SRA*, the English High Court provided a most helpful and detailed narrative on the question of whether an oral hearing is warranted in a case alleging dishonesty [80-85]; [90]; [93-94] and [98-99] (footnotes not quoted):

"*80.As Lord Bridge stated in Lloyd v McMahon supra at p702 "what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates." The requirements of fairness are not necessarily limited, however, to cases in which "rights" in some strict sense are affected. As Lord Bridge himself pointed out in R v Secretary of State for the Environment ex p Hammersmith and Fulham London Borough Council [1991] 1 AC 521 at p598, they apply "to decisions whereby citizens may be affected in their person, their property or their reputation". They may also apply when an authority contemplates depriving someone of an existing benefit that he hopes to retain or denying a person a benefit which he hopes to attain: see R v Devon County Council ex p Baker supra at pp88-89, 91a-b. It is in this context that Simon Brown LJ stated (at p91a-b) that there was an "unsurprising principle" that the demands of fairness may be somewhat higher "when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit. That is not to say that a bare applicant will himself be without any entitlement to fair play. On the contrary, the developing jurisprudence suggests that he too must be fairly dealt with."*

81.The SRA's decision on any application for a certificate that it is satisfied as to applicant's character and suitability to be a solicitor and for admission to the Roll is a decision that affects that applicant's freedom to provide legal services and his or her reputation. In that respect it is no different from decisions that may be taken against solicitors in disciplinary proceedings. Such an applicant is not a person with a mere hope of obtaining a future benefit. The decision is one that affects his rights. As the Admission Regulations make plain, if the SRA is satisfied as to the applicant's character and suitability to be a solicitor, it is required to issue a certificate of satisfaction (provided

that it is also satisfied that he has met the relevant training regulations) and that certificate entitles the applicant to be admitted as a solicitor unless good cause is shown to the contrary: see paragraph [9] above. No doubt the SRA must exercise judgment as to whether the objective criteria it has specified are met in relation to suitability and character, but it has no general, much less an arbitrary, discretion to deny a certificate or admission, particularly if its authorisation scheme is to comply with the requirements of Part 3 of the Provision of Services Regulations 2009. Such an applicant, therefore, does not merely have a mere hope of obtaining a benefit, as Mr Dunlop appeared to imply. But, even if an applicant merely had such a hope, he would nonetheless be entitled to have his application dealt with fairly.

82.It is no doubt for an applicant to satisfy the SRA about his or her character and suitability to be a solicitor: see Jideofo v Law Society (2007) July 31st per Sir Anthony Clarke MR at [16]-[17]. Fairness nonetheless requires that the applicant should be notified of those matters which the SRA consider might lead it to conclude that it is not satisfied about his character and suitability to be a solicitor and should be given an opportunity to satisfy the SRA that it should nonetheless be satisfied. Such an opportunity need not necessarily be provided by way of an oral hearing. "There is ample authority that decision-making bodies other than courts and bodies whose procedures are laid down by statute, are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing": R v Army Board of the Defence Council ex parte Anderson [1992] QB 169 per Taylor LJ at p187g.

83. The question is, therefore, whether the procedure adopted was unfair, not whether it could be improved, and "the court must determine for itself whether a fair procedure was followed....Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required": R (Osborn) v Parole Boardsupra per Lord Reed JSC at [65].

84.The Guidance is designed to secure that applicants have an opportunity in writing to address concerns that it has before any decision is made on admission and for a review of such decisions. Following such guidance may very well be sufficient to secure a fair hearing in some cases. Thus an allegation that can be decided on the basis of documents which record the relevant facts, which are not in dispute, may be fairly determined without an oral hearing. For example, in R (Wayne Thompson) v the Law Society supra, Mrs Anderson complained that she had been misled by her solicitor. He contended that she had withheld certain documents creating a false impression of the advice and explanations that she had received and submitted with his appeal to the Adjudication Panel all the documents that he contended she had withheld. In such circumstances, provided the solicitor knew the case that he had to meet in relation to all the documents, an oral hearing was not required in order to determine whether Mrs Anderson had been misled: see at [37]-[44]. Similarly, in R (Heather Moor & Edgecomb Limited) v Financial Ombudsman Service supra, the issue was whether advice given by the claimants, who were independent financial advisers, adequately alerted their client to the risks associated with a transfer from an occupational pension scheme. The Court

of Appeal held that fairness did not require the Ombudsman to provide an oral hearing to enable the financial advisers to cross examine their client as to the advice he had received, as their advice had been given in meetings of which they had kept detailed notes (which they did not claim were inaccurate), as the advice had been subsequently confirmed in writing and as they did not suggest that any advice previously given had been contradicted or modified orally: see at [58]-[59].

85.There may nonetheless be circumstances in which an oral hearing may be necessary, as the Guidance itself recognises: see paragraph [15] above. It is neither desirable nor possible to define exhaustively the circumstances in which fairness requires such a hearing. But, given the seriousness of a finding that the SRA is not satisfied as to an applicant's character and suitability to be a solicitor, in my judgment one should be held when material facts are in dispute which cannot fairly be resolved on the basis of the documentation available or when a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility: see R (Osborn) v Parole Board supra per Lord Reed at [2(ii)], [74], [75], [78], and [85]. This may involve hearing from the applicant or from others: ibid at [82].

90. In all these cases, if material facts in dispute cannot fairly be resolved on the basis of the documentation available or if a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility, fairness requires an oral hearing not merely to assist decision-making but also to enable the individual concerned to participate when he or she has something to say which is relevant to the decision, thereby avoiding a sense of injustice which he or she might otherwise feel: cf R (Osborn) v Parole Board supra per Lord Reed at [66]-[69].

93. In my judgment that case does not assist Mr Dunlop. When considering an application for a certificate of satisfaction and for admission as a solicitor, the SRA is performing an independent adjudicative function in the public interest that is directly decisive for an individual's freedom to provide legal services and reputation. Nor does the decision in that case undermine the principle that fairness requires an oral hearing in such a case when material facts are in dispute which cannot fairly be resolved on the basis of the documentation available or when a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility.

94.The question whether an individual has acted dishonestly is one likely to raise such an issue. It is one that inevitably depends on the state of mind of that individual when he or she did, or failed to do, something. Moreover the significance of any such finding is also particularly serious. That is no doubt why, in the SRA's own guidance, the first of the factors to which regard is to be had when considering whether an oral hearing is required is where "the honesty of the relevant person is being questioned": see paragraph [10(i)] quoted in paragraph [15] above.

98. Mr Dunlop submitted that Ashan provided no relevant guidance: in that case the decision was to be taken by an independent tribunal, rather than a regulator; the

consequences were more serious, involving the loss of a right rather than a future benefit; and the legal framework did not suggest that oral hearings would be unusual. In my judgment none of these matters justifies departing materially from the guidance provided. If oral evidence could make a difference to whether or not an individual is found to have acted dishonestly, it cannot be fair to that individual to exclude it, whether the finding may be made by a tribunal or by a regulator. The consequences of such a finding will, of course, vary depending on the statutory scheme within which it is made. But the consequences for an individual of a finding that the SRA is not satisfied as to character and suitability as a solicitor because he has acted dishonestly are, self-evidently, sufficiently serious for him or her to be treated fairly. As Lord Clarke MR put it in Afsar v the Solicitors Regulation Authority [2009] EWCA Civ 842 at [38], "where...the SRA positively asserts dishonesty, it should prove it to the appropriate civil standard. The refusal of student enrolment or cancellation of enrolment on the grounds of dishonesty is as serious a matter as to strike off a solicitor for dishonesty. I would add that it is incumbent on the SRA in properly discharging its regulatory function to ensure that it adopts as rigorous and fair approach as the court does to the matter." Indeed it is notable that, in other cases to which I was referred, oral hearings in cases of potential dishonesty have been held by those taking decisions on behalf of the Law Society or the SRA: see Jideofo v Law Society supra at [27], [41]; Masrur[2009] EWCA Civ 944 at [8]; and Khan v Solicitors Regulation Authority [2010] EWHC 1555 at [7], [30]. Such a hearing was also held where matters of mitigation were put forward: see Mulla v Solicitors Regulation Authority [2010] EWHC 3077 (Admin) at [5].

99.In summary, therefore, when the SRA are deciding whether it is satisfied as to an applicant's character and suitability as a solicitor, fairness requires an oral hearing when material facts are in dispute which cannot fairly be resolved on the basis of the documentation available or when a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility. When considering whether the applicant has acted dishonestly, if such factual issues arise or such an explanation is advanced, fairness requires that an opportunity should be provided to give evidence on such matters orally except when oral evidence could truly make no difference. An applicant may decide not to take advantage of such an opportunity but it is one that he or she should be offered."

80. Whether KMD's opportunity to address the Bar Council on the question of dishonesty is by way of a written submission or via an oral hearing is a matter for the Bar Council. Of course, in making that determination the Bar Council must act fairly and in good faith. It should also consider the principles outlined in the above extracts of the judgment in *Yussouf v The SRA.*

81. Moving past the subject of mode of hearing, I should also consider whether this application of section 10E(4)(d)(ii) entitles the Bar Council to assume the role of both the complainant and judge in its own cause, thereby breaching section 6(8) of the Constitution and the related principles of natural justice. While I am not seized of any constitutional challenge to section 10E(4)(d)(ii), I would opine that the section allows for the question of non-disclosure to be determined fairly. The statutory framework for a determination under section 10E(4)(d)(ii) is subject to an appeal by way of a full rehearing. As observed by Kawaley J (as he then was) in

Fay and Payne v The Governor and the Bermuda Dental Board, the Privy Council in *Preiss v General Dental Council* [2001] 1 WLR 1926 accepted that the availability of a full rehearing on appeal was sufficient to bring a statutory regime for professional disciplinary matters within the boundaries of the rule of natural justice. The judgment of the Judicial Board was delivered by Lord Cooke of Thorndon who said [9-10]:

"*9. The appellant accepts that the points taken under article 6(1) cannot succeed if the Board is itself prepared to conduct a complete rehearing of the case, including a full reconsideration of the facts and of the question whether the facts found amount to serious professional misconduct. Their Lordships consider that the position is no different under the common law rules of natural justice applicable to proceedings before domestic tribunals: compare Calvin v Carr [1980] AC 574.*

10. As the Board has undertaken such a complete rehearing (a subject to 30 which their Lordships will return), to discuss the appellant's points might seem unnecessary; but, for several reasons, it is as well to do so. First, a disciplinary system in which a hearing satisfying article 6(1) could be secured only by going as far as the Privy Council could not be commended. Secondly, the right is to have such a hearing within a reasonable time. Although there has been no suggestion of undue overall delay in this instance, that might not always be the case. Thirdly, it has recently been emphasised in a judgment of an English Divisional Court (Regina v Secretary of State of the Environment, Transport and The Regions, ex parte Holding & Barnes plc, 13th December 2000) that the proceedings as a whole have to be considered in deciding whether article 40 6(1) is satisfied. While again this does not apply to the instant case, there may be some risk of unpredictable circumstances where even a full Privy Council rehearing is not enough. Last, the General Dental Council has embarked on a programme of constitutional reform. Some observations on the disciplinary structure as it has operated in the past may be useful."

82. Commenting on this passage, Kawaley J in *Fay and Payne v The Governor and the Bermuda Dental Board* [35] rightly pointed out:

"35. *This passage is instructive in the context of the present application for the following reasons. Firstly, it illustrates the well recognised principle that complaints about non-compliance with fundamental fair hearing rights which occur before a statutory tribunal (other than a court) which is not itself sufficiently independent or impartial can be cured where a right of appeal to a constitutionally compliant tribunal exists. Ancillary to this first proposition, the cited passage from Lord Cooke's judgment reminds us of the important implicit underlying principle, that in considering compliance with section 6(8), the proceedings as a whole must be looked at. Secondly, the cited passage illustrates the equally well recognised proposition that the fair hearing rights under section 6(8) of the Bermuda Constitution are substantially the same as the common law rules of natural justice*."

83. I am persuaded by the reasoning of the Privy Council in *Preiss v General Dental Council* and I agree with Kawaley J's extrapolation from the Board's judgment that the constitutional soundness of a statutory regime is to be assessed by looking at the entire procedural framework.

Applying to the present case the fullness of the 1974 Act together with the related rules, I find that the evaluation of KMD's non-disclosures is a matter for the Bar Council's initial assessment under section 10(4(d)(ii) and the Appellant ought to be given a clear opportunity to defend or explain her failure to disclose the full record of her regulatory history.

Conclusion:

84. The Appeal is allowed and the Decision of the Bar Council made on 9 December 2019 is quashed.

85. The question of the issuance of an FPP Certificate is remitted to the Bar Council who in determining KMD's application afresh shall do so under section 10E of the 1974 Act and in accordance with this judgment.

86. It should also be said that the extensive delay in bringing some of the professional misconduct complaints against KMD before a tribunal for final disposal is most unsatisfactory, wherever the blame may lay.

87. Unless either party files a Form 31TC to be heard on the subject of costs, the Appellant shall have 60% of her costs to be taxed by the Registrar on a standard basis, if not agreed.

Wednesday 30 June 2021

THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT