COMMONWEALTH OF THE BAHAMAS **2020/APP/sts/No.00015**

IN THE SUPREME COURT

Appellate Division

IN THE MATTER OF THE INSURANCE ACT, CHAPTER 347 OF THE REVISED LAWS OF THE BAHAMAS

BETWEEN

CARLA OUTTEN-MINNIS

Appellant

AND

THE INSURANCE COMMISSION OF THE BAHAMAS

Respondent

Before: The Honourable Sir Brian M. Moree Kt.

Appearances: Ms. Dwana Davis with Ms. Palincia Hunter for the Appellant
Mr. Frederick Smith QC with Mr. R. Dawson Malone and Ms. Kandice Maycock for the Respondent

REASONS FOR DECISION

1. In this action Ms. Carla Outten-Minnis ("***Ms. Outten-Minnis"*** or "***the Appellant"***) appealed the decision of The Insurance Commission of The Bahamas ("***the Commission****" or "****the Respondent****")* made under section 126 of the Insurance Act ("***the Act***") whereby it proposed to cancel her registration as an insurance salesperson effective 31 July, 2020 ("***the Decision***").

2. On 2 August, 2022 I handed down my decision in this case with written reasons to follow. After considering the evidence and the submissions of counsel, I dismissed the appeal by Ms. Outten-Minnis against the Decision. I also ordered costs to be paid by the Appellant to the Respondent to be taxed if not agreed. I now set out the reasons for that decision with my apologies for the delay in doing so.

Introduction

3. On 29 July, 2020 the Appellant commenced this appeal by filing a Notice of Originating Motion and her supporting Affidavit. Later, with the leave of the Court, the Appellant filed an Amended Notice of Originating Motion on 18 November, 2021 ("***the Amended NOM****")* and the appeal proceeded under the Amended NOM.

4. Through the Amended NOM the Appellant sought an Order setting aside the Decision on the following grounds:

> **"(1) The Commission erred in law and fact in failing to provide the Appellant with the specifics or evidence that was used to determine that the Appellant was in breach of section 126(2)(b)(ii) of the Act;**
>
> **(2) The procedure used by the Commission in this matter which involved factual and evidential disputes denied the Appellant the right to be heard;**
>
> **(3) The procedure used by the Commission in determining that the Appellant breached the Act resulting in the proposal to cancel the Appellant's insurance registration was unfair and in breach of the principles of natural justice;**
>
> **(4) The decision of the Commission is against the weight of the evidence adduced and disclosed during the investigation; and**
>
> **(5) The Commission erred in law and in fact in the proposed cancellation of the Appellant's registration as an insurance salesperson."**

5. In October, 2021, prior to the hearing of the appeal, the Commission had applied to dismiss this appeal on the ground that it was filed out of time under Order 55 rule 4(2) of the Rules of the Supreme Court ("***the RSC****")*. For the reasons stated in my written Ruling dated 14 December, 2021 I rejected that application.

Evidence

6. At the hearing of the appeal Ms. Davis, counsel for the Appellant, relied on the evidence of the Appellant contained in her Affidavits filed on 29 July, 2020 ("***the 1st Appellant's Affidavit****")* and 20 September, 2021 ("***the 2nd Appellant's Affidavit****")* respectively together with the Exhibits attached to those Affidavits. With the consent of counsel for the Commission, Mr. Smith KC, those two Affidavits were taken as the evidence in chief of the Appellant. Mr. Smith elected not to cross examine the Appellant as he contended that the appeal was limited to the issue of whether the procedure employed by the Commission in coming to the Decision was fair and provided the Appellant with a right to be heard on the

allegations against her before making the Decision. On that basis he submitted that the appeal was not a trial of the underlying allegations against the Appellant which were the subject matter of the Decision. Therefore, Mr. Smith stated that the only relevant factual issues in the appeal related to process and procedure and, in his view, there was no need to cross examine the Appellant on those issues.

7. For its part, the Commission relied on the evidence of Ms. Lorna Longley-Rolle, Legal Counsel of the Commission ("***Ms. Longley-Rolle***"), contained in her Affidavit filed on 30 March, 2021 ("***the Longley-Rolle Affidavit****")* and the Exhibits attached thereto. Again, with the consent of counsel, that Affidavit was taken as the evidence in chief of Ms. Longley-Rolle and she was cross examined by counsel for the Appellant.

8. In October, 2021, before the start of the hearing of the appeal, the Appellant had applied to strike out certain paragraphs of the Longley-Rolle Affidavit, certain documents attached as Exhibits to that Affidavit and all references in the Affidavit to those documents. By my written Ruling dated 18 January, 2022 ("***the January 2022 Ruling***") I declined to strike out any of the challenged material and dismissed the application. However, I stated in the Ruling that, for the reasons stated therein, I would not consider the following words in the second sentence of paragraph 36 of the Longley-Rolle Affidavit when dealing with the appeal – "*The Commission advised the Appellant that she had been given all of the information that the Commission was capable of disclosing…"*. Accordingly, I disregarded those words when I made my decision in this appeal.

9. The evidence showed that on 23 July, 2007 the Appellant signed an Agent Agreement with Colina Imperial Insurance Ltd. ("***Colina***") whereby she was appointed as an Agent of Colina effective as of 1 August, 2007. At that time the Appellant was a registered insurance salesperson with the Commission under the provisions of the Act.

10. The Commission was established under section 4 of the Act and its functions and powers are contained in section 8. The Commission acts as an independent regulatory agency with responsibility for regulating all insurance activity in and through The Bahamas. According to the evidence of Ms. Longley-Rolle, which I accepted, the Commission "…*serves as the prudential and market conduct regulator, and provides ongoing monitoring and control of all domestic insurers (general and long-term), intermediaries (agents, brokers, salespersons, adjusters, and underwriting managers) and external insurers*."

11. By letter dated 17 November, 2016 Colina notified the Commission that it had terminated the employment of Ms. Outten-Minnis as a salesperson ("***the Termination Notice****")*. At that time, Colina enclosed with the letter a completed Form 12B in compliance with section 129(2) of the Act ("***Form 12B****")*. In that Form, at item #3, Colina stated that the reason for the termination was 'lapping' and that the Appellant's employment ceased on 4 November, 2016. Copies of the Termination Notice and Form 12B had not been given to the Appellant by the Commission prior to attaching them as Exhibits to the Longley-Rolle Affidavit.

12. In her evidence Ms. Longley-Rolle defined 'lapping' as "*…a fraudulent practice whereby an employee diverts a payment made by one customer to cover a missing payment from another*

customer." She stated that its purpose is not to embezzle money from the insurance company but to prevent a particular customer's policy from lapsing as a result of the default in payment of premiums up to a certain period. Ms. Longley-Rolle explained that commissions are commonly paid by an insurance company to insurance salespeople up front when a policy is issued on the condition that if the policy lapses before the end of a specified qualifying period (typically two years) the commission is clawed back by reversing and debiting the salesperson's commission account. Under this arrangement the salesperson obviously has a financial interest in keeping a policy from lapsing during the qualifying period in order to avoid a claw back of commission he/she received when the policy was issued. I understood Ms. Longley-Rolle to state that 'lapping' occurs when a salesperson wrongfully diverts a premium paid by a client in respect of a policy (which in many instances has passed the qualifying period) to cover a default in the payment of a premium relating to another policy (which in many instances is still within the qualifying period) to avoid a claw back of commission. To the extent that it was relevant, I accepted Ms. Longley-Rolle's evidence on those matters.

13. Upon receipt of the Termination Notice and Form 12B from Colina, the Commission launched its own investigation into whether the Appellant's registration as a salesperson should be cancelled. In this regard, the Commission requested from Colina additional information in respect of the allegations of 'lapping' against the Appellant and copies of the documents which Colina claimed to support those allegations. In response to that request Colina sent a Report to the Commission on 13 January, 2017 ("***the Colina Report***").

14. A copy of the Colina Report was never given to the Appellant and her evidence was that she had never seen that Report.

15. The Appellant applied to the Commission to renew her registration as a salesperson under a new sponsor company. After receiving the application, representatives of the Commission met with the Appellant on 4 January, 2017 and informed her that Form 12B, which it had received Form Colina, contained information which required further investigation by the Commission. That position was confirmed in the letter dated 11 January, 2017 from the Commission to the Appellant.

16. The Appellant's attorney pressed the Commission to process the renewal application contending that there was no basis in the Act for that application to be deferred pending the completion of the investigation into the Colina allegations of 'lapping' against the Appellant. The Commission responded by sending two letters to the Appellant both dated 8 March, 2017. The first letter stated that as the Appellant had completed the renewal process by submitting to the Commission the completed Form 12A, it enclosed her registration card with an expiration date of 31 March, 2018. I took this to mean that the Commission had acceded to the Appellant's application to renew her registration as a salesperson under the Act. The second letter stated that the Commission's investigation into the allegations made by Colina against the Appellant was ongoing and that it would inform the Appellant of the outcome once it had been completed. In that letter the Commission reserved its right to take any regulatory action it deemed appropriate upon the completion of the investigation.

17. The investigation by the Commission focused on six payments made by the Central Andros Local Government ("***CALG**") to Colina in 2016 ("**the Six Payments**") prior to the termination of the Appellant's employment by Colina. Each of those payments was made by cheque in respect of premiums for seven policy holders of Colina who all were employed by CALG. The names of the seven policy holders are Rosiemae Blaise ("**RB**"), Rudolph Mackey ("**RM**"), Joanne Mackey ("**JM**"), Wendy Riley ("**WR**"), Elsie Mae-Mackey ("**EMM**"), Laurie Cleare ("**LC**") and Theresa Coakley ("**TC**") (together "**the 7 Clients**").

18. Ms. Longley-Rolle's evidence was that the 7 Clients had all taken out their respective life insurance policies through the Appellant. In the 2nd Appellant's Affidavit (which formed part of her evidence in chief at the hearing of the appeal) she stated in paragraph 11 that she "*….was unable to confirm whether the seven (7) customers as referred to in paragraph 21 of the Respondent's Affidavit* [i.e. the 7 Clients] *were in fact my clients."* However, on page 2 of her lawyer's letter to the Commission dated 19 January, 2018 ("**the 19 January 2018 Letter**") it was stated that "*Mrs. Minnis recognizes some of the names in Table 1* [who were the 7 Clients] *and admits that they may well all have been her clients…."*. Later in that letter at paragraph numbered 4 on page 3 it was stated that the Appellant did not deny that the 7 Clients (referred to in that paragraph as the persons listed in Tables 2 through 6 in the letter of 8 December, 2017 from the Commission to the Appellant) were her clients. I was of the view that the Commission was entitled to proceed on the basis of the statements in the 19 January 2018 Letter.

19. The monthly premium for each of the 7 Clients was paid by CALG by way of salary deduction. Each month CALG would pay the seven premiums by a single cheque made payable to Colina with instructions to allocate the proceeds of the cheque to pay the respective premiums on the policies of the 7 Clients. The allegation by Colina was that in the case of each of the Six Payments the Appellant received the CALG cheque in her capacity as a salesperson of Colina and diverted the premiums of some of the 7 Clients to pay premiums on insurance policies of other policyholders. According to the evidence of Ms. Longley-Rolle and the statements of the Appellant's lawyer in the 19 January 2018 Letter (see paragraph numbered 3 under the sub heading Allegation 1 on page 2 and the paragraph numbered 4 on page 3) those other policyholders (who were described in that letter as names on Table 1.1 and Tables 2.1 through 6.1) were all clients of the Appellant. Again, the Commission was entitled to proceed on the basis of those statements in the 19 January 2018 Letter.

20. The Appellant denied the allegation that she caused premiums relating to policies of the 7 Clients to be diverted to pay premiums of other policyholders.

21. On 18 August, 2017 the Commission wrote to Colina requesting an onsite inspection to retrieve copies of relevant documentation in respect of the 7 Clients ("**the Request Letter**"). That letter set out a list of the documents which the Commission wished to obtain and sought information on the status of the insurance policies designated therein which had been issued to the 7 Clients respectively. Colina responded to that letter on 31 August, 2017 ("**the Colina Response**"). Copies of the Request Letter and the Colina Response were not given to the Appellant by the Commission prior to attaching them as Exhibits to the Longley-Rolle Affidavit.

22. The onsite inspection was conducted at the head office of Colina on 29 August, 2017 when some of the requested documentation was obtained from Colina.

23. The Commission obtained from Colina copies of the six cheques from CALG payable to Colina relating to the Six Payments – see pages 41, 46, 49, 51, 55 and 58 of the Exhibits to the Longley-Rolle Affidavit ("***the Six Cheques***"). Counsel for the Appellant invited me to infer that copies of those cheques were not obtained from Colina in August, 2017 but from CALG in February, 2018. Ms. Davis submitted that the basis for the inference was that in its letter to the Administrator of CALG dated 19 February, 2018 the Commission requested copies of "*….the cheques issued by CALG from January, 2016 to October, 2016…"* Therefore, it was said that the Commission must not have had copies of the Six Cheques if it was requesting copies of those cheques from the Administrator in 2018. I did not accept that position. In the letter from the Commission to the Administrator it was requesting copies of cheques for 10 months (January to October). In my view that was not inconsistent with the Commission having copies of cheques for some of those months but nevertheless asking CALG for a complete set of the cheques for the 10 month period. Also, in her evidence Ms. Longley-Rolle stated that additional copies of documents were sought in an attempt to get better quality copies. That was plausible given the poor quality of some of the copies of the documents in Exhibit "LLR-1" to the Longley-Rolle Affidavit. Additionally, it seemed clear to me from paragraphs 28 and 31 of the Longley-Rolle Affidavit, which was part of her evidence in chief, that the Commission limited its allegations against the Appellant in its letter of 8 December, 2017 (which was subsequently replaced by its letter dated 17 January, 2018) to the Six Payments partially because it had only obtained copies of the Six Cheques. For those reasons I did not accept the inference suggested by counsel for the Appellant and I was satisfied that the Commission had copies of the Six Cheques before it sent the 8 December, 2017 letter.

24. The Commission also obtained from Colina some of the transaction records for each of the Six Payments made by CALG in 2016 ("***the Transaction Records***"). Copies of the Transaction Records, which appeared to also include transactions not related to the Six Payments, were not given to the Appellant by the Commission prior to attaching those documents as Exhibits to the Longley-Rolle Affidavit.

25. The Commission wrote to the Appellant on 8 December, 2017 ("***the First Allegations***") setting out the allegations against her which had been "….*formulated during its investigation*" to provide her with an opportunity to respond to those allegations. Those allegations related to the Six Payments. It will be seen from the events set out below that the First Allegations were subsequently replaced by the Commission's letter to the Appellant dated 17 January, 2018 ("***the Amended Allegations***").

26. On 9 January, 2018 (wrongly stated on the letter as 2017) the attorney for the Appellant responded by letter to the First Allegations ("***the January 9 Response***"). He impugned the motives of Colina in making the allegations against the Appellant on the basis that there was an extant employment dispute between her and Colina and then stated that she was unable to adequately answer the First Allegations as (i) the Six Cheques were all made payable to Colina and would have been deposited into its bank account; (ii) she was not directly responsible for

applying the proceeds of those cheques; and (iii) the cashiers at Colina would act on instructions from CALG when applying such proceeds. In this regard the attorney attached to his letter copies of the cheque numbered 1021043 dated 26 January, 2016, the Central Andros List for January, 2016 ("***the January 2016 List***") and a voucher from CALG which all related to the first of the Six Payments. He requested in the letter copies of all documents relied on by Colina to support its allegations against the Appellant in respect of the Six Payments and made the point that there were numerous discrepancies in the figures set out in the First Allegations.

27. There was a meeting held on 12 January, 2018 ("***the January 2018 Meeting***") for the purpose of allowing the Appellant to respond to the First Allegations. That meeting was attended by the Appellant, her attorneys, Mr. Wayne Munroe KC and Ms. Palincia Hunter and four representatives from the Commission who were Ms Tamika Dean, Mr. Kean Smith, Ms. Phelice Jones and Ms. Tiffany Moss. The Minutes of that meeting ("***the Minutes***") were attached as an Exhibit to the Longley-Rolle Affidavit. According to those Minutes the Appellant stated that she needed to see the supporting documents for all the allegations against her in order to respond as she had no recollection of the events under investigation. Her attorney referred to cheque number 1021043 dated 26 January, 2016 and the January 2016 List both relating to the first of the Six Payments and stated that the handwriting on the documents was not that of the Appellant. In the meeting, Ms. Outten-Minnis maintained that she had not received that cheque from CALG and that the instructions on the cheque stub did not come from her. According to the Minutes, the Appellant stated that the persons named in Table 1.1 of the First Allegations (i.e. four of the recipients of the alleged diverted funds) may have been her clients as she recognized some of the names. Similarly, the Minutes recorded the attorney for the Appellant stating that in connection with the second to sixth of the Six Payments, the recipients of the alleged diverted funds listed in Tables 2.1, 3.1, 4.1, 5.1 and 6.1 in the First Allegations may have been the Appellant's clients as she recognized some of their names.

28. According to the Minutes, Ms. Outten-Minnis stated that she was not involved in the payment process relating to CALG and *"…sometimes the payments were mailed in and went directly to the cashiers."* Her position was that she sold insurance and her assistants dealt with all administrative matters. The Appellant's attorney stated that he would consider obtaining a court order to compel the Commission to allow the Appellant to examine all documents which were used to support the allegations against the Appellant.

29. According to the Minutes, Ms. Outten-Minnis stated that she had no recollection of any lapses or missed payments in connection with policies issued to staff members of CALG. On those matters she said that Colina sent out notices to policyholders by text or email and her assistants dealt with those issues or would bring them to her attention. She said that if a client was late in paying a premium she would sometimes pay the premium and get reimbursed by that client at a later date.

30. The Minutes stated that Ms. Outten-Minnis explained that in the case of employees of CALG, the initial premium payment for new policies would be made by cash or some other mode over the counter and then salary deductions would be set up. The salary deduction forms

would be stamped by CALG and returned to her and she would then submit that form along with the insurance application form and the initial premium payment to Colina's underwriting department for approval. Once approval was obtained the insurance policy would be issued. Once a salary deduction arrangement was in place there would not be any over the counter payments.

31. The Minutes reflected Ms. Outten-Minnis stating that she did not deal with posting of funds to individual accounts of policyholders.

32. According to the Minutes, the representatives of the Commission stated that certain amendments would be made to the First Allegations as a result of the meeting and an updated letter would be issued. That occurred when the Commission sent to the Appellant the Amended Allegations.

33. The Amended Allegations contained the following details relating to the Six Payments:

> **Payment 1** – Royal Bank of Canada cheque number 1021043 dated 26 January, 2016 payable to Colina from CALG in the amount of $520.12 for insurance premiums for:
>
> (i) RB - $88.94;
> (ii) RM - $86.78;
> (iii) JM - $80.50;
> (iv) WR - $79.13;
> (v) EMM - $78.66;
> (vi) LC - $63.86; and
> (vii) TC - $50.23.
>
> It was alleged that the Appellant (i) received the abovementioned CALG cheque on or about 30 January, 2016; and (ii) diverted the premium payments for RM, JM, WR and EMM to pay the premiums for the policies of the following policy holders (who were all clients of the Appellant but not employees of CALG) in the amounts set out opposite their respective names:
>
> (i) Raskell Kemp ("**RK**") - $78.45;
> (ii) D'shan Samantha McPhee ("**DSM**") - $75.60;
> (iii) Latesa Whymms ("**LW**") - $74.71; and
> (iv) Steffen Russell ("**SR**") - $88.33.
>
> **Payment 2** – Royal Bank of Canada cheque number 1021227 dated 21 March, 2016 payable to Colina from CALG in the amount of $520.12 for insurance premiums for:
>
> (a) RB - $88.94;
> (b) RM - $86.78;

(c) JM - $80.50;
(d) WR - $79.13;
(e) EMM - $78.66;
(f) LC - $63.86; and
(g) TC - $50.23.

It was alleged that the Appellant (i) received the abovementioned CALG cheque on or about 29 March, 2016; and (ii) diverted the premium payments for RB, RM, JM, EMM, LC and TC to pay the premiums for the policies of the following policy holders (who were all clients of the Appellant but not employees of CALG) in the amounts set out opposite their respective names:

(h) Prince Rahming ("**PR**") - $73.35;
(i) Vilaine Rahming ("**VR**") - $64.89;
(j) Alexander Diaz ("**AD**") - $151.65;
(k) Jardie Adderley ("**JA**") - $85.10; and
(l) Avain Bowe ("**AB**") - $66.00.

Payment 3 – Royal Bank of Canada cheque number 1021402 dated 24 May, 2016 payable to Colina from CALG in the amount of $520.12 for insurance premiums for:

(m) RB - $88.94;
(n) RM - $86.78;
(o) JM - $80.50;
(p) WR - $79.13;
(q) EMM - $78.66;
(r) LC - $63.86; and
(s) TC - $50.23.

It was alleged that the Appellant (i) received the abovementioned CALG cheque on or about 6 June, 2016; and (ii) diverted premium payments for RM, JM, WR, EMM, LC and TC to pay the premiums for the policies of the following policy holders (who were all clients of the Appellant but not employees of CALG) in the amounts set out opposite their respective names:

(t) Britney Russell ("**BR**") - $75.22;
(u) Anthony Winston ("**AW**") - $90.65;
(v) Scherell Hope Leadon ("**SHL**") - $84.29;
(w) Richara Coleby ("**RC**") - $41.67; and
(x) Vandrea Martial ("**VM**") - $139.37.

Payment 4 – Royal Bank of Canada cheque number 1021481 dated 20 June, 2016 payable to Colina from CALG in the amount of $520.12 for insurance premiums for:

(y) RB - $88.94;
(z) RM - $86.78;
(aa) JM - $80.50;
(bb) WR - $79.13;
(cc) EMM - $78.66;
(dd) LC - $63.86; and
(ee) TC - $50.23.

It was alleged that the Appellant (i) received the abovementioned CALG cheque on or about 4 July, 2016; and (ii) diverted premium payments for RB, RM, JM, WR and EMM to pay the premiums for the policies of the following policy holders (who were all clients of the Appellant but not employees of CALG) in the amounts set out opposite their respective names:

(ff) PR - $73.35;
(gg) VR - $64.89; and
(hh) AD - $151.65.

Payment 5 – Royal Bank of Canada cheque number 1021644 dated 22 August, 2016 payable to Colina from CALG in the amount of $520.12 for insurance premiums for:

(ii) RB - $88.94;
(jj) RM - $86.78;
(kk) JM - $80.50;
(ll) WR - $79.13;
(mm) EMM - $78.66;
(nn) LC - $63.86; and
(oo) TC - $50.23.

It was alleged that the Appellant (i) received the abovementioned CALG cheque on or about 1 September, 2016; and (ii) diverted payments for RM, JM, WR, EMM and LC to pay the premiums for the policies of the following policy holders (who were all clients of the Appellant but not employees of CALG) in the amounts set out opposite their respective names:

(pp) RC - $36.32;
(qq) Anastasha Smith ("**AS**") - $77.58;
(rr) Latico Sands ("**LS**") - $83.88;
(ss) VM - $139.37; and
(tt) BR - $43.80.

Payment 6 – Royal Bank of Canada cheque number 1021765 dated 23 September, 2016 payable to Colina from CALG in the amount of $520.12 for insurance premiums for:

(uu) RB - $88.94;
(vv) RM - $86.78;
(ww) JM - $80.50;
(xx) WR - $79.13;
(yy) EMM - $78.66;
(zz) LC - $63.86; and
(aaa) TC - $50.23.

It was alleged that the Appellant (i) received the abovementioned CALG cheque on or about 11 October, 2016; and (ii) diverted premium payments for RB, JM, WR and EMM to pay the premiums for the policies of the following policy holders (who were all clients of the Appellant but not employees of CALG) in the amounts set out opposite their respective names:

(bbb) D'shay Lightbourne ("**DL**") - $86.29;
(ccc) Stephen Sweeting ("**SS**") - $82.08;
(ddd) Diandra Wallace ("**DW**") - $66.45; and
(eee) Sirtera Bain ("**SB**") - $86.40.

34. The Appellant's attorney sent the 19 January 2018 Letter to the Commission summarizing her responses given at the January 2018 Meeting (which was described in the letter as "*the hearing*") to the allegations made against her by Colina and setting out her responses to the Amended Allegations. That letter stated:

(i) that the Appellant's primary role at Colina was that of a sales agent and she had over two thousand clients;
(ii) that a number of administrative assistants worked with the Appellant who dealt with all administrative work;
(iii) the process for the initiation of new business and addressed the procedure for monthly premium payments on existing policies;
(iv) with regard to employees of CALG who were clients of the Appellant that "….*often times a cheque would be sent on the plane and left with a customer representative who would either carry the cheque directly to the cashier or her assistant would retrieve the cheque from the customer representative and take it to the cashier to be paid and posted"*;

(v) that if a policy was at risk of lapsing a representative of Colina's Customer Care Department would contact the policyholder to inform him/her of the position;

(vi) that the Appellant was able to retrieve documentation relating to the first of the Six Payments and the handwriting on the January 2016 List was not hers or her assistants which suggests that the cheque for the 1st Payment had been delivered directly to a cashier;

(vii) that the persons named in Tables 1 and 1.1 may have been clients of the Appellant;

(viii) that there were discrepancies in the figures set out in a number of the Tables contained in the Amended Allegations;

(ix) that Colina cannot reasonably suggest that the cashiers who posted the payments in respect of the 7 Clients would ignore specific written instructions from CALG with regard to the allocation of the proceeds of the cheque in respect of the 1st Payment;

(x) the Appellant had not seen the documents submitted with the cheques for the 2nd through 6th Payments and therefore could not comment on the posting of the proceeds of those cheques;

(xi) that all supporting documents for the 2nd through 6th Payments should be given to the Appellant;

(xii) that the Appellant did not deny that the persons named in Tables 2 and 2.1 through 6 and 6.1 of the Amended Allegations were her clients;

(xiii) the Appellant did not recall whether or not she was in receipt of the Six Cheques and in any event cheques and documentation are turned over to the cashiers; and

(xiv) that the Appellant did not instruct anyone or otherwise cause anyone to transfer money from the accounts of the 7 Clients to the individuals listed in Tables 2.1 to 6.1 of the Amended Allegations.

35. In her evidence Ms. Longley-Rolle stated that on 31 January, 2018 representatives of the Commission, Mr. Kean Smith and Ms. Lakisca Lightbourne, had a conference call with Mr. Glenn Lightbourn, the Administrator of the Central Andros District, and Ms. Laurie Cleare-Neymour, the Account Clerk of the Central Andros Local Government Office ("***the CALG Conference Call***"). The purpose of that conference call was to determine how the cheques made payable to Colina representing insurance premiums for CALG employees were sent from Central Andros to Nassau and who was involved in that process. During that conversation Ms. Cleare-Neymour stated that the monthly cheques from CALG to pay the insurance premiums would be sent from Andros to Nassau by Glen Air, a private air charter company, and the Appellant, who she said was well known to her, would personally collect the cheques from Glen Air in Nassau. She stated that if the Appellant was on vacation the cheque would be collected by her assistant. There were times when the Appellant was in

Andros and on those occasions, she would collect the cheque from the Central Andros Local Government Office. Ms. Cleare-Neymour stated that the Appellant, after collecting the CALG cheques, would confirm by a telephone call to the Central Andros Local Government Office that the cheques had been processed. Ms. Lakisca Lightbourne prepared an internal Memorandum dated 1 February, 2018 summarizing the matters discussed during the conference call which was attached as an Exhibit to the Longley-Rolle Affidavit ("***the 2018 Memorandum***"). A copy of that Memorandum was not given to the Appellant by the Commission prior to attaching it to that Affidavit.

36. In the 2nd Appellant's Affidavit (which formed part of her evidence in chief at the hearing of the appeal) she stated in paragraphs 18 and 23 that, as related by her to the Commission staff members at the January 2018 Meeting and confirmed in the 19 January 2018 Letter, the monthly premium cheques for her clients who were employees of CALG were either sent by post to Colina or she or her secretary would collect the cheque from Glen Air and deliver it to a customer representative at Colina. According to her evidence, the Appellant only collected cheques from the Central Andros Office on two or three occasions. The Appellant stated in her evidence that she was not privy to the communications between the Commission and the representatives from CALG and reiterated that she or her assistant would collect the cheques from Glen Air and give them to a Customer Service Representative at Colina. She also stated that Ms. Cleare-Neymour never called her to complain about premiums for policies of CALG employees not being paid.

37. There was a second telephone call between the Commission's representatives and the CALG officials on 12 February, 2018 and that was followed by a letter dated 19 February, 2018 from the Commission to the Administrator requesting confirmation of the method used to transport and deliver to Colina the CALG cheques in 2016 relating to the 7 Clients ("***the February Comm. Letter***"). The Administrator responded by letter dated 21 February, 2018 ("***the February CALG Letter***") reiterating in large part the details communicated by Ms. Cleare-Neymour to the Commission representatives during the CALG Conference Call. According to that letter, the monthly cheques from CALG to Colina for the payment of premiums for the 7 Clients (except that JM was not included for the months of November and December, 2016) would be collected by the Appellant or someone from her office from Glen Air in Nassau although there were times when the Appellant personally collected the monthly cheque when she was in Andros. In all instances the cheque was accompanied by a list (similar to the January 2016 List) showing how the proceeds of the cheque were to be applied between the policies of the 7 Clients. Copies of the February Comm. Letter and the February CALG Letter were not given to the Appellant by the Commission prior to attaching those documents as Exhibits to the Longley-Rolle Affidavit.

38. On 7 June, 2018 the Commission wrote to the Appellant ("***the June 2018 Letter***") stating that it had completed its investigation into the allegations made against her by Colina and after considering the findings of the investigators the Commissioners had concluded that she had committed the following breaches of the Act:

> *"1. .....carrying on insurance business otherwise than in accordance with sound insurance principles and practices pursuant to section 126(2)(b)(ii)…; and*

2. *……as a result, [she had] demonstrated that [she was] not a fit and proper person for continued registration as an insurance intermediary, namely salesperson pursuant to sections 2(3)(b) and 126(2)(b)(vi) [of the Act.]"*

The letter continued by informing the Appellant that (i) pursuant to sections 126(2)(b)(ii) and 126(2)(b)(vi) of the Act the "*....Commission proposes to cancel your registration as an insurance salesperson effective August 7, 2018;"* (ii) she had a right under section 126(1) of the Act to seek a reconsideration of that position by the Commission; and (iii) she had a right to appeal to the Supreme Court before the effective date of cancellation.

39. At that time the Commission had not given reasons for its conclusions that the Appellant had breached the Act and that she was not a fit and proper person to be registered as a salesperson. The Appellant filed an appeal based on, *inter alia*, that point. The appeal was eventually settled and the Commission wrote to the Appellant on 28 May, 2020 ("***the Cancellation Letter***") setting out the reasons for its conclusions communicated in the June 2018 Letter and the underlying findings of fact in connection therewith ("***the Reasons****")*. In summary that letter stated:

1. the Appellant had agreed with CALG to be responsible for collecting the monthly premium cheques for the 7 Clients which were sent to her through the courier service of Glen Air. Additionally, when the Appellant was visiting Andros, she collected the cheques from the office of CALG in Andros;

2. the Appellant routinely communicated with persons in the CALG office confirming receipt of the monthly cheques;

3. counsel for the Appellant stated in the 19 January 2018 Letter that she did not recall whether or not she received the Six Cheques;

4. the Commission believed that it was *'...more likely than not…'* that the Appellant received premium cheques directly from CALG."

5. in 2016 premium payments submitted on behalf of the 7 Clients were diverted to other clients of the Appellant. That had occurred at least 30 times because it related to 6 cheques each representing the premiums for 6 employees. The Commission believed that it was "*….more likely than not…"* that the premiums were diverted by the Appellant or on her instruction as she was the common factor;

6. the Appellant had access to Colina's software programme which allowed her to see when premium payments from her clients were in arrears or their policies were at risk of lapsing. Notwithstanding this, the Appellant claimed that she was not aware that in 2016 there were more than 30 premium payments "*missing*" in respect of the 7 Clients. The Commission believed that it was "*….more likely than*

not…" that the Appellant was aware of the missing premium payments. Further, even though she had access to the software programme and should have known of the missing premium payments, the Appellant failed to inform the 7 Clients of the missing premium payments and took no action to "…*return the premium payments to the policy accounts of…"* the 7 Clients;

7. the policy of Joanne Mackey, one of the 7 Clients, lapsed in 2016. It was noted by Colina that that policy was paid up to 16 February, 2016 and was cancelled on 18 April, 2016. However, CALG continued to send the premium payment for that policy via the Appellant throughout 2016. Subsequent to the dismissal of the Appellant by Colina in October, 2016 Colina received from CALG a cheque for monthly premium payments for its staff which included Joanne Mackey. The Commission believed that it was "….*more likely than not…"* that the payments in respect of the policy of Joanne Mackey were received by the Appellant and diverted to other policyholders and therefore the lapse occurred as a result of the actions of the Appellant.

40. The Cancellation Letter stated that based on the Reasons the Commission formed the view that the Appellant had been carrying on insurance business otherwise than in accordance with sound insurance principles and practices pursuant to section 126(2)(b)(ii) and that she had demonstrated that she was not a fit and proper person for continued registration as an insurance intermediary pursuant to section 126(2)(b)(vi) of the Act. Therefore, under section 126(1) of the Act the Commission proposed to cancel the Appellant's registration as an insurance salesperson effective 31 July, 2020. The letter also stated that at any time prior to 31 July, 2020, the Appellant had the right to submit a written request for the Commission to reconsider its decision stating the reasons why her registration as a salesperson should not be cancelled. Finally, the Cancellation Letter advised the Appellant of her right of appeal under section 228 of the Act.

41. Counsel for the Appellant wrote to the Commission on 20 July, 2020 ("***the 2020 Response Letter****")* acknowledging receipt of the Cancellation Letter and responding to a number of the matters set out therein. In summary that letter made these points:

(i) the Appellant would personally collect the CALG cheques for the monthly premium payments when she was in Andros. Otherwise, the employees of CALG who had insurance policies with Colina would either arrange for persons to go into the Colina office and pay the premiums directly to the cashier or leave the cheque with a Colina Customer Service Representative who would deliver it to the cashier or to the Appellant's assistant, Ms. Marlyn Rolle, who would then take it to the cashier;

(ii) the Appellant did not at any time direct or request a cashier to divert premium payments from CALG for the 7 Clients (or for any other employees of CALG) to pay premiums on policies of her other clients;

(iii) all cheques from CALG were payable to Coilna and the proceeds would have been deposited into its account;

(iv) the Appellant was not directly responsible for applying the proceeds of individual premiums as that task was performed by the cashiers;

(v) in applying the proceeds of the CALG cheques the cashiers would act on instructions from CALG as set out in the Local Government Employee Salary Deductions/Contributions list (similar in form to the January 2016 List);

(vi) the Appellant's assistant would notify her clients when their policy was about to lapse for failure to pay premiums although Colina's Customer Care Department was primarily responsible for this task;

(vii) the Appellant had not been provided with any documentary evidence to respond to the allegations against her; and

(viii) there were discrepancies between funds that were allegedly received and the sums that were allegedly diverted – for example in Table 1 in the Amended Allegations the unpaid premium was $325.07 as compared to $317.09 which was the amount of the alleged funds diverted in Table 1.1 with no explanation as to what happened to the short fall of $7.98. It was stated that that raised doubts as to the accuracy of the information obtained from Colina.

42. Ms. Outten-Minnis' attorney concluded the letter by stating that she should be provided with the documentary evidence that Colina relied on in making the allegations against her and that no steps should be taken to cancel the Appellant's registration until there is "…*a fair and proper hearing…"* to give her an opportunity to respond to the evidence.

43. The Commission responded to the letter on 27 July, 2020 asserting that its process was fair to the Appellant and maintained that she had been "….*given a clear outline of the allegations and was also given all information that the Commission was capable of disclosing. The allegation was put to her in writing and orally at the meeting on January 12, 2018 and* [the Appellant], *who was accompanied with Counsel, responded orally at the time and in writing on January 19, 2018."* Later in the letter the Commission, when referring to the January, 2018 Meeting, stated that the Appellant "…..*was presented with all of the allegations, and could have brought any witnesses (or sent statements or letters) and chose not to and was given an opportunity to go away and make further submissions or requests in writing, which was done. There is no obligation to have a "hearing". There was a meeting and a request for submissions in writing which has taken place."* The letter notes that a request for a reconsideration had not been made and stated that the opportunity to do so remained open until 31 July, 2020.

44. On 29 July, 2020 the Appellant's counsel once again wrote to the Commission stating in part that "……*there is no basis for us to ask for reconsideration as you have not provided us with any new information/evidence that would allow for us to provide a different response from that which was already advanced in previous communications.*" The letter concluded by stating that legal proceedings would be commenced and the relevant documents would be served on the Commission. This appeal was filed later that day.

Discussion

45. This appeal is brought pursuant to section 228 of the Act. It is clear from the Amended NOM that the target of the appeal is the Decision which was communicated to the Appellant in the Cancellation Letter.

46. Section 228 of the Act provides that:

> **"228. Any person aggrieved by a decision of the Commission on any matter pursuant to this Act may appeal to the Supreme Court in accordance with rules of Court.**

47. At the material time the relevant rules of Court referred to in section 228 were the Rules of the Supreme Court, 1978 ("***the RSC****")* and specifically Order 55. That Order, in part, provides as follows:

> **"Rule 1. (1) Subject to paragraphs (2) and (3), this order shall apply to every appeal which by or under any enactment lies to the Supreme Court from any court, tribunal or person.**
>
> **(2) This Order shall not apply to an appeal by case stated.**
>
> **(3) The following rules of this Order shall, in relation to an appeal to which this Order applies, have effect subject to any provision made in relation to that appeal by any other provision of these Rules or by or under any enactment.**
>
> **(4) In this Order references to a tribunal shall be construed as references to any tribunal constituted by or under any enactment other than any of the ordinary courts of law.**
>
> **Rule 2. An appeal to which this Order applies may be heard and determined by a single judge.**
>
> **Rule 3. <u>(1) An appeal to which this Order applies shall be by way of rehearing and must be brought by originating motion.</u>** <u>[My emphasis]</u>
>
> **(2) Every notice of the motion by which such an appeal is brought must state the grounds of the appeal and, if the appeal is against a judgment, order or other decision of a court, must state whether the appeal is against the whole or a part of that decision and, if against a part only, must specify the part.**

(3) The bringing of such an appeal shall not operate as a stay of proceedings on the judgment, determination or other decision against which the appeal is brought unless the court by which the appeal is to be heard or the court, tribunal or person by which or by whom the decision was given so orders.

……

Rule 6. (1) The notice of the motion by which an appeal to which this Order applies is brought may be amended by the appellant, without leave, by supplementary notice served not less than 7 days before the day appointed for the hearing of the appeal, on each of the persons on whom the notice to be amended was served.

(2) Within 2 days after service of a supplementary notice under paragraph (1) the appellant must lodge two copies of the notice in the Registry.

(3) Except with the leave of the Court, no grounds other than those stated in the notice of the motion by which the appeal is brought or any supplementary notice under paragraph (1) may be relied upon by the appellant at the hearing; but that Court may amend the grounds so stated or make any other order, on such terms as it thinks just, to ensure the determination on the merits of the real question in controversy between the parties.

(4) The foregoing provisions of this rule are without prejudice to the powers of the Court under Order 20.

Rule 7. (1) In addition to the power conferred by rule 6(3), the Court 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 judge 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 a 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 him or it.

(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."

48. The provisions of Order 55 of the RSC were considered in the Bahamian case of **Executive Director of the Securities Commission of The Bahamas v Accuvest Funds Securities Limited and another** [2012] 1 BHS J No. 1. In that case Justice Hepburn addressed in her judgment the nature of an appeal under Order 55 in these terms:

> **"13 The observations of May LJ in the English Court of Appeal, Civil, case of El Du Pont De Nemours & Co v ST Dupont [2003] EWCA Civ 1368 on the nature of an appeal under RSC O. 55 at paragraphs 85, 88, 89 and 90 accurately reflect the role of the court hearing an appeal under O. 55 in The Bahamas, notwithstanding that case concerned an appeal brought pursuant to the English CPR 52.11:**
>
> > **85. In considering the nature of an appeal, certain questions intrinsically arise. Will the appeal court start all over again as if the lower court had never made a decision? Will the appeal court hear the evidence again? What weight is to be given to the decision of the lower court? Will the appeal court admit fresh evidence and, if so, upon what principles? To what extent and upon what principles will the appeal court interfere with the decision of the lower court? These and related questions are not answered simply by labelling the appeal process as a review or a rehearing.**

...

88. Order 55, which applied generally to statutory appeals to the High Court, provided in rule 3(1) that an appeal to which that order applied should be by way of rehearing. By rule 7(2), the court hearing the appeal had power to receive further evidence on questions of fact, but without the restriction in Order 59 rule 10(2)[1]. The court again had power to draw inferences of fact...

89. These provisions for a rehearing were not however references to a rehearing "in the fullest sense of the word" as noted by Brooke LJ in paragraph 31 of his judgment in *Tanfern Limited v. Cameron-MacDonald* [2000] 1 WLR 1311 at 1317. Brooke LJ was there referring to High Court appeals from a Master or Registrar to a Judge in Chambers under Order 58 rule 1. On those appeals, the judge treated the matter as though it came before him for the first time. The parties were able to bring forward fresh evidence which had not been before the Master unconstrained by restrictions applicable to the Court of Appeal. The judge hearing the appeal was able to exercise any discretion afresh. As Lord Atkin said in *Evans v. Bartlam* [1937] A.C. 473 at 478:

> **"I wish to state my conviction that where there is a discretionary jurisdiction given to the Court or a judge the judge in Chambers is in no way fettered by the previous exercise of the Master's discretion. His own discretion is intended by the rules to determine the parties' rights: and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the Master: but he is in no way bound by it."**

90. <u>Rehearings on appeal under RSC Orders 55 and 59 were well understood not to extend to rehearings in the</u>

> **fullest sense of the word. The court did not hear the case again from the start. It reviewed the decision under appeal giving it the respect appropriate to the nature of the court or tribunal, the subject matter and, importantly, the nature of those parts of the decision making process which were challenged.** [My Emphasis]
>
> **14 Thus, unlike appeals from the Registrar to the Judge in Chambers under RSC Order 58 which are brought simply by serving on every other party to the proceedings a notice to attend before the judge on a specified date in the notice without stating the grounds of appeal, appeals under Order 55 are brought by originating motion which must state the grounds of the appeal. The reason for the distinction is that under Order 58, the Judge in chambers exercises a fresh discretion unfettered by the decision of the Registrar although the Registrar's decision is given the weight it deserves. On the other hand, in appeals under Order 55, the court reviews the decision under appeal. In reviewing the Decision, I must give the Decision the respect appropriate to a tribunal which is comprised of persons who are not directly connected with the securities industry in the Bahamas but have a background in law, banking, government, accountancy or economics, the type of breaches which the Panel was considering and the fact that the appeal is against the entirety of the Decision.** [My emphasis]
>
> **Footnote 1: The English Order 59 concerns appeals to the Court of Appeal. Rule 10(2) provides that "in the case of an appeal from a judgment after the trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or earing) shall be admitted except on special grounds".**

49. It was common ground between counsel for the parties that the appeal was a rehearing in the sense explained above in **Executive Director of the Securities Commission of The Bahamas v Accuvest Funds Securities Limited and another** (supra).

50. Counsel for the Commission submitted that:

> *"This appeal…, although it's a rehearing, it is not a trial of the charges laid against Ms. Minnis. The factual issues in dispute, we submit, are concerned disputes* (sic) *about procedure, and that is, whether or not what was said and done by the Commission or Ms. Minnis, during the investigation and determination of her charges was the proper procedure* – see the transcript of the hearing on 2 March, 2022 at pages 5 and 6.

51. Additionally, Mr. Smith stated:

> *"Our first and primary position is that the Court shouldn't be conducting now in a vacuum its own analysis of whether based on all of the evidence before it, this Commission had sufficient evidence to come to the decision that it did.*
> *The question is: Based on what was before the Commission, did it act reasonably in considering it, giving it (sic) an opportunity to the Appellant to be heard in many different ways, and exercising its statutory powers come to a conclusion."* – see transcript of 2 March, 2022 at pages 11 and 12.

52. Further, counsel submitted that the appeal was not a *de novo* hearing and that the authorities had established that the views and decisions of the statutory decision maker were weighty factors in determining the outcome of the appeal.

53. Counsel for the Appellant stated in her written Closing Submissions dated 11 March, 2022 that:

> *"Order 55 Rule 3(1) and Rule 5(3) together establish the scope of the court's jurisdiction and powers on an appeal under Order 55. When taken together it is apparent that this appeal is limited to the grounds of appeal as contained in the Notice of Originating Motion (as amended). When read together with paragraph 13 of the judgment of Hepburn J in the Supreme Court case of Executive Director of the Securities Commission of The Bahamas v Accuvest Funds Securities Limited and another [2012] 1 BHS J No. 1, it is apparent that the appeal is by way of a rehearing but not a rehearing in the "fullest sense of the word" because the court on such an appeal "did not hear the case again from the start. It reviewed the decision under appeal giving it the respect appropriate to the nature of the court or tribunal, the subject matter and, importantly, the nature of those parts of the decision making process which were challenged."*

54. Ms. Davis submitted that the question for the Court in the appeal was;

> "*….whether the Commission ought to have disclosed to the Appellant the information on which it relied to frame its Allegations and make its conclusions – particularly when the Commission knew or ought to have known that the Appellant required the information to assist her in her response to the Allegations?"*

55. I respectfully agreed with the views of Justice Hepburn in **Accuvest Funds Services** (supra) (which followed the guidance of the English Court of Appeal in **ST Dupont** (supra)) with regard to the nature of the rehearing under O.55 r 3(1) of the RSC. Accordingly, I proceeded on that basis, *mutatis mutandis*, when considering the appeal of the Decision. In doing so I

did not hear the case again from the start. I reviewed the Decision having regard to its subject matter and the nature of those parts of the decision making process which were challenged giving it the respect appropriate to a specialist tribunal comprised of Commissioners who, under Paragraph 1(1) of the First Schedule of the Act, were required to have wide experience in, and to had shown capacity in, insurance, financial or commercial matters, industry, law, or administration.

56. In considering the appeal I was mindful that I should not impose my view in substitution for that of the Commissioners in this case unless I concluded that they had misdirected themselves or that the Decision was plainly wrong. That point was made by the Chief Justice of Bermuda in **Maria Aguiar and another v Chief Immigration Officer** [2018] SC (Bda) 83 Civ when he stated in his judgment:

> **"12. In Thobani v The Pharmaceutical Society of Great Britain [1990] Lexis Citation 2690, a case cited in the Supreme Court Practice 1999 commentary on Order 55, Watkins LJ stated the position as follows:**
>
> > **"The function of this court when reviewing a sentence of the Society, as has been said on many previous occasions, is not to impose its own view in substitution for a view taken by the committee unless it comes to the conclusion that the decision of the committee was plainly wrong or unless of course the committee has, in reaching its conclusion, misdirected itself for the reasons which I have already given."**
>
> **13. These authorities show that even in a case where the appeal is by way of a rehearing the decision of the tribunal below is entitled to great weight and respect. However, that decision can be departed from and the appellate body can exercise its own discretion where it comes to the view that the decision of the tribunal below was, for whatever reason, plainly wrong."**

Grounds of appeal

57. During the closing submissions of counsel an issue arose with regard to the meaning and scope of ground 4. That ground was:

> "**The decision of the Commission is against the weight of the evidence adduced and disclosed during the investigation."**

58. Ms. Davis stated that under this ground the Appellant was not addressing or challenging the merits of the Decision. Rather, she contended, that this ground was an extension of the other grounds of appeal in that it related to the fact that the Commission had not given to the Appellant copies of the Undisclosed Documents which was fundamentally unfair. Under

ground 4, I understood Ms. Davis to submit that based on the information and documents which were disclosed to the Appellant during the investigation, there was insufficient evidence to support the Decision by the Commissioners. Put another way, if the Commissioners had disregarded all of the Undisclosed Documents, there would not have been a proper evidential basis for the Decision. Accordingly, counsel for the Appellant submitted that ground 4, like the other grounds, challenged the fairness and propriety of the process and procedure adopted by the Commission in carrying out its investigation and in coming to its Decision.

59. At the hearing on 2 March, 2022, while dealing with ground 4, there was this exchange between the court and Ms. Davis on page 35 at line 31 to line 15 on page 36 of the transcript:

> *"THE COURT: So bottom line is the following: The Court is going to consider one, and only one issue, and that is, whether the withholding of the documents was unfair, unreasonable, deprived the Appellant of a fair hearing and breached the rules of natural justice. Full stop.*
> *MS. DAVIS: And what is the effect of the breach.*
> *THE COURT: Well, right. If I decide that it was fair and reasonable, the appeal is dismissed, but if for any further consideration.*
> *MS. DAVIS: Exactly.*
> *THE COURT: If I find that the procedure and process was fatally flawed, then the appeal will be allowed and I will have to hear counsel on what the appropriate order is to make in those circumstances.*
> *MS. DAVIS: Yes, my Lord."*

60. Later, while still addressing ground 4 there was this further exchange recorded in the transcript on page 38 at line 27 to line 5 on page 39:

> *"So again, I say to Ms. Davis, if I have your submission and your position wrong, you will tell me……based upon my understanding of your position, which you have clarified, to use that neutral term, I do not now intend to consider ground 4 outside of grounds 1, 2 and 3, as to whether the process and procedure was fair. Now, Ms. Davis.*
> *MS. DAVIS: Yes, my Lord and that is entirely correct."*

61. Additionally, the transcript reflects this statement by Ms. Davis on page 45 at lines 1-7:

> *"…… I also confirm the Court's summary of what we said and that is that there's no need to go into the weight of the evidence that was before the Commission, particularly for the purposes of ground 1 to 4 of our notice of originating motion as a amended."*

62. Finally, this statement by Ms. Davis appears in the transcript of the hearing on 2 March, 2022 on page 39 at lines 22-24:

> *"Our case was always about the issue of the undisclosed evidence having been withheld from the Appellant before the determination was made*."

63. Bearing in mind those statements I found it convenient to consider all the grounds of appeal together. It is helpful to repeat them here:

> **"(1) The Commission erred in law and fact in failing to provide the Appellant with the specifics or evidence that was used to determine that the Appellant was in breach of section 126(2)(b)(ii) of the Act;**
> **(2) The procedure used by the Commission in this matter which involved factual and evidential disputes denied the Appellant the right to be heard;**
> **(3) The procedure used by the Commission in determining that the Appellant breached the Act resulting in the proposal to cancel the Appellant's insurance registration was unfair and in breach of the principles of natural justice.**
> **(4) The decision of the Commission is against the weight of the evidence adduced and disclosed during the investigation.**
> **(5) The Commission erred in law and in fact in the proposed cancellation of the Appellant's registration as an insurance salesperson."**

64. Those grounds related to the process followed and the procedure adopted by the Commission in making the Decision. In essence they raised the narrow issue of whether, to use Ms. Davis' language, the "*Commission's failure or refusal to disclose the Undisclosed Documents…"* to the Appellant resulted in a breach of natural justice. In paragraph 42 of her written Submissions dated 11 March, 2022, counsel defined the Undisclosed Documents as pages 14-17, 19-109 and 136-140 of Exhibit "LLR-1" to the Longley-Rolle Affidavit. Those documents were:

> (i) the Termination Notice (with Form 12B);
> (ii) the Request Letter;
> (iii) the Colina Response;
> (iv) copies of the Six Cheques and the Transaction Records;
> (v) the 2018 Memorandum;
> (vi) the February Comm. Letter; and
> (vii) the February CALG Letter

together hereinafter referred to as "***the Undisclosed Documents****"*.

65. Under the January 2022 Ruling I held that all of those documents were admissible except the Request Letter, the Colina Response, the February Comm. Letter and the February CALG

Letter which were outside the scope of the application which was the subject of that Ruling – see paragraphs [3] and [22] of the Ruling. Nevertheless, in my view, those four documents were admissible under the reasoning set out in the January 2022 Ruling. I should add here that the Undisclosed Documents, which the Commission had in its possession when making the Decision, were admitted for the purpose of allowing the Court to determine whether the Commission acted unfairly and in breach of natural justice in not giving copies of those documents to the Appellant before making the Decision. They were not admitted to support, fortify or justify the decision by the Commissioners that the Appellant had breached provisions of the Act and therefore it proposed to cancel her registration as an insurance salesperson. Nor were those documents admitted to fill a lacuna in the evidence before the Commissioners. The appeal was attacking the fairness of the decision making process and the procedure adopted by the Commission in making the Decision. As counsel for the Appellant stated in her closing submissions on 3 March, 2022:

> *"…..in this particular appeal, the issue is whether natural justice, whether the documents that the Commission relied on to frame its allegations and its conclusion ought to have been provided to the Appellant before it made its final conclusion specifically when she requested a copy of the documents."*

66. The primary complaints underlying the grounds of appeal were that (i) the Commission did not provide the Appellant with all the documents which it relied on in making the Decision and (ii) the process and procedure followed by the Commission in making the Decision denied the Appellant a fair hearing in breach of the principles of natural justice. Counsel for the Appellant stated that 'a fair hearing' in this context was "…*the fair and reasonable opportunity of the Appellant to be heard on the nature of the [a]llegations [made against her] and a review and consideration of the evidence upon which the Respondent relied to make its conclusions and determinations as contained in the Cancellation Letter"* - see paragraph 27 of the written Submissions on behalf of the Appellant dated 13 October, 2021.

(i) Did the Commission breach the rules of natural justice by not providing the Appellant with copies of the Undisclosed Documents?

67. Counsel for the Appellant submitted that it was not possible for the Appellant to answer the Amended Allegations made against her by the Commission without having copies of all the documents relied on in the investigation by the Commission and/or used as the source for those allegations. She stated that there were many discrepancies in the figures set out in the Amended Allegations which were not explained by the Commission. Ms. Davis contended that there was no lawful reason or basis for the Commission's failure to disclose the Undisclosed Documents as section 74 of the Act did not apply in the circumstances of this case.

68. Ms. Davis submitted that the Commission had a duty to act fairly and responsibly in conducting its investigation and that duty included "…*the obligation to give the Appellant an opportunity to be heard on the evidence available to the Respondent, and on which it based*…" the Amended Allegations and the Decision. Counsel contended that the Commission had breached that duty. She submitted that the only information provided to the Appellant by the

Commission during the course of the investigation was the CALG cheque numbers, the policy numbers of the Appellant's alleged clients and the monthly premium amounts and payments. Counsel submitted that the Commission had not provided any documentary evidence to substantiate the allegations of 'lapping'.

69. Ms. Davis further submitted that the effect of the proposed cancellation of the registration of the Appellant as an insurance salesperson under the Act was to deprive her of her livelihood, reputation and career. In this regard counsel cited the case of **Kioa v Minister of Immigration and Ethnic Affairs** [1985] 62 ALR 321 where it was said:

> **"It is a fundamental rule of the common-law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it … The reference to "right and interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood or reputation, as well as to proprietary rights and interests. <u>The law had now developed a point where it may be accepted that there is a common-law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary intention.</u>"** <u>[My emphasis]</u>

70. Counsel also relied on **R v Army Board of the Defence Council ex p Anderson** [1992] QB 169 where the Court stated:

> **"Because of the nature of the Army Board's function pursuant to the Race Relations Act, I consider that a soldier complainant under that Act should be shown all the material seen by the Board, apart from any documents for which public interest immunity can properly be claimed. The Board is not simply making an administrative decision requiring it to consult interested parties and hear their representations. It has a duty to adjudicate on a specific complaint of breach of a statutory right. Except where public interest immunity is established. I see no reason why on such an adjudication, the Board should consider material withheld from the complainant."**

71. Counsel for the Commission accepted that the Commission was bound to act fairly in carrying out its investigation and in making the Decision. He contended that fairness in this case did not require the Commission to give the Appellant copies of all the documents (i) which the Commission obtained during its investigation of the allegations against her by Colina; or (ii) relied on by the Commissioners when making the Decision. He submitted that the material

information from those documents was fully set out in the Commission's correspondence with the Appellant and her attorney which included the First Allegations and the Amended Allegations. Further, such information was reviewed and discussed with the Appellant and her counsel at the January 2018 Meeting. Counsel stated that the Appellant was clearly informed of the case against her which, in the circumstances of this case, was all that was required. Specifically, Mr. Smith contended that fairness did not require the Commission to give to the Appellant copies of the Six Cheques and the Transaction Records as it had set out in the First Allegations and the Amended Allegations a full account of the relevant transactions relating to the Six Payments.

72. On the point under section 74 of the Act, counsel for the Commission stated in his written Closing Submissions dated 3 March, 2022 that:

> "[t]*he Commission does not contend before this Court that it was forbidden by s.74 from disclosing to* [the Appellant] *documents it took into account in its decision. Rather, it submits that it was entitled to set its own procedure, so long as that procedure was fair. And it submits that it was not unfair, in the circumstances of this case, to withhold from her one category of documents that it took into consideration in its decision: namely the Colina transaction records which showed to which policies the relevant cheques had been supplied."*

73. In view of that concession, which in my view was a proper one to make, it was not necessary to further consider the submissions of Ms. Davis on section 74 of the Act.

74. Mr. Smith KC submitted that it was important to note that save for the first of the Six Payments, the Commission did not have in its possession any documents with instructions pertaining to the application of the proceeds of the CALG cheques relating to the Six Payments. Consequently, the request for such documentation was fruitless. With regard to the first of the Six Payments, it will be remembered that the Appellant had copies of the cheque, the January List and the related voucher. Her attorney had sent the Commission copies of those documents under cover of the January Response.

75. It was axiomatic that the Commission was under a duty to act fairly in conducting its investigation into the allegations against the Appellant and in its decision making process by which the Commissioners made the Decision. In that regard, the Appellant was entitled to know the case sought to be made against her and to be given an opportunity to answer it. That was not disputed – the issue was the scope of that duty with reference to the disclosure of documents to the Appellant by the Commission.

76. It appeared to me from the authorities that the extent of the obligation to disclose documents in a given case depends on the facts and circumstances of that case. This point was forcibly made by Lord Mustill in **R v Secretary of State for the Home Department ex parte Doody** [1994] 1 AC 153 when he said:

> **"It has frequently been stated that the right to make representations is of little value unless the maker has knowledge**

> **in advance of the considerations which, unless effectively challenged, will or may lead to an adverse decision. The opinion of the Privy Council in Kanda v. Government of Malaya [1962] A.C. 322, 337 is often quoted to this effect. This proposition of common sense will in many instances require an explicit disclosure of the substance of the matters on which the decision-maker intends to proceed. Whether such a duty exists, how far it goes and how it should be performed depend so entirely on the circumstances of the individual case that I prefer not to reason from any general proposition on the subject."** [My emphasis]

77. Later in the Judgment when discussing what fairness required in that case, Lord Mustill stated:

> **"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."** [My emphasis]

78. Accordingly, it was my view that in this case there was no absolute duty on the Commission to provide the Appellant with copies of every document relied on either in the investigation or in making the Decision. What was essential was for the Appellant to know the case being made against her including the specific allegations made in that context and to have an

opportunity to answer that case and contradict or challenge any part of it or any statement made against her interest.

79. I now turn to consider each of the Undisclosed Documents to determine whether, individually or together, their non-disclosure by the Commission was unfair and resulted in a breach of the principles of natural justice.

The Colina Report

80. The Colina Report was not one of the Undisclosed Documents as defined in paragraph 58 above. Nonetheless, it was submitted on behalf of the Appellant that she was entitled to be provided with a copy of the Colina Report on the basis that the Commission relied on it when formulating the allegations against her.

81. However, in paragraph 17 of the Longley-Rolle Affidavit, which, it will be recalled, was her evidence in chief at the hearing of the appeal, she stated that the Commission did not rely on the Colina Report in its investigation into the allegations against the Appellant. She put it this way:

> "*17. As for the Colina Report itself, it includes matters which are hearsay as it sets out the results of Colina's investigations and recounts an interview with the Appellant conducted by Colina personnel. The Commission takes a careful approach to such information. It often has cause to respond to and investigate allegations made by a party such as Colina following that party's (here Colina) own investigation, and it takes such allegations as the starting point for its own investigation. But it takes the position that it does not rely on another party's investigatory findings, nor upon a hearsay account of such investigations"*

82. Additionally, Ms. Longley-Rolle's evidence was that the Colina Report was reviewed by the investigators but it was not given to the persons on the Board of Commissioners ("***the Commissioners***") who actually made the Decision. This is set out in sub paragraph 19.2 of the Longley-Rolle Affidavit Further, in paragraph 20 of that Affidavit Ms. Longley-Rolle stated that the Colina Report "*….did not form part of the Commissioner's reasons for proposing that the Appellant's registration be cancelled, and is not relevant to that decision."*

83. Based on the evidence it seemed to me that the investigators at the Commission read the Colina Report and based on its content launched their own investigation into the underlying allegations. They did not rely on the findings in that Report and I accepted that it was not given to the Commissioners who were the actual decision makers in this matter. Based on the evidence and my review of the Reasons I concluded that neither the Decision nor the Reasons was based on the Colina Report or in any way reliant on that Report. In those circumstances I did not find that the disclosure of the Colina Report to the Appellant was required in this case and I held that the fact that it was not given to the Appellant did not result in unfairness or deprive her of a fair hearing.

The Undisclosed Documents

84. The information in the Termination Notice was known by the Appellant. With regard to Form 12B, Colina stated in item #3 that the Appellant's employment was terminated "*due to lapping."* In her submissions, Ms. Davis stated that 'lapping' was not used in the First Allegations and that specifically it was not "…*put to the Appellant as a charge to answer. It therefore remain*[ed] *unclear to what extent the term and/or offence of lapping featured in the Investigation, and/or informed the* [Decision and the Reasons underlying it]*."* The First Allegations (and the Amended Allegations) did not use the term of 'lapping' but set out with specificity the allegations against the Appellant and she was invited to answer <u>those</u> allegations; not allegations which were made by Colina when her employment was terminated. I stated above my conclusion on the evidence that the Commission had not relied on the findings of Colina when carrying out its investigation or when making the Decision. In my view, there was no ambiguity in the First Allegations and later in the Amended Allegations on the case which was being advanced against the Appellant. Specific information relating to the bases of that case were set out in both of those documents. Therefore, whether one used the nomenclature of 'lapping' in those two documents was not the point; it was the substance of the allegations which was important. In those circumstances, it was my view that the non-disclosure of the Termination Notice and Form 12B did not in any way deprive or impair the ability of the Appellant to answer the case made against her in the First Allegations which were subsequently replaced by the Amended Allegations.

85. The Request Letter and the Colina Response related to obtaining information and the result of those letters was summarized in the First Allegations and the Amended Allegations. Therefore, in my view, the Commission was not required to provide copies of those documents to the Appellant.

86. The 2018 Memorandum, the February Comm. Letter and the February CALG Letter all related to the communications between the Commission officials and the officers of CAGL. Those communications dealt with the way in which the monthly premium cheques for the policies of the 7 Clients were delivered to Nassau or picked up in Andros. That was a subject which had been extensively canvassed by staff members of the Commission with the Appellant and her lawyer. During the January 2018 Meeting, the Appellant had stated that she was not involved in the payment process and that she did not recall collecting the CALG cheque in respect of the first of the Six Payments. In the 19 January 2018 Letter counsel for the Appellant stated that "….*often times a cheque would be sent on the plane and left with a customer representative who would either carry the cheque directly to the cashier or her assistant would retrieve the cheque from the customer representative and take it to the cashier to be paid and posted"*. Later in that letter it was stated that the Appellant did not recall whether or not she received the Six Cheques. Therefore, the Commission staff were fully aware of the Appellant's position on the payment process relating to the Six Cheques. Any further examination of that issue with the Appellant would have inevitably resulted in a recapitulation of the Appellant's position which she had previously communicated to the Commission.

87. The case of **University of Ceylon v. Fernando** [1960] 1 WLR 223 concerned an appeal arising from the determination of a disciplinary charge against a student for cheating, in which

the appellant had complained that witnesses were examined in his absence. The Privy Council dealt with that issue in this way:

> **"But this did not, in their Lordships' view, in itself involve any violation of the requirements of natural justice. To adapt Lord Loreburn's words in Board of Education v. Rice, the ViceChancellor was not bound to treat the matter as if it was a trial, had not power to administer an oath, and need not examine witnesses, but could obtain information in any way he thought best.**
> **<u>It seems to their Lordships to follow that inasmuch as the Vice-Chancellor, when the alleged offence under clause 8 was brought to his notice, was not bound to treat the matter as a trial but could obtain information about it in any way he thought best, it was open to him, if he thought fit, to question witnesses without inviting the plaintiff to be present.</u>**
> **But, while there was no objection to the Vice-Chancellor informing himself in this way, it was undoubtedly necessary that before any decision to report the plaintiff was reached, he should have complied with the vital condition postulated by Lord Loreburn, which adapted to the present case may be stated as being to the effect that a fair opportunity must have been given to the plaintiff to correct or contradict any relevant statement to his prejudice."**

88. Applying that dicta, I was of the view that it was not procedurally improper for staff members of the Commission to communicate with the CALG officials in the absence of the Appellant. The fundamental fairness of the process was preserved as the subject matter of the communications was the delivery of the monthly premium cheques to Colina and the Appellant had stated her position on that subject to the Commission on numerous occasions. In my view, it was not a case where evidence had been obtained from a party who made allegations against the Appellant and she was not given an opportunity to answer the allegations – as was the position in the case of **Kanda** (infra) which was relied on by counsel for the Appellant. Having heard the Appellants position and the position of the CALG officials on the payment process it was open for the Commission to make a decision on that issue and draw reasonable inferences from the evidence which had been obtained.

89. In those circumstances I did not regard it as procedurally improper or a breach of natural justice that copies of the 2018 Memorandum, the February Comm. Letter and the February CALG Letter were not given to the Appellant.

90. Most of the Undisclosed Documents were the Transaction Records. Those together with copies of the six cheques were important documents. The issue on that point was whether the Appellant had sufficient information on the Six Payments in order to allow her to answer the allegations against her. I concluded that she had received such information as the relevant transactions were described in detail in the First Allegations and the Amended Allegations.

The Appellant met with representatives of the Commission on 12 January, 2018 to discuss the First Allegations and there were several exchanges of letters with the Appellants counsel on that letter and the Amended Allegations.

91. It was my view that the Appellant could not reasonably have been in any doubt as to the allegations which were made against her and the case which she was called on to answer. It was straightforward. It was alleged that (i) on six occasions on specified dates in 2016 the Appellant had collected cheques from CALG for premium payments on the policies of the 7 Clients; and (ii) she diverted some of the proceeds of those cheques to pay premiums of other policyholders who were her clients. Based on the Transaction Records a detailed summary of the transactions relating to the Six Payments was set out in the First Allegations and the Amended Allegations including the names and policy numbers of the 7 Clients, the names and policy numbers of all the recipients of the alleged diverted funds, the date, number and amount of each of the cheques and a breakdown of how the proceeds of those cheques had been booked. That was essentially the information reflected in the Transaction Records with regard to the Six Payments.

92. It was apparent to me from the evidence that apart from the January List and related voucher in connection with the first of the Six Payments, the Commission did not have in its possession any documents with posting instructions to the cashiers in respect of the Six Cheques and so there was no issue of withholding documents on that point. The Commission's case was that it was a matter of inference to be drawn from the facts as to what the instructions were and who gave them.

93. In those circumstances, I concluded that the fact that copies of the Transaction Records were not given to the Appellant did not deprive her of a fair hearing or otherwise was a breach of the rules of natural justice

(ii) Did the process and procedure followed by the Commission in making the Decision deny the Appellant a fair hearing in breach of the principles of natural justice?

94. The Commission, when acting under section 126 of the Act, was entitled to adopt its own decision-making procedures subject only to (i) where appropriate, the statutory mandate in that section to notify in writing the Appellant that it proposed to cancel her registration as an insurance intermediary giving reasons and informing her of her right to request a reconsideration or to appeal under section 228; and (ii) the overall fairness of the procedure.

95. In **ex parte Doody** [1994] 1 AC 153 Lord Mustill stated:

> **"…..it is not enough for them to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather, they must show that the procedure is actually unfair. The court must constantly bear in mind that it is to the decision maker, not the court, <u>that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made.</u>"** <u>[My emphasis]</u>

96. The House of Lords in England considered the issue of fairness in **Board of Education v. Rice and others** [1911] AC 179 in this extract from its judgment:

> **"… the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. <u>They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view</u>."** [My emphasis]

97. Based on the evidence adduced at the hearing of the appeal, my understanding of the investigative and decision making process followed in this case was that certain staff members within the Commission carried out the investigation and then submitted to the Commissioners, who were the actual decision makers, a Memorandum containing a summary of the information and evidence obtained in the investigation – see sub paragraph 19.3 of the Longley-Rolle Affidavit. That Memorandum was then discussed and considered by the Commissioners in a meeting which was attended by Ms. Longley-Rolle and other staff members. The Commissioners then made the Decision.

98. Ms. Longley-Rolle stated in her evidence that the Commission's investigation which led to the First Allegations which were subsequently replaced by the Amended Allegations included obtaining copies of available relevant documentation, questioning relevant parties and speaking directly with the Appellant and giving her an opportunity to respond orally and in writing to the allegations against her.

99. The main points relating to the investigation can be summarized in the following steps:

    (i) Colina submitted to the Commission the Termination Notice together with the completed Form 12B;
    (ii) the Commission launched its investigation into the allegations made by Colina against the Appellant;
    (iii) Colina sent the Colina Report to the Commission;
    (iv) the Commission requested an onsite inspection at Colina and carried out such inspection. The Commission obtained copies of the Six Cheques and the Transaction Records;
    (v) the Commission sent to the Appellant the First Allegations;
    (vi) the Appellant's counsel sent the January Response to the First Allegations;
    (vii) the Appellant, her counsel and the Commission representatives attended the January 2018 Meeting to give the Appellant an opportunity to respond to the First Allegations;

(viii) the Commission sent to the Appellant the Amended Allegations which superseded the First Allegations;
(ix) the Appellant's counsel sent to the Commission the 19 January 2018 Letter setting out responses to the First Allegations and the Amended Allegations;
(x) the two conference calls with the CALG officials took place and the 2018 Memorandum was prepared;
(xi) the February Comm. Letter was sent followed by the February CALG Letter;
(xii) the Commission completed its investigation and sent to the Appellant the June 2018 Letter stating, in part, that based on its findings in the investigation it was proposing to cancel her registration as an insurance salesperson effective August 7, 2018; and
(xiii) the Cancellation Letter was sent by the Commission to the Appellant giving its reasons for the Decision.

100. Based on my assessment of all the evidence I concluded that the investigation by the staff members of the Commission was independent of the Colina investigation as the investigators had not relied on the investigative findings of Colina and had not given the Colina Report to the Commissioners. I also concluded from the evidence that the content of the Colina Report had not formed part of the Reasons for the Decision.

101. Counsel for the Appellant accepted that an in person "*formal face-to-face hearing"* was not required. However, she stated that the Commission was required to inform the Appellant of the case against her, the evidence in support of that case and the statements made which affected her and to give her a fair opportunity to address the statements made against her. Ms. Davis contended that the Commission had not done so.

102. Ms. Davis relied on the case of **B. Surinder Singh Kanda v Government of the Federation of Malaya]1962] A.C. 322** to support her submission that the Appellant had been denied a fair hearing by the Commission in breach of the principles of natural justice. That was a case decided by the House of Lords in which the appellant, who was an inspector of police in the Royal Federation of Malaya Police, was dismissed by the Commissioner of Police on the ground that he had been guilty of an offence against discipline. The appellant brought an action in the High Court challenging his dismissal. The judge declared that his dismissal was void and of no effect. The Government appealed. The Court of Appeal by a majority allowed the appeal and held that the appellant had been validly dismissed. The appellant appealed to the House of Lords. The appeal raised two questions: (i) whether the Commissioner of Police had any power to dismiss the appellant; and (ii) whether the proceedings which resulted in his dismissal were conducted in accordance with natural justice. The second point was the relevant one for the purpose of Ms. Davis. A board of inquiry had made findings in respect of the dismissal of the appellant and its report had been given to the adjudicating officer without giving a copy to the appellant who did not have any knowledge of the contents of the report until the fourth day of the trial of the action.

103. The judgment of their Lordships was delivered by Lord Denning. Counsel for the Appellant commended to the Court the following extract from the Judgment:

> **"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……It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice, Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing……...**
>
> **Applying these principles, their Lordships are of opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J. in these words: "In my view, the furnishing of a copy of the findings of the board of inquiry to the adjudicating officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal."**

104. Counsel for the Commission submitted that **Kanda** must be considered in light of the later decision of the House of Lords in **ex parte Doody**. He further contended that in this case the material information before the Commission and the documents relied on by the Commission had been summarized in the Amended Allegations and the subsequent correspondence with the Appellant and her counsel. There was no information which had been given to the Commissioners relating to a subject which had not been addressed by the Appellant. Mr. Smith contended that the Commission had adopted a fair procedure in conducting its investigation and in coming to the Decision which gave the Appellant a fair opportunity to put forward her case and to answer the allegations against her. In this regard he referred to the multiple letters exchanged between the Commission and the Appellant and her counsel. He also referred to the January 2018 Meeting. Counsel contended that the Decision by the Commissioners was based on sound and proper inferences to be drawn from the facts of the case. Therefore, counsel submitted that there was no reason for the Court to interfere with the Decision made by the Commissioners in the exercise of their statutory duties.

105. The Commission had decided on its procedure for conducting its investigation and on its decision making process which resulted in the Decision. I was of the view that it was entitled

to do so. In taking that approach, the Commission was not conducting a trial and was not required to follow the procedure of a court when doing so – see **Board of Education v. Rice** (supra) and **University of Ceylon v. Fernando** (supra). It was not procedurally improper for the Commission to communicate with witnesses in the absence of the Appellant provided the Appellant had been given an opportunity to address the subject matter of those communications – see **University of Ceylon v. Fernando** (supra). I held that that condition had been met in connection with the Commission's communications with the officials of CALG – see paragraphs 86 – 88 above. Earlier in these Reasons for my decision I also held that the non-disclosure of the Undisclosed Documents did not result in a breach of the rules of natural justice. I also expressed above my view that the investigation was independent.

106. After considering the evidence it was my view that the investigation and decision making process of the Commission was fair in that the First Allegations and the Amended Allegations informed the Appellant of the case against her which she was invited to answer, gave sufficient details of the underlying bases of that case to allow her to respond and summarized the documents relied on in conducting the investigation and in making the Decision. Additionally, I held that the Appellant had been given a fair opportunity to answer all the allegations made against her. She (i) received the First Allegations and the Amended Allegations; (ii) provided an initial response to the First Allegations through the January Response from her attorney; (iii) attended the January 2018 Meeting with her counsel and addressed the First Allegations; and (iv) through the 19 January 2018 Letter summarized her responses to the First Allegations given at the January 2018 Meeting and submitted written responses to the Amended Allegations. I could find no instance where that procedure was unfair to the Appellant in the sense of either failing to inform her of the case against her or depriving her of the right to a fair hearing on issues before the Commission. In adapting the principle enunciated by Lord Mustill in **ex parte Doody**, I bore in mind that it was not enough for the Appellant to persuade the court that a procedure other than the one followed by the Commission in this case would have been better or fairer. Rather, the Appellant was required to show that the procedure used in this case by the Commission was actually unfair. In my view, the Appellant had not done so.

107. I did not accept that as the Commission had not provided copies of the Undisclosed Documents to the Appellant the Commissioners should not have considered those documents in coming to the Decision. I have set out above my conclusion (with reasons) that the non-disclosure of those documents did not, in the circumstances of this case, result in a breach of the rules of natural justice. The material information in those documents had been provided to the Appellant and she was informed of the case made against her in respect of the Six Payments and given a fair opportunity to answer that case. I concluded that in those circumstances, the Commissioners were entitled to consider the Undisclosed Documents when making the Decision.

108. The scope of the appeal was narrow. It only challenged the process adopted by the Commission in conducting its investigation and the decision making procedure of the Commissioners in making the Decision which focused in large measure on the Undisclosed Documents. Therefore, it was not necessary to consider any other issues relating to or arising from the Decision.

109. It was my clear understanding of the submissions by counsel for the Appellant that she was not seeking to extend the scope of the appeal under ground 5 to include any issue outside the process and procedure adopted by the Commission and specifically the non-disclosure of the Undisclosed Documents. However, to the extent that it might be suggested otherwise, I will briefly address the Reasons for the Decision and the underlying findings of fact were set out in the Cancellation Letter and are summarized in paragraph 39 above.

110. It was not disputed that the First Allegations and the Amended Allegations only related to the Six Payments. There was evidence before the Commission that (i) the 7 Clients were employees of CALG and the monthly premium for each of the insurance policies for the 7 Clients was paid in 2016 by CALG based on salary deductions; (ii) in each case the monthly cheque from CALG was accompanied by a list (similar to the January 2016 List) showing the application of the proceeds of the cheque between the policies of the 7 Clients; (iii) the Commission and the Appellant had copies of the January 2016 List and the related voucher relating to the first of the Six Payments but did not have copies of any of the other lists with regard to the other Payments; (iv) the handwriting on the January 2016 List was not the Appellant's handwriting; (v) all of the 7 Clients were clients of the Appellant; (vi) it had been agreed with the Appellant that CALG would send the monthly premium cheques made payable to Colina in connection with the 7 Clients to Nassau via the package delivery services of Glen Air and that the Appellant or someone from her office would collect those cheques; (vii) sometimes when she was visiting Andros the Appellant would personally collect the cheques from the CALG in Andros; (viii) the Appellant did not recall whether or not she received the Six Cheques; (ix) some of the proceeds of each of the Six Cheques had been diverted to pay premiums of other Colina policyholders who were all clients of the Appellant; and (x) Colina would send out notices to policyholders who had missed premium payments or where the policy was "*behind"* and the Appellant's assistants would deal with those matters or bring it to her attention.

111. The Commission also had specific evidence from the Appellant with regard to the way in which the monthly CALG cheques were sent to Nassau. The Appellant stated at the January 2018 Meeting that the monthly CALG cheques for the 7 Clients would either be sent by post to Colina or she or her secretary would collect the envelope with the cheque from Glen Air and leave the envelope with a customer representative – see paragraphs 18 and 23 of the 2nd Appellant's Affidavit. Also, the Appellant stated through her counsel in the 19 January 2018 Letter that on frequent occasions the monthly cheque would be sent on the "*…plane and left with a customer representative who would either carry the cheque directly to the cashier or her assistant would retrieve the cheque from the customer representative and take it to the cashier to be paid and posted."*

112. Given the information which was before the Commissioners I was satisfied that there was an evidentiary basis for their findings of fact which were set out in the Reasons. Further, I was satisfied that it was open to the Commissioners to draw the inferences from those facts which were contained in the Reasons.

113. For all the reasons stated above I did not accept any of the grounds of appeal.

Disposition

114. Based on my conclusions on the disposition of the grounds of appeal I did not find it necessary to consider Order 55 r 7(7) of the RSC.

115. I dismissed the appeal and ordered the Appellant to pay the costs of the Commission to be taxed if not agreed.

Dated 23 April, 2024

Sir Brian M. Moree KC