

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2023/0002

BETWEEN:

NALINI BHUP

Appellant

and

THE ROSS UNIVERSITY SCHOOL OF VETERINARY MEDICINE
(ST. KITTS) LIMITED

Respondent

Heard together with

SKBHCVAP2023/0003

BETWEEN:

THE ROSS UNIVERSITY SCHOOL OF VETERINARY MEDICINE
(ST. KITTS) LIMITED

Appellant

and

NALINI BHUP

Respondent

Before:

The Hon. Mr. Trevor M. Ward

Justice of Appeal

The Hon. Mde. Esco L. Henry

Justice of Appeal

The Hon. Mr. Reginald T. A. Armour

Justice of Appeal [Ag.]

Appearances:

Mr. Brian Barnes for the Appellant

Mr. Garth Patterson, KC with him, Mr. Johnathan Rattan for the Respondent

2025: December 8;
2026: September 25.

Civil appeal – Contract – University Disciplinary Committee – Student Handbook – University's Code of Conduct – Natural justice – Natural justice principles in private law – Juridical basis for review – Procedural fairness – Whether judge erred in finding breach of procedural fairness – Apparent bias – Remittal to disciplinary committee – Whether remittal was available and was procedurally fair – Whether remittal remains viable – Assessment of evidence – Whether judge erred in ordering a rehearing – Reinstatement of student – Whether judge erred in not ordering reinstatement – Damages – Whether judge erred in refusing to award aggravated and exemplary damages – Nominal damages awarded for breach of procedural fairness

Ms. Nalini Bhup ('Ms. Bhup' or 'the Student') was admitted to Ross University School of Veterinary Medicine (St. Kitts) Limited ('the University' or 'Ross') in May 2016 on a scholarship to pursue the undergraduate Doctor of Veterinary Medicine programme. She successfully completed three semesters and was promoted to the fourth semester when she was charged under Ross' Student Handbook ('the handbook') with four violations of the University's Code of Conduct, namely: cheating in examinations by using a cell phone, dishonesty during proceedings, violation of university policies, and academic misconduct. Mr. Jeffrey Fazio, the University's Conduct Administrator, interviewed Ms. Bhup and prepared and signed the administrative complaint dated 5th May 2017, which was sent to her that same day. Mr. Fazio subsequently served as chairperson of the conduct panel ('the panel') that presided over the disciplinary proceedings. The panel found against Ms. Bhup and recommended suspension; however, Mr. Fazio determined that she should be expelled. On 31st May 2017, the panel expelled Ms. Bhup from the programme and changed all her passing grades for the third semester to zero. Ms. Bhup unsuccessfully appealed the panel's decision through the appeal process set out in the handbook.

Ms. Bhup initially filed a claim for judicial review of the panel's decision pursuant to Part 56 of the Civil Procedure Rules 2000 ('CPR'). Upon Ross' application to strike out the claim on the basis that public law remedies were unavailable, Ms. Bhup agreed to discontinue the judicial review claim. She thereafter amended her claim, abandoned the claim for judicial review, and proceeded under the common law with a re-amended claim filed on 9th April 2019. Ms. Bhup relied on the contractual relationship constituted in part by the handbook and on an implied term that the disciplinary process would be reasonable, fair and accord with the principles of natural justice. She sought declarations that the expulsion decision contravened the said implied term and that Mr. Fazio was infected with actual and/or perceived bias. She also claimed general, aggravated and exemplary damages, and a mandatory injunction directing the University to accept, ratify and uphold: (i) her course grades; and (ii) her promotion to the fourth semester issued on 21st April 2017 pursuant to Rule 2.7.7 of the handbook. She also claimed interest, costs and any other relief the court may deem just. Ross maintained that the parties were in an unwritten contractual relationship in which Ms. Bhup agreed to be bound by its rules, and that it undertook to conduct disciplinary hearings in accordance with its internal regulations and the principles of natural justice. The University contended that it had followed its internal procedures and provided a fair hearing, and that Ms. Bhup was therefore not entitled to damages or a mandatory injunction.

By judgment delivered on 21st April 2022, the learned judge concluded that the panel hearing was subject to natural justice as an implied incident of the contractual relationship between the parties. The learned judge found that the adjudication process was infected by Mr. Fazio's bias and that he could not, in the circumstances, fairly perform the function of chairperson. She nevertheless declined to grant the mandatory injunction or damages. The judge set aside the decision of the panel that Ms. Bhup violated Ross' Code of Conduct and the consequent expulsion and remitted the matter for rehearing before a differently constituted panel. The judge awarded Ms. Bhup prescribed costs of \$7,500.00.

Being dissatisfied with the decision, both parties by notices of appeal filed on 2nd June 2023 appealed aspects of the judgment. Ms. Bhup, the appellant in SKBHVAP2023/0002 challenged, in particular, the judge's refusal to grant reinstatement and damages, and the order for a rehearing. The University, the appellant in SKBHCVAP2023/0003, contended that the judge erred in finding a breach of natural justice and by setting aside the decision of the conduct panel and the expulsion.

Ms. Bhup advanced ten grounds of appeal and Ross advanced three grounds of appeal.

Five issues arose on appeal for consideration which were:

- (1) The juridical basis for review by the High Court of the conduct panel's disciplinary process and whether those proceedings were subject to natural justice principles. ('The basis for review point')
- (2) Whether the judge erred in finding that Ross breached the principles of natural justice, specifically, material unfairness and apparent bias. ('The procedural fairness point')
- (3) Whether the court had the jurisdiction in the contract claim to set aside the disciplinary decisions of the conduct panel and the Conduct Administrator and, if so, whether remittal was available and procedurally fair and whether the judge erred in making that order. ('The remittal point')
- (4) Whether the judge erred in her assessment of the evidence and procedural approach in ordering a rehearing on a basis not advanced by the parties. ('The evaluation point')
- (5) Whether the judge erred in not ordering Ms. Bhup's reinstatement and refusing to award damages. ('The remedies point')

Held: allowing both appeals in part and making the orders at paragraph [87] of this judgment that:

1. It is clear that a private domestic tribunal does not become, and cannot be regarded or treated as, a public authority simply because it performs an adjudicative function. Equally, it is well established that judicial review is ordinarily unavailable where the source of the power is purely contractual. The critical distinction is between the

source of the court's jurisdiction and the standards that inform the contractual obligation being enforced. In this case, the source of the court's jurisdiction is private law. The disciplinary panel is not a public body, and its decisions are not amenable to judicial review merely because they determine disciplinary obligations. Rather the court's jurisdiction derives from the contractual relationship between Ross and Ms. Bhup, including the handbook and the implied obligation, accepted by the parties below, that the disciplinary machinery would be operated fairly. It does not follow, however, that principles of natural justice are irrelevant. In this context, those principles do not constitute an independent public-law source of jurisdiction; rather, they inform the content and performance of the contractual obligation of fairness. Accordingly, the court is not exercising the prerogative or supervisory jurisdiction associated with judicial review but is determining whether Ross exercised a contractually conferred disciplinary power consistently with the express and implied terms governing its exercise. Therefore, the judge did not err in subjecting the exercise of Ross' disciplinary powers to judicial scrutiny for conformity with the express and implied terms of the parties' contractual relationship, including the obligation of procedural fairness.

Haron bin Mundir v Singapore Amateur Athletic Association [1992] LRC (Const) 1006 considered; **Breen v Amalgamated Engineering Union** [1971] 2 Q.B. 175 considered; **Bradley v The Jockey Club** [2007] LLR 543 applied.

2. It is settled that the rules of natural justice must be observed not only by courts, tribunals and arbitrators but also by other decision makers including persons and entities who perform administrative or judicial functions, except where the principles are excluded expressly or impliedly or due to special circumstances. At minimum, a person whose status and educational future are at stake must know the case to be met and have a fair opportunity to answer adverse material. Mr. Fazio's cumulative involvement in the investigation, formulation and advancement of the allegations, coupled with his position as complainant and material witness on the allegation of dishonesty, was incompatible with his subsequent participation as chairperson of the adjudicative panel. His involvement at all levels of the investigation, initiation and adjudication of the disciplinary proceedings gave rise to apparent bias and rendered them procedurally unfair. Equally, the panel's refusal to allow Ms. Bhup to include her medical evidence and its decision to admit into evidence prejudicial statements about prior misconduct without prior disclosure, prejudiced her in the presentation of her defence. She was entitled to a fair opportunity to rebut those assertions and was deprived of the chance to do so because she was blind-sided with that evidence during the hearing. The judge's evaluation of the relevant evidence and materials on these matters was reasonably open to her and discloses no material error of principle, misunderstanding of the evidence or conclusion that was plainly unavailable on the record. Accordingly, the judge did not err in finding that Ross breached the principles of natural justice.

R v Board of Visitors of Hull Prison ex p St Germain (No. 2) [1979] 1 WLR 1401 applied; **Wiseman v Borneman** [1971] AC 279 applied; **R v Secretary of State for the Home Department ex p Cheblak** [1991] 2 All ER 319 applied; **B Surinder**

Singh Kanda v Government of the Federation of Malaya [1962] AC 322 applied; **Porter v Magill** [2002] 2 AC 357 applied; **Benjamin Exeter v Winston Gaymes et al** SVGHCVAP2016/0021 consolidated with SVGHCVAP2016/0022 **Lauron Baptiste v Vil Davis et al** (delivered 13th June 2017, unreported) followed; **Stuart A. Lockhart v Valentina Nonini et al** ANUHCVP2019/0004 (delivered 14th October 2020, unreported) followed; **Attorney General of Trinidad and Tobago v Kublalsingh and Others** TT 2014 CA 8 considered.

3. Remittal is a familiar consequence where a disciplinary determination is set aside for procedural unfairness and an order that gives effect to the parties' contractual allocation of decision-making responsibility does not necessarily amount to an exercise of public law power of certiorari or mandamus. The substance and effect of the relief rather than the label are the controlling features. However, the judge erred in law in her procedural approach to the remittal order. The record reveals that although Ms. Bhup expressly prayed for 'any other relief' in her claim form, neither she nor the University addressed the court as to any relief that might be available on the facts of the case, other than those expressly outlined in the prayer. The written submissions in the lower court are silent as to the possibility of any other available relief. Similarly, the judge's notes which are included in the record contained no such reference. The judge should have invited submissions from the parties on the remittal aspect of her decision. The judge erred in law by not eliciting representations from them on the question of remittal before directing that the hearing be remitted to and conducted by a differently constituted panel. Court rules of procedure impose a duty on the court to invite representations by litigants where it intends to exercise powers of its own volition. The judge's failure to do so constituted a procedural error.

Stuart A. Lockhart v Valentina Nonini et al ANUHCVP2019/0004 (delivered 14th October 2020, unreported) followed; **Sylvester Solomon v His Honour Senior Magistrate Robert Shuster** MNIHCVP2014/0004 (delivered 11th August 2015, unreported) followed; **Regina v Secretary of State for the Home Department, Ex parte Doody** [1994] 1 AC 531 applied; **In the Matter of Section 84 of the Commonwealth of Dominica Constitution Order between Corporal Philbert Bertrand v The Secretary, PSC** Dominica Civil appeal No. 10 of 1999 (delivered 27th March 2000, unreported) followed.

4. Remittal cannot be justified abstractly. The Court must consider whether intervening events have rendered a rehearing impossible. The Court must consider therefore whether the evidence establishes that the passage of time has created such irremediable forensic or institutional prejudice that a fair rehearing is no longer realistically possible. The material presently before this Court does not establish that threshold. The material before this Court indicates that significant contemporaneous evidence is still available or forms part of the record, including the surveillance video, documentary records relating to the investigation and disciplinary proceedings and other relevant materials that were generated around the relevant time. Therefore, reconsideration through Ross' contractual disciplinary machinery remains legally available and viable.

5. There is a traditional reluctance to order specific performance in relationships involving continuing personal interaction, trust and educational supervision. The court should not ordinarily substitute its own substantive decision for that of the domestic tribunal entrusted by the parties to determine disciplinary liability. An order compelling reinstatement would do more than restore the status quo pending a valid determination. In the circumstances of this case, it would effectively determine or render practically irrelevant disciplinary questions that the parties' contractual arrangements entrusted to the University's disciplinary machinery in the first instance. Therefore, the judge was correct to refuse the mandatory injunction requiring reinstatement.

R v Incorporated Froebel Educational Institute, ex parte L [1999] ELR 488 applied; **Bradley v The Jockey Club** [2007] LLR 543 applied.

6. It is trite law that recoverability of damages depends on the nature of the loss claimed, causation, remoteness and proof. The judge was correct to approach damages according to ordinary contractual principles. The absence of proof of substantial loss does not erase the established breach of contract. Where a contractual right has been infringed but measurable loss has not been proved, an award of nominal damages may serve to vindicate the right infringed. Ms. Bhup did not establish recoverable financial loss attributable on the applicable contractual principles to the procedural breach. It does not follow that absent the breach she would necessarily have completed the programme. Rather, she would have received a procedurally fair determination of the disciplinary allegations. The evidence does not permit the Court to conclude that the educational and economic losses claimed would probably have been avoided if the contractual obligation of fairness had been met. The judge was therefore entitled to refuse substantial damages.

Addis v Gramophone Co Ltd [1909] AC 488 applied.

JUDGMENT

Introduction

- [1] **HENRY JA:** The central question raised by these two appeals concerns the juridical basis on which a court may review disciplinary proceedings conducted by a private educational institution pursuant to its contractual relationship with a student. They also raise issues as to the nature of the relief available where that contractual disciplinary process is conducted in breach of procedural fairness.

- [2] The proceedings in the lower court were pursued through the re-amended claim filed on April 9th 2019¹ by Ms. Nalini Bhup ('Ms. Bhup' or 'the student') against Ross University School of Veterinary Medicine (St. Kitts) Limited ('the University' or 'Ross') alleging that the decision to expel her was made in breach of natural justice principles and therefore fatally flawed. By judgment dated 21st April 2022 the judge found in Ms. Bhup's favour. She held that the disciplinary proceedings were subject to principles of natural justice as an implied term of the contractual relationship between the parties. She found that the disciplinary process was unfair, partly because the chairperson was affected by actual or apparent bias and because prejudicial evidence had been introduced without disclosure to Ms. Bhup. Both the student and the University filed appeals against the learned judge's judgment.

Background

- [3] The factual matrix is not complicated. Ms. Bhup was, from May 2016, a student at the University having been admitted to the undergraduate degree of Doctor of Veterinary Medicine programme on the basis of a scholarship awarded by Ross. Ms. Bhup successfully completed three semesters of study. For purposes of her examination at the end of those semesters, due to her medical condition she was accorded certain accommodation. Those included the use of a private room that was outfitted with cameras.
- [4] After sitting her examinations and being promoted to the fourth semester, Ms. Bhup was accused of and charged under Ross' Student Handbook ('the handbook') with four violations of the University's Code of Conduct namely, cheating in the examinations by using a cellular phone, being dishonest during the university proceedings, violation of university policies and academic misconduct. An abridged version of the charges was set out in the judge's judgment as follows:
- “(i) Code of Conduct 1.6.3.15.8: Violations of Academic Integrity; Academic Integrity included a commitment not to engage in or tolerate acts of falsification, misrepresentation or deception;

¹ Page 34 Record of Appeal Vol. 1.

- (ii) Code of Conduct 1.6.3.16: False information; which includes knowingly providing false statements or testimony during an investigation or University proceeding;
- (iii) Code of Conduct 1.6.3.21: Violation of published University policies, procedures, rules or regulations; and
- (iv) Academic Misconduct: Rule 1.11.1: It is an offence for any covered person to make use of unethical or unfair means in any RUSVM assessment. It includes 'Receipt or transmissions of unauthorized aid on assignments or examination materials or other forms of dishonesty in academic affairs are also considered as academic misconduct.'²

[5] In his capacity as the University's Conduct Administrator, Mr. Jeffrey Fazio interviewed Ms. Bhup. He then prepared and signed the administrative complaint dated 5th May 2017.³ A letter was sent to Ms. Bhup that day informing her of and setting out the complaint.

[6] The complaint formulated by Mr. Fazio states:
 "RUSVM is filing complaint that Ms. Nalini Bhup violated RUSVM Exam Center policy by bringing a cell phone into the private, accommodated testing room in the examination center during examinations. It is alleged that Ms. Bhup used the cell phone to ascertain an advantage (cheating) on several final examinations. Furthermore, Ms. Bhup lied to university administrator, Jeffrey Fazio, about possessing a cell phone in the exam center..."

[7] Mr. Fazio subsequently served as the chairperson of the conduct panel ('the panel') which presided over the disciplinary proceedings. The panel as established under the handbook comprised five other persons: four members of Ross' Faculty and one student government representative.

[8] The panel found against Ms. Bhup and recommended a penalty of suspension. However, the Chair, Mr. Fazio determined that she should be expelled. On 31st May 2017, by decision of the panel, Ms. Bhup was expelled from the University's undergraduate Doctor of Veterinary Medicine programme. In addition, her passing

² Para. [15] of the judgment.

³ Page 284 Record of Appeal Vol 3.

grades for the third semester were all changed to zero. She unsuccessfully appealed the panel's decision through the appeal process set out in the handbook.⁴

[9] Ms. Bhup filed a fixed date claim in the High Court thereafter for judicial review of the decision pursuant to Part 56 of the **Civil Procedure Rules 2000** ('CPR') and sought remedies in public law. She pleaded that in breach of the principles of natural justice, and contrary to the handbook she was not allowed to see the entirety of the video surveillance of the examination room, and she had insufficient time to access the hearing documents.

[10] Ms. Bhup sought declarations that Ross contravened rules 1.8.3.5.c, 1.8.3.5.e. and 1.8.3.5.f of the handbook which state respectively:

“1.8.3.5.c. In advance of the hearing, both the complainant and the respondent will be given access to the identified information that is available before the hearing which will be considered by the conduct panel.

1.8.3.5.e. The University, the complainant, the respondent and the conduct panel shall be allowed to present witnesses, subject to the right of cross-examination by the conduct panel.

1.8.3.5.f. Pertinent records and exhibits including video and written statements, may be accepted as evidence for consideration by a conduct panel at the discretion of the Conduct Administrator/chairperson.”

[11] Consequent on an application by Ross to strike out the fixed date claim on the basis that public law remedies were not available to Ms. Bhup, she agreed to discontinue the Part 56 claim and was granted permission to do so. She amended the claim, abandoned the Part 56 cause of action and proceeded under the common law with the re-amended claim filed on 9th April 2019.⁵ Ms. Bhup relied on the contractual relationship constituted in part by the handbook and on an implied term that the disciplinary process would be reasonable, fair and accord with the principles of

⁴ Under Rule 1.8.6.

⁵ Page 34 Record of Appeal Vol 1.

natural justice. She challenged the examination process, the complaint, and the conduct hearing leading to her expulsion. She claimed that the procedure employed by Ross to expel her from the veterinary program was unfair and, in several respects, was in breach of the principles of natural justice.

- [12] At first instance, Ms. Bhup submitted that she did not have a fair trial and consequently, the decision of the hearing panel ought to be set aside, and her enrolment ought to be restored. She sought declarations that the expulsion decision contravened the implied term in her contract; and, that Mr. Fazio was infected with actual and/or perceived bias against her and could not fairly or properly fulfil his functions as chairman of the panel under the handbook, or at all. She also claimed general, aggravated and exemplary damages and a mandatory injunction directing the University to accept, ratify and uphold: (i) the course grades; and, (ii) the promotion to the fourth semester issued to her on 21st April 2017 pursuant to the Grading Policy set out in Rule 2.7.7 of the handbook. Additionally, she claimed interest, costs and any other relief that the court may deem just.
- [13] Ross' position was that the parties were in an unwritten contractual relationship in which Ms. Bhup agreed to be bound by Ross' rules, and that it undertook to conduct all disciplinary hearings against her in accordance with its internal regulations and the principles of natural justice. The University maintained that it followed its internal procedures by which Ms. Bhup agreed to be bound consequent on her enrolment, and it provided a fair hearing in compliance with the rules of natural justice. Accordingly, Ms. Bhup is not entitled to damages or a mandatory injunction.
- [14] The judge examined the incident report, the circumstances surrounding the formulation of the charges, the materials before the panel and how they were handled, the operation of the handbook, and the fact of Mr. Fazio's participation in the adjudicative process as chairperson. She drew a distinction between Ross' compliance with the formal sequence of its internal rules and the fairness of the actual disciplinary process in Ms. Bhup's case.

- [15] She concluded that the panel hearing was subject to natural justice as an implied incident of the contractual relationship between the parties. She found that the adjudication process was infected by Mr. Fazio's bias and that he could not, in the circumstances, fairly perform the function of chairperson. She nevertheless declined to grant the mandatory injunction or damages.
- [16] Regarding Ms. Bhup's claim for damages, the judge found that she had not pleaded, particularised or proved special damages. She ruled that damages for distress, humiliation or injury to reputation were not ordinarily recoverable for breach of contract. As to reinstatement, she held that a mandatory injunction would be inappropriate because the court could not determine the unresolved merits of the disciplinary allegations without usurping the panel's function and essentially concluding that Ms. Bhup had not committed the disciplinary offences.
- [17] The judge determined that in several respects Ross followed its internal rules and regulations in that it afforded Ms. Bhup access to the identified information available before the panel hearing and the right to call witnesses, albeit that her witnesses were excluded at the discretion of the Conduct Administrator. Ultimately, she ruled that Ross had breached the implied term that the disciplinary process that led to Ms. Bhup's expulsion would be fair and in accordance with the rules of natural justice. On that basis, she held that Ms. Bhup is entitled to certain of the declarations sought in paragraph 68(a), (b) and (c) of the re-amended claim and that the decision of the conduct panel must be set aside.⁶ She concluded that Ms. Bhup is not entitled to the declarations sought in paragraph 68(d) and (e) of her claim. The judge set aside the decision of the panel that Ms. Bhup had violated Ross' Code of Conduct and the consequent expulsion and remitted the matter for rehearing before a differently constituted panel. She awarded Ms. Bhup prescribed costs of \$7,500.00 pursuant to CPR 65.5.

⁶ Para. [64] of the judgment.

- [18] Being dissatisfied with the decision, both parties by notices of appeal filed on 2nd June 2023 appealed aspects of the judgment. Ms. Bhup challenges, in particular, the judge's refusal to grant reinstatement and damages, and the order for a rehearing. The notice of appeal filed by Ms. Bhup was given the case number SKBHCVAP2023/0002. By order of a single judge of the Court dated 20th July 2023, a stay was granted of paragraph 69 of the judge's decision dated 21st April 2023.⁷
- [19] Ross, for its part, contends that the judge erred in finding a breach of natural justice and by setting aside the decision of the conduct panel and the expulsion. Its appeal proceeded under the assigned case number SKBHCVAP2023/0003.
- [20] Ms. Bhup advanced ten grounds of appeal. In her written submissions Ms. Bhup contended that the only issue to be determined is whether 'having regard to the totality of the evidence in her appeal the remittal of the matter to a fresh panel would be at odds with the ends of natural justice.' Her grounds of appeal are broadly grouped as follows:
- (a) The judge erred in fact and law in failing to order the appellant's reinstatement to the fourth semester and instead remitting the matter for rehearing, notwithstanding (i) the absence of any credible complaint or evidence of misconduct; (ii) the finding that the charge of lying was predetermined; and, (iii) the prejudice occasioned by the lapse of time, including the appellant's diminished ability to obtain a fair hearing.
 - (b) The judge erred in fact and law in failing to find and declare that the complaint and resulting charges were a nullity, in circumstances where they were unsupported by independent evidence, lacked any credible foundation, and included a predetermined allegation and unreliable material.

⁷ Page 18 of the Record of Appeal.

- (c) The judge erred in fact and law in ordering a rehearing on a basis not advanced by the respondent nor raised by the court, thereby denying the appellant the opportunity to address the prejudice arising therefrom.
- (d) The judge erred in law in refusing damages by placing undue reliance on general principles while failing to give sufficient weight to the particular facts and prejudice suffered by the appellant as a result of the respondent's conduct and the passage of time.

[21] Ross contended that nominal damages were, at most, the appropriate remedy that Ms. Bhup could recover. It advanced three grounds of appeal: (i) since the judge had no supervisory jurisdiction over the private conduct panel comparable to judicial review, she erred in law by making the orders setting aside the conduct panel's decision that Ms. Bhup violated Ross' Code of Conduct and the expulsion and by remitting the rehearing to another panel; (ii) she erred in that she wrongly applied public law principles and remedies to a private law contractual claim; and, (iii) she erred in making the orders remitting the complaint against Ms. Bhup for rehearing by a differently constituted panel because they were made without notice, were inconsistent with the refusal of the mandatory injunction and exceeded the remedies available in contract.

[22] Given the similarity and overlap of the subject matter and issues in the two appeals, they were heard together on 8th December 2025.

Issues

[23] Five issues emerge for consideration, namely:

- (1) The juridical basis for review by the High Court of the conduct panel's disciplinary process and whether those proceedings were subject to natural justice principles. ('The basis for review point')

- (2) Whether the judge erred in finding that Ross breached the principles of natural justice, specifically, material unfairness and apparent bias. ('The procedural fairness point')
- (3) Whether the court had the jurisdiction in the contract claim to set aside the disciplinary decisions of the conduct panel and the Conduct Administrator and, if so, whether remittal was available and procedurally fair and whether the judge erred in making that order. ('The remittal point')
- (4) Whether the judge erred in her assessment of the evidence and procedural approach in ordering a rehearing on a basis not advanced by the parties. ('The evaluation point')
- (5) Whether the judge erred in not ordering Ms. Bhup's reinstatement and refusing to award damages. ('The remedies point')

The Basis for Review Point

Ross' Submissions

- [24] Relying on the distinction between a court's judicial review remit in relation to public bodies on the one hand and the court's jurisdiction in ordinary claims against private institutions on the other hand, Ross argued that the court does not have supervisory jurisdiction over a privately constituted conduct panel and conduct administrator in the same manner as a panel established in public law. Citing **Commonwealth Caribbean Administrative Law**⁸ it was submitted that the court primarily exercises its supervisory jurisdiction in public law claims. Ross maintained that the cause of action in the re-amended claim was purely contractual. It was submitted that the judge erred in applying strictly public law principles to a private law claim without appreciating that those public law principles are not applicable to the conduct panel. Ross reasoned that any reference to public law principles should have been

⁸ Eddy Ventose, *Commonwealth Caribbean Administrative Law* (1st edn, Routledge 2013).

narrowly applied to the question of whether there was a breach of the implied natural justice term.

[25] Ross accepted that its relationship with Ms. Bhup was contractual. It submitted that the judge approached the conduct panel as if it were a public tribunal amenable to judicial review. Relying on CPR Part 56 and authorities distinguishing public law review from private contractual claims, Ross submitted that public law principles cannot simply be transplanted into a private contractual relationship. For example, reliance was placed on **Credit Suisse v Allerdale Borough Council** in which Hobhouse LJ stated, 'private law issues must be decided in accordance with the rule of private law.'⁹ Ross argued that this prevents the court from treating a private disciplinary panel as if it were a statutory tribunal.

[26] The University subsequently acknowledged that the contract might contain an implied obligation of fairness in contractual claims where the private body, who is the subject of the contract, has a duty to act fairly. It was submitted that the claim was one in private law for breach of contract and this was not changed by the application of natural justice principles as an implied term of the contract between the parties. **Mok v Fitzmaurice House Ltd (trading as The Lansdowne Club)**¹⁰ was cited in support.

[27] Placing reliance on **Bradley v The Jockey Club**,¹¹ Ross submitted that if the private body fails to act fairly, the High Court can review the decision, applying similar public law principles to that of judicial review. It was emphasized however, that the High Court cannot grant remedies such as certiorari or mandamus against private bodies, but can grant declarations and injunctions, typically prohibitory injunctions, as exemplified in **Breen v Amalgamated Engineering Union and Others**,¹² **R v**

⁹ [1996] 4 All ER 129 at 171.

¹⁰ [2024] EWHC 2804 (KB) at para. [25].

¹¹ [2007] LLR 543 at para. [66].

¹² [1971] 2 Q.B. 175 at 190.

Fernhill Manor School ex parte A¹³ and **Credit Suisse v Allerdale Borough Council**.¹⁴ Ross further cited **R v East Berkshire Health Authority, ex parte Walsh**¹⁵ and **R (on the application of Imam) v Croydon London Borough Council**¹⁶ as authorities for the proposition that the remedy of judicial review is available only where an issue of public law is involved.

The Student's Submissions

- [28] It was Ms. Bhup's contention that the University's private status does not permit it to exercise contractual disciplinary power free from conformity with the principles of natural justice. She maintained that the handbook was the source of Ross' power to discipline and it simultaneously imposed procedural constraints of fairness and freedom from bias. Accordingly, the court was empowered to declare decisions taken in breach of such constraints invalid and to make orders preventing Ross from relying on them. The judge was therefore not exercising public law judicial review powers but enforcing a private law contractual obligation.

Discussion

- [29] It is clear that a private domestic tribunal does not become and cannot be regarded or treated as a public authority simply because it performs an adjudicative function. Equally, it is well-established that judicial review is ordinarily unavailable where the source of the power is purely contractual. In **Haron bin Mundir v Singapore Amateur Athletic Association**,¹⁷ the Singapore High Court held that the defendant athletic association was a private organisation and not amenable to judicial review. However, it ruled that the contractual relationship contained an implied term that disciplinary proceedings affecting the claimant's rights or livelihood would comply with the rules of natural justice.

¹³ [1994] ELR 67.

¹⁴ [1996] 4 All ER 129.

¹⁵ [1984] 3 All ER 425.

¹⁶ [2024] 2 All ER 93.

¹⁷ [1992] LRC (Const) 1006.

[30] In **Breen v Amalgamated Engineering Union**, the English High Court held that the rules of natural justice did not apply to the election of Mr. Breen as a shop steward. A majority in the Court of Appeal agreed. In his dissenting opinion, Lord Denning MR recognized that administrative law applies to statutory and domestic bodies to ensure that people get fair hearings. More recently, in **Bradley v The Jockey Club**, the English Court of Appeal while emphasizing that deference is to be demonstrated to the expertise and discretionary judgment of expert domestic tribunals and private disciplinary bodies, confirmed the supervisory roles that courts play in reviewing disciplinary penalties imposed by such bodies.

[31] In that case, at first instance Richards J explained that the court's function in relation to a private disciplinary body is supervisory: He remarked:

“The function of the court is not to take the primary decision but to ensure that the primary decision maker has operated within lawful limits.”

On appeal, Lord Phillips of Worth Matravers MR approved Richards J.'s judgment and his description of the court's function as supervisory in such cases. He opined that its function is 'very similar to that of the court on judicial review.... [and] In each case the essential concern should be the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision maker, and so forth.'¹⁸

[32] **Bradley v The Jockey Club**¹⁹ demonstrates that a tribunal's decisions are not immune from the court's ordinary jurisdiction merely because the arrangement in dispute is contractual. The underlying contract may expressly or implicitly require compliance with the body's rules and established standards of basic procedural fairness.

¹⁸ [2005] All ER (D) 144 at para [17].

¹⁹ Paras. [33] – [40], and [48] – [66].

- [33] In the case at the appellate bar, it is noteworthy that in the lower court, the judge invited submissions from the parties as to the court's jurisdiction in cases dealing with universities, in particular as regards the issue of the sole, exclusive and final jurisdiction of the office of 'visitor' over the internal affairs of a university. It was common ground between the parties then that the court had jurisdiction to entertain the claim in relation to the conduct panel and the Conduct Administrator. The court decided that it had jurisdiction and the trial proceeded on that basis.²⁰
- [34] It is relevant although not determinative that the jurisdictional objection now advanced by Ross was not maintained before the judge. The proceedings below were conducted on the common footing that the court possessed jurisdiction to determine the contractual claim. That circumstance cannot however confer a jurisdiction which the court does not possess as a matter of law. Since Ross' challenge raises a question concerning the juridical foundation and limits of the court's power in relation to the disciplinary determination and since both parties have addressed that question fully on appeal, it is appropriate to consider it.
- [35] The critical distinction is between the source of the court's jurisdiction and the standards that inform the contractual obligation being enforced. The source of jurisdiction is private law. The standards of fairness by which performance of the contractual disciplinary process falls to be judged may nevertheless substantially correspond with principles familiar to the law of natural justice.
- [36] Ross' submission correctly identifies an important distinction but attributes to it an impermissible consequence. The disciplinary panel is not a public body, and its decisions are not amenable to judicial review merely because they determine disciplinary obligations. The court's jurisdiction in this case derives instead from the contractual relationship between Ross and Ms. Bhup including the handbook and the implied obligation, accepted by the parties below that the disciplinary machinery would be operated fairly.

²⁰ See para. [10] of the judgment.

- [37] It does not follow that principles of natural justice are irrelevant. In this context, those principles do not constitute an independent public law source of jurisdiction. Rather, they inform the content and performance of the contractual obligation of fairness. Accordingly, the court is not exercising the prerogative or supervisory jurisdiction associated with judicial review; it is determining rather whether Ross exercised a contractually conferred disciplinary power consistently with the express and implied terms governing its exercise.
- [38] **Bradley v The Jockey Club** is instructive in this respect. Although the court described its function in relation to a private disciplinary body as supervisory and analogous to judicial review, the analogy concerns the nature and intensity of judicial scrutiny rather than the juridical source of the court's power. The court does not undertake the disciplinary inquiry afresh or substitute its assessment of the merits for that of the body entrusted with the primary decision. Its function is to determine whether the decision-making power was exercised within the limits imposed on it by the parties' private law relationship.
- [39] It follows that the judge committed no error merely by employing principles of natural justice in determining whether Ross breached its contractual obligation of fairness. The material question is whether those principles were applied as incidents of the parties' contractual relationship rather than as an exercise of public law judicial review. Properly understood, Ross' challenge to the judge's jurisdiction fails.
- [40] In this case, the duty of procedural fairness arose as an implied term of the contractual relationship between the parties. Ross' disciplinary process was therefore required to comply with that contractual obligation. The judge did not err in subjecting the exercise of Ross' disciplinary powers to judicial scrutiny for conformity with the express and implied terms of the parties' contractual relationship, including the obligation of procedural fairness. Accordingly, I am satisfied that Ross' complaint and its related grounds of appeal are without merit.

Procedural Fairness, Evaluation and Remittal

The Parties' Submissions

- [41] There was common ground between the parties as to what natural justice entails. Where they differed was regarding the consequences that should flow from breach of those principles in the circumstances of this case. Ross maintained that the court could not deploy what were essentially public law remedies even if a breach of natural justice principles was made out. For her part, Ms. Bhup contended that the judge erred in not concluding that the disciplinary proceedings were without a credible foundation and therefore a nullity leading to her automatic reinstatement.

Discussion

- [42] Broadly, natural justice refers to procedural fairness and encapsulates the basic fundamental principles of fair treatment. There are two basic rules of natural justice that are derived from the common law. The first is that no person is to be a judge in his or her own cause – expressed by the Latin maxim *nemo iudex in causa sua*. The second is that no one is to be condemned unheard commonly referred to as the *audi alteram partem* rule: **R v Board of Visitors of Hull Prison ex p St Germain (No. 2)**.²¹ These rules govern the way in which a decision is taken rather than its correctness.
- [43] It is settled law that the rules of natural justice must be observed not only by courts, tribunals and arbitrators but also by other decision makers including persons and entities who perform administrative or judicial functions, except where the principles are excluded expressly or impliedly or due to special circumstances such as national security: **Wiseman v Borneman**²² and **R v Secretary of State for the Home Department ex p Cheblak**.²³ The principle of natural justice was succinctly set out

²¹ [1979] 1 WLR 1401 at 1408.

²² [1971] AC 279.

²³ [1991] 2 All ER 319.

by Lord Denning in the Privy Council judgment **B Surinder Singh Kanda v Government of the Federation of Malaya** as follows:

“The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo iudex in causa sua*: and *Audi alteram partem*. They have recently been put in the two words, **Impartiality and Fairness**. But they are separate concepts and are governed by separate considerations.”²⁴ (Emphasis supplied)

- [44] Decided cases illustrate that the content of procedural fairness is context-sensitive. At a minimum, a person whose status and educational future are at stake must know the case to be met and have a fair opportunity to answer adverse material. A disciplinary body may not determine an allegation materially different from that charged or rely on undisclosed prejudicial evidence.²⁵ The precise requirements of fairness are necessarily conditioned by the contract, the rules governing the disciplinary process, the nature and seriousness of the allegations and the consequences that an adverse determination may have for the student.
- [45] Prior involvement by a member of a disciplinary body in the investigation or formulation of allegations does not necessarily establish apparent bias in every institutional setting. The question is whether, viewed objectively and having regard to the nature and extent of that involvement and the structure of the particular disciplinary process, the fair-minded and informed observer would conclude that there was a real possibility of bias. Where, however, the person concerned has been materially involved in investigating the alleged misconduct, has formulated or advanced the accusation, or is himself a complainant or material witness and thereafter participates in its adjudication, the risk of apparent bias becomes particularly acute.

²⁴ [1962] AC 322 at 172.

²⁵ See: ANUHCVP2019/0004 *Stuart A. Lockhart v Valentina Nonini et al* (delivered 14th October 2020, unreported) at paras. [20]-[29]; See also *B Surinder Singh Kanda v Government of the Federation of Malaya* [1962] AC 322.

- [46] In the words of Byron CJ in **In the Matter of Section 84 of the Commonwealth of Dominica Constitution Order between Corporal Philbert Bertrand v The Secretary, PSC**²⁶ 'An essential element of any judicial process by any body established to perform adjudicative functions is attention to procedural fairness. This is an intrinsic duty irrespective of the manner in which its rules are detailed. It is well settled that no judicial or adjudicative process could be acceptable if the rules of natural justice were not observed.'²⁷ In evaluating whether the proceedings are infected by actual or perceived bias, the court must have regard to all of the circumstances that relate to the assertion that the decision-maker is biased and decide whether a fair-minded and informed observer would conclude that there was a real possibility of bias on the part of the decision-maker.
- [47] Central to the *nemo iudex in causa sua* rule is the idea that it is difficult if not impossible for a person to be impartial in respect of a matter in which he or she has a personal interest or labours under actual or perceived bias. It is considered unnecessary to prove actual bias. It suffices if apparent bias is made out on the facts.
- [48] The test for apparent bias was adumbrated by Lord Hope in **Porter v Magill**.²⁸ Apparent bias is established where the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal or a member of the tribunal was biased. The inquiry is objective and must consider the decision-making process as a whole. The test has been applied numerous times by this Court including in **Benjamin Exeter v Winston Gaymes et al**²⁹ and **Stuart A. Lockhart v Valentina Nonini et al**.³⁰

²⁶ Dominica Civil appeal No. 10 of 1999 (delivered 27th March 2000, unreported).

²⁷ Ibid at para. [10].

²⁸ [2002] 2 AC 357 at [103].

²⁹ SVGHCVP2016/0021 consolidated with SVGHCVP2016/0022 Lauron Baptiste v Vil Davis et al (delivered 13th June 2017, unreported).

³⁰ ANUHCVP2019/0004 (delivered 14th October 2020, unreported) at paras. [30] to [32].

[49] In **Stuart A. Lockhart v Valentina Nonini et al**, this Court held that while the test for apparent bias is whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased, an appellate court is required to look at the whole spectrum of decision-making, as long as it is borne fully in mind that such a test has to be applied in very different circumstances and that those circumstances must have an important and possibly decisive bearing on the outcome.³¹ As explained in the **Attorney General of Trinidad and Tobago v Kublalsingh and Others**, the fair-minded hypothetical observer is fair-minded, neither complacent nor unduly suspicious and considers the relevant circumstances in their proper context.³²

[50] In the case at the appeal bar on the issue of bias, the learned judge considered the foregoing legal principles and some of the referenced cases and took into account the contrasting narratives of Mr. Fazio, Ms. Bhup and defence witness Dr. Melissa Bucknoff. She preferred Dr. Bucknoff's account regarding Mr. Fazio's participation in the panel's deliberations. She concluded that taking all of the circumstances into account it is clear that Mr. Fazio had come to a predetermination that Ms. Bhup had used a cell phone during the examinations when no other member of the panel so concluded from viewing the video footage.

[51] Additionally, the judge found that in relation to the charge alleging that Ms. Bhup lied, Mr. Fazio was the complainant and the sole witness to that complaint. As a result, she held that on the facts, it was a clear case of predetermination and bias on his part and that a fair-minded observer is likely to conclude that there is a real possibility that Mr. Fazio predetermined the charges against Ms. Bhup and should not have sat as chairperson of the adjudicative panel given this blatant conflict of interest. Further, the judge opined that on this basis alone, the panel's decision ought to be set aside.

³¹ At held point 3, applying *Porter v Magill* and considering *In re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 WLR 700.

³² TT 2014 CA 8 at para. [4] per A. Mendonça JA.

- [52] The judge's conclusion was not merely reasonably open to her on the evidence. Once Mr. Fazio's multiple and overlapping roles are considered cumulatively (investigator, initiator of the complaint, complainant and material witness in respect of the allegation of dishonesty, and ultimately chairperson of the adjudicative panel) the objective appearance of impartiality was materially compromised. Applying the test in **Porter v Magill**, a fair-minded and informed observer, having considered those circumstances as a whole could reasonably conclude that there was a real possibility of bias. No sufficient basis has been demonstrated for appellate interference with that conclusion.
- [53] However, the matter does not end there. Although the judge opined that this finding was determinative of the claim, she nonetheless, went on to consider two of the other allegations of procedural unfairness. These relate to Ms. Bhup's complaints that: a) the 'concerning behaviour' on the surveillance video was occasioned by her medical condition and she was not permitted to include that medical evidence in the hearing bundle; and, b) prejudicial evidence of prior cheating that was not previously disclosed was adduced during the hearing. The judge found that Ms. Bhup was prejudiced by the non-disclosure of this evidence and by being deprived of the opportunity to launch her medical evidence. In both respects, she considered that Ms. Bhup's assertions were made out and constituted substantial irregularities that amounted to procedural unfairness sufficient to vitiate the hearing by the conduct panel, justified setting aside the expulsion order and remitting the matter for rehearing by a differently constituted panel.
- [54] On appeal, Ms. Bhup contended that the judge having found that the charge of lying had been pre-determined by the Conduct Administrator and that there was no or no credible complaint by anyone against her of cheating with a cellular telephone in the four examinations, the judge erred in law by not ordering reinstatement in the exercise of her discretion. Further, she argued that the judge erred in fact and law by not finding that Mr. Fazio signed that complaint and it was unsupported by independent evidence or evidential finding which suggests that it was not a credible

complaint that was fit for consideration by the conduct panel and it was therefore a nullity.

[55] She argued further that the alleged report by Dorian King, a fellow student, was doubtful as to its credibility and authenticity, and further bolstered her contention that the complaint had no credible evidential basis. Another contention was that after finding that there were no clear charges under Rule 1.8.3.2. and that none of the panel members concluded that Ms. Bhup had a cellular phone in any of the four examinations, the judge erred by not upholding Ms. Bhup's promotion to the fourth semester. In addition, she argued that the judge's decisions on those matters were not supported by the weight of the evidence. By these contentions, Ms. Bhup invited this Court to substitute the judge's remittal order with one of unconditional reinstatement.

[56] The opposing contentions by Ross and Ms. Bhup requires a determination by this Court as to whether: (a) the learned judge was empowered to set aside the panel's and the Conduct Administrator's disciplinary decisions; and, (b) whether remittal was an appropriate remedy, procedurally fair or a blatantly wrong decision. Before addressing those issues, it is instructive to comment generally on the legal effect of breach of natural justice principles in the circumstances of this case.

[57] Applying the principles illustrated in **B Surinder Singh Kanda v Government of the Federation of Malaya, In the Matter of Section 84 of the Commonwealth of Dominica Constitution Order between Corporal Philbert Bertrand v The Secretary, PSC, Porter v Magill, Benjamin Exeter v Winston Gaymes et al, Stuart A. Lockhart v Valentina Nonini et al and Attorney General of Trinidad and Tobago v Kublalsingh and Others** to the particular circumstances of this case, Mr. Fazio's cumulative involvement in the investigation, formulation and advancement of the allegations, coupled with his position as complainant and material witness on the allegation of dishonesty, was incompatible with his subsequent participation as chairperson of the adjudicative panel. His involvement

at all levels of the investigation, initiation and adjudication of the disciplinary proceedings gave rise to apparent bias and rendered them procedurally unfair.

[58] Equally, the panel's refusal to allow Ms. Bhup to include her medical evidence and its decision to admit into evidence prejudicial statements about prior misconduct without prior disclosure prejudiced her in the presentation of her defence. The panel acted on the allegations of prior cheating by Ms. Bhup in arriving at their decision. She was entitled to a fair opportunity to rebut those assertions and was deprived of the chance to do so because she was blind-sided with that evidence during the hearing. Likewise, the panel would have been unaware of her medical concerns that she was not permitted to adduce into evidence. I agree with the judge³³ that those events represent further incidents of procedural unfairness (i.e. breach of the right to be heard) that vitiated the hearing and the panel's decision.

[59] The judge's evaluation of the relevant evidence and materials on these matters was reasonably open to her and discloses no material error of principle, misunderstanding of the evidence, or conclusion that was plainly unavailable on the record. In particular, her finding that Mr. Fazio and not Darion King was the complainant is not challenged on appeal. No sufficient basis has been demonstrated for disturbing her finding concerning the other panel members' assessment of the evidence relating to the alleged use of a cellular phone. Her findings therefore provide no proper basis for appellate intervention.

[60] It is however important to note that the judge did not conclude, nor was she required to, that Ms. Bhup was innocent of the disciplinary allegations. Her conclusion was limited to deciding that the process by which the panel made its decision was contractually and procedurally defective. Furthermore, she found that Ross had complied with its internal rules in several respects including providing identified information before the hearing and allowing Ms. Bhup to call witnesses subject to the Conduct Administrator's decision regarding particular witnesses. Her conclusion

³³ At para. [63] of the judgment, for example.

was therefore not that the entire process was procedurally defective in every respect, but that the deficiencies that were established were sufficiently serious to breach the implied contractual term of fairness. There was adequate evidential basis and legal support for her findings. Therefore, I see no basis for appellate interference with that conclusion.

[61] However, Ms. Bhup's invitation to reinstate her, if granted, would have the effect of treating the procedural deficiencies as establishing that she did not cheat. While this Court could agree with the learned judge's determination as to the lack of procedural fairness in the disciplinary proceedings, this does not entitle the court to replace the panel as the primary fact finder in respect of the disciplinary proceedings. In fact, this would not be an appropriate resolution. For these reasons, Ms. Bhup's contentions and grounds of appeal that seek a finding that the allegations against her were disproved are rejected. This brings me to Ross' arguments that the setting aside and remittal orders are public law remedies that are impermissible in respect of the subject contractual claim.

[62] Ross submitted that the court could only grant private law remedies. Further, it was submitted that the orders setting aside the panel decision and remitting the complaint are, in substance, a certiorari followed by remittal and are remedies that are available in public law under CPR Part 56. It contended that private law declarations, injunctions and damages are available reliefs, but a quashing order and remittal are not. **Credit Suisse** and **Breen** were cited in support. Ms. Bhup resisted remittal on the grounds that it would be unfair to her and futile in view of the length of time that has transpired since the initial events and proceedings.

[63] She argued that it is highly unlikely that she would be able to obtain a fair hearing before a differently constituted panel since the circumstances of her expulsion were well known throughout the University and it would be virtually impossible to constitute a panel with persons who are unaware of and not tainted by this matter or who would take apposition against the hard line position adopted by Ross over the past seven years. Additionally, it would be difficult for her to locate witnesses to

support her case and as a result she would be deprived of a reasonable opportunity to maintain her defence against these serious allegations and be severely prejudiced. Ms. Bhup contended that her promotion should be upheld, her grades restored and that she be permitted to continue her education at the University.

[64] The remaining questions are whether in this private contractual claim reconsideration through Ross' disciplinary machinery was legally available as a consequence of the invalid determination and, if so, whether the judge could order that course without first hearing the parties on the question of remittal. The parties were not invited to make representations on that issue.

[65] The record reveals that although Ms. Bhup expressly prayed for 'any other relief' in her claim form, neither she nor the University addressed the court as to any relief that might be available on the facts of the case, other than those expressly outlined in the prayer. The written submissions in the lower court are silent as to the possibility of any other available relief. Similarly, the judge's notes which are included in the record contained no such reference. From the available material, it does not appear that this was considered by the parties.

[66] Once the judge concluded that the disciplinary determination was reached in breach of the contractual obligation of procedural fairness, it became necessary to determine the consequence of that breach. The invalid determination could not constitute a contractually effective foundation for Ms. Bhup's expulsion. That conclusion did not, however establish that the underlying allegations were factually unfounded or entitle the court itself to determine disciplinary liability.

[67] In **Stuart A. Lockhart v Valentina Nonini et al**, this Court set aside a disciplinary determination for breach of natural justice and remitted the complaint for rehearing before a differently constituted panel. Chief Justice Pereira who authored the judgment explained:

“... fairness requires that the complaint be remitted to the Disciplinary Committee for rehearing. In this regard, I adopt the words of Byron CJ in **In**

**the Matter of Section 84 of the Commonwealth of Dominica
Constitution Order between Corporal Philbert Bertrand v The
Secretary, PSC:**

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

... in my view, the principles of natural justice leave no room for the Court’s discretion in this case as to whether to remit the matter for rehearing where natural justice was not observed.”³⁴ (Emphasis supplied)

[68] Remittal is a familiar consequence where a disciplinary determination is set aside for procedural unfairness. **Stuart A. Lockhart v Valentina Nonini** illustrates that course in the context of a statutory professional disciplinary body. The case is therefore not authority for the proposition that a private contractual tribunal is subject to the same remedial jurisdiction. It is nevertheless instructive as to the underlying rationale that ordinarily the body entrusted with primary responsibility for determining disciplinary liability rather than the reviewing court, should make that determination through a procedurally fair process.

[69] In the present contractual setting, the availability of reconsideration must therefore be justified by reference to the contract itself and the court’s ordinary private law remedial powers. If the handbook entrusts determination of the disciplinary allegations to a conduct panel and the previous determination cannot bind Ms. Bhup because the contractual machinery was operated unfairly, an order that gives effect to the parties’ contractual allocation of decision-making responsibility does not necessarily amount to an exercise of public law power of certiorari or mandamus. The substance and effect of the relief rather than the label are the controlling features.

³⁴ At paragraph [33].

[70] Court rules of procedure impose a duty on the court to invite representations by litigants where it intends to exercise powers of its own volition. In this regard, CPR 26.2 states:

“26.2

(1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.

(2) If the court proposes to make an order of its own initiative, it must give any party likely to be affected a reasonable opportunity to make representations.” (Emphasis added)

[71] In **Sylvester Solomon v His Honour Senior Magistrate Robert Shuster**³⁵, this Court held that the right to a fair hearing entails each party being given an opportunity to put his own case before a decision is reached. Blenman JA (as she then was) quoted approvingly and affirmed the requirements of fairness as stated by Lord Muskill in **Regina v Secretary of State for the Home Department, Ex parte Doody** as follows:

“My Lords, ... 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.”³⁶ (Emphasis added).

³⁵ MNIHCVAP2014/0004 (delivered 11th August 2015, unreported) at para. [29].

³⁶ [1994] 1 AC 531.

- [72] In light of the principles in **Ex parte Doody** as applied in **Sylvester Solomon v His Honour Senior Magistrate Robert Shuster** the judge should have invited submissions from the parties on the remittal aspect of her decision. She erred in law by not eliciting representations from them on the question of remittal before directing that the hearing be remitted and conducted by a differently constituted panel. Her failure to do so constituted a procedural error. Ross succeeds on this aspect of its appeal. However, that conclusion does not determine the ultimate disposition. The question remains whether on the evidence remittal is legally impermissible. The appropriate consequence is therefore to set aside that part of the judge's order not because remittal is necessarily wrong substantively, but rather because the procedure by which that relief was arrived at was defective.
- [73] That issue was raised in these appeals and addressed fulsomely by the litigants. They therefore had the opportunity that was absent in the lower court. Any order for remittal would therefore be this Court's order made after full argument. This Court must consequently determine afresh having heard both parties, whether remittal is now an appropriate remedy.
- [74] The judge's order setting aside the decision did not convert the claim or proceedings into one for judicial review purely by the nomenclature employed. I reject Ross' contention that remittal is confined to public law. It seems to me that where a contract entrusts the determination of disciplinary liability to a designated tribunal, a court order required the unresolved dispute to be reconsidered through the stipulated contractual process is to be understood as enforcing the contractual machinery rather than exercising the prerogative jurisdiction in public law.
- [75] That conclusion does not make remittal automatic. I am also mindful that remittal cannot be justified abstractly. The court must consider whether intervening events have rendered a rehearing impossible. The court would be loathe to order remittal where a reconstituted panel would be incapable of complying with the contractual obligation to conduct the disciplinary proceedings in accordance with natural justice

principles. Nearly nine years have elapsed since the events that gave rise to the disciplinary complaint. Delay of that magnitude is relevant to whether a rehearing can still satisfy the obligation of fairness, the breach of which invalidated the first hearing. This Court must consider therefore whether the evidence establishes that the passage of time has created such irremediable forensic or institutional prejudice that a fair rehearing is no longer realistically possible.

[76] The material presently before this Court does not establish that threshold. The material before this Court indicates that significant contemporaneous evidence is still available or forms part of the record, including the surveillance video, documentary records relating to the investigation and disciplinary proceedings and other relevant materials that were generated around the relevant time. Ms. Bhup has identified legitimate concerns regarding faded recollection, potential unavailability of witnesses and institutional knowledge of the dispute, however those concerns have not been demonstrated on the evidence to have become specific and irremediable prejudice that renders any fair reconsideration impossible. I am not persuaded that the mere passage of time, albeit substantial, can without more, justify a finding by the Court determining disciplinary liability in Ms. Bhup's favour.

[77] I therefore conclude that reconsideration through Ross' contractual disciplinary machinery remains legally available and viable. That conclusion should not however be understood as determining how Ross must conduct any further disciplinary proceedings, or whether the circumstances that exist when the matter is reconsidered warrants a substantive rehearing. Those are matters that have to be addressed consistently with the handbook and Ross' continuing contractual obligation of procedural fairness. For this reason, a remittal order must therefore be couched in directory and not mandatory terms to avoid dictating the conduct of any further disciplinary process.

The Remedy Point

- [78] Ms. Bhup maintained that the only reasonable and just outcome is an order restoring her position immediately preceding the disciplinary sanction. She contended that such relief is appropriate given the weakness in the disciplinary case and the protracted delay. Ross countered that reinstatement is unsupported by authority, incompatible with the contractual character of the relationship and impractical in view of the curricular changes. It relied on the courts' reluctance to grant mandatory relief compelling continuation of educational relationships.

Discussion

Restoration / Reinstatement

- [79] In **R v Incorporated Froebel Educational Institute, ex parte L**,³⁷ the court refused a mandatory injunction compelling a private school to re-admit a pupil. It was emphasized that there is a traditional reluctance to order specific performance in relationships involving continuing personal interaction, trust and educational supervision. Importantly, **Bradley v The Jockey Club** established that the court should not ordinarily substitute its own substantive decision for that of the domestic tribunal entrusted by the parties to determine disciplinary liability.
- [80] I do not accept Ms. Bhup's submission that she is entitled to restoration merely because the disciplinary decision was invalidated. While no valid disciplinary determination presently exists, this does not mean that a properly constituted panel acting fairly on admissible and reliable evidence could not reach an adverse conclusion. The invalidity of the disciplinary determination removes the existing contractual foundation for the expulsion; it does not establish the converse proposition that Ms. Bhup was substantively entitled to progress free of the unresolved disciplinary allegations. An order compelling reinstatement to the fourth semester would therefore do more than restore the status quo pending a valid determination. In the circumstances of this case, it would effectively determine or render practically irrelevant disciplinary questions that the parties' contractual

³⁷ [1999] ELR 488.

arrangements entrusted to the University's disciplinary machinery in the first instance.

- [81] The judge was correct to refuse the mandatory injunction requiring reinstatement. Ms. Bhup's grounds challenging that refusal therefore fail.

Damages

- [82] Regarding damages as a possible remedy, the judge was correct in law, to approach damages according to ordinary contractual principles. A breach of the implied obligation to afford a fair disciplinary process is capable in principle of sounding in damages. However, it is trite law that recoverability depends on the nature of the loss claimed, causation, remoteness and proof. The rule associated with **Addis v Gramophone Co Ltd**³⁸ does not mean that non-pecuniary loss is incapable of recovery in every contractual setting. Rather, damages for injured feelings, distress or reputational harm are not ordinarily recoverable merely because a breach of contract has caused such consequences. No sufficient basis has been demonstrated in the pleadings or evidence for bringing the present claim within a recognized exception to that general rule.

- [83] More fundamentally, Ms. Bhup did not establish recoverable financial loss attributable on the applicable contractual principles, to the procedural breach. It does not follow that absent the breach she would necessarily have completed the programme. Rather, she would have received a procedurally fair determination of the disciplinary allegations. In the absence of a valid and fair determination of the disciplinary proceedings, the evidence does not permit the Court to conclude that the educational and economic losses claimed would probably have been avoided if the contractual obligation of fairness had been met. The judge was therefore entitled to refuse substantial damages. I would not disturb her refusal to award special damages.

³⁸ [1909] AC 488.

[84] There remains the question of nominal damages. The absence of proof of substantial loss does not erase the established breach of contract. Where a contractual right has been infringed but measurable loss has not been proved, an award of nominal damages may serve to vindicate the right infringed. Since Ross' breach of the implied contractual obligation of procedural fairness has been established, I would award Ms. Bhup nominal damages of \$1,500.00. That sum is not intended to compensate Ms. Bhup for unproved consequential loss but formally recognizes the infringement of the contractual right established in these proceedings.

Conclusion

[85] From the foregoing analysis, it follows that Ross fails in its contention that the judge's treatment of the invalid disciplinary determination impermissibly involved the exercise of public law remedial jurisdiction. Ross succeeds only with respect to its complaint that the judge ought not to have ordered remittal of her own initiative without first hearing the parties. Ms. Bhup's challenge to the judge's refusal to order reinstatement and substantial damages fails. Like Ross, her challenge to the remittal order succeeds only to the extent that the original order was made without affording the parties an opportunity to address that remedy. Having now heard full arguments, this Court is entitled to conclude that reconsideration through the contractual disciplinary machinery remains an available and appropriate course of action, and I would make such an order.

Costs

[86] Each party has achieved a measure of success but has failed on substantial aspects of its respective appeal. Ross succeeds on the procedural challenge to the original remittal order but fails on its principal challenges to the finding of contractual procedural unfairness and the availability of reconsideration. Ms. Bhup succeeds in obtaining nominal damages but fails in her claims for reinstatement and substantial damages. In those circumstances, applying CPR 64.6, I consider that the just order is that each party bears its own costs of the appeals.

Disposition

[87] For all of the foregoing reasons, I would order as follows:

- (1) The Appeal of Ross University School of Veterinary Medicine (St. Kitts) Limited in SKBHCVAP2023/0003 is allowed only to the limited extent that the judge erred in ordering remittal without first affording the parties a reasonable opportunity to make representations concerning that remedy. In all other respects, the appeal is dismissed.
- (2) Save for the judge's order directing remittal, which is set aside for the reason stated in paragraph [76] of this judgment, the declarations and orders of the judge determining that the disciplinary proceedings breached the implied contractual obligation of procedural fairness and setting aside the resulting disciplinary determination and expulsion, are affirmed.
- (3) The disciplinary complaint against Ms. Bhup is remitted for consideration by a differently constituted conduct panel.
- (4) Ms. Bhup's appeal in SKBHCVAP2023/0002 is allowed only to the extent that nominal damages of \$1,500.00 is awarded to vindicate the infringement of her right to procedural fairness in the disciplinary proceedings. In all other respects her appeal is dismissed.
- (5) The stay imposed by order of a single judge of this Court dated 20th July 2023 pending determination of these appeals is discharged.
- (6) Each party shall bear their own costs on the appeals.

[88] This Court extends its gratitude to the legal practitioners for their written and oral submissions. The delivery of the judgment was delayed due to unavoidable circumstances. The Court gratefully acknowledges the parties' forbearance and regrets any inconvenience caused.

I concur.
Trevor M. Ward
Justice of Appeal

I concur.
Reginald T. A. Armour
Justice of Appeal [Ag.]

By The Court

Deputy Chief Registrar