IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-2582
[2019] NZHC 1956

UNDER	the Real Estate Agents Act 2008
BETWEEN	DUONG HAI HA Appellant
AND	REAL ESTATE AGENTS AUTHORITY First Respondent
AND	DAVID GRIFFITHS Second Respondent

Hearing: 25 June 2019

Appearances: S Judd for Appellant
M Mortimer for Real Estate Agents Authority
D Griffiths for Respondents

Judgment: 12 August 2019

JUDGMENT OF WALKER J

This judgment was delivered by me on 12 August 2019 at 4.00 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Introduction

[1] The appellant, Mr Ha, appeals a decision of the Real Estate Agents Disciplinary Tribunal (the Tribunal).[1] The Tribunal's decision upheld a finding of unsatisfactory conduct by the Complaints Assessment Committee (412) (the Committee) of the Real Estate Agents Authority dated 9 November 2017.

[2] The Tribunal found Mr Ha guilty of unsatisfactory conduct under s 72 of the Real Estate Agents Act 2008 (the Act) in that Mr Ha had breached r 9.11 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (the 2009 Rules). The relevant rule provides:[2]

> 9.11 The licensee must not invite a prospective client to sign a sole agency agreement without informing the prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than one agent in the event that the transaction is concluded.

[3] The Tribunal found that Mr Ha did not meet his obligation to provide this advice to the second respondent, Mr Griffiths. Mr Ha's challenge to this decision is two-pronged. First, he attacks the decision on the grounds that it contravenes natural justice. He says that a breach of r 9.11 was never put to him by the Complaints Investigator and was not the basis of the investigation nor the charges he faced. Consequently, Mr Ha submits there is no evidence directed to the issue of compliance with r 9.11.

[4] As this is an appeal where the substantive decision is challenged, rather than a judicial review proceeding, I am treating this ground as an assertion that the flawed process resulted in substantive error. In short, that if there was a breach of natural justice, the Tribunal's decision (and the Committee determination before it) should be set aside for lack of sufficient evidential basis.

[5] As an alternative or subsidiary ground, Mr Ha contends that it can be inferred that on the balance of probabilities he did in fact inform Mr Griffiths of the potential risk of two commissions. He submits that the evidence is more consistent with

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1 *Ha v Real Estate Agents Authority* (CAC 412) [2018] NZREADT 57.
2 The transactions at issue predate the commencement of the 2012 version of the Rules.

compliance with r 9.11 than non-compliance, so that regardless of the natural justice challenge, the Tribunal decision is wrong.

Background

[6] The events underpinning the complaint by Mr Griffiths against Mr Ha occurred between March and June 2012. The complaint against Mr Ha was not made until 24 February 2017 for the reasons which emerge from the chronology.

[7] On 20 March 2012, Mr Griffiths engaged a real estate agency trading as 'the Professionals' to sell a rural property he owned near Pukekohe. He signed a six-month sole agency agreement with the Professionals. During the term of the sole agency, Mr Ha approached Mr Griffiths advising that he had a buyer interested in the property. Mr Griffiths was, by that time, disillusioned by lack of progress on the sale and was open to switching agencies. He advised Mr Ha that he had a six-month sole agency agreement with the Professionals.

[8] According to Mr Griffiths, Mr Ha assured him that a sole agency agreement could only last for 90 days and thereafter any agent can sell the property. Mr Ha said that he initially told Mr Griffiths that it was legally possible to cancel. After reviewing various documents including the existing sole agency agreement, he advised Mr Griffiths that his property met the requirements to be cancelled; thereafter he could legally list and sell his property for him. The slight difference in the way in which this advice was expressed is not material for the purposes of this appeal. What is relevant is that the view Mr Ha took about the right to cancel the agency with the Professionals was firmly held and passed on to Mr Griffiths without equivocation.[3]

[9] Mr Ha gave this advice after concluding that the property was residential property. Section 131 of the Act provides that parties may cancel sole agency agreements in respect of **residential** property 90 days after an agreement is signed.

[10] Mr Ha suggested to Mr Griffiths that he should call the Real Estate Agents Authority (REAA) to have his advice confirmed, and Mr Griffiths did so. A

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[3] Committee Decision 9 November 2017 at [3.5].

representative of the REAA told him that it is correct that a sole agency residential property agreement could be cancelled after 90 days. That confirmation begged the question however of whether the rural zoned property was a residential property within the Act's definition, which in fact was the nub of the issue. It transpires that the answer to that issue may not be straightforward. At the time of the sale, the land was zoned rural under the operative District Plan. A plan change in 2006 resulted in the property being zoned "rural village". In 2010, Mr Griffiths successfully appealed a refusal to grant consent to subdivide the property into 10 lots.

[11] On 26 June 2012, Mr Griffiths gave written notice to the Professionals that the sole agency agreement was cancelled. On 29 June 2012, he entered into a three-month sole agency agreement with Mr Ha. Just a few days later, Mr Griffiths entered into a conditional sale and purchase agreement to sell the entire property to Mr Ha's buyer for $990,000. The conditions were not met. On 14 September 2012, five days before the agency agreement with the Professionals would have run its course, Mr Griffiths entered into an unconditional agreement for sale through Mr Ha's agency for $750,000. Mr Griffiths paid commission of $35,000 to Top One Real Estate, Mr Ha's firm.

[12] On 7 August 2013, the Professionals asserted they were also entitled to commission. They claimed that their sole agency had remained on foot at the time of the sale because the property was not properly characterised as residential. They claimed commission of $32,142.50 from Mr Griffiths and commended proceedings in the District Court after attempts to negotiate a resolution failed.

[13] The claim was settled at the end of the hearing in the District Court but before judgment was issued. Mr Griffiths paid the Professionals $16,500, half of the claimed commission. That outcome prompted Mr Griffiths to make complaints against his lawyers to the New Zealand Law Society, to the REAA against the Professionals, and ultimately against Mr Ha.

Complaint and investigation

[14] Mr Griffiths made his complaint against Mr Ha on 20 February 2017. The gist of Mr Griffiths' complaint was that he should not have had to pay two commissions

(and lawyer's fees) after Mr Ha advised him he was entitled to cancel the sole agency with the Professionals.[4] The REAA assigned an investigator on 12 June 2017.[5]

[15] It appears that the investigator provided Mr Ha with the complaint from Mr Griffiths and requested a general summary and chronology from Mr Ha. He also asked for responses to specific questions. He sifted through documents, including the listing agreements at issue and correspondence between a barrister acting for the Professionals and Mr Griffiths before the launch of the District Court proceedings.

[16] The investigator then prepared an "Investigation Report" dated 29 September 2017, which was circulated and put before the Committee. That report summarises the complaint, sets out a chronology, lists the key issues confirmed with Mr Griffiths as complainant with supporting documentation, and summarises Mr Ha's response with supporting evidence. Mr Ha does not accept some of the summary statements by the Complaints Investigator; however, these are not material for the purposes of this appeal.

[17] The Investigation Report identified three issues. It also identified the relevant Real Estate Agents Act (Professional Conduct and Client Care) Rules, along with s 72 of the Act. In error, the Investigation Report referred to the 2012 version of the Rules which did not come into force until after the transactions in question. The operative rules were in fact the 2009 Rules. The issues identified were:

> **Issue 1:**
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> Whether licensee 1 exposed the complainant to the risk of double commission by encouraging him to cancel his existing listing agreement with another agency (pursuant to rr 9.14, 5.1, 6.3, 6.4).
>
> **Issue 2:**
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> Whether Licensee 1 acted in the best interest of the complainant in failing to notify the other agency about the new listing agreement when the complainant had asked him to (pursuant to r 9.1).

[18] The third issue relating to supervision is not relevant to this appeal.

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4 While two commissions were claimed, Mr Griffiths in fact paid half of the claimed commission amount to the Professionals.

5 The ambit of the investigation included the conduct of Top One Real Estate which employed Mr Ha, however this aspect was not the subject of the appeal.

[19] As pointed out by counsel for the appellant, Mr Judd, the issues identified did not include whether Mr Ha had failed to provide the complainant with the advice required by r 9.10 of the 2012 Rules, or the equivalent r 9.11 of the 2009 Rules.[6] Rule 9.10 of the 2012 Rules provides:

> 9.10 A licensee must explain to a prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than 1 agent in the event that a transaction is concluded.

[20] The Report did however squarely identify that Mr Griffiths' complaint was about payment of "double commission" There was no oral evidence or cross-examination before the Committee. Neither Mr Griffiths, nor Mr Ha, were specifically asked about r 9.11 of the 2009 Rules or r 9.10 of the 2012 Rules. Mr Judd's first submission is that this is fatal to the fairness of the process.

[21] Mr Ha's response to the Investigator's queries focused on justifying his view that the property was residential, triggering reliance on s 131 of the Act. When asked what advice he gave Mr Griffiths about his existing listing agreement with the Professionals, Mr Ha's written response was "I advised the complainant that a sole agency residential agreement with the "Professionals" could be cancelled after the expiry of 90 days". To a later question, Mr Ha responded (in material part):

> The request to the complainant to attend my office later that evening was part of a process.
>
> Firstly, to advise and reassure him that the cancellation of the "Professionals" sole agency was ethical and lawful. That cancellation of a residential property could be effected after 90 days."

[22] Although the Investigator's report did not mention the relevant rule, it can be inferred that the Committee had their sights on r 9.10 of the 2012 Rules in its assessment of Mr Ha's conduct. The Committee determination of 9 November 2017 recorded the details of the complaint as:

> "[Mr Ha] failed to clearly explain to [Mr Griffiths] that if he entered into another agency agreement with him, he could be liable to pay full commission to more than one agent in the event that a transaction is concluded. Further [Mr Griffiths] alleges [Mr Ha] acted in such a way that made it likely that he would attract more than one commission in the same transaction."

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6 There is no substantive difference between r 9.10 of the 2012 Rules and r 9.11 of the 2009 Rules.

[23] The Committee accepted the complaint, expressly referring to rr 9.10 and 9.14 of the 2012 Rules. It determined that Mr Ha therefore met the test for unsatisfactory conduct under s 72 of the Act.

[24] Mr Ha appealed to the Tribunal. Appeal to the Tribunal against determinations by a Committee are by way of rehearing under s 111 of the Act.

The Tribunal decision

[25] After traversing the background to Mr Griffiths' complaint, the Tribunal recorded that the parties agreed that the Committee decision ought to have been based on rr 9.4 and 9.11 of the 2009 Rules, rather than the 2012 Rules. It also recorded that "nothing turns upon this distinction so far as the present appeal is concerned."[7]

[26] The primary ground of appeal argued by Mr Ha was whether he was correct that the property was residential. If so, Mr Ha contended that he correctly advised Mr Griffiths of his ability to cancel the agreement with the Professionals. It is apparent that the parties were, to some extent, speaking past one another because, as recorded in the Tribunal's decision, the REAA submitted:[8]

> ... the basis of the unsatisfactory conduct finding, and the issue for determination on appeal, is not the correctness or otherwise of Mr Ha's advice. The primary conduct issue is the very firm manner in which Mr Ha communicated that advice to Mr Griffiths, without recommending that Mr Griffiths seeking (sic) legal advice or otherwise advising of the potential for double commission.

[27] The Tribunal described the requirement of r 9.11 as the minimum required advice; the obligation being to make a statement which communicates that circumstances of this kind can give rise to the jeopardy of a double commission.

[28] The Tribunal considered that Mr Ha did not comply with r 9.11. Rather, Mr Ha took it on himself to provide a risk assessment which oversimplified the issues involved.[9] The form of sole agency agreement between Mr Ha and Mr Griffiths

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7 *Ha v Real Estate Agents Authority* (CAC 412) [2018] NZREADT 57 at [13].
8 At [7].
9 At [32].

contained other advice about cancelling prior contracts and did not affect the obligation of Mr Ha to give advice pursuant to r 9.11. The Tribunal concluded that the contravention of r 9.11 meant that Mr Ha was guilty of unsatisfactory conduct under s 72 of the Act.

Approach to a general appeal under s 116 of the Act

[29] This challenge to the Tribunal's decision to uphold the Committee's finding of unsatisfactory conduct against Mr Ha is a challenge to an evaluative decision of a specialist tribunal. The principles discussed by the Supreme Court in *Austin, Nichols & Co v Stitchting Lodestar* apply.[10] I am required to come to my own view on the merits although I am also entitled to have some regard to the expertise of the Tribunal.

Issues

[30] The issues are:

(a) Was there a breach of natural justice resulting in a substantively unfair outcome?

(b) If so, was any breach of natural justice cured or curable before the Tribunal?

(c) Was there a proper evidential basis for reaching a view on compliance with r 9.11?

(d) Is it more probable than not that Mr Ha did give the advice required by r 9.11?

(e) If so, what are the consequences?

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[10] *Vosper v Real Estate Agents Authority* [2017] NZHC 453, (2017) 18 NZCPR 633 at [10] citing *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103; [2008] 2 NZLR 141.

Submissions

[31] Mr Judd submits that the fact that no allegation of breach of r 9.11 was made to Mr Ha during the investigation is sufficient for the appeal to succeed. However, he also accepts that the central issue is whether the substance of r 9.11 was put to Mr Ha rather than the correct identification of the rule.

[32] The gist of Mr Judd's submission, as I apprehend it, is that Mr Ha was denied the opportunity to be informed of and respond to the allegation, in breach of natural justice. This meant there was no direct evidence on the compliance issue and no justified basis for the Committee or Tribunal to reach the decision each made.

[33] Mr Judd relies on the seminal authorities discussing the concept of natural justice, such as *Ridge v Baldwin*.[11] He also relies on *D v M and Board of Trustees of Auckland Grammar School*,[12] drawing an analogy with the context of that case to describe the metes and bounds of what adherence to the principles of natural justice requires.

[34] In oral submissions, Mr Judd suggested the Investigator ought to have asked Mr Ha pointed questions such as: "what did you say to Mr Griffiths about the risk of double commission?" or "did you discuss with Mr Griffiths that if he has more than one agency agreement, there is a risk of double commission?"

[35] As an alternative ground, Mr Judd submits that, on the material before the Committee and Tribunal, it is more probable than not that Mr Ha did in fact give the advice required by r 9.11. He relies on Mr Ha's insistence on termination of the prior agreement with the Professionals and cl 3.3 of the agency agreement between Mr Ha and Mr Griffiths as evidence from which inferences can be made about the topics that were discussed.

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11 *Ridge v Baldwin* [1964] AC 40.

12 *D v M and Board of Trustees of Auckland Grammar School* [2003] NZAR 726 (1998). Also, *Daganaysi v Minister of Immigration* [1980] 2 NZLR 130 (CA); *Murdoch v New Zealand Milk Board* [1982] 2 NZLR 108; *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2009] 2 NZLR 56 (CA).

[36] Mr Mortimer, on behalf of the REAA, notes a potential breach of natural justice was not raised by Mr Ha at the Tribunal stage. He candidly acknowledges that the investigative process was not perfect. However, he contends that the complaint and investigation centred on Mr Ha's advice and conduct in relation to the risk of double commission. For that reason, Mr Ha was fairly on notice of the relevant matters, even though r 9.11 was not identified until the Committee reached its determination. He relies, among other things, on the Investigator's questions to Mr Ha, the nexus between advice about the risk of double commission and cancellation of an existing agency agreement and Mr Griffiths' evidence that Mr Ha told him "have no worries about anything". Even if there were shortcomings in the investigative process, Mr Mortimer submits that there was no prejudice to Mr Ha since the adverse ruling under r 9.11 was foreseeable.[13]

[37] He further submits that it is clear from the Committee decision that the finding against Mr Ha relied on r 9.10, the equivalent of r 9.11 under the 2012 Rules. From that point on, even if the process had miscarried in any respect, Mr Ha had an opportunity to redress or cure that miscarriage before the Tribunal. Mr Mortimer emphasises that at no stage has Mr Ha sought to adduce evidence that he advised Mr Griffiths in terms complying with r 9.11.

[38] Finally, Mr Mortimer portrays it as implausible that Mr Ha would have given the r 9.11 advice since this would necessarily have undercut the advice which he gave Mr Griffiths about his ability to cancel the agreement with the Professionals. There is no dispute that cancellation advice was given to Mr Griffiths.

Discussion

[39] I begin with context. Heath J in *Vosper v Real Estate Agents Authority*, helpfully described the framework of the Act in terms which I adopt.[14] It is a consumer protection measure. It is designed to maintain and improve industry standards for those engaged in business as real estate agents. Section 3 of the Act provides:

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13 In reliance on the principle set out in *Khalon v Attorney-General* |[1996] 1 NZLR 458 at 466: if an adverse finding is foreseeable there is no surprise.

14 *Vosper v Real Estate Agents Authority* [2017] NZHC 453; (2017) 18 NZCPR 633.

3 Purpose of Act

(1) The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.

(2) The Act achieves its purpose by—

(a) regulating agents, branch managers, and salespersons:

(b) raising industry standards:

(c) providing accountability through a disciplinary process that is independent, transparent, and effective.

Complaints and discipline matters are dealt with under Pt 4 of the Act. This part:

(a) Defines "unsatisfactory conduct" and "misconduct";[15]

(b) Sets out the functions and powers of a Complaints Assessment Committee;[16]

(c) Defines the powers of the tribunal;[17] and

(d) Provides for appeals from a complaints assessment committee to the tribunal, and for subsequent appeals to the high court and court of appeal.[18]

[40] A Complaint Assessment Committee exercises dual functions as both an investigator and decision-maker. First, a Committee determines whether a complaint should be considered.[19] It may regulate its own procedure, as it thinks fit, provided that it exercises its powers and performs its duties and functions in a manner consistent with the "rules of natural justice".[20] The Committee makes a decision whether to determine the complaint or allegation.[21]

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15 Sections 72 and 73.
16 Sections 75-99.
17 Sections 100-115.
18 Sections 111 and 116-120.
19 Section 79.
20 Section 84.
21 Section 89.

[41] The Act creates two levels of disciplinary offences. The first is "unsatisfactory conduct". The second is "misconduct". A Complaints Assessment Committee may rule on unsatisfactory conduct but misconduct must be referred by the Committee to the Tribunal, for decision. In that instance, the Committee fulfils a role akin to that of a prosecutor in respect of the charges brought.

[42] A determination by a Committee that the conduct of a licensee contravenes a provision in the Rules, equates to one of "unsatisfactory conduct" unless the Committee exercises its discretion not to take any further action on a complaint.

[43] The term "unsatisfactory conduct" is defined by s 72 of the Act:

> **72 Unsatisfactory conduct**
>
> For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—
>
> (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or
>
> (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or
>
> (c) is incompetent or negligent; or
>
> (d) would reasonably be regarded by agents of good standing as being unacceptable.

[44] The procedures and power of the Committee to determine complaints or allegations are set out ss 84 and 89 of the Act. It is evident from the range of available penalties that there is a wide spectrum of conduct which conceivably falls within the definition of "unsatisfactory conduct".

[45] The Code of Professional Conduct and Client Care Rules are prepared by the Authority, as required by s 14 of the Act. The rules represent minimum standards and a reference point for discipline.[22] They must be read in conjunction with the Act. A charge of "misconduct" or "unsatisfactory conduct" does not have to be based on a breach of any specific rule."[23]

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22 Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, r 3.3.
23 Rule 3.3.

Natural justice requirements

[46] Adherence to principles of natural justice is statutorily prescribed by the Act in s 84(1) dealing with Committee procedure. Section 105(2) also incorporates a requirement that the Tribunal adhere to principles of natural justice. It provides:

> **105 Proceeding before Tribunal**
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> (1) The Tribunal may regulate its procedures as it thinks fit.
>
> (2) Subsection (1) is subject to the rules of natural justice this Act, any regulations made under this Act, and any practice notes issued under section 115A.

[47] Section s 27 of the New Zealand Bill of Rights Act 1990 also requires that all decision-makers, empowered to make determinations affecting a person's rights or interest, observe the principles of natural justice.

[48] These provisions do not attempt to prescribe the ambit of natural justice. The term "natural justice" has a long-established meaning. It is sometimes expressed as essentially a duty to act fairly.[24] Natural justice rules are designed to promote decisions that are informed and accurate, and which instil a sense of fairness.[25]

[49] This concept of fairness may be relied on substantively or procedurally. If the attack is procedural, then attention is focused on the manner or process of decision-making. A decision may be procedurally unfair and set aside no matter how one views the correctness of the decision ultimately made. The reliance on natural justice principles in this case does not amount to an attack on process in the same sense. Rather, the question is whether any breach of natural justice or lack of fairness led the Tribunal to reach an erroneous conclusion.

[50] The requirements of natural justice are "flexible", "adaptable" and "context specific"[26] They are generally considered to fall under one of two heads. The first is

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24 *Daganyasi v Minister of Immigration* [1980] 2 NZLR 130 (CA).

25 *R v Taito* [2001] UKPC 50, [2001] UKPC 59, [2003] 3 NZLR 577 at [20].

26 Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington,2014) at 1023 citing *Bradley v Attorney-General* [1988] 2 NZLR 454 (HC) at 478; *Drew* v *Attorney-General* [2002] 1 NZLR 58 (CA) at [67]; *Carroll v Auckland Coroner's Court* [2013] NZHC 906; [2013] NZAR 650 at [35].

the requirement of adequate notice and an opportunity to be heard, otherwise known as the audi alteram partem principle.[27] It is this principle which is engaged in the appeal. If an opportunity to be heard is to be meaningful, decision-makers must ensure that all relevant information is disclosed to allow interested parties the chance to answer material prejudicial to their case.

[51] The REAA acknowledges that neither r 9.11 of the 2009 Rules, nor the equivalent from the 2012 Rules, were specifically put to Mr Ha during the investigative phase. There was no reference to these rules in the Investigative Report, although other specific rules were identified as relevant by the investigator. The question is whether the omission amounted to a breach of natural justice.

[52] It is uncontroversial that a party "should normally be given an opportunity to respond to an allegation which, with adequate notice, might be effectively refuted."[28] However, as Fisher J described in *Khalon v Attorney-General*:[29]

> The converse will generally be true if the risk of an adverse finding was always foreseeable, particularly if the challenge to the finding relates to the way in which the tribunal had exercised a value judgment rather than the completeness of the material which had been placed before the tribunal. The key elements are surprise and potential prejudice. If an adverse finding is foreseeable there is no surprise.

[53] Mr Judd relies on *D v M and Board of Trustees of Auckland Grammar School*.[30] I consider the facts and context distinguishable. That case was a judicial review proceeding involving a high school student who admitted smoking on a field trip. There were past breaches of the 'no smoking' rule by the student. Material relating to these past breaches was provided to the decision-makers but not disclosed to the parties. Those disclosures were used by the decision-makers to effectively elevate the assessment to one based on both gross misconduct, which was the specific charge levelled against the student, and continual disobedience. The charge of continual disobedience had not been levelled against the student in the disciplinary process.

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27 Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington,2014) at 1024.
28 *Khalon v Attorney-General* [1996] 1 NZLR 458 at 466.
29 At 466.
30 [2003] NZAR 726.

[54] The failure to inform the student that the Board proposed to effectively add a charge and include such a finding in its decision, and the failure to give the student a chance to "address that possibility specifically" amounted to a breach of natural justice.[31] The material difference in my view was the inclusion of material relating to past breaches on different occasions. There is no question in Mr Ha's case that anything other than the transactions and events relating to commission payable by Mr Griffiths were in issue.

[55] The complaint by Mr Griffiths which was submitted to the REAA identified the issue as the payment of "two commissions and expensive lawyer's fees" through the actions of Mr Ha. In a background document with his complaint form, he asserted that Mr Ha told him he can guarantee a contract can only go for 90 days and after that anyone can sell the property. He also told Mr Griffiths to call the REAA and confirm the "90-day residential property expiry clause". According to Mr Griffiths, Mr Ha told him to "have no worries about anything".

[56] On 7 June 2017, Committee (412) made the decision to enquire into the complaint. This put into train the appointment of an investigator, who then set about making enquiries.

[57] On 31 August 2017, Mr Ha wrote to the REAA, enclosing documentation. It was divided into various parts. The first part provided a general narrative and chronology, itself divided into two issues. The first issue was described as "the power to cancel a residential sole agency listing conferred by s 131 Real Estate Agents Act 2008". That narrative references correspondence dated 7 August 2013 from Mr John Weymouth, a solicitor acting for the Professionals in the commission dispute with Mr Griffiths. Mr Weymouth's letter refers to a potential claim against Don Ha Real Estate Ltd for unsatisfactory conduct pursuant to the provisions of r 9.11 of the 2009 Rules. Most of the general narrative was taken up with an analysis of the designation of the property as "residential".

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[31] At 741.

[58] In the background section of the formal response, Mr Ha described his long involvement in the real estate profession (some 24 years as at that date). He claimed to have a working knowledge of the Act. He also stated:

> I am well aware and cognisant of the rules regarding the standard of professional competence required of a real estate agent. I am punctilious and, mindful of how to discharge my duties as a licensed agent in that regard.

[59] Mr Ha confirmed that he explained to Mr Griffiths that it was legally possible to cancel a six-month sole agency, that his property met the requirements to enable cancellation, and, after cancellation, he could legally list and sell Mr Griffiths' property.

[60] It is apparent that the REAA investigator also asked Mr Ha to respond to a series of specific questions. Although the document setting out the questions to be addressed was not provided in the bundle of documents at the hearing, Mr Ha's written response identified the questions to which he responded. One of those questions was: "What advice/information did you give the complainant about his existing listing agreement with Professionals?"

[61] The investigator prepared an investigation report dated 29 September 2017. In a section headed "Key issues confirmed with complainant", the three issues identified at paragraph [17] of this Judgment were identified. While specific rules were identified, the rule at issue in this appeal was not specifically identified.

[62] In my view, this is not fatal to the fairness of the process up to the Committee determination. I consider that Mr Ha was, in substance, informed about the issues at stake. The investigation was focused on the “double commission” issue. The investigator asked open-ended questions about what Mr Ha had communicated to Mr Griffiths, as well as asking for a general narrative and background from Mr Ha’s perspective. The open-ended question put to Mr Ha is not materially different in my view to the questions which Mr Judd submitted ought to have been put directly to Mr Ha (and Mr Griffiths). This was not a case of the Committee relying on undisclosed information. Rather, it is an instance of an evaluative judgment based on material fairly disclosed to Mr Ha, to which Mr Ha had the opportunity to respond.

[63] There is another, more fundamental answer to Mr Ha's appeal. The purpose of the Client Conduct and Care rules is to protect consumers, including the clients of agents.[32] The express wording of r 9.11 in the 2009 Rules is not limited to situations where a client **is** liable to pay full commission. The protection is broader. It is triggered whenever a sole agency agreement is signed. The obligation is to warn that a client **could be liable** to pay full commission to another agent in certain circumstances. The objective is to put a client on notice that the issue warrants legal advice. The intent is precisely to avoid the spectre of agents giving any advice about the extent of risk reflecting the potential for these issues to be complex, within the province of legal advisers and not agents with personal interest in the transaction.

[64] For reasons which include the consumer protection imperative, the obligation in r 9.11 is an obligation of substance, not form. Whether the requisite advice mandated by r 9.11 is given is not to be assessed simply by whether a statement is made that "[the client] could be liable to pay full commission to more than 1 agent in the event that a transaction is concluded". The requisite advice must be unqualified.

[65] If an agent gives the mandatory advice in one breath but, in another, firmly advises that the prior agency agreement may be cancelled, the effect is to neutralise the import of the mandatory advice to such a degree that it amounts to not giving that advice at all. As noted by the Tribunal, r 9.11 is breached if the agent gives advice which differs from the unambiguous terms of r 9.11, suggests that there is no risk, or suggests that the risk is so slight that it can be safely ignored.[33] What r 9.11 requires, in order that there be compliance both in terms of the spirit and the letter, is to tell the client of the jeopardy of more than one commission being payable. Here, even if Mr Ha had expressly stated the terms of r 9.11, his firm advice around entitlement to cancel defeated the intent of r 9.11 by undercutting the consumer warning.

[66] It follows that even if I was satisfied that it was more likely than not that Mr Ha had at some stage before entering into an agency agreement relayed the statement set out in r 9.11 to Mr Griffiths, I could not conclude that r 9.11 had been complied with.

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32 Rule 9.

33 *Ha v Real Estate Agents Authority* (CAC 412) [2018] NZREADT 57 at [23]-[24].

[67] This point also answers Mr Judd's reliance on clause 3.3 of the agency agreement between Mr Griffiths and Mr Ha. Mr Judd does not rely on this clause as a substitute for the requisite advice under r 9.11. Rather, he submits that the written acknowledgements are consistent with a scenario in which Mr Ha probably did give the required advice. I am unable to accept this submission for the same reason that, viewed in the round, any advice in terms of r 9.11 was undercut, if not neutralised by Mr Ha's firm advice about entitlement to cancel.

[68] Mr Ha's focus at this Committee stage was firmly fixed on supporting his conclusion that Mr Griffiths was entitled to cancel the agency agreement with the Professionals because the proper designation of the property was "residential".

[69] Regardless of that conclusion, the decision of the Committee dated 9 November 2019 certainly made it clear that r 9.10 of the 2012 Rules was engaged. The Committee expressed the substance of the complaint as a failure to clearly explain to Mr Griffiths that if Mr Griffiths entered into another agency agreement with Mr Ha, "... he could be liable to pay full commission to more than one agent in the event that a transaction is concluded."[34]

[70] At para 3.12 of that Decision, the Committee referenced, in particular, rr 9.10 and 9.14 of the 2012 Rules. That Decision also recorded Mr Ha's firm belief of the legal correctness of his position. At para 3.9 the Committee states:

> At no point did he ever waiver from his firm belief of the legal correctness of his position, nor refer to any comments that he made to the complainant clarifying that he was not qualified as a solicitor, had not undertaken any legal research on the complicated planning matters that may attach to this particular piece of land, or suggest to the complainant that he should obtain his own legal advice, or indeed that there was any risk that if Licensee 1 was wrong in his assumption that s 131 applied, then the complainant could face a demand to pay full commission to the first agency.

[71] Despite this, at no time has Mr Ha sought to adduce further evidence, though there is a procedural mechanism to seek to adduce further evidence on appeal from a Committee Decision to the Tribunal.

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[34] Committee Decision 9 November 2017 at [1.4].

[72] Before the Tribunal, Mr Judd argued that the Committee's finding was wrong for three reasons. The first was that Mr Ha did communicate with Mr Griffiths and keep him well informed, as required by r 9.3.[35] The second reason was that, contrary to the Committee's finding, Mr Ha correctly explained to Mr Griffiths that he was entitled to terminate the agency agreement with the Professionals after 90 days and so complied with r 9.10 (the 2012 equivalent to r 9.11). He did not allege a breach of natural justice but focused on the issue of whether Mr Ha was correct in his view that the property in question was "residential property" as defined in the Act. The third reason was that Mr Ha did not act in a way that caused Mr Griffiths to attract more than one commission. It is apparent then that, at least before the Tribunal, Mr Ha explicitly tackled the finding in respect of r 9.10.

[73] That there was no explicit reliance on breach of natural justice is not surprising in the circumstances. The attack on the Committee's finding was predicated on the view that Mr Ha's advice in relation to the ability to cancel the agreement with the Professionals was correct. Most of the written submissions before the Tribunal canvassed the reasons why Mr Ha was correct. It is apparent that Mr Ha and his counsel took the view that, provided the advice was correct, r 9.10 was not engaged because there was no other agency agreement. In my judgment, for the reasons set out above, this overlooks the scope and breadth of r 9.11 of the 2009 Rules and the equivalent r 9.10 of the 2012 Rules.

Result

[74] I conclude that there was no breach of natural justice tainting the adjudication process. If I am wrong in that conclusion, I consider that any process irregularity did not lead to an erroneous substantive decision. From the point of the Committee determination, Mr Ha was on notice of the engagement of r 9.10 of the 2012 Rules (the equivalent of r 9.11 2009 Rules) even if he had insufficient notice before that time. There was an opportunity to cure any miscarriage of the Committee. More fundamentally, in providing the cancellation advice, Mr Ha had embarked on the very

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[35] At this stage, the parties were still operating under the 2012 Rules rather than the 2009 Rules. As r 9.10 of the 2012 Rules is expressed in the same terms as 9.11 of the 2009 Rules, nothing turns on this.

exercise which r 9.11 is intended to prevent. I concur with the Tribunal finding of breach of r 9.11 and, by dint of that, the finding of unsatisfactory conduct under s 72 of the Act.

[75] I therefore dismiss the appeal.

Costs

[76] The first respondent is entitled to costs and disbursements on a standard 2B basis. As the second respondent was self-represented, he is entitled to claim appropriate disbursements (out of pocket expenses only). I invite the parties to confer with a view to reaching agreement on costs. If no agreement is reached, I direct:

(a) The respondents to file a memorandum of no more than 3 pages within 21 days;

(b) The appellant to file a memorandum in response of no more than 3 pages within 14 days thereafter;

(c) Any memoranda in reply (solely on new matters arising from the appellant's memorandum) to be filed within 7 days thereafter.

[77] I thank counsel for their assistance.

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Walker J