

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2016] NZREADT 3

READT 008/15

**IN THE MATTER OF** an appeal under s 111 of the Real Estate Agents Act 2008

**BETWEEN** **JOHN EICHELBAUM** of Auckland,  
Barrister

Appellant

**AND** **REAL ESTATE AGENTS  
AUTHORITY (per CAC 303)**

First respondent

**AND** **ROSALYN CLAIRE WHITE** of  
Rahuikiri Road, Pakiri Beach,  
Auckland, Real Estate Agent

Second respondent

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Mr G Denley - Member  
Ms N Dangen - Member

**HEARD** at AUCKLAND on 2 November 2015 with subsequent written submissions

**DATE OF THIS RULING** 19 January 2016

**COUNSEL**

The appellant on his own behalf  
Mr M J Hodge, for the Authority  
Ms J K Katz and Ms A Parlane, for the licensee

**RULING OF THE TRIBUNAL ON THE NATURE OF THIS APPEAL**

***Background***

[1] In 2014 the appellant complained to the Authority that the licensee (allegedly as a real estate agent vendor) had failed to disclose known defects at 41 St Georges Bay Road, Parnell, Auckland, when the appellant purchased that property in March 2010. It is also alleged that the licensee falsely advertised the age of the property and failed to disclose the property's lack of compliance with Council requirements.

[2] That led to a 16 January 2015 written decision from a Complaints Assessment Committee ("the CAC") giving reasons why it declined to take further action on the complaint.

[3] That CAC decided there was a clear conflict in evidence between Mr Eichelbaum (the complainant) and Ms White (the second respondent). As the CAC deal with Mr Eichelbaum's complaint on a papers only basis, it felt that any contest between witnesses was better tested in the District Court as at that time the appellant, in the name of his trustee company purchaser, had issued proceedings in the District Court against Ms White. Those proceedings have since been discontinued.

[4] The CAC also stated, in relation to the alleged defects, that the question was whether Ms White "*knew or ought to have known that the work [remedial work carried out] was unconsented when it required a consent and that the work disguised a serious issue with the property*".

[5] The CAC then said:

*"In order to satisfy ourselves that the licensee failed to disclose a matter she knew was a defect in the property, the evidence must show that the person who completed the work told or otherwise informed the licensee what he was doing and why. The evidence does not show that"*.

[6] The Committee also said in its decision:

*"4.27 The Committee concedes that the issues in this matter would be better tested in the District Court where witnesses could be examined and cross examined to ascertain the level of proof required. As it stands the Committee has insufficient evidence before it to determine that the licensee knew about the extent of the damage or that she attempted to cover it up with the repairs.*

*4.28 The Committee has come to the view that we are unable to provide the evidential sufficiency required to find unsatisfactory conduct or lay a charge of misconduct against the licensee."*

[7] A substantive submission for Ms White is that Mr Eichelbaum should not now, on appeal to us, have a second bite at the cherry with further or new evidence and if there was an insufficiency of evidence before the CAC, that should not be cured by our allowing a de novo hearing.

[8] There are issues between the parties as to admissibility of contents of various briefs of evidence filed for the complainant appellant, but those have been put to one side while we rule on the nature of the appeal to us.

[9] Mr Katz QC has made extensive and very pertinent submissions to us on that issue. We shall summarise those submissions and the response of Mr Eichelbaum, but then discuss the response submissions from Mr Hodge on behalf of the Authority because, broadly, we agree with Mr Hodge's submissions and they, to quite a degree, follow much of the reasoning of Mr Katz in his submissions.

### ***The Present Application for the Licensee***

[10] Essentially, Mr Katz submits for the second respondent that a Committee's determination under s 89(2)(c) (i.e. to take no further action with regard to the complaint) can only be dealt with by us on appeal in accordance with the record before the CAC.

[11] Such an appeal lies in terms of ss 102(c) and 111 of the Act and is a “*rehearing*” in terms of s 111(3). As already indicated, the issue now before us is the nature of that “*rehearing*” to which s 111(3) refers. It is submitted by Mr Katz that it is a rehearing on the record (i.e. confined to that record) before the CAC and is not a de novo hearing with witnesses being called and cross-examined before us.

[12] Mr Katz referred in some detail to a number of relevant case authorities, namely, *Austin Nicholls & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141; *Kacem v Pashir* [2011] 2 NZLR 1; *O v Complaints Assessment Committee 10028* [2011] READT 15; *The Foundation for Anti-Aging Research v The Charities Registration Board* [2015] NZCA 449 (21 September 2015); *Hong v Auckland Standards Committee No. 3* [2015] NZHC 2521 (14 October 2015); and a number of other decisions in support of his submission that the appellant is restricted to an “*on the papers*” appeal i.e. confined to the material which was before the CAC.

[13] Mr Katz submitted from the authorities, with particular reference to *The Foundation for Anti-Aging Research* case, that it must follow that an appeal “*by way of rehearing*” is on the papers and the record in the forum below. He also adds that, in accordance with the Anti-Aging Research case, we have no power to entertain an application for leave to hold a de novo appellate hearing. Mr Katz also put it that, to the extent that an appellant wishes to adduce further evidence, an application for leave to adduce fresh evidence must be made.

[14] Later in his initial submissions Mr Katz QC states:

- “52. *There are no relevant Regulations as to procedures before the Tribunal beyond those in Schedule 1 to the Act and the Real Estate Agents (Complaints & Discipline) Regulations 2009. Schedule 1 does not assist. Nor do the Regulations. It is of interest however that Regulation 7 (the licensee response to a charge) requires that the response must state “whether the person wishes to be heard by the Disciplinary Tribunal”. By contrast Regulation 9, which deals with appeals against determinations of the CAC made under ss 81 or 94 of the Act, has no requirement for giving notice of a requirement to be heard.*
53. *And it is Regulation 9 that applies in the present case. That is because Regulation 9 governs appeals against determinations made by the CAC under ss 81 and 94 of the Act.*
54. *Section 94 refers back to determinations made under s 89, which the present one was.*
55. *So, with the exception of a s 89(2)(a) determination (which is a referral to the Tribunal) all other determinations are subject to ss 94 and 111 and Regulation 9 as mentioned. Nothing in Regulation 9 confers any jurisdiction or power to give notice of a desire to be heard. It follows that although there is clearly a right of audience there is no right (or ability) to call evidence. It is on the papers with only a right to address the Tribunal on the facts and law as relevant to the record below and the determination itself.”*

[15] Mr Katz also noted as follows:

*“64. If the appellant contends he should not be disadvantaged by a papers only appeal it must be remembered.*

*64.1 The appellant put before the CAC a wealth of material from the District Court proceeding.*

*64.2 The appellant (through his company Revans Holdings Limited) elected to issue contemporaneous District Court proceedings raising the identical issues.*

*64.3 After the CAC determination (and some 8 months later) the appellant elected to discontinue the District Court proceeding.*

*64.4 The appellant should have invited the CAC (if it could not resolve factual or credibility issues) to refer the complaint to the Tribunal under s 89(2)(a). He did not do so.*

*64.5 The appellant, in the face of factual disputes, should have requested a face to face hearing before the CAC. He did not do so. As a result he had adverse findings made against him. He was responsible for that outcome.”*

[16] Mr Katz continued:

*“70. The appellant may also seek to argue that as the hearing before the CAC was itself on the papers, then the appellant has never had a face to face or viva voce hearing at all.*

*71. That is no answer. Under Part 4 and ss 75 – 99 the CAC has very broad powers, akin to those of a Court or Tribunal, to call for evidence, to receive affidavits, to require production of documents and to hold a hearing on the papers “unless the Committee otherwise directs” (s 90(3) REAA). Section 90(2) is consistent with this.*

*72. That proviso is ample authority for a complainant to request, indeed require, a hearing in person if there is good reason to do so. It was in the hands of the appellant to do so. He did not.*

*73. So a complainant is not thereby disadvantaged, especially as the CAC must comply with the duty to accord the complainant natural justice (s 84(1) (REAA).*

*74. It is also relevant to note that hearings before a Standards Committee of the Law Society are conducted on the papers unless the Committee otherwise directs (see s 153(1) Lawyers & Conveyancers Act 2006).*

*75. As the judgment of Kos J in Hong v Auckland Standards Committee No. 3 notes, if there are concerns over a practitioner (licensee) response a face to face hearing should take place. The appellant could have insisted on that but did not. He is therefore the author of his own misfortune, if there be any. He cannot now be heard to complain.”*

***The Stance of the Appellant (on this Nature of the Appeal Issue)***

[17] Mr Eichelbaum focused on the concession by Mr Katz that, at least in certain circumstances, viva voce evidence is permissible in appeals to us. He submits that on the particular facts of this case viva voce evidence is required and should be allowed. He puts that because the CAC recognised that it was required but anticipated it would be given in the said District Court civil proceedings then extant but which have been discontinued; and also because there has been a breach of the rules of natural justice due to the absence of notice of the CAC hearing leading to the appellant losing the opportunity to make submissions.

[18] The appellant has deposed that he was not given notice of the original hearing before the CAC. That Committee appears to have originally decided to hold a hearing on 12 September 2012 but notified the appellant that the hearing would be on 13 September 2012 so he did not attend on 12 September 2012, although it seems that hearing did not take place on either date. Apparently, the complaint was later referred to another CAC which is said to have heard the complaint on 14 September 2014 but Mr Eichelbaum deposes that no notice was given to him of that hearing either.

[19] The appellant observes that ss 105 and 109 of the Act, together with para 8(1) of its Schedule 1, allow us to hear “*all evidence*” (as he puts it). Section 105 allows us to regulate our procedures as we think fit, and s 109 gives us wide power to receive relevant evidence. The said para 8(1) confirms our power from s 109(2) to take evidence on oath.

[20] The appellant submits that the fact that the CAC did not give either party notice that it was about to conduct a hearing on the precise date is a breach of natural justice so that the complaint must be either re-heard before the CAC or before us with *viva voce* evidence. He is submitting that he was not given proper prior notice of the hearing of the case by the CAC, nor given a fair opportunity to present his case.

[21] Also of concern to Mr Eichelbaum is the length of time the proceedings have dragged on before the CAC and now before us.

***Discussion (Based on Submissions for the Authority)***

[22] The submission for the Authority is that there is no requirement that we must hear appeals de novo and our usual position should be a rehearing on the record before the Committee.

[23] However, Mr Hodge notes that we have wide procedural powers and the Act contemplates that we finally dispose of matters on appeal rather than remit them back to Committees for further hearings. Accordingly, he submits that we have the power to permit cross-examination of witnesses who have put their account of events before the Committee, to allow further evidence to be admitted, and to hear an appeal de novo, if justified in the circumstances of a particular case.

[24] The Authority is neutral as to how we deal with the further evidence sought by the appellant to be admitted in this case.

*Tribunal's Jurisdiction for De Novo Hearing*

[25] Mr Hodge observes that, as counsel for the second respondent has set out in his detailed submissions, most appeals by way of rehearing are simply conducted on the record of the body below, subject to the possibility of admitting further evidence on the appeal if certain conditions are met. However, this is not the case if the statute indicates that there is to be an appeal de novo, which “*include[s] a full hearing of oral evidence if any party so insisted*”: see *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA, per Cooke P at 440).

[26] This was affirmed by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*, where Elias CJ at para [4] held:

*“The appeal is usually conducted on the basis of the record of the Court or tribunal appealed from unless, exceptionally, the terms in which the statute providing the right of appeal is expressed to indicate that a de novo hearing of the evidence is envisaged (An example of a right of appeal with that effect was that under the legislation considered by the Court of Appeal in Shotover Gorge Jet Boats Ltd v Jamieson).”*

[27] We accept that the starting point to determine whether there is an appeal de novo is the nature of the appeal right and the meaning of the statute conferring the same. In *Housing NZ Corp v Salt* DC AK CIV-2007-004-002875, 9 May 2008, Joyce DCJ endorsed the following passage taken from the Law Commission’s Issues Paper No 6 (January 2008) *Tribunals of New Zealand*: “*An appeal may be by way of de novo hearing even when this is not expressly stated. This is the case where the right of appeal is expressed in terms that indicate that it is unrestricted.*”

[28] Mr Hodge submitted that there are two particular features of the Act that are significant in this context:

- [a] Section 105(1) of the Act provides that we may regulate our procedures as we think fit, subject to the Act and any regulations made under the Act, and the rules of natural justice;
- [b] Section 111 empowers us (after considering the appeal) to confirm, reverse or modify the decision to exercise any of the powers of the Committee but it does not expressly empower us to remit a matter back to a Committee for it to hear a matter further or afresh.

[29] Mr Hodge notes that the procedural power in s 105 (to regulate our procedures as we think fit subject to natural justice) is expressed in wide terms and gives us considerable freedom in how we regulate our procedures. He submits that the way in which an appeal is to be heard, whether solely on the record, or on the record with additional evidence, or de novo, is a procedural matter.

[30] We record that Regulation 17(a) of the Real Estate Agents (Complaints and Discipline) Regulations 2009 provides, that our chairperson is responsible for “*making such arrangements as are practicable to ensure the orderly and expeditious discharge of the functions of the Disciplinary Tribunal*”

[31] In relation to s 111, Mr Hodge submits that, while a power to remit a matter to a Committee may be implied where required as a necessity, it is significant that Parliament expressly gave us wide powers to effectively “*stand in the shoes*” of a

Committee when hearing an appeal but not to remit matters back for rehearing. He submits this is a clear legislative indication that we are expected to deal with matters conclusively when hearing an appeal, including hearing further evidence if necessary, rather than remitting matters back to Committees. He puts it that the Act contemplates flexible, speedy and relatively informal decision-making processes, in line with its consumer protection purpose, and that our determining appeals in a final way rather than having matters go back and forth between Committees and us, is consistent with that purpose.

[32] It is also submitted by Mr Hodge that these features of the legislation do not mean that we must conduct appeals as de novo rehearsings, and that there is no clear legislative indication that there is such a mandatory requirement. Rather, it is submitted that the legislation promotes procedural flexibility which best allows us to address the circumstances of the particular case.

[33] Mr Hodge observes that there are circumstances where a de novo rehearing may arguably work against the purposes of the Act. He suggests that licensees who engage legal counsel for an appeal to us may seek to take advantage of de novo procedures to adduce new evidence to us when that evidence could have been readily provided to the Committee. He put it that unrepresented consumers may find themselves in a position where the evidential position has changed dramatically from that which was before the Committee, and may be unable to adequately deal with what is effectively a wholly new case being run before us by counsel.

[34] Mr Hodge submits that, ultimately, whether the matter is looked at from the perspective of consumers or licensees, it should not generally be the position that a wholly new case can be run on appeal unless there are good reasons for that to occur. It follows that the Authority agrees that de novo hearings on appeal are not required under the Act, but disagrees with the proposition that we are precluded as a matter of jurisdiction from conducting a de novo hearing on appeal.

[35] Mr Hodge then put it that, on that basis:

- [a] Most appeals will be conducted on the record which was before the Committee;
- [b] We may allow certain witnesses to be cross-examined on their evidence provided to the Committee, if we see fit, and may also allow new evidence to be admitted if we consider there are good reasons to do so;
- [c] We may direct that the appeal be heard de novo if the particular circumstances warrant it. This may be where, for example, we consider that it is necessary to do so to properly determine the appeal because, at no fault of the parties, critical issues were not addressed by the Committee.

[36] We agree with those submissions of Mr Hodge.

### *Natural Justice*

[37] Mr Hodge states that the Authority is neutral on whether, in the circumstances of this case, we decide to permit cross-examination of any of the witnesses, allow further evidence to be filed, or go further and permit the entire appeal to be heard de novo. However, as we cover below, he makes some brief further submissions on the point of natural justice raised by the appellant and the admission of further evidence generally.

[38] Mr Hodge referred to the appellant maintaining that there was a breach of natural justice by the Committee failing to give him notice of its hearing and submitting that is a complete answer to the present application from the licensee to restrict his appeal to the record before the Committee.

[39] It is accepted by the Authority that the Committee process followed a slightly unusual course in this case and that a specific notice of hearing was not sent immediately prior to the Committee ultimately making its decision. This was in large part because the matter was before CAC20003 in 2012 and that Committee had completed its enquiries and intended to determine the matter then. However, it was proposed that determination of the complaint be adjourned pending the civil proceedings between the parties and this is what occurred. Given the ongoing delay, the matter was later determined by CAC303 and notice of the determination was given in January 2015.

[40] Mr Hodge puts it that the key point is that the appellant and the licensee were advised in 2012 that the Committee would be holding a hearing on the papers to determine the matter; they were provided with a copy of the documents not previously supplied and an index listing the documents to be considered by the Committee; and were informed that the hearing would be on the papers and would not involve any witnesses.

[41] Mr Hodge puts it that, if the appellant had concerns that important evidence was not before the Committee, there was ample opportunity to remedy that given that the Committee's hearing did not proceed in September 2012. It seems that at no stage was the Authority or its Committees advised that a party wished to file further evidence. It was the Committee which approached the parties in August 2014 to obtain an update as to the progress of the civil proceedings.

[42] For all that, we accept Mr Eichelbaum's evidence that, somehow or another, he did not get correct notice of the date of hearing by the Committee. We are not at all satisfied that he has had a fair and sensible opportunity to fairly present his case, i.e. his complaint.

#### *Further Evidence*

[43] The Authority is also neutral on whether any new evidence should be admitted on this appeal and made the following brief submissions about that issue on general principles only.

[44] Mr Hodge submits that while we are not bound by the High Court Rules, they are a helpful reference where relevant, as is the common law they are based on. He noted that *The Foundation for Anti-Aging Research & Anor v The Charities Registration Board* case addressed the correct approach to HCR 20.16. There the appellant argued that s.61(4) of the Charities Act 2005 governed appeal procedure. The appellant further argued that allowed the Court to "*make any order it thought fit*" with respect to the admission of further evidence on appeal and ousted the tighter regime of HCR 20.16. The Court considered that s 61(4) related to the Court's powers in relation to determination of the appeal, that is to its disposition, and did not relate to appeal procedure. The reference to the Court being empowered to make "*any other order it thinks fit*" was designed to expand the list of possible outcomes available to it. That power did not "*address appeal procedure at all*" and therefore did not "*displace the express and specific wording of HCR 20.16*".



[45] HCR 20.16 reads:

- (1) Without leave, a party to an appeal may adduce further evidence on a question of fact if the evidence is necessary to determine an interlocutory application that relates to the appeal.
- (2) In all other cases, a party to an appeal may adduce further evidence only with the leave of the court.
- (3) The court may grant leave only if there are special reasons for hearing the evidence. An example of a special reason is that the evidence relates to matters that have arisen after the date of the decision appealed against and that are or may be relevant to the determination of the appeal.
- (4) Further evidence under this rule must be given by affidavit, unless the court otherwise directs.

[46] Mr Hodge observes that the power to govern procedure as provided by s 105(1) of the Real Estate Agents Act 2008 is wide and expressly applies to procedure, in contrast to a power to make orders in respect of a determination of an appeal. We agree. He opines that, on a *Foundation for Anti-Aging* case analysis, s 105(1) is capable of displacing the stricter regime of HCR 20.16 or, at least, allows more flexibility in the approach.

[47] Mr Hodge adds that, generally, the Court on appeal will decide the appeal on the record at first instance but will be guided by the “*interests of justice*” in considering whether exceptions ought to be properly made. In *Greenpeace New Zealand Inc* [2011] 2 NZLR 815 (HC), Heath J commented that this is not relaxing the HCR 20.16 test; rather, it is applying that test in the particular statutory context of each case.

[48] Mr Hodge submits that the standard test for admission of further evidence is that it must be cogent and material and must not have been reasonably available at first instance; refer *Telecom Corp of NZ Ltd v CC* [1991] 2 NZLR 557. He noted in his written submissions:

“5.6...

[a] *In Comalco New Zealand Ltd v TVNZ Ltd* [1996] 10 PRNZ 573, Gallen J held that:

*“It is also important the evidence should not have been available at the earlier hearing by the exercise of reasonable diligence. I accept also, however, that the test should not be put so high as to require the circumstances to be wholly exceptional. Every case must be considered in relation to its own circumstances.”*

[b] *In Complaints Committee No 1 of the Auckland District Law Society v P* [2007] 18 PRNZ 760, Duffy J noted at paragraph [2]:

*“There is always room for the special case where fresh evidence is admitted, even though it was reasonably available for the hearing at first instance. The discretionary power ... is broad enough to permit a Court to allow such evidence to be adduced. Furthermore,*

*discretionary authority should never be fettered by fixed guidelines. But such exceptions should be rare ...”*

[49] Mr Hodge also puts it that, in exercising the discretion to grant leave, the Court may take the following factors into account (refer *Dragicevich v Martinovich* [1969] NZLR 306 (CA)):

- [a] Whether the evidence could have been obtained with reasonable diligence for use at the trial;
- [b] Whether the evidence would have had an important influence on the outcome;
- [c] Whether the evidence is apparently credible; and
- [d] Whether admitting the evidence would require further evidence from other parties and cross-examination.

[50] Mr Hodge adds that in *Foundation for Anti-Aging Research*, the Court of Appeal accepted that “*natural justice considerations could in some cases require an oral hearing on appeal in order to ‘get to the bottom’ of the issues*”. The Court considered that this was so given the inquisitorial nature of the Board’s processes and the absence of an oral hearing at first instance. Other factors warranting an oral hearing were said to include the correction of factual errors or other obvious mistakes and updating evidence. Also, in that decision the Court of Appeal noted at paragraph [51]:

*“We [the Court] agree that there may be cases where, in order to secure the objective or a just and effective right of appeal, the discretion to permit further evidence or carefully limited rights of cross-examination may be necessary and appropriate. Rule 20.16(3) itself gives by way of example of a special reason, evidence relating to matters that have arisen after the date of the decision under appeal where the evidence is or may be relevant. The Court will be guided by the usual criteria of freshness, relevance and cogency. Material that would merely elaborate or improve upon the evidence already available in the record of proceedings at first instance is unlikely to meet the test.”*

[51] Mr Hodge submits that our wide procedural power gives us ample scope to apply these principles in a flexible way depending on the circumstances of the case. However, he submits that what is not permissible is to give a party to an appeal the opportunity to run their case afresh simply because they wish they had conducted it differently in the first instance. We agree.

### ***Our Conclusions with regard to the Present Case***

[52] We now accept that, prima facie, this appeal is to be heard by being confined to the record available to us from the CAC. However, we consider that we have power to allow further evidence if we think it to be in the interests of justice to do so. We also accept that our powers are those given to us by statute and we have no inherent jurisdiction.

[53] In the present case, there is the circumstance where, rightly or wrongly, Mr Eichelbaum did not realise that he needed to put more evidence before the Committee and there was confusion over the appointed hearing date before the CAC. Also, the CAC seems to have over-relied on the existence of civil proceedings in the

District Court as if they were parallel to this appeal when our concern is not the liability of Mrs White but her conduct as a licensee at material times.

[54] We accept that the appellant did not present his case to the CAC as he had intended and this seems to have been due to genuine confusion as to the hearing date. Accordingly, we perceive a real risk of him not receiving natural justice or of there being a miscarriage of justice.

[55] However, we are not prepared to allow Mr Eichelbaum to run his case afresh. We accept that in the ordinary course we are confined to the evidence contained in the record of the CAC, although we have powers to allow further evidence. Even considering the evidence presently available to us, and the objections to it, *prima facie*, there seem to be concerns about the conduct of the licensee.

[56] This means that we need to consider to what extent Mr Eichelbaum may call further evidence for, in terms of briefs filed, we understand that he seeks to do that. He is entitled to be fairly heard and to receive natural justice. We also need to analyse the application from Mrs White that much of the proposed evidence for Mr Eichelbaum is inadmissible.

[57] We observe that the type of “*hearing*” usually conducted by a CAC in terms of the Act seems to be a sensible objective review of the material made available to it and/ or obtained by its investigatory staff; rather than a *viva voce* adversarial trial.

[58] We do not accept the submission from Mr Katz QC that natural justice issues be left to the High Court on review.

[59] It is now necessary to hear the application for the licensee that portions of the proposed evidence by and for the appellant are inadmissible. Tuesday and Wednesday 26 and 27 January 2016 have been set aside for that.

[60] Pursuant to s 113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s 116 of the Act.

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Judge P F Barber  
Chairperson

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Mr G Denley  
Member

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Ms N Dangen  
Member