BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 28

READT 019/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	SANGEETA (ROSH) DAJI Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 521) First Respondent
AND	JAMES MARSHALL Second Respondent

On the papers

Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms C Sandelin, Member
Submissions received from:	Mr T Rea, on behalf of Ms Daji Ms L Lim, on behalf of the Authority Mr J Marshall
Date of Decision:	25 June 2020

DECISION OF THE TRIBUNAL

Introduction

[1] Ms Daji has appealed against the decision of Complaints Assessment Committee 521 ("the Committee"), dated 15 April 2019, in which it made a finding of unsatisfactory conduct against her ("the substantive decision"). She has also appealed against the Committee's decision, dated 4 June 2019, in which it made penalty orders against her ("the penalty decision").

Background

[2] The relevant events occurred between July and October 2018.

[3] Ms Daji is a licensed salesperson, and at all material times was engaged at James Law Realty Limited. On 4 July, she entered into a sole agency agreement for one month to market an eight-unit property at Sandringham, Auckland ("the property") for sale ("the Daji sole agency"). The property was owned by a trust, the trustees of which were Mr and Mrs Denning, and an independent trustee, Mr Daniel.

[4] The property was managed by Charlton Realty Limited, trading as Harcourts Epsom ("Harcourts"). Ms Daji contacted the Harcourts property manager (Ms Hart), advised her that the property was for sale, and asked her to inform the tenants and provide copies of tenancy agreements.

[5] On 12 July, a prospective purchaser entered into a conditional agreement for sale and purchase of the property. In late July, Ms Daji contacted Mr Denning requesting an extension of the conditional agreement. Mr Denning advised her that Harcourts had approached him with a prospective purchaser, and were waiting for Ms Daji's sole agency to end before introducing him to the property. He declined to extend the conditional agreement, which was subsequently cancelled.

[6] Ms Daji's sole agency ended on 4 August. On 13 August, the vendors entered into a sole agency agreement with Harcourts, for one month ("the Harcourts sole agency").

[7] On 4 September, Ms Daji called Mr Denning and asked if the property had sold. He told her that that the property had not sold, and there was no agency on the property as the Harcourts sole agency had fallen over. Ms Daji asked Mr Denning to call his solicitor to check this, and when she followed up with Mr Denning, was told that there was no sole agency in place. He further told her that the copy of the agency agreement he had was signed only by Mr Daniel.[1] Ms Daji said Mr Denning was stressed, so she said she would call Harcourts to check.

[8] On 5 September Ms Daji was told by a Harcourts salesperson, Mr White, that Harcourts had a sole agency. Ms Daji called Mr Denning and told him she did not want to disturb the Harcourts sole agency. Also on 5 September, Mr Marshall, also a salesperson at Harcourts, sent Ms Daji an email confirming the sole agency and stating that if she contacted the vendor directly, they would "take the necessary steps".

[9] On 9 September, Mr Denning called Ms Daji and told her that Harcourts had asked for an extension of their sole agency, which he had refused, saying that they did not have a sole agency. Ms Daji asked Mr Denning to check again with his solicitor. Ms Daji spoke with Mr Denning again on 10 September, in response to a call from him. He again said that Harcourts did not have a sole agency. He wanted to view the property, and she told him that the property manager would have to be informed. She offered to contact the tenants to advise them that the landlord wished to view the property.

[10] Ms Daji contacted the tenants of Units 4, 5, 7, and 8. Only one of these, Unit 8, was available to be visited. Ms Daji and Mr and Mrs Denning visited Unit 8 on 11 September. The same day, the tenant at Unit 5 telephoned Harcourts saying he had had a request from a "Harcourts consultant", for "an appointment to view the property with a buyer". He provided Harcourts with the cell phone number given by the caller, which was Ms Daji's cell phone number. Ms Daji's evidence was that she did not say she was from Harcourts, and did not say she was bringing a buyer to view the property.

---

1 The Tribunal notes that the copy of the Harcourts sole agency agreement provided to the Committee contained the signatures of all three owners of the property.

[11] On 12 September, Mr and Mrs Denning called Harcourts, instructing them that they were to allow Ms Daji to sell the property. Mr Marshall sent an email to Ms Daji, expressing concern that she had gone to Unit 5, representing herself as a Harcourts agent. The email went to Ms Daji's junkmail, but was seen by her business manager, Mr Law. They discussed the email but did not reply to it. They said this was because Ms Daji had not represented herself as a Harcourts agent, and had not visited Unit 5.

[12] On 12 September, Ms Daji and the vendors renewed the Daji sole agency. The Harcourts agency expired on 13 September, and was not renewed. On 14 September, a prospective purchaser introduced by Ms Daji entered into an unconditional agreement to buy the property.

Complaint

[13] Mr Marshall complained to the Authority about Ms Daji on 9 October 2018. His complaint was clarified with an Authority investigator as being that:

[a] Ms Daji represented herself as being a Harcourts agent to the tenant of Unit 5; and

[b] Ms Daji knew that Harcourts had a sole agency agreement with the vendors but continued to approach the vendors directly without informing Harcourts.

[14] The Committee decided to inquire into the complaint on 26 October 2018. It advised Ms Daji of that decision on 8 November 2018. The Committee set out the "Issues raised by the complainant" as being "whether the Licensee represented herself as being a salesperson from Harcourts when she contacted the tenant to arrange a viewing", and asked her to respond to ten specific questions.

[15] Ms Daji responded to the complaint. Her response included a "General Narrative of Events/Chronology", her response to the issue stated by the Committee, and her responses to the specific questions. As requested by the Committee, Ms Daji provided

copies of the Daji sole agency agreement, the two agreements for sale and purchase, and email correspondence. Ms Daji was not asked to provide any further response.

[16] The investigator sought comment from Mr Law, which he provided. The investigator also spoke with the tenant of Unit 5, and sent him a follow-up email enquiry. The investigator did not seek comment from any of the vendors. Mr Marshall said in an email to the investigator on 17 October 2018 that he "did not wish to involve the elderly vendors" who were "happy in that they have now sold their property unconditionally".

The Committee's substantive decision

[17] The Committee decided to take no further action on the complaint that Ms Daji represented herself to be an agent from Harcourts. It found that there was insufficient to establish the claim on the balance of probabilities. As that decision has not been appealed, we need not refer to it further.

[18] The Committee found that Ms Daji had engaged in unsatisfactory conduct. It first said:[2]

> The Committee found that the evidence proves that [Ms Daji] has engaged in unsatisfactory conduct under s 89(2)(b) of the Act in relation to the claim that the Licensee has circumvented the sole agency agreement held by [Harcourts] by engaging directly with the vendor despite being advised of the existence of the sole agency agreement which did not expire until 13 September 2018. This decision was also made with reference to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules).

[19] The Committee then expressed its conclusion differently:[3]

> On the complaint against the Licensee that she has circumvented the sole agency agreement with [Harcourts] by engaging directly with the vendor despite being advised of the existence of the sole agency agreement which did not expire until 13 September 2018, the Committee found, pursuant to section 72(b) of the Act, that the Licensee has engaged in unsatisfactory conduct by failing to explain to the vendor that they may be liable to pay more than one

---

2 Substantive decision, at 2.3.
3 At 3.1(a).

> commission if a transaction were to be concluded in breach of in particular Rule 6.2 and 9.10.[4]

[20] The Committee considered that Ms Daji had been put on notice of another potential agency when she was advised that Harcourts had contacted the vendor with another possible buyer, and this was confirmed when Mr White told her of the Harcourts agency on 5 September. The Committee referred to Ms Daji's evidence that she had asked Mr and Mrs Denning to check with their solicitor as to the Harcourts agency and went on:[5]

> … However, we are concerned that [Ms Daji] seems to have ignored some obvious warning signs which indicated that even if it was not immediately clear whether another agency agreement existed or not, the circumstances were such that at the very least the vendor should have been advised of potential further enquiries which should have been made of [Harcourts].
>
> A licensee must exercise skill, care, competence, and diligence at all times when acting for a client and carrying out real estate agency work. In particular, the requirements of Rule 9.10 are clear. An agent must explain to a prospective client the potential liability of paying a full commission to more than one agent if the client has already entered into an agency agreement. The consequences of a breach of Rule 9.10 are serious, and it is not open to a licensee to argue that he or she has relied on the instructions of the client in circumstances where a greater degree of skill is required.
>
> The Committee therefore considered that it was unacceptable for [Ms Daji] to allow the vendor to enter into a new sole agency agreement on 13 September 2018 whilst the agreement with [Harcourts] remained current. [Ms Daji] should not have relied solely on the response of the vendor who, in her own words, was "quite stressed" and "agitated" by the circumstances in which he found himself, nor with further reference to [Harcourts] to check the accuracy of what she was being told by the vendor. That, together with the other warning signs mentioned above […] should have alerted [Ms Daji] to the need to make further enquiries as to the currency of [Harcourts] agreement, and at the very least should have led her to advising the vendor as required by rule 9.10.

The Committee's penalty decision

[21] The Committee noted that a finding of unsatisfactory conduct had previously been made against Ms Daji, and that it considered that "this was not a minor, technical, or insignificant breach", and that "there is a basic tenet in the real estate industry that

---

4 Rule 6.2 provides "A licensee must act in good faith and deal fairly with all parties engaged in a transaction". Rule 9.10 provides: "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."

5 Substantive decision, at 3.9–3.11.

licensees do not interfere with the sole or exclusive listings of others".[6] It assessed her conduct as being "below mid-level, but above the lowest-level on the scale of seriousnesss".[7]

[22] The Committee censured Ms Daji and ordered her to pay a fine of $3,000 (30 percent of the maximum available fine).

Submissions as to the Committee's substantive decision

[23] Mr Rea submitted that the Committee's finding that she was in breach of r 9.10 was made in the context of a complaint of "interference with a sole agency". He submitted that "interference with a sole agency" and "potential exposure to double commission" are conceptually distinct and separate concepts.

[24] With respect to "interference with a sole agency", Mr Rea submitted that the purpose of discouraging "interference" is to give effect to vendors' presumed wishes, implicit in their granting sole agencies, that their sole agent should be the point of contact for any inquiries, rather than the vendors personally.

[25] He submitted that there had been no wrongful interference in the present case, as Ms Daji had no actual knowledge of the existence of any such agency. He submitted that she had reason to suspect another agency agreement, having been told by the vendors that Harcourts had told them they wanted to introduce a prospective purchaser, but no basis for knowing the nature of any such agreement, as the property was not publicly marketed. He further submitted that Ms Daji's conduct, on 4 September, was solely to ask the vendors if the property had sold, and that could not amount to interference.

[26] Mr Rea also submitted that the vendors made it clear to Ms Daji that they wished to deal with her, not Harcourts. He referred to the Committee's acceptance of Ms Daji's evidence that the vendors were "sharp in their minds" and "wished to conduct business on their own terms" and submitted that any justification that Harcourts may

---

6 Penalty decision, at 4.3.
7 At 4.4.

have had for insisting that Ms Daji communicate with them ceased to exist, and the vendors were entitled to deal directly with Ms Daji, if they so wished.

[27] Mr Rea submitted that the Committee's finding that Ms Daji had breached rr 6.2 and 9.10 by failing to advise the vendors as to the potential risk of having to pay double commission was a breach of natural justice, and not based on any evidence. He submitted that Mr Marshall had not made a complaint of a breach of r 9.10, and had not expressed any concern as to a potential risk to the vendors. He submitted that the Committee's decision to inquire into the claim made no reference to any issue as to compliance with r 9.10.

[28] He further submitted that Ms Daji was asked to respond to specific questions, none of which concerned advice to the vendors about potential commission. He submitted that if the Committee had wished to expand its inquiry to that issue, it should have instructed its investigator to raise it with Ms Daji.

[29] Mr Rea submitted that any connection there may be between "exposure to double commission" and "interference with a sole agency" is not sufficient for the purpose of satisfying the natural justice requirement that Ms Daji was entitled to be put on notice as to the Committee's concerns. He submitted that it failed to give her notice that it was concerned as to whether she had complied with r 9.10, and therefore breached its obligation to observe the rules of natural justice.

[30] Mr Rea further submitted that the Committee had no evidence before it that Ms Daji had failed to comply with r 9.10. The evidence before the Committee showed that she had told the vendors (three times) to take legal advice as to their agency agreement with Harcourts, and was told by Mr Denning that they had done so. He submitted that correspondence with the vendors' solicitors was also evidence that the vendors were aware of the potential risk of double commission.

[31] Mr Rea submitted that entry into another agency agreement does not expose a vendor to a risk of double commission; that risk is triggered by a vendor entering into an agreement for sale and purchase, and in the present case, that occurred after the Harcourts sole agency had expired.

[32] Ms Lim accepted on behalf of the Authority that no direct questions were asked of Ms Daji as to compliance with r 9.10, but submitted that she was "in substance" informed of the issues being investigated. She submitted that the issue of potential interference with the Harcourts sole agency was a central focus of the Committee's investigation, but that any questions regarding existence of a sole agency agreement, particularly in the context of "interference", "plainly" brought compliance with r 9.10 and exposure to the risk of double commission into play. She submitted that as a licensed salesperson, this should have been apparent to Ms Daji.

[33] She submitted that a licensee's obligations under r 9.10 are always engaged when entering into an agency agreement, and when the issue under investigation is whether a licensee has "interfered with a sole agency", the risk of exposing the client to double commission should be at the forefront of the licensee's mind. She submitted that a licensee is not freed from the obligation to comply with r 9.10 simply because the vendor wants to enter into another agency agreement: she submitted that that would be contrary to the consumer-protection purposes of the Act. She submitted that the Committee was not required to give Ms Daji explicit notice that r 9.10 was in issue, as it was clearly engaged.

[34] Ms Lim referred to the decision of her Honour Justice Walker in *Ha v Real Estate Agents Authority*,[8] in which it was held that Mr Ha had "in substance" been informed that compliance with r 9.11 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (the predecessor of r 9.10 under the current Rules) was in issue, in support of her submission.

[35] Ms Lim submitted that even if there were a failure to put Ms Daji on notice as to her compliance with r 9.10, it did not result in any significant prejudice to her. She submitted that Ms Daji had said she had advised the vendors to take legal advice, but had not sought to adduce any evidence that she had advised the vendors in accordance with r 9.10. She submitted that it could be inferred from Ms Daji's correspondence with the vendors' solicitors that she did not unequivocally advise the vendors as to the risk of double commission, but considered it sufficient to send the solicitors a copy of

---

8 *Ha v Real Estate Agents Authority* [2019] NZHC 1956.

her own sole agency agreement, and relied on them to advise of any overlap between that and the Harcourts sole agency agreement.

[36] Accordingly, she submitted, the Tribunal could find that there was no breach of natural justice, or that there was a breach, which did not justify relief being granted. She submitted that if the Tribunal found a breach of natural justice, which justified relief, the proper course is to remit the matter back to the Committee to re-open its investigation. She submitted that a procedural failing does not warrant a licensee escaping all liability.

[37] In his reply submissions, Mr Rea submitted that there was a significant difference between the present case and *Ha*, as the risk of double commission was expressly raised in the complaint against Mr Ha, which was from the vendor, and Mr Ha had been asked open-ended questions about advice given regarding an existing agency agreement. Mr Rea submitted that was not the case here.

[38] Mr Rea further submitted that Ms Daji's statements to the Committee were not inconsistent with her having complied with r 9.10, and her correspondence with the vendors' solicitors does not support an inference that she had failed to unequivocally advise the vendors of the risk of double commission, or that her advice was somehow negated. He also referred to his submission to the Committee in relation to penalty, in which he advised that, had she been asked, Ms Daji would have provided evidence of her compliance with r 9.10.

[39] We record that Mr Marshall did not wish to file submissions in relation to the appeal, beyond the evidence provided to the Committee.

Application to adduce further evidence

[40] On 20 May 2020, Ms Daji affirmed in an affidavit that she was not aware that the issue of compliance with r 9.10 was a matter that the Committee expected her to address in her response to the complaint by Mr Marshall. She stated that she is well aware of the requirements of r 9.10, and it is her invariable practice to give advice to vendors as required by the Rule. She stated that was her practice at the time of the

events at issue in this proceeding, and confirmed that she is certain that she did so in the present case.

[41] Mr Rea sought leave to adduce Ms Daji's affidavit, on the grounds that the issue of compliance with r 9.10 had not expressly, or in substance, been raised by the Committee, Ms Daji had informed the Committee in penalty submissions that she would have adduced the evidence is the issue had been raised admission of the evidence would assist the Tribunal to deal effectively with the issues before it, and it is in the interests of just that the evidence be allowed.

[42] Ms Lim advised the Tribunal that the Authority abides the Tribunal's decision as to the application to adduce further evidence. She submitted that admissibility of the evidence will follow the Tribunal's determination of Ms Daji's submission that the Committee breached natural justice. She further submitted that if the Tribunal were to admit the evidence, any breach of natural justice will have been remedied, and the Tribunal could determine the appeal on the merits, or remit the matter back to the Committee to make further inquiry.

Discussion

[43] We accept Ms Lim's submission that as an appeal against a substantive finding of unsatisfactory conduct, the Tribunal is required to make its own assessment on the merits. After considering the appeal, the Tribunal may confirm, reverse, or modify the decision of the Committee, and if it reverses or modifies a Committee decision, it may exercise any of the powers that the Committee could have exercised.[9]

Committee's error in stating date of agreement for sale and purchase

[44] We observe that the Committee's reference (at paragraph 3.11 of its substantive decision, set out at paragraph [20], above) to an agreement for sale and purchase having been entered into on 13 September (before the expiry of the Harcourts' sole agency) is incorrect. It is evident on the face of the document that was before the

9 See s 111(4) and (5) of the Act.

Committee that it is dated 14 September, and was therefore entered into after the Harcourts sole agency expired.

[45] Further, we accept Mr Rea's submission that entry into another agency agreement does not expose a vendor to a risk of double commission; that risk is triggered by a vendor entering into an agreement for sale and purchase with one agent while a sole agency agreement with another agent is in place. In the present case, the agreement for sale and purchase with the prospective purchaser introduced by Ms Daji occurred on 14 September, after the Harcourts agreement expired.

"Interference with a sole agency" and Rule 9.10

[46] It is apparent from the paragraphs of the substantive decision set out earlier that the Committee conflated the concepts of "interference with a sole agency", and a licensee's obligation to comply with r 9.10, which requires an explanation to be given to a prospective vendor as to the potential risk of having to pay more than one commission in the event that a transaction is concluded.

[47] We were not referred to any Rule, or statutory provision which expressly imposes on licensees an obligation not to "interfere with", or "circumvent" a sole agency entered into with another agency. Mr Rea referred us to the decision of Complaints Assessment Committee 10032 in *Kahukura*, in which the concept of "interference with a sole agency" was explained as follows:[10]

> The CAC believes that where vendors of properties elect to appoint an exclusive sole agent for the sale of their property, that contractual relationship and decision by the vendors should be respected by other licensees. The vendors have effectively notified other agents that all contact should be through their elected sole agent and not direct to them. Without this restriction licensees could potentially use the conduct to undermine the relationship and confidence the vendor of a property has with their sole agent.
>
> The CAC finds that while on occasion it may not be clear that a property is being marketed under a sole agency, and in those circumstances, direct contact by a licensee to a vendor may be permissible, where it is clear to the licensee that a property is marketed under a sole agency all contact should be through that sole agent. The CAC does not believe that one-off instances of this principle should generally mean that a licensee is found guilty of unsatisfactory conduct under s 72(d), but where there are a number of instances indicating a pattern of behaviour or modus operandi by a licensee, then this generally would

[10] *Kahukura* Complaint CA2788626, [2011] NZREAA 26 (11 February 2011), at 4.8–4.9

> amount to conduct that would be reasonably regarded by agents of good standing as being unacceptable.

[48] We accept Mr Rea's submission that the purpose of the "interference" principle, is to give effect to vendors' wishes (implicit in their entry into a sole agency agreement) that their sole agent should be the point of contact for any inquiries, not the vendors directly. We also accept his submission that any justification for applying the principle in the present case was negated by the (unchallenged) evidence that the vendors told Ms Daji they did not want to deal with Harcourts.

[49] We also accept his submission that "interference" is a separate concept from compliance with r 9.10. If a licensee "interferes" with another agency's sole agency, it does not necessarily follow that the licensee had failed to comply with r 9.10. Equally, if a licensee fails to comply with r 9.10, it does not necessarily follow that the licensee has "interfered" with a sole agency.

[50] We find that the Committee erred in law in finding at paragraph 3.1(a) of the substantive decision that the complaint that Ms Daji circumvented the Harcourts sole agency was established by its finding that she engaged in unsatisfactory conduct by failing to comply with r 9.10.

[51] We also find that on the evidence before it, the Committee could not find that Ms Daji interfered with or circumvented the Harcourts sole agency. The evidence before the Committee was that Ms Daji contacted Mr and Mrs Denning on 4 September to ask whether the property had sold (which could not be either interference or circumvention) and that she told Mr and Mrs Denning on 9 September that she did not want to be involved if there were another agency agreement in place. After that, contact was instigated by Mr and Mrs Denning, who made it clear that they did not wish to deal with Harcourts.

Was Ms Daji given sufficient notice that her compliance with r 9.10 was in issue?

[52] Both counsel referred us to the High Court's judgment in *Ha*.[11] Mr Ha had appealed against a decision of the Tribunal upholding a Complaints Assessment

---

11 *Ha v Real Estate Agents Authority*, above fn 8.

Committee's finding of unsatisfactory conduct, for breach of the predecessor of r 9.10 (r 9.11 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009). He argued that a breach of r 9.11 had never been put to him, so that the Committee's decision was a breach of natural justice.

[53] In *Ha*, a complaint was made to the Authority by the vendor of the property, who had cancelled a sole agency agreement with another agency after being told by Mr Ha that he could legally do so, then entered into a sole agency agreement with Mr Ha's agency. After the property was sold (through Mr Ha's agency), the other agency claimed commission. That claim was settled by the vendor paying the other agency half the commission it claimed.

[54] The vendor's complaint was that he should not have had to pay two commissions, as Mr Ha had wrongly advised him that he was entitled to cancel the first sole agency agreement. The key issues were identified by an Authority investigator as being whether Mr Ha had exposed the vendor to a double commission by encouraging him to cancel the first agency agreement, and whether Mr Ha acted in the best interests of the vendor by failing to notify the other agency about the agreement with Mr Ha.

[55] It was accepted that the identified issues did not include whether Mr Ha had failed to provide the advice required to be given under (then) r 9.11, and neither the vendor nor Mr Ha was specifically asked about compliance with the Rule, although he was asked "What advice/information did you give the complainant about his existing listing agreement with [the other agency]". Her Honour Justice Walker found that Mr Ha was, in substance, informed about the issues at stake. She said:[12]

> … The investigation was focussed on the "double commission" issue. The investigator asked open-ended questions about what Mr Ha had communicated to [the vendor], 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 question which [counsel for Mr Ha] submitted ought to have been put directly to Mr Ha. …

[56] We accept Mr Rea's submission that the facts in *Ha* are not directly comparable with the present case. The complaint against Ms Daji was not made by the vendors of

---

12 *Ha*, at [62].

the property, it was made by Mr Marshall, another licensee. The complaint was not that the vendors had been asked to pay two commissions, it was that Ms Daji had represented herself to be a Harcourts' agent, and had circumvented the Harcourts sole agency. The focus of the investigation was not on a "double commission" issue, it was on whether Ms Daji had represented herself to be a Harcourts agent. Further, Mr Marshall expressly indicated that the vendors should not be contacted: thus removing any possibility of evidence (which would have been essential to any consideration of Ms Daji's compliance with r 9.10) being obtained from them.

[57] *Ha* does not assist the Authority to establish that Ms Daji was given notice that she was required to address her compliance with r 9.10 in her response to Mr Marshall's complaint. We find that a breach of natural justice occurred when the Committee found that she had failed to comply with r 9.10, and found her guilty of unsatisfactory conduct, when she had not been given notice that she was at risk of such a finding being made, and the opportunity to respond.

Ms Daji's application to adduce further evidence

[58] We accept that for the following reasons:

[a] compliance with r 9.10 was neither expressly, nor in substance, raised by the Committee, so Ms Daji had no notice that she was required to address the point in her response to the Committee;

[b] Ms Daji informed the Committee in her penalty submissions that she would have adduced evidence of her compliance with r 9.10 if the issue had been raised during the investigation;

[c] admission of the evidence will assist the Tribunal to deal effectively with the issues before it in this appeal; and

[d] it is in the interests of justice that Ms Daji's affidavit be admitted;

it is appropriate that the affidavit is admitted as new evidence on appeal.

Outcome

[59] We refer to Ms Lim's submissions as to the options available to us, in the event that we found that a breach of natural justice occurred in the Committee's substantive decision and that we admitted Ms Daji's affidavit. We do not consider it appropriate to remit the matter back to the Committee for further investigation. Instead, it is appropriate that the Tribunal exercises its power to reach its own conclusion on the merits.

[60] We accept Ms Daji's affidavit evidence. We find that Ms Daji complied with r 9.10, and gave the vendors the required advice that they could be liable to pay full commission to more than one agent in the event that a transaction was concluded. Accordingly, the Committee's finding of unsatisfactory conduct is reversed. As a result of that finding, the Committee's penalty orders are also reversed.

[61] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.