



# Financial Services Tribunal

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## DECISION NO. 2016-RSA-001(b)

In the Matter of an appeal under the *Real Estate Services Act*, S.B.C. 2004, c. 42

**BETWEEN:** Danielle (Cui Zhu) Deng **APPELLANT**

**AND:** Real Estate Council of British Columbia and  
Superintendent of Real Estate **RESPONDENTS**

**BEFORE:** Wendy A. Baker, Q.C. Panel Chair

**DATE:** Conducted by way of written submissions  
concluding on May 26, 2017

**APPEARING:** For the Appellant: Jeffrey Scouten, Counsel  
For the Respondent Superintendent: Joni Worton, Counsel  
For the Respondent Real Estate Council : David McKnight, Counsel

## APPEAL

[1] On January 13, 2016 the Discipline Committee of the Real Estate Council issued a decision finding the appellant, Ms. Deng, committed professional misconduct while acting for a buyer (the "Complainant") in that she failed to act in the best interests of the Complainant and with reasonable care and skill when she did not disclose to the Complainant all material information with respect to a property which the Complainant had expressed interest in. On July 12, 2016, the Discipline Committee issued its decision with respect to penalty and enforcement expenses.

[2] Ms. Deng was not represented by counsel at the Discipline Committee hearing.

### **Grounds of Appeal**

[3] The articulation of the grounds of appeal varied from the notice of appeal, to the original submissions on appeal, and finally to the reply submissions of the appellant. I have organized the grounds of appeal below in a slightly different way than were presented to me, however, all grounds of appeal have been considered:

#### ***Lack of procedural fairness***

1. There was a lack of procedural fairness or breach of natural justice in the manner in which the hearing was conducted, particularized to include the following:

- a) the Committee allowed the prosecuting counsel to excessively intervene in the cross-examination conducted by Ms. Deng of the Complainant;
- b) the Committee allowed the prosecuting counsel to ask a patently leading question of the Complainant;
- c) the Committee failed to give reasonable assistance to Ms. Deng, as an unrepresented party, to ensure the hearing was fair, including failing to inform her of the importance of covering all material points in her evidence in chief and her cross-examination, and by suggesting Ms. Deng was wasting the Committee's time in her cross-examination of the Complainant;
- d) the Committee allowed prosecuting counsel to ask further questions of the Complainant after completion of Ms. Deng's cross-examination and questioning by the Chairperson on matters not arising from their questions or the answers given by the witness; and
- e) the Committee did not afford Ms. Deng the opportunity to ask further questions of the Complainant following the questions of the Chairperson and the prosecuting counsel.

***Reasonable apprehension of bias***

2. The remarks made by the Chairperson during the course of her questioning of the appellant give rise to a reasonable apprehension that she had prejudged, before hearing submissions, that the appellant was guilty of professional misconduct and thereby gave rise to a reasonable apprehension of bias.

***Reliance on Consent Orders***

3. The Committee erred in relying on consent orders previously made by the Council's Consent Order Review Committee in other discipline matters.

***Errors in determining material facts***

4. The Committee erred in finding that certain information was material information which the appellant was obliged to disclose and more particularly,

- a) erred in law in finding the material not disclosed by Ms. Deng to her client was material information within the meaning of the disclosure obligation in Rule 3-3(f) of the *Real Estate Services Act*;
- b) erred in determining that Ms. Deng's conduct fell below the ethical standard required of her in the absence either of evidence of published standards or of expert or other evidence as to the conduct of a real estate agent in the circumstances; and

- c) erred as matter of mixed fact and law in finding that the information not disclosed by Ms. Deng to her client constituted material information which she had an obligation to disclose, based on the evidence that was before it.

***Penalty***

5. The appellant challenges the penalty issued by the Committee in the event the appeal is successful. If the appeal is not successful, the appellant does not challenge the penalty decision.

**Decision under Appeal**

[4] Ms. Deng acted as the Complainant's agent in the purchase of a property in Surrey. The Complainant's offer on the first property she was interested in was not successful. Ms. Deng then wrote an offer on a second property on behalf of the Complainant. Before the deal on the second property closed, and before the inspection on the second property had taken place, Ms. Deng learned that the successful offer for the first property had collapsed. Ms. Deng did not tell the Complainant about the collapsed offer on the first property, and following her inspection of the second property, the Complainant removed the subjects on the second property. The Complainant filed a complaint with the Real Estate Council alleging that Ms. Deng had an obligation to tell her that the first property was available again, as that information would have affected her decision to remove subjects on the second property.

[5] The Discipline Committee found that Ms. Deng failed to act in the best interests of the Complainant and with reasonable care and skill, when she did not disclose material information relating to the first property, including that the deal had collapsed, until after the Complainant removed her conditions on the second property

[6] For reasons which are explained below, my decision turns on the questions of procedural fairness and bias. The parties agree that the standard of review applicable on questions of procedural fairness, of which bias is a subset, is that of fairness; that is, whether or not, in the tribunal's view, the hearing below was fair. As found by Panel Chair Lewis in *Re Jalloh*, 2012-FIA-002(a), a 2012 FST decision: "The issue is simply whether the procedure was fair in all the circumstances, taking into account the various factors outlined in *Baker v. Canada*, [1999] 2 SCR 817.

**Breach of Procedural Fairness in Conduct of Hearing**

[7] I find that Ms. Deng was entitled to a high degree of procedural fairness before the Committee. The issues raised for decision before the Discipline Committee were significant, involving issues of professional misconduct, and could be expected to have a significant impact on her. *Knight v. Indian Head School Division No. 19*, [1990] a SCR 653 at para. 35.

[8] Where a litigant is unrepresented, the prosecuting counsel and Committee have an obligation to assist with the process the parties are participating in. This is not to say they must do the appellant's job for her, but they must take steps to help the appellant to adequately understand the process to be able to participate effectively. Providing reasonable assistance is one aspect of a tribunal's duty to act fairly: *Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27, para 77-78.

[9] I have read the transcript of the hearing before the Committee. What emerges from the transcript is a sense that the prosecuting counsel, Ms. Gossen, found the appellant to be frustrating and difficult to deal with. Unfortunately, this frustration manifested itself in prosecuting counsel assuming the role of the Discipline Committee itself in instructing Ms. Deng on how she could ask and answer questions, ruling on whether questions posed by Ms. Deng were appropriate, ruling on Ms. Deng's compliance with technical rules of evidence, such as the rule in *Browne v. Dunn*,<sup>1</sup> all of which were acquiesced in by the Discipline Committee without comment, for the most part.

[10] Examples of Ms. Gossen overstepping her role, interfering in the cross-examination by Ms. Deng, lecturing Ms. Deng, making determinations as to whether the witness is required to answer questions, and asking her own questions of the witness while the witness was under cross-examination, can be seen in the following passages taken from the cross-examination of the Complainant by Ms. Deng:

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#### **CROSS-EXAMINATION BY MS. DENG:**

Q Okay. So those are my exhibits. And I would like to go tab by tab. So tab 21.

Under tab A, I was not at all aware of [the Complainant]'s interest in the property of number 39.

MS. GOSSSEN: First of all – okay.

MS. DENG: Maybe –

MS. GOSSSEN: Yeah, let me say, Ms. Deng, this is your opportunity to ask this witness questions. That's the only opportunity you have right now is to ask questions. You can't give your evidence.

MS. DENG: So –

MS. GOSSSEN: So you ask questions on the basis of what she has said.

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<sup>1</sup> A rule of evidence named after the British case in which it was first established: *Browne v Dunn* 6 R 67, (1863, House of Lords)

MS. DENG: Okay. Okay, all right. Okay, so that's asking questions then I –

MS. GOSSSEN: And then later, after all the evidence is given and [the Complainant] has left, then you can give your evidence and under oath.

MS. DENG: Okay.

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MS. DENG: Yes.

Q And the page before that is [the Complainant]'s e-mail in Chinese. So basically from February 14 at 9:01 a.m., I received [the Complainant]'s e-mail with the "Working with a Realtor" brochure but without her husband's, [Mr. H]'s, ID. So my question was that she had the opportunity to send me both the brochure and the ID at the same time, so that at least I can – I can verify the signature for her husband. But she chose to send the brochure without the ID. So, I would like to know –

MS. GOSSSEN: Okay, you're back into providing evidence to the Committee, and you're not under oath. You can't be telling them information. Your opportunity right now is to ask her questions.

MS. DENG: Okay, so –

MS. GOSSSEN: Okay? You need to clarify for her what she's looking at, and then ask a question. And that's all you can do right now.

MS. DENG: Okay.

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MS. DENG:

Q Why did you not send the brochure and ID of your husband at the same time?

MS. GOSSSEN: Well, maybe you need to establish that she didn't. So – the "Working with a Realtor" brochure was sent to you. Maybe you can identify what was sent to you, and when.

MS. DENG:

Q So, on February 14, at 9:01 A.M., [the Complainant] sent me the e-mail.

MS. GOSSSEN: You're asking a question of her. Do you confirm that you sent it? That's the way you would ask that question.

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A So, this is the first time I have been asked this kind of question. So, can I review that? You ask why I did not send you the – what do you mean, brochure? It's the brochure of what? I have to –

Q Okay. To make it easy for you –

MS. GOSSEN: Tab 42.

THE CHAIRPERSON: Tab 42.

A Tab 42. Okay.

THE CHAIRPERSON: The very last page.

A The very last –

MS. GOSSEN: Right. So you go to the very last page of that tab. The very last page. Keep going. Okay. So then –

MS. DENG: And also –

MS. GOSSEN: So we have – no, hang on, hang on. She's identifying the document. Do you agree that there was – this was the "Working with a Realtor" –

A Yes

MS. GOSSEN: -- that you sent to her?

A Yeah.

MS. GOSSEN: I'm referring her to one page before.

A Mm-hmm. Any –

MS. GOSSEN: Can you see what the time – it was?

A Yeah. It's any – any mention of the ID? I did not get the point. What's the ID? My husbands' ID?

MS. DENG: Mm-hmm.

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MS. GOSSEN: Well, maybe this – maybe the question that Ms. Deng can put to you is, is that your husband's signature, and did you sign that document? Because that is the point that she is trying to make.

A So we get back to –

MS. GOSSEN: Did you sign the document?

A So, we get back to the signature issue, right?

MS. GOSSEN: That is her issue, so answer the questions.

A Okay. As I say, I remember I sent an email to Council about the signature. I say very clearly that my husband, since he work in Richmond, I work in Vancouver, sometimes the document has to be signed immediately because my agent kept telling me the market is hot, you have to do as quickly as possible, so I –

MS. DENG: It is not relevant.

MS. GOSSSEN: Excuse me, she is answering your questions, so, you don't get to say that.

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A Except that one, I put my first initial there, so okay I realize it for signature not initial so I signed on top. If you think it's not – it's okay you can ask me to re-sign. I don't get the point here as in my –

MS. GOSSSEN: Let's clarify the question. The question is that on the "Working with a Realtor" the signature was more her full signature and on the documents in relation to the purchases, and particularly we're talking about number 59, it looks like she's just put her initials in there. So you're sort of suggesting that there's a inconsistency.

MS. DENG: Yeah, inconsistency, that's my point. Yes. Her first document that she signed was "Working with a Realtor" brochure dated February 13, and her second document –

MS. GOSSSEN: You are asking questions, so this is later you can tell the Committee what you think is the significance of all that. So she's answered your questions, I think, sufficiently. Do you have more questions for her?

MS. DENG: Yeah. My question is basically what is it not consistent?

MS. GOSSSEN: I think she's answered your question. I am going to say that she has.

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Q Okay, what's my question? Okay. Now, do you see any, any difference here? You told me that the ID was on the way. But then I did not receive the ID until 10:37, so –

MS. GOSSSEN: You can make that argument later. You've asked the question, she's answered it. Move on.

[11] I have not included all interjections by Ms. Gossen in the passages set out above. Suffice it to say, the interjections occurred far too frequently. For example, in the first 6 pages of the transcript of Ms. Deng's cross-examination of the Complainant, Ms. Gossen interjected 21 times. The overall finding I make is that

Ms. Gossen interrupted the cross-examination constantly, eventually wearing down Ms. Deng to the point that she stopped asking further questions. Ms. Gossen did not ask the Discipline Committee to make rulings on the conduct of the cross-examination, and the Committee took no steps to address the conduct of Ms. Gossen. While some comments by Ms. Gossen may be seen as attempts to assist Ms. Deng in clarifying questions, the frequency of the interruptions, the scolding tone, and the wholesale recasting of questions by Ms. Gossen undermined Ms. Deng's ability to complete her cross-examination of the Complainant to the best of her ability.

[12] Further, while the Chairperson did ask Ms. Deng at the end of her cross-examination if she had any more questions, to which Ms. Deng declined, I find that in the face of the findings I have made and the overall conduct of the hearing, this final invitation by the Chairperson was not sufficient to overcome the procedural deficiencies of the hearing.

[13] Following the cross-examination of the Complainant by Ms. Deng, the Committee had certain questions for the Complainant. Once these were complete, Ms. Gossen was given the opportunity to ask further questions arising of the Complainant. Once Ms. Gossen's questions were complete, Ms. Gossen advised the Committee that the Complainant could be excused. No opportunity was given by the Committee to Ms. Deng to address questions raised by the Committee or Ms. Gossen in redirect.

[14] Once the examination and cross-examination of the Complainant was complete, Ms. Deng took the stand. Ms. Gossen, during Ms. Deng's evidence in chief, interrupted Ms. Deng and advised her that Ms. Deng could not give evidence on certain points because the evidence had not been put to the previous witness. In other words, Ms. Gossen was relying on the rule in *Browne v. Dunn*. After an exchange between Ms. Deng and Ms. Gossen which went on for more than one page of the transcript, the Chairperson attempted to make a ruling, which she was unable to complete before Ms. Deng indicated she would just skip the evidence. On the following page, this exchange is recorded:

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MS. GOSEN: Okay, stop. Stop. You cannot repeat things she said without having put it to the witness.

MS. DENG: Ok, sorry.

MS. GOSEN: It's not, you cannot do this. You can't be giving [evidence] that this committee had not heard her side of things.

MS. DENG: Okay. Sorry about that. I am not familiar with the procedures here, but I am going to skip that then. Okay? ...

[15] In *Kelly, supra*, the Court found that the tribunal, in dealing with the unrepresented complainant, outlined the process to be followed, gave the

complainant guidance throughout, accommodated the complainant by allowing him to cross-examine his own witnesses and re-examine them broadly, gave the complainant guidance in the sorts of questions he could ask the witness, and intervened to clarify the information the complainant was attempting to elicit. While these are not all requirements on every tribunal, what they demonstrate is a tribunal which is alive to the disadvantages of an unrepresented party, and ensures that the unrepresented party is not procedurally disadvantaged by his or her lack of legal training. The same cannot be said of the Discipline Committee in the case before me.

[16] While the Discipline Committee in the case before me is entitled to create its own procedures, such procedures must be fair, and provide the subject of the hearing with a fair opportunity to be heard: *Knight v. Indian Head School Division No. 19*, [1990] 1 SCR 653 at para. 49.

[17] As found by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 22:

22. Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, **with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.** [emphasis added]

23. Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight, supra*, at p. 683, it was held that “the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making”. The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface, supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.), at p. 118; *Syndicat des employés de production du Québec et de l’Acadie v. Canada (Canadian Human Rights Commission)*, 1989 CanLII 44 (SCC), [1989] 2 S.C.R. 879, at p. 896, per Sopinka J.

...

25. A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the

procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, 1980 CanLII 10 (SCC), [1980] 1 S.C.R. 1105, at p. 1113:

A high standard of justice is required when the right to continue in one's profession or employment is at stake. . . . A disciplinary suspension can have grave and permanent consequences upon a professional career.

[18] I find that the high degree of procedural fairness owed to Ms. Deng in this discipline proceeding required the Committee to ensure that she was able to fully present the case and evidence which she felt were important to allow her to meet the case against her. I do not agree with the appellant that the Committee was obligated to inform Ms. Deng of the importance of covering any particular issues in chief or in cross-examination. However, I do find that the Committee was obligated to ensure the appellant understood the procedure which would be followed, and be given some latitude to express herself in her questions in a way that recognized she was not legally trained. This was necessary to ensure that Ms. Deng was able to put forward her views and evidence fully and have them considered by the Committee, consistent with *Baker, supra*.

[19] I find that the prosecuting counsel overstepped her role and intimidated Ms. Deng with her constant interruptions, corrections, rulings and questions advanced during Ms. Deng's cross-examination. It was up to the Committee to control the hearing and not allow the prosecuting counsel to usurp the Committee's role. It was the Committee's obligation to explain the process to Ms. Deng in a neutral way and assist Ms. Deng in understanding what rules of procedure would be required and how those rules could be complied with, and to provide some latitude to Ms. Deng in her questioning of the witness. The prosecuting counsel was adverse to Ms. Deng in this discipline hearing. It creates an unfairness to allow the prosecuting counsel to determine, essentially, what evidence will be permitted to be placed before the Committee. It is the role of the Committee to independently assess objections to evidence and process; it is not the role of the prosecuting counsel.

[20] It should have been obvious to the Committee that Ms. Deng was not able to present the evidence she thought was important because of her lack of understanding of the process being insisted upon by Ms. Gossen. The Committee had the ability to address this lack of understanding in a way that addressed Ms. Gossen's concerns, and allowed Ms. Deng to present the evidence she felt was important.

[21] The Committee could have addressed the rule in *Browne v. Dunn* in a way which reflected the more flexible rules of evidence in an administrative tribunal, while still protecting the witnesses. For example, the Committee could have recalled the Complainant and allowed Ms. Deng to canvas with her those statements where Ms. Deng had contrary evidence. Alternatively, the Committee

could have allowed Ms. Deng to give her evidence and given Ms. Gossen the right to bring the Complainant back in reply to address any issues of concern.

[22] The Committee could have explained to Ms. Deng that, to the extent she referred to her own "evidence" in posing questions, the Committee would not be able to receive that evidence for its truth until she repeated it under oath during her own testimony. The Committee could then have controlled its own process in a neutral way, without simply letting the prosecuting counsel run the show.

[23] Similarly, there is no explanation for why the Committee failed to give Ms. Deng the opportunity to re-examine the Complainant after their questions were complete. It appears the Committee simply acceded to the instruction from Ms. Gossen to excuse the witness.

### **Reasonable apprehension of bias**

[24] The appellant submits that the comments made by the Chairperson at the end of the evidence give rise to a reasonable apprehension of bias, in that the Chairperson's comments suggest that she pre-judged the case before hearing final submissions.

[25] I have reviewed the passage challenged by the appellant and do not find it meets the threshold of giving rise to a reasonable apprehension of bias. The passages referred to by the appellant demonstrate an effort by the Chairperson to clarify that the appellant in fact understood what the charges against her meant, and understood what the hearing was intended to address. Given the answers provided by the appellant, it was not clear to me that the appellant had a good grasp on the charges against her or the purpose of the hearing. While the Chairperson clearly asked the appellant if she understood that certain conduct is not permissible, I find that the question was posed in the context of the Chairperson clarifying the purpose of the hearing with the complaint. I do not find any evidence in the transcript that the Chairperson came to the hearing with less than an open mind, capable of being persuaded either way during the course of the hearing.

[26] I find that the questions posed by the Chairperson are akin to the facts in the case of *Bussey v. Registrar of Mortgage Brokers*, (2009) FST 08-039 where the FST found at page 20:

The Registrar's questions themselves were at times in the nature of cross-examination (i.e. they were leading questions), and they arguably went beyond what was necessary to determine the allegations against the Appellants. Viewed in isolation, the questions might be described as 'worrisome and com[ing] very close to the line' (*R. v. R.D.S., supra*, at para. 152). However, when the entire context of the proceeding is considered (including the Registrar's role in protecting the public interest), I find the Appellants have not satisfied the onus of demonstrating a reasonable apprehension of bias."

[27] As such, I find that no reasonable apprehension of bias arose through the questioning of Ms. Deng by the Chairperson.

## **DECISION**

[28] My assessment of the appellant's case with respect to procedural fairness in the conduct of the hearing is fundamental to the issues on appeal. For the reasons which are set out above, I find that the hearing was not conducted in accordance with the principles of natural justice. The problems arising from the conduct of the hearing go to the reliability of the evidentiary record before the Committee. In the absence of a sound evidentiary record, I am of the opinion that I cannot assess whether the Committee erred in determining the material facts before it, or erred in relying upon consent orders of the Council.

[29] Having found that there was a denial of natural justice before the Discipline Committee, the decision of the Committee on liability, and the subsequent decision and order with respect to penalty and enforcement expenses, are invalid and are hereby set aside.

[30] I make this conclusion in accordance with the principle outlined by the Supreme Court of Canada:

If there has been a denial of a right to a fair hearing it cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal.

*Newfoundland Telephone Co. v.  
Newfoundland (Public Utilities Board),  
[1992] 1 SCR 623, para. 40*

[31] I find that the Discipline Committee breached the duty of procedural fairness owed to Ms. Deng for the following reasons:

1. failing to ensure Ms. Deng understood the rules of procedure which would be employed in the hearing,
2. failing to ensure that Ms. Deng had a full opportunity to present her case, including accommodating her unfamiliarity with the hearing process,
3. allowing prosecuting counsel to unreasonably interfere with the cross-examination conducted by Ms. Deng,
4. allowing prosecuting counsel to rule on what questions were permitted to be asked, and what evidence may be given, by Ms. Deng, and
5. failing to give Ms. Deng a fair opportunity to conduct a further examination of the Complainant on issues arising from the questions posed by the Committee.

[32] In light of my findings, I will not provide any reasons in relation to the other grounds of appeal raised in this appeal.

[33] The appeal is allowed. Pursuant to s. 242.2(11) of the *Financial Institutions Act*, I send this matter back for reconsideration to the Discipline Committee constituted under the *Real Estate Services Act*, to be reheard in a proceeding conducted in accordance with the principles of natural justice as I have outlined in this decision.

“Wendy A. Baker”

Wendy A. Baker, Q.C.  
Panel Chair  
Financial Services Tribunal

July 13, 2017